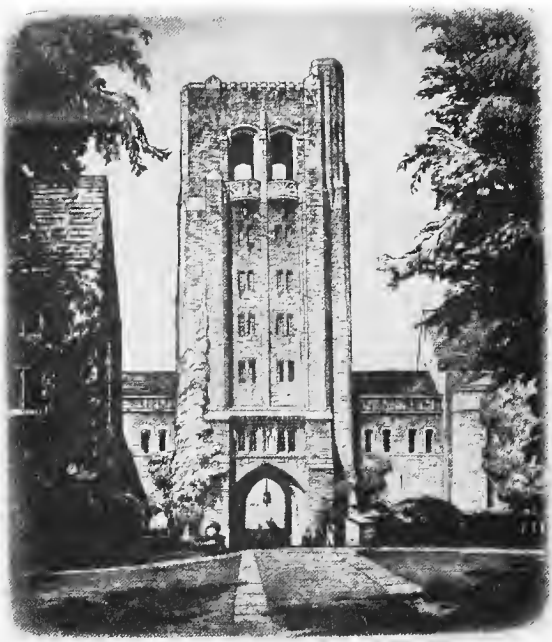

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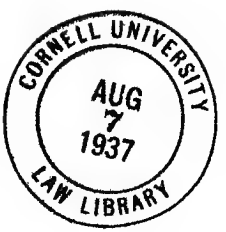

NEW YORK

BAR EXAMINATION

QUESTIONS AND ANSWERS

BY

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PREFACE.

These questions and answers have been collated to meet the wants of candidates for admission to the bar of the state of New York. The questions, saving repetitions, have been propounded by the examining committee during the past seven years, and complete answers, with copious excerpts from statutes and decisions and the citation of authorities in support, have been carefully prepared. They have been classified by topic into twenty-one chapters, and arranged with special reference to the convenience and need of students. While not designed or intended to take the place of a systematic course of study in the law, the candidate for admission will readily recognize their valuable supplementary aid and systematic means of review in order to meet successfully his final test.

TABLE OF CONTENTS.

NEW YORK BAR EXAMINATION

QUESTIONS AND ANSWERS.

CHAPTER I.

Agency.

Q. A, an infant, is the owner of a certain piece of land. He authorizes B, an adult, to sell said land. B conveys the same to C. After A became of age, it is claimed that he ratified the conveyance. A sues in ejectment. Can he recover?

A. Judgment for A. The question here is, can an infant, after arriving at age, ratify the act of his agent, performed while he was an infant. This depends upon whether his appointment of an agent is a void or voidable act. If the former, it cannot be ratified; if the latter, it can be. In New York, the doctrine is laid down, that the only act an infant is incapable of performing as to contracts, is the appointment of an agent or attorney. Whether the doctrine is founded upon solid reasons may be doubted, but there is no doubt that it is law. Fonda v. Van Horn, 15 Wend. 631.

Q. A appoints B, an infant, as his agent to sell certain goods. B sells the goods to C. A afterwards seeks to disaffirm the sale, and brings action to recover back the goods on the ground that B's act was void, as an infant cannot be an agent. Judgment for whom and why?

A. Judgment for C. "It is by no means necessary for a person to be sui juris, or capable of acting in his or her own right, in order to qualify himself or herself to act for others." Story's Agency,

secs. 6, 7, 9. It is the undoubted law of agency, that a person may do through another what he could do himself in reference to his own business and his own property; because the agent is but the principal acting in another name. The thing done by the agent is, in law, done by the principal. This is axiomatic and fundamental. Qui facit per alium facit per se. Story's Agency, sec. 440.

Q. A sends B, his servant, with a horse of A's to C, with instructions to sell the horse to C for $500, but in no case to take any money from C. B sells the horse to C for $400, and makes away with the money. C knows nothing of the instructions to B. What are the rights of A against C, and give the reasons for your answer?

A. A has no rights. "Where private instructions are given to a general or special agent respecting the mode and manner of executing his agency, intended to be kept secret and not communicated to those with whom he may deal, such instructions are not to be regarded as limitations upon his authority, and notwithstanding he disregard them, his act, if otherwise within the scope of his agency, will be valid and bind his employer." Edwards v. Dooley, 120 N. Y. 540.

Q. A appoints B, as his agent, to sell his horse, instructing him (B) not to warrant the soundness of the animal. B gives a warranty on the sale. A is sued for breach of warranty. Is he liable?

A. Yes. He is liable, as horses are usually sold with warranty. Whether an agent is authorized to give a warranty in a particular case, must depend upon the character of his agency, the usage of trade in the locality in which the sale is made, and the subject of the sale. Ordinarily an agent vested with discretion, and having authority to do whatever is necessary to carry out the object of his agency, may bind his principal by a warranty. Ahearn v. Goodspeed, 72 N. Y. 108; Murray v. Smith, 4 Daly, 277.

Q. A was the freight agent of the defendant corporation whose duty and authority it was to receive and forward freight over the defendant's road, giving a bill of lading therefor. He issued bills of lading for goods to B, although no goods were shipped by

B or delivered to the defendant. B transferred the bills of lading to C who had no notice. C sues the defendant. Can he recover?

A. Yes. "It is a settled doctrine of the law of agency in this State, that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." Finch, J., in Bank of Batavia v. R. R. Co., 106 N. Y. 195.

Q. The president and directors of a warehouse company passed a resolution giving to the president of the company authority to sign receipts for the goods in the warehouse. The president issued a receipt to himself, claiming that he had goods in the warehouse, when in fact there were none. The president then pledged such receipt to a bank and received money on it. The bank sues the company for the amount of the receipt. Judgment for whom and why?

A. Judgment for the defendant. A general power of authority given to an agent to act for his principal does not extend to [illegible] appears that the agent is himself the person on the other side. Where a power is intended to be given to the agent to act as such, in such a case, it must be expressed in language so plain, that no other interpretation can rationally be given it. Bank of N. Y., etc., v. Amer. D. & T. Co., 143 N. Y. 552.

(NOTE.) This case must be distinguished from Hanover Nat. Bank v. Amer. D. & T. Co., 148 N. Y. 612, where it was held, that: "If an officer of a warehouse company having express authority to issue negotiable warehouse certificates to others for goods deposited, but having no such authority to issue certificates to himself, does issue warehouse certificates in his own favor to the knowledge express or implied of the company's directors, their acquiescence in such acts, after having had a reasonable time to put an end thereto, will permit the inference that the act of certifying in his own favor was within the officer's actual authority, and will estop the company from denying, as to purchasers for value, that the power to so certify in fact so existed."

Q. A who is trustee of the X estate, appoints B to act in his

stead. B fraudulently misapplies $5,000 of the trust funds. A is sued for the amount. Is he liable?

A. Yes. A is absolutely liable. In general, the power conferred upon an agent, is based upon special confidence or trust which the principal has in the agent's personal ability or integrity, and such power in the absence of authority express or implied, cannot be redelegated by the agent so as to bind the principal. The maxim of "Delegatus non potest delegare" applies in such a case. The authority of an agent to receive money is most clearly a personal trust and confidence, which cannot be delegated. Bodine v. Ins. Co., 51 N. Y. 123.

(NOTE.) An agent cannot delegate any portion of his power requiring the exercise of discretion or judgment, otherwise, however, as to powers or duties merely ministerial or mechanical. Bank v. Norton, 1 Hill, 501. Where an agent has authority to employ subagents, he will not be liable for their acts or omissions, unless in their appointment, he is guilty of fraud or gross negligence, or improperly co-operates in the acts or omissions. But where the agent has no authority express or implied to appoint a subagent, he will be responsible to his principal for the acts of a subagent appointed by him. Elwell v. Chamberlain, 31 N. Y. 611.

Q. The First Nat. Bank of New York receives a note payable in Chicago from X, and forwards it to the Traders Bank of Chicago for collection. The Traders Bank negligently fails to collect. X sues the New York Bank. Can he recover?

A. Recovery allowed. The doctrine that a bank receiving a note, draft, or bill of exchange in one state, for collection in another state, from a holder residing there, is liable for neglect of duty occurring in its collection, whether arising from the default of its own officers, or from that of its correspondent in the other state, or an agent employed by such correspondent, in the absence of any express or implied contract varying such liability, is established by decisions in New York. Allen v. Merchants Bank, 22 Wend. 215; Ayrault v. Pacific Bank, 47 N. Y. 570.

(NOTE.) A bank receiving for collection a check sent by another bank which holds it only for collection is the agent of the latter, and not of the payee, because there is no right to delegate the authority in such a case. Castle v. Corn Exch. Bank, 148 N. Y. 122.

Q. A, an agent, with power to issue negotiable paper, drew a check for a purpose for which he was not authorized. B, his prin-

cipal, ratified the act, but subsequently refused to pay, claiming that there was no original authority. Is he liable?

A. Yes. To ratify is to give validity to the act of another. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had originally been given.

(NOTE.) Two acts may be ratified,—First, where an agent does an act in excess of his authority. Second, where one assumes to act as the agent of another without authority. "An individual having power to make a contract may ratify or affirm it, when made by one who without authority assumes to be his agent; but if the individual himself have no such power, he can no more bind himself retroactively to its performance by affirmance or ratification, than he could have done prospectively in the first instance. The power to ratify ex vi termini implies a power to have made the contract, and the power to ratify in a particular manner, implies the power to have made the contract in that manner. Brady v. Mayor of N. Y., etc., 16 How. Pr. 432. See also Calhoun v. Millard, 121 N. Y. 69, 81.

Q. A made a note payable to the order of B, and then forged B's indorsement thereon, and then for its face value transferred it to C. The first information B had of the forgery, was a receipt of notice of dishonor as indorser. Subsequently, he told C that the indorsement was a forgery, but that he would indorse the note to save trouble, but he soon changed his mind, and refused to pay. A went to Europe. Can C recover against B?

A. Yes. One whose name is forged to a note, may bind himself on the instrument in New York, by an unwritten ratification of the signature as his own, made after delivery of the note. Howard v. Duncan, 3 Lansing (N. Y.), 174; Thorne v. Bell, Hill & Denio's Reports (Lalor's Suppl. N. Y.), 430.

(NOTE.) While there is a sharp conflict of authority as to the possibility of ratifying a forgery (New York holding that it may be ratified), all the cases agree that one may, by his admissions or conduct, estop himself from denying the genuineness of his signature, as against one who has changed his legal position relying on such admissions, representations, or conduct. Huffcut on Agency, sec. 43.

Q. A, the agent of B, sells a certain piece of land belonging to B to C, and at the time of the sale, makes fraudulent representations to C to induce him to purchase. C sues B for the damages sustained. Is B liable?

A. Yes. When an authorized agent acting within the scope of

his authority, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he is liable as for his own wrong. Bennett v. Judson, 21 N. Y. 238, a leading case followed in Elwell v. Chamberlain, 31 N. Y. 611; Dawson v. Chisholm, 15 St. Rep. 984, and hosts of others in New York cases. These authorities rest upon the principle, that when a party clothes another with authority to speak in his behalf, and indorses him to third persons as worthy of trust and confidence, those who are misled by the falsehood and fraud of the agent are entitled to impute it to the principal. The latter will not be permitted to retain the fruits of a transaction infected with fraud, whether the deceit, which he seeks to turn to his profit, was practised by him or by his accredited agent. In such a case, he cannot separate the legal from the illegal elements of the contract, and appropriate the advantages it secures, while he rejects the corrupt instrumentalities by which they were obtained.

Q. A gives B, his agent, power to sell real estate. B knowing that A is short of funds and is in need of cash, obtains a mortgage on the property and signs the same as A's agent under the power to sell. He sends the money thus obtained to A, who dies intestate, having retained the money. What are the rights of the heirs as to the mortgage?

A. The heirs hold subject to the mortgage. By accepting and retaining the money, which was the fruit of the agent's act, without objection, the principal is presumed to have ratified that act. Having received the benefits of the contract, the heirs could not, as their intestate had signified his acquiescence, invoke the aid of the courts to relieve them of the obligation. Hyatt v. Clark, 118 N. Y. 563. A principal cannot enjoy and retain the fruits or benefits of the act of his agent, without adopting and ratifying the instrumentalities by which those fruits were obtained, even though employed without his authority or knowledge. Baldwin v. Burrows, 47 N. Y. 199.

Q. A sends to B, his shares of stock in the X Bank to be sold at par. In order to induce C to purchase the stock, the broker gives him a warranty in the name of his principal, that the stock is actually worth par. The broker returns the proceeds of the sale less his commission to A, with no information regarding the war-

ranty. A retains the proceeds. The X Bank is really insolvent at the time of this transaction, although A knew nothing of the insolvency, and actually thought the stock was worth par. C was damaged to the extent of $5,000 by the deal. Can he maintain action against A on the warranty?

A. A is not liable on the warranty. An agent with express authority to sell has no implied authority to warrant, where the property is of a description not usually sold with warranty. One employed to make a sale of bank stock is not presumptively empowered to warrant it in the name of his principal. The receipt of the proceeds by the owner of the stock in ignorance of an unauthorized warranty by the agent, is not a ratification of the unauthorized engagement. Smith v. Tracey, 36 N. Y. 79. The ratification of the act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts.

Q. X, Y & Z who are trustees of the Seamen's Society sign, seal, and deliver a bond to John Brown. They are sued on the bond personally. Can the action be maintained? The bond was executed in the following form: "X, Y & Z, trustees of the Seamen's Society."

A. Yes. The seals are not those of the society, and the affixing of the names of their offices does not relieve the parties from personal liability. Such words will be regarded merely as descriptive of the persons. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names some official title has no legal signification as qualifying their obligation, and imposes no liability on the corporation whose officers they may be. This must be regarded as the long and well settled rule in this state. Taft v. Brewster, 9 John. 341; Hills v. Bannister, 8 Cowen, 31; Moss v. Livingston, 4 N. Y. 208.

Q. A contract under seal began by stating that it was made between Thompson, by Smith his attorney, and Jones. The concluding was: "In witness whereof the said Smith, as attorney for the said party of the first part, has set his hand and seal." Signed by Jones and by Smith, attorney for Thompson. Thompson sues

Jones. Jones demurs and answers that the agreement was between himself and Smith, and that Thompson cannot maintain the action. Judgment for whom and why?

A. Judgment for Thompson. When an authorized agent executes a contract under seal, in which he represents himself as agent and discloses his principal, and by the terms of which he assumes to contract for the principal only, in the absence of any personal promise or covenant on his part, the contract cannot be held to be his contract, for it is the contract of the principal who alone can sue and be sued upon it. The agent cannot be made liable individually thereon, although it is only signed in his individual name. Whitford v. Laidler, 94 N. Y. 145.

Q. J is the president of the A corporation, and G of the X corporation; they make a joint note in the usual form to B. They have the authority to make such notes for their respective corporations; the note is drawn on a corporation blank, with the name of A corporation across the end. The note is signed J, president of A corporation, and G, president of the X company. Are they personally liable on the note?

A. Yes. "Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder, taking bona fide, and without notice of the circumstances of its making, is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons and not of the character of the liability. This rule is well settled and is founded in the general principle that in a contract every material thing must be definitely expressed and not left to conjecture. Unless the language creates or fairly implies, the undertaking of the corporation, if the purpose is equivocal, the obligation is that of its apparent makers. The appearance upon the margin of the paper of the printed name of the corporation was not a fact carrying any presumption that the note was, or was intended to be, one by the company. It was competent for its officers to obligate themselves personally, for any reason satisfactory to themselves, and, apparently to the world, they did so by the

language of the note, which the mere use of a blank form of a note, having upon its margin the name of their company, was insufficient to negative." Gray, J., in Casco Nat. Bank v. Clark, 136 N. Y. 307.

Q. A gave B instructions to go to C and purchase a horse for him. B went to C and made the purchase. The horse was delivered by C, and then B told C that the purchase was for A. What rights has C in the matter? Answer in full.

A. C can sue either A or B. Where goods are sold to a person, whom the vendor believes to be a purchaser, but who in fact bought as agent of another, the vendor may, on discovery of this fact, maintain an action against the principal for the purchase price. Kayton v. Barnett, 116 N. Y. 625. This is a case in which the rule commonly known as the doctrine of undisclosed principal applies. At first glance the rule is foreign to the idea of contract (mutual assent) for the minds of A and C did not meet, but the courts in order that the person who obtains the benefit of the contract shall not escape its burdens invoked in their aid the fiction of identity, i. e., the principal and agent are considered one and the same person, and hold the principal liable. The doctrine of mutuality is applied in these cases and the undisclosed principal is allowed to sue the other party.

Q. A makes a contract with B in writing. A is in fact acting for C, an undisclosed principal. B sues C, and at the trial offers evidence to show that the contract was in fact made for C. Can he recover?

A. Yes. A party who has entered into a written contract may maintain an action against the principal upon parol proof that the contract was in fact made for the principal, where the agency was not disclosed by the contract and was not known to the plaintiff when it was made. Such proof does not contradict the written contract. It superadds a liability against the principal to that existing against the agent. The parol evidence may be introduced in such a case to charge the principal, while it would be inadmissible to discharge the agent, is well settled by authority. Coleman v. Bank, 53 N. Y. 393.

Q. A appointed B as his agent, for the purpose of purchasing

certain lands belonging to C. B, without disclosing the agency, entered into a contract under seal with C, whereby he agreed to purchase such lands at a specified price; the contract was executed by C in his own name. C sues A for the purchase price, offering to execute a good and sufficient deed. Can he recover?

A. No. "A was not a party to the agreement. He did not sign it himself, nor did it purport to have been executed for him by B. His name did not appear in it, and there is nothing upon the face of the agreement to indicate that he was in any way connected with or interested in the purchase. The covenants in the agreement are solely between B and C. Those persons only can be sued on an indenture who are named as parties to it, and an action will not lie against one person on a covenant which purports to have been made by another. It is true that a principal may be charged upon a written parol executory contract entered into by an agent, in his own name, within his authority, although the name of the principal does not appear in the instrument and was not disclosed. But there is a well recognized exception to this rule in the cases of sealed instruments. C's agreement was with B and not with A. To change it from a specialty to a simple contract, in order to charge the principal, is to make a different contract from the one the parties intended. A seal has lost most of its former significance, but the distinction between specialties and simple contracts is not obliterated" Andrews, J., in Briggs v. Partridge, 64 N. Y. 357.

Q. A, the owner of property, appoints B as his agent to collect the rent of certain premises. A thereafter dies, and one of the tenants continues to pay the rent to B. B thereafter absconds. Can the administrator recover the rent that was paid to B by the tenant?

A. Yes. The question is not new, and it has been uniformly answered by our decisions, to the effect, that the death of the principal puts an end to the agency, and therefore, is an instantaneous and unqualified revocation of the authority of the agent. There can be no agent where there is no principal. No notice is necessary to relieve the estate of the principal of responsibility, even on contracts into which the agent had entered with third persons who were ignorant of his death. Those who deal with an agent are held to assume the risk that his authority may be terminated by death, without notice to them. Weber v. Bridgman, 113 N. Y. 600.

Q. A being indebted to B, his agent, gives him (B) authority to sell certain goods, and to pay himself from the proceeds, the amount which is due him. A dies before the goods are sold, and his representatives seek to recover the goods from the agent. Can they do so?

A. No. In this case, the power given is coupled with an interest in the goods, and so irrevocable by death of the principal or otherwise. To make the agency irrevocable, there must be an interest in the subject of the agency itself, and not a mere interest in the result of the execution of the agency. Where power to sell property is given as a security for the purpose of reimbursing the agent, the power is not revocable. The law on the point has been very well settled, since the early and very leading case of Hunt v. Rousmanier, 8 Wheaton (U. S.), 174, where Chief Justice Marshall, who delivered the opinion of the court, says: "This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an interest, it survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, "a power coupled with an interest?" Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing." The doctrine of this case has been uniformly followed in New York. Knapp v. Alvord, 10 Paige's Ch. 205; Hutchins v. Hebbard, 34 N. Y. 24.

Q. A hired B as his agent, and in the contract of hiring, it was agreed that the authority given the agent to sell goods, should not be revoked for five years. After one year, A, the principal, revokes the agency. The agent refuses to cease acting. What are the rights of the parties?

A. The principal may revoke, but he must respond in damages for the breach of the contract. The distinction must be drawn between the power and the right to revoke. As agency is a personal relation, it depends for its existence upon the will of the

principal who creates it; and he may, therefore, recall the appointment of an agent of his own selection at his pleasure, unless the agency is coupled with an interest. Although the power to revoke may exist in a given case, yet it cannot be exercised without rendering the principal liable in damages, when he has agreed that the agency shall not be revoked for a certain period. Hunt v. Rousmanier, supra.

Q. A engaged a broker to sell a certain piece of property at a certain price; afterwards A sells it to C, a friend of his; next day the broker brings a purchaser willing to buy at the stipulated price. What are the broker's rights against A?

A. The broker has no rights. This is a revocation by disposition of the subject matter, and as the property which was the subject matter of the agency, has been sold by the principal, the agency ceases ipso facto. In such a case, the principal violates no rights of the broker by selling to the first party who offers the price asked. He failed to find or produce a purchaser upon the terms prescribed in his employment, and the principal was under no obligation to wait longer, that he might make further efforts. Where no time for the continuance of a contract is fixed by its terms, either party is at liberty to terminate at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But, that having been granted to him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. The principal has an absolute right before a bargain is made, while negotiations remain unsuccessful, before commissions are earned, to sell the property and thus revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal. Wylie v. Marine Nat. Bank, 61 N. Y. 416; Sibbald v. Bethlehem Iron Co., 83 N. Y. 378.

Q. A is employed by B as agent. Thereafter A is discharged. Subsequent to his discharge, A buys goods from C in the name of B, and then absconds with the goods. Is B liable for the value of the goods?

A. Yes. When one has constituted and accredited another his agent to carry on his business, the authority of the agent to bind his principal continues, even after an actual revocation, until notice of the revocation is given; and as to persons who have been accustomed to deal with such agent, until notice of the revocation is brought home to them. As prior dealers, actual notice is necessary, while as to others, constructive notice, for instance, publication in a newspaper, is held sufficient. Claflin v. Lenheim, 66 N. Y. 301.

Q. A appoints B, as his agent, to sell a certain piece of real estate for him, naming $10,000 as the price. B is able to secure $15,000 for the property and sells for that amount. He gives $10,000 to his principal and retains the balance. A upon discovering the facts consults you. What are his rights?

A. He can recover the $5,000 from his agent. An agent owes a duty to his principal to secure the best price he can. It was the duty of B to get the highest price for the real estate that could be obtained for it in the market. An agent has duties to discharge of a fiduciary character towards his principal, and will not be allowed to make secret profits. Dunlop v. Richards, 2 E. D. Smith, 181; Bain v. Brown, 56 N. Y. 285.

Q. A employs B to purchase silk for him at $1 per yard. B informs A that he has purchased for that price. He then sends A the desired quantity of his own silk. B sues for the price. Can he recover?

A. No. An agent cannot sell his own goods to his principal without the knowledge of his principal, as the fiduciary relation which exists between them, forbids it. Conkey v. Bond, 36 N. Y. 427.

Q. A, the owner of real estate, placed it in the hands of B for sale. B's clerk unknown to A, became the purchaser for $5,000, after having informed A in B's name that it was doubtful if more could be obtained. A subsequently becoming dissatisfied with the sale, consults you. What are his rights against B and the clerk? Reasons.

A. A can have the conveyance set aside, or have judgment compelling B or the clerk to pay to him the ascertained value of

the land. "It is a principle that an agent, trustee, or other person in a fiduciary capacity, can never be a purchaser; and I assume it as not requiring proof that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud and those dangerous consequences which would ensue if agents or trustees might themselves become purchasers, or if they were not in every respect kept within compass." Munro v. Allaire, 2 Caines' Cases (N. Y.), 183. This rule has been affirmed in many subsequent cases. Dobson v. Racey, 8 N. Y. 216; Jewett v. Miller, 10 N. Y. 402. "It is undeniable from these authorities, that if the purchase in this case had been made by B, it could not be sustained. Does the same principle apply to a purchase made by the clerk? It is not perceived upon what substantial ground a distinction can be drawn. Whatever duty B owed to A, he, the clerk, equally owed the same. And it has so been held." Poillon v. Martin, 1 Sandf. Ch. 569; Gardner v. Ogden, 22 N. Y. 327.

Q. A, a real estate agent, is employed by B to sell or exchange a lot, and by X to sell and exchange a farm; and an exchange is affected between B and X, they knowing nothing at the time that the other employs A. A sues both parties in separate actions for his commissions. Can he recover?

A. He can recover from neither. The contract between A and B was an inducement to A to effect a sale or exchange to X, even if it was on lower terms than might have been obtained from others or less advantageous to B, because he thereby secured his commissions from both parties. It was therefore an agreement which placed A under the temptation to deal unjustly with B. Contracts which are opposed to open, upright, and fair dealing are against public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. This rule, that a broker employed by both parties, can recover from neither, when he is instrumental in effecting a sale or exchange between them is well settled in New York. Knauss v. Krueger Brewing Co., 142 N. Y. 70.

(NOTE.) Where in a negotiation for the sale or exchange of real estate, a broker is employed by both parties with notice that he is acting for the other in the matter and with such notice, each agrees to pay him his commissions, he can recover from both. Rowe v. Stevens, 53 N. Y. 621. Where a broker

is employed by both vendor and purchaser, neither can refuse compensation, if it was promised with full knowledge that the broker held the same relation to the other party. It seems, that if one knew of the double agency, the agent can recover from him. Jarvis v. Shaefer, 105 N. Y. 289.

Q. A engaged B, a broker, to sell his farm, and agreed to pay 5% commission. C, at about the same time, also engaged B to look up a farm for him and agreed to pay 5% commission. B brought A and C together, and they closed the transaction. Neither party knew that B was acting for the other. B charges both A and C the 5% commission, and they both refuse to pay it after discovering the facts. B comes to you for advice. What are his rights?

A. B can recover from both. Real estate brokers employed as middle men to bring purchasers and sellers together to enable them to make their own bargain, may charge commissions to both parties. They are not agents to buy and sell, and not within the rule which prohibits their acting without consent, as agent for both buyer and seller. Siegel v. Gould, 7 Lansing (N. Y.), 177. "If an agent is employed to procure a purchaser for property, and has nothing to do with the terms and conditions of the sale, but these are determined by his principal when he meets the prospective purchaser, there can be nothing inconsistent with good faith on the part of the agent in his making and arranging with the purchaser for commissions, or in failing to notify his principal (the vendor) of such arrangement; but if the agent is intrusted with the least discretion, or if the agent's skill and judgment were relied upon by the seller, then his agreement to act in a similar capacity for the purchaser where his duty and interest might conflict, would avoid his right to recover any compensation from his principal." Gracie v. Stevens, 56 App. Div. 203.

Q. A is employed by the X corporation to go to Albany, and use his utmost influence and exertion to procure the passage of a bill, granting to the corporation, a certain railroad franchise in the city of New York. A goes to Albany and argues before the legislative committee to the best of his ability. He sues the corporation for his services. Can he recover?

A. No. This contract is void as against public policy. It is a contract leading to secret, improper, and corrupt tampering with legislative action. It is not necessary that the parties stipulated

for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results. It furnishes a temptation to the plaintiff, to resort to corrupt means or improper devices to influence legislative action. It tends to subject the legislature to influences destructive of its character, and fatal to public confidence in its action. The law avoids contracts and promises made with a view to place one under wrong influences; those which offer him a temptation to do that which may affect injuriously the rights and interests of third persons. It is a sufficient objection to a contract, on the ground of public policy, that it has a direct tendency to induce fraud and malpractice upon the rights of others, or the violation or neglect of high public duties. Lyon v. Mitchell, 36 N. Y. 235; Mills v. Mills, 40 N. Y. 543.

Q. A, a commercial agent, sold goods to B on thirty days' credit. The agent was instructed by the house he represented to make no collection. At the expiration of thirty days' time, the agent called upon B and presented a bill for the goods. B paid him (A) the amount thereof. A subsequently absconds. B is sued by the house for the price of the goods. Is he liable and upon whom does the loss fall?

A. The loss must fall upon B. Ordinarily, a mere sales agent has no authority to receive payment for goods sold by him for the owner; his only authority is to find a purchaser. Mere authority to sell does not imply authority to collect. But where a person is apparently clothed with full authority to sell and deliver, a payment to such person is good as against the owner. Maxfield v. Carpenter, 84 Hun, 450.

(NOTE.) Where goods are sold by an agent, and there is notice, direct or implied, to pay the price to the principal, payment by the vendee to the agent will not bind the principal nor protect the vendee. Lamb v. Hirschberg, 1 App. Div. 518.

Q. Your client hands a broker $10,000, with which to purchase a bond and mortgage, which he did. The bond and mortgage were left with the broker to collect the semi-annual interest when due, but not to collect the principal when due. The broker collected the interest and principal, and by a forged satisfaction piece satisfied the record, and gave the bond and mortgage to the mortgagor, then absconded with the principal. Who must bear the loss?

A. The loss falls on the mortgagee, as the mortgagor is authorized to infer that the agent is empowered to receive both interest and principal from his having possession of the bond and mortgage. Williams v. Walker, 2 Sandf. Ch. 325. A mortgagor who makes a payment to one, other than the mortgagee, does so at his peril. If the payment be denied upon him rests the burden of proving that it was paid to one clothed with authority to receive it. There is, however, one exception to this rule. If payment be made to one having apparent authority to receive the money, it will be treated as if actual authority had been given for its receipt. So if a mortgagee permits a broker, who negotiates a loan, to retain in his possession the bond and mortgage, after the principal is due, and the mortgagor with knowledge of that fact and relying upon the apparent authority thus afforded, shall make a payment to him, the owner will not be permitted to deny that the attorney possessed the authority which the presence of the securities indicated he had. Having conferred the apparent authority upon the agent, the principal is estopped from denying that the actual authority existed. Smith v. Kidd, 68 N. Y. 130; Brewster v. Carnes, 103 N. Y. 556.

Q. A, through B his attorney, loaned C $8,000 on bond and mortgage for five years. The papers were left in B's possession, and he was authorized to collect the interest but not the principal. After the principal became due, B received from C two payments of $1,000 each to apply on the principal, the bond and mortgage being each time produced by B. On a subsequent occasion, $1,000 more was paid to B to apply on the principal, but the bond and mortgage were not produced, though B then had them in his possession and told C so. B then sold the bond and mortgage and forged an assignment of them to the purchaser. After that B received from C the balance due upon the mortgage. A brings foreclosure. Can he recover, and what are the rights of the parties?

A. Judgment for A for $5,000. Clearly, as to the first two payments, the attorney had apparent authority to receive the principal, and the mortgagor could not deny to them, the effect of payment pro tanto, by proof that he did not have actual authority. As to the subsequent payment of $1,000, it is true, C did not at the time of making the payment see the bond and mortgage, but it was actually in the possession of the attorney, and the attorney so

informed him. Here then, was possession, and information of the possession. It was information upon which he acted, and inasmuch as it was true, it constituted apparent authority. If it turned out to be untrue, it could not have availed him. There is no ground for insisting that a party must actually see and examine the securities, in order to entitle him to the protection of the doctrine of apparent authority; if he have trustworthy information of the fact which he believes and relies upon, and it shall prove to be true, there seems to be no reason, why it should not avail him, as well as a personal examination of the securities. It follows that the defendant should have been credited with the third payment of $1,000. As to the remaining $5,000 that was paid to B after he had parted with the bond and mortgage, C's failure to take the precaution of ascertaining whether the attorney was actually in the possession of the securities, when he paid the $5,000, deprived him of the right to assert that he was induced to make the payment, because it appeared to him that the attorney had the right to receive the money. "Information of the physical fact of possession by the attorney is alone effectual for protection. And he must have such knowledge when every payment is made, for no presumption of a continuance of possession can be indulged in, for the purpose of giving support to an apparent authority on the part of an attorney to act, where no actual authority exists. The rule comprises two elements: First, possession of the securities by the attorney with the consent of the mortgagee; second, knowledge of such possession on the part of the mortgagor. The mere possession of the securities by the attorney is not sufficient. The mortgagor must have knowledge of the fact. It is the appearance of authority to collect, furnished by the custody of the securities, which justifies him in making payment. And it is because the mortgagor acts in reliance upon such appearance, an appearance made possible only by the act of the mortgagee in leaving the securities in the hands of an attorney, that estops the owner from denying the existence of authority in the attorney which such possession indicates." Parker, J., in Crane v. Gruenewald, 120 N. Y. 274.

(NOTE.) "Where an attorney who did not make the investment originally, and who has no direct authority to receive payment of the principal of a bond and mortgage, has received by the authority of the assignee thereof one payment of interest, and has obtained in some undisclosed manner the physical possession of the bond and mortgage, but not of the assignment thereof, he has not such

apparent authority to receive payment of the principal of such bond and mortgage as will protect the mortgagor, in paying the principal secured thereby, to him. To justify such inference of authority on the part of the attorney, he must have had control of the investment from the beginning to the end." Central Trust Co. v. Folsom, 26 App. Div. 40.

Q. A, the holder of a mortgage, employed his son to retain an attorney to foreclose it, and directed B to bid for the property at the foreclosure sale on behalf of A, but not to bid beyond a certain sum. B attended the sale and bid as A directed him to do. Others bid for the property more than the sum to which A had limited B, and thereupon B bid in his own name, and bought the property for himself. Assuming that there was no actual fraud on B's part, and A consults you as to his rights, what would you advise?

A. A has no rights against B. This was a special agency, and B's authority to bid was limited by the instructions given. He had no right to bid beyond the specified amount. When the sum named was exceeded by the other bids, his authority ceased. He was merely A's agent up to the amount limited. While he could not bid in opposition to his principal, as far as the limited amount was concerned, as this would be opposed to the fiduciary relation existing between them, yet there would be nothing inconsistent with good faith or loyalty to his principal in bidding for and buying the property himself when that amount was passed by other bids, for he was then no longer his agent. See Story on Agency, secs. 126, 127.

Q. A is the financial agent of B, and B is accustomed always to indorse notes that he sends by A to the bank to be cashed. B has a note payable to bearer. He sent it by A to be cashed at the bank, especially instructing him that it is payable to bearer and does not need to be indorsed. A presents the note at the bank, and the bank refuses to accept it unless A indorses it. A informs the bank that B instructed him not to indorse the note, but the bank still refuses, unless A indorses B's name. A then does so, and receives $1,000 on the same. The maker becoming insolvent, the bank brings an action against B. Judgment for whom and why?

A. The bank cannot recover. A had but limited authority, namely, to have the check cashed. The act of indorsing was not within the scope of his authority. A informed the bank of the

extent of his authority, thus charging the bank with notice; therefore, as the lack of the agent's authority to make the indorsement was known to the bank, they cannot hold his principal liable. Bliss v. Sherrill, 24 App. Div. 280.

Q. An agent, having a sample in his possession, warrants the goods to come up to the sample. When A, a purchaser, is sued for the purchase price, and he sets up the breach of the warranty, the plaintiff sets up that the agent had no authority. Is his defense to the counterclaim available?

A. No. An agent authorized to sell property must be presumed to possess such authority, to make such representations in regard to the quality and condition of the goods sold, as usually accompanies such transactions. Therefore, an agent, who has been given authority to sell goods by sample, has implied power to warrant the quality of the goods, and that the bulk corresponds with the sample. Mayer v. Dean, 115 N. Y. 556.

Q. John Doe, a gentleman, engages B as his agent to purchase a coach horse for him, and limits him strictly to the price of $5,000. B purchases a horse from C for the price of $6,000 on Doe's acceptance, and offers it to Doe, who refuses because of the price. B then sues C for $5,000 which he has paid C, who knew nothing of the limitation on B's agency. Can B recover?

A. Yes. It is very clear, that any one who proposes to deal with a special agent, has the right, in the first place, to know what authority he possesses and all limitations upon it. He deals with him at his peril, because he is bound to inquire into the nature and extent of the authority conferred. In this case, the sale was made conditional upon Doe's acceptance, and there was no fraud or concealment as Doe refused to accept; there was no sale, and B could recover back the amount paid. "The principal is not to be bound by the acts of the special agent, beyond what he is authorized, because he has not misled the party dealing with him, or enabled the agent to practice any deception; has never held the agent out as having any general authority whatever in the premises, and if the other party trusts without inquiry, he trusts to the good faith of the agent, and not to that of the principal." Story on Agency, sec. 125.

CHAPTER II.

Bailments.

Q. A takes fifty bushels of wheat to a miller to be made into flour. Miller sells the wheat to B. What rights has A in the matter?

A. A can replevy the wheat from B, or sue either the miller or B for conversion. An agreement to deliver wheat to be manufactured into flour, is a bailment merely, and not a sale, and therefore A may replevy the wheat. Mallory v. Willis, 4 N. Y. 76. Where a contract is made with a manufacturer to deliver to him raw materials to be returned manufactured, the contract is one of bailment and not of sale, and title to the articles when manufactured remains in the original owner. Foster v. Pettibone, 7 N. Y. 433. The fundamental distinction between a bailment and a sale is, that in the former, the subject of the contract, although in an altered form, is to be restored to the owner; whilst in the latter, there is no obligation to return the specific article; the party receiving it is at liberty to return some other thing of equal value in place of it.

Q. A, a farmer, mades a contract with B, a manufacturer, whereby A agrees to deliver to B certain produce, and B agrees to manufacture the same into pickles. It is also agreed between the parties that the pickles are to be sold, and the proceeds divided between them. The sheriff, upon an execution on a judgment against B, levies on the pickles. A sues the sheriff in conversion. Can he recover?

A. Yes. "When property in an unmanufactured state is delivered by one person to another, upon a contract that it shall be manufactured or improved by his labor and skill, and when thus improved in value, shall be divided in certain proportions between the respective parties, or sold and the proceeds divided, it constitutes a bailment, and the original owner retains his exclusive title to the property until the contract is completely executed, although

the labor to be performed by the bailee may be equal or even greater in value than that of the property when received by him." Sattler v. Hallock, 160 N. Y. 291.

Q. A, a contractor, gives to B, a tailor, cloth to make 100 suits of clothes; suits to be made according to a sample, and at a certain price. B makes the clothes, but they are not according to the sample, and A refuses to pay for them. Who has the title to the cloth while it is in the possession of B? What are the rights of the parties?

A. Title remains in A, and B cannot recover as the suits were not made according to sample. The owner of materials who delivers them to another to be manufactured into goods, does not lose his property therein, nor is he precluded by receiving the manufactured articles from asserting his title, and at the same time, resisting a recovery for the work, on the ground that the workman has not performed his contract. See Mack v. Snell, 140 N. Y. 193.

Q. A and B contract, A to furnish the principal part of the materials, and B some minor materials, and to do the work necessary to make a quantity of shears, which are to correspond to a sample furnished by A. Part of the shears have been made and delivered, when it is found that they have a latent defect, and A refuses to take any more, or to pay for those already delivered.

A. B has no rights. "The contract was one of bailment, and not of sale and purchase, and so title to the completed articles was at all times in the bailor, and this, notwithstanding his refusal to receive them; the bailees having wholly failed to perform were not entitled to recover anything for their work; and the acceptance of part of the articles, and the omission to return them on discovery of the defect, or to notify bailees thereof, did not preclude the bailor from claiming non-performance, as he had the absolute right to retain them, and was neither bound to inspect them, or to notify bailees of his objection; also the bailor was entitled to recover upon a counterclaim as damages, the difference between the price agreed upon for bailee's work, and the value of the articles had they been made according to sample." Mack v. Snell, supra.

Q. A delivered to B 1,000 bushels of wheat from which he was to receive 200 barrels of flour. The miller placed his wheat in his granary, which, without negligence, was burnt. Upon whom does the loss fall? Why?

A. The loss must fall upon A. This is a bailment and not a sale, as B was to deliver flour from the same wheat received. A bailee is only liable for loss occasioned by his own negligence. He is not an insurer. "The cases agree, that where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them, or account for such non-delivery; this is to be treated as prima facie evidence of negligence. Burnel v. R. R., 45 N. Y. 184; Steers v. Liverpool S. S. Co., 57 N. Y. 1; Fairfax v. R. R. Co., 67 N. Y. 11. The rule proceeds either from the assumed necessity of the case, it being presumed that the bailee has exclusive knowledge of the facts and that he is able to give the reason for his non-delivery, if any exist, other than his own act or fault, or upon a presumption that he actually retains the goods and by his refusal converts them. But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no prima facie evidence of his want of care, and the court will not assume in the absence of proof on the point, that such fire or theft was the result of his negligence. Schmidt v. Blood, 9 Wend. 269; Lamb v. R. R., 46 N. Y. 271. It will be seen, as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence, to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is of course not intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by alleging as an excuse, that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. The warehouseman in the absence of bad faith is only liable for negligence. The plaintiff must in all cases, suing him for loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman, and his refusal to deliver, these facts unexplained are treated by the courts as prima facie evidence of negligence; but, if either, in the course of his proof or that of the defendant, it appears that the goods

have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman." Hand, J., in Claflin v. Meyer, 75 N. Y. 260.

Q. A leaves a watch with a jeweler to be repaired. The shop was burglariously entered without fault of the jeweler, and A's watch was stolen. A brings action against the jeweler. Can he recover? State the rule.

A. Upon it appearing that the goods were lost by a burglary committed upon the defendant's shop, it was for the plaintiff to establish affirmatively, that such burglary was occasioned or was not prevented by reason of some negligence or omission of due care on the part of the jeweler, and as there was no fault or negligence on the part of the jeweler, A clearly could not recover. The rule is, that the bailee is only liable for loss of goods when he has been negligent. Claflin v. Meyer, supra.

(NOTE.) Negligence may in a proper case be presumed from the mere happening of the accident, as where the bailee's warehouse in which the property is stored, collapses while repairs necessitated by a fire are being made. Kaiser v. Lattimer, 40 App. Div. 149.

Q. A pledged with B two diamond studs. B placed one of the studs in his safe, and the other he wore in his necktie. Thereafter the stud in the safe was stolen, and subsequently thereto, the one in the tie was also stolen. A demands the return of the diamonds, and upon B's failure to deliver them, brings suit. Can he recover?

A. He cannot recover as to the one stolen from the safe, but may recover as to the one stolen from the tie. A pawnbroker or bailee is only liable for ordinary diligence, and where his place of business is broken into, and articles pledged are stolen therefrom, he is not liable if he exercised ordinary diligence. Abbett v. Frederick, 56 How. Pr. 68. "Jewels held in pawn may be worn, if the pawnee takes care not to lose or injure them, the pawnee being liable for any loss through theft or otherwise, which might happen in the wearing, for the pawn is so far in the nature of a depositum that it can be used but at the peril of the pawnee." Sheridan v. Presas, 18 Misc. 180.

Q. A leaves his horse in first-class condition with B, to board, at the agreed price of $20 per month, telling B that he is not to use

the horse, and is only to give him such exercise as can be given with a halter. B does not heed these instructions and allows his wife to drive the horse, as a result of which the animal becomes foundered. When A finds this out, he refuses to pay board any longer for the horse and abandons him as utterly worthless. What action will A bring, and what will be the measure of damages?

A. A can sue in conversion, the measure of damages being the value of the horse. A bailee for hire who uses the property contrary to instructions of the bailor, is liable for a conversion thereof. Collins v. Bennett, 46 N. Y. 490.

Q. A delivered to B, a tailor, 1,000 yards of cloth which B agreed to make into trousers at $1 per pair. He makes and delivers 250 pairs. He afterwards makes but refuses to deliver the rest of the trousers, until he is paid for all. A tenders at the rate of $1 per pair for the last lot, and sues for the return of the cloth. Give the nature of the transaction. Who is entitled to the cloth?

Q. A made a contract with B whereby he agreed to bind 1,000 books at the rate of fifty cents a book and deliver them in lots of a third at a time. The first two lots had been delivered, and A had not demanded or received any pay. A then refuses to deliver any more books until the whole amount has been paid. What are the rights of the parties?

A. Where deliveries of property are made, under a single contract, by the owner to another, at different times, for the purpose of having work done thereon which adds to its value, a lien in favor of the person doing the work attaches to all the property in the same manner, as if it had all been delivered at one time; and if a part is voluntarily returned without payment for the work, the workman retains his lien for all the work done on the property which remains in his possession; the only effect of the return is a release of so much of the securities. The transaction is clearly a bailment, and the bailee can retain the rest of the property, till the whole debt is paid. Morgan v. Congdon, 4 N. Y. 552.

Q. A takes some gold to B, a jeweler, who agrees to make it into a chain for $100, the money to be paid thirty days after the completion and delivery of the chain. When the chain is completed, A demands it of B, but the latter refuses to give it up until

he gets his pay, claiming an artisan's lien. Rights of A and B? State your reasons.

A. A has an absolute right to the chain. The agreement in this case, to deliver before receiving payment, is inconsistent with the retention of the lien, and therefore B is estopped from setting it up. Where a particular time of payment is fixed by the contract, which is, or may be subsequent to the time when the owner is entitled to a return of the property, there can be no lien. Wiles Laundering Co. v. Hahlo, 105 N. Y. 234.

Q. A delivered to B, a bookbinder, 1,000 books to be bound at $1 each. Five hundred of the books were bound and delivered by the binder to A without exacting payment. The remaining 500 books were bound by B, and then pledged by him to C, as security for a loan of $1,000. C refused to deliver the books to A on demand. A consults you. What is the nature of the transaction, and what are the respective rights of A, B and C under the circumstances?

A. This is a bailment, and title to the books is in A, subject, however, to B's lien for the work done upon it. B having a lien could pledge the same, and C acquired all B's rights to retain the books until the entire amount due upon them, was paid by A. Wiles Laundering Co. v Hahlo, supra, a leading case.

Q. A brings a wagon to B for repairs. It is worth $25 when taken. B repairs the wagon, increasing its value to $100. C has a judgment against B, and offers A $25 for his interest in the wagon. A refuses to accept it, C then levies on the wagon, and sells it under his judgment against B. A brings an action against C. Can he recover, and what is the extent of the recovery?

Q. A buys an overcoat for $50, and takes it to a furrier, who agrees to furnish furs and line it for $150. After the furrier has completed the job, and the coat is ready for A, C, a creditor, levies on the coat. A sues C in conversion, alleging $200 damages. To whom does the coat belong? If judgment for A, for how much?

A. The owner of property, who delivers it to another for the purpose of having repairs done thereon, or other work which adds to its value, does not thereby lose his title to the property. Therefore, he may recover as damages from one who has converted the

property, the value at the time of the conversion. Anything affixed to one's property becomes a part of that property, and title to it passes to the owner. In both of these cases, therefore, A can recover the value of the property when taken. See Mack v. Snell, 140 N. Y. 193.

Q. A delivered goods to B, a warehouseman. C, the rightful owner of said goods, brings action against B who is compelled to pay $500 damages, their value. A demands the goods from B, who refuses to deliver them. A sues B. Can he recover?

A. The rule that a bailee cannot deny the title of his bailor, does not apply to a case where the bailor has been compelled by action to pay for the property to one having the true title; therefore A here cannot recover from B. Cook v. Holt, 48 N. Y. 275.

CHAPTER III.

Bills and Notes.

Q. (No date.)

Three months after date, I promise to pay to the order of X, $500 in wheat. (Signed) A. B. It this a valid promissory note? When does it become due and payable?

A. This is not a valid promissory note, as it is not payable in money. Sec. 20 of the N. Y. Neg. Inst. Law (Laws of 1897, chap. 612) provides as follows: "An instrument to be negotiable must conform to the following requirements: 1. It must be in writing and signed by the maker or drawer. 2. It 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 5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty." If this instrument were negotiable, it would be payable thirty days from its delivery, as where an instrument is not dated, it will be considered to be dated as of the time when it was issued. Sec. 36, Neg. Inst. Law. The absence of a date from an instrument does not affect its negotiability. Sec. 25 of Neg. Inst. Law.

Q. June 2, 1899.

I promise to pay to the order of W $55 at my store, or in goods on demand. (Signed) T. P. Is this a valid promissory note?

A. Yes. This instrument has all the essential qualities of a negotiable promissory note. It is for the unconditional payment of a certain sum of money, at a specified time, to the payee's order. It was not optional with the maker to pay in money or goods, and thus to fulfill his promise in either of two specified ways. In such case, the promise would have been in the alternative. If the holder chooses, he may surrender the note and receive goods, but that rests entirely with himself, and no choice is left to the debtor. Hostatter v. Wilson, 36 Barb. 307; Hodges v. Shuler, 22 N. Y.

114. The statute has left this rule unchanged. Sec. 24 of the Neg. Inst. Law provides that: "An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument is not affected by a provision which gives the holder an election to require something to be done in lieu of the payment of money."

Q. Feb. 18, 1900.

Pay A or order $2,000 out of the rents which you will collect from my building 265 Broadway. To B. (Signed) C. Is this a good bill of exchange?

A. Clearly not, as it is payable out of an uncertain fund. The test is, whether the drawee is confined to the particular fund, or whether though a particular fund is mentioned, the drawee may charge the bill to the general account of the drawer, if the designated fund turns out to be insufficient. It must appear that the bill is drawn on the general credit of the drawer; though it is no objection when so drawn, that a particular fund is specified, from which the drawer may reimburse himself. Munger v. Shannon, 61 N. Y. 251; Brill v. Tuttle, 81 N. Y. 457; The statute has not changed the law in this respect. Sec. 22 of the Neg. Inst. Law says: "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."

Q. A indorsed for the accommodation of B the latter's promissory note for $1,000, payable sixty days after date. The note was complete in form, except as to date and place of payment. A told B to date the note November 1, at the First National Bank, Boston. B, in fraud of his instructions, dated the note October 1, 1900, and made it payable at the Mechanics and Traders Bank, New York City, and then negotiated it in due course to C, who now sues A and B thereon. The above facts appearing, judgment for whom and why?

A. Judgment for C. It is well settled law, that if one affixes

his signature to an incomplete promissory note and entrusts it to the custody of another for the purpose of having the blanks filled up, and thus becoming a party to a negotiable instrument, he thereby confers the right, and such instrument carries on its face an implied authority to fill up the blanks and complete the contract at pleasure as to name, terms and amount, date and place of payment, so far as consistent with its words. As to all purchasers for value without notice, the person to whom a blank note is entrusted must be deemed the agent of the signer, and the act of perfecting the instrument is deemed the act of the principal. An oral agreement between such principal and agent limiting the manner in which the note shall be perfected, cannot affect the rights of an indorsee who takes the note before maturity for value in ignorance of such an agreement. Van Duzer v. Howe, 21 N. Y. 531; Redlich v. Doll, 54 N. Y. 234; Weyerhauser v. Dunn, 100 N. Y. 150. Sec. 33 of the Neg. Law, 1897, is a substantial re-enactment of this rule, and is as follows: "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 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."

Q. A gives a note to B, of which the following is a copy: Buffalo, N. Y., Jan. 15, 1897. Sixty days after death, I promise to pay to B $5,000 for value received. (Signed) A. B is the son of A, and after A's death sues the personal representatives of A for the amount of the note. Can he recover?

A. Yes. A bill or note payable so many days after the death of a party is certain as to time, because the time is sure to arrive. Carnright v. Gray, 127 N. Y. 92; Hegeman v. Moon, 131 N. Y. 462. The Neg. Inst. Law, 1897, Sec. 23, is to the same effect,

being as follows: "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." It will be noticed in this case that the instrument is not negotiable, as it does not contain words of negotiability. In Carnright v. Gray, supra, which was decided under the Revised Statutes, it was held that such an instrument carried with it a presumption of consideration. In the recent case of Deyo v. Thompson, 53 App. Div. 9, it was held that the Neg. Inst. Law, 1897, sec. 50, has repealed the provision of the Rev. Stat., and that the presumption of consideration extends only to negotiable instruments; that non-negotiable instruments do not import a consideration, and the burden is upon the party suing on such a note, to prove the existence of a consideration therefor by extrinsic evidence.

Q. A's clerk made out a check payable to a fictitious person. A signed the check. The clerk then endorsed the name of the fictitious person upon the check, and presented it to the bank for payment. The bank paid the amount of same, and charged it to A's account. A sues the bank. Can he recover?

A. Yes. The rule that paper made payable to the order of a fictitious person is treated as payable to bearer, applies only to instruments put in circulation by the maker with knowledge that the name of the payee does not represent the name of a real person. "The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person." O'Brien, J., in Shipman v. Bank, 126 N. Y. 318. Sec. 26 of the Neg. Inst. Law of 1897, reaffirms this rule.

Q. A drew a bill of exchange leaving the name of the drawer blank; addressed it to himself, and then wrote an acceptance across it. He placed it in his desk, and then left the office. While he was absent, B came in and stole the paper. B then filled it up with the drawer's name, and transferred it to C, a bona fide holder. C sues A upon the instrument. Can he recover?

A. No. "The rule that a bona fide holder of an incomplete instrument, negotiable, but for some lack capable of being supplied, has an implied authority to supply the omission, and to hold the maker thereon, only applies where the latter has by his own act or by the act of another, authorized, confided in, or invested with apparent authority by him, put the instrument into circulation as negotiable paper. Where an instrument is stolen, a bona fide holder in such a case, acquires and can convey no title." Ledwich v. McKim, 593 N. Y. 307. Sec. 34 of the Neg. Inst. Law is in accord. It is as follows: "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."

Q. A gives B his agent authority to issue negotiable paper. B issues a note signing his own name as maker. Subsequently the instrument comes into the hands of C, who takes it for value before maturity, and without notice. C sues A on the note. Is A liable?

A. Clearly not. It is a well settled rule in the law of commercial paper, that persons taking negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party to the instrument cannot be charged with liability thereon, upon proof that the ostensible party signed as his agent. Pentz v. Stanton, 10 Wend. 271; sec. 37 of the Neg. Inst. Law.

(NOTE.) Where a note is signed by a person who adds the word "agent" to his name, the person signing, and not the undisclosed principal is liable thereon. Bank v. Love, 13 App. Div. 561. Sec. 39 of the Neg. Inst. Law is to the same effect, and is as follows: "Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a 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 an agent, or as filling a representative character, without disclosing his principal does not exempt him from personal liability."

Q. Buffalo, N. Y., June 10, 1896.

Three months after date for value received, we promise to pay to the order of C, $500 with interest at the First National Bank.

(Signed) A, Pres. X Corporation.
B, Treas. X Corporation.

A and B were authorized to issue notes for the corporation, and

it was business paper. The bank had no notice of the transaction, except what was on the face of the paper. The bank sued A and B individually. Are they liable? Give your reasons.

A. Yes. This is not the note of the corporation, but merely the note of the officers A and B. The words "president and treasurer" are purely descriptive. "Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder, taking bona fide, and without notice of the circumstances of its making is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons and not of the character of the liability. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbreviation of some official title has no legal signification as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. This must be regarded as the long and well-settled rule." Gray, J., in Casco Nat. Bank v. Clark, 139 N. Y. 307.

Q. A, a creditor, has dealings with B, as agent of C, which A knows. B buys goods as agent, which A is aware of. B gives A a note for the price, signed "B, agent for C." Whose note is it, and against whom can it be collected?

A. In this case, the principal would be liable to A. Where the names of both principal and agent appear on a negotiable instrument, in such a manner as to render it doubtful as to whom credit was given, parol evidence is admissible between the original parties to the instrument, and others affected with notice, to remove the doubt. "Where individuals subscribe their names to a note, prima facie they are personally liable, although they add a description of the character in which the note was given; but such presumption of liability may be rebutted by proof that the note was in fact given by the makers as agents of a principal, or officers of a corporation for a debt of the principal or corporation due to the payee, and that they were duly authorized to make such note as agents or officers." Brockway v. Allen, 17 Wend. 40. In Schmittler v. Simon, 114 N. Y. 177, the court, citing Brockway v. Allen, supra,

with approval, says: "A like presumption exists in that, as in this case, that the added designation is description personæ, and the right to show the fact otherwise, is dependent upon the knowledge of the other party to the contract that such was the purpose when it was made."

Q. A is the executor of an estate, and gives the ordinary promissory note for goods purchased for the estate, and signs "A, executor." Is there a personal liability on the note against A?

A. Yes. The addition of an official character, to the signatures of executors and administrators, in signing instruments and executing contracts has no significance, and operates merely to identify the person, and not to limit or qualify the liability. Pinney v. Admrs., 8 Wend. 500; Schmittler v. Simon, 101 N. Y. 554. See also sec. 39 of Neg. Inst. Law of 1897.

Q. A forges B's name as maker to a promissory note. It comes into the hands of C, a holder in due course. B refuses to pay the same, and C brings action against him. Can he recover?

A. Clearly not. As this note had no valid inception, it could not be made valid by subsequent negotiation. The rule that a forged instrument cannot be validated has long been well settled, and is re-embodied in sec. 42 of the Neg. Inst. Law, which is as follows: "Where a signature is forged, or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor, 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 be set up is precluded from setting up the forgery or want of authority."

Q. A gives his note to B for a debt which he owes B. Upon suit on the note by B, A defends on the ground of no consideration. Judgment for whom and why.

A. Judgment for B. While in a simple contract, this would not be held to be a sufficient consideration, yet under the Neg. Inst. Law of 1897, sec. 51, it would be a good consideration. This section provides as follows: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt

constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

(NOTE.) "Absence or failure of consideration is 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." Sec. 54 of Neg. Inst. Law.

Q. A makes a note for the accommodation of B. B transfers it for value to C. C, at the time of taking the note, knew that A was only an accommodation party. C sues A on the instrument. Can he recover?

A. C can recover. It has been held before the statute (Grocer's Bank v. Penfield, 69 N. Y. 502) that where a promissory note is made for the accommodation of the payee, without restrictions as to its use, an indorsee taking it in good faith for value can recover thereon against the maker. Sec. 55 of the Neg. Inst. Law is very explicit upon this point. It is as follows: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and 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 such instrument knew him to be an accommodation party."

Q. A, the cashier of the X Bank, sent to the Y Bank to be discounted, a bill of exchange payable to the order of "A, cashier," indorsed by him with the same addition to his signature. The Y Bank sues the X Bank as indorser on the bill. Judgment for whom and why?

A. Judgment for the Y Bank. It was uniformly held before the statute, that circumstances such as these, imported that the indorsement was that of the bank in the regular course of business, and not that of the cashier individually. Bank of Genesee v. Patchin Bank, 19 N. Y. 312. Sec. 72 of the Neg. Inst. Law has preserved this rule. It is as follows: "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."

Q. A, the holder of a note on which there are six indorsements, strikes out the second and third. Thereafter he sues X and Y who are the fourth and fifth indorsers respectively on the note, the same having been dishonored. Can he recover? State the rule.

A. No. Sec. 78 of the Neg. Inst. Law of 1897 answers this question. This section is as follows: "The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsements subsequent to him, are thereby relieved from liability on the instrument."

Q. A gives to B his promissory note for $500, payable in thirty days to B's order. The note is procured through fraud. B transfers the note for value without indorsement to C. Thereafter C gets notice of the fraud and gets B to indorse the note. C then sues A on the note. Can he recover? Give reasons.

A. C cannot recover. A subsequent indorsement made after notice of the maker's defense to the instrument, although the paper was transferred for value without notice of the defense, will not relate back to the time of the transfer so as to cut off the equities of the maker against the payee. Goshen Nat. Bank v. Bingham, 118 N. Y. 349. This rule continues in effect under sec. 79 of the Neg. Inst. Law, which reads: "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferror had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferror. 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."

Q. A makes a note to B or order. It is duly indorsed by B, C, D, and E, the last indorsing it over to B, the original holder. Default and due notice, etc. B sues the maker and all the indorsers. Advise all parties.

A. B cannot recover against C, D, and E. B's rights against them as last indorser are merged in his liability as first indorser to them. His only remedy is against A. This rule prevents circuity of action, and is stated in sec. 80 of the Neg. Inst. Law as follows: "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."

Q. A gives a negotiable note to B for $35. Subsequently a demand arises in favor of A against B for $30. B transfers the note before maturity for value and without notice to C. C sues A on the note. A sets up a counterclaim against C which he has against B. C demurs. Judgment for whom and why?

A. The demurrer must be sustained. C is a holder in due course, and the counterclaim, which would have been available against B, cannot be set up against him. This rule is contained in sec. 96 of the Neg. Inst. Law. It is as follows: "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."

Q. C was indebted to B for coal, and indorsed to him certain promissory notes payable to C's order before maturity, made by D, in payment of tobacco sold by C to D. B entered C's account with the full face value of the notes, including the accrued interest thereon. The notes were not paid at maturity. B sues D, the maker. D answers and admits the making of the note, transfer and non-payment thereof, and sets up affirmatively a breach of the contract of sale of the tobacco by C, for which the notes were given, and claims damages therefor to the amount of the notes as a set-off. B demurs to the answer. Judgment for whom and why?

A. Judgment for B. B is a holder in due course, and therefore the defenses are not available against him, under sec. 96, Neg. Inst. Law. That B is a holder in due course will be seen from sec. 91, which is as follows: "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. 2. That he became the holder of it before it was overdue, and without notice that it had 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."

Q. A note is usurious in its inception. It is transferred to A for value without notice before maturity, and there is nothing on the face of the note showing usury. Can A recover from the maker?

A. No. Usury has always been considered a real defense in this state, and no recovery is allowed on the instrument even by a holder in due course. The rule is well stated by Vann, J., in Claflin v. Boorum, 122 N. Y. 385, where he says in part: "The loan, when made, was a violation of the statute, and the notes were thus rendered absolutely void, and no subsequent transaction could make them valid. Even if, as the plaintiffs claim, they purchased the notes before maturity for value and without notice, they cannot enforce them, because the vice of usury follows a promissory note into the hands of a bona fide holder. A note, void in its inception for usury, continues void forever, whatever its subsequent history may be. It is as void in the hands of an innocent holder for value as it was in the hands of those who made the usurious contract. No vitality can be given to it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade." The Neg. Inst. Law, 1897, has not changed this rule.

(NOTE.) The distinction between real and personal defenses is called attention to. It still exists under the Neg. Inst. Law. A person whose title is defective must be distinguished from one who has no title at all and who can confer none, as for example one who makes title through a forged indorsement. Sec. 94, defining defective title, is as follows: "The title of a person who negotiates an instrument is defective within the meaning of this act, when he obtains 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."

Q. A negotiable promissory note not usurious in its inception, but subsequently becoming so, comes into the hands of A, a bona fide holder for value without notice. He sues the maker, who pleads the usury as a defense. State the rule governing the rights and liabilities of the maker and the owner of the note under the circumstances.

A. A can recover from the maker. The subsequent usurious transaction in nowise affects the maker, who has already become

bound upon the instrument. The subsequent negotiation of a note upon a usurious consideration cannot defeat an action thereon against the maker by the holder if the instrument had a legal inception. All subsequent transfers of a valid note are treated as so many sales of chattels, and any fraud or usury between intermediate parties, while they are defenses between those parties among themselves, are not available to the maker. Cameron v. Chappell, 24 Wend. 94. Catlin v. Gunther, 11 N. Y. 368. This rule continues in force under the Neg. Inst. Law. See sect. 98.

Q. A has a negotiable note. The note is stolen. B acquires the same in due course and before maturity. At the maturity thereof B presents the note for payment to A. A says the note was stolen from him, and refuses to pay. B sues A on the note. Can he recover?

A. Yes. It is elementary that a thief can convey good title to negotiable paper, although he cannot do so on the sale of a chattel. In order that a recovery may be had by the holder, he must have taken the instrument under such circumstances as to make him a holder in due course. He must have taken the instrument in good faith; mere negligence will not defeat a recovery. "He is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defeat in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide, his title, according to settled doctrine, will prevail." O'Brien, J., in Cheever v. R. R., 150 N. Y. 59. The Neg. Inst. Law, sec. 95, is in full accord with this statement of the rule.

Q. A makes his promissory note payable to the order of B. B transfers it for value before maturity to C, who takes it without notice of the fact that B had procured the note through fraud. C

after maturity of the instrument indorses it to D, who takes with notice. D sues A upon the note. Can he recover?

A. Yes. D, the indorsee, steps into the shoes of his indorser C, and as C was a holder in due course, and took the instrument free from all defenses, D succeeds to his rights. As C so held the note, his title and rights thereto were such, that they could not be defeated by A. In the transfer, the title and rights held by him passed to D. The notice which D may have had of the fraud in the original transaction does not defeat the rights he acquired by the transfer. One reason of the rule is obvious. The maker of the note would be liable to the transferror; his condition is made no harder by the note coming into the hands of one having notice of its infirmities. Sec. 97 of the Neg. Inst. Law, continues this rule. It is as follows: "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 a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

Q. A indorses a note to B, with which to pay a certain other note in the X Bank. A is not liable on the first note. B goes to the cashier of the X Bank and states the facts to him, but says that he wishes to have the note discounted so that he might pay still another note, and that he will pay the one then due within a few days. B paid the note as agreed. The discounted note was not paid when due, and the X Bank sues A upon the note. Judgment for whom and why?

A. A is not liable. The bank was informed of the facts, and therefore took with notice; having done so it does not occupy the position of a holder in due course. Nickerson v. Ruger, 76 N. Y. 279.

Q. A holds a check drawn upon the X Bank by B. As a matter of fact B's signature is a forgery, but A is ignorant of the fact. A has the X Bank certify the check. Later A presents the check for payment, and the bank refuses to honor it. In an action by A against the bank, the latter sets up forgery as a defense. State the rights of the parties.

A. The bank is liable. Where a check is certified by a bank upon which it is drawn, the certification is equivalent to an acceptance. Sec. 323 of the Neg. Inst. Law. "For more than a century it has been held without question, that it is incumbent upon the drawee of a bill to be satisfied that the signature of the drawer is genuine, that he is presumed to know the handwriting of his correspondent, and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money paid." Allen, J., in Nat. Park Bank v. Ninth Nat. Bank, 46 N. Y. 77.

Q. A drew a check on the X Bank payable to B. B lost the check, and the finder thereof forged B's name and negotiated it. It came into the hands of C, a holder in due course. C presented to the bank which paid the same. The bank, upon discovering the above facts, sues to recover back the money paid on the check. What are the rights of the parties?

A. Judgment for the bank. "The drawee of a draft or check is supposed to know the signature of the drawer, but the same knowledge of signature of an indorser is not imputable to him, and by acceptance or payment he does not admit or guaranty the genuineness of the signature of the payee, and money so paid may be recovered back, on the ground that it was paid under a mistake of facts." Holt v. Ross, 54 N. Y. 472.

(NOTE.) "A bank by certifying a check in the usual form, simply certifies to the genuineness of the signature of the drawer, and that he has funds sufficient to meet it, and engages that those funds will not be withdrawn from the bank by him; it does not warrant the genuineness of the body of the check as to payee or amount. Where a bank certifies a check, which has been altered by changing the date, name of the payee, and raising the amount, and subsequently pays the same, it may recover back the amount paid. The bank is not under a duty to take precautions against subsequent fraudulent alterations; it is the drawer who has control over its form." Marine Nat. Bank v. Nat. City Bank, 59 N. Y. 67.

Q. A signed a note as surety, and underneath his name wrote "Utica, N. Y." At maturity the note was not paid, and the notary who protested it, knowing A's residence and place of business was at Rome, N. Y., mailed the notice of protest to A, 22 Castle St., Rome, N. Y. A never received it. Is A liable? Why?

A. Yes, because he signed as surety. The undertaking of A was not conditional like that of an indorser, nor was it upon any

condition whatever. It was an absolute undertaking that the note should be paid by the maker at maturity. When the maker failed to pay, A's contract was broken, and the plaintiff had a complete right of action against him. It was no part of the agreement that the plaintiff should give notice of the non-payment, nor that he should sue the maker, or use any diligence to get the money from him. The point was decided long ago that the undertaking of a surety on a note like the one in question is not conditional, but an absolute undertaking that the maker will pay the note when due. Allen v. Rightmere, 20 Johns. 365; Brown v. Curtis, 2 N. Y. 225. Sec. 113, Neg. Inst. Law, has not changed this rule, and is as follows: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Under this section, however, there is no reason why one should not bind himself as guarantor or surety to a holder in due course, if he clearly indicates such an intent. As the place where the notice was sent does not affect the liability in this case, the question of notice will be discussed in the answer to a subsequent question in this chapter.

Q. A is the holder of an instrument payable to bearer. The instrument unknown to him, had been given upon a usurious consideration. He transfers the note to B for value by delivering it to him. B subsequently sues the maker and is defeated, the defense of usury having been set up. He then sues A. Can he recover? Answer fully.

A. No. Where the holder of a promissory note which is tainted with usury, transfers the same for a valuable consideration without indorsement and without representations as to its legality, in the absence of knowledge on his part at the time of the transfer of the defect, no warranty against it will be implied, and an action cannot be maintained against him for the loss sustained. A scienter is essential to establish a warranty as to the validity of the note. Littauer v. Goldman, 72 N. Y. 506. If the instrument is a forgery, the transferee can recover back the amount he paid to his transferror, as there is an implied warranty of genuineness of the instrument. In such cases, scienter or knowledge is not necessary in order to hold the transferror liable. Whitney v. Bank of Potsdam, 45 N. Y. ~~284~~ 303. Sec. 115, Neg. Inst. Law, covers these points, being as fol-

lows: "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. But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee."

Q. A, B, and C are the successive indorsers on a promissory note for $300. At maturity the note is not paid, and A pays it. A then sues B and C each for $100 contribution, and offers in evidence a parol agreement made by A, B, and C at the time of the indorsement, that there should be contribution among them. Is the evidence admissible?

A. Yes. The indorsers can agree among themselves to share the loss equally. The terms of the contract contained in instruments of this character which are within its scope to define and regulate, cannot be changed by parol; but the understanding between the indorsers is a distinct and separate subject, an outside matter, which may be properly proved independent of, and without any regard to the instrument itself. Barry v. Ranson, 12 N. Y. 462; Easterly v. Barber, 66 N. Y. 433. Sec. 118 of the Neg. Inst. Law recognizes this rule, and is as follows: "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."

Q. A's name appears first as an indorser of a promissory note; B's name appears second on the same note. A, in a suit by the holder against him as first indorser, attempts to show that in reality B signed first, and that they agreed between themselves that B should be primarily liable. Can he show it?

A. No. While the evidence as we have seen would be admissible as between A and B, yet it cannot be admitted in a suit by the holder; as to him the indorsers are liable in the order in which they indorse, and also jointly and severally, and no evidence can be admitted to vary this liability. Hubbard v. Gurney, 64 N. Y. 457. Sec. 118 only allows evidence to show that as between or among themselves they have agreed to become bound in a different capacity.

Q. A gives B his promissory note for good consideration, payable at the Mechanics Bank, Troy, N. Y. On the day of payment B goes to the bank and inquires if the note is paid. B does not protest the note, but goes to A's place of business, tells him that the note is not paid, and then and there demands payment of A. A refuses to pay. B brings suit on the note. Can he recover?

A. Judgment for B. It is not necessary to present the instrument, give notice of dishonor, or notice of protest in order to hold the maker liable. Sec. 130 of the Neg. Inst. Law provides as follows: "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; 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 on his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers." Protest is not necessary according to sec. 189, which is as follows: "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." Notice of dishonor need not be given to the maker, but must be given to the drawer and indorsers in order to hold them liable. Sec. 160.

Q. A makes a note payable three months after date at his bank. B indorses the same. The note falls due on Saturday, and the holder presents the note and protests it for non-payment on that day. Both A and B set up the want of a legal demand and presentment. Is this defense good?

A. The defense is good. Sec. 145 of the Neg. Inst. Law provides as follows: "Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls on Sunday, or a holiday, the instrument is payable on 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 o'clock noon on Saturday when that entire day is not a holiday." It will be noticed that this instrument was payable at a certain period after date, and not on demand, therefore presentment was not according to the statute, and hence of no effect.

Q. X is the maker of a promissory note. Y is an indorser who has a store in Buffalo where he resides. Z is a farmer into whose hands the note has come in the regular course of business. On the day of maturity Z goes to X, and showing the note, asks for the money. X refuses to pay. Desiring to save notarial fees Z goes to Y's store the next day, and throwing the note down on the counter, says: "There, X has refused to pay that note and I want you to do so." Y refuses, and in a few days thereafter, Z hears something of the necessity of notice of dishonor or protest. Has the indorser been discharged? Discuss fully.

A. No. The oral notice of dishonor given here is sufficient, according to sec. 167 of the Neg. Inst. Law, which says: "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." The notice was given in the proper time. Sec. 174 provides: "Where the person giving, and the person to receive notice reside in the same place, notice must be given within the following time: 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 usual course on the day following." Sec. 175 provides: "Where the person giving, and the person to receive notice, reside in different places, the notice must be given within the following time: 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 of that day, by the next day thereafter. 2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified in the last sub-division."

Q. A was an indorser on a promissory note made by B, discounted by the X Bank. The note was protested for non-payment, and notice thereof given by the bank, by depositing the same in the post office, properly addressed to A. A never received the notice, it having been stolen and destroyed before delivery by a dishonest

post office employee. Because of its non-receipt, A lost an opportunity of saving himself, and he now claims that he is not liable as an indorser because he did not receive the notice. Is he liable? State the rule.

A. A is liable. Sec. 176, Neg. Inst. Law, covers this point. It is as follows: "Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails." Sec. 177 should also be noticed in this connection. It is as follows: "Notice is deemed to have been deposited in the post office, when deposited in any branch post office, or in any letter box under the control of the post office department."

Q. A, doing business in N. Y. City, indorses in that city a promissory note which was dated and discounted there. His indorsement did not give specific directions as to where notice of dishonor should be sent, and the bank duly mailed notice to the street and number in Albany where A resided. A failed to get the notice in time, and thereby lost an opportunity of saving the debt. Is he liable on his indorsement, and why?

A. Yes. The notice was sent to the proper place, according to the provisions of sec. 179 which says: "Where a party has added an address to his signature, the 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 post office nearest to his place of business, or to the post office where he is accustomed to receive his letters; or 2. If he live in one place, and have 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 so sojourning. But where the notice is actually received within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section."

Q. A indorsed a note of B, and took back a chattel mortgage to secure him therefor. The note came into the hands of C, a bona fide holder except as to the mortgage. When the note became due, C relying upon the security held by A, failed and neglected to present the note and protested the same, which fact A sets up as a defense in an action against him. Judgment for whom and why?

A. In the case of Otsego Bank v. Warren, 18 Barb. 290, it was held that it was not necessary for the holder to give notice to the indorser who had taken security. The Neg. Inst. Law of 1897 is silent upon this point, and the intent of the framers very probably was not to change the existing law. Sec. 186 naming the cases in which notice need not be given to an indorser does not make any provision for it.

Q. A makes a promissory note payable to B. B indorses it to C. The note is not paid at maturity. C fails to give notice to B in proper time. B subsequently promises to pay the amount of the note, but thereafter when C demands payment he refuses to pay. C sues B. Can he recover? State the rule.

A. Yes. The rule is stated in the headnote to the case of Ross v. Hurd, 71 N. Y. 14, as follows: "Where an indorser of a promissory note who has been discharged from liability, by the failure of the holder to give notice of non-payment, with full notice of the laches of the holder, unequivocally consents to continue his liability as though due protest has been made, he waives his right to object, and stands in the same position as if proper steps had been taken to charge him. The assent of the indorser to be bound may be established by any transaction between him and the holder which clearly indicates such intent. The assent, however, must be clearly established, and will not be inferred from doubtful or equivocal acts or language. A promise by an indorser to pay a note or bill, after he has been discharged by the failure to give him notice of its dishonor, will bind him, provided he had full knowledge of the laches when the promise was made. A promise made under these circumstances affords the clearest evidence that the indorser does not intend to take advantage of the laches of the holder, and the law without any new consideration moving between the parties gives effect to the promise." The statute has not altered this rule, as will be seen from an examination of sec. 180, which is as follows: "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 expressed or implied."

Q. A and B who are partners indorse a promissory note made by X. X fails to pay the note at maturity, and the holder gives

notice of dishonor to A only. The firm of A and B had been dissolved by mutual consent before the maturity of the instrument, which fact the holder knew. The holder now sues B, A being irresponsible. B sets up the want of legal notice. Judgment for whom and why?

