QUESTIONS AND ANSWERS

FOR

BAR-EXAMINATION REVIEW

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TO

THE DEAN AND PROFESSORS

OF

THE HARVARD LAW SCHOOL,

to whom the authors are most deeply indebted,

THIS BOOK IS DEDICATED.

PREFACE.

The preparation of this book was suggested a number of years ago by the actual work of a general review preparatory to the examinations for admission to the New York Bar. The very marked changes in the methods of Bar Examiners had, at that time, first become manifest, and it was thought that a book for review which was prepared in accordance with the change in the nature of the examination questions would be desirable.

The present theory of the Boards of Examiners of the different States was expressed by a member of the New York Board in 1895, when he felt called upon to explain the difference in the form of questions from that of previous years; "We want to see if you can *apply* legal principles." A student is no longer asked to define a partnership, or a corporation, but is required to state the rights or the liabilities of the parties in a given case. This more exacting method of examination requires a more careful review than was formerly necessary when the questions had become almost stereotyped.

In preparing the present book no effort has been made to follow any questions asked by former examiners in any State, and no old examination papers have even been consulted. On the contrary, every effort has been made to write a book which should not, in any sense, be a "cramming book," but would simply assist a student to make the needed review of his past work. It is believed that a book which aids in an honest and thorough review of the legal principles previously acquired occupies a legitimate field.

But a review presupposes former study. The present book has not been written with the least expectation that it would be of interest or of value to laymen who wish to read the elementary principles of the common law. It is for the law student, who has previously done the work, that the book has been prepared.

The utmost care has been taken to do the work in such a way as to make the book of equal value in all of the States of the

country. Citations have been chosen from all jurisdictions, and where there is a conflict between the different States upon any material point, the conflict has been noted, and the opposing jurisdictions given, as far as possible. English cases, also, have been cited, but only where such citations were believed to be of value in this country. In many subjects, such as Real Property and Sales, the leading cases are frequently to be found in the English reports.

The cases cited should be read as far as such a course is feasible. A large proportion of them are from the cases selected for use at the Harvard Law School as a result of long experience and painstaking search, and they will be found to be of the greatest value.

The debt which the authors owe to the professors of the Harvard Law School is most gladly acknowledged. To them is due any value which the present work may have. The collections of cases made by them have been freely used; the text-books written or edited by them have been freely quoted, and the notes of their lectures have been a constant assistance. It is only hoped that the book may, in some degree, reflect the spirit of their instruction.

September 15, 1899.

C. S. H.
A. M. M.

PREFACE TO THE SECOND EDITION.

The ten years which have passed since the publication of the first edition have demonstrated the fact that some new subjects should be added to make the book more complete. This work has been done, and in the present edition the subjects of Bankruptcy, Domestic Relations, Suretyship, Perpetuities and Restraints on Alienation have been added. The article on the New York Code has also been revised to conform to the amendments passed since 1899.

The increased duties of active practice have made it impossible for the authors to prepare this new material without a delay which seemed undesirable, and they desire to express their indebtedness to Mr. John W. Griffin, of the New York Bar, for his assistance in writing the articles on Suretyship, Perpetuities, and Restraints on Alienation and in revising the article on the New York Code; to Mr. John W. Banks, of the Connecticut Bar, for his assistance in preparing the article on Bankruptcy, and to Mr. David S. Day, of the Connecticut Bar, for his assistance in preparing the article on Domestic Relations.

The authors wish also to make acknowledgment of their indebtedness to the professors at the different law schools for their encouragement. The belief that a book of this kind had a legitimate field has been justified by the approval of legal instructors who are known the country over for the singleness of their purpose to train their students thoroughly, and to equip them as fully as possible for the exacting work of the profession. The approval of such critics has made the years spent upon the original work a very pleasant memory, and the acknowledgment of help from the younger men, who have put the book to a practical test, has been scarcely less encouraging.

It is hoped that the enlarged edition may be still more helpful to the students of the present day in preparing themselves — not only for the passing of their Bar examinations, but for the successful and useful accomplishment of their life work.

March 25, 1909.

C. S. H.,
A. M. M.

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QUESTIONS AND ANSWERS

FOR

BAR EXAMINATION REVIEW.

AGENCY.

I. What Acts Cannot be Done by an Agent.

1. *A. is made a trustee for the management of certain property. Can he delegate the performance of any of his trust duties to an agent?*

The rule is absolute that a trustee has no power of delegation, i. e., he cannot delegate the performance of any act which requires his personal discretion. It is his personal qualification that has caused his selection as trustee. Merrill v. Trust Co., 24 Hun (N. Y.), 297, 299.

Where the acts are merely clerical, however, and require no discretion, delegation by a trustee is possible.

2. *A. is required in an action to make a certain affidavit. Can it be sworn to by B., A.'s agent?*

If A. is a corporation the affidavit must, of necessity, be made by an agent, but if A. is an individual, the text-books usually state that he must swear to the affidavit personally. The authorities quoted are not numerous, however.

Pool v. Webster, 3 Met. (Ky.) 278, sustains this view, and Flake v. Day, 22 Ala. 132, is *contra*. The question should be one of substance. If personal credit is required, then it is certainly correct to hold that an agent cannot act. If, however, the affidavit is one of mere form, then the agent should be competent. In almost every State there is a statute allowing an agent to take an oath for his principal.

II. Who May be a Principal.

3. *Can an insane person, a minor or a married woman be a principal?*

An insane person cannot, as he is unable to act for himself, and so cannot appoint an agent. Stead v. Thornton, 3 B. & Adol. 357, note.

As to an infant, the law is settled by the weight of authority that he cannot be a principal, and that the appointment of an agent by him is void. Mechem on Agency, §§ 51-55. The soundness of this view, however, is well questioned by the same author. Id., § 55. Certainly, the infant would be amply protected if the appointment were simply voidable, as in the case of contracts. Towle v. Dresser, 73 Me. 252, 256, and Whitney v. Dutch, 14 Mass. 457, support this view and seem sound.

In so far as a married woman has statutory capacity to act, she can act through an agent, even if the latter be her husband. Bodine v. Killeen, 53 N. Y. 93.

III. WHO MAY BE AN AGENT.

4. *A. authorized B., his slave, to act for him. Is A. bound by such action? Suppose B. is an infant? a married woman?*

A slave may be an agent. Chastain v. Bowman, 1 Hill (S. C.), 175.

Both an infant and a married woman may also be agents. Mechem on Agency, §§ 59-61. These illustrations show that the ability to contract in one's own right is not necessary for a capacity to act as an agent.

IV. CONFERRING AUTHORITY TO EXECUTE INSTRUMENTS UNDER SEAL.

5. *A. draws a deed and gives his agent parol authority to fill up certain blanks. Would the deed be valid?*

If the blanks were not material, the parol authority would be sufficient. Vose v. Dolan, 108 Mass. 155. But if the blanks were material, parol authority to fill them up would not be sufficient in jurisdictions where the seal has not been abolished by statute. Where such statutes have not been passed, the old rule still obtains that an authority to execute an instrument under seal must also be under seal. Mechem on Agency, § 93. Many of the western States, however, have abolished seals, and in such jurisdictions the seal will be disregarded and the instrument treated as a simple contract for which parol authority is sufficient. Id., § 95.

V. CONFERRING AUTHORITY GENERALLY.— ACTUAL AND INCIDENTAL AUTHORITY.

6. *A., a tailor, hired B. to carry on a branch store. B., without authority, paid his doctor's bill in clothes. Could A. recover from the doctor?*

Yes. B. had authority to do anything which would be usual in the conduct of the business, but he had no authority to bind A. when using A.'s goods for private purposes. Such an authority could in no way be implied from that actually given. Stewart v. Woodward, 50 Vt. 78.

7. *A. appoints B. his general agent to sell his horses, telling him specially not to warrant the soundness of one particular horse. B. does warrant that horse. Could A. be held for breach of warranty?*

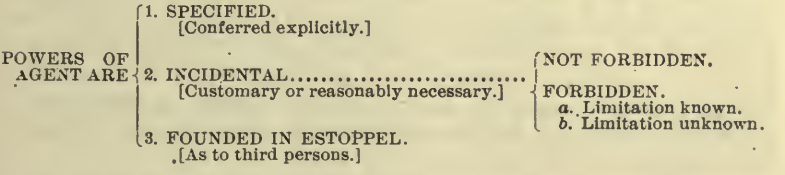
Yes. B. had the incidental authority to warrant the horse, i. e., such authority was reasonably to be implied from his general authority to sell, and the purchaser could rely upon B.'s apparent authority unless the limitation was actually known. A principal cannot free himself from liability by secret instructions to his agent. Howard v. Sheward, L. R. 2 C. P. 148, 151.

8. *A.'s agent, a ship captain, signed a bill of lading when, in reality, the goods had never been received. Would A. be bound by his agent's acts, if sued by an innocent third party?*

In the United States, by the best authority, he would be. Where a principal gives his agent authority to do an act upon the existence of some extrinsic fact, peculiarly within the knowledge of the agent and of the existence of which the act of execution is itself a representation, the principal is then estopped to deny the truth of his agent's representation to one who has dealt with the agent, in good faith, in reliance upon the representations. Bank of Batavia v. R. R. Co., 106 N. Y. 195; New York, etc., R. R. Co. v. Schuyler, 34 id. 30, 53; Sioux City, etc., R. R. Co. v. Bank, 10 Neb. 556.

In England, however, the law is settled *contra*, and A. would not be bound. Grant v. Norway, 10 Com. Bench, 665; Coventry v. Railroad Co., 11 Q. B. Div. 776.

The powers of an agent in general may be shown by the following diagram:



As has been shown by the previous answers, incidental authority is that which a man would reasonably infer to be implied by the giving of the powers which are conferred explicitly. Whether incidental authority exists in a certain case is, therefore, a question of fact for the jury. Brady v. Todd, 9 C. B. (N. S.) 592. Incidental authority is as *actual* as any other, and as has also been shown, any limitation of it must be known to the third party in order to affect his rights.

VI. SUBSTANTIAL PERFORMANCE OF AUTHORITY.

9. *A. gave B., his agent, authority to sign a note for him, payable in six months. B. signed a note payable in sixty days. Is A. liable?*

No. The agent had no authority of any kind to sign a note for sixty days. Batty v. Carswell, 2 Johns. (N. Y.) 48. A special power must be followed strictly.

10. *A. ordered fifty cases of goods through B., his agent. B. shipped forty-nine, being all that he could get. Can A. refuse the goods? Suppose B. had shipped one hundred cases?*

A. could not refuse the forty-nine cases. Such a shipment was a substantial performance of B.'s authority. He would have an incidental authority to deviate from the exact orders to a reasonable extent. Lathrop v. Harlow, 23 Mo. 209.

When an agent exceeds his directions two questions arise: (1) had he, by incidental authority, power to do the whole, and (2) is the contract severable. If the agent had no power to do the whole, as he would not have to buy one hundred cases, A. could not be held at all, unless the purchase of one hundred cases could be severed into two or more contracts, one of which substantially complied with the order for fifty cases as given. If that could be done, A. would be bound as to that part.

VII. SUBSTITUTION.— DELEGATING AUTHORITY.

11. *A., an executor, employs B. to act in his place. What, if any, would be A.'s liability for B.'s negligence or misconduct?*

A. would be absolutely liable. Where personal trust is placed in an agent, such as an executor, he has no right to delegate his power, nor to substitute another in his stead. Mechem on Agency, § 189.

12. *Under what circumstances may an agent delegate his authority, and what are his liabilities after such delegation?*

An agent may delegate his authority (1) when the acts to be performed are mechanical or ministerial only; (2) where necessity requires it, as the employment of an attorney, if an agent is directed to bring suit; (3) where such delegation is customary; (4) where it was originally contemplated. Mechem on Agency, §§ 192-196.

After delegating his authority, the agent is in no way liable for the misdeeds of the sub-agent, providing he has used due care in his selection. In that case the sub-agent is directly responsible to the principal. If due care has not been used, however, the agent will be liable for the injury arising from the negligent delegation. Mechem on Agency, § 197.

13. *The A. bank is given a note payable in a distant city, and sends it to the B. bank for collection. The B. bank negligently fails to collect. Is the A. bank liable?*

In most jurisdictions, it is held that this is a case where delegation is necessary, and, therefore, that the A. bank would not be

liable, if it had exercised due care in selecting the B. bank. The courts are not unanimous, however, and it is held in New York, Michigan, Ohio, New Jersey, Montana, Indiana, the United States Supreme Court and in England that the A. bank would be liable. In these jurisdictions the A. bank is considered as an independent contractor, which selects its own agents and is liable for their default. Mechem on Agency, § 514. See Trusts, Ques. 6.

VIII. RATIFICATION.

a. Generally.

14. *An agent with authority to draw checks, drew one for an unauthorized purpose. The principal ratified the agent's act, and then stopped payment of the check on the ground that there was no consideration for his ratification. Would he be liable?*

Yes. Ratification needs no consideration. It is not a contract, but an adoption of an act which would have been good if there had been authority. Commercial Bank v. Warren, 15 N. Y. 577.

15. *The Statute of Frauds requires that a contract for the sale of goods shall be signed by a duly authorized agent of the party to be charged. If an agent makes and signs an unauthorized contract and his principal then ratifies, has the statute been satisfied?*

Yes. For the purposes of the statute the ratification of the principal relates back to the time of the contract, and the memorandum is good *ab initio*. Maclean v. Dunn, 4 Bing. 722.

16. *B.'s agent X., acted without authority, and C., wishing to profit by the contract made by X., ratified it. Who would be liable on the contract, B. or C.?*

Neither would be liable; B. because he never ratified, and C. because he could not ratify. Ratification is only possible by the person from whom the agent expected to get his authority. Wilson v. Tumman, 6 Man. & G. 236.

17. *A. forges B.'s name. Can B. ratify the forgery?*

The authorities are divided. Maine, Massachusetts, Connecticut, Illinois, Missouri and New York hold that a forgery can be ratified. See Greenfield Bank v. Crafts, 86 Mass. 447. England, Pennsylvania, Ohio, New Hampshire, Maryland and Indiana say that a forgery cannot be ratified. See Brook v. Hook, L. R. 6 Exch. 89; Workman v. Wright, 33 Ohio St. 405. As a strict question of principle, the latter view seems better. As said in Brook v. Hook (*supra*), ratification applies only when the party pretends to act under authority, and a forger never represents himself as an

agent, nor intends to act as one. The whole basis of ratification is the idea that there is a principal who can ratify.

18. *B. acts for a corporation about to be formed, and after the incorporation the company ratifies B.'s act. Is the ratification good?*

No. Ratification relates back to the time of the original act, and there must be a principal who could act at that time. The existence of the principal at the time of the ratification merely is not enough. Kelner v. Baxter, L. R. 2 C. P. 174.

19. *A. makes an unauthorized contract in the name of his principal, who dies before ratifying. Can the administrator ratify?*

No. There can be no ratification after the death of the party for whom the act was done. Whiting v. Ins. Co., 129 Mass. 240.

20. *A., an agent, made an unauthorized purchase of goods from B. C. attached these goods as the property of B., and then A.'s principal ratified his purchase? Who has a right to the goods?*

They belong to C. Ratification does not relate back so as to defeat the rights of intervening parties. Pollock v. Cohen, 32 Ohio St. 514.

21. *Can a principal revoke a ratification?*

No. When a principal once makes an election, that is final. Beall v. January, 62 Mo. 435, 439; Jones v. Atkinson, 68 Ala. 167.

b. Time of Ratification.

22. *A. insures B.'s ship without authority. B. ratifies after he learns of the loss of the ship. Can he hold the insurance company?*

Yes. Ordinarily, a principal must have the power to make the contract himself at the time of ratification, but in cases of marine insurance, the exception is established that ratification after loss is good. Finney v. Ins. Co., 46 Mass. 192. See also Williams v. Ins. Co., L. R. 1 C. P. Div. 757, 764. In Canada this exception is carried into cases of fire insurance. Ogden v. Ins. Co., 3 U. C. C. P. 497, 511.

23. *An agent made an unauthorized contract with a third party, who then rescinded before the principal had had an opportunity to ratify. The principal did ratify as soon as he learned of the contract. Could he hold the third party?*

No. Before ratification the third party has a perfect right to rescind, and after rescission there is nothing left for the principal to ratify. Walter v. James, L. R. 6 Ex. 124.

24. *A., an agent, makes an unauthorized contract with B. The principal ratifies A.'s act, but B. then refuses to abide by the contract. Is he bound?*

By the authorities, such a contract is held not to be binding. Dodge v. Hopkins, 14 Wis. 630, 636; Mechem on Agency, § 179. The argument is that, as the principal is not bound until ratification; the third party cannot be bound until he assents to the ratification. This reasoning, however, overlooks the fact that the third party did assent to the contract originally, and, on principle, his assent should continue, as it would in the case of an offer, until it is rescinded. According to the authorities in the above situation, ratification is an impossibility. There must be an entirely new contract.

c. Attempt to Ratify in Part.

25. *A.'s agent contracted to sell B. negotiable paper falsely representing that it was good. A. sues B. for the contract price and argues that his agent's fraud is no defense, as it was not authorized? Is the argument good?*

No. An agent's acts cannot be ratified in part and repudiated in part. By suing, A. ratified all his agent's acts, including the fraud, whether authorized or not. Elwell v. Chamberlin, 31 N. Y. 611, 619.

d. Oral Ratification of Instrument under Seal.

26. *An agent, without authority, conveyed his principal's land by deed. The principal ratified the agent's sale by parol, and now seeks to rescind? Can he do so?*

Yes. When an instrument under seal is executed by an agent, his authority must be given by an instrument also under seal, and parol ratification is no better than parol authority. Stetson v. Patten 2 Me. 358; Zimpelman v. Keating, 72 Tex. 318. This rule has been generally relaxed, however, in partnership cases, allowing parol ratification by one partner of an instrument sealed by a copartner. Peirce v. Weber, 47 Ill. 41, 45. And in Massachusetts it is held that the sealing of any instrument may be ratified by parol. McIntyre v. Park, 77 Mass. 102, 106. This is very extreme, however, and is nowhere followed.

e. Ratification without Full Knowledge.

27. *A.'s agent makes a contract which A. ratifies before he knows all of the facts of the case. On learning them, he repudiates. Would his previous ratification bind him?*

No. Ratification, to be binding, must be with full knowledge of all the material facts. Coombs v. Scott, 94 Mass. 493, 497; Walker v. Walker, 5 Heisk. (Penn.) 425, 429.

f. As to What Constitutes Ratification.

28. *A. ordered his agent to buy goods in Boston. The agent bought in New York and notified A., who said nothing for several days, until he was informed that the goods had been lost. He then repudiated the agent's purchase. Could he do so?*

No. Silence, though not ratification, may be such strong evidence of it that the inference is necessary, as it is in this case. A principal cannot hold his peace to bide the event. Ratification is a question of fact, and a man who will not speak must let a jury construe his silence. Foster v. Rockwell, 104 Mass. 167, 172. He cannot lie by and seize the benefit of a contract if profitable, or renounce it if otherwise, at his election. Phila., etc., R. R. Co. v. Cowell, 28 Penn. St. 329.

Even when the *quasi* agent is a mere meddler, the silence of the principal is admissible evidence of ratification, though not very weighty. Heyn v. O'Hagen, 60 Mich. 150, 157. Contrary to this, however, is Ward v. Williams, 26 Ill. 447.

29. *An agent made an unauthorized contract. The principal told a party not interested in the contract that he had ratified it. Would that alone be a good ratification?*

Yes. Ratification is simply a case of election, and all that you need to prove is that the election was made, as shown by some act to anyone. Upton v. Stunbridge Mills Co., 111 Mass. 446; Bishop on Contracts, §§ 777-783, 803, 808, 844.

30. *A.'s friend (not an agent) sells and delivers A.'s goods to B. without authority, and while doing so, breaks B.'s window. A. knowing this, sues for the value of the goods. Has he ratified the tort as well as the contract?*

Yes. A. has ratified the *relation* of principal and agent and the liability for the tort is incidental to the relation. Dempsey v. Chambers, 154 Mass. 330.

31. *An agent, without authority, brings suit in his principal's name. The principal ratifies after service of the pleadings. Is the suit well begun?*

Yes. It is held that the ratification relates back and that the suit is good *ab initio*. Ancona v. Marks, 7 Hurl. & N. 686. This view is generally followed in the United States.

But see Wittenbrock v. Bellmer, 57 Cal. 12. In that case the plaintiff sued upon a note which was assigned to him by an agent without authority, and it was held that a ratification after the suit was begun was unavailing.

IX. MODE OF EXECUTING AUTHORITY.— FORM OF SIGNATURE.

a. Contracts under Seal.

32. *Action against B., C. and D. on bond signed "B., C. and D., trustees of X. society," and sealed by them respectively. Are B., C. and D. liable personally?*

Yes. In spite of the evident intention of the parties, the seals are not those of the society, and the addition of the words "trustees," etc., will not free the parties from personal liability. The words are treated by the court as merely descriptive. Taft v. Brewster, 9 Johns. (N. Y.) 334. To bind the principal the sealed instrument must purport to be signed and sealed by the principal. The proper way to have signed the above bond would have been, "The X society (seal) B., C. and D., trustees."

In the case of public officers, however, the town or city is charged where an intention to do so is shown, though the signature and seal are those of the officer. Hodgson v. Dexter, 1 Cranch, 345; Knight v. Clark, 48 N. J. Law, 22. But see Brown v. Bradley, 156 Mass. 12, *contra*, holding that there is no distinction between public and private agents.

b. Negotiable Paper.

33. *A note, "Thirty days from date I promise to pay* $1,000," *signed "J. S., agent of A. B." Who is liable on the note? Suppose it had been signed "J. S., agent for A. B."*

If the signature was "J. S., agent of A. B.," the liability would rest on J. S. alone. "Agent of A. B." is treated only as description by the courts. Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101, 104. If, however, the signature was "J. S., agent for A. B.," A. B. would be held liable. The two expressions are not held to be identical. Mechem on Agency, § 432. In Colorado, even "agent for" is not held to bind the principal.

The general rule is well stated in Tucker Mfg. Co. v. Fairbanks (*supra*), "In order to exempt an agent from liability upon an instrument executed by him, within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal is bound, and the

agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal, or to exempt the agent from personal liability."

34. *A check is drawn "Pay to order of A. B., cashier" (of a bank), and indorsed by him. Is A. B. liable personally as indorser?*

No. Where negotiable paper is made payable to an agent of a corporation, *as such*, it is treated as payable to the principal, and an indorsement, "A. B., cashier," is held to be an indorsement by the principal. If the check had been payable to A. B. *individually*, he would have been liable on the indorsement. Bank v. Bank, 29 N. Y. 619; Mechem on Agency, § 439.

c. Simple, Written and Oral, Contracts.

35. *A contract recited that "H., S. and N., as committee of the town of W.," agreed to pay for certain work. Could they be held personally liable for the payment?*

Yes. The test is the intention of the parties, as shown by the contract, but a mere description as "agents" or "committee" is not enough to free the agents from personal liability. Simonds v. Heard, 40 Mass. 120; Brown v. Bradley, 156 id. 28.

The same rule applies to oral contracts. Worthington v. Cowles, 112 Mass. 30.

X. LIABILITY OF A PRINCIPAL FOR THE TORTS OF HIS AGENT.

a. When the Relation of Principal and Agent Exists.

36. *A. gave certain work to an independent contractor and assigned B., one of his ownemployees, to work for the contractor. C., another one of A.'s employees, was injured by B. Could C. recover from any one?*

Yes, from the contractor. When B. began working under the orders of the contractor, he was the contractor's servant and no longer the fellow-servant of C. In cases of tort the man is liable as principal, who has the *right of control* over the servant doing the injury. Rourke v. Colliery Co., L. R. 2 C. P. D. 205; Johnson v. Boston, 118 Mass. 114.

37. *A. was injured by B.'s cart. B.'s servant was not driving at the time, but was on the cart and had allowed a friend to drive. Is B. liable for the injury?*

Yes. In such cases the friend is looked upon as the instrument through which the servant acted, and the master is held. Booth v. Mister, 7 Car. & P. 66; Althorf v. Wolfe, 22 N. Y. 355, 360.

38. *A warehouse caught fire and B.'s goods were burned. Several servants of the warehousemen not connected with the warehouse were about the premises and could have put the fire out easily if they had acted promptly. Is the warehouseman liable for the loss?*

No. The servants committed no tort by refraining from putting out the fire. They were not agents for that purpose; therefore, the defendants are not chargeable with their neglect. Aldrich v. R. R. Co., 100 Mass. 31.

b. What Acts are within the Scope of the Agency.

39. *A.'s servant, a truckman, after finishing A.'s business, deviates from the way home for his own personal purposes, and on the road runs over B. Is A. liable for the injury?*

No. To hold the master, the servant must have been doing the master's business at the time. Here the servant was doing his own business. It is a question of degree, however, how much of a deviation from the proper road will put a servant beyond the scope of his employment. A very slight deviation would not. Story v. Ashton, 10 Best & Smith, 337. Whether or not a servant is acting within the scope of his employment is a simple question of fact.

40. *The driver of A.'s delivery wagon drives upon a sidewalk partly for the purpose of delivering goods and partly to injure the walk. Is A. liable for the injury?*

Yes. Where the servant has a mixture of motives, if one of them is to do the master's business, the master is liable, unless the means adopted is beyond reason. Howe v. Newmarch, 94 Mass. 49.

Even when the special act done is actually forbidden, if the servant is doing the master's business, the master is liable for any injury. As where an engineer in running his locomotive disregards orders. R. R. Co. v. Derby, 14 How. 468, 487.

There are three phases of the acts of agents:

I. Where the servant intends to act for his principal.

II. Where there is a mixture of motives, one to act for the master and another to act for himself. The independent motive may be benevolent as well as malicious.

III. Where there is no intention of acting in the course of the master's service.

Each of these phases may have three subdivisions:

1. Where the act does facilitate the master's business.

2. Where it might have been supposed to be in the course of the employment if it had not been prohibited.

3. Where the act could not be supposed to be in the course of employment, whether prohibited or not.

The master is liable for his agent's torts, in I, 1 and 2, II, 1 and 2, and not liable in I, 3; II, 3; and III, 1, 2 and 3. Where there is no intention of acting in the master's business he cannot be held, even if the act did benefit him.

41. *A.'s agent, without authority, but in the course of his employment as bookkeeper, makes false representations by which B. is injured. Can A. be sued in tort for deceit?*

Yes. The master should be as liable for the deceit of his servant as for any other tort, and that is the general rule. White v. Sawyer, 82 Mass. 586; Barwick v. English, etc., Bank, L. R. 2 Ex. 259; Bennett v. Judson, 21 N. Y. 238. There has been a good deal of conflict, however, about holding a master for deceit, and the law in England is still in doubt. Udell v. Atherton, 7 Hurl. & N. 172. And in New Jersey the principal is held not to be liable for the deceit of his agent. Decker v. Fredericks, 47 N. J. Law, 469. Deceit does differ from other torts in that it must be relied upon by the third party in order to give a right of action. Fraudulent representations are often, of necessity, so involved with the master's business as to make him liable, though the agent was serving his own ends.

c. The Independent-Contractor Doctrine.

42. *What is the difference between an independent contractor and an agent?*

The difference is in the amount of control which the principal possesses. In the case of an agent, the principal has the right to direct every individual step. A contractor, however, acts in the "course of an independent occupation, representing the will of the employer only as to result of the work, and not as to means by which it was accomplished." Hexamer v. Webb, 101 N. Y. 377, 383; R. R. Co. v. Hanning, 15 Wall. 649, 657; Lawrence v. Shipman, 39 Conn. 586.

43. *Under what circumstances, if any, is a principal liable for the torts of a contractor?*

(1) If X. employs Y., a contractor, and Z. is damaged by the result which X. sought, X. is liable.

(2) If X. employs Y. to produce a given result and the only means of producing it are necessarily injurious, X. is then liable.

(3) If X. is under a duty to Z. and employs Y. to perform it, he is liable for Y.'s failure.

(4) In all other cases the principal is not liable for the torts of a contractor. Mechem on Agency, §§ 747, 748; Lawrence v. Shipman, 39 Conn. 586, 589; Storrs v. City of Utica, 17 N. Y. 104; Sturgis v. Theological, etc., Society, 130 Mass. 414.

XI. As to Criminal Liability of a Principal for Acts of an Agent.

44. *Can a principal be held liable criminally for the acts of his agent?*

Ordinarily he cannot, as a criminal intent is almost invariably necessary for criminal liability. The only exceptions are (1) where a principal is indicted for nuisance, as the obstructing of a road by his agent, in which case, however, the offense is nearer a tort, Reg. v. Stephens, L. R. 1. Q. B. 702; and (2) where a statute has been passed in such a form that masters are made criminally liable though personally innocent, as in case of a sale of liquor to improper persons. George v. Gobey, 128 Mass. 289; People v. Roby, 52 Mich. 577.

XII. Liability of Principal for Injury Occasioned to a Servant by the Act of a Fellow-Servant.

a. Generally.

45. *The X. railroad company allows the Y. railroad company to run on its tracks. A. is hired by the X. company to act as switchman for trains of both companies, and is injured by the negligence of a brakeman of the Y. company. Can he recover?*

Yes. The X. company is the one which could exact obedience from A., and, therefore, he is its servant, and only employees of that company are his fellow-servants. Had A. and B. been fellow-servants, no recovery would have been possible. Swainson v. Ry. Co., 3 Exch. Div. 341.

The principle that a master is responsible for the torts of his agent is not extended to injury by fellow-servants. This "fellow-servant rule" though only sixty years old, is universally accepted. The reasons for its original introduction were those of supposed justice to the master, in that the servant could protect himself, if he would, by restraining his fellow-servant, or remonstrating with his master. This reasoning, however, has lost what little force it may ever have had, in these days when a servant of a large company doesn't even know who his fellow-servants are.

It has been frequently stated that a servant contracts to run the risks from the negligence of his fellow-servants when he enters the employment. Farwell v. R. R. Co., 45 Mass. 49, 57. This is a mere fiction, however, as clearly appears in a case where a servant doesn't know who his fellow-servants are. He can't agree to a risk when he doesn't know of its existence. The application of the rule depends simply upon a question of fact, whether men are fellow-servants or not. Johnson v. Lindsay, L. R. 23 Q. B. Div. 508.

The rule goes so far as to hold that a mere volunteer, assisting a ser-

vant, cannot recover from the master, if injured. Flower v. Penn. R. R. Co., 69 Penn. St. 210; Ry. Co. v. Bolton, 43 Ohio St. 224. See *contra*, Althorf v. Wolfe, 22 N. Y. 355.

46. *A. and B. are fellow-servants. B. injures A.'s wife negligently. Can A. recover from their common master for the loss of his wife's services?*

Yes. The fellow-servant rule is not extended beyond personal injury suffered by a fellow-servant. Gannon v. R. R. Co., 112 Mass. 234.

b. Who is a Servant within the Meaning of the Fellow-Servant Rule.

47. *A. worked for a railroad company, and part of the consideration of his hiring was that he should be carried by defendant's train to the shops. When being so carried he was injured by a brakeman. Would the company be liable?*

No. Though A.'s hours of work had not begun when injured, it is held that the conveyance was incident to the employment and that the parties were fellow-servants. Vick v. R. R. Co., 95 N. Y. 267; Seaver v. R. R. Co., 14 Gray, 446. Had A. actually paid his fare, the result would be contrary, and in Pennsylvania it is held that A. is not a fellow-servant in either case. O'Donnell v. R. R. Co., 59 Penn. St. 239, 247.

In order to make men fellow-servants, they need not be doing the same kind of work. It is enough "if they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purposes." Laning v. R. R. Co., 49 N. Y. 521, 528; R. R. Co. v. Lewis, 33 Ohio St. 196, 199; Crispin v. Babbitt, 81 N. Y. 516, 521; Beach on Cont. Neg. (1st ed.), §§ 110, 116; Mechem on Agency, § 668; McKinney on Fell.-Serv. 165.

c. Vice-Principal — *Alter Ego.*

48. *X., a common laborer in a mill, is injured by the negligence of his superintendent. Are the two fellow-servants, or can X. recover from the millowner?*

By the best view, they are fellow-servants and X. cannot recover. Their grade does not make them the less fellow-servants. Howells v. Landore Steel Co., L. R. 10 Q. B. 62; Crispin v. Babbitt, 81 N. Y. 516, 520; McKinney on Fell.-Serv., § 58, collecting N. Y. cases. Compare Houser v. R. R. Co., 60 Iowa, 230.

A so-called vice-principal rule has obtained in some jurisdictions, however, where it is held that a man in authority is the principal's "*alter ego*," and when an employee is injured by the vice-principal's

negligence, he may recover from the principal. This theory has been adopted in Illinois, Iowa, Kentucky, Missouri, Nebraska, New York, North Carolina, Ohio, Pennsylvania, Tennessee and Virginia. See Lewis v. Seifert, 116 Penn. St. 628; Hardy v. R. R. Co., 36 Fed. Rep. 657; Little Miami R. R. Co. v. Stevens, 20 Ohio, 415, 431; Malone v. Hathaway, 64 N. Y. 5, 9. But see Brick v. R. R. Co., 98 N. Y. 211. The rule in the United States Supreme Court is doubtful. Compare R. R. Co. v. Ross, 112 U. S. 377,* and R. R. Co. v. Baugh, 149 id. 368.

The weakness of this vice-principal rule is shown in that it does not work both ways, as the superintendent is treated as a fellow-servant so as to bar his recovery from the master if injured by other servants of lower grade, even though he is not a fellow-servant if he injures them.

d. Duty of Principal to Supply Suitable Appliances.

49. *The plaintiff, an engineer, was injured by the defects in his locomotive, which were known to the road superintendent. Can he recover from the railroad company?*

Yes. It is the duty of the master to use all due care in supplying proper tools and appliances for a servant. This duty is not lessened by delegating it to others, and any negligence by the master or his agents, either of high or low degree, in furnishing appliances, makes the master liable. The master, however, is not an insurer; and where it is proved that there has been no negligence on his part or on the part of the agent delegated to supply the appliances, there is no liability. Hough v. Ry. Co., 100 U. S. 213; Ladd v. R. R. Co., 119 Mass. 412.

It is to be noticed as above stated, that this duty to furnish safe appliances is not affected by the fellow-servant rule. Ford v. R. R. Co., 110 Mass. 240, 255.

The same duty rests upon the master to furnish a proper place for the servants to work in. Anderson v. Bennett (Or.), 19 Pac. Rep. 765; Manning v. Hogan, 78 N. Y. 615; McKinney on Fellow-Servants, 72.

e. Duty of Principal to Select Competent Agents and to Provide Sufficient Number of Them.

50. *A. was injured by the negligence of a fellow-servant, who, however, was not a fit person to do the work to which he had been assigned. Can A. recover?*

Yes. The duty of the master to furnish proper fellow-servants is the same as that to furnish proper appliances, requiring due care on his part. Wabash Ry. Co. v. McDaniels, 107 U. S. 454; Tarrant v. Webb, 18 C. B. 797.

*Since the publication of this book, the U. S. Supreme Court has overruled the Ross case, and has practically declared against the vice-principal rule. New England R. R. Co. v. Conroy, 175 U. S. 85.

f. Agent's Knowledge of Defects.

51. *A. goes into an employment knowing of certain defects in the machinery. Can he recover if injured through such defects? Suppose the defects arise after he enters the employment?*

If the agent knows of the defects when he enters the employment, he accepts the risk and cannot recover later. Gibson v. Erie Ry. Co., 63 N. Y. 449.

If the defects arise later, he also takes the risks if, knowing of them, he says nothing. If he remonstrates and changes are promised, he has a right to wait a reasonable time before he can be held to assume the risk. Clark v. Holmes, 7 H. & N. 937; Ford v. R. R. Co., 110 Mass. 240, 261; Hough v. R. R. Co., 100 U. S. 213.

g. Decisions under Statutes Modifying the Common-Law Rule.

52. *In a jurisdiction where an employers' liability act is in force, may an employee, by contract, express or implied, agree not to seek the benefit of such a statute, if injured?*

The best decisions upon principle are to the effect that he cannot. The act is passed for reasons of public policy, and it is against public policy to allow the intended beneficiary to contract away the benefits of the statute. Kansas Pacific R. R. Co. v. Peavey, 29 Kan. 169; Ry. Co. v. Spangler, 44 Ohio St. 471, 476; Mechem on Agency, § 671.

In England it was held that such a contract could be made. Griffiths v. Earl of Dudley, L. R. 9 Q. B. Div. 357. But a statute was at once passed by Parliament prohibiting such a contract.

53. *Where an employers' liability act is in force, does the common-law rule of volenti non fit injuria apply?*

Where such a statute is in force, or where any statute has been enacted for the protection of laborers, the rule of *volenti non fit injuria* ought not, in principle, to apply. Such statutes are passed for reasons of public policy, to protect the lives of the laboring classes, and it is as much against public policy to allow the privileges of such statutes to be waived as to allow them to be contracted away. See Ques. 52, *supra*.

Thus, it has been held, that when a statute required certain precautions to be taken to protect miners from injury at the pit of a mine, and a miner was injured by the absence of such statutory precautions, the defense of *volenti non fit injuria* was not open, for reasons of public policy, to the owner who had violated the statute. Baddeley v. Earl Granville, L. R. 19 Q. B. Div. 423. The principle of the decision seems perfectly sound and has been followed in a number of cases. Bartlett Coal, etc., Co. v. Roach, 68 Ill. 174; Johnson v. Steam Gauge Co., 146

N. Y. 152; Shepard v. Buffalo, etc., Co., 35 id. 641, 644; Simpson v. N. Y. Rubber Co., 80 Hun (N. Y.), 415; Knisley v. Pratt, 75 id. 323.

In the last case, however, judgment was reversed by the Court of Appeals, and by the opinion handed down the previous cases seem, in effect, overruled. The court held, that there was "no reason in principle or authority why an employee should not be allowed to assume the obvious risks of the business as well under the Factory Act, as otherwise." Knisley v. Pratt, 148 N. Y. 372. See also Freeman v. Glens Falls, etc., Co., 70 Hun (N. Y.), 531, affirmed 142 N. Y. 630.

XIII. UNDISCLOSED PRINCIPAL.

54. *Upon what ground can an undisclosed principal be held on a contract made by his agent, and what is his liability?*

The only ground for holding an undisclosed principal is that the agent actually is representing him, and it is simply a case of good luck for the third party that he may sue either the undisclosed principal or the agent as he sees fit. It is plain that the principal is not held on any theory of *quasi* contracts, for he has to pay the contract price; nor is he held on estoppel, as he has made no representations.

The undisclosed principal is liable in an action by the third party in all cases where the latter has not made an election to hold the agent, after knowing of the agency; Thompson v. Davenport, 9 B. & C. 78; or has not so acted as to mislead the principal into supposing that he has been paid by the agent. Irvine v. Watson, L. R. 5 Q. B. Div. 414; Fradley v. Hyland, 37 Fed. Rep. 49, 52.

55. *What constitutes an election by the third party to hold the agent or the undisclosed principal liable?*

Election is a question of fact, and the only conclusive evidence of it is the pursuing of the claim of one of the parties to an actual judgment. Curtis v. Williamson, L. R. 10 Q. B. 57. When the principal is a foreigner, however, it is almost a presumption of law in England that the domestic agent is the only one to be held. Hutton v. Bulloch, L. R. 8 Q. B. 331. In this country the question of who is liable is treated as one of fact in all cases.

56. *Under what circumstances can the undisclosed principal recover from the third party?*

He can recover in all cases, except where the third party has acted in reliance upon the representation that the agent is the principal. In such cases the principal stands in the agent's shoes and must suffer any set-off or counterclaim which the third party had against the agent. Borries v. Bank, L. R. 9 C. P. 38.

57. *A., acting for an undisclosed principal, draws a bill of exchange. Can the principal be sued on the bill? Suppose A. had signed a sealed instrument? a written contract?*

Owing to the peculiar nature of bills and notes and sealed instruments, the doctrine of an undisclosed principal does not apply to them. Only parties which appear on such instruments are liable. Pentz v. Stanton, 10 Wend. 271, 275.

In the case of an ordinary written contract, however, the principal is liable. Beckham v. Drake, 9 M. & W. 79, 91.

XIV. TERMINATION OF THE AGENCY.

a. Revocation by Principal.

58. *A.'s agent, by express authority, contracts for the sale of certain goods, but before he has made a memorandum in writing, to satisfy the Statute of Frauds, A. revokes the authority. Is A. freed from liability?*

Yes. The contract was made by express authority and was perfectly good, but it cannot be enforced without a memorandum in writing. Farmer v. Robinson, 2 Camp. 339, note.

59. *By the express contract of hiring, A. agreed that the authority given his agent to sell goods should not be revoked for six months. A. does revoke before that time. Can the agent continue to act?*

No. The principal has the power to revoke the authority given an agent in every case, except where the agency is coupled with an interest in the thing itself, independent of the compensation. See Ques. 62, *infra*. The principal may be liable to the agent in damages for the revocation, but that will not affect his actual power to revoke. Blackstone v. Buttermore, 53 Penn. St. 266; Parke v. Frank, 75 Cal. 364, 368; Stensgaard v. Smith, 43 Minn. 11; Hunt v. Rousmaniere, 8 Wheat. (U. S.) 174, 203.

60. *A. represents that his agent has extensive powers for an unlimited time, and then revokes the authority without giving notice to those who had previously dealt with the agent. Is A. liable on contracts made with the agent after the revocation, by persons who still suppose that A. is principal?*

Yes. Though the revocation was good, yet, after representing that the agent had such wide powers, A. would be estopped to deny that he was still principal. Under such circumstances he must give notice of the revocation of authority to those who are likely to be misled. Tier v. Lampson, 35 Vt. 179, 182.

b. Revocation by Death.

61. *A.'s agent had authority to draw money from the bank, and the bank, before A.'s death was known, cashed one of the agent's checks drawn after A. died. Does an action lie against the bank?*

Yes. Death terminates the agency instantly, and in revocation by death, the question of estoppel is no longer considered, so that the ignorance of the bank will not save it. It has dealt with a person who had no authority, and is responsible to the estate. Davis v. Windsor Savings Bank, 46 Vt. 728. Persons dealing with agents run the risk of revocation by death. Weber v. Bridgman, 113 N. Y. 600, 605. The rule seems harsh, but is fixed. An agent cannot represent a person after he is dead, and personal representation underlies the entire law of agency.

In Pennsylvania it is held in Cassidy v. McKenzie, 4 Watts & Serg. 282, that where an agent acts in ignorance of his principal's death, the contract is not void, but this goes on the idea of the Roman Law, of charging the estate of the deceased. On common-law principles such a decision is not sound.

62. *A. gives his agent authority to sell property and from the proceeds to pay himself a debt due from A. Would the death of A. revoke the agent's authority?*

No. This is a case where the authority is coupled with an interest, and is, therefore, irrevocable by death or otherwise. The agent's interest is in the nature of a lien. Marzion v. Pioche, 8 Cal. 522, 536; Gaussen v. Morton, 10 B. & C. 731; Hutchins v. Hebbard, 34 N. Y. 24, 27.

c. Revocation by Insanity.

63. *After A. becomes insane, his agent, B., makes a contract with C., who knows of A.'s condition, and another contract with D., who is ignorant of it. What are the rights of C. and D. upon the contracts?*

C.'s contract is invalid and D.'s is perfectly good. The insanity of the principal is held to be a revocation, or at least a suspension of authority; Davis v. Lane, 10 N. H. 156; except as to innocent third parties, who are protected. Drew v. Nunn, L. R. 4 Q. B. Div. 661. The reason for the rule of revocation by insanity is the same as that for revocation by death, i. e., that the relation of agency can exist only so long as there is a principal capable of acting. The rule is not logically carried out, however, in that innocent third parties are protected in the case of insanity, while in the case of death innocence is of no avail.

The insanity of the agent, also, of course terminates the relation. The mental soundness of the agent is a condition precedent, except where the agent has a power coupled with an interest. State v. Greesdale, 106 Ind. 364, 366; Graver's Appeal, 50 Penn. St. 189; Bartlett v. Hamilton, 46 Me. 435.

d. Revocation by Bankruptcy.

64. *After A.'s bankruptcy, his agent makes a contract in A.'s name. Is it good?*

No. When a man is adjudicated a bankrupt, the power of his agent to bind his bankrupt estate ceases. That power is thereby taken out of his hands. Drinkwater v. Dowding, Cowp. 251; Minett v. Forrester, 4 Taunt. 541; Parker v. Smith, 16 East, 382. Mere insolvency, however, is not enough to vitiate the contract. Mechem on Agency, § 264.

The bankruptcy of the agent also terminates the relation unless his acts are merely ministerial. Audenried v. Betteley, 8 Allen (Mass.), 202; Hudson v. Granger, 5 Barn. & Ald. 27.

e. Revocation by War.

65. *A principal lives in Spain and the agent in this country. What effect would war between the countries have upon the relation?*

As a general rule war operates as a dissolution of the relation. Business relations between the two countries have become illegal and communication between the parties has become impossible. Ins. Co. v. Davis, 95 U. S. 425.

XV. RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT INTER SE.

a. Generally.

66. *A. was appointed treasurer of a horse show without compensation. Owing to his failure to accept the appointment, B. could not get a premium to which he was entitled. Is A. liable?*

No. It is always possible to create an agency without compensation, i. e., by appointment, provided the appointment is accepted, but the way of showing an acceptance is by acting, and there was only a failure to act here, which shows rather a non-acceptance. The rule is usually stated that a gratuitous agent is only liable for malfeasance, and not liable for nonfeasance. Balfe v. West, 13 C. B. 466; Mechem on Agency, § 478; Thorne v. Deas, 4 Johns. (N. Y.) 84. But the real reason for not holding the gratuitous agent in a case of nonfeasance seems to be, as suggested, that the relation of agency has never arisen. After the

gratuitous agent has once begun to act, and so accepted the agency and its duties, he is subject to all its liabilities. Mechem on Agency, § 478; Williams v. Higgins, 30 Md. 404; Spencer v. Fowles, 18 Mich. 9.

67. *A. appoints B. a gratuitous agent. B. acts to the best of his ability, but is totally unfit for the work. Has A. any right to recover for injury suffered?*

No. A gratuitous agent is only required to use such skill as he has, and is not liable if not actually negligent. He differs materially from a paid agent who must use such skill as a reasonable man would under the circumstances. Shiells v. Blackburne, 1 H. Blackstone, 158; Wilson v. Brett, 11 M. & W. 113.

68. *A. consigned goods to B., with orders not to sell below a certain price. B. made advances on the goods, and as A. failed to repay them, he sold the goods at the best price possible, but below the price fixed by A. Is he liable for so doing?*

By the American rule he is not. The consignee is always given a right to protect himself for advances, in spite of instructions. Parker v. Brancker, 39 Mass. 40; Field v. Farrington, 10 Wall. (U. S.) 141. He may also refuse to sell if told to do so at a price too low to reimburse him. Weed v. Adams, 37 Conn. 378.

By the English rule B. would be liable for the sale. There a factor making subsequent advances has none of the rights of a pledgee. Smart v. Sanders, 5 C. B. 895, 914. And even if the advances are cotemporaneous, the English factor has none of the pledgee's powers if they are not expressly stipulated for in the contract. De Comas v. Frost, 3 Moore, P. C. (N. S.) 158.

69. *An agent collects money for his principal and puts it with some of his own in a money drawer. All of the money is then stolen without the fault of the agent. Is he in any way liable?*

The agent would be liable for the whole amount. Any mixture of the principal's money makes the agent a mere debtor, and no longer a trustee, and after becoming a debtor he is liable absolutely. Mechem on Agency, § 529. Wherever the identity of the money is lost, the result is the same, even if the agent deposited the money in a bank in a separate account, but in his own name. Naltner v. Dolan, 108 Ind. 500.

b. Agent Acting under *Del Credere* Commission.

70. *Is a parol del credere commission bad under the Statute of Frauds?*

No. A del credere factor does guarantee the payment of the debts to be collected, but his contract is more than a contract of guaranty, and is not within the meaning of the statute as to the payment of the debts of third persons. Wolff v. Koppel, 5 Hill (N. Y.), 458.

71. *Has a del credere factor a right to have the debt of his principal "written off" against a debt of his own?*

No. He is not relieved from the ordinary obligation of an agent to receive the payment for the principal, even though he has guaranteed the payment. He may become bankrupt himself. Cotterall v. Hindle, L. R. 1 C. P. 186.

c. Bad Faith of Agent. Inconsistent Positions and Secret Profits.

72. *A. appoints B. his agent to sell property for* $17,000. *B. makes a bona fide contract for that amount, and then learns that he can get* $26,000, *whereupon he gets a release of the first contract and sells for* $26,000 *in his own name, and hands over to A.* $17,000. *Has A. any action for the remaining* $9,000?

Yes. B., as an agent, was in a fiduciary relation which demanded the utmost good faith on his part. Even if his first contract was bona fide and $17,000 was the price fixed by A. himself, still when B. found that he could do better for his principal, that was his legal duty. The relation of principal and agent is guarded most carefully by the courts, and no transactions are allowed whose effect or tendency is to benefit the agent at the expense of the principal. Bain v. Brown, 56 N. Y. 285.

73. *A. writes B. to buy him certain stock at not more than* $150 *per share. B. writes that he has bought at that price, and sends some shares of his own. Can B. recover the purchase price?*

No. Though the agency was gratuitous, and even if B. was perfectly honest, the fiduciary relation between the parties was such that B. could not buy from himself without A.'s knowledge. Conkey v. Bond, 36 N. Y. 427. And even where a trade custom is proved, by which an agent can transfer his own property to the principal, it is held that the custom will not be effective unless the principal knew of it, as by it the agent is placed in an inconsistent position. Robinson v. Mollett, L. R. 7 H. of L. 802; Butcher's Sons v. Krauth, 14 Bush (Ky.), 713.

74. *A committee of fourteen men is appointed to carry out certain public improvements. Could a firm composed of two of their members take the contract to do the work?*

No. Though by no means a majority of the board, the two members of the committee would have no right to place themselves in a position hostile to the public interests. People v. Township Board, 11 Mich. 222.