A. Judgment for the holder. The notice given to one partner binds his copartner, even though such notice be given after the dissolution of the firm. The implied agency of the one partner for the other continues for this purpose after dissolution. Hubbard v. Matthews, 54 N. Y. 43. It is otherwise as to mere joint debtors, the notice to one not binding the other, unless he has express authority to receive the same. Willis v. Green, 5 Hill 232. The statutes continues these rules without change. Sec. 170 says: "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." Sec. 171 reads: "Notice to joint debtors who are not partners must be given to each of them, unless one of them has authority to receive such notice for the other."

Q. A is indorser on C's promissory note, which is overdue, and notice of protest has been served on both A and C. A requests the holder to proceed at once against the maker as he fears that in a short time C will be unable to pay. The holder neglects to do so, and C fails. The holder sues A and C on the note. Judgment for whom and why?

A. Judgment for the holder. If the indorser of an overdue note demands of the holder that he proceed against the maker, of whom the amount could then be collected, but who subsequently becomes insolvent, and the holder neglects or refuses to do so, the indorser is not discharged thereby While it is true that the indorser occupies a position similar to that of a surety, he also has a separate liability, his duty being to take up the instrument when dishonored. Trimble v. Thorn, 16 Johns. 152; Newcomb v. Hale, 90 N. Y. 326, 329.

Q. A is a bona fide holder of a note for one year, signed by B and C, apparently as joint makers, and does not know that C is only surety for B. A extends the time of payment for another year on consideration that B give A a chattel mortgage as addi-

tional security. What are the rights and liabilities of C? Reasons. State the general rule.

A. C is not discharged. The general rule is that any extension of time by a valid agreement will discharge the indorsers; and for this purpose the contract must be supported by a valid consideration. The reason commonly given for this rule is, that the position of the indorser or surety would be jeopardized by the extension of time, his rights and remedies being suspended thereby. Cary v. White, 52 N. Y. 138; Smith v. Erwin, 77 N. Y. 486. But in this case, as against A who was a holder in due course, B and C must be treated as joint makers, and one of them cannot be released by an extension of time to his joint maker. Where a person has signed as surety a joint and several promissory note, and it does not appear by the instrument itself that such relation existed, he may prove such facts by parol. Such proof does not tend to alter the contract; but this can only be shown in suits by the payee or others affected with notice, and not in a suit by a bona fide holder. Hubbard v. Gurney, 64 N. Y. 457: Brink v. Stratton, 64 App. Div. 331.

(NOTE.) Sec. 201 of the Neg. Inst. Law specifies the cases in which a person secondarily liable is discharged, and is as follows: "A person secondarily liable on an instrument is discharged: 1. By any act which discharges the instrument. 2. By the intentional cancellation of his signature by the holder. 3. By the discharge of a prior party. 4. By a valid tender of payment made by a prior party. 5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved. 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 the right of recourse is expressly reserved."

Q. A is the holder of a past due promissory note. By a binding agreement he allows C, the maker, three months' additional time in which to pay. D is an indorser for value upon the note before its maturity. Is he released by the agreement of A with C?

A. Yes. It is the duty of an indorser of a note to take it up upon its dishonor. The indorser, however, can only succeed to the rights of the holder; when he takes up the note he steps into the shoes of the holder, and would be bound by any agreement of the latter with the maker. Here, as the holder extended the time of payment, the extension being binding upon the indorser would tie up his hands for the period of the extension and thus impair his

rights; and this according to the settled rule would discharge him from liability. Green v. Bates, 74 N. Y. 333.

Q. A gives his note to B, no interest being specified. B adds interest thereto and conveys the same for value before maturity to C, who takes it without notice. Can C enforce the note against A for principal and interest? Discuss fully.

A. No. C can, however, recover the amount of the principal, as he is a holder in due course. This was a material alteration according to sec. 206 of the Neg. Inst. Law, which is as follows: "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 or relations of the parties. 5. The medium of 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." Before the enactment of the statute, a material alteration avoided and discharged the instrument, except as against a party who made or assented to the alteration. The alteration extinguished all remedies. Benedict v. Cowden, 49 N. Y. 396; Dinsmore v. Duncan, 57 N. Y. 581. The statute has mitigated the rigor of the common-law rule in favor of a holder in due course, and allows a recovery by him according to the original tenor of the instrument, as will be seen from sec. 205, which is as follows: "Where a negotiable instrument is materially altered without the assent of all 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."

Q. A draws a check on the X Bank payable to B for $200. He negligently leaves a blank space so that the amount is raised to $2,000. The bank pays out this amount. A sues the bank for the amount it has over paid. Can he recover?

A. No. While the general rule is that a bank may only pay out the funds of a depositor in the usual course of business and in conformity to his direction, and it is not entitled to charge to him any payments, except those made at the time when and to the per-

son to whom, and for the amount authorized by him, and where a check properly drawn by the customer has been subsequently altered in a material point without his consent, even if done so skillfully as to defy detection on examination, the bank is responsible for an omission to discover the original terms and conditions thereof; yet where the maker has been negligent, he is estopped and cannot recover. This doctrine has been recognized since the early English case of Young v. Grote, 4 Bing. 253, and followed in this state in the case of Crawford v. Bank, 100 N. Y. 50. See also Critten v. Chemical Nat. Bank, 171 N. Y. ~~50~~. 219

Q. A drew a certain check on the X Bank for $1,000 and delivered the same to B for value, who indorsed it to C for value. C had the X Bank certify it, all taking place in a reasonable time. The day after the certification, the X Bank fails. C consults you as to his rights and remedies on the check. A and B are both responsible. What would you advise him to do? Give your reasons.

A. C has no rights. Where the holder of a check presents the same to the drawee when due, and procures it to be certified instead of paid, it is as between him and the drawer and indorsers treated as payment, and operates to discharge them from liability thereon. First Nat. Bank v. Leach, 52 N. Y. 350. Sec. 324 of the Neg. Inst. Law of 1897 is to the same effect.

Q. A, a resident of Ohio borrows $5,000 in New York City from B, a resident of that city, for use in Ohio. A note is given for security, dated at New York City, payable in Ohio. The legal rate of interest in Ohio is 10%, in New York 6%. Upon default, suit is brought in New York state, claiming interest at 10%. A sets up the defense of usury. What are the rights of the parties? What law governs?

A. A's defense must fail. It is well settled by the decisions in this state, that commercial paper executed in one state, and payable in another is governed by the law of the state in which it is payable. Bowen v. Newell, 13 N. Y. 290.

CHAPTER IV.

Carriers.

Q. What is a common carrier, and what are his duties?

A. A common carrier is one, who undertakes for hire to transport the goods of all who choose to employ him. It is the duty of every common carrier to receive for carriage, and to carry the goods of any person tendered to it for transportation, provided they are such as it holds itself out as willing to carry, and the party tendering them offers to pay its proper charges. See Fish v. Clark, 2 Lans. (N. Y.) 176. Such a duty is attached to every person or corporation who becomes a common carrier, and under it, no carrier can refuse to accept goods of any customer, except for just cause, nor can any carrier afford to one shipper facilities not granted to another under same circumstances. A special contract to carry need not be shown. Mere delivery and acceptance, imply a contract to carry. Delivery is a sufficient consideration for the undertaking to carry. The carrier is liable to an action for refusal or failure to carry. Plaintiff, in such an action, must show the wrongful refusal or failure to carry his goods, was the proximate cause of the loss complained of. The duty to accept for carriage, and to carry goods tendered is not an absolute duty on the part of the carrier, but is subject to reasonable limitations and conditions; a carrier is not a common carrier as to every character of goods, but only as to such as he professes to carry; he may therefore refuse to accept for transportation, goods of a character which is not his business or custom to carry, and which he does not hold himself out as willing or undertaking to carry. See 5 Amer. & Eng. Ency. of Law (2d ed.) 158.

Q. Is a sleeping car company a common carrier? A, a traveler, upon retiring for the night to his berth in a sleeping car, places under his pillow $500. It is stolen by a thief. A sues the company. Can he recover?

A. It is well settled that a sleeping car company is not a com-

mon carrier. There is, however, an obligation on its part, to exercise reasonable care and vigilance over the persons and property of its passengers, especially while they are sleeping. The company is bound, and it is its right to preserve order and enforce proper decorum, as well as to keep reasonable watch over the persons and property of its passengers. Welch v. R. R., 16 Abb. Pr. (N. S.) 352. "Money necessary for the payment of expenses of a journey undertaken, which is carried in the trunk of a passenger, is part of his baggage, and if lost while in the custody of the carrier, it is liable. But carriers do not undertake to safely carry and deliver the effects of passengers not delivered into their custody, and it cannot be held, that money in a passenger's clothing worn during the day, and placed under his pillow at night, is in the custody of a corporation which carries and furnishes travelers with berths in sleeping coaches." Carpenter v. R. R., 124 N. Y. 53.

Q. The A Manufacturing Co. agrees with the N. Y. C. R. R. Co., that in consideration of giving all its shipping business to said road, the latter agrees to transport all its freight at a lower rate than that charged to other shippers. Objection is raised to this by the B Co., another customer of the road. Is the objection valid?

A. The objection is not valid. "While a common carrier is bound to convey and deliver goods for a reasonable compensation, and may not, where the circumstances and conditions are the same, unreasonably or unjustly discriminate in favor of one against another, it may make a discount from its general rates in favor of a particular customer or class of customers in isolated cases, and for special conditions. A carrier may, by special agreement, give reduced rates to customers who stipulate to give it all their business, and refuse those rates to others who are not willing to so stipulate, provided the charge exacted from those others is not excessive or unreasonable." Lough v. Outerbridge, 143 N. Y. 271.

Q. Goods are transported by a common carrier from New York to Buffalo. On the way, the train is derailed, and train wreckers secure some of the freight. The owners of the freight sue the railroad company. Is the company liable?

A. Yes. The common carrier's liability is absolute. The carrier is an insurer of the safety of the goods. It is liable for all loss, except that caused by the "act of God," "public enemy," or some "inherent defect in the goods." In this case, the loss clearly was not caused by the public enemy, within the meaning of that term as used in the law of carriers. By "public enemy" is meant, not merely lawless men in general, but armed forces with whom the country is at war. Merritt v. Earle, 29 N. Y. 115.

(NOTE.) The "act of God," signifies the violence of nature, such as storms, earthquakes, and unprecedented floods, not caused by any human intervention. To relieve the carrier from liability, the "act of God" must be the sole and immediate cause of the loss. Unprecedented floods of such magnitude, that the ordinary safeguards provided by the carrier are wholly insufficient to withstand their effects, are within the term "act of God," and the carrier is not liable for a loss resulting from such a cause, unless it appears that his own want of care was the proximate cause of the loss. McFadden v. R. R., 44 N. Y. 478.

Q. A entered into a contract with B, whereby he agreed to transport from New York to St. Louis, Mo., and safely deliver in thirty days, certain goods at a certain price. A expected to transport the goods by way of a canal in Pennsylvania. In consequence of an unusual freshet, this canal was not navigable, and the goods were detained for fifteen days, and did not arrive in St. Louis until twenty days after the time specified in the contract. B sues A for breach of contract. The latter sets up as a defense that the delay was caused by the "act of God." Can B recover?

A. Yes. If a carrier undertakes by special contract to deliver goods at the point of destination at a fixed time, it is bound to do so, and is liable for a failure to do so within the prescribed time. Inevitable accident, or the "act of God" is no defense. Harmony v. Bingham, 12 N. Y. 99.

Q. A makes an agreement with a railroad company, whereby in consideration of a reduced rate, he releases the company from all claims for any damage or injury, "from whatsoever cause arising." The goods are lost through the negligence of the company. A sues the company. Can he recover?

A. Yes. "While it is settled in New York, that a common carrier can stipulate against liability for loss resulting from his own negligence, by special agreement, yet the contract will not be con-

strued as exempting the carrier from liability for negligence, unless it is expressed in unequivocal terms. In this case, the exemption did not specifically include a loss arising from the carrier's negligence, and for such loss it must be held liable." Maynard v. R. R., 71 N. Y. 180.

Q. A ships goods by the N. Y. C. R. R. Co., and agrees to limit the amount of the company's liability for loss, to an amount not exceeding $5,000. The goods are lost, and A sues the company for $10,000, which he alleges is the actual value of the goods. The company sets up the agreement as a defense. Judgment for whom, and for how much?

A. Judgment for A, for $5,000. "Where the shipper of property enters into a contract with a carrier, whereby it is stipulated that in the event of loss or injury resulting from causes which would make the carrier liable, the liability shall be limited to an amount not exceeding a valuation specified, the shipper, in case of loss or injury, can recover no more than the sum specified." Zimmer v. R. R., 137 N. Y. 460.

Q. A was a passenger on the D. L. & W. R. R. While seated in the train, he gave his baggage checks to the agent of the D Express Co., to have the baggage sent to his residence in New York. He received in return therefor, a printed receipt which contained a statement limiting the liability of the company to $100. The car at the time was so dark that he could not read the printed matter, and he therefore did not do so. The express company fails to deliver. A sues the express company. Can he recover?

A. Yes. The nature of the transaction was not such as would make the passenger believe that the receipt contained a contract. Where a railroad passenger in a dimly lighted car receives a receipt for baggage on which a contract is printed in fine type so as not to be easily read by a passenger; if he fails to see it, he is not bound by its terms. It was so held in Blossom v. Dodd, 43 N. Y. 264.

(NOTE.) Where a traveler, on delivery of baggage to a local express company, receives a paper, which he has a right to regard as a receipt, to enable him to follow and identify his property, and no notice is given him that it embodies the terms of a special contract, his omission to read the paper is not negligence, and he is not bound by its terms. There must be notice either actual or con-

structive. The notice "read this ticket," etc., must be printed in large type at some conspicuous place on the ticket, so as to be easily read, in order to charge the party receiving it with constructive notice. Madan v. Scherard, 73 N. Y. 329. "It is incumbent upon a shipper to acquaint himself with the contents of a contract executed by him, and although he fails to do so, will be held chargeable with knowledge thereof. The cases where parties proposing to have articles of property transported by a carrier, deliberately enter into some necessary contract relating to the transportation, differ materially from those cases of travelers who commit their trunks or articles of baggage to an agent of some express or transportation company, and receive at the moment some paper which, as had been said, amounts simply to a voucher enabling them to follow and identify their property. There is a distinction between contracts of shipments of merchandise, and such contracts as local express companies endeavor to force upon travelers. While a carrier may limit its liability by express contract, the burden rests upon it to show that the passenger assented to the terms of such receipt." Grossman v. Dodd, 63 Hun, 324.

Q. A makes an oral agreement with a railroad company in regard to shipping goods. After the goods were shipped, and on the same day, the company gave him a bill of lading containing conditions not in the oral agreement. The goods are lost under such conditions that the bill of lading does not cover the loss. A sues the company. Can he recover?

A. Yes. "Where goods are shipped under a verbal agreement for the transportation thereof, such agreement is not merged in a bill of lading, partly written and partly printed, delivered to the shipper, after he has parted with the control of his goods, although such bill of lading by its terms limited the liability of the carrier, and expressed on its face that by accepting it, the shipper agreed to the conditions. The mere receipt of the bill, after the verbal agreement had been acted upon, and the shippers omitting, through inadvertence, to examine the printed conditions, are not sufficient to conclude him from showing what the actual agreement was under which the goods had been shipped." Bostwick v. R. R., 45 N. Y. 712.

Q. A shipped his trunk at the N. Y. C. R. R. Co., in New York City for Albany, and the next day called for the trunk at Albany. It could not be found. A sues the company, proves delivery to the company, the contract, the demand and value. The company does not offer any evidence. Judgment for whom and why?

A. Judgment for A. Non-delivery or delivery in bad condition of goods is prima facie evidence of negligence. If another than

plaintiff is not named as consignee, plaintiff's evidence, that the carrier's contract was made with himself, is sufficient proof of his title. Therefore, here A's evidence establishes his title, and the company's negligence, and he must recover. Canfield v. R. R., 93 N. Y. 532.

Q. A ships goods by railroad to B from Troy to Rochester. The goods arrived safely and properly at Rochester. The railroad company notifies B to take the goods. B fails to do so, and the railroad stores the goods in one of its warehouses. A week later the goods are destroyed by fire without negligence on the part of the railroad. At the trial on the above facts, both sides moved for judgment. On what ground did the plaintiff base his motion? On what ground did the defendant base his motion? What did the court say?

A. The ruling of the court must have been, that the sole question involved was whether or not one week was a reasonable time for the consignee to remove the goods. "The duty of common carriers by railroad as to the delivery of goods at the place of destination, is subject to the following rules: If the consignee is present upon their arrival, he must take them without unreasonable delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of their arrival, and he then has a reasonable time in which to remove them. If he is absent, unknown or cannot be found, then the carrier can place them in his freight house, and if the consignee does not call for them in a reasonable time, the liability as a common carrier ceases. If the consignee has a reasonable opportunity to remove them, and does not, he cannot hold the carrier as an insurer." Fenner v. R. R., 44 N. Y. 505. See also Faulkner v. Hart, 82 N. Y. 413.

(NOTE.) "What constitutes a reasonable time cannot be measured by any arbitrary or inflexible rule, but depends upon the circumstances of each case, and if the facts are undisputed, it is a question of law for the courts to determine. After the liability of a railroad company as a common carrier ceases, towards the owner of the trunk checked by it, it still owes a duty to him, although its strict liability as a carrier has been changed to a modified liability, such as that of a warehouseman, and it can be charged with responsibility for the loss of the trunk, only on the ground that it was negligent, and failed as such warehouseman to discharge in full the duty it owed to the owner of the trunk." Mortland v. R. R., 81 Hun, 473. A common carrier need not give

notice to a consignor, in the absence of a contract to that effect. Weed v. Barney, 45 N. Y. 344.

Q. A ships goods to B by the D. L. & W. R. R. to Elmira, N. Y. The company notifies B, who calls at the office at 5 P. M. on the day of arrival, and asks the company to keep the goods for him until the next morning, which the company agreed to do. A fire breaks out during the night, and the goods are consumed without any negligence on the part of the company. B sues the company for the value of the goods. Can he recover?

A. No. "When the consignee has notice of the arrival of his goods, and without any refusal or unwillingness on the part of the carrier to deliver, agrees with the latter for their mutual convenience, that the goods be left over night in the freight house, the liability as a common carrier has ceased, and the goods being destroyed by fire during the night, the company cannot be held as an insurer." Fenner v. R. R., supra.

Q. A, an inhabitant of Cairo, Ill., shipped goods by the Illinois Central to Byron Rogers, 50 Chambers St., N. Y. City. At Buffalo, the N. Y. Central, by its traffic arrangement with the Ill. Central, took the goods for the purpose of carrying them through to New York. By an error of the N. Y. Central agents, the address became changed to Bryan and Roger, and as the latter was an unknown firm in New York, after ten days, in which the railroad company tried to find the consignee, the railroad stored the goods with a reputable warehouse. The goods were subsequently destroyed by fire, through no fault of the bailee. The consignee wishes to bring suit for the value of the goods. Whom would you sue?

A. The consignee has a right of action against the New York Central. "In the case of the transportation of property over several railroads, constituting a connecting line, neither company is the agent of the owner; each exercises an independent contract with the owner, and is responsible for its own negligence, and it cannot make the owner responsible for the negligence of a connecting road." Sherman v. R. R., 64 N. Y. 254.

Q. X, a swindler in Rome, N. Y., orders goods of the Y. Co. of Buffalo in the name of John Doe & Co., a fictitious firm. The Y Co. ships the goods by the N. Y. C. R. R. Co. The railroad com-

pany delivers them to X, who absconds with the goods. The Y Co. sues the railroad company. Judgment for whom and why?

A. Judgment for the Y Co. "Where a common carrier without requiring evidence of identity, delivers goods to a stranger which have been fraudulently ordered by the latter in the name of a fictitious firm, and which have been shipped in compliance with the order directed to the fictitious firm, the carrier is liable to the consignor for their value." Price v. R. R., 50 N. Y. 213.

Q. A, a passenger on the Erie R. R. Co., finding no vacant seat in the ordinary car, entered the drawing room car, which was not owned by the railroad company, and took a seat there. When called upon for an extra fare he refused to pay, but announced his willingness to go into another car if a seat were provided for him there. The porter of the drawing room car, who was in the employ of the owner of that car, forcibly ejected him. A sues the railroad company. Can he recover?

A. Yes. The railroad company is liable for the assault. "A railroad company cannot relieve itself of its obligations and liabilities as a common carrier of passengers, to those passengers who make use of the accommodations afforded by sleeping, palace, or drawing room cars. The porter of the drawing room or sleeping car is, in the performance of the duties of the railroad company under its contract, the servant of that company, although it does not hire or pay the porter. A railroad company by the sale of a ticket for passage on its road, assumes the obligation, and undertakes absolutely to protect the passenger against any injury from negligence or wilful misconduct of its servants while performing its contract. Whatever may be the motive which incites the servant to commit an unlawful or improper act towards the passenger, during the existence of the relation of carrier and passenger, the carrier is liable for the act, and its natural and legitimate consequences." Thorpe v. R. R., 76 N. Y. 402. See also Dwinelle v. R. R., 120 N. Y. 117.

Q. A, a passenger on a street railway car, is struck by the conductor of said car without provocation on A's part. A sues the company for damages. The company defends, on the ground that the act of the conductor was malicious, and not within the scope of his employment. Is the defense good? Judgment for whom and why?

A. Judgment for A. "The rule relieving a master from liability for a malicious injury inflicted by his servant, when not acting within the scope of his employment, does not apply as between a common carrier of passengers, and a passenger. Such a carrier undertakes to protect a passenger against any injury resulting from the negligence or wilful misconduct of its servants, while engaged in performing a duty which the carrier owes to the passengers. The carrier's obligation is to carry his passengers safely and properly, and to treat them respectfully, and if he entrusts this duty to his servants, the law holds him responsible for the manner in which they execute the trust." Stewart v. R. R., 90 N. Y. 588.

Q. X, a passenger on a street railway car, uses profane and insulting language to the conductor of said car, whereupon the latter strikes and severely injures him. X sues the company. Can he recover? Give your reasons.

A. No. "While it is true that the use of the abusive language to the conductor did not justify the assault, so far as the conductor was concerned, in the eyes of the criminal law, there is no reason for holding that where a passenger, by his own improper and insulting behavior while a passenger, brought upon himself the assault, that the carrier should be held responsible. It is clear that the conductor was not acting within the course of his employment, and the defendant could only be held liable under the rule, that the carrier was responsible for the wilful acts of its servants; but such rule can have no application to a case, where the injury was brought about by improper behavior of the passenger, which caused the assault of which he complained." Scott v. R. R., 53 Hun, 414; Kosters v. R. R., 151 N. Y. 630.

Q. A goes to a station of the X Railroad Co., and tenders a $2 bill in payment for a ticket. The ticket agent has been notified by the police authorities, to watch for men of a certain description, suspected of passing counterfeit bills. The agent suspected A of being one of the counterfeiters wanted by the police, and thought the bill looked queer, but nevertheless took it, and gave back the change with the ticket saying nothing to A. The agent then sent for a police officer, to whom he pointed out A who was then on the station platform. The bill was subsequently pronounced to be genuine, and A was discharged. A brings action against the company. Can he recover?

A. No. The company is not responsible, because the agent was not, in what he did, acting within the scope and line of his duty. His acts were not such as would be deemed to be performed in the course of his employment, or such as were demanded for the protection of his employer's interest, but rather those of a citizen, desirous of aiding the police in the detection and arrest of persons suspected of being engaged in the commission of a crime. His duty, as the particular agent of the company, was to have refused to accept and change the bill tendered in payment for the passage ticket, if he supposed it was not genuine; and when he did accept it, his only purpose could have been to further the efforts of the police authorities by such a step, and could not possibly be considered as something which his employer or employment required of him. Here the ticket agent was not acting for the protection of the company's interests, but went quite outside of the line of his duty to perform a supposed service to the community, by procuring the arrest of criminals whom he knew the authorities were endeavoring to apprehend. Mulligan v. R. R., 129 N. Y. 506.

Q. A purchased a ticket of the agent at an elevated railroad station, and passed through to take the cars after some dispute about the amount of the change. The ticket agent immediately afterwards came out upon the platform of the station, charged him with having given him a counterfeit piece of money, and demanded another coin in place of it. A insisted upon the money being genuine, and refused to give another coin or to hand back the change. The ticket agent called him a counterfeiter, and detained him in the station until he could procure a policeman to arrest and search him. The charge proving unfounded, A brings action against the company. Can he recover?

A. Yes. This case must be distinguished from the preceding case, in that the act done was within the agent's authority and for the company's interests. "Here the agent was acting for his employers, and with no other conceivable motive; losing his temper and injuring and insulting the plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him, and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his employer's property; and if, in his conduct, he committed an error, which was accompanied by insulting language and

the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury. For all the acts of a servant or agent which are done in the prosecution of the business entrusted to him, the carrier becomes civilly liable, if its passengers or strangers receive injury therefrom. The good faith and motive of the defendant are not a defense, if the act was unlawful. Though injury and insults are acts in departure of the authority inferred or implied, nevertheless as they occur in the course of the employment, the master becomes responsible for the wrong committed." Gray, J., in Palmeri v. R. R., 133 N. Y. 261.

Q. A tramp was stealing a ride on a railroad car. A brakeman employed by the railroad company kicked the tramp off the car while it was in motion. The tramp fell under the wheels of the car, and was injured. He brings suit against the railroad company, which defends: 1. That the plaintiff was a trespasser. 2. That the brakeman was not acting within the scope of his employment. Judgment for whom and why?

A. The company is liable. The company had a right to remove plaintiff from the car but not by the unreasonable and improper means which they used, and which subjected him to unnecessary danger. It is true in this case, that the plaintiff was a trespasser, and the company owed him no duty of protection. Its servants had a right to remove him from the car, but could not subject him to any extra hazard in doing so, or to so violently assault him as to cause him to fall from it. Although he was a trespasser, they owed him the duty not to subject him to danger. Although the brakeman's act was unreasonable and ill-timed, yet it was clearly within the scope of his employment, for it was his duty to expel trespassers from the train. McCann v. R. R., 117 N. Y. 505; Ansteth v. R. R., 145 N. Y. 210.

Q. A wished to cross a street which was blocked by vehicles and by the car of the X Railway Co. He mounted the platform of the car for the purpose of reaching the other side of the street, and in doing so, was struck by the driver of the car, causing him to fall and severely injure himself. He sues the company. Can he recover? Give reasons.

A. The company is liable. Where a street car is stopped, so as to obstruct the passage of a traveler on foot desiring to cross the

street, it is not a trespass or wrongful act on his part to step upon and pass over the car, in order to avoid the obstruction; he has a right to do so. The company had no right to remove the plaintiff from the platform, and hence could confer none on its servants. The driver was acting within the course of his employment in keeping the platform clear. Therefore A can recover. Shea v. R. R., 62 N. Y. 180.

Q. A, a conductor on a freight train, invites B, who is walking along the road, to come aboard the train. B does so. While on the car, he is injured by the negligence of the company's employees. B sues the company. Can he recover?

A. No. B was not riding as a passenger, and therefore had no rights as such. The conductor had no authority, actual or apparent, to invite him to board the train, and the company cannot be held liable. Eaton v. R. R., 57 N. Y. 382.

(NOTE.) In Ulrich v. R. R., 108 N. Y. 80, one traveling on a free pass was injured by a collision due to the negligence of the railroad company. Upon the pass was an indorsement releasing the company from liability in case of accident. Held: that the person was not a passenger, and could not recover against the railroad company.

Q. A, a passenger on a street car, informs the conductor that B. a fellow passenger, is intoxicated and threatens to strike him, The conductor pays no attention to this. B strikes A, injuring him severely. A sues the company. Can he recover?

A. Yes. "A railroad company is not responsible for the wrongful acts of a passenger, but it is bound to exercise the utmost vigilance in maintaining order and guarding its passengers against violence. It has authority to refuse to receive as a passenger, one who so demeans himself, so as to endanger the safety, or interferes with the reasonable comforts and convenience of other passengers; and this police power, the conductor or other servant in charge of the car is bound to exercise with all the means at its command when the occasion requires. If this duty is neglected, and in consequence a passenger receives injury which might have been reasonably anticipated, the company is liable. The fact, that an individual has drank to excess will not, in every case, warrant his expulsion; it is rather the effect upon him, and that by reason of intoxication, he is dangerous and annoying to others, that gives the right and imposes the duty of expulsion. The conductor is

only called upon to act upon improprieties or offenses witnessed by or made known to him; and the company can only be charged for the neglect of some duty, arising from circumstances of which the conductor was cognizant, or of which in the discharge of his duties he ought to have been cognizant." Putnam v. R. R., 55 N. Y. 108.

CHAPTER V.

Code and Pleading.

Q. Draw a summons in a divorce case.

A. Supreme Court,
County of New York.

JOHN BROWN, *Plaintiff*, *against* MARY BROWN, *Defendant*.	SUMMONS. ACTION FOR A DIVORCE.

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, May 1, 1902.

JOSEPH STORY, Plaintiff's Attorney.
Post-office address and office, No. 50 Wall St.,
Borough of Manhattan, New York City.

For the form of summons, see sec. 418 of the Code of Civ. Pro.

The special requirement in divorce cases, as to the form of the summons, is found in sec. 1774. It is there provided that final judgment shall not be rendered in favor of the plaintiff upon the defendant's default in appearing or pleading, unless the copy of the summons served contains legibly written or printed upon the face thereof, "Action to annul a marriage;" "Action for a divorce;" or "Action for a separation," as the case may be.

Q. Your client desires you to bring an action in the supreme

court against B to collect $1,000 for money loaned; no defense being anticipated, you wish to dispense with a complaint. Draw the necessary papers to be served upon B to enable you to take judgment by default, in the absence of such complaint, without application to the court.

A. The proper paper to be drawn in this case would be a summons with notice. It is provided in secs. 419 and 420, that in an action to recover a liquidated amount, judgment may be entered by the clerk without application to the court, where a copy of the complaint is served with the summons, or a notice is served with the summons stating that judgment will be taken against the defendant by default for a certain specified sum if he fails to appear or answer. The form of the summons is the same as the preceding question, omitting of course the words "Action for a divorce." The following is the form of notice generally used:

NOTICE. Take notice, that upon your default to appear or answer the above summons, judgment will be taken against you for the sum of $1,000, with interest from January 1, 1902, and with costs of this action.

JOSEPH STORY,
Plaintiff's Attorney.

Q. Draw an affidavit of the service of the summons.

A. Supreme Court,
Fol. 1. County of New York.

JOHN BROWN, *Plaintiff*,
against
THOMAS JONES, *Defendant*.

CITY AND COUNTY OF NEW YORK, *ss.*

Fol. 2. Peter Smith, being duly sworn, says that he is nineteen years of age; that on the 10th day of May, 1901, at 320 Broadway, in the city of New York, he served the annexed summons on Thomas Jones, the defendant herein, by delivering a copy to him personally, and leaving the same with him.

Deponent further says that he knew the person so served, to be

the same person mentioned and described in said summons as the defendant in this action.

PETER SMITH.

Sworn to before me this
10th day of May, 1901.
ROBERT GREEN,
Notary Public,
New York County.

The summons may be served by any person of the age of eighteen years or upwards other than a party to the action. See sec. 425 of the Code of Civ. Pro.

Q. While A, a resident of the state of Ohio, was in attendance at court as defendant in an action then being tried in the city of Utica, plaintiff caused a summons in another action to be served upon him. A, not wanting any more litigation outside of his own state, consults you. What would you advise, and what steps would you take, if any, to afford him relief?

A. The service is bad, and will be set aside upon motion. A non-resident party is exempt from service of process while actually attending court here as a party. In making the motion to set the service aside, care should be taken to appear specially for the purpose of the motion. Matthews v. Tufts, 87 N. Y. 568.

Q. A is a resident of a foreign country who attended as a witness in obedience to a subpœna issued from the supreme court of Albany county, in an action there on trial in the city of Albany. Before he was sworn as a witness, a summons was served upon him in a suit where B, a resident of Albany, was plaintiff. A immediately caused a notice of appearance in the action to be served by C, an attorney of Albany. Was the service regular? What was the effect of the notice of appearance?

A. The service was irregular, but the notice of appearance cured the irregularity, and gave the court jurisdiction. "A resident of a foreign state, while attending a court of this state as a witness, cannot be served with a process for the commencement of a civil action against him." Person v. Grier, 66 N. Y. 124. "While a person attending court as a witness is privileged from service, such privilege will be waived by a general appearance in the action." Chadwick v. Chase, 5 Weekly Dig. 589.

(NOTE.) "A resident witness is, while attending examination, exempt from arrest, but not from the service of process. A different rule applies to non-resident witnesses." Frisbie v. Young, 11 Hun, 474.

Q. In an action where A was defendant, and B plaintiff, the original summons was entitled in the city court, but the summons delivered to A was entitled in the supreme court. Which court has jurisdiction?

A. The supreme court has jurisdiction. A party may always treat a paper served upon him as a true copy of the original, and act accordingly; therefore as the copy here was entitled in the supreme court, that court has jurisdiction. Bailey v. Sargent Co., 23 Civ. Pro. 319.

Q. In a case where you get an order for the service of the summons on a defendant by publication, and thereafter serve him personally without the state, when does his time to answer expire?

A. The defendant's time to answer expires sixty-two days after personal service upon him outside of the state. "Under the provisions of the Code in reference to the service of a summons by publication, such service is not complete until the expiration of at least six weeks from the time of the first publication, or when service is made out of the state, until the expiration of that period after such service." Market Nat. Bank v. Pacific Nat. Bank, 89 N. Y. 397. For service by publication, see secs. 438 to 445 of the Code, inclusive.

Q. The time in which to commence an action is about to expire, and you cannot personally serve the defendant until two weeks, when your time will have expired. What proceedings would you take in order to get the action under way?

A. Get an order for the service of the summons by publication, or deliver the summons to the sheriff to be served. The provision as to publication is to be found in sec. 438, par. 6, which is as follows: "An order directing the service of a summons upon the defendant, without the state, or by publication, may be made in either of the following cases: 6. Where the defendant is a resident of the state or a domestic corporation; and an attempt was made to comence the action against the defendant, . . . and the limitation would have expired, within sixty days next preceding the ap-

plication, if the time had not been extended by the attempt to commence the action." Sec. 399, providing for service by the sheriff, is as follows: An attempt to commence an action, in a court of record, is equivalent to the commencement thereof against each defendant, within the meaning of each provision of this act, which limits the time for the commencement of an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff, or, where the sheriff is a party, to a coroner of the county, in which that defendant or one or two or more codefendants, who are joint contractors, or otherwise united in interest with him, resides or last resided; or, if the defendant is a corporation, to a like officer of the county in which it is established by law, or wherein its general business is or was last transacted, or wherein it keeps or last kept, an office for the transaction of business. But in order to entitle a plaintiff to the benefit of this section, the delivery of the summons to an officer must be followed, within sixty days after the expiration of the time limited for the actual commencement of the action, by personal service thereof upon the defendant sought to be charged, or by the first publication of the summons, as against that defendant, pursuant to an order for the service upon him in that manner."

Q. A rents a house situated at No. 50 Grand St., New York City, for one year at the monthly rental of $100 per month, commencing on May 1, 1901. A fails to pay his rent for the months of May, June and July, 1901. Draw a complaint in the supreme court to recover the rent, omitting verification.

A. Fol. 1. Supreme Court,
New York County.

JOHN BROWN, *Plaintiff*,
against
THOMAS JONES, *Defendant*.

John Brown, plaintiff in the above entitled action, by Joseph Story, his attorney, complains of the defendant and alleges:

1. That heretofore and on or about May 1, 1901, the plaintiff leased to the defendant certain premises known as No. 50 Grand Street, in the city of New York, for one year, beginning with the

said May 1, 1901, at a monthly rental of $100, payable in advance, which sum defendant agreed to pay.

2. That said defendant has not paid said rental for the months beginning May 1, June 1 and July 1, 1901, the same amounting to the sum of $300.

3. That plaintiff has demanded said sum from the defendant, but the defendant has not paid the same nor any part thereof.

4. That there is now due and owing to the plaintiff from the defendant the said sum of $300, with interest on $100 from May 1, 1901, and on $100 from June 1, 1901, and on $100 from July 1, 1901.

Wherefore plaintiff demands judgment against the defendant for the said sum of $300 with interest as aforesaid, together with the costs of this action.

JOSEPH STORY,
Plaintiff's Attorney,
50 Wall Street,
New York City.

Q. Draw a complaint which will hold good against the maker and three indorsers of a promissory note.

A. Fol. 1. Supreme Court,
New York County.

JOHN BROWN, *Plaintiff*,
against
THOMAS JONES, DAVID ROE, RICHARD SMITH AND WM. BLACK, *Defendants*.

See secs. 454 and 534, Code of Civ. Pro.

John Brown, the plaintiff in the above entitled action, by Joseph Story, his attorney, complains of the defendants and alleges:

1. That heretofore and on or about May 1, 1900, at New York City, the defendant, Thomas Jones, made, executed and delivered his certain promissory note in writing, of which the following is a copy:

$500.00 NEW YORK, May 1, 1900.

Thirty days after date, I promise to pay to the order of David

Roe, the sum of five hundred ($500.00) dollars, payable at the Chemical National Bank, New York City, with interest.

Value received. THOMAS JONES.

2. That the defendant, David Roe, indorsed the same and delivered it so indorsed.

3. That thereafter the defendants, Richard Smith and Wm. Black, indorsed the same in blank, and delivered it so indorsed, and thereafter and before its maturity it lawfully came into the hands of the plaintiff for value.

4. That at maturity, said note was duly presented for payment, and payment thereof then and there demanded, but the same was not paid, of all of which due notice was given to the defendants.

5. That no part of said note has been paid.

Wherefore the plaintiff demands judgment against the defendants for the sum of $500 with interest thereon from the 1st day of May, 1900, together with the costs of this action.

JOSEPH STORY,
Plaintiff's Attorney,
50 Wall Street,
New York City.

(Verification.)

Q. Draw a complaint in a county court, asking judgment for the highest amount there obtainable for personal services.

A. Fol. I. County Court,
Kings County.

JOHN BROWN, *Plaintiff*,
against
THOMAS JONES, *Defendant*.

John Brown, plaintiff in the above entitled action, by Joseph Story, his attorney, complains of the defendant and alleges:

1. That between the 2d day of January, 1900, and the 10th day of December, 1900, at 50 Montague Street, in the borough of Brooklyn, New York city, plaintiff rendered certain services to the defendant at his request, as his private secretary.

2. That the same were reasonably worth $2,000.

3. That no part of the same has been paid.

Wherefore the plaintiff demands judgment against the defendant for the sum of $2,000, with interest from the 10th day of December, 1900, together with the costs of this action.

JOSEPH STORY,
Plaintiff's Attorney,
50 Wall Street,
New York City.

(Verification.)

The highest amount obtainable in a county court is $2,000, according to sec. 340 of the Code of Civ. Pro.

Q. Give the different grounds of demurrer to a complaint.

A. Sec. 488 of the Code of Civ. Pro. provides that: "the defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof:

"1. That the court has not jurisdiction of the person of the defendant.

"2. That the court has not jurisdiction of the subject of the action.

"3. That the plaintiff has not legal capacity to sue.

"4. That there is another action pending between the same parties, for the same cause.

"5. That there is a misjoinder of parties plaintiff.

"6. That there is a defect of parties, plaintiff or defendant.

"7. That causes of action have been improperly united.

"8. That the complaint does not state facts sufficient to constitute a cause of action."

Q. What are the grounds on which you can demur to an answer, and also the grounds of demurrer to a counterclaim?

A. The one ground of demurrer to an answer is given in section 494 as follows: "The plaintiff may demur to a counterclaim or a defense consisting of new matter, contained in the answer, on the ground that it is insufficient in law, upon the face thereof." The grounds of demurrer to a counterclaim are contained in section 495, and are as follows:

1. That the court has not jurisdiction thereof.

2. That the defendant has not legal capacity to recover upon the same.

3. That there is another action pending between the same parties, for the same cause.

4. That the counterclaim is not of the character specified in section 501 of this act.

5. That the counterclaim does not state facts sufficient to constitute a cause of action.

On demurrer generally, see sections 487 to 499 inclusive.

Q. A complaint served in the supreme court does not state facts sufficient to constitute a cause of action. Defendant puts in a general denial, Upon the trial, can the defendant take advantage of the situation? If so, in what way? If not, why not?

A. The defendant can move to dismiss at the trial before the plaintiff opens. The defect is not waived by the failure to interpose a demurrer, according to section 499 of the Code, which is as follows: "If such an objection is not taken either by demurrer or answer, the defendant is deemed to have waived it; except to the jurisdiction of the court, or the objection that the complaint does not state facts sufficient to constitute a cause of action."

Q. Plaintiff sues for $25. The defendant, in his answer, makes no reference to the plaintiff's cause of action, but sets up a counterclaim for $50 for a past debt due on a note made by plaintiff. No further pleading is served. The case was noticed for trial. At the trial both sides move for judgment. What should the court do? What about the costs? If you were the defendant's attorney, what would you have done before or at the trial?

A. The court should give judgment for the defendant for $25 with costs. The defendant's attorney should have entered up judgment on the pleadings for $25 before the trial. The defendant, by not mentioning plaintiff's cause of action in his answer, is deemed to have admitted it, and the plaintiff, by not replying to the defendant's counterclaim, must be deemed to have admitted his liability thereon. See secs. 515 and 522 of the Code of Civ. Pro. Costs go to the defendant as judgment is in his favor, the counterclaim exceeding the amount of the plaintiff's demand. See secs. 503 and 3229 of the Code.

Q. A sues B. B has previously obtained judgment against A in an action of tort. Under our Code, a cause of action arising

on a tort cannot be set up as a counterclaim against a cause of action on contract. Can this judgment be pleaded as a set-off by B?

A. Yes. "A judgment is a contract of the highest nature known to the law—and actions upon judgments are actions upon contract. The cause or consideration is of no importance, it being merged in the judgment. Hence in an action upon contract, the defendant may set up as a counterclaim, a judgment obtained by him against the plaintiff in an action of tort. The original cause of action having disappeared, the judgment remains as a contract between the parties. If suit were brougnt upon the judgment, it would be an action upon a contract, and it is not the less so when set up as a counterclaim." Woodruff, J., in Taylor v. Root, 4 Keyes (N. Y.), 335.

Q. When is a reply necessary? What is the effect of a failure to reply?

A. A reply is only necessary where the defendant has interposed a counterclaim. (Sec. 514 of the Code.) If the plaintiff fails to reply or demur to the counterclaim, the defendant may apply, upon notice, for judgment thereupon. (Sec. 515 of the Code.) Although a reply is only necessary to a counterclaim, yet in certain cases a reply may be ordered by the court, as provided in sec. 516, which is as follows: "Where an answer contains new matter, constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter. In that case, the reply, and the proceedings upon failure to reply, are subject to the same rules as in the case of a counterclaim."

Q. A man is sued for goods sold and delivered. He comes to you with a receipted bill for the goods. Draw him up an answer to the complaint, omitting title and verification.

A. (Caption and title, same as in the preceding forms.)

John Brown, the defendant in the above entitled action, appearing therein by Joseph Story, his attorney, for answer to the complaint herein alleges:

That on or about the 10th day of May, 1902, he paid said plaintiff the sum of $60 in full payment for the goods mentioned and

described in said complaint, as sold and delivered by the plaintiff to the defendant.

Wherefore the defendant demands judgment dismissing said complaint with costs.

JOSEPH STORY,
Defendant's Attorney,
60 Wall Street,
New York City.

Q. A gave a note to B for $100, dated May 1, 1894, due on demand. On June 10, 1901, B sued A on it. Draw an answer for A, omitting title and verification.

A. (Caption and title, same as in preceding forms.)

A, the defendant in the above entitled action, appearing by James Kent, his attorney, for answer to the complaint herein alleges:

That this action was not commenced within six years after the cause of action accrued.

Wherefore, etc. (as in preceding forms).

(NOTE.) A note payable on demand is due immediately, and therefore the Statute of Limitations begins to run from its date. Mills v. Davis, 113 N. Y. 243.

Q. A sues B on a note which is eight years overdue. No payments have been made, and no indorsements of liability have been made thereon. B comes to you with the complaint. How would you take advantage of the defense?

A. The claim of course is barred by the Statute of Limitations, the note being more than six years overdue. (Sec. 382 of the Code.) The defense of the Statute of Limitations can only be taken advantage of by answer, according to sec. 413 of the Code.

Q. State generally what may be proven under an answer of general denial. A sues B on contract. B interposes a general denial, and at the trial attempts to show that the contract is illegal. Can he do so?

A. Yes. The defense of illegality, though not pleaded specifically, may be raised under a general denial. "The general rule is, that a general denial in an answer in an action on contract puts in issue simply, all matters which the plaintiff is bound to prove to

make out a cause of action; and in order to avail himself of facts, not appearing on the face of the contract, to establish its invalidity, the defendant must plead them. But under a general denial in an action on contract, the defendant may object that plaintiff's evidence shows that no valid contract was made. The theory upon which the action proceeds is, that the plaintiff has a contract valid in law, and whatever shows the invalidity of the contract, shows that no such contract as alleged ever existed." Wilking v. Richter, 25 Misc. 735.

Q. A sues B for goods sold and delivered. B puts in an answer of general denial, and on the trial offers to prove payment. Will he be allowed to do so?

A. No. Payment is an affirmative defense. All facts which show the plaintiff's allegations to be untrue may be proved under a general denial, while matters in avoidance merely, which are consistent with the truth of plaintiff's averment, but show that he has no cause of action, are affirmative defenses, and must therefore be specifically pleaded. "Payment, whether total or partial, of the indebtedness sued for, cannot be proved under a general denial, even though the complaint contains the usual formal but unnecessary allegation of non-payment, and this be specifically traversed." McKyring v. Bull, 16 N. Y. 297.

(NOTE.) "But if the complaint alleges that no part of the indebtedness shown has been paid, except specified sums, and demands judgment for the balance, a general denial puts in issue the allegation that no other payments have been made, and lets in evidence of other payments than those admitted. Where plaintiff sues for a balance, he voluntarily invites examination into the amount of the indebtedness, and the extent of the reduction thereof by payments." Quinn v. Lloyd, 41 N. Y. 349. "Where a complaint contains an allegation of non-payment as a necessary and material fact to constitute the cause of action, proof of payment is admissible under a general denial." Knapp v. Roche, 94 N. Y. 333.

Q. A sues B in ejectment. B answers by general denial only. On the trial, B offered to prove title to the premises in C. A objected to the evidence as being inadmissible under the pleadings. What was the ruling of the court?

A. The evidence is admissible. In ejectment, the defendant may prove title in a third party under a general denial, because plaintiff must prove title to establish his cause of action. Raynor v. Timerson, 46 Barb. 518.

Q. A sues B for slander. B pleads a general denial only, and on the trial, he offers to prove the general bad reputation of A. A has not been a witness. A's attorney objects. What should be the ruling of the court? Give your reasons.

A. The objection should be sustained, as circumstances in mitigation, such as the bad reputation of the plaintiff must be set up in the answer, in order to make evidence thereof admissible. Willover v. Hill, 72 N. Y. 38.

Q. A sues B on a promissory note in 1899. The note was payable on demand, and was dated January 1, 1891. B answered by general denial. At the trial, B attempts to prove the above facts. Ought he to be allowed to do so over A's objection?

A. No. The Statute of Limitations is an affirmative defense, and to be available, must be specifically set up in the answer. See Abbott's Trial Brief on the Pleadings, p. 750.

Q. A sells B certain goods of the price of $60. There is no memorandum signed by either party. B refuses to take the goods, and A sues him for the price. B answers by general denial, and at the trial attempts to introduce the defense of the Statute of Frauds. A objects. Is the objection good?

A. The objection should be sustained. It is now well settled that the Statute of Frauds is an affirmative defense, and must be specifically pleaded. It cannot be taken advantage of under a general denial. Crane v. Powell, 139 N. Y. 379.

Q. When, and how must a verification be made by a party pleading?

A. This question is answered by sec. 525 of the Code of Civ. Pro., which is as follows: "The verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them, who is acquainted with the facts, except as follows: 1. Where the party is a domestic corporation, the verification must be made by an officer thereof. 2. Where the people of the state are, or a public officer, in their behalf, is the party, the verification may be made by any person acquainted with the facts. 3. Where the party is a foreign corporation; or where the party is not within the county where

the attorney resides, or if the latter is not a resident of the state, the county where he has his office, and capable of making the affidavit; or, if there are two or more parties united in interest, and pleading together, where neither of them acquainted with the facts is within that county, and capable of making the affidavit; or where the action or defense is founded upon a written instrument for the payment of money only, which is in the possession of the agent or the attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney; in either case, the verification may be made by the agent of or the attorney for the party."

Q. Draw a verification by an attorney to a complaint in an action for goods sold and delivered, where a client resides in a different county from that of his attorney.

A. STATE OF NEW YORK, COUNTY OF NEW YORK, *ss:*

John Brown, being duly sworn, deposes and says: That he is the attorney for the plaintiff herein, and resides at No. 56 Charles Street, in the city of New York, county of New York; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says, that the sources of his information, and the ground of his belief as to the matters not stated upon his knowledge are (state facts).

Deponent further says that the reason this verification is not made by the plaintiff is, that the plaintiff is not within the said county of New York.

JOHN BROWN.

Sworn to before me this
10th day of May, 1901.
THOMAS JONES,
Notary Public,
New York County.

Q. A brings action against a newspaper publishing company for libel. The attorney for A serves a verified complaint, and the attorney for the company serves an unverified answer. What proceeding, if any, should A's attorney take?

A. A's attorney cannot take any proceedings; he must go to trial. In an action for libel, even though the complaint is verified, the defendant need not verify his answer. (2 Civ. Pro. Rep. 34.) The same rule applies in a case of a suit for a divorce on the ground of adultery. See sec. 1757 of the Code. Sec. 523 of the Code provides as follows: "Where a pleading is verified, each subsequent pleading, except a demurrer, or the general answer of an infant by his guardian ad litem must also be verified. But the verification may be omitted, in a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying, as a witness, concerning an allegation or denial contained in the pleading. A pleading cannot be used, in a criminal prosecution against the party, as a proof of a fact admitted or alleged therein."

Q. Your client is sued. You answer, and in addition to separate defenses plead a counterclaim, then existing in his favor, which has but six months to run before it will be barred by the Statute of Limitations. The case is at issue for a year, and is then discontinued by the plaintiff. What would you advise in such a case, under the circumstances?

A. The defendant has a right to object to the discontinuance of the action, as his counterclaim would be endangered thereby. "The court will not refuse leave to plaintiff to discontinue his action, although a counterclaim has been interposed by the defendant, unless it appear that the counterclaim would be jeopardized by the discontinuance." Pacific Mail Co. v. Luling, 7 Abb. Pr. (N. S.) 37.

Q. A case is at issue. The plaintiff learns of certain facts after issue had been joined, which he would like to add for the purpose of strengthening his case. By what method may he get these facts before the court?

A. By amending the complaint. The amendment may be made within twenty days after issue is joined; of course without costs, and without application to the court. Sec. 542 of the Code. If after the expiration of twenty days, application must be made to the court for leave, the court may, on such terms as it deems just, grant an order amending the complaint, and permit the insertion of the newly discovered facts. See sec. 723 of the Code.

Q. Plaintiff's attorney notices a case for trial, within twenty days after the service of an answer upon him. After the notice was served, and within twenty days, the defendant's attorney served a bona fide amended answer, setting up a new defense, regularly upon the plaintiff's attorney. Plaintiff's attorney seeks to force defendant to trial for the term of court for which notice was served. Note of issue was regularly filed, and the case put on the calendar. The amended answer was served so late, that new notice of trial could not be given. Can the defendant be compelled to try at that term, and why?

A. No. "Where after issue has been joined in an action, and the same has been regularly noticed for trial at a circuit by plaintiff, and the defendant, in good faith, and within the time allowed by law, serves an amended answer, the issue theretofore joined and noticed for trial is destroyed, and the action cannot be tried until new issues have been joined and regularly noticed for trial. Where an amended pleading is served in bad faith, the remedy of the party aggrieved is by motion to strike it out." Ostrander v. Conkey, 20 Hun, 421.

Q. Plaintiff, in an action for breach of contract, in his complaint demanded judgment for $2,000. The jury gave him a verdict for $3,000. How, if at all, can the plaintiff avail himself of this?

A. "Where a jury awards damages exceeding the amount demanded in the complaint, the plaintiff cannot amend the complaint unless he abandons the verdict, pays costs, and consents to a new trial." Decker v. Parsons, 11 Hun, 295. "Accordingly in all actions for the recovery of damages, whether sounding in tort or on contract, the sum in the conclusion of the complaint must be sufficient to cover the real demand; it would be unjust to allow it to be enlarged after verdict, without granting a new trial, as the defendant may have gone to trial, relying that no more damages than the sum claimed could be recovered against him." Pharis v. Gere, 31 Hun, 443.

Q. A brought action against B and C for assault and battery. The complaint stated a cause of action against both, and the proof on the trial sustained the allegation of the complaint. Both B and C appeared and defended the action. The jury found a verdict for $1,000 for the plaintiff. The complaint in the prayer for re-

lief, through an inadvertence, demanded judgment only against B, who was financially irresponsible. On the day subsequent to the trial, A's attorney, having discovered the defect of his complaint, makes a motion before the trial court, which was opposed, for, and obtained an order permitting him to so amend his complaint, as to demand judgment against both B and C, and then entered the judgment against both. C appeals. Who wins and why?

A. C's appeal should be dismissed; the amendment was proper and permissible under sec. 1207 of the Code, which is as follows: "Where there is no answer, the judgment shall not be more favorable to the plaintiff, than that demanded in the complaint. Where there is an answer, the court may permit the plaintiff to take any judgment, consistent with the case made by the complaint, and embraced within the issue."

Q. A purchases cigars of the United Cigar Co., of N. Y.; cigars to be according to sample. A keeps the cigars, says nothing, and in an action for their price, judgment is taken against him by default, which judgment he pays. He afterwards buys other cigars of the same firm, which are according to sample, and in an action for their price, sets up his damage on the former shipment as a counterclaim in the action. Can the counterclaim be maintained?

A. The counterclaim can be maintained, for a breach of warranty is not a defense to an action for the purchase price of goods, but is merely available by way of counterclaim. It is the settled rule that one, having a counterclaim, is not bound to set it up, when an action is brought against him by the one against whom the counterclaim exists, but may sue upon the counterclaim as an independent cause of action which it is, at any time. Brown v. Gallaudet, 80 N. Y. 413; Patrick v. Shaffer, 94 N. Y. 423.

Q. A tenant is sued for rent of his premises by his landlord, and appears but does not answer. Judgment was taken by default. Afterwards the tenant sues the landlord for damages caused by a former eviction. The landlord sets up the judgment by default in the former action by him as a defense. The tenant plaintiff demurs to the answer. Judgment for whom and why?

A. Judgment for the landlord. While, as we have seen, a de-

fendant, having a counterclaim, is not bound to set it up, yet when the same facts constitute a counterclaim and a defense, and he does not defend the action, a judgment rendered against him becomes res adjudicata, upon any defense which the defendant might have interposed. The defendant might have set up the defense of eviction, and as he did not avail himself of it, he is concluded by the former judgment. Phipps v. Oprandy, 69 App. Div. 497. "The doctrine of res adjudicata applies not only to judgments rendered after a litigation of the matters in controversy, but also to judgments upon default and confession, and as to every defense which might have been raised." Brown v. Mayor, 66 N. Y. 385.

(NOTE.) "A judgment rendered on the merits is coextensive with the issues upon which it is founded, and is conclusive between the parties thereto, not only to the matters actually proved and submitted for decision, but also as to every other matter directly at issue by the pleadings, which the defeated party might have litigated." Lorillard v. Clyde, 122 N. Y. 41.

Q. A brings summary proceedings against B to recover possession of certain premises leased to him. Judgment is rendered by default. Subsequently B brings action against A to recover damages for breach of the alleged agreement, whereby A agreed to allow B to remain in possession for six months after the expiration of the lease. A sets up the judgment in the first action as a defense. Judgment for whom and why?

A. Judgment for A. "Either the plaintiff or the defendant had a right to the possession of the premises. If under any agreement, plaintiff had such a right, she could not be dispossessed or removed. Any agreement which authorized her to keep possession was a perfect defense to the summary proceedings, and if such an agreement existed, no judgment of removal was authorized. Such agreement, not having been set up or proved, plaintiff is not in a position to claim that she had a right to the possession of the premises. She had had her day in court, with full opportunity to be heard and to assert and protect her rights, and having failed to do so at the proper time, the record of the proceedings upon which she might have done so, is a bar to her right to recover in the action." Nemetty v. Naylor, 100 N. Y. 562.

Q. What is the office of a bill of particulars? Will a bill of particulars of an answer be granted, and when?

A. The office of a bill of particulars is to extend and define the

pleading, so as to enable the adverse party to prepare to meet the case to be made against him. It is not a means of discovery of the evidence to be relied upon by the other side. A bill of particulars is an amplification of the pleadings. A defendant, as well as a plaintiff, may be required to furnish particulars of his claim, and this includes not merely the case of an affirmative claim, as a counterclaim, but also of matter set up merely as a defense. Bishop's Code Pro. pages 191 to 192, citing Ball v. Ev. Post Pub. Co., 38 Hun, 11; 100 N. Y. 602. Sec. 531 of the Code provides in part as follows: "The court may, in any case, direct a bill of the particulars of the claim of either party to be delivered to the adverse party." The leading case on the subject is Tilton v. Beecher, 59 N. Y. 176. In this case Rapallo, J., said: "That in almost every kind of case in which the defendant can satisfy the court that it is necessary to a fair trial, that he should be appraised beforehand of the particulars of the charge which he is expected to meet, the court has authority to compel the adverse party to specify those particulars, so far as is in his power."

Q. What is the purpose and object of an affidavit of merits? Draw one.

A. The purpose of the affidavit of merits is to prevent application being made to the court for the mere purpose of delay. The affidavit is required when an ex parte application is made asking an extension of time, etc. Rule 23 of the General Rules of Practice provides: "That no order extending the defendant's time to answer or demur shall be granted, unless the party applying for such order shall present to the court an affidavit of merits."

Supreme Court,
County of New York.

JOHN BROWN, *Plaintiff*, *against* THOMAS JONES, *Defendant*.	AFFIDAVIT OF MERITS.

CITY AND COUNTY OF NEW YORK, *ss.*:

Thomas Jones, being duly sworn, says that he is the defendant in the above entitled action, and that he has fully and fairly stated

the case to Joseph Story, his counsel in this action, who resides at No. 5 East 12th Street, in the city of New York, and that he has a good and substantial defense on the merits to the action, as he is advised by said counsel, after such statement made as aforesaid, and verily believes it to be true.

THOMAS JONES.

Sworn to before me this
10th day of June, 1901.
RICHARD GRAY,
Notary Public,
New York County.

Q. An injunction order is granted ex parte against your client. You desire to have the same vacated. Where, and to whom would you apply?

A. Application to vacate the order ex parte can only be made to the judge who granted the order, and it can only be made upon the papers upon which it was granted. See sec. 626 of the Code. The application also may be made upon notice to the court. Such an application may be founded upon the papers upon which the injunction was granted; or upon proof, by affidavit, on the part of the defendant, or both. See sec. 627 of the Code.

Q. In what causes of action can you procure an order of arrest?

A. Sec. 549 of the Code provides as follows: "A defendant may be arrested in an action, as prescribed in this title, where the action is brought for either of the following causes: 1. To recover a fine or penalty. 2. To recover damages for a personal injury; an injury to property, including the wrongful taking, detention or conversion of personal property; breach of a promise to marry; misconduct or neglect in office, or in a professional employment; fraud or deceit; or to recover a chattel where it is alleged in the complaint that the chattel or a part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff and with intent that it should not be so found or taken, or to deprive the plaintiff of the benefit thereof; or to recover for money received or to recover property or damages for the conversion or misapplication of property where it is alleged in the complaint that the money was received or the property was embezzled or fraudulently misapplied by a public officer or by an attorney, solicitor or counselor, or by an officer or agent of a corporation or

banking association in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity. Where such allegation is made, the plaintiff cannot recover unless he proves the same on the trial of the action; and a judgment for the defendant is not a bar to the new action to recover the money or chattel. 3. To recover moneys, funds or property held or owned by the state, or held or owned officially or otherwise for or in behalf of a public or governmental interest by a municipal or other public corporation, board, officer, custodian, agency or agent of the state or of a city, county, town, village or other division, subdivision, department or portion of the state which the defendant has without right obtained, received, converted or disposed of; or to recover damages for so obtaining, receiving, paying, converting or disposing of the same. 4. In an action upon contract, express or implied, other than a promise to marry, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability, or that he has since the making of the contract or in contemplation of making the same, removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover upon the contract only." The order of arrest may also be granted in equity and divorce cases. These cases are provided for in sec. 550 which is as follows: "A defendant may also be arrested in an action wherein the judgment demanded requires the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt where the defendant is not a resident of the state, or being a resident, is about to depart therefrom, by reason of which non-residence or departure there is danger that a judgment or an order requiring the performance of the act will be rendered ineffectual."

Q. When and in what cases may an injunction order be obtained? At what time during the progress of the action may it be granted?

A. Sec. 603 of the Code provides as follows: "Where it appears, from the complaint, that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action would produce injury to the plaintiff,

an injunction order may be granted to restrain it. The case provided for in this section is described in this act, as a case where the right to an injunction depends upon the nature of the action." Sec. 604 says: "In either of the following cases, an injunction order may also be granted in an action: 1. Where it appears, by affidavit, that the defendant, during the pendency of the action, is doing, or procuring, or suffering to be done, or threatens, or is about to do, or to procure, or suffer to be done, an act, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom. 2. Where it appears, by affidavit, that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition." Sec. 608 provides that: "The order may be granted to accompany the summons, or any time after the commencement of the action and before final judgment."

Q. What is the object of a warrant of attachment? In what actions can it be had, and what is necessary to obtain it?

A. The object of an attachment is to secure property of the defendant out of which the judgment may be satisfied when obtained. It keeps the property under the control of the court, so that it can be levied upon when execution is issued. Sec. 635 of the Code enumerates the cases in which the warrant may be granted. It provides that "a warrant of attachment against the property of one or more defendants in an action may be granted upon the application of the plaintiff, as specified in the next section, where the action is to recover a sum of money only as damages for one or more of the following causes: 1. Breach of contract, express or implied, other then a contract to marry. 2. Wrongful conversion of personal property. 3. An injury to person or property, in consequence of negligence, fraud or other wrongful act." Sec. 636 of the Code states what must be shown to secure the warrant. The section is as follows: "To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the judge, granting the same, as follows: 1. That one of the causes of action specified in the last section exists against the defendant. If the action is to recover damages for breach of contract, the affidavit must show that the plaintiff is

entitled to recover a sum stated therein, over and above all counterclaims known to him. 2. That the defendant is either a foreign corporation or not a resident of the state; or, if he is a natural person and a resident of the state, that he has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or, if the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of or secrete property with the like intent; or where, for the purpose of securing credit, or the extension of credit, the defendant has made a false statement in writing, under his own hand or signature, or under the hand or signature of a duly authorized agent, made with his knowledge and acquiescence, as to his financial responsibility or standing; or, where the defendant, being an adult and a resident of the state, has been continuously without the state of New York for more than six months next before the granting of the order of publication of the summons against him, and has not made a designation of a person upon whom to serve a summons in his behalf, as prescribed in sec. 430 of this act; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the state, after diligent effort."

Q. What must an affidavit in an action of replevin contain?

A. Sec. 1695 of the Code provides as follows: "The affidavit, to be delivered to the sheriff, as prescribed in the last section, must particularly describe the chattel to be replevied; and must contain the following allegations: 1. That the plaintiff is the owner of the chattel, or is entitled to the possession thereof, by virtue of a special property therein; the facts with respect to which must be set forth. 2. That it is wrongfully detained by the defendant. 3. The alleged cause of the detention thereof, according to the best knowledge, information, and belief of the person making the affidavit. 4. That it has not been taken by virtue of a warrant, against the plaintiff, for the collection of a tax, assessment, or fine, issued in pursuance of a statute of the state, or of the United States; or, if it has been taken under color of such a warrant, either that the taking was unlawful, by reason of defects in the

process, or other causes specified, or that the detention is unlawful by reason of facts specified which have subsequently occurred. 5. That it has not been seized by virtue of an execution or warrant of attachment, against the property of the plaintiff, or of any person from or through whom the plaintiff has derived title to the chattel, since the seizure thereof; or, if it has been so seized, that it was exempt from the seizure, by reason of facts specified, or that its detention is unlawful, by reason of facts specified which have subsequently occurred. 6. Its actual value."

Q. Your client, a resident of Pennsylvania, was assaulted in that state by a resident of New Jersey. He brings an action in the Supreme Court, New York County, against his assailant, the summons being personally served upon the latter in New York City. The defendant answers, and the case comes to trial. At the close of the trial, the defendant's attorney requested the court to charge that the action could not be maintained in the courts of this state, which request was refused. The defendant appeals. Is the appeal good?

A. The appeal is not good. While the court might in its discretion have refused to entertain the action, the defendant was not entitled to a dismissal as a matter of right. "Courts of this state may in their discretion, entertain jurisdiction of any action for the recovery of damages for a personal injury between citizens of another state actually domiciled therein when the action was commenced, although the injury was committed in the state of their residence and domicile." Burdick v. Freeman, 120 N. Y. 426. "The refusal of the court to entertain jurisdiction of an action between non-residents, for a tort committed out of the state, does not depend upon the motion of the parties necessarily, but the court may refuse to do so upon its own motion." Winchester v. Brown, 37 State Rep. 542.

Q. A, a resident of California, sues B, your client, a resident of New Jersey, as maker of a promissory note, naming the county of New York as the place of trial. Can you, and if so, on what grounds, procure a change of the place of trial?

A. The only grounds for procuring a change of the place of trial would be, that a fair and impartial trial could not be had in that county, or that the convenience of witnesses would be best suited

by having the trial in another county. The county designated was the proper one, according to sec. 984 of Code, which is as follows: "An action not specified in the last two sections must be tried in the county, in which one of the parties resided, at the commencement thereof. If neither of the parties then resided in the state, it may be tried in any county, which the plaintiff designates, for that purpose, in the title of the complaint." Sec. 987 provides as follows: "The court may, by order, change the place of trial, in either of the following cases: 1. Where the county, designated for that purpose, in the complaint, is not the proper county. 2. Where there is reason to believe that an impartial trial cannot be had in the proper county. 3. Where the convenience of witnesses, and the ends of justice, will be promoted by the change."

Q. Plaintiff resides in A county. Defendant resides in B county. Plaintiff brings an action on a transitory cause of action in C county. The defendant asks for a change of the place of trial from C to B county. On the argument of the motion, the plaintiff produces affidavits showing that all the witnesses reside in C county. Should the affidavits be admitted in determining the question?

A. No. The defendant is entitled to a change as a matter of right to his own county, when a county in which neither of the parties reside is designated. "On a motion to change the place of trial of an action to the county in which both parties reside as required by sec. 984 of the Code, the plaintiff should not be permitted to read affidavits showing that the convenience of witnesses requires that the trial take place in the county named in the summons and complaint. The proper practice is to change the place of trial to the proper county, and allow the plaintiff to make a motion to change it back to the county designated in the summons for the convenience of witnesses." Sylvester v. Lewis, 55 App. Div. 470.

Q. On the trial of an action, the attorneys for both parties ask that a verdict be directed, each in favor of his client. The motion of the one is denied, and the motion of the other is granted. The one whose motion was denied appeals, on the ground that he produced sufficient evidence to warrant the case being submitted to the jury. What should be the decision on appeal?

A. The appeal should be dismissed. A request by both parties for the direction of a verdict is a virtual consent to the determination of the issues by the court. When both request the direction of a verdict, they submit to the court for decision any question of fact presented by the evidence. Thompson v. Simpson, 128 N. Y. 270.

Q. The plaintiff in an action puts in his evidence, and by stipulation of the defendant's attorney leaves the state, having some important business to attend to. The defendant then puts in evidence certain statements made by the plaintiff, which the plaintiff alone could deny. The defendant's attorney had given no warning to plaintiff of his intention to introduce such evidence. If you were the plaintiff's attorney, what would you do ?

A. Plaintiff's attorney should object to the admission of the evidence, and if his objection is overruled, and judgment is given against his client, he should make a motion for a new trial on the ground of surprise, which by reason of the stipulation of the defendant ought to be granted. "A party is not entitled to a new trial on the ground of surprise, because the opposite party and his counsel on the trial led him to believe that certain facts material to the defense would be admitted or not disputed, and by reason thereof, he did not introduce evidence upon such facts, so long as the conduct of the opposite party and his counsel in the matter is free from fraud or positive stipulation it forms no ground for a new trial although it might have misled." Taylor v. Harlow, 11 Howard's Pr. 285.

Q. Your client sues an infant, and alleges $2,000 damages. The summons was served on the infant, and he defaults. Describe the procedure necessary to get judgment.

A. The first thing to be done is to secure the appointment of a guardian ad litem for the infant, care being taken not to name the guardian to be appointed in the application, as Rule 49 of the General Rules of Practice provides that no person shall be appointed guardian ad litem of an infant, who is nominated by the adverse party. After the expiration of twenty days from the appointment of the guardian ad litem, proceedings may be taken for the entry of judgment by default. Sec. 1218 provides that "a judgment by default shall not be taken against an infant defendant, until

twenty days have expired, since the appointment of a guardian ad litem for him." See generally as to infants, secs. 468 to 477 inclusive. See § 426.

Q. A brings an action against B to recover damages for personal injuries inflicted. B defaults. How will A proceed to fix the damages and obtain judgment? What rights, if any, has B in such proceeding?

A. The damages must be assessed, by means of a writ of inquiry, which is a writ directed to the sheriff commanding them to fix the damages. The plaintiff cannot enter up judgment by default as a matter of course in actions for personal injuries, but must use this method to have the damages ascertained, and then he can enter judgment for the amount fixed. See sec. 1215 of the Code. On such a proceeding before a sheriff's jury, the defendant may call witnesses and prove any matter which properly goes to mitigate the damages. But of course he cannot attack the plaintiff's cause of action. Thompson v. Lumley, 7 Daly 74; sec. 536 of the Code. "The rule that on an assessment of damages either at the circuit or before a sheriff's jury, a defendant may call and examine witnesses, or otherwise prove all proper mitigating circumstances, seems to be well settled." Duffis v. Bangs, 61 Hun, 23.

Q. How many peremptory challenges are allowed in a civil action in the supreme court?

A. In a civil action six peremptory challenges are allowed in a court of record. Sec. 1176 of the Code.

Q. What are the qualifications of trial jurors in New York County?

A. Sec. 1079 of the Code provides as follows: "In order to be qualified to serve, as a trial juror, in a court in the city and county of New York, a person must be: 1. A male citizen of the United States, and a resident of that city and county. 2. Not less than twenty-one, nor more than seventy years of age. 3. The owner, in his own right, of real or personal property, of the value of $250; or the husband of a woman who is the owner, in her own right, of real or personal property of that value. 4. In the possession of his natural faculties, and not infirm or decrepit. 5. Free from all legal exceptions; intelligent; of sound mind and good character;

and able to read and write the English language understandingly."

Q. What are the qualifications of trial jurors in counties other than New York and Kings?

A. Sec. 1027 of the Code covers this question, and provides as follows: "In order to be qualified to serve, as a trial juror, in a court of record, a person must be: 1. A male citizen of the United States and a resident of the county. 2. Not less than twenty-one nor more than seventy years of age. 3. Assessed, for personal property, belonging to him, in his own right, to the amount of $250; or the owner of a freehold estate in real property, situated in the county, belonging to him in his own right, of the value of $150; or the husband of a woman who is the owner of a like freehold estate, belonging to her, in her own right. 4. In the possession of his natural faculties, and not infirm or decrepit. 5. Free from all legal exceptions; of fair character; of approved integrity; of sound judgment; and well informed."

Q. You have an important witness residing in the state of Indiana, whose evidence you desire on the trial of an action in your county. How would you procure the evidence?

A. The evidence would be procured by the issuing of a commission, addressed to a person in the city in which the witness resides, authorizing him to take the witness's testimony, by putting to him the questions which are sent with the commission. The defendant may also send cross questions corresponding to the cross-examination on a trial. Sec. 887 of the Code provides as follows: "In a case specified in the next section, where it appears, by affidavit, on the application of either party, that the testimony of one or more witnesses, not within the State, is material to the applicant, a commission may be issued, to one or more competent persons named therein, authorizing them, or any one of them, to examine the witness or witnesses named therein, under oath, upon the interrogatories annexed to the commission; to take and certify the deposition of each witness, and to return the same, and the commission, according to the directions given in or with the commission. The applicant, or any other party to the action, may be thus examined." See on depositions generally, secs. 887 to 913 inclusive.

Q. A brings an action against B, serving a verified complaint. B serves a verified answer. A, believing that the facts stated in the answer are false, makes a motion to strike out the answer as a sham. Should his motion be granted?

A. No. "A verified answer cannot be stricken out as a sham. If the answer is good in form, and sets up apparently a good defense, the court will not try the issue raised by the answer, on affidavits, where the answer is verified. It is the duty of the trial court to determine whether the defense is true or false." Wayland v. Tyson, 45 N. Y. 281. An unverified answer may sometimes be stricken out as sham. In order, however, that the pleading should be stricken out as sham, it must be false in the sense of being a mere pretense set up in bad faith, and without color of fact. Bishop's Code Pr. pages 197 and 198. See also sec. 538 of the Code.

Q. A sues B. B interposes an answer which is bad upon its face. What would you do if you were A's attorney?

A. Plaintiff's attorney should apply for judgment on the answer, on the ground that it is frivolous. An answer is frivolous when it contains no general or special denial, and sets up no defense by way of new matter, and does not contain a counterclaim. It must be so clear and palpably bad as to require no argument to demonstrate its frivolity, and as to be pronounced frivolous, and indicative of bad faith in the pleader, upon a bare inspection. The pleading will be sustained if a material issue is presented. The pleading is not stricken out, but whatever action may be had in respect to it, it remains a part of the record and is added to the judgment roll. Judgment is taken upon it. Cook v. Warren, 88 N. Y. 39; Bishop's Code Pr. p. 195; sec. 537 of the Code.

Q. A, on his return from Europe, finds a judgment by default entered against him on an affidavit of personal service of the summons and complaint. In fact there was no personal service. A does nothing for more than a year, and then comes to you. What would you advise him, and what would you do, if anything?

A. The judgment can be vacated, even though more than a year has elapsed, as it was fraudulently obtained. "The power of the supreme court to control its judgments, and to set aside on motion a judgment, for fraud and deceit practiced by a party, is not

subject to the limitations of time prescribed in secs. 724, 1282 and 1290 of the Code. Cases of fraud are not within these sections." Furman v. Furman, 153 N. Y. 309.

Q. The property of A, a non-resident, was attached, He was served by publication. Judgment was entered for the creditor, and execution was issued, and the property attached was sold. There was a deficiency. The creditor issued an execution against the property that was not attached, and satisfied his deficiency judgment therefrom. A sues for conversion. Who prevails?