75. *A. leases a building for business purposes. Can his agent in the business legally contract for a renewal of the lease to himself, personally, without A.'s knowledge?*

No. As long as a man is an agent, he is held strictly to his fiduciary duty. The good-will of the lease is a valuable interest to A., and his agent cannot tamper with it. Davis v. Hamlin, 108 Ill. 39.

76. *A. employs B. to furnish him with information regarding certain tracts of land in order that he may purchase it. B. hinders A. somewhat, and then buys the land himself. Has A. any remedy?*

Yes. He can hold B. as a trustee of the land so acquired or compel him to account for the value of it. Winn v. Dillon, 27 Miss. 494; Gardner v. Ogden, 22 N. Y. 327; Haight v. Pearson, 39 Pac. Rep. 479. In Massachusetts, however, the law is *contra*, and A. would have no remedy, on the ground that B.'s duty was not such as to deprive him of the right to buy. Collins v. Sullivan, 135 Mass. 461; Emerson v. Galloupe, 158 id. 146. But see Mechem on Agency, § 469.

77. *A. is employed by B. to purchase land on commission, and by C. to sell. Can he under any circumstances earn the commission from both?*

He can, if both parties know the facts. Bell v. McConnell, 37 Ohio St. 396; Redfield v. Tegg, 38 N. Y. 212; Robinson v. Jarvis, 25 Mo. App. 421. Where either or both of the principals are ignorant of the agent's attempt to earn double commissions, he cannot get them from either, and that irrespective of the agent's honesty. The dangerous tendency of such transactions is the thing considered. Scribner v. Collar, 40 Mich. 375; Rice v. Wood, 113 Mass. 133; Bell v. McConnell (*supra*).

78. *A., a broker, is employed as a middleman by both B. and C., the one wishing to sell and the other to buy. Without their knowledge of the facts he introduces them to each other and they make a contract themselves, in which A. takes no part. Can A. recover his commissions from both?*

The better view is that he cannot. To allow it produces the temptation that the agent will bring together only those who have employed him. Mechem on Agency, §§ 953, 973; Walker v. Osgood, 98 Mass. 348. But see *contra*, Siegel v. Gould, 7 Lans. 177; Orton v. Scofield, 61 Wis. 382.

79. *A., plaintiff's intestate, was insured in the X. company; the company agreed to cancel the policy and return the premium notes and sent them to B., A.'s agent, to whom A. had given the policy, with instructions to surrender it. Before the notes were canceled, B. applied to have the policy reissued to him. The policy was reissued to B., and A. thereafter died. What rights has A.'s administrator?*

He can compel B. to account for the advantage thus obtained. It makes no difference if the agent did use his own money to obtain this advantage. Dutton v. Willner, 52 N. Y. 312, 319.

d. Agent's Right to Compensation.

80. *A. employed B. to act as selling agent on commission. A. accepted orders which B. procured and then refused to deliver the goods or to pay B.'s commissions. Has B. a right of action?*

Yes. B. had done everything to earn his commission, when he procured a good order which A. accepted. If the transaction then failed through A.'s fault, B. is not to suffer. Lockwood v. Levick, 8 C. B. (N. S.) 603.

In Trapp v. Wallace, 41 N. Y. 477, A. wanted to purchase real estate, and B. in good faith introduced C. to him who had property he wished to sell. A contract was entered into which A. subsequently refused to carry out because C. could not give a good title. It was held, however, that it was no answer to B.'s claim for commission, that the title was defective, on the ground that B. did not undertake that it should be good. The contract did not make his commissions depend upon the validity of B.'s title.

81. *A. employed B. to sell all of the coal from his colliery that should be sent to L. A. then sold his colliery. Has B. any right to recover commissions?*

No. A. made no contract that coal should be sent to L., and he could ship to other points or sell the colliery. Rhodes v. Forwood, L. R. 1 App. Cas. 256. But compare Lewis v. Ins. Co., 61 Mo. 534, where it was held that the insolvency of a company did not terminate its liability upon contracts with its agents, and that they must be paid though the company was not allowed to do business by the State authorities.

XVI. RIGHT OF PRINCIPAL TO RESCIND.

82. *When an agent and a third party have secretly agreed to make a contract for defrauding the principal, what are the latter's remedies?*

If the principal acts before the rights of third parties have become involved, he may recover his property and have the contract rescinded. In any case the third party and the agent are liable for the injury to the principal. Panama Teleg. Co. v. India Rubber Co., L. R., 10 Ch. App. 515; Atlee v. Fink, 75 Mo. 100.

83. *A.'s agent, B., was secretly in the employ of C., when he executed a contract for A. with C. The terms, however, were perfectly fair to A. May he still object?*

Yes. The double agency is a fraud upon the principal, whatever the results or the intentions of the parties, and he may, by acting promptly, rescind the whole contract and recover back his property. Panama Teleg. Co. v. India Rubber Co., L. R. 10 Ch. App. 515; Atlee v. Fink, 75 Mo. 100; Ins. Co. v. Ins. Co., 14 N. Y. 85, 90. Compare Hinckley v. Arey, 27 Me. 362; Coltons v. Holliday, 59 Ill. 176.

BANKRUPTCY.

I. Jurisdiciton.

1. *What courts have jurisdiction of bankruptcy proceedings?*

The District Court of the United States for the district within which the bankrupt had his principal place of business, resided or had his domicile for the greater portion of the six (6) months preceding the filing of the petition. §§ 1 (8) and 2 (1).*

2. *What is the effect of the Bankruptcy Act upon State insolvency laws?*

All State insolvency laws applying to the same persons as the Bankruptcy Act are suspended by the passage of the act, but in so far as such laws do not conflict with the federal law they are valid and continue operative. Sturges v. Crowningshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 213; Ketchum v. McNamara, 6 Am. B. R. 160, 72 Conn. 709.

II. Voluntary Proceedings.

a. How Instituted.

3. *Who may file a petition, where and how filed, fees, etc.?*

Any person who owes debts except a corporation may file a voluntary petition. § 4a.

The petition, to which is annexed a complete schedule of assets and liabilities (form 1), is filed in the District Court in triplicate, § 7a (8), and must be accompanied by a filing fee of thirty dollars, §§ 40a, 48a, 52a, unless the petition is accompanied by an affidavit that the petitioner is without and cannot obtain the money with which to pay such fees. § 51a (2).

b. Partnership Proceedings.

4. *If one partner wishes to file a partnership petition and the other partner refuses to join, what is the procedure?*

The Bankruptcy Act treats a partnership as an entity. One petition only is filed in a partnership proceeding (form 2), though a set of schedules of the partnership assets and liabilities and a separate schedule of assets and liabilities for each partner must be annexed thereto.

* All references by section are to the Bankruptcy Act of July 1, 1898, as amended February 5, 1903. References to general orders and forms are to those adopted by the Supreme Court under said act.

The entity theory, however, does not prevent the adjudication of the partnership upon a petition in which one partner refuses to join. The petitioning partner files schedules for himself and for the partnership and accompanies his petition with a request for a subpœna to be served upon the nonassenting partner as in involuntary cases. Collier on Bankruptcy (5th ed.), 70, 72.

The latter may appear and make any defenses and in case of an adjudication must file an individual schedule of assets and liabilities. Gen. Ord. VIII.

5. *A., being a member of a partnership, files an individual petition. The firm has no assets. Do the partnership creditors share with A.'s individual creditors in the distribution of his estate?*

No. The general rule is that in bankruptcy partnership property is appropriated to the payment of partnership debts and the individual property of each partner to the payment of his individual debts. § 5f.

It has been held that an exception to this rule exists when there are no firm assets and no solvent living partner. Conrader v. Cohen, 9 Am. B. R. 619, 121 Fed. 801 (C. C. A. 3d Cir.); In re Green, 116 Fed. 118, 8 Am. B. R. 533.

The weight of authority, however, under the present Act seems to be in favor of the rule without exception that joint assets belong to joint creditors and individual assets to individual creditors. In re Janes, 133 Fed. 912, 13 Am. B. R. 341 (C. C. A. 2d Cir.); In re Wilcox, 2 Am. B. R. 117, 94 Fed. 84; In re Henderson, 16 Am. B. R. 91, 142 Fed. 588.

III. INVOLUNTARY PROCEEDINGS.

6. *Against whom may a petition be filed?*

A petition may be filed against any natural person (except a wage-earner or farmer), any unincorporated company and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of one thousand dollars or over, § 4b, who is insolvent and has committed an act of bankruptcy within four months. § 3b. An act of bankruptcy consists in (1) conveying or concealing property with intent to hinder, delay or defraud creditors, or (2) transferring while insolvent property to one or more creditors with intent to prefer them over other creditors, or (3) permitting while insolvent any creditor to obtain a preference through legal proceedings and not having at least five days before the sale of any property affected by such preference vacated or discharged such preference, or (4) made a general assignment for the benefit of his creditors, or being insolvent applied for a receiver or trustee for his property, or because of insolvency a receiver has been put in charge of his property, or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt.

7. *A judgment is entered against A. without his knowledge or consent and he fails to vacate or discharge it at least five days before the sale of the property but without any intent to prefer the creditor obtaining the judgment. Has he committed an act of bankruptcy?*

Yes. Mere passive nonresistance is sufficient and the intent of the debtor is not an element. Matter of Rung Furn. Co., 14 Am. B. R. 12 (C. C. A. 2d Cir.); Wilson Bros. v. Nelson, 183 U. S. 191, 7 Am. B. R. 142. The rule was otherwise under the law of 1867. Wilson v. City Bank, 17 Wall. 473.

8. *Who may file an involuntary petition?*

Three or more creditors who have provable claims amounting in the aggregate to $500 or over, or if all the creditors are less than twelve then one of such creditors whose claim equals such amount. § 59b.

IV. PROVABLE DEBTS.

9. *A. has a claim against B. for unliquidated damages resulting from injury to his property. B. is adjudged a bankrupt.*

(a) *Can A. prove his claim against the estate and receive a dividend thereon?*

(b) *Would the result be different if he had recovered judgment on his claim before the adjudication?*

(c) *Suppose the claim were one for conversion of his property?*

(a) No. The general rule under previous bankruptcy acts was that liabilities *ex delicto* were not provable debts. Section 63a gives a list of debts which may be proved. Section 63b states that unliquidated claims may upon application to the court be liquidated and thereafter proved and allowed. It was thought that par. b added to the list of debts provable under par. a, and that under it debts grounded in tort might be liquidated and then proved. Collier on Bankruptcy (5th ed.), 479.

It is now well settled, however, that such is not the effect of par. b, but that its only purpose is to permit an unliquidated claim coming within the provision of par. a to be liquidated. Brown v. United Button Co., 17 Am. B. R. 565, 149 Fed. 48; Dunbar v. Dunbar, 190 U. S. 340, 10 Am. B. R. 139.

The same rule of course applies to claims for damages resulting from injury to the person and it has accordingly been held that a claim for damages for wrongfully causing death is not provable. Matter of N. Y. Tunnel Co., 20 Am. B. R. 25 (C. C. A. 2d Cir.).

(b) Yes. Section 63a (1) provides for the proof of a debt evidenced by a judgment whether based upon an action in contract or tort.

(c) Since in conversion the plaintiff may waive the tort and sue in assumpsit a claim for conversion of property is a provable debt under section 63a (4) which authorizes the proof of a debt

"founded upon an open account or upon a contract express or implied." Crawford v. Burke, 12 Am. B. R. 659, 195 U. S. 176.

10. *A. is indorser on a note and before the note falls due is adjudged a bankrupt. Is his liability as indorser a provable debt against his estate?*

Yes. It was at first held that since the liability of the indorser was contingent merely at the time of filing of the bankruptcy petition it was not a provable debt not being a "fixed liability" * * * "absolutely owing at the time of the filing of the petition" under section 63a (1) In re Schaefer, 5 Am. B. R. 92, 104 Fed. 973.

It seems now, however, to be well settled that such a liability is provable under section 63a (4) which provides for the proof of claims "founded upon an open account or upon a contract express or implied." In re Gerson, 6 Am. B. R. 11, 107 Fed. 897.

11. *A. has a claim against the bankrupt based upon a note which is secured by indorsers who are responsible. Can he prove the claim and receive a dividend upon the full amount?*

Yes. Though one who has a secured claim can only prove it for the excess, if any, of the claim over the value of the security, § 57e, the Bankruptcy Act defines a secured creditor as one "who has security for his debt upon the property of the bankrupt." § 1 (23). Though his claim is fully secured by the indorsements on the note he may prove and receive a dividend upon the full amount since the security is not upon the property of the bankrupt. In re Noyes Bros., 127 Fed. 286, 11 Am. B. R. 506 (C. C. A. 1st Cir.).

V. ELECTION OF TRUSTEE.

12. *At the first meeting of creditors the attorney for the bankrupt presents proofs of claims and powers of attorney from a majority in number and amount of the creditors whose claims have been allowed and who are represented at the meeting and offers to vote them for the election of B. as trustee. Will he be permitted to vote them, and if so will the election of B. as trustee be confirmed by the Referee?*

The act provides for the election of the trustee by creditors and the courts will not tolerate any attempt on the part of the bankrupt to control the election and thereby secure a trustee favorable to his interests. If it appears that claims presented have been solicited by the bankrupt and are voted in his interest, the Referee will either refuse to permit them to vote or refuse to confirm the election. In re Dayville Woolen Co., 114 Fed. 674, 8 Am. B. R. 85.

As in such case the interests of the creditors and of the bankrupt are diverse the attorney for the bankrupt will not ordinarily be allowed to represent creditors or to vote their claims.

VI. TITLE OF TRUSTEE.

13. *A. sells goods to B. upon conditional bill of sale reserving title in himself until goods are paid for. The bill of sale is not recorded as required by statute of the state where sale is made. B. is adjudged a bankrupt, the goods being in his possession and unpaid for. Does his trustee take title to them?*

The general rule is that the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it and subject to all the equities impressed upon it in the hands of the bankrupt. Where therefore the statute (as in New York) provided that an unrecorded bill of sale was void only as against subsequent purchasers or pledgees or mortgagees in good faith it was held good as against the trustee in bankruptcy. Hewitt Tr. v. Berlin Machine Works, 194 U. S. 296, 11 Am. B. R. 709.

The trustee, however, represents the general creditors of the estate, and where the language of the statute is such that an unrecorded bill of sale is invalid as against creditors it has been held to be invalid as against the trustee in bankruptcy. In re Yukon Woolen Co., 2 Am. B. R. 805, 96 Fed. 326; Bradley v. McAfee, 17 Am. B. R. 495.

In Ohio an unrecorded bill of sale is void as against creditors, but the State court has held that only creditors who have taken steps to fasten upon the property for the payment of their debts can take advantage of the statute. The U. S. Supreme Court adopting this construction of the statute decided that when there are no creditors who have attached the property the trustee takes no title to it, holding that the adjudication does not operate as an attachment. York Mfg. Co. v. Cassel, 201 U. S. 344, 15 Am. B. R. 633.

If, however, prior to the bankruptcy a creditor had attached the property so that under the statute he was in a position to attack the conditional sale, although his attachment was vacated by the adjudication, the trustee under section 67 of the act would be subrogated to his rights and entitled to the proceeds of the sale of the property to the extent of the claim of the attaching creditor. In re N. Y. Econom. Printing Co., 6 Am. B. R. 615, 110 Fed. 514 (C. C. A. 2d Cir.); First Nat. Bank v. Staake, 15 Am. B. R. 639, 202 U. S. 141.

14. *A. is induced to sell goods to B. by materially false representations. B. having the goods in his possession is adjudged a bankrupt. Can A. recover the goods, and if so how?*

False representations made as a basis for credit entitle the seller to reclaim the goods, and since the trustee has no better title than the bankrupt had he takes the goods affected with the fraud of the bankrupt. The property being in the custody of the Bankruptcy Court is not subject to replevin in the State court. In re

Russell and Birkett, 3 Am. B. R. 658, 101 Fed. 248; In re Mertens, 12 Am. B. R. 698, 131 Fed. 507.

The creditor may, however, file in the Bankruptcy Court his petition to reclaim the goods upon a rescission of the sale and upon proof of his case obtain an order that the trustee surrender possession of them. In re Weil, 7 Am. B. R. 90, 111 Fed. 897.

Property consigned to the bankrupt may be recovered in a similar procedure.

15. *A. mingles a trust fund in one bank deposit with moneys of his own and draws upon the deposit from time to time: Upon his adjudication as a bankrupt can the real owner of the fund recover it in preference to other creditors of the estate?*

The well-established rule in equity is that the owner of a trust fund may follow it into whatever form it may have been converted and though in the case of money it has been mingled in one mass with other money of the trustee. In re Hallet's Estate, 13 Ch. Div. 696, 36 Eng. Rep. 779.

The rule is that any drafts upon the deposit thus mingled are presumed to have been made against the trustee's own share of the deposit and that what is left belongs in equity to the *cestui que trust.* But the mere misapplication of trust funds does not give the defrauded beneficiary a general priority over other creditors of the trustee. The trust fund must be distinctly traced into the estate of the bankrupt and be shown to exist there in some shape at the date of the bankruptcy. If the fund cannot be shown to have been deposited in the bankrupt's bank account or invested in some specific property which is a part of his estate, or if having been so deposited the bankrupt has drawn against it so that neither his own share of the deposit or the trust fund is still in existence, then the beneficiary must share *pari passu* with the general creditors of the estate. In re Mulligan, 9 Am. B. R. 8, 116 Fed. 715.

The burden of tracing the trust fund into the property claimed rests upon the beneficiary though he may be assisted in bearing it by the legal presumption above referred to concerning the joint account. In re Marsh, 8 Am. B. R. 576, 116 Fed. 396.

VII. EXEMPTIONS.

16. *What property may the bankrupt retain as exempt?*

The Bankruptcy Act does not grant any specific exemptions to the bankrupt, but provides that he shall be entitled to the exemptions allowed by the laws of the State of his domicile. § 6.

They should be claimed by the bankrupt in Schedule B (5) attached to his petition. It is the duty of the trustee within twenty days of his appointment to set out to the bankrupt his exemptions, and any creditor may take exception to his action within twenty days after the report is filed. Gen. Ord. XVII.

17. *A. files a petition in bankruptcy and schedules a life insurance policy which has a cash surrender value payable to himself. By the laws of the State of his domicile such insurance is exempt. Is the trustee entitled to the cash surrender value of the policy?*

While section 6 of the act adopts for the purpose of the bankruptcy proceedings the exemptions allowed by the laws of the several States, section 70a of the act provides that when a bankrupt has an insurance policy which has a cash surrender value payable to himself, he may by paying over the amount of such cash surrender value to his trustee hold the policy free from the claims of his creditors. It was held in In re Scheld, 5 Am. B. R. 102, 104 Fed. 870, that the effect of section 70a was to limit the broad terms of section 6, adopting the State exemption laws and that the trustee was entitled to the cash surrender value. The contrary doctrine has, however, been finally adopted by the Supreme Court and the bankrupt is entitled to the exemption. Holden v. Stratton, 198 U. S. 202, 14 Am. B. R. 94.

VIII. EXAMINATION OF BANKRUPT.

19. *May the bankrupt upon his examination be compelled to answer a question the answer to which would tend to incriminate him?*

No. Section 7a provides that "no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding." It has been held, however, that this does not grant him the immunity contemplated by section 5 of the Constitution of the United States. Counselman v. Hitchcock, 142 U. S. 565; In re Nachman, 114 Fed. 995, 8 Am. B. R. 180; In re Rosser, 96 Fed. 305, 2 Am. B. R. 755; In re Feldstein, 103 Fed. 269, 4 Am. B. R. 321.

The refusal of the bankrupt, however, to answer any material question approved by the court is by the amendment of 1903, § 14b (6), made a ground of objection to his discharge.

IX. PREFERENCES AND LIENS.

20. *A., being insolvent and indebted to B., gives him a mortgage upon his property in part to secure the existing indebtedness and in part to secure a loan made at the time the mortgage is given. Within four months he is adjudged a bankrupt. Under what circumstances would the mortgage be held invalid, and if so whether in whole or in part?*

The mortgage is good in any event to the extent of the loan made at the time it was given since to that extent the mortgagee gets no preference over other creditors. If at the time the mortgage was given the mortgagee had reasonable ground for believing that it was intended to give him a preference the mortgage is

invalid to the extent of the pre-existing indebtedness. City Nat. Bank v. Bruce, 109 Fed. 69, 6 Am. B. R. 311 (C. C. A. 4th Cir.); In re Furse & Co., 127 Fed. 690, 11 Am. B. R. 733 (C. C. A. 4th Cir.); Grant v. Nat. Bank, 97 U. S. 80; Stuckey v. Sav. Bank, 108 U. S. 74.

The question of whether the mortgagee has reasonable ground for believing that it was intended to prefer him is one of fact for the jury. This includes reasonable ground for believing that debtor is insolvent and that he will obtain a larger percentage of his debt than other creditors in his class. The intent of the debtor is immaterial. Loveland on Bankruptcy (3d ed.), 561.

21. *A. brings suit against B. in which he attaches his property and in due course obtains judgment. Within four months after the entering of the judgment but more than four months after the attachment, B. is adjudged a bankrupt. Does the adjudication dissolve the lien of the attachment?*

No. Section 67f provides that the adjudication dissolves "all levies, judgments, attachments or other liens obtained through legal proceedings" within four months. Although the judgment was obtained within four months of the bankruptcy, since it was a judgment in enforcement of pre-existing lien which was not dissolved, having been in existence more than four months, it is not affected by the provision of this section which refers to judgments *creating* liens. Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36; In re Beaver Coal Co., 110 Fed. 630, 6 Am. B. R. 404; In re Blair, 108 Fed. 529, 6 Am. B. R. 206; In re Snell, 125 Fed. 154, 11 Am. B. R. 35.

22. *Is a mechanic's lien filed within four months of bankruptcy proceedings valid as against the trustee?*

Only liens obtained through legal proceedings are invalidated by section 67c and f. A mechanic's lien although filed within four months of bankruptcy is therefore valid and has been so held even though it was inchoate at the time of the adjudication and further action was necessary after that date in order to perfect it. In re Grissler, 136 Fed. 754, 13 Am. B. R. 508 (C. C. A. 2d Cir.), overruling In re Roeber, 121 Fed. 449, 9 Am. B. R. 303; In re Georgia Handle Co., 109 Fed. 632, 6 Am. B. R. 472 (C. C. A. 5th Cir.); In re Emslie, 4 Am. B. R. 126, 102 Fed. 291 (C. C. A. 2d Cir.).

X. SALE OF ASSETS.

23. *The property of a bankrupt is subject to liens which make it difficult for the trustee to obtain anything for the equity if the property is sold subject to liens. Can he sell it free and clear of the liens?*

No specific authority is given in the Act of 1898 to order a sale of property free of incumbrances, but it is well settled that the

court has power to make such an order, in which case the lien is transferred from the property to the fund produced by its sale, and the Bankruptcy Court may determine the rights of the lien claimants. Loveland on Bankruptcy (3d ed.), 742; Collier on Bankruptcy (5th ed.), 570; In re Granite City Bank, 137 Fed. 818, 14 Am. B. R. 404 (C. C. A. 8th Cir.); In re Union Trust Co., 122 Fed. 937, 9 Am. B. R. 767 (C. C. A. 1st Cir.); Chauncey v. Dyke Bros., 119 Fed. 1, 9 Am. B. R. 444 (C. C. A. 8th Cir.); Carroll Co. v. Young, 119 Fed. 576, 9 Am. B. R. 643 (C. C. A. 3d Cir.).

XI. DISTRIBUTION OF THE ESTATE.

a. Priority Claims.

24. *Employee of bankrupt presented claim for wages earned more than three months before the bankruptcy. The State statute allowed priority to all wages earned within one year. Was the claim entitled to priority?*

No. Section 64b (4) allows priority to wages earned within three months of the bankruptcy proceedings and section 64b (5) allows priority to "debts owing to any person who by the laws of the State or the United States is entitled to priority." Since clause 4 contains a specific provision regarding wages it is the exclusive rule as to their priority in spite of the different rule stated in the general provision of clause 5. In re Slomka, 122 Fed. 630, 9 Am. B. R. 635 (C. C. A. 2d Cir.); In re Rouse, Hazard & Co., 91 Fed. 96, 1 Am. B. R. 234 (C. C. A. 7th Cir.).

b. Payment of Dividends.

25. *A. presents a claim against a bankrupt estate within one year after the adjudication but subsequent to the declaration of a dividend. Can he share in the dividend? What if the final dividend has been declared and the estate closed?*

The Bankruptcy Act fixes no definite limitation of time for the presentation of claims against estates except the negative one that no claims may be proved subsequent to one year after the adjudication. § 57n. This does not mean, however, that creditors have a year in which to present their proofs and share in dividends. Trustees are required to close up estates "as expeditiously as is compatible with the best interests of the parties in interest." § 47 (2). They may pay out all the funds in their hands and close the estate and creditors subsequently presenting claims, although within the year, will receive nothing. In re Stein, 94 Fed. 124, 1 Am. B. R. 662.

The proof of a claim within the year and before the estate is closed but subsequent to the payment of a dividend does not disturb that dividend nor affect the rights of the creditors who have received it, but such claims will be entitled to "dividends equal

in amount to those already received by the other creditors, if the estate equals so much, before such other creditors are paid any further dividends." § 65c.

Creditors who delay presenting claims until after the payment of dividends therefore take their chances of securing a share in such dividends, but since the amendment of 1903 requiring that "the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed" the cases will be rare in which they will not receive the same dividends as creditors proving their claims before the first dividend. § 65b.

XII. COMPOSITIONS.

26. *In what ways may a bankrupt secure the dismissal of the proceedings and the revesting of the title to his property in his own name?*

1. If he can secure the signature of all his creditors to a statement that their claims are satisfied he may then petition for a dismissal of the proceedings upon payment of the expense to date. Notice of such a petition must be given to all creditors unless it is waived by them. § 59g.

2. He may at any time after he has been examined make a composition offer to his creditors. § 12a. If accepted in writing by a majority in number and amount of creditors whose claims have been allowed he may file an application for its confirmation upon depositing in court the consideration and a sum sufficient to pay the cost of the proceedings and the debts which have priority. The composition will be comfirmed if (1) it is for the best interests of creditors, (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and (3) the offer aand its acceptance are in good faith. § 12b, d.

The confirmation of a composition has the effect of revesting in the bankrupt the title to his property, §§ 70f, 21g, and of discharging him from his debts other than those agreed to be paid by the terms of the composition offer and those not affected by a discharge. § 14c.

XIII. DISCHARGE.

a. Grounds of Opposition.

27. *For what reasons may a discharge be refused the bankrupt?*

The bankrupt is entitled to a discharge unless he has (1) committed an offense punishable by imprisonment as provided in the act. which may consist in his having (a) concealed from his trustee any property belonging to his estate or (b) made a false oath or account in the bankruptcy proceeding.

(2) With intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained.

(3) Obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit.

(4) At any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed or concealed any of his property with intent to hinder, delay or defraud his creditors.

(5) In voluntary proceedings been granted a discharge in bankruptcy within six years.

(6) In the course of proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court. §§ 14b, 29.

28. *A. testifies falsely upon his examination at the first meeting of creditors. Can this be made the ground for an objection to his discharge?*

Yes. Section 7 provides that no testimony given by the bankrupt upon such examination shall be offered in evidence against him in any criminal proceeding and for that reason some cases have held that such testimony could not be used against him upon his application for a discharge. In re Marx, 4 Am. B. R. 521, 102 Fed. 676.

It is now settled, however, that the proceeding upon the application for a discharge is not a criminal proceeding and that a discharge may be denied the bankrupt for false testimony upon his examination. In re Dow, 5 Am. B. R. 400, 105 Fed. 889; In re Gaylord, 7 Am. B. R. 1, 112 Fed. 668 (C. C. A. 2d Cir.).

29. *A. is adjudged a bankrupt but fails to file a petition for discharge within one year. May he file a second petition and receive in that proceeding a discharge from debts scheduled in the first proceeding?*

No. The record of his failure to make the application in that proceeding was in effect a judgment by default and renders the issue as conclusively *res adjudicata* as a judgment upon a trial. In re Bramlett, 161 Fed. 588, 20 Am. B. R. 402; Kuntz v. Young, 12 Am. B. R. 505, 131 Fed. 719 (C. C. A. 8th Cir).

b. Debts Affected by a Discharge.

30. *Is a bankrupt discharged from an unliquidated claim for damages for tort?*

No. because such claim is not a provable debt (see Question 9) and the bankrupt can be discharged only from provable debts. § 17. If. however. the claim has been reduced to judgment prior to the adjudication it becomes provable. § 63a (1). It is then

dischargeable unless it belongs in the class of debts not affected by a discharge, that is, is either a liability for obtaining property by false pretenses or false representations, or for a wilful and malicious injury to person or property, or for alimony, or for maintenance or support of wife or child, or for seduction or criminal conversation, or was created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting as an officer or in any fiduciary capacity. § 17. Matter of N. Y. Tunnel Co., 20 Am. B. R. 25 (C. C. A. 2d Cir.).

31. *Does a bankrupt get a discharge from a debt which he has failed to place in his schedule?*

No, unless the creditor has had actual knowledge of the proceedings. § 17 (3).

The bankrupt may, however, amend his schedules at any time. Gen. Ord. XI.

32. *A. after being adjudged a bankrupt promises a creditor that he will see that he is paid. He subsequently gets a discharge. Can the creditor collect the debt?*

Yes, because the discharge does not extinguish the debt; the moral obligation remains and is a sufficient consideration for the new promise. Dusenberry v. Hoyt, 53 N. Y. 521; Mutual Reserve, &c. v. Beatty, 2 Am. B. R. 244, 93 Fed. 747; In re Merriman, 44 Conn. 587.

33. *A., as agent for B., converts to his own use the proceeds of the sale of B.'s property. Can he obtain a discharge in bankruptcy from A.'s claim against him?*

Yes. The claim is a provable one (see Question 9, c) and is not covered by the enumeration in section 17 of debts not affected by a discharge which include those created by "fraud, embezzlement, misappropriation or defalcation while acting as an officer or in a fiduciary capacity" since this only applies to technical trusts and acts of an official character or in a fiduciary cpacity. Crawford v. Burke, 195 U. S. 176, 12 Am. B. R. 659; Hennequin v. Clewes, 111 U. S. 676; Palmer v. Hussey, 119 U. S. 96; In re Hale, 161 Fed. 387.

XIV. SUMMARY PROCEEDINGS.

34. *A. is adjudged a bankrupt. His trustee discovers property of A.'s in the possession of B., who refuses to surrender it. By what process may the trustee obtain possession of the property?*

If B. is an "adverse claimant," that is one claiming title to the property in his own right and not merely the agent of the bankrupt, the trustee must bring a plenary suit to recover the property. Bardes v. Bank, 178 U. S. 524, 4 Am. B. R. 163.

Prior to the amendment of 1903 such suit under the decision in *Bardes v. Bank* could not be brought in the U. S. District Court except with the consent of the defendant but must be brought in the court where the bankrupt might have brought it if bankruptcy proceedings had not been instituted. By the amendment of 1903 such suit may now be brought in the District Court. §§ 23b, 60b, 67e. If, however, B, is not an "adverse claimant" but is merely holding the property for the bankrupt he may be cited in in the bankruptcy proceedings and summarily ordered to surrender possession to the trustee. White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178; Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224.

In *Bryan v. Bernheimer,* upon a sale of goods by a general assignee after the filing of a petition in bankruptcy, the vendee who bought with knowledge of the petition, was held amenable to summary process, as was the bankrupt's son to whom he had delivered a large amount of property just prior to the bankruptcy in *Mueller v. Nugent.*

The Bankruptcy Court has the power in any particular case to ascertain whether the claim asserted is an adverse one existing at the time the petition was filed, and according to the conclusion reached the court will retain jurisdiction or decline to adjudicate the merits in the summary proceeding. Louisville Trust Co. v. Comingor, 184 U. S. 18, 7 Am. B. R. 421; Matter of Friedman, 20 Am. B. R. 37 (C. C. A. 2d Cir.).

XV. CONTEMPT PROCEEDINGS.

35. *Bankrupt has money or property which he refuses to deliver to the trustee. How may he be compelled to do so?*

It is the bankrupt's duty to obey all lawful orders of the court. § 41. If the court is satisfied that he has in his possession property belonging to his estate, it may order him to surrender it and upon his failure to do so may commit him for contempt. Schweer v. Brown, 130 Fed. 328, 12 Am. B. R. 178 (C. C. A. 8th Cir.).

Before he can be punished for contempt, however, he must have notice and an opportunity to show cause why he should not comply with the order. In re Cole, 163 Fed. 180 (C. C. A. 1st Cir.); In re Rosser, 101 Fed. 562, 4 Am. B. R. 153 (C. C. A. 8th Cir.).

Such commitment does not violate a constitutional prohibition against imprisonment for debt. In re Anderson, 4 Am. B. R. 640, 103 Fed. 854.

XVI. APPELLATE PROCEEDINGS.

36. *How may decisions of the bankruptcy courts be reviewed?*

Any ruling or order of a referee may be taken to the District Court by a petition for review filed within a reasonable time. § 39 (5). Gen. Ord. XXVII.

There are three methods of reviewing a decision of the District Court sitting in Bankruptcy.

1. A final judgment in controversies arising in bankruptcy proceedings may be reviewed on writ of error or appeal by the Circuit Court of Appeals as in other cases. § 24a. Such appeal may be taken within six months.

2. Any order or decree final or interlocutory in a proceeding in bankruptcy may be superintended and revised in matters of law only on petition for review by the Circuit Court of Appeals. § 24b. No time is fixed within which such petition must be filed. It must be made within a reasonable time. By rule in the Second Circuit such petition must be filed within ten days.

3. A judgment in bankruptcy proceedings may be reviewed on appeal as in equity to the Circuit Court of Appeals in the following classes of cases only: Judgments adjudging or refusing to adjudge the defendant a bankrupt; granting or denying a discharge; allowing or rejecting a claim of $500 or over. § 25a. Such appeal must be taken within ten days.

A sharp distinction has been drawn by the courts between "controversies arising in bankruptcy proceedings" which may be reviewed by writ of error or appeal, and rulings in bankruptcy proceedings which may be reviewed as to questions of law upon a petition to revise, the latter being confined to questions arising in the administration of estates in bankruptcy proper, the former to controversies arising outside of the bankruptcy proceedings proper. In re Mueller, 135 Fed. 711, 14 Am. B. R. 256 (C. C. A. 6th Cir.).

If in doubt as to whether a case is "a controversy arising in bankruptcy" or a proceeding in bankruptcy proper the safe practice is to take an appeal and also file a petition to revise. In re Worcester County, 102 Fed. 808, 4 Am. B. R. 496 (C. C. A. 1st Cir.).

BILLS AND NOTES.*

I. IN GENERAL.

1. *What is "negotiable paper," and how does it differ from ordinary choses in action?*

The term "negotiable" is applied to a contract, the right of action on which is transferable by indorsement or delivery, so that the one taking it can sue in his own name. Bouv. Law Dict. The prime distinction between such contracts and ordinary contracts is this: When an ordinary chose in action is assigned, the assignee stands exactly in the shoes of his assignor and is subject to any defenses which were available to the other contracting party against the assignor; when, on the other hand, a negotiable contract is transferred under certain conditions (explained *infra*), the transferee can recover in spite of the existence of such defenses. Bishop on Contracts, §§ 1179, 1180, 1189; 1 Parsons on Contracts, 227; 1 Daniel, Neg. Inst., § 1.

2. *What are the formal requisites of a bill of exchange or promissory note?*

They are as follows: (a) A promise to pay, if a note, or an order on a third person, if a bill. If in the form of a request or a mere authority, it is not a bill. King v. Ellor, 1 Leach, C. L. 323; Little v. Slackford, M. & M. 171. So an "I. O. U," or "Due John Smith, $10.00," is not a negotiable instrument, but only evidence of an indebtedness. Currier v. Lockwood, 40 Conn. 349; Smith v. Allen, 5 Day (Conn.), 337.

(b) The order or promise must be absolute and unconditional. Thus, "Pay X. $10.00 out of my growing subsistence," is bad as a bill, because dependent on a certain fund. Josselyn v. Lacier, 10 Mod. Rep. 294, 316.

"I promise to pay X., or order, $100.00; and when that sum is paid to X., this note is to be given up to me." This condition restricts the negotiability and it is not a note. Hubbard v. Mosely, 11 Gray, 170.

(c) It must be payable in money, i. e., in legal tender, and not in merchandise or the like. Foreign money is a commodity. See Chrysler v. Renois, 43 N. Y. 209; Thompson v. Sloan, 23 Wend. 71.

* In 1897 the Legislatures of New York, Connecticut, Colorado, Virginia and Florida and in 1898 those of Maryland and Massachusetts adopted a uniform code of laws on bills and notes which was prepared and recommended by the Conference of Commissioners on Uniformity of Laws. Mr. John J. Crawford, of New York, who made the draft of the act, has prepared an edition of it, with annotations, which is referred to in the succeeding pages and is of value not only because the Act adopted embodies the rules thought to be supported by the most weighty authorities, but because the annotations contain those authorities and the principal ones which are *contra*.

This Act should of course be consulted by students in the States which have adopted it, whether attention is called in these pages to the changes made thereby, or not.

(d) It must not contain an independent agreement; e. g., to pay money and deliver up horses. Martin v. Chauntry, 2 Str. 1271. But if there is a memorandum of collateral security (Wise v. Charlton, 4 Ad. & El. 786), or a provision to facilitate its collection, such as an agreement to pay attorney's fees if suit is necessary, this probably does not destroy its negotiability. Sperry v. Horr, 32 Iowa, 184. The case of Overton v. Tyler, 3 Barr. (Penn.), 346, represents the courts holding that such a promise destroys negotiability, but the decisions are in much confusion.

(e) It must be for a definite sum, and the amount should appear on its face. That is, a promise "to pay $65.00, and all other sums which may be due," is not a note. Smith v. Nightingale, 2 Starkie, 375; Riker v. Sprague Mfg. Co., 14 R. I. 402. And compare the preceding paragraph.

(f) It must be certain as to time of payment. As a convenient commercial representative of money, a note should by its own terms show a specific date for its maturity, or an option in the holder by which he can at any time fix it. Otherwise, in order to charge indorsers, the holder would have to be constantly on the watch for the happening of some contingency. Alexander v. Thomas, 16 Q. B. 333; Brooks v. Hargreaves, 21 Mich. 254. It is probably law, however, that if the event is one which must necessarily occur, the uncertainty in time does not destroy the negotiability of the instrument. Colehan v. Cooke, Willes, 393 (ten days after the death of my father); Bristol v. Warner, 19 Conn. 7 (on demand, after my decease); Riker v. Sprague Mfg. Co., *supra*.

(g) There must be certainty of parties. A bill must be signed by a drawer, and a note by a maker (McCall v. Taylor, 34 L. J. Rep. 365); and there must be a payee sufficiently described to be ascertained. Thus, a note to "A. B., trustee," or to "the estate of Y.," is good. It means the person who is trustee, or executor, at maturity. Shaw v. Smith, 150 Mass. 166. So, a bill must name a drawee. Peto v. Reynolds, 9 Ex. 410.

(h) A bill or note becomes operative only upon delivery. What amounts to delivery is a question of intention. Chamberlain v. Hopps, 8 Vt. 94; Lawrence v. Bassett, 5 Allen, 140.

See, on this whole subject, 2 Ames, Cas. on Bills and Notes, 826, 834; Crawford, Neg. Inst. Act, pp. 8-16.

3. *Define accommodation paper.*

It is a device to supply credit. X. wishes to raise money and applies to Y. for the use of his name to support X.'s credit. For this purpose, Y. signs a note payable to X.'s order, or indorses one already in existence or draws or accepts a bill, generally without consideration. The importance of the subject is this: that a subsequent holder, even if he knows that there was no actual business transaction between X. and Y., can recover against Y. as maker or

acceptor or indorser, as he may appear on the instrument. Obviously, if such knowledge by a third party prevented his recovering from Y., the practice would lose much of its value to the accommodated party. The Grocers' Bank of New York v. Penfield, 69 N. Y. 502; Duncan v. Gilbert, 29 N. J. Law, 521. What remedy over would be available to Y. as against X., would of course depend on the contract between them.

4. *What is the legal status of a check? of a certificate of deposit?*

A check is simply a bill of exchange, payable on demand, and drawn on a bank or banker. Crawford, Neg. Inst. Law, 112; Bowen v. Newell, 4 Seld. 190.

A certificate of deposit is a promissory note. Bank v. Merrill, 2 Hill, 295; Bellows Falls Bank v. Rutland Bank, 40 Vt. 377.

5. *Is a consideration necessary in a bill or note? and if so, between what parties can the want or failure thereof be shown as a defense?*

A valuable consideration is necessary between the immediate parties to a bill or note, as much as in a simple contract, and as between them, the want or failure of it may, therefore, always be shown. Thus, one who signs his note and delivers it as a gift cannot be held liable upon it by the donee, even though there is a strong moral obligation or a valid reason of natural love and affection which induced him to give it. Hill v. Buckminster, 5 Pick. 391; Fink v. Cox, 18 Johns. 148. The other rules governing the consideration of simple contracts apply equally to commercial paper. For example, a note given for a debt barred by the Statute of Limitations creates a binding obligation; Giddings v. Giddings, 51 Vt. 227; s. c., 31 Am. Rep. 682; and again, if a note be founded on an illegal consideration it is unenforceable and the parties will be left where they are. Scollans v. Flynn, 120 Mass. 271.

"Immediate parties" are, maker and payee, drawer and payee, acceptor and drawer, and an indorsee and his immediate indorser. 1 Daniel, Neg. Inst., § 174.

As between "remote parties," e. g., between indorsee and maker or payee and acceptor, the want or failure of consideration in the original transaction cannot be shown unless *every* transfer of the instrument has been either without value, or with knowledge of the defect in question. In other words, any one transfer before maturity, where value passed, and the transferee had no notice of the defect, protects all subsequent holders, even if they know all the facts as to consideration. Hascall v. Whitmore, 19 Me. 102; s. c., 36 Am. Dec. 738; Estabrook v. Boyle, 1 Allen, 412.

Accommodation paper stands on a footing peculiar to itself. See Ques. 3, *supra*.

6. *Suppose X. makes his note, "Two years after date I promise to pay John Smith ten dollars." Is this a promissory note?*

Such an instrument is known as a "non-negotiable note," though that is, perhaps, a contradiction in terms. For while it is held to be a species of commercial paper, though without words of negotiability (Arnold v. Sprague, 34 Vt. 402; Averett v. Booker, 15 Gratt. [Va.] 163; s. c., 76 Am. Dec. 203), nevertheless, it lacks that characteristic which is the chief value of such paper. See Ques. 1.

Thus, though these notes *prima facie* import a consideration (Carnwright v. Gray, 127 N. Y. 92), and carry days of grace (Duncan v. Maryland Sav. Inst., 10 Gill. & J. [Md.] 195), an indorsee is merely an assignee and stands in his assignor's shoes. Lyon v. Summers, 7 Conn. 399; Dyer v. Homer, 22 Pick. 253.

II. ACCEPTANCE.

7. *What is the usual method of accepting a bill, and what is the contract which the acceptor makes?*

The decisions are unsettled and irreconcilable, but the method of acceptance by writing "Accepted, John Smith," across the face of the bill, is the most satisfactory from a legal standpoint, because a bill or note ought to show what its condition is by what appears upon it. In this country, however, an acceptance on another paper is good. The rule almost universally followed is laid down in Coolidge v. Payson, 2 Wheat. 66. "A letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise." See Exchange Bank v. Rice, 98 Mass. 288 (a full discussion); Barney v. Worthington, 37 N. Y. 112. At common law an oral acceptance is enough. Exchange Bank v. Rice, *supra;* Jarvis v. Wilson, 46 Conn. 90.

Furthermore, it is in many jurisdictions law that an acceptance, though not appearing on the bill, is binding in favor of any holder, whenever it is given, provided the acceptor's promise is made to "any person interested in having the bill paid." Spaulding v. Andrews, 48 Penn. St. 411; Jones v. Council Bluffs Bank, 34 Ill. 313; s. c., 85 Am. Dec. 306.

The liability assumed by the general acceptance of a bill is like that of the maker of a note, namely, to pay it according to its tenor* to the payee or subsequent holder in due course. The acceptor's obligation is primary, and it is not a promise to pay the debt of another. Jarvis v. Wilson, *supra;* Spaulding v. Andrews,

* Formalities as to duty of presentment for payment, place of payment, etc., are considered under Presentment, *infra*.

supra. Accordingly, the genuineness of the drawer's signature and his capacity and authority to draw are not involved in a suit against the acceptor. Halifax v. Lyle, 3 Ex. 446; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77.

8. *What are conditional and qualified acceptances, and what is the effect of taking an acceptance of either kind?*

A conditional acceptance, as its name indicates, is one which makes the liability of the acceptor dependent on the happening of some event, as an acceptance "to pay when in funds."

A qualified acceptance is one which varies the sum, time, place, or mode of payment.

If the drawee puts a conditional or a qualified acceptance on the bill, the party who has presented it to him for acceptance has a choice of two alternatives; he may treat the bill as then and there dishonored, and by proper protest and notice hold the parties whose names are already on the instrument, or he may keep the obligation in its new form. In the latter event, the parties whose names are already on the bill are discharged, for the acceptor has changed its terms and they cannot be bound by this new contract. 1 Daniel, Neg. Inst., §§ 508, 509, 515; Whitehead v. Walker, 9 M. & W. 506; Russell v. Phillips, 14 Q. B. 900; Tuckerman v. Hartwell, 3 Me. 147.

9. *What is an acceptance supra protest, or for honor?*

When a bill has been protested for nonacceptance, a stranger to the bill may accept it "for the honor" of the drawer or an indorser. His contract is to pay the bill if it is regularly presented to the drawee at its maturity, payment refused, and due notice given him. Williams v. Germaine, 7 B. & C. 468; Byles on Bills, *p. 267.

By the custom of merchants, if an acceptor for honor pays the bill, he can recover the amount from the person for whose honor he accepted it (generally the drawer). Mertens v. Winnington, 1 Esp. 113; Konig v. Bayard, 1 Pet. 250; Byles on Bills, *p. 268.

III. INDORSEMENT.

10. *State the mode of indorsement in full and its effect.*

An indorsement is an order to the acceptor or maker written by the payee or subsequent holder in due course upon the instrument, to pay the contents of the bill or note to some third person. An indorser of a note thus becomes practically the drawer of a bill, with the maker as its acceptor. Delivery is necessary to complete an indorsement. Marston v. Allen, 8 M. & W. 494; Middleton v. Griffith, 57 N. J. L. 442; 2 Parsons on Notes and Bills, p. 25; Bouv. Law Dict., "Indorsement."

The effect of such indorsement is twofold. It transfers the title of the instrument to the indorsee, and raises a contract by the indorser, namely, that he will pay the bill or note, if at maturity it is dishonored and proper steps taken to give him notice. Clark v. Sigourney, 17 Conn. 511, 519; Ross v. Jones, 22 Wall. 576, 588.

11. *What is the meaning of "indorsement in blank"? of "indorsement without recourse"? of an indorsement "Pay X."?*

An indorsement in blank is one where the name of the transferee is not stated; i. e., it is usually simply the signature of the indorser. It gives authority to the transferee or any subsequent holder in due course to fill in his own name. Byles on Bills, *p. 148.

An indorsement with the words "without recourse" or equivalent terms, means that the indorser transfers the title, but assumes no liability to pay the holder of the instrument if it is dishonored at maturity. Rice v. Stearns, 3 Mass. 225; Byles on Bills, *p. 151. Such indorsement, however, being a sale, the indorser warrants "that the instrument itself and all the antecedent signatures are genuine." Blethen v. Lovering, 58 Me. 437; Hannum v. Richardson, 48 Vt. 408.

"Pay X." means "Pay X. or order." "The words of the indorsement are interpreted by the negotiable character of the instrument, and that being negotiable, the contract between the indorser and the indorsee is equally negotiable although it was not indorsed to X. 'or order'." Edie v. E. I. Co., 1 W. Bl. 295; Hodges v. Adams, 19 Vt. 74.

12. *Suppose A. wishes to get his note discounted at a bank, and needs the credit of someone else to induce the bank to take it. He executes the note, making the bank payee, and B. writes his name on the back. What is B.'s liability to the bank or its indorsee?*

Such indorsement is known as an *irregular* or *anomalous* indorsement, and decisions as to the indorser's liability are almost as varied as they are numerous. Such an indorser never has the title to the note, and the idea of the bank as payee suing B., as indorser, was so opposed to the usual course that courts made every effort to escape it.

One line of cases (the most numerous) holds B. bound as a joint maker with A., so that a holder, to charge other indorsers, must present the note at maturity to both A. and B. President, etc. v. Willis, 8 Met. (Mass.) 504 (but see Mass. Stat. 1874, chap. 404, and Bank v. Law, 127 Mass. 72); Rothschild v. Grix, 31 Mich. 150; s. c., 18 Am. Rep. 171.

Other courts hold B. as a guarantor, the guaranty being negotiable. Camden v. McKoy, 4 Ill. 437; Carroll v. Weld, 13 id. 682.

In Louisiana, B. is a surety. McGuire v. Bosworth, 1 La. Ann. 248. And see Cook v. Southwick, 9 Tex. 615, for further illustration of the struggle.*

New York and a few other States have adopted the simplest solution, namely, they assume the transaction to have been (1) the making; (2) an indorsement without recourse by the payee (bank); (3) indorsement in blank by B. Hall v. Newcomb, 7 Hill, 416; Barto v. Scheneck, 28 Penn. St. 427.

This desirable result, which generally corresponds to the facts and the intention of the parties, has been more directly reached and very clearly stated in the Negotiable Instruments Law (alluded to above, and settling the law for the States mentioned in the note to Ques. 1 of this section). See Crawford's Ann. Neg. Inst. Act, § 114; and on the whole subject, 1 Ames, Cas. on Bills and Notes, note, p. 269, and the note 29 Am. Dec. 297.

IV. TRANSFER.

a. Delivery.

13. *What is the effect of a delivery of a bill or note without indorsement?*

If it is payable to bearer or has been indorsed in blank, the delivery is a complete transfer of the title. No indorsement is necessary, since the bearer is the one to whom the promise is made. In other words, that is a transfer "according to the tenor of the instrument." Truesdell v. Thompson, 12 Met. (Mass.) 565; Poorman v. Mills, 35 Cal. 118; s. c., 95 Am. Dec. 90; Watervliet Bank v. White, 1 Denio, 608.

If the instrument is payable (or indorsed) to order, a delivery passes the title in equity. The transferee can compel his transferor to indorse it, and a subsequent indorsement by him after becoming a bankrupt, or by his personal representative after his decease, is good. Watkins v. Maule, 2 Jacob & Walker, 237; Malbon v. Southard, 36 Me. 147.

b. Purchaser for Value Without Notice.

14. *A. makes a note payable to bearer. Subsequently it is stolen from the owner by B., who transfers it before maturity for value to C. C. has no notice of the theft. Is A. liable to C.?*

A. is liable, although B., not being the rightful holder, had no right to transfer it to C. The latter, however, taking for value, without notice, and before maturity, can recover. As it is com-

* Almost everywhere refinements as to presumptions of law or fact, admission of evidence on the real intention of the parties, and the like, increase the confusion.

monly put, the thief has no title, but he can convey a good title to an innocent purchaser for value.

This is for the convenience and security of mercantile transactions, and is peculiar to the law-merchant, being in striking contrast to the common-law rule of sales that the seller can only pass what rights he himself possesses. Miller v. Race, 1 Burr. 452; s. c., 1 Sm. Lead. Cas. 250; 2 Parsons on Notes and Bills, 267-269; Peacock v. Rhodes, 2 Doug. 633; Seybel v. Bank, 54 N. Y. 288.

15. *(a) Smith makes a note payable to Brown in settlement of a gambling debt in a State where contracts based on such consideration are absolutely void. Brown sells the note to Robinson, who pays value and has no knowledge of the transaction between the maker and payee. (b) Smith is induced by Brown's fraud to execute a note to him, which is also sold to Robinson by Brown before maturity for value and without notice. Is Smith liable to Robinson in a suit on either or both of these notes?*

These two cases bring out the difference between defenses known as legal or real defenses, and those known as equitable or personal. If a note is *void* as between the original parties, whether by statute or by a common-law rule, such as the one that the contracts of a married woman are void, no one can recover on it against the maker. It never had any life in it as a note. Lowe v. Waller, 2 Doug. 736; Kendall v. Robertson, 12 Cush. 156; Streit v. Sanborn, 47 Vt. 702 (void because for a prohibited sale of liquor.)

On the other hand, in the second case, the defense is personal only; i. e., it is a perfectly good defense to Smith in a suit by Brown on the note. Robinson, however, can recover. The note was duly executed and had legal existence. Brown thus acquired the legal title, and although as against him Smith had an equity, one taking the title before maturity for value and without notice cannot be affected by that. Miller v. Finley, 26 Mich. 249; s. c., 12 Am. Rep. 306; Humphrey v. Clark, 27 Conn. 381. Other illustrations of personal defenses are failure of consideration; Mulford v. Shepard, 2 Ill. 583; s. c., 33 Am. Dec. 432; and the case of a note unenforceable because made on Sunday. Cranson v. Goss, 107 Mass. 439 (a valuable opinion by Gray, C. J.).

16. *What is the meaning of "value" and "without notice" in the phrase, "purchaser for value without notice," as it is used in the law pertaining to bills and notes?*

A buyer of a bill or note is clearly a taker "for value," when he gives in exchange actual money or anything which would be a good consideration in an ordinary contract; e. g., promise to forbear enforcing some right. Oates v. Nat. Bank, 100 U. S. 239,

247. The question whether one who takes a note in conditional payment of a pre-existing debt is a holder for value, has aroused much discussion. The weight of authority is for the affirmative. Swift v. Tyson, 16 Pet. 1; Brush v. Scribner, 11 Conn. 388; Blanchard v. Stevens, 3 Cush. 162. The leading case *contra* is Stalker v. McDonald, 6 Hill, 93, though the ruling on this exact point is only a dictum. This decision was shaken by such cases as Mayer v. Heidelbach, 123 N. Y. 332, and done away in New York by the Negotiable Instruments Act of 1897, section 51. See Crawford, Ann. Neg. Inst. Act, p. 30.

"Notice" means that the plaintiff knew or should have known that there was something wrong with the bill or note. Gross negligence is not enough, but actual bad faith must be shown. Lord Blackburn's summary is this: "It is not enough to show that there was carelessness, negligence or foolishness in not suspecting the bill was wrong when there were circumstances which might have led to such a suspicion. * * * If he was (so to speak) honestly blundering and careless, he would not be disentitled to recover; but if it appeared that he must have had a suspicion of something wrong and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his secret mind, 'I suspect there is something wrong, and if I ask questions, it will be no longer suspecting, but knowing, and then I shall be unable to recover,' that is dishonesty." Jones v. Gordon, 2 App. Cas. 616; s. c., 26 W. R. 172; Seybel v. Bank, 54 N. Y. 288; Goodman v. Simonds, 20 How. (U. S.) 343, 367.

In connection with this topic, compare Ques. 22, 25, in section on Trusts.

17. *If a material alteration is made in a note, does this afford a real or a personal defense? In other words, can the maker successfully set it up against one taking the note, after such alteration, for value and without notice of the change?*

It has been settled that such alteration furnishes the maker a complete defense. It renders the instrument a nullity as to him, for the contract as altered is not the contract to which he bound himself. Master v. Miller, 4 T. R. 320 (change in date); McGrath v. Clark, 56 N. Y. 34 (addition of "with interest"); Citizens' etc., Bank v. Richmond, 121 Mass. 110 (amount altered). But see Crawford, Ann. Neg. Inst. Act, p. 87.

It should be noted, however, that there are weighty authorities which hold that if a maker executes a note negligently so that its alteration is easy, he is liable upon it in the altered state. Young v. Grote, 4 Bing. 253; Halifax Union v. Wheelwright, L. R. 10 Ex. 183; Yocum v. Smith, 14 Am. Rep. 120 (Ill.); Leas v. Walls, 101 Penn. St. 57. But see, *contra*, Greenfield Bank v. Stowell, 123 Mass. 196.

18. *Suppose someone forging X.'s name draws a check upon a bank and sells it to Z., who has no notice of the forgery. The bank pays Z., and later discovers the forgery. Who loses; X., the bank, or Z.?*

The bank loses. They cannot charge up the amount to the account of X. because X. did not draw upon them, and they have, therefore, no authority from him to pay.

Neither can the bank recover from Z. Both of them have been deceived by the same person, and the loss must lie where it falls. Price v. Neal, 3 Burr. 1354; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77; Bank v. Bank, 10 Vt. 141.

19. *A bill is drawn on a bank payable to the order of H. Davis. The bank accepts the bill, which afterwards is indorsed by another H. Davis to Z., who is innocent of any knowledge of the forgery. Is the bank liable to Z.?*

Again, suppose a forger raises the amount of a check, and transfers it to X. The bank pays it, as raised, to X., who is an innocent holder for value. Can the bank recover from the latter?

Both cases must be decided in favor of the bank, though they stand on different grounds. In the first case, Z. secures no title because that can only be passed by the real H. Davis. The bank has agreed to pay according to the tenor of the bill only. Consequently, it has a right to require that the indorsement of the payee be shown. Mead v. Young, 4 T. R. 28. And if it pays, it can recover as for money paid under a mistake of fact. Holt v. Ross, 54 N. Y. 472; Espy v. Bank of Cincinnati, 18 Wall. 604.

In the second case, though it would seem that the principle of Price v. Neal (3 Burr. 1354) ought to apply (see 4 Harv. Law Rev. 306), the rule is that the bank can recover, as for money paid under a mistake of fact. Redington v. Woods, 45 Cal. 406; s. c., 13 Am. Rep. 190; Birmingham Nat. Bank v. Bradley, 103 Ala. 109.

Furthermore, even where a bank has certified a raised check (whereby the drawer is discharged, Minot v. Russ, 156 Mass. 458), and later pays an innocent holder who has taken it on the strength of the certification, the bank can recover from him. Marine Nat. Bank v. Nat. City Bank, 59 N. Y. 67; Parke v. Roser, 67 Ind. 500. On principle, the check when certified becomes an obligation of the bank itself, and when it goes from the one who asks for the certification to an innocent holder for value, the latter should be protected. The bank ought to be treated as if it had issued a certificate of deposit, and it was so held in Louisiana Nat. Bank v. Citizens' Bank, 28 La. Ann. 189; s. c., 26 Am. Rep. 92, note on 96.

By the uniform Negotiable Instruments Act, the certification is made "equivalent to an acceptance."

c. Transfer of Overdue Paper.

20. *A. makes his note to the order of B., payable in two months. The consideration is illegal. After the expiration of the two months, B. sells the note to C., who pays value and has no knowledge of the consideration for it. Can C. recover against A.?*

He cannot. If he had bought of B. under the same circumstances, but before maturity, he could of course have recovered from the maker (Questions 14, 15, 16, *supra*); but after the date of its maturity, commercial paper is not supposed to circulate as such. The protection of a *bona fide* purchaser is taken away and C. here takes the note subject to the same equitable defense to which it was open while held by B. Bissell v. Gowdy, 31 Conn. 47.

The above case is typical, and the same rule holds for all cases where the maker would have an equitable defense against a suit by the payee. Howard v. Ames, 3 Met. (Mass.) 308 (fraud); Amer. Bank v. Jenness, 2 Met. (Mass.) 288 (payment); Brown v. Davies, 3 T. R. 80.

21. *Suppose a note by A. to B. tainted with fraud, and a transfer for value and without notice of the fraud to C. before maturity. C. transfers it to X. after maturity. Can A. successfully claim that because X. bought after maturity, he is subject to the defense available between the original parties?*

No. X. stands in C.'s shoes, and C. was safe, being a *bona fide* purchaser before maturity. C. owned an unassailable title to the note, and X., *whenever* he buys, holds the note on the same terms. Roberts v. Lane, 64 Me. 108; s. c., 18 Am. Rep. 242; Sonoma Bank v. Gove, 63 Cal. 355; s. c., 49 Am. Rep. 92.

Moreover, he is protected even if he in fact knows of the original fraud, for C.'s protection would be imperfect if he could not sell freely. Roberts v. Lane, *supra;* and cf. section on Trusts, Question 23.

22. *A. makes his note to B. on good consideration, but there is a collateral obligation of B.'s in favor of A. which A. could set off against B. in a suit on the note. If B. transfers after maturity, is the transferee subject to this right of set-off?*

By the weight of authority, the transferee is free from the set-off, for the reason that it has nothing to do with the instrument itself. The equities to which an indorsee of overdue or dishonored paper is subject "must be inherent in the bill or note." 2 Daniel, Neg. Inst., §§ 1435-1437; Burroughs v. Moss, 10 B. & C. 558; Robinson v. Lyman, 10 Conn. 30; Trafford v. Hall, 7 R. I. 104; s. c., 82 Am. Dec. 589.

The opposing decisions hold that the set-off is available if it was in existence at the time of the transfer. Baxter v. Little, 6 Met. 7; s. c., 39 Am. Dec. 707; Sargent v. Southgate, 5 Pick. 312; s. c., 16 Am. Dec. 409. And see section on New York Code, Ques. 31.

23. *A note payable to bearer was stolen from the holder before it was due and sold by the thief to Y. after maturity. Can the former holder compel Y. to deliver up the note?*

Yes. The theory is that a thief or finder, having no title, can confer none after maturity, even to an honest buyer. The protection afforded by the law-merchant to a *bona fide* purchaser is only for purchasers *before* maturity, and the transfer here was the same as the sale of an ordinary chattel. The former owner can, therefore, proceed against Y. and regain the note. Vermilye & Co. v. Adams Exp. Co., 21 Wall. 138; Hinckley v. Bank, 131 Mass. 147.

24. *When is a demand note overdue, so that one taking it thereafter is bound by its defects?*

At common law, in this country, the rule was that a demand note was overdue after a reasonable time, what was a reasonable time being dependent "on the circumstances of the case and the situation of the parties." Tomlinson Co. v. Kinsella, 31 Conn. 268; Losee v. Dunkin, 7 Johns. 70. And see Question 35, *infra*. This unsatisfactory limitation has been in some States changed to a fixed time (Mass. Gen. Stat., chap. 53, § 10; Cal. Civil Code, § 3248; Paine v. C. V. R. R. Co., 118 U. S. 152), but the Negotiable Instruments Act continued the old law. Crawford, Ann. Neg. Inst. Act, § 92.

V. DISCHARGE; INCLUDING PAYMENT AND RETRANSFER.

a. Discharge.

25. *Under what circumstances is the primary debtor discharged from liability on the instrument?*

1. By voluntary physical destruction of the instrument by the holder. Bank of the U. S. v. Sill, 5 Conn. 106; Blade v. Noland, 12 Wend. 173.

2. By voluntary cancellation of the instrument by the holder (Baxendale v. Bennett, 3 Q. B. Div. 525; Dist. of Columbia v. Cornell, 130 U. S. 655); but the cancellation must be so made as to be apparent on the face of the note, or it is no defense against one buying *bona fide* before maturity. Ingham v. Primrose, 7 C. B. (N. S.) 82.

3. By renunciation by the holder of his rights. If this occurs at or after maturity, the instrument is discharged; if before maturity,

it is equally good, except against one purchasing for value and without notice before that date. Foster v. Dawber, 6 Exch. 839. In this country the rule is that a renunciation is in no case effectual without a surrender of the instrument. Vanderbeck v. Vanderbeck, 30 N. J. Eq. 267; Bragg v. Danielson, 141 Mass. 195.

4. By payment in due course. See Questions 29, 30, *infra*.

5. By material alteration. See Question 17, *supra*.

6. By operation of law, as by appointment of the acceptor or maker as executor of the holder, thus merging in one the creditor and the debtor. Freakley v. Fox, 9 Barn. & Cr. 130; s. c., 17 E. C. L. 66; Byles on Bills, *pp. 55, 56.*

On the whole subject, see 2 Ames on Bills and Notes, 821 *et seq.*

26. *There are four indorsers on a note. Suppose the holder gives the second one a full discharge of all liability on it, or makes a binding contract with him that he shall not be sued on it for a certain time. What is the effect on the third and fourth indorsers?*

Their liability is discharged.

The contract of an indorser has two aspects. The agreement to pay the holder on dishonor of the note is counterbalanced by a right of recourse to any prior party for indemnity. The duty and the right are interdependent, and, consequently, whatever amounts to a discharge of any one party operates to discharge all *subsequent* parties. For if a holder after discharging an indorser X. should then proceed against an indorser Y., whose indorsement was subsequent to X.'s, Y. could say, "You have destroyed my right of recourse on this instrument and, therefore, you have no right to ask me to pay." The chain falls to pieces.

The reason for the rule is also stated (and perhaps more accurately) in other terms, namely, that it is to prevent circuity of action. For if the holder after releasing a prior indorser should be allowed to compel payment from a subsequent indorser, the latter ought to be allowed to sue the prior indorser. But the holder has agreed with the latter that this shall not be done, so he (the holder) would be liable in turn to him. Randolph on Commercial Paper, §§ 772, 1430; Story on Promissory Notes, §§ 400-402, 413, 414; Brown v. Williams, 4 Wend. 360; Newcomb v. Raynor, 21 id. 108. See 2 Ames Cases on Bills and Notes, 118, 120.

In the same way, if instead of a full discharge there is a valid agreement to give the prior indorser time, without the consent of the subsequent indorsers, the latter are discharged from all liability, since the holder has no more right to impair or hamper their right of recourse than he has to destroy it. By the end of the time named, the prior indorser may be insolvent and their remedy over, worthless. Hence, they are fully discharged. Phil-

* Many States have modified by statute the common-law rule alluded to.

pot v. Briant, 4 Bing. 717; s. c., 13 E. C. L. 708; and authorities just cited.

The absolute discharge of the one *primarily* liable of course discharges everyone on the instrument. 2 Daniel, Neg. Inst., § 1236; Suydam v. Westfall, 2 Denio, 205; Dooley v. Co., 3 Hughes (C. C.), 221.

27. *If the holder in the preceding case had gratuitously assured the second indorser that he would not sue him for a certain time, would the subsequent indorsers have been released?*

No. They are released only if the holder and the prior indorser make a binding enforceable contract that no action shall be taken on the instrument. Neither a mere promise to forbear for a certain time, nor actual delay and indulgence is sufficient; there must be a consideration. Ross v. Jones, 22 Wall. 576; Philpot v. Briant, 4 Bing. 717; s. c., 13 E. C. L. 708; Bell v. Martin, 18 N. J. Law, 167.

It should, however, be noticed that even if there is a binding contract made, the holder may preserve his rights against the subsequent indorsers by making his intention to do so clear. The contract with the prior indorser is then construed to mean simply that *the holder* will not sue the party in question, and since any indorser who wishes can pay up the note and immediately bring suit, the latter's right of recourse has not been impaired by the contract as thus made. Sohier v. Loring, 6 Cush. 537; Hagey v. Hill, 75 Penn. St. 108; s. c., 15 Am. Rep. 583. See 2 Ames Cases, 120.

28. *Summarize the ways in which one secondarily liable on a bill or note is discharged.*

1. By a full release or discharge of a prior party by the holder as explained in Question 26.

2. By a binding agreement by the holder with a prior holder that the latter shall not be sued for a time named. This impairs the rights of all subsequent indorsers as pointed out in Question 26, and discharges them on principles analogous to those which govern the discharge of sureties. See Ross v. Jones, 22 Wall. 576, and Bell v. Martin, 18 N. J. Law, 167, *supra.*

3. By the intentional cancellation (by the holder) of his signature. 2 Parsons on Notes and Bills, 30.

4. By a material alteration. This avoids the instrument as to all parties who are bound by it at the time of the alteration. It effects a change in their contract to which they have not assented. See Question 17, *supra.*

On the whole topic, see Crawford, Ann. Neg. Inst. Act, pp. 83-88.

5. Payment by any indorser at or after maturity discharges all indorsers whose liability is subsequent to his. West, etc., Bank v.

Thompson, 124 Mass. 515; Davis v. Miller, 14 Gratt. 5; Story on Promissory Notes, §§ 400-402.

b. Payment.

29. *Before maturity, X., the maker of a note, paid it to the holder, Y., but did not take the note. Y. thereupon sold it, still before maturity, to a bona fide purchaser, who sued the maker upon it. Can he recover?*

Yes. The transaction between X. and Y., while it furnished a good defense to X. against Y., was not a payment in due course. It is not the habit of business men to pay their notes before they are due, and such payment is not available as a defense against parties buying in good faith before maturity. 2 Daniel, Neg. Inst., § 1233; Harrison v. Edwards, 12 Vt. 648; s. c., 36 Am. Dec. 364; and see Question 15, *supra*.

30. *A. makes a note payable to B.'s order, and B. indorses it in blank in transferring it to C. The note is stolen from C., and at maturity the thief presents it to A., who pays. Must he pay again to C.?*

Not if his payment was in good faith; for the one presenting it was the bearer, and hence payment to him was payment according to the tenor of the indorsement. It is another instance of the modification of ordinary rules to promote the convenience and security of business transactions. Occasional payments to the wrong person are better than a requirement that the bearer must always satisfy the debtor of his title. 2 Daniel, Neg. Inst., § 1230; Chitty on Bills, 394; Brennan v. Bank, 62 Mich. 343; Lamb v. Matthews, 41 Vt. 42.

Moreover, all danger may be avoided by indorsing the instrument in full. In that case, if the debtor pays anyone other than the indorsee named, even if the person asking payment has possession of the bill or note, he does so at his peril. Doubleday v. Kress, 50 N. Y. 410; s. c., 10 Am. Rep. 502.

c. Retransfer.

31. *A. makes a time note payable to B.'s order, which is indorsed to C. Before maturity, A. pays C. and takes the note. Later, but still before maturity, he sells it to D. The note being dishonored when it falls due, D. seeks to charge B. as indorser. Can he do so?*

This is not the same case as the one dealt with in Question 29. Here the question is whether the person primarily liable who has bought the paper before it is due, can sell it again,—"reissue" it, as it is sometimes called.

The weight of authority is that he can do so and that the bill or note is the same obligation in all respects as before he bought it, and carries the same responsibility of the indorser. In short, the arguments that such a transaction is not a payment in due course and that the indorser is bound only as he expected to be, have prevailed. Morley v. Culverwell, 7 M. & W. 174; Rogers v. Gallagher, 49 Ill. 182; s. c., 95 Am. Dec. 583, and note; 1 Daniel, Neg. Inst., § 781b, and note.

Contra, Central Bank v. Hammett, 50 N. Y. 158, holding that one taking from an acceptor is not a *bona fide* holder, because he has notice that in the ordinary course of business it could only have been in the possession of the transferor either for acceptance, or after it had been paid. To the same effect, that the union of legal title with the obligation in the one primarily liable extinguishes the instrument absolutely, see Beebe v. Bank, 4 Ark. 546. But these cases seem to assume the point at issue.

32. *Suppose a bill or note dishonored by nonpayment at maturity is paid by a drawer or indorser. Can he retransfer it so that the purchaser can hold the other parties whose names are on the instrument?*

Firstly, the purchaser cannot hold those whose indorsements are subsequent to that of the indorser who pays. See Questions 26 and 28, *supra*.

Secondly, as a general rule, those whose indorsements are prior can be held. They are already liable to the one paying, as explained in preceding questions, by reason of his having paid; and it makes no difference to them whether they pay him or his transferee. A bill or note is still negotiable even after dishonor. French v. Jarvis, 29 Conn. 347; Cochran v. Wheeler, 7 N. H. 202; s. c., 26 Am. Dec. 732; Callow v. Lawrence, 3 Maule & Selw. 95.

Thirdly. There are two exceptions to the rule as stated in the preceding paragraph. If a bill drawn payable to the order of a third person is dishonored and taken up by the drawer, and then transferred, he himself is the only one the transferee can sue. For it has been said since Beck v. Robley (1774), that if it is still a bill so that the transferee can sue the *acceptor*, the *payee* must also continue liable on his indorsement, "for which there is no color."* Beck v. Robley, 1 H. Blackstone, 89, note a; Gordon v. Maynard, 7 Allen, 456; s. c., 83 Am. Dec. 699; Price v. Sharp, 2 Ired. L. (N. Car.) 417, per Ruffin, C. J.

The other exception is where the bill was accepted for the accommodation of the drawer. The transferee cannot sue the acceptor there on account of the circuity of action; for if he were allowed to recover, the acceptor would have an action against the

* The courts do not point out why the transferee, a taker after maturity, would not be subject to the equitable defense by the payee of discharge by the drawer's payment.

drawer on account of their agreement that payment at maturity by the accommodated party should be the end of the bill. The transferee taking after maturity would be subject to this defense by the acceptor. 2 Daniel, Neg. Inst., § 1239; Lazarus v. Cowie, 3 Q. B. 459; s. c., 43 E. C. L. 819; Blenn v. Lyford, 70 Me. 149.

The Negotiable Instruments Act continued the law as here stated. See Crawford, Ann. Neg. Inst. Act, p. 85.

VI. PRESENTMENT FOR PAYMENT; PROTEST, AND NOTICE OF DISHONOR.

a. Presentment for Payment.*

33. *Why is it necessary to present a bill or note for payment?*

In order to hold the drawer or indorser in case the acceptor or maker does not pay. According to the contract of the drawer or indorser, it is a condition precedent to his liability that demand for payment shall be made at maturity, of the person primarily liable. The holder must, therefore, do this to hold those secondarily liable (though of course it may be waived), and the fact that they know the obligation is due and unpaid makes no difference. Dwight v. Scovil, 2 Conn. 654; Cayuga, etc., v. Warden, 1 N. Y. 413. But see Question 36, *infra.*

As a rule, presentment is not necessary to charge the acceptor or maker. His engagement is absolute that the obligation shall be paid at maturity. 1 Daniel, Neg. Inst., § 571. If, however, the instrument is payable at a particular place, a failure to make demand of the debtor at that place relieves him from paying interest and costs provided he was ready to pay at the time and place designated. Wolcott v. Van Santvoord, 17 Johns. 248; Parker v. Stroud, 98 N. Y. 379; Eldred v. Hawes, 4 Conn. 465.

Whether presentment is a condition precedent to fix the liability of one who is bound on the instrument as an absolute guarantor is a mooted question. The courts which deny the necessity of demand and notice of nonpayment to hold a guarantor say that this is an absolute contract and that on nonpayment at maturity it is the duty of the guarantor to seek the holder and pay him. Brown v. Curtiss, 2 N. Y. 225; Clay v. Edgerton, 19 Ohio St. 549; s. c., 2 Am. Rep. 422; Breed v. Hillhouse, 7 Conn. 523; City Bank v. Hopson, 53 Conn. 453.

The opposing decisions hold that the contract is collateral, that the fact of nonpayment is peculiarly within the knowledge of the guaran-

* Presentment of a bill of exchange to the drawee for *acceptance* is unnecessary except where the bill is payable at sight, or a fixed time after sight or after demand. 2 Ames on Bills and Notes, 857; 1 Daniel, Neg. Inst., § 454; Fall River Bank v. Willard, 5 Metc. 216. Bills of the class named must be presented for acceptance "within a reasonable time," or the drawer and indorsers are discharged. What is a reasonable time depends on the facts of each case. 1 Daniel, Neg. Inst., §§ 454, 465, 466.

By the Negotiable Instruments Act, bills payable after sight "or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument" must be presented for acceptance. See Crawford, Ann. Neg. Inst. Act, p. 97.

tee, and that the guarantor is entitled to require demand upon the maker "within a reasonable time and notice of nonpayment within a reasonable time." 2 Daniel, Neg. Inst., § 1787; Oxford Bank v. Haynes, 8 Pick. 423; s. c., 19 Am. Dec. 334 (a strong case); Douglas v. Reynolds, 7 Pet. 126.

34. *What is a sufficient presentment?*

1. It must be by the holder or one duly authorized by him. Sussex Bank v. Baldwin, 2 Harr. (N. J.) 487; (compare Question 30, *supra*).

2. To the drawee or acceptor of a bill or the maker of a note or an authorized agent, such as the wife of the obligor if presentment is at his residence, or a clerk if at his place of business. 1 Daniel, Neg. Inst., §§ 589, 590. Stewart v. Eden, 2 Cai. (N. Y.) 121; s. c., 2 Am. Dec. 222.

3. On the exact day of maturity, unless some legal excuse be forthcoming. Griffin v. Goff, 12 Johns. 423; Mechanics' Bank v. Bank, 6 Met. 13. See Question 36, *infra*, for matters of excuse.

4. At a proper place. If no place is mentioned, presentment at either the home or the place of business of the maker or acceptor is sufficient. 1 Daniel, Neg. Inst., § 635; Cox v. Bank, 100 U. S. 713. If a particular place is named, presentment must be made there. 1 Daniel, *supra*, and § 644; Parker v. Stroud, 98 N. Y. 379.

5. At a reasonable hour; i. e., during customary banking hours if presentment is made at a bank, or if at a house, between the usual hours of rising and retiring. Salt etc., Bank v. Burton, 58 N. Y. 430; Dana v. Sawyer, 22 Me. 244; s. c., 39 Am. Dec. 574 (11:45 p. m. too late at house).

In the case of Sussex Bank v. Baldwin, *supra*, there is a discussion of several of these requisites, and on the whole topic, see 1 Daniel, Neg. Inst., chap. XX, especially §§ 571, 572, 575, 590a, 601, 602, 604, 635, 636.

35. *X. holds two notes, one payable in three months from January first, the other payable on demand. Both are indorsed. On what days should he present these notes for payment in order to charge the indorsers?*

The common-law rule as to time notes and bills was that three days of grace should be added to the time named in the instrument. That is, the day of maturity of the first note would be April 4th. 1 Daniel, Neg. Inst., § 614; Bank v. Triplett, 1 Pet. 25.*

The question of the date on which it is necessary to present demand paper in order to charge indorsers is far from settled, and

* Days of grace are abolished by the Negotiable Instruments Act, and also by statute in several States which have not yet adopted that Code. See Crawford, Ann. Neg. Inst., p. 67.

a reference to all the shades of opinion would be beyond the scope of this book. Distinctions are made between demand bills, notes and checks, between simple demand notes and demand notes payable "with interest," and what not. See the discussion and cases cited in 1 Daniel, Neg. Inst., §§ 604-610.

The Negotiable Instruments Act provides that presentment must be made within a reasonable time. Crawford, Ann. Neg. Inst. Act, p. 61.

36. *Is delay in making presentment ever excusable?*

Yes. The liability of the drawer or indorser is not made to depend absolutely upon presentment on the day of maturity, but only upon *due diligence* of the holder in making presentment. Usually this means presentment on the exact day of maturity, but an allegation of due demand is supported by proof that the holder, being prevented by inevitable accident from presenting the instrument for payment on the day of maturity, made presentment within a reasonable time thereafter. Instances are, mistake in the post-office (Windham Bank v. Norton, 22 Conn. 213); and maturity falling between the death of the holder and appointment of a personal representative. White v. Stoddard, 11 Gray, 258. And see cases cited in vol. 4, Am. & Eng. Ency. of Law (2d ed.), 365.

b. Protest.

37. *What does "protest" mean?*

Protest, technically speaking, is the second formality which must be taken by the holder of a certain kind of negotiable paper in order to hold the drawer and indorsers. The proper method is to have a notary public make presentment of the bill to the drawee, and then, if payment is refused (or acceptance, if the presentment be for that purpose), set down under his official hand the facts of the presentment, reciting in full and exact detail a fair description of the bill, the reason for dishonor, the fact of protest, and of compliance with all the requisites of presentment explained in the preceding section. The instrument thus made *is* the "protest." Each necessary fact should be distinctly set forth, for the document is only evidence of what it states on its face. At common law, protest can only be used for foreign bills of exchange, but for that class of commercial paper it is vital; that is, "it constitutes an independent solemnity essential to fix the liability of a drawer or indorser of a foreign bill." 2 Ames, Bills and Notes, 114, and cases cited. The custom of merchants took this form because this certificate of a public officer would provide the most satisfactory evidence to the drawer, who, living abroad, could not easily make proper inquiry into the facts of dishonor. 2 Daniel, Neg. Inst., §§ 926, 927, 929, 950; Dennistoun v. Stewart, 17 How. 606.

By statute, a similar proceeding may be taken to present notes or inland bills, but such presentment is not generally made necessary. 2 Daniel, Neg. Inst., § 926; Bryant v. Lord, 19 Minn. 396. And see the Statutes of the various States.

38. *What is the use made of the protest?*

The instrument itself is *prima facie* evidence of all the facts which it recites, so far as they come within the scope of the notary's duty; i. e., to make presentment and protest. When the protest is of a foreign bill, the notarial act must be produced. 2 Daniel, Neg. Inst., § 959; Townsley v. Rumrall, 2 Pet. 170. When, however, it is of a note or an inland bill, the instrument is at common law not even admissible as evidence of the facts it recites. By the statutes which permit protest of such paper, the document gains admission, but does not become indispensable. 2 Jones on Ev., § 557; Bailey v. Dozier, 6 How. 23, 28.

c. Notice of Dishonor.

39. *The holder of a bill or note on which there are indorsers, presents it to the drawee or maker at maturity, and the latter refuses to pay it. What further shall be done to hold the indorsers liable?*

Immediate notice must be sent to them (or to the one the holder means to make liable for payment), and this notice, though no invariable form is required, should include these requisites: (1) A copy or such a description of the instrument that the indorser will not be misled; Mills v. Bank, 11 Wheat. 431; Gates v. Beecher, 60 N. Y. 518; (2) An intimation (not necessarily an express statement) that the bill or note was dishonored; Burgess v. Vreeland, 24 N. J. Law, 71; Youngs v. Lee, 12 N. Y. 551; and cf. 2 Daniel, Neg. Inst., § 983; (3) The notice should be sent by the holder, or his agent for collection, or at least by some party liable on the bill or note. 2 Daniel, *supra*, §§ 987-994; Woodthorpe v. Lawes, 2 M. & W. 109; Brailsford v. Williams, 15 Md. 150; s. c., 74 Am. Dec. 559. It is not necessary, though formerly so laid down, to state in the notice that the party to whom it is sent is looked to for payment. Burgess v. Vreeland, *supra*.

The importance of sending a correct notice of dishonor is that that ceremony is a condition precedent to the liability of the drawer or indorser. It is part of his contract that he shall not be liable unless such a notice is sent; and knowledge on his part, through other sources, of the fact of dishonor is of no consequence. 2 Daniel, *supra*, § 970; Dwight v. Scovil, 1 Conn. 654; Juniata Bank v. Hale, 16 S. & R. 157; s. c., 16 Am. Dec. 558.

40. *When and how must the notice be sent?*

The rule is that notice shall be given within a reasonable time after dishonor; but the definition of a reasonable time is so exact as to leave little room for variation. By the weight of authority notice of dishonor, when the holder and the indorser to be notified live in different towns, must be posted so as to leave town not later than the first mail of the day following the day of dishonor, provided that mail does not leave until a convenient time after the opening of business hours to send off the message. If it does leave at an inconveniently early hour, then by the next mail thereafter. Burgess v. Vreeland, 24 N. J. Law, 71; s. c., 59 Am. Rep. 408; Smith v. Poillon, 87 N. Y. 590, 597; 2 Daniel, Neg. Inst., §§ 1039–1041.

When the parties live in the same town, the limit of time is fixed at the end of proper hours for doing business on the day after the dishonor. Until recently, under these circumstances, the proper method of serving notice has been by personal delivery, but the postal service may be employed in cities where house-to-house delivery is made, and statutes of many States provide for its use in all towns. 2 Daniel, Neg. Inst., §§ 1003, 1008; 4 Am. & Eng. Ency. of Law, 426, and cases cited; Ransom v. Mack, 2 Hill (N. Y.), 580; s. c., 38 Am. Dec. 602, and note; Eagle Bank v. Hathaway, 5 Met. 214.

If the accepted rules as laid down above are followed, it is a good notice to the indorser whether actually received by him or not; and if, on the other hand, some other method of transmission be adopted and the notice is actually received within the proper time, the indorser is equally bound; he cannot complain of the means used. 2 Daniel, *supra*, § 1003; Cabot Bank v. Warner, 10 Allen, 524.

The Negotiable Instruments Act provides for sending notice either by delivery or by post, at the option of the sender, and limits the time in accordance with the rules above set forth. See Crawford, Neg. Inst. Act, pp. 72, 75, 76.

CARRIERS.

I. CARRIAGE OF GOODS.

a. In General.

1. *What is a common carrier*?*

He is one who undertakes for hire to carry from place to place the goods of anyone who chooses to employ him. Hutchinson on Carriers,† § 47. The undertaking is limited in its scope by the public profession he makes of the kind and quantity of goods he will carry. This, each carrier determines for himself, when he takes up the business, but within that line he must act for every one alike, and is liable to an action for refusal. Messenger v. R. R. Co., 37 N. J. Law, 531, 534; Tunnel v. Pettijohn, 2 Harr. (Del.) 48; Hutchinson on Carriers, §§ 77, 78. See, also, on the public nature of the calling, 1 Chit. Pl. 136; Nevin v. P. P. C. Co., 106 Ill. 222.

2. *Is it necessary that a carrier should have possession of the property he takes charge of? or, to illustrate, is a tugboat a common carrier of its tow?*

The decisions are not uniform. On the one hand, the bailment, which is generally an essential in the carriage of goods, is absent in the case suggested; the tug merely furnishes motive power. See Wells v. Nav. Co., 2 N. Y. 204; Trans. Line v. Hope, 95 U. S. 297, which hold that a towing line is not a common carrier.

But on the other hand, there is certainly a transportation and in the usual case, where the master of the tug has full control of the location and management of his tow, there is reason to consider the bailment sufficiently complete and the tugboat a common carrier. Bussey v. Trans. Co., 24 La. Ann. 165. And see Ashmore v. Steam, etc., Co., 4 Dutch. 180, per Van Dyke, J.

3. *An express company which sent the goods of its patrons from place to place by means of railroad trains, steamers and other vehicles, set up the fact that it did not own or control the means of conveyance to show that it was not a common carrier. Is this a valid argument?*

No, it is of no importance. The question is, what is the service they offer to the public. The means they choose to adopt do not affect the question. Buckland v. Adams Exp. Co., 97 Mass. 124.

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* "Carrier" in this section is used throughout as meaning *common* carrier.

† References are to the second edition of Hutchinson on Carriers (1891).

4. *Is a sleeping-car company a common carrier?*

Clearly not of the passengers, because its undertaking is only to furnish sleeping accommodations, not to transport people. And not of the goods of its patrons, because there is no bailment. The rule is uniform. Lewis v. Car Co., 143 Mass. 267; Woodruff Co. v. Diehl, 84 Ind. 474.

b. Liability for Loss.

1. IN GENERAL.

5. *What is the general rule as to the carrier's liability for goods lost?*

That he is liable absolutely; that is, that the carrier is an insurer of the safety of the goods. The reason usually assigned for this harsh doctrine is the impossibility of the owner's watching the property and the consequent danger of collusion between the carrier and thieves. The two historic exceptions are (1) the act of God (Eliot v. St. Louis, etc., Ry. Co., 76 Mo. 518); and (2) the public enemy (Hutchinson on Carriers, 170 a, 211); but the numerous modern exceptions show the tendency to conform the old law to present conditions.

2. THE EXCEPTIONS TO THE RULE.

6. *Which, if either, of the following cases would be included under the excuse known as "Act of God." (a) A vessel was proceeding into harbor in a moderately heavy snow storm. The master was misled by the storm and by the omission of some third person as to the harbor lights, and the cargo was damaged by the ship's grounding. (b) A ship was passing through a bridge when a sudden gust of wind drove her against one of the piers and sunk her.*

The question is, "Was a human act any part of the proximate cause?" In (a) the storm was an act of nature, and hence, strictly speaking, an act of God, but it furnishes no defense to the carrier, because a human agency (though that of someone unconnected with the carrier) concurred in causing the loss. McArthur v. Sears, 21 Wend. 190. In (b) the act of God, i. e. the unusually strong gust, was the sole cause. Amies v. Stevens, 1 Strange, 128. The carrier was, therefore, excused in (b), and not excused in (a).

7. *Inherent nature of the goods carried. The plaintiff shipped hogs by defendant's line. When the train was stopped for any length of time the animals crowded to the doors for air, according to their natural tendency, and many were thereby smothered. Is the defendant liable?*

No. The rule of absolute liability does not extend to losses caused by any "inherent vice" of the goods carried, for clearly the loss from such causes is not traceable to the carrier (Kinnick v. Chicago, etc., Ry. Co., 69 Iowa 665); but a duty remains, in this case and all other exceptions to the insurer's liability, to take *ordinary* care. Kinnick v. R. R. Co., *supra;* Steamboat Lynx v. King, 12 Mo. 272..

8. *Act of shipper. (a) The shipper of a carriage insisted on lashing it to the car himself. The carriage was blown off en route. (b) The shipper packed his goods improperly, and damage ensued, partly before the improper packing became evident to the carrier and partly afterwards. (c) The shipper sent a letter by a common carrier of letters, containing a valuable article of a kind not usually so sent, which he did not mention. Which must bear the loss in these cases?*

(a) The shipper, having assumed to attend to the fastenings himself, must bear the loss. His own act is part of the legal cause. Miltimore v. Chicago, etc., Ry. Co., 37 Wis. 190.

(b) Such a case modifies the doctrine just stated. The carrier is liable for that part of the loss occurring after the improper packing is apparent. Even then, moreover, he is not bound to his extraordinary liability, but only to use "ordinary care" to prevent further damage from the defective packing. Union Exp. Co. v. Graham, 26 Ohio St. 595; Shriver v. R. R. Co., 24 Minn. 506.

(c) The shipper cannot recover — for, although the general rule is that the shipper need not volunteer information of the contents of a package (Phillips v. Earle, 8 Pick. 182), still it is a fraud to send goods so packed as to seem to be what they are not. Hayes v. Wells, Fargo & Co., 23 Cal. 185; R. R. Co. v. Shea, 66 Ill. 471.

9. *Is a carrier excused for nondelivery caused by a seizure of the goods under legal process?*

Yes. The policy of the law is strongly against any resistance to an officer, and the carrier is not to be forced into making such resistance. If the writ is fair on its face, he is justified in handing over the property (Stiles v. Davis, 1 Black 101); and this is true even if the attachment should be under a statute proving later to be unconstitutional. McAllister v. R. R. Co., 74 Mo. 351. Kiff v. R. R. Co., 117 Mass, 591, *contra.* The rule is qualified by the reasonable requirement that the owner shall be notified. Bliven v. R. R. Co., 36 N. Y. 403.

Analogous to the case of attachment is that of a surrender of goods on demand of the true owner, a course in which the carrier is clearly justified. Bates v. Stanton, 1 Duer, 79.

10. *The exercise of the right of stoppage in transitu forms another excuse to the carrier for nondelivery. Define that right.*

A vendor who discovers after forwarding goods that the consignee is bankrupt, has the right to stop the goods at any time during the "transitus," i. e., before delivery to the consignee or his agent. The carrier is not only excused for not delivering after such notification from the consignor, but a delivery would be a conversion. Reynolds v. R. R. Co., 43 N. H. 580; Newhall v. Vargas, 13 Me. 93.

3. LIABILITY FOR DELAY OR DEVIATION.

11. *What is the rule as to delay?*

The question is simply whether the time occupied in the transit is, under the circumstances, reasonable. Scovill v. Griffith, 12 N. Y. 509; Dawson v. R. R. Co., 79 Mo. 296. A strike, for instance, would excuse delay, especially if violence were used by the strikers, but in that case as in every other, reasonableness under the circumstances, including the question of yielding to the strikers' demands, is the final test. Geismer v. L. I., etc., R. R. Co., 102 N. Y. 563; R. R. Co. v. Hazen, 84 Ill. 36.

12. *Deviation. A carrier left his route to call at his home, about three miles from the main road. A bridge on the by-road gave way and the goods were injured. Is he liable?*

Yes; by a general principle of law, that if one interferes or meddles with another's property, he does so at his peril. Powers v. Davenport, 7 Blatchf. 497; Davis v. Garrett, 6 Bing. 716. If, however, an emergency, such as a strike, arises so that the carrier must choose between a deviation from his route and long delay with possible loss, the proper course is to send the goods around by some other route, though more roundabout than the regular one. Express Co. v. Kountze Bros., 8 Wall. 342; Steiger v. Erie R. R. Co., 5 Hun, 345.

4. EXPRESS LIMITATIONS OF THE ABSOLUTE LIABILITY.

13. *An express company published in a newspaper, which one X. read regularly, a notice that it would not be liable for losses of more than* $50 *on any package unless the value was stated when the goods were sent. X., who had never heard of the notice, sent a package worth* $200. *Can he recover the value?*

Yes: for such notice must be brought to the shipper's actual knowledge. A carrier may make reasonable regulations and they will bind the shipper, but, generally speaking, they must be brought home to the shipper, *as part of the reasonableness.* Hollister v. Nowlen, 19 Wend. 234; Judson v. Western, etc., Corp., 6 Allen, 486.

14. *Can a carrier, by a contract with the shipper, relieve himself from liability for negligence?*

By the great weight of authority in this country, he cannot. He is a public servant and must be kept strictly to his duty, on strong grounds of public policy. In some courts, also, he is considered to have an unfair advantage of position in dealing with the shipper. Davidson v. Graham, 2 Ohio St. 131; R. R. Co. v. Lockwood, 17 Wall. 357. The contrary rule has been adopted in some States. Maynard v. R. R. Co., 71 N. Y. 180.

Contracts are frequent, however, by which the carrier is relieved from liability for loss not caused by his negligence (e. g., by pure accident), in return for which a diminished rate of freight is given. These are everywhere upheld. Davidson v. Graham, *supra;* R. R. Co. v. Morrison, 19 Ill. 336.

15. *Suppose there is an agreement between the carrier and the shipper that in event of loss the value of the goods shall be taken to be a certain amount. Is this good?*

The decisions are divided, though both sides insist that the fixed valuation must be made fairly. In applying this, several courts, headed by the Supreme Court of the United States, take the statement of value in the bill of lading as in all cases conclusive. Hart v. Penn. R. R. Co., 112 U. S. 331; Garves v. L. S. R. R. Co., 137 Mass. 33. On the other hand, by perhaps the weight of authority, such contracts are only supported when the value stated actually approximates the true value. They consider that otherwise the objections (of public policy) which apply to contracts against liability for negligence apply to these also, especially when the stipulations of value are "ironclad," i. e. in an invariable printed form. Ry. Co. v. Wynn, 88 Tenn. 320; R. R. Co. v. Backman, 28 Ohio St. 144.

As to when stipulations in a bill of lading will bind the consignor, without regard to his knowledge of them, the weight of authority is that when the shipper takes what he knows or believes to be a contract and does not dissent from its terms, he is bound by those terms. Lawrence v. R. R. Co., 36 Conn. 63; Kirkland v. Dinsmore, 62 N. Y. 171. In Illinois, however, and some other jurisdictions, it must be found as a fact that the shipper gave assent. Anchor Line v. Dater, 68 Ill. 369; Seller v. S. S. "Pacific," 1 Ore. 409.

c. Delivery by the Carrier.

1. TERMINATION OF LIABILITY AS CARRIER.

16. *Where is the line to be drawn which will end the strict liability of a carrier,— at actual delivery to the consignee? or at what point?*

This depends upon what the carrier holds out to the public as his route; and that varies of course with different classes of carriers.

The route of a parcel express company clearly extends to the house or place of business of the consignee, and something equivalent to a personal delivery is necessary to end the liability of the carrier as such. The route of a carrier like a railroad company, however, extends only to the freight station, and the question then arises: Does the special liability cease when the train stops, when the goods are unloaded, or at what time?

Opinion is evenly divided between the logical view, that with such a carrier the *absolute* liability lasts only until the goods are placed in a position accessible to the consignee (the liability being thereafter that of a warehouseman); Norway Plains Co. v. R. R. Co., 1 Gray, 263; Gashweiler v. R. R. Co., 83 Mo. 112; and the view that it lasts a "reasonable time" after the goods are unloaded. R. R. Co. v. Maris, 16 Kan. 333; Graves v. Steamboat Co., 38 Conn. 143. New York stands alone in requiring also notice to the consignee. Faulkner v. Hart, 82 N. Y. 413.

17. *A carrier whose route is from A. to B., receives a package directed to C., a point beyond his line. The package is lost after he delivers it to the carrier running from B. to C. Is he liable? In other words, can you prove a through contract with the first carrier by simply showing a receipt for a package directed as above?*

The great weight of authority in this country is that such a receipt is not even *prima facie* evidence of a through contract, but that the natural meaning of it is an undertaking to carry as far as his line goes and deliver safely to the connecting line. Nutting v. R. R. Co., 1 Gray, 502; Elmore v. R. R. Co., 23 Conn. 475. The English courts, with a small following here, are *contra*. Muschamp v. R. R. Co., 8 M. & W. 421; Mulligan v. R. R. Co., 36 Iowa, 181.

The carrier may, of course, contract specially for the whole distance, either directly, by such a clause as "goods to be delivered at C."; (Hansen v. R. R. Co., 73 Wis. 346); or indirectly, as by advertising a through line, e. g. "Through freight for South and West by boat and rail." Clyde v. Hubbard, 88 Penn. St. 358.

18. *Suppose the first carrier finds the second unable to take the goods on account of a press of business, and they are destroyed by accidental fire while awaiting transfer. Who is to lose?*

The first carrier loses unless the delay has been so great as to justify warehousing. The reasons for holding him are that as far as the shipper is concerned the goods are continually in transit from the time he sends them, and as for the carrier, he has not completely performed his contract and must reckon upon the consequences of ordinary delays. Goold v. Chapin, 20 N. Y. 259; Condon v. R. R. Co., 55 Mich. 218.

2. DELIVERY TO THE CONSIGNEE.

19. *Suppose an express company cannot find the consignee immediately, or there is no one at the address to receive the package. When does its liability as carrier cease?*

Under the general rule that such a company must give reasonable accommodations to the community, its hours for delivery must be within convenient hours for doing business; and to find the consignee, reasonable diligence must be used. Zinn v. Steamboat Co., 49 N. Y. 442.

If the company observes these rules and the consignee is still not to be found, it becomes an ordinary bailee and its duty is to store, notifying the consignor. Pelton v. R. R. Co., 54 N. Y. 214; O'Rourke v. R. R. Co., 44 Iowa, 526. And see Stone v. Waitt, 31 Me. 409.

20. *Does the consignor or the consignee have control of the disposal of the goods during the transit; or in other words, what assumption may the carrier safely make as to the title?*

In the common case, the title passes to the consignee when the goods are delivered to the carrier. Unless, therefore, there is something to show the carrier that there is a restriction on its passing, he is bound to follow the orders of the consignee, and a delivery which is good as between him and the consignee furnishes a good defense against an action by the consignor. Sweet v. Barney, 23 N. Y. 335; Armentrout v. R. R. Co., 1 Mo. App. 158. And see Cork Distilleries Co. v. R. R. Co., L. R. 7 H. L. 269; s. c., 10 Eng. Rep. 25.

21. *A swindler in the town of X. assumed the name of J. Smith, and sent an order in that name to the plaintiff. There was a John Smith in the same town, a reputable dealer, and known to the plaintiff. The plaintiff sent the goods addressed to J. Smith, and the defendant carrier delivered to the swindler. Is defendant liable?*

No. The carrier is to deliver to the person to whom the consignor actually sent the goods. Here, of course, the consignee really intended was the swindler, because he gave the order. The delivery to him is therefore the only proper one. Samuel v. Cheney, 135 Mass. 278; Wernwag v. R. R. Co., 117 Penn. St. 46. Price v. R. R. Co., 50 N. Y. 213; is *contra*, but stands almost alone.

The rule as to delivery is strict. If by mistake, even after the utmost care, the goods are delivered to some other person than the one intended by the shipper, it is a misdelivery for which the carrier must answer. Powell v. Myers, 26 Wend. 591; Am. Exp. Co. v. Stack, 29 Ind. 27.

d. Remedies.