A. A prevails. The second levy was illegal, because when the summons is served otherwise than personally on a non-resident, the judgment is substantially one in rem, and only the attached property is bound. Sec. 707 provides as follows: "Where a defendant, who has not appeared, is a non-resident of the state, or a foreign corporation, and the summons was served without the state, or by publication, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act, the judgment can be enforced only against the property which has been levied upon, by virtue of the warrant of attachment, at the time when the judgment was entered." Sec. 1370 of the Code provides as follows: "Where the warrant of attachment, issued in the action, has been levied, by the sheriff, the execution must substantially require the sheriff to satisfy the judgment, as follows: 1. Where the judgment debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it, without the state, or otherwise than personally, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act, and the judgment debtor has not appeared in the action; out of the personal property attached, and if that is insufficient, out of the real property attached. 2. In any other case, out of the personal property attached; and, if that is insufficient, out of the other personal property of the judgment debtor; if both are insufficient, out of the real property attached; and, if that is insufficient, out of the real property belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any other time thereafter."

Q. A sheriff levies upon $200 in gold and $50 in silver under an execution. Your client is the judgment creditor, and asks the

sheriff to immediately deliver the money to him. The sheriff refuses. What are the rights of the parties?

A. He can compel the sheriff to deliver to him the silver coin, but not the gold coin, as the latter must be sold according to sec. 1410 of the Code, which is as follows: "The officer, to whom an execution against property is delivered, must levy upon current money of the United States, belonging to the judgment debtor; and must pay it over, as so much money collected, without exposing it for sale; except that where it consists of gold coin, he must sell it, like other personal property; unless he be otherwise directed, by an order of a judge, or by the judgment in the particular case." For the rule and reasons, see Muscott v. Woolworth, 14 How. Pr. 477.

Q. On January 1, 1896, A duly recovered and docketed a judgment against B for $1,000. On February 1, 1896, C recovered and duly docketed a judgment against B for $2,000. Both were unpaid and unsatisfied on March 1, 1896, when B's father died intestate, seized of an estate of real property, to which estate B succeeded as the only heir-at-law. A and C issued executions, and the land is sold under both for $900. How is it distributed?

A. The money realized from the sale should be distributed in proportion to the amount of the judgments. Neither is entitled to the whole amount, to the exclusion of the other. "Under sec. 1251 of the Code, docketed judgments became liens simultaneously, and without priority between them, upon real property subsequently acquired by the judgment debtor during ten years from the filing of the judgment roll, at the time of his acquisition of the property. Hence when there are several judgments docketed against the judgment debtor at the time he acquires property, the judgment first docketed is not prior lien on such after-acquired property, but all the judgments are entitled to rank equally." Matter of Hazard, 73 Hun, 22.

Q. On August 1, 1879, A recovered a judgment against B for $1,000, but issued no execution. On September 15, 1890, without further action, A issues execution to the sheriff, and the latter sells the real estate owned by B, August 1, 1879 to C. C desires to sell to your client. Is the title good? What would you have done if you were A's attorney?

A. The title is not good. Before execution was issued, a notice should have been filed in the county clerk's office, describing the judgment, the execution and the property levied upon, according to sec. 1252 of the Code, which is as follows: "When ten years after the filing of the judgment roll have expired, real property or a chattel real, which the judgment debtor, or real property which a person, deriving his right or title thereto, as heir or devisee of the judgment debtor, then has, in any county, may be levied upon, by virtue of an execution against property, issued to the sheriff of that county, upon a judgment hereafter rendered, by filing, with the clerk of that county, a notice, subscribed by the sheriff, describing the judgment, the execution, and the property levied upon; and, if the interest levied upon is that of an heir or devisee, specifiying that fact, and the name of the heir or devisee. The notice must be recorded and indexed by the clerk, as the notice of the pendency of an action. For that purpose, the judgment debtor, or his heir or devisee, named in the notice, is regarded as a party to an action. The judgment binds, and becomes a charge upon, the right and title thus levied upon, of the judgment debtor, or of his heir or devisee, as the case may be, only from the time of recording and indexing the notice, and until the execution is set aside, or returned."

Q. A recovered and docketed a judgment against B. While the judgment was in force, B purchased a piece of real estate from C, taking the title thereto in his own name. At the same time, and as a part of the transaction, B gave a mortgage thereon to C, to secure the purchase price. A issues an execution, and claims that his judgment takes precedence over C's mortgage. What are the rights of the parties? State the rule.

A. The purchase money mortgage has priority, according to sec. 1254 of the Code, which is as follows: "Where real property is sold and conveyed, and at the same time, a mortgage thereupon is given by the purchaser, to secure the payment of the whole or a part of the purchase money, the lien of the mortgage, upon that real property, is superior to the lien of the previous judgment against the purchaser."

Q. A was indebted to B in the sum of $2,000. He transfers to his wife valuable real estate in fraud of his creditors. B then re-

covers judgment against A, and upon discovering the above facts, comes to you for advice. What would you advise are his rights?

A. A should issue execution upon his judgment, and when the execution is returned unsatisfied, he may maintain a judgment creditor's action to have the transfer set aside, according to sec. 1871 of the Code, which is as follows: "Where an execution, against the property of a judgment debtor, issued out of a court of record, as prescribed in the next section, has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action against the judgment debtor, and any other person, to compel the discovery of anything in action, or other property belonging to the judgment debtor, and of any money, thing in action, or other property due to him, or held in trust for him; to prevent the transfer thereof, or the payment or delivery thereof, to him, or to any other person; and to procure satisfaction of the plaintiff's demand as prescribed in the next section but one." Sec. 1873 provides: "The final judgment in the action must direct and provide for the satisfaction of the sum due to the plaintiff, out of any money, thing in action, or other personal property, belonging to, or due to the judgment debtor, or held in trust for him, which is discovered in the action; whether the same might or might not have been originally taken." See secs. 1874 to 1879 inclusive.

Q. A owes B $5,000. He transfers certain property to his daughter for the purpose of defrauding his creditors. What steps must B take, in order to maintain a judgment creditor's action, to set the transfer aside?

A. B should commence an action, obtain judgment, issue execution, and after the same is returned unsatisfied, commence a judgment creditor's action. It is absolutely essential to have the execution returned unsatisfied, before commencing the judgment creditor's action.

Q. What would you allege in denying corporate existence?

A. Sec. 1776 of Code covers this question, and is as follows: "In an action, brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation."

Q. A is assaulted and injured by B, and has a cause of action therefor. A assigns the cause of action to C, who brings suit upon it. Can he maintain the action?

A. No. This being a personal action is not assignable, according to sec. 1910 of the Code, which is as follows: "Any claim or demand can be transferred, except in one of the following cases: 1. Where it is to recover damages for a personal injury, or for a breach of promise to marry. 2. Where it is founded upon a grant, which is made void by a statute of the state; or upon a claim to or interest in real property, a grant of which, by the transferror, would be void by such a statute. 3. Where a transfer thereof is expressly forbidden by a statute of the state, or of the United States, or would contravene public policy."

Q. A and B commit a joint assault and battery upon C. C sues A without any allegation in the complaint as to B. A demurs on the ground that B should be a party. Should the demurrer be sustained?

A. No. Joint tort feasors are jointly and severally liable. "Where a personal injury results from the negligence or wilful misconduct of several tort feasors, they are separately as well as jointly liable; the party injured may sue all or either of the wrongdoers." Creed v. Hartmann, 29 N. Y. 591.

Q. A and B, two minors, assault C, who claims $1,000 damages from each. A's father pays C $500, which C accepts in full settlement against A, and gives a written release. Subsequently C brings suit against B to recover $1,000 damages for the assault. Has B any defense to the action? Give your reasons.

A. B has a perfect defense to the action, as satisfaction by one joint tort feasor is a satisfaction for all. "The rule is, that a party receiving an injury from the wrongful acts of others, is entitled to but one satisfaction, and that an accord and satisfaction by, or a release or other discharge by the voluntary act of the party injured, of one, of two or more joint tort feasors, is a discharge of all." Barrett v. R. R., 45 N. Y. 628.

Q. A is injured through the negligence of B and C. He brings suit against B and recovers judgment, and issues execution, but as B is financially irresponsible, the execution is returned wholly un-

satisfied. A then brings suit against C, who sets up the judgment which A had obtained against B as a defense. Judgment for whom and why?

A. Judgment for A. "The fact that the plaintiff had recovered judgment against the brewing company, it not appearing that the judgment thus recovered had been actually paid or satisfied, did not debar the plaintiff from appealing from the judgment in favor of the railroad company, as a judgment recovered against one of two joint wrongdoers is, until paid or satisfied, no bar to the prosecution of an action for the same cause against the other wrongdoer." Hurley v. Brewing Co., 13 App. Div. 167.

Q. A and B, minors, together assault C. A's father settles with C for A for $100. C assigns his rights against B to D, who brings suit against B, your client. State how many and what defenses you would set up.

A. There are two defenses here: 1. A personal injury action cannot be assigned. Pulver v. Harris, 52 N. Y. 73; sec. 1910 of the Code. 2. Satisfaction by one of two joint tort feasors is a satisfaction for all. Barrett v. R. R., supra.

Q. A sues B and C in an action for assault and battery committed by the two jointly. On recovering judgment, he issues execution and recovers the whole amount of B. What right, if any, has B against C? State the general rule.

A. B has no rights whatever against C, as there is no contribution between tort feasors. "In actions for joint torts, a joint liability exists, and a recovery may be enforced against any one of the defendants. The party paying such claim has no right to contribution from the other defendants, even although by the payments he has relieved them from liability. The principle upon which these decisions are made is that whenever the liability arises ex delicto, there is no contribution." Andrews v. Murray, 33 Barb. 354.

Q. A received a plurality of votes cast for county clerk, but the board of county canvassers issued a certificate of election to his opponent. A comes to you for advice before his opponent takes office. What are his rights, and what proceedings would you take to enforce them?

A. He can obtain a writ of certiorari to review the action of the board under sec. 2120 of the Code, et seq., or he may pursue the remedy prescribed in sec. 133 of the Election Law of 1896, and correct the error of the board by a writ of mandamus. Sec. 133 of the Election Law provides in part as follows: "The supreme court may, upon affidavit presented by any elector, showing that errors have occurred in any statement or determination made by the state board of canvassers, or by any board of county canvassers, or that any such board has failed to act in conformity to law, make an order requiring such board to correct such errors, or perform its duties in the manner prescribed by law, or show cause why such correction should not be made, or such duty performed. If such board shall fail or neglect to make such correction, or perform such duty, or show cause as aforesaid, the court may compel such board, by writ of mandamus, to correct such errors or perform such duty; and if it shall have made its determination and dissolved, to reconvene for the purpose of making such corrections or performing such duty. . . . A special proceeding authorized by this section must be commenced within four months after the statement or determination in which it is claimed that errors have occurred was made, or within four months after it was the duty of the board to act in the particular or particulars as to which it is claimed to have failed to perform its duty."

Q. A was legally elected to the office of sheriff of his county. B claimed that he was elected, and has taken possession and is administering the office. A says he is bound to oust the usurper and obtain possession. How will A enforce his rights, and how are the issues triable?

A. A can have an action brought by the attorney general on A's relation to oust the usurper under sec. 1948 of the Code, which in part is as follows: "The attorney general may maintain an action, upon his own information, or upon the complaint of a private person, in either of the following cases: 1. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the state, a franchise, or a public office, civil or military, or an office in a domestic corporation." The issues in such an action are triable as a matter of right by a jury. Secs. 1949 and 1950 of the Code.

Q. What is the difference between a writ of certiorari and a writ of mandamus ?

A. "The office of a mandamus is to set a ministerial or administrative officer in motion, and to compel him to act, while a certiorari may be resorted to, to review the legality of his act and if found illegal to set aside or reverse it. The judgment of an officer, court, or body charged with judicial functions cannot be coerced by mandamus. The most that can be accomplished by that writ is to compel such officer, court or body to act, leaving the decision to the free exercise of the tribunal charged with the duty of deciding, and reserving to the party affected, the right to review the decision by certiorari or appeal." People ex rel. v. Rosendale, 76 Hun 103.

Q. What are the different kinds of mandamus, and define each ?

A. "A writ of mandamus is either alternative or peremptory. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor, and either with or without previous notice of the application, as the court thinks proper." Sec. 2067 of the Code. "A peremptory writ of mandamus may be issued, in the first instance, where the applicant's right to the mandamus depends only upon questions of law, and notice of the application has been given to a judge of the court, or to the corporation, board, or other body, officer, or other person, to which or to whom it is directed . . . . except as prescribed in this section, or by special provision of law, a peremptory writ of mandamus cannot be issued, until an alternative mandamus has been issued and duly served, and the return day thereof has elapsed." Sec. 2070 of the Code.

Q. Your client was a member of a mutual benefit association. He was expelled from it by proceedings which were not in accord with the laws of the society. What remedy would you pursue to reinstate him in the society ?

A. The remedy is by writ of mandamus. "The expulsion was illegal, and he was entitled to a peremptory writ of mandamus for his reinstatement. The relator was not required to exhaust the means provided in the by-laws for reinstatement before resorting to a mandamus; that those provisions relate to causes of expulsion supported by proceedings lawfully conducted, and

where the appeal is to the discretionary power of the society." People ex rel. v. M. M. P. Union, 118 N. Y. 101.

Q. In a criminal proceeding, the criminal escaped after trial and pending an appeal. After his escape, his attorney presents to the trial court his case and exceptions for settlement on the appeal. The judge refuses to settle the case, and the attorney applies for a writ of mandamus to compel him to do so. The criminal was not recaptured. What are the prisoner's rights and will a writ of mandamus lie?

A. A writ of mandamus will not lie, as the prisoner has no rights before the court. "It is essential to any step on behalf of a person charged with a felony, after indictment found, that he should be in custody, either actual, by being confined in jail, or constructive, by being let to bail. An escaped prisoner can take no action before the court." People v. Genet, 59 N. Y. 80.

Q. A is dismissed from the police force by the police commissioner without a fair hearing. He consults you. State the proceedings you would take in the matter.

A. Apply for a writ of certiorari, as no appeal lies. A writ of certiorari is issued to review the determination of a body or officer. It lies only when no appeal from the decision can be taken to a higher court. See sec. 2120 of the Code, et seq.

Q. You find one of your most important witnesses locked up in jail, and it is absolutely necessary that you have him as a witness. State how you would proceed.

A. Procure a writ of habeas corpus to testify, according to sec. 2008 of the Code, which is as follows: "A court of record, other than a justice's court of a city, or a judge of such a court, or a justice of the supreme court, has power, upon the application of a party to an action or special proceeding, civil or criminal, pending therein, to issue a writ of habeas corpus, for the purpose of bringing before the court, a prisoner detained in a jail or prison, within the state, to testify as a witness in the action or special proceeding, in behalf of the applicant." On habeas corpus generally see secs. 2008 to 2014, inclusive.

Q. The surrogate is about to take certain action in a will contest

which will be prejudicial to your client. You desire to prevent the action being taken. What proceedings would you take?

A. Apply for a writ of prohibition. This writ is used to arrest judicial action. It is a writ directed to some inferior court restraining an abuse of jurisdiction. See sec. 2091 of the Code, et seq.

CHAPTER VI.

Constitutional Law.

Q. The city of Buffalo makes an assessment on property, to pay for certain local improvements which benefit the property, but gives no notice to the owner. The owner comes to you for advice. What are his rights, and what constitutional provision is involved?

A. He has the right to have the assessment vacated. The constitutional provision involved is that part of the Fourteenth Amendment to the United States Constitution which provides as follows: "Nor shall any state deprive any person of life, liberty, or property without due process of law." "A law imposing an assessment for local improvement, without notice to, and without a hearing, or an opportunity to be heard on the part of the owner of the property to be assessed, has the effect to deprive him of his property without due process of law, and is unconstitutional. The legislature may prescribe the kind of notice, and the mode in which it may be given, but it cannot dispense with all notice. It is not enough that the owner may by chance have notice, or that he may, as a matter of favor, have a hearing; the law must require notice, and give a right to a hearing." Stuart v. Palmer, 74 N. Y. 184.

Q. The provisions of a treaty made between the United States and Great Britain are in conflict with a statute of the United States which has been in force since 1796. The court is called upon to determine which is binding upon it, the treaty or the statute. What should its judgment be and why?

A. The judgment should be, that the last in order of time prevails. Art. 6 of the United States Constitution provides in part as follows: "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 in any state to the contrary notwithstanding." "As between a law of the United States made in pursuance of the Constitution, and a treaty made under the authority of the United States, if the two in any of their provisions are found to conflict, the last one in point of time must control. For the one as well as the other is an act of sovereignty, differing only in form and in the organ and agency through which the sovereign will is declared. Each alike is the law of the land in its adoption, and the last law must repeal everything that is of no higher authority which is found to come in conflict with it. A treaty may therefore supersede a prior act of Congress, and on the other hand, an act of Congress may supersede a prior treaty." Cooley, Const. Law, pp. 31, 32. See Foster v. Neilson, 2 Peters (U. S.), 253.

Q. A commits a crime. After the crime was committed, but before sentence, a law is passed increasing the penalty and providing that it shall apply to "all crimes heretofore as well as hereafter committed." He is sentenced according to this statute, and the case is taken to the higher court on appeal. What should the appellate court do?

A. The judgment should be reversed, for as to him the law is ex post facto and therefore void. Ex post facto laws are classified in the leading case of Calder v. Bull, 3 Dallas (U. S.), 386, as follows: 1. Every law which makes an action done before the passing of the law, and which was innocently done, criminal, and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the commission of the crime, in order to convict the offender. "That is an ex post facto law, which increases the punishment denounced against the act, when committed, or punishes an offense in a manner in which it was not punishable when committed, irrespective of its comparative severity, unless the now punishment is one the same in kind as the old but less in degree. A person against whom a wrong judgment is pronounced upon a regular trial and conviction under an

ex post facto law, cannot be subjected to another trial. Shepard v. People, 25 N. Y. 406. A statute which permits the infliction of a lesser degree of the same kind of punishment than was permissible when the offense was committed is not ex post facto. People v. Hayes, 140 N. Y. 484.

Q. The statute provides that any person who engages in the business or works as a barber on Sunday, shall be deemed to be guilty of a misdemeanor, and, on conviction thereof, shall be fined and imprisoned. Your client is a barber and does not believe in Sunday as a religious institution, and who needs the money that the carrying on of the business on Sunday brings him. He is arrested for violating the statute. Is such a statute valid? If so, upon what principle can it be maintained?

A. This statute is valid as a proper exercise of the police power. "The act, which makes it a misdemeanor for any person to carry on or engage in the business or work of a barber on Sunday, is a valid exercise of the police power by the legislature, works no deprivation of liberty or property within the meaning of the Constitution, and does not violate the Fourteenth Amendment to the Federal Constitution by denying the equal protection of the law." People v. Havnor, 149 N. Y. 195. "All property and all rights within the jurisdiction of the state are subject to the regulations and restraints of its police power, except so far as they are removed therefrom, by the express provisions or implications of the Federal Constitution. The police power may be defined in general terms, as that power which inheres in the legislature to make, ordain, and establish all manner of reasonable regulations and laws whereby to preserve the peace and order of society, and the safety of its members, and to prescribe the mode and manner in which everyone may so use and enjoy that which is his own, as not to preclude a corresponding use and enjoyment of their own by others." Cooley, Const. Law, p. 338. "The Fourteenth Amendment is held not to have taken from the states, the police power reserved to them at the time of the adoption of the Constitution. It does not deprive the states of the right to preserve order within their limits, to pass laws against crimes, and punish offenders, to regulate relations between individuals, to control for the public good the use of private property, to protect the health, life, and the safety of the people, and, to that end, not only to enact suitable legislation, but to destroy private property

that is dangerous to the well being of the state." Cooley, Const. Law, p. 251.

Q. The legislature passes an act prohibiting the manufacture of cigars in any form in tenement houses. The constitutionality of the law is attacked, but it is upheld by the court. On appeal, what should the decision be?

A. The decision should be, that the law is unconstitutional. "While generally, it is for the legislature to determine what laws are required to protect and secure public health, comfort, and safety, under the guise of police regulation, it may not arbitrarily infringe upon personal or property rights, and its determination as to what is a proper exercise of the power, is not final or conclusive, but is subject to the scrutiny of the courts. When, therefore, the legislature passes an act ostensibly for the public health, but which does not relate to, and is inappropriate for the purpose, and which destroys the property or interferes with the rights of citizens, it is within the province of the court to determine this fact, and to declare the act violative of the constitutional guaranties of those rights." Matter of Jacobs, 98 N. Y. 98, a leading case on the police power.

Q. A purchases a lot in New York City, intending to erect thereon a building. Before he commences work, the legislature passes a law extending the fire limits, the effect of which is to prohibit A from building anything but a brick or stone house. A, not having the necessary means to build a house of such materials, is prevented from building. Is the law constitutional?

A. This law is constitutional. This is a legitimate exercise of the police power, because it has for its purpose the protection of the lives and property of its people, and does not deprive them of property without due process of law. Matter of Jacobs, supra.

Q. A and B are husband and wife. The evidence of his wife is inadmissible at the time C sues B on a certain claim. Thereafter the legislature passes a law, providing that the wife's evidence shall be admissible. C, being informed that the wife has knowledge of certain facts material to his case, the evidence of which would be admissible under the new law, subpœnas her. Objection is made to the admissibility of the evidence. Is the objection good?

A. The evidence is admissible, as the law is constitutional. While the legislature cannot take from persons vested rights without compensation, the remedy by which rights are to be enforced, or defended, are within the absolute control of that branch of the government. There is no vested right in a rule of evidence, as such rules only effect the remedy, and it is within the constitutional power of the legislature to modify them, and to enact new rules as to the qualifications and competency of witnesses. Southwick v. Southwick, 49 N. Y. 510; Howard v. Moot, 64 N. Y. 262.

(NOTE.) The phrase "ex post facto" applies only to criminal cases, and penal statutes; it has no application to civil cases. The legislature has power in relation to general civil legislation, to enact laws and to give them retroactive operation. Dash v. Van Kleek, 7 Johns. 477,

Q. A is anxious to obtain a right of way through B's land, and offers to purchase it from B, but B refuses to sell it to him. A procures the passage of an act by the legislature, which by its terms compels B to sell the right of way to A. B attacks the constitutionality of the law in the courts. What should the decision be?

A. The decision must be, that the law is unconstitutional. "The statute authorizing a private road to be laid out over the lands of a person without his consent is unconstitutional and void. The legislature can exercise the right of eminent domain for public purposes only. Private property cannot be taken even for a public use, without making just compensation to the owner." Taylor v. Porter, 4 Hill, 140.

Q. A railroad corporation is authorized by the railroad law to condemn private property for the purposes of its incorporation. The railroad seeks to condemn property belonging to A, so that it may build a storage warehouse thereon, in which the goods of its shippers along its road may be kept, until a favorable market for their sale exists. A brings action to restrain this. Can the action be maintained?

A. A can restrain the threatened act. "The acquisition of lands for speculation of sales, or to prevent interference by competing lines, or methods of transportation, or in aid of collateral enterprises, remotely connected with the running or operating of the road, although they may increase its revenue and business,

are not such purposes as authorize the condemnation of private property therefor, and is unconstitutional." R. R. Co. v. Davis, 43 N. Y. 137.

(NOTE.) "The eminent domain may be defined as the lawful authority which exists in every sovereignty to control and regulate those rights of a public nature, which pertains to its citizens, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand." Cooley, Const. Law p. 363.

Q. A railroad company, having a station in a certain city, finds it necessary, because of the increase of business, to have a larger station. It owns no land itself, and the property owners will not sell. The railroad company consults you. What would you advise?

A. The railroad company can institute condemnation proceedings. "Passenger depots, convenient and proper places for the storing and keeping of cars and locomotives, proper, secure, and convenient places for the receipt and delivery of freight, are among the acknowledged necessities for the running and operating of a railroad; and the right to take land for these purposes is included in the grant of power which authorizes railroad corporations to acquire real property for the purposes of their incorporation or for the purpose of running or operating their road." R. R. Co. v. Kip, 46 N. Y. 546. See sec. 3359, et seq. of the Code of Civ. Pro. on condemnation proceedings.

Q. The New York State Constitution provides that the legislature shall not incorporate any corporation by special act, except for municipal purposes or when in its judgment, its objects cannot be carried out under the general law. The legislature passes a law, incorporating a certain company for purposes not municipal. Can that act of the legislature be reviewed?

A. No. "By the constitution of this state it is declared that corporations may be formed under general laws, and shall not be created by special act, except in cases where in the judgment of the legislature the objects of the corporation cannot be attained under the general laws. By this provision of the constitution, it is left to the legislature to decide whether the objects of the corporation can be attained under a general law. It is well settled in this state, that whether a special act of incorporation is necessary or not, is a matter in the discretion of the legislature, and the

courts have no power to review this action of the legislature." People v. Bowen, 21 N. Y. 517; Met. Bank v. Van Dyck, 27 N. Y. 448.

Q. A right of action was vested. At that time there was a statute of limitation of five years. Four years passed before the action was brought. Previously, however, a law was passed changing the limitation to four years, thus barring the plaintiff's right of action. Is this law valid as against plaintiff? What is the principle involved?

A. The law is void as against plaintiff, being unconstitutional. An enactment of a new statute of limitation is unconstitutional as to existing causes of action, if it fails to allow a reasonable time, after it takes effect, for the commencement of suits thereon. It is not enough that the act affords a reasonable interval between its passage or becoming a law, and its taking effect. "The right possessed by a person of enforcing his claim against another is property, and if a statute of limitation acting upon the right, deprives the claimant of a reasonable time within which suit may be brought, it violates the constitutional provisions "that no person shall be deprived of property without due process of law." There is no question as to the power of the legislature to pass, or to shorten statutes of limitations. A party has no more a vested interest in the time for the commencement of an action, than he has in the form of the action. The only restriction upon the legislature in the enactment of statutes of limitations is that a reasonable time be allowed for suits upon causes of action theretofore existing." Gray, J., in Gilbert v. Ackerman, 159 N. Y. 118. See also People v. Turner, 117 N. Y. 227.

Q. A commits a crime in May, 1895. The statute of limitation then for that crime was three years. In May, 1898, the legislature passes an act by which the limitation is extended to five years. In June, 1899, A is arrested for the offense committed May, 1895. You are called upon to advise as to his rights, and as to the constitutionality of the law. What would be your advice?

A. The law is ex post facto as to A, and therefore unconstitutional and void. "A law requiring all indictments to be found and filled within three years after the commission of the offense, by extending the time to five years, does not apply to offenses com-

mitted prior to the passage thereof." People v. Lord, 12 Hun, 282.

Q. A was elected to the office of district attorney of X County, the term of office then being two years. Subsequently the legislature passes an act extending his term to four years. This is attacked as unconstitutional. What should be the decision of the court?

A. The law is unconstitutional and void. An incumbent's term of office cannot be prolonged by the legislature, where the office can only be filled by election or appointment, for this would be in effect an appointment by the legislature, and therefore void. People ex rel. v. Palmer, 154 N. Y. 133; Matter of Kelly v. Van Wyck, 35 Misc. 210.

Q. A was elected to a public office, which had certain fees attached to it by law. He qualifies, and enters upon the duties of his office. Subsequently, the legislature passes an act reducing his fees. What are A's rights? Is the law constitutional?

A. The law is unconstitutional. It violates the prohibition contained in art. 3, sec. 18 of the New York Constitution, which is as follows: "The legislature shall not pass a private or local bill in any of the following cases: Creating, increasing or decreasing fees, percentage or allowances of public officers who are elected or appointed."

Q. The legislature passes an act changing the name of John Brown to Thomas Smith. John Brown objects and consults you as to his rights. What would you advise him? Is the act valid?

A. The act is unconstitutional and void. Art. 3, sec. 18 of the New York Constitution provides in part as follows: "The legislature shall not pass a private or local bill in any of the following cases: 1. Changing the names of persons."

Q. The legislature passes an act, authorizing a street railroad company to lay its tracks along certain streets without any further proceedings. The property owners along the street object. Have they any remedy? Give your opinion as to this legislation.

A. The act is unconstitutional and void. The abutting owners can enjoin the laying of the tracks, and the operation of the road. Art. 3, sec. 18, further provides as follows: "But no law shall au-

thorize the construction or operation of a street railroad, except upon condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of that portion of the street or highway, upon which it is proposed to construct or operate such railroad, be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court of the department in which it is proposed to be constructed, may upon application, appoint three commissioners, who shall determine after a hearing of all the parties interested, whether such railroad ought to be constructed or operated, and their determination confirmed by the court, may be taken in lieu of the consent of the property owners."

Q. A railroad corporation desired to operate its road through the streets of X, and was unable to secure the property owners' consent. Subsequently, the corporation applies to the Appellate Division for the appointment of commissioners, who decide that the company cannot operate its road through the streets of X. The Appellate Division confirms the report of the commissioners. Thereafter the legislature passes a special act, giving to the company the right to operate its road through the streets of X. Is the law unconstitutional?

A. The law is unconstitutional and void. The commissioners having decided against the operation of the road, the case stands the same as if no application was made, therefore the act, attempting to give the right to lay down the tracks without the property owners' consent is in contravention of art. 3, sec. 18 of the New York Constitution, supra, and void.

Q. The legislature passes an act, limiting the amount of damages recoverable for injuries resulting in death. Is this act constitutional?

A. This act is clearly unconstitutional, being in contravention of art. 1, sec. 18 of the New York constitution, which is as follows: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

Q. A was charged with the commission of a criminal offense in

a certain county of this state, was indicted, tried, and acquitted. Subsequently, it was claimed that the offense for which he had been tried was really committed in an adjoining county, and he was indicted, tried, and convicted in that county for the same offense. During the second trial, the district attorney put him upon the witness stand against the objection of his counsel, and he was compelled to testify, that he was present at the time and place at which the offense was committed. A appeals from the conviction. Is the appeal well taken? State your reasons.

A. The appeal is well taken, and judgment must be reversed. The second trial was in violation of the constitutional provision, "that no person shall be subject for the same offense to be twice put in jeopardy of life or limb." An acquittal is a bar to any subsequent trial for the same offense. Sec. 9 of the Code of Crim. Pro. covers this point, and is as follows: "No person can be subjected to a second prosecution for a crime for which he has been once prosecuted and duly convicted or acquitted." As to the other point, it was a violation of the constitutional provision, which provides: "That no person can be compelled in a criminal action to be a witness against himself." This provision is also found in sec. 10 of the Code of Crim. Pro.

Q. A is indicted for murder in the first degree. He is put on trial and convicted of murder in the second degree. He appeals from the conviction, and the appellate court grants him a new trial. He is subsequently put on trial for murder in the first degree, and objects, claiming that he cannot again be tried for murder in the first degree. Was this objection good?

A. No. "Where a defendant is convicted of a lower degree of the crime charged in the indictment, and on appeal, judgment is reversed and a new trial ordered, the case stands as if there had been no trial, and the defendant must be tried under the indictment as it is, not simply for the lesser grade of crime of which he was convicted. This is not unconstitutional as subjecting a person to be twice put in jeopardy for the same offense, as the jeopardy is incurred with the consent of, and as a privilege granted to the defendant upon his own application." People v. Palmer, 109 N. Y. 413.

Q. A is indicted. The indictment contains two counts, one for

burglary, and one for larceny. He is tried and convicted of larceny. Upon appeal, a new trial is ordered. Subsequently the district attorney seeks to try him for burglary. A's counsel objects. What should be the ruling of the court?

A. A cannot be tried for burglary, as a conviction on one count operates as an acquittal on the other counts. People v. Dowling, 84 N. Y. 478.

(NOTE.) The distinction between this case, and the last one should be carefully noted. One is a conviction of a lesser degree of the same crime, and the other, a conviction on one count of an indictment charging different crimes.

Q. A is indicted for murder in the first degree. During the course of the trial, one of the jurors becomes ill and is unable to attend. A's counsel consents to proceed with eleven jurors. A is convicted. He appeals. What should be the decision of the higher court?

A. The conviction is illegal and unconstitutional, and must be set aside. In criminal cases, at least in cases of felony, the accused cannot waive the right of trial by jury. By jury, is meant in the constitution a common-law jury. This is a tribunal of twelve persons. The jury cannot consist of less than twelve, and a trial by less than that number even by consent, is a mistrial. If a defendant were allowed to waive his right of a trial by twelve jurors, he might also be allowed to waive his right of a trial by jury, which would in fact be a deprivation of life or liberty without due process of law. Cancemi v. People, 18 N. Y. 128.

Q. A is on trial for burglary. After the evidence is all in, the jury retire. They deliberate for some time, and return to the court room asking for further instructions. The defendant is not present at this time. A verdict of guilty is rendered and A appeals. What should the decision be?

A. The conviction should be set aside. Sec. 427 of the Code of Crim. Pro. provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given after notice to the district attorney and to the counsel for the defendant, and in cases of felony, in the presence of the defendant."

Q. A is being tried for robbery. He is compelled against his counsel's objection to stand up in court and be identified. He is convicted and appeals upon the ground that he was compelled to give evidence against himself. Should the appeal be sustained ?

A. The appeal should be dismissed. "A witness under examination, or one present in court as a party, may be compelled by the court to stand up to be identified. This is not a violation of the constitutional provision, protecting a person from being compelled in a criminal case to be a witness against himself." People v. Gardner, 144 N. Y. 119.

CHAPTER VII.

Contracts.

Q. A writes to B, a carpenter, asking him to make certain office fixtures, and offering to pay a certain price therefor. B did not reply thereto, but purchased the necessary lumber and began the work. A thereafter wrote B countermanding the order. After receiving this letter, B brings suit for breach of contract. Can he recover?

A. No. A's offer was never accepted. "The note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff, as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff. We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer, before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way, to be, in the usual course of events, in some reasonable time communicated to him. In the case in hand, the plaintiff determined to accept. But a mental determination, not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party, of an acceptance, and does not operate to hold him to his offer. Conceding that the testimony

shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it, to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. There was nothing in his thought formed but not uttered, or in his acts that indicated or set in motion, an indication to the defendants of his acceptance of their offer, or which could necessarily result therein." Folger, J., in White v. Corlies, 46 N. Y. 467.

Q. A wires B that he has a horse, and thinks that he will suit B, describing him, whereupon B writes A that he will take the horse if he "will fill the bill." A immediately telegraphs B, "The horse is yours," and sends the horse to B by his man. B refuses to take the horse saying that he has bought no horse of A. What are the rights of the parties? Give reasons.

A. A has no rights against B, as there was no contract. B's reply was not an acceptance of A's offer, nor was it a counter-offer. In order to have a contract, there must be mutual assent of the parties. An offer to sell imposes no obligation, until it is accepted according to its terms. For a case covering this point, see Stagg v. Compton, 88 Ind. 171, the principle of which is fully recognized in this state.

Q. A is an auctioneer, and B is a bidder on certain property; the auctioneer says, "one, two, three," but before the hammer falls, B revokes his bid. The auctioneer said, "Sold to B for so much." What are the rights of the parties?

A. There was no contract, as the offer was withdrawn before acceptance. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller, by knocking down the hammer, which was not done here till the bidder had retracted. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. This principle has been firmly established since the leading English case of Payne v. Cave, 3 Term Rep. 148, and uniformly followed in this state.

Q. Defendant wrote to plaintiff offering to sell a horse for $200. Plaintiff replied that he would reply in five days. As he is about to mail letter, he receives a telegram withdrawing the offer. He

reads the telegram and mails the acceptance of the offer. What are the rights of the parties?

A. There is no contract here, as the offer was withdrawn before its acceptance. The receipt of the telegram operated as a revocation of the offer, and therefore, the attempted acceptance was of no avail, as there was no offer in existence at that time capable of being accepted. An offer may always be withdrawn before it is accepted. The revocation of an offer, to be effective, must always be communicated to the offeree. This principle is elementary and requires no citation of authorities.

Q. A in New York writes B in California making a proposition of contract. Upon receipt of a letter, B mails an answer accepting his proposition; next day B telegraphs A rejecting the offer, telegram and letter reaching A at the same time. What are the rights of the parties?

A. There is a contract here, which arose upon the mailing of the letter of acceptance, irrespective of the time when the letter was received. An acceptance once given cannot be withdrawn, and therefore, the telegram, retracting the acceptance, has no effect. "Where two parties, both being present together, enter into negotiations looking to the making of a contract, the minds of both must ordinarily meet, at the same time, upon the same identical terms, or no contract is made. Where the parties reside at a distance from each other, and the negotiation is conducted by written correspondence, though there must be the assent of both parties, to the same provisions, it is of course impracticable that such assent should be manifested simultaneously. One must state what he is willing to agree to, and the other must, when the proposition has reached him, assent to the same terms, and in some manner manifest that assent." Selden, J., in Vassar v. Camp, 11 N. Y. 441. "It is only necessary, that there should be a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act, and the sending of a letter, announcing the consent to the proposal was a sufficient manifestation, and consummated the contract, from the time it was sent. The sending of a letter accepting the proposition is regarded as an acceptance, because it is an overt act clearly manifesting the intention of the party sending it, to close with the offer of him to whom it is sent, and thus mak-

ing that 'aggregatio mentium' which is necessary to constitute a contract." Scrugham, J., in Trevor v. Wood, 36 N. Y. 307. "The minds of the parties met, when the plaintiff complied with the usual, or even occasional practice, and left the acceptance in a place of deposit recognized as such by the defendant. This doctrine is analogous to that which has been adopted in the case of communication by letter or by telegram. The principle governing these cases is, that there is a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act." Dwight, C., in Howard v. Daly, 61 N. Y. 362.

Q. A wrote B, offering to sell the latter 100 barrels of flour at $10 per barrel, and gave the latter ten days in which to accept or reject the proposition. On the third day thereafter, A sold the flour to C, and B on the fourth day, without notice, wrote A accepting the offer. B on learning of the sale, brings suit against A. Judgment for whom and why? Suppose B had notice of the sale before accepting the offer; how would this affect your answer?

A. Judgment for B, but if he had notice of the sale, no recovery would be allowed. While in general, a revocation of an offer to be effective must be communicated to the offeree by the offeror, yet it is held that any act of the offeror, inconsistent with the continuance of the offer, and which comes to the knowledge of the offeree, constitutes a revocation. B here accepted before the offer was withdrawn, and therefore can recover. But of course, if he obtained information of the sale to C before accepting, his acceptance would be of no effect. "It appears to me, that there is neither principle nor authority, that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be, that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the plaintiff knew that D was no longer minded to sell the property to him as plainly and clearly as if D had told him in so many words, 'I withdraw the offer.' It is to my mind quite clear that before there was any attempt at acceptance by the plaintiff, he was

perfectly well aware that D had changed his mind, and that he had, in fact, agreed to sell the property to A. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement." James, L. J., in Dickinson v. Dodds, L. R. 2 Chan. Div. 463, a leading case followed in New York.

Q. A sent an order for 100 barrels of flour to B, on twenty days' credit, A agreeing to pay the freight. B, not having 100 barrels in stock, and having only 99 barrels, sent them to A on ten days' credit. This time of credit had always been customary with B, and A knew of it. B sent a bill to A for 99 barrels on ten days' credit. The goods were destroyed in transit. Who must bear the loss?

A. The loss falls upon B, as there was no contract. If a person sends an order to a merchant to send a particular quantity of goods upon certain terms of credit, and the merchant sends a less quantity of goods, at a shorter credit, and the goods sent are lost on the way, the merchant must bear the loss, as there is no contract between the parties. There is no agreement, no meeting of the minds of the parties as to the subject matter of the contract. Bruce v. Pearson, 3 Johns. 534.

(NOTE.) "As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has neither been accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw the offer; and either rejection or withdrawal leaves the matter as if no offer had been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modifications suggested. The other party having once rejected the offer cannot afterward revive it by tendering an acceptance of it." Gray, J., in R. R. Co. v. Mill Co., 119 U. S. 149.

Q. A lost certain property, and offers $500 to the finder as a reward. B knowing nothing of the reward, finds the property and returns it to A. B afterward learns of the reward, and brings an action against A for the same. Judgment for whom?

A. Judgment for A. "To the existence of a contract there must be mutual assent, or in another form, offer and consent to the offer. The motive inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there

be consent or assent to that of which the party has never heard? But the plaintiff did not, in giving that information, manifest any assent to the defendant's offer, nor act in any sense in reliance thereon; they did not know of its existence. The information was voluntary, and in every sense (material to this case) gratuitous. The offer could only operate upon the plaintiffs after they heard of it." Woodruff, J., in Fitch v. Snedaker, 38 N. Y. 248. To entitle a person to a reward offered for the recovery, or for information leading to the recovery of property lost, he must show a rendition of the services required after a knowledge of, and with a view of obtaining the offered reward. Howland v. Lounds, 51 N. Y. 604.

Q. On May 1, A advertises in the Herald a reward of $1,000 to any person who captures or gives information leading to the apprehension of a certain thief. On May 3, A publishes in the same paper, a revocation of his offer. On May 4, B succeeds in apprehending the thief. He now claims the reward, and brings suit to recover the sum offered. Can he recover? State your reasons.

A. B cannot recover, as the offer was withdrawn before the act asked for was performed. An offer may always be withdrawn before it is accepted, through the same source, and in the same manner in which it was made. "It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything was done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channels in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made." Strong, J., in Shuey v. U. S., 92 U. S. 73.

Q. A, the uncle of B, promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became twenty-one years of age, he would pay him the sum of $5,000. The nephew assented thereto, and fully performed the conditions inducing the promise. When the nephew arrived at the age of twenty-one years he demanded the money, which was refused. He brings suit. The uncle demurs on the ground that the contract was without consideration to support it, and therefore, invalid. Judgment for whom and why?

A. Judgment for B. Refraining from drinking, using tobacco, etc., was the giving up of a legal right, and, therefore, constituted a sufficient consideration. "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other. Courts will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, foreborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson's Prin. of Contracts, 63. "In general, a waiver of any legal right at the request of another party, is a sufficient consideration for a promise." Parsons on Contracts, 444. Now applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. It is sufficient that he restricted his legal freedom of action within certain prescribed limits upon the faith of the uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Parker, J., in Hamer v. Sidway, 124 N. Y. 538.

Q. Sailors are hired for a certain voyage for $100; in the midst of a storm, the sailors refused to navigate the ship unless the captain agrees to pay them $150; the captain has authority to bind the owners; he submits to their demands, but when he reaches

shore, the owners refuse to pay but $100; one of the sailors sues for $150. Can he recover and why?

A. No. The agreement is void for want of consideration. There was no consideration for the pay promised to the sailors who remained with the ship. Before they sailed, they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. They were bound by the terms of their original contract, to exert themselves to the utmost to bring the ship in safety to her destined port. "The promise to give higher wages is void for want of consideration. The seamen had no right to abandon the ship at Beaufort, and a promise to pay them an extra price for abstaining from doing an illegal act was a nudum pactum." Spencer, J., in Bartlett v. Wyman, 14 Johns. 260.

Q. A is indebted to B in the sum of $1,000. B agrees that if A will pay him $750, he will receipt him in full. A pays the money, and B refuses to give the receipt, and sues A. Can he recover?

A. Yes. There was no consideration for B's promise to give the receipt, as B was already legally bound to pay the entire sum. In order to have consideration, there must be the waiver of a legal right; doing what one is already legally bound to do can constitute no consideration. Wherever as here, the claim is liquidated, the mere acceptance of a part with the promise to discharge the whole, is not enough, for there is no new consideration. Bunge v. Koope, 48 N. Y. 225; Nassoiy v. Tomlinson, 148 N. Y. 326.

Q. A owed B $1,000. B agreed to give A a receipt in full, if A would pay $800. A paid the sum and received a receipt in full. Thereafter B sued A for $200. Can he recover? Give reasons.

A. Yes. There was no consideration for the giving of the receipt, as A only paid what he was legally bound to pay. Where upon payment of a portion of an undisputed account, the creditor gives a receipt in full, he is not concluded thereby from recovering the balance, although the receipt was given with knowledge, and there was no error or fraud. Ryan v. Ward, 48 N. Y. 204.

Q. A, a physician, sent B a bill for $500 for professional services. There had been no agreement as to the price to be paid. B on receiving the bill, sent a letter to A, not disputing the services, but ques-

tioning the justice of the charges and enclosing a check for $350, which he stated was in full satisfaction of A's claim. A made no reply, but retained the money. He subsequently sues to recover $150 as balance due. Judgment for whom and why?

A. Judgment for B, as there was an accord and satisfaction of A's claim. Where a debtor offers a certain sum of money in full satisfaction of an unliquidated demand, and the creditor retains and accepts the money, his claim is cancelled, and no protest, declaration, or denial on his part can vary the result. Fuller v. Kemp, 138 N. Y. 231. "An accord and satisfaction requires a new agreement and the performance thereof. It must be an executed contract founded upon a new consideration. If the claim is liquidated, the mere acceptance of a part with a promise to discharge the whole, is not enough, for there is no new consideration. If the claim is unliquidated, the acceptance of a part, and an agreement to cancel the entire debt, furnishes a new consideration, which is founded in the compromise. A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and when it is admitted that one or two specific sums are due, but there is a genuine dispute as to which is the proper amount, the amount is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction. Plaintiff was either bound to reject the check or by accepting it, to accede to the defendant's terms. The money tendered belonged to the defendants, and they had a right to say on what condition it should be received. When plaintiff indorsed and collected the check referred to, in the letter asking him to sign the indorsed receipt in full, it was the same, in legal effect, as if he had signed and returned the receipt, because acceptance of a check was a conclusive election to be bound by the condition upon which the check was offered. The use of the check was ipso facto an acceptance of the condition. The minds of the parties then met so as to constitute an accord." Vann, J., in Nassoiy v. Tomlinson, 148 N. Y. 326.

Q. A owes B $500. B needs the money and demands it from A. A refuses, but agrees that if B will extend the time of payment of a note of A's held by B for six months, he (A) will pay the $500 then and there. B agrees and takes the $500, but at the date of the maturity of the note, refuses to extend the time of payment, and now consults you as to his rights. Can he bring action on this note?

A. Yes. There was no consideration for the extension of the time of payment, as A was under a legal obligation to pay the money at the time. Cary v. White, 52 N. Y. 138.

Q. A was indebted to B in the sum of $1,000. They agreed between themselves that A should pay to B $500 in cash, and also give to him a certain horse for which A was offered $250. B took the horse and cash, in full for his claim and gave a receipt accordingly. B was unable to sell the team for more than $200, which he did, and then sued A to recover the balance of his original indebtedness. A answers setting up the facts. B demurs. Judgment for whom, and if for B, for what amount? Answer fully.

A. Judgment for A. B cannot recover anything. There was a full accord and satisfaction. "While the payment of a sum less than the amount of a liquidated debt, under an agreement of the creditor to accept the same in satisfaction of the debt, forms no bar to the recovery of the balance, if there be some additional benefit or legal possibility of benefit to the creditor, this will be a sufficient consideration to support an agreement to accept the lesser sum in full payment. There must be something different to that which the recipient is entitled to demand, in the thing done or given, in order to support his promise. The difference must be real, but the fact that it is slight will not destroy its efficacy in constituting a consideration, for if the courts were to say that if the thing done in return for a promise was not sufficiently unlike to that which the promisor was already bound, they would in fact be determining the adequacy of the consideration. Thus the giving of a promissory note for a money debt, or the gift of a horse, or a hawk, or a robe in satisfaction is good. Either of these things might be more beneficial to the creditor than money." Huffcut's Anson on Contracts, p. 69. "But it is held that where there is an independent consideration, or the creditor receives any benefit or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled except for the agreement, then the agreement is not nudum pactum, and the doctrine of the common law to which he had adverted has no application." Andrews, J., in Allison v. Abendroth, 108 N. Y. 470. For an elaborate discussion of this

question and a careful review of all the authorities, see the able opinion of Potter, J., in Jaffray v. Davis, 124 N. Y. 164.

Q. A dealer sold and delivered 200 barrels of flour to B, knowing him to be a friend of C's. C afterward wrote to A, saying to him that in consideration of the sale to B, he would pay if B did not. Can the dealer recover from C?

A. No. This is a past or executed consideration which is insufficient to support C's promise. The promise must be coextensive with the consideration. There must be something given in exchange for the promise. Where the thing has already been given, or the act done, obviously nothing is given in exchange for the subsequent promise, and is therefore gratuitous and unenforceable. The doctrine that a past or executed consideration will not support a subsequent promise has long been settled in this state.

Q. A owed B $1,000. B was about to bring an action for the amount, when C promised to pay him $1,200 in consideration of his forebearance to sue. B does as requested, but C refuses to pay. B sues C on the promise. Can he recover? Answer fully.

A. B can recover. An agreement to withhold suit is a good consideration to support a promise to pay a debt, although no fixed and definite time is expressly agreed upon. Traders Nat. Bank v. Parker, 130 N. Y. 415. "There is no doubt, that an agreement by the creditor to forebear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential, that the creditor should bind himself at the time to forebear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes in consideration of forbearance being given, to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforceable agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for a collateral undertaking. In other words, a request followed by performance is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be

bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested." Andrews, Ch. J., in Strong v. Sheffield, 144 N. Y. 392.

Q. A threatens to sue B for $1,000, believing his claim to be valid. B promises to pay $400 in full settlement, to which A agrees, and they compromise. Afterward it turns out that A has no cause of action, and B refuses to pay the $400. A brings suit to recover the $400. Judgment for whom and why?

A. Judgment for A. As A honestly believed his claim to be doubtful, his forbearance to sue was a sufficient consideration for B's promise to pay. It would be otherwise, if he knew the claim to be bad. It is not necessary to uphold a promise, based upon the surrender or compromise of a claim, to show that the claim was valid or enforceable at law. The settlement of a doubtful claim is a good consideration. White v. Hoyt, 73 N. Y. 505; Zoebisch v. Van Minden, 120 N. Y. 406.

Q. A loaned money to B, on his (B's) promise to pay the same to C, to whom A said he owed and had promised to pay a like sum. Can he recover? What principle of law is involved?

A. Yes. The well known principle of Lawrence v. Fox, 20 N. Y. 268, applies, where it was held that a third person for whose benefit a contract was made between two others, could maintain an action thereon, when there is an obligation existing between that third person and the promisee. This case, despite many criticisms and modifications, continues to represent the law of this state on this question.

Q. A, the owner of real property on which B holds a mortgage of $2,000, gives a deed to C as security for $1,000 prior indebtedness, and for future advances which C may make, C agreeing by the terms of the deed to assume the payment of B's mortgage. C quitclaimed to D in consideration of D's agreement to pay the $1,000 due C from A. D knew the terms of the transaction between A and C, in which title was not intended to pass. D claims that C must pay B's mortgage, and B claims that C is liable for any deficiency which may arise on foreclosure of B's mortgage. C refuses to pay. Is he liable?

A. C. is liable. The other requirement of the principle laid

down in Lawrence v. Fox, supra, an obligation due from the promisee to the beneficiary under the contract is here present, for the promisee (mortgagor) is personally indebted to the mortgagee, and it is his personal indebtedness that is secured by the mortgage upon the lands, the payment of which has been assumed by C. In this case, the courts say, that the clause of assumption, or contract made between the mortgagor and his grantee, is for the benefit of the mortgagee, and that as a consequence, the mortgagee may institute an action thereon directly against the promisor.

Q. A mortgage was executed by A who then owned the mortgaged premises. He then conveyed the mortgaged premises to B, who took the property subject to the mortgage. B conveys to C, who assumes the payment of the mortgage. The mortgagee forecloses, and seeks to enter a deficiency judgment against C. May he do so?

A. No. The requirements of the principle of Lawrence v. Fox, supra, are not here present. There must exist some legal or equitable obligation between the promisee and the third party. As B was not liable to the mortgagee, he not having assumed the payment of the mortgage, his grantee (C) cannot be held liable on the assumption, for there was no legal obligation existing between B (the promisee) and the third party (the mortgagee), and it was so held in the case of Vrooman v. Turner, 69 N. Y. 280.

Q. A writes a letter to B, offering to employ him for ten months at $50 per month. B telegraphs A accepting the offer, and says that he will reduce the contract to writing the next day. Thereafter B presents himself at A's place of business, and announces his readiness to perform; but A has already employed C in his stead. B brings suit against A. Can he recover?

A. Yes. Where by means of letters and telegrams exchanged between the parties, a clear and definite proposition containing all the requirements of a completed contract, is made by one and accepted by the other, with the understanding that the agreement shall be expressed in formal writing, the parties are bound by the contract as made by the correspondence. When the parties intend that a mere verbal agreement shall be finally reduced to writing as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed. But

here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put in another form. The principle governing such cases was well stated by Selden, J., in Pratt v. H. R. R. R. Co., 21 N. Y. 308, as follows: "A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is in all respects as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was, that a written contract embodying these terms should be drawn and executed by the respective parties, this is an obligatory contract, which neither party is at liberty to refuse to perform." In this case, it is apparent, that the minds of the parties met through the correspondence, upon all the terms as well as the subject matter of the contract, and that the subsequent failure to reduce this contract to the precise form intended did not affect the obligation of either party which had already attached, and they may now resort to the primary evidence of the mutual stipulation. Sanders v. Pottlitzer Fruit Co., 144 N. Y. 209.

Q. A enters into an oral agreement with B, whereby the latter agrees to paint a certain house in fourteen months. B works five months and then is arbitrarily discharged by A, who claims that the contract is void under the Statute of Frauds. Can B recover on this contract?

A. Yes. This agreement is valid. The Statute of Frauds provides that every agreement which by its terms is not to be performed within one year from the making thereof, shall be void, unless it, or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent. This agreement may be performed within one year, and is therefore valid. "An agreement to save the Statute of Frauds need not be in writing, although by the terms of it, the party may at his election perform the agreement after the year; it is only when it appears by the whole tenor of the agreement that it is to be performed after the year, that a note in writing is necessary."

Plimpton v. Curtis, 15 Wend. 336. "The statute, as interpreted by the courts, does not include agreements, which may or may not be performed within one year from the making thereof, but merely those which within their terms and consistent with the rights of the parties, cannot be performed within one year from the making thereof." Allen, J., in Kent v. Kent, 62 N. Y. 560, 564.

Q. A makes a contract with B, by which, for a certain price, A was to repair the boilers of B's factory; price to be paid when the boilers as fixed, have proved to B's satisfaction, to be a success. The boilers were fixed, and B used them a reasonable length of time without objection. In an action for the price, B defends on the ground that the boilers are not satisfactory. Can A recover?

A. Yes. The defense is untenable. "A simple allegation of dissatisfaction, without a good reason therefor, is no defense. Under such a contract that which the law will say a contracting party ought in reason to be satisfied with, that it will say he is satisfied with." Duplex Boiler Co. v. Garden, 101 N. Y. 387. "There is no doubt of the general rule, that, where one party agrees to do a certain thing to the satisfaction of the other, and the excellence of the work is a matter of taste, such as for instance, a portrait, bust, suit of clothes, dramatic play, or a piece of furniture, the employer may reject it without assigning any reason for his dissatisfaction. In such a case, the law cannot relieve against the folly of the employee, by inquiring whether the dissatisfaction of the employer was based upon reasonable grounds or not. It is even doubtful, whether it can inquire into the good faith of the employer's decision. The parties must stand to their contract as they made it, and if one party agrees to furnish an article that is satisfactory to the other, he constitutes the latter the sole arbiter of his own satisfaction. If, however, the task to be performed does not involve a matter of taste, but of common experience, as an ordinary job of mechanical work or quality of material, the law will say, what in reason ought to satisfy him, does satisfy him." McAdam, J., in Gray v. Alabama Bank, 10 N. Y. Suppl. 5.

Q. A and B entered into a contract by which B was to build a house for A. A was to pay $1,000 upon its completion, and B was to present to him a certificate from X, an architect, that the house as built, fully complied with the terms of the contract. B

duly completed the house, but the architect, having a grudge against B, refused to deliver the certificate. B brings suit to recover the $1,000. Can he recover?

A. Yes. Where a contractor in a building contract has substantially performed, although by the contract he is bound to procure an architect's certificate of performance, he may recover without procuring such certificate, by showing an unreasonable refusal of the architect's certificate. It is a general rule of law, that a party must perform his contract before he can claim the consideration due him upon performance; but the performance in all cases need not be literal and exact. It is sufficient if the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially, and then he may recover for his work, notwithstanding slight or trivial defects in performance, for which compensation may be made by an allowance to the other party. Whether a contract has been substantially performed, is a question of fact, depending upon all the circumstances of the case to be determined by the trial court. Nolan v. Whitney, 88 N. Y. 648.

Q. A entered into a contract with B, whereby B agreed to purchase fifty slaughtered steers to be delivered immediately, and fifty live steers to be delivered two months later. The price agreed upon was $10 per head for the live steers, and $15 per head for the slaughtered steers. The slaughtered steers were delivered by A, but he failed to deliver the others. A sues B for the price of those delivered. B defends on the ground that the contract was entire, and that performance of the contract by A in all its terms was a condition precedent to his recovery. What are the rights of the parties?

A. A can recover the price of the slaughtered steers, subject to a counterclaim for B's damages for breach of contract as to the live steers. "It is a question of intention, whether the several parts of a contract made at one and the same time are to be taken distributively and are independent, or whether entire performance by one party of all steps on his part, is a condition precedent to his right of recovery against the other party in respect to a portion of the contract which he has fully performed. In arriving at such intention, it is to be assumed that goods are not to be delivered without payment." Tipton v. Feitner, 20 N. Y. 423. "A contract

is entire, when the parties intend that the promise by one party is conditional upon entire performance of his part of the contract by the other party. A contract is said to be severable, when the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item, or is left to be implied by law." Ming v. Corbin, 142 N. Y. 334. "Indeed the entirety or divisibility of several items is always a question of intent and frequently one of fact. No precise rule can be given by which this question in a given case may be settled. Like most other questions of construction, it depends upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject matter of the contract." Silberman v. Fretz, 16 Misc. 449.

Q. A agrees by written contract to deliver 1,200 tons of steel to B in lots of 100 tons each, on twelve successive days, at a specified price per ton, B agreeing to furnish security for the purchase price before the first delivery. Six lots of the steel are delivered on six successive days, but B pays cash on delivery of each lot, but no security is given by B as he agreed. On the seventh day steel advances in price, and A refuses to complete the contract. B then offers A the purchase price of the remaining 600 tons, but A refuses to accept the same. What are the rights of the parties? Answer fully.

A. A, by not insisting on the security being given, waived B's breach. A therefore cannot refuse to perform. "Where a breach of contract by one party occasions an injury to the other which is susceptible of compensation in damages, it does not relieve the latter from liability under the contract, where both parties have gone on and performed it for some time thereafter. And if he is entitled to the strict enforcement of his contract, but has led the other party to believe that he will not exact it, he thereby waives his right to a strict performance." 3 Amer. & Eng. Ency. of Law (2d ed.), 154.

Q. A promises to marry B on January 1, 1900. On May 1, 1899, he marries C. B immediately sues A for breach of promise, without alleging a demand on her part or that she is ready and willing to perform. A demurs. Judgment for whom and why?

A. Judgment for B. An action for breach of promise will lie at

once, where one party has voluntarily placed it beyond his power to perform, or upon a positive refusal to perform a contract of marriage, although the time specified for the performance has not arrived, and demand and tender are both unnecessary. Burtis v. Thompson, 42 N. Y. 246.

Q. B makes an agreement with A for the purchase of 1,000 yards of silk at $1 per yard, to be delivered June 30, 1895. On June 1, 1895, B meets A and tells him that he cannot use the silk, and that he need not deliver the same. A consults you; what are his rights, and what are the measure of damages if any?

A. A can sue immediately, and the measure of damages is the difference between the contract price and the market price at the time and place of delivery. "Where before the time of delivery fixed by a contract for the sale of goods, the vendee notifies the vendor that he will not receive or pay for the goods, and requests him to stop any further efforts to carry out the contract, the vendor is justified in treating the contract as broken at that time, and is entitled to bring an action for the breach immediately without tendering delivery; it is not necessary to await the expiration of the time of performance fixed by the contract, nor can the vendee retract his renunciation of the contract, after the vendor has acted upon it, and by sale of the goods to other parties has changed his position." Windmuller v. Pope, 107 N. Y. 674.

Q. A agrees with B to deliver to him at his store in three days, fifty barrels of salt at $3 per barrel. The next day salt falls in price, and B refuses to accept the salt upon its delivery. What are A's rights?

A. A can sue for breach of contract; the damages recoverable being the difference between the contract price and the market price. The facts show merely a contract and not a sale.

Q. A and B enter into a contract on May 1, 1897, whereby the latter agrees to buy of A a certain farm, title to be given and purchase price paid January 1, 1898. On October 1, 1897, a barn on the farm, which is not worth much, burns. January 1, 1898, A tenders deed, but B refuses to accept or pay the contract price. What are the rights of the parties? Answer fully.

A. A cannot compel B to take the land. The agreement had

reference to the existence of the property in substantially the same condition, reasonable wear and tear excepted, as it was at the time, and performance of the agreement by the vendor being rendered impossible by the fire, the vendee was not bound. He was entitled to the property in the condition it was in when the agreement was made, and a refusal to take the property after the barn had been destroyed by fire was not a breach of contract. See Smyth v. Sturges, 108 N. Y. 495; Goldman v. Rosenberg, 116 N. Y. 78.

Q. A agrees by written contract to employ B at $10 per week for an indefinite time, and B agrees to give A three weeks' notice in writing before leaving or forfeit $200. B works for twenty weeks without drawing salary, and then leaves without giving A any notice. B sues A to recover $200, as salary due. A sets up the agreement as a defense. Judgment for whom and why?

A. Judgment for B. The amount of damages agreed upon as a forfeiture is so much greater than the actual loss suffered, as to avoid the stipulation on the ground that it is a penalty. A can of course set up as a counterclaim his actual damage sustained by reason of B's breach. "Where the parties to a contract stipulate for a payment in liquidation of damages by a party in default, if the damages are in their nature uncertain and incapable of exact ascertainment, and may be dependent upon extrinsic consideration and circumstances, and the amount is not upon the face of the contract out of all proportion to the probable loss, it will be treated as liquidated damages. The fact that the sum agreed to be paid is termed by the parties a penalty, is not controlling upon the question of construction. It seems, however, that when the stipulated sum is disproportionate to the presumable or probable damage, or to a readily ascertainable loss, the courts will treat it as a penalty, and will relieve upon the principle that the precise sum was not the essence of the agreement, but was in the nature of a security for performance." Gray, J., in Ward v. H. R. Bridge Co., 125 N. Y. 230.

Q. A and B agree to corner the price of wheat in the market, and thus raise the price. They each deposit the sum of $5,000 with C, as a forfeiture for a failure to perform by either one of them. A does not perform, and B sues C for the $10,000. A also

sues C for the return of the $5,000. What are the rights of the parties?

A. As this contract is illegal, being in restraint of trade, B cannot recover the $10,000, but can get a return of his $5,000 deposit. A is also entitled to the return of his $5,000. The contract being illegal, and therefore void, is not enforceable. See 15 Am. & Eng. Ency. of Law (2d ed.), 1007. See also Merritt v. Millard, 4 Keyes (N. Y.), 208; Woodworth v. Bennett, 43 N. Y. 273.

Q. A was a manufacturer of matches in New York. He sold his stock, trade-marks and good will to the X Corporation, at the same time agreeing not to engage in the manufacture and sale of matches within any of the several states of the United States, excepting Nevada. Thereafter A started a match factory in New Jersey. The X Company brings action to restrain A from carrying on the factory. Can the action be maintained?

A. Yes. The contract is not void, as being in restraint of trade, as the restraint is not general. Here the party was not restrained from carrying on the match business entirely, as the terms of the contract gave him the right to carry on the match business in Nevada, thus saving the contract from invalidity. See Diamond Match Co. v. Roeber, 106 N. Y. 473.

Q. A agreed orally to sell to B a certain house and lot, and to do painting thereon, for $40,000. B paid the money, and A conveyed the house and lot by deed, properly executed, but failed to perform the labor as agreed. B sues for breach of contract, and A in defense sets up the Statute of Frauds.. Judgment for whom and why?

A. Judgment for A. The Statute of Frauds is a good defense, as a contract for the sale of land must be in writing, and where one part of a contract is void by the Statute of Frauds, the whole contract is void. In this case, the sale was void under the Statute of Frauds, and therefore the entire contract was void. The sale was legalized by the delivery of the deed, but the work to be done was not, and as there was one consideration for both, the clauses cannot be separated, and the action cannot be maintained. Dowe v. Way, 64 Barb. 255.

Q. A by written contract agrees to employ B for one year for

one hundred barrels of flour at $10 per barrel. At the end of the year A refuses to give B the one hundred barrels of flour, whereupon B sues A for $1,000 in money. Can he recover?

A. Yes. Where a party agrees to pay the value of services rendered in specific chattels or articles of property, and upon demand refuses or fails to deliver the property, the obligation is thereby converted into one for the payment of money. N. Y. News Pub. Co. v. Nat. S. S. Co., 148 N. Y. 39.

CHAPTER VIII.

Corporations.

Q. State the difference between a corporation and a joint stock company.

A. The distinction is very well drawn by Finch, J., in People ex rel. v. Coleman, 133 N. Y. 282, in the following language: "The debt of the corporation is its debt, and not that of its members, the debt of the joint stock company is the debt of the associates however enforced; the creation of the corporation merges and drowns the liability of its corporators, the creation of the stock company leaves unharmed and unchanged the liability of the associates; the one derives its existence from the contract of individuals, the other from the sovereignty of the State. The two are alike, but not the same. More or less they crowd upon and overlap each other, but without losing their identity, and so, while we cannot say that the joint stock company is a corporation, we can say that a joint stock company is a partnership with some of the powers of corporation."

Q. A Brooklyn manufacturing company fails to take certain necessary steps required by law to create a corporation. Subsequently the corporation purchases $2,000 worth of goods from A, and fails to pay for the same. A brings suit against the company to recover the amount of the purchase price. The company defends on the ground, that it was not a corporation at the time the debt was contracted. Judgment for whom and why?

A. Judgment for A, as the corporation is estopped from denying its corporate existence, by reason of its having held itself out as a corporation. "The papers filed by which the corporation is sought to be created are colorable, but so defective, that in a proceeding on the part of the state against it, it would for that reason be dissolved, yet by acts of user under such an organization it becomes a corporation de facto, and no advantage can be taken

of such defect in its constitution collaterally by any person." Buffalo R. R. Co. v. Cary, 26 N. Y. 75.

Q. A corporation failed to file a duplicate certificate of incorporation as required by statute. A purchases goods from the corporation to the value of $5,000; and in an action for the price by the corporation against him, he sets up the non-incorporation as a defense. Is the defense good? Give your reasons.

A. The defense must fail. "A party who has entered into a contract with another, in which the latter assumes to be, and contracts as a corporation, is estopped from denying the corporate existence, and cannot resist an action brought by the corporation against him on the contract." U. S. Vinegar Co. v. Schlegel, 143 N. Y. 537. "To establish a corporation de facto against one who has recognized the corporate character by contracting with it, it is sufficient to show the existence of a law authorizing its formation, proceedings taken for that purpose in professed compliance with the law, and subsequent acts of user." Methodist Church v. Pickett, 19 N. Y. 482.

Q. Defendant was sued by plaintiff, a creditor of a corporation, to enforce defendant's liability as a stockholder thereof, for a debt contracted while the latter was a stockholder of record and managing director. Defendant answers that there was no such corporation, the same not having been incorporated according to statute. Plaintiff demurs. Judgment for whom and why?

A. The demurrer should be sustained. "A defect in the proceedings to organize a corporation is no defense to a stockholder sued to enforce his individual liability, who has participated in its acts of user as a corporation de facto, and appeared as a stockholder upon its books, when the debt for which he is sued was contracted." Eaton v. Aspinwall, 19 N. Y. 137.

Q. The New York statute requires a certificate of incorporation of a corporation to be signed by a justice of the supreme court and a copy filed with the secretary of state, and also a copy with the county clerk. B contracted with the X Company as a corporation, and now seeks to hold the stockholders liable individually as partners, on the ground, that as the corporation had failed to file a copy of its certificate of incorporation with the county clerk,

the corporation was never legally incorporated. Can the stockholders be held as partners ? Give reasons.

A. The stockholders are not liable as partners. "If an association assumes to enter into a contract in a corporate capacity, and a party dealing with the association contracts with it as if it were a corporation, the individual members of such association cannot be charged as parties to the contract, either severally, jointly, or as partners. This is equally true, whether the association was in fact a corporation, or not, and whether the contract with the association in its corporate capacity was authorized by the legislature or not. If an association undertakes to enter into a contract as a corporation, it is clear that the members of the association do not agree to be parties to the contract either jointly or severally. They do not agree to be bound as partners, either to each other, or to the party contracting with the association. It is equally clear that the party contracting with the association does not intend to contract with its members individually. To treat the individual members of the association as parties to the contract, under the circumstances, would not only involve the nullification of the contract which was contemplated by the parties, but the creation of a different contract which neither of the parties intended to make." Seacord v. Pendleton, 55 Hun, 579.

Q. The X Savings Bank acting as agent for an undisclosed principal, employs A as broker to purchase and sell for it, cotton for future delivery. A purchases certain cotton for the bank which the latter refuses to take, on the ground that it had no power or authority to deal in cotton. A brings an action against the bank for his commissions. Can he recover ?

A. No. "Speculative contracts entered into for the sale or purchase of stock by a savings bank at the stock board or elsewhere subject to the hazard and contingency of gain and loss, are ultra vires, and a perversion of the powers conferred by its charter. Contracts of corporations are ultra vires when they involve adventures or undertakings outside and not within the scope of power given by their charters. The plea of ultra vires will always prevail, unless it shall defeat justice or accomplish a legal wrong. The defense of ultra vires is not available if the contract be executed, for then the defendant is estopped from setting up such a

defense. But this doctrine has no application to executory contracts which are sought to be made the foundation of an action, or to contracts that are prohibited as against public policy. A corporation acting as the agent of an undisclosed principal, and so liable as principal, is entitled, when this liability is sought to be enforced, to all the rights and privileges that the law will give to it, if in fact it occupy the position of principal." Haight, J., in Jennison v. Bank, 122 N. Y. 135.

Q. The X Corporation, a railroad company, sells to the Y Company certain mirrors. In a suit for the contract price, the Y Company sets up that the X company was not authorized to manufacture and sell the goods. Is the defense good? State your reasons.

A. No, as the contract is executed. "Where a corporation has fully performed a contract on its part to manufacture and deliver certain articles, it is no defense to an action brought to recover the purchase price, that the contract was not within or incidental to its chartered powers and privileges, or for the purposes for which it was created." Whitney Arms Co. v. Barlow, 63 N. Y. 62. "A corporation cannot avail itself of the defense of ultra vires, when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. Lienkauf v. Lombard, 137 N.Y. 417.

Q. The X Company threatens to do an ultra vires act. A, a shareholder, objects and comes to you for advice. What are his rights?

A. He can restrain the act. A threatened abuse of the corporate powers may be arrested by the courts at the suit of a shareholder. (So also, the shareholders may recover their damages against the officers who have diverted the capital to improper uses.) (The state may also interpose, and reclaim the charter.) Bissel v. R. R., 22 N. Y. 258.

Q. A, together with B and C, was a promoter of a corporation. Realizing that the ownership of certain real estate would be necessary to the corporation, when formed, he purchased it with his own money. He then united with others in forming the corporation. B and C did not become members of the corporation. A subse-

quently sold the real estate to the corporation when formed, at an advance of 200% over the price paid by him therefor. He retained a portion of the profits himself, and divided the remainder of the profits between B and C. At the time of the purchase of the land by the corporation, the other stockholders had no knowledge. Upon learning of the facts, they object. What, if any remedy, have they, and against whom can it be enforced? Give your reasons in full.

A. The stockholders can compel A, B and C to account up to the amount of profits they made. "Where several persons are engaged in a joint enterprise for their mutual benefit, each has a right to demand and expect from his associates good faith in all that relates to their common interest, and no one of them will be permitted to take to himself a secret and separate advantage to the prejudice of the others; and where one, unknown to his associates, causes to be transferred to the association property previously purchased by himself, at a price exceeding that paid by him therefor, he is accountable to his associates for the profits thus made. In this adventure the three are regarded as partners. It matters not that the title to the lands was not in all the partners; after partners have divided the profits between them; they are certainly in no position to deny the existence of the partnership, and all are accountable for the profits to the corporation." Getty v. Devlin, 54 N. Y. 403.

(NOTE.) "It is only where the promoter informs every subscriber, or the director informs every fellow director and stockholder, that he is personally interested in and of the amount of profits he expects to make on a sale to the corporation, that a promoter or director will be permitted to retain or make a profit on such sale; and the burden is upon him to show that he took no advantage of his fellow subscribers or stockholders. Where only a part of the directors or stockholders have notice or knowledge of a sale of real estate, made by a promoter and director to the corporation, the latter cannot retain an individual profit, but must account therefor to the corporation in an action brought against him by it." Colton Imp. Co. v. Richter, 26 Misc. 26.

Q. A is a stockholder in a corporation. There is an accumulation of profits in the treasury, but the directors wrongfully refuse to declare a dividend. Has A any remedy, if so, what?

A. A can compel the directors to declare a dividend by mandamus. "Where the surplus profits of a corporation properly applicable to a dividend, are without doubt ample for the purpose, and

the directors or a majority of them, acting in bad faith and without reasonable cause, refuse to declare a dividend, the courts will interfere in favor of those stockholders who otherwise would be without remedy." Hiscock v. Lacy, 9 Misc. 578. "When a corporation has a surplus, whether a dividend shall be made, and if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors, uncontrollable by the courts. If the discretion is not fairly and honestly exercised, the inference is that the courts should interpose in behalf of the injured stockholders." Williams v. Western Union Tel Co., 93 N. Y. 162.

(NOTE.) "A shareholder in a corporation has no legal title to its property or profits until a division is made; and a contract by him in reference to dividends and profits upon his stock includes only dividends or profits ascertained and declared by the company and allotted to the stockholders." Hyatt v. Allen, 56 N. Y. 552.

Q. It is provided by the by-laws of a corporation that the manager should not have the power to contract debts above the amount of $1,000 without a vote of the board of directors. B, the manager, in violation of this provision of the by-laws, contracts with the X Company for certain goods to the amount of $5,000. The corporation refuses to receive or pay for the goods, and upon being sued sets up as a defense that B exceeded his authority. Is the corporation liable?

A. The corporation is liable, as the act was within the apparent scope of B's authority. "It follows from the general principle now well settled, to the effect that third persons may act upon the apparent authority conferred by the principal upon the agent, and are not bound by secret limitations or instructions qualifying the terms of the written or verbal appointment, that the defense based upon the limitation in the by-laws, of which plaintiff had no knowledge, cannot be sustained. By-laws of business corporations are, as to third persons, private regulations binding as between the corporation and its members, but of no force as limitations per se as to third persons of an authority which, except for the by-laws, would be construed as within the apparent scope of the agency." Rathbun v. Snow, 123 N. Y. 343.

Q. A is president of a railroad corporation. The majority of the directors individually, but not at any meeting of the board, give

consent to A's selling a greater part of the corporate land. A enters into a land contract with B, by which he agrees to transfer the same. Can specific performance be enforced? What rights, if any, has B?

A. B can get specific performance. The corporation is bound by the acts of the officer. A formal vote of the board of directors at a meeting is not necessary, in order to confer authority upon the officer, as the consent of the board may be given in any other informal way. "Nor is the presumption of authority of the president to execute the deed, afforded by the instrument itself, overcome by proof that no resolution authorizing its execution is found in the minutes of the board of directors. The presumption is, that the seal was rightfully affixed, by a person duly authorized, to any deed or other instrument on which it appears. This presumption will not be overcome by evidence of the mere fact that there has been no vote of the board of directors authorizing the execution of the instrument, since there are other ways of expressing the corporate assent." Mutual Life Ins. Co. v. Bank, 35 App. Div. 218. See also Thompson on Corporations, secs. 5106, 5107.

Q. A, B and C, directors of the X corporation, make a contract for the manufacture of certain goods with D, the goods being those which the corporation was incorporated to manufacture and sell. Subsequently the stockholders have a meeting and refuse to accept the contract as that of the corporation. The directors side with the stockholders. What are the rights of D? Is the corporation liable?