1. AGAINST THE CARRIER.

22. *Who is the proper plaintiff in an action against a carrier? and what is the form of action?*

On these questions courts have differed. One class of cases, led by Davis v. Peck, 8 T. R. 330, and Krulder v. Ellison, 47 N. Y. 36, hold that the question turns simply on whether the title has passed to the consignee or not.

Another class, led by Blanchard v. Page, 8 Gray, 281, allow the consignor to sue without regard to the title to the goods, basing the action on the so-called *contractual* relation raised by the duty to carry imposed by law on the carrier, and the reciprocal duty to pay a reasonable price imposed on the one offering the goods. See Hutchinson on Carriers, §§ 728-748, and Hooper v. R. R. Co., 27 Wis. 81, 90. It is hardly necessary to add, that where either of the two parties is allowed to sue, a recovery by one frees the carrier from further liability.

The form of action has become comparatively unimportant from the statutory destruction of common-law pleading, but probably its real substance is in tort, for violation of a duty imposed by law, as witness the success of suits by passengers injured on Sunday. Carroll v. R. R. Co., 58 N. Y. 126, 134.

23. *Which side has the burden of proof in a suit against a carrier?*

The carrier has it, both in cases where the common-law exceptions are the only ones relied upon to excuse a loss, and in cases where by special contract he is liable only for negligence. This is probably because originally all bailees were accountants; i. e., bound to give an account for the goods or make a valid excuse. Shriver v. R. R. Co., 24 Minn. 506; R. R. Co. v. Lockwood, 17 Wall. 357, 376. Another reason given is that the loss is *prima facie* evidence of negligence. Canfield v. R. R. Co., 93 N. Y. 532.

A distinction should be observed between the cases above noticed and those where the fault charged is negligence in the care of goods *after* they have been damaged by an act of God. There, the plaintiff clearly has the burden of proof. Trans. Co. v. Downer, 11 Wall. 129.

2. THE CARRIER'S COMPENSATION.

24. *Goods are shipped on a contract to carry from Boston to Baltimore. When does the right to the freight accrue under the contract? and who is liable therefor?*

It accrues on the safe delivery to the consignee, because a contract of carriage includes such delivery. If the contract is entire,

the goods must actually arrive, and substantially in specie, or no freight whatever is due; but if it is divisible, e. g., one thousand bushels of wheat at so much per bushel, the freight must be paid *pro rata* on what arrives. Sayward v. Stevens, 69 Mass. 97; Barnes v. Marshall, 18 Ad. & El. 785; Angell on Carriers (4th ed.), § 398.

If freight is prepaid and the voyage is not fully performed the money must be refunded. Griggs v. Austin, 3 Pick. 20; Angell on Carriers, § 399, note, and cases.

It has long been settled that though the carrier can insist on prepayment (Fitch v. Newberry, 1 Doug. [Mich.] 1; s. c., 40 Am. Dec. 33), or can hold the goods by a lien for his freight, he need not do so, but may deliver them and rely on payment by the consignor. Shepard v. De Bernales, 13 East, 565; Wooster v. Tarr, 8 Allen, 270. By acceptance of the goods, the consignee or the indorsee of the bill of lading also becomes liable, the consideration on the carrier's part being the giving up of his lien. Merian v. Funck, 4 Denio, 110; Cock v. Taylor, 13 East, 399.

25. *What is the extent of the carrier's lien?*

This may, perhaps, be best answered by first stating some charges the lien does *not* cover, namely: (1) Charges for demurrage. Crommelin v. R. R. Co., 4 Keyes (N. Y.), 90; R. R. Co. v. Jenkins, 103 Ill. 588. Refusal by the owner to pay these charges is simply a breach of contract and not a ground for holding by lien, no labor having been bestowed on the goods by reason of the delay. (2) Charges on other shipments by the same party, i. e., on a general account. Rushforth v. Hadfield, 7 East, 224.

On the other hand, the lien being bestowed by law as a balance to the duty imposed on carriers to serve all comers, at all times, the law extends it to all fair charges for services by the carrier as such, and makes it paramount. It includes payments by the last carrier of a series to former carriers for their labor, (Wells v. Thomas, 27 Mo. 17; Briggs v. R. R. Co., 6 Allen, 246; Knight v. R. R. Co., 13 R. I. 572); supersedes even the right of stoppage in transitu, (Potts v. R. R. Co., 131 Mass. 455; R. R. Co. v. Amer. Oil Works, 126 Penn. St. 485, 494); and has been held in England available against the true owner, though the shipment was without his consent. York v. Greenough, 2 Ld. Raym. 866; Hutchinson on Carriers, §§ 489, 490. As to the last case, however, though seemingly it is supportable on the ground of the compulsory nature of the carrier's duty, the entire current of American decision is *contra*, on the ground that the carrier has no duty to carry goods for a thief and must investigate the title as much as anyone else dealing with the property. Fitch v. Newberry, 1 Doug. (Mich.) 1; Bassett v. Spofford, 45 N. Y. 387; Robinson v. Baker, 5 Cush. 137. And see Question 9 in the section on Personal Property.

26. *Suppose a proper and reasonable rate for carrying a certain amount of freight is one hundred dollars. A carrier performs the service occasionally for X. for seventy-five dollars. Is this a ground for other shippers to complain? Would it alter the question if a large proportion of shippers paid only the lower rate?*

A New Jersey case (Messenger v. R. R. Co., 36 N. J. Law, 407) goes so far as to hold that the lowest rate given to any one shipper is the only measure of what is a reasonable rate. But R. R. Co. v. Gage, 12 Gray, 393, going to the other extreme, stands for the ruling that so long as the higher rate is not in fact an unreasonable charge for the service rendered, the carrier may charge it to one person alone, no matter how high it is, as compared with that charged to others.

The true rule lies between and seems to be this: A low rate to one or two persons is some evidence that the one paid by the other shippers is too high. And when it is found that a large proportion of the business, reckoned either by the number of shippers, or the volume of freight carried, is done at the lower rate, it is conclusive evidence that the lower rate is the only reasonable one. Schofield v. R. R. Co., 43 Ohio St. 571; R. R. Co. v. The People, 67 Ill. 11, 22. Cf. Ragan v. Aiken, 9 Lea (Tenn.), 609; McDuffee v. R. R. Co., 52 N. H. 420, 438-440; Hays v. R. R. Co., 12 Fed. Rep. 309.

e. Miscellaneous Topics.

27. *Explain the threefold character of the bill of lading.*

This document, which is a "written acknowledgment signed by the carrier, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination and there delivered," is (1) a contract. As such it is subject to the rule against contradiction of its terms by parol, and to the other usual rules applying to such instruments. The Delaware, 14 Wall. 579. (2) It is a receipt, showing so many goods in such and such condition. As a receipt it is open to explanation (O'Brien v. Gilchrist, 34 Me. 554); but not as to third parties who have seen and relied on its terms. Relyea v. Mill Co., 42 Conn. 579. (3) The third function of the bill of lading is its representative one. It stands for the goods in transit, and is treated *as* the goods for many purposes, such as sale of them before arrival. Relyea v. Mill Co., *supra;* Shaw v. R. R. Co., 101 U. S. 557.

28. *As to carriage at sea; state the position of the master of a vessel.*

The master occupies the unusual situation of representing three interests at once, those of the owner of the ship, the owner of the

freight and the owner of the goods. He is a fiduciary towards all three. If a moral necessity for doing so actually exists, he can even sell the cargo, passing good title, to get money to repair the ship. Star of Hope, 9 Wall. 203, 237; The Gratitudine, 3 C. Robinson, 240, 255. And in general he must act for the benefit of all three interests. De Cuadra v. Swann, 16 C. B. (N. S.) 772; The Velona, 3 Ware, 130; Butler v. Murray, 30 N. Y. 88.

29. *In what respect is a maritime lien peculiar?*

Such a lien is practically an acquisition of an interest in the ship itself; and the last lien gained is, therefore, paramount. Thus, for example, money lent for repairs at an intermediate port is really invested in the ship, so that charges for salvage services rendered thereafter are properly made against the money lender (together with the other owners), i. e., against one having a "prior" lien. Cargo ex Galam, 9 Law Times Rep. 550; Abbott on Shipping, pp. 117, 594-595.

30. *What is "general average;" and when does it attach?*

General average amounts to this: That sometimes, when one of the three interests involved, i. e., freight, cargo or ship, has suffered a loss, a proportionate part of this loss is shouldered by the other interests. The three conditions necessary for such a division are well stated in Barnard v. Adams, 10 How. 270, 303. There must be (1) a danger common to the crew, the ship and the cargo, so imminent that destruction seems inevitable; (2) a voluntary sacrifice of some part of the joint concern, i. e., a shifting of the danger from the whole to the particular part selected for sacrifice; and (3) the attempt to avert destruction must be successful. See also Birkley v. Presgrave, 1 East, 220, 228; Scudder v. Bradford, 31 Mass. 13. Cf. Bradhurst v. Ins. Co., 9 Johns. 9 (a lonely decision).

31. *What is salvage?*

"A salvor is one who, as a volunteer, assists a ship in distress." Abbott on Shipping, pp. 536, 539. If the one rendering the service is already under a duty to afford this assistance, he is not a volunteer; a sailor or a pilot, for example, could hardly ever be so classed. Lea v. Ship Alexander, 2 Paine (U. S.), 472. Again, the assistance rendered must be effectual, so far as it goes. The Blackwall, 10 Wall. 1, 12.

The amount granted to salvors for their help rests largely in the discretion of the court, the leading considerations governing the award being the nearness of the danger which threatened the ship, the peril incurred by the salvors, the amount of time spent, and the value of the goods saved. The Blackwall, 10 Wall., *supra;* The Rialto, 15 Fed. Rep. 124.

II. CARRIAGE OF PASSENGERS.

a. Who are Passengers.

32. *Passenger carriers are in the exercise of a public calling like carriers of goods, and subject, like them, to an action for refusal to serve anyone who wishes to employ them. Are there any exceptions?*

Yes. The carrier has a right, and indeed a duty, to eject from its vehicles or exclude altogether (1) persons likely to cause annoyance or danger to other passengers. This is from the obligation to provide for the comfort of the public. Vinton v. R. R. Co., 11 Allen, 304; Putnam v. Street Ry. Co., 55 N. Y. 108. The carrier may refuse (2) persons not really wishing to go from place to place. The duty to serve is only to *bona fide* travelers. A person, for instance, who goes on board a conveyance to ply his trade does not go there in order to reach any particular place. The D. R. Martin, 11 Blatchf. 233. (3) Persons intending some illegal act on the journey, such as gambling. Thurston v. R. R. Co., 4 Dill. 321. (4) Persons securing transportation by fraud, e. g., either by collusion with some employee or by concealment. Way v. R. R. Co., 64 Iowa, 48; R. R. Co. v. Brooks, 81 Ill. 245.

33. *A railroad company carries some persons without expecting or demanding compensation, such as its workmen on a gravel train or people riding on free passes. What relation does it bear to them?*

Neither are passengers, legally speaking. The workmen have a license to ride, but if they are injured, even by the engineer's negligence, the company is not liable. The relation is master and servant, and the servant takes the risks of the employment. Gilshannon v. R. R. Co., 64 Mass. 228; Ryan v. R. R. Co., 23 Penn. St. 384.

As to persons riding on free passes there is a conflict of authority. Such passes generally contain a release of the company from any liability, and they are sustained by some courts on the ground that the carrier is not acting as a public carrier, but as a gratuitous bailee, and may make any arrangement satisfactory to the holder of the pass. Quimby v. R. R. Co., 150 Mass. 365; Griswold v. R. R. Co., 53 Conn. 371. The opposing decisions deny the carrier's right to throw off his character of public servant, on the ground that freedom from liability in such cases would tend to lessen the care necessary for properly conducting the business and so endanger the other travelers. Jacobus v. Ry. Co., 20 Minn. 125; R. R. Co. v. McGown, 65 Tex. 640.

The above cases of strictly free passes should be carefully distinguished from those like R. R. Co. v. Stevens, 95 U. S. 655, where the passenger, though on a pass in the usual form, had contracted to make some investigations for the company in Montreal, and they

had agreed to pay his expenses. There the clause limiting the company's liability was clearly invalid, the carriage not being gratuitous in any sense.

b. Liability to Passengers for Injury.*

34. *So far as care to secure the safety of the passenger is concerned, under what circumstances is the carrier liable?*

He is liable for any injury partly or wholly caused by a failure to take the *utmost care possible* in providing any of the appliances incidental to his service as a carrier. For a railroad these would include the roadbed (Gleeson v. R. R. Co., 140 U. S. 435), as well as the carriages themselves (Meier v. Penn. R. R. Co., 64 Penn. St. 225), and servants. Hall v. Steamboat Co., 13 Conn. 319. The question is, not whether it was scientifically possible for any one in the process of making to discover the defect in the machinery, but whether it was practically possible by human care and foresight; and, subject to this explanation, the prevailing rule is that the carrier is a warrantor of the soundness and reliability of his appliances. Sharp v. Grey, 9 Bing. 457, and cases *supra*.

There is some authority, however, which limits the liability to injuries arising from defects discoverable by external examination, i. e., that the warranty does not extend to the work done by others than the company, provided the manufacturers of the appliances have been selected for their known skill. Ingalls v. Bills, 50 Mass. 1; Alden v. R. R. Co., 26 N. Y. 102.

35. *The preceding question would include any liability from the negligence of servants of a railroad company or other carrier, but carriers are liable also for acts of servants which are wilfully wrong and for many trespasses by other passengers. How far does this extend, and on what principle is it based?*

The liability rests on the duty of a common carrier, as such, to treat the passenger respectfully and protect him from violence, and its existence is unquestioned. The company intrusts the management of its conveyances to conductors and other employees and must respond in damages for their violations of the duty referred to. Goddard v. R. R. Co., 57 Me. 202; R. R. Co v. Flexman, 103 Ill. 546. The liability for injuries to travelers from other passengers rests on the same principle. Putnam v. Street Ry. Co., 55 N. Y. 108.

c. Baggage.

36. *What is baggage, legally considered?*

It is anything the passenger may reasonably need to carry for personal use and convenience on that journey, taking into conside-

*As the usual rules of contributory and imputed negligence are not varied when carriers are involved, it is unnecessary to add here to the full discussion of them under the subject of Torts.

ration its ultimate purpose, the articles which persons of the same class ordinarily carry on similar journeys and other elements. Many difficult and interesting questions arise, but the above definition is, perhaps, sufficiently comprehensive. R. R. Co. v. Fraloff, 100 U. S. 24; Bank v. Brown, 9 Wend. 85. See on the whole subject of baggage, Macrow v. R. R. Co., L. R. 6 Q. B. 612.

The tools of a watchmaker, carried to be used when he found employment, are baggage, (R. R. Co. v. Morrison, 34 Kan. 502); and a man's baggage may properly include things belonging to his wife. Dexter v. R. R. Co., 42 N. Y. (3 Hand) 326. Bicycles have been on the line, but they are close to guns or fishing rods which may clearly be baggage, and probably usage, through which anything may become baggage, has gone far enough now to include them. State ex rel. Bettis v. Mo. Pac. R. R. Co., reported 43 Cent. L. J. 377. See, on guns and the like, Hawkins v. Hoffman, 6 Hill, 586; and on bicycles, 43 Cent. L. J., *supra*, and 12 Harv. Law Rev. 119 (1898.)

It should further be noted that, although the carrier cannot refuse to carry any articles for the passenger which are properly taken with him as baggage, it does not follow that it is unreasonable for him to charge for "overweight."

37. *Suppose a man sends his trunk a day ahead, and it is destroyed or lost. Can he recover?*

He cannot. The contract of the railroad company is not to carry a trunk *and* a passanger, but a trunk *with* a passenger. Historically considered, this is plainly true, since originally the baggage was brought in the hands of the passenger.

Therefore, if one sends his trunk to the station more than a reasonable time before he himself intends to leave, it is a fraud on the company, and the latter is liable only for wilful injury. Wilson v. R. R. Co., 56 Me. 60, 57 Me. 138; Beers v. B. & A. R. R. Co., 67 Conn. 417 (1896); Marshall v. Pontiac, etc., R. R. Co., 126 Mich. 45.

38. *What is the extent of the liability of the carrier for baggage intrusted to his care; and what is his duty towards articles retained in the passenger's possession?*

His liability for baggage taken into his possession is that of a carrier of goods. Ouimit v. Henshaw, 35 Vt. 605. But as to the articles of baggage retained by the passenger, the rule is that the company is liable only for negligence by itself or its agents. Kinsley v. R. R. Co., 125 Mass. 54; Henderson v. R. R. Co., 123 U. S. 61.

d. Tickets and Regulations.

39. *What is the general nature of a ticket?*

By issuing a ticket a carrier agrees to accept it in lieu of a money payment of fare, if it is used in compliance with prescribed

conditions. It is a formal contract, and unless otherwise provided, it is freely transferable (Carsten v. R. R. Co., 44 Minn. 454); hence it is good in the hands of any *bona fide* holder.

Any regulations, regarding its use *as a means of paying fare,* which appear on it or are usual in tickets of its class, are part of the contract. Examples are restrictions as to stopping over, or as to signing by the purchaser. Cheney v. R. R. Co., 11 Met. 121; Boylan v. R. R. Co., 132 U. S. 146.

All carriers have the right to demand compensation in advance, and fare is, therefore, due on the passenger's entering the train; the ticket, if demanded, must then be given up. A neat case in illustration is Auerbach v. R. R. Co., 89 N. Y. 281, where a ticket expired at 12 o'clock. The train was boarded at 11:40, but the ticket was held to be good for fare on the whole journey. To the same effect is Lundy v. R. R. Co., 66 Cal. 191.

40. *Is the rule reasonable by which a higher price is charged for fare when paid on the train than when a ticket is bought at the station?*

Perfectly. The delay and difficulty of receiving fares and making change en route, the possible loss to the road from the dishonesty of conductors, and the convenience of the traveling public all go to show the reasonableness of the regulation, and it is uniformly upheld. Swan v. R. R. Co., 132 Mass. 116; R. R. Co. v. Rogers, 28 Ind. 1.

The necessary qualification on such a rule is that the passenger shall have a reasonable opportunity to purchase his ticket at the station before the train leaves; what is such reasonable time depending on the character of the station, the number of people who have occasion to get tickets there and similar considerations. R. R. Co. v. Rogers, *supra;* Everett v. R. R. Co., 69 Iowa, 15.

41. *It being admitted that a person refusing to pay fare on a train can be ejected, can the traveler, after such refusal, by tendering the fare, compel the company to carry him along on the same train?*

It is well settled that the company may refuse to receive him on the train, if he is actually put off, and the rule is considered a salutary one. O'Brien v. R. R. Co., 15 Gray, 20; State v. Campbell, 3 Vroom, 309.

The carrier is probably equally safe in declining to carry him along on that train in the case where the tender is made before an actual ejectment, especially if the train has been stopped for the purpose, for the inconvenience and danger to other passengers are the same, and otherwise the power to eject would prove much less useful. Skillman v. R. R. Co., 39 Ohio St. 444; O'Brien v. R. R. Co., 80 N. Y. 236.

CONSTITUTIONAL LAW.

I. "CITIZENS" AND "PERSONS."

1. *Is a corporation a citizen within article four, section two, of the United States Constitution, and what does that section provide?*

The provision of section two of that article is that "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." "The term 'citizen' as used in the clause applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature, and possessing only such attributes as the legislature has prescribed." Pembina, etc., Co. v. Penn. 125 U. S. 181; s. c., Thayer's Cas. Const. Law, 468; Paul v. Virginia, 8 Wall. (U. S.) 180.

2. *What are the provisions of the Fourteenth Amendment, section one, of the United States Constitution?*

Section 1 of the Fourteenth Amendment is as follows:
"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. *Pennsylvania passed a statute requiring an annual license fee from a foreign corporation which "does not invest and use its capital in this commonwealth." Is such a statute unconstitutional as "denying to any person within its jurisdiction the equal protection of the laws"? Is any corporation a "person" within the meaning of this clause?*

Every domestic corporation would be a "person" within the meaning of the clause above quoted. "Under the designation of person there is no doubt that a private corporation is included." Pembina, etc., Co. v. Penn., 125 U. S. 181; s. c., Thayer's Cas. Const. Law, 468.

The statute, however, would not be unconstitutional. A foreign corporation is not a corporation in Pennsylvania, and cannot,

therefore, be a "person within its jurisdiction." A State may prescribe conditions upon the entrance of foreign corporations or may even exclude them, as it sees fit, without violating the Fourteenth Amendment.

"The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits * * * arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign." Pembina, etc., Co. v. Penn. (*supra*).

4. *A State passed a law which provided that it should be unlawful for any person who is not a bona fide resident of the State to act as trustee. Is such a law constitutional?*

No. It is against the Fourteenth Amendment to the Constitution, which enacts, in part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." A citizen of the United States may acquire property in any State, and may, therefore, take it in trust. Roby v. Smith, 131 Ind. 342; s. c., Thayer, Cas. Const. Law, 457.

II. "DUE PROCESS OF LAW."

5. *What are the provisions of the Fifth Amendment to the United States Constitution?*

The provisions of that amendment are as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

It is to be noted that the provision in regard to "due process of law" in the Fifth Amendment, is the same as that in the Fourteenth Amendment, quoted above (Ques. 2.) There is a great distinction between the provisions, however, in that the Fifth Amendment is a restraint upon the Federal government, while the Fourteenth Amendment was introduced as a restraint upon the several States.

"It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon

its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment." Davidson v. New Orleans, 96 U. S. 97 (1877); s. c., Thayer, Cases Const. Law, 610.

6. *What is meant by "due process of law," in the United States Constitution?*

Due process of law generally implies and includes, *actor, reus, judex*, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings. Yet this is not universally true, and a proceeding may be "due process of law" in which there is no trial whatever. Thus the Federal government may proceed summarily against a revenue collector for a balance due, and a statute which provides for a seizure and sale of the collector's property to satisfy his indebtedness without judicial procedure, is not unconstitutional. What is "due process of law," or to use the original phraseology of the Magna Charta, "the law of the land," is a question which must be regarded from an historical standpoint. Murray v. Hoboken Land Co., 18 How. (U. S.), 272; s. c., Thayer, Cases Const. Law, 600.

In Davidson v. New Orleans (*supra*, Ques. 5), Mr. Justice Bradley said: " * * * in judging what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive, and unjust it may be declared to be not due process of law."

7. *A.'s property was assessed by statute for improvements made by the State, and the assessment was given the force of a judgment. A. was served with a notice to this effect and given a reasonable time to object by court proceedings. Is A. deprived of his property "without due process of law" by such a statute?*

No. A. has not been so deprived of his property "when as regards the issues affecting it, he has by the laws of the State a fair trial in a court of justice, according to the modes of proceedings applicable to such a case." Davidson v. New Orleans, 96 U. S. 97; s. c., Thayer, Cases Const. Law, 610; Spencer v. Merchant, 125 U. S. 345; s. c., Thayer, Cases Const. Law, 647.

8. *A. is imprisoned for contempt of court. He contends that he has been deprived of his liberty without due process of law, not having been tried by a jury. Is his contention valid?*

No. Before the passage of the Fourteenth Amendment, courts had power to punish for contempt; this power was not taken away by that amendment, and a summary proceeding *is* due process of law within the meaning of the Fourteenth Amendment. Eilenbecker v. Plymouth Co., 143 U. S. 31.

So, also, where a person pleads guilty to an indictment, and is thereupon sentenced without a jury trial, but in the regular course of the administration of law, through the courts of justice of the State, he is not deprived of his liberty without due process of law. The Fourteenth Amendment was not designed to interfere with any regular court process or with the administration of the courts of a State in the manner provided by the laws of the State. In re Converse, 137 U. S. 624; s. c., Thayer, Cases Const. Law, 681.

In constitutional law, perhaps, more than in any other subject, a question must be looked at historically, and in considering a question raised under the Fourteenth Amendment, it should always be remembered that that amendment was passed after the emancipation of the slaves, and for the purpose of securing to them the full rights enjoyed by other persons before their emancipation. The operation of the amendment, however, is not confined to negroes, and it protects all persons, including resident aliens and corporations. Yick Wo v. Hopkins, 118 U. S. 356; s. c., Thayer, Cases Const. Law, 532, note; Pembina, etc., Co. v. Penn., 125 U. S. 181; s. c., Thayer, Cases Const. Law, 468. See also Ques. 3, *supra*. But the extent of that protection is largely determined by considering the specific result for the accomplishment of which the provisions were framed.

9. *A city passed an ordinance which prohibited any person from washing or ironing clothes within certain limits between* 10 *p. m. and* 6 *a. m. Is such an ordinance against the fourteenth constitutional amendment that no person shall be deprived of his life, liberty or property, etc.?*

No. This is merely a police regulation and as such is not in violation of the Fourteenth Amendment. Such regulations, though special in their character, do not furnish just grounds of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Barbier v. Connolly, 113 U. S. 27; s. c., Thayer, Cases Const. Law, 623.

In that case the court went so far as to say that the Fourteenth Amendment had practically no effect whatever upon the police power. Mr. Justice Field there said:

"But neither the amendment (XIV) — broad and comprehensive as it

is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power."

Similar statements are made in Powell v. Penn., 127 U. S. 628; s. c., Thayer, Cases Const. Law, 637; and Mugler v. Kansas, 123 U. S. 623; s. c., Thayer, Cases Const. Law, 782. And perhaps this is the general expression of the Supreme Court, but the statement is broader than the facts of the cases in which it appears require, and would probably prove misleading and subject to some modification if a proper state of facts were presented. It is almost invariably true that a statute passed, *bona fide*, for the health or welfare of the State, is constitutional, but if a statute should be enacted which was actually contrary to the Constitution or any of the amendments, the fact that it came under the police power would not save it. The police power, like any other power of the State, must conform to the requirements of the Constitution.

Thus before the Fourteenth Amendment it would have been within the power of the States to provide different kinds of schools for different classes of people. But after that amendment, although *separate* schools could be provided for colored or other people, they could not make State provisions for different *kinds* of schools, providing only inferior instruction for certain classes.

An accurate view of the operation of the Constitution and the amendments upon the police power of the States is expressed by Earl, J., in In the Matter of Jacobs, 98 N. Y. 98; s. c., Thayer, Cases Const. Law, 627. He there says:

"These citations are sufficient to show that the police power is not without limitations, and that in its exercise the legislature must respect the great fundamental rights guaranteed by the Constitution."

III. THE POLICE POWER.

10. *A railroad company is required by a statute to do away with grade crossings and to pay all expenses, including damages to neighboring property owners. Is this statute against the Fourteenth Amendment and unconstitutional, because it deprives the plaintiff of his property without due process of law?*

No. Such a statute, though extreme, would come within the range of the police power of the State. New York, etc., R. R. Co. v. Bristol, 151 U. S. 556; s. c., Thayer, Cases Const. Law, 687.

"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 every one 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, Principles of Const. Law, 320.

"This is a most comprehensive branch of sovereignty, extending as it does to every person, every public and private right,

everything in the nature of property, every relation in the State, in society, and in private life." Cooley, Principles of Const. Law, 238. See, also, Munn v. Illinois, 94 U. S. 113; s. c., Thayer, Cases Const. Law, 743; Barbier v. Connolly, 113 U. S. 27; s. c., Thayer, Cases Const. Law, 623.

11. *Has the legislature the power to fix rates for warehousing grain and carrying passengers?*

Yes. The only question seems to be that the rate must be a reasonable one, as the legislature has no power to compel the doing of services without reward. "When private property is devoted to a public use, it is subject to public regulation." Certain other kinds of business, also, hold such a peculiar relation to the public interest that there is superinduced upon them the right of public regulation, as ferrymen and hackmen, and interest on use of money, and regulating the cost of elevating grain. Budd v. New York, 143 U. S. 517; s. c., Thayer, Cases Const. Law, 804; Munn v. Illinois, 94 U. S. 113; s. c., Thayer, Cases Const. Law, 743.

In dealing with statutes passed for the public interest under the police power, the authority of the courts is on principle very limited. The courts are not entitled to approach such statutes as if they were themselves legislators. The propriety of the legislation is a question with which they have no right to deal. As to that, the legislature is the sole judge. The only question which a court may consider is whether the legislature had the *power* to pass the statute. If it had such power, the statute is constitutional no matter how ill-judged its enactment may have been.

In determining the constitutionality of such police regulations the main and frequently the only question is, whether the legislature can reasonably say that there is a public interest for such an enactment. If so, then the legislation is possible. It is in passing on this question that the courts frequently exceed their power.

Thus a statute prohibiting the manufacture of cigars in any tenement-house used for living purposes was held unconstitutional in New York, as depriving a person of his property without due process of law, and as not within the "police powers of a State." In the Matter of Jacobs, 98 N. Y. 98; s. c., Thayer, Cases Const. Law, 627. This case is, at least, extreme in holding that the exercise of the legislative power was unreasonable. The act is said to be to improve the public health, and such a view is hardly irrational. If the legislature can reasonably say that the act will improve the public health, the court has no authority to say that it is beyond the police power and unconstitutional.

So also a statute to prevent deception in sales of dairy products and prohibit the manufacture of oleomargarine was also held unconstitutional in New York, as against the Fourteenth Amendment, and not within the police power. People v. Marx, 99 N. Y. 377; s. c., Thayer,

Cases Const. Law, 632. In Pennsylvania, however, there was a similar statute prohibiting the manufacture and sale of oleomargarine to prevent fraud in the sale of butter, and this statute was held constitutional by the United States Supreme Court. Powell v. Pennsylvania, 127 U. S. 678; s. c., Thayer, Cases Const. Law, 637. Mr. Justice Harlan there said:

"The legislature of Pennsylvania * * * has determined that the prohibition of the sale, or offering for sale, or having in possession to sell for purposes of food of any [oleomargarine] * * * will promote the public health and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

In a previous passage in the same case, Mr. Justice Harlan also said:

"It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that (XIV) amendment."

12. *Give examples of a legitimate exercise of the police power.*

The following are examples of a legitimate exercise of the police power:

A statute requiring a railroad to erect and maintain cattle-guards and fences at all crossings. Thorpe v. Rutland, etc., R. R. Co., 27 Vt. 140; s. c., Thayer, Cases Const. Law, 706.

A statute requiring adjoining landowners to bear the expense of sidewalks and curbstones, on the ground of general comfort and convenience. Paxson v. Sweet, 1 Gr. (N. J.) 196; City of Lowell v. Hadley, 8 Met. (Mass.) 180. So also a statute requiring adjoining owners to pay for draining marsh land, where each is allowed a hearing as to the amount of his assessment. Wurts v. Hoagland, 114 U. S. 606; s. c., Thayer Cases Const. Law, 768.

A statute regulating the sale of liquor and the use to be made of premises where liquor is sold. The fact that a statute impairs the value of property does not make it unconstitutional. That is not a taking of property within the meaning of the Constitution. Bertholf v. O'Reilly, 74 N. Y. 509; s. c., Thayer, Cases Const. Law, 725; Mugler v. Kansas, 123 U. S. 623; s. c., Thayer, Cases Const Law, 782.

A statute regulating the use to be made of the mails, prohibiting its use for lottery purposes, or for the sale of "green goods." In re Rapier; In re Dupre, 143 U. S. 110; s. c., Thayer, Cases Const. Law, 732.

The regulation of marriage and divorce also comes under this power. "Every independent State must be at liberty to regulate

the domestic institutions of its people as shall seem most for the general welfare." Cooley, Principles of Const. Law, 239.

A State law requiring all persons engaged in the plumbing business or drug business to pass an examination, and to register, is a legitimate exercise of the police power. Singer v. Maryland, 72 Md. 464; s. c., Thayer, Cases Const. Law, 874; State v Heinemann, 80 Wis. 253; s. c., Thayer, Cases Const. Law, 876, note.

But a State statute imposing a tax on the captain or owner of a vessel at the rate of $1.50 for each passenger landed in the port is void, as this is a matter belonging exclusively to Congress. Head Money Cases, 112 U. S 580, 590; s. c. Thayer, Cases Const. Law, 758.

Personal rights and private property can never be arbitrarily invaded, however, under the mere guise of police regulations, and the question whether or not a statute is arbitrary as drawn, or in its operation, is frequently the only point upon which its constitutionality turns. Equal protection of the laws is guaranteed by the Fourteenth Amendment. It does not require, however, "that every person in the land shall possess precisely the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection given by the law is to be deemed equal, if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred and liabilities imposed." Cooley, Principles of Const. Law, 237.

But when it is said that legislation may single out certain classes it is to be understood that they cannot be so selected arbitrarily. There must be some good reason for the discrimination. Thus, to put the familiar example, a statute would be unconstitutional which was to be enforced only against red-haired men or blue-eyed men. Such a classification would be merely arbitrary. On this principle an ordinance forbidding any one from carrying on the laundry business without the consent of certain officers, was held unconstitutional where the officers arbitrarily withheld their consent from all Chinamen, but granted it to other persons. Yick Wo v. Hopkins, 118 U. S. 356; s. c., Thayer, Cases Const. Law, 774. So also an ordinance requiring all Chinamen to live within a certain district is void. In re Lee Sing, 43 Fed. Rep. 359; s. c., Thayer, Cases Const. Law, 861. But an ordinance forbidding *all* laundrymen from washing during certain hours in specified parts of a city is valid. Barbier v. Connolly, 113 U. S. 27; s. c., Thayer, Cases Const. Law, 623.

IV. THE RIGHT OF EMINENT DOMAIN.

13. *Define the right of eminent domain.*

"The right of eminent domain is that attribute of sovereignty by which the State may take, appropriate or divest private property whenever the public exigencies demand it; or, according to

the usual definition, it is the right of taking private property for public purposes. And to this right the obligation always attaches of making just compensation for the property taken." 19 Monthly Law Reporter (Boston), 241, 247; Thayer, Cases Const. Law, 953.

It is to be remembered, however, that in the absence of constitutional prohibition, the right of eminent domain may be exercised without compensation. There was no such limitation to the right at common law, and where the limitation exists, it has been added by our Federal or State Constitutions. "The obligation to give just compensation, unquestionable and universally admitted, is a moral obligation, not enforceable by courts, it would seem, as against clear and indubitable action of the legislature, unless the Constitution add to this moral obligation a legal sanction." Thayer, Cases Const. Law, 952, note 1. There are only three States, however, the Constitutions of which do not contain a clause expressly requiring compensation. All of the other State Constitutions and the Federal Constitution contain a clause (substantially the same in all) that "private property shall not be taken for public purposes without just compensation." Thayer, Cases Const. Law, 954, 955, note 1. See Randolph, Em. Dom. 401-416, for provisions of the State Constitutions.

"But, although the right is inherent in sovereignty, it lies dormant until legislation is had, defining the occasions, methods, conditions and agencies under and by means of which it may be exercised." Cooley, Principles Const. Law, 345.

14. *Has the Federal government the right to take land in a State for Federal purposes?*

Yes. Such a right in the Federal government was questioned until 1875 when it was settled by Kohl v. U. S., 91 U. S. 367.

15. *A State legislature condemns property, and the owner claims that there is no public necessity for the taking, and that it is not taken for a public use. What redress do the courts afford?*

The courts have the right to inquire into the use to which condemned property is to be put, and the final determination as to whether or not the use is public rests with them. But if the use is public the question of necessity rests with the legislature.

"Of course, there is the further limitation, necessarily implied, that the use shall be a public one; upon which question the determination of the legislature is not conclusive upon the courts. But, when the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance." Fairchild v. City of St. Paul, 46 Minn. 540; s. c., Thayer, Cases Const. Law, 965; People v. Smith, 21 N. Y. 595; s. c., Thayer, Cases Const. Law, 962; Dingley v. Boston, 100 Mass. 544. By the Michigan Constitution, however, the necessity for

using the property is a question for a jury or a commissioner appointed by the court, and not for the legislature, as in other States. Const., art. 18, § 2; Paul v. Detroit, 32 Mich. 108, 113. Such a provision is certainly very strange, as by it a legislative question which may be of the greatest importance is frequently left to twelve men selected by lot.

16. *A State legislature seeks to take the real estate and franchise of a corporation by right of eminent domain. The corporation contends that their franchise cannot be taken on account of the constitutional prohibition against impairing the obligation of contracts. Is the contention sound?*

No. All contracts, whether with a State, or between individuals, are made subject to the condition that they may be affected by an exercise of the right of eminent domain. Any kind of property can be taken. "We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more." The West River Bridge Co. v. Dix, 6 How. 507, 532; s. c., Thayer, Cases Const. Law, 976.

17. *A railroad, by legislative authority, built its track in such a way as to remove an embankment which protected A.'s land in time of freshet. The embankment was not on A.'s land, but his property was overflowed by freshets. Would such a construction of the road constitute a "taking of property"?*

It has been held in such a case that property was taken within the meaning of the constitutional clause prohibiting the taking without compensation. In Eaton v. Boston, etc., R. R. Co., 51 N. H. 504, the court, by Smith, J., said:

"If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes' *pro tanto*, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'User is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land."

This view has been followed in several cases, and has been declared to be the "best considered case which can be found in the books upon this subject." Grand Rapids Booming Co. v. Jarvis, 30 Mich. 321. See also Thayer, Cases Const. Law, 1077, note, and cases cited.

The question of what constitutes a taking of property is, however, to be looked at in the light of the historical conception of the meaning of a taking of property, and where so viewed, it is a question whether the courts have not over refined in such a case as Eaton v. R. R. Co.

The idea of property as a "bundle of rights" was not as exact as this, at the time of the Constitution, and the word "property" must be interpreted by much that has been done. The cases holding that there must be a more absolute appropriation of the property, to come within the meaning of the constitutional prohibition, seem the more sound. See Transportation Co. v. Chicago, 99 U. S. 635; s. c., Thayer, Cases Const. Law, 1081.

V. TAXATION.

18. *Upon what constitutional ground may the State or the Federal government levy taxes?*

"The power to tax is an incident of sovereignty, and is coextensive with the subjects to which the sovereignty extends. It is unlimited in its range, acknowledging in its very nature no limits, so that security against its abuse is to be found only in the responsibility of the legislature which imposes the tax to the constituency who are to pay it." Cooley, Principles of Const. Law, 55.

A tax cannot, however, be constitutionally levied for any but public purposes, and statutes which are enacted for the collection of money to be devoted to a private use are unconstitutional, however deserving the purpose may be. Thus, it was held that a tax could not constitutionally be imposed to collect money to be loaned to the people who had suffered by the great Boston fire. Lowell v. Boston, 111 Mass. 454; s. c., Thayer, Cases Const. Law, 1224. So, also, a tax to aid private corporations to carry on manufacturing business; Loan Ass'n v. Topeka, 20 Wall. (U. S.) 655, 663; s. c., Thayer, Cases Const. Law, 1235; and a tax to supply farmers who have lost their crops with provisions and seed. State v. Osawkee, 14 Kan. 418; s .c., Thayer, Cases Const. Law, 1247, note. The principle upon which these cases were decided is sound, but it seems a question whether or not it is properly applied in all of them. It may be that it is for the benefit of the public that a private person should be benefited. Thus, in Lowell v. Boston, the statute was to make possible a rapid rebuilding of the city, which would seem to have many advantages to the public, although the court treated the suggestion of a public purpose in the statute as not worth arguing. Such legislation should be looked at in view of the consideration whether or not there is a reasonable public purpose, and not merely in answer to the question, whether or not some private person or corporation will also be benefited. Perry v. Keene, 56 N. H. 514; s. c., Thayer, Cases Const. Law, 1247.

19. *How far is the Federal government subject to taxation by the States?*

No property, whatever, of the Federal government can be taxed by the States. Wisconsin Cent. R. R. Co. v. Price Co., 133 U. S. 496; s. c. Thayer, Cases Const. Law, 1397.

Neither can the salary of a Federal officer be taxed. Dobbins v. Com'rs Erie Co., 16 Pet. (U. S.) 435; s. c., Thayer, Cases Const. Law, 1352. Nor United States bonds. Weston v. Charleston, 2 Pet. 442: s. c., Thayer, Cases Const. Law, 1346. Nor a bank created by the United States as its fiscal agent. McCulloch v. Maryland, 4 Wheat. 316, 368; s. c., Thayer, Cases Const. Law, 1340.

It is equally well established that the Federal government cannot tax the salary of a State officer. The Collector v. Day, 11 Wall. (U. S.) 113; s. c., Thayer, Cases Const. Law, 1378. The process of a State court is also exempt. Warren v. Paul, 22 Ind. 276; Georgia v. Atkins, 1 Abb. (U. S.) 22.

VI. EX POST FACTO AND RETROACTIVE LAWS.

20. *Is the Federal or the State government prohibited from passing ex post facto laws by the United States Constitution?*

Both are prohibited. Const., art. I, § 9, cl. 3; art. I, § 10, cl. 1.

21. *Distinguish between retrospective and ex post facto laws, and define the latter.*

All *ex post facto* laws are retrospective, but only retrospective laws of a criminal nature are *ex post facto* within the meaning of the Constitution.

Ex post facto laws were defined by Chase, J., in Calder v. Bull, 3 Dall. 386 (s. c., Thayer, Cases Const. Law, 1435), as follows:

"I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1. Every law that makes an action done before the passing of the law, and which was innocent when 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 time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited. * * * But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime, or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the Statute of Limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as

the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime."

VII. STATE LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.

22. *What is the provision of the Federal Constitution prohibiting Congress from passing statutes impairing the obligation of contracts?*

There is no such provision. Unlike the provision against *ex post facto* laws which is made binding both upon Congress and the States, the provision against passing laws impairing the obligation of contracts, is binding upon the States alone. Const., art. I, § 10.

23. *A State charters an educational institution for the public good, with certain powers. Can those powers be materially changed by later enactment?*

In the famous Dartmouth College Case, 4 Wheat. 518 (s. c., Thayer, Cases Const. Law, 1565), it was held that a charter was a contract, and that such a statute was unconstitutional as impairing the obligation of contracts. This view has always been followed.

It is admitted, universally, that where a State has made a contract the obligation of it cannot be impaired any more than the obligation of any other contract. Cooley, Principles Const. Law, 313. Perhaps the criticism is just, however, that in some instances the "court has been quick to discover a contract that it might be protected." Miller, J. (dissenting), in Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430, 442; Washington University v. Rouse, id. 439; s. c., Thayer, Cases Const. Law, 1676, note.

24. *A State passed a statute applying to past mortgages, enacting that the mortgagor should have an equity of redemption for twelve months after the sale of the property under foreclosure. Is the obligation of the contract thereby impaired, or is the change simply in the procedure and valid?*

The statute would be unconstitutional in any case, whether or not it was construed as a change of procedure, as the obligation would be substantially impaired. A mere change in remedy does not necessarily impair the obligation of a contract, but it is a question of substance whether or not a man is injured, and if he is he would not be bound by the statute. Bronson v. Kinzie, 1 How. (U. S.) 311; s. c., Thayer, Cases. Const. Law, 1645.

The obligation of a contract has been very ably defined as follows:

"'The obligation of a contract' is, therefore, the collective legal rights and duties which the existing law, applicable to the contract, raises or

creates out of or from the stipulations of the parties; rights which it devolves upon one party, and corresponding duties which it lays upon the other."

25. *Can a State enter into an irrepealable contract, restricting its power of taxation upon certain property, or exempting it from taxation altogether?*

Yes. It has been uniformly held that such a contract is binding. State Bank of Ohio v. Knoop, 16 How. (U. S.) 369; Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430, 438. See also Thayer, Cases Const. Law, 1673, 1676, note. It has been vigorously argued in such cases that the legislature had no authority to grant away the power of taxation, but this argument has been overruled, though with the reservation that a State could not bargain away its whole power of taxation. Stone v. Mississippi, 101 U. S. 814; s. c., Thayer, Cases Const. Law, 1771.

But, however much the power of taxation may be contracted away, the States are free to exercise the police power in spite of the constitutional restriction. In New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650 (s. c., Thayer, Cases Const. Law, 1773), the court said:

"The constitutional prohibition upon State laws impairing the obligation of contracts, does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with the State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations." * * *

Of course a State may always annul its contracts under the right of eminent domain by making compensation. That right can never be lost. And where the general laws or the Constitution of a State have a general provision, as that all charters shall be subject to repeal, the constitutional prohibition is without force. Crease v. Babcock, 23 Pick. (Mass.) 334; s. c., Thayer, Cases Const. Law, 1642.

VIII. THE REGULATION OF COMMERCE.

26. *Under what circumstances have the States authority to regulate interstate or foreign commerce?*

A State has no power, under any circumstances, to pass a statute which is *simply* for the regulation of commerce, unless it be entirely confined to its own boundaries. By the Constitution Congress has the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Const.. art. I. § 8, cl. 3. This power is absolutely exclusive in that no State statute

can stand which is opposed to an act of congress, but "the mere existence of this power in Congress does not necessarily exclude the States from all authority whatever which might *affect* the commerce falling within the control of Congress, provided no actual legislation of congress is interfered with." Cooley, Principles Const. Law, 67; Cooley v. Wardens, 12 How. 299. States do many things which, in a sense, do regulate commerce and yet are valid for other reasons. See the Mayor, etc., of New York v. Miln, 11 Pet. (U. S.) 102; s. c., Thayer, Cases Const. Law, 1840; Leisy v. Hardin, 135 U. S. 100; Plumley v. Massachusetts, 155 U. S. 461.

CONTRACTS.

I. PARTIES CAPABLE OF CONTRACTING.

1. *Who are capable of making contracts by the common law?*

Every one, generally speaking, can make a binding contract, except (1) infants, (2) married women, (3) lunatics, (4) drunken people, and (5) corporations.

(1) The contracts of infants are voidable. Infants may, indeed, be charged for necessaries which they have purchased, but even in those cases they are not charged upon the contracts made, but upon the principles of quasi-contracts. Thus only a fair price for the necessaries can be recovered, regardless of the contract price. Trainer v. Trumbull, 141 Mass. 527, 530. Of course, in cases where an infant still has the property contracted for, he cannot deny liability on the ground that the contract is voidable and still keep the property. Stull v. Harris, 51 Ark. 294.

(2) The disability of married women to contract has been almost entirely removed by statute, but at common law their contracts were absolutely void. 1 Parsons on Contracts (8th ed.), 369.

(3) Contracts made by lunatics should, on principle, be voidable as those made by infants; but it is held in most jurisdictions that if the party contracting with them acted in ignorance, and the lunatic received good consideration, the contract is binding. Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541.

In a few jurisdictions, however, the contracts of lunatics are absolutely void or voidable, under all circumstances. Brigham v. Fayerweather, 144 Mass. 48. See also Dexter v. Hall, 15 Wall. 9, where the authorities are examined. The States in which this view has been upheld are Maine, Michigan, Missouri, Oregon, and Pennsylvania. For citations, see 1 Parsons on Contracts (8th ed.), 423, note 1.

(4) Contracts of drunken men are void only when they are so intoxicated as not to know what they are doing. Van Wyck v. Brasher, 81 N. Y. 260.

(5) Contracts of corporations are binding only so far as they are authorized to make them. See Corporations, Ques. 22-25.

II. CLASSIFICATION OF CONTRACTS.

2. *What is meant by unilateral and bilateral contracts? by executed and executory contracts?*

The terminology of unilateral and bilateral, as applied to contracts, has been introduced in comparatively very recent years, and

among the members of the bench and the older members of the bar, has met with but little favor, but it is certainly scientific and accurate, and has the great merit of being free from ambiguity, and of indicating the real nature of the transaction.

Goods can be transferred without any contract whatever, as where they are purchased over the counter in exchange for cash paid at once. But in most transactions there is a promise made by one or both parties. Thus, if A. goes to a store and buys on credit, he promises to pay for the goods a stipulated price. The storekeeper, however, makes no promise, but delivers the goods. In such a case there is a unilateral or one-sided contract, as only one of the contracting parties makes a promise. The other does something. If, however, A. goes to a manufacturer and asks him to make him certain goods, there a contract is entered into on which both sides make promises. A. promises to buy certain goods when made at a fixed price, and B. promises to manufacture those goods and to sell them to A. at that price. Such a contract, therefore, is bilateral or two-sided.

The more familiar designation of these two classes of contracts is to call the first an executed and the second an executory contract, but those terms have not been used with nice discrimination and are frequently ambiguous. See 2 Langdell, Cases on Contracts, p. 1092.

Contracts are also classified as (1) contracts by specialty or contracts under seal, and (2) simple contracts or those not under seal.

There is a still further classification into (1) express contracts which are stated by the parties verbally or in writing, and (2) implied contracts, the terms of which are to be gathered from the actions of the parties. 1 Parsons on Contracts (8th ed.), 6, and note 1.

III. MUTUAL CONSENT.

3. *What is meant by a "meeting of minds" in the making of a contract?*

The ordinary expression is that there can be no contract, unless there is a "meeting of minds." That statement means, however, only that there must be an offer and an acceptance of that offer while it still continues. The courts did not, at first, act upon the idea that an offer could continue open for some time after it was made, and if accepted while in force, result in a binding contract. That principle, however, has long been recognized, and an offer which has once been made, continues open until it is withdrawn, or a reasonable time for its acceptance has expired. 1 Parsons on Contracts (8th ed.), 497.

As originally used, the phrase "meeting of minds," did mean that both parties must have the same idea at the same time, but at present it is the acts of the parties which are held to bind them,

and not their intentions. Thus, a man might make an offer and immediately change his mind, but if the offer were not withdrawn he would be bound by an acceptance of it. These principles were first established in Adams v. Lindsell, 1 B. & Ald. 681, and are now recognized everywhere.

As Judge Holmes expresses it, "The making of a contract does not depend on the state of the parties' minds, it depends on their overt acts." Holmes, The Common Law, 307.

4. *A. offers to sell certain land for* $1,000. *B. makes a counter offer to purchase for* $750, *which A. declines. B. then accepts A.'s offer to sell for* $1,000, *and that also is declined. Has B. any right against A.?*

No. Had A.'s offer been accepted originally, there would have been a good contract which B. could have enforced, but a counter offer is a refusal to accept the original offer and, therefore, terminates it. Hyde v. Wrench, 3 Beav. 334; Nat. Bank v. Hall, 101 U. S. 43, 50.