A. The corporation is liable as it is bound by the acts of its directors. The directors of a corporation are clothed with all the powers of the corporation, and are authorized to make any contract in its behalf that it is capable of making. Hamilton Trust Co. v. Clemes, 163 N. Y. 423.

Q. A and B, the secretary and treasurer of the X corporation, make an agreement with D to lease the latter certain corporate lands without consulting the board of directors. C, the president, with A and B who own nearly all the stock of the corporation assent to the making of the lease. A stockholder makes complaint. What are his rights, and is the corporation liable on the agreement?

A. The corporation is not bound, as the directors alone have

the power to make such agreements. A stockholder can get an injunction to prevent this act. "The secretary and treasurer of a corporation have no implied power to execute a lease of the corporate lands, and a person claiming under such a contract must prove that the secretary and treasurer had special authority to execute it. Acts and declarations of the secretary and treasurer and the president, who owned all but a few shares of the stock of the corporation, do not act as a ratification of the contract, in the absence of a resolution of the board of directors, or the acquiescence of all the stockholders." Broadway Theatre Co. v. Dessau Co., 45 App. Div. 475.

Q. The X corporation divides a certain amount of its capital stock among its shareholders, while various claims of its creditors are unliquidated. A, who is one of the creditors, sues the corporation and obtains judgment. He issues execution which is returned unsatisfied. A comes to you for advice. What are his remedies?

A. A can follow the property into the hands of the stockholders. "Where property of a corporation has been divided among its stockholders before all its debts have been paid, a judgment creditor after a return of an execution unsatisfied, may maintain an action in the nature of a creditor's bill against a stockholder to reach whatsoever was so received by him. It is immaterial whether he got it by fair agreement with his associates, or by a wrongful act. A creditor is not required to bring a suit on behalf of other creditors who may choose to come in, or to make all stockholders parties to the action. Assets of a corporation are a trust fund for the payment of its debts, and its creditors have a lien thereon and a right to priority of payment over its stockholders." Bartlett v. Drew, 57 N. Y. 587.

Q. A, a creditor of the X corporation, brings suit against the directors of the corporation for misappropriation of the corporate funds. The directors desiring to make restitution, come to you and ask you to hinder and delay the suit until they have an opportunity to do so. They also ask you to defend, on the ground that the creditor has no right to bring the suit. What would be your advice to them?

A. The defense is good. The corporation itself is the proper

party to bring the action; if it, however, refuses to do so, a stockholder may sue for himself and on behalf of all other stockholders. The creditor has no right to interfere with the affairs of a going corporation. There is nothing to show that his claim would not be paid. "An action against an officer of a corporation to recover damages for a fraudulent misappropriation and conversion by him of the corporate property, can only be brought by a stockholder in his own name, after application to, and a refusal on the part of the corporation to bring the suit. In case of such refusal, the stockholders may bring an action for the benefit of himself and the other stockholders, but must make the corporation a party defendant, alleging in his complaint and proving the refusal." Greaves v. Gough, 69 N. Y. 156.

Q. A owes ten shares of stock in the X corporation. At an election of directors, he attempts to cast ten votes, but the person in charge of the election refuses to allow him to do so, claiming that each stockholder is entitled to but one vote. Is this contention valid? What are A's rights?

A. This question is fully answered by sec. 20 of the Corp. Law of 1892, which is as follows: "Unless otherwise provided in the certificate of incorporation, every stockholder of record of a stock corporation shall be entitled at every meeting of the corporation to one vote for every share of stock standing in his name on the books of the corporation, and at a meeting of a non-stock corporation, every member, unless disqualified by the by-laws, shall be entitled to one vote."

Q. A client states to you that he is a stockholder and director in a corporation whose annual meeting for the election of directors is about to be held; that he is about to be re-elected a director by the stockholders; that under the by-laws of the corporation a meeting of the new board of directors must be held immediately after the election of the directors by the stockholders; that he will be unable to attend either of said meetings, and desires you to represent him at the meetings of the stockholders and directors, and to vote in his stead at the election of directors by the stockholders and at the subsequent meeting of the directors. What would you advise him?

A. A stockholder may vote by proxy, while a director cannot.

Sec. 21 of the Gen. Corp. Law of 1892 covers the question of proxy voting, and is as follows: "Every member of a corporation except a religious corporation entitled to vote at any meeting thereof may so vote by proxy. No officer, clerk, teller or bookkeeper of a corporation formed under or subject to the banking law, shall act as proxy for any stockholder at any meeting of any such corporation. Every proxy must be executed in writing by the member himself, or by his duly authorized attorney. No proxy hereafter made shall be valid after the expiration of eleven months from the date of its execution, unless the member executing it shall have specified therein the length of time it is to continue in force, which shall be for some limited period. Every proxy shall be revocable at the pleasure of the person executing it, but a corporation having no capital stock may prescribe in its by-laws, the persons who may act as proxies, and the length of time for which proxies may be executed." No director or trustee of a corporation can vote at a meeting of a board of directors by proxy. Craig Med. Co. v. Bank, 59 Hun, 561.

Q. The by-laws of the X corporation provide that an election of directors shall be held once a year. The board elected July, 1899, is sued for failing to file an annual report in May, 1901, no election having been held in 1900. The directors defend on the ground that their terms of office ended July, 1900, and that they are not liable for subsequent acts of the corporation. Is the defense good?

A. The defense is not good. Sec. 23 of the Corp. Law of 1892 provides: "If the directors shall not be elected on the day designated in the by-laws, the corporation shall not for that reason be dissolved; but every director shall continue to hold his office and discharge his duties until his successor has been elected." Therefore in this case, the directors continuing as such, are liable for the failure to file an annual report.

Q. The by-laws of a corporation provide that a majority of the board of directors, at a meeting duly assembled, shall constitute a quorum for the transaction of its business. The board of directors consisted of five members. At a meeting duly called, three directors were present; two voted to sell a piece of the corporation's real estate to your client, and one voted against it. Is the title good? Reasons.

A. Title is good according to the provisions of sec. 29 of the Corp. Law of 1892, which are as follows: "The affairs of every corporation shall be managed by its board of directors, at least one of whom shall be a resident of this state. Unless otherwise provided by law, a majority of the board of directors of a corporation at a meeting duly assembled shall be necessary to constitute a quorum for the transaction of business, and the act of a majority present at a meeting at which a quorum is present, shall be the act of the board of directors."

Q. The X corporation was dissolved, and thereafter the directors of said corporation sued A to recover a debt due by him to the corporation. A demurs on the ground that the directors have no legal capacity to sue. Judgment for whom and why?

A. Judgment for the directors. Sec. 30 of the Corp. Law of 1892, is as follows: "Upon the dissolution of any corporation, its directors unless other persons shall be appointed by the legislature or by some court of competent jurisdiction shall be the trustees of its creditors, stockholders or members, and shall have full power to settle its affairs, collect and pay outstanding debts, and divide among the persons entitled thereto, the money and other property remaining after the payment of debts and necessary expenses. Such trustees shall have authority to sue for and recover the debts and property of the corporation, by their names as such trustees, and shall jointly and severally be personally liable to its creditors, stockholders, or members to the extent of its property and effects that shall come into their hands."

Q. The X corporation is incorporated in 1897, to manufacture cigars. It does not begin its business until 1900. A question arises as to the existence of the X corporation. Give your opinion as to whether or not the corporation has a legal existence.

A. This question is fully answered by sec. 31 of the Corp. Law of 1892, which is as follows: "If any corporation, except a railroad, turnpike, plankroad, or bridge corporation, shall not organize and commence the transaction of its business or undertake the discharge of its corporate duties within two years from the date of its incorporation, its corporate powers shall cease."

Q. The X corporation, finding that its term of existence is about

to expire, comes to you and asks how and in what manner its term of existence may be extended. What would your advice be?

A. Sec. 32 of the Stock Corp. Law of 1892, covers this point, and is as follows: "Any domestic corporation at any time before the expiration thereof, may extend the time of its existence beyond the time specified in its original certificate of incorporation or by-law, or in any certificate of extension of corporate existence, by consent of the stockholders owning two thirds in amount of its capital stock, or if not a stock corporation, by two thirds of its members, which consent shall be given, either in writing, or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meeting of stockholders."

Q. Testator gives to A the income of one hundred shares of stock, and after his death the shares to go to B. After testator's death, the corporation issues twenty-five shares of new stock to eat up the surplus profits. To whom does the new stock belong, A or B?

A. The shares of stock belong to A. "When a stock dividend declared by a corporation, and allotted to shares of its original capital stock, belonging to a testamentary trust estate, constitutes as matter of fact a distribution of accumulated earnings or profits, it represents income, and belongs to the life tenant of the trust estate, as between him and the remainderman. The courts are not concluded from treating such earnings as income, by the form of their distribution, as in shares of stock." McLouth v. Hunt, 154 N. Y. 179.

Q. A was the owner of stock in the X corporation. He sells it to B. B makes application to the officers of the corporation to issue him a certificate. They refuse on the ground that the corporation has a large claim against A. Rights of B and why? Answer fully.

A. The corporation can only refuse a transfer of the stock when sec. 26 of the Stock Corp. Law of 1892, is written or printed upon the certificate. This section is as follows: "If a stockholder shall be indebted to the corporation, the directors may refuse to consent to a transfer of his stock until such indebtedness is paid, provided

a copy of this section is written or printed upon the certificate of stock." Irrespective of the question of indebtedness, it is well settled that an equitable action will lie to compel a transfer on its books by a corporation of shares of its capital stock to the owner of the same. Cushman v. Thayer, 76 N. Y. 365. In that case the court said: "It is easy to see that the party may have become the owner or purchaser of stock in a corporation, which he desires to hold as a permanent investment, which may be at the time of but little value, in fact without any market value whatever, and its real worth may consist in the prospective rise which the owner has reason to anticipate will follow from facts within his knowledge. To say that the holder shall be entitled to the stock, because the corporation, without any just reason, refuses to transfer it, and that he shall be left to pursue the remedy of an action for damages, in which he can recover a nominal amount, would establish a rule which must work great injustice in many cases, and confer a power on corporate bodies which has no sanction in the law."

Q. A, having recovered judgment against the corporation, wishes to bring suit against certain stockholders in the X corporation and desires to know their names. He applies to the corporation for leave to inspect its books, but the corporation refuses his request. A comes to you for advice. What are his rights?

A. He can compel the corporation to allow him to inspect its books, for sec. 29 of the Stock Corp. Law of 1892 provides as follows: "Every stock corporation shall keep at its office, correct books of account of all its business and transactions, and a book to be known as a stock book containing the names of all the stockholders of the corporation, showing their places of residence, number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon. The stock book of every such corporation shall be open daily during at least three business hours for the inspection of its stockholders and judgment creditors who may make extracts therefrom. . . . Every corporation that shall neglect, or refuse to keep, or cause to be kept such books, or to keep any book open for inspection as herein provided, shall forfeit to the people the sum of fifty dollars for every day it shall so refuse or neglect. If any officer or agent of any such corporation shall wilfully neglect or refuse to make any proper entry in such book or books, or shall refuse

or neglect to exhibit the same, or allow them to be inspected and extracts taken therefrom as provided for in this section, the corporation and such officer or agent shall each forfeit and pay to the party injured a penalty of fifty dollars for every such neglect or refusal, and all damages resulting therefrom."

Q. The directors of the X corporation fail to file an annual report as prescribed by law. B, a creditor, sues one of the directors upon a debt which accrued subsequent to the failure of the directors to file their report. The director demurs on the ground that B must first sue the corporation, and furthermore that he must join the other directors as defendants with him. Judgment for whom and why?

A. Judgment for B. "Under the provisions of sec. 30 of the Stock Corp. Law of 1892 compelling every corporation, except moneyed or railroad corporations, to furnish a complete and accurate statement of its financial condition and responsibility at the commencement of each year, an action in case of the violation of this section can be maintained against any one director thereof, and the recovery of a judgment against the corporation and the issue of an execution thereon and its return unsatisfied, are not conditions precedent to the bringing of such action." Milsom Co. v. Baker, 16 App. Div. 581.

Q. A sells 100 shares of stock to B. B demands that the corporation place his name upon the books as a shareholder which is refused by the corporation. Has the corporation a right to refuse to recognize the demands of B? If so, why so? If not, why not? Give reasons.

A. The corporation has no right to refuse a transfer on the books of the corporation, unless the stock was not fully paid up. Sec. 40 of the Stock Corp. Law of 1892, providing in part as follows: "No share shall be transferable until all previous calls thereon shall have been fully paid in."

Q. A sells certain property to the X corporation for $5,000, the property being necessary for the corporate purposes. Subsequently the corporation issues a call on said stock claiming that the value of the property was only $3,500. A refuses to pay and consults you. What are his rights?

A. He can hold the stock as fully paid stock, and need not pay any calls thereon, according to sec. 42 of the Stock Corp. Law of 1892, which is as follows: "No corporation shall issue either stock or bonds except for money, labor done, or property actually received for the use and lawful purposes of such corporation. Any corporation may purchase any property authorized by its certificate of incorporation or necessary for the use and lawful purposes of such corporation, and may issue stock to the value of the amount thereof in payment therefor, and the stock so issued shall be full paid stock, and not liable for any further call; neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and in the absence of fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation, by law required to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported as being issued for property purchased."

Q. A corporation engaged in the manufacture of clothing becomes insolvent, and executes a chattel mortgage upon its machines as collateral security for its commercial paper in order to give preference to the holders thereof. Is this mortgage valid as against the other creditors?

A. The mortgage is void as against the other creditors, as preferences by an insolvent corporation are not permitted by sec. 48 of the Stock Corp. Law of 1892, which is as follows: "No corporation which shall have refused to pay any of its notes or other obligations when due, in lawful money of the United States nor any of its officers or directors shall transfer any of its property to any of its officers, directors, or stockholders directly or indirectly for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment, or transfer of any property of any such corporation, by it, or by any officer, director, or stockholder thereof, nor any payment made, judgment suffered, lien created, or security given by it, or by any officer, director, or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation shall be valid, except that laborer's wages for services shall be pre-

ferred claims and be entitled to payment before any other creditors, out of the corporate assets in excess of valid prior liens or encumbrances. Every person receiving by means of any of such prohibited acts or deeds any property of the corporation shall be liable to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of this section shall be void. Every director or officer of a corporation who shall violate or be concerned in violating any provision of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be a director or officer, to the full extent of any loss they may respectively sustain by such violation."

Q. The X corporation becomes insolvent and makes an assignment in which two of its directors are preferred. Two of the creditors put in their claims before the referee, and then move before the referee to reject the preferred claims on the ground of the invalidity of the preference. What are the rights of the parties, and should the motion have been made before the referee?

A. The preference is void, and the referee has power to pass on its validity, it being a violation of sec. 48 of the Stock Corp. Law of 1892, supra. In Berwind Co. v. Ewart, 11 Misc. 490, it was so held.

Q. An insolvent manufacturing corporation owes a bona fide debt to A, one of the directors, to which it has no defense. A sues and recovers judgment by default, levies upon the property of the corporation and sells it to pay his debt. A receiver is appointed and finds no tangible assets. What are the rights of the receiver in the premises, if any, and how would you enforce them?

A. The receiver can have the judgment vacated. In Kingsley v. Bank, 31 Hun, 329, it was held: "That as A was a stockholder in, and a director of the company, it was his duty to do all in his power to carry out the object and purpose of the law, and secure equality of payment among the creditors of the company; that the entry of judgment by him in his own favor against the company, while it was insolvent, and the levy made and the execution issued

thereon was a violation of such duty, and that the judgment should be vacated and annulled on the receiver's application."

(NOTE.) In Throop v. Hatch Co., 125 N. Y. 530, it was said by the court: "That sec. 48 prohibits the acquisition by a director of an insolvent corporation who is also a creditor, through process of attachment, of a preferential lien on the corporate assets; and this although the writ was issued in hostility to, and not in collusion with, the corporation." See 161 N.Y. 539.

Correction

Q. A, the director of the X corporation, and certain creditors thereof, agree that the creditors should sue the corporation by service upon A, and that A, the director, would not report the service to the officers and other directors, and that the creditors might take judgment. This was done as agreed. Is there any valid objection to the judgment?

A. There is no objection to the judgment. The case of Varnum v. Hart, 119 N. Y. 101, is exactly in point; it was there held: "That the statute was not violated, as neither creditor nor director was under any statutory restraint; and that there was no violation of the statute by a failure of the director to disclose the fact of the service of the papers upon him, whereby a debt really existing and honestly due obtained a preference. Neither the director who was served nor the other officers if they had known of the service of the papers were bound to interpose a defense; and whatever was done or authorized to be done or omitted, the fact remains that there was no assignment or transfer of the property, and hence no violation of the statute. An insolvent corporation is not obliged to defend any suit brought against it, for a valid debt, against which there is no valid legal defense, for the sole purpose of defeating a preference; it may suffer default, and thus allow a preference." This case was cited with approval in French v. Andrews, 145 N. Y. 445, and in Lopez v. Campbell, 163 N. Y. 340. In this last case it was held that the rule laid down in Varnum v. Hart, supra, has not been changed even though sec. 48 has been amended.

Q. The X corporation issues fully paid up stock to A. In fact A has only paid 20% of the par value of said stock. The corporation becomes insolvent and a receiver is appointed. The receiver calls upon A to pay the remaining 80% of his stock. A refuses, and the receiver brings an action to compel him to do so. Can the action be maintained?

A. Yes. Sec. 54 of the Stock Corp. Law of 1892, provides in

part as follows: "Every holder of capital stock not fully paid, in any stock corporation shall be personally liable to its creditors to an amount equal to the amount unpaid on the stock held by him, for the debts of the corporation contracted while such stock was held by him." Contra. 205 N.Y. 559 –

Q. A does certain painting for the X corporation, which afterwards becomes insolvent. A, not having been paid for his work, sues B, one of the stockholders. Can the action be maintained? If you had been A's attorney, what would you have done?

A. The action cannot be maintained without first exhausting the remedies against the corporation, and otherwise complying with sec. 54 of the Stock Corp. Law of 1892, which is in part as follows: "The stockholders of every stock corporation shall jointly and severally be personally liable for all debts due and owing to any of its laborers, servants or employees, other than contractors, for services performed by them for such corporation. Before such laborer, servant or employee, shall charge such shareholder for such services, he shall give him notice in writing within thirty days after the termination of such services that he intends to hold him liable, and shall commence an action therefor within thirty days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for such services." Sec. 55 provides that: "No action shall be brought against a stockholder for a debt of the corporation, until judgment therefor has been recovered against the corporation, and an execution thereon has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against the stockholder."

Q. A, an officer of a corporation, lends to the corporation $10,000, and takes a bond of the corporation as security. The corporation at that time was solvent. Six months later, the corporation becomes insolvent and a receiver is appointed. A attempts to prove his claim on the bond before the receiver. The claim is disallowed. A takes legal steps to enforce his claim with the other creditors. Can he succeed?

A. Yes. A had a right to secure himself for the advances made, and in the absence of proof of fraud, or of an improper or undue advantage taken, or the insolvency of the company at the time he

took the bond, to prove them for the full amount, and to share in the distribution up to the amount of his claim. There is nothing inconsistent with his position as officer to loan money to the corporation, and to secure himself for the loan made, therefore he has equal rights with the other creditors. Duncomb v. R. R., 88 N. Y. 1.

Q. The president of the X corporation is voted an extra compensation by the directors of said corporation, for services performed. A, a stockholder objecting, comes to you for advice. What are his rights, if any.

A. The president, in the absence of an agreement, is not entitled to an extra compensation, and if money is paid to him by the directors, the latter become liable therefor. Barril v. Callendar Co., 50 Hun, 257.

CHAPTER IX.

Criminal Law.

Q. State the legal presumption as to the responsibility of an infant for his crimes.

A. Sec. 18 of the Penal Code provides: "A child under the age of seven years is not capable of committing crime." Sec. 19 further provides in part as follows: "A child of the age of seven years, and under the age of twelve years, is presumed to be incapable of crime, but the presumption may be removed by proof that he had sufficient capacity to understand the act or neglect charged against him, and to know its wrongfulness." Otherwise infants are liable for their crimes, the same as adults.

Q. A was indicted for murder in the first degree; he admitted the killing, but offered evidence to show that when he committed the deed, he was in a state of voluntary intoxication, and offered no other evidence. The evidence is objected to as irrelevant and incompetent. Was the evidence admissible? If so, for what purpose, and what is the general rule? State whether or not voluntary intoxication is a defense to a crime.

A. Voluntary intoxication is no defense to a crime, but is admissible in evidence to show intent. Sec. 22 of the Penal Code covers this question, and is as follows: "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such a condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

Q. Husband and wife are jointly indicted for robbery in the first degree. State the general rule governing the liability of the wife.

A. Sec. 24 of the Penal Code is as follows: "It is not a defense, to a married woman charged with crime, that the alleged criminal act was committed by her in the presence of her husband." There is, however, a presumption of coercion raised by the presence of the husband which may be rebutted. This presumption prima facie relieves the wife from liability, but if she actively participates, she is also liable. People v. Ryland, 97 N. Y. 126.

Q. A holds B, while C, A's wife, takes B's pocketbook containing $2,000 from him (B). A and C are subsequently indicted for robbery. At the trial, the attorney for the prisoners asks the court to discharge the wife on the ground that the act was committed in the presence of her husband, and therefore she was not responsible. What should the ruling of the court be?

A. The motion should be denied, as the wife is liable, she having actively assisted in the commission of the crime. "A husband and wife may be jointly indicted and convicted of a crime, where it appears that they were both guilty of the offense charged, and it is shown that there was no coercion, as in such case the wife acts in her own capacity, as one able to commit crimes, and of her own accord and intent, the same as if she were an unmarried woman." Goldstein v. People, 82 N. Y. 231.

Q. A instructs B, his wife, to go on Broadway to pick pockets. In obedience to his instructions, she goes there and picks D's pocket, the husband not being present at the time. The wife is indicted for grand larceny. Is she liable? State the rule.

A. Yes. "The presumption of coercion, which excuses a wife for a larceny committed in the company of her husband is prima facie; not conclusive. If it appears that she was not urged to the offense by him, but was an inciter of it, she is liable as well as he. It is the presence of the husband which raises the presumption, and if the wife commits the offence, by the bare command or procurement of the husband, when he is not present, she is liable." Seiler v. People 77 N. Y. 411.

Q. A is given a $20 bill by his employer, with instructions to go to the market and purchase certain goods. On the way he is met by B, who induces him to misappropriate the money. Of what crime, if any, is B guilty?

A. B is guilty of petit larceny, as the amount misappropriated is less than $25. As B aided and abetted, he is deemed a principal within the provisions of sec. 29 of the Penal Code, which is as follows: "A person concerned in the commission of a crime, whether he directly commits the acts constituting the offense, or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal." This section abolishes the common-law distinction between accessories before and after the fact, the former being included in the definition of a principal. Accessory, corresponding to the common-law accessory after the fact, is defined in sec. 30 of the Penal Code as follows: "A person who, after the commission of a felony, harbors, conceals or aids the offender, with intent that he may avoid or escape from arrest, trial, conviction, or punishment, having knowledge or reasonable ground to believe, that such offender is liable to arrest, has been arrested, is indicted or convicted, or has committed a felony, is an accessory to the felony." In this case, even if B were not held to come within the statutory definition of a principal, he would yet be liable, as petit larceny is a misdemeanor (sec. 535, Penal Code), and all are considered as principals in misdemeanors, according to sec. 31, which is as follows: "A person who commits or participates in an act which would make him an accessory if the crime committed were a felony, is a principal, and may be indicted and punished as such, if the crime be a misdemeanor."

Q. A lies in wait for the carriage of B to pass, in which he supposes B to be riding. B has, however, left the carriage just before reaching the spot. A shoots through the carriage top supposing B to be there. Is A guilty of a crime, and if so, what?

A. A is guilty of attempted murder. "An attempt to commit a crime may be effectual, although for some reason undiscoverable by the intending perpetrator, the crime, under existing circumstances, may be incapable of accomplishment." People v. Moran, 123 N. Y. 254. Sec. 34 of the Penal Code provides as follows: "An act done with intent to commit a crime and tending but failing to effect its commission, is an attempt to commit that crime."

(NOTE.) An approach with intent to commit an assault, although not near enough to enable it to be committed, constitutes an attempt to commit the assault. People v. McConnel, 60 Hun, 113.

Q. A was walking down Broadway. B puts his hand in A's pocket. At the trial, it appears that there was nothing in the pocket. Is B guilty of a crime, and if so, what?

A. B is guilty of attempting to commit grand larceny in the second degree. In People v. Moran, supra, it was held that a person commits the crime of attempting to commit the crime of grand larceny in the second degree, who puts his hand in the pocket of a garment upon the person of another, with intent to steal what may be in that pocket, even though there is nothing in the pocket.

Q. A in the nighttime passes through an alley in the rear of the store of B, with the intention of robbing the same. He reconnoitres the premises. He has with him at the time burglar tools, which he does not consider strong enough. He leaves them near the store, and goes to a neighboring blacksmith's shop, and obtains a crowbar and returns. On his return, a detective who has been watching him, arrests him before he commences to act. Is A guilty of any crime?

A. A is guilty of attempt to commit burglary. "The act of getting the proper instruments, whether from the blacksmith's shop or elsewhere, was as much an act to enable him to commit the offense, as it would have been if he had taken the crowbar for the purpose, which he had happened to find beside the door of the store. In order to constitute an attempt to commit a crime, there must be more than a mere design, there must have been some ineffectual act or acts towards its accomplishment." People v. Lawton, 56 Barb. 126. 173 N.Y. 122.

Q. A takes poison intending to end his life. He is taken to a hospital where he recovers. Is he guilty of a crime, and if so, what? Is suicide a crime?

A. Suicide is not a crime according to sec. 173 of the Penal Code, which is as follows: "Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed." But an attempt to commit suicide is a felony, according to secs. 174 and 178, which are as follows: "A person who, with intent to take his own life, commits upon himself any act dangerous to human life, or which, if committed upon or towards another person, and followed by death as a consequence, would render the perpetrator chargeable with

homicide, is guilty of attempting suicide." Sec. 178 says: "Every person guilty of attempting suicide is guilty of a felony, punishable by imprisonment in a state prison for not exceeding two years, or by a fine not exceeding $1,000 or both."

Q. A is charged with the murder of B. A dismembered body is found, but the prosecuting attorney cannot prove that it is the body of B. A's attorney moves for a dismissal of the indictment. What should be the ruling of the court?

A. The motion should be granted. Sec. 181 of the Penal Code provides as follow: "No person can be convicted of murder or manslaughter, unless the death of the person alleged to have been killed, and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt."

Q. A strikes B with his fist. B immediately draws a pistol and shoots him dead. B is indicted, and on his trial, his counsel moves for his discharge, on the ground that the killing was done in self-defense. Should the motion be granted?

A. No. "One who is without fault himself, when attacked by another, may kill his assailant, if the circumstances be such as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and the danger is imminent. But this principle will not justify one in returning blows with a dangerous weapon, when he is struck with the naked hand, and there is no reason to apprehend a design to do him great bodily harm. Nor will it justify homicide, when combat can be avoided, or where after it has been commenced, the party can withdraw from it in safety before he kills his adversary." Shorter v. People, 2 N. Y. 193.

Q. A burglariously breaks into the house of B. B attempts to capture him, and while so doing is shot by A. A is arrested and indicted for murder in the first degree. At the trial, his attorney asks for a dismissal of the indictment on the ground that there was no premeditation and deliberation. What should be the ruling of the court?

A. The motion should be denied. The killing of any human being, while engaged in the commission of a felony (as a burglary)

is murder in the first degree, whether the felony was committed upon or affects any person or concerns property only. People v. Greenwall, 115 N. Y. 520. Sec. 183 of the Penal Code defines murder in the first degree as follows: "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed, either 1. From a deliberated and premeditated design to effect the death of the person killed, or of another; or 2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; or 3. When perpetrated in committing the crime of arson in the first degree."

Q. A and B are engaged in a quarrel, and come to blows. B strikes A with his fist causing A to fall down, and fatally injure himself. B is indicted and tried for murder. Can he be convicted?

A. No. He can only be convicted of manslaughter. Sec. 193 of the Penal Code, defining manslaughter in the second degree, is as follows: "Such homicide is manslaughter in the second degree when committed without a design to effect death, either 1. By a person committing or attempting to commit a trespass, or other invasion of a private right either of the person killed, or of another not amounting to a crime; or 2. In the heat of passion, but not by a dangerous weapon, or by the use of means either cruel or unusual; or 3. By an act, procurement, or culpable negligence of any person, which, according to the provisions of this chapter, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree." A homicide may only be classed as manslaughter when there is no design to kill; when that purpose is present, the crime is murder in one of its degrees. Deliberation is there, when there is sufficient opportunity for reflection, that reflection was had, and choice was made with full opportunity to chose otherwise. People v. Beckwith, 103 N. Y. 360.

Q. Define justifiable and excusable homicide, and are the terms synonymous?

A. The terms are not synonymous. Excusable homicide is de-

fined in sec. 203 of the Penal Code as follows: "Homicide is excusable when committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any lawful act, by lawful means, with ordinary caution, and without any unlawful intent." Secs. 204 and 205 define justifiable homicide, and are as follows: "Homicide is justifiable when committed by a public officer, or a person acting by his command, and in his aid and assistance, either 1. In obedience to the judgment of a competent court; or 2. Necessarily in overcoming actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty; or 3. Necessarily in retaking a prisoner who has committed, or who has been arrested for, or convicted of, a felony, and who has escaped or has been rescued, or in arresting a person who has committed a felony and is fleeing from justice; or in attempting by lawful ways and means to apprehend a person for a felony actually committed, or in lawfully suppressing a riot, or in lawfully preserving the peace." Sec. 205 says: "Homicide is also justifiable when committed, either 1. In the lawful defense of the slayer, or of his or her husband, wife, parent, child, brother, sister, master or servant, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slaying to commit a felony, or to do some great personal injury to the slayer, or to any such person, and there is imminent danger of such design being accomplished; or 2. In the actual resistance of an attempt to commit a felony on the slayer, in his presence, or upon or in a dwelling or other place of abode in which he is."

Q. While A is sitting in his room counting money, B enters with a loaded pistol in his hand, and points it at A, demanding the money. A, becoming frightened, immediately drops the money, and runs out of the room. B then gathers up the money which A left, and runs away. Of what crime is B guilty?

A. Seemingly this does not come within the statutory definition of robbery, which requires the taking to be in the presence of the one robbed. Sec. 224 of the Penal Code, defining robbery, is as follows: "Robbery is the unlawful taking of personal property, from the person or in the presence of another against his will, by means of force, or violence, or fear of injury, immediate or future, to his person or property, or the person or property of a relative or

member of his family, or of any one in his company at the time of the robbery." There seem to be no New York decisions in point, but in the case of State v. Calhoun, 72 Ia. 432, it was held: "It is not necessary in order to constitute the crime of robbery, that the property should actually be taken from the person of the victim, or from his immediate presence; and when the victim is bound in the room of his house, and through fear of personal violence is induced to tell his assailant where his property may be found in another room, and the assailant goes into such room and finds and takes the property, this is 'a taking from the person' within the meaning of the statute." If this question were fairly put to our courts, it would probably be held to be robbery. Of course, if B is not guilty of robbery, he is clearly guilty of larceny.

Q. A is standing on a street corner, and takes his wallet from his pocket for the purpose of taking a coin therefrom to purchase something. B comes along and snatches it from his hand. Is B guilty of robbery?

A. No. This is merely larceny, and not robbery. Violence as used in the Penal Code implies overcoming, or attempting to overcome an actual resistance, or prevent such resistance through fear. People v. Hall, 6 Park. Cr. Rep. 642; People v. McGinty, 24 Hun, 62.

Q. A picks B's pocket and runs off. B pursues him, and upon coming up with him attempts to seize him. A, for the purpose of effecting his escape, draws a pistol, whereupon B desists. Several days later A is arrested, and subsequently indicted and tried for robbery. Can he be convicted?

A. No, for this is not robbery, according to sec. 225 of the Penal Code, which is as follows: "To constitute robbery, the force or fear must be employed either to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. If employed merely as a means of escape, it does not constitute robbery."

Q. A takes B's watch and chain from B's pocket. B, upon discovering this, grapples with him, and attempts to retake his property, whereupon A strikes him a heavy blow causing him to release

his hold upon the watch and chain. A then makes good his escape with the property. Of what crime is A guilty?

A. A is guilty of robbery. The force was here employed for the purpose of retaining possession of the property, and constitutes robbery within the provisions of secs. 224 and 225, supra. "Although the thief may have secured possession of the property of another without force or violence, the removal of the property from the presence of that other with force or violence constitutes robbery." People v. Glynn, 54 Hun, 332.

Q. A and B are husband and wife. A, the husband, leaves the country, and is not heard of for more than five years. B, the wife, believing him to be dead, marries C. Of what crime, if any, is B guilty?

A. B is not guilty of any crime, within the meaning of secs. 298 and 299 of the Penal Code which are as follows: "A person who having a husband or wife living, marries another person, is guilty of bigamy, and is punishable by imprisonment in the penitentiary or state prison for no more than five years." Sec. 299 says: "The last section does not extend, 1. To a person whose former husband or wife has been absent for five years successively then last past, without being known to him or her within that time to be living, and believed by him or her to be dead; or 2. To a person whose former marriage has been pronounced void, or annulled, or dissolved, by the judgment of a court of competent jurisdiction, for a cause other than his or her adultery; or 3. To a person who, being divorced for his or her adultery, has received from the court which pronounced the divorce, permission to marry again; or 4. To a person whose husband or wife has been sentenced to imprisonment for life."

Q. A, the wife of B, learns that B is living in another state with another woman. A consults a lawyer, and asks him if she may lawfully marry again. The lawyer informed her that she could. A acted in good faith, and stated all the facts to the lawyer. She marries again after five years. What crime, if any, is she guilty of?

A. A is guilty of bigamy, for according to sec. 299, supra, the husband or wife, in order to have the right to marry again, must believe the other to be dead, and the advice of counsel does not

alter the matter. The case of People v. Meyer, 8 St. Rep. 256, is in point. "The defendant was asked whether he had stated to a lawyer, that his wife had been absent over five years, that he had made diligent search to ascertain her whereabouts, and was unable to do so; also whether the lawyer did not inform him that he had a right to marry. Held that the questions had no material bearing on the question of his belief in the death of his wife, and were incompetent."

Q. A, an unmarried man marries B knowing her to be the wife of C, and also knowing that C is living in Canada. Of what crime, if any, is A guilty?

A. A is guilty of bigamy, according to sec. 301 of the Penal Code, which is as follows: "A person who knowingly enters into a marriage with another, which is prohibited to the latter by the foregoing provisions of this chapter, is punishable by imprisonment in a penitentiary or state prison for not more than five years, or by a fine of not more than $1,000, or both."

Q. A's coachman is sleeping in a room which is fitted up for him in A's barn. B, thinking that the coachman has gone away for the night, sets fire to the barn, but the fire is extinguished before any material harm is done. B is indicted, tried and convicted of arson in the first degree. On appeal, B's counsel asks that the judgment be reversed on the following grounds: (*a*) That the indictment did not allege or the proof show any intention to burn the building. (*b*) That B did not know that there was a man in the building. (*c*) That the barn was not a dwelling house. (*d*) That nobody was injured. Should the judgment be reversed? State your opinion on each one of these sub-divisions.

A. (*a*) This contention is not valid. It is not necessary to charge in an indictment, or to prove upon the trial, that the defendant set the fire with the intent to destroy the building. People v. Fanshawe, 137 N. Y. 68. (*b*) It is not necessary that the defendant should know that a human being is present in the building, if it is a dwelling house, according to sec. 486 of the Penal Code, which is as follows: "A person who wilfully burns, or sets on fire in the nighttime, either 1. A dwelling house in which there is, at the time, a human being; or 2. A car, vessel, or other vehicle, or a structure or building other than a dwelling house wherein, to the

knowledge of the offender, there is, at the time, a human being, is guilty of arson in the first degree." (*c*) The barn was a dwelling house. "Any building is a dwelling house, within the acts defining arson in the first degree, which is in whole or in part usually occupied by persons lodging therein at night, although other parts, or the greater part may be occupied for an entirely different purpose." People v. Orcutt, 1 Park. Cr. Rep. 252. Sec. 492 of the Penal Code re-enacts the rule laid down in this case. (*d*) It is not necessary that anybody should be injured in order to constitute arson. For these reasons, the judgment should be affirmed.

Q. Is it a crime for a man to burn his own property, and if so what?

A. ~~Yes~~. It ~~is~~ arson. Shepherd v. People, 19 N. Y. 537. Sec. 495 of the Penal Code provides as follows: "To constitute arson, it is not necessary that another person than the defendant should have had ownership in the building set on fire."

Q. A feloniously in the nighttime sets fire to the house of B. By reason of a heavy wind the sparks are communicated to the house of A, resulting in its destruction. Thereafter A is charged with arson, and indicted for having burned his own house. Can he be convicted?

A. Yes. Sec. 491 of the Penal Code is as follows: "Where an appurtenance to a building is so situated with reference to such building or any building is so situated with reference to another building that the burning of the one will manifestly endanger the other, a burning of the one is deemed a burning of the other, within the foregoing provisions against any person actually participating in the original setting on fire, as of the moment when the fire of the one communicates to and sets on fire the other."

Q. A intended feloniously to set fire to the house of B, but through a mistake went to the house of C, to which he set fire on the outside, and just as the fire began to catch, a violent rain storm came up and extinguished the fire. The damage done to C's house was very slight and inconsequential. Can A be convicted of arson under the circumstances or not? If so, why so? If not, why not?

A. Yes. An indictment for burning one house is sustained by

proof of the burning of another, with the criminal intent of burning the house specified. Woodford v. People, 62 N. Y. 117.

(NOTE.) Though there must be an actual burning to constitute the offense, it is not necessary that the building should be consumed, or materially injured. If any part, however small, is consumed, it is sufficient. A flame is not necessary. Charring constitutes a burning. Mere scorching or discoloration is not enough. See People v. Butler, 16 Johns. 203.

Q. A sets fire to his trunk containing all his clothing for the purpose of defrauding the insurance company. The clothing is consumed, but no part of the building is burned. He is indicted and tried for arson. Can he be convicted? If not, is he guilty of any other offense?

A. A is not guilty of arson, but he is guilty of malicious mischief. Setting fire to personal property in a building will not constitute the crime of arson, if no part of the house itself is burned. Dedieu v. People, 22 N. Y. 178. That this is malicious mischief, see sec. 637 of the Penal Code, which provides as follows: "A person who wilfully burns or sets fire to any grain, grass, or growing crop, or standing timber, or to any building, fixtures or appurtenances to real property of another, under circumstances not amounting to arson in any of its degrees, is punishable by imprisonment for not more than four years."

Q. A asked B to set fire to C's barn, and gave him material for the purpose. A did not mean to be present at the commission of the offense, and B never intended to commit it, and in fact never set the barn on fire. Of what crime, if any, is A guilty?

A. A is guilty of an attempt to commit arson. The fact that A prepared the combustibles, and solicited another to use them in burning the barn, is sufficient to constitute an attempt. People v. Bush, 4 Hill, 133; McDermott v. People, 5 Park. Cr. Rep. ~~86~~ 102.

Q. A agrees with B, a servant of C's, that at an appointed time, B shall unlock the door of C's house, so that A might come in C's house and commit burglary. The door is unlocked by B and A enters, but before he takes away anything he is frightened away, and is afterwards arrested. Upon the trial for burglary, the defendant's attorney asks the court to charge the jury to acquit the defendant on the ground that burglary was not committed. What should have been the ruling of the court? State your reasons.

A. The motion should be denied, for A has committed burglary. There was a break within the meaning of that term as defined in sec. 499 of the Penal Code, which is as follows: "The word 'break' as used in this chapter, means and includes: 1. Breaking or violently detaching any part, internal or external, of a building; or 2. Opening for the purpose of entering therein, by any means whatever, any outer door of a building, or of any apartment or set of apartments therein, separately used or occupied, or any window, shutter, scuttle, or other thing, used for covering or closing an opening thereto or therein, or which gives passage from one part thereof to another; or 3. Obtaining an entrance into such a building or apartment by any threat or artifice used for that purpose, or by collusion with any person therein; or 4. Entering such building or apartment by or through any pipe, chimney, or other opening, or by excavating, digging, or breaking through or under the building, or the walls or foundation thereof."

(NOTE.) To constitute the crime of burglary, there must be both a break and an entry. Burglary in the first degree is defined in sec. 496 of the Penal Code as follows: "A person, who with intent to commit some crime therein, breaks and enters in the nighttime the dwelling house of another in which there is at the time a human being: 1. Being armed with a dangerous weapon; or 2. Arming himself therein with such a weapon; or 3. Being assisted by a confederate actually present; or 4. Who, while engaged in the nighttime in effecting such entrance, or in committing any crime in such building, or in escaping therefrom, assaults any person; is guilty of burglary in the first degree.

Q. A climbs upon the roof of a dwelling house, and by means of a rope ladder climbs down the chimney and into the house without disturbing any articles of furniture, takes a gold watch, and retires as he came. Of what crime or crimes, is he guilty?

A. He is guilty of burglary, for there is a break within the meaning of sec. 499 of the Penal Code, supra.

Q. A, a tramp, passes a farmhouse, and seeing a window open, enters the house through it, and sleeps there for the night. Upon awakening in the morning he takes some silverware, and is about to depart when he is discovered and arrested. He is indicted and tried for burglary. Can he convicted of that crime?

A. No. This is not burglary for there was no break. One who obtains entrance to a house through an open door or window

is not guilty of burglary. People v. Arnold, 6 Park. Cr. Rep. 231.

(NOTE.) Raising a window sash constitutes a breaking; so also the pushing open of a closed but unfastened transom. People v. Edwards, 1 Wheeler Cr. Rep. (N. Y.) 374. A removal of props from the door in order to open and enter is a breaking, but if a door or window is a little way open, it is not a breaking to push it further open. 5 Am. & Eng. Ency. of Law, 45.

Q. A goes to B's house with the intention of robbing the same. The door is closed but not locked. A opens the door and enters the house, but is discovered and arrested before he commences to act. Of what crime, if any, is A guilty?

A. A is guilty of burglary. Where the door of a house is tightly closed without being either bolted, locked, or fastened, it is burglary to open it and enter the house with the purpose of stealing. Tickner v. People, 6 Hun, 657.

Q. A stopped at the house of B, and asked B's daughter for a drink of cider, offering to pay for it. She refused to let him have it, and he thereupon opened the door of the house, although forbidden to do so by her, went in and drank some cider. He was arrested and indicted for burglary. Is he guilty of that crime?

A. No. Here the accused did not enter with the intent to commit a crime. While he intended to obtain a drink of cider, and thus deprive B of his property, there was an absence of the circumstances ordinarily attending the commission of a larceny, and which distinguishes it from a trespass, and all the circumstances were consistent with the view that the transaction was a trespass merely. Every breaking does not constitute burglary; there must be a felonious intent. McCourt v. People, 64 N. Y. 583.

Q. A is suddenly awakened one night by a violent ringing of his door bell. He opens the window and sees B, who says he has a telegram for A. A goes down stairs and opens the door. B immediately thrusts a pistol in A's face and demands entrance. A grapples with B, who releases himself and runs off. B had no telegram, and intended to rob A's house after gaining entrance by this subterfuge. What crime, if any, has B committed?

A. B has committed the crime of burglary in the first degree within the meaning of sec. 496 of the Penal Code, supra. He

obtained entrance by an artifice, which constituted a break under sec. 499, supra. There was an entry within the meaning of sec. 501, as the pistol was thrust into the building. Sect. 501 defines "enter" as follows: "The word 'enter' as used in this chapter, includes the entrance of the offender in such building or apartment, or the insertion therein of any part of his body, or of any instrument or weapon held in his hand, and used, or intended to be used, to threaten or intimidate the inmates, or to detach or remove property."

Q. A breaks a window in a jewelry store, and projects a stick into the window for the purpose of removing some jewelry and stealing the same. He is arrested. Of what crime, if any, is he guilty?

A. A is guilty of burglary, for there was both a break and an entry within the meaning of the statute. See secs. 499, 501, supra.

Q. A, intending to rob the store of B, bored a hole through the door with a centerbit; but before he could proceed any further he was discovered and arrested. Part of the chips were found on the inside of the store, from which it was apparent that the end of the centerbit had penetrated into the house. A is indicted and tried for burglary. Can he be convicted of that crime?

A. No. The instrument was not introduced into the building for the purpose of taking property. While there was a sufficient breaking, there was not a sufficient entry to constitute a burglary. If the instrument is used solely for the purpose of effecting an entry, and not for the purpose of committing the contemplated felony, it will not amount to a burglarious entry. See sec. 501, supra.

Q. A servant of B, pretending to be acting in accord with C, who intended to burglarize B's house, agreed with C that on a signal to be given him, she would open the door and let him in. The servant, having informed B of the affair and her arrangement, was instructed by him to carry out her arrangement which she did, and on C's entering the house, he was at once arrested by an officer concealed therein, indicted, tried and convicted of burglary. Would the conviction stand on appeal? If not what is the trouble? State your reasons.

A. The judgment of conviction should be reversed. A person cannot be guilty of burglary who enters a house by permission of

the servant of the owner, the latter knowing at the time that the person wishes to enter to steal. It is in effect a consent to the entry by such person, and is not even a trespass. Here the servant was the agent of the owner of the house in the transaction, and whatever the agent did in conformity to his instructions, must be treated as done by the principal. It seems that there are no New York decisions on this point, but the case of Allen v. State, 40 Ala. 334 (91 Amer. Dec. 475), is exactly in point, and it was there so held.

Q. A has a fruit stand erected on a street against a building. This stand has both a window and a door. B, in the nighttime, while A is sleeping therein, breaks and enters into it, and takes therefrom $10. He is subsequently arrested and indicted for burglary. Upon the trial, B's counsel moves for a dismissal of the indictment, on the ground that the stand was not a building within the meaning of the Penal Code, and therefore could not be the subject of burglary. What should be the ruling of the court? State your reasons.

A. The motion should be denied. The stand was a booth under sec. 504 of the Penal Code, which is as follows: "The term 'building' as used in this chapter, includes a railway car, vessel, booth, tent, shop, or other erection or inclosure." It was so held in the case of People v. Hagan, 37 St. Rep. 660.

(NOTE.) A vault in a cemetery is not included within the terms "building, erection or inclosure" as used in the Penal Code defining burglary. People v. Richards, 108 N. Y. 137. The chamber of a guest at a hotel is not his dwelling house, but that of the landlord; therefore an indictment charging one to have attempted to enter the dwelling house of A, and it appearing that an attempt was made to enter a room in a hotel assigned to A, was held fatally defective. Rodgers v. People, 71 N. Y. 569. A store was under the same roof of a dwelling house; there was no internal communication between the store and the upper rooms. Held that an entry into the store was an entry into a dwelling house. Quinn v. People, 71 N. Y. 561.

Q. A, while travelling on a street car with B, puts his hand into B's coat pocket, and lifts the pocketbook of the latter containing $100 about half way out of the pocket. He is discovered by a detective who happens to be in the car, and is arrested. He is subsequently indicted for larceny. On his trial, his attorney asks that the indictment be dismissed on the ground that there was not a sufficient carrying away to constitute larceny. What should be the ruling of the court?

A. The motion should be denied. To constitute the offense of larceny, there must be a taking of the goods from the power or control of the owner. A temporary possession, however, by the thief, though but for a moment, is sufficient. Harrison v. People, 50 N. Y. 518.

Q. A goes to the house of B in B's absence, and represents to B's wife, C, that B has been arrested, and has sent A to get his watch, which he wishes to pawn and secure bail, all of which is false. C gives the watch to B. Is B guilty of any crime, or simply conversion?

A. B is guilty of larceny. If by trick or artifice, the owner of property is induced to part with the custody or naked possession for a special purpose to one, who receives the property with a felonious intent, the owner still meaning to retain the right of property, the taking is larceny. Smith v. People, 53 N. Y. 111.

(NOTE.) The common-law distinction between larceny, embezzlement, and obtaining goods under false pretenses is abrogated, and is now included in sec. 528 of the Penal Code, which is as follows: "A person who, with intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either 1. Takes from the possession of the true owner, or of any other person, or obtains such possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any other person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or acticle of value of any kind; or 2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any person other than the true owner or person entitled to the benefit thereof, steals such property, and is guilty of larceny."

Q. A was indicted for obtaining goods under false pretenses and representations. At the time of the purchase, he offered his check dated the next day in payment for the goods, saying that there would be plenty of money to meet the check when due. The dealer relying on his representations took the check and delivered the goods, and presented the check for payment at the bank on which it was drawn the next day, when payment was refused. It turned out that A had placed no money in the bank, and at the

time of the transaction did not intend to pay the check. The facts being conceded, is A guilty or not guilty and why?

A. A is guilty. The case of Lesser v. People, 73 N. Y. 78, is exactly in point. It was there held that the circumstances tended to show the transaction to be a device on the part of the prisoner to defraud the prosecutor; that the fact that the check was post-dated, did not under the circumstances make the transaction simply an undertaking that the money to meet it would be in the bank at its maturity; and that the facts justified a conviction. Cases of this kind are covered by sec. 529 of the Penal Code, which is as follows: "A person who wilfully, with intent to defraud, by color or aid of a check or draft, or order for the payment of money, or the delivery of property, when such person knows that the drawer or maker thereof is not entitled to draw on the drawee for the sum specified therein, or to order the payment of the amount, or delivery of the property, although no expressed representation is made in reference thereto, obtains from another any money or property is guilty of stealing the same and is punishable accordingly."

Q. A finds a gold brooch on which B's name is engraved. A is acquainted with B, and knows where she can be found. A, however, says nothing to B, but uses the property as his own. What remedy, or remedies, has B, if any?

A. B can sue A in conversion, and A is also guilty of larceny under sec. 539 of the Penal Code, which is as follows: "A person who finds lost property, under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person who is not entitled thereto, without having first made every reasonable effort to find the owner, and restore the property to him, is guilty of larceny."

Q. A steals some money and a watch in Albany county. He takes it into Oneida county, and is there arrested, and the money and watch found on his person. He is tried in Oneida county, and at the completion of the evidence, the counsel for the prisoner asks the court to direct the jury to acquit the prisoner, on the ground that the crime was commited in Albany county. What should the court do?

A. The motion should be denied. A prisoner may be convicted of burglary or larceny in any county into which he carries the goods stolen by means of the burglary or larceny. Haskins v. People, 16 N. Y. 344.

Q. A commits burglary in Westchester county. He is arrested in Albany county on a warrant issued in Westchester county. A claims to be entitled to be admitted to bail in Albany county. A consults you. What advice would you give?

A. A's contention is not valid. Where by a warrant, an arrest be directed for a felony, the magistrate issuing it has exclusive jurisdiction, except in case of his absence or inability to act, to examine, commit to bail, or discharge a prisoner arrested under such a warrant. People v. Navagh, 4 Cr. Rep. 289. The distinction must be drawn between arrests for felonies and misdemeanors. Sec. 158 of the Code of Cr. Pro. provides: "If the crime charged in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate in the same county." Sec. 159 says: "If the crime charged in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must upon being required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail, for his appearance before the magistrate named in the warrant, and take bail from him accordingly."

Q. In what cases may a private person arrest another?

A. Sec. 183 of the Code of Crim. Pro. provides: "A private person may arrest another, 1. For a crime, committed or attempted in his presence; 2. When the person arrested has commited a felony, although not in his presence."

(NOTE.) Sec. 177 enumerating the cases in which a police officer may arrest without a warrant, in addition to the two cases given in sec. 183, supra, adds a third, which is as follows: "When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it.

Q. A is being tried for robbing B of a diamond stud. The indictment alleges that the robbery occurred on the 10th day of May, 1899, and that the property taken belongs to B. The evidence shows that the robbery took place on the 18th day of May, and

that the stud was one loaned to B, and the property of C. A's counsel asks the court to instruct the jury to acquit the defendant on the ground that there is a variance between the indictment and the proof. What should be the ruling of the court?

A. The motion should be denied. A variance between the averment in an indictment, and the proof, as to the day on which the crime was committed, may be disregarded and the indictment amended. People v. Jackson, 111 N. Y. 362. Sec. 280 of the Code of Crim. Pro. provides as follows: "The precise time at which the crime was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the crime." Sec. 293 says: "Upon the trial of an indictment, when a variance between the allegations therein and the proof, in respect to time, or in the name or description of any place, person or thing shall appear, the court may, in its judgment, if the defendant cannot be thereby prejudiced in his defense on the merits, direct the indictment to be amended, according to the proof, on such terms . . . as the court may deem reasonable."

Q. An indictment charges three counts: 1. Burglary, by breaking and entering the dwelling house of B in the nighttime. 2. Grand larceny, by feloniously taking and carrying away articles of property in the house. 3. For receiving the stolen property mentioned in count two. Is the indictment good, under that section of the Code of Crim. Pro. which prohibits indictments for more than one crime?

A. The indictment is good. The rule stated in sec. 278 of the Code of Crim. Pro. that the indictment must charge but one crime, is subject to one exception stated in sec. 279, which is as follows: "The crime may be charged in separate counts to have been committed in a different manner or by different means; and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts." See also Hawker v. People, 75 N. Y. 487. See also Penal Code §506

Q. Upon a trial for murder, in examining jurors it develops that A, one of the jurors, has already formed an opinion as to the guilt of the prisoner. What must the prosecuting attorney show in order to make the juror acceptable?

A. This case is governed by sec. 376 of the Code of Crim. Pro., which in part is as follows: "But the previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declare on oath, that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the court is satisfied that he does not entertain such present opinion or impression as would influence his verdict." The case of People v. Flaherty, 162 N. Y. 532, shows how strictly this section is construed. It was there held that: "A juror's declaration on oath, that he could render a fair and impartial verdict upon the evidence brought out on the trial, does not remove a prima facie disqualification arising from his testifying that he has an opinion as to the guilt or innocence of the accused, where he does not declare on oath, as required by the statute, "that he believes such opinion or impression will not influence his verdict."

Q. A walks into B's house one summer afternoon, the door being open, and steals therefrom a watch worth $20. He soon after repents of having done so, goes to B and returns the watch, and receives from B a formal release, whereby B agrees not to prosecute him for the theft. Can A thereafter be convicted of any crime, and if so, what?

A. As the amount was less than $25, and was not taken from B's person, the crime committed was petit larceny, which is a misdemeanor and can be compromised; therefore A having received a release, cannot thereafter be prosecuted for the theft. Sec. 663 of the Code of Crim. Pro. provides for the compromise of certain crimes, and is as follows: "When a defendant is brought before a magistrate, or is held to answer on a charge of a misdemeanor, for which the person injured by the act constituting the crime has a remedy by civil action, the crime may be compromised, except when it was committed: 1. By or upon an officer of justice while in the execution of the duties of the office; 2. Riotously; or 3. With an intent to commit a felony."

CHAPTER X.

Domestic Relations.

Q. A and B, husband and wife, agree in writing that: "Because of certain serious disagreements between us, we hereby mutually agree to live apart." A agrees to pay B $200 per month by the terms of the agreement. He does not pay for three months, upon which B brings suit for $600. A defends on what ground? Rights of B?

A. B cannot recover, as the agreement is void as against public policy. The case of Poillon v. Poillon, 49 App. Div. 341, is exactly in point. It was there held that: "A separation agreement executed by a husband and wife, without the intervention of a trustee, which provides that the parties have mutually consented and agreed and 'by these presents do mutually consent and agree to hereafter live separate and apart from each other,' is void as against public policy, the necessary inference therefrom being, that the parties, neither of whom appeared to be entitled to a separation, were living together when the paper was signed, and that it was an essential part of the agreement that they should thereafter separate. Sec. 21 of the Domestic Rel. Law of 1896, providing that a married woman may make contracts 'with any person including her husband, as if she were unmarried, but a husband and wife cannot contract to alter or dissolve the marriage, or to relieve the husband from his liability to support his wife,' does not enlarge the power of the husband and wife in respect to separation agreements."

(NOTE.) The husband and wife may, however, make such agreement through the medium of a trustee. The case of Clark v. Fosdick, 118 N. Y. 7, represents the law on this point. It was there held as follows: "A husband and wife agreed to live separately, and to effectuate that agreement, entered into articles of separation through the medium of a trustee, by the terms of which, the husband agreed to pay the trustee annually a sum named for the support of the wife during her life, the same to be in full satisfaction for such support and maintenance and of all alimony; the wife and trustee covenanted to save the husband harmless from his obligation to support her, and upon the

execution of the agreement the parties separated. In an action against the husband to recover a payment under the agreement, held that it was valid, that the trustee was a trustee of an express trust, and that the action was properly brought in his name."

Q. A husband agreed with his wife, they having separated, that he should pay her $10 per week for her support. This was done, but $10 was not enough, and she went to a grocer who knew of the contract and purchased groceries. The grocer sues the husband for the amount of the goods. What are his rights? Answer in full.

A. The grocer can recover from the husband. The question involved in this case has been the subject of much litigation. In Hatch v. Leonard, 38 App. Div. 128, it was held, that where a husband and wife are living separate and apart from each other, the presumption that the wife is the agent of the husband, authorized to charge him with purchases of necessaries made by her ceases. This decision was reversed by the Court of Appeals (Hatch v. Leonard, 165 N. Y. 435), and it was there held by the court, that the husband is bound to supply necessaries even after separation, and that the implied agency to buy necessaries does not cease after separation. This same case came up very recently on another appeal (71 App. Div. 241), where it was held, if the husband had provided the wife with a sufficient amount, he is discharged irrespective of the tradesman's knowledge. Of course in the question put, the husband not having supplied a sufficient sum, is liable.

Q. A and B, husband and wife, enter into a partnership. C loans money to the firm, and A being financially irresponsible, C sues B for the amount. She defends on the ground that a husband and wife cannot enter into a partnership. Is the defense good? State your reasons.

A. The defense is not good. This question was settled by the case of Suau v. Caffe, 122 N. Y. 308, where it was said by Follet, Ch. J., in delivering the opinion of the court: "It being settled, that a husband and wife may be the agents of each other, and that they may bind themselves by joint contracts entered into with third persons, they are liable as partners to the same effect. Where a husband and wife assume to carry on a business as copartners, and contract debts in the course of it, the wife cannot escape liability on the ground of coverture." Sec. 21 of the Dom. Rel. Law of

1896 continues this rule, and gives a husband and wife very complete power to contract with each other; this section is as follows: "A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment, and disposition thereof, and to make contracts in respect thereto with any person including her husband, and to carry on any business, trade, or occupation, and to exercise all powers and enjoy all rights in respect thereto, and in respect to her contracts, and be liable on such contracts as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage, or to relieve the husband from his liability to support his wife."

Q. A, the wife of B, does certain work for the X Co. which refuses to pay for the same. B, the husband, sues the company, which defends on the ground, that he is not the proper party to bring the suit, but that the wife herself should sue. Is the defense good?

A. Yes. The law up to very recently was, that the husband alone could sue for wages earned by his wife. Holcomb v. Harris, 166 N. Y. 257. In Klapper v. R. R., 34 Misc. 528, a woman sued a New York City Railway Co. for loss of wages during the period in which she was unable to work, by reason of the injury caused by the road. The court upheld the company's contention that she had no right to sue, as her husband owned whatever wages she might earn. It was this decision that caused the legislature (1902) to pass a bill to be known as sec. 30 of the Dom. Rel. Law, which gives a married woman the right to sue for the wages she earns in her own name. See also Stevens v. Cunningham, 75 App. Div. 125. and 161 N.Y. 457

Q. A, the wife of B, works for her husband in his place of business for ten weeks at $10 per week. B refuses to pay her. She sues for the amount due. B defends on the ground that the contract is void, and even if it was valid her earnings belongs to him. Is the defense good? Can she recover?

A. This is a mooted question, and has not been settled by the Dom. Rel. Law of 1896. In the case of Blaechinska v. Howard Mission, 130 N. Y. 497, it was held as follows: "The provisions of the act in relation to married women (Laws 1860 and 1884) making the property a married woman acquires her separate property,

does not apply to labor performed by her for her husband, and she cannot make a binding contract with him for her services, although the same are to be rendered outside of her household duties. While he cannot require her to perform services for him outside of the household, such services as she does render, whether within or without the strict line of her duty, belong to him, and a promise to pay therefor is simply a promise to make her a gift, and so is not enforceable." In the Matter of Callister, 153 N. Y. 294, Vann, J., in his opinion intimates by way of dicta that a recovery by the wife would be allowed under sec. 21 of the Dom. Rel. Law. He says: "It was not until after the death of Mr. Callister, that there was legislation which would enable a husband to make a valid and enforceable promise to his wife to pay her for personal services rendered apart from a separate business." But in the face of sec. 21 of the Dom. Rel. Law, it was held in Holcomb v. Harris, supra, that a married woman could not sue for wages rendered to third persons, and the new statute changing that rule does not specifically give her the right to sue her husband for services rendered to him.

Q. By antenuptial contract, a wife gives her husband $1,000. At that time she has $10,000. After the marriage, the creditors of the wife before the marriage sue the husband for a claim of $3,000 which they had against his wife. Can the creditors collect? If so, how much?

A. The creditors can collect $1,000, according to sec. 24 of the Dom. Rel. Law of 1896, which is as follows: "A husband who acquires property of his wife by antenuptial contract or otherwise, is liable for her debts contracted before marriage, but only to the extent of the property so acquired."

Q. A and B are husband and wife, and are living together. The wife goes to the grocer, and purchases groceries, agreeing to be individually responsible therefor. The wife refuses to pay. The grocer sues the husband for the amount of the bill. Can he recover? Answer in full.

A. No. "When a married woman makes express contracts in her own name for her necessary support, she will not be deemed to have acted as agent for her husband in procuring such support, nor is there any implied agreement on the part of her husband to

pay for such necessaries. When a person makes an express contract with a married woman for the joint support of herself and husband, if the wife is the sole contracting party, and the credit is given to her alone, and she is in all respects competent to make a valid contract and bind herself, such person will not be permitted to shift the liability upon the husband, who is not a party to the contract, upon the failure of the wife to pay the amount due thereunder." Byrnes v. Rayner, 84 Hun, 199. Sec. 25 of the Dom. Rel. Law accords with this rule, and is as follows: "A contract made by a married woman does not bind her husband or his property."

Q. A, the wife of B, goes to a butcher and purchases some meat for the use of the household. B also goes and makes purchases of meat at various times. All the purchases are charged to B. B fails to pay. The butcher sues the wife. Can he recover?

A. No. "A wife living with her husband is not liable for goods purchased in part by her, and in part by him, for use in their family, where she does not agree to become personally responsible for the indebtedness, and the goods are charged to the husband at the time of the purchase." Bradt v. Schull, 46 App. Div. 347.

Q. A, the wife of B, in his presence grossly slanders C. C sues B, the husband. Can he recover? State your reasons.

A. No. Sec. 27 of the Dom. Rel. Law of 1896 answers this question, and is as follows: "A married woman has a right of action for an injury to her person, property, or character, or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts; her husband is not liable for such acts, unless they were done by his actual coercion or instigation, and such coercion or instigation shall not be presumed, but must be proven."

Q. A, the wife of B, sets a dog upon C in B's presence. The dog belongs to B. C sues both the husband and wife. B defends, on the ground that he is not a necessary or proper party. Judgment for whom and why?

A. Judgment for B. "Under the Dom. Rel. Law of 1896, sec. 27, a husband is not liable for the wrongful acts of his wife, in setting upon another, a dog owned by the husband, in the absence of proof, that her conduct was the result of his actual coercion or

instigation." Strubing v. Mahar, 46 App. Div. 400. That the husband is not a necessary or proper party, sec. 450 of the Code of Civ. Pro. provides as follows: "In an action or special proceeding, a married woman appears, prosecutes, or defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate, or character of his wife, and all sums that may be recovered in such action or special proceeding shall be the separate property of the wife. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate, or character of another, on account of the wrongful acts of his wife committed without his instigation."

Q. A is sentenced to imprisonment for life. He serves six years, and is then pardoned. He had previously been married, and had had two children born to him. On regaining his liberty, he seeks to secure the guardianship of his children. He comes to you for advice. What are his rights?

A. He cannot secure the guardianship of the children, for sec. 28 of the Dom. Rel. Law provides that: "A pardon granted to a person sentenced to imprisonment for life within this state, does not restore that person to the rights of a previous marriage, or to the guardianship of a child, the issue of such marriage."

Q. A and B, husband and wife, are living in a state of separation, but no decree of divorce has been made by a court affecting their marriage. B has possession of the two children, the issue of the marriage, both of whom are minors, and the husband wishes to get control of them. He comes to you for advice. What are his rights, and how would you proceed to enforce them?

A. Apply to the supreme court for a writ of habeas corpus, according to sec. 40 of the Dom. Rel. Law, which is as follows: "A husband or wife being an inhabitant of this state, living in a state of separation, without being divorced, who has a minor child, may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court on due consideration, may award the

charge and custody of such child to either parent, for such time, under such regulations and restrictions, and with such provisions and directions as the case may require, and may at any time thereafter vacate or modify such order."

Q. A question has arisen upon the return to a writ of habeas corpus, as to the proper person to have the custody of a child five years old. The father claims it as a right, and it is not contended that he is a person unfit to take charge of it. Upon what consideration should the court decide the question, and what circumstances should control as to the disposition of the child?

A. The only consideration is, what is the best interest of the child? As a general rule, the father is entitled to the custody of the infant, all other facts being equal. Mercein v. People, 25 Wend. 64. "It is the well settled law of this state, that in determining the custody of infants, between father and mother, their welfare, and not the supposed rights of the parents is the controlling principle." Perry v. Perry, 17 Misc. 28.

Q. A, the father of B, an infant, meets C in the street. A tells C who had employed B without the consent of A, not to pay wages to B, but to himself, A. At the end of a month, C pays the wages to B. A sues C to recover the same amount again. Judgment for whom and why?

A. Judgment for C; the notice in order to be binding on the employer must be in writing, according to sec. 42 of the Dom. Rel. Law, which is as follows: "When a minor is in the employ of a person other than his parent or guardian, payment to such minor of his wages is valid, unless such parent or guardian notify the employer in writing within thirty days after the commencement of such service, that such wages are claimed by such parent or guardian, but whenever such notice is given at any time, payments to the minor shall not be valid for services rendered thereafter."

Q. A, the son of B, works for C for six months. At the expiration of this time, the father learning of the employment, serves notice in writing on the employer, instructing him not to pay any more wages to the son. C does not heed the notice, and pays the wages as before. The parent subsequently brings suit for the wages that accrued after the serving of the notice. C defends,

claiming that the notice was not served in time. Judgment for whom and why?

A. Judgment for the parent. "It was not the purpose of the legislature to prevent a parent from collecting the wages of a minor child, if he failed to give notice within the time specified (thirty days). Subsequent notice would enable him to collect the infant's future earnings, but would not affect prior payments." McClurg v. McKercher, 40 St. Rep. 603.

(NOTE.) Where the father of a minor child who resides with his parents, neglects to serve upon the child's employers a notice that he claims the child's wages, the title to such wages vests in the child; and when the child, without objection on the part of the father, pays the wages to his mother, the latter obtains a valid title thereto. The father of a minor obtains no title to money acquired by a minor in the purchase and sale of property at a profit. Watson v. Kemp, 42 App. Div. 372.

Q. A comes to you and says that he wishes to adopt B, the child of C, who was thirteen years of age. Both of B's parents are living. What steps would you take to secure the adoption of the child in a legal manner?

A. It is necessary to secure the consent of the child, and the consent of the parents. This practice is governed by sec. 61 of the Dom. Rel. Law of 1896, which is as follows: "Consent to adoption is necessary as follows: 1. Of the minor if over twelve years; of the foster parent's husband or wife, unless lawfully separated, or unless they jointly adopt such minor; 3. Of the parents or surviving parent of a legitimate child, and of the mother of an illegitimate child; but the consent of the parent who has abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery or cruelty, or adjudged to be insane, or to be an habitual drunkard, or is judicially deprived of the custody of the child on account of cruelty or neglect, is not necessary; 4. Of a person of full age having lawful custody of the child, if any such person can be found, where the child has no father or mother living; or no father or mother whose consent is necessary under the last subdivision. If such child has no father or mother living, and no person can be found who has the lawful custody of the child, the judge or surrogate shall recite such facts in the order allowing the adoption."

Q. A minor child was legally adopted by A and B, husband and

wife. What are the rights and duties of the child with regard to its foster parents, and its natural parents? From whom does it inherit, and to what extent?

A. This question is fully answered by sec. 64 of the Dom. Rel. Law of 1896, which is as follows: "Thereafter the parents of the minor are relieved from all parental duties towards, and of all responsibility for and have no rights over such child, or of his property by descent or succession. The child takes the name of the foster parents. His rights of inheritance and succession from his natural parents remain unaffected by such adoption. The foster parent or parents and the minor sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopted, but as respects the passing and limitations of real property and personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent, so as to defeat the rights of the remainder-man."

Q. A, a female eighteen years of age, who is under the guardianship of B, marries C. A's estate in the hands of B amounts to $10,000. She now consults you as to her legal status. Advise her.

A. The guardianship over the person ceases with the marriage of the female, but the guardianship over her property continues during her minority. D.R.L. § 54

Q. A minor for whom a general guardian has not been appointed acquires real property. State the rule as to the several persons, in order, to whom the guardianship of his property, with the rights, powers and duties of a guardian in socage belongs.

A. Sec. 50 of the Dom. Rel. Law, provides that guardianship in socage shall be given to the relatives in the following order. 1. To the father. 2. If there be no father, to the mother. 3. If there be no father or mother, to the nearest and eldest relative of full age, not under any legal incapacity, and as between relatives of the same degree of consanguinity, males shall be preferred.

Q. A, whose wife has been granted a divorce against him for his infidelity in this state, promises to marry B, an unmarried female. He subsequently refuses to do so, and B sues him for breach of promise. Can the action be maintained? Give your reasons.

A. No. "An action for the breach of the contract of marriage, between the parties in this state, cannot be maintained, where one of the parties was by law incapable of entering into the marriage relation at the time of making the contract. Where a divorce has been granted on the ground of the adultery of the husband, he cannot in this state, make a valid contract of marriage during the lifetime of the wife who obtained the divorce." Haviland v. Halstead, 34 N. Y. 643. An action in the nature of deceit, however, will lie. It was allowed in the case of Blattmacher v. Saal, 29 Barb. 22, where it was said: "The parties are not in pari delicto, and the defendant must restore the plaintiff to what she has lost by his deceit, and his promise to do what he could not legally perform. What he agreed to do was not an act illegal in itself. If it had been, no action could have been maintained. But he promised to do an act which it was unlawful for him to consummate with the plaintiff only because he was legally disqualified from doing it, and this was unknown to plaintiff."

Q. A young lady nineteen years of age brings an action against a man of full age for breach of promise to marry. About the same time, she herself is sued for breach of promise of marriage by another man, also of full age. Will either action lie? If so, which one?

A. Her action will lie, while the action against her will not. "The contract to marry by an infant is not void; but voidable at the election of the infant; yet as to the person of full age contracting with the infant it absolutely binds; hence an infant may maintain this action against an adult, but an adult not against an infant." Hunt v. Peake, 5 Cowen, 475.

Q. Your client married a woman believing her to be chaste. There was no fraud on the part of the woman except concealment. It turned out that the woman was a notorious prostitute, a fact which, if your client had known it, would have prevented his marriage with her. He consults you. What are his rights in the

premises, and what remedy would you pursue for him under the circumstances?

A. He has no remedy; the marriage cannot be annulled. "The fact concealed from a husband, that the wife before marriage had been a prostitute, and also had given birth to an illegitimate child, does not in itself constitute such fraud as will authorize an annulment of the marriage, for antenuptial unchastity is no ground for annulment." Shrady v. Logan, 17 Misc. 329.

Q. A girl sixteen years of age, while living with her parents, marries B, who is twenty years of age, without the consent of her parents. The father of the girl brings an action against B to annul the marriage. B demurs on the ground that 1. The complaint does not state facts sufficient to constitute a cause of action, and 2. That the father is not the proper party plaintiff. What is your opinion on each of these points? Is the defense good? Suppose B had brought the action, on the ground that A was only sixteen years of age at the time of the marriage. Could the action be maintained?

A. B's demurrer should be overruled, for the age of consent is eighteen years for females as well as males under sec. 4 of the Dom. Rel. Law of 1896, and the father is the proper party to maintain the action under sec. 1744, of the Code of Civ. Pro., which latter section prohibits B from bringing the action as he was above the age of legal consent. Sec. 1744, of the Code is as follows: "An action to annul a marriage, on the ground that one of the parties had not attained the age of legal consent, may be maintained by the infant, or by the guardian of the infant's person; or the court may allow the action to be maintained by any person, as the next friend of the infant. But a marriage shall not be annulled, at the suit of a party who was of the age of legal consent when it was contracted, or where it appears that the parties, for any time after they attain that age freely cohabited as husband and wife."

Q. The defendant B is the father of the plaintiff A. When the plaintiff was sixteen years old, the defendant persuaded her to remain at home and work for him promising to pay her for the work done. Plaintiff who has just become of age demands the money, which is refused. She brings this suit for the amount. Defendant concedes the facts to be as stated, admits that plaintiff per-

formed the work, but claims that she was bound to do so. What are the rights of the parties, and why?

A. The plaintiff cannot recover, as the defendant's promise was gratuitous. A father is entitled to the services of his minor daughter until she attains the age of twenty-one years. As to such services therefore, there was no consideration for the defendant's promise. Bolton v. Terpenny, 14 Weekly Dig. 533. Of course if the infant is emancipated, a different rule prevails, for then as said by Earl, J., in Kain v. Larken, 131 N. Y. 300, "It is the undoubted rule of law in this state, that a father may emancipate his minor child even by parol, and after such emancipation may make contracts with him, and become liable to pay him for wages."

Q. A man is sued for necessaries furnished to his son by a stranger. Plaintiff proves that the infant was without necessary clothing, and that the clothing furnished by him for the infant was not unfitted to the infant's station in life. Plaintiff now rests, and asks for judgment on the facts proved. What should the judgment be?

A. Judgment for the defendant. The plaintiff in addition to the facts proved, should have shown that the father refused or neglected to furnish the necessary clothing. "Inasmuch as a parent is under a natural obligation to furnish necessaries for his infant children, if the parent neglect the duty, any person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent; but in order to authorize any person to act for the parent in such a case, there must be a clear and palpable omission of duty in that respect on the part of the parent." Van Valkenburg v. Watson, 13 Johns. 430.

Q. An infant who is living with his parent buys certain clothing from a merchant. The clothing was necessary and suitable to the station in life of the infant. The goods were sold to the infant with the knowledge of the father. Can the merchant recover from the infant?

A. No. An infant who resides at home, under the care of a parent, and is supported by him, cannot bind himself for necessaries. Wailing v. Toll, 9 Johns. 141. "An infant is only liable for neces-

saries, when he has no other means of obtaining them except by pledge of his personal credit. If an infant is under the care of a parent or guardian, who has the means, and is willing to furnish what is actually necessary, he cannot, without the consent of such parent or guardian, make a binding contract for articles which under other circumstances would be necessaries." Kline v. L'Amoreux, 2 Paige, 419.

Q. An infant living apart from his father contracts certain debts for board and lodging. On his failure to pay he is sued, and interposes the defense of infancy. The creditor proves the debt, and then rests his case. Can he recover against the infant?

A. No. He must show that the father failed or refused to provide for the infant. "A father is bound by law to support his minor child, and board and lodging furnished by a third party to the child, in the absence of proof that the father has not the ability, or refuses to support him, do not constitute necessaries within the rule which renders an infant liable therefor." Goodman v. Alexander, 28 App. Div. 227. This case was reversed by the court of appeals, but merely on a technical question of pleading. The rule of substantive law laid down by the appellate division was not questioned, as will be seen from the opinion of Parker, Ch. J. (Goodman v. Alexander, 165 N. Y. 289), which in part is as follows: "That the obligation rests upon a father or other person standing in loco parentis, who has the ability to do so, to support his infant children even though they have an estate of their own, and that therefore one who furnishes board and lodging to infants so situated, cannot recover against them is well settled law."