If B. had said, however, "Will you take $750?" that would not have amounted to a refusal to pay $1,000, and the offer would still have remained open. Stevenson v. McLean, L. R. 5 Q. B. Div. 346. A conditional acceptance also is a rejection of an offer and nullifies it as completely as a counter offer. To make a binding contract, an offer must be accepted in terms and unconditionally. Ortman v. Weaver, 11 Fed. Rep. 358.

It is not to be understood, however, that any act showing that a man means to accept an offer will make a binding contract. The act must be one which puts out of his control and into the control of the party making the offer, a notice that the offer is accepted. Beginning to perform in accordance with the offer is not an acceptance. White v. Corliss, 46 N. Y. 467.

5. *A. sends an offer by mail to sell B. certain goods at a fixed price, asking reply by return mail. B. accepts the offer by return mail as directed, but his acceptance is never received. Is there a contract? Suppose B. had replied by wire?*

As previously stated the law looks to the acts of the parties to show whether they have entered into a contract, and the courts have almost universally taken the mailing of an acceptance as the act which completes a contract. Having held that the contract was binding upon both parties as soon as the acceptance is mailed, it was necessary to hold also that the contract was equally binding whether or not the acceptance was received. A leading case on this point is Vassar v. Camp, 11 N. Y. 441. See also Dunlop v. Higgins, 1 H. of L. Cas. 381.

If B. had replied by wire, however, there would have been no contract, unless the telegram was received. A man, in making an

offer, has a right to authorize any mode of communication he sees fit for accepting that offer, and he is bound as soon as the communication is put out of the power of the party accepting, if the latter sends the reply as authorized. But if the acceptance is sent in some other way than the one authorized, even though it be considered a better way, the offerer is not bound, unless the acceptance is actually received. If, however, in the question put, the telegram were received while the offer was open then there would be a binding acceptance. Eliason v. Henshaw, 4 Wheat. (U. S.) 225.

So also if a man specifies a particular place to which to send an acceptance, the principles are the same as in the case of a specified mode of communication. If the acceptance is sent to another place than the one specified, there is no contract upon mailing the acceptance and none if it is received unless it reaches the offerer as soon as it would have done if sent to the place designated. Eliason v. Henshaw, (*supra*).

In Massachusetts, however, the tendency has been towards a contrary rule, holding that a contract is not binding until the acceptance by mail is received. McCulloch v. Eagle Ins. Co., 1 Pick. 278. The point is not, perhaps, absolutely settled. Lewis v. Browning, 130 Mass. 173, 175, and Judge Holmes prefers the rule of the other States. Holmes, The Common Law, 306.

6. *A. makes B. an offer and in it states that an acceptance is to be mailed but shall not be binding until received. Is such a condition binding?*

Yes. In making an offer a man may impose any conditions he sees fit, and such a condition is a very wise one. Lewis v. Browning, 130 Mass. 173; Haas v. Myers, 111 Ill. 421, 427.

7. *A. mails a letter accepting an offer, and then finding that the contract is not advantageous, sends a telegram declining the offer. The telegram is received before the letter. Can A. be held to the contract?*

Yes. A man cannot overtake a letter with a telegram, any more than he can recall words. Hallock v. Ins. Co., 26 N. J. Law, 268, 281.

8. *A. writes B., offering to sell certain goods at a specified price. B., in ignorance of A.'s offer, writes him, at the same time offering to buy the same goods at the same price. Is there a binding contract between them?*

No. Two offers are not the same as an offer and an acceptance. In Pearson v. The Commercial, etc., Co., 29 L. T. Rep. (N. S.) 271,

Blackburn, J., said, p. 279: "The promise or offer being made on each side in ignorance of the promise or the offer made on the other side, neither of them can be construed as an acceptance of the other." See also opinion of Brett, J., p. 278. There is little, if any, other authority upon the point, and the opinion above quoted was simply a *dictum*, but is sound on principle.

9. *A. agrees to sell certain goods "to arrive ex ship Peerless." B. agrees to purchase the same, thinking that the goods are to arrive in October by the ship "Peerless," which is due then. There are, however, two ships "Peerless," and A. is selling goods to arrive by a later ship. Can A. enforce the contract?*

No. There was no meeting of minds in the more literal meaning of that phrase. That is, the parties to the contract were not thinking or talking of the same things. The "Ship Peerless," meant the October ship to B., but an entirely different ship to A. Raffles v. Wichelhaus, 2 H. & C. 906. See also Stoddard v. Ham, 129 Mass. 383.

10. *A. offers to sell B. "not exceeding* 6,000 *tons" of coal. B. accepts the offer in terms. How much coal could B. require A. to deliver to him?*

B. could not require the delivery of any coal, as such an acceptance would not make a binding contract. When an offer is made of an unspecified amount, the other party must specify the amount as to which he is contracting in his acceptance. There can be no binding contract where one of the terms is not fixed. Nat. Bank v. Hall, 101 U. S. 43, 50; Chicago, etc., Ry. Co. v. Dane, 43 N. Y. 240.

11. *A. mailed an offer October* 1*st, which was received October* 10*th, and accepted at once. On the* 2*d, however, A. wrote revoking the offer and his letter arrived October* 12*th. Is there a good contract?*

Yes. A revocation of an offer, to be effective, must be communicated. "A state of mind not notified, cannot be regarded in dealings between man and man" Byrne v. Van Tienhoven, 5 C. P. Div. 344; Kempner v. Cohn, 58 Am. Rep. (Ark.) 104.

It may not, however, be necessary that the revocation should always be communicated directly. It has been held that where A. offers to sell a house to B., the offer to be "left over" for a specified length of time, and then A. sells to a third person before the time has expired. B., after he has learned of that sale though from an outside source, cannot make a good contract by accepting

the offer made to him. Dickinson v. Dodds, 2 Ch. Div. 463. Pollock cites this case for the point that the knowledge of the offerer's change of intention, however received, will be a sufficient revocation. Pollock on Contracts, *p. 28. This, however, and Coleman v. Applegarth, 68 Md. 21 (*accord*) are, it is believed, the only recorded cases on the point.

12. *A., by public advertisement, offers a reward of* $1,000 *for information leading to the conviction of the murderer of X. B. knows of the offer, but makes no effort to accept it. Later, being in a supposed dying condition, he gives the necessary information, and upon recovery, sues for the reward. Is he entitled to it? Suppose he had not known of the reward offered?*

B. would not be entitled to the reward, whether he knew of it or not. This is a unilateral contract, completed when the conditions are fulfilled, but an offer and an acceptance are as necessary in a unilateral as in a bilateral contract. If A. did not know of the reward offered, the giving of the information could not be an acceptance of the offer, and so also, even if the offer were known, B. would have to accept it by giving the information with the intention of complying with its terms. The real question is, what does B.'s act mean? It may mean acceptance or not. Hewitt v. Anderson, 56 Cal. 476.

IV. CONSIDERATION.

a. In General.

13. *What elements are necessary to constitute good consideration for a promise?*

The idea of consideration in the eye of the law is that of an exchange. A promise must be bought. The one requisite is that something must be given for it. That which is given must, to sustain a suit upon the contract, be a detriment to the plaintiff, moving to the defendant, at the defendant's request, and the plaintiff must undertake the detriment voluntarily, and without any previous binding duty or obligation to undertake it.

Consideration is usually a benefit to the defendant as well as a detriment to the plaintiff, but not necessarily, and it will be a good consideration where it is purely a detriment to the plaintiff; and on the other hand, it will not be good consideration where there is only a benefit to the defendant. Thus, where A. agrees, for a sum of money, to discontinue a suit upon a claim which he knows is bad, he could not enforce the contract for want of consideration. It is a benefit to have an action against one discontinued, even though it is groundless, but it is no detriment to a man who abandons such a suit. He has given up nothing. Wade v. Simeon, 2 C. B. Rep. 548.

On the other hand, it is a detriment in the eye of the law that a man does what he is not bound to do. Thus, in Homer v. Sidway, 57 Hun (N. Y.), 229, a boy was offered $5,000 if he would not smoke, drink or gamble, and the trial court ruled that such a promise was not good consideration, as it was no detriment to the boy to forego such things, but this ruling was reversed in the Court of Appeals, where it was held, that the giving up of any right is a detriment. Homer v. Sidway, 124 N. Y. 538.

In the case of a sealed instrument, however, no consideration was held to be necessary to make a contract binding, owing to the deliberateness of the act, and that rule still prevails to-day in the absence of statute. Krell v. Codman, 154 Mass. 454; McMillan v. Ames, 33 Minn. 257. In New York a seal is only presumptive evidence of consideration. N. Y. Code Civ. Pro., § 840.

b. Sufficiency of Consideration.

14. *A.'s property being on fire, he promises the chief of the fire department* $1,000 *if he will do his utmost to put it out. He also offers him another* $1,000 *if he will rescue a child. He is sued for the* $2,000, *and defends on the ground that his promise was without consideration, as the plaintiff was already bound by his connection with the fire department to do all in his power to save property and life. Judgment for whom?*

The plaintiff should have judgment for the $1,000 promised for saving the child, provided that in so doing the man ran a personal risk greater than he was bound to incur by reason of his connection with the fire department. Reif v. Paige, 55 Wis. 496; Davis v. Munson, 43 Vt. 676. He could not recover the other $1,000 under any circumstances, however. As stated, *supra* (Ques. 13), a plaintiff's act is not good consideration, when he was already bound to perform that act, and it is a fireman's duty to do his utmost to put out a fire. He, therefore, suffered no detriment which could be consideration for the other's promise, being bound to suffer it in any case. Reif v. Paige, (*supra*).

The principle that when a man is already bound to do a thing, the doing of it will not be good consideration to make a binding contract, is illustrated in many cases. The previous legal obligation may be:

1. To the promisee. Thus a promise to pay a debt already due is not good consideration. Warren v. Hooge, 121 Mass. 106. Nor a promise to complete a railroad by a contractor to build. Ayres v. Chicago, etc., R. R. Co., 52 Iowa, 478.

2. To a third person. Thus where a man is already bound by a contract with A. to do a thing, the doing of that thing will not be good consideration for another contract with B. Putnam v. Woodbury, 68 Me. 58.

3. To the public. Thus forbearance to commit a tort is not good consideration. McCaleb v. Price, 12 Ala. 753. The performance of official duty is equally ineffectual. Kick v. Merry, 23 Mo. 72.

4. So also the performance of a legal duty is no consideration, as the attendance of a witness who has already been subpoenaed. Dodge v. Stiles, 26 Conn. 463.

Of course, where the several contracts are unilateral the above questions do not arise Thus, ten men may each offer A. $10 if he will do a certain thing, and he would be entitled to recover from each of them, as he was under no previous obligation to do the thing by reason of any of the offers. It is only when by a public duty or a previous bilateral contract a man is already bound to do a thing that a second promise fails to be good consideration. Of course, if two bilateral contracts would be made at the same time they could be enforced, as there would be no previous obligation in such a case.

15. *A., who has allowed a note to go to protest, makes the following agreement with B.: "In consequence of said note not being paid, I agree to pay two per cent. interest per month until it is paid." Could B. recover more than the legal rate of interest on the agreement?*

He could not recover upon the agreement at all. The promise is made upon the past default of A., which is no consideration at all. Consideration must be given for the promise. Shealy v. Toole, 56 Ga. 210; Pollock on Contracts (4th Am. ed.), 232.

16. *A. pays B.* $10 *in return for his promise to immediately return him* $20. *Could A. recover the* $20*?*

No. This illustrates the only class of cases in which the courts require sufficiency of consideration. In most cases the courts will not inquire into the adequacy of consideration given, and a man may promise anything for what he sees fit and will then be held to it, but where the agreement on both sides is for the payment of money, at the same time, the sums to be paid must be equal. Where, however, one party is to pay the money at another place or another time, both would be held to the performance of any contract they might make. In other words, the courts will only inquire into the sufficiency of consideration, even in contracts for the payment of money, when the terms as to time and amount of payment are the same. 1 Parsons on Contracts (8th ed.), p. 450, and note 1; 2 id. p. 804, note t; Shepard v. Rhodes, 7 R. I. 470.

17. *A. holds a note of B.'s which he is unable to collect, owing to the Statute of Limitations. He surrenders it upon B.'s agreement to give a new note. A. sues upon the new note, and*

B. defends upon the ground that the surrender of a note which could not be collected was not good consideration. Is the defense good?

No. The surrender of the note would be good consideration, whether or not it could be collected. Wilton v. Eaton, 127 Mass. 174.

As shown before, the thing given need not be intrinsically valuable to make it good consideration. See also Haigh v. Brooks, 10 A. & E. 309.

18. *A., B. and C. sign a subscription list agreeing to contribute to purchase a church bell. The church contracts for the purchase of the bell and sues A., B. and C. to recover the amount subscribed. Who should have judgment?*

Judgment, on principle, should be for the subscribers. Such a subscription is merely a gratuity, and cannot, on principle, be enforced. This view is established in New York. Presbyterian Church v. Cooper, 112 N. Y. 517; Twenty-third Street Baptist Church v. Cornell, 117 id. 601. And is also the law in England. In re Hudson, 54 L. J. Ch. (N. S.) 811.

In almost every jurisdiction, however, such subscriptions are enforced, but upon widely varying grounds. Some seven different views have been expressed upon which such a subscription can be collected, and the courts have taken the utmost pains to find some consideration for the subscriber's promise to pay. They have succeeded in making him pay, but not in advancing any good reason, in law, why he should. The subscriber's promise is purely gratuitous when made, and cannot be changed by the lapse of time, or by the action of the church.

For the different views and a collection of authorities, see 1 Parsons on Contracts (8th ed.), 468, note 1.

19. *A. agrees to forbear bringing suit upon a claim which is actually not valid, though he honestly believes it to be. Would such an agreement be good consideration for a contract? Suppose suit had been begun and the agreement was to discontinue it?*

There is a somewhat different ruling in many States as to the sufficiency of the consideration in agreements to forbear suit and to discontinue suits actually begun. Where suit has been begun, a court will presume it to be well begun, and when a defendant claims that an agreement to discontinue it is not good consideration he must show that the action was groundless. Bidwell v. Catton, Hobart, 216; s. c., 1 Langdell, Cases on Contracts, 245.

Where suit has not been begun, and also after suit, it is held in England, that if a man honestly believes that he has a good claim,

a promise to forbear suit or to discontinue will be good consideration, even though the claim is really bad. The courts in so doing look, and it would seem rightly, at the question of the consideration from the standpoint of the parties, just as is done in a policy of insurance upon a ship, "lost or not lost." Callisher v. Bischoffsheim, L. R. 5 Q. B. 449; Miles v. New Zealand, etc., Co., 32 Ch. Div. 266; 1 Parsons on Contracts (8th ed.), 456, note 1.

In the United States, however, the prevailing rule is that where suit has not been begun, the claim must be shown to be at least doubtful, in order to entitle a plaintiff to recover upon a contract to forbear suit. The objection to this rule is that it is necessary to go into court in order to determine whether or not a claim is doubtful. 1 Parsons on Contracts (8th ed.), 456, note 1, cases collected. Some four or five States, however, have followed the rule laid down in Callisher v. Bischoffsheim, or have laid down a similar one. See Union Bk. v. Geary, 5 Pet. (U. S.) 99; Morris v. Munroe, 30 Ga. 630; Grandin v. Grandin, 49 N. J. Law, 508; Zoebisch v. Van Minden, 120 N. Y. 406; Bellows v. Sowles, 55 Vt. 391; Hewett v. Currier, 63 Wis. 386. See also Prout v. Pittsfield Fire District, 154 Mass. 450; Dailey v. King, 79 Mich. 568; Clark v. Turnbull, 4 N. J. Law, 265; Wildman v. R. R. Co., 25 Atl. Rep. (Vt.) 896.

In Mississippi, the extreme rule is maintained. A promise to forbear suit is only good consideration where the claim is actually good. Gunning v. Royal, 59 Miss. 45.

Of course, in all jurisdictions, a promise to forbear bringing suit or to discontinue a case is not good consideration when a man knows that his claim is bad. Headley v. Hackley, 50 Mich. 43; Ormsbee v. Howe, 54 Vt. 182.

In the States where the rule laid down in Callisher v. Bischoffsheim is followed, it would, of course, make no difference whether suit had been begun or not. See Grandin v. Grandin, 49 N. J. Law, 508, 514. In most jurisdictions, however, where a claim must be doubtful the distinction would prevail.

c. Moral Consideration.

20. *Give briefly the historical origin of the idea of moral consideration.*

The doctrine of moral consideration was developed and given importance largely by Lord Mansfield, who laid down the principle that "where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration." Hawkes v. Saunders, Cowp. 289. The courts, however, soon showed an unwillingness to apply the doctrine to new cases, and it was finally expressly overruled, as laid down in the broad language of Lord Mansfield, above quoted. In Eastwood v. Kenyon, 11 A. & E. 438, the limitation of the principle was thus stated: "an express promise can

only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." In accordance with this statement, moral consideration is still to be traced in several fixed rules of law which prevail to-day. These are to be explained only upon historical grounds, and are really "pure exceptions to an otherwise invariable rule" that consideration must be given in exchange for the promise. 1 Parsons on Contracts (8th ed.), 445, note 1.

21. *In what branches of the law of contracts does the element of moral consideration still exist?*

There are several branches of the law of contracts which present rules contrary to the general principles of consideration. These rules can be explained only upon the historical ground of moral consideration:

1. In cases of infancy where the contracts made are voidable, if the infant wishes to plead his infancy, his promise to pay or otherwise perform the contract after he becomes of age will bind him to the performance promised. The action must still be based upon the original promise and the new promise will only be proved in case infancy is pleaded, when it is held that the new promise repels the defense, and revives the original promise by its ratification. Edmonds' Case, 3 Leonard, 164; s. c., 1 Langdell, Cases on Contracts, 314. The new promise is not a mere waiver of the right to plead infancy. Freeman v. Nichols, 138 Mass. 313. Thus where a new promise is made after suit has been brought it is not sufficient to sustain the pending action. Hale v. Gerrish, 8 N. H. 374. Of course, there is no consideration for the new promise, but there used to be, under the ideas of moral consideration, and the explanation for the rule to-day is simply historical.

2. Similarly, in cases of bankruptcy, a discharge acts as a bar to any action, but the bankrupt may waive the bar; and in case of a new promise to pay, an action may be brought upon the original debt, and if the discharge is then pleaded, the new promise makes a good replication. Shippey v. Henderson, 14 Johns. (N. Y.) 178; Way v. Sperry, 6 Cush. (Mass.) 238.

3. So, also, a new promise to pay a debt already barred by the Statute of Limitations may be enforced. In this case, however, there is a different method of reasoning, which is rendered necessary by the statute itself. Where a defendant pleads the Statute of Limitations it is impossible to plead the new promise in the replication, as the statute specifically states that an action cannot be brought after a certain lapse of time, and to sustain the replication would be an open violation of the statute. Where,

therefore, the Statute of Limitations is pleaded, the plaintiff must tender issue on the plea, and bring in the new promise in evidence. The court then resorts to the fiction that the new promise shows a debt actually existing, and that the law *implies* a promise to pay it. It is obvious, however, that in order to apply the fiction, the original cause of the action must be one in assumpsit where the promise to pay can be implied, and where an express promise is not necessary. Isley v. Jewett, 3 Metc. (Mass.) 439. The new promise may be conditional or partial, and the plaintiff can only recover the amount specifically promised, which shows that the new promise is the gist of the action. Foster v. Smith, 52 Conn. 449.

4. The only other well-recognized exception to the rule that a promise must have good present consideration is in the case of a promise by a drawer or indorser of a bill or note to pay the holder, although the latter has lost his right of suit by failing to use due diligence. Such a promise will be enforced. Turnbull v. Maddox, 68 Md. 579; Salisbury v. Renick, 44 Mo. 554.

It is generally held that the new promise must be made to the party to whom the money is owed. In Banning on Statute of Limitations, chap. 5, p. 64, it is stated, however, that the new promise is binding if made to a party in interest, Croman v. Stull, 119 Penn. St. 91; or if it was meant to be communicated. De Freest v. Warner, 98 N. Y. 217. Of course part payment is as good as a new promise. Isley v. Jewett, 3 Metc. (Mass.) 439.

Speaking generally, there is to-day a marked disinclination in almost every jurisdiction to extend the rule holding moral obligations to be good consideration. In Mills v. Wyman, 3 Pick (Mass.) 207; Parker, Ch. J., aptly says: "If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called."

Pennsylvania, however, goes far beyond the well-recognized cases of moral consideration considered above, and even holds that in case of gratuitous services a later promise to pay for them may be enforced. Landis v. Royer, 59 Penn. St. 95. See also Stebbins v. Crawford, 92 id. 289, and Holden v. Banes, 140 id. 63. In holding that a moral consideration was sufficient when there never had been any binding legal obligation which would have supported an original cause of action, Pennsylvania in Landis v. Royer, (*supra*), goes to the extreme limit in enforcing moral consideration. In the four instances of moral consideration considered above there has been a good original obligation and those are very different cases from one where the new promise is held to create an original cause of action. Such a view is thoroughly objectionable.

d. Executed Consideration.

22. *A. sold B. a horse, and after the sale warranted him sound. Is he bound by the warranty?*

No. The old idea of past or executed consideration, as well as that of moral consideration, has long since been disposed of. It arose, like the other idea, at the time that the action of assumpsit was being developed, and when the courts still held that an express promise was necessary to sustain an action in debt. A later promise was then seized upon in order to do justice, and from that the principle of executed consideration was largely extended. It has been established for years, however, that "a consideration past and executed will support no other promise than such as would be implied by law." In the case put, therefore, a later warranty would have no consideration as it is no promise which the law would imply. Roscorla v. Thomas, 3 Q. B. Rep. 234.

It is equally true that where the past consideration is such that the law will imply a promise, still that consideration will not support even a slight variation in the new promise. Thus where on an account stated A. is found to be indebted and promises to pay on the tenth day of the following month, that promise could not be enforced, as made, without consideration. A.'s liability was to pay the amount due on request, and a new consideration would be necessary to render him liable to pay on a future fixed day. Hopkins v. Logan, 5 M. & W. 241. These two cases — Roscorla v. Thomas and Hopkins v. Logan, (*supra*) — thoroughly disposed of the old ideas as to past consideration.

e. Consideration Void in Part.

23. *A. agrees not to distrain for rent due and to give up a note of B.'s in return for the latter's promise to pay* $100. *A. sues for the money, and B. pleads want of consideration, as A. never had any right to distrain. Is the answer good?*

No. There are two classes of cases where consideration is void in part. The first is where the party to the contract does not get all that he has asked for, owing to the fact that part of the consideration cannot legally be performed. In that case there is no contract, owing to the failure of the consideration. But, in the second case, as here, where the party does get all that he asks for, although part of it is not good consideration, there is a perfectly good contract. If the other part of the consideration is good it will sustain the agreement. King v. Sears, 2 C., M. & R. 48.

V. CONTRACTS FOR BENEFIT OF THIRD PERSONS.

24. *A. and B., in consideration of the marriage of their son and daughter, agree that each will pay to X., their son and son-*

in-law, respectively, $5,000. *B. refuses to pay. Would X. have a good cause of action?*

The law is well settled in England that X. could not recover in such a case, and that result is sound on principle. X. here is not a party to the contract and has given no consideration for B.'s promise. "It would be a monstrous proposition to say that a person was party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued." Tweddle v. Atkinson, 1 Best & Smith, 393.

This view, however, is not generally law in this country, owing to the difficulties of doing justice. If, in the case put, A. should bring suit upon B.'s refusal to pay, he could only recover nominal damages, as he would not be personally injured substantially by B.'s failure to pay X. If X. is not allowed to sue, therefore, no one can enforce the contract. In many jurisdictions, for this reason, the courts have jumped the difficulty and allowed the beneficiary to sue. Such a course enforces the intentions of the parties and works substantial justice. It is not necessary, however, in cases where the party to the contract could recover substantial damages for its breach. But the prevailing rule in this country is, that when a contract has been made for the benefit of a third person he may sue upon it, and his right of action is sustained in a large variety of cases where the party to the contract could recover substantial damages. 3 Am. & Eng. Ency. (1st ed.) 863, note 5.

Thus, where A. who is indebted to X. lends money to B. upon the latter's promise to pay it over to X. at a later day, X. has been allowed to sue, even though he did not know of the contract when made. Lawrence v. Fox, 20 N. Y. 268. See also Gifford v. Corrigan, 117 id. 257, and Bassett v. Hughes, 43 Wis. 319. Cf. the latest New York case, Buchanan v. Tilden, 5 App. Div. 354; reversed 158 N. Y. 109.

But where the third party is only indirectly benefited he would, of course, have no right of action. Burton v. Larkin, 13 Pac. Rep. (Kan.) 398.

Where, however, an action must be based upon a bill or note or a sealed instrument, it is held generally that a third party beneficially interested cannot sue. Such instruments are considered so formal that only a party to them can maintain an action. Moore v. House, 64 Ill. 162; Fairchild v. North Eastern, etc., Assn., 51 Vt. 613.

VI. ASSIGNMENT OF CONTRACTS.

25. *In what cases may contracts be assigned?*

There are three kinds of assignment:

(1) The assignment of a benefit — any unilateral obligation. (2) The assignment of a duty, as subletting a contract to build. (3) The assignment of both benefit and duty, as to build a house and

get the original price offered by the party for whom the house is built.

An assignment of the first kind is always good. Any one may be appointed to collect a debt. The second kind of an assignment is allowable, if the duty to be performed is such that the one originally bound could have performed it though an agent. Where the personal services of a party are contracted for, as in the case of a physician, no assignment would be possible. The question is the same in the third kind of an assignment — whether the assignee can satisfactorily perform the duty. British Wagon Co. v. Lea, 5 Q. B. Div. 149; Arkansas Co. v. Belden Co., 127 U. S. 379.

VII. CONDITIONAL CONTRACTS.

a. Generally.

26. *Classify the different kinds of conditions to be met with in contracts, and distinguish between them.*

As regards the times when conditions are to be performed they are classified as: (1) Conditions precedent; (2) Concurrent conditions; and (3) Conditions subsequent. As the terms indicate, in (1) one of the parties makes his performance conditional upon some prior thing which is to happen or to be done before he can be called upon to perform his part of the contract. In (2) the performances are to take place at the same time. In (3) a complete contract is made between the parties, but a condition is inserted by which the contract may be rescinded if the condition is not fulfilled. 3 Am. & Eng. Ency. (1st ed.) 909-911. Thus, in a mortgage, the only way in which it materially differs from a deed is in the condition subsequent that the estate conveyed shall cease upon the payment of the mortgage debt.

Conditions are also express and implied, according as the parties insert them in express words, or they are implied from the terms of the contract. And implied conditions are again subdivided into (1) Conditions implied in law, and (2) Conditions implied in fact.

A condition is implied in law that a party will perform his part of a contract and, therefore, recovery by either party is conditional upon his showing that he has performed, or offered to do so. A very common example of such a condition occurs in the sale of goods where delivery and payment are concurrent conditions. In such cases neither party can recover without showing his performance or its equivalent. See Benjamin on Sales (6th Am. ed.), 897.

A condition is implied in fact when one of the parties to the contract cannot carry out his agreement, as intended, until the happening of some event. Thus, where a defendant promises to deliver fifteen tods of wool to be selected by the plaintiff from a larger number of tods, the selection by the plaintiff is a condition precedent, implied in fact, the performance of which is necessary. Raynay v. Alexander, Yelv. 76; s. c., 1 Langdell, Cases on Contracts, 443.

"When, in the order of events, the act to be done by one party must necessarily be done before the other can be done, it is necessarily a condition precedent." Cadwell v. Blake, 6 Gray (Mass.), 402, 409.

27. *A. agrees to pay* $1,000 *on September* 10*th, and B., in consideration agrees to convey land on September* 20*th. B. sues for payment of the money on September* 15*th, and A. pleads that the land has not been conveyed. Is the plea a good defense?*

No. In such a case the covenants are independent. In the early days the courts took a very artificial view of mutual covenants, holding that they were separate contracts and independent of each other, unless expressly made dependent. Thorp v. Thorp, 12 Mod. 455, per Holt, Ch. J. And in the case of mutual promises, as soon as they were held to be good consideration for each other, the courts held that one promise was payment for the other and, therefore, that the *performances* were independent. Battisworth v. Campion, Yelv. 134.

It was only after many years that the principle was worked out that performance was what the parties were contracting for, not promises, and, to-day, the courts will construe all promises as concurrent, as far as possible, and will hold the conditions of performance, also, concurrent, and not allow one party to recover upon a contract before he has himself performed or offered to do so. Marsden v. Moore, 4 H. & N. 500. Parties may, however, by the terms of their contract, make their promises independent, so that one party may recover without having himself performed. In the present case A., having agreed to pay ten days before the land was to be conveyed, would be bound to do so. The law was thus expressed by Sergeant Williams, in his famous note to Portage v. Cole, 1 Wms. Saund, 319.

"If a day be appointed for payment of money or part of it, or for doing any other act, and the day is to happen or may happen before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent."

Portage v. Cole has led to some very unsound decisions, and the quotation above has been frequently misapplied, but is still good law, when properly applied to the facts. See Ques. 39 (*infra*).

For a clear discussion of dependent and independent conditions, see Jones v. Marsh, 22 Vt. 144. In general it may be stated that where the performance of a contract takes time on both sides, and there is nothing on either side to show that the performance by one party is a condition precedent to performance by the other, then each must go

ahead with his part of the agreement, and the promises are independent and each has a right of action for the failure of the other to perform. In other words, when performances are not in exchange for each other the covenants are usually independent, and perhaps always so. Where, however, promises can be held concurrent without violating the expressed intentions of the parties, the courts will so construe them. Thus if A. agrees to perform certain work and B. agrees to pay for it on a fixed day, the covenants will be held to be concurrent if the work can be finished before the fixed day. If no day was fixed for payment then it would be held to come after the work was done. In such cases A. could not recover without showing a completion of the work, nor could B. recover without showing a tender. It is in the interest of all that independent suits should not be encouraged by parties who have not themselves performed. Where a contract can be construed so that payment may be either a condition concurrent or precedent, it is more just to construe it as a condition precedent by which all parties will be protected. 2 Parsons on Contracts (8th ed.), 645, note r.

28. *A. leases property to B., agreeing to keep in repair and B. agreeing to pay rent. The premises later need repair, and B. refuses to pay rent until the repairing is done. Can he be ejected?*

Yes. The covenants in such a case are independent. By giving possession a lessor performs the principal part of his covenant, and the lessee does not pay rent for what is promised, but almost entirely for possession which he has received. "The lessee's covenant to pay rent was not affected by the injury to the premises * * * and is independent of the lessor's covenant to make repairs. And it is not now denied that the lessee was rightly required to pay rent, and lawfully ejected for failing to pay." Leavitt v. Fletcher, 92 Mass. 119, per Gray, J.

So also where A. agreed to guarantee a debt for B. and the latter agreed to guarantee a debt for A., the promises would be independent, and either could recover though he had not himself paid. Christie v. Borelly, 29 L. J. Rep. Com. Pleas, 153.

Both in the case put in the question and the last case cited, the performances are not in exchange for each other, and, therefore, performance by one is not a condition precedent to his right to recover.

29. *A. agrees to convey certain land to B., and in consideration B. gives A. his promissory note for* $1,000. *A. brings action on the note without offering to convey, and claims that the note is an independent instrument and can be enforced whether he has performed or not. Judgment for whom?*

Judgment should be for B. In England A.'s claim that a bill or note is independent has been sustained, and a party holding such

an instrument has been allowed to recover, though himself in default. Spiller v. Westlake, 2 B. & Ad. 155; Moggridge v. Jones, 14 East, 486.

In the United States, however, the promises of such a contract are held to be dependent, and no recovery could be had in the above case if A. had not offered to convey. By this view the rights of the parties are worked out much more satisfactorily. The defendant should not be required to pay for what he is not going to receive, because he has given a note. Frequently, a note is given simply to see if the consideration will be given. Hunt v. Livermore, 5 Pick. (Mass.) 395; Sutton v. Beckwith, 68 Mich. 303.

b. Conditions Precedent.

30. *A. agrees to pay freight at a rate to be determined by designated persons, whose determination is to be final. Action is brought against him without any determination by the arbitrators as to the rate due. Is he liable?*

No. Such a provision is a valid condition precedent. A. only agreed to pay at such a rate as should be established in a prescribed way, and "cannot be compelled to acquiesce in the determination in any other manner, and until a rate is established, no liability is incurred under the contract, or right of action given." D. & H. Canal Co. v. Penn. Coal Co., 50 N. Y. 250, 263.

An agreement to refer all matters of difference to arbitration has been generally declared void by the courts as ousting them of their jurisdiction, but that idea has lost favor in the present time, and is frequently criticised and will not be extended. Condon v. Ry. Co., 14 Gratt. (Va.) 302, 313; Kinney v. B. & O., etc., Assn., 35 W. Va. 385. Wherever an agreement to arbitrate or to have any facts determined by a stated person is a condition precedent to a right of recovery, it will be enforced. 2 Parsons on Contracts (8th ed.), *p. 709, note 1, cases collected; Sweet v. Morrison, 116 N. Y. 19, 27.

In Massachusetts, however, A. would probably be liable in the case put. In that State the idea in ousting a court from its jurisdiction is more rigorously enforced than in most jurisdictions. Reed v. Washington Ins. Co., 138 Mass. 572, 575; Badenfeld v. Mass. Accident Assn., 154 Mass. 77, 83.

31. *A. agrees to construct a building for B. in accordance with certain specifications. He uses inferior materials and intentionally violates the specifications without B.'s consent, and B. refuses to pay for the building, but occupies it. A. sues. What should he recover?*

A. should recover nothing. The erection of the building according to the specifications is a condition precedent to A.'s right

to recover upon the contract, and no recovery can be had even upon an implied obligation, simply because the building remains upon B.'s land and is occupied. The law will not imply an obligation to pay in such a case where a man has no option to pay or return the property. Of course, if A. had virtually performed his contract he could recover, but the above is not such a case. Elliott v. Caldwell, 43 Minn. 357.

Where a plaintiff has virtually performed his part of a contract a slight breach will not bar his right to recover. Thus, where A. agrees to teach a year for $300, his performance is a condition precedent to a right to claim the money, but a few days' absence after part performance will not prevent his recovery. Fillieul v. Armstrong, 7 A. & E. 557. See also Ques. 36 (*infra*).

32. *A. agrees to work for a year for* $1,000. *After six months he wrongfully stops work. What right of recovery has he? Suppose he stopped owing to illness?*

Where a party to a contract wrongfully refuses to perform, and his performance is a condition precedent to a right of recovery, he has no right whatever to payment for services rendered before his breach. Where, however, the breach is due to illness and is not wrongful, recovery may be had on a *quantum meruit* for the services rendered. See Quasi-Contracts, Ques. 20, 23.

c. Warranties as Conditions.

33. *A. charters to B. the ship Dove, "now at sea, having sailed three weeks ago." It later appears that she had not sailed as represented, and B. refuses to accept the ship on the ground that the breach was material. A. contends that the clause quoted was merely a representation and not a warranty. Judgment for whom?*

If the representation as to the sailing of the ship was material, judgment should be for B. It is frequently a very important question, whether a certain clause of a contract is a representation or a warranty. If it is merely a representation, the other party has practically no relief if it proves untrue, for the fact that a representation is not true is not a breach of the contract and does not even give a cause of action, unless the representation was made fraudulently, and the party can show all of the other elements necessary for an action in tort for deceit. Whereas, if the facts stated constitute a warranty, its falsity alone is a sufficient defense. Behn v. Burness, 3 B. & S. 751.

In distinguishing between a warranty and a representation the only point of investigation is the substantial importance of the facts in the disputed clause of the contract. If those facts are important, the

clause is held to be a warranty and is then treated as an express condition. When used in this sense a warranty is always a condition and is different from the term when used in sales. In Behn v. Burness (*supra*), 755, the court says:

"But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine * * * appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition, on the failure or nonperformance of which, the other party may, if he is so minded, repudiate the contract *in toto*."

In the case put, therefore, B. need not accept the ship. Ollive v. Booker, 1 Exch. 416; Gray v. Moore, 37 Fed. Rep. 266; Wilfred v. Myers, 40 id. 170.

If B. should accept the vessel, however, he could not afterwards "treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action to recover damages." Behn v. Burness, 3 Best & Smith, 751, 756.

d. Breach of Conditions.

34. *An insurance company makes an express condition in its policy that no loss occasioned by fire shall be paid for except it is certified to by the minister of the place. A.'s property burns down and the minister wrongfully refuses to certify the loss. Can he recover by proving the loss in any other way?*

No. Where there is an express condition made by the parties it must be performed. Implied conditions are inventions of the courts for working justice, and the courts can mold them as they wish, but there is no reason, based on sound principle, why parties should not live up to their express conditions, and by the best authority they are absolutely required to do so. Worsley v. Wood, 6 Term Rep. 710; Johnson v. Phoenix Ins. Co., 112 Mass. 49. But see O'Neill v. Mass. Ben. Assn., 18 N. Y. Supp. 22, where the beneficiary was allowed to recover on a life insurance policy, where a physician obstinately refused to certify the insured's death, although such a certificate was an express condition precedent. It is, perhaps, probable that some other courts will follow this case, but it rests only upon the hardship of a contrary decision. In holding in that case that the claimants were simply bound to use diligent efforts to comply with the stipulated conditions, the court overlooked the binding character of express conditions precedent.

It may be said, in general, that the New York courts are less rigorous than most jurisdictions in enforcing conditions precedent of this nature. They go so far as to hold that when a contractor has substantially performed the contract an architect's certificate is not necessary, though made an express condition precedent to payment by the

terms of the contract. The rule that recovery may be had where a certificate is refused through gross error, (*infra*), works justice, but the further relaxation of the condition precedent does away with the rights of the defendant. It is neither technical nor just that a jury should be allowed to pass upon the fulfillment of a contract when the parties have expressly stipulated that a third party named shall be sole judge as to the satisfactory completion of the work. The defendant does not want a right to deduct money from the contract price for the failure of the plaintiff to make certain things satisfactory, and the courts should recognize his rights to contract for perfectly satisfactory work. That right, however, seems denied in Crouch v. Gutmann, 134 N. Y. 45; and Nolan v. Whitney, 88 id. 648. In the latter case, the court says, p. 650, that when the contractor "had substantially performed his contract, the architect was bound to give him the certificate, and his refusal to give it was unreasonable" and that, therefore, the certificate need not be secured. The question of the "substantial" performance is, therefore, of necessity left to the "twelve good men and true" in place of the architect.

A condition implied in fact is from its very nature like an express condition, as it is a necessary implication from the express terms, and such a condition must absolutely be performed. Cadwell v. Blake, 6 Gray (Mass.), 402.

There are, however, several instances where a party has not performed an express condition or one implied in fact and may yet recover. Thus where a superintendent or an engineer is to certify to the quality of work before it is to be paid for, a contractor may recover for work done where he can show (1) that the certificate is withheld through fraud or bad faith on the part of the engineer; or (2) through collusion between the defendant and the engineer; or (3) through a manifest mistake made by the engineer. Chism v. Schipper, 51 N. J. Law, 1; Chicago, etc., R. R. Co. v. Price, 138 U. S. 185; Hudson v. McCartney, 33 Wis. 331, and cases cited. Where the defendant himself prevents or materially hinders the performing of a condition precedent, such action is, of course, a waiver of his right to insist upon it, and recovery may be had by pleading the prevention or hindrance, unless the circumstances of the contract show that the risk of prevention was assumed by the plaintiff. Seipel v. Ins. Co., 84 Penn. St. 47.

In other cases, however, which are not of the nature of those mentioned above, express conditions must be performed to entitle a party to recover, no matter how good an excuse he may have for not performing, as, for example, illness. Spalding v. Rosa, 71 N. Y. 40; Johnson v. Walker, 155 Mass. 253.

35. *A. agrees to make a suit of clothes to the satisfaction of B. Upon the completion of the work, B. refuses to accept the*

suit and returns the same, but is capricious in his dissatisfaction. Has A. any right of recovery?

If the terms of the contract were sufficiently strong to allow B. to refuse the suit, if actually dissatisfied, though his dissatisfaction was merely capricious, then he should be allowed to do so. B. has stipulated for work to his satisfaction, and the question of whether it would satisfy others is really irrelevant. In Brown v. Foster, 113 Mass. 136, the court said that if the plaintiff "contracted that the articles, when manufactured, should be satisfactory to the defendant, he can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for anyone else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensation of the plaintiff * * * may thus be dependent upon the caprice of another, who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered."

So, also, in Gibson v. Cranage, 39 Mich. 49, where an artist agreed to paint a portrait which should not be paid for if unsatisfactory, the court held that, even though the picture might be an excellent one, and the defendant ought to have been satisfied with it, yet "under the agreement the defendant was the only person who had the right to decide this question. When parties thus deliberately enter into an agreement which violates no rule of public policy, and which is free from all fraud or mistake, there is no hardship whatever in holding them bound by it." See also Wood, etc., Co. v. Smith, 50 Mich. 565; Zaleski v. Clark, 44 Conn. 218, *accord*. The only requirement necessary is that the defendant shall be honestly dissatisfied. It makes no difference how good or how poor a reason he has for his dissatisfaction. McClure v. Briggs, 58 Vt. 82; Exhaust Ventilator Co. v. Chicago, etc., Ry. Co., 66 Wis. 218; Seeley v. Welles, 120 Penn. St. 69.

The courts will not give the defendant such a wide range of discretion, however, unless he has contracted for it in unmistakable terms. In Hawkins v. Graham, 149 Mass. 284; Holmes, J., thus accurately expresses the law:

"The only question in this case is, whether the written agreement between the parties left the right of the plaintiff to recover * * * dependent upon the actual satisfaction of the defendant. Such agreements usually are construed, not as making the defendant's declaration of dissatisfaction conclusive, in which case it would be difficult to say that they amounted to contracts, but as requiring an honest expression. In view of modern modes of business, it is not surprising that in some cases, eager sellers or selling agents should be found taking that degree of risk with unwilling purchasers, especially where

taste is involved (citing cases discussed and cited *supra*). Still, when the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested party. In doubtful cases, courts have been inclined to construe agreements to do the thing in such a way as reasonably ought to satisfy the defendant." See also 2 Parsons on Contracts (8th ed.), 62, note 1.

e. Part Performance and Breach in Limine.

36. *A. agrees to make several payments of money for B., in return for a certain service to be rendered. A. fails to make the final payment and B. refuses to act. Has A. any right of action?*

If the payments already made by A. were of the essence of the contract he would have a good right of action. "It is a clearly recognized principle, that, if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to." Franklin v. Miller, 4 A. & E. 599, per Littledale, J.; 2 Parsons on Contracts (8th ed.), 795; Taylor v. Renn, 79 Ill. 181.

It may be stated, in general, that a breach after part performance is only fatal when it goes to the essence of the contract. See Boone v. Eyre, 1 H. Bl. 273, note.

If, however, in a contract for personal services for a year, at a stated sum for the term, the employee should irretrievably break his contract after eleven months' service, upon strict principle he would not be entitled to recover anything for his past services. Eldridge v. Rowe, 7 Ill. 91; Olmstead v. Beale, 19 Pick. 529. In some jurisdictions, however, a recovery is allowed, even in such a case, on the principles of *quasi* contracts, the defendant being required to pay the value of the services rendered on a *quantum meruit*. Britton v. Turner, 6 N. H. 481; Parcell v. McComber, 11 Neb. 209; Duncan v. Baker, 21 Kan. 99.

37. *A. agrees to sell certain land to B. with the timber growing thereon. Before the day fixed for the transfer, A. cuts down a number of the trees and B. refuses to take the land. A. sues, alleging that his breach is immaterial. Can he recover?*

No. This is a breach *in limine* and is regarded very differently from a breach after part performance. When a breach occurs at the beginning of a contract it need not go to the essence of the contract in order to give the other party the right to rescind. A slight breach will then be fatal. Smyth v. Sturges, 108 N. Y. 495; Tully v. Howling, L. R. 2 Q. B. Div. 182. In Hoare v. Rennie, 5 Hurl. & N. 19, Pollock, C. B., said: "The only question we have to

deal with is whether, on a contract like this, if the sellers at the outset send a less quantity than they are bound to send, so as to begin with a breach, they can compel the purchasers to accept and pay for that, the sending of which was a breach and not a performance of the agreement." That was a case of a breach in making the first of four shipments of iron agreed upon, and it was held to be fatal.

But, even in the case of a breach *in limine*, the court will not consider it fatal, unless it has some material bearing. Tarrabochia v. Hickie, 1 Hurl. & N. 183.

The fact is to be carefully noted, however, that the distinction between a breach *in limine* and after part performance is only maintained in cases of conditions implied in law, where the condition of one man's recovery is the performance of his own promises. In express conditions and conditions implied in fact, absolute performance is essential. See Ques. 34, (*supra*).

f. Divisible Contracts.

38. *A. agreed to ship B.* 5,000 *tons of iron,* 1,000 *tons to be shipped per month and to be paid for upon delivery. A. shipped only* 400 *tons in the first month and* 800 *tons in the second, and B., upon learning these facts, refused to accept the shipments and claimed a right to rescind. A. claimed that each shipment was a separate matter, and that a default in one shipment gave B. no right to refuse a later installment. Which contention should prevail?*

B. would be entitled to rescind by the weight of authority in this country. The contract is a single one for the sale of 5,000 tons of iron, and the arrangement for payment and shipment only stipulated how it should be carried out. A divisible contract is one where the payment and consideration are apportioned, so that part payment may be secured after part delivery, but it is still a single contract, relating, however, to a series of transactions. The breach of such a contract is, therefore, to be looked at as any other breach, to ascertain how far it goes to the essence. In the present case it would entitle B. to rescind. Norrington v. Wright, 115 U. S. 188. This is the leading case on the point and represents the weight of authority in this country. See also Barrie v. Earle, 143 Mass. 1, where the entirety of such a contract was illustrated by a ruling that a man who had agreed to buy a series of books and pay for each upon delivery, could not rescind the contract upon the ground of fraud, without returning two volumes which he had received and paid for.

The view of the English courts in regard to such contracts is, however, that each installment of goods and the payment for it constitute

a distinct contract, and that no default in one installment can justify a refusal to perform the next. Simpson v. Crippin, L. R. 8 Q. B. 14. See also 2 Parsons on Contracts (8th ed.), *p. 571. note 1, and cases cited.

The English view seems unsound and unsatisfactory in practice, but has been followed in Blackburn v. Reilly, 47 N. J. Law, 200; Skillman Hardware Co. v. Davis, 53 id. 144. See also Johnson v. Allen, 78 Ala. 387; Hansen v. Consumers, etc., Co., 73 Iowa, 77; Haines v. Tucker, 50 N. H. 307; Cahen v. Platt, 69 N. Y. 348; Scott v. Coal Co., 89 Penn. St. 231.

39. *A. agrees to sell land to B., the latter to pay in five installments of* $1,000 *each, and the deed to be given upon the payment of the fifth installment. B. fails to pay as the installments become due, and after the day fixed for the payment of the last installment, A. sues for the entire amount. B. defends on the ground that the deed has not been tendered. Judgment for whom? If for A., for what amount?*

Upon sound principle judgment should be for A. for $4,000. Before the last installment was due A. had a perfect right to sue for the four installments due, without a tender of the deed. By the terms of the contract the covenants to pay the first four installments were independent, and the fact that the fifth installment is due, which was only to be paid upon conveyance, cannot make the other covenants also dependent upon the tender of the deed. In Duncan v. Charles, 5 Ill. 561, 567, where a similar contract was under discussions, the court said:

"In no imaginable case can an independent covenant, which has been once broken and upon which a cause of action has consequently accrued, be converted or shifted into a dependent covenant." See also Sheeren v. Moses, 84 Ill. 448.

For the recovery of the last installment, however, a tender of the deed would be necessary. The contract makes that payment and the giving of the deed dependent. There is no difficulty, in principle, in enforcing such a contract in which there is both a dependency and an independency of covenants. Duncan v. Charles, (*supra*).

It was held, however, in Beecher v. Conradt, 13 N. Y. 108, that in such a contract after the last installment came due the payment of the whole of the purchase money, and the conveyance of the land became dependent acts. Such a decision seems to violate sound principle, but is still law in New York. Eddy v. Davis, 116 N. Y. 247, 252. And in Connecticut the reasoning that where several items are due they must all be sued upon in one action has been carried to the extreme limit. Burritt v. Belfy, 47 Conn. 323. It seems unreasonable, however, that where money is originally due in installments, a defense which was originally only good as to the last of the installments, if they are

enforced severally, should, by the mere lapse of time, be construed so as to "leaven the whole lump."

The New York cases, however, show the strong tendency of the courts to construe conditions as concurrent for the greater protection of the parties.

In many cases of conveyance and in many other cases where conditions are concurrent, courts often drop into somewhat inexact language about the parties being "ready and willing" to convey or to perform. Of course the mere mental state of being "ready and willing," if unexpressed, would not be sufficient. "By the term 'tender' is generally meant the actual physical production of the deed, and the reaching it out, with words of offer of it, to the vendee." Such a formality is frequently unnecessary, but the law does require a party so to act that he may be plainly understood. Lawrence v. Miller, 86 N. Y. 131, 137.

g. Waiver of Performance. Anticipatory Breach.

40. *A. agrees to convey land to B. on September 1st, and B. agrees to purchase on that day. On August 1st B. says that he will never carry out the contract, and on August 2d A. sues for breach of contract. Can he recover?*

It is held in England that where a day is fixed for performance, if one of the parties declares that he will not perform, such a declaration gives the other a good right of action at once, although the day of performance has not arrived. Hochster v. De la Tour, 2 El. & B. 678. The case is based largely upon arguments of convenience. At p. 690, Lord Campbell says:

"It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind."

So, also, where a man promises to marry a woman on a certain day, and before that time marries another, he may be sued at once. Short v. Stone, 8 Q. B. 358. And where a man contracts to lease property on a certain day, and before that day leases to another, he may be sued before the day of performance. Ford v. Tiley, 6 Barn. & C. 325.