Q. A young man on his twentieth birthday, his father consenting, entered into a contract in writing with a merchant, to work as a clerk two years for the sum of $720, being at the rate of $30 per month, which was all that his services were reasonably worth. At the end of the third month, the clerk quit work, refusing to perform his contract. The clerk claims the salary agreed upon from the merchant for the time he worked; the merchant claims damages by way of recoupment for the avoidance of the contract. State fully the legal rights and remedies of the parties. Give your reasons.

A. The infant can recover for the services actually rendered.

The merchant cannot recover damages by way of recoupment. Where a party enters into a contract, and having performed part of it, without the consent of the master, voluntarily abandons further performance of it, he cannot maintain an action for the labor actually performed; as the contract is entire, a full performance is necessary to plaintiff's right of action, and is a condition precedent. Jennings v. Camp, 13 Johns. 94. The case of infants is an exception to this rule. "In an action by an infant to recover for work and labor, it is neither a defense nor a ground for reducing the damages, that the work was done under a contract by the infant to labor for the defendant for a fixed period of time, which he violated by leaving the defendant's employ without cause before the time expired." Whitmarsh v. Hall, 3 Denio, 375.

Q. A, an infant, buys goods of B, at the same time representing that he is of full age. B sues for the purchase price of the goods. A sets up infancy as a defense. Judgment for whom and why?

A. Judgment for A. The fraud did not charge the infant with a legal liability on the contract of purchase, and as B seeks to enforce the contract, not to recover damages resulting from the fraud, he is not entitled to recover. Studwell v. Shapter, 54 N. Y. 249.

(NOTE.) "If an infant, by fraud, obtains property with no intention of paying, though it be under a pretense of a contract of purchase, the defrauded party may recover. He does so, on the ground that there was no real contract, and he disaffirms the apparent contract. On the same ground those cases must stand, which have permitted a recovery for damages, when an infant, to obtain goods, has fraudulently pretended that he was of full age. On the same principle, if a party has been induced to purchase property from an infant, by the infant's fraud and misrepresentation, it would seem that he might, on discovering the fraud, disaffirm the contract, and return or offer to return the property, and thus put the infant in the position of a mere wrongdoer unjustly keeping what he had fraudulently obtained, and it would seem that the infant would then be liable in damages for tort. But where the aggrieved party retains the benefit of the contract, he does not disaffirm it. His action thereon rests on the ground that he has made a contract, and it is necessary for his recovery that he should show that a binding contract has been made. Here then infancy becomes a defense. The defendant says there has been no binding contract, no action therefore lies for fraud in respect to the contract which he did not make. The alleged contract is the substantive ground of, or inducement to the cause of action, for if there was no contract, there could be no fraud in the making of it, and disproving the contract defeats the action." Hewitt v. Warren, 10 Hun, 560.

Q. A, an infant eighteen years of age, conveys certain real estate to B, his father. He spends the money received from the sale, and on coming of age demands the property. Was the conveyance valid? What are the rights of the parties?

A. The conveyance is voidable at the election of the infant, who can recover the property without restoring the consideration. "Where a son during infancy conveys real estate to his father, receiving and expending or wasting the consideration therefor, before his arrival at full age, and has no other property with which to replace it, he may disaffirm his deed after he arrives at full age, without restoring or offering to restore the consideration. Mere acquiescence by the son, without any affirmative act for three years after his arrival at full age, is not a ratification of the conveyance." Green v. Green, 69 N. Y. 553.

CHAPTER XI.

Equity.

Q. State three maxims of equity, and give a state of facts wherein one of them will apply.

A. "He who seeks equity, must do equity." "He who comes into equity, must do so with clean hands." "Equity considers that as done which ought to have been done." An example is: Where one, on the due day of a mortgage, has tendered the amount of the mortgage to the mortgagee, and the latter has refused the same, if the mortgagor then goes into equity asking that the mortgage be canceled of record, he cannot obtain relief unless he keeps the tender good. Now while it is not necessary that you continue a tender in force for the purpose of removing the lien of the mortgage, yet if you desire affirmative relief in equity, as you do in this case, where you desire the mortgage to be canceled of record, equity says to you, you are asking our aid, you are coming into equity for affirmative relief, therefore you must do equity, and to do equity you must offer to pay that money here and now, by continuing the tender which you originally made. See Tuthill v. Morris, 81 N. Y. 94.

Q. A and B enter into an agreement in New York City, whereby B agrees to convey to A certain mining lands in California. B fails to deliver the deed on the day agreed upon. A brings suit in New York for specific performance. B defends on the ground that the court has no jurisdiction. Is the defense good? What maxim of equity is involved?

A. The defense must fail. The maxim involved is: "Equity acts in personam." It matters not where the "res," the subject matter of the contract is situated, so long as the person is within the jurisdiction of the court, equity can force him to specifically perform. The decrees of a court of equity command a person to do a certain act, and if he fails to do so, the court will imprison

him for contempt. The court of equity, unlike a court of law, acts upon the person, and not upon the thing which is the subject matter of the contract. This principle has been very well settled, since the early and historic case of Penn v. Lord Baltimore, 1 Keener's Cases on Eq. Juris. 1, and is uniformly followed in this state.

Q. An insolvent merchant executed a voluntary conveyance to his son. Afterwards having effected a compromise with his creditors, he requests the son to reconvey. What are the rights of the father and son? What principle of equity is involved?

A. The father cannot force a reconveyance. The equitable maxim involved is: "He who comes into equity must do so with clean hands." Voluntary conveyances are effectual between the parties, and cannot be set aside by the grantor, although he afterwards becomes dissatisfied with the transaction. See Proseus v. McIntyre, 5 Barb. 424. "A conveyance of land made in payment of a debt owing by the grantors, upon an understanding embodied in a contract executed by the parties immediately after the delivery of the deed, that the land is to be reconveyed to the wives of the grantors upon the payment of the debt and interest, is fraudulent as against the creditors of the grantors. As between the parties themselves to the transaction, the deed is valid." Harris v. Osnowitz, 35 App. Div. 594.

Q. A and B are adjoining property owners, and agree not to build within forty feet of the street. A builds within forty feet of the street, B not raising any objection thereto. Subsequently B starts to build within forty feet of the street, and A comes to you for advice, and asks you if he can prevent B from so building. What would you tell him? What equitable principle is involved?

A. A cannot prevent B from building, he having already violated the agreement by himself building within the prohibited distance. The maxim involved is: "He who comes into equity, must do so with clean hands."

Q. A began an action in equity to restrain by injunction proceedings, a collection of $1,000 taxes, $500 of which was illegally levied. What maxim of equity is involved in this transaction? What condition should the court exact?

A. The court should compel A to pay the $500 which was legally levied, on the principle that "He who seeks equity must do equity." Having sought the affirmative aid of a court of equity, he must act equitably, that is, pay the amount which is justly due.

Q. A gives a mortgage to B on his land, as security for the payment of two promissory notes made by A, payable to B. One of the notes was given at a usurious rate of interest. A brings action in equity, seeking to have the mortgage canceled of record. Can the action be maintained? If not, why not? If so, what condition will the court impose before granting relief? What equitable maxim applies?

A. Equity will compel A to pay the amount of the legal note, upon the principle that "He who seeks equity must do equity." "Where a mortgage has been given upon lands, in order to secure the payment of several promissory notes, a part of which notes are usurious, and a part of which are bona fide, although the mortgage is void, equity will require the plaintiff to do equity, by paying or tendering payment of the amount of the valid notes covered by the mortgage, before it will entertain a suit to cause the mortgage to be delivered up to be canceled as a cloud upon title." Williams v. Fitzhugh, 37 N. Y. 444.

Q. A gives a mortgage on his farm for $10,000; the mortgage provides for a usurious rate of interest. A brings an action to set aside the mortgage on account of the usury. Can he maintain the action? What condition, if any, will the court exact? What maxim of equity arises?

A. A can maintain the action, and the court cannot impose any condition for granting relief. The maxim of equity which arises is: "He who seeks equity must do equity." In other jurisdictions, the borrower is compelled to repay the amount of the loan with legal interest as a condition for obtaining the relief. But in this state, the rule is different according to our Statute of Usury (Laws of 1837, chap. 430, sec. 13), which is as follows: "Whenever any borrower of goods, money, or thing in action, shall file a bill in chancery for relief or discovery, or both, against any violation of the provisions of the said title, or of this act, it shall not be necessary to pay or offer to pay any interest or principal on the sum or thing loaned; nor shall any court of chancery require or compel the pay-

ment or deposit of the principal sum or interest, or any portion thereof as a condition of granting relief, or compelling or discovering to the borrower in any case usurious loans forbidden by said title or by this act." The right granted by this section is, however, purely personal to the borrower. See Allerton v. Belden, 49 N. Y. 373. Buckingham v. Corning, 91 N. Y. 525.

Q. A, who is in pressing need of money, tells B that if he will let him have $5,000, he will give him a mortgage on his real estate. B advances the $5,000, but A refuses to give the mortgage. What are the rights of B?

A. B can sue to recover back the money loaned, or can compel A to execute a mortgage; in the meantime he has a lien on the property by way of equitable mortgage. Where one party advances money to another, upon the faith of a verbal agreement by the latter to secure the payment by a mortgage on certain lands, and the mortgage is not executed, or if executed, is so defective or informal, as not to effectuate the purpose of its execution, equity will impress upon the land a lien in favor of the creditor, upon the principle that "Equity regards that as done which ought to have been done." Sprague v. Cochran, 144 N. Y. 104.

Q. A sells B a horse in the presence of C, who is the owner of the horse. C remains quiet at the time of the transaction, and subsequently sues B in replevin to recover the horse. Can the action be maintained? What equitable principle is involved?

A. No, the action cannot be maintained. The principle involved is that of equitable estoppel, or estoppel in pais. C, having remained quiet when another was selling his property as his own, is estopped from setting up his title against the purchaser. The maxim that "He who has been silent, when in conscience he ought to have spoken, shall be debarred from speaking, when conscience requires him to be silent," applies in this case. See Hamlin v. Sears, 82 N. Y. 327.

Q. A stood by and allowed B to sell and deliver as his own, A's wagon to C, of the value of $500 for cash. A said nothing. He had an opportunity to tell the facts, but did not do so. C knew that A owned the wagon at the time, but relied upon A's silence to give him title. B has spent the $500, and is insolvent. A de-

mands the wagon of C, and threatens to replevy it. C consults you. What would be your advice?

A. A can recover the wagon. The doctrine of equitable estoppel can have no application to a case, where a party was not deceived by the owner's silence. Here C, knowing that the title to the wagon was in A, was not misled by A's failure to speak, and therefore cannot invoke the doctrine of equitable estoppel. See 11 Am. & Eng. Ency. of Law (2d ed.), p. 442 et seq.

Q. A dies, and by his will leaves certain real property to trustees, with directions to sell the same, and apply the proceeds to the use of B, his only son. B dies intestate. How should the property be distributed. What equitable principle is involved?

A. The property should be divided according to the Statute of Distribution of Personal Property. Equity, regarding that as done which ought to have been done, considers the real estate as personal property. It is an instance of the so-called doctrine of equitable conversion.

Q. A owns two pieces of land. He was indebted to B. He secured his indebtedness to B by a mortgage covering both these tracts. He subsequently became indebted to C, and he secured that debt by a mortgage covering one of the tracts only. The first creditor, whose debt is secured by mortgage, goes to foreclose his mortgage, and seeks to satisfy his mortgage, first out of that lot upon which his mortgage and the mortgage of the other creditor are liens. C objects. What are his rights? What principle of equity is involved?

A. The equitable doctrine of "marshalling assets" is involved in this case. Equity will compel B, who holds a mortgage on both lots as security, to exhaust his mortgage as against that lot not covered by C's mortgage, before resorting to the lot which is subject to both mortgages. "The facts present a case, where the creditor has a lien upon two funds for the security of his debt, and another party has an interest in only one of the funds, without any right to resort to the other. In such a case, equity will compel the creditor to take his satisfaction out of the fund upon which he alone has an interest, so that both parties may if possible escape without injury." Ingalls v. Morgan, 10 N. Y. 178.

Q. A owns certain lands. He gives two mortgages thereon, one to B, and one to C. C pays the first mortgage to B, has a satisfaction written upon it, and then takes it. C then brings an action to foreclose the first mortgage. A, the owner of the land, defends on the ground that C, having paid the first mortgage and taken a discharge of the same, thereby removed the lien from the land, and consequently cannot foreclose this mortgage. Judgment for whom and why? What equitable doctrine is involved?

A. Judgment for C. The equitable doctrine of "subrogation" applies in this case. Whenever to protect his own rights, one pays or satisfies a debt for which another is primarily liable, he is subrogated to the rights of the creditor, and may enforce against the person primarily liable, all securities, benefits, and advantages held by the creditor. In this case, C being a second mortgagee, his mortgage security was subsequent in lien to the first mortgage. When he paid the first mortgage, he was paying a debt which was a prior lien to the interest he had in the lands by reason of his second mortgage, and being in that position when he paid this first mortgage debt, he was entitled to succeed to all the securities for the enforcement of that debt which the first mortgagee had. The security for the enforcement of that debt held by the first mortgagee was his mortgage, and consequently equity will permit C to succeed to that security, and will treat this transaction as in fact vesting in him by assignment the title to that first mortgage. That being so, he may maintain this action to foreclose the mortgage. Lewis v. Palmer, 28 N. Y. 271.

Q. A mortgages three parcels of land to D; later sells one parcel to B, another to C, and retains the third. Foreclosure proceedings are commenced, and B and C are made parties. C consults you as to his rights. What would you advise him to do, and what are his rights?

A. C has the right to have the lots decreed to be sold in the inverse order of their alienation. Therefore, as one lot has not yet been conveyed, the title to it being still retained by the mortgagor, that lot must be sold first. The last conveyance was made to C, therefore his lot must be sold second. The third lot had previously thereto been conveyed to B, his lot therefore must be sold last. The rule is well settled in this state. See 87 N. Y. 114; 104 N. Y. 393.

Q. A was the owner of a tract of land, divided into lots, which he sold to B, C, D, and E. In each deed there was a covenant running with the land, that the premises should not be used for any factory purposes. D leases his tract to a soap manufacturer, who begins work. Can he be enjoined from doing so?

A. Yes, for an equitable easement has been imposed upon the land. "Equitable easements are the rights, which neighboring owners of lots have, to enforce in equity restrictions as to the use or enjoyment of their property, which affect a number of lots in the same way, and were placed upon them all by one and the same grants." Trustees of Columbia College v. Lynch, 70 N. Y. 440, a leading case on the subject of equitable easements.

(NOTE.) "A provision contained in a deed of one of three lots owned by a common grantor, "that no building or edifice of any description whatsoever exceeding eight feet in height shall at any time hereafter be erected within thirty-two feet of the rear line of said two lots," not coupled with any reservation of the condition in favor of the heirs or assigns of the grantee, will in the absence of any words giving a right of re-entry for its breach, be construed as a mere personal restriction for the benefit of the common grantor, especially where the history of the land, and the purpose to which the land has been devoted, show no necessity for its continuance, and the subsequent deeds of the property coutain no mention of the conditions, and it appears that the persons who have owned the property regard the restriction as obsolete." Krekeler v. Aulbach, 51 App. Div. 591.

Q. A covenant in a deed prohibits the building of anything but a dwelling house on the land. Through several conveyances the land comes into the hands of B, who commences to erect a factory on the lot, claiming that the surroundings have so changed that it is a very unsuitable location for a dwelling house. It is conceded in the agreed state of facts that the covenant runs with the land. Is B's contention good? If so, why so? If not, why not?

A. The contention is good; for in such a case, equity will relieve the grantee from the restrictions imposed by the covenants. "Where the owner of lands in a city has laid it out into lots, which are sold to different purchasers, each conveyance containing covenants on the part of the grantee running with the land, restricting the use thereon to the purposes of a private residence, or prohibiting the erection thereon of certain specified structures, while a court of equity has power to enforce the performance of these covenants, the exercise of this authority is within its discretion, and where there has been such a change in the character

of the neighborhood as to defeat the object and purposes of the covenants, and to render it inequitable to deprive a grantee or his successors in title of the privilege of conforming his property to that character, such relief will not be granted, and in lieu thereof damages will be allowed. The court in awarding damages is not confined to those sustained before the commencement of the action, but may award permanent damages; but must require the plaintiff, upon receipt of the damages awarded, to execute to the defendant a release of the covenant." Ammerman v. Deane, 132 N. Y. 355.

Q. The X Co., a telegraph corporation, with the consent of the highway commissioners, but without the consent of the property owners, placed their telegraph poles in a highway, the fee to which was in the adjoining property owners, subject to the usual right of the public in highways. A, an adjoining property owner, comes to you for advice. Is there any remedy for the owners, and if so what?

A. The owners have an action for damages, but usually no injunction is granted in these cases. "An injunction to prevent the erection in the street in front of plaintiff's lot of an electric wire pole denied, because there was no evidence to show that if the defendant's work were allowed to proceed, any irreparable injury would be done, or any injury which could not be compensated by pecuniary payment, and upon the further ground, that if the injunction was allowed to stand, a public improvement would be obstructed for many months, which in the end might be allowed to proceed." Tracy v. R. R., 54 Hun, 550.

Q. A is the owner of certain real estate. He remains out of possession for one year. During his absence B, claiming title, makes a deed conveying the property to C. C records the deed, and goes into possession. A, learning of these facts, brings an action against C to compel him to cancel the fraudulent deed of record, as being a cloud upon his title, and that the deed be delivered up to him, and for further equitable relief. Can the action be maintained? If so, why so? If not, why not?

A. No. A should bring ejectment. It is held that a bill to remove a cloud upon title, can be maintained in this state, only where the plaintiff is in actual possession of the property. The

reason is, that where the defendant is in possession, plaintiff can bring ejectment, and thus test his title at law. Diefendorf v. Diefendorf, 132 N. Y. 100.

Q. A is the owner of, and in possession of, a certain tract of land. B, a swindler, forges A's name to a deed of the property. B has a false certificate of acknowledgment added, and puts the deed on record, C, a confederate, being named as grantee. A brings action for the removal of the deed as a cloud upon his title. Can the action be maintained? State your reasons.

A. Yes. "When the law raises a presumption without direct proof of the validity of a conveyance, and its invalidity can only be made to appear by extrinsic evidence, a case is presented for the exercise of the jurisdiction of a court of equity, to compel the surrender and cancellation of a conveyance as a cloud upon title. Such is the case of a forged deed, which on the strength of a false certificate of acknowledgment, has been put on record." Remington Paper Co. v. O'Dougherty, 81 N. Y. 474.

Q. A borrows $10,000 of B, and gives as security a deed of his house and lot. The deed was absolute on its face. The loan was to be returned in one year with interest. At the expiration of the year, A tendered to B $10,000, and the interest due, and demanded a reconveyance. B refused to reconvey, claiming that he had bought the land. What is the nature of the transaction between them? State the remedy, if any.

A. A can bring an action in equity to have the deed declared to be a mortgage. "The rule that a deed absolute on its face can, in equity, be shown by parol or other extrinsic evidence to have been intended as a mortgage, has been upon the fullest consideration deliberately established in this state, and will not be departed from." Horn v. Keteltas, 46 N. Y. 605. See also Coe v. Cassidy, 72 N. Y. 133.

Q. A sues B for trespass, claiming that B entered upon his premises and polluted a well upon his land. B answers by general denial. A, on the trial, proves possession of, but not title to, the premises. B offered to prove title in another person. The court refused to receive the evidence. Should it have been admitted?

What effect on the judgment would it have had, had it been received, and title to the premises proved to be in another person?

A. The evidence should not have been admitted. "An illegal possessor may maintain trespass for an entry upon him against all the world, except the rightful owner." Evertson v. Sutton, 5 Wend. 281. "While it is true, that plaintiff might maintain an action of trespass, by showing actual possession and occupation alone, without alleging or proving title, yet under such allegation and proof, he could not recover for damages to the freehold." Taylor v. Wright, 36 App. Div. 568. It will be observed in the question put, the action was simply one of trespass, and not one for damages; therefore if the evidence were admitted it would have no effect upon the judgment.

Q. A contracts with B for twenty chests of tea. B delivers ten chests, and then refuses to perform as to the other ten chests, although it is within his power to do so. A brings action to compel B to specifically perform his contract. Can the action be maintained? State your reasons.

A. No. A has an adequate remedy at law, in a suit for damages for a breach of the contract. The extraordinary equitable remedy of specific performance can only be invoked when the plaintiff has no adequate remedy at law. Philips v. Berger, 2 Barb. 608.

Q. A agrees with B to sell certain real estate for $10,000, deed to be delivered, and payment made at a certain time. B signs an agreement which satisfies the Statute of Frauds. At the appointed time, A presents a good and sufficient deed, and demands the money. B refuses to perform his contract. Will equity decree specific performance? Substitute in the above case $10,000 worth of stock instead of the real property. What would your answer be?

A. As to the real property, specific performance will be decreed on the principle of mutuality of remedies. An agreement to convey real property will always be specifically enforced, as there is no adequate remedy in a suit for damages at law, it being impossible to measure the damages with certainty, as each piece of real estate may have a peculiar value to the prospective purchaser, on account of its location, etc. As the vendee can thus enforce specific per-

formance, equity, applying the doctrine of mutuality of remedies, gives the vendor the same remedy, and allows him specific performance, when the vendee refuses to perform. See 57 N. Y. 219. As to the stock, there is an adequate remedy at law, as it can be purchased in open market, and the damages readily estimated; therefore specific performance should not be decreed, unless the stock could not easily be purchased in the market. Johnson v. Brooks, 93 N. Y. 337.

Q. A buys a certain piece of land from B. Afterwards he brings an action for reformation of the deed, claiming that when he bought the property he supposed there were certain copper mines on the land, and would not have bought it if he had not supposed this. Will a court of equity grant him this relief? If so, why so? If not, why not? State your reasons.

A. A cannot procure the relief desired in the absence of fraud on the part of B, the mistake not being mutual. "In the absence of fraud, a party cannot obtain reformation of a contract, because it is not what he wanted it, but as the other intended it to be, nor because the effect proved different from what he supposed, when it was just what the other party supposed and intended it to be. There must be either mutual mistake, or mistake on one side, and fraud on the other." Curtis v. Giles, 7 Misc. 590.

Q. A sues to reform a contract, because at the time of making it, he was under such a mistake of fact as to have changed his whole intentions had he known the truth. Upon the trial both parties move for a verdict. Upon the facts alone stated above, who would have judgment? Would any additional fact change the decision? If so, what fact?

A. Upon the facts stated, judgment should be for the defendant, but if either mutual mistake, or mistake on the part of the plaintiff, and fraud on the part of the defendant be shown, then judgment must be for the plaintiff. "A mistake which will warrant a court of equity to reform a written contract, must be a mistake made by both parties, or by one by which his intentions have failed of expression, and with it fraud in the other in taking advantage of the mistake, and obtaining a contract with the knowledge that the one dealing with him is in error in regard to its terms." Bryce v. Ins. Co., 55 N. Y. 240.

Q. A, who is the financial agent of a corporation, has a voluntary accounting with it. A signed an instrument acknowledging that he is indebted to it for a certain sum. Afterwards A brings an action in equity for the reformation of the instrument, and alleges that at the time of the settlement he added the column, but did not examine the items, and that one of the items is wrong. He acknowledges that the corporation at the time of the settlement believed the instrument to be true. The corporation puts in a demurrer. Judgment for whom, and why?

A. Judgment for the defendant, as the mistake here was not mutual, and there was no fraud on the part of the defendant. A party who seeks the reformation of an instrument on the ground of a mistake of fact, must establish by the clearest evidence that the mistake was mutual, that a different agreement was intended by the parties, and that fraud has been exercised by the other. Sternback v. Friedman, 23 Misc. 173.

Q. A buys a piece of land of B, and by mutual mistake part of the description in the deed was left out. Subsequently B sues A in ejectment, and A wishes to defend. A comes to you for advice. What are his rights? How would you proceed to enforce them?

A. The mistake being mutual, A can go into equity and obtain a reformation of the deed to accord with the intentions of the parties. He can then set this up as a defense to the ejectment suit. Paine v. Upton, 87 N. Y. 327.

Q. A agrees to buy a house from B for $7,000. The deed is to be delivered the next day. A gives $1,000 to bind the bargain. B takes the money, and on the next day tenders the deed to A, who refuses to accept it, and to complete the purchase as agreed, at the same time demanding the return of his money. The agreement was verbal. B comes to you for advice. What are his rights?

A. B has the right to retain the $1,000, A having broken the contract. B, however, cannot secure specific performance, as the contract, not having been reduced to writing, is void. (Sec. 224 of the Real Prop. Law of 1896.) Part payment is not sufficient to take the contract out the statute, and secure specific performance. "It is a general rule that the mere payment of purchase

money is not sufficient to authorize a judgment requiring specific performance of a verbal agreement for the sale of lands, except in a case where an action at law to recover the amount paid would not, under the circumstances, give the purchaser an adequate remedy. But where the purchase money has been paid, and possession under the contract has also been taken, the contract will be specifically enforced." Pawling v. Pawling, 86 Hun, 502.

Q. Your client placed in the hands of his agent $5,000 in cash, in trust, to be invested for him in bond and mortgage. Instead of doing so, the agent used the entire fund, except $1,000, in paying his personal debts. Thereafter he made an assignment for the benefit of his creditors. His estate to the amount of $10,000 came into the hands of his assignee. Is your client entitled to a preference to the amount of his debt in the distribution of his assets?

A. No. The preference will only be allowed for the amount of the fund coming into the hands of the assignee, that is, $1,000. "The trust fund, with the single exception mentioned, was misappropriated by W to the payment of his private debts prior to the assignment. It cannot be traced into the property in the hands of the assignee, for the plain reason that it is shown to have gone to the creditors of W in satisfaction of their debts. The court below seems to have proceeded upon a supposed equity springing from the circumstances, that by the application of the fund to the payment of W's creditors, the assigned estate was relieved pro tanto from debts which otherwise would have been charged upon it, and that thereby the remaining creditors, if entitled to distribution without regard to the petitioner's claim, will be benefited. We find this quite too vague an equity for judicial cognizance. The preference should be allowed, only to the extent of the trust fund coming into the hands of the assignee." Matter of Cavin v. Gleason, 105 N. Y. 256.

CHAPTER XII.

Evidence.

Q. What is meant by the term of "burden of proof?" A makes a contract for work, labor and services. Upon B's failure to pay, A brings suit against him. B answers denying any contract. Upon whom does the burden of proof rest? Who has the right to open and close? If B had answered admitting the contract but pleading payment, who would have the burden?

A. The term "burden of proof" is used in two senses, one as denoting the burden of establishing a given proposition, the other as denoting the burden of going forward in support of a given proposition. By the first is meant the duty of establishing one's case. The usual test given as to who has this duty or burden is, that it rests upon the party against whom judgment would be given if no evidence were offered by either side. In the first question put, the burden of establishing is upon A, he affirming that there is a contract, and B denying the same. The burden of establishing, and the right to open and close are coincident with each other. In the second case, B having admitted that there is a contract, and setting up payment, an affirmative defense, there is no issue as to the contract, and hence B has the burden of establishing payment, it being the only question in controversy. The burden of establishing never shifts, although the burden of going forward with evidence shifts from side to side, according as the weight of evidence preponderates. "Where the party having the burden of proof establishes a prima facie case, and no proof to the contrary is offered, he will prevail. Therefore the other party, if he would avoid the effect of such prima facie case, must produce evidence of equal or greater weight to balance and control it, or he will fail. Still the proof on both sides applies to the affirmative or negative of one and the same issue or proposition of fact; and the party whose case requires the proof of that fact has all along the burden of proof. It does not shift, though the weight in either

scale may at times preponderate. But where the party having the burden of proof, gives competent and prima facie evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and a distinct proposition which avoids the effect of it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact." Powers v. Russell, 13 Pick. 69. See also Thayer's Cas. on Ev., note on Burden of Proof.

Q. A is on trial for murder. The judge in his charge to the jury instructs them, that the people must establish their case by a preponderance of evidence, and if they fail so to do, the prisoner must be acquitted; that if the people establish the killing by the defendant, he must show that it was justifiable or excusable, or else be convicted of murder. What do you say to this charge?

A. The charge was clearly erroneous. While in civil cases, the plaintiff need only establish his case by a preponderance of evidence, yet in criminal cases, the duty is upon the people to establish the guilt of the prisoner beyond a reasonable doubt. There is no legal implication from the fact of the killing. The burden of establishing rests upon the people throughout the trial; it never shifts to the prisoner; his only duty throughout is to raise a reasonable doubt. "The charge in this case ran counter to these rules, and was calculated to impress upon the jury a belief that proof of the homicide carried with it a legal implication of crime which shifted the burden of proof upon the prisoner, and required him to satisfy the jury, that the killing was either justifiable or excusable at the peril of a conviction if he should fail in his attempt. It is true, that while there is no legal implication of the crime of murder from the bare fact of a homicide, the jury may infer it as a fact, and may do so even though no motive is assigned for the act, and the case is bare of circumstances of explanation. But the inference is one of fact which the jury must draw, if such seems to be their duty, and not one of law which the court may impose upon their deliberations, and then upon that assumption, shift the burden upon the prisoner and require him to prove that in fact no crime has been committed. People v. Downs, 123 N. Y. 558. People v. Conroy, 97 N. Y. 77.

Q. A is on trial for murder. He interposes the defense of in-

sanity. The court instructs the jury that in order to acquit the prisoner, the evidence offered on his part must satisfy them that he was insane at the time of the killing; that he must prove insanity by a preponderance of evidence. A is convicted. He appeals on the ground that the charge was improper. Is the appeal good?

A. Yes. The prisoner has no duty to establish any defense, such as insanity, by a preponderance of evidence. The rule in criminal cases, that the defendant is entitled to the benefit of a reasonable doubt, applies not only to the case as made by the prosecution, but to any defense interposed. It is true, that he has the burden of going forward with evidence of insanity, but not the burden of establishing the same. It is never incumbent upon the prosecution to give affirmative evidence of sanity in a particular case, yet the burden is upon it to establish beyond a reasonable doubt that the crime was committed by a sane person. Walter v. People, 32 N. Y. 147; People v. Riordan, 117 N. Y. 71.

Q. A offers a will for probate. It is contested on the ground of the insanity of the testator. On whom is the burden of establishing the sanity of the testator? On whom is the burden of going forward with evidence on the question of sanity?

A. The burden of establishing that the will was the act of a competent testator is upon the proponent. But as the law presumes that every one is of sound mind, he is relieved by this presumption from going forward with evidence. The proponent need only prove the due formal execution of the will, and then it is opened to the contestant to show incapacity, and to the proponent to offer affirmative proof of mental soundness in rebuttal. Taking the proceeding for probate as a whole, the proponent must throughout see to it that the preponderance of evidence is in favor of the presumption, and such as will satisfy the court in assuming the requisite soundness of mind. Tyler v. Gardiner, 35 N. Y. 559.

Q. A leaves home in 1890, and is not heard of for more than ten years. His property is claimed by both B and C. It becomes important for B to establish that A died in 1892. At the trial of an action for the possession of A's property, B offers evidence of A's unexplained absence, and rests. C moves for judgment. Judgment for whom and why?

A. Judgment for C. The rule is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or at the end of any particular period during those seven years; that if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort to be laid before the court for that purpose, beyond the mere lapse of seven years since such person was last heard of. The presumption of law relates only to the fact of death, and the time of death, whenever it is material, must be subject of distinct proof. If no sufficient facts are shown from which to draw a reasonable inference, that death occurred before the lapse of seven years, the person will be accounted in all legal proceedings as having lived during that period. Eagle v. Emmett, 4 Bradford (N. Y.), 117. See also Matter of Davenport, 37 Misc. 455.

Q. A, B, and C, husband, wife, and child, were stopping at a certain hotel which was destroyed by fire. They all three perished in the flames. On the trial of an action, it becomes material to prove that A, the husband, survived the others. The attorney for one of the parties contends that the husband, being the stronger survived, and offers no evidence. Is the contention valid? State your reasons.

A. No. There is no presumption of survivorship in this state, either that any one survived, or which one was the survivor "There is no legal presumption which courts are authorized to act upon, that there was a survivor, any more than that there was a particular survivor. It is not claimed that there is any legal presumption that they died at the same time. Indeed it may be conceded, that it is unlikely, that they ceased to breathe precisely at the same instant, and as a physical fact, it may perhaps be inferred that they did not. But this does not come up to the standard of proof. The rule is, that the law will indulge in no presumption on the subject. It will not raise a presumption by balancing probabilities, either that there was a survivor, or who it was. . . . These expressions only mean that as the fact is incapable of proof, the one upon whom the onus lies, fails, and persons thus perishing must be deemed to have died at the same time for the purpose of disposing of their property." Church, Ch. J., in Newell v. Nichols, 75 N. Y. 78.

Q. A sues an insurance company. On the trial of the action, the attorney for the company admits that B, whom A claims signed his policy, was the agent of the company. A recovers judgment, and the insurance company appeals. The judgment is reversed and a new trial ordered. On the new trial, the insurance company is represented by another attorney, and he objects to receiving the admission made on the first trial by the previous attorney for the company. The court overrules the objection. Was the ruling correct? State your reasons.

A. Yes. The admission was binding on the company throughout the litigation. "A written stipulation with respect to the facts in a case made by the parties or their attorneys for the purpose of evidence, if it is general and not expressly limited in respect to time, or confined in terms to some particular purpose or occasion, stands in the case for all purposes until the litigation is ended, unless the court upon application shall relieve either or both of the parties from its operation." Clason v. Baldwin, 152 N. Y. 204.

(NOTE.) "In our law, the term admission is usually applied to civil transactions, and to those matters of fact in criminal cases which do not involve criminal intent; the term confession being generally restricted to acknowledgment of guilt. . . . We shall first consider the person whose admissions may be received. And here the general doctrine is, that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence." Greenleaf on Evidence, secs. 169, 171.

Q. A brings an action of trespass against B. On the trial of the action, B offers in evidence an admission of C, a former owner of the land, to the effect that B had certain rights therein, which would defeat A's action. The evidence was objected to. What should have been the ruling of the court?

A. The evidence was admissible. Declarations of former owners of real estate are admissible in evidence as against subsequent grantees, on the ground of identity of interest. Jackson v. Shearman, 6 Johns. 19; Chadwick v. Fonner, 69 N. Y. 404.

Q. A brought an action against B to recover the amount of a promissory note made by B payable to C's order. On the trial, certain declarations, alleged to have been made by C while he was

the owner of the note, were offered in evidence. Objected to. Should the objection be sustained? State your reasons.

A. Yes. The evidence is inadmissible. "It will be found, on an examination of most of them, that they do not sustain the doctrine that the declarations of a prior holder of a note, or vendor of a chattel, are admissible in evidence as against a subsequent owner, who acquired title for a valuable consideration. It may, I think, be laid down as a general proposition, that the cases in which such evidence has been held admissible, are those only where the declarations were made by a party really in interest, or by one through whom the plaintiff claimed as privy through representation, as in cases of bankruptcy, death and others of a similar character. Where the rule is applicable, there must, it is conceded, be an 'identity of interest' between the assignor and assignee. That relation appears to me to be based on the fact, that the rights of the assignor continue and are represented by the assignee. Where a person becomes a purchaser of a chose in action or a chattel for a valuable consideration, his rights are independent of the assignor and beyond his control. Although it may be necessary to found his title on a transfer, yet the mere proof of such transfer is evidence of his right. Personal property is frequently acquired by delivery merely. Possession alone is then prima facie evidence of title, and the rights of the possessor do not necessarily depend on the title of the person by whom the delivery was made, or from whom such possession was obtained." Lott, S., in Paige v. Cagwin, 7 Hill, 361.

Q. When the will of A is offered for probate, it is contested by B on the ground of undue influence. B offers evidence to show that C, one of the legatees, made declarations to the effect that he, C, unduly influenced A in making the will. This is objected to by the other legatees. What should be the ruling of the court? Give reasons.

A. The evidence is inadmissible. "It seems to me that the weight of authority is against the admissibility of the declarations of one party to affect the rights of another, unless such parties be jointly interested, by which each party is authorized to speak and act for the whole, or there is proof of a combination, in which case, a conspirator may speak for all his confederates. But in the latter

case, a conspirator, by his admissions or declarations, can only affect his co-conspirators, and if his admissions or declaration cannot but affect other parties, not confederated, such admissions or declarations should be excluded. This rule is based upon the most obvious principle of justice. Is there any good reason to be suggested why the rights of one party should be affected by the irresponsible admissions of another party with whom he chances to be associated as such, but upon whom he has conferred no authority to speak for him? Such a principle would enable a party to deprive another of his legal rights without that other being able either to disprove the admissions, or by cross-examination to test their truth. It is true that the admissions of a party adverse to his interests are held admissible, because of the improbability of a person admitting a fact contrary to his interest, unless such admissions be true, and there seems to be a propriety in holding such a party bound by his own admissions, but when the interests of another party intervene, that other party has the right to insist that they shall not be divested, except by the ordinary proof attested by the sanction of an oath, or by his own voluntary admissions." Calvin, S., in La Bau v. Vanderbilt, 3 Redf. (N. Y.) 384.

Q. Father and son are standing together when plaintiff sells his goods. Nothing is said at the time of the responsibility of either. Plaintiff sues the father, and attempts to show that 1. The son is irresponsible; 2. Father has paid debts of this kind for the son. Can he show both?

A. He cannot show either. "In an action where the question at issue was whether credit was given to the defendant or his son, evidence on the part of the plaintiff of the inability of the son was received under objection. Held error, that no fair inference could be drawn that defendant received the credit because he happened to have the most property. So also the reception of evidence that defendant had paid debts of other persons against his son held error, as the fact of such payments were no evidence of a promise to pay other debts." Green v. Disbrow, 56 N. Y. 334.

Q. A sues B and C for a tort committed by them. At the trial, he offers in evidence an admission of B. C objects to its reception in evidence. What should be the ruling of the court? State your reasons.

A. The objection should be sustained, as the admissions of one joint tort feasor cannot be used against the other. The law does not recognize a sufficient identity of interest between them, to permit the admissions of one to bind the other. Carpenter v. Sheldon, 5 Sandf. 77; Wilson v. O'Day, 5 Daly, 354.

Q. A is arrested charged with having committed a murder. He makes a full confession to an officer who visits him in prison. On the trial it is offered in evidence against him. A's attorney objects, claiming that it is not admissible as he was under arrest. It is conceded that the officer used no threats or promises to secure the confession. What should be the ruling of the court?

A. The objection should be overruled. It is no ground for the exclusion of confessions of a prisoner charged with crime, that they were made while he was under arrest, if shown to have been made voluntarily, and without influences of promises or threats. People v. McGloin, 91 N. Y. 240; People v. Chapleau, 121 N. Y. 266. "By voluntary is meant proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause." Selden, J., in People v. McMahon, 15 N. Y. 384. Sec. 395 of the Code of Crim. Pro., governing the admissibility of confessions in criminal cases, is as follows: "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction without additional proof that the crime charged has been committed."

Q. A coroner's inquest is being held to inquire into the cause of the death of A. B is subpœnaed as a witness and gives certain testimony. He is subsequently arrested and charged with having murdered A. On his trial, the district attorney attempts to introduce in evidence B's testimony given before the coroner. It is objected to. What should be the ruling of the court?

A. The objection should be overruled, as the evidence is admissible. Where an inquest is held before it has been ascertained that a crime has been committed, or before any person has been arrested charged with the crime, and a witness is sworn before a coroner's

jury, the testimony, though the witness be afterwards charged with the crime, may be used against him on his trial, notwithstanding the fact, that at the time of his examination he was aware a crime was committed, and that he was suspected of being the criminal. If he desires protection, he must claim his privilege. It would have been different if he had been arrested before being taken before the coroner; in such case, the evidence given by him could not be used against him on his trial for the crime. People v. Mondon, 103 N. Y. 211.

Q. A brings action against the X company to recover damages for personal injuries caused by defendant's negligence, in providing an unsafe and defective machine whereby he was injured. At the trial, A's attorney offers evidence to show that three days after the accident the company made certain repairs to the machine. The evidence is objected to. What should be the ruling of the court?

A. The objection should be sustained. It is well settled in this state that such evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant. "Such evidence has no tendency whatever, we think, to show that the machine or structure was not previously in a reasonably safe and perfect condition, or that the defendant ought in the exercise of reasonable care and diligence, to have made it more perfect, safe and secure. While such evidence has no legitimate bearing upon the defendant's negligence or knowledge, its natural tendency is undoubtedly to prejudice and influence the minds of the jury." Earl, J., in Corcoran v. Village of Peekskill, 108 N. Y. 151.

Q. A is injured by falling on the sidewalk in front of B's house. The sidewalk was out of repair and in a dangerous condition. A brings action against B to recover damages for the injuries sustained. B answers denying any liability, claiming that he was under no duty to repair the sidewalk. At the trial, A introduces evidence to show that shortly after the accident B made certain repairs to the sidewalk, by replacing the broken stone with a new

one. This evidence is objected to. Should the objection be sustained?

A. No. The evidence should be admitted. "The evidence to the effect that the defendant replaced the worn-out stone was admissible to show that the defendant had control over the sidewalk." Bateman v. R. R., 47 Hun, 429; Sprague v. City of Rochester, 52 App. Div. 53.

Q. A question arises in condemnation proceedings as to the value of a certain piece of property owned by A. A offers to prove what had been paid for a similar piece of property situated in the same neighborhood. This is objected to. What should be the ruling of the court?

A. The objection should be sustained. "The reasons assigned for the conclusions reached in the cases cited are in the main: That the test in legal proceedings is, what is the present market value of the property which is the subject of the controversy? It may be shown by the testimony of competent witnesses, and on cross-examination, for the purpose of testing their knowledge respecting the market value of land in that vicinity, they may be asked to name such sales of property, and the prices paid therefor, as have come to their attention. But a party may not establish the value of his land by showing what was paid for another parcel similarly situated, because it operates to give to the agreement of the grantor and grantee the effect of evidence by them that the consideration for the conveyance was the market value, without giving to the opposite party the benefit of cross-examination to show that one or both were mistaken. If some evidence of value, then prima facie a case may be made out so far as the question of damages is concerned by proof of a single sale, and thus the agreement of the parties, which may have been the result of necessity or caprice, would be evidence of market value of land similarly situated, and become a standard by which to measure the value of land in controversy. This would lead to an attempt by the opposing party to show, first, the dissimilarity of the two parcels of land; and, second, the circumstances surrounding the parties which induced the conveyance. Thus each transaction in real estate, claimed to be similarly situated, might present two side issues which could be made the subject of as vigorous contention as the main issue, and

if the transactions were numerous it would result in unduly prolonging the trial, and unnecessarily confusing the issues, with the added disadvantage of rendering preparation for trial difficult. Value of property having a recognized market value, such as number one wheat and corn, may of course be proven by showing the market prices, but the value of property which is dependent upon locality, adaptability for a particular use, as well as the use made of property immediately adjoining, may not be shown by evidence of the price paid for similar property." Parker, J., in Petition of Hubert Thompson, 127 N. Y. 463.

Q. A brings action against a municipality to recover damages for personal injuries sustained, caused by A tripping and falling over an obstacle in the walk. Is the testimony of others that they at or about the same time tripped over the same obstacle, competent?

A. The evidence is admissible. Evidence to show the happening of a similar accident at the same place is admissible to show that the street was unsafe, and also to show knowledge on the part of the city. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character, at least it is some evidence to that effect. Besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention of the city authorities. Quinlan v. City of Utica, 74 N. Y. 603; Magee v. City of Troy, 48 Hun, 383, aff'd 119 N. Y. 640.

Q. A railroad company is sued by a brakeman who received an injury. The complaint sets forth that the injury was caused by the neglect of the company to place in operation upon its road, an improved switch, which was in use upon a few roads. Defendant offers evidence to show that the switch used by it was in general use on other roads. Is the evidence admissible?

A. Yes. "Such evidence tends to show that the switch is such as a reasonably prudent person, exercising reasonable diligence, would properly consider safe for the purposes for which it was designed." Frace v. R. R., 143 N. Y. 182. See also McGrell v. Buffalo Co., 153 N. Y. 265.

Q. A's house catches fire and is consumed. A sues the X rail-

road company, claiming that the fire was caused by sparks which escaped from one of its engines. A shows by evidence that the fire could not have originated from any other cause, and then attempts to prove that passing locomotives of the X company have, on other occasions, caused fires in the neighborhood by scattering sparks, and also that they have repeatedly scattered sparks, though no actual fire was thereby caused. The counsel for the road objects to the admission of this evidence. What should be the ruling of the court?

A. The evidence is admissible as tending to prove the possibility that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. "The business of running the trains on a railroad supposes a unity of management and a general similarity in the fashion of the engines and the character of the operations. I think, therefore, it is competent prima facie evidence for a person seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that about the time it happened, the trains which the company was running past the location of the fire were so managed, in respect to the furnaces, as to be likely to set on fire objects not more remote than the property burned." Denio, Ch. J. in Sheldon v. R. R., 14 N. Y. 218. See also Field v. R. R., 32 N. Y. 339.

Q. B is the acceptor of a bill in which the payee named is a fictitious person. Can it be shown in an action brought by him that he has accepted similar paper containing the name of a fictitious payee, upon the question of bona fides?

A. Yes. The evidence is admissible as tending to show that he knew that the payee was a fictitious person. The fact of knowledge may be established by circumstantial evidence, even where it is necessary to show actual knowledge, and for this purpose evidence of previous transactions is competent. See Abbott's Trial Brief on Ev. p. 445.

Q. B is on trial for receiving stolen property. He offers evidence to show that when A brought the property to him, A told him where and from whom he bought it, when he bought it, and the price he had paid for it. Is the evidence admissible?

A. The evidence is admissible, as showing how the defendant came by the property, and was competent upon the issue of guilty knowledge. As it was material to prove that he received the goods with knowledge that they were stolen, evidence to show that he received them under circumstances which would negative this knowledge was relevant. People v. Dowling, 84 N. Y. 478.

Q. A is on trial for obtaining goods under false pretenses, and with fraudulent intent. He is asked by the attorney "What was your intent?" The district attorney objects to the admissibility of the evidence. Should the objection be sustained?

A. No. "A party when charged with an intent to deceive, or cheat or defraud, has a right to testify as a witness in his own behalf, that he did not intend to cheat, deceive, or defraud in the transaction wherein he is charged with having had such motive, leaving the weight due to his evidence to be determined by the jury." Pope v. Hart, 35 Barb. 630.

Q. A is on trial for receiving stolen goods from B with the knowledge that they were stolen. Evidence is offered to prove the receipt of similar goods at about the same time from B. A's attorney objects. What should be the ruling of the court?

A. The objection must be sustained, because there is nothing to show that the goods were stolen from the same person and by the same thief. "Upon the trial of an indictment for receiving stolen goods, it is not competent for the prosecution to show for the purpose of proving knowledge, that the accused has received other property, from other persons, knowing the same to have been stolen. In order that the evidence is admissible, the articles must have been stolen from the same person and delivered to the receiver by the same thief." Coleman v. People, 55 N. Y. 81. "Upon the trial of an indictment for receiving stolen property, knowing it to have been stolen, evidence that the accused has frequently received similar articles of property under like circumstances from the same thief, stolen from the same person or place, knowing that they were stolen, is proper upon the question of guilty knowledge." Copperman v. People, 56 N. Y. 591.

Q. A is indicted for burglary. Upon the trial the prosecuting attorney offers evidence to prove the general bad character of A.

An exception is taken to the ruling, admitting the testimony. Is the exception well taken?

A. The exception is well taken, as the prisoner here does not appear to have offered evidence of his own good character before the attempt of the prosecution to introduce evidence of his bad character. "The character of a prisoner cannot be attacked, unless he has himself put his character in issue by introducing evidence of his good character. It is only after the defendant has opened the door as to his character, that the prosecuting attorney will be permitted to give evidence of the bad character of the accused." People v. White, 14 Wend. 111.

Q. Three witnesses testified upon the former trial of the same action. Of these witnesses one is dead, one insane, and the other has forgotten the facts. How would you proceed to get the testimony before the court, if it is admissible?

A. The evidence of the one that is dead, and the evidence of the one that is insane, can be read at the new trial from the stenographer's minutes, but the evidence of the one that has forgotten the facts cannot be read in evidence. This is provided for by sec. 830 of the Code of Civ. Pro., which is as follows: "Where a party or witness has died or become insane since the trial of an action, or the hearing upon the merits of a special proceeding, the testimony of the decedent, or insane person, or of any person who is rendered incompetent by the provisions of the last section, taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing, or upon any subsequent trial or hearing of the same subject matter in an action or special proceeding between the same parties who were parties to such former trial or hearing, or their legal representatives by either party to such new trial or hearing or to such subsequent action or special proceeding, subject to any other legal objection to the competency of the witness, or to any other legal objection to his testimony or any question put to him. The original stenographic notes of such testimony taken by a stenographer who has since died or become incompetent may be so read in evidence by any person whose competency to read the same accurately is established to the satisfaction of the court or officer presiding at the trial of such action or special proceeding."

Q. In an action by A against B, B defaults, but A appears. An inquest is taken, A being sworn as a witness and giving testimony in his own behalf. B subsequently makes a motion to have the default opened, which is granted; but before the retrial of the cause A dies. His personal representatives continue the action, and seek to have A's testimony given at the inquest read from the minutes. B's attorney objects. What should be the ruling of the court?

A. The objection should be overruled. The evidence was competent under sec. 830 of the Code of Civ. Pro., and as the defendant had the power to appear and cross-examine, his failure to do so was a waiver of that right. Bradley v. Mirick, 91 N. Y. 293.

Q. A man was killed in a railroad accident. On the trial of an action by his personal representatives for damages, the plaintiff offered to prove dying declarations of the deceased as to the manner of his injuries. These declarations were made about two days after the accident. The attorney of the railroad company objects to the admission of this evidence. What should be the ruling of the court? State your reasons.

A. The objection should be sustained. The declarations having been made after the accident are not part of the res gestæ, and therefore inadmissible. "Even dying declarations are not received in civil actions unless part of the res gestæ. Such declarations made in the immediate presence of death, under the most solemn circumstances, when all motive to pervert the truth may be supposed to have ceased to operate, are received only in trials for homicide of the declarant in cases where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. It is said that the reasons for thus restricting the rule may be, that credit is not in all cases due to the declarations of a dying person, for his body may survive the power of his mind; or his recollection, if his senses are not impaired, may not be perfect; or for the sake of ease, and to be rid of the importunity and annoyance of those around him, he may say, or seem to say, whatever they may choose to suggest. The rule admitting dying declarations as thus restricted stands only upon the ground of the public necessity of preserving the lives of the community by bringing manslayers to justice." Earl, J., in Waldele v. R. R., 95 N. Y. 274.

Q. When as a general rule are dying declarations admissible in evidence? Why are they admitted, and on what ground? What circumstances are essential to their admission?

A. Dying declarations are not admissible in civil cases, but only in criminal cases of homicide. "Such evidence is admissible, in cases of homicide, only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations." Grover, J., in People v. Davis, 56 N. Y. 95. The declarant must be shown to the satisfaction of the judge, to have been in actual danger of death, and to have given up all hope of recovery at the time when the declaration is made. The slightest hope of recovery excludes the declaration. The sense of impending death is deemed equivalent to the sanction of an oath. The person offering the declarations in evidence must show that they were made under the sense of impending death. The declarations are admissible when made within a reasonable time after the commission of the crime. In some cases one month has been held to be a reasonable time. Brotherton v. People, 75 N. Y. 159; People v. Smith, 104 N. Y. 191.

Q. A is found mortally wounded. B, who assists him to regain consciousness, asks him who inflicted the injuries upon him. A answers, "I think it was C." C is subsequently arrested and tried for A's murder. Upon his trial, the district attorney attempts to put in evidence the dying declarations of A. C's attorney objects. What should be the ruling of the court?

A. The objection should be sustained. The evidence is inadmissible. "Upon trials for murder, declarations of the deceased made when in extremis, which are not statements of fact which a living witness would have been permitted to testify to, but are merely expressions of belief and suspicions are not admissible." People v. Shaw, 63 N. Y. 36.

Q. A witness testifies to an ante-mortem statement made by the deceased. The judge allows the same. Admitting the ruling to be correct, is the following charge to the jury sustainable on appeal? "This testimony should be given the greatest weight that the law can attach to any evidence, for it is the best evidence."

A. The charge was clearly erroneous and cannot be sustained

on appeal. "While dying declarations when admitted in evidence are entitled to be considered as having the weight of an oath, they are not of the same value and weight as the direct evidence of a witness subject to cross-examination, and whose demeanor, when upon the stand, is open to the observation of the jury. An instruction, therefore, that such a declaration should be given all the sanction of evidence which the law can give to any evidence, is reversible error." People v. Kraft, 148 N. Y. 631.

Q. It was important for the plaintiff in an action of ejectment to establish the date of the marriage of A and B, both of whom were lost at sea thirty years before. Plaintiff claimed to be the legitimate son of A and B. He offered to show by C, that C had heard the mother of B say about ten years before, that her daughter was married to A on the date claimed by the plaintiff. The mother has since died. The evidence was objected to as incompetent and hearsay. How did the court rule and on what theory?

A. The evidence was admissible as a pedigree statement, as the question involved in this case is a purely genealogical one, i. e., descent and relationship. "It seems to me that they are competent as hearsay evidence in a case of pedigree. Such a case is a well known and recognized exception to the general rule excluding hearsay evidence. This case (action of ejectment by one claiming to be a legitimate son) involves without doubt a question of pedigree simply. It is what is termed in the books a purely genealogical controversy. . . . The exception regarding the admission of hearsay evidence in case of pedigree is not confined to ancient facts, but extends also to matters of pedigree which have recently transpired; and the hearsay as to deceased witnesses is admitted as to facts which have occurred in the presence of living witnesses. Matters of pedigree consist of descent and relationship, evidence of declarations of particular facts, such as births, marriages, and deaths. . . . Upon questions of pedigree, i. e., in a controversy merely genealogical, hearsay evidence is allowed as to the time of the birth of a certain party, as to a marriage, death, legitimacy, or the reverse, consanguinity generally, and particular degrees thereof, and of affinity. The term 'pedigree' says Greenleaf, embraces not only descent and relationship, but also the fact of birth, marriage, and death, and the times when these events happen, and the rule permits hearsay evidence of the declarations of deceased mem-

bers of the family upon these points in any case involving pedigree. . . . As to what is a case of pedigree, an examination of the question shows that a case is not necessarily one of that kind, because it may involve questions of birth, parentage, age, or relationship. Where these questions are merely incidental, and the judgment will simply establish a debt, or a person's liability on a contract, or his proper settlement as a pauper, and things of that nature, the case is not one of pedigree, although questions of marriage, death, or birth, are incidentally inquired." Peckham, J., in Eisenlord v. Clum, 126 N. Y. 552. Of course the declaration to be admissible must be made before the existence of a controversy in regard thereto (ante litem motam), and by a member of the family. See Young v. Shulenberg, 165 N. Y. 385.

Q. Upon a certain trial for abduction, it becomes necessary and material to prove the age of the female abducted. For the purpose of proving the girl's age, the district attorney offers in evidence a family bible containing entries of births. Counsel for the prisoner objects to this testimony. Is the evidence admissible?

A. Yes. Although this is not a question of pedigree, as there is no genealogical controversy, the evidence is nevertheless admissible under sec. 19 of the Penal Code, which in part is as follows: "Whenever in any legal proceedings it becomes necessary to determine the age of a child, the child may be produced for personal inspection, to enable the magistrate, court, or jury, to determine the age thereby; and the court or magistrate may direct an examination by one or more physicians, whose opinion shall also be competent evidence upon the question of age. A copy of the record of baptism of any child in any parish register, or register kept in a church, or by a clergyman thereof, or a certificate of baptism duly authenticated by the person in charge of such register, or who administered said baptism, and also a transcript of the record of birth recorded in any bureau of vital statistics or board of health duly authenticated by its secretary or under its seal, and the *entries made in a family bible* shall also be competent evidence upon the question of the age."

Q. A, a butcher, sues B for the value of certain meat furnished by him to B and his family. It was proved by several witnesses that A had been in the daily practice of supplying B's family with

meat during the period for which he claimed payment. It was proved by some of those who dealt with him, that he kept honest accounts. He then offered his books of account in evidence, it appearing that he employed no clerk. The admission of the books in evidence was objected to, but the objection was overruled. An exception was taken, and the case now comes up on appeal. What should be the decision of the appellate court?

A. The evidence was properly admitted. "They are not evidence in the case of a single charge, because there exists, in such case, no regular dealing between the parties. They ought not to be admitted where there are several charges, unless a foundation is first laid for their admission, by proving that the party had no clerk, that some of the articles charged have been delivered, that the books produced are the account books of the party, and that he keeps fair and honest accounts, and this by those who have dealt and settled with him." Vosburgh v. Thayer, 12 Johns. 461. This case represents the so-called shop book rule of this state.

(NOTE.) "The rule which prevails in this state, that the books of a tradesman or other person engaged in business containing items of account, kept in the ordinary course of book account, are admissible in favor of the person keeping them against the party against whom the charges are made, after certain preliminary facts are shown, has no application to the case of books or entries relating to cash items or dealings between the parties. This qualification of the rule was recognized in the earliest decisions of this state, and has been maintained by the courts with general uniformity. It stands upon clear reasons. The rule admitting account books of a party in his own favor in any case, was a departure from the ordinary rules of evidence. It was founded upon a supposed necessity, and was intended for cases of small traders who kept no clerks, and was confined to transactions in the ordinary course of buying and selling or the rendition of services. In these cases some protection against fraudulent entries afforded in the publicity which to a greater or less extent attends the manual transfer of tangible articles of property or the rendition of services, and the knowledge which third persons may have in the transactions to which the entries relate. But the same necessity does not exist in relation to cash transactions. They are usually evidenced by notes or writings or vouchers in the hands of the party paying or advancing the money." Andrews, J., in Smith v. Rentz, 131 N. Y. 169.

Q. A witness is called to prove a payment to plaintiff. He is unable to recall that he has made such payment. On looking up an entry which he made, and which he testifies to be correct, he says his memory is refreshed, and he now remembers the payment, to which he testifies, positively. The entry is then offered in evidence. Is it admissible?

A. No. "It is indispensable to the admission in evidence of a memorandum made by a witness at the time of the making of an alleged agreement, that it be shown that the witness has no recollection of the matter stated therein independent of the written paper. If he has such recollection, the entry is not admissible." Meacham v. Pell, 51 Barb. 65.

(NOTE.) "In an action for conversion of personal property consisting of many items, a witness who has made a list of all the items and their values, and who is able to testify that all the articles named were taken and were of the value stated, may aid his memory while testifying, by such lists, and may use it to enable him to state the items; after he has testified the list may be put in evidence, not as proving anything of itself, but as a detailed statement of the items testified to." Howard v. McDonough, 77 N. Y. 592.

Q. On the trial of an action a witness is called to prove a certain payment; he is unable to recall the fact that he made one. He is shown an entry which states the payment and the date thereof. He testifies that his memory is not refreshed, but that he had acknowledged the fact when he made the entry, and that the entry records correctly what he then knew to be true. Is the entry admissible in evidence?

A. Yes. "In Halsey v. Sinsebaugh, 15 N. Y. ~~435~~ 485, the question whether a memorandum, made at or about the time when the event or transaction mentioned in it took place, and where the author swears that he knows it to have been correct when made, can be read to the jury in connection with the oral testimony of the witness, or whether the evidence is confined to what the witness is able to recollect after refreshing his memory by referring to the memorandum come up for decision in this court. And it was held to be admissible. The paper did not fall within the rule as an entry made in the course of business, like the memoranda and entries made by clerks in banks and the like; and it was not placed on that footing in the opinion of the court. On the contrary, Judge Selden, by whom the opinion was prepared, took pains to say that he did not consider the case of such memorandum as the one then in question, was governed by any particular rule, but that the general question was presented, whether a memorandum, that is, any memorandum made and sworn to in the manner stated, would be admissible. The whole of the reasoning of the opinion, and the cases relied upon, sustain the position as a general one, applicable to every species of memorandum, and not

restricted to the routine entries referred to." Denio, J., in Guy v. Mead, 22 N. Y. 482.

Q. A is a foreman, and B is a bookkeeper of the X corporation. The X corporation sues C for goods sold and delivered. At the trial, entries in the books of the corporation are offered in evidence, and by way of foundation A is called as a witness. He swears that he does not remember the transactions, but that he always reported correctly to B each day, the bills of goods made and delivered. B is then called, and swears that he does not remember the transactions, but that he always entered the reports of A correctly in the books. Are the entries admissible?

A. Yes. "Where a party testifies that he made certain entries in a book, in accordance with statements made to him by others, and such others testify that the facts were correctly given to him, and that he entered them, such evidence is admissible. An entry is not incompetent evidence because of its being of a fact not within the personal knowledge of the party making it. It is enough if it appears that such entry rests upon knowledge and not hearsay, and is proved to have been correctly made." Payne v. Hodge, 7 Hun, 171, aff'd 71 N. Y. 598.

(NOTE.) "We are of opinion that the rule as to the admissibility of memoranda may properly be extended so as to embrace the case before us. The case is of an account kept in the ordinary course of business, of laborers employed in the prosecution of the work, based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master, but of a higher grade, who in turn, also in accordance with his duty, entered the time as reported. We think entries so made, with the evidence of the foremen that they made true reports, and of the person who made the entries that he correctly entered them, are admissible. It is substantially by this method of accounts, that business transactions in numerous cases are authenticated, and business could not be carried on, and accounts kept in many cases, without great inconvenience, unless this method of keeping and proving accounts is sanctioned. In a business where many laborers are employed, the accounts must, in most cases, of necessity, be kept by a person not personally cognizable of the facts, —and from reports made by others. . . . We are of opinion, however, that it is a proper qualification of the rule admitting such evidence, that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum not made in pursuance of any duty owing by the person making it, or when made upon information, derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation." Andrews, J., in Mayor, etc., v. Second Ave. R. R., 102 N. Y. 572.

Q. A, a locomotive engineer was killed by the derailing of the locomotive, caused by a defective rail. A physician who attended the decedent about an hour after the accident, testified that the decedent, who had been insensible, upon regaining consciousness exclaimed: "My head! My head!" Being interrogated further, the physician testified as to certain things told him by the engineer at the time which would prevent the plaintiff from succeeding in the action. Plaintiff objects. Is the objection good? How far good, if good at all?

A. The exclamations having been made an hour after the accident are clearly inadmissible as a part of the res gestæ, but are admissible as declarations as to the state of health or bodily feeling. "In actions to recover damages for alleged negligence causing a personal injury, declarations of the party injured made some time after the injury, simply to the effect that he is suffering pain, when not made to a physician for the purpose of professional attendance, are not competent. The rule is different as to groans, screams, or exclamations indicative of pain." Roche v. R. R., 105 N. Y. 294. As to the subsequent statements made by the engineer, they are also admissible, and the physician is not precluded from testifying, the statements not being privileged communications. "The prohibition in sec. 834 of the Code of Civ. Pro., relating to communications between physicians and patients, extends only to such communications as are necessary to enable the physician to act in his professional capacity, and does not extend to admissions made by the patient, of facts which have no possible relation to the professional conduct of the physician." DeJong v. R. R., 43 App. Div. 427.

Q. At the probate of a lost or destroyed will, a witness swears that he was present when the decedent took a paper, declared it to be his will, stated its contents, and that because his son had acted in a certain way he would destroy it. He thereupon took the paper and threw it into the fire, while the witness was looking on. His testimony is objected to. Shall the objection be sustained?

A. No. The evidence is admissible, as the declarations accompanied the act, and were a part of the res gestæ. "I consider these cases as establishing the doctrine that upon a question of revocation no declarations of the testator are admissible except such as accompany the act by which the will is revoked; such declarations

being received as a part of the res gestæ, and for the purpose of showing the intent of the act. . . . The fact to be proven in such cases is, the act claimed as a revocation, together with the intent with which it was done; and all declarations of the testator which do not accompany the act are to be regarded as mere hearsay, and should be treated as such." Selden, J., in Waterman v. Whitney, 11 N. Y. 157.

Q. The probate of the will of A is contested by his son B on the ground of the insanity of A. Evidence is offered at the trial of the declarations of A made two months after the execution of the will, and stating the contents of the will to be different than its original contents. The evidence is objected to. What should be the ruling of the court, if admissible at all, how, and for what purpose?

A. The evidence is admissible for the purpose of showing the mental condition of the testator at the time of the execution of the will. "Here, as in that case, the offer was to prove declarations of the testator, stating the contents of the will to be entirely different from what they were in fact; and these declarations were offered in connection with other evidence bearing upon the competency of the testator at and before the execution of the will. If evidence of the mental condition of the testator after the execution of the will is admissible in any case, as to his capacity when the will was executed, and the competency of such proof seems to be sustained by many authorities and contradicted by none, then it is clear that the testimony offered here should have been admitted. It does not follow from this, that evidence of this nature is necessarily to be received however remote it may be in point of time from the execution of the will. The object of the evidence is to show the mental state of the testator at the time when the will was executed." Selden, J., in Waterman v. Whitney, supra, a leading case.

Q. A was duly authorized by B, as his agent, to purchase of C a quantity of furniture for him, B. A purchased the same, and it was duly delivered to B, who became insolvent before it was paid for. C replevied the goods claiming title. B defended denying plaintiff's title. On the trial, C testified that the goods were sold on sixty days' credit, and that it was verbally agreed between him-

self and A at the time of the sale, that title should remain in him, C, until the furniture was paid for. C was then allowed to prove, over the defendant's objection, as a part of his case, that about a month after the sale and delivery, A stated to X that he had agreed with C at the time of the purchase, that title should remain in him until the furniture was paid for. Was the evidence competent or otherwise? State your reasons and the rule.

A. The evidence was incompetent and should have been excluded. "Evidence of declarations of an agent made to a third party as to the nature of a past transaction is inadmissible against his principal. The fullest authority to an agent to contract confers no power to bind the principal by subsequent declarations as to what the contract was. The declarations in order to be admissible must be a part of the res gestæ. Wood & Co. v. Pierson, 46 St. Rep. 70.

Q. A tells his servant to sell his wagon. The servant represents the wagon to be a "Brewster" make. The servant said to a witness: "John Doe (buyer) thinks he has bought a Brewster wagon, but he has not," referring to the wagon sold. This conversation took place about an hour after the sale. The buyer sues A and wants to introduce this testimony of the witness as to the servant's declarations to show that the article sold was not what it was represented. Is this admissible?

A. No. The evidence was not admissible, as it consisted of declarations of an agent made when not engaged in the business of his agency, and so not binding upon his principal. The declarations of an agent, in order to bind his principal, must be made, not only during the continuance of the agency, but at the very time of the transaction in question, and so forming part of the res gestæ. Anderson v. R. R., 54 N. Y. 334; White v. Miller, 71 N. Y. 118.

Q. A is run over by a street car and injured. He brings an action on the ground of negligence of the motorman, and also claims that the brakes were out of repair. On the trial, he was allowed to prove by the testimony of a bystander, that just as the car stopped, and while he, A, was under it, the motorman in response to a question said he could not reverse the brake, and that was why he could not stop. Was the evidence admissible, and if so, why?

A. The evidence is admissible as a part of the res gestæ, as the

declaration was made at the time of the act, and formed part of it. Luby v. R. R., 17 N. Y. 131. See also Whitaker v. R. R., 51 N. Y. 295, where a declaration made immediately after the car had passed the scene of the accident was held inadmissible.

Q. A brings action to recover damages for alleged negligence, causing the death of B, his son. At the trial, the plaintiff offers in evidence certain statements made by B thirty minutes after the accident. Objected to. Is the evidence admissible? State the rule.

A. The evidence is not admissible, as the declarations were not part of the res gestæ, having been made after the accident. "The claim that the declaration can be treated as part of the res gestæ is not supported by authority in this state. The res gestæ, speaking generally, was the accident. These declarations were no part of that, . . . were not made at the same time, or so nearly contemporaneous with it as to characterize it, or throw any light upon it. They are purely narrative, giving an account of a transaction not partly past, but wholly past and completed. They depend for their truth wholly upon the accuracy and reliability of the deceased, and the veracity of the witness who testifies to them. Nothing was then transpiring or evident to any witness which could confirm the declarations, or by which upon cross-examination of the witness testifying, or by the examination of other witnesses the truth of the declarations could be tested." Earl, J., in Waldele v. R. R., 95 N. Y. 274, the leading case upon the subject.

Q. A sues the N. Y. C. R. R. Co. for injuries sustained by the closing of the gate upon him by the brakeman on the train. At the trial, he offers in evidence the reply of the brakeman to the exclamation of pain made by him (A) when he was hurt. This is objected to. Is the objection good?

A. The objection should be sustained, as the remarks of the brakeman were not a part of the res gestæ. The exclamation must be part of the principal fact, and so part of the act itself. But here the act was complete before the remark of the brakeman was made, although closely connected with it, in point of time, it was not one naturally accompanying the act, or calculated to unfold its character or quality, and therefore not admissible as part of the res gestæ. If declarations of third persons are not in their nature

a part of the fact, they are not admissible in evidence, however closely related in point of time. Butler v. R. R., 143 N. Y. 417.

Q. A was on trial for murder. The district attorney asks an expert the following question: "Having heard all the testimony adduced in this case, what is your opinion as to the sanity of the defendant when he committed the crime?" The defense of insanity had been interposed. The question was objected to. Is the objection sustainable?

A. The objection is good; the question was improper. "The witness was thus permitted to take into consideration all the evidence in the case given upon a long trial extending over nine days, and upon so much of it as he could recollect, determine for himself the credibility of the witnesses, the probability or improbability of their statements, and drawing therefrom such inferences as in his judgment were warranted by it, pronounce upon the sanity or insanity of the defendant. It cannot be questioned, but that the witness was by the question put in the place of the jury, and was allowed to determine upon his own judgment what their verdict ought to be in the case. We think it is not competent in any case to predicate a hypothetical question to an expert upon all the evidence in the case, whether he has heard it all or not, upon the assumption that he then recollects it, for it would then be impossible to determine the facts upon which the witness bases his opinion, and whether such facts were proved or not." Ruger, Ch. J. in People v. McElvaine, 121 N. Y. 250.

(NOTE ON EXPERT TESTIMONY.) "It is not sufficient to warrant the introduction of expert evidence, that the witness may know more of the subject of inquiry and may better comprehend and appreciate it than the jury; but the subject must be one relating to some trade, profession, science or art, in which persons instructed by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed to have." Earl, J., in Ferguson v. Hubbell, 97 N. Y. 507.

Q. A sues B. On the trial, A's attorney asks C, a witness of B's, as to the whereabouts of a letter written to B by A. C answers that he does not know where it is. A's attorney thereupon attempts to introduce parol evidence of the letter. B's attorney objects. Is the objection good? State the rule.

A. The objection is good. The rule is, that where a writing is in the possession of the adverse party, he must be notified to pro-

duce it at the trial, and it is only upon his failure or refusal to do so, that parol evidence of its contents is admissible. While the notice to produce is generally written, yet a verbal notice given in court is sufficient where the paper is in court at the time. In the question put, the paper having been in the possession of the adverse party, and not being proved to be in court, a notice to produce was necessary before secondary evidence could be given. Kerr v. McGuire, 28 N. Y. 446.

Q. Upon the trial of an action, the plaintiff's attorney produces a paper upon notice from his opponent. The latter inspects the same, but refuses to put it in evidence. Can he be compelled to do so or not?

A. No. A party is not bound to read a paper in evidence, simply because it was produced by the opposite party on the trial at his request and was inspected by him. Carradine v. Hotchkiss, 120 N. Y. 608.

Q. A sues B, and on the trial B's attorney offers in evidence pages one and two of a four page letter written by A to B. A's attorney objects. What should be the ruling of the court? What rights has A?

A. The objection should be overruled, but A has the right to offer the rest of the letter in evidence. "The introduction by one party of a part of a conversation or writing in evidence, renders admissible on the other side so much of the remainder as tends to explain or qualify what has been received, and that is to be deemed a qualification which rebuts and destroys the inference to be drawn from, or the use to be made of, the portion put in evidence." Grattan v. Ins. Co., 92 N. Y. 274.

Q. A goes to the X bank, and makes an agreement with the president to make a special deposit for one year, of $1,000, and in a conversation with the president, it is agreed that he shall receive 6 % interest for that term. He deposits the money, and a certificate is given him in the following form:

$1,000. Oct. 1st, 1896.

Deposited this day with the X bank by A, one thousand dollars, payable one year from this date on presentation of this certificate.

(Signed) B, cashier.

At the end of the year A presents the certificate, and demands his $1,000 with interest. The bank refuses to pay the interest, but tenders the $1,000. A sues for $1,000 with interest. Upon the trial he offers to prove the conversation with the president. Objection is made. What should be the ruling of the court? No question is raised as to the power of the president to make the arrangement for interest.

A. The objection should be overruled. The evidence offered does not contradict or vary the terms of the instrument, but merely introduces a separate collateral agreement. The so-called parol evidence rule, that oral evidence is not admissible to vary or contradict the terms of a written instrument, is not violated by proof of the subsequent promise. Read v. Bank of Attica, 55 Hun, 154. But this case was reversed on this point in 124 N.Y. 671.

Q. In an instrument partly written and partly printed, there is a repugnancy between the written and the printed parts. Which will prevail?

A. The written parts will prevail. In the interpretation of an instrument of which a portion is printed and a portion written, greater weight will be given to the written than to the printed words, when they are in conflict and tend to different results. Clark v. Woodruff, 83 N. Y. 513.

Q. A makes a contract with B, to build him a house with the agreement that the contractor is not to sub-let any of the work. B sub-lets a portion of the work, and afterwards sues A on the contract. A, on the trial, puts in evidence the agreement to show that B had no right to sub-let. B claims that there was a parol agreement before the instrument was signed that a portion might be sub-let, and offers evidence of the same. Is it admissible? State the rule.

A. The evidence is not admissible, as to allow it would be to vary and contradict the terms of the written instrument. The general rule requires the rejection of parol evidence, when offered to cut down or take away obligations entered into between parties, and by them put into writing. Potter v. Hopkins, 25 Wend. 417.

Q. A gives B a deed, and subsequently a dispute arises between

the parties in regard thereto. A claims that there was an oral agreement under which the deed was delivered, and on the trial of an action between the parties, offers evidence to prove the same. Is the evidence admissible?

A. Yes. This is not an attempt to vary the terms of a deed, and therefore does not violate the parol evidence rule; it merely proves a collateral separate agreement under which it was delivered, and is not inconsistent with the terms of the deed. Van Brunt v. Day, 81 N. Y. 251.

Q. A brings an action on a deed which recites a consideration of $10,000. At the trial he offers to prove that the consideration was not in fact $10,000, but $5,000, and the good will of a certain business, and that the sum was not paid. The attorney for the other side objects to the evidence. Is it admissible?

A. Yes. An acknowledgment of payment in the consideration clause of a deed does not conclude the grantor. In an action to recover the purchase price, he may show the actual consideration, that it was not paid, and the time when and the manner in which it was to be paid. Hebbard v. Haughian, 70 N. Y. 54.

Q. A agrees by a valid contract in writing, to sell B, thirty days from date, a certain pump called a pulsometer pump for $800, payment to be made on delivery, the pump to be used to pump water from a mine. The pump was delivered and paid for. B tried the pump, but it did not work satisfactorily, and brings suit against A for breach of an oral warranty that the pump would throw water to the surface from the bottom of a shaft fifty-five feet deep. On the trial, B offered evidence of this parol warranty made by A at the time the contract was made. A's counsel objects to the proof of the warranty. Is the evidence admissible, if so, why?