These cases have been followed in most of the States where the question of suit upon an anticipatory breach has been settled. In Burtis v. Thompson, 42 N. Y. 246, the defendant promised to marry the plaintiff "in the fall," but early in October announced that he would not perform the contract, and the court held that the action could be brought immediately. Hochster v. De la Tour is approved by Dwight, C., in Howard v. Daly, 61 N. Y. 362, but merely by way of an elaborate dictum upon which the rest of the court expressed no opinion. In Shaw v. Republic Life Ins. Co., 69 N. Y. 286, 293, the court re-

fused to concur in the English cases, but the point was not specifically raised. They there held that where the defendant declares that he will not perform and does not withdraw his declaration before the day arrives, the plaintiff is excused for a nonperformance on his part, and may recover when the day has passed. See also Nichols v. S. S. Co., 137 N. Y. 471, 486; Wharton & Co. v. Winch, 140 id. 287. Since Burtis v. Thompson (*supra*) the question of a right to sue upon an anticipatory breach has not been decided in New York, and is expressly left open by the two cases last cited.

Action upon an anticipatory breach is allowed in:

Iowa: Crabtree v. Messersmith, 19 Iowa, 179; McCormick v. Basal, 46 id. 235.

Illinois: Kadish v. Young, 108 Ill. 170.

California: Remy v. Olds, 88 Cal. 537.

The question is discussed but not settled in Maryland. Dugan v. Anderson, 36 Md. 567; Pinckney v. Dambmann, 72 id. 173, 182. The question can hardly be said to be settled in Michigan. But see Sheahan v. Barry, 27 Mich. 217.

In Daniels v. Newton, 114 Mass. 530, the question was squarely raised, and after a most elaborate examination of the authorities it was held that where a defendant notifies the plaintiff that he will not perform a contract by which he is bound to take a conveyance of land on a future day, such a notice cannot be a breach of the contract giving an immediate right of action, before the time set for performance has arrived. It may excuse the plaintiff from preparing to perform and "it may destroy all capacity of the party, so disavowing its obligations, to assert rights under it afterwards, if the other party has acted upon such disavowal. But we are unable to see how it can, of itself, constitute a present violation of any legal rights of the other party, or confer upon him a present right of action. * * * Until the time arrives when, by the terms of the agreement, he is or might be entitled to its performance, he can suffer no injury or deprivation, which can form a ground of damages."

The reasoning in this case seems sound, and in jurisdictions where the point is not settled should have great weight. On principle it is difficult to see how there can be a breach of performance before the date of performance has arrived; but where the plaintiff has acted upon an unqualified disavowal of the contract, it is right that the defendant should be estopped afterwards to say that he was ready to perform, as suggested above. See also Rayburn v. Comstock, 80 Mich. 448, 452; Zuck v. McClure, 98 Penn. St. 541.

h. Contracts Conditional upon Notice.

41. *A. takes out a policy of insurance upon B.'s life and B. agrees to do nothing to render the policy void. He has never seen the policy, and without knowing that he will void*

the policy by leaving the country, does so. Is he liable for breach of contract?

No. Having had no notice that leaving the country would render the policy void, and having no practical means of learning that fact, unless notified by the plaintiff, he would not be liable for the breach.

"The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event, which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the matter, and is what is laid down in all the cases on the subject, and if there are any to be found which deviate from this principle, it is quite time that they should be overruled." Per Lord Abinger, C. B., in Vyse v. Wakefield, 6 Mees. & W. 442.

VIII. CONTRACTS IMPOSSIBLE OF PERFORMANCE.

42. *A. conveys land to B., the latter covenanting only to build certain kind of buildings upon it. The land is then taken by act of legislature and used for other purposes. Has A. a right of action? If so, would damages be substantial or nominal?*

A. would have no right of action whatever. Anything which the law makes impossible of performance without any fault on the part of the defendant the law will excuse. Bailey v. De Crespigny, L. R. 4 Q. B. 180.

Where it is a foreign law, i. e., the law of another State, which renders the performance impossible, it is a question of fact, whether or not performance is impossible.

There are three general classes of cases in which impossibility is an excuse for nonperformance of a contract:

1. Where domestic law forbids performance, as in the case above.

2. Where the contract rests upon the supposition of the existence of subject-matter which is destroyed.

3. Where services are contracted for which are of a personal nature, and sickness or death prevents. In none of these cases can the other party to the contract recover for nonperformance.

Thus, as an example of the second class, where A. contracts to make repairs upon B.'s building, and it is destroyed, A. will be excused for nonperformance. "The agreement on both sides is upon the implied condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties will excuse performance of the contract, and leave no right of recovery of

damages in favor of either against the other." Butterfield v. Byron, 153 Mass. 517, 519, and cases cited. This rule does not apply, however, to a case where A. contracts to erect the building entire. In such a case he is solely responsible for it and if it is destroyed he must rebuild it. Performance in such a case, i. e., the delivery of a completed building, is not impossible, but simply more difficult. If a day were fixed for the delivery, and destruction made the completion of the building by that time impossible, of course the contractor would be excused for nonperformance in that respect, but the mere hardship would not excuse him. Butterfield v. Byron, (*supra*), and cases cited; Cutliff v. McAnally, 88 Ala. 507. Of course, intentional destruction would be no defense.

In the third class of cases the law is universally established that sickness or death is such an act of God as to excuse performance, but where it may be plainly foreseen, it constitutes no excuse for nonperformance. Jennings v. Lyons, 39 Wis. 553. Nor would it do so, probably, if it were wilfully brought about after the contract was entered into. Allen v. Baker, 86 N. C. 91, 97.

Of course it is always competent to show that the party in default willingly ran the risk of performance becoming impossible, and any man may so contract, if he sees fit. Where such a question is at issue it is simply a question of fact whether "the party really did intend to warrant that to be possible which was impossible." Clifford v. Watts, L. R. 5 C. P. 577, 585.

In Louisiana, in accordance with the principles of the civil law, the courts are more liberal in excusing a party on the ground of impossibility. Engster v. West, 35 La. Ann. 119.

For a general citation of authorities upon the subject of impossibility, see 2 Parsons on Contracts (8th ed.), 786, note 1; 787, note 1.

IX. ILLEGAL CONTRACTS.

a. In Restraint of Trade.

43. *Two gas companies owning equal and exclusive rights under a municipal franchise combine and apportion the city between them for the purpose of avoiding competition and raising prices. Will such a contract be sustained by the courts?*

No. Such a contract would be illegal upon the grounds of public policy as being in restraint of trade, and in promotion of monopolies. Companies in such positions owe a public duty and will not be allowed to disregard that duty and combine in such a way as to turn their privileges solely to their own advantage by stifling competition. Chicago Gas Light Co. v. People's, etc., Co., 121 Ill. 530.

In considering whether a contract is against public policy, as unreasonably in restraint of trade, the kind of business to which the contract relates must be considered. Thus, as suggested above, where companies owe a public duty, the courts will be very strict in passing upon contracts whereby the public will be deprived of competition

and left to the mercies of a monopoly. Thus carriers can't pool their earnings or go into partnership, as they also owe a duty to the public. Hooker v. Vanderwater, 4 Den. (N. Y.) 349; Texas, etc., Ry. Co. v. So. Pac. Ry. Co., 41 La. Ann. 970. So, also, on similar grounds, courts will not uphold contracts which seek to organize or maintain a monopoly in the supply of the necessaries of life, as in coal. Arnot v. Pittston, etc., Coal Co., 68 N. Y. 558.

It is to be observed, however, that frequently individuals may combine to do a thing which would be illegal if done by corporations owing a public duty. Thus stevedores, who owe no public duty, may legally apportion their business though gas companies may not. Collins v. Locke, L. R. 4 App. Cas. 674. See also Marsh v. Russell, 66 N. Y. 288; Hopkins v. Ensign, 122 N. Y. 144, 149. But where either private persons or public corporations are simply trying to obtain a monopoly and force prices, their contracts will not be sustained.

The question is whether the agreement imposes an unreasonable restraint upon trade, and where the object is simply to secure freedom from competition and inflate prices, the contract will in almost every case be declared void. Am. Biscuit Co. v. Klotz, 44 Fed. Rep. 721; 2 Parsons on Contracts (8th ed.), 875, note 1, cases cited. But see Central, etc. Co. v. Cushman, 143 Mass. 353.

The application of the rule as to contracts in restraint of trade to the classes of cases above noted is an extension, of recent years, of the principle that a contract was illegal which sought, for any consideration, to keep a man out of his trade in an unlimited territory, to lessen competition. This rule had its origin in England at a time when it was almost impossible for a man to change his trade and when the custom of apprenticeship was in full force. It was then held that a contract unlimited in extent, i. e., covering the whole kingdom, was illegal. In recent years, however, the test of a territorial limit has been abandoned in England, and the reasonableness of the restraint for the protection of the other party is now the sole test. If "the extent of the restraint is not greater than can possibly be required for the protection of the plaintiff, it is not unreasonable." Fry, J., in Rousillon v. Rousillon, 14 Ch. Div. 351, 364. See also Rogers v. Maddox [1892], 3 Chan. 346; Badische, etc., Fabrik v. Schott [1892], id. 447. In the United States the tendency of the courts is in accord with the English cases above cited, making the validity of the restraint depend upon its reasonableness under all the circumstances. In Massachusetts, however, the old English rule is still followed, and it is held that any contract requiring a restraint over the entire State is necessarily invalid. Alger v. Thacher, 19 Pick. 51; Bishop v. Palmer, 146 Mass. 469.

By act of Congress, July 2, 1890 (26 Stat. at Large, 209), contracts and monopolies in restraint of trade are made criminal, but this statute only applies to contracts of an interstate nature. Congress has no authority to legislate in regard to contracts which are to be performed wholly within any State. For cases of indictments under this statute, see U. S. v. Greenhut, 50 Fed. Rep. 469; U. S. v. Nelson, 52 id. 646.

44. *A. enters into a scheme to illegally advance the price of lard by "cornering the market" and employs B. as his broker, who knows of A.'s intention. B. defrauds A. by falsely charging commissions and A. sues. What should he recover?*

By the weight of authority in this country A. would have no right of action whatever. The courts will refuse altogether to investigate illegal transactions. Leonard v. Poole, 114 N. Y. 371.

b. Wagering Contracts.

45. *A. orders B., his broker, to sell wheat "short" for future delivery, his intention being simply to speculate and not to buy the grain for delivery. B. is ignorant of these facts. Can he recover for commissions due? Suppose he had known of A.'s intentions?*

The sale of property which one does not possess is not necessarily void as a wager, and may well be perfectly legitimate. The intention of the parties merely to gamble, at the time of entering into the contra t, is the important thing. If the actual transfer of property is never intended, then the contract for commissions is void if the gambling nature of the contract is known to both parties. In the case put, however, where B. was ignorant of his principal's intention, he could recover his commissions for executing a contract which, on its face, might be perfectly legal. Where he had full knowledge of A.'s illegal purpose, however, he would be regarded as *particeps criminis*. Irwin v. Williar, 110 U. S. 499; Harvey v. Merrill, 150 Mass. 1. But see Winchester v. Nutter, 52 N. H. 507, where the mere knowledge of a third person, who was not a party to a wagering contract, was held not to preclude recovery. Force was given to the fact that his compensation, as in the case of a broker, was fixed and in no way depended upon the result of the wager. The argument certainly has force, but other courts have not gone so far.

It is not to be understood, however, that there is anything illegal in speculation. Where a purchase and actual delivery of goods are intended, contracts are perfectly valid. A contract is only void as a wager when the parties are simply betting upon the rise and fall of prices in the market. The test is whether an actual delivery was originally intended. Irwin v. Williar, (*supra*), at p. 508; Wall v. Schneider, 59 Wis. 352. See also cases collected, 2 Parsons on Contracts (8th ed.), 879, note 1.

46. *A. employs B. as his attorney to collect a claim by suit and agrees to give him one-half of the net sum collected, B. to pay costs of suit. After recovery A. sues B. for the entire amount recovered. Judgment for whom?*

According to the strict rules of the common law such an agreement would be considered a gambling contract, and would be void for champerty and maintenance, both the providing of money to prosecute a suit and the contract to act as attorney upon a contingent fee being looked upon with great disfavor. In some States, as Massachusetts, the strictness of the old rules still prevails. Ackert v. Barker, 131 Mass. 436. In most States, however, the courts have greatly modified the restrictions, especially in regard to champerty; and in California, Delaware, Michigan, Nebraska and New Jersey, champerty and maintenance are not judicially recognized. 5 Am. & Eng. Ency. (2d ed.), 823, 824. In New York also. they receive practically no recognition. Browne v. West, 9 N. Y. App. Div. 135.

CORPORATIONS.

I. In General.

a. Nature.

1. *Define a corporation and distinguish an ordinary business corporation from other kinds.*

Chief Justice Marshall's definition in the Dartmouth College case is, in part, "an artificial being, invisible, intangible and existing only in contemplation of law." This and similar expressions are frequently employed in describing a corporation; but it should be kept in mind that *in fact* a corporation is not a being separable from its members. It is really a collection of individuals, authorized by law to act in certain respects as one person. 1 Morawetz on Corporations, § 1; 1 Kyd on Corporations, § 13; 1 Thompson on Corporations, §§ 1, 2.

Corporations are either public or private. The latter, as distinguished from the former, are based on the voluntary association of the members, while the former are governmental establishments with no contractual relation between those who compose them.

Again, corporations are aggregate, composed of several members, or sole, consisting of a single person.

Private corporations are subdivided into eleemosynary, ecclesiastical, and civil.

The ordinary business corporation, e. g., for transportation, manufacturing or newspaper purposes, is a private, civil corporation, and it is with such that this section chiefly deals. See 1 Morawetz on Corporations, §§ 2-5, and authorities cited.

As part of its essential characteristic of *collective action*, a corporation has a distinct name, the capacity to sue and be sued, and generally a common seal. As a rule, there is perpetual succession among its members, by transfer of the shares of its capital stock or otherwise, but this is not a necessary incident; and the exemption from individual liability for debts, while generally prevalent, is by no means indispensable to corporate existence. Liverpool, etc. v. Massachusetts, 77 U. S. 566; Warner v. Beers, 22 Wend. 103, per Senator Verplanck.

2. *Distinguish between a private corporation and a partnership?*

Morawetz points out the differences as follows:

1. While both are formed by the mutual agreement of those who compose them, the partnership relation may be established by

any persons, at any time, and is dependent only on the law of contract and agency, but a corporation cannot lawfully be formed without the authority of the legislature. It has been regarded as against public policy for individuals to act as a corporation, and the privilege can only be enjoyed by special permission from the legislative body.

2. At law, the members of a firm are always treated as individuals; the firm, as such, is not recognized. A corporation, on the other hand, is considered as one person, and its constituent parts are disregarded. It can be sued by one of its own members.

3. Each partner is liable for partnership debts to the full extent of his possessions, but the members of a corporation are ordinarily not liable to its creditors at all.

4. Partnership is a relation of special confidence and personal trust, and the act or contract of each partner is the act or contract of all. In a corporation the business is managed by agents, selected by a majority vote, and the personal element is very small. Any stockholder can transfer his shares and his rights to anyone he may choose. 1 Morawetz on Corporations, § 7.

3. *A. and B. own all the stock of the X. corporation, and they, in their own names, execute a deed of real estate belonging to it. Does the title pass?*

No. The title cannot be at the same time in the corporation and in the individual members. As a practical matter, moreover, to recognize such a deed as valid, would render titles to land highly uncertain. Wheelock v. Moulton, 15 Vt. 519; Button v. Hoffman, 61 Wis. 20.

4. *Is a corporation a "citizen" of the State under the laws of which it was organized so that it has the protection of the clause of the Constitution declaring that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States?*

It is not. The term only applies to natural persons, owing allegiance to their respective States. It does not include artificial persons, who have only certain restricted powers and attributes. Moreover, the right to act as a corporation is a special privilege conferred, and can have no operation outside the jurisdiction of the legislative body which grants it. Each State can entirely exclude foreign corporations or admit them on such terms as it sees fit. Paul v. Virginia, 8 Wall. 168; Christian Union v. Yount, 101 U. S. 352.

b. Creation.

5. *How are corporations created?*

Almost all the States have a general law, under which individuals, by complying with the formalities prescribed, may organize

a corporation, thus practically doing away with the common-law prohibition. In some States, however, it is still necessary to secure a special charter in each case, while in others special charters are absolutely prohibited by their Constitutions.

The charter or act of the legislature does not of itself create the corporation. It is a grant of a right to form a corporate body, and cannot take effect without the consent and acceptance of the corporators. This is generally easy to find in action taken by them under the terms of the charter, and may be inferred from an application for incorporation. 1 Morawetz on Corporations, §§ 21-24; State v. Dawson, 16 Ind. 40.

6. *Suppose several men meet and attempt, in good faith, to organize a corporation in accordance with a general incorporation law, but do not strictly comply with its terms; e. g., they file a certificate which fails to state the performance of certain acts required by the statute. They then proceed to act as a corporation. In a suit against a subscriber for the amount of his subscription can he show, as a defense, the defects in the plaintiff's organization?*

No. This organization is what is known as a *de facto* corporation, and it is well settled that no one except the State can question its corporate existence. To constitute such a corporation, two things must be shown: (1) a charter, or a general incorporation law; (2) a user of the rights claimed to be conferred by it. If a *bona fide* attempt to organize according to the statutory provisions can be shown, very slight evidence of user will be sufficient to prove existence as a *de facto* corporation. Meth. Church v. Pickett, 19 N. Y. 482; R. R. Co. v. Cary, 26 id. 75.

If, however, the company not only violates the common-law prohibition against acting as a corporation without authority of law, but is also illegal because its dealings are in violation of some principle of morality or of public policy, the contract of the subscriber would be unenforceable on the latter ground. 2 Morawetz on Corporations, § 758, and cases.

So, again, where a subscriber signs articles agreeing to the organization of a company, "as therein stated," it must be so organized or he is not bound. Ind. Co. v. Herkimer, 46 Ind. 142.

7. *A. borrows money of a de facto corporation and gives his note. When sued on the note, he attempts to set up as a defense the lack of legal incorporation, but the court refuses to allow it. What is the ground of the decision?*

It is frequently said that the recognition of *de facto* corporations as legal rests on an estoppel (Slocum v. Providence, etc.,

10 R. I. 112); but while this is plausible when brought forward in a suit *against* the company, the reason is not broad enough to cover all the cases. In the case suggested, it would be absurd to say that A. has misled the company as to its own organization. In reality there is no estoppel about it.

The true ground of this recognition of a *de facto* corporation, which practically puts it on the same footing as a perfectly organized *de jure* corporation, is public policy. The corporation actually exists, though without authority of law. It would be a harsh and in many cases an absolutely unnecessary requirement to compel all corporations to be ready, at any length of time after their start, to prove their organization. Moreover, it is only by a rule of public policy that the corporation is not legal, and, on the same broad ground, it is plain that the ends of justice will be best served by treating as facts what all the parties have relied upon as such in their mutual dealings. 2 Morawetz on Corporations, §§ 692, 750; Soc. Perun v. Cleveland, 43 Ohio St. 481 (with a full discussion of the subject); Swartwout v. R. R. Co., 24 Mich. 390.

8. *If a de facto corporation refuses to perform its contract obligations can the creditor ignore the corporation and sue the members as partners?*

By the weight of authority, this cannot be done. Neither side intended a contract on those terms. The members did not so contract between themselves, and the third party did not contemplate such an advantage. The court has no right to create a new contract for them. 2 Morawetz on Corporations, § 748; Snider Sons' Co. v. Troy, 91 Ala. 224; s. c., 24 Am. St. Rep. 887 (naming the States on each side of the question); Stout v. Zulick, 48 N. J. Law, 599.

There is, however, some opposing authority. See Cook on Stock and Stockholders, § 233; Bigelow v. Gregory, 73 Ill. 197.

The members may, of course, so act as to make themselves liable in tort; and if they are in fact partners, a different case is presented. 2 Morawetz on Corporations, § 749; National, etc. v. Landon, 45 N. Y. 410.

c. Construction of Charters.

9. *What general rule of construction is applied to ascertain the limit of the powers granted a corporation by its charter?*

The charter expresses the contract of the corporators between themselves, and also acts as the grant from the State to them of the right to act as a corporation, and it generally states only the main objects of the undertaking. The American rule is that corporations have the powers that are expressly set forth, and such others as are incidental or necessary to carry into effect the purposes for which they were established. The construction of the

charter, is to be neither strict nor liberal, but simply according to the fair natural import of the language used. 1 Morawetz on Corporations, §§ 316, 318, 320; Downing v. Mt. Washington Road Co., 40 N. H. 230.

The English rule is that a corporation has all powers except those which are prohibited, but inasmuch as whatever is not expressly or impliedly granted is impliedly prohibited, the result is the same. 1 Morawetz on Corporations, § 317, and note.

10. *The State grants a charter to the X. corporation to build a toll-bridge across the Charles river, and the bridge is accordingly constructed. Later it grants a charter to the Y. corporation to build a toll-bridge a few rods from the location of the existing one. Can the X. corporation prevent the building of the new bridge?*

It cannot. A charter which grants privileges that concern the public or that are in derogation of common right, such as the one held by the X. corporation, or a grant of exemption from taxation, is to be strictly construed against the corporation. "Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. * * * This doctrine is vital to the public welfare." Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666; Charles River Bridge v. Warren Bridge, 11 Pet. 420.

But if an exclusive right is expressly granted, it is, in general, valid, as, for instance, a right to operate a toll-bridge, with a provision in the charter, declaring that no other bridge shall be built for a distance of two miles in either direction. The Binghamton Bridge, 3 Wall. 71.

d. General Powers.

11. *How can you tell whether a corporation has authority to issue negotiable paper?*

It can lawfully do so, when necessary for the purposes for which it was organized, i. e., when such a proceeding would be, in the ordinary course of business, an appropriate and usual one if the corporation were an individual. The liability of the corporation depends on principles of agency, and if the giving of a note would under ordinary circumstances be an appropriate means of carrying out the chartered purposes of the corporation, the payee can enforce it, even if in the particular case the transaction was for an unauthorized object. The payee, however, according to fundamental rules of agency, cannot recover, if he has notice that the act is unauthorized. 1 Morawetz on Corporations, §§ 350, 351; Union Bank v. Jacobs, 6 Humph. (Tenn.) 515; Moss v. Averell, 10 N. Y. 449, 457, 460; National Park Bank v. German, etc., Co., 116 id. 281. And see Ques. 25, *infra*.

12. *A railroad company attempted to mortgage its property, including franchise, roadbed and all other property, to secure certain bonds issued to pay for construction. It had no express authority to do so. Is the mortgage valid?*

No. It is well settled, that a corporation cannot legally mortgage, lease or sell its franchise, or any of its property which is *essential to continue operations under the franchise*, without legislative permission, stated expressly or by strong implication. One reason for this is that the legislature is the only body which can grant to individuals the privilege of acting as a corporation; a corporation, therefore, cannot be allowed to transfer its *franchise* to A., B. and C., for it would then be the members of the corporation who would confer corporate rights and privileges.

The *property* of ordinary trading corporations can generally be sold, because it is not as a rule essential to their continued existence and activity; a new location can be secured. Leggett v. N. J., etc., Co., 1 N. J. Eq. 541; s. c., 23 Am. Dec. 728, and note. But the property of a railroad, or a gas or water company, is essential to the performance of its public duties. "The discharge of those duties is the leading object of their creation." Other reasons given for the rule are, the tendency to a monopoly by a union of corporations, the personal trust put in the original corporators by the legislature, and the rule of strict construction of charters concerning the public interest.

Leases, mortgages and absolute transfers are all invalid for the same reason for they differ only in the degree by which they hamper or prevent the due performance of the public functions undertaken. Commonwealth v. Smith, 10 Allen, 448; Brunswick, etc., Co. v. United, etc., Co., 85 Me. 532, and especially the note to this case, 35 Am. St. Rep. 390, 397, 402, 405.

13. *Can a corporation buy its own stock?*

It has been held that there is no objection to such a "purchase," that no one is injured provided the corporation is solvent, and that the corporation can hold it for sale like other marketable property. City Bank v. Bruce, 17 N. Y. 507; Iowa Lumber Co. v. Foster, 49 Iowa, 25; R. R. Co. v. Marseilles, 84 Ill. 145, and 643.

But these decisions have been strongly opposed. The sale is virtually a withdrawal of the stockholder and a certain amount of capital stock from the enterprise. It deceives the public, who are dealing with the corporation, as to the real amount of money invested, and it injures the remaining stockholders by weakening the treasury and hampering the operations of the concern. See 1 Morawetz on Corporations, §§ 112-114; Coppin v. Greenless Co., 38 Ohio St. 275; Percy v. Millaudon, 3 La. (O. S.) 570; Crandall v. Lincoln, 52 Conn. 73.

e. Dissolution.

14. *Are corporate rights lost by nonuser?*

A mere nonuser or misuser of corporate rights does not of itself work a forfeiture of those rights, or of the franchise, unless they are expressly made conditional upon their due exercise. The violation of duty may be a good reason for forfeiture and dissolution, at the suit of the State, but it cannot be taken advantage of, either collaterally or directly, by an individual, for the only parties to the compact created by the act of incorporation are the corporation and the government. However great the breach may be, therefore, an individual cannot step in; for the State may waive it. Heard v. Talbot, 7 Gray, 113; Commonwealth v. Ins. Co., 5 Mass. 230; State v. Turnpike, 15 N. H. 162.

It has even been held, that provisions in charters that in a certain event, "the corporate powers shall cease," or, the charter "shall be void," mean only that they shall then be subject to forfeiture at the suit of the State. Briggs v. Cape Cod, etc., Co., 137 Mass. 71; Sewall Falls Bridge Co. v. Fisk, 23 N. H. 171. But see 2 Morawetz on Corporations, § 1006.

15. *In what way does the existence of a corporation come to an end?*

1. By direct action by the legislature, if no constitutional privilege be violated.
2. By expiration of the charter, as where there is a set time limited for the duration of the corporation.
3. By agreement to dissolve and a surrender, with the State's consent.
4. By judgment of dissolution pronounced in a judicial proceeding.

On the whole subject, see Boston, etc. v. Langdon, 24 Pick. 49; 2 Morawetz on Corporations, §§ 1004-1008.

Death of all the members does not dissolve a corporation, except in a case where new members must be elected by vote of the old ones. 2 Morawetz on Corporations, § 1009.

The proceeding by the attorney-general, on behalf of the State, is generally by a writ in the nature of *quo warranto*. A bill in equity is not a proper proceeding; for a court of equity has no right to act when the remedy at law is adequate. There are two cases, however, where such a bill can be used, viz., to prevent or stop a public nuisance, and to enforce a charitable trust. Hardon v. Newton, 14 Blatchf. 376; Attorney-General v. Ice Co., 104 Mass. 239; Attorney-General v. Aqueduct Corporation, 133 Mass. 361; and see a long note, 8 Am. St. Rep. 179.

f. Torts and Crimes.

16. *How can a corporation be liable for a tort?*

The argument was made in behalf of corporations that they could not be held for torts. It was said that if the act was within the authority of the corporation by charter, it could not be unlawful; and if it was outside that authority, the corporation could not be held because a corporation only has the rights and powers bestowed by the legislature upon it.

But this reasoning is fallacious in not considering the plain facts, and it has been everywhere repudiated. If a corporation is chartered to build a railroad, and does so by its agents, there is no reason why it should not be made liable by acts of those agents exactly as an individual is. The law is that whenever a corporation acts by an agent, it can be bound in any way that an agent can bind a principal. Chestnut Hill, etc. v. Rutter, 4 S. & R. (Penn.) 6, (trespass on the case); R. R. Co. v. Quigley, 21 How. 202 (libel); Green v. Omnibus Co., 7 C. B. (N. S.) 290 (vexatious interference with business).

17. *If a railroad corporation enters upon the publication of a newspaper can it be held for a tort committed by one of its employees in that enterprise?*

Here again, the question is one of agency. Such a business is beyond the chartered authority of the railroad company. The majority of the stockholders cannot drag the others into it against their will, and hence they have no authority to appoint agents to conduct it. If, however, there has been a ratification of the undertaking by *all* the members of the corporation, the corporation is then bound as principal in the ordinary way. Central, etc., Co. v. Smith, 76 Ala. 572; s. c., 52 Am. Rep. 353, and note citing, at length, 47 N. J. Law, 137, and 40 N. Y. 168.

18. *For what can a corporation be criminally charged?*

It can be indicted for any crime for which a criminal intention is not requisite.* Such crimes can be committed by agents. Hence, corporations are indictable for a public nuisance, whether the act be "misfeasance" or "nonfeasance" (Commonwealth v. Bridge Co., 2 Gray, 339; State v. Morris, etc., R. R. Co., 23 N. J. Law, 360); for omitting a statutory duty (Commonwealth v. Central Bridge Co., 12 Cush. 242), or "for doing any act, which is made indictable without regard to the intention of the offender." 2 Morawetz on Corporations, § 733, and cases *supra*.

*Morawetz, § 732, says that if all the corporators unite in a criminal intent it remains only the several intent of the several members, and is not *one* intent of the company. But if all the corporators, when gathered in a corporate meeting and meaning to act in a corporate capacity can produce by united, concurrent effort an intent which binds the corporation and not the individuals, such as an intention to accept a contract, why can they not by a similar effort create a corporate intent of an evil character, such as to rob or murder?

II. LEGISLATIVE CONTROL.

a. Charter as a Contract Between the State and the Corporation.

19. *What did the case of Dartmouth College v. Woodward decide?*

It held that the charter of incorporation of the college was a contract within the meaning of the clause in the Federal Constitution, prohibiting any State from passing a law impairing the obligation of contracts. The court assumed this conclusion as obvious, so they did not give a full statement of their reasons for so deciding, but it was held, that the compact was between the donors and the Crown, and that the college represents the former, is the assignee of their rights, and can complain of a breach of the contract; that the Crown received full compensation for granting the charter in the gifts for public education, which were conditional on its being granted, and that "there can be no reason for implying in a charter given for a valuable consideration, a power [of future control], which is not only not expressed, but is in direct contradiction to its express stipulations."

The impairment of the contract (which the court also found to be beyond argument) consisted in raising the number of trustees from twelve to twenty-one, the appointment of the additional members being given to the Executive of the State, and in creating a board of overseers, also appointed by the Executive, with power to control the most important acts of the trustees. Dartmouth College v. Woodward, 4 Wheat. 517* (1818), (reversing the State court).

One effect of the decision was that all the States have since inserted in their Constitutions a provision that all charters of corporations shall be subject to repeal, amendment or alteration.

20. *A legislature passes a law requiring all railroads to build cattle-guards at highway crossings, and to pay damages arising from any neglect to do so. The A. & B. Railroad Company was already in existence, and there was no power reserved by the legislature to amend, alter or repeal its charter. Does that company, therefore, escape the operation of the law in question?*

Clearly not. Even granting that the charter is an irrepealable, unalterable compact, it does not follow that corporations are thereby exempt from the police regulations that are imposed by law. They are on the same footing as other persons. For the sake of protecting the lives, health and morals of the public, the legislature can impose restraints, in numberless particulars, upon the conduct of their business, especially when it is of a dangerous char-

* The validity of the decision cannot be here considered. See articles discussing it in 8 Am. Law Rev., 189, and 6 Harv. Law Rev., 161, 218 (by the late Chief Justice Doe).

acter like a railroad. If the legislature can bargain away its police powers at all, it certainly cannot do so without express words. Thorpe v. R. R. Co., 27 Vt. 140; Beer Co. v. Mass., 97 U. S. 25.

b. Control by Legislature when Power is Reserved to Amend, Alter or Repeal the Charter.

21. *When the legislature repeals the charter of a corporation under a reserved power to do so, what property rights remain and to whom do they belong?*

It seems plain that the property not dependent on the charter, such as personal property, corporeal real estate, choses in action, or funds on hand, title to which has vested, belongs to creditors, and the surplus, if any, to the stockholders, whose money has been paid for it. The death of a corporation leaves these things in much the same situation as the death of a natural person leaves similar property. Mumma v. Potomac Co., 8 Pet. 281; Greenwood v. Freight Co., 105 U. S. 13; Bacon v. Robertson, 18 How. 480.

It seems equally clear that the members of the dissolved corporation have lost the rights "dependent solely on the grant of the charter, and which could not be exercised by unincorporated private persons, under the general laws of the State." An illustration of such a right is the privilege of street railroads or gas companies to occupy city streets. These rights are gone, because the charter was conditional. It was accepted with the definite possibility of a repeal in view. 2 Morawetz on Corporations, §§ 1093, 1094; Greenwood v. Freight Co., *supra.*

But if, under an authority to mortgage, the corporation has mortgaged its franchise, i. e., the right to operate a railroad or act otherwise as a corporation, in what condition does a repeal leave the mortgagees? Do these rights, frequently of immense value, disappear in this case also, leaving the mortgagees without their security? In People v. O'Brien, 111 N. Y. 1, and 2 Morawetz on Corporations, § 1102, it is strongly urged that these third parties obtain rights which are unaffected by the repeal. But it is difficult to see why the parties have not contracted in full view of the power to repeal, and with the knowledge that the power may at any time be exercised. See 9 Am. Law Rev. 65, 70.

22. *A corporation was organized and chartered to build a railroad five miles long through a level country from X. to Y. The legislature passed an act altering the charter so that the corporation was empowered to build twelve miles beyond Y. through an uneven, hilly country to Z. If the company prepares to build this extension can a dissenting stockholder get an injunction to stop it?*

Courts of high authority have differed widely on this question. On the one hand is the case of Durfee v. R. R. Co., 5 Allen, 230. This holds that an extension of a railroad and union with another company, when the alteration is made by the legislature, and accepted by the majority of the stockholders, cannot be objected to. The court say that unless this is so the reservation of a right to alter is nugatory, for even without it a change could be made, if the legislature and the *whole* body of corporators agreed to it; and also that the stockholders formed the company with the distinct understanding that the enterprise might be altered in this very way.

The plaintiff urged with much force that it was begging the question to say that they agreed to this material change, unless the court was prepared to say that an alteration could be made from a railroad to a soap factory or anything else of a wholly different character from the original purpose; but this conclusion the Massachusetts court declined to admit.

On the other hand we have the case of Zabriskie v. R. R. Co., 18 N. J. Eq. 178, where the facts were those suggested in the above question. The court said that neither the legislature, nor the majority, nor both together, could make a change of the kind proposed. Increase of power, even if it is of the same kind as that originally granted, is not an unmixed blessing, and may change the enterprise as much as an alteration to something of a different character. "Power to alter a mansion-house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind, wholly or chiefly new, substituted for another, is not an alteration; it is a change."

As instances of legitimate alterations, statutes relating to the right to take land by condemnation, the amount of fare to be taken, or width of bridges or track, are suggested. See also Meadow Dam Co. v. Gray, 30 Me. 547; Oldtown, etc., Co. v. Veazie, 39 id. 571; Kenosha R. R. Co. v. Marsh, 17 Wis. 13.

In accordance with Durfee v. R. R. Co., see Buffalo, etc. v. Dudley, 14 N. Y. 355, representing, probably, the weight of authority. Compare Commonwealth v. Essex Co., 13 Gray, 239.

III. VALIDITY OF UNAUTHORIZED CORPORATE ACTS (ULTRA VIRES).

23. *Define the term "ultra vires."*

It is used to express many different ideas. Sometimes it means an act which is beyond the chartered *authority* of the company to do under any circumstances; sometimes an act which is outside that authority when performed for a certain purpose; again, an act within the authority granted by the corporate charter, but performed by an agent without authority, and so on.

According to Morawetz, it has no proper use with reference to private corporations, unless used in the first sense mentioned (i. e., translating "*vires*" as *authority* rather than *power*), for his view is that any body of men have the *power* to act in a corporate capacity, whether chartered or not. If they have no charter, their acts are, to be sure, prohibited by the common law, but they are collective, corporate acts, nevertheless; such acts are facts; and acts done after an incorporation, but outside the express or implied authority of the charter, are facts of the same kind. He, therefore, regards the term as misleading, except as applied to municipal corporations. 2 Morawetz on Corporations, §§ 648-651, 700; Bissell v. Mich., etc., Co., 22 N. Y. 259.

Other authorities, using the term to describe acts outside the chartered authority, but in its literal sense of "outside the powers" of the corporation, regard that meaning as satisfactory and truthful. They say a corporation is a creation of the law, endowed with only a certain number of attributes and powers. The theory is that since it has only those qualities which are conferred upon it, it *cannot* act outside the line so drawn. Angell & Ames on Corporations, § 256; Green's Brice's Ultra Vires, pp. 33-35.

24. *Suppose a common case; where the act is one plainly outside the charter authority of the corporation, and can be recognized as such by the third party by a comparison of the terms of the contract with the charter (of which all are obliged to take notice). In pursuance of a unanimous vote of the stockholders, a railroad company by its president contracts with one X. to buy a thousand grand pianos, and the goods are delivered by X. and accepted. On the refusal of the company to pay for them, what remedy has X.?*

In a number of jurisdictions, he can sue on the contract and recover the contract price, the argument being as follows:

Two principles are involved, one of agency, and one of public policy. The whole body of stockholders, acting in their corporate capacity, have made the president of the company their agent for a particular purpose,* and when he contracts for them in accordance with his actual or apparent authority, the corporation is bound, exactly as any principal is bound by the acts of his agent. (Ratification also by the entire corporate body of an unauthorized contract made on its behalf would have the same effect as ratification by an individual). The contract thus existing as a matter of fact, the next question is; How shall it be treated? Such a contract is prohibited by the common law, because made by the corporation without legislative authority. But "the effect of the prohibition upon the contract, therefore, depends wholly upon the requirements of the public policy, pursuant to which the policy was

*For the effect of dissent by a minority, see Ques. 28-30, *infra*.

established." 2 Morawetz on Corporations, § 689. When, therefore, as in the case suggested, such a contract has been performed by either one of the parties, and there is no *express* prohibition against it, or such an intrinsic illegality in its subject-matter or object as would render a similar contract between individuals unenforceable (see 2 Morawetz on Corporations, §§ 654-660), the policy of the law is best served by compelling the other party to make compensation for the failure to perform on his part. 2 Morawetz on Corporations, §§ 618, 619, 628, 632, 641, 642, 648-653, 689-699; Whitney Arms Co. v. Barlow, 63 N. Y. 62; State Board, etc. v. R. R. Co., 47 Ind. 407.

It is no argument against this view to say that the common-law prohibition is of no avail if such contracts are to be recognized, because the rule only applies when one party has performed. So long as the contract remains executory, either side may withdraw without liability. 2 Morawetz on Corporations, § 685; Bradley v. Ballard, 55 Ill. 417.

On the other hand, there is a strong array of cases in which a different conclusion is reached. These cases hold that outside the authority granted by their charter, a body of stockholders *cannot* act in a corporate capacity. That is, they have the bundle of powers contained in the charter, and no more. Any attempt to contract or act outside of that limited field is illegal and void, and no performance of any part of an agreement of that kind can make it enforceable. Davis v. Old Colony R. R. Co., 131 Mass. 258; Central Trans. Co. v. Pullman Co., 139 U. S. 24, 60, 61; Ashbury Co. v. Riche, L. R. 7 H. L. 653.

Even by these authorities, however, the contract is not treated like contracts which are illegal in the usual sense. If money or property has been voluntarily received, an action for its reasonable value may be maintained, either by or against the corporation, for this is considered to be in disaffirmance of the contract, and independent of it. White v. Bank, 22 Pick. 181; Davis v. R. R. Co., *supra;* Northwestern, etc. v. Shaw, 37 Wis. 655.

Courts holding these opposing views are, nevertheless, agreed that where a corporation, though without charter authority, makes a completed purchase, under which property is transferred to it and paid for, the grantor cannot afterwards repudiate the transaction, and demand his property back; nor can the lack of authority be urged against the corporation on a subsequent sale to a third person, as a ground of a refusal by the latter to pay for the property. In these cases it lies with the State alone to call the corporation to account. Leazure v. Hillegas, 7 S. & R. 313; Hough v. Land Co., 73 Ill. 23; Rutland, etc., Co. v. Proctor, 29 Vt. 93.

25. *Suppose the purchasing agent of a railroad company contracts with X. for a certain amount of steel rails. They are*

not intended to be used for purposes of construction, but are bought for speculation. The company refuses to accept them when delivery is tendered by X. Is it justified in so doing?

It is not. This is as complete and binding a contract as ever was made and the decisions are believed to be uniform on the point, irrespective of the divergent views concerning contracts outside the charter authority, pointed out in the foregoing question. Such a case is not to be regarded as of that class. For by its charter the company has authority to buy steel rails for a certain purpose, and X. could not tell from the face of the transaction that the object was an unauthorized one. If, indeed, by an examination of the charter, he would have known that the proposed dealings were beyond the corporate authority, as, for example, in the case suggested in Question 24, or if he had had actual notice of the facts, no enforceable contract would have been formed. Subject, however, to this qualification, the corporation is bound in such cases to the terms of the contract as the agent makes it, and specific performance may be secured, where the nature of the contract is such that that remedy would be available as between individuals. Eastern, etc., Ry. v. Hawkes, 5 H. L. Cas. 331, 349; Monument, etc. v. Globe Works, 101 Mass. 57. Cf. Bissell v. Michigan, etc., R. R. Co., 22 N. Y. 259, and Ques. 11, *supra*.

It should be added that on principles of agency the liability exists without regard to the consent of the shareholders. For after they have embarked upon the enterprise and appointed agents to act in carrying it on, they are made liable by the latter, if within their apparent authority, just as an individual is sometimes bound by acts of his agent contrary to his express orders. 2 Morawetz on Corporations, §§ 577-581, 585-589.

26. *A. bequeathed a sum of money to Cornell University, which was authorized to hold only a certain amount of property. To take the sum bequeathed would carry the funds of the institution beyond the limit, but the surrogate ordered it paid over by the executor. On appeal by the heirs-at-law, what is the proper decision?*

By the weight of authority, the appeal should be sustained. It is held that, although a completed transfer to the University by A. in his lifetime would not have been assailable either by A. while living or his heirs after his death, nevertheless, when affirmative action by the court is necessary to compel a transfer of the title, it will not be taken. The title was not legally bequeathed, and the court will not order a transfer of the property when the corporation, by receiving it, will instantly render its charter liable to forfeiture. See the elaborate discussion by Peckham, J., in *Re* McGraw, 111 N. Y. 66; Wood v. Hammond, 16 R. I. 98, 116.

IV. RIGHTS OF SHAREHOLDERS

a. Power of the Majority.

27. *At a regular stockholders' meeting of the X. corporation, a motion is passed committing the company to a change of its business policy, which seems imprudent and dangerous to the minority. Assuming that nothing outside the chartered authority is implied in the new measures, what can the dissenters do to prevent them?*

They have no means of prevention, except by persuasion of their associates. When a corporation is formed, every stockholder agrees that the will of the majority, when exercised in good faith and for purposes within the scope of the undertaking, shall prevail. Even if as a matter of fact the decision is clearly unwise and inexpedient, there is no help for it. 1 Morawetz on Corporations, §§ 243, 244; Dudley v. Kentucky High School 9 Bush (Ky.), 576; Elkins v. R. R. Co., 36 N. J. Eq. 241.

When, however, the majority propose to go outside the original objects of the company, and undertake projects not included in the charter or articles of association, any stockholder may interfere by injunction, however promising the schemes may be. The charter is the statement of his contract, and he remains free to decide whether he will divert the funds so invested to different channels. Changes in the *method* of operation are permissible, but the majority cannot undertake to "advance objects essentially different or to advance the same objects in methods essentially different from those originally contemplated." Union Locks v. Towne, 1 N. H. 44; s. c., 8 Am. Dec. 32 (the case should be read in full); Hartford, etc. v. Croswell, 5 Hill, 383.

b. Right of Shareholder to Sue on Behalf of the Corporation.

28. *A shareholder brought a bill in equity against the directors of the corporation, alleging that they had sold their own land to the corporation at a price far in excess of its value, and asking relief. The directors demurred. What decision?*

It is well settled that when an actionable wrong has been committed against a corporation *by its own agents*, or when those agents exceed their discretionary powers in refusing to bring suit to protect the corporate interests, a court of equity will take cognizance of the matter, in order to protect the rights of a single stockholder, who is allowed to enforce the right of action belonging to the corporation. 1 Morawetz on Corporations, §§ 245, 248; Hawes v. Oakland, 104 U. S. 450; Brewer v. Proprietors, 104 Mass. 378.

There are, however, two important exceptions to the rule. (1) The stockholder cannot bring his bill if the act complained of is such that the corporation by a majority vote can legally adopt

and confirm it. The case put in the question is one of this character. Such a sale, since the directors are in a fiduciary position, is voidable at the option of the corporation, but it is voidable *only*, and a court will not take action to set it aside at the instance of a shareholder, when a corporate meeting may be at the same moment exercising its right to ratify it. Foss v. Harbottle, 2 Hare, 461.

(2) It must also appear, unless delay would very greatly prejudice his interests, that the complainant has made an earnest endeavor to induce the corporation to remove the delinquent officers, and appoint others who will take action to protect the corporate interests. This restriction is one of practical convenience and common sense. It is not desirable that any and every stockholder should have free rein in bringing such suits. Several individuals might bring suits to redress the same wrong; and moreover, the only valid ground for asking the court to take jurisdiction is that the suitor has exhausted all the established means for protecting his interests, and found them inadequate. The exception is thoroughly established. Smith v. Hurd, 12 Met. 371 (decided before equity jurisdiction existed in Massachusetts); Hawes v. Oakland, *supra;* Dunphy v. Traveller Assn., 146 Mass. 495; Tuscaloosa v. Cox, 68 Ala. 71. On the whole subject, see 1 Morawetz on Corporations, §§ 237-253.

29. *Suppose the directors who have defrauded the corporation own a majority of the stock, or are in collusion with those who do. What effect does this additional fact have?*

In that case (as well as in the case where the majority have no authority or right to bind the corporation by ratification, 1 Morawetz on Corporations, § 249), the fact should be set out in the complaint to excuse the protesting stockholder from making an effort to have the corporation act. The reason for requiring him to delay until he has tried the usual means of redress fails when it would be useless for him to do so. If, therefore, the majority are themselves the wrongdoers, or are controlled by them, or if they have prevented suit being brought for the corporation, or in any way have acted so that the corporate meeting would not furnish a fair hearing, it need not be called. Atwool v. Merryweather, L. R. 5 Eq. 464, n.; Brewer v. Proprietors, 104 Mass. 394; Hawes v. Oakland, 104 U. S. 450.

One further point should be added. If the stockholder is seeking, not to gain affirmative relief from transactions already accomplished, but to prevent agents from entering upon unauthorized dealings, he can secure at least a temporary injunction, even if the acts are capable of ratification by the majority. For example, where a corporation had power by majority vote to increase its stock, and the directors at-

tempted to issue the increase on their own responsibility, they were enjoined at the suit of a stockholder. Railway Co. v. Allerton, 18 Wall. 283. See 1 Morawetz on Corporations, §§ 250, 254.

c. Transfer and its Effect; and Other Rights.

30. *The directors of a certain corporation did certain acts on behalf of the company, which were actionable by the corporation. Knowledge of this came to some of the stockholders, but not to all. Those who knew acquiesced in the situation, and later one of them sold his stock to a third party. Can the latter bring suit (assuming, of course, that the corporation refuses to do so)?*

This depends upon whether or not he knew at the time of his purchase that his transferor had acquiesced in the wrong done.

If his transferor, while still a stockholder, had tried to bring such a suit in the name of the corporation, he would have been thrown out of court. For although the right of action is that of the corporation, and not of the stockholder who sues, it is not permissible for one who has ratified and condoned (or perhaps participated in) the wrong, to assume to enforce the corporate rights and pursue the wrongdoers. Kent v. Quicksilver Mining Co., 78 N. Y. 159.

The right of action, however, unless it is extinguished by unanimous ratification or acquiescence by all the stockholders, remains one of the assets of the company, and when stock is sold it carries with it the right to share in the profits from that asset as well as from others. The disqualification from bringing suit (of one who has acquiesced) is personal to him, and the buyer, therefore, if he has no knowledge of this acquiescence of his predecessor in title, can assert the right of action on behalf of the corporation in the usual way. It is, in this respect, somewhat analogous to the transfer of negotiable paper. See 1 Morawetz on Corporations, §§ 261-268; Parsons v. Joseph, 92 Ala. 403. Cf. Parsons v. Hayes, 14 Abb. N. C. (N. Y.) 425 et seq.

31. *X., who was the owner of certain certificates of stock, and also of bonds of the Y. corporation, lost them, though not guilty of any lack of proper care. The certificates he had indorsed in blank and the bonds were payable to bearer. Z. bought them for full value from the finder, and was without notice of their past history. What interest did Z. acquire?*

He secured a perfect title to the bonds, but none at all to the stock certificates.

At common law, a bond payable to blank was void, because, being under seal, the blank could not be filled on the mere parol authority of the maker, and because, to allow such authority to be sufficient would have this very effect of making bonds negotiable. In

this country, however, by universal custom and repeated decision, the convenience and practical necessities of trade have prevailed to make State, municipal and other corporate bonds *negotiable instruments*, if by their terms they are payable in blank, or to bearer, or to A. or order. White v. R. R. Co., 21 How. 575; Seybel v. Bank, 54 N. Y. 288.

Certificates of stock are of a wholly different character. When they are transferred, the transaction is something between an ordinary assignment and the transfer of a bill or note. It is not an assignment, for the buyer does not afterwards act in the name and place of the seller; he is substituted for him in the corporate body. On the other hand, it is unlike the transfer of a bill or note, because the certificate is not in itself the property which is sold. It is a "muniment of title," an evidence of the right to participate in the operations of the corporation. Hence, the doctrine of *bona fide* purchaser does not attach. The registration laws, which are generally provided in varying terms by the charter of the corporation or otherwise, tend to the same result. East Birmingham, etc. v. Dennis, 85 Ala. 565; Barstow v. Savage Mining Co., 64 Cal. 388; s. c., 49 Am. Rep. 705. Compare also Fisher v. Essex Bank, 5 Gray, 373, per Shaw, Ch. J.