A. The evidence is admissible. The rule prohibiting the reception of parol evidence varying or modifying a written agreement, does not apply where the original contract was verbal and entire, and a part only was reduced to writing, nor does it apply to a collateral undertaking; these facts are always open to inquiry and may be proved by parol. Here the evidence was merely to prove a collateral separate agreement, a warranty, which is not

contradicting the terms of the instrument. "If the fitness of the machine is implied, the guaranty is in harmony with it, and adds nothing; if it is not implied, the paper contains no declaration, that the machine shall be taken with all faults and insufficiencies, or at the defendant's risk. The parol evidence therefore contradicts no terms of the writing, nor varies it." Chapin v. Dobson 78 N. Y. 74. This case is near the boundary line 98 N.Y. p. 298.

Q. On the trial of A for larceny, B is called as a witness. Upon cross-examination, B is asked if he has ever been convicted of burglary. He answers that he has not. How may the district attorney contradict him, if at all? Give the general rule.

A. B can be contradicted either by cross-examination or by the record. The question in this case is fully answered by sec. 832 of the Code of Civ. Pro., which is as follows: "A person who has been convicted of a crime or misdemeanor is, notwithstanding, a competent witness in a civil or criminal action or special proceeding; but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not concluded by his answer to such a question."

Q. A, who is a witness upon a certain trial, is asked on cross-examination whether he has ever been arrested for larceny. The question is objected to. What should be the ruling of the court?

A. The objection should be sustained. This question was improper, as the arrest was consistent with innocence; it is only allowable in impeaching the credibility of witnesses on cross-examination to prove their conviction of a crime. People v. Crapo, 76 N. Y. 288.

Q. A, a witness, upon the trial of an action brought by B against C, is asked by B's attorney whether he has been in state's prison. The question is objected to. Is the objection good?

A. The objection should be overruled. (Does it?) Being in a state's prison presupposes a conviction of a crime, and therefore the question is admissible in order to impeach the credibility of the witness. People v. Irving, 95 N. Y. 277.

Q. A is on trial for murder. He takes the stand as a witness in his own behalf. The district attorney asks him if he did not commit burglary three years before in the house of M. A answered no. The district attorney then attempted to prove by other witnesses, that A had committed the burglary which he denied having committed. A's attorney objects to this. The court overrules his objection. Is the ruling sustainable on appeal?

A. The ruling cannot be sustained on appeal. This evidence is inadmissible, because the cross-examination as to the burglary of M's house was collateral, and it is familiar law that the people are bound by the answers of a defendant given on cross-examination, and they cannot afterwards call witnesses to contradict him in reference to such answers. People v. Greenwall, 108 N. Y. 296. This same rule applies to the like answers of any witnesses. If they deny having committed a crime, their answers cannot be contradicted. Stokes v. People, 53 N. Y. 175. Conviction may be proved by the record - §832 C.C.P. supra.

Q. A tells B's attorney that he saw C sign a certain deed on a certain day. Subsequently on the trial of an action of B against C, it becomes material to prove that C signed the deed. A is called as a witness, and testifies that the deed was signed on that day, but by D. B's attorney thereupon asks A, whether he did not previous to the trial tell him, the attorney, that C had signed the deed. The question was objected to on the ground that he was impeaching the credibility of his own witness. What should be the ruling of the court? State your reasons.

A. The objection should be overruled. "The further question has frequently arisen whether the party calling the witness should, upon being taken by surprise by unexpected testimony, be permitted to interrogate the witness in respect to his own previous declarations, inconsistent with his evidence. We are of opinion that such questions may be asked of the witness for the purpose of proving his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistencies. This course of examination may result in satisfying the witness that he has fallen into error, and that his original statements were correct, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circum-

stances which induced the party to call him. Though the answers of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry. Proof by other witnesses that his statements are incorrect would have the same effect, yet the admissibility of such proof cannot be questioned. It is only evidence offered for the mere purpose of impeaching the credibility of the witness which is inadmissible when offered by the party calling him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken, and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility. In case he should deny having made previous statements inconsistent with his testimony, we do not think it would be proper to allow such statements to be proved by other witnesses; but where the question as to such statements are confined to the witness himself, we think they are admissible." Rapallo, J., in Bullard v. Pearsall, 53 N. Y. 230.

Q. A and B have some difficulty and call on C, an attorney, and by his advice effect a settlement. A subsequently sues B for failure to keep and perform his contract of settlement. A subpœnas the attorney, C, for the purpose of showing the terms of the agreement. The attorney refuses to answer on the ground that he is prohibited from disclosing a professional communication. Is the testimony of the witness privileged?

A. No. "All communications made by a client to his counsel with a view to professional advice or assistance are privileged, whether such advice relates to a proceeding or suit pending or contemplated, or any other matter proper for such advice or aid; but communications made in the presence of all parties to the controversy are not privileged." Britton v. Lorenz, 45 N. Y. 51.

(NOTE.) Sec. 835 of the Code of Civ. Pro., relating to privileged communications, provides as follows: "An attorney or counselor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person employed by such attorney or counselor be allowed to disclose any such communication or advice given thereon."

Q. A contest has arisen over a will. It is alleged that undue influence has been used. The proponents offer to prove by the draftsman of the will, who is an attorney, the instructions received

from the testator, and that they were carried out by the will. Is the evidence admissible?

A. Yes. "The draftsman of a will though he is an attorney, is not incompetent under sec. 835 of the Code of Civ. Pro. to testify in support of the will, to the instructions received from the testator in respect to the provisions to be incorporated in the will." Matter of Chase, 41 Hun, 203.

Q. A, who is a witness on the trial of B for larceny, is asked by the district attorney if he did not assist B, the defendant, in taking the goods. He refuses to answer the question. Can he be compelled to do so?

A. No, as he is privileged from answering questions which would tend to incriminate him. The rule is stated in sec. 837 of the Code of Civ. Pro., as follows: "A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish the fact that he owes a debt, or is otherwise subject to a civil suit. But this provision does not require a witness to give an answer, which will tend to accuse himself of a crime or misdemeanor, or to expose him to a penalty or forfeiture; nor does it vary any other rule, respecting the examination of a witness."

Q. A is on trial for murder. His attorney puts his wife on the stand as a witness for him. The district attorney raises an objection as to her competency. The objection is sustained by the court, and the wife's evidence is excluded. A is convicted and his attorney appeals on the ground that the court made an error in excluding the testimony of A's wife. Is the appeal good? State your reasons.

A. The appeal is good, for the wife was a competent witness under sec. 715 of the Penal Code, which is as follows: "The husband or wife of a person indicted or accused of a crime, is in all cases a competent witness, on the examination or trial of such person; but neither the husband nor wife can be compelled to disclose a confidential communication, made by one to the other during their marriage." That the evidence of the husband or wife against the other is admissible, see People v. Petmecky, 2 N. Y. Cr. Rep. 221.

Q. A sues B, her husband, for an absolute divorce. On the trial, she takes the stand and attempts to testify as to his adultery. The husband's attorney objects. Is the objection good?

A. Yes, the objection should be sustained. Sec. 831 of the Code of Civ. Pro., which in part is as follows: "A husband or wife is not competent to testify against the other, upon the trial of an action, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery."

CHAPTER XIII.

Insurance.

Q. A delivers some cloth to B, to have the same made into suits. B insures the same in the X Insurance Co. During the progress of the work, the cloth is destroyed by fire. B puts in his claim for the amount of the insurance. The insurance company refuses to pay, claiming that B had no insurable interest in the goods. B sues the company. Can he recover? Answer fully.

A. B can recover, for he has an insurable interest. Agents, commission merchants, bailees, or others having custody of, and being responsible for, property, may insure in their own names, and they may, in their own names, recover of the insurer, not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy up to the value of the property. The right is put upon the fact, that having possession of the property, exclusive as to all but the owner to whom they are responsible; they have the right to protect themselves from loss, so that the property or its value may be rendered to the owner when he calls for his own. Waring v. Ins. Co., 45 N. Y. 606.

(NOTE.) A legal or equitable title is not necessary to give an insurable interest in the property; if one has a right which may be enforced against the property, and which is so connected with it, that injury thereto will necessarily result in a loss to him, he has an insurable interest. When insurance is upon property, not only must the insured have an interest in the subject matter of the contract at its inception, but also at the time of the loss, for the contract being one of indemnity recovery by the insured is limited to the loss actually sustained by him. As soon as his interest ceases in the property, the contract is at an end from the impossibility of any loss happening to him afterwards. Rohrbach v. Ins. Co., 62 N. Y. 47.

Q. A, a stockholder in the X corporation, insures a certain building belonging to the corporation. The building is destroyed by fire, but the insurance company refuses to pay the loss to A, claim-

ing that he has no insurable interest in the property. Upon suit by A against the company, what should the judgment be?

A. Judgment for A. It is not necessary to constitute an insurable interest, that the interest is such, that the event insured against would necessarily subject the insured to loss. It is sufficient that it might do so, and that pecuniary injury would be the natural consequences. A stockholder in a corporation has such an interest in the corporate property, and so he may protect the same, by an insurance of specific tangible property of the corporation. Riggs v. Ins. Co., 125 N. Y. 7.

Q. A owed B $10,000. B, acting on his own behalf, took out a policy upon the life of A, and paid the premiums. A died, having paid the $10,000, and the policy was outstanding. To whom does the policy go? Give reasons.

A. The policy belongs to B, the creditor. Where a creditor procures an insurance upon the life of his debtor, his insurable interest continues, although the latter has paid the debt before the creditor's death. The contract of life insurance is not one for indemnity merely, and if the insured had an interest in the life when he took the policy, he may recover, although the interest has ceased. Rawls v. Ins. Co., 27 N. Y. 282.

(NOTE.) It is well settled that a creditor has an insurable interest in the life of his debtor, so employers and employees have insurable interests in the lives of each other, so also partners, and near relatives such as parent and child, and sister and brother. The only reason in life insurance, for requiring an insurable interest, is to eliminate from the contract, the character of a wager. Hoyt v. Ins. Co., 3 Bosworth (N. Y.), 440; Grattan v. Ins. Co., 15 Hun, 75. In Wright v. M. B. L. Assn., 118 N. Y. 237, it was held that the plaintiff could recover the whole amount provided by the policy, although the debt owing to the payee by the insured, to secure which the insurance was taken out by the plaintiff, was less than the sum insured.

Q. A insures his life for the benefit of B, his old college friend. A subsequently, with B's consent, assigns the policy to C, a stranger, for $1,000. A dies, and C claims the amount of the policy from the company. The company refuses to pay, and C brings suit. The company defends on the ground that C had no insurable interest in the life of A. Judgment for whom and why? State your reasons.

A. Judgment for C. A valid policy of insurance affected by a

person upon his own life, is assignable like an ordinary chose in action. The assignee for value of such a policy is entitled on the death of the party, whose life is insured, to recover the full sum insured, without reference to the amount of the insurance paid by him for the assignment. As life insurance is not regarded as a contract of indemnity merely, any person may insure his own life for the benefit of a stranger. St. John v. Ins. Co., 13 N. Y. 31. This rule has been affirmed in the comparatively recent case of Steinback v. Diepenbrock, 158 N. Y. 24, where it was held: "That a policy of life insurance taken out by the insured himself on his own life, in good faith, and not for the mere purpose of assignment, may be lawfully assigned to one, having no insurable interest in the life of the insured, and the assignee when the assignment is absolute and general, will be entitled to the entire proceeds of the policy. The fact that the insured's condition of health has failed, does not deprive him of the right to realize on his policy by assignment."

Q. Plaintiff at 10 o'clock A. M., went to the office of the defendant Fire Ins. Co., and agreed orally with the proper officer for an insurance. At noon, and before the policy was written, the property was destroyed by fire. Plaintiff immediately tendered premium. The payment of loss was refused, and plaintiff brings action. Can he recover?

A. The plaintiff can recover the amount of the loss. A recovery can be had upon a parol contract to insure, although no policy was ever issued by the insurer, if it appears that the insured applied for insurance, that the company accepted the risk, and that the premium was tendered. Clarkson v. Assn. Co., 92 Hun, 527. "An oral contract to insure is valid, and the law reads into the contract, the standard fire insurance policy of the state of New York, whether it was referred to in terms or not." Hicks v. Assn. Co., 162 N. Y. 284.

Q. A has a policy in the X Life Ins. Co., and fails by neglect to pay the premium on January 1, 1900, the due day; the following May he dies, and his representatives sue the company for the amount of the policy. Can they recover?

A. No. "Punctuality in the payment of premiums, in the case of a life insurance policy, is of the very essence of the contract,

and if payment is not made when due, the company has the right to forfeit if such is the contract. The rule that strict construction is to be given to a provision of forfeiture in a policy of insurance, and that it may not be extended for the purpose of working a forfeiture beyond the strict and literal meaning of the words used, applies only where the meaning is doubtful, and the words capable of two constructions. Where the language is plain and unequivocal, and the meaning not in doubt, in the absence of fraud or mistake, the contract must be enforced as it reads." Holly v. Ins. Co., 105 N. Y. 437.

Q. A takes out a policy of fire insurance in the X Insurance Co. It provides that the policy shall be void, if any mechanics shall be employed in repairing the building for longer than twenty days without notice to the company. A employed mechanics to repair the house without giving notice to the company, it taking thirty days to complete the work. Afterwards, when the mechanics have left, and from a cause in noway connected with their work, A's house takes fire and is destroyed. The company refuses to pay. A brings suit. Can he recover?

A. No, for a condition of the policy was violated by A, and this rendered it void and unenforceable. Where a policy of fire insurance is issued containing conditions, a violation of which by the terms of the policy avoids it, the insured will be held strictly to his contract, however immaterial to the risk the matter stipulated against may be. Mack v. Ins. Co., 106 N. Y. 560; Newport Imp. Co. v. Ins. Co., 163 N. Y. 237.

Q. An insurance policy provides that if the property insured now or hereafter has a chattel mortgage on it, the policy shall be void. A, the insurance agent of the company, insures B's personal property, there being at the time a chattel mortgage thereon, which is filed in the county clerk's office. The property is subsequently destroyed by fire. B, not having made any concealment, and having acted in good faith, brings suit against the insurance company. The company claims that the contract is void, because of the mortgage. Judgment for whom and why?

A. Judgment for the company, as there was a violation of a condition of the policy. It matters not that the mortgage was recorded, as the company cannot be charged with notice thereby, in

the face of an express condition in the policy. The question of good faith is not material, when the policy expressly stipulates that it shall be avoided in case of a violation of a condition.

(NOTE.) "The distinction between a warranty and a representation is that the former is contained in, and forms part of, the contract, and must be complied with whether material to the risk or not, while the latter is outside of the contract, and it is immaterial whether it is true or false, unless material to the risk." Chase v. Ins. Co., 20 N. Y. 52.

Q. There is a fire insurance upon a mill, the policy providing that it shall be null and void, if the mill ceased to be operated for more than ten consecutive days, or became vacant or unoccupied, and so remained for ten days. The mill is closed and inoperative for one week, in order that repairs to the machinery may be made. The next week it is inoperative, because the miller is so sick that he cannot work. The mill takes fire on the last day of the two weeks, and is destroyed. The miller brings suit against the company upon their refusal to pay the loss. Can the action be maintained?

A. Judgment for the miller. The case of Ladd v. Ins. Co., 147 N. Y. 478, is exactly in point. The headnote reads: "A mere temporary cessation of the operation of the machinery in a manufacturing establishment by reason of sickness, breakdown, low water, or other unavoidable cause, without any intention on the part of the insured to cease operating, or to allow the premises to become vacant or unoccupied, is not of itself to be deemed a violation of the provisions of a fire insurance policy, avoiding it in case the establishment ceased to be operated for more than ten consecutive days, or became vacant or unoccupied and remained so for ten days."

Q. A insures his building against loss by fire in the sum of $5,000. In the policy was a provision to the effect "that the entire policy should be void, if the interest of the insured be other than an unconditional and sole ownership." At the time the policy was issued, there was a mortgage on the premises for $5,500. The existence of this encumbrance was not disclosed to the insurance company that issued the policy. Upon the total destruction of the building by fire, the company refused to pay the loss. A brings suit on the policy. Can he recover?

A. Yes. The policy was not vitiated by the omission of all ref-

erence to the mortgage. The insured held the legal title to the property, and was the sole and unconditional owner thereof within the meaning of those terms as therein used. Woodward v. Ins. Co., 32 Hun, 365.

Q. A takes out a policy of fire insurance in the X Insurance Co. There was a clause in the policy which read, that if the insured property was encumbered in any way, this policy shall be null and void. After the issuance of the policy, judgment was rendered against A, which was the result of a decision in a contested suit. The building is subsequently destroyed by fire, and A presents his claim to the company which refuses to pay the same. A brings suit. Can he recover?

A. Yes. "A condition in a policy of fire insurance, forfeiting it in case the property insured becomes encumbered in any way, without the consent of the company written on the policy, refers to encumbrances created by the act of the insured; it does not apply to encumbrances by judgment, or otherwise by operation of law." Baley v. Ins. Co., 80 N. Y. 21.

(NOTE.) In Egan v. Ins. Co., 5 Denio, 326, the policy declared that if the insured *should suffer a judgment* which shall be a lien on the insured premises, without communicating it to the company, the policy should be void. It was held that the provision was an express warranty, and judgment having been rendered against the insured, the policy was avoided.

Q. A takes out a policy of fire insurance upon his building in the X Insurance Company. The policy contained a clause, to the effect that if the property be encumbered by judgment or legal process, the policy should be avoided. A mechanic's lien, without the procurement of A, was filed against the building. Shortly after the building is destroyed by fire. The company refuses to pay the loss. What are the rights of the parties?

A. A can recover the amount of the loss. "A condition in a fire insurance policy, that the insured shall not be liable for a loss, if without the consent of the company, the property shall in any way become encumbered, applies only to encumbrances created by, or with the consent of, the insured, and to the creation of which he might apply for consent. A mechanic's lien filed against the property, without his procurement, does not avoid the policy, and is not an encumbrance contemplated by the condition." Green v. Ins. Co., 82 N. Y. 517.

(NOTE.) A sale of real property upon execution does not, before the expiration of the period allowed for redemption, avoid a policy of fire insurance upon real property, under a condition that the policy shall be void, if any change take place in the interest, title or possession of the subject of the insurance, whether by legal process or judgment, or by act of the insured. Wood v. Ins. Co., 149 N. Y. 342.

Q. A takes out a policy of life insurance, and makes B, his wife, the beneficiary. In the application is the following question: "Are you married, and if so, to whom?" He answers yes, to B, and warrants that his answers are true. The policy contains a clause that if there are any false statements in the application, the policy shall be void. At the time B is merely living with A as his mistress, and is in fact the wife of another man still living. A dies. The company refuses to pay the amount of the policy. B brings suit. Can she recover?

A. No. This is a breach of warranty. The statements in the application which were made warranties were untrue, and this avoided the policy, even though they were made in good faith, and with a belief of their truth. The word "false" in the policy was used in the sense of untrue, and did not limit the effect of the warranty to a statement intentionally untrue. Foot v. Ins. Co., 61 N. Y. 571.

(NOTE.) Answers to questions propounded by insurers in an application for insurance, unless they are clearly shown by the form of the contract, to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be considered as representations, as to which substantial truth in everything material to the risk, is all that is required of the applicant. Where a policy of life insurance is issued, upon an application, in which a warranty is understandingly and clearly given by the insured, he will be held strictly to his contract, however immaterial the facts may be. To avoid a policy of life insurance upon the ground of misrepresentations, it must, in the absence of fraud, be in respect to some circumstance or fact material to the contract, and by which the insurer is induced to take the risk. A warranty, however, must be literally true, whether the fact warranted be material or not. Barteau v. Ins. Co., 67 N. Y. 595; Dwight v. Ins. Co., 103 N. Y. 341.

Q. A takes out a life insurance policy, and warrants his age to be fifty-three, when in fact he was fifty-four. A dies. What are the rights of his representatives against the company?

A. They have no rights whatever against the company. The answers contained in the application were warranties, and were

material to the risk, and therefore the policy was avoided. Schmitt v. Ins. Co., 84 Hun, 128; Kabok v. Ins. Co., 4 N. Y. Supp. 718.

Q. A took out a policy of insurance upon his life, payable to himself, his executors, administrators or assigns. The policy was silent upon the question of the liability of the insurance company, if the insured should die by suicide. All of the conditions in the policy were fulfilled by the insured, in payment of premiums, etc. The insured intentionally took his own life while he was sane. State whether or not the insurance company is liable on the policy? Give your reasons.

A. The company is liable. "Where life insurance is effected for the benefit of one's representatives, suicide, while sane, is not a defense, in the absence of a condition or exception to that effect in the policy. The representatives are not bound by the acts of the deceased, after the issuance of the policy, unless in violation of some condition thereof." Fitch v. Ins. Co., 59 N. Y. 557.

Q. A takes out a policy of life insurance payable to his wife and children. The policy provides that it shall be void if the insured die by his own hand. A commits suicide while insane. Can his beneficiaries recover on the policy?

A. Yes. "Where a policy of life insurance contains the usual condition, declaring it void in case the insured shall die by his own hand, the only exceptions to the condition are where self-destruction is clearly shown to be accidental or involuntary; to take a case out of the proviso on the ground of insanity the insured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it while under the influence of some insane impulse which he could not resist." Van Zandt v. Ins. Co., 55 N. Y. 169; Newton v. Ins. Co., 76 N. Y. 426.

Q. A, the wife of B, secures a policy of insurance on his life, payable in ten years to herself in case she lives, and in case she die before her husband, to be paid to her husband. In case she outlives her husband, to be paid to her children, share and share alike. One year after the issuance of the policy, A and B make an assignment of the policy to D. The insurance company at the end of the ten years pays to the assignee of A and B. At that time A is living

with her three children. The children, through a guardian, bring suit against the insurance company to enforce their rights under the policy. What are their rights, and was the assignment valid? Who should have judgment?

A. Judgment for the insurance company. The policy was payable to A, if she were alive, and she having assigned her rights to D, he acquired and possesses the same rights she would have had under the policy. The children therefore have no rights; whatever right they had was cut off by the assignment. The assignment was valid. An assignment of a life insurance policy, issued upon the life of a husband, in which his wife is the beneficiary, is valid, where the assignment is made by the wife with the written consent of the husband. Fuller v. Kent, 13 App. Div. 529.

Q. There is an insurance upon the life of A, payable to his wife, or if she be dead, to the children. They have two children, X and Y. X dies, leaving a son, then A's wife dies, then A dies. Who is entitled to recover the amount of the policy?

A. Y gets all. X simply had a contingent interest in the property, which terminated upon the happening of the contingency, i. e., her death prior to that of her mother, and so no interest was transmitted to her representatives. Upon the death of the mother, all interest in the policy vested at once in the child then living. Walsh v. Ins. Co., 133 N. Y. 408.

Q. A takes out a fire insurance policy. The policy reads that if A has any other insurance on his premises, the policy is void. A has a policy existing in the same company. His barn burns, and he sues the company. Can he recover?

A. Yes, for the company must be deemed to have waived the condition. "When the facts are all known, before any contract is made, a condition against a state of things known or presumed to be known to exist by all the parties, cannot be deemed to be within their intention and purpose." Forward v. Ins. Co., 142 N. Y. 382. "The company is estopped from setting up the forfeiture, since it is presumed to know of the existence of the other policy in its own company." Kelly v. Ins. Co., 15 App. Div. 320.

Q. A policy of fire insurance contained a clause that the insured should serve a verified proof of loss upon the company within sixty

days after the fire, as a condition precedent to his maintaining an action thereon. The insured served an unverified proof of loss within sixty days, which the company retained, making thereto no reply or observation. A sues the company. Judgment for whom and why?

A. Judgment for A. "Under the facts disclosed by the evidence, the defendant was called upon to object to the proofs of loss that were furnished within a reasonable time, and to point out the defects, to the end that plaintiff might remedy them within the period of time in which he was permitted to lodge with the defendants formal proofs; and a question of fact was presented to the jury to consider whether under all the circumstances, defendant had not waived the right to insist upon more formal proofs." Messmer v. Ins. Co., 24 App. Div. 241. In the case put, the act of the company was clearly a waiver of the forfeiture. By accepting the informal proofs, they are estopped from demanding service of the verified proof of loss. Bumstead v. Ins. Co., 21 N. Y. 81.

Q. Sparks from the locomotive of a R. R. Co. burn the barn of B; B is insured and the insurance company pay him the full amount of the insurance, $1,000. B sues the R. R. Co. in tort for damages. The R. R. Co. demurs on the ground that the insurance company has brought an action for the same cause. Judgment for whom and why?

A. Judgment for the railroad company. If a loss under a policy of fire insurance is occasioned by the wrongful act of a third person, the insurer upon payment is subrogated to the rights and remedies of the assured and may maintain an action against the wrongdoer. Ins. Co. v. R. R. Co., 73 N. Y. 399.

Q. A has a policy of fire insurance for $1,000. The insured property is mortgaged for $5,000 to B, and in the policy is this clause: "Damage, if any, payable to the mortgagee to the extent of his interest." As a result of a fire, the insurance company becomes liable for $4,000, but because of the above clause in the policy, are undecided as to whom to pay the money, so they refuse to pay to either. Who may bring suit?

A. The suit may be brought by either A or B, on the principle that either a beneficiary or the promisee may sue on the contract. Lawrence v. Fox, 20 N. Y. 268.

CHAPTER XIV.

Partnership.

Q. A and B are copartners. They employed C as manager of their business, and agreed to give him 15% of the profits of the business as his salary. Subsequently X sells a bill of goods to the partnership, and upon their failure to pay for the same, sues C, claiming that A, B, and C are partners. Can he recover? State your reasons. Answer fully.

A. No. One who has no interest in the capital or business of a firm, save that he is to receive a percentage of the net profits of the business for his services, is not a partner with the others interested in the profits. Smith v. Bodine, 74 N. Y. 30.

Q. A, B, and C run stage coaches over a route divided into three sections, each paying his own expenses for his own section, but the money received as fare of passengers, deducting therefrom the tolls paid, was divided among the partners in proportion to the number of miles run by each. B, in the course of one of his trips, negligently ran his coach against the carriage of D, who was rightfully in the highway without fault, and thereby D was thrown from his carriage and sustained severe injuries. D brought an action to recover damages for the personal injuries received, not only against B, but also against A and C, on the ground that all three were partners. The complaint alleges all these facts. A and C appeared separately, and each demurred to the complaint. Judgment for whom and why? Give reasons.

A. Judgment for D. In the case of Champion v. Bostwick, 18 Wend. 175, it was held that they were jointly liable as partners, and it was said that to constitute one a partner, he must have such an interest in the profits as to entitle him to an account, and give him a specific lien or preference in payment over other creditors.

(NOTE.) The test as to what constitutes a partnership has varied greatly in the New York decisions. It can be said that the mere sharing of profits and

losses does not constitute a partnership. Whether or not a partnership has been formed, depends very largely on the intention of the parties. Probably the best test, as to what constitutes one a partner, is that given in the case of Magovern v. Robertson, 116 N. Y. 61. It was there said that: "Persons having a proprietary interest in a business and its profits are liable as partners."

Q. A leases a hotel to B at a rental of $1,000 a year and one-half of the profits of the hotel, C, knowing nothing about the relation existing between A and B, delivers goods to B, which were not paid for. C, learning of the relation, brings an action and seeks to charge A as a partner. Can he succeed?

A. No. It is well settled that a lease of real or personal property at a rental to be measured by a share of the profits does not make the lessor a partner, from the lack of an intention of the parties to form a partnership. Taylor v. Bradley, 39 N. Y. 129.

Q. A and B enter into an agreement, whereby A is to stock his farm and B is to carry it on furnishing all the labor for one year. A and B are then to divide the crop. B hires C to aid him in carrying on the work of the farm. C sues A for the value of the services, claiming that A and B are partners. Can he recover? What relation exists between A and B?

A. C cannot recover from A. This is the familiar case of working a farm on shares. The dividing of the crop is merely a means of paying the rent. The relation existing between A and B is not that of partners, but that of tenants in common of the crop. Putnam v. Wise, 1 Hill, 234; Davis v. Morris, 36 N. Y. 569.

Q. A loans money to the firm of B and C, and takes a mortgage on their property, on which he is to receive interest and a stipulated share of the profits. B and C agree to repay the money in five years, the term fixed for the duration of the partnership. D sells goods to the firm, and in default of payment, sues A, seeking to hold him liable as a partner. Can he recover? State your reasons.

A. No. "Where a person, who has no interest in the firm or the capital invested, lends money to the firm, for which he takes a mortgage on property, and is to receive interest and a guaranteed share of the profits, and which loan the borrowers personally agree to pay in any event, he is not a partner, and cannot be held liable as such by the creditors of the firm. Curry v. Fowler, 87 N. Y. 33.

(NOTE.) "A person who has no interest in the business of a firm, save that he is to receive a share of the profits as compensation for services, or for money loaned for the benefit of the business, is not a partner, and cannot be held liable by the creditors of the firm." Richardson v. Hughitt, 76 N. Y. 55.

Q. A loans B certain machines for use in B's manufacturing establishment, stipulating that he is to receive one-third of the profits of the business for the loan. B contracts certain debts, and his creditors seek to hold A liable as a partner. Can they do so?

A. No. "A person is not to be regarded as a partner, even as to third persons, merely because he stipulates that in return for the hire of a chattel, he shall receive a part of the profits that might be earned by the use of the chattel in the bailee's business." Wilson Co. v. Bowker, 27 Abb. N. C. 153.

Q. A and B were partners in the shoe business. A died and left a will, by which he directed his executors therein named to conduct his interest in the business in the firm name, in conjunction with the surviving partners. X subsequently sells goods to the firm, and seeks to hold the separate estate of A. Can he do so?

A. No. "The executor became a copartner in the firm business, and debts incurred in the business were claims upon the partnership merely, and not upon the separate estate of the deceased partner. The intention of a testator to confer upon his executor power to continue a trade or business must be clearly expressed in the will. When the simple power is conferred, it only authorizes the use of the fund invested in the business at the time of the testator's death; the general assets may not be used, unless such an intent on the part of the testator is expressed in the will." Willis v. Sharp, 113 N. Y. 586. See also Columbus Watch Co. v. Hodenpyl, 135 N. Y. 430.

Q. A holds himself out to be a partner of B and C, which he is not. D gives credit to the firm, without knowing anything of A's partnership. State A's liability generally to the creditors of the firm, and is he liable to D?

A. A is not liable to D, because the latter did not rely on the holding out. A is merely a partner by estoppel, and as such is only liable to those who have dealt with the firm in the belief that he was a partner. "A person who is not actually a partner may

render himself liable as though he were one, by so conducting himself as to reasonably induce third persons to believe that he is a partner, and to act upon that belief. It is the case in which the principle of estoppel applies. First, the alleged act of holding out must have been done by him or by his consent. Second, it must have been known by the person seeking to avail himself of it." Mechem on Partnership, sec. 69. "Declarations made by a person that he is interested in a certain business, not only estop him from denying his partnership therein, as against those who have sold goods to the alleged firm on the faith of his declarations, but are also competent evidence of the existence of a partnership, in favor of others as to whom there may have been no estoppel." Griffin v. Carr, 21 App. Div. 51. "A person not actually a partner may render himself liable as one by inducing people to act upon the faith of representations by him that he is a partner, the principle being that of estoppel. The holding out must antedate the contract, and the plaintiff's knowledge of, and reliance upon his alleged connection must be proved as of that time, for otherwise the plaintiff was not misled. No particular mode of holding out is necessary. If he knowingly consents to being represented as a partner, he is liable; and his knowledge and consent may be inferred from circumstances." Bates on Partnership, secs. 90, 91.

Q. John Brown agrees with Jones and Smith, who are the actual partners in the firm of Brown, Jones & Co., for $2,000 a year, to allow his name to be used as a member of the firm. The object of this arrangement was to continue the firm name, Samuel Brown of the original firm having died. X sells goods to the firm, not knowing who was represented by the name of Brown. Subsequently on discovering the fact, and the firm having defaulted in payment, he seeks to hold Brown as a partner. Can he succeed? State your reasons.

A. Yes. "One, who for a valuable consideration, authorizes the use of his name in a partnership, as if he was a member thereof, is liable as a partner to a subsequent creditor of the firm, and this, although the creditor was ignorant of the arrangement, or that the name represented such nominal partner, and did not give credit on the faith of his apparent connection with the firm." Poillon v. Secor, 61 N. Y. 456. "Where one is held forth to the world as a partner by his authority, consent, or connivance, the presumption

is almost absolute that he was so held out to every creditor or customer. If so held out by his own negligence only, he should be held only to a creditor who has been actually misled thereby." Parsons on Partnership, sec. 119.

Q. A solvent partnership consisting of two partners owns real estate. One of the partners dies. His widow claims to be entitled to dower in one-half of the partnership realty. Is she so entitled? What are her rights?

A. She is entitled to dower, subject to the rights of the partnership creditors, and the claims of the copartners between themselves. "Real estate purchased by a partnership firm, for partnership purposes, with partnership funds, is regarded in equity, so far as the firm and its creditors are concerned, as personal property. . . . After the dissolution of the firm, and the claims of its creditors are discharged, and the equities of the respective partners in its assets are determined and satisfied, such property, so far as it is preserved in specie, and is awarded and conveyed to the respective members, undoubtedly loses its character of personal property, and again becomes subject to the rules governing the devolution of real estate. But so long as the partnership affairs remain unsettled, like all the other assets of the firm, its real estate is equitably pledged to creditors, and liable to be disposed of and absorbed in the process of liquidating the firm debts, and satisfying the claims of the respective partners as against each other." Greenwood v. Marvin, 111 N. Y. 433.

Q. A, B, and C are partners. B has the legal title to certain property, bought with partnership funds, and used for partnership purposes. B dies, leaving a widow and an heir-at-law. What are the rights of the parties? State the general rule.

A. The widow is entitled to dower, and the heir-at-law to the remainder of B's share after payment of the partnership debts, and an adjustment of the partnership accounts. B's share was one-third, notwithstanding the title to the whole property was in his name. "For the purpose of paying the debts of the firm, and discharging the claims and equities of the copartners between themselves, real estate belonging to the firm is treated in equity as personal property, and thus, although the title stands in the name of one of the partners only, he holds it in trust for the firm." Tarbel

v. Bradley, 7 Abb. N. C. 273. "Real estate purchased for, and appropriated to, partnership purposes, and paid for out of partnership funds is partnership property, although the legal title is taken in the name of one of the partners; equity will hold him as trustee for the firm. There is no distinction in respect to the proof necessary to establish the fact, that the real estate is partnership property, between such a case and the case of a conveyance to the several partners; it may be established in either case by parol evidence. For the purpose of paying debts and adjusting the equities between the copartners, real estate belonging to a partnership is treated as personal property, and what remains is regarded as real estate descending to the heirs of the partners according to their several interests." Fairchild v. Fairchild, 64 N. Y. 471. "On the death of either partner, where the title is vested in both, the share of the land, standing in the name of the deceased partner, descends as real estate to his heirs, subject to the equities of the surviving partners to have it appropriated to accomplish the trust to which it was primarily subjected. The portion of the land not required for partnership equities retains its character as reality, and it leaves the law of inheritance and descent to their ordinary operation." Darrow v. Calkins, 154 N. Y. 503.

Q. A and B are partners in a firm in which part of the assets is real estate. About a month before the time fixed for the expiration of the partnership by the articles of copartnership, A brings an action for the partition of the real estate. There has been no accounting. Can A succeed in the action? Give reasons.

A. No. In the absence of any accounting between the copartners, or adjustment of the copartnership accounts, the real estate cannot be separated from the rest of the copartnership property, and made the subject of a separate action in partition to divide the same or the proceeds thereof between the parties. MacFarlane v. MacFarlane, 82 Hun, 238.

Q. A and B are partners in the business of manufacturing hats. A sells and conveys his interest in the firm to C. What effect has the transfer on the partnership? What rights does C, the purchaser, acquire?

A. The transfer dissolves the firm, and as a partner's interest is merely a chose in action, the purchaser thereof merely acquires the

right of a partner to an accounting, and the share of the assets which may be then found to be due him. "An assignment by one partner in the share of the common stock, simply transfers the interest he may have in any surplus remaining after payment of the firm's debts, and the settlement of all accounts; nor can the partnership effects be taken by an attachment or sold on execution to satisfy a creditor of one of the partners, except to the extent of such interest. The remaining partners are entitled to the control of the firm property, and to apply it to the payment of its debts. Where a partner sells his interest to a stranger or it is sold upon execution against him, his right to have partnership debts paid, and his liability therefor discharged out of the property, is not divested by the sale." Menagh v. Whitwell, 52 N. Y. 146.

Q. A and B are copartners in the clothing business. They purchased certain goods of C on sixty days' credit, and failed to pay at the expiration of that time. C's attorney brings an action against A and B, but only serves the summons on A. B is financially irresponsible, and has fled the state. Against whom should judgment be entered, and how should the execution be issued?

A. Judgment should be entered against A and B; it should, however, be stated that B was not served. Execution should be issued the same way. Sec. 1932 of the Code of Civ. Pro. provides as follows: "In an action, wherein the complaint demands judgment for a sum of money against two or more defendants, alleged to be jointly indebted upon contract, if the summons be served upon one or more, but not upon all of the defendants, the plaintiff may proceed against the defendant or defendants upon whom it is served, unless the court otherwise directs; and if he recovers final judgment, it may be taken against all the defendants thus jointly indebted." Sec. 1934 says: "An execution upon such a judgment must be issued in form against all the defendants; but the attorney for the judgment creditor must indorse thereupon a direction to the sheriff containing the name of each defendant who was not summoned, and restricting the enforcement of the execution as prescribed in the next section." Sec. 1935 is in part as follows: "An execution against property, issued upon such a judgment, shall not be levied upon the sole property of such a defendant; but it may be collected out of personal property, owned by him, jointly with the other defendants, who were

summoned, or with any one of them; and out of the real and personal property of the latter, or any one of them."

Q. A is a partner in the firm of A, B, and C. Upon an individual judgment against A, an execution issues against A's interest in the firm. Thirty days later, an execution under a judgment recovered against the firm is issued. There is not enough property to satisfy both executions in full. What disposition should be made of the firm property in reference to the executions?

A. The execution against the firm must be first satisfied for the full amount called for by it. "Where a sheriff receives for collection, an execution against one of the members of a copartnership, and by virtue thereof levies upon the interest of the judgment debtor in the goods of the firm, and where within thirty days after, and before a sale, he receives an execution against all the members of the firm for a copartnership debt, the latter is the prior lien, and if upon the sale the stock brings sufficient to satisfy it, he is justified in returning the former execution nulla bona." Eighth Nat. Bank v. Fitch, 49 N. Y. 539.

Q. A, B, and C enter into a partnership. A and B are both infants. The firm buys certain goods of X and fails to pay for them. X brings suit against the three members of the firm. A and B set up infancy as a defense. X only recovers judgment against C, and seeks to satisfy it out of the firm property. Can he do so?

A. Yes. Even though the contract of an infant is voidable, yet when he enters into a partnership he assumes a status, one of the incidents of that status being that the property of the firm is liable for its debts, and he cannot therefore be relieved from the operation of this rule by reason of his infancy. Of course the separate property of the infant cannot be charged with the firm debts. "In an action against copartners for a partnership debt, where judgment is rendered in favor of two members of the firm, on the ground that the debt was contracted during their infancy, and against the remaining adult member: Held, that the judgment against the adult member of the firm was a partnership liability, so far as to make the moneys and property of the firm applicable to its payment." Whittemore v. Elliot, 7 Hun, 518.

Q. A and B were partners. A buys out B's interest, and agrees to pay all the firm debts, giving B a bond binding himself to do so. X is a creditor of the firm, and sues A on the bond for the amount of his claim. A demurs. Judgment for whom and why?

A. Judgment for A. "Where upon the dissolution of the firm, one partner executes to another a bond conditioned for the payment by the partner executing it, of all the firm debts, the liability of the obligor is to the obligee only, not to the creditors, and an action cannot be maintained therefor by a firm creditor, to recover his indebtedness from the obligor." Merrill v. Green, 55 N. Y. 270. See also Serviss v. McDonnell, 107 N. Y. 260.

Q. Upon the statement of the defendant, Brown, that the firm of Brown and Jones intends to increase its capital stock, and that he, Brown, wishes to put in $1,000 as his share of such increase, plaintiff loans Brown $1,000, and takes two firm notes for $500 each. He sues the firm upon the notes. What are the rights of the parties? What principle of law is involved?

A. The firm is not bound, as the facts show that the intention was to loan to Brown individually. Of course, if the loan was made to the firm on Brown's application, the firm would be bound irrespective of the question, whether or not they received the money, as a partner has implied power to borrow money for the firm; but as the loan was made to Brown individually, even though he would apply the money to the firm, the firm would not be bound. The statement that each wanted to increase the capital stock by $1,000, shows clearly that the money was loaned to Brown. The presumption raised by the giving of the firm note is thus rebutted by the facts. "A note given by one of several partners in the name of a firm, is of itself presumptive evidence of a partnership debt; and if the other partners seek to avoid its payment, the burden of proof lies upon them to show that the note was given in a matter not relating to the partnership business, and that, with the knowledge of the payee. All the members of a firm are liable for money lent to the firm, upon the application of one of the partners, and it is not necessary to show the actual application of the money to the use of the firm, or the assent of the other members to such application thereof. Whittaker v. Brown, 16 Wend. 550.

Q. A, of the firm of A and B, goes to C, and borrows from him $500, giving therefor his individual note for that amount. A subsequently places the money in the firm. The note not being paid at maturity, C sues the firm. Can he recover? State your reasons.

A. No. "Where money is loaned upon the promissory note of one member of copartnership, and upon his individual credit, the fact that the money is applied to the use of the firm does not constitute the lender a creditor of the firm. It is only when the name used, and to which credit is given, is that adopted by the firm, and used to designate the partnership, that it is held liable." Nat. Bank v. Thomas, 47 N. Y. 15.

(NOTE.) "A lender is warranted in assuming when nothing is said, that money borrowed by a partner is for the firm, but where the money is borrowed on the individual credit of the partner, though it is applied to the use of the firm, it does not thereby become an indebtedness of the firm. And the same rule applies where money comes to the hands of a partner, through a transaction outside of the firm's business, and is afterward applied to its use. So on the other hand, if money is borrowed, or goods purchased for the firm, and upon its credit, the subsequent misappropriation of the avails by the borrowing or purchasing partner, does not relieve the firm of its liability therefor." 17 Amer. & Eng. Ency. of Law, 1016.

Q. A, of the firm of A and B, buys certain goods for the partnership from X, in his, A's, own name. X was ignorant of the existence of the partnership. The goods were applied to the use of the firm. Upon discovering the facts, X sues the firm for the purchase price of the goods. Can the action be maintained? State your reasons.

A. Yes. Partners are all liable for goods furnished for the benefit of the firm, though the vendor does not know of the existence of the firm, and though he supposed himself dealing with, and gives credit to the individual partner by charging him alone in his books. The doctrine of undisclosed principal applies, each partner being the agent for his copartner. Reynolds v. Cleveland, 4 Cowen, 282.

Q. A, of the firm of A, B, and C, makes a contract with M. A is guilty of fraud in the making thereof. B and C are entirely ignorant of the matter. M sues A, B, and C. What are the rights of the parties?

A. The firm is liable. "Where a fraud is perpetrated by one

of the members of a partnership, in the transaction and prosecution of a partnership enterprise, they are all liable, although the others had no connection with, knowledge of, or participation in the fraud." Chester v. Dickerson, 54 N. Y. 1.

Q. A, B, and C are partners in the butcher business. A has a grudge against M's dog, for having annoyed his, A's, children. He throws some poisoned meat to the dog when he passes, and the dog dies from eating it. M brings action against the firm to recover damages. Can he recover? Give reasons in full.

A. The firm is not liable, as A's act was committed (?) not in the course of the firm's business, or for its benefit, but purely for his own personal reasons. "Each partner being the agent of the firm for the purpose of carrying on its business in the usual way, the partnership is liable in damages for torts or wrongs committed by any of the partners within the proper scope of their agency. While the wilful and malicious torts of a member of a firm are usually not within the scope of his agency, and consequently do not render his copartners liable, yet if such an act is done clearly and plainly for the benefit of all, and in the usual and ordinary prosecution of the business of the firm, all are liable, notwitstanding the malicious motive of the partner committing the act." 17 Am. & Eng. Ency. of Law, 1065.

Q. A and B are partners. C agrees with B, that if B will give him a firm contract, he, C, will pay him, B, $1,000 for his sole benefit. B gives the contract to C, and receives the money. A knows nothing of the private agreement between his partner and C, but finds it out after the contract has been given to C. A now consults you as to his rights. What would you advise?

A. B can be compelled to account for the $1,000 to the firm. "Any rewards or commissions secretly obtained, by one copartner from third persons, for inducing his firm to make particular purchases or sales, or to enter into particular transactions, must be accounted for to the firm." Dunlop v. Richards, 2 E. D. Smith (N. Y.), 181. "The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and so bound to act in entire good faith to the other. The functions, rights and duties of partners are similar to that of trustees and agents. Neither partner can, in the business and affairs of

the firm, stipulate for a private advantage to himself; he can neither sell to, nor buy from the firm, at a concealed profit to himself. Every advantage which he can obtain in the business of the firm must enure to the benefit of the firm." Earl, C., in Mitchell v. Reed, 61 N. Y. 123.

Q. A and B were partners; the firm was in straitened circumstances. A, wishing to give to C, a creditor of the firm a preference, assigned to him all the firm property, the value of which amounted to the debt due to C. What are the rights of B and the firm creditors, in the absence of the Bankruptcy Law?

A. They have no rights. "One partner has authority to sell and transfer all the partnership effects directly to a creditor of the firm, in payment of a debt, without the knowledge or consent of his copartner, although the latter is at the place of business of the firm and might be consulted. Nor is such transfer invalid, though the firm is insolvent, and thereby one creditor acquires a preference over the other creditors of the firm." Mabbett v. White, 12 N. Y. 442. See also Bender v. Hemstreet, 34 N. Y. Supp. 423, where it was held, that while a partner has the right to sell to a creditor, yet he has no such right to sell to a stranger.

Q. A and B are partners. After a time the partnership is dissolved, and A carries on the business. A then gives a note in the firm name to C to extend the payment of a firm debt. C, who all the time has known of the above facts, now sues A and B as members of the firm on the note. Can he recover?

A. No. It is well settled, that one partner cannot bind the other after dissolution, by a firm note, even for an old firm debt. This is the making of a new contract by one, for all the partners after his authority is revoked. During the continuance of the partnership, one partner is entitled to act for all as their general agent. On dissolution, he ceases to hold that character and must be considered as a mere joint debtor. Bank v. Norton, 1 Hill, 572.

Q. On January 2, 1894, A and B, for value received, made and delivered to C their promissory note for $500, payable in three months. A and B were in partnership at this time. In May, 1899, A and B dissolved partnership. No further attention was paid to the note by either of the parties thereto, until January 2, 1901,

when B paid to C all of the interest due and unpaid on the same, and $100 on account of the principal, which C at once indorsed on the note as a payment thereon. C thereafter sues A and B on the note. A pleads the Statute of Limitations. On the above facts, judgment for whom and why?

A. Judgment for A. After the dissolution of a partnership, an acknowledgment and payment made by one of the partners will not revive a debt against the firm which is barred by the Statute of Limitations. Van Keuren v. Parmelee, 2 N. Y. 523. Of course B is liable, the payment by him having taken the case out of the statute, as far as he personally was concerned.

(NOTE.) In Forbes v. Garfield, 32 Hun, 389, it was held that: "Where payments are made by one of several partners after the dissolution of a firm, upon a note given by the firm for goods sold to it, and such payments are received by the payee in ignorance of the fact that the firm is dissolved, such payments are to be treated as if made by the firm, and prevent the running of the Statute of Limitations in favor of the other members of the old firm."

Q. A and B are partners. The firm is dissolved by mutual consent. Notice of dissolution is published in the newspapers. C, who has sold goods to the firm on credit before, sells goods to A who has continued the business. Upon default in payment, he seeks to hold B liable as a partner. Can he do so?

A. Yes. A retiring partner remains liable as a partner, until proper notice of his withdrawal is given. This notice, in the case of former dealers, must be actual, and must be brought home to them. A mere publication in the newspapers is not sufficient. To one who is not a prior dealer, constructive notice, as publication in a newspaper, will be sufficient. One who has sold goods to a firm on credit, even though no definite time of forbearance is agreed upon, is a former dealer, but one who has only sold for cash is not. Clapp v. Rogers, 12 N. Y. 283. "A retiring partner is liable for subsequent engagements made by his former copartner in the firm name, with those who had previous dealings with the firm, and who entered into the new transaction without notice of the change of the firm. A person who is entitled to actual notice of the dissolution must be one who has had business relations with the firm, by which a credit is raised upon the faith of the copartnership. To relieve a retiring partner from subsequent transactions in the firm name, notice of the dissolution must be brought

home to the person giving the credit to the partnership. Publication of notice of dissolution will not relieve a retiring partner from liability to one dealing previously with the firm, but will be sufficient as to others." Andrews, J., in Austin v. Holland, 69 N. Y. 571, where it was held, that the mailing of notice to a prior dealer, it never having reached him, was not sufficient.

CHAPTER XV.

Quasi Contracts.

Q. A, by written contract, hires B to work for him for one year. At the end of three months, B leaves the employment without any cause. A refuses to pay for the services rendered. B brings action to recover the value of the services upon a quantum meruit. Can the action be maintained? State your reasons.

A. No. In this case, the doctrine of unjust enrichment does not apply. Marsh v. Ruleson, 1 Wend. 514. "Where a servant, on contract for a certain time, without cause, goes away declaring that he will work no more, the master is not bound to receive him again, nor can the servant procure a pro rata compensation." Lantry v. Parks, 8 Cowen, 63. "Where a party enters into a contract and having performed part of it, without the consent of the master, voluntarily abandons further performance of it, he cannot maintain an action for the labor actually performed. Where the contract is entire, a full performance is necessary to the plaintiff's right of action." Jennings v. Camp, 13 Johns. 94.

Q. A hires B as managing engineer to supervise the construction of a certain railroad. After having worked six months, B becomes seriously ill, so as to be incapacitated from doing any further work. The contract provided that B was to work for one year for $10,000. A refuses to pay for the work already performed; B brings suit to recover $5,000 which he claims is due him. A sets up as a defense that the contract was entire, and alleges nonperformance. Judgment for whom and why? Give your reasons.

A. B can recover on a quantum meruit, and as this is a special contract could probably recover the proportionate amount of the contract price. B having been prevented from performing without any fault on his part, A would be unjustly enriched, if he were

not compelled to pay for the work. "One, who under a contract requiring his personal services, and providing for partial payment during the employment and the remainder at the end of the term, performs services valuable to the employer, but is before the end of a stipulated period, disabled by sickness from completing his contract, is entitled to recover as upon a quantum meruit for such services as he rendered." Wolfe v. Howes, 20 N. Y. 197. "The compensation of an agent or servant employed under a special contract, a complete performance of which is prevented by his sickness or death, is not confined to a quantum meruit, but is to be measured by the contract." Clark v. Gilbert, 26 N. Y. 279.

Q. A hires B, an infant, to work for him in his grocery store at $20 per month. After working two weeks, the boy becomes dissatisfied with the place, and without the knowledge of the employer, leaves in the night-time and returns to his home. His father subsequently brings action for the services rendered. Can the action be maintained? Give your reasons in full.

A. Yes. The case of infants is an exception to the rule, that a servant, who voluntarily leaves his position, cannot recover for the services already rendered. "In an action by an infant to recover for work and labor, it is neither a defense nor a ground for reducing the damages, that the work was done under a contract by the infant to labor for a fixed period of time, which he violated by leaving the defendant's employ without cause, before the time expired." Whitmarsh v. Hall, 3 Denio, 375.

Q. A, on December 1, 1899, hires B by verbal agreement to work for him for one year from January 1, 1900. B enters upon the employment and works for six months. A, not being satisfied with B's work, discharges him. B brings action to recover for the services performed. A defends on the ground that the contract is void under the Statute of Frauds. Judgment for whom and why?

A. Judgment for B. As A was unjustly enriched by the services of B, the latter can recover as upon a quantum meruit. The statute would be a good defense if the action were brought upon the contract, but here a recovery is allowed on the principle of quasi contract. "Where services are rendered under a contract void by the Statute of Frauds, no action can be maintained to re-

cover their value, except upon the default of the other party or his refusal to go on with the contract." Galvin v. Prentice, 45 N. Y. 162.

Q. Plaintiff, seeing fire spreading on defendant's land during defendant's absence, hired men to put it out, and thereby saved defendant's house from destruction. He sues defendant for the money expended. What are the rights of the parties?

A. He cannot recover for the services were purely gratuitous, and the principle of unjust enrichment does not apply in such a case. "Labor or services voluntarily done or performed by the plaintiff for the defendant without his privity or request, however meritorious or beneficial it may be to the defendant, as in saving his property from destruction by fire, affords no right of action." Bartholomew v. Jackson, 20 Johns. 28.

Q. A makes an agreement with B to purchase a piece of land from him for $5,000. The agreement is verbal, but A pays to B $500 to bind the bargain. On the next day, A becoming dissatisfied with his contract and receiving a more advantageous offer from a third party, demands the return of his $500 from B. B comes to you for advice. What would you inform him are his rights?

A. B has a right to retain the $500. A cannot invoke the principle of unjust enrichment in his favor, for he has himself broken the contract; he cannot found a recovery upon his own breach. B has no right of action to compel specific performance, as the contract is void under the Statute of Frauds, being a contract for the sale of lands which, under sec. 224 of the Real Prop. Law of 1896, must be in writing; part payment does not take the case out of the statute. Lawrence v. Miller, 86 N. Y. 131.

Q. A agrees with B to build a house for him and deliver the same completed by October 1, 1900. A performs most of the work, and the house is substantially completed by September 15, 1900, but has not been delivered into the possession of B, and on the 16th of September is destroyed by fire. B has already paid to A several installments of the price, amounting in all to $1,000. On October 2, A not having delivered the house, B brings action to recover the money paid and also damages for non-performance of the contract. Can the action be maintained? State your reasons.

A. Yes. This seems rather a harsh case, but recovery is allowed on the ground that A not having performed his contract by delivering the house, would be unjustly enriched by a retention of the money. "One who has agreed to build a house on the land of another, and has substantially performed his contract, but has not completely finished the house nor delivered it, when it is destroyed by fire, is liable to an action for money advanced upon the contract and damages for its non-performance. Where a party engages unconditionally by express contract to do an act, performance is not excused by inevitable accident, or other unforeseen contingency not within his control." Tompkins v. Dudley, 25 N. Y. 272.

Q. A agrees to do certain fresco painting in the house of B. He enters upon the work, and when it is about half finished, the building is destroyed by fire. A brings action to recover for the value of the work already finished. Can he recover?

A. Yes. A recovery is allowed in this case, on the ground that there is an implied condition annexed to the contract, of the continued existence of the thing upon which the work is to be done. The owner of the house must keep it in readiness for the performance of the work, and even though it is destroyed without his fault, he is liable for the labor actually performed thereon before its destruction. Niblo v. Binsse, 3 Abb. Court of Appeals Dec. 375.

Q. A enters B's house and agrees to perform certain services for him without compensation. He works for two years and then leaves. He subsequently brings action to recover for the value of the services rendered. Can he recover?

A. No. The principle of unjust enrichment does not apply to this case. "Where one agrees to work for another gratuitously, although he may afterward refuse to do so, he cannot recover for the services rendered." Doyle v. Church, 133 N. Y. 372.

Q. A wrongfully took and converted to his own use, the horse of B valued at $100. B sues A on contract for goods sold and delivered. Above facts were shown on trial, and the defendant moved for a dismissal. Ruling and reasons.

A. Judgment for B. "The owner of personal property which

has been wrongfully converted by another, may, although the property is retained by the wrongdoer, waive the tort, and sue for and recover its value, as upon an implied contract of sale." Terry v. Munger, 121 N. Y. 161.

Q. A and B wrongfully take a carriage belonging to C. C brings an action on an implied contract to recover its value. He recovers judgment and issues execution, but the same is returned unsatisfied. He then discovers that the carriage is in the possession of D, having been bought from B. He brings an action of replevin against D. Judgment for whom and why?

A. Judgment for D. By bringing an action on contract, C elected to treat the transaction as a sale, and the title thereby passed to the wrongdoers; therefore the wrongdoers could pass a good title, and C must therefore fail in his action of replevin against D. Terry v. Munger, supra.

Q. A is induced to deal with B, to his damage, by means of B's false representations. He brings suit on contract for damages, but afterwards discontinues the action, and sues in fraud and deceit. B interposes a demurrer to the second suit. Judgment for whom and why?

A. Judgment for B. A, having with knowledge of the fraud, brought an action on contract, thereby elected to affirm the contract, and he could not thereafter repudiate it and sue in tort. He is bound by his election of remedies. Where one has two remedies, and he elects to pursue one, he cannot thereafter follow the other. "Where a party takes legal steps to enforce a contract, this is a conclusive election not to rescind on account of anything then known to him." Conrow v. Little, 115 N. Y. 387.

Q. A brings an action against B, for conversion of property. Judgment against A on the ground that it was a sale. Can A thereafter maintain an action for the value of the property?

A. Yes. "The institution by a party of a fruitless action, which he has not the right to maintain, will not preclude him from asserting the right he really possesses. Defendants, by their contention, succeeded in establishing that there was an absolute sale, and that therefore plaintiff had mistaken his remedy,

and they cannot now set up the judgment which they then obtained, to prevent the plaintiff from recovering the purchase price of the property, which they formerly urged and established was sold to them by him, and which it is conceded they have not paid for, and thus not only retain the property but also the purchase price. Plaintiff here did not make an election of remedies; he simply made a mistake as to what his remedy was. There must be two remedies from which to elect. It is not enough that he supposed he had two remedies, he must have them in fact." McNutt v. Hilkins, 80 Hun, 235.

CHAPTER XVI.

Real Property.

Q. A sells to B by oral agreement, certain trees which are growing upon his lands, with liberty to cut and remove them at any time within two years. Part of the trees were cut and removed, but A refused to permit any more to be taken, and for this, B brings suit against A. A defends on the ground that the contract is void under the Statute of Frauds. Judgment for whom and why?

A. Judgment for A. This contract, being one for an interest in lands, must be in writing under the Statute of Frauds. Sec. 224 of the Real Property Law of 1896 says: "That a contract for the sale of real property or an interest therein is void, unless the contract, or a note or memorandum thereof, is in writing, subscribed by the grantor, or his lawfully authorized agent." Those things, as growing trees, which are the natural products of the soil, and not the result of husbandry or cultivation, are realty. A contract for the sale of them, is a contract for the sale of an interest in land. Those things, as annual crops and corn, wheat and the like, which are the result of cultivation of the soil, are personalty, and a contract for the sale of them is not required to be evidenced by writing. Kilmore v. Howlett, 48 N. Y. 569.

Q. A dies leaving a farm, upon which there is growing grass and corn. To whom does the grass and corn belong, the heir-at-law, or the administrator?

A. The grass belongs to the heir-at-law, and the corn goes to the administrator; the former being considered as realty, while the latter as personalty. A distinction has always been taken between growing crops of grain and vegetables, such as wheat, corn, and potatoes, the annual produce of labor in the cultivation of the earth, and growing trees, fruit, and grass, the natural produce of the earth, which grow spontaneously and without cultivation. The

grass and fruits growing on the lands, belonging to an intestate at the time of his decease, are not assets belonging to the administrator, but descend with the land to the heir. Kain v. Fisher, 6 N. Y. 597. The crops being treated as personalty, pass to the administrator. Green v. Armstrong, 1 Denio, 552.

Q. A, by will, devises all his real property to his son John, and all his personal property to his daughter Mary. At the time of his death there were one hundred acres of wheat growing upon the farm, about half of which had been cut and bound. There was also a large orchard, and one hundred bushels of apples had been picked and barrelled. A has debts amounting to $1,000, which either the apples or wheat will satisfy. To whom, and in what shares do the apples and wheat belong, and out of which must the debt be paid?

A. The wheat that has been cut, and the apples that have been picked are personalty, and therefore go to the daughter; the apples on the trees, go to the son. The cut wheat, and the picked apples must be used to satisfy the debt. If the uncut wheat is not needed for the payment of the testator's debts, it passes to the devisee, and the devisee has a right to call upon the executors to apply to the payment of the debts, all other personal property not specifically bequeathed, before recourse is had to the crops. When the owner of the land has made a will devising the lands to a certain person, it is said that there is evidence of an intention on his part, to have those lands go to the devisee in the condition in which they are at his decease. "Where land, upon which a crop is growing, is devised in such form, as to convey it to the devisee, the crop is put upon the footing of a chattel specifically bequeathed, and cannot be sold for the payment of general legacies, but only for the payment of debts, after the other assets, not specifically bequeathed, have been applied." Stall v. Wilbur, 77 N. Y. 158.

Q. A cherry tree stands wholly upon the lands of A, with limbs overhanging the lands of B. The lands of A and B were separated by a rail fence. To whom do the cherries on the limbs of the tree which overhang the land of B, belong? Answer in full. Reasons.

A. The ownership of the entire tree follows the ownership of the entire land upon which the trunk of the tree stands, and that, regardless of the fact that a part of the roots may extend into the neighboring land. Therefore, the entire fruit of the tree, includ-

ing that growing on the overhanging branches, belongs to A. The owner of the tree has a right to reasonably go upon the adjoining land and pick his fruit; it is an involuntary trespass, because the overhanging is an act of nature. While it is true that the ownership of the overhanging branches is in him on whose land the trunk of the tree stands, nevertheless the overhanging branches constitute a nuisance, in that they interfere with the enjoyment, by the owner, of the adjoining land of his premises. The adjoining owner, therefore, has the right to abate this nuisance by his own act, without calling on the courts to aid him, that is, he may sever the branches at the boundary line, even though by his doing so, the tree would be deprived of life. That would simply be the natural exercise by the owner of the adjoining land over which the limbs projected, of his legal right to abate a nuisance. He has no right to make use of the branches cut for fuel or other purposes, for he would then be making use of another's property. Hoffman v. Armstrong, 48 N. Y. 201.

Q. A sells to B, by deed, a farm upon which there is at the time eight cords of wood piled in the woods, and a quantity of manure piled in heaps. B goes into possession and uses the wood and manure. A sues B for wrongfully retaining possession of the manure and the wood, claiming an oral agreement on the part of B to allow him to take it away. Judgment for whom and why?

A. Judgment for A. The wood having been severed from the land is personalty and so belongs to the vendor even without an agreement. As to the manure, B should have judgment, for in New York the holding is that manure, whether spread upon the farm or in heaps, is realty. Goodrich v. Jones, 2 Hill, 142; Littlebrook v. Corwin, 15 Wend. 169. Conceding the agreement to have been made, as to the manure, it is not enforceable; it is a reservation of a part of the realty, and must be excepted by the deed or a separate contract in writing to comply with the Statute of Frauds. Austin v. Sawyer, 9 Cowen, 39.

Q. A and B own adjoining lands; a barn on A's land stands on stone abutments. A sells B fifteen feet next to B's lot, and the deed makes no reservation. The fifteen foot line cut the barn in two. A parol agreement that A could remove the barn, was made between the parties, and A has done so. B sues for damages. Can he recover?

A. Yes. "Where lands and buildings thereon belong to the same person, the buildings are a part of the realty, and pass upon a conveyance thereof, and neither the grantor, nor those claiming under him, may show that it was agreed by parol that a building should be reserved. He can retain title to the building only by some reservation in the deed, or by an agreement in writing answering the Statute of Frauds. Leonard v. Clough, 133 N. Y. 292.

Q. A was erecting an apartment house in the city of New York, and contracted with B for certain mirror frames to be put in places left in the walls for that purpose. The frames were made and fastened in the walls by hooks and screws; if they were removed, the walls would appear unfinished. The frames corresponded with the cabinet work of the rooms. After the completion of the work, A failing to pay for the same, B files a mechanic's lien. Can he do so? State your reasons.

A. Yes, as the mirrors formed part of the realty. The intention of the person at whose instance the annexation is made, to make these mirrors a permanent accession to the freehold, is directly apparent. There is an actual annexation made during the process of building. These mirrors were not brought into the house as a completed article of furniture, but they formed a part of the completion of the structure. The facts show that they were an essential part of the inner surface of the building; that they were of material and construction to correspond with the fittings of the building; that they were fastened to the walls by hooks and screws; while they might be removed, nevertheless their removal would have left an unfinished wall, and would have required work to supply their absence. It is from these circumstances that the intention to make them a part of the realty is gathered. See Ward v. Kirkpatrick, 85 N. Y. 413. In McCabe v. Hanover, 81 N. Y. 38, where mirrors were brought into a house after its completion, as mere furniture for the purpose of ornament, it was held that they were personalty.

(NOTE ON FIXTURES.) Fixtures are articles which in themselves are personal property, but which by the actual or constructive annexation to the freehold, have become a part of it, and consequently have taken on the form of realty. The paramount test, whether a given article be a part of the realty, or whether it remains personalty, is the intention with which the annexation is made; that intention is the apparent and evident intention, and which may be found in an express agreement to that effect, or in the absence of an express agree-

ment, it must be gathered from the following circumstances: The character of the annexation; the adaptability of the thing annexed to the use of the freehold to which it is annexed; the relationship existing between the parties between whom the question as to whether the given article be a part of the realty or not arises, and in connection with the last test, the rule is that as between vendor and vendee, and as betweeu mortgagor and mortgagee, the courts will adjudge the property annexed to be real estate rather than personal property, and consequently passing by a conveyance of the land. As between heir-at-law and personal representatives, executors and administrators, the same strict rule that is applied as between vendor and vendee applies, and that the article affixed will go to the heir-at-law, unless a contrary intention on the part of the testator be evidenced from the circumstances. But as between landlord and tenant, the rule is greatly relaxed, and as between them, articles which are affixed for ornament, or for the purpose of domestic convenience, and certain articles affixed for the purpose of trade, will be held to be personalty, and removable by the tenant. Bishop v. Bishop, 11 N. Y. 123; Snedacker v. Waring, 12 N. Y. 170; Murdock v. Gifford, 18 N. Y. 28.

Q. A leases land of B for one year, and puts one building thereon for the purpose of his business. At the expiration of the year, the lease is renewed for three years. The second lease is in writing, and does not mention building in any way. A short time before the expiration of the second lease, A desiring to terminate his tenancy, consults you as to his right to remove the building. What would you advise are his rights?

A. He has no right to remove the building. The tenant must remove fixtures during the term in which he erects them. If he fails to remove them during the term, there is an abandonment of the fixtures to the owner of the land; title to them passes to him. The taking of a new lease, though it be on the same terms of the original lease, is not a waiver of the abandonment, and the tenant cannot, during the second term, created by the giving of a new lease, remove the fixtures; his rights in them are lost by his failure to remove them during the first term. If the tenant desires the right to remove the fixtures, he must reserve that right expressly to himself in the new lease. Loughran v. Ross, 45 N. Y. 792. "The right of a tenant, to remove fixtures erected for trade, is conceded to him for reasons of public policy, and being in the nature of a privilege he must exercise it before the creation of the term, or before he quits the premises." Talbot v. Cruger, 151 N. Y. 117.

Q. A and B each own adjoining lots; each has a well on his

own lot. B gets angry at A, and maliciously sinks his well deep enough to destroy the general source, thereby drying up A's well completely. What action, if any, has A against B? State the general rule.

A. A has no right of action against B. Percolating waters belong to the owner of the land through which they percolate, and he may do what he sees fit with the waters. He may take the waters absolutely, and appropriate them to his own use. If there is an interference with percolating waters, preventing them from reaching the neighboring land, that interference does not give rise to a right of action. It is not a violation of any legal right, so that even though the interference be due to an improper motive, though it be actuated by malice, yet it will not give rise to a right of action, because where there is no violation of a legal right, motive is of no moment. "A party is not liable for the consequence of an act done upon his own land, lawful in itself, and which does not infringe upon any lawful rights of another, because he was influenced in the doing of it by wrong and malicious motives; the courts will not inquire into the motive actuating a person in the enforcement of a legal right." Phelps v. Nowlen, 72 N. Y. 39.

Q. A and B own adjoining lots. B has been receiving the percolating waters from A's land as a supply to his (B's) well for more than twenty-five years. At the end of this period, A sinks a well on his own land, the effect of which is to cut off the percolations which supply B's well. B brings action against A to prevent him from cutting off the percolations. Can he do so? Answer fully.

A. No, as there is no prescriptive right. In order to have a prescriptive right, there must be an act done, which is a violation of a right in the other, and this violation must continue for twenty years; a wrong, which by a continuance thereof for twenty years, can ripen into a right. There is nothing in these cases that can give rise to a prescriptive right, because the act of the owner of the land to which the percolating waters come, at no time, is a violation of a right in the other, to which the other may be said to assent impliedly; so that a right to have percolating waters come to one's land cannot be acquired by simple continuance of the use of such waters, for the period of twenty years. The fact that the owner

of the land through which the waters percolate, who, by reason of his ownership in the land, has title to those waters, has taken no steps to prevent the water percolating, does not deprive him of the right to those waters. Dagor v. Collins, 23 Barb. 444; Bloodgood v. Ayres, 108 N. Y. 400.

Q. A is the owner of certain land through which certain waters flow to the X stream. This stream is used by the city of Buffalo as a reservoir. He digs a ditch which cuts off the supply of water. The city brings action against him to restrain his act. Judgment for whom and why?

A. Judgment for the city. "Whatever may be the rule in respect to the right of a landowner to use the water percolating through the earth, and thereby to affect the sources of wells and springs upon his neighbor's land, he may not divert and diminish the natural flow of a surface stream, by preventing its usual and natural supply, or by causing through suction or otherwise, a subsidence of its waters." Smith v. City of Brooklyn, 160 N. Y. 357.

Q. A and B are adjoining owners. There are two springs in A's land, one of which A uses for his own water supply, and for a valuable consideration accompanied by covenants of warranty, he grants to B the right to use the other spring. B lays pipes in order to conduct the water to his own house for his domestic use. Subsequently A's spring dries up, and he sinks a well near the spring granted to B, thus cutting off its source and supply, and rendering it worthless. B brings action against him. Can he recover?

A. No. "A limited and specific grant of the right to dig and stone up a certain spring, and conduct the water therefrom through the grantor's land by pipes, to the grantee's house, with covenants of warranty, does not render the entire premises servient to the easement; and the grantor may lawfully sink another spring, although the effect is to render the first one useless." Bliss v. Greely, 45 N. Y. 671.

(NOTE.) In Johnston Cheese Mfg. Co. v. Veghte, 69 N. Y. 16, it was said: "But there was no grant in that case (Bliss v. Greely, supra) of any particular supply of water from the spring, or from the defendant's land. The grant was merely of the right to the spring, and secured the plaintiff no greater

rights, than such as he would have had, if he would have owned the land upon which it was situated. In this case, the grant was of the use of the water, which at the time of the grant was being conducted from the spring, and the intent was to secure the continuance of the supply of water, it being essential to the operation of the cheese factory conveyed."

Q. A gives B permission to open a road on A's farm. B immediately fenced in the way, and spent considerable money thereon in grading and making it an appropriate way to his farm. B has exclusive and unrestricted use thereof as a road to his farm for thirty years. Then A barred up the way with gates and fences, and prevented B from using the road in any way thereafter. B brings action to restrain him. Can he succeed? What principle of law is involved?

A. B cannot maintain the action, as the permission given was a mere license, and so revocable at any time at A's pleasure. The distinction must be drawn between an easement and a license. An easement is an interest in land, an incorporeal hereditament created by grant or prescription; it gives rise to an estate in the land, and is therefore irrevocable. A license does not give the licensee any estate or interest in the land; it is a mere permit to do something on the land, and may be revoked by the licensor at any time, even though it has been used for longer than the period necessary for the acquiring of a prescriptive right, for there is never any violation of a right in the licensor, it being by his permission, and so no prescriptive right arises. Licenses may be given by parol, easements can only be created by deed, or may arise by twenty years' adverse user. A mere license is not made irrevocable by the fact that a valuable consideration was paid therefor. Wiseman v. Luckinger, 84 N. Y. 31. "There can be no equitable estoppel, which will operate to prevent the revocation of a license, grounded upon the fact that the licensee has entered upon the land and expended labor and money upon the faith of the license. It seems, that an easement to do some act of a permanent nature upon the lands of another cannot be created by a license, even when in writing executed upon a good consideration; it can only be created by a deed or conveyance operating as a grant." Peckham, J., in White v. Manhattan R. R. Co., 139 N. Y. 19.

Q. A conveyed by warranty deed to B, ten acres of land, surrounded on three sides by his remaining land, and on the other

side by the land of C, so that B has no way in getting to and from his ten acres, except to cross A's or C's land. Afterwards, B buys C's tract from him, and has easy access to the road; he, however, claims a right of way over A's land. What are the rights and obligations of the parties? Give your reasons in full.

A. When B bought A's land, he acquired a right of way over A's land by way of necessity. This way of necessity ceased when B bought C's tract, and acquired an access to the road, because when the necessity ceases, the easement also ceases. For a full discussion of easements by necessity, see N. Y. Ins. Co. v. Milner, 1 Barb. Chan. 352.

Q. A owns the X farm and the Y farm adjoining. He builds a road through the Y farm to the X farm, and uses it for thirty years. A then sells to B the X farm with all easements, and the Y farm to C subject to all easements. C seeks to close the way across the Y farm. B comes to you for advice. What are his rights?

A. B can prevent the closing of the way as he has an easement. "The owner of real property has, during his ownership, entire dominion and control over its natural qualities, and may dispose of and arrange them at will. He may alter the natural dispositions of those qualities, so as essentially to change the relative value of the different parts, and may, in a great variety of ways, make one portion of the premises subservient to another. No easement exists so long as there is a unity of ownership, because the owner of the whole may at any time rearrange the qualities of the several parts. But the moment a severance occurs by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created corresponding to the benefits and burdens mutually existing at the time of the sale. This rule is not for the benefit of purchasers, but is entirely reciprocal. The rule which is general in its application to easements which are continuous, that is self-perpetuating, independent of human intervention, as the flow of a stream, is, it seems, restricted in the case of discontinuous easements, that is those which only can be had by the intervention of man, as rights of way, or a right to draw water, to such as are absolutely necessary to the enjoyment of the property conveyed." Selden, J., in Lampman v. Milks, 21 N. Y. 505.

Q. A and B are tenants in common of a tract of land over which a stream of water flows. B individually owns land further down the stream on which there is a mill. B, without A's consent, dams the stream, thus making it overflow the lands owned in common by A and B. This is continued for a period of twenty-five years, during which time A makes no complaint. B then sells the land which he owns individually, and the mill thereon, to X, with the privilege of operating the mill and using the dam in the same way as used by him. Subsequently A and B together sell their lot, which they hold as tenants in common, to Y. Y brings an action against X for flooding his land. X sets up a prescriptive right. Is this defense good?

A. The defense is not good. "One tenant in common cannot, by his sole act, create an easement in the premises held in common. Nor can a tenant in common, who holds other premises in severalty, so use the last as to acquire or exercise for the benefit thereof, an easement in the property held in common, and he cannot by grant, or operation of an estoppel, or otherwise, confer upon another rights and privileges which he does not himself possess." Crippen v. Morse, 49 N. Y. 63.

Q. Plaintiff leased to the defendant a house for the term of one year, rent payable at the end of the term. Defendant took possession. The plaintiff against the protests of the defendant, removed the defendant's property into a wing, and prevented the defendant from having access to the main building. The defendant occupied the wing during the term, when the plaintiff demanded the proportionate rent, which the defendant refused to pay. Plaintiff sues upon a quantum meruit. Defendant sets up the facts. Plaintiff demurs. For whom should judgment be rendered?

A. Judgment for the defendant. "Where the landlord, during the continuance of the lease, evicts a tenant from a part of the premises, the tenant is relieved, during the continuance of such eviction, from the payment of any portion of the rent. The tenant under such circumstances is not bound to vacate the premises, and is entitled to refuse payment of the rent, until possession of the whole of the demised premises is restored. The landlord cannot only not recover the rent as rent but cannot even recover the value of the portion of the premises, which the tenant still enjoys, by means of an action for use and occupation." Carter v. Byron, 49 Hun, 299.

Q. An attorney rented an office in a building; during his occupancy, the owner rents the adjoining room to printers. The noise of the presses is such, that the lawyer cannot work at all, and each day the noise drives him from his office. He remains until his lease expires, and in an action for rent sets up the defense of eviction. Judgment for whom?

A. Judgment for the landlord. There was no constructive eviction, for the essential element of a constructive eviction is abandonment of the possession of the premises. There can be no constructive eviction, save where the tenant has actually abandoned the premises. Boreel v. Lawton, 90 N. Y. 293.

(NOTE ON EVICTION.) Eviction is either actual or constructive. There is an actual eviction of the tenant, whenever he is actually ousted of his possession of the premises, or a part thereof, either by a stranger who claims by a title paramount to that of his lessor, or by an act of his lessor. If the lands demised be recovered by a third person under a superior title, there is an actual eviction, and the tenant is discharged from liability for the payment of rent after the ousting. When there is an eviction as to part of the lands by a stranger under a claim of paramount title, the result of this eviction is to discharge so much of the rent as is in proportion to the value of the land from which the tenant is evicted. If the lessor himself expels the tenant absolutely from the premises, the tenant of course is relieved from the necessity of paying rent. And as we have already seen, where the tenant is actually ousted from a part of the premises by his lessor, he is relieved absolutely from the payment of the whole rent. Christopher v. Austin, 11 N. Y. 216; Johnson v. Oppenheim; 12 Abb. Pr. (N. S.) 449.

Q. A landlord leases premises to a tenant for one year, rent payable monthly. The tenant goes into possession, and after six months, the landlord causes a nuisance to exist on the premises which renders them untenantable. The tenant ceases to pay rent after the beginning of the nuisance, but stays in possession until the end of the year, when the landlord sues him for the unpaid rent. At the trial, the attorney for tenant requests the court to charge the jury as follows: 1. That to create an eviction, it was not necessary for the tenant to surrender the premises. 2. That the landlord cannot recover rent which accrued after the creation of the nuisance. 3. That even if the landlord can recover such subsequent rent, the tenant has a counterclaim for damages against the landlord. If you were the judge, how would you charge the jury on each of these propositions?

A. The judge should refuse to charge each request. 1. Con-

structive eviction results whenever the lessor by his own act, or by his own procurement, renders the enjoyment of the premises demised impossible, or diminishes the enjoyment of the premises to a material extent. But it is absolutely essential, in order to have a constructive eviction, that the tenant should abandon the premises. Dyett v. Pendleton, 8 Cowen, 727. 2. If the tenant remains in possession, he has no defense to an action for rent which accrued after the creation of the nuisance. 3. In the absence of a covenant to repair, the tenant cannot, in an action for rent brought by the landlord, set up as a counterclaim, the damages caused by the neglect of the landlord in permitting a nuisance to exist on the premises. Edgerton v. Page, 20 N. Y. 281.

Q. A certain lease expires on May 1, 1899. On that day, the tenant's wife is so sick that the doctor positively forbids her removal. On May 8, 1899, the wife is able to be removed, and the tenant quits the premises. The landlord consults you as to his rights, if any, against the tenant. What advice would you give him?

A. The landlord can treat the holding over as a renewal of the lease for another year. Sickness is no excuse, unless the board of health forbids the removal. "When tenants continue in possession of the demised premises after the expiration of the year for which they were leased, the landlord may regard such holding over as creating a new lease for another year. The fact that sickness of the wife of the defendant was the sole cause of their remaining in possession after the expiration of the term, does not affect the right of the landlord in this respect." Herter v. Mullen, 9 App. Div. 593." "A renewal of a lease, by reason of a holding over of a tenant, will not be implied, where the tenant was prevented from moving by the action of the board of health in quarantining the family, and forbidding such removal; and the tenant, in such case, is liable, if at all, only for the use and occupation for the time he actually occupied." Regan v. Fosdick, 19 Misc. 489.

Q. A, by a written lease, in which there is no covenant to repair, rents certain property to B. During the tenancy, the roof leaks so as to render the upper story of the house uninhabitable. Who must make the repairs?

A. In the absence of a covenant in the lease to that effect, the

landlord is never bound to repair; that duty rests upon the tenant, for he is absolutely in possession of the premises. 45 N. Y. 119; 52 N. Y. 512.

Q. A leases the Royal Hotel to B for three years. There are no covenants in the lease as to who should make the repairs. In the first year, the water pipes of the hotel burst, and B was unable to procure a sufficient amount of water for the purposes of his business. B remains in possession, but refuses to pay his rent. The landlord brings an action to recover the rent, and B defends on the ground that the premises were untenantable. Judgment for whom and why? State your reasons.

A. Judgment for the landlord. "An answer interposed in an action, brought to recover the rent of a hotel, alleging that the demised premises became untenantable, because the water pipes of the hotel burst, and the water supply failed, but not alleging that the landlord had covenanted to make repairs to the demised premises, does not present a defense. The provisions of the law of 1896, relieving a tenant from the payment of rent of a building, which without fault or negligence on his part, shall have been destroyed or injured by the elements or other cause as to be untenantable, have reference to a destruction or injury resulting from sudden and unexpected action of the elements or other cause, and not to gradual deterioration and decay, produced by the ordinary action of the elements. A tenant, even in a case coming within the statute, is not discharged from his obligation to pay rent, unless he surrenders up the possession of the demised premises." Lansing v. Thompson, 8 App. Div. 54.

Q. A holds an estate for life, and B the remainder in fee. The city makes an assessment on the property for certain local improvements. A refuses to pay the same, claiming that the duty to do so is upon B, the remainder-man. What are the rights of the parties?

A. It is well settled that the duty of paying all current taxes as they accrue, is entirely upon the life tenant, and he cannot look to the remainder-man for contribution; if the life tenant neglects to pay the taxes, the remainder-man is entitled to proceed against him for the appointment of a receiver to collect the rents, and make payment of the taxes. Seidenburg v. Seeley, 90 N. Y. 265. A

municipal assessment differs from a tax in this respect: that the tax is a contribution for general governmental purposes, but an assessment for municipal improvements is a making of compensation for benefit received. The general rule is that the municipal assessment for permanent improvements are apportioned between the life tenant and the remainder-man, and the apportionment must depend upon the circumstances of each particular case, and the respective interests of life tenant and remainder-man. The apportionment is usually fixed by the probable duration of the life tenant's term, and this of course depends upon the age of the life tenant, etc. Beck v. Sherwood, 56 N. Y. 615; Thomas v. Evans, 105 N. Y. 601.

Q. A, who is a married man, purchases a certain piece of land, paying $5,000 in cash, and giving a mortgage for the remainder. After his death, the mortgage is still upon the property, and the widow claims dower in the whole property. What are her rights? State the rule.

A. The widow is not entitled to dower in the whole of the property but only in the amount in excess of the purchase money mortgage. Mills v. Van Voorhis, 20 N. Y. 412. Sec. 173 of the Real Prop. Law of 1896 continues this rule, and is as follows: "Where a husband purchases lands during the marriage, and at the same time mortgages his estate in those lands, to secure the payment of the purchase money, his widow is not entitled to dower in those lands, as against the mortgagee or those claiming under him, although she did not unite in the mortgage."

(NOTE.) Dower is an estate for life, which the widow is entitled to in one-third of all the lands whereof her husband was seized at any time during the coverture. The requisites necessary are: 1. A valid marriage. 2. Seisin of the husband of an estate of inheritance at some time during the coverture. 3. Death of the husband.

Q. A and B are husband and wife. Subsequently B, the wife, obtains an absolute divorce from her husband. A, the husband, dies leaving certain real estate. B claims dower in the same. What are her rights? Suppose A, the husband, obtained a divorce for the misconduct of his wife, then would B, the wife, be entitled to dower in A's real estate?

A. B is entitled to dower in the lands of A, of which he was seized, before or at the time the decree of divorce was granted,

but she would not be entitled to dower if the husband had obtained a divorce for her misconduct. This is provided for by sec. 176 of the Real Prop. Law of 1896, which says: "In case of a divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." That the wife's inchoate right of dower is not affected by a decree of divorce granted for the husband's misconduct, sec. 1759 of the Code of Civ. Pro. subds. 3, 4, provide as follows: "Where final judgment is rendered dissolving the marriage, the plaintiff's inchoate right of dower in any real property of which the defendant then is, or was theretofore seized, is not affected by the judgment."

Q. A secures an absolute divorce from B, her husband, for his misconduct. He subsequently purchases real estate, and dies intestate. A claims dower in the lands. What are her rights?

A. She is not entitled to dower. A divorced wife is not entitled to dower in the realty of the husband acquired after the divorce, for at that time the relation of husband and wife no longer exists between them. Kade v. Lauber, 16 Abb. Pr. (N. S.) 288.

Q. If an estate in lands is conveyed to John Brown and Jane, his wife, how do they hold it?

A. They hold it as tenants by the entirety. The estate by the entirety still exists; it was not abolished by the Married Women's Acts. The effect of those acts is simply to give to the husband and wife each a moiety of the rents and profits of the land during their joint lives. A grant to two and their heirs at common law would have vested in those two, a joint estate, without any words to that effect. The statute, however, now provides that such a grant shall vest in the grantees an estate in common, and in order to create a joint estate, you must have express words to that effect. The statute simply applies to joint estates proper, and does not apply to estates by the entirety. The result is that the grant to the husband and wife, without any words of exception, vests in them after the statute as before, an estate by the entirety; but the statute modifies the common-law rule in this, that the husband and wife each take a moiety of the rents and profits during their joint lives, and the husband is not, as theretofore, entitled to the entire rents and profits of the land. Bertles v. Nunan, 92 N. Y. 152; Zorntlein v. Bram, 100 N. Y. 12.

Q. A husband and wife hold an estate in lands by the entirety. The husband afterwards secures a divorce and remarries. He then dies intestate. What are the rights of the parties? State your reasons.

A. The divorce converts the tenancy by the entirety into a tenancy in common. The first wife therefore holds an undivided half in fee simple; the second wife has dower in the husband's one-half interest. "As such tenancy is founded upon the marital relation, and upon the legal theory that the husband and wife are one, it depends for its continuance on the continance of the relation, and when the unity is broken by a divorce, the tenancy is severed; each takes a proportionate share of the property as a tenant in common. There is no implied condition annexed to the estate by the entirety, that the grantees shall remain faithful to the marriage vow, or that either shall not by misconduct cause a severance of the marital relation, and a decree of divorce granted, because of adultery, does not vest the whole title in the innocent party." Peckham, J., in Stelz v. Shreck, 128 N. Y. 263.

Q. A and B, who are husband and wife, hold an estate as tenants by the entirety. A, the husband, executes a mortgage on the lands. The mortgage is foreclosed, and C purchases the property at the foreclosure sale. What interest and rights does he acquire?

A. In Hiles v. Fisher, 144 N. Y. 306, it was held: "Where a husband executed a mortgage on lands deeded to him and his wife, that the mortgage was effectual to cover his interest, which was a right to the use of an undivided half of the estate during their joint lives, and to the fee in case he survived her, and that the purchaser on the sale under foreclosure of the mortgage acquired this interest, and became a tenant in common with the wife, subject to her right of survivorship. The grand characteristic which distinguishes a tenancy by the entirety from a joint tenancy, is its inseverability, whereby neither husband nor wife, without the assent of the other, can dispose of any part of the estate, so as to affect the right of survivorship in the other."

(NOTE.) "Under a deed made since the enabling act to a husband and wife, which provides in express terms that they should take as joint tenants, and not as tenants in common, the wife takes and holds as a joint tenant with her husband, and not as a tenant by the entirety." Joos v. Fey, 129 N. Y. 362.

Q. A, the wife of B, takes an undivided one-half interest in certain real estate by descent. B subsequently purchases the remainder. A, the wife, dies leaving one child, and B claims the estate as survivor. What are the rights of the parties?

A. B is not entitled to the whole estate as survivor, for the estate was not held by them as tenants by the entirety, not being created by the same deed. They hold as tenants in common, and there is no incident of survivorship annexed to that estate; on the death of either tenant, his undivided half descends to his heirs. If there were an estate by the entirety here, the entire estate would go to the survivor just as in joint tenancies. The wife, having died intestate, the husband is entitled to curtesy, a life estate in her undivided half of the land, and the child to the remainder in fee. The estate of curtesy at the death has not been abolished. It, however, obtains only where the wife chooses to die intestate. She can bar the right by deed or will. "The common-law rights of a husband as a tenant by the curtesy are not affected by the acts of 1848 for the more effectual protection of the property of married women as to the real property of the wife undisposed of at her death." Hatfield v. Sneden, 54 N. Y. 280. The essentials of an estate by the curtesy are: 1. A lawful marriage. 2. Seisin by the wife of an estate of inheritance during the coverture. 3. Issue born alive, capable of inheriting the estate. 4. The death of the wife. It will be noticed that an estate by the curtesy is an estate for life in all the lands of the wife, while dower is merely a life interest in one-third of all the lands of the husband.

Q. A and B are husband and wife. They have a child C, which dies at the age of six years. After the death of the child, the wife becomes seized in fee of a piece of real estate and dies intestate, leaving a brother as her only heir-at-law. What interest in the estate are the husband and brother respectively entitled to?

A. The husband is entitled to a life interest in the property; the brother to the remainder in fee. The husband is entitled to a life estate (curtesy) as there was a child born alive capable of inheriting the estate; it matters not that the child died before the wife. All the other elements of the estate by the curtesy are also present: seisin by the wife of an estate of inheritance, and death of the wife intestate. Leach v. Leach, 21 Hun, 381.

Q. A contracts with B to sell the latter a house and lot. A received title from his wife by means of a quitclaim deed. The wife had a good right to convey the same. A offered the deed to B, who comes to you. What would you advise him?

A. B has a right to refuse to take the property. "A release of dower by the wife directly to her husband will not divest her dower, so as to enable the husband to convey good title by his sole deed. If effectual at all on delivery of such release, the husband becomes the owner of the property, and the wife becomes entitled to dower therein." Wightman v. Schliefer, 45 N. Y. St. Rep. 698.

Q. A description reads as follows: Commencing at the corner of A and B street, running thence along B seventy-five chains, thence one hundred chains parallel with A street, to a hemlock tree; thence along the margin of A to the beginning. The measurements show that the one hundred chain course is twenty-five chains short of reaching the hemlock tree. Who has the twenty-five chains, grantor or grantee?

A. The grantee. Boundaries by fixed objects or monuments must control over measurements, upon the presumption that all grants are made with reference to an actual view of the premises by the parties thereto. Raynor v. Timerson, 46 Barb. 518.

Q. A owns property abuttiug on a non-navigable stream. He conveys the land to B. To how much, if any, of the stream does B get title?

A. A deed conveying property bounded on a non-navigable stream passes title to the grantee to the center of the stream, just as it would in the case of a tract bounded upon a highway. People v. Jones, 112 N. Y. 597.

Q. A sells a farm to B for $10,000. B does not record his deed, but goes into actual possession. Afterwards, A sells the farm to C for $8,000. C records his deed. Who owns the property?

A. B owns the property. "One, who seeks to establish a right in hostility to a recorded title, or to security upon land, by virtue of an unrecorded conveyance, must show actual notice to the purchaser of his rights, or circumstances which will put a prudent man on his guard. Constructive possession will not suffice." Brown v. Vol-

kening, 64 N. Y. 76. "The possession, which will constitute constructive notice of an unrecorded deed to a subsequent purchaser, must be under the deed and actual, open and visible, so that the subsequent purchaser could have gone upon the land and obtained by inquiry information." Page v. Waring, 76 N. Y. 463.

CHAPTER XVII.

Sales.

Q. A mortgages to B all the wheat and corn which he is about to sow on his farm. When the same is planted, and before it can be harvested, C, an execution creditor, levies on the wheat and corn. B, by virtue of his mortgage, claims that his lien is prior. What are the rights of the parties? Answer in full.

A. C, the execution creditor, has a prior lien, because to effectuate a mortgage, the thing mortgaged must have an actual or potential existence. "A chattel mortgage cannot as a matter of law be given future effect as a lien upon personal property, which at the time of the delivery of the mortgage was not in existence, either actually or potentially, where rights of creditors have intervened. The mortgage can only operate on property in actual existence at the time of its execution. Such mortgage may, as between the parties, be regarded in equity as an executory agreement to give a lien when the property comes into existence; some further act thereafter is requisite to make it an actual and effectual lien against creditors. Crops which are the annual products of labor and of cultivation of the earth have no actual or potential existence before a planting. Such limitation, however, seems to apply only when the rights of third persons have intervened. But it would seem that there may be a valid agreement to sell, or executory contracts of sale, where the subject thereof is something to be subsequently acquired by the vendor, though such vendor may not even have a potential right at the time in the thing contracted to be sold." Rochester Co. v. Rasey, 142 N. Y. 570.

(NOTE.) Sec. 22 of the Personal Property Law of 1897 provides as follows: "An agreement for the purchase, sale, transfer or delivery, of a certificate or other evidence of debt issued by the United States, or by any state, or a municipal, or other corporation, or of any share or interest in the stock of any bank, corporation, or joint-stock association, incorporated or organized under the laws of the United States, or of any state, is not void or voidable for want of consideration, or because of the non-payment of the consideration, or be-

cause, the vendor, at the time of making such contract, is not the owner or possessor of the certificate or certificates, or other evidence of debt, share or interest."

Q. A agrees with B, to sell him a certain horse for $500; payment to be made at the time of delivery. Before the same can be delivered, a fire breaks out on A's farm, where the horse is being kept, and the horse perishes in the flames. B sues A for non-delivery. Judgment for whom?

A. Judgment for A. In order to have a sale, the thing must be in existence at the time when title is to pass. "Where a contract is made for the sale and delivery of specified articles of personal property, under such circumstances that title does not vest in the vendee, if the property is destroyed by accident, without the fault of the vendor, so that delivery becomes impossible, the latter is not liable to the vendee in damages for non-delivery. The contract is subject to the implied condition of the continued existence of such thing." Dexter v. Norton, 47 N. Y. 62.

Q. A and B make an agreement, whereby A is to deliver to B a quantity of wheat, and B is to give him one barrel of "first rate superfine flour" for every four bushels of wheat so delivered. A delivers 500 bushels of wheat under the agreement, at B's mill. A few days thereafter, the mill containing the wheat is destroyed by fire. A demands the quantity of flour which he is entitled to under the agreement, and upon B's failure to deliver the same, brings suit. B sets up the destruction of the wheat as a defense. Judgment for whom and why?

A. Judgment for A, as the terms of the contract imported a sale of the wheat; title passed, and the property was at the risk of B. "There is nothing in the contract, that expressly or by implication, obliged the defendant to deliver to the plaintiffs flour manufactured from his wheat to the exclusion of any other in their possession, or which they might subsequently obtain. The agreement on his part was satisfied by the delivery of a barrel of "first rate superfine flour" for every four bushels of wheat received from plaintiffs, whether manufactured at his mill, or elsewhere obtained by purchase or otherwise. This is a controlling circumstance to show that the parties intended a sale or exchange, and not a bailment. The distinction between an obligation to restore the specific thing

received in the same or an altered form, or of returning others of equal value, in the same or a different form, is the distinction between a sale and a bailment." Norton v. Woodruff, 2 N. Y. 153.

Q. A rented a farm with ten cows thereon to B, with the agreement that B at the termination of the lease was to leave ten cows thereon of equal value. The cows died from disease. On whom does the loss fall?

A. The loss falls on B. From the terms of the agreement, the same cows delivered were not to be returned, but B was at liberty to return others of equal value, therefore title passed to him, and the cows were at his risk. Smith v. Clark, 21 Wend. 83.

Q. A brewer sold and delivered 50 barrels of ale bearing his brand to a retailer, upon the agreement that the barrels were to be returned after the ale was drawn, but if any were not returned, he should pay $2 apiece for them. B returns 25 of the barrels, and is about to return the rest, when they are attached by a creditor of his (B). The brewer claims the barrels as his. What are the rights of the parties?

A. The brewer is entitled to the barrels; this is a mere bailment, and not a sale of the barrels. In Westcott v. Thompson, 18 N. Y. 363, a case exactly in point, it was held that the property in the barrels remained in the vendor, and that the specification of their value operated, not to give an election to the vendee to retain them at that price but to fix damages in respect to such as he should be unable to return."

Q. A delivers a mare to B, with the understanding that if at the end of two months B is satisfied with the mare, he (B) is to have title to her on the payment of $500. While in the possession of B, and through no fault of his, the mare took sick, and died. A brings action against B to recover the value of the mare. Judgment for whom and why?

A. Judgment for B, as this was a mere bailment with the privilege of purchase, and not a sale. In the absence of any negligence or want of care on the part of the bailee, he is discharged from liability, and the loss must fall upon him who has the title. Where the property is delivered for the purpose of trial, with the agree-

ment that if it is satisfactory the receiver will retain it, and pay an agreed price for it, the transaction is considered to be a bailment until the receiver exercises his privilege to purchase; it then becomes a sale. Title does not pass until the exercise of the option by the receiver. Whitehead v. Vanderbilt, 10 Daly, 214.

Q. A sells B 500 bales of cotton, upon the agreement that if the cotton is not satisfactory for the purpose of B's business, he can return the same. A sends the cotton to B, who duly receives the same. A few days thereafter it is destroyed by fire. B refuses to pay for the cotton, claiming that A must bear the loss. A brings suit. Judgment for whom and why?

A. Judgment for A. "Contracts of sale made on condition that the property may be returned at the option of the buyer, carry the title to the buyer. The act of returning the goods is a condition subsequent which may, if performed, defeat the title already vested. If the right of return is not duly exercised, and the property is retained, the right is forfeited and the sale becomes absolute. Where the contract prescribes the time within which a return must be made, that time controls; and if no time is stated, then the vendee must return the goods within a reasonable time." Costello v. Herbst, 18 Misc. 176. In the question put the transaction was a sale with privilege to return, and title passed to B; therefore the loss falls upon him.

Q. A who was not a lawyer, purchased from B as conditional vendee, a law library, payment to be made in installments, upon condition that the ownership thereof should remain in B until the entire amount of the purchase price should be paid. The law books were delivered to A. The contract of sale and purchase was in writing, executed in duplicate, and one duplicate was delivered to A at his residence, and was not filed in the office of the clerk of the town where he resided. A afterwards, and before he paid for the law books, sold them to C, who paid the full price and bought in good faith, without notice of B's rights. State whether C acquired a good title to the law books against B, with your reasons.

A. No. It is sufficient that the contract was executed in duplicate, and one duplicate delivered to A, to make the attempted sale to C void. Sec. 112 of the Lien Law of 1897 provides as follows: "Except as provided in this article, all conditions in a contract for

the conditional sale of goods and chattels accompanied by immediate delivery and continued possession of the thing to be sold, to the effect, that ownership of such goods is to remain in the conditional vendor, until they are paid for, or until the occurrence of a future event or contingency, shall be void as against subsequent purchasers, pledgees, or mortgagees in good faith, and as to them, the sale shall be deemed absolute, unless such contract of sale containing such conditions or reservations, or a true copy thereof be filed as directed in this article." Sec. 113 provides that the contract should be filed in the town clerk or register's office. Sec. 115 as amended in 1898, provides as follows: "The preceding sections of this article do not apply to the conditional sale of household goods, law books, law blanks, etc. (enumerating various other articles), if the contract for the sale thereof is executed in duplicate, and one duplicate be delivered to the purchaser."

Q. B owes A certain money, and gives him a chattel mortgage to secure the payment of the debt. There was a default made. What steps should A take to foreclose the mortgage?

A. A chattel mortgage is a conditional sale, and title to the property passes to the mortgagee on default. The mortgage is foreclosed by a sale under the power of sale, which is given in the instrument. The mortgage may also be foreclosed by an action to foreclose a lien upon a chattel under sec. 1737 of the Code of Civ. Pro.

Q. A pledges a diamond with B for the loan of $100. A defaults. What proceedings should B take in realizing upon the jewel?

A. Sec. 80 of the Lien Law provides as follows: "A lien against personal property, other than a mortgage upon chattels, if in the legal possession of the lienor may be satisfied by the public sale of such property according to the provisions of this article." Sec. 81 provides: "That notice of the sale must be given to the pledgor." Sec. 82 provides: "That the sale must be advertised." Secs. 83 and 84 provide for a redemption and the disposition of the proceeds, the pledgor to receive the surplus remaining after satisfying the lien.

Q. A, while upon his deathbed, and while in full realization of

his condition, gave to B his bank book on a savings bank, saying that he gave it to him as his own. Is this gift valid?

A. The gift is valid; it is a gift causa mortis. "The gift was consummated by the delivery of the books, and no other formality was needed to constitute the actual delivery of the bank deposit, needful to vest the possession and title in the donee; any delivery of property is sufficient to effectuate a gift. To consummate a gift, whether inter vivos or causa mortis, the property must be actually delivered, and the donor must surrender the possession and dominion thereof to the donee. In the case of gifts inter vivos, the moment the gift is thus consummated, it becomes absolute and irrevocable. But in the case of gifts causa mortis, more is needed. The gift must be made under the apprehension of death from some present disease, or some other impending peril, and it becomes void by the recovery from the disease or escape from the peril. It is also revocable by the donor, and becomes void by the death of the donee in the lifetime of the donor. When a gift is made in the apprehension of death from some disease from which the donor did not recover, and the apparent immediate cause of death was some other disease with which he was afflicted at the same time, the gift becomes effectual." Earl, J., in Ridden v. Thrall, 125 N. Y. 572. "To constitute a valid gift causa mortis, three things are necessary: 1. It must be made with a view to the donor's death. 2. The donor must die of that ailment or peril. 3. There must be a delivery." Grymes v. Hone, 49 N. Y. 17.

Q. A hires B by oral contract to make four carriages for him for $400, to be finished and delivered within six months. B is to furnish the materials, and do the work, the carriages to be made in a way that A has directed. B does not perform. What are the rights of the parties? Is the contract within the Statute of Frauds?

A. A can maintain an action for breach of contract. This contract does not come within the Statute of Frauds, as it is merely a contract for work, labor, and services, and not for the sale of chattels. The law in New York is well settled, that a parol contract to manufacture and deliver an article not in esse at the time of the making of the contract does not come within the Statute of Frauds. Sewall v. Fitch, 8 Cowen, 215.

Q. B, a paper manufacturer, contracts orally with A, a newspaper publisher, to manufacture and deliver to him twenty tons of paper in sixty days. B does not deliver the paper according to the agreement, and, in a suit by A, sets up the Statute of Frauds as a defense. Is it good?

A. The defense is not good. "A parol contract to manufacture and deliver a quantity of paper to be thereafter manufactured at the contractor's mills, is not a contract within the provisions of the Statute of Frauds." Parsons v. Loucks, 48 N. Y. 17.

Q. A goes to the lumber yard of B, and selects certain lumber to be delivered to him at his carpenter shop. The price agreed upon was $500. B also agreed to cut the lumber in certain sizes. The agreement was oral. B tenders the lumber, cut as directed, to A, who refuses to receive the same. In an action by B for the purchase price, A sets up the Statute of Frauds as a defense. Is this a valid defense?

A. The defense is good, as the facts show this to be a sale of merchandise of more than $50, and therefore within the Statute of Frauds. It is not a contract for work, labor, and services, as the articles were in existence at the time of the order, and merely required some change to suit the buyer's purposes. Cook v. Millard, 65 N. Y. 352.

Q. A purchases from B several lots and styles of hats, at different prices, but on the same day, amounting in all to $85, the lots averaging from $10 to $15 each. The goods are to be shipped by Adams Express. B delivers the goods to the express company. A does not take the goods on their arrival at his place of business. B sues for the price. A sets up the Statute of Frauds. Judgment for whom and why?

A. Judgment for A. The contract is entire, and therefore within the Statute of Frauds. A delivery to a carrier specified in a parol contract of sale, does not take it out of the operation of the statute, there must be an acceptance by the vendee or his authorized agent, and an authority to receive for transportation carries with it no implied authority to accept. Allard v. Greasert, 61 N. Y. 1. The New York Statute of Frauds contained in sec. 21 of the Personal

Prop. Law of 1897, in so far as it applies to sales, is as follows: "Every agreement, promise, or undertaking is void, unless it, or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent; if such promise, agreement, or undertaking: 6. Is a contract for the sale of any goods, chattels, or things in action for the price of $50 or more, and the buyer does not accept and receive part of such goods, or the evidences or some of them of such things in action nor at the time pay any part of the purchase money. If the goods be sold at public auction, and the auctioneer at the time of the sale enters in a sales book, a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale was made, such memorandum is equivalent in effect to a note of the contract or sale subscribed by the party to be charged therewith."

Q. A bought 500 bushels of wheat from B, being a part of a large quantity stored in an elevator in charge of C. A paid for the wheat in full, and took from B a receipted bill therefor, together with an order from B to C to deliver the wheat to A. Before the wheat was delivered, or separated from the other wheat in the elevator, the whole was burned. A demanded his wheat, and brought suit against B to recover back his purchase money. Was he entitled to recover? State your reasons.

A. No. The title passed to A, and he must therefore bear the loss. "Upon the sale of a specified quantity of wheat or grain, its separation from a mass, indistinguishable in quality or value in which it is included, is not necessary to pass title where the intent to do so is otherwise clearly manifested. Here the payment of the price, and the delivery of the order for the wheat purchased, sufficiently manifested an intent to pass title, and rendered the transaction an executed contract without actual separation or delivery of the property." Kimberley v. Patchin, 19 N. Y. 330.

Q. A, who was a merchant in New York, received from B of Chicago, an order for certain goods to be sent by the Penn. R. R. Co. A delivered the goods to the railroad company consigned to B according to the order. The goods were lost en route. A brings suit against the railroad company. The company demurs on

the ground that he is not the proper party plaintiff. Judgment for whom and why?

A. Judgment for the railroad company. On the delivery to the carrier, the title passed absolutely to the consignee, and the plaintiff (consignor) cannot maintain an action for their loss. Krulder v. Ellison, 47 N. Y. 36.

Q. A orders certain goods of B. B ships the goods C. O. D. by an express company. The vessel by which the goods were shipped was lost at sea. Who must bear the loss? Give your reasons.

A. The loss must fall on B. Payment and delivery were to be concurrent, and until such payment and delivery title remained in the vendor, the contract being merely executory; consequently the goods were, while in course of transit, at the risk of the vendor, and being lost no action will lie against the vendee for the price. It matters not that the goods were sent by a particular carrier named by the vendee, for by such delivery and instructions to the carrier, the vendor made him his own agent. "But where it is apparent from the circumstances under which delivery was made, that the vendor did not trust to the ability or readiness of the purchaser to perform his contract, and intended to insist upon strict prepayment as a condition of delivery by the carrier, such delivery by the vendor to the carrier is not within the general rule, and does not operate to pass title." Baker v. Boucicault, I Daly, 23. This case represents the law on this point. The case of Higgins v. Murray, 73 N. Y. 252, is not in conflict with it, for the question of title was not involved in that case, according to the language of the opinion.

Q. The defendant sold the plaintiff's horse. It turns out that the defendant was not the true owner, but had purchased from a thief. The sale to the plaintiff was without a warranty. Plaintiff sues to recover the price paid. Has he a cause of action?

A. Plaintiff can recover. In sales of personal property, where the vendor at the time has possession, a warranty of title is implied. Burt v. Dewey, 40 N. Y. 233.

Q. A agrees to deliver 5,000 tons of coal to B at $5 per ton, payment to be made in thirty days. A delivers the coal. B fails

to make payment in thirty days. He is sued by A, and sets up as a defense that the coal was not worth $5 per ton, but was worth less, because of the slate mixed with it, and tendered into court what he considered the reasonable value. At the trial it is established that B had sold part of the coal to his customers. Is B's defense good?

A. B's defense is not good. Where after the discovery of, or opportunity to discover any defect in goods delivered under an executory contract of sale, the vendee neither returns nor offers to return the property, nor gives the vendor notice or opportunity to take it back, in the absence of a collateral warranty or agreement as to quality, he is conclusively presumed to have acquiesced, and may not thereafter complain of inferior quality. A buyer ordinarily takes the thing sold at his own risk as to its quality. Caveat emptor is the rule. Copley Iron Co. v. Pope, 108 N. Y. 412.

Q. A agrees to buy the growing crops of B, a tobacco planter, the same to be well cured and in good condition at the time of delivery. B sends the tobacco to A, who uses the same in his business. B demands payment of the price but A refuses to pay, claiming that some of the tobacco is of an inferior grade. What are the rights of B?

A. He can recover the purchase price. "A mere executory agreement for the sale of a growing crop of tobacco to be delivered 'well cured and in good condition' does not amount to an express warranty. A failure to deliver merchantable tobacco is a mere breach of contract. The defect was waived by the receipt and acceptance." Reed v. Randall, 29 N. Y. 358.

Q. A sells B certain goods, and warrants them to be of a certain quality. The goods are delivered. B sells the goods at retail in his store. B sues for breach of warranty. A answers, setting up the fact that B retained the goods, as a defense. Judgment for whom and why?

A. Judgment for B. It is well settled that upon the sale and delivery of goods, with express warranty, if the goods upon trial turn out to be defective, and there is a breach of the warranty, the vendee may retain and use the property, and yet have his remedy upon the warranty without returning or offering to return. Day v. Pool, 52 N. Y. 416. Brigg v. Hilton, 99 N. Y. 517.

Q. A sells a horse to B, warranting him sound and all right; the horse is unsound, which fact B could have discovered upon inspection and inquiry. Has B any right of action against A, and if so, what are his rights?

A. If the defect was obvious, B cannot recover upon this warranty, otherwise he can, as an express warranty survives acceptance. Day v. Pool, supra. A general warranty does not apply to obvious defects apparent upon ordinary inspection by the buyer. Bennett v. Buchan, 76 N. Y. 386.

Q. A sells to B dressed beef, which he says has not been warmed before being killed. B takes the meat, and discovers that it has been warmed before killing. He keeps the goods. A brings suit against him for the purchase price. B sets up a breach of warranty by way of counterclaim. Is the counterclaim good? State your reasons.

A. The counterclaim is good, as A's agreement amounted to an express warranty which survived delivery and acceptance. It was not necessary, in order to constitute the express warranty, that the word "warranty" should have been used; a positive affirmation as to quality understood and relied upon by the vendee, as such, is sufficient. "A warranty is an express or implied statement of something which a party undertakes shall be a part of the contract, and, though part of the contract, collateral to the express object of it. Contracts of sale with warranty must contain two independent stipulations: 1. An agreement for the transfer of title and possession from vendor to vendee. 2. A further agreement that the subject of the sale has certain qualities and conditions. No particular phraseology is requisite to constitute a warranty. It must be a representation which the vendee relies upon, and which is understood by the parties as an absolute assertion, and not the expression of an opinion. It is not necessary that the vendor should have intended the representation to constitute a warranty. If the writing contained that which amounts to a warranty, the vendor will not be permitted to say that he did not intend what is clearly and expressly declared. The right to recover damages for a breach of the warranty survives an acceptance, the vendee being under no obligation to return the goods." Parker, J., in Fairbanks Canning Co. v. Metzger, 118 N. Y. 260.

Q. A is a manufacturer of cloth. He sells a certain quantity of cloth to B, who is a manufacturer of clothing. B uses the goods, and manufactures them into clothing. He subsequently discovers through his customers that the cloth was defective. He brings action against A to recover damages sustained. Can he do so? State your reasons.

A. B can maintain the action. On the sale of goods by a manufacturer, a warranty is implied that the articles sold is free from any latent defect growing out of the process of manufacture. The obligation arising from the implied warranty imposed upon the seller of goods manufactured by himself, survives their acceptance, if the defects were not discoverable upon inspection by ordinary tests. Hoe v. Sanborn, 21 N. Y. 552. Bierman v. City Mills, 151 N. Y. 482.

Q. A sells B certain beef for immediate consumption. It turns out that the beef was unsound and tainted. B brings action against A. Can he recover? State your reasons.

A. B can recover. In the case of the sale of provisions for domestic use, the vendor at his peril is bound to know that they are sound and wholesome, and if they are not so, he is liable in damages. There is an implied warranty of soundness. Van Bracklin v. Fonda, 12 Johns. 468. When the provisions are sold merely as merchandise, and not for immediate consumption by the buyer, no warranty attaches. Devin v. McCormack, 50 Barb. 116; Moses v. Mead, 1 Denio, 378.

Q. A sells certain watches to B by sample. B receives the goods and sells them. In a suit by A for the price, B sets up as a counterclaim that the bulk of the goods did not correspond with the sample, as more than half of the watches contained an inferior movement. Is the counterclaim good?

A. Yes. B can recover damages by way of counterclaim, for breach of the warranty which arises on a sale by sample, even though he retained the goods. "Where goods are sold by sample, and there are no circumstances to qualify the transaction, there is an implied warranty that each of the articles shall correspond with the sample." Leonard v. Fowler, 44 N. Y. 289. "A contract of sale of goods which points out a known and ascertainable standard

by which to judge the quality of the goods sold, is for all practical purposes, a sale by sample. Upon a sale by sample, with warranty that the goods shall correspond with the sample, the vendee is not precluded from claiming and recovering damages for breach of warranty, although he has accepted the goods after an opportunity for inspection." Zabriskie v. R. R., 131 N. Y. 72.

Q. A consigns goods to B to be shipped to Chicago, and then B is to ship them wherever he pleases. The goods reached the depot of the railroad company by which they were carried to Chicago. When A learns that B is insolvent, he demands the goods of the railroad company, which refuses to deliver them. What are the rights of the parties?

A. A has no rights to the goods. The right of stoppage has ceased. Stoppage in transitu is the right which the seller has to retake the goods at any time before they come into the possession of the buyer or his agent, when the goods have not been paid for, and the buyer has become insolvent. Buckley v. Furniss, 17 Wend. 504. The railroad company here appears to be the agent of the buyer, and therefore, the goods having reached their destination, the right of stoppage is gone. "The delivery of goods to the vendee, which puts an end to the state of passage, and so deprives the vendor of the right of stoppage in transitu, may be at a place where the former means the goods to remain, until a fresh destination is given to them by orders from himself. When they have reached the place for which they were intended under the direction given by the vendee, and have come under the actual control of the vendee, the right of stoppage ceases. The right of stoppage is also defeated by the endorsement and delivery by the vendee of a bill of lading of the goods, to a bona fide indorsee for a valuable consideration without notice of facts on which such right would otherwise exist." Becker v. Hallgarten, 86 N. Y. 167.

Q. A sold to B 1,000 tons of iron, which B wrongfully refused to accept and pay for. A comes to you for advice, and wishes to be informed of his rights. What are his rights and remedies? Answer in full.

A. On the failure of a purchaser to perform a contract for the sale of personal property, the vendor, as a general rule, has the election of three remedies: 1. To hold the property for the pur-

chaser, and recover of him the entire purchase money. 2. To sell it after notice to the purchaser, as his agent for that purpose, and recover the difference between the contract price and that realized on the sale. 3. To retain it as his own, and recover the difference between the contract price and the market price at the time and place of delivery. Dustan v. McAndrew, 44 N. Y. 72.

Q. A, on June 1, 1899, makes an agreement with B to sell him 500 barrels of flour at $5 per barrel, to be delivered on July 1. About June 8, flour falls in price, and B goes to A and tells him not to send the goods, as he will not take them at the contract price. A, on the next day thereafter, sells the goods to C. Flour in the meantime has advanced in price to $6 per barrel, and B on the day following writes A to send the 500 barrels of flour at once. A consults you as to his rights and remedies. What would you advise him?

A. A need not send the goods, but instead can bring suit immediately (before July 1) against B for breach of contract. "Where before the time of delivery fixed by a contract of sale of goods, the vendee notifies the vendor that he will not receive or pay for the goods, and requests him to stop any further efforts to carry out the contract, the vendor is justified in treating the contract as broken at that time, and is entitled to bring an action immediately for the breach without tendering delivery; it is not necessary to await the expiration of the time of performance fixed by the contract, nor can the vendee retract his renunciation of the contract after the vendor has acted upon it, and by the sale of the goods to other parties, changed his possession." Windmuller v. Pope, 107 N. Y. 674.

CHAPTER XVIII.

Suretyship and Guaranty.

Q. A is surety for the faithful performance of a contract made by B with C. Upon B's default, C immediately brings action against A, who defends on the ground that C should have first exhausted his remedies against B before proceeding against him. Is the defense good?

A. The defense is not good, as the liability of a surety is absolute and unconditional; he is primarily liable. The surety undertakes to pay the debt if the principal does not. He is an insurer of the debt. The surety assumes to perform the contract of the principal, if he does not, and if the act which the surety undertakes to perform through the principal is not done, then the surety is liable at once. A person who engages to be answerable for the debt, default or miscarriage of another, is a surety. Pingrey on Suretyship and Guaranty, pp. 1–5.

Q. A is a guarantor of the payment of a note of B to the order of C. At maturity, it is unpaid, and C makes no effort to enforce collection from B. He sues A. Can he recover?

A. Yes, for this is an absolute guaranty. "The defendant has very plainly contracted as guarantor. If he is not liable as such, he is not liable at all; and if he is liable as such, he cannot get rid of the obligation by calling himself an indorser, or anything else. The undertaking of the defendant was not conditional, like that of an endorser, nor was it upon any condition whatever. It was an absolute agreement that the note should be paid by the maker at maturity. When the maker failed to pay, the defendant's contract was broken, and the plaintiff had a complete right of action against him. It was no part of the agreement that the plaintiff should give notice of the non-payment; nor that he should sue the maker, or use any diligence to get the money from him. The point was decided long ago, that a guaranty of payment, like

the one in question, is not conditional, but an absolute undertaking that the maker will pay the note when due. Allen v. Rightmere, 20 Johns. 365. The guarantor does not promise to pay himself, but that the maker will pay. The defendant was under an absolute agreement to see that the maker paid the note at maturity. The plaintiff was under no obligation to institute legal proceedings." Bronson, J., in Brown v. Curtiss, 2 N. Y. 225.

Q. A guaranties the collection of a note made by C to B. Upon C's default to pay the same, B immediately sues A without making any effort to get payment from C. Can he maintain the action?

A. No. One who guaranties in general terms the collection of a debt thereby undertakes that it is collectible by due course of law, and only promises to pay, when it is ascertained that it cannot be collected by suit against the principal, prosecuted to judgment without unnecessary delay, and execution issued thereon. An endeavor to so collect, is a condition precedent to a right of action against the guarantor. Bank v. Sloan, 135 N. Y. 371.

Q. A and B become sureties to C, for D, for the same debt. Each executes a separate bond, A's being in the penal sum of $10,000, and B's being in the penal sum of $30,000. D defaulted in the sum of $10,000, and C sues A on his bond and compels him to pay the amount thereon. Has A, under the circumstances disclosed, any remedy against B? If so, what? If not, why not?

A. He has a right to compel B to contribute. The rights and obligations of sureties inter sese are the same, whether bound in one or several like obligations; where there are several distinct bonds, in different penalties, they are bound to contribute in proportion to the amount of the penalties of their respective bonds. Armitage v. Pulver, 37 N. Y. 494. Co-sureties are entitled to the right of contribution when they are bound for the performance by the same principal of the same obligation, and whether they became so at the same time, or at different times, by one or several instruments, even if they are bound in different sums, or if each is ignorant, that the other is a surety. The obligation of co-sureties to contribute to each other has grown out of the rule that equality is equity, and is not founded on the idea of a contract between the sureties. Aspinwall v. Sacchi, 57 N. Y. 331.

Q. A and B are co-sureties on a debt of C to D of $12,000. C fails to pay. A is compelled to pay to D $8,000, and begins action against B for $4,000 contribution. Can the action be maintained? State your reasons.

A. He cannot recover $4,000; he can only compel B to pay him $2,000, the amount in excess of one-half of the debt. "The obligation, of one of two co-sureties, is to pay the whole debt; if he does so, he may recover of his co-sureties one-half; if he pays less than the whole debt, he can only recover from his co-sureties, the amount he has paid in excess of the moiety." Morgan v. Smith, 70 N. Y. 537.

Q. A is surety to secure the performance of a contract by B to C. C holds a chattel mortgage upon property belonging to B as security. B defaults, and A is compelled to pay the amount of the obligation to C. What right, if any, has A?

A. He is entitled to the possession of the chattel mortgage by right of subrogation. "Where one has been compelled to pay a debt, which ought to have been paid by another, he is entitled to a cession of all the remedies which the creditor possesses against that other." Schram v. Werner, 85 Hun, 293.

Q. A is surety for B in the sum of $10,000. B defaults, and A is sued by the creditor. He settles for $6,000. A then brings action against B to recover the whole $10,000. Can the action be maintained? State your reasons.

A. A can only recover the amount he has paid. If the surety extinguishes the debt for less than the whole amount due, he can only recover what he actually paid, as the contract between principal and surety is for indemnity only. Eno v. Crooke, 10 N. Y. 60.

Q. The defendant, as surety, signed a bond for the faithful performance of a contract of A with a corporation. The corporation paid A in advance. A refuses to perform; the corporation sues A for damages, but the contract is held void by the court, A being compelled to return the money paid him by the corporation which he is unable to do. The corporation thereupon sues the surety. Is he liable? Give reasons.

A. No. As the contract is void, the surety is released from liability. He merely agreed to be bound on the contract; the money here is to be repaid, not in performance of the contract, but merely as money received under a void contract. The liability of a surety is strictissimi juris, which means that a surety shall not be held beyond the precise terms of his contract. Smith v. Molleson, 148 N. Y. 241.

Q. A is appointed bookkeeper by the X Bank. At the time of the appointment, B executes to the bank a bond conditioned that A will faithfully perform the duties imposed upon him as a bookkeeper, and the duties of any other office, relating to the business of the bank which may be assigned to him. After service for several years as bookkeeper, B was appointed as receiving teller of the bank, and while acting in that capacity embezzled $5,000 of the bank's funds. The bank sues B on the bond. Is he liable?

A. No. The surety undertook only for the fidelity of the principal while he was bookkeeper, both in the performance of that office, and of any other office, trust or employment temporarily imposed upon, or assumed by him during that time relating to the bank's business, but not for his fidelity in another position to which he was permanently appointed. The liability of a surety is always strictissimi juris, and may not be extended by construction beyond his specific engagement. Nat. Merchants Bank Assn. v. Conkling, 90 N. Y. 116.

(NOTE.) Where the bond recited "or shall be appointed to any other office, duty or employment, he shall also faithfully perform the duties of that office," it was held that the surety was liable for misappropriation by the principal after appointment to that office. Bank v. Spinney, 120 N. Y. 560.

Q. A became surety to B's bank for the faithful performance of the duties of X as bookkeeper. X was allowed to take the teller's place each day during the dinner hour of the latter, and while acting as teller, he stole $10,000. A is sued on the bond and claims he is not liable. Judgment for whom and why?

A. Judgment for A. A is not liable, because X stole as teller, and not in the capacity of bookkeeper, for which A became surety only. He is relieved from liability on the principle that the liability of a surety is strictissimi juris, and the courts will not inquire as to whether the alteration in the performance of the con-

tract is, or is not to his injury. Page v. Krekey, 137 N. Y. 313. See also Bank v. Elwood, 21 N. Y. 88.

Q. A is employed in the X Bank. He takes and appropriates to his own use from the bank's funds $1,000. This is afterwards discovered, and A makes restitution of the amount. He is retained in the bank's employ on condition that B become surety for him. B becomes his surety without knowledge of the former embezzlement, and the bank knows that B does not know of it. A afterwards embezzles $2,000, and absconds. The bank brings action against B as surety on the bond. Judgment for whom and why?

A. Judgment for B. "Where an employer takes a bond as security for the fidelity of his agent, who, to the knowledge of the employer has previously violated the trust put in him, and the employer does not disclose such fact or misconduct to the surety, he is guilty of the fraudulent concealment of a material fact, which good faith requires him to disclose, and he cannot recover of the sureties the damages resulting from a subsequent default of his agent." U. S. Life Ins. Co. v. Salmon, 90 Hun, 535.

Q. A was surety on a bond to the First National Bank of Buffalo for no definite time, conditioned for the faithful performance by B of his duties as cashier of the bank. He had been appointed and held the position of cashier on the strength of the bond. After it had been running for four or five years, A notified the bank that he revoked the same and considered himself no longer liable thereon. The bank refused to consider his release from his liability thereon, and so informed him. Thereafter B became a defaulter, and the bank seeks to hold A on his bond. A consults you. What would you advise? Give your reasons.

A. A is not liable on the bond. "A surety bound for the fidelity and honesty of his principal, and so for an indefinite and contingent liability, and not for a sum fixed and certain to become due, may revoke and end his future liability in either of two cases, viz.: 1. When the guaranteed contract has no time to run; 2. Where it has such definite time, but the principal has so violated it, and is so in default that the creditor may safely and lawfully terminate it on account of the breach. Where the person employed commits an act of dishonesty, and is unfaithful to his trust, the employer may end the contract and trust for his own protection,

and what he may do and ought to do for his own safety, the surety may require it to be done for his." Emery v. Baltz, 94 N. Y. 414.

Q. A was surety for B on a contract made with C. C, being about to enforce the contract, and B not being able to pay at the time, agreed to extend B's time one year, and did so without the knowledge of A. Subsequently C seeks to hold A liable as surety, B having defaulted. Is he liable or not, and why?

A. A is not liable. The rule is that an extension of time to the principal without the consent of the surety discharges him from liability on the ground that his position is jeopardized thereby. The creditor, in giving time to the principal debtor, deprives the surety of the right which he would have had from the mere fact of entering into the position of a surety, that is, the right to proceed against the principal, and if this right be suspended, no matter for how short a time, and not injuring the surety at all, and even actually benefiting him, nevertheless it is established that this discharges the surety altogether. Cary v. White, 52 N. Y. 138.

Q. A was surety, B principal, and C creditor on an obligation. B asks C to refrain from suing or pressing his claim, until he (B) should be able to pay the same. C said he would be patient, but would not agree to give him any time. When the obligation was due, B was solvent, but became insolvent soon after. The surety had no knowledge of the conversation. Upon B's default, C brings action against the surety to recover the debt. Judgment for whom and why? State your reasons.

A. Judgment for C; A is not discharged. A mere indulgence to the debtor will not discharge the surety; there must be an agreement to extend the time of payment binding on the creditor. Smith v. Erwin, 77 N. Y. 466. "To have the effect of discharging the surety, an agreement for the extension of time of payment, made by the creditor with the principal debtor without the consent of the surety, must be upon a valid consideration, such as will preclude the creditor from enforcing the debt against the principal debtor." Olmstead v. Lattimer, 158 N. Y. 313.

Q. A, who is surety for B, requests C, the creditor, to sue B the principal debtor, but the creditor neglects to do so. Two years thereafter, the creditor sues, but the debtor is then insolvent. C

then brings action against A to enforce his liability as surety. A sets up as a defense, his request to sue. Judgment for whom and why?

A. Judgment for A. A surety may require the creditor to proceed against the principal, and enforce collection of his demand by action if not otherwise paid, and a failure to so proceed within a reasonable time will operate to discharge the surety if he suffers injury by such delay. Solvency of the principal at the time of the demand to sue, and his subsequent insolvency after neglect to institute suit will discharge the surety from his obligation. But the notice to the creditor must be clear and explicit, and he must be given to understand that he is required to sue, otherwise the surety will not be discharged. Pain v. Packard, 13 Johns. 174; Colgrove v. Tallman, 67 N. Y. 95.

Q. A is surety for the firm of B and C on a bond to the extent of their purchases. Without A's knowledge, another partner is taken into the firm, and subsequently A is sued on the bond. Can he be held liable? If so, why so? If not, why not?

A. A cannot be held liable, as he did not bind himself as surety for the new firm. "In the absence of terms in a guaranty, given for a partnership, showing that the parties intended that it should survive changes in the firm, the guaranty terminates with the existence of the firm for which it was given, and does not continue for the benefit of any firm or party succeeding to its business." Bennett v. Draper, 139 N. Y. 266.

Q. A and B, husband and wife, execute a mortgage to C for $5,000, as a security for a pre-existing debt of A's. The mortgage is given on a piece of property belonging to A. A fails to pay the mortgage debt at maturity; C forecloses, and the property is sold by order of the court, the amount realized being just sufficient to pay the mortgage and costs. B demands certain bonds, which were held by C as security for the debt, previous to the giving of the mortgage. C refuses to comply with the demand. What are the rights of the parties?

A. B has no rights to the bonds. She, merely having released her dower in the mortgaged premises, is not in the position of a surety, and therefore is not entitled to the right of subrogation.

"She cannot be treated as the surety of her husband, because she joined with him in a mortgage of his lands; she can only release her dower, but is entitled to dower in the equity of redemption." Hawley v. Bradford, 9 Paige, 200.

Q. A was the principal debtor, and B the surety, on an obligation held by C. C had collateral given him by A to further secure the debt. On A's default, B, the surety, pays the debt. C in the meantime has lost the collateral. B consults you as to his rights. What would be your advice?

A. B can recover the value of the collateral from C. "A creditor who by himself or by his agents, so deals with securities to which a surety may be entitled by way of subrogation, as to lose or destroy them, is liable for the value of the securities to the surety paying the debt, or whose property is resorted to for the purpose of securing payment thereof." Sternbach v. Friedman, 34 App. Div. 534.

Q. A was surety for the faithful performance of a contract by B with C. B gives C certain bonds as security for the debt. At the maturity of the debt, B failing to pay, C sues A for the amount of the debt, and A pays the same. C thereupon returned the bonds to B, who sold the same, and is now insolvent. A claims the securities or their value from C, who informs him that he has surrendered them to B. What are the rights of the parties?

A. A is entitled to the securities, by reason of his having paid the debt, by virtue of the right of subrogation. C having surrendered the securities, is liable for their value to A. "The rule that a surety is discharged pro tanto, through the surrender of securities by the creditor, does not rest on contract, but upon the equitable principle, that property of the debtor pledged for the payment of the debt should be applied on the debt. In such a case, the surety is discharged to the extent he is injured." State Bank v. Smith, 155 N. Y. 185.

Q. A buys a suit of clothes from a tailor. Afterwards, B writes the tailor that he will pay for the clothes, if A does not. Is this promise binding?

A. No, for a guaranty being a contract to answer for the debt, default, or miscarriage of another, must have a consideration to

support it. If the debt of the principal debtor be pre-existing, then there must be a new and distinct consideration to sustain the promise of the guarantor. Where the guaranty is made subsequent to the creation of the debt, and was not an inducement to it, the consideration of the original debt will not support it, and so there must be some further consideration having an immediate respect to such liability, and it is sufficient that there be something moving towards the principal debtor. McNaught v. McLaughry, 42 N. Y. 22.

Q. A buys a bill of goods from B. At the same time, C writes on the back of the bill that he guarantees the collection of the within bill. Upon default by A, B sues C for the amount of the bill. C defends on the ground that there was no consideration for his promise. Is his defense good?

A. No. The consideration supporting the sale is sufficient to support the guaranty. Leonard v. Vredenburg, 8 Johns. 38. "Where a contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the latter, supports the former, and the consideration need not be expressed in the guaranty, but may be shown by parol." Bank v. Coit, 104 N. Y. 532.

Q. B guarantees the payment of A's rent. A fails to pay and the landlord sues the guarantor without exhausting his remedy against the tenant. Can he maintain the action? Why?

A. Yes, the action is maintainable. A guaranty of the payment of rent is an absolute guaranty, and where a guaranty is absolute, the guarantor's liability does not depend upon demand and notice of default; a fortiori, suit against the principal debtor is not necessary in the case of an absolute guaranty, to fix the liability of the guarantor. 14 Am. & Eng. Ency. of Law (2d ed.), 1141.

Q. A goes to a jewelry store to purchase a gold watch on credit. The jeweler, not knowing A, refuses to give it to him, whereupon B, who happens to be in the store at the time, says that he will pay for it if A does not. A fails to pay, and the jeweler sues B who sets up the Statute of Frauds as a defense. Is this defense good?

A. The defense is good, as the promise here was clearly one to answer for the debt, default, or miscarriage of another, or in other

words a guaranty, which in order to be binding must be in writing, and subscribed by the party to be charged (the guarantor), according to the Statute of Frauds, which in part is as follows: "Every agreement, promise or undertaking is void, unless it, or some note or memorandum thereof, be in writing and subscribed by the party to be charged therewith, or by his lawful agent; if such promise, agreement or undertaking, 2, is a special promise to answer for the debt, default, or miscarriage of another person." Sec. 21, Personal Prop. Law, 1897.

Q. A hires B, a contractor, to build a certain house for him. The workingmen, becoming dissatisfied, go upon a strike, and A, being anxious to have his house finished in the fall, tells the workingmen, that if they will go on with the work, he will see them paid. The men comply with his request, and upon completion of the work, bring suit against him on his promise. A sets up the Statute of Frauds as a defense. Is the defense good?

A. No. "A promise made by the owner of a house, which a contractor was engaged in constructing, to workingmen employed by the contractor that if the workingmen will proceed with their work, the owner would see them paid, is an original undertaking, and is not within the Statute of Frauds, notwithstanding the fact that the liability of the contractor to the workingmen is not affected thereby." Almond v. Hart, 46 App. Div. 431.

Q. A is about to contract with C; the latter will not contract unless B will become a surety for A. B will not go surety for A, unless D will agree to indemnify him against any loss. The agreement between B and D is by parol. B, who is obliged to perform, brings action against D, who sets up the Statute of Frauds. Is the defense maintainable on that ground?

A. No, as this is an original undertaking. A verbal promise by one person to indemnify another for becoming a guarantor for a third person, is not within the Statute of Frauds, and need not be in writing, and the assumption of the liability is a sufficient consideration for the promise. Jones v. Bacon, 145 N. Y. 446.

Q. A purchased goods from B, who relied upon an oral promise of C that if A did not pay for the goods, C would pay for them out of money in his hands belonging to A. A does not pay for

the goods, and B looks to C for payment. Prior to this, C had given back the money belonging to A. What are the rights of the parties?

A. B can recover from C, as the promise here is not within the Statute of Frauds. "When a debtor puts a fund into the hands of the promisor, either by absolute transfer, or upon a trust to pay the debt, the promise of the latter to pay the same is not within the Statute of Frauds. The party making the promise holds the funds of the debtor for the purpose of paying his debt, and as between him and the debtor, it is his duty to pay the debt, and so that when he promises the creditor to pay it, in substance, he promises to pay his own debt, and not that of another." Mallory v. Gillett, 21 N. Y. 412.

(NOTE.) The fact, that the debtor has placed property in the hands of another to enable him to raise the means of paying the debt, or to indemnify him if he should choose to pay it out of his own means, does not take a verbal promise by him to the creditor, to pay the debt, out of the Statute of Frauds. The distinction must be drawn between the giving of property and the giving of money to another; a promise to pay before the property given has been converted into money, is within the Statute of Frauds. Belknap v. Bender, 75 N. Y. 446; Ackley v. Parmenter, 98 N. Y. 425.

Q. A sells B a horse for $100, taking at the time a note of C for the amount, which B orally agreed to pay if C did not. The note was not paid by C. B is sued on the oral promise, and sets up the Statute of Frauds as a defense. Is the defense good?

A. No. The promise was an original undertaking. There was a new and distinct consideration, independent of the debt of the maker, and one moving between the parties to the new promise. In such cases, where the party undertakes for his own benefit, and upon a full consideration received by himself, the promise is not within the statute. Johnson v. Gilbert, 4 Hill, 178. "In mere form, it was certainly a collateral undertaking, because it was a promise that another person should perform his obligation. But looking at the substance of the transaction, we see that the defendant paid in this manner a part of the price of a horse sold to himself. In a sense merely formal, he agreed to answer for the debt of C. In reality, he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make payment for him, and thereby discharge him." Selden, J., in Cardell v. McNeil, 21 N. Y. 336.

CHAPTER XIX.

Torts.

Q. A assaults B and is arrested and indicted for the same. B then brings an action against A to recover damages resulting from the assault. A defends on the ground that the civil action is merged in the criminal prosecution. Is A's defense good?

A. A's defense is not good. Sec. 1899 of the Code of Civ. Pro. provides as follows: "Where the violation of a right admits of a civil and also of a criminal prosecution, the one is not merged in the other."

Q. A receives personal injuries causing his death, from the negligence of B's servant. The personal representatives of A bring action against B to recover damages. After the summons had been served and before the trial, B dies. The representatives of A then make a motion to have B's representatives substituted as defendants in place of B. What should be the decision of the court? State your reasons.

A. The court should deny the motion, as the cause of action does not survive the death of the wrongdoer. A cause of action for negligence resulting in death, given by statute to the representatives of the decedent, is abated by the death of the wrongdoer. The action cannot be maintained against the representatives of the wrongdoer. Heggerich v. Keddie, 99 N. Y. 258.

Q. A boy in the employ of A quarrelled with B on the street. B picked up a club and chased the boy, who took refuge in A's store. In trying to save himself, the boy knocked a valuable clock from the counter, destroying it. Has A a cause of action against B for the value of the clock? State your reasons.

A. Yes, as the act of B was the proximate cause of the destruction of the clock. "One who does an illegal or mischievous act, which is likely to prove injurious to others, is answerable for the consequences which may directly and naturally result from his

conduct, though he did not intend to do the particular injury which followed." Vandenburg v. Truax, 4 Denio, 464.

Q. A was driving along the street, when a spark from an elevated train fell upon his horse, causing it to run away. A being unable to control the horse, turned it against the curbstone, hoping to check it in that way. The wagon passed over the curb, A being thrown out and hurt, and B, who was standing on the walk, was knocked down and severely injured. What are the rights of the parties?

A. Both A and B have a right of action against the Railroad Co., as the falling of the spark was the proximate cause of their injuries. "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances attending it. The primary cause may be the proximate cause of a disaster though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied at the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? Lowery v. Manhattan El. Ry. Co., 99 N. Y. 158.

Q. A and B, who were employees of C, were engaged in the painting of a house. A fell from the ladder on which he was working, by reason of its defective construction, and in falling, struck B, injuring him severely. What are the rights of A and B?

A. A and B both have an action against C; A because the ladder was defectively constructed, and B because the falling of A was the proximate cause of his injuries. See Ryan v. Miller, 12 Daly, 77.

Q. A, an infant, hired a horse from B. The infant drove the animal with such violence, and otherwise cruelly treated it, that it died in consequence thereof. The owner brings action against

the infant. Can the action be maintained? If so, upon what theory? If not, why not?

A. Yes, the infant is liable in tort. Where an infant takes a horse on hire, and wilfully and intentionally injures the animal by driving him with such violence that he dies, this amounts to an election on the part of the infant to disaffirm the contract of hiring, and an action in tort lies against him. Campbell v. Stakes, 2 Wend. 137.

Q. A beats his wife, severely injuring her. She brings action against him to recover $1,000 damages for the assault. The husband demurs. Judgment for whom and why?

A. Judgment for the husband. A wife cannot maintain an action against her husband, to recover damages for an assault and battery which he has committed upon her. The Dom. Rel. Law of 1896 does not give her this right. Abbe v. Abbe, 22 App. Div. 483.

Q. A corporation is sued for malicious prosecution by A; the corporation demurs. Judgment for whom and why?

A. Judgment for A; a corporation is liable for malicious prosecution. A corporation is liable for its wrongful acts to almost the same extent as a natural person. Morton v. Ins. Co., 34 Hun, 366.

(NOTE.) The anomalous decision of Eichner v. Bowery Bank, 24 App. Div. 63, is called attention to. It was there held that a corporation is not liable for a slander committed by its agents on the ground stated that "a corporation itself could not talk." It is probably the only case of tort in which a corporation has been held not liable.

Q. A municipal corporation, acting under and pursuant to the provisions of its charter, excavated in and upon one of its public streets in order to properly grade the same. In so doing, it dug away a part of a natural bank extending into the highway, which supported A's land, by reason of which it lost its support, and fell with certain outhouses, shrubbery and fences into the excavation in the highway, to A's damage in the sum of $10,000. There was no negligence, or want of care in the execution of the work. The question arises as to the liability of the corporation. What do you say? Give your reasons.

A. The corporation is not liable. "Municipal corporations engaged in the performance of public works, authorized by law, are not liable for damages occasioned thereby to others, where private property is not directly encroached upon, unless such damages are caused by misconduct, negligence or unskillfulness." Atwater v. Trustees, 124 N. Y. 602.

Q. A, without authority from the municipality, piles brick in the street. By reason of not keeping a light at the place during the night, B who was driving on the highway at night, was injured, without fault or negligence on his part. He brings an action against the municipality. What additional facts, if any, must be shown to entitle him to recover?

A. He must show that the city had either actual or constructive notice. "It is the duty of a municipal corporation to keep its streets in a safe condition for public travel, and it is bound to exercise reasonable diligence to accomplish that end; this is so, as well where an obstruction rendering travel unsafe, is caused by a third person, as well as where it is the act of the corporation. Where therefore, public or private improvements are being made in a city street causing an obstruction, it is the duty of the city to guard them, so as to protect travelers on the street from receiving injuries therefrom. The municipality is not absolved from liability by the fact that the obstruction was caused by a contractor, who, by his contract, is bound to properly guard it or to place warning lights. Plaintiff must show that it was left unguarded by the defendant after notice of its existence." Pettengill v. City of Yonkers, 116 N. Y. 558.

Q. A is run over by an ambulance belonging to the Department of Charities of the city of New York, and sustains injuries which cause his death. His representatives bring suit against the city. Can the action be maintained? Give your reasons.

A. No. The city is not liable. "Where by the act of the legislature, a municipal corporation is required to elect or appoint an officer to perform a public duty laid not upon it, but upon the officer in which it has no private interest, and from which it derives no special benefit, such officer is not a servant or agent of the municipality, and for his negligence or want of skill in the performance of his duty, or for that of a servant whom he employs, it is

not liable; and this although the officer or servant has in charge, and the negligence is in the use of corporate property. The duties imposed upon the commissioner of charity for the city of New York by statute are public in their character, and from their performance no special corporate benefit is acquired. Such officers, therefore, or their servants are not agents of the city for whose negligent acts it is liable." Maxmillian v. Mayor, 62 N. Y. 160.

(NOTE.) In Missano v. Mayor, 160 N. Y. 123, it was held that the city of New York is liable for the negligent acts of its employees in its department of street cleaning, on the ground, that the city acts in discharge of a special power granted to it by the legislature, in the exercise of which it is a legal individual, and that the duty of removing ashes, garbage, etc., is a private, and not a governmental function. See also Quill v. Mayor, 36 App. Div. 476.

Q. A is injured in an accident, and is taken to a charity hospital for treatment. Through the negligence of the physician in charge, gangrene sets in on the wounds, and as a consequence thereof, A dies. His representatives bring action against the hospital. Can they recover?

A. No. "A public hospital or asylum is liable for the tort or negligence of an officer or servant, only when such corporation has been guilty of negligence in selecting such officer or servant. When the corporation has used due care in selecting the officer or servant, it is not liable for his subsequent act, unless prior to the occurrence of such act, knowledge of the unfitness and incapacity of such officer or servant was communicated to and fully brought home to the corporation." Joel v. Hospital, 89 Hun, ~~23~~ 73

Q. A enters a certain charity hospital, and agrees to pay $25 a week for treatment, the hospital also agreeing to furnish a trained nurse. Through the negligence of the nurse furnished, A's illness becomes aggravated, and in consequence thereof, she is compelled to undergo an operation involving the expenditure of a large sum of money. A brings action against the hospital. Can the action be maintained? If so, upon what theory? If not, why not?

A. The action can be maintained on the theory of a breach of contract. It was so held in Ward v. St. Vincent Hospital, 39 App. Div. 624, where it was said that: "A contract made by a a charity hospital, to receive a patient into the hospital, and to furnish her with a skillful trained nurse for a certain sum per week, is not beyond its powers. The patient may, in an action

against the hospital to recover damages for breach of such contract, obtain indemnity for injuries sustained by the negligence of its servants."

Q. A, B's coachman, with B's footman, riding on the seat beside him, and B, the owner, in the carriage, negligently drives into another vehicle driven by the owner. The footman is severely injured. The owner of the second carriage is free from contributory negligence. The footman brings action against B. Can he recover?

A. No, for the master is not liable for injuries caused by the negligence of fellow servants. "A master is not liable to those in his employ, for injuries resulting from the negligence of a fellow servant engaged in the same general business. Nor is it necessary that the sufferer, and the one who caused the injuries, should be at the time engaged in the same particular work. If they are in the employ of the same master, engaged in the same common work, and performing duties and services for the same general purposes, the master is not liable." Laning v. R. R., 49 N. Y. 521.

Q. A enters into a contract with B, whereby the latter agrees to erect a building for A. B directs some workmen to erect a scaffold. They do so, using poor material, without utilizing the good material furnished by B for the purpose. C, an employee, is injured by the falling of the scaffolding, his fall being caused by stepping on the defective material used. He brings action against B. B defends on the ground that the injury was caused by the negligence of a fellow servant. Is the defense good?

A. The defense must fail. "Prior to the enactment of the Labor Law of 1897, the rule was well established that a scaffold erected for workmen is not a place in which their work is to be done, within the meaning of the rule requiring a master to furnish a suitable place in which to do his work, but is an appliance or instrumentality by means of which the work is to be done, and that if the master furnishes proper material for the scaffold, he is not liable to his workmen for the negligent act of one of his employees in building it; but since the enactment of sec. 18 of that law, the scaffold is regarded as a place furnished by the master, upon which the servant is to work, and the duty has devolved

upon the master not to permit that place to be unsafe, unsuitable or improper. A servant of the master, in building the scaffold, acts as the master himself. An employee required to use the scaffold is not called upon to inspect it, in order to ascertain if it is safe; he has a right to assume that the master has performed his duty in that regard." Stewart v. Ferguson, 52 App. Div. 515.

Q. A, the owner of a building, erected the same knowing that the elevator shaft was defective. B, an employee of A, was riding up the same in the course of his duty, when the engineer gave the machinery a sudden start, which together with its defective condition caused the elevator to fall, B being severely injured. What are B's rights? State your reasons.

A. B can maintain an action against A for damages sustained by reason of the injuries. "The rule which excuses a master from liability to a servant for injuries caused by the negligence of a co-servant, presupposes that the master has performed the duties which the law imposes upon him, and that no negligence in this respect contributed to the injury. Where, therefore, the master has furnished a dangerous and defective machine, he is not excused from liability for an injury to his servant, which would not have happened had the machinery been safe and suitable, by the fact that the negligence of a fellow servant co-operated in producing the injury; and this, although the machine by the exercise of care and caution, might have been operated so as not to cause injury." Stringham v. Stewart, 100 N. Y. 516.

Q. A was working as a laborer in the iron works of B. C was the manager and general superintendent of the work. While doing some work, A was injured through the negligence of C. He brings action against B. Can he recover? If so, upon what fact will the recovery depend? If not, why not?

A. A can recover if the negligence of the superintendent was in the discharge of a duty, which the master ought to have performed, otherwise not. "But for the mere negligence of one employee, the master is not responsible to another engaged in the same general service. The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men or represent the master in other respects is, in the manage-

ment of the machinery, a fellow servant of the other operatives. On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to some inferior employee. On this principle, the Flike case (53 N. Y. 549) was decided. Church, Ch. J., says, at page 553: "The true rule I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties, as it is required to perform as master, without regard to the rank or title of the agent entrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed." The liability of the master is thus made to depend upon the character of the act in performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow servant for its improper performance." Rapello, J., in Crispin v. Babbitt, 81 N. Y. 516. This case illustrates the so-called vice principal doctrine of this state.

Q. A, an employee of B, was injured through the negligenee of C, a fellow servant. C was merely an apprentice, but was allowed by B to do the work of a master mechanic. A brings action against B. Can he recover?

A. Yes. "A master owes a duty to his servant of furnishing adequate and suitable tools and implements for his use, a safe and proper place in which to prosecute his work, and when needed, the employment of skillful and competent workmen to assist in the performance of his duties." Pantzer v. Mining Co., 99 N. Y. 368.

Q. A is an employee in a factory, engaged in operating a machine with unguarded cogwheels. She is injured while cleaning the machine through lack of such guard. The Factory Act requires that cogwheels should be guarded. A brings action against the owner of the factory. Can she recover?

A. No. "An employee may, by entering upon an employment

with full knowledge of all the facts, waive under the common-law doctrine of obvious risks, the performance by the employer of the duty to furnish the special protection prescribed by the Factory Act, regulating the employment of women and children in factories. There is no reason, in principle or authority, why an employee should not be allowed to assume the obvious risks of business, as well under the Factory Act as otherwise." Bartlett, J., in Knisley v. Pratt, 148 N. Y. 372.

(NOTE). The doctrine of assumption of obvious risks is stated in Gibson v. R. R., 63 N. Y. 449, as follows: "Where a servant enters upon an employment, from its nature necessarily hazardous, he assumes the usual risks and perils of service, and all those risks which are apparent to ordinary observation. If he accepts the service with knowledge of the character and position of structures from which employees might be liable to receive injury, he cannot call upon his master to make alterations to secure greater safety, or in case of injury hold him liable."

Q. A, the owner of a building, makes an agreement with B, a contractor, to repair the roof of his house, for a certain sum. To do this, it is necessary to erect a scaffold over the street. A workman of B carelessly let fall a hammer and injures C, who is passing on the street. What are the rights of C?

A. C can bring an action against B, but has no right of action against A. "Where a person is employed to perform a certain kind of work in the nature of repairs or improvements to a building by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, with no restriction as to its exercise, and no limitation as to the authority conferred in respect to the same, such person does not occupy the relation of a servant under the control of the master, but he is an independent contractor, and the owner is not liable for his acts, or the acts of his workmen who are negligent, and the cause of injury to another." Hexamer v. Webb, 101 N. Y. 377. "The rule, that where the relation of master and servant does not exist, but an injury results from negligence in the performance of work by a contractor, the party with whom he contracts is not responsible for his negligence, or that of his servant, is well settled in New York." Reemer v. Striker, 142 N. Y. 134.

(NOTE.) "There are certain exceptions to the independent contractor rule; as 1, where the employer personally interferes with the work, and the act

performed by him occasioned the injury; 2, where the thing contracted to be done is unlawful; 3, where the acts performed create a public nuisance; and 4, where an employer is bound to do a thing efficiently by statute, and an injury results from its inefficiency." Berg v. Parsons, 156 N. Y. 109.

Q. B is a contractor building a house for A. B is short of help, and borrows A's hired man and sets him at work on the building. While at work, he negligently lets fall a beam on C, a stranger, who is free from contributory negligence, injuring him. Who is liable, if anybody, to C? Give the general rule.

A. B is liable to C, because the hired man was the servant of B at the time of the accident. "The doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong, at the time, and in respect to the very transaction out of which the injury arose. The fact that the party to whose wrongful or negligent act an injury may be traced, was at the time in the general employ and pay of another person, does not make the latter responsible. When one person lends his servant to another for a particular employment, the servant, for anything done in that employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the man who lent him." Higgins v. W. U. Tel. Co., 156 N. Y. 75.

Q. A instructs his coachman to shovel the snow off his roof, and to be careful not to throw any of it on the passers-by in the street. The coachman secures the assistance of a friend of his, and leaves him for a few moments. During the absence of the coachman, the friend injures a passer-by on the street below, by throwing a quantity of snow and ice upon him from the roof. Has the passer-by an action against any one, and if so, against whom?