Where, however, a certificate of stock indorsed in blank is intrusted to a broker for a special purpose, and he sells it in excess of his authority, or where in any way the owner clothes another with apparent power to dispose of the stock and a third party buys in innocent reliance upon the *indicia* of ownership, thus conferred, the owner is upon ordinary principles estopped to set up his title. See the cases just cited; and also McNeil v. Bank, 46 N. Y. 325; 2 Ames on Bills and Notes, 784, and cases.

32. *What is the difference between a stockholder's right to profits before, and after, a dividend is declared?*

According to the ordinary course of business the power of determining when to declare a dividend out of the accumulated profits of the corporation rests with the directors. The interest of a shareholder in these profits is merely an undivided and remote interest in common with the other shareholders, and it is only when the directors abuse their discretion that he can bring a shareholder's bill to compel the declaration of a dividend. Some part of the earnings may well be set apart as a surplus fund, or to increase and develop the business, and the facts of each case must determine whether the directors are wrongfully refusing to divide the profits or not. They have a wide discretion. Pratt v. Pratt, 33 Conn. 456; Scott v. Eagle Fire Ins. Co., 7 Paige, 203.

On the other hand, "after a dividend is declared, all community of interest in relation to such dividend, as between the

stockholders themselves and between the stockholders and the corporation, is at an end. The right of a party to whom the dividend is payable is recognized as a separate and independent right which may be enforced as against the corporation * * * . The true principle is, that the dividend, from the time that it is declared, becomes a debt due from the corporation to the individual stockholder, for the recovery of which, after demand of payment, an action at law may be maintained." King v. Paterson, etc., Co., 29 N. J. Law, 82 and 504.

It is a severance of so much money from the general mass of the company's funds, and if the company becomes insolvent *after* the declaration, the money so appropriated cannot be used for payment of creditors. It is the property of the individual stockholders. Le Roy v. Ins. Co., 2 Edw. Ch. 657.

33. *Suppose a stockholder owns land which will be increased in value by certain contemplated operations of the corporation. Can his vote in favor of such operations be questioned?*

A stockholder is very seldom disqualified from voting by his interest or his motive. In general, such considerations cannot be regarded; on practical grounds, it would be impossible to inquire into them, and the right of each stockholder to the benefit of the personal judgment of the others is rather vague and shadowy, though an express provision by charter or by-law is still necessary to validate voting by proxy. 1 Morawetz on Corporations, § 486. Agreements among stockholders to vote for certain measures or in a certain way, even for a period of some years in the future, are not necessarily illegal (Mobile, etc., Co. v. Nicholas, 98 Ala. 92), but they are not favored (Shepaug Voting Trust, 60 Conn. 553; State v. Standard Oil Co., 49 Ohio St. 137; s. c., 49 Am. St. Rep. 541); and it is a rule that if the majority use their votes to control the corporate action unfairly, or for their personal ends, any of the minority can interfere. 1 Morawetz on Corporations, §§ 477, 529; Barr v. R. R. Co., 96 N. Y. 444. And see Ques. 28-30, *supra*.

V. RIGHTS OF CREDITORS.

a. Rights With Respect to the Capital.

34. *When, if ever, can a creditor interfere with the control of corporate affairs?*

The limits upon the rights of creditors to interfere with the management and disposition of the capital of a "going" corporation are not very plainly marked.

The capital is frequently said to be a "trust fund" for the creditors, but this must not be taken literally. A corporation is no more a trustee for its creditors than an individual is for his

"A corporation is a distinct entity; * * * in law it is as distinct a being as an individual is, and is entitled to hold property as absolutely as an individual can hold it. Its estate is the same; its interest is the same; its possession is the same." Graham v. R. R. Co., 102 U. S. 148. And see Catlin v. Eagle Bank, 6 Conn. 233.

If a corporation is making a fraudulent conveyance to avoid its creditors' claims, a creditor can interfere just as in the case of a similar act by an individual (Graham v. R. R. Co., *supra;* Pond v. R. R. Co., 130 Mass. 134); and possibly he may do so if there is a fundamental alteration of the enterprise whereby his security is impaired, as from a railroad company to a mining venture, for this would be like the dissolution of the corporation and the formation of a new one. 2 Morawetz on Corporations, §§ 807, 808.

But the company retains, and must be understood by every creditor to retain, the widest discretion in the management of its own affairs. Continual interference would be intolerable; and, therefore, the mere improvidence of a corporate act, if without fraud, furnishes no ground for a creditor to interpose (2 Morawetz on Corporations, §§ 782, 783; Mills v. Northern Ry. Co., L. R. 5 Ch. App. 621; Pond v. R. R. Co., *supra*); and this is true, even if the corporation is insolvent in the sense of being unable at the time to pay its debts; it can continue the management and control of its affairs unless the assets are being fraudulently diverted or are going to waste. 2 Morawetz on Corporations, §§ 786, 787; Paulding v. Chrome Co., 94 N. Y. 336; Catlin v. Eagle Bank, *supra.*

35. *If the capital of a corporation has been returned to the stockholders, either directly by a division or indirectly by the payment of dividends when there have been no profits, what redress has a creditor?*

In either of the cases suggested he may, upon a showing that he cannot recover his debt of the corporation itself, proceed against the stockholders for the funds so distributed.

The capital is the fund which is represented to creditors as constituting the property of the corporation; and it is upon this, therefore, that they rely in dealing with it. Frequently, it is spoken of as a trust fund, as in the leading case of Wood v. Dummer, 3 Mason, 308, where there was an actual division of the capital itself among the stockholders. More accurately, perhaps, the responsibility to the creditors is grounded in tort; the stockholders in effect represent that so much property has been put into the enterprise and *has not been taken out.* Williams v. Boice, 38 N. J. Eq. 364, and note (where stockholders were compelled to refund dividends the payment of which had impaired the capital). But compare McDonald v. Williams, 174 U. S. 397 (1898).

Whichever theory is correct, the principle itself is well established. Another case illustrating it is that where an indirect return of capital

has been made by a transfer of corporate funds or property to a stockholder by a purchase of his shares; he is liable to make restitution, though no fraud or bad faith appears. Clapp v. Peterson, 104 Ill. 26; Crandall v. Lincoln, 52 Conn. 73, citing many authorities. See on the whole subject, 2 Story, Eq. Jur., § 1252; Cook on Stock and Stockholders, § 456; Bartlett v. Drew, 57 N. Y. 587. Compare McDonald v. Williams, 174 U. S. 397, holding that a receiver cannot recover a dividend paid to a stockholder out of capital if the stockholder *bona fide* believes it to be paid out of profits and the corporation is solvent at the time.

b. Right to Compel Payment of Stock Subscriptions in Full.

36. *The X. corporation was organized with a nominal capital of* $100,000. *Part of the shares were taken by subscription and 75 per cent. of the par value paid therein. The rest were subsequently issued to the stockholders as "bonus" stock, i. e., a pure gratuity. Upon the insolvency of the corporation, it is attempted on behalf of the creditors to compel the stockholders to pay the balance of their subscriptions, and to pay the par value of their "bonus" stock. What decision?*

It is well settled that they must pay both of these items, even if by some device or other, such as a release or a change in the form of indebtedness, a way has been sought to cover the fact of non-payment. Courts are not unanimous, however, as to the reason of the rule. The commonest explanation is set forth in a leading case, to the effect that the capital stock is a *trust fund* for creditors. Sawyer v. Hoag, 17 Wall. 610. And see Cook on Stock and Stockholders, § 199, and cases. But this term is misleading and has been explained by the Supreme Court itself to mean only that the claims of creditors must be satisfied before any of the capital can be distributed to stockholders. Fogg v. Blair, 133 U. S. 534, 541.

Some decisions, again, say that there is an implied contract. Flinn v. Bagley, 7 Fed. Rep. 785. A third view, and the most satisfactory, from a logical standpoint, is that stated in Hospes v. Car Co., 48 Minn. 174. This court repudiate the theory of a "trust," and ground the liability in tort for fraud. They say: "Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests — one legal and one equitable; one person as trustee holding the legal title, while another as *cestui que trust* has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. * * * It (a corporation) is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further."

And, later, in exposition of the tort theory, "The capital of a corporation is the basis of its credit. * * * People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them. * * * It is the misrepresentation of fact in

stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied or who can fairly be presumed to have relied upon the professed amount of capital, in whose favor the law will recognize and enforce a liability against the holders of 'bonus' stock." See also Williams v. Boice, 38 N. J. Eq. 364.

Thus, this liability is enforceable only by creditors who became such after an issue of stock not fully paid for, and who did not know of the actual facts under which it was made. First National, etc. v. Co., 42 Minn. 327; s. c., 18 Am. St. Rep. 510. And these propositions are supported also by the "trust fund" advocates. Handley v. Stutz, 139 U. S. 435; Coit v. Gold, etc., Co., 119 id. 343; 2 Morawetz on Corporations, §§ 829, 830.

On the whole subject, see a voluminous note, 3 Am. St. Rep. 806.

The question whether a purchaser of stock issued as fully paid-up, and bought in the market without knowledge that any balance remained unpaid, can be compelled by a creditor to make up the deficiency, is more difficult. On the one hand, there is the right of the creditor to have all the capital, on which he has relied, paid in in money or an equivalent. On the other, there is the great desirability of making stock readily transmissible from hand to hand; and this is much hampered, if every buyer of stock represented as paid-up must investigate the actual facts in order to be protected.

The latter considerations have prevailed, and a *bona fide* purchaser of such shares is safe. 2 Morawetz on Corporations, § 836; Steacy v. R. R. Co., 5 Dill. 348; Brant v. Ehlen, 59 Md. 1.

37. *The X. corporation, in purchasing certain land needed for the purposes of the enterprise in which it was engaged, paid the seller for it in stock. The par value of the stock was greater than the actual value of the land by some* $10,000. *On the insolvency of the corporation the creditors claimed that the seller had not fully paid for his stock and must make up the* $10,000. *Decision for whom?*

The decision is for the defendant, provided the contract between him and the company was made in good faith, and the property put in at a fair *bona fide* valuation. Originally, stock had to be paid for in money, but the rule is now universal that a payment is good if made by work and labor, or by a transfer of property, if the circumstances just stated appear. In other words, actual fraud, of which a gross overvaluation would, of course, be strong evidence, must be shown in order to impeach the transaction. Coit v. Gold, etc., Co., 119 U. S. 343; Wetherbee v. Baker, 35 N. J. Eq. 501. The case of Van Cott v. Van Brunt, 82 N. Y. 535, seems *contra;* but see the criticism of the case, 2 Morawetz on Corporations, § 826.

c. Statutory Liability of Stockholders for Corporate Debts, in Excess of Subscription for Shares.

38. *A Kansas statute provided that shareholders in corporations should be personally liable for the corporate debts. The X. corporation was formed after the statute was passed and Y. became a stockholder by subscription outside of Kansas. To what kind of a liability is he subject?*

Every stockholder in a corporation becomes a party to the provisions of its charter and of the laws relating to such corporations which are in force in the State where it is created, no matter where he lives or where his subscription occurred. Such statutes as the one in question, being in force at the formation of the corporation, are part of the voluntary agreement of the members, and bind them to the corporation creditors in a *contractual* obligation. Thus, this obligation is under the protection of the Federal Constitution, forbidding the impairment of the obligation of contract. Hawthorne v. Calef, 2 Wall. 10.

Moreover, it is not a *penalty*, in the sense of a punishment provided as a police regulation for the protection of the State which passes the law and, therefore, unenforceable in other States. It is, on the contrary, remedial in its character, intended for the benefit of individuals dealing with the corporation, and enforceable in any court which has jurisdiction of the parties and of such a subject-matter. Flash v. Conn, 19 U. S. 371; Paine v. Stewart, 33 Conn. 517. A neat case, in illustration, is Wiles v. Suydam, 64 N. Y. 173: A statute provided for personal liability of shareholders and of directors until certain papers were filed, the directors being the agents charged with the executive duty of filing them. It was held that a person who was both a shareholder and a director could not be sued in the same action as shareholder and as director, being liable in contract in the former capacity and for a penalty in the latter. See also Derrickson v. Smith, 27 N. J. Law, 166; and compare Huntington v. Attrill, 146 U. S. 657; Diversey v. Smith, 103 Ill. 378; s. c., 42 Am. Rep. 14.

The cases are in some confusion, owing partly to differences in the legislative language and intent, and partly to different constructions of statutes seemingly identical in structure. See, on the whole subject, 2 Morawetz on Corporations, §§ 869-881, especially §§ 870 and 877.

39. *Suppose, under a statute of the kind spoken of in the preceding question, a debt is incurred. A. is then a stockholder, but before suit is brought he sells to B. Which one is liable to the creditor?*

Sometimes the statutes provide for this contingency, as for example, by making a stockholder liable for one year after the debt arises. When no provision is made, the better doctrine is that the

one who owns the stock when the obligation is enforced is the one to be sued. As between A. and B. themselves, and as between them and the corporation, it is always understood that B. steps into A.'s shoes as to all rights and liabilities, and, as a practical matter, this liability ought to be included with the rest. Otherwise, it would cause almost inextricable confusion and needlessly long and expensive litigation to adjust the rights of all parties. Moreover, in the case of large corporations, the personal credit of individual stockholders seldom enters into the calculations of the third party. 2 Morawetz on Corporations, §§ 888-891; Curtis v. Harlow, 12 Met. 3; Middletown Bank v. Magill, 5 Conn. 28, 63-71. *Contra*, Chesley v. Pierce, 32 N. H. 388. Cf. Allen v. Sewall, 2 Wend. 327; Rosevelt v. Brown, 11 N. Y. 148.

VI. MUNICIPAL CORPORATIONS.

a. In General.

40. *An act of the Michigan legislature created a Board of Park Commissioners for the city of Detroit, empowered them to purchase land for a large city park, and commanded the city authorities to provide the money to pay for it by taxation. They refused to do so. Can they be compelled to lay the tax?*

This brings up the important distinction between the public character of a municipal corporation, as a political subdivision of the State, and its private or proprietary character as a corporate individual.

In its former character, it is universally held that it is completely under the control of the legislature, except so far as that body is restrained by the State or the Federal Constitution. Being merely an instrumentality created for the more convenient administration of the government, its powers as well as its territory can be enlarged or diminished at any time; and its rights and property are held for the welfare of the State as a whole, rather than for local purposes. Powers and privileges which may be granted it, in this capacity, are not contracts, and are, therefore, subject to modification or repeal, as the legislature may deem expedient.

Thus, the legislature may divide a township and apportion its liabilities between the two sections (Laramie County v. Albany County, 92 U. S. 307); it may control the means provided by a municipal corporation for the maintenance and equipment of a police force (Baltimore v. Board of Police, 15 Md. 376); or repeal a ferry franchise granted to a municipality. East Hartford v. Hartford Bridge Co., 10 How. 511. See also 1 Dillon, Mun. Corp. (4th ed.), §§ 56, 57, 60-62, 65-68, 71.

On the other hand, it is also recognized that such corporations can hold certain property and have certain property rights in a proprietary or private character, for the benefit of the local com-

munity solely, and with many of the ordinary rights and liabilities of private ownership. The line of distinction is a delicate one to draw, and by no means settled by the decisions. 1 Dillon, *supra*, §§ 57, 66, 67. As illustrations, such property includes a building used largely as a source of revenue, by renting to private parties, Oliver v. Worcester, 102 Mass. 499; as well as city gas works, Western, etc. v. Phila., 31 Penn. St. 183; and see, for further illustration and discussion, 1 Dillon, *supra*, § 68, and notes.

The facts stated in the question are those of People v. Detroit, 28 Mich. 228; s. c., 15 Am. Rep. 202, where the court (per Cooley, J.) held that a city park was a matter of private and local concern only, and that the State had no right to tax the city for such a purpose. See the discussion of the case in 1 Dillon, Mun. Corp., §§ 72-74, and cf. Darlington v. Mayor, 31 N. Y. 164, 192-206.

41. *What powers are impliedly given by the charter of a municipal corporation? How does the rule governing the subject differ from that concerning charters of private or business corporations?*

Judge Dillon uses this language: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation — not simply convenient, but indispensable." 1 Dillon, Mun. Corp., § 89.

This strict rule exists because public corporations do not depend upon the mutual agreement of their members. The majority rules not only without the consent, but against the will, of the minority, and the only safety for individual property or liberty lies in the strict construction pointed out above. Spaulding v. Lowell, 23 Pick. 71; Hackettstown v. Schwackhamer, 37 N. J. Law, 191. "If there is a reasonable doubt as to its existence, it (the power) does not exist." Baldwin, J., in Crofut v. Danbury, 65 Conn. 294, 300.

With private corporations the rule is also that the only powers implied are those which are necessary or incident to those expressly granted, but a more liberal construction of the word "necessary" is adopted, except when the express power is in derogation of some public right. As a rule, the legislature is assumed to intend that a private corporation may carry on its affairs like an individual, and the charter is construed "neither strictly nor liberally, but according to the fair and natural import of it, with reference to the purposes and objects of the corporation." Bell, Ch. J., in Downing v. Mt. Washington Road Co., 40 N. H. 230. And see Ques. 9 and 10, *supra*.

b. Liability in Tort.

42. *A police officer, appointed and paid by city authorities, committed an assault and battery on a citizen, while attempting to arrest him. The officer was in the enforcement of a city ordinance, but acted in an unjustifiable manner. Is the city liable?*

No. The officer was employed to perform a public duty, one in which the city had no special interest or profit, and which it performed as a part of the governmental machinery of the State. The fact that the officer was appointed, employed and paid by the municipal authorities makes no difference; that system is only adopted for convenience in administering the functions of government. Buttrick v. Lowell, 1 Allen, 162. By the same principle a city is not liable for wrongful or negligent acts of firemen in the performance of their duties, (Jewett v. New Haven, 38 Conn. 368; Fisher v. Boston, 104 Mass. 87); or of the driver of an ambulance. Maximilian v. New York, 62 N. Y. 160. See 2 Dillon, Mun. Corp. §§ 974-979.

43. *A traveler was injured by a defect in a bridge caused by the neglect of the county to repair the structure. A general statute imposed the duty to repair bridges upon all counties, but gave no right of action to an individual injured by neglect. Can the county be held liable?*

Towns, counties, school districts and the like, being quasi-corporations (i. e., without charters, and thus *wholly* involuntary in organization), are at common law not liable in such a case, and no damages can be recovered except under a statute expressly giving such remedy. The doctrine was set out in Russell v. Men of Devon, 2 T. R. 667, as based on the fact that there was no corporate fund, or means of obtaining one, from which to satisfy a judgment. This decision was upheld in this country in Mower v. Leicester, 9 Mass. 247, and is generally followed in the other States, even where the town has power to levy taxes for erecting public works and keeping them in repair. The duty imposed is a *public* duty, and the local corporation derives no special benefit or pecuniary profit from it. 2 Dillon, Mun. Corp., §§ 962, 963, and notes; Hill v. Boston, 122 Mass. 344; Eastman v. Meredith, 36 N. H. 284; Frecholders, etc. v. Strader, 18 N. J. Law, 108; Dosdall v. County, 30 Minn. 96; s. c., 44 Am. Rep. 185.

44. *Would the answer be the same if the injury had been caused by a defect in a city street, the duty of keeping streets in repair being imposed by the charter, but no action for damages caused by defects being expressly given?*

By the weight of authority, the city is liable in such a case. Sometimes the ground for thus charging a city or incorporated

village, when a quasi-corporation (such as a county) would not be held liable under the same circumstances, is placed on the ground of the absolute control over their streets granted to such corporations; sometimes, on the ground that their charters are in fact always asked for (although theoretically *imposed* by the legislature), and that a contract to keep streets in repair arises, based on the special privileges granted to the community by the incorporation. Judge Dillon is inclined to place it upon the absolute control over the streets, plus the adequate means supplied (by power of taxation) to perform the obligation, plus the public utility of the doctrine. However that may be, the rule is upheld by the majority of our courts. Barnes v. Dist. of Col., 91 U. S. 540, 551; Weet v. Brockport, 16 N. Y. 161; 2 Dillon, Mun. Corp., §§ 999, 1017, 1022, 1023; and see the dissenting opinion by Cooley, J., in Detroit v. Blakeby, 21 Mich. 84.

Contra, are the New England States and a few others, the leading case being Hill v. Boston, 122 Mass. 344. See Burritt v. New Haven, 42 Conn. 174, 197 (and cf. Jones v. New Haven, 34 Conn. 1); Detroit v. Blakeby, *supra*. But in these States statutes generally give a right of action. See 2 Dillon, *supra*, 1000, note.

45. *A city altered a street so that a stream which naturally ran along one side was diverted to the other side, thereby securing better drainage for the highway. The work was carelessly done, so that X.'s cellar was flooded at every heavy rain. Can he recover damages from the city?*

The course of the decisions on this general subject is in such a state of confusion and contradiction that it would be presumptuous to attempt, in a book of this description, to speak of all the various rules, and modifications and exceptions thereto, which have been announced.

It is clear, nevertheless, that a city is not liable to individuals for a mere *failure* to make or enforce ordinances or to exercise a duty like that of providing sewerage or fire protection. Such a duty is legislative, or, perhaps, quasi-judicial, in character. Rivers v. Augusta, 65 Ga. 376; Lincoln v. Boston, 148 Mass. 578; 2 Dillon, Mun. Corp., § 949, and cases. And it is, perhaps, true (for the same reason) that it is not liable for damage caused by defects in the *plan adopted*, as distinguished from that arising from a careless *construction of the work*. Mills v. Brooklyn, 32 N. Y. 489; Henkel v. Detroit, 49 Mich. 249; Carr v. Northern Liberties, 35 Penn. St. 324; Child v. Boston, 4 Allen, 41. But see 2 Dillon, *supra*, §§ 1046-1047, and cases cited.

When, however, a scheme (e. g., of sewerage) has once been adopted, the satisfactory view, and the one most generally prevailing, is that the duty of the city becomes ministerial, and that the corporation is liable for damage caused by negligence in construction or in the maintenance and operation of the works. In short it is

then liable, whenever, under the same facts, a natural person would be liable to the individual injured; and such was the reasoning and decision on the facts of the case stated in the question. Nevins v. Peoria, 41 Ill. 502; s. c., 89 Am. Dec. 392. The chief reason assigned was that a stream of mud and water was *turned upon* the plaintiff's land. See, to the same effect, Seifert v. Brooklyn, 101 N. Y. 136; s. c., 54 Am. Rep. 664, and note; Barton v. Syracuse, 36 N. Y. 54; Field v. West Orange, 36 N. J. Eq. 118. The principle that municipal corporations may be held liable like individuals, for the improper management of property held by them, is also recognized in Eastman v. Meredith, 36 N. H. 258, and in Oliver v. Worcester, 102 Mass. 489.

It may be added, as a partial explanation of the existing confusion on the subject, that in practice it is frequently of great difficulty to separate the legislative duties of a corporation from those of a ministerial character, or to distinguish defects in a *plan* from defects in its *execution*. Rochester White Lead Co. v. Rochester, 3 N. Y. 463; s. c., 53 Am. Dec. 316, and note; 2 Dillon, *supra*, §§ 1049-1051.

c. Liability for Money Borrowed or Other Benefits Received.

46. *Suppose the charter of a city contains no reference to borrowing money. Can the city borrow and then issue negotiable paper in return for the funds so obtained?*

It is generally held that cities have an implied authority to borrow money, since that is necessary to the ordinary management of their complex affairs. Pres., etc. v. Chillicothe, 7 Ohio (part II), 31; Mills v. Gleason, 11 Wis. 470; Clarke v. School District, 3 R. I. 199. See *contra*, Hackettstown v. Schwackhamer, 37 N. J. Law, 191, and cf. 1 Dillon, Mun. Corp., §§ 117, 125.

But the issuance of commercial paper is a different matter. The argument of *necessity*, which has led the courts to imply the power to borrow money, does not apply. The borrowing which may be necessary is for a temporary purpose, to provide for the city's wants until they can be met by the only proper method of raising funds — taxation. But the issue of negotiable bonds or notes, enforceable by one purchasing in good faith before maturity whatever may have been the equities between the city and the original holder, may easily involve the citizens in overwhelming debt, contracted extravagantly or corruptly by careless or dishonest officials. This is a strong argument against any legislative intent to impliedly give such power, and represents the position taken by the weightier authorities. 1 Dillon, Mun. Corp., §§ 507, 507a; Mayor v. Ray, 19 Wall. 478; Hackettstown v. Schwackhamer, *supra*. But see Mills v. Gleason, *supra;* Ketchum v. Buffalo, 14 N. Y. 356, holding less strict doctrines.

If, however, there is an express power to borrow money, the power to issue negotiable obligations may generally be gathered

from that. 1 Dill., *supra*, §§ 125-127; Williamsport v. Commonwealth, 84 Penn. St. 487. But see, directly *contra*, Brenham v. Bank, 144 U. S. 173, overruling the established doctrine of the Federal courts and pointing out that if a legislature wishes to give the power to issue bonds it is easy for it to do so in express terms.

47. *If a city is sued on a contract made by its officers, but which is outside the powers conferred by its charter, can the defense of ultra vires be set up? And if so, is there any remedy for a contractor from whom the city has received money or property?*

The general rule is, undoubtedly, that municipal corporations may set up that defense. The powers of its officers are conferred by legislative enactment and every one must take notice of them at his peril. Moreover, such corporations do not depend for their existence upon the consent or mutual contract of their members; they are wholly artificial in their organization and have such powers only as are given by the act which creates them. 2 Morawetz on Corporations, §§ 714, 718; 1 Dillon, Mun. Corp., § 457; Vincent v. Nantucket, 12 Cush. 103; New Jersey, etc. v. Fire Commissioners, 34 N. J. Eq. 117.

If, however, a city receives money into its treasury or accepts and enjoys the benefit of property derived under an *ultra vires* contract, it is bound by an implied or quasi-contractual obligation to restore it or pay for it, unless the transaction has been in disregard of a positive prohibition of law or is in violation of some principle of public policy.

In the words of Field, Ch. J.: "If the city obtains money of another by mistake or without authority of law, it is her duty to refund it — not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation; the law, which always intends justice, implies a promise. * * * The money must have gone into her treasury or been appropriated by her; and when it is property other than money it must have been used by her or be under her control." Argenti v. San Francisco, 16 Cal. 255, 282. See also 1 Dillon, Mun. Corp., §§ 458, 462; Hitchcock v. Galveston, 96 U. S. 341; Thomas v. Port Hudson, 27 Mich. 320; Turner v. Cruzen, 70 Iowa, 202.

48. *A statute provided that when authorized by a majority vote of a county, the County Commissioners were to subscribe for bonds of a certain railroad. A vote was taken and the subscription made. The bonds, which recited the statute and a*

majority vote under the election therein provided for, came into the hands of a bona fide purchaser. On suit by him, the county set up as a defense that as a matter of fact the prescribed formalities prior to the election had not been performed. Decision for whom?

The facts stated are those of Knox County v. Aspinwall, 21 How. 539 (the first of a series of cases on the subject), where it was held that the commissioners were the body designated by the statute to determine whether a proper majority vote had been had, and that since the bonds recited the occurrence of all the conditions necessary to give the board power to issue them, the *bona fides* of purchasers was not affected by their not inquiring into the actual facts of the matter. The recitals bound the municipality conclusively.

An additional reason for thus construing the legislative intent was that to require such an investigation would destroy, or at least seriously affect, the market for securities of this kind. See the statement of the rule by Strong, J., in Town of Coloma v. Eaves, 92 U. S. 484, 491. See also Humboldt v. Long, 92 id. 642; Chaffee County v. Potter, 142 id. 355; and compare Northern Bank v. Porter Township, 110 id. 608, where the rule is somewhat qualified.

The doctrine set forth briefly above, though steadily adhered to by the Supreme Court, has not passed unchallenged. In a strong dissenting opinion to Humboldt v. Long, *supra*, three justices (Miller, Davis and Field) expressed their conviction that it was dangerous, unjust and illogical. They urged that an agent cannot establish his authority by his own representations, that legislative restrictions on taxation are rendered abortive by such a construction, and that an easy road to fraud is provided, for, apparently, the only bonds that can be questioned are those which are issued in the face of an absolute prohibition, and which show by their contents that they are so issued. This view is supported by Judge Dillon. See his Mun. Corp., §§ 518-531.

CRIMINAL LAW.

I. Generally.

1. *What is a crime?*

A crime "is a violation or neglect of a legal duty, of so much public importance that the law, either common or statute, takes notice of and punishes it." May's Crim. L. (2d ed.) 1.

2. *What elements are necessary to constitute a criminal act?*

(1) All illegal acts are not criminal. An act only becomes a crime when it is of such a character that the interests of the public are involved. Acts which merely injure private persons individually, are redressed by civil suits, in which the government is no party. Rex v. Wheatley, 2 Burr. 1125, 1128.

(2) The act need not be morally wrong. If the public good demands that rapid driving be made a crime, one who disobeys the statute, though in perfect ignorance, has still committed a criminal act.

(3) There must be a criminal intent or criminal negligence. Criminal intent is simply an intent to do the act which violates the law and is not necessarily joined with an immoral motive. In the case of a statute, unless the legislature meant otherwise, the intent is usually implied from the mere violation, and ignorance of the statute is no excuse. The intent may also be constructive, as where a man, intending to commit one crime, commits another. Specific intent is only necessary when it is a necessary part of the crime, as assault with intent to kill. Such an intent can never be constructive. May's Crim. L. (2d ed.) 17-26.

(4) There must be a criminal capacity, both mental and physical. Thus, infants, who have not reached years of discretion or of criminal capacity, and insane people are not held criminally for their acts. Voluntary drunkenness, however, is no excuse, though it is admissible as evidence upon the existence of a specific intent. Delirium tremens and involuntary intoxication, however, are treated as excusing a man from criminal liability. May's Crim. L. (2d ed.) 26-37.

3. *What elements are necessary to constitute an attempt to commit a crime?*

(1) There must be some act "done in part execution of a design to commit a crime." The "design" or criminal intent is necessary, and the act which constitutes an attempt must be distinguished

from acts which are merely those of preparation. Smith v. Commonwealth, 54 Penn. St. 209, 212.

(2) The means adopted must be reasonably calculated to the perpetration of the crime. Respublica v. Malin, 1 Dall. (Penn.) 33. But it is not necessary that the person should have the absolute power of completing the criminal design.

Thus, where by a statute, stealing a sum less than $10 was only a misdemeanor, A. broke and entered B.'s house intending to steal all the money in the safe. There was less than ten dollars in the safe at the time, but A. was held to be guilty of burglary. He intended to steal all that the safe contained, without knowing how much there was. Harvick v. State, 49 Ark. 514. So, also, an attempt to pick an empty pocket is criminal, though there is no power of actually taking property. People v. Jones, 46 Mich. 441. See also People v. Moran, 123 N. Y. 254.

In People v. Moran (*supra*), at p. 257, the law in regard to an attempt was well expressed by Ruger, Ch. J.: "Whenever the *animo furandi* exists, followed by acts apparently affording a prospect of success, and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute. * * * The question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted assumption of his design." And his act is not the less criminal nor the less deserving of punishment for the public protection, because the accused fails to accomplish his crime "for some cause not previously apparent to him."

4. *What will constitute a justification of acts, which would ordinarily be criminal?*

(1) The acts may be done in the execution of proper authority, as the hanging of a murderer by a sheriff, and even a private person may at times be justified in taking life, as in preventing the escape of a felon. 1 East, P. C. 298.

(2) Public policy may demand the acts, as the destruction of property during a conflagration. Cooley on Constitutional Limitations (6th ed.), 739.

(3) The acts may be done in the lawful defense of person or property. Regina v. Rose, 15 Cox C. C. 540.

(4) It has been argued that necessity would be a justification, as where one pushes another from a plank to prevent both from drowning. U. S. v. Holmes, 1 Wall. Jr. (U. S.) 1 But it is very questionable how far a man may legally make another suffer what he himself wishes to avoid, merely because of his superior strength. Steph. Dig. Cr. L., art. 32. And it has been specifically held that shipwrecked sailors may not kill the weakest of their number, though that was the only way to preserve their lives. Reg. v. Dudley, 14 Q. B. Div. 273.

5. *What are the three classes of crimes and how are they distinguished?*

Crimes are classified as treasons, felonies, and misdemeanors.

Treason is marked by active disloyalty against the State.

Felonies are distinguished by their punishment and are all those offenses which are punished by death or by confinement in the State prison. 1 Bish. Cr. Law, § 618. An act which was a felony at common law, unless some statute has provided otherwise, is still regarded as a felony in all the States, with the possible exception of Vermont. State v. Scott, 24 Vt. 127, 130.

Misdemeanors include all other crimes of whatever degree or character. Walsh v. People, 65 Ill. 58, 60; 1 Russell on Crimes (6th ed.), 193.

6. *How are criminals classed?*

Criminals are divided into principals and accessories.

Principals have been divided into those of the first degree who actively commit the crime, and those of the second degree who, though present and encouraging the commission of the crime, do not actually participate in the act. This distinction has, however, become practically obsolete in many of the States. 1 Bish. Cr. Law (7th ed.), § 648.

Accessories are divided into two classes — those before and those after the fact. An accessory before the fact is one who, without being present, aiding or abetting, procures, advises or commands another to commit the crime. 4 Shars. Black. Com. 37. An accessory after the fact is one who, knowing that a felony has been committed, receives, relieves, comforts or assists the felon. 4 Shars. Black. Com. 38. This distinction is confined, however, to felonies; all parties in misdemeanors and treason are treated as principals. Ward v. People, 6 Hill (N. Y.), 144; Commonwealth v. McAtee, 8 Dana (Ky.), 28.

To be held as an accessory after the fact, the defendant must be actually rendering personal assistance to the felon. Mere presence is, of course, not enough. U. S. v. Jones, 3 Wash. C. C. 209, 223; People v. Cook, 5 Parker Cr. Rep. (N. Y.) 351.

7. *A., standing in Massachusetts, shoots at and wounds B. in Connecticut, and B. dies of the wounds in New York. Which State has jurisdiction to punish the crime?*

Connecticut would have jurisdiction. The place where the public is injured is where the act takes effect and not where the shot is fired. Commonwealth v. Macloon, 101 Mass. 1, 6. Nor where the person dies. U. S. v. Guiteau, 1 Mackey (D. C.), 498.

8. *A. steals goods in X. county and carries them into Y. county. Can he be indicted in Y. county?*

Yes. It has been argued that there is a continuing trespass, and so a new taking in every jurisdiction into which the goods are taken. Commonwealth v. Uprichard, 3 Gray (Mass.), 434, 438. The better explanation, however, is probably historical. May's Crim. L. (2d ed.), § 80.

This principle of a continuing trespass has also been applied to the case of goods stolen in one State and carried into another. Commonwealth v. Holder, 9 Gray (Mass.), 7. Or stolen in a foreign country. State v. Underwood, 49 Me. 181. In other States, however, the contrary view is held, more correctly, it would seem. Stanley v. State, 24 Ohio St. 166, cases collected; Commonwealth v. Pritchard, 3 Gray (Mass.), 434, 438.

9. *A. utters counterfeit United States notes in New York. Where may he be punished?*

He has committed a crime against both the State and the Federal government, and may be punished by both. Under our system there is, frequently, concurrent jurisdiction. Fox v. Ohio, 5 How. (U. S.) 410. See also Phillips v. People, 55 Ill. 429.

II. OFFENSES AGAINST THE GOVERNMENT.

a. Bribery.

10. *A. agrees to vote for B. for one public office in consideration that B. will vote for him for another office. Has any criminal offense been committed?*

Yes. Both A. and B. are guilty of bribery. That crime consists in "corruptly offering, soliciting or recovering any undue reward as the consideration for the discharge of a public duty." "By undue reward is meant any pecuniary advantage, direct or indirect, beyond that naturally attached to or growing out of the discharge of the duty." May's Crim. L. (2d ed.), § 140. Strictly speaking, the offering or soliciting of a bribe is only an attempt, but both have long been treated as bribery. Walsh v. People, 65 Ill. 58.

The theory is that any conduct, which tends to induce a man to administer a public office for other than the public good, is an offense against the public. Trist v. Child, 21 Wall. (U. S.) 441.

b. Perjury.

11. *What is perjury?*

"Perjury, by the common law, seemeth to be a wilful false oath, by one who, being lawfully required to depose the truth in any proceeding in a course of justice, swears absolutely, in a matter of

some consequence, to the point in question, whether he be believed or not." 1 Hawk. P. C. (8th ed.) 429; Commonwealth v. Pollard, 12 Met. (Mass.) 225-228.

The oath must be required by law, or a false oath is not perjury; and when so required, the oath must be administered by an authorized person, or it is extra-judicial. State v. Wyatt, 2 Hayw. (N. C.) 219; Commonwealth v. Pickering, 8 Gratt. (Va.) 628.

"Judicial proceeding" includes the main action, and all subsidiary proceedings which are incidental, as an affidavit initiatory of a proceeding. Carpenter v. State, 5 Miss. 163; or in aid of one pending; White v. State, 9 Miss. 149; or on a motion for a new trial. State v. Chandler, 42 Vt. 446.

The oath must be wilfully false, and if so, it is immaterial whether the witness testifies under compulsion or voluntarily, as when he voluntarily gives privileged testimony. Commonwealth v. Knight, 12 Mass. 273; Mackin v. People, 115 Ill. 312. Swearing to the truth of a fact, according to the affiant's knowledge and belief, is also perjury, if he knows to the contrary, or if he believes to the contrary, even though the fact be true. United States v. Shellmire, 1 Bald. C. C. 370, 378.

That is material, which tends to prove or disprove any fact in issue, although it may only be an incidental fact. Commonwealth v. Grant, 116 Mass. 17; State v. Norris, 9 N. H. 96, 100.

c. Contempt of Court.

12. *What constitutes contempt of court, and is it technically a crime?*

A court is held in contempt when its rules are violated, its authority defied, or its dignity offended, whereupon the offender may be summarily punished by the court, without indictment. Contempt is not, strictly speaking, a crime, but is treated as a breach of order or decorum. Ex parte Robinson, 19 Wall. (U. S.) 505. Not being a crime, a party accused of contempt is not entitled to a trial by jury. In re Deaton, 105 N. C. 59, 64. Contempt is, however, substantially a crime, as it is punishable by fine and imprisonment.

13. *How is an offender proceeded against for contempt of court?*

If the contempt be committed in the presence of the court, the offender may be ordered into custody and proceeded against at once, but if the offense is not so committed, the usual manner of proceeding is upon an order to show cause why the offender should not be punished. May's Crim. L. (2d ed.), § 158; People v. Kelly, 24 N. Y. 74.

III. OFFENSES AGAINST THE PUBLIC PEACE, HEALTH AND ECONOMY.

a. Affray.

14. *What constitutes an affray?*

An affray is the fighting of two or more persons in some public place, to the terror of the people. 4 Shars. Black. Com. *p. 145.

The place must be a public one, that is, where the public may witness the breach of the peace. Carwile v. State, 35 Ala. 392. But actual fear need not be excited among the onlookers. It is enough if the conduct of the accused be calculated to excite fear.

One defending himself from attack, however, is never guilty of any offense. Klum v. State, 1 Blackf. (Ind.) 377.

b. Riot.

15. *What constitutes a riot?*

A riot is a "tumultuous disturbance of the peace, by three or more persons assembling together of their own authority, with an intent to assist one another against any one who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act itself be lawful or unlawful." 1 Hawk. P. C. (8th ed.) 513, § 1.

The violence need not be actually inflicted upon any person. Threatening with weapons, or even words, is sufficient, as the disturbance of the peace, by exciting terror, is the gist of the offense. Bell v. Mallory, 61 Ill. 167; State v. Renton, 15 N. H. 169.

c. Libel and Slander.

16. *Define libel and distinguish it from slander.*

Libel is the "malicious publication of any writing, sign, picture, effigy or other representation tending to defame the memory of one who is dead, or the reputation of one who is living, or to expose him to ridicule, hatred or contempt." May's Crim. L. (2d ed.), § 172. Libel differs from slander only in that the latter consists entirely of verbal expressions. Both are punished criminally on account of their tendency to lead to a breach of the peace. 1 Hawk. P. C. (8th ed.). 542, § 3; People v. Croswell, 3 Johns. Cas. (N. Y.) 337.

The publication need not be malicious in the ordinary acceptance of the word. If the act is done wilfully, the malice is presumed, as matter of law, from the publication. Commonwealth v. Snelling, 15 Pick. (Mass.) 321.

The truth of the libelous matter is no defense to a criminal prosecution, as it is in a civil suit. On the contrary, the old common-law maxim was "the greater the truth, the greater the libel," the danger of a disturbance of the public peace being the thing considered. This common-law rule has been modified by statutes in a number of the States, however; and in practically all of the States truth is a defense, if the matter was published for a justifiable end, and with good motives. May's Crim. L. (2d ed.), § 173.

The placing of libelous matter where it may be seen by one or more persons, other than the publisher, is a publication, and the act is indictable, whether or not the matter is seen. Giles v. State, 6 Ga. 276. And also whether or not the matter, as seen, is understood, as where it is in a foreign language. Haase v. State, 20 Atl. Rep. (N. J.) 751.

Privileged communications are not libelous, but they cannot be used as a cloak for personal attack, as in the case of a criticism of a book. Carr v. Hood, 1 Camp. 354, note.

d. Nuisance.

17. *Define nuisance.*

Nuisance to be punishable as a crime must be something which causes inconvenience or injury to the public. That is injurious "which substantially interferes with the free exercise of a public right, which shocks or corrupts the public morals or injures the public health." May's Crim. L. (2d ed.), § 178. Acts of omission may equally well be nuisances as acts of commission. 4 Shars. Black. Com. 166, § 5.

Certain acts are nuisances, *per se*, as obstruction of public roads, or navigable waters, pollution of streams or corruption of public morals, because they violate the public right and welfare. Knox v. N. Y. City, 55 Barb. 404; State v. Taylor, 29 Ind. 517. Other acts, however, are nuisances or not, according to the attendant circumstances. Refineries or slaughter-houses may be nuisances in some localities, and perfectly permissible in others. Commonwealth v. Miller, 139 Penn. St. 77; Ballentine v. Webb, 84 Mich. 38. It may also well happen, that an act which was not a nuisance at one time will become so by the increase of population or other change of surroundings. Commonwealth v. Upton, 6 Gray (Mass.), 473. The lapse of time never gives a prescriptive right against the State to maintain a nuisance. The Statute of Limitations does not run against the State, nor is it any defense that similar nuisances have been tolerated. Commonwealth v. Perry, 139 Mass. 198.

e. Conspiracy.

18. *Define conspiracy.*

Conspiracy is "an agreement to do, against the rights of another, an unlawful act, or to use unlawful means" (to do *any* act). May's Crim. L. (2d ed.), §§ 186-187, and cases cited. The agreement may be indictable as conspiracy, though the thing to be done

is not criminal, nor even indictable. State v. Mayberry, 48 Me. 218; State v. Rowley, 12 Conn. 101.

It may be, however, that some unlawful acts are too frivolous to support an indictment for conspiracy, but there is no rule which can be used as a guide. Regina v. Kenrick, L. R. 5 Q. B. Rep. 49, 62.

The gist of the offense is the agreement, on the ground that the organization for unlawful purposes is the dangerous thing. When the agreement is made, therefore, the crime is complete, though no offense is actually committed. United States v. Cole, 5 McLean C. C. 513, 611; State v. Noyes, 25 Vt. 415.

A man cannot be a conspirator, however, without an actual wrongful intent. For instance, a man cannot be deceived into being a conspirator. Rex v. Whitehead, 1 Car. & P. 67.

19. *A. and B., as the result of a conspiracy, commit a felony. May they be punished for both the conspiracy and the crime as separate offenses? Suppose they had committed a misdemeanor?*

In the case of the commission of a felony the conspiracy merges and is punishable as part of the felony. State v. Noyes, 25 Vt. 415, 421; Commonwealth v. Kingsbury, 5 Mass. 106. But see, *contra*, State v. Mayberry, 48 Me. 218, 238.

In the case of a misdemeanor, however, there is no merger, and the conspiracy is punished separately. People v. Richards, 1 Mich. 216; State v. Murray, 15 Me. 100.

IV. OFFENSES AGAINST THE PERSON.

a. Assault and Battery.

See Torts, Ques. 7–9.

b. Mayhem.

20. *Define mayhem.*

Mayhem is defined by Blackstone as "the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself or to annoy his adversary." Thus, at common law, an injury which tended only to disfigure, but not to weaken, was not mayhem, as the cutting off of an ear. 4 Shars. Black. Com. 205.

The offense is now, however, almost universally defined by statute, and in many cases disfigurement is included, which would not have come within the common-law definition. Under the New York statute, the act must be premeditated and "of purpose." Godfrey v. People, 63 N. Y. 207. In North Carolina, however, a preconceived intention to disfigure need not be proved. A *prima facie* case is made by the proof of the disfigurement. State v. Girkin, 1 Ired. 121.

c. Homicide.

21. *Define homicide and give its different degrees.*

Homicide is the killing of a human being. It may be justifiable, as an execution by a sheriff, or a necessary killing to prevent the commission of a threatened crime of a violent nature; U. S. v. Wiltberger, 3 Wash. C. C. 515; or it may be excusable, as when done in the protection of one's person. In such cases no crime has been committed.

Homicide, as a crime, is either murder or manslaughter, the former being homicide with malice aforethought, and the latter without such malice, as where one kills another in the heat of passion, or upon great provocation. Commonwealth v. Webster, 5 Cush. (Mass.) 295, 305; Maria v. State, 28 Tex. 698.

Manslaughter may be voluntary or involuntary, according as the act is committed with the design to kill, or results from some unlawful act, but without the intention of taking life. May's Crim. L. (2d ed.), § 226.

At common law there were no degrees of murder or manslaughter, but statutes have been universally passed making the punishment less severe, where there are mitigating circumstances.

22. *A., having determined to kill B., sends him poison, which is taken by C. through mistake. How should the judge charge the jury?*

He should charge the jury, that if such facts were found there was conclusive evidence of malice aforethought, the use of poison showing necessary preparation; and that the malice against B. would be imputed to the act so as to make A. guilty of the murder of C., though he might have been his best friend. Saunders's Case, 2 Plow. 473; McGehee v. State, 62 Miss. 772.

A jury should also generally be charged that the premeditation which constitutes malice aforethought need not be extended over any lengthy period of time. It is enough that the purpose should have been completely entertained for however short a period before its execution. People v. Williams, 43 Cal. 344, 351; Shoemaker v. State, 12 Ohio St. 43, 52. Neither need a personal enmity be shown to prove malice. It will be implied by law, when the act is done without provocation, or in a deliberately reckless or careless manner. 4 Shars. Bl. Com. 198-200.

23. *What will constitute such a provocation for homicide as to reduce the degree of the offense to manslaughter?*

The degree of the offense will be reduced when the offender suffered such treatment from the one killed as would have aroused a high degree of passion in a man possessing ordinary self-control. No words, however, will be sufficient, nor any trespass upon land

or goods. And no provocation, however great, will reduce the degree of the offense, unless the act of killing is done under the influence of the passion produced by that provocation. May's Crim. L. (2d ed.), §§ 227-228.

When resisting unlawful arrest, however, it has been held in some States, that the taking of life would only be manslaughter, though the act was deliberate and unnecessary, and not done in the heat of passion. Commonwealth v. Carey, 12 Cush. (Mass.) 246; Rafferty v. People, 69 Ill. 111, 115. This doctrine, however, is not universally approved. Galvin v. State, 6 Cold. (Tenn.) 283, 291; Roberts v. State, 14 Mo. 138, 146.

24. *A. died of certain injuries inflicted by B., who showed on the trial that the injuries would not have been fatal had they been properly treated. Will such evidence help him?*

No. The offender is not to be excused in a criminal prosecution because the effects of his wrong might have been avoided. Bowles v. State, 58 Ala. 335; Kee v. State, 28 Ark. 155, 163.

25. *A. inflicted injuries upon B., of which he died after two years. Would A. be guilty of murder or manslaughter?*

He would be guilty of neither. The injuries must be the proximate cause of the death, and it is held that such is not the case, unless death follows within a year and a day after the injuries. State v. Shepherd, 8 Ired. (N. C.) 195; People v. Kelly, 6 Cal. 210. The time limit is generally covered by statute, however.

26. *A. drives his wife out of the house, and she dies of exposure. Is he guilty of homicide?*

If she left the house from fear of death or great bodily harm and her fears were well-grounded or reasonable, and her death was the natural and probable consequence of leaving the house at the time and under the circumstances he is guilty.

The doing of any act which will naturally lead to death is murder or manslaughter, according to the intention with which it is done. Hendrickson v. Commonwealth, 85 Ky. 281, 286. Criminal carelessness or neglect of a duty may also result in murder as well as affirmative acts of violence. State v. O'Brien, 32 N. J. Law, 169; State v. Hoit, 23 N. H. 355.

As to homicide in self-defense, see Torts, Ques. 21a.

d. False Imprisonment.

See Torts, Ques. 37, 38.

e. Rape.

27. *Define rape.*

Rape is the unlawful carnal knowledge of a woman without her consent. The act must be accomplished with force and be met

with such resistance as to negative the idea of consent. Fraud will not take the place of force, and if there is consent, however obtained, the crime is not rape, if the woman knows to what she is consenting. McNair v. State, 53 Ala. 453. Where, however, the consent is obtained under pretext of medical treatment, the offense is rape. Regina v. Case, 4 Cox C. C. 220, 223. But see Don Moran v. People, 25 Mich. 356, *contra*. The force which will negative the idea of consent may be very slight or practically absent, if the woman is not capable of resisting on account of being insensible or asleep. Commonwealth v. Burke, 105 Mass. 376; Regina v. Mayers, 12 Cox C. C. 311.

f. Robbery.

28. *Define robbery.*

Robbery is larceny from the person or personal presence and protection, with the added element that the crime is executed by force or by putting in fear. Commonwealth v. Humphries, 7 Mass. 242; Commonwealth v. Holland, 1 Duv. (Ky.) 182. The force or fear must be the means by which the crime is accomplished, and must be prior to or simultaneous with it. Thomas v. State, 91 Ala. 34. It is also necessary that the force be used with the intention of accomplishing the larceny. Regina v. Edwards, 1 Cox C. C. 32.

For the general principles of larceny, see *infra*, Ques. 37 *et seq.*

V. OFFENSES AGAINST THE DWELLING-HOUSE.

a. Arson.

29. *Define arson.*

Arson is the malicious burning of another's dwelling-house. May's Crim. L. (2d ed.), § 250.

30. *A. sets fire to his own house when B.'s house was so near that the fire would naturally spread to it. If B.'s house burns, is A. guilty of arson?*

Yes. Simply burning one's own house is no offense at common law, if innocent Bloss v. Tobey, 2 Pick. (Mass.) 320; but where the destruction of B.'s house is a result which would naturally follow from A.'s act, he is guilty of arson. Rex v. Isaac, 2 East P. C. 1031. The only malice necessary is an intention to burn. Thus, the crime is complete, when one intending to burn A.'s house sets fire to B.'s house by mistake. 1 Hale, P. C. 569; May's Crim. L. (2d ed.), § 254.

31. *A. intentionally burns the house of which he is lessee. Is he guilty of arson?*

No. For the purposes of the crime, a man is burning his own house, if he has the right of present possession. He need not be the holder of the title; it is enough that he is the rightful occu-

pant, as the gist of the offense is the violation of the sanctity of another's abode. State v. Lyon, 12 Conn. 487; McNeal v. Woods, 3 Blackf. (Ind.) 485, 486; State v. Toole, 29 Conn. 342.

By statute, however, in some States, the wilful burning of any building is made punishable, whether the act be committed by the owner or not. State v. Hurd, 51 N. H. 176; Shepherd v. People, 19 N. Y. 537.

32. *A. sets fire to a stable in which the coachman lives. What is the offense?*

The offense is arson. Any building is a dwelling-house, within the definition of the offense, which is actually occupied as such, though it may not have been erected for that purpose, and may also be used for other purposes, as for a jail. People v. Cotteral, 18 Johns. (N. Y.) 115, 120; Smith v. State, 23 Tex. App. 357. But compare Jenkins v. State, 53 Ga. 33, where it is said that there is no intention to burn the jail, but to burn a hole, through which to escape.

The occupant need not be actually in the building when it is set on fire, but it must be, in a real sense, occupied. State v. Toole, 29 Conn. 342. Mere ownership, though combined with the intention to occupy, is not enough. Hooker v. Commonwealth, 13 Gratt. (Va.) 763; State v. Warren, 33 Me. 30.

The burning necessary for arson must be an actual combustion. It is sufficient if the wood be charred, though not enough, if only scorched. May's Crim. L. (2d ed.), § 255.

b. Burglary.

33. *Define burglary.*

Burglary is the breaking and entering of another's dwelling-house in the night-time, with the intent to commit a felony therein, whether the felonious intent be executed or not. 1 Hawk. P. C. (8th ed.), 129.

34. *A., finding the shutters and window of B.'s house open, enters to commit a felony. Finding the door of an inner room locked, he breaks it open. Would this be a sufficient breaking to make the offense burglary?*

Yes. The breaking of an inner door, even after entry into the house, is sufficient for the offense. State v. Scripture, 42 N. H. 485; Rolland v. Commonwealth, 85 Penn. St. 66, 71. It would not be burglary, however, if A. had simply broken open a chest, cupboard, clothes-press, or other movable piece of furniture not part of the house. State v. Wilson, Coxe (N. J.), 439.

The mere entering through the open window, was not a breaking. To constitute burglary, the breaking must be actual. Very little force is

required, however, and sliding a bolt or tearing a netting which covered an open window is sufficient. State v. O'Brien, 81 Iowa, 93; Commonwealth v. Stephenson, 8 Pick. 354. But the window or door must not be so carelessly left open, as to invite an entry, and it would be held to be such an invitation if the window had been left only slightly open, so that it must be pushed farther up to admit of entry. Commonwealth v. Strupney, 105 Mass. 588; McGrath v. State, 25 Neb. 780. A breaking out of the house, however, to escape, would, probably, not be held burglary anywhere. May's Crim. L. (2d ed.), § 262.

There may also be a constructive breaking, where fraud or threats are substituted for force. Entry by conspiracy with persons within the house is burglary. State v. Rowe, 98 N. C. 629.

35. *After opening a window, A. obtains possession of goods by means of a long hook. Has there been an entry of the building?*

Yes. When the hand or any implement passes within, for the purpose of committing the intended felony, there is an entry. It is not enough, however, if the implement is simply used for the purpose of breaking. May's Crim. L. (2d ed.), § 263.

36. *A. breaks into B.'s house at four o'clock p. m., with the intention of examining some private documents of B.'s. Would the offense be burglary?*

No. The offense would not be burglary for two reasons: First, the breaking must be in the night-time to constitute burglary — that is, broadly speaking, from sunset to sunrise, though some States have fixed the time differently by statute. In Massachusetts "night-time" is defined to be from one hour after sunset to one hour before sunrise. Commonwealth v. Williams, 2 Cush. (Mass.) 582, 589.

Second, to constitute burglary the breaking must be with the intent to commit a felony, and an intent to commit a misdemeanor will not be sufficient. Thus, if one break and enter with the intent to commit adultery, the offense would or would not be burglary, according as the jurisdiction might hold adultery to be a felony, misdemeanor or, as in some States, no crime at all. State v. Cooper, 16 Vt. 551; Commonwealth v. Newell, 7 Mass. 245.

The crime of burglary has been very generally extended, frequently covering offenses committed by day as well as by night, and in most jurisdictions it is a crime to break and enter any building, for the purpose of committing a felony therein. May's Crim. L. (2d. ed.), § 268.

The question of what constitutes a dwelling-house is the same in burglary as in arson. See *ante*, Ques. 32.

VI. OFFENSES AGAINST PROPERTY.

a. Larceny.

37. *Define larceny.*

Larceny is the unlawful taking possession of the personal property of another, with the intent to steal. 4 Shars. Black. Com. 229.

38. *A., intending to steal a bag of flour, puts it on his shoulder, but is caught before he has moved away. Has there been a sufficient taking possession of the flour to constitute larceny? Suppose he had only stood the bag on end?*

The taking possession must be actual so that the thief has the real possession and control, but his possession need only be for an instant, and there would be a sufficient taking of possession where the bag was put upon the shoulder. State v. Craig, 89 N. C. 475; State v. Gazell, 30 Mo. 92; Rex v. Walsh, 1 Moody Cr. C. 14; Rex v. Pitman, 2 Car. & P. 423.

So, if money in a person's pocket be actually lifted in the hand of a thief, the taking possession is sufficient, even though the money is dropped again and never actually removed from the pocket. Harrison v. People, 50 N. Y. 518; Eckles v. State, 29 Ohio St. 508.

Where, however, the bag is only set on end, preparatory to taking away, there is not such a taking possession as will constitute larceny. State v. Jones, 65 N. C. 395.

39. *A., by a fraudulent representation, has the possession of certain goods given to him. Is he guilty of larceny?*

Yes. Though possession here is actually given, it is held that the fraud which induced the giving of possession is equivalent to the trespass which is usually necessary to constitute the crime of larceny. The offense is recognized as larceny by trick. Regina v. Bunce, 1 Fost. & F. 523; Regina v. Buckmaster, 16 Cox C. C. 339.

Where, however, the fraud leads the owner to confer *title* upon the thief, his taking of possession is not larceny. If the owner intended to pass title, and the thief intended to take it, no fraud will prevent its passing, as it is simply a question of intention, and when title has been given, the holder cannot be regarded as committing larceny, when he takes possession. His own goods cannot be the object of his trespass. 2 Bishop on Criminal Law (7th ed.), §§ 808-812.

40. *A. asks to examine a watch, which is handed over the counter to him, and he runs off with it. Was he given possession so that the offense is not larceny?*

No. There is a distinction to be noted between possession and mere custody. Where the owner of property hands it to another

for a specific purpose to be carried out under the owner's own inspection, possession does not pass, but mere custody, and the owner still has possession. When the thief ran, therefore, the possession was taken and the offense was larceny. People v. Call, 1 Den. (N. Y.) 120; Commonwealth v. O'Malley, 97 Mass. 584.

41. *A. leaves part of his goods with his servant and others with a bailee. Both appropriate the goods. Are both offenses larceny?*

No. Only the servant has committed larceny. The delivery of goods to a bailee passes possession, but owing, probably, to the historical idea of slaves, it is held that when a master gives property to his servant, the latter only obtains custody, and that possession is still in the master, and, therefore, the taking by the servant is a taking of possession, and so is larceny. Commonwealth v. Berry, 99 Mass. 428; People v. Belden, 37 Cal. 51.

If, however, the servant is given goods by a third person for his master, he does get possession, and an appropration by him is not larceny. Regina v. Masters, 1 Den. Cr. Cas. 332. One servant, however, who has only custody, cannot give possession to a fellow-servant. Only custody passes. Rex v. Murray, 1 Moody Cr. Cas. 276; May's Crim. L. (2d ed.) § 283.

42. *A. finds a bag in the road, which has been dropped from a wagon, to which a tag is attached. He tears off the tag without looking for the name and appropriates the bag. Is the act larceny? Suppose there had been no tag?*

The taking of the bag, with the tag attached, would be larceny. In spite of the fact that the bag was actually lost, when a finder takes possession of an article with a clue to it, and with the intention to appropriate it regardless of the fact that the owner might be found, it is held to be a taking within the definition of larceny. Reed v. State, 8 Tex. App. 40; Commonwealth v. Titus, 116 Mass. 42.

If there had been no tag, the bag would have been without clue, and the act would not have been criminal. Regina v. Thurborn, 1 Den. Cr. Cas. 387.

43. *A storekeeper finds a purse upon his counter, which has been left by mistake. A thorough examination of it, however, fails to reveal the identity of its owner. Is his appropriation larceny?*

Yes. In such a case the property cannot be treated as lost, for at the time of appropriation there was a probability, known to the

offender, that the owner would return and claim the purse. Lawrence v. State, 1 Humph. (Tenn.) 228; Regina v. West, 6 Cox C. C. 415.

In every case, however, the intention to appropriate must be present at the time of finding, otherwise there is no wrongful taking of possession. Baker v. State, 29 Ohio St. 184; Reed v. State, 8 Tex. App. 40.

44. *Define personal property within the meaning of the definition of larceny.*

Personal property means such property as may be described as "goods and chattels." As soon as property becomes a chattel, and as long as it remains so, it is the subject of larceny. Thus, milking a cow, shearing a sheep, or taking turpentine from a tree may be larceny. State v. Moore, 11 Ired. (N. C.) 70. A dead body is not considered property, though graveclothes are. 2 East P. C. 652; Wonson v. Sayward, 13 Pick. (Mass.) 402. Deeds, promissory notes, and such papers were held not to be subjects of larceny at common law. Their character, as a chattel, was considered to be merged in their more important character of written obligations. Payne v. People, 6 Johns. (N. Y.) 103; U. S. v. Davis, 5 Mason C. C. 356. When, however, the written obligation is inoperative, as a canceled check, it is then mere paper, and, therefore, a subject of larceny. Regina v. Watts, 4 Cox C. C. 336. The common-law rule has been modified by statute, however, in almost every jurisdiction, and written instruments are regularly considered subjects of larceny. May's Crim. L. (2d ed.), § 272.

By the very definition of the offense, the subject of larceny must be a chattel, and so there can be no larceny of real estate. Rex v. Webster, 1 Leach C. C. (4th ed.) 12. When, however, portions of the realty are severed so as to become chattels, they become subjects of larceny after they have once come into the possession of the owner. If, however, the severance and the taking away constitute one and the same act, the offense is only a trespass, as the owner has never had possession of the chattel. State v. Hall, 5 Harr. (Del.) 492; Regina v. Townley, 12 Cox C. C. 59.

Wild animals, in a state of nature, are not subjects of larceny, though they may be when shot and reduced into possession. Dogs, cats and the like were not considered property under the common law, and are not to-day subjects of larceny in this country, except by statute. 4 Shars. Black. Com. 236; Ward v. State, 48 Ala. 161.

The chattel to be the subject of larceny must also have some value, or it cannot be regarded as property. The value may be trifling, but must be appreciable. Payne v. People, 6 Johns. (N. Y.) 103; People v. Wiley, 3 Hill (N. Y.), 194, 211.

45. *A. owns property which, however, has been attached for the benefit of a creditor. A. takes the property away with intent to deprive the creditor of his lien. What is the offense?*

The offense is larceny. A. had no right to the possession of the property, and for certain purposes the property was that of the attaching creditor. Commonwealth v. Greene, 111 Mass, 392; People v. Thompson, 34 Cal. 671.

46. *A. takes goods from her husband's house previous to eloping with another man. Is the offense larceny?*

No. By the common-law principles a wife cannot have possession of property apart from her husband; in law they are one person. Regina v. Kenny, 2 Q. B. Div. 307; Rex v. Wills, 1 Moody, Cr. C. 375.

47. *A. takes B.'s hat for the purpose of inducing B. to follow him. Is the offense larceny?*

No. By the definition, the taking of the property must be with the intent to steal, *i. e.*, to permanently deprive the possessor of property or of his interest in it. If the purpose of the offender is only to make a temporary use of the chattel, the offense is not larceny. Rex v. Dickinson, Russ. & Ry. 420. But taking property with the intent to keep it until a reward is offered is larceny. Berry v. State, 31 Ohio St. 219; Commonwealth v. Mason, 105 Mass. 163.

It is also necessary that the intent to steal be present at the time of taking, as in the case of finding goods (see Ques. 43, *supra*), otherwise there is no larceny. A taking without a fraudulent intent, and a fraudulent conversion afterwards, will not, in general, constitute larceny. Wilson v. People, 39 N. Y. 459; State v. Shermer, 55 Mo. 83. In some cases, however, it has been held, that while, if the original taking be rightful, a fraudulent conversion later will not be larceny, yet if the original taking be wrongful, as by trespass, it will be, though the wrong did not consist in an intent to steal. Commonwealth v. White, 11 Cush. (Mass.) 483; State v. Coombs, 55 Me. 477.

48. *A., on trial for larceny, shows that the goods which he took were of no advantage to him, and were not taken with the expectation of personal gain. Is that a defense?*

No. Though it was once laid down that such an offense was more properly malicious mischief, it is now generally held that there need be no motive of gain in order to convict of larceny. The permanent injury to the owner is sufficient. State v. Ryan, 12 Nev. 401; State v. Davis, 38 N. J. Law, 176. But see, *contra*, Pence v. State, 110 Ind. 95, 99; People v. Woodward, 31 Hun (N. Y.), 57.

49. *Define larceny from the person and larceny from a building.*

Larceny from the person and from a building are but aggravated forms of larceny, of statutory growth and. as far as the larceny is concerned, subject to the regular tests.

Larceny from the person is a taking from the personal protection, with force. The mere force of the taking is enough, and it differs from robbery in that the assault of the latter offense is prior to and in aid of the larceny. Thus, if A. scratches B.'s watch in taking it, the offense is larceny from the person; if he knocks B. down in order that he may steal his watch, the offense is robbery. Commonwealth v. Dimond, 3 Cush. (Mass.) 235; 2 Russell on Crimes, 89.

Larceny from the building is committed when the goods taken are under the protection which is supposed, by law, to be afforded them by being kept in a building.

The offense of larceny from a building is not committed, however, if the goods are under the personal protection of the owner, though they may be in a building. In such a case the goods are under the owner's protection, rather than that of the building. The house is not supposed to be a protection against every one; the owner of the house may commit larceny in it, yet the offense would not be larceny from a building. Commonwealth v. Hartnett, 3 Gray (Mass.), 450. So, also, if the offense is committed by the owner's wife. Rex v. Gould, Leach C. C. (4th ed.) 217.

50. *A. steals property which was owned in common by B. and C. How many offenses has he committed?*

Only one. There is but one act which is criminal, and that is an offense against the public, not against A. and B., as individuals. As to them it is but a trespass, and the allegation of ownership is only a matter of pleading for the purpose of identifying the property. Nichols v. Commonwealth, 78 Ky. 180; Bell v. State, 42 Ind. 335.

b. Embezzlement.

51. *Define embezzlement.*

Embezzlement is the "fraudulent appropriation of another's property by one who has the lawful possession." The offense is purely the result of statutes which were passed to punish persons for the appropriation of property of which they had lawful possession, and who could not, therefore, be convicted of larceny.

The appropriation must be fraudulent, or the offense is not committed. Thus, if the property is taken under the claim of right, it is not embezzlement. Ross v. Innis, 35 Ill. 487; Kirby v. Foster, 22 Atl. Rep. (R. I.) 1111, 1112.

As to what property may be the subject-matter of the offense, the practical result is that whatever may be stolen may be embezzled. May's Crim. L. (2d ed.), § 303. See also Ques. 44 (*supra*).

The question of who has possession, within the meaning of the definition, brings up the distinction between possession and custody (considered under questions 38-42, *supra*), and also the distinction between a clerk or servant, and an agent or officer. As a general rule, a clerk and a servant only have custody of goods which are given to them by their master, so that an appropriation by them is larceny, whereas, an agent or an officer, public or private, has possession, and his offense would be embezzlement. Where the line is to be drawn, however, between a servant and an agent, is a very difficult question of fact, but perhaps the best test is the question of control. A master has full control over his servant, both as to what he shall do, and how he shall do it, but his control over his agent does not extend to the small details of how the work is accomplished.

52. *A., the teller of a bank, enters the bank after hours and appropriates money from the safe. Is the offense embezzlement?*

No. Though a teller is an officer who would, ordinarily, have lawful possession of the money, under the definition of embezzlement, yet his possession only lasts during banking hours, and when in the safe the possession of the money is in the bank. Commonwealth v. Barry, 116 Mass. 1.

53. *A. acts as a general commission merchant, and places all of the money which he collects for all customers in one bank account, from which he pays his own private creditors. Is he guilty of embezzlement?*

No. Every agent who appropriates money collected for others is not guilty of embezzlement. The very business of a commission merchant carries with it the permission, implied from the necessities of the case, of using all moneys received as a general fund. Commonwealth v. Foster, 107 Mass. 221; May's Crim. L. (2d ed.), § 301.

Manifestly, mere failure to pay a loan can never be embezzlement. People v. Wadsworth, 63 Mich. 500, 509.

c. False Pretenses.

54. *What are the elements of the crime of obtaining goods under false pretenses?*

To convict a man of the crime it is necessary to show: (1) That the pretense is false; (2) that there was an intent to defraud; (3) that an actual fraud was committed; (4) that the false pretenses were made for the purpose of perpetrating the fraud; and (5) that the fraud was accomplished by means of the false pretenses. Commonwealth v. Drew, 19 Pick. (Mass.) 179; May's Crim. L. (2d ed.), § 305.

The false pretense must be a false statement, regarding some past or existing fact, as distinguished from a promise, an opinion or a statement about an event that is to take place. Thus, the ordinary "puffing" of goods by the seller is not criminal, as being a mere expression of opinion, against which the purchaser must guard. Regina v. Bryan, 7 Cox C. C. 312; State v. Estes, 46 Me. 150. The representation must be actually false. It is not enough that the man believed it to be false and intended to defraud. If the representation actually turns out to have been true, he is not guilty. State v. Asher, 50 Ark. 427. The pretense must also be false at the time the property is obtained. If true then, it makes no difference how false it may have been when made. In re Snyder, 17 Kan. 542, 555.

The crime is one purely of statutory creation. So many frauds were committed, which could not come within the common-law definitions of larceny, that the statute of 30 Geo. II, chap. 24, was passed making the offender indictable and statutes to the same effect are to be found in every jurisdiction, with little, if any, real difference in their provisions.

55. *A. went to a store wearing a gown worn only by certain college students. The storekeeper gave him credit, supposing him to be a student, though he asked no questions. Was there a sufficient pretense to constitute a crime?*

Yes. The pretense need not be in words; acts are sufficient, if reasonably misleading. Rex v. Barnard, 7 Car. & P. 784. The crime may also be committed when all of the statements are true, if a falsehood is implied, as where one sells goods which do not belong to him. Regina v. Sampson, 52 Law. T. 772; State v. Mills, 17 Me. 211.

56. *A. makes a false pretense to get B.'s money, and then keeps it in payment of a debt which B. justly owes him. Has he obtained the money by false pretenses?*

No. The second point of the definition (Ques. 54, *supra*) is not present. There is no intent to defraud in the criminal sense, as the money was justly due him. People v. Thomas, 3 Hill (N. Y.), 169; Rex v. Williams, 7 Car. & P. 354.

57. *A. obtains a promissory note from B., a minor, by false pretenses. Is his act criminal?*

No. There has been no fraud actually perpetrated; as the minor is not bound to pay the note, it is, therefore, not considered as property. Commonwealth v. Lancaster, Thatch. Cr. Cas. (Mass.) 428.

58. *A. and B. both make false pretenses in exchanging watches. How is the case to be dealt with?*

Both are indictable, and neither can defend on the ground of the deceit of the other. Commonwealth v. Morrill, 8 Cush. (Mass.) 571, 572.

It is held in New York, however, that where money is paid to a pretended officer not to serve a warrant, the indictment will not lie. McCord v. People, 46 N. Y. 470. This goes on the ground that the object of the law is to protect the honest, while the better view is that "the law is for the protection of all, by the punishment of rogues." May's Crim. L. (2d. ed.), § 312.

59. *A. obtains B.'s property by false pretenses, which, however, were so obviously false that B. would not have been deceived, but for extreme negligence. Can A. defend on that ground?*

No. It was once generally the law, as expressed by Lord Holt, that one man is not to be indicted because another has been a fool. Regina v. Jones, 2 Ld. Raym. 1013. At present, however, it is generally held that if the pretense actually causes the man to part with his property, the offense is complete regardless of his lack of caution. The act is equally criminal whether or not it is easy of perpetration. Cowen v. People, 14 Ill. 348, 349, 350; State v. Mills, 17 Me. 211, 218.

60. *A. obtained property from B. upon representations, some of which were false and others true. Under what circumstances can he be convicted?*

The false pretense need not be the only inducement. B. would be convicted if the fraud would not have been accomplished but for the false pretense. People v. Haynes, 11 Wend. (N. Y.) 557, 567; s. c., 14 id. 546, 555; Foy v. Commonwealth, 28 Gratt. (Va.) 912, 917. The pretense must be reasonably near, however. Thus, where a man obtained admission to a race by false pretenses and won a prize, he was held not to be guilty of obtaining the prize by false pretenses.

61. *What kind of property may be obtained under false pretenses?*

In general, the property must be such as is the subject of larceny. For example, the obtaining of credit is not generally within the statutes. Regina v. Eagleton, Dears. 515, 537. The particular statute of the jurisdiction must control, however.

The property must have been actually obtained by the pretense. If the false pretense is simply used to keep the possession of property,

which has been legally obtained, the offense is not committed. People v. Haynes, 14 Wend. (N. Y.) 546, 563.

It is very serviceable for the student to keep clearly in mind the distinctions by which the offenses which have just been considered, shade from one to the other. (1) In larceny the offender takes possession from the one rightfully in possession, with at least some technical force, and, of course, gets no title. (2) In larceny by trick, the person rightfully in possession is induced by fraud to give up possession, but not title. (3) In obtaining property under false pretenses the person rightfully in possession is induced by fraud to give up both possession and title. (4) In embezzlement the possession is originally in the offender, and he appropriates the property to his own use. Thus, in (1) possession is taken without title; in (2) possession is given without title; in (3) both possession and title are given; and in (4) possession is in the offender from the start.

d. Receiving Stolen Goods.

62. *When is a man guilty of receiving stolen goods?*

When he receives into his possession goods of another, knowing them to be stolen, with a fraudulent intent to deprive the person rightfully entitled to possession, of his interest in them. People v. Johnson, 1 Park. Cr. (N. Y.) 564; Rice v. State, 3 Heisk. (Tenn.) 215.

The possession received need not be actual, manual possession, but must be equivalent to constructive possession. State v. St. Clair, 17 Iowa, 149; Regina v. Wiley, 4 Cox C. C. 412. If one finds property, which he has good reason to believe was stolen, and appropriates it, he may even then be convicted of receiving stolen goods. Commonwealth v. Moreland, 27 (Old Series), Pitts. L. J. (Penn.), p. 217, No. 45. It is always enough if the receiver of goods has reasonable grounds for believing that the goods were stolen; and if he knows the facts of the case it is not necessary that he should know that they were such as would, in law, constitute larceny. But if he believed that the circumstances constituted no crime at all, the receiver cannot be convicted. Commonwealth v. Leonard, 140 Mass. 473.

e. Forgery.

63. *Define forgery.*

Forgery is "the fraudulent making or altering of a writing to the prejudice of another man's right." 4 Black. Com. 247.

The word "writing" includes both printed and engraved matter. Commonwealth v. Ray, 3 Gray (Mass.), 441. But not a painting, with the name of the artist falsely signed. Regina v. Closs, 7 Cox C. C. 494. As appears by the definition, the altering of an instrument may be forgery, as well as the making of it, but the alteration must be ma-

terial, as the change of the name of a party to negotiable paper, or an erasure, by which the instrument is changed. State v. Robinson, 1 Harr. (N. J.) 507; State v. Stratton, 27 Iowa. 420. So also the alteration of an entry in a book, or the making of a false entry, or even the filling in of a blank, to defraud an employer, is forgery. Biles v. Commonwealth, 32 Penn. St. 529; People v. Dickie, 17 N. Y. Supp. 51.

The intent to defraud is, of course, necessary to the offense, as appears by the definition. Pauli v. Commonwealth, 89 Penn. St. 432. And when such intent exists it is immaterial that the forged signature bears no resemblance to the genuine one; and if the intent does not exist, it makes no difference how close the resemblance is. Commonwealth v. Goodenough, Thatch. Cr. Cas. (Mass.) 132.

64. *A. finds a will which was executed without witnesses, and changes it so as to make himself sole legatee. Is he guilty of forgery?*

No. If the instrument has no legal force, as here, the alteration is not forgery. State v. Smith, 8 Yerg. (Tenn.) 150; Cunningham v. People, 4 Hun (N. Y.), 455. See also State v. Anderson, 30 La. Ann. 557.

65. *A., knowing that his name is the same as that of another man, signs a promissory note intending to pass it off as the note of the other. Is the act forgery?*

Yes. A man may not use his own name for fraudulent purposes. People v. Peacock, 6 Cow. (N. Y.) 72; Commonwealth v. Foster, 114 Mass. 311. The forged name may also be that of a fictitious person, or of one deceased. Sasser v. State, 13 Ohio St. 453, 485; Henderson v. State, 14 Tex. 503.

66. *A. forges a bill in New York and sends it to the drawee in Maine. Where has the forgery been uttered?*

The forgery would seem to be uttered in both jurisdictions. Regina v. Finkelstein, 16 Cox C. C. 107.

VII. CRIMINAL PROCEDURE.

67. *How is an accusation made?*

The formal accusation may be made in three ways — by indictment, by information, or by complaint. A complaint is an accusation by a private person, under oath, and is generally allowed only in cases of small misdemeanors. An information is an accusation by the attorney-general, under his own oath, and is not a common form of procedure. The usual form of accusation is by indictment, which is found by the grand jury upon oath. May's Crim. L. (2d. ed.), § 90.

68. *What is the grand jury and what are its duties?*

The grand jury is a body of at least twelve, and not more than twenty-three men. Its meetings are attended only by witnesses and the public prosecuting attorney, and its principal duty is to pass upon the formal written charges presented by the prosecution. The evidence for the prosecution is heard, and if twelve jurors find that there are reasonable grounds for believing that the charge stated in the bill is true, the words "true bill" are indorsed upon it, and certified by the foreman. Such bills are handed to the clerk, and are called indictments.

Besides the bills prepared by the prosecuting attorney, the grand jury may inquire into matters which come to their knowledge in considering other matters or through the personal knowledge of some member of the jury. May's Crim. L. (2d ed.), 91; McCullough v. Commonwealth, 67 Penn. St. 30.

69. *What are the requisites of an indictment?*

The indictment must set forth the crime of which the defendant is accused fully, plainly, substantially and formally. It must describe the facts which constitute the crime without ambiguity. The language is immaterial except where it must contain certain formal words, as feloniously, with malice aforethought, etc. The facts, if true, must necessarily import a crime, and all of the elements of the crime charged must be set forth, as specific intent in murder. The indictment must also be so particular in its framing, as to furnish sufficient information and particulars to enable the accused to prepare his defense properly, and it must be sufficiently precise to protect him from a second prosecution. And even where the State goes farther than is necessary in particularizing, it must prove every material allegation to insure conviction. Thus, if an indictment alleges that the accused suborned J. S. of W. to commit perjury, it is not enough to show that he suborned J. S. of X., though the indictment would have been good if the residence of J. S. had not been alleged at all. Commonwealth v. Stone, 152 Mass. 498.

The indictment must, of course, show jurisdiction and venue; i. e., that the act was against the peace of the sovereignty which is instituting the prosecution, and that the court in which the indictment is found also has jurisdiction.

The indictment must state the name of the accused, with such accuracy that there can be no doubt as to who is meant; otherwise he could not avail himself of a former judgment, if he were prosecuted a second time. Commonwealth v. Perkins, 1 Pick. (Mass.) 388. The time and place of the offense must also be stated, though neither need be proved precisely as alleged, unless they are material to the offense, as in the violation of a Sunday law, or in burglary. State v. Caverly, 51 N. H. 446; Rex v. Napper, 1 Moody Cr. C. 44; May's Crim. L. (2d ed.), §§ 98-116; Stark. Crim. Pl. (1st Am. ed.), chap. V.

70. *What is the accurate meaning of the rule that a man shall not be twice put in jeopardy of life or limb for the same offense?*

The rule means that where a man has once been indicted, put on trial in a court of competent jurisdiction, tried and acquitted, or convicted and sentenced, and has acquiesced in the punishment in part or in whole, he can plead the judgment as an absolute bar to another action for the same offense, even if the first indictment was insufficient and the proceedings irregular. Commonwealth v. Land, 3 Metc. (Mass.) 328; Ex parte Lange, 18 Wall. (U. S.) 163.

This is an ancient rule of the common law, which has, however, found its way into the Federal Constitution, and into those of most or all of the States. It has been argued from the words "jeopardy of life or limb," that where such words are used the rule is applicable only in cases of such crimes as are punished by injury to life or limb, but it is universally held, that the rule is applicable to all grades of offenses. Bryans v. State, 34 Ga. 323; Ferris v. People, 48 Barb. (N. Y.) 17. If, however, the act actually constitutes two different offenses, there may be punishment for each. State v. Innes, 53 Me. 536; Commonwealth v. McShane, 110 Mass. 502.

So firmly is this rule established, that a second prosecution is not possible, even though the acquittal of the accused was due to the judge's mistake of law, or the jury's disregard of fact. If the accused, however, be *convicted* by an error of the judge or misconduct on the part of the jury, the verdict may be set aside at his request. The trial is then regarded as not completed, so that the accused may again sit at the bar. Commonwealth v. Sholes, 13 Allen (Mass.), 554.

The rule, however, does not protect from prosecution by another sovereignty, where the same act is a violation of the laws of both, as a conviction can have no *extra*-territorial effect. United States v. Amy, 14 Md. 149, note, 152; State v. Brown, 1 Hayw. (N. C.) 100.

71. *What is meant by the "same offense" in the above rule?*

"To entitle the defendant to this plea, it is necessary, that the crime charged be precisely the same; if the crimes charged in the former and present prosecution are so distinct, that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law, to say that the offenses are so far the same, that the acquittal of the one will be a bar to the prosecution for the other." Where the prisoner might have been convicted on the first indictment by proof of the facts contained in the second indictment, an acquittal on the first is a bar to the second. Burns v. People, 1 Park. C. C. (N. Y.) 182; Commonwealth v. Roby, 12 Pick. (Mass.) 496.

Where, however, under the first indictment, there was an acquittal for variance, in that the venue was improperly stated, or the crime

wrongly described, a new indictment will lie. The two offenses in such cases are not the same. Commonwealth v. Call, 21 Pick. (Mass.), 509; May's Crim. L. (2d ed.), § 122.

Where a person has been tried for an offense, which necessarily includes others of which he might have been convicted under the first indictment, he cannot be tried a second time for those lesser offenses. Thus, a trial and acquittal for robbery is a bar to an indictment for larceny, where property alleged to have been taken is the same. People v. McGowan, 17 Wend. (N. Y.) 386. But on the other hand, a conviction under an indictment for assault, with intent to kill, is no bar to an indictment for murder, as the accused has never met the second charge. See Commonwealth v. Roby 12 Pick. (Mass.) 496; Burns v. People, 1 Park. C. C. (N. Y.) 182.

After an acquittal on an indictment for manslaughter, however, the accused cannot be tried for murder, as the previous acquittal necessarily involved a finding upon the issue of killing, whether with or without malice, in favor of the defendant. State v. Foster, 33 Iowa, 525, 526; 1 Bishop on Criminal Law, chap. 63.

DAMAGES.

I. Nominal Damages.

1. *Define damnum absque injuria.*

The phrase means the damage, pecuniary or otherwise, which a man suffers, owing to the act of another, but which act gives him no right to legal redress; *e. g.*, where a man is damaged by trade competition, or by the proper use of water by riparian owners, or by the lawful use of his neighbor's property. The plaintiff has a right of action only when the defendant has violated some duty owed the plaintiff. Penn. Coal Co. v. Sanderson, 113 Penn. St. 126.

2. *A. enters upon B.'s land by mistake and fertilizes it. Can B. recover in an action of trespass?*

Yes. The violation of a legal right (*injuria*) gives a right to damages, and B. would be entitled to nominal damages here, though he had suffered no real damage whatever, but had been actually benefited. Gile v. Stevens, 13 Gray (Mass.), 146. In the case suggested, such a rule is particularly necessary in order to protect titles from constant trespass. Hathorne v. Stinson, 12 Me. 183. But it applies to all kinds of actions, every *injuria* being held to "import damage." Ashby v. White, 2 Ld. Raym. 938, 955.

Lord Holt there says: "Every injury imports a damage, though it does not cost the party one farthing."

Nominal damages, however, are only granted to affirm an infringed right, not to compensate for any injury, and such an award is not an exception to the underlying principle of damages, that a plaintiff can only recover what he has suffered. 1 Sutherland on Damages (1st ed.), 17.

II. Remote Damages.

3. *How far is a defendant liable for the remote consequences of his act?*

He has no responsibility for such consequences. The rule is well stated in Warwick v. Hutchinson, 45 N. J. Law, 61. "It is a fundamental principle of law applicable alike to breaches of contract of this description, and to torts, that in order to found a right of action there must be a wrongful act done, and a loss resulting from that wrongful act; the wrongful act must be the act

of the defendant, and the injury suffered by the plaintiff must be the natural and not merely a remote consequence of the defendant's act. The wrong done and the injury sustained must bear to each other the relation of cause and effect; and the damages, whether they arise from withholding a legal right, or the breach of a legal duty, to be recoverable, must be the natural and proximate consequence of the act complained of."

But to be natural, it is not necessary that the consequences be such as the defendant could foresee. They need only be of a kind which would be natural. Childress v. Yourie, Meigs (Tenn.), 561.

Where, moreover, another efficient cause intervenes between the defendant's act and the injury, the defendant is not responsible. Marble v. Worcester, 4 Gray (Mass.), 395.

See also on proximate and remote cause, Torts, Ques. 66.

III. PROSPECTIVE AND PERMANENT INJURY.

4. *A. unlawfully diverts the water of a stream so as to injure a riparian owner below. The latter sues for the permanent injury arising from the depreciated value of his land. What would be the measure of his recovery?*

He could recover for his injury only up to the date of the suit. The court will not presume that the defendant will continue his unlawful conduct, after it has been so declared. The first action establishes the plaintiff's right to damages up to that time; subsequent actions must be brought, if the injury continues, and no former action is a bar. Bare v. Hoffman, 79 Penn. St. 71; Uline v. N. Y. C. & H. R. R. R. Co., 101 N. Y. 98, and cases cited.

Where, however, injury results from the erection of structures, such as public works, which from their nature are to be permanent, successive suits need not be resorted to, but the entire damage will be awarded at once. Smith v. R. R. Co., 23 W. Va. 451, 453.

IV. EXEMPLARY OR PUNITIVE DAMAGES.

5. *Under what circumstances should exemplary or punitive damages be awarded?*

Upon strict principles of law, they should never be awarded. The purpose of civil courts is not to punish defendants, but to give the plaintiff such damage as he has suffered. He is entitled to no more, and the defendant should not be required to pay more; and if for reasons of public policy the defendant is to be punished, the infliction of such punishment is within the province of the criminal courts, and the fines imposed do not belong to the plaintiff. Only a few States, however, hold in accordance with these principles; and in most jurisdictions, if a defendant acts with malice or gross negligence or wilfully, punitive damages will be given. Par-

ker v. Shackelford, 61 Mo. 68. The general tendency of the courts, however, is to be more conservative than formerly, in allowing exemplary damages; and in Massachusetts, New Hampshire, Indiana, Nebraska and Michigan, the principle of punishing a defendant by giving the plaintiff more than he is entitled to has been repudiated. Boyer v. Barr, 8 Neb. 68; Stilson v. Gibbs, 53 Mich. 280, 283; Stewart v. Maddox, 63 Ind. 51, 57; Maegher v. Driscoll, 99 Mass. 281, 285; Bixby v. Dunlap, 56 N. H. 456.

Where the defendant has been culpably in the wrong, however, there is always a tendency to be more liberal in awarding damages. "The true rule, as I understand it," said Cushing, J., "is to instruct the jury, that if they find the defendant has been malicious the rule of damages will be more liberal." Bixby v. Dunlap, 56 N. H. 456, 464; Smith v. Holcomb, 99 Mass. 552.

6. *Where, by statute, an action of tort survives the death of tort-feasor, may punitive damages be awarded against his executor?*

No. Even where the courts are most liberal in allowing punitive damages, they will not be allowed against the representatives of the deceased, the object of the rule being, as the courts hold, not to compensate the plaintiff, but to punish the defendant. Sheik v. Hobson, 64 Iowa, 146.

7. *Can a corporation be held liable for punitive damages under any circumstances?*

Yes. In many jurisdictions, punitive damages will be allowed against a corporation for the wrongful act of its agent, acting within the scope of his employment, when such damages could be recovered against the agent himself, even though the corporation was in no moral way responsible for the agent's act, either by original authority or ratification or through negligence in selecting the agent. Atlantic & Great West. R. R. Co. v. Dunn, 19 Ohio St. 162; McKeon v. Citizens R. R. Co., 42 Mo. 79. See also Doss v. Mo., etc., R. R. Co., 59 Mo. 27.

Some of the States, however, adopt the more reasonable rule of refusing to allow punitive damages, except where the corporation has some moral responsibility for defendant's injury. In Cleghorn v. N. Y., etc., R. Co., 56 N. Y. 44, 47, the court said: "For the purpose of this case, the following rule may be laid down as fairly deducible from the authorities, viz.: For injuries by the negligence of a servant, while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages, unless he is also chargeable with gross misconduct." *Cf.* Maisenbacker v. Concordia Society, 71 Conn. 369, holding that the corporation is liable for punitive damages only when it has authorized or ratified the act of misconduct.

V. LIQUIDATED DAMAGES.

8. *Under what circumstances may a provision in a contract for liquidated damages be enforced? When may a penalty be collected?*

When a sum is fixed upon by the parties to a contract as a fair measure of the damages which will be sustained by a breach of that contract, and especially when liquidated damages are agreed to, because of the nature of the contract, the uncertainty of proof of damage, or the difficulty of calculating it, the courts will enforce the provisions. Streeper v. Williams, 48 Penn. St. 450, 454. As where A. agrees to pay a fixed sum in case of failure to exchange or sell real estate. Gammon v. Howe, 14 Me. 250; Mead v. Wheeler, 13 N. H. 351. So also in a contract not to carry on a certain business. Dunlop v. Gregory, 10 N. Y. 241.

Where, however, the parties merely provide for a penalty in case of nonperformance, the courts will never enforce it.

"The great object of this system (compensation) is to place the plaintiff in as good a position as he would have had, if his contract had not been broken. So long as parties themselves keep this principle in view, they will be allowed to agree upon such a sum as will probably be a fair equivalent of a breach of contract. But when they go beyond this, and undertake to stipulate, not for compensation, but for a sum out of all proportion to the measure of liability which the law regards as compensatory, then the law will not allow the agreement to stand. In all agreements, therefore, fixing upon a sum in advance as the measure or limit of liability, the final question is, whether the subject of the contract is such that it violates this fundamental rule of compensation. If it does so, the sum fixed is necessarily a penalty." Sedgwick on Damages (8th ed.), § 406.

The general result of the authorities has been correctly stated to be, that "when the injury is susceptible of definite admeasurement, as in all cases where the breach consists in the nonpayment of money, the parties will not be allowed to make a stipulation for a greater amount, whether in the form of a penalty, or of liquidated damages." Bispham's Eq. (3d ed.) 234. And cf. Equity, Ques. 15.

9. *A. agrees to have the work on a railroad bridge completed by a certain day, and to be liable for* $1,000 *per week as liquidated damages for failure to complete the work. Is the provision for damages binding?*

Yes. This is one of the class of cases where, from the nature of the contract, the damages cannot be computed with any degree of certainty, and the courts will enforce the payment of the stipulated sum as liquidated damages. Texas, etc., R. R. Co. v. Rust, 19 Fed. Rep. 239; Wolf v. Des Moines, etc., R. R. Co., 64 Iowa, 380; Curtis v. Brewer, 34 Mass. 513.

VI. BREACHES OF CONTRACT.

10. *A. and B. enter into a contract for the sale and purchase of real estate. What is the measure of damages in case of a failure to perform?*

If the vendee will not accept title when offered, the measure of damages is the difference between the price agreed to be paid for the land and the salable value of the land at the time the contract was broken. Old Colony R. R. Co. v. Evans, 6 Gray (Mass.), 25, 34.

If the vendor conveys away title or refuses to convey to the purchaser, he also will be liable in substantial damages. Wilson v. Spencer, 11 Leigh (Va.), 261. The measure of damages in that case would be the difference between the contract price and the market value of the land at the time when the conveyance should have been made. Drake v. Baker, 34 N. J. Law, 358.

Where, however, the vendor is unable to make a good title the courts differ as to the measure of damages allowed. Some hold that the vendor is liable only for nominal damages, when he is unable to make good title through no fault of his, but hold him to substantial damages, if there is fraud. Cockroft v. N. Y., etc., R. R. Co., 69 N. Y. 201; Tracy v. Gunn, 29 Kan. 508.

In several States, however, no distinction is taken, and substantial damages are allowed in all cases of breach, whether arising from bad faith, or inability to convey, on the part of the vendor. The courts so holding, are Maine, Indiana, Massachusetts, Iowa, Maryland, Rhode Island, and Illinois. See Case v. Wolcott, 33 Ind. 5; Hopkins v. Lee, 6 Wheat. (U. S.) 109; 5 Am. & Eng. Ency. (1st ed.) 28, note 3, cases cited.

11. *A. agrees to sell B. certain goods at a specified time and place. B. refuses to take the goods. What remedy or remedies has A.?*

He has a choice of three remedies: "(1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may sell the property, acting as the agent, for this purpose, of the vendee, and recover the difference between the contract price and the price obtained in such resale; or (3) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price." Dustan v. McAndrew, 44 N. Y. 72, 78; Ames v. Moir, 130 Ill. 582, 592; 2 Sedgwick on Damages (8th ed.), § 750 et seq.

Where there is no market at the place of delivery, evidence of the value of the goods in the nearest market determines the question. East Tenn. R. R. Co. v. Hale, 85 Tenn. 69; Washington Ice Co. v. Webster, 68 Me. 449, 463. The market price, however, does not always determine

the market value of the goods. Where there is an inflated speculative market the actual market value is the standard, and this may be ascertained by the price before or after the day of delivery. Kountz v. Kirkpatrick, 72 Penn. St. 376, 388.

12. *The paintiff bought cabbage seed from defendant, which was warranted to produce "Bristol cabbages." What would be the measure of damages for a breach of the warranty?*

The plaintiff could recover the value of a crop of "Bristol cabbages," such as would ordinarily have been raised that year, less the expense of raising the crop and the value of the crop actually raised. Passinger v. Thorburn, 34 N. Y. 634; White v. Miller, 78 id. 393. In such a case the profit to be made is really the only thing purchased, and is properly made the measure of damages. Wood's Mayne on Damages, 82.

13. *A. contracts to sell and deliver certain goods to B. at a fixed price. A. fails to deliver. What is the measure of damages? Suppose the goods have been paid for in advance?*

Where the goods have not been paid for, the measure of damages is plain on principle and authority. "It is, no doubt, quite settled that, on a contract to supply goods of a particular sort, which at the time of the breach can be obtained in the market, the measure of damages is the difference between the contract price and the market price at the time of the breach." Blackburn, J., Elbinger v. Armstrong, L. R. 9 Q. B. 473, 476.

Where, however, the price has been paid in advance, the courts are divided. In some jurisdictions it is held that the purchaser having lost the use of his money should be allowed as damages the best price he could have obtained for the property, at any time up to the time of the trial. It is considered just that as the seller alone is in fault, he should run the risk of the fluctuations. This rule obtains in California, Connecticut, Iowa, Indiana, Texas, and New York. 21 Am. & Eng. Ency. 620.

Even in these jurisdictions, however, a purchaser would probably not be allowed to delay bringing a suit for an unreasonable time, in order to speculate upon the market at the expense of the seller. Clark v. Pinney, 7 Cow. (N. Y.) 681. And in Heilbroner v. Douglass, 45 Tex. 402, it was held that this rule would not apply when the circumstances of the case made it inequitable.

The States opposing this rule, and advocating the regular rule, based upon the market price at the time of delivery called for in the contract, are Pennsylvania, Vermont, Maine, New Hampshire, Illinois, Michigan, Colorado, Kentucky, Tennessee, Mississippi, Louisiana. 21 Am. & Eng. Ency. 621, 622.

VII. PROFITS.

14. *A. agreed to print show bills for B. before his arrival in town, but failed to do so, and, as a result, B.'s circus was not advertised. B. sues for the profits he would naturally have made had the advertising been done. Can he recover on that basis?*

No. His measure of damages is the difference between the contract price for the printing and what he had to pay to effect, as far as possible, the same amount of advertising, by the means which he actually used. Great West., etc., Co. v. Tucker (Iowa), 34 N. W. Rep. 205.

15. *A. agrees to employ B. as his agent for one year at a salary of* $1,500, *but dismisses him at the end of six months without good reasons. What would be the measure of B.'s damages?*

A. may wait until the expiration of the year, and then recover the entire balance of salary due, less what he has or might reasonably have earned during that time elsewhere. Howard v. Daly, 61 N. Y. 362. He must not remain idle needlessly for the purpose of recovering the entire amount. Howard v. Daly, 61 N. Y. 362, 371. But on the other hand, he is only bound to seek like employment for the purpose of reducing damages, and cannot be required to undertake some other trade or calling. Fuchs v. Koerner (N. Y.), The Reporter, February 1, 1888.

VIII. INJURY TO PROPERTY.

16. *A., owing to an erroneous survey, mines coal from B.'s land. B. sues for the value of the coal at the mouth of the mine. Can he recover?*

No. The most that he could recover in any jurisdiction would be the value of the coal *after* severance and before it was put upon the mine cars. Blaen Avon Coal Co. v. McCulloh, 59 Md. 403; Moody v. Whitney, 38 Me. 174. See also Tilden v. Johnson, 52 Vt. 628. The same view is held in North Carolina, California and Illinois. 5 Am. & Eng. Ency. (1st ed.) 36, note 2, cases cited.

The most general rule, however, is that the plaintiff can recover only actual compensation, measured by the value of the coal *in place* and such other damage to the land as the mining may have caused. That is full compensation, and does not place upon the innocent trespasser the hardship of forfeiting the cost of his labor in mining the coal. Herdic v. Young, 55 Penn. St. 176; Winchester v. Craig, 33 Mich. 205.

17. *A. cut and carried away B.'s timber. What would be the measure of damages?*

The amount of recovery would depend upon the animus of the defendant. (1) Where the defendant is a wilful trespasser the

plaintiff may recover the full value of the property at the time and place of demand, or of suit brought, with no deduction for the defendant's labor or expense. (2) Where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the measure of damages is the value at the time of conversion; or if the conversion sued for was after value had been added to it by the work of the defendant, the value less the cost of such improvement. (3) Where he is a purchaser without notice from a wilful trespasser, the value at the time of such purchase. Woodenware Co. v. U. S., 106 U. S. 432; Winchester v. Craig, 33 Mich. 205. See Pers. Prop., Ques. 4, for remedy in replevin.

IX. INJURY TO PERSON.

a. Not Causing Death.

18. *What are the elements of damage in cases of personal injury not causing death?*

When punitive damages are not given, the elements of damage to be considered are (1) the plaintiff's loss of time from his business or employment; (2) his loss of capacity to perform the kind of labor for which he is fitted; (3) the expense he has incurred for medical services, nursing, etc., and (4) the mental pain he has suffered and any insult and indignity involved in the injury. 5 Am. & Eng. Ency. (1st ed.) 40.

19. *A., when about to cross a railroad track, receives a severe mental shock by the passing of a train. The employee of the railroad company negligently failed to signal the fact that the train was approaching, but A. was in no way physically injured. Has A. any right of recovery?*

The weight of authority is overwhelmingly in favor of the position that no recovery can be had, where there is no *physical* injury or contact in connection with the mental suffering. Indianapolis, etc., R. R. Co. v. Stables, 62 Ill. 313. In that case the court said (p. 321): "The mental anguish which would not be proper to be considered is where it is not connected with the bodily injury." See also Canning v. Williamstown, 1 Cush. (Mass.) 451.

There is, however, a tendency at present in some of the courts to allow a recovery for mental suffering purely, and the theory of the law of damages would seem to justify these cases. Once it is clearly established that any injury has been done, its nature should not preclude recovery. See 1 Sedgwick on Damages (8th ed.), § 43 et seq.

In practical accordance with this view is Craker v. Chicago, etc., R. R. Co., 36 Wis. 657; s. c. 9 Am. Ry. Rep. 