A. He has an action against A. "One who directs his servant to remove snow and ice from the roof of his house, is responsible for an injury received by a passenger in the street, from such snow and ice, whether the negligence was that of a servant, or a stranger whom he employed or who volunteered to assist him." Althorp v. Wolf, 22 N. Y. 355.

(NOTE.) The recent case of Long v. Richmond, 68 App. Div. 466, is called attention to. In that case the court says that: "A master is not liable for

injuries to a third person, when his servant, contrary to instructions, allows another to do his work, and the injury results therefrom."

Q. A, who is employed by B as driver for his milk wagon during the week, went to his master's stable on Sunday, and took therefrom the master's horse and carriage. While driving the same, he negligently runs over and injures C. C brings action against B. Can he recover?

A. He cannot recover. "A master is not liable for personal injuries sustained by a third person through the negligence of his servant, unless the relation of master and servant existed in respect to the very transaction out of which the injury arose; therefore, for an injury caused by the negligence of a servant, without the authority and when not on the business of the master, the master is not liable." Fish v. Coolidge, 47 App. Div. 159.

(NOTE.) "A master is liable for the acts of his servant within the general scope of his employment, while engaged in the master's business, and done with a view to the furtherance of the master's business and interest, whether such act be done negligently, wantonly, or even wilfully." Levy v. Ely, 48 App. Div. 554.

Q. A driver is returning with his master's load from a warehouse; on the way he meets a clerk of his master, who asks him to go up a side street and get a personal package for the clerk; he does so, and while on the side street injures C. What are the rights of the parties? State the general rule.

A. The master is not liable. "The departure of the driver from the ordinary route to the stables for the purpose of doing a favor for a co-servant, as stated in the evidence, was clearly an unauthorized deviation, and not within the scope of his duty. He cannot be said, within the authorities, to have been acting in the service of the defendant while engaged in going for the trunk and valise for his co-servant, and taking them to their destination. The act was not only without authority, but also without the knowledge or consent of the defendant or of any superior officer of the driver. It is well settled that a master is not liable for injuries sustained by the negligence of his servant while engaged in an unauthorized act beyond the scope and duty of his employment, for his own or another's purposes, although the servant is using the implements or property of the master in such unauthorized act." Cavanagh v. Dinsmore, 12 Hun, 465.

Q. A and B were employed by the X Ice Company to drive their wagon and supply their customers with ice. On a certain day they were sent with a load of ice to C who had ordered the same, with instructions to proceed directly to his (C's) place of business. On the way they stopped at D's store to sell him a cake of ice for their own private gain. D's store was about six blocks out of the direct route to C's place. After selling the cake of ice to D, they immediately proceeded to C's place. While on the way they negligently ran over and injured M. M brings action against the company. Can he recover? State your reasons.

A. Yes, as the accident did not occur during the deviation. "It is the rule, no doubt, that a master is not necessarily relieved from responsibility for an injury resulting from the negligence of his servant, simply because the servant is at the time acting in disobedience to the master's orders. The question in every case is whether the act he was doing was one in prosecution of his master's business, not whether it was done in accordance with his instructions. If the act was one, which continued until the termination, would have resulted in carrying out the object for which the servant had been employed, the master would be liable for whatever negligence might take place during its performance, although the servant in doing it was not obeying the instructions of the master, or although he had deviated from the route prescribed by the master for the purpose of doing some act of his own, yet with the intention at the same time of pursuing his master's business. Within the rule above cited the liability still continues, unless the deviation is made, not in the prosecution of the master's business, but for some different and other purpose. That the fact that the defendant's employees had, for purposes of their own, deviated from the direct route in delivering the ice, did not of itself relieve the master from liability, although such liability might be suspended during the time the employees prosecuted their own affairs, as a liability would attach again immediately after the driver in prosecution of the master's business resumed his course to the station." Geraty v. Nat. Ice Co., 16 App. Div. 174.

Q. A and B being engaged in an angry altercation, B stepped into his office and brought out a gun, which he aimed at A in an excited and threatening manner, A being three or four yards distant. B snapped the gun twice at A. A believed that the gun

was loaded. The gun was in fact not loaded, and B knew this. Has A a cause of action against B?

A. Yes. This is an assault, and there need be no injury done in order to constitute an assault. "An assault is an attempt or offer to beat another without touching him. The least touching of another's person, wilfully or in anger, is a battery." 3 Bl. Comm. 120. "An assault is an attempt with force or violence to do a corporeal injury to another, and may consist of any act tending to such corporeal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability of using actual violence against the person." Hays v. People, 1 Hill, 351.

Q. A strikes B with his fist. B immediately picks up a club, and beats A with it injuring him severely. B brings action against A to recover damages for assault and battery. Can he recover?

A. No. "A party first attacked is not entitled to maintain an action for assault and battery against the other party, if he, the first party, exceeds the bounds of self-defense. Care must be taken that the resistance does not exceed mere defense, so as to become vindictive, for then the defender would himself become the aggressor." Elliot v. Brown, 2 Wend. 499.

Q. A was bookkeeper and cashier for B. He collected certain money from a customer of B's, and refused to give it up when requested to do so by B, claiming that the sum was due to him (A). B then attempted to take the money from A by force, striking and knocking him down, thereby injuring him severely. A brings action against B. Judgment for whom and why?

A. Judgment for A. "It is elementary that one may justify an assault and battery in self-defense, or in defense of his possession of real or personal property. But the general rule is, that a right of property merely, not joined with possession, would not justify the owner in assaulting to regain possession, though possession is wrongfully withheld." Bliss v. Johnson, 73 N. Y. 529. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defense, but not of redress. The circumstances may be aggravating; the remedy at law may seem to be inadequate; but still the injured party

cannot be arbiter of his own claim. If one has entrusted his property to another, who afterwards honestly, though erroneously, claims it as his own, the owner has no right to retake it by personal force. See Gyre v. Culver, 47 Barb. 592.

Q. A sues B for false imprisonment. At the trial, the judge charges the jury that the plaintiff in order to succeed must establish the want of probable cause and malice, in addition to the unlawful restraint. Is the charge sustainable on appeal?

A. No. "Even malicious motives, and the absence of probable cause, do not give a party arrested an action for false imprisonment. They may aggravate his damages, but they have nothing whatever to do with the cause of action." Earl, J., in Marks v. Townsend, 97 N. Y. 590. All that is necessary, in order to maintain an action for false imprisonment, is unlawful restraint of one's person.

Q. B, the infant child of A, is injured by the negligence of a railroad company. In an action by A against the company, what damages are recoverable?

A. "In an action brought by a parent, for loss of services of a minor child disabled by the tortious acts of the defendant, plaintiff is entitled to recover not only for loss of services up to the time of the trial, but for the prospective loss during the child's minority; also for expenses actually and necessarily incurred, or which are immediately necessary in consequence of the injury, in the care and cure of the child, but not for future prospective contingent expenses of this kind. It seems that such expenses can only be recovered, if at all, in an action by the child." Cumming v. R. R., 109 N. Y. 95.

Q. A and B are husband and wife. C, the father of A, induced him to leave his wife; A furnishes her with necessaries, but will not go back to her; she is thereby deprived of his society. What action, if any, can B bring?

A. B can sue the father for the alienation of her husband's affections. "A wife may maintain an action, under sec. 450 of the Code of Civ. Pro., in her own name and for her own benefit, without joining her husband has a party, against one who has enticed him from her, alienated his affections, and deprived her of his society." Bennett v. Bennett, 116 N. Y. 584.

Q. A persuades his daughter to leave her husband, and live apart from him, on the ground that he believes it is not proper for her to live with him, on account of statements which he has heard concerning the husband's moral character, which statements A hears from what he considers a reliable source, and honestly believes them to be true. There was in fact no foundation for the charges, and they were utterly false, but A acted in good faith. Can the husband maintain an action against the father for damages?

A. No, as the father acted in good faith. "It is well settled that a husband may maintain an action for enticing away his wife, or inducing her to live apart from him; and this, whether the wrongdoer be the father of the wife or any other person. When the conduct of the husband is such as to endanger the personal safety of his wife, or is so immoral and indecent, as to render him grossly unfit for her society, so much so that she would be justified in abandoning him, her parents have the right to receive her into their house, and advise her to come there and remain, and they will not be answerable in damages to the husband. And the same doctrine is applicable to a case, where the advice is given by a parent, in the honest belief, justified by information received by him, that such circumstances exist, although the information prove subsequently to have been unfounded. It is sufficient for his protection, that he was warranted in such belief, and acted from pure motives." Bennett v. Smith, 21 Barb. 439.

Q. A seduces B, the minor daughter of C. C brings action against him to recover damages. At the trial, the father does not show any actual loss of the daughter's services. B moves to dismiss. What should be the ruling of the court?

A. The motion should be denied. An action may be maintained by a father for seduction without proving any actual loss of services; it is enough that the daughter be a minor residing with her father, or that he has the right to command her services. Although the action for seduction is founded upon the legal fiction of loss of services, the damages recoverable always embrace injuries to the family reputation, etc. Hewitt v. Prime, 21 Wend. 148.

(NOTE.) The father's right of action continues after the daughter has become of age, if the relation of master and servant still exists between them. If the daughter submits, after her majority, to her parents' exercising authority over her, although not under an actual engagement to serve them, the action

is maintainable by the parent. The slightest acts of service have been held sufficient to constitute the relation of master and servant. The rule as to damages is the same, whether the daughter be a minor or of full age, and the plaintiff is not limited in his recovery to mere compensatory damages, but may recover exemplary damages, where he is so connected with her, as to be capable of receiving injury through her dishonor. Lipe v. Eisenlord, 32 N. Y. 229.

Q. A, a young man, promises to marry B, a girl of nineteen years of age, who resides with her parents. Thereafter he seduces her. What action or actions, if any, can be maintained against A?

A. The parent may maintain an action for the seduction. Seduction under promise of marriage, is also a crime, by sec. 234 of the Penal Code. While the seduced party cannot maintain an action for her own seduction, since she has consented to the act, yet she may sue for breach of promise, in which action she practically recovers damages for the seduction.

Q. A, a physician, brings suit against B for slander, who said of him: "He is a blockhead! He is not fit to treat a cow!" The physician introduced no testimony of any kind as to actual damage. The plaintiff asked to have submitted to the jury the question of punitive damages. Should the court grant his request?

A. Yes. The words spoken are actionable per se without proof of actual damage. The cases actionable per se are generally said to be the following: 1. Where the words spoken impute a criminal offense. 2. Where they impute having a disgraceful disease, which would cause the party to be excluded from society. 3. Where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession, trade or calling. It is also provided by sec. 1906 of the Code of Civ. Pro., that an imputation of unchastity to a woman is actionable without proof of special damage. In cases actionable per se, plaintiff is usually entitled to recover punitive damages. "When the falseness of an article which is actionable per se is proved, this is sufficient, as a general rule, to warrant the jury in giving exemplary or punitive damages. Proof that there was no actual malice, while not conclusive, is to be considered by the jury with the other evidence, in the determination of the question whether exemplary damages should be given or withheld." Bergman v. Jones, 94 N. Y. 51.

Q. A says of B who is a plumber, that he knows nothing of his trade. B brings action against A, and on the trial attempts to show that he has lost many customers by reason of this slander. He did not allege any special damage in his complaint. A objects to the admission of the evidence. What should be the ruling of the court?

A. The evidence should be excluded. Even in cases actionable per se, special damage must be alleged in order that it may be proven at the trial. Terwilliger v. Wands, 17 N. Y. 54.

Q. A, the publisher of a newspaper, publishes of B, a clergyman, that he was seen in certain concert halls of bad reputation. He brings action against A, but does not allege any special damage. A sets up truth as a defense. What are the rights of the parties?

A. The clergyman can maintain the action if the words are false, for writings are actionable without proof of special damage, when they tend to hold the party up to contempt, disgrace or ridicule. Truth, however, in civil actions is a good defense. Root v. King, 7 Cowen, 613. In criminal cases, truth alone is not a good defense, but the publication is only justified when the matter charged as libellous is true, and was published with good motives, and for justifiable ends. Penal Code, sec. 244.

Q. A corporation engaged in the dry goods business was charged by a certain newspaper with being insolvent. The corporation brings action against the paper, without alleging special damage. Can the action be maintained?

A. Yes. The imputation of insolvency is actionable per se therefore the corporation can maintain the action without showing special damage. Bank v. Thompson, 23 How. Pr. 253.

Q. A mercantile agency published a statement, to the effect that a judgment for $4,000 had been rendered against A, who was engaged in the manufacturing business. This statement was untrue. A brings action without alleging any special damage. Can he maintain the action?

A. No. "The words were not in themselves libellous, as an imputation against the soundness of plaintiff's financial condition. The mere recovery of a judgment does not necessarily import de-

fault in the payment of a debt. There is nothing to indicate in defendant's report, that the judgment was produced by any cause prejudicial to the credit of the plaintiff. It seems, that, upon an averment and proof of special damages resulting from such a false publication, an action would be sustainable." Woodruff v. Bradstreet, 116 N. Y. 217.

Q. The defendant—a news publishing company—on the trial of an action brought to recover damages for publishing a libellous article concerning plaintiff, sought to prove in mitigation of damages, that the plaintiff had in two other actions, obtained judgments aggregating $2,000 against other newspapers for having published the identical libel complained of in this action, and that said judgments had been paid, all of which the defendant duly pleaded. State whether or not the evidence should be admitted. Give your reasons.

A. The evidence should not be admitted. "Thus a previous judgment against the proprietor of a newspaper, even though satisfied, is no bar to an action for the same libel against the author. A fortiori, that heavy damages have been recovered against one newspaper, is no bar to an action against another newspaper which has published the same libel. Such previous recovery should not even be mentioned to the jury in mitigation of damages, nor should it be stated that such other actions are pending." Odgers on Libel and Slander, p. 457.

Q. A sues B for libel. B, at the trial, attempts to show in mitigation of damages, that A has at various times committed acts similar to the one charged in the statement. Should he be allowed to do so?

A. No. A defendant will not be allowed to show in mitigation of damages for a specific libel, other and disconnected immoral acts on the part of the plaintiff, but can only attack the plaintiff's general bad character. Holmes v. Jones, 147 N. Y. 59.

Q. A, a lawyer, on the trial of a certain action, in summing up to the jury, denounces B as a liar and a perjurer. This is absolutely false. B brings an action against A for slander, and at the trial attempts to show that the statements were made maliciously. Can he do so, and is the action maintainable?

A. The evidence cannot be admitted, and the action cannot be maintained. Statements made by counsel in addressing the jury, when pertinent to the issue, are absolutely privileged, and no evidence of malice is admissible. Marsh v. Ellsworth, 50 N. Y. 309.

(NOTE). The distinction must be drawn between absolute and qualified privilege. In the former, the protection is complete, and no evidence of malice is admissible; the latter is only effectual for protection when the statements are not made maliciously; if malice is shown, the privilege fails. The rule as to qualified privilege is stated in sec. 253 of the Penal Code as follows: "A communication made to a person entitled to or interested in the communication by one who was also interested in or entitled to make it, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, is presumed not to be malicious, and is called a privileged communication."

Q. A, an intimate friend of B and her family, in good faith, tells the father and brother of B, that C, to whom B is engaged, has been convicted of a felony. Has C any right of action, and if so, what?

A. He can maintain an action for slander. The statement not being in answer to an inquiry, was not privileged. "A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them. The duty of refraining from the utterance of slanderous words, without knowing or ascertaining their truth, far outweighs any claim of mere friendship. A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty is privileged, if made to a person having a corresponding interest or duty, although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation. . . . It is easy enough to apply the rule in cases where both parties, the one making and the other receiving the communication, are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has an interest to subserve, or where the party making it is under a legal duty to make it. But when the privilege rests simply upon the moral duty to make the communication, there has been much uncertainty in applying the rule. The difficulty is to determine what is meant by

the term "moral duty," and whether in any given case there is such a duty." Earl, J., in Byam v. Collins, 111 N. Y. 143, the leading case in this state on the subject of privileged communications.

Q. A tells B that the stock of a certain corporation is a safe and good investment, honestly believing that what he said was true. B relying on the statements, buys some of the stock. It is worthless, and B loses his money. B comes to you for advice. What are his rights?

A. He has no rights against A, as the statements were merely opinions, and therefore not fraudulent. The elements of an action for fraud and deceit are not here present. The elements of such an action are: 1. False representations of material facts by the defendant. 2. That defendant knew they were false, or should have known so. 3. Plaintiff believed and had a right to believe that they were true. 4. That defendant intended that the statements should be acted upon. 5. That plaintiff did act upon them to his damage. See Arthur v. Griswold, 55 N. Y. 400; Brackett v. Griswold, 112 N. Y. 454.

Q. A owns a farm some distance away. B wishes to buy, and goes to A and inquires. A tells him that the farm is worth $50 per acre, but in reality it is only worth $10 per acre. A also tells him that if he wishes he would take him out to see the farm, or if he wishes he can inquire as to its value. B purchases without doing either. What rights has B in the matter under the circumstances?

A. He has no rights. "Upon the question of value, the purchaser must rely upon his own judgment, and it is his folly to rely upon the representations of the vendor in that respect." Ellis v. Andrews, 56 N. Y. 83. "I think the general rule is, that if the facts represented are not matters peculiarly within the one party's knowledge, and the other party has the means available to him of knowing by the exercise of ordinary diligence, the truth or real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentation." Gray, J., in Schumaker v. Mather, 133 N. Y. 590.

Q. A owns a certain farm and offers to sell it to B for $2,000, telling him that it is fully worth that amount. The farm is situ-

ated some ten miles distant, and B is a stranger in that neighborhood. B relies entirely upon A's representations, and hence does not go to see the farm before buying it. The farm turns out to be worth less than $1,000. What are B's rights?

A. He can sue A for the damages sustained by reason of the fraud, as the facts show actionable deceit. "The rule is well stated, that a naked assertion by the vendor of the property offered for sale, even though untrue of itself, and known to be such by him, unless there is a want of knowledge on the part of the vendee, and the sale is made in entire reliance upon the representation, or unless some artifice is employed to prevent inquiry or the obtaining of knowledge by the vendee, will not render the vendor liable for damages." Chrysler v. Canaday, 90 N. Y. 272.

Q. A sells land to B. In order to induce B to purchase, A told him that he had paid $2,500 for the land to C, from whom he (A) had bought it. B thereupon paid $2,500 for the land. As a matter of fact, A had only paid $1,000, and the property was not worth more than that amount. What are B's rights?

A. B may maintain an action for fraud and deceit. A false representation deliberately made by the vendor, when about to sell land, to the party proposing to purchase, as to the price he paid for it shortly before, to a former owner, which was intended and did influence the purchaser, is actionable deceit. Fairchild v. McMahon, 139 N. Y. 290.

Q. A has certain moneys in his house; he misses the same, and suspecting B, a servant, of having taken the moneys, he has him (B) arrested and indicted for larceny. The servant alone had access to the room where the moneys were kept. On the trial, it appearing that the moneys were found, having been misplaced, B was acquitted. He sues A for malicious prosecution. Can he recover?

A. No, for A had reasonable cause for instituting the prosecution. In order to maintain the action for malicious prosecution, three things are necessary: 1. That the prosecution is at an end, and was determined in favor of the plaintiff. 2. Want of probable cause. 3. Malice. "A real belief, and reasonable grounds for it, must concur to afford a justification. Good faith alone is not sufficient." Farnam v. Feeley, 56 N. Y. 451.

(NOTE.) "To authorize a recovery, in an action for malicious prosecution in bringing a civil action wherein the defendant was unsuccessful, clear and satisfactory proof of all the fundamental facts constituting plaintiff's case must be given. Costs awarded to a successful defendant in a civil action are the indemnity which the law gives him for a groundless prosecution, and actions for malicious prosecution based thereon are not to be encouraged." Ferguson v. Arnow, 142 N. Y. 580.

Q. A is engaged in blasting rock on his own land. In the process of blasting, some of the rock was thrown on the house of B, doing considerable damage. A used all due care in doing the work. B brings action against A. Can he recover?

A. Yes. The owner of land is liable for committing a trespass on the lands of his neighbor, by casting rocks thereon, although he exercised all due care in doing the work. Here there was a physical invasion of the land of the plaintiff, and therefore the defendant is liable, even though there was no negligence. Hay v. Cohoes Co., 2 N. Y. 159.

Q. A, in building the foundation for his house, is obliged to blast certain rock. The work of blasting causes the building of his neighbor B to shake, doing great damage. B brings action against A for the damages sustained. Conceding that A used all due care in blasting, is he liable to B?

A. No. A is not liable in the absence of negligence, for there was no trespass, no part of the rock having been cast upon B's land. "There are many acts which the owner of land may lawfully do, although they bring annoyance, discomfort, or injury to his neighbor, which are damnum absque injuria. . . . But here the defendant was engaged in a lawful act. It was done upon his own land, to fit it for a lawful business. It was not an act which, under all circumstances, would produce injury to his neighbor, as is shown by the fact that other buildings near by were not injured. The immediate act was confined to his own land; but the blasts by setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house. The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think, the plaintiff has no legal ground for complaint." Andrews, Ch. J., in Booth v. Rome Ry. Co., 140 N. Y. 267.

Q. A has a certain steam boiler upon his land for use in his

business. Through no fault of his, the boiler explodes, injuring the dwelling house of B, his neighbor. B brings suit against him. Can he recover?

A. No. "Where one places a steam boiler upon his premises, and operates the same with care and skill, so that it is no nuisance, in the absence of proof of fault or negligence on his part, he is not liable for damages to his neighbor, occasioned by the explosion of the boiler. If the explosion was caused by a defect in the manufacture of the boiler, he is not liable in the absence of proof that such defect was known to him, or was discoverable upon examination or by the application of known tests." Losee v. Buchanan, 51 N. Y. 476.

Q. A, while lawfully traveling upon a public highway, was killed by a blow from a piece of rock which fell upon him from and by reason of a blast exploded by B upon his adjoining land. B, for the lawful purpose of improving his land, was engaged in blasting the rock. He used the most scientific of methods, and was skillful and without negligence. On the trial of an action for damages for causing A's death, the above facts appeared, and both sides moved for judgment. Judgment for whom and why?

A. Judgment for A's representatives. A person who for a lawful purpose and without any negligence or want of skill, does blasting upon his own land, and thereby causes a piece of rock to fall on a person, lawfully traveling on a public highway, is liable for the injury inflicted, and in an action brought against him to recover damages for the death of the person injured, by his representatives, it is not essential for the plaintiffs to establish negligence or want of care, in order to make out a cause of action. Sullivan v. Dunham, 161 N. Y. 290.

(NOTE.) The distinction between this case, and that of Losee v. Buchanan, supra, is, that the latter was not a case of an intentional, but of an accidental, explosion.

Q. A was a law book seller, and employed B as porter. B stole certain valuable books, and sold them to C. C, in the usual course of his business, sold them with other books to D. D sells the books to E. A, discovering the facts, without making any demand upon D, sues him in conversion. D had no knowledge of the theft. Can the action be maintained? Give your reasons.

A. Yes. The act of selling the books to E was an unlawful exercise of ownership over A's property, amounting to a conversion, and therefore no demand was necessary. "The assumed sale by the porter of the plaintiffs to Perry was wholly nugatory and conveyed no title. On like grounds, the sale by Perry to the defendants was without effect. They were constructively in possession of the plaintiff's property without the consent of the latter. This exercise of an act of ownership or dominion over the plaintiff's property, assuming to sell and dispose of it as their own, was within reason and the authorities, an act of conversion to their own use. The assumed act of ownership was inconsistent with the dominion of the plaintiffs, and this is of the essence of a conversion. Knowledge and intent on the part of the defendant are not material. So long as the defendants had exercised no act of ownership over the property, and acted in good faith, a demand and refusal would be necessary to put them in the wrong and constitute conversion. Until such demand, there is no apparent inconsistency with their possession and the plaintiff's ownership. After a sale had been made by the defendants, they have assumed to be the owners, and will be estopped to deny in an action by the lawful owner, the natural consequences of their act, and to resist an action for the value of the goods. As according to these views, the conversion took place at the moment of the unauthorized sale by the present defendants, no demand was necessary; the sole object of a demand being to turn an otherwise lawful possession into an unlawful one by reason of a refusal to comply with it, and thus to supply evidence of a conversion." Dwight, C., in Pease v. Smith, 61 N. Y. 477, a leading case.

Q. A brings an action against B to restrain him from operating a furnace, claiming that it is a nuisance, and that the smoke and cinders escaping therefrom annoy him and his family. B defends on the ground that his business is a lawful one, and that he has operated the furnace under the same conditions for the past ten years. Judgment for whom and why?

A. Judgment for A. The length of time and the lawfulness of the business are no defense. "If one carry on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages, and it is not necessary to a right of action that the owner should be driven from his dwelling; it

is enough that the enjoyment of life and property be rendered uncomfortable." Bohan v. P. J. G. L. Co., 122 N. Y. 18.

Q. A mill burns soft coal. A's dwelling is near the mill, and smoke and cinders enter his house, and the vibrations of the machinery are felt there. It also affects all other residents in the locality in the same manner. A brings action in tort for damages. Can he recover, and why?

A. Yes, as he has sustained special damage. "The evidence showed that other houses in the vicinity were affected similarly to those of the plaintiff. The ground of the motion was, that as the stench injured a large number of houses, the nuisance was common, and therefore no one could maintain an action for his particular injury, the only remedy being an indictment for the common injury to the public. The error of this is obvious both upon principle and authority. The idea that if by a wrongful act, a serious injury is inflicted upon a single individual, a recovery may be had, therefore, against the wrongdoer, and if by the same act numbers are so injured, no recovery can be had by any one, is absurd. The rule is, that one erecting and maintaining a common nuisance is not liable to an action at the suit of one who had sustained no damage therefrom, except such as is common to the entire community, yet he is liable to one who has sustained damages peculiar to himself. No matter how numerous the persons may be, who have sustained this peculiar damage, each is entitled to compensation for his injury." Earl, J. in Francis v. Schoellkopf, 53 N. Y. 152. "The mere fact of a business being carried on which may be shown to be immoral, and therefore prejudicial to the character of the neighborhood, furnishes of itself no ground for equitable interference at the suit of a private person; and though the use of property may be unlawful or unreasonable, unless special damage can be shown, a neighboring property owner cannot base thereupon any private right of action. It is for the public authorities acting in the common interest to interfere for the suppression of a common nuisance. If the business is unlawful, the complainant in a private action must show special damage, by which the legitimate use of his adjoining property has been interfered with, or its occupation rendered unfit or uncomfortable. That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law, is not an answer

to an action against him by a private person to recover for injuries sustained, and for an injunction against the continued use of his premises in a similar manner." Gray, J., in Cranford v. Tyrrell, 128 N. Y. 341.

Q. A goes upon B's premises seeking employment as a farm hand. While upon the premises a defective steam boiler explodes and severely injures him. He brings action against B. Can he recover?

A. No. "A person who goes upon the land of another without invitation, to secure employment of the owner of the land, is not entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey. Though it may be shown that the owner might have ascertained the defect by the exercise of reasonable care, he owed no legal duty to a stranger so coming upon his premises which required him to keep the machinery in repair." Larmore v. Iron Co., 101 N. Y. 391.

Q. A brings action against B for negligence. B demurs to A's complaint on the ground that it does not state that the plaintiff was free from contributory negligence, and hence does not state facts sufficient to constitute a cause of action. What should be the decision on the demurrer?

A. The demurrer should be overruled. "It is not essential that the complaint in an action for negligence shall allege the absence of contributory negligence on the part of the plaintiff; such an allegation is substantially involved in the averment that the injury complained of was caused by the defendant's negligence. To prove this averment it is necessary, and the burden is on the plaintiff to establish that his own negligence did not cause or contribute to the injury." Lee v. Troy Gas Co., 98 N. Y. 115.

Q. A child of the age of four years, while playing in the middle of the street, is run over by one of the cars of the X Street Ry. Co. The parent brings action against the company. The company defends on the ground that the child was guilty of contributory negligence. Is this defense good?

A. Yes. "Where a child of such tender age as not to possess

sufficient discretion to avoid danger, is permitted by his parents to be in a public highway without any one to guard him, and is there run over by a traveler and injured, the traveler is not liable. In such an action if the plaintiff is negligent, there can be no recovery, and although the child, by reason of tender age, is incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of the parents and guardians of the child furnishes the same answer to an action by the child as would its omission on the part of the plaintiff in an action by an adult." Hartfield v. Roper, 21 Wend. 615. This case although much criticised is the settled law of this state, and the negligence of the custodian must be imputed to a plaintiff non sui juris. See Mangan v. R. R., 38 N. Y. 455; Huerzeller v. R. R., 139 N. Y. 490.

Q. A was traveling on a public highway when B's building collapsed; a part of the same struck and severely injured him. He brings action against B, and at the trial shows the above facts, and rests. Both sides move for judgment. What should be the ruling of the court?

A. Judgment for A, as negligence is presumed. "The owner of a building adjoining a street or highway is under a legal obligation to take reasonable care that it is kept in proper condition so that it shall not fall into the street and injure persons lawfully there. From the happening of such an accident, in the absence of explanatory circumstances, negligence will be presumed, and the burden is upon the owner of showing the use of ordinary care." Mullen v. St. John, 57 N. Y. 567. See also Hogan v. Manhattan El. Road, 149 N. Y. 23, as to the presumption of negligence arising from the falling of articles from the elevated structure into the streets.

Q. A is a passenger on a train of the Erie R. R. While in the course of the journey, a collision occurs between the train on which he is riding, and a train of the Penn. R. R., through which A receives severe injuries. The engineers of both trains were guilty of negligence. He brings action against the Penn. R. R., which defends on the ground that the engineer of the train on which A was riding was guilty of negligence. Judgment for whom and why?

A. Judgment for A; the negligence of the engineer of the train on which A was riding is not imputable to him. "He was a passenger on the cars, conducting himself as he lawfully ought, having no control over the train or its management; on the contrary, bound to submit to the regulations of the company and the directions of their officers. To say that he is chargeable with negligence because they have been guilty, is plainly not founded on any fact of conduct on his part, but is mere fiction." Chapman v. R. R., 19 N. Y. 341.

Q. A invites B for a carriage ride. They both sit on the seat of the vehicle. Through A's negligence, a collision occurs with another carriage driven by C, the owner; the latter was also guilty of negligence. B sustains severe injuries, and brings action against C. Can he recover?

A. No. "It is no less the duty of a passenger where he has the opportunity to do so, than of the driver to learn of danger and avoid it if practicable. This rule applies where both driver and passenger are on the same seat, and not where the passenger is seated away from the driver and is without opportunity to discover the danger and inform the driver of it." Brickell v. R. R., 120 N. Y. 290.

CHAPTER XX.

Trusts.

Q. A, by his will, leaves certain lands in trust to apply the rents and profits to the use of two persons who are living, and then to convey to Yale College. Is the trust valid?

A. Yes, as the power of alienation is not suspended for more than two lives in being. Sec. 32 of the Real Prop. Law of 1896, governing the suspension of the power of alienation, is as follows: "The absolute power of alienation is suspended, where there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such person may be determined before they attain full age."

Q. A by will devises real property to B, in trust to pay over the rents and profits to C, D and E during their joint lives, and on the death of all, to convey it to F in fee. The instrument also gives power to B sell the land at any time and deliver the proceeds to F. Is it a valid trust? If so, why? If not, why not?

A. Yes, the trust is valid. "Where the trustee is empowered to sell the land, without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the non-action of the trustee, or in consequence of a discretion reposed in him by the creator of the trust. The Statute of Perpetuities is pointed only to the suspension of the power of alienation, and not at all to the time of its actual exercise. Where a

trust for sale or distribution is made, without restriction as to time, and the trustees are empowered to receive the rents and profits pending the sale for the beneficiaries, the fact that the interest of the beneficiaries is inalienable by statute, during the existence of the trust, does not suspend the power of alienation, for the reason that the trustees are persons in being who can at any time convey an absolute fee in possession." Robert v. Corning, 89 N. Y. 225.

Q. A will contains a clause, by which a sum of money is given to a trustee to invest in securities of any kind, and accumulate the profits for a term of twenty years, and then, to pay the fund with income to the children of the testator in equal shares. Is the trust valid?

A. The trust is not valid. The Personal Prop. Law of 1897, sec. 2, provides as follows: "The absolute ownership of personal property shall not be suspended by any limitation or condition for a longer period than during the continuance, and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator, in other respects, limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property." The power of alienation is here suspended during a fixed and arbitrary period of time, suspended by the provision which compels the holding of the estate in the hands of the trustee intact, during twenty years subsequent to the death of the testator, the holding being merely for the purpose of accumulation during that time, of the interest and income. This provision violates the statute in this respect, that the period during which the power of alienation is suspended thereby is not measured by lives. The trust that is created by the provision is not determinable within any two ascertained lives; the trust is not limited by lives, but by a fixed period, and under the statute the trust in order to be valid must be measured by lives. Rice v. Barrett, 102 N. Y. 161.

Q. A dies, leaving a will by which his estate is given to his wife upon certain trusts, the trust being to hold the estate for her use, and the maintenance and support of the children, until the youngest child living at the death of the testator should arrive at

the age of twenty-one, or would arrive at the age of twenty-one if living. This provision is attacked on the ground that it unlawfully suspends the power of alienation. What should the decision be?

A. The provision is void, because an arbitrary time is fixed, the time when the infant if living would have attained the age of twenty-one, during which time the power of alienation is suspended. The period during which the power of alienation is suspended is not measured by two lives, but by any arbitrary and fixed time. In this respect, the provision contravenes the statute, and is therefore void. See 117 N. Y. 433.

Q. A, by his will, leaves his property in trust to his executors, to pay the income to his widow for twenty years, and at the end of that period to divide it among his children. Is the trust valid?

A. The trust is valid. The power of alienation is not suspended for more than one life in being, as the trust terminates if the widow dies before the expiration of the twenty years; for the object of the trust being the payment of the income, would be fulfilled upon her death, and the trust would therefore cease with her life. The trust is therefore measured by her life, and being measured by a life, and not by an arbitrary period of time, comes within the statute, and is therefore valid. Sec. 89 of the Real Prop. Law of 1896 provides as follows: "When the purpose for which an express trust is created ceases, the estate of the trustee shall also cease." The trust is valid under this section, as the widow's death would terminate the trust.

Q. A, by his will, devises his real estate in trust, to keep the property intact, and to accumulate the income until his son C became thirty years of age, and then to give him the property and the accumulated income. At the time A died, C was nineteen years of age. C consults you as to the legal effect of the trust. What is your advice?

A. The trust is valid, until C becomes twenty-one years of age, according to sec. 51 of the Real Prop. Law of 1896, which in part is as follows: "All directions for the accumulation of rents and profits of real property, except such as are allowed by statute,

shall be void. An accumulation of the rents and profits of real property for the benefit of one or more persons may be directed by any will or deed sufficient to pass real property as follows: 1. If such accumulations be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority. 3. If in either case, such direction be for a longer term than during the minority of the beneficiaries, it shall be void only to the time beyond such minority."

Q. A bequeathed his personal estate in trust, and after authorizing the expenditure of a certain sum for the support of a minor child, he directed that the unexpended income should be added to the capital of the trust fund, and that the income of the whole fund should be payable to the child, after reaching the age of twenty-one. The testator then directed that on the death of the child, the whole fund, including the accumulation of unexpended income, should be paid to the other persons named in the will. On becoming of age, the child consults you. What are his rights?

A. The child is entitled to the income given to him by the provisions of the will, as the direction for the accumulation of the income is valid under sec. 4 of the Personal Prop. Law of 1897, which is as follows: "An accumulation of income of personal property directed by any instrument sufficient in law to pass such property is valid: 1. If directed to commence from the date of the instrument, or the death of the person executing the same, and to be made for the benefit of one or more minors then in being, or in being at such death, and to terminate at or before the expiration of their minority. 2. If directed to commence at any period subsequent to the date of the instrument, or subsequent to the death of the person executing it, and directed to commence within the time allowed for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and to terminate at or before the expiration of their minority. All other directions for the accumulation of income of personal property not authorized by statute are void; but a direction for any such accumulation for a longer term than the minority of the persons intended to be benefited thereby has the same effect as if limited to the

minority of such persons, and is void as respects the time beyond such minority."

Q. A, by his will, devises his realty to trustees, to collect the rents and profits, and pay a certain portion for the support of B, his infant son then eight years old, until the infant arrives at age, the remainder of the income to be accumulated until the expiration of B's minority, when the realty and the accumulations are to go to C and D in fee. B died at the age of seventeen. In whom, and when does the legal estate vest, and who is entitled to the accumulations in the hands of the trustees at B's death?

A. The legal estate vests in the remainder-men, C and D, and they are therefore entitled to the accumulations, according to sec. 53 of the Real Prop. Law of 1896, which is as follows: "When in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate."

Q. A father is entrusted with $10,000 by a will, to hold in trust for his infant son. He buys real estate with the money and takes title in his own name. He subsequently sells the same to a third party, who pays full value and has no notice of the fact. The son on becoming of age consults you. What would you advise?

A. He cannot follow the property into the hands of the third party as the latter is a bona fide purchaser; his only remedy is by action against the father. "In courts of equity, the doctrine is well settled and is uniformly applied, that when a person standing in a fiduciary relation misapplies or converts a trust fund into another species of property, the beneficiary will be entitled to the property acquired. The doctrine is illustrated, and applied most frequently in cases of trust, where trust moneys have been, by the fraud or violation of duty of the trustee, diverted from the purposes of the trust, and converted into other property. In such cases, a court of equity will follow the trust fund into the property into which it has been converted, and appropriate it for the indemnity of the beneficiary. It is immaterial in what way the change has been

made, whether money has been laid out in land, or land has been turned into money, or how the legal title to the converted property has been placed. Equity only stops the pursuit, when the means of ascertainment fail, or the rights of bona fide purchasers for value and without notice of the trust have intervened." Newton v. Porter, 69 N. Y. 133. Sec. 75 of the Real Prop. Law of 1896 shows that the son in this case cannot claim that a trust for his benefit resulted in the property as against the bona fide purchaser. This section provides as follows: "An implied or resulting trust shall not be alleged or established, to defeat or prejudice the title of a purchaser for a valuable consideration without notice of the trust."

Q. A gives his attorney, B, $5,000, to invest in bond and mortgage. B takes the money, and purchases a piece of land with it, taking title thereto in his own name. What are A's rights?

A. A can compel a conveyance to himself, as a trust resulted in his favor, according to sec. 74 of the Real Prop. Law of 1896, which is as follows: "A grant of real property for a valuable consideration to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands, but the title vests in the grantee, and no use or trust results from the payment to the person paying the consideration or in his favor, unless the grantee either, 1. Takes the same as an absolute conveyance in his own name, without the consent or knowledge of the person paying the consideration, or 2. *In violation of some trust purchases the property so conveyed with money or property belonging to another.*"

Q. A father, with the intention of defrauding his creditors, purchases a certain piece of property for $5,000, but by his direction the deed is drawn in the name of his son. Subsequently, he demands that the son convey the land to him, and upon the son's refusal, brings an action in equity, alleging that the son at the time of the transaction, agreed with him that he would convey the property whenever the father so desired. Judgment for whom and why?

A. Judgment for the son. "Voluntary conveyances are effectual

as between the parties, and cannot be set aside by the grantor, though he afterwards becomes dissatisfied with the transaction. Where land is purchased by a father and paid for by him, but the conveyance is made to his son, by the direction of the father, for the purpose of defrauding the creditors of the latter, no trust will result in favor of the father, in consequence of his having paid the consideration money; but as between the father and the son, and those claiming under the father, the conveyance is absolute and vests in the son the entire legal and equitable interest." Proseus v. McIntyre, 5 Barb. 424. "A deed in fee may not be so far contradicted by parol, as to show that it was not intended to operate at all, or that it was the intention or agreement of the parties that the grantee should acquire no rights under it, or that he should reconvey on request of the grantor and without consideration." Hutchins v. Hutchins, 98 N. Y. 56.

Q. A executed and delivered to a N. Y. Trust Co. a deed of trust to his real estate, the income of which he directed should be paid to him during his life, and at his death the property should be conveyed to persons designated in his will, or to his heirs-at-law in case no such persons are designated. Thereafter A becomes indebted to B for $10,000. B obtains judgment against A for the $10,000; execution is returned unsatisfied. What is the nature and effect of the trust deed, and what are the rights of B?

A. The trust is void and B can follow the property. A person will not be allowed to put his property in trust with remainder over, reserving to himself the life interest subject to the expenses of the trust, and thereby put the life interest beyond the reach of creditors whose claims arose after the creation of the trust. A trust created by the debtor, and by which he is the beneficiary, does not protect his interest from the claims of creditors. Schenck v. Barnes, 156 N. Y. 316.

Q. A is a trustee of an estate. He puts $5,000 of the trust funds in a bank, together with $5,000 of his own money. The entire amount was credited to him personally. The bank fails. No fraud is charged against the trustee. Is he liable to the estate for the loss sustained?

A. The trustee is liable. "A strict observance of established rules requires that trust funds received for investment, in the ab-

sence of any discretion in the matter, shall be invested as speedily as it is reasonably possible, in the modes which the law recognizes to be prudent and proper. While awaiting investment or distribution, it is manifestly in the line of the more correct performance of the trustee's duty, that he shall place and hold them separately and apart from his own funds. If he fail to do so, and loss ensues, he becomes personally liable." Matter of Nesmith, 140 N. Y. 609.

Q. For what purposes may trusts be created in this state?

A. Trusts may be created for the four purposes mentioned in sec. 76 of the Real Prop. Law of 1896, which is as follows: "An express trust may be created for one or more of the following purposes: 1. To sell property for the benefit of creditors. 2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon. 3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto. 4. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by law."

Q. A goes to the X Savings Bank, and opens an account in the name of B. A does not inform B of what he has done, nor does he, at the time of making the deposit, make any statement or declaration to the receiving teller beyond giving his name, address, etc. A subsequently dies intestate, and his heirs and B both claim the money. Who is entitled to it? State your reasons.

A. The heirs are entitled to the money. "While a deposit in a savings bank by one person of his own money, in the name of another, is consistent with an intent on the part of a depositor to give the money to the other, it does not alone, unaccompanied by any declaration of intention, authorize a finding that the deposit was made with that intent, at least where the deposit was to a new account, and the depositor received and retained a pass-book, the possession and retention of which, by the rules of the bank, known to the depositor, is made the evidence of a right to draw the deposit." Beaver v. Beaver, 117 N. Y. 421.

Q. A recovers judgment against B. B has no property, except

the income of a trust fund which he receives under the provisions of a will made by his father. A issues execution on his judgment, and the execution is returned unsatisfied. He consults you as to whether or not he can reach the trust fund. What would you advise him?

A. He can reach the sum in excess of the amount necessary for B's support and education, according to sec. 78 of the Real Prop. Law of 1896, which is as follows: "Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors, in the same manner as other personal property which cannot be reached by execution."

CHAPTER XXI.

Wills and Administration.

Q. A, nineteen years of age, makes a will leaving all her personal property to her brother Thomas, and all her real property to her brother John. This will is attacked on the ground of the infancy of the testatrix. Is the will good? How far good, if good at all?

A. As to the personal property, the will is good, but as to the real estate, the will is not good, being made by a minor. The law of this state is that an infant cannot make a will of real estate. As to personal property, the will of a male of eighteen years or over, and of a female of sixteen years or over, is valid. See Birdseye's Rev. Stat. title Wills.

Q. Objections had been duly filed to the probate to the last will and testament of B, on the ground that at the time of its execution, B was of unsound mind and incompetent. A, who was not a witness to the will, and who was a non-professional and not an expert, but of unusual intelligence and very familiar with the acts and conduct of B, was called as a witness to show the competency of B. How, and to what extent, can his opinion be given in evidence on the question involved? Answer fully.

A. In this state A would be merely allowed to testify to acts of the testator observed by him, and to characterize them as rational or irrational, and give the impression produced thereby on his mind. But he would not be allowed to state his opinion as to the testator's sanity or insanity. "Where non-professional witnesses, who did not attest the execution of a will, are examined as to matters within their own observation, bearing upon the competency of the testator, they may characterize, as in their opinion, rational or irrational, the acts and declarations to which they testify, but the examination must be limited to their conclusions from the specific facts they disclose, and they cannot be permitted to express their

opinions on the general question whether the mind of the testator was sound or unsound. An exception to this rule is admitted in the case of attesting witnesses, whose testimony relates to the condition of the testator at the very time of executing the will, and who may well retain a recollection of the general result of their observation after the particular circumstances have been effaced by lapse of time." Clapp v. Fullerton, 34 N. Y. 490.

Q. A was an invalid and lived with B for several years preceding his death. He was attended and nursed by B with great care and attention. He told B that he would provide for him in his will as a reward for his kindness. A, by his will, leaves most of his property to B. The relatives of A contest the will on the ground of undue influence. It does not appear that B coerced or forced A into making the will. Shall probate be granted? Answer fully.

A. Probate should be granted, as the facts do not show undue influence. "To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like—these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition and not the record of some one else's." Hall v. Hall, L. R. 1 P. & D. 481. The tests given in this case, as to what constitutes undue influence, have been adopted in this state. See Tyler v. Gardner, 35 N. Y. 559; Matter of Budlong, 126 N. Y. 423.

Q. A person is about to execute his will. The instrument is ready for execution, and you are called in to advise the proper formalities. What are they?

A. Sec. 8 of the Statute of Wills provides as follows: "Every last will and testament, of real or personal property, or both, shall be executed and attested in the following manner: 1. It shall be subscribed by the testator at the end of the will. 2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses. 3. The testator at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament. 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator." It is important for the witnesses to observe the provisions of sec. 9 which are as follows: "The witnesses to any will shall write opposite to their names, their respective places of residence, and every person who shall sign the testator's name to any will at his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who will sue for the same. Such omission shall not affect the validity of any will, nor shall any person liable to the penalty aforesaid be excused or incapacitated on this account, from testifying respecting the execution of such will."

Q. What are nuncupative wills, and by whom, and under what circumstances, can such wills be made?

A. Sec. 7 of the Statute of Wills provides as follows: "No nuncupative or unwritten wills bequeathing personal estate shall be valid, unless made by a soldier while in actual military service, or by a mariner while at sea." It should be observed that a nuncupative will is an oral will, and can only be made bequeathing personal property.

Q. A was the captain and owner of a coasting vessel. On a certain day, when the vessel was lying at anchor in Delaware Bay inside the breakwater, about a mile from land, he was taken suddenly sick on board and died. Just before his death, he told several witnesses that he wished his wife to have all his property. He did not make any request to them to bear witness that it was his will. The wife applies for probate, as of a nuncupative will.

The father of A contests the same, claiming that A died intestate. Should probate be allowed?

A. Yes. "The testator was a mariner within the meaning of the statute. A nuncupative will may be made by the master of a coasting vessel whilst on his voyage, though then lying at anchor in an arm of the sea where the tide ebbs and flows. It is enough that the testator, in prospect of death, state his wishes in answer to questions what disposition he desires to make of his property; it is not requisite that he should request those present to witness that such is his will." Hubbard v. Hubbard, 8 N. Y. 196.

Q. A wrote his own will, and taking it to his friends told them that it was his last will and testament, and asked them to witness it. They signed their names as witnesses to the will. Immediately afterwards A signed the will in the proper place, and gave it to one of his friends to keep it for him. One of the relatives of A objects to its admission to probate. What are his rights?

A. Probate should be denied. In this state, the witnesses must sign after the testator has signed, for the fact that the testator has signed is one of the things which the witness is to attest. "It is essential to the due execution of a will, that the witnesses, who are to attest the subscription and publication thereof by the testator, should sign the same after the subscription by him." Jackson v. Jackson, 39 N.Y. 153.

Q. A drew his will upon a printed blank which was folded in the middle, so as to make four consecutive pages. The attestation clause was at the top of the second page, and the will was executed at that point by the testator and the subscribing witnesses. The third page contained further dispositions of property. The third page was numbered "two," and the second page "three," the draftsman having passed to the third page after he had filled the first. Objections are raised to the admission of the will to probate. What should be the decision of the surrogate?

A. The will should be refused probate, as it was not properly executed. "The will was not subscribed by the testator 'at the end of the will' as required by the statute. The doctrine of incorporation cannot be successively invoked, so as to read into such will the alleged second page, as the result would be to permit an invasion of the statute." Matter of Andrews, 162 N. Y. 1.

Q. A makes his will and calls in two subscribing witnesses. He covers up part of the will, and tells the witnesses that because of certain things contained in it, he does not care to let them see it. He tells them that he has signed it, but they cannot see his signature. The witnesses subscribe in the proper place. The will is offered for probate. Objected to. What should be the decision?

A. The will should be denied probate, as it was not properly acknowledged. "There would undoubtedly have been a formal execution of the will, in compliance with the statutes, if the witnesses had at the time seen the signature of the testator to the will. Subscribing witnesses are required by law, for the purpose of attesting and identifying the signature of the testator, and that they cannot do, unless at the time of the attestation they see it. And so it has been held in this court. . . . A signature neither seen, identified, or in any manner referred to as a separate and distinct thing, cannot in any just sense be said to be acknowledged by a reference to the entire instrument by name to which the signature may, or may not be at the time subscribed. The formalities prescribed by the statute are safeguards thrown around the testator to prevent fraud and imposition. To this end, the witnesses should either see the testator sign his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature." Earl, J., In re Mackay's Will, 110 N. Y. 611.

Q. A wrote his will and called in B and C to witness it. After subscribing it, he showed them his signature on the instrument, saying to them: "I declare the within to be my free act and deed." B and C thereupon subscribed their names to the instrument. The witnesses did not know that the paper was a will. Objections are raised to the probate of the will. What should the surrogate do?

A. Probate should be refused. "It will not suffice that the witnesses have elsewhere and from other sources learned that the document which they are called to attest is a will, or that they suspect and infer from the circumstances that such is the character of the paper. The fact must in some manner, although no particular form of words is required, be declared by the testator in their presence, that they not only know the fact, but that they may know it from him, and that he understands it, and at the time

of its execution, which includes publication, design to give effect to it as his will, and to this, among other things, they are required by statute to attest. The declaration that the instrument was his free will and deed, was equivocal, and would be satisfied by a deed executed voluntarily. It did not necessarily inform the witnesses that it was a will by excluding every other instrument from the mind. From the expression they could not know that the testator did not suppose the instrument was a deed." Allen, J., in Lewis v. Lewis, 11 N. Y. 220.

Q. A wrote his will and summoned two friends to his house for the purpose of witnessing it. They came there, saw the testator subscribe his name, and signed their names as witnesses. Before doing so, one of them asked the testator if he requested him to sign the will as a witness; to which he answered in the affirmative. Both the witnesses then proceeded to sign, the testator and the witnesses all being at one table, and in close proximity to each other. Objection is raised to the probate of the will on the ground that there was not a proper execution. What should be the decision?

A. The will was properly executed, and should be admitted to probate. "Now, the statute, it is true, declares that each witness must sign on such request. But the manner and form in which the request must be made, and the evidence by which it must be proved, are not prescribed. We apprehend it is clear that no precise words, addressed to each of the witnesses at the very time of the attestation is required. Any communication importing such request, addressed to one of the witnesses in the presence of the other, and which, by a just construction of all the circumstances, is intended for both, is, we think sufficient. . . . In thus requiring both the witnesses to be present, and in thus answering the interrogatory addressed to him by one of them, we think that he did, in effect, request them both to become the subscribing witnesses to the instrument." Comstock, Ch. J., in Coffin v. Coffin, 23 N. Y. 9.

Q. A signed his will in the presence of the draftsman and the witnesses. B, the draftsman, then, in the presence of testator and witnesses, said to the witnesses that the paper A signed was his will, and that he wished them to sign it as witnesses. The wit-

nesses then signed the instrument in the proper place. The testator made no dissent, took the will, and thereafter retained it. It is now offered for probate. Should probate be granted?

A. Yes. There was a valid request to sign. The request need not be made by the testator himself, but can be made by another on his behalf, if the testator assent thereto. Here the conduct of the testator indicated his assent. Gilbert v. Knox, 52 N. Y. 125.

Q. A will is signed by the testator, and mailed to each of the witnesses, who sign their names at the end of the will, and return the same to the testator. In the letter accompanying the will, he declares the paper enclosed, which he has already subscribed, is his last will and testament, and requests them to sign and attest the same as witnesses. The will is offered for probate. Should probate be allowed?

A. Yes. In this state, the statute does not require the witnesses to sign in the testator's presence, and as all the other requisites to a valid execution were present, the will should be admitted to probate. Rudden v. McDonald, 1 Bradf. (N. Y.) 352; Vernam v. Spencer, 3 Bradf. 16.

Q. A will is signed by the testator, whose witnesses do not sign in the presence of each other. An objection is made to its admission to probate, as not being a valid will. Is the objection good?

A. The objection is not good, and the will should be admitted to probate. In this state, the statute does not state that the witnesses must sign in the presence of each other, therefore when they sign their names at the end of the will at the request of the testator, it is sufficient. Hoysradt v. Kingman, 22 N. Y. 372.

Q. Draw an attestation clause to a will.

A. "Signed, published and declared by the above named testator, as and for his last will and testament, in the presence of us, and of each of us, who at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as subscribing witnesses this day of .

"John Brown, Residing at No. 100 Fifth Ave., N. Y. City.

"Thomas Jones, Residing at No. 85 Fifth Ave., N. Y. City."

(NOTE). It is to be observed, that it is not necessary to have an attestation

clause at all, but it is useful for the purpose of proving the will. While the above is the usual form, nevertheless, as we have already seen, it is not necessary for the witnesses to sign in each other's presence, or in the presence of the testator.

Q. The will of A is offered for probate. There was a full attestation clause, but the two witnesses both denied all its allegations, and also denied that they had signed it. Should probate be allowed?

A. Yes, if the signatures of the witnesses be proved to be their handwriting. "To believe this evidence, requires us to suppose that the testator deliberately forged the names of witnesses to his will, at a time and under circumstances when it was just as convenient for him to have obtained their genuine signatures thereto. It is quite unreasonable to supppose that such a person having drawn and signed a will, and having added thereto a proper attestation clause, should have provided witnesses therefor, and required them to sign a certificate to the effect that each of the required formalities had then been observed, without also providing for their actual performance. He had knowledge of the necessity of the act required, to the validity of the business he was then transacting, and to hold that he omitted it would oblige us to ascribe to him the intention of performing a vain and useless ceremony at the expense of time and labor to himself, and the commission of a motiveless crime." Ruger, Ch. J., in Matter of Cottrell, 95 N. Y. 329.

Q. You are the attorney for the proponents of a will, in which one of the subscribing witnesses is dead, and the other does not remember the transaction. What would you do to have the will admitted to probate.

A. Sec. 2620 of the Code of Civ. Pro. governs a case like this and is as follows: "If all of the subscribing witnesses to a written will, are, or if a subscribing witness, whose testimony is required, is dead, or incompetent by reason of lunacy or otherwise, to testify, or unable to testify; or if a subscribing witness is absent from the state; or if such a subscribing witness has forgotten the occurrence; or testifies against the execution of the will; the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also such other

circumstances as would be sufficient to prove the will upon the trial of an action."

Q. A draws his will, B and C becoming the subscribing witnesses thereto. B receives a legacy of $1,000 by the will. The will is offered for probate, and B is called to testify to its execution. His testimony is objected to. Is he a competent witness? What effect, if any, has the fact of his becoming a witness upon his legacy?

A. B loses his legacy, but is nevertheless a competent witness, according to sec. 18 of the Statute of Wills, which is as follows: "If any person shall be a subscribing witness to the execution of any will, wherein any devise, bequest or legacy . . . shall be made to such witness, and such will cannot be proved without the testimony of such witness, such devise, bequest or legacy shall be void, so far only as concerns such witness or any one claiming under him, and such person shall be a competent witness and compellable to testify respecting such execution of said will in like manner, as if no such devise, bequest or legacy had been made." Sec. 19 is called attention to, and is as follows: "But if such witness would have been entitled to any share of the testator's estate in case the will was not established, then so much of the share that would have descended, or would have been distributed to such witness, shall be saved to him as will not exceed the value of the devise or bequest made to him by the will, and he shall recover the same from the devisees and legatees in proportion."

Q. A makes his will. Subsequently he writes on a paper that he revokes his will as he is not satisfied with its provisions, tells no one of this paper and encloses the same in an envelope. Both the will and the paper are found after A's death. The will is offered for probate. Should probate be allowed?

A. The will should be admitted to probate, as there was no revocation. "The statute is just as rigid on the subject of written revocations, as in regard to the execution of wills. A revocation in writing, to be valid, must be "executed with the same formalities with which the will itself was required by law to be executed." The testator might have revoked by burning, tearing, cancelling, obliterating, or destroying; but he selected the mode of revocation by writing, and has failed in accomplishing his object for want of

the necessary formalities." Nelson v. Public Admr. 2 Bradf. 210. The statute governing the revocation of a will is as follows: "No will in writing, except in the cases hereinafter mentioned, shall be revoked or altered otherwise than by some other will in writing, or by some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed, or unless such will be torn, burnt, cancelled, obliterated, or destroyed with the intent, and for the purpose of revoking the same, by the testator himself, or by another person in his presence by his direction and consent, and when so done by another person, such direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses."

Q. A, who is unmarried, makes her will leaving all her real and personal property to her mother. She subsequently marries and dies. The will is offered for probate. What should the surrogate do?

A. The will should be refused probate, as the statute provides that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage." This statute has been held good in the face of the Married Women's Acts in Brown v. Clark, 77 N. Y. 369, where it is said: "The statute does not make the marriage a presumptive revocation, which may be rebutted by proof of a contrary intention, but makes it operate eo instanti as a revocation."

Q. B, the widow of A, makes her will leaving all her property to her brother John. She subsequently marries C and dies, leaving him surviving. The executor appointed in the will offered the instrument for probate but was opposed in his proceedings by C. What should be the decision of the court?

A. The will should be denied probate, as it was revoked by the marriage of B with C. The will of a widow is revoked by her subsequent marriage. "The unmarried woman referred to by the statute must be defined according to that rule of statutory construction which requires that the words used in legal enactment shall be understood and taken in their ordinary and familiar significance. So read, the unmarried woman of the statute is the woman who is not in a state of marriage." Gray, J., in Matter of Kaufman, 131 N. Y. 620.

Q. A, the wife of B, makes a will leaving all her property, both real and personal, to her sister. Subsequent to the making of the will, B dies. A thereafter marries C, and dies leaving him surviving. The will is offered for probate. C contests. What should be the decision?

A. The will should be admitted to probate. A will made by a married woman is not deemed revoked by her marrying again after an intervening widowhood. Matter of McLarney, 153 N. Y. 416. It will be observed that the will here was made by a woman who was *married* at the time she executed it.

Q. A makes a will leaving all his property to his brother. He afterwards marries, has a child, and dies. The will is offered for probate. Should probate be allowed?

A. Probate should be denied, as the will was revoked by the testator's subsequent marriage, and the birth of the issue. Sec. 11 of the Statute of Wills provides as follows: "If after the making of any will disposing of the whole estate of the testator, such testator shall marry and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall have been provided for in the will or in such way mentioned therein, as to show an intention not to make such provision, and no other evidence to rebut the presumption of such revocation shall be received."

Q. A has $30,000 in government bonds. He makes a will in 1899, whereby he leaves $20,000 to his wife, and the rest to his only child. In 1900 he has another child born to him, and dies in 1901, not having made any change in his will, and not mentioning the second child in anyway. Will the birth of the second child affect the will, and if so, how?

A. The birth of the second child results in a partial revocation of the will, so as to give the post-testamentary child the share he would have taken had the testator died intestate. This is provided for in sec. 17 of the Statute of Wills, which is as follows: "Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and

shall die leaving such child so after born, unprovided for by any settlement, and neither provided for, nor in anyway mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate; and shall be entitled to recover the same portion from the devisees and legatees, in proportion to, and out of the parts devised and bequeathed to them by such will."

Q. A, whose estate amounts to $100,000, leaves $60,000 to Hobart College, and the rest of his property to his children. The children attack the bequest to the college. Is the bequest good? How far good, if good at all?

A. The bequest to the college is good for $50,000, according to sec. 25 of the Statute of Wills, which is as follows: "No person having a husband, wife, child, or parent, shall by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts; (and such devise or bequest shall be valid to the extent of one-half and no more)." See Jones v. Kelley, 170 N. Y. 401.

Q. A makes his will, in which he gives a bequest of $5,000 to his nephew John. Becoming displeased with the nephew's actions, he takes the will and draws lines through this bequest, intending thereby to revoke the same. What effect, if any, has this upon the will?

A. This has no effect whatever on the will, as under the New York Statute, there cannot be a revocation of a part by obliteration. Lovell v. Quitman, 88 N. Y. 377.

Q. A makes a will, devising his house and lot to his son John. Subsequently he sells the same, and deposits the proceeds ($10,000), in a bank in his own name, but apart from his own funds, and leaves it intact. He dies. What would you advise as to John's rights?

A. He has no rights whatever, as the devise was revoked by the sale of the house and lot. "If a testator devises real property, and sells the same before the will takes effect, the proceeds of the

sale will become personalty, and no court can substitute the money received by the testator for the land devised." Gray, J., in Ametrano v. Downs, 170 N. Y. 388.

Q. A devises a certain house to B, and thereafter sells the same to C, taking back a purchase money mortgage for $5,000. At A's death, B claims the amount of the mortgage. What are his rights?

A. B has no rights to the mortgage. "Where a lot is specifically devised, and afterwards sold by the testator to a third party, the sale operates quoad hoc as a revocation of the gift, and the devisee acquires no interest in a mortgage given to secure the whole or any portion of the purchase money." McNaughton v. McNaughton, 34 N. Y. 201.

Q. A makes his will, and places it among his papers. After his death, although diligent search is made, the will cannot be found. The executor named therein attempts to prove the contents thereof as a lost will. What presumption, if any, is there?

A. Where a will previously executed cannot be found after the death of the testator, it having remained in his custody during his lifetime, there is a strong presumption that it was destroyed by him animo revocandi. Collyer v. Collyer, 110 N. Y. 481. "If the will had remained in the custody of the testator, or it had appeared after its execution, he had had access to it, the presumption of law would be, from the fact that it could not be found after his decease, that the same had been destroyed by him animo revocandi. But that presumption is entirely overcome and rebutted, when it appears, as it did in the present case, that, upon the execution of the will, it was deposited by the testator with the custodian, and that the testator did not thereafter have it in his possession or have access to it." Davies, Ch. J., in Shultz v. Shultz, 33 N. Y. 653.

Q. A makes a will in 1895, and in 1897 makes a second will, which by its terms expressly revokes the former. At the death of A, the will of 1897 cannot be found, and the beneficiaries of the will of 1895 attempt to have the will of 1895 admitted to probate. Should probate be allowed?

A. No. Where a will is revoked by the execution of a second will, which provides that all previous wills of the testator are there-

by revoked, the first will will not be revived by the fact that after the testator's death, the second will cannot be found. In re Forbes's Will, 24 N. Y. Supp. 841; Matter of Barnes, 70 App. Div. 523. Sec. 53 of the Statute of Wills provides: "If after the making of any will, the testator shall duly make and execute a second will, the destruction, cancellation or revocation of such second will shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will; or unless after such destruction, cancellation or revocation, he shall duly republish his first will."

(NOTE.) A will that has been revoked by a later one which was destroyed by the testator will not be revived by his statement that he desires his first will to stand, made to others than the subscribing witnesses, and where the person to whom such statement was made, did not subscribe as a witness to the will. Republication requires the same formalities as publication itself; therefore a will which has been revoked can be revived only by its republication in the presence of its subscribing witnesses. Matter of Stickney, 161 N. Y. 42.

Q. A man and his wife make a joint will, each devising their entire estate to each other. Is it valid? Can either revoke without the other's consent? If so, what is the effect on the other unrevoking party?

A. The will is valid and revocable by either party. "A mutual will executed by husband and wife, devising reciprocally to each other, is valid. Such an instrument operates as a separate will of whichsoever dies first." Matter of Diez, 50 N. Y. 88. "A joint will is revocable at any time during the joint lives by either testator, so far as relates to his own disposition, upon giving notice to the other, but becomes irrevocable after the death of one of them, if the survivor takes advantage of the provisions made by the other." 29 Am. & Eng. Ency. of Law, 138.

Q. A devises certain property to his son B. B dies before the testator, leaving a son, C, surviving. Thereafter A dies. The next of kin of A, and C both claim the property. Who is entitled to it?

A. The devise does not lapse, but goes to C. It would have been otherwise, if A had left the property to a stranger, but not to his son. Sec. 20 of the Statute of Wills, covering this case, provides as follows: "Whenever any estate, real or personal, shall be

devised or bequeathed to a child or other descendant of the testator, and such legatee or devisee shall die in the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and died intestate."

(NOTE.) This provision applies only to descendants, and a widow of a deceased son does not take. Cook v. Munn, 12 Abb. N. C. 344.

Q. A devises his house and lot and $10,000 to B. He leaves all the rest, residue and remainder of his estate to C. B dies before A, the testator. At A's death, the executors claim B's devise. C also claims it, and D claims it as next of kin of B. B was no relative to the testator. How is the estate to be divided, and in what shares?

A. C gets all the estate, both real and personal, the devise and bequest to B having lapsed by his death, he being no relative to the testator. "The common-law rule that lapsed devises do not fall into the residue, but go to the heirs as undisposed of by the will, was done away with by the Statute of the Wills, and there is now no difference between lapsed devises and lapsed legacies, as it respects the operation upon them of a general residuary clause." Cruikshank v. Home for the Friendless, 113 N. Y. 358. The rule now, therefore, is, that both lapsed legacies and devises go to the residuary devisee and legatee.

Q. A father by his will gives a legacy to two children, B and C, on condition that the same shall be void if they contest his will. They both contest, B being of full age, and C a minor by her guardian. What is the effect of the contest by both? Is the provision in the will valid?

A. The provision in the will is valid as to the adult, but invalid as to the minor, and the effect would be to forfeit the legacy to B. As to the minor, the condition was void as against public policy; it is, however, a valid provision as to the one of full age. The testator having a right to say to whom his property shall be bequeathed and devised, has also the right to attach a condition to any gift that the recipient thereof shall not contest the probate of the will. Bryant v. Thompson, 59 Hun, 549.

Q. A dies, leaving a valid will, but naming no executor therein. Is the will vaild? How would it be carried into effect, if valid?

A. The will is valid, and will be carried into effect by the appointment of an administrator with the will annexed, according to sec. 2643 of the Code of Civ. Pro.

Q. A makes his will appointing an executor therein. A dies, and the executor refuses to act. What should be done?

A. Application should be made for the appointment of an administrator with the will annexed. Sec. 2643 of the Code of Civ. Pro.

Q. The executor of a will in the state of New Jersey discovers personal property in this state belonging to the testator. He comes to you for advice. What would you advise him to do?

A. He should apply for ancillary letters testamentary, according to sec. 2695 of the Code of Civ. Pro.

Q. Testator appoints B as his executor, "granting to said executor and his successor full power to sell real estate." B refuses to qualify, and an administrator with the will annexed is appointed. Can he sell the real estate?

A. Yes. He has the same power as the executor would have had, and all sales made by him shall be equally valid as if they were made by the executor named in the will. Sec. 2642 of the Code of Civ. Pro.

Q. A died intestate, leaving mortgaged realty. B is the only heir-at-law. B demands that the administrator pay off the mortgage. What are his rights? State the rule.

A. The administrator cannot be compelled to pay off the mortgage, according to sec. 215 of the Real Prop. Law of 1896, which is as follows: "When real property subject to a mortgage executed by any ancestor or testator descends to an heir, or passes to a devisee, such heir or devisee must satisfy and discharge the mortgage out of his own property without resorting to the executor or administrator of his ancestor or testator, unless there be an express direction in the will of such testator that such mortgage be otherwise paid."

Q. The will of A gives the legal title of all his property both real and personal, to different legatees and devisees, but there is an obscurity as to the identity of some of the parties intended to take the real estate. B, who claims to be one of the devisees, commences an action for the judicial construction of the will, making the other devisees and legatees defendants. The executor and the other beneficiaries demur, on the ground that the facts do not constitute a sufficient cause of action. Is the demurrer good?

A. The demurrer is good. The proper action to be brought, is an action by the alleged devisee to recover the devise which he claims. This action should be brought as a legatee or devisee against the executor, according to sec. 1819 of the Code of Civ. Pro.

Q. It is provided in the will of A, that his personal property should be distributed amongst his next of kin, according to the statute providing therefor. He leaves a widow, two nephews and a niece. The widow claims one-third as her share. What are her rights? How should the property be divided?

A. The widow gets nothing; the property must be divided equally among the nephews and the niece. "A provision in a will directing generally that the personal property of the testator shall be distributed as provided by statute in case of intestacy, where the testator leaves a widow, will entitle her to be included in the distribution, although not specially mentioned, but when the distribution is by the terms of the will confined to the next of kin, the reference to the statute simply gives the rule of distribution among the next of kin, as if there is no widow, and she is not included." Luce v. Dunham, 69 N. Y. 36.

Q. A, by will, devises to his executors in trust, a certain piece of real estate with instructions to sell it immediately after his death, and divide the proceeds between his sons, B and C. A few days after his death, and before the sale of the real estate, B dies leaving a wife and son surviving. How would the property descend? Give the rule governing such a state of facts.

A. This is a case of equitable conversion, and the property must be divided as personal property, C receiving one-half, and the other

half being divided between B's wife and son, the wife receiving one-third and the son two-thirds, according to sec. 2732 of the Code of Civ. Pro., which in part is as follows: "If the deceased died intestate, the surplus of his personal property after payments of debts; and if he left a will, such surplus, after the payment of debts and legacies if not bequeathed, must be distributed to the widow, children, or next of kin, in the manner following: 1. One-third part to the widow, and the residue in equal portions among the children, and such persons as legally represent the children if any of them have died before the deceased."

Q. A, the wife of B, obtains a divorce from him for his misconduct. B subsequently dies leaving $5,000 in personal property. A claims a distributive share of the property. What are her rights?

A. She is not entitled to any share of his personal property, as she is no longer his wife. "A divorced wife, whether the divorce was granted because of misconduct of herself or her husband, is not entitled, if he die intestate, to administration or to a distributive share of his personal estate." Matter of Ensign, 103 N. Y. 234.

Q. A dies, devising his entire property to his only son, X, and appointing his father, X's grandfather, the general guardian. A's widow consults you as to her rights. Advise her.

A. She has the right of dower in A's realty; he could not cut this off by will. He had full power, however, to bequeath his personalty, and therefore she has no rights in the personal property.

Q. A died, leaving him surviving five children of a deceased son, and one son of a deceased daughter, his only heirs-at-law. How is his property distributed among the grandchildren?

A. Both real and personal property would be divided equally among them. Sec. 282 of the Real Prop. Law of 1896 states the rule as to the real property, and is as follows: "If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts, however remote from him the common degree of consanguinity may be." Sec. 2732, par. 10 of the Code of Civ. Pro., governs the distribution of the personal property, and is as

follows: "Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal."

Q. A dies intestate, leaving him surviving a son and two grandchildren, the children of a deceased daughter. What respective shares have each of them in the real and personal property of A?

A. The son is entitled to one-half, and the grandchildren receive the share of their mother, which is one-half, to be divided between them. Sec. 283 of the Real Prop. Law of 1896 governs the disposition of the real property, and is as follows: "If any of the descendants of such intestate be living, and any be dead, the inheritance shall descend to the living, and the descendants of the dead, so that each living descendant shall inherit such share, as would have descended to him, had all the descendants in the same degree of consanguinity who shall have died leaving issue, been living, so that the issue of the descendants who shall have died, shall respectively take the shares which their ancestor would have received." Sec. 2732, par. 11 of the Code of Civ. Pro., as to the personalty, is as follows: "When such descendants or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled."

Q. A makes a will, leaving one-third of his realty to his wife, and the residue and remainder to be divided equally between his sons, C who is unmarried, and B who is married. A dies, and one hour after the probate of his will, his son B dies. B leaves no children. The property consists of $30,000 in money, and 400 acres of land. How should this be divided?

A. The personalty not being mentioned in the will, A must be deemed to have died intestate as to that, and therefore the personal property must be distributed according to the Statute of Distribution. A's widow would get one-third, C would also get one-third, B's one-third would be divided between his widow, his mother, and C, the widow receiving one-half, and the mother and C dividing the other half equally between them. Sec. 2732, par. 2 of the

Code of Civ. Pro. provides as follow: "If there be no children, nor any legal representatives of them, then one-half of the whole surplus shall be allotted to the widow, and the other half distributed to the next of kin of the deceased, entitled under the provisions of this section." Par. 6 is as follows: "If the deceased leave no children and no representatives of them, and no father, and leave a widow and a mother, the half not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother, and to the brothers and sisters, or the representatives of such brothers and sisters." The real property would be distributed in the following manner: Assuming the provision to be in lieu of dower, the widow will get one-third, C will also get his one-third, and B's one-third will be divided as follows: B's widow will get dower, a life estate in one-third of B's share, and the remainder of B's share will be divided as follows: To the mother for life, remainder in fee to C. This last is according to sec. 285 of the Real Prop. Law of 1896, which is as follows: "If the intestate die without descendants, and leave no father . . . and leave a mother and a brother or sister, or the descendant of a brother or sister, the inheritance shall descend to the mother for life, and the reversion to such brothers and sisters of the intestate as may be living, and to the descendants of such as may be dead. . . . If the intestate in such case leave no brother or sister or descendant thereof, the inheritance shall descend to the mother in fee."

Q. A dies intestate, leaving $4,000 in personal property. He leaves him surviving a widow and two brothers, but no children. How should the property be distributed?

A. The widow is entitled to the whole $4,000, according to sec. 2732, par. 3 of the Code of Civ. Pro., which is as follows: "If the deceased leave a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to one-half of the surplus as above provided, and to the whole of the residue if it does not exceed $2,000; *if the residue exceeds that sum, she shall receive in addition to the one-half*, $2,000; and the remainder

shall be distributed to the brothers and sisters and their representatives."

Q. A, an unmarried female, dies leaving certain real property, which she acquired through her own industry. She made no will. She left her surviving a father and two brothers. How should the property be divided?

A. The father alone takes the property in fee. As it did not come to the intestate on the part of the mother, but was acquired by her own industry, the brothers have no rights thereto. This case is governed by sec. 284 of the Real Prop. Law of 1896, which is as follows: "If the intestate dies without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the inheritance descending on her part shall go to the father for life, and the reversion to such brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided."

Q. A dies intestate, leaving him surviving a father and a widow but no children. His personal property amounts to $10,000. How should the same be distributed?

A. The widow and father each get one-half according to sec. 2732, par. 7 of the Code of Civ. Pro., which is as follows: "If the deceased leave a father and no child or descendant, the father shall take one-half if there be a widow, and the whole, if there be no widow."

Q. A, the wife of B, dies intestate leaving her husband and a child surviving. Her personal property amounts to $50,000. What are the rights of the husband and child?

A. The husband is entitled to one-third, and the child to two-thirds of the property, according to sec. 2734 of the Code of Civ. Pro., which is as follows: "The provisions of this article respecting the distribution of property of deceased persons apply to the personal property of married women dying, leaving descendants them surviving. The husband of any such deceased married woman shall be entitled to the same distributive share in the personal property of his wife to which a widow is entitled in the personal property of her husband by the provisions of this article and no more."

Q. A, a married woman dies intestate leaving $50,000 in personal property. She leaves no descendants, but leaves a brother, a sister, and a husband. How should the property be distributed?

A. The husband takes all. As there are no descendants, sec. 2734 of the Code does not apply. "Where a married woman possessed of a separate personal estate, dies without having made any disposition of it in her lifetime, or by way of testamentary appointment, the title thereto vests in her surviving husband, and cannot be affected by the granting of administration upon her estate to any one else." Robbins v. McClure, 100 N. Y. 328. See also Barnes v. Underwood, 47 N. Y. 351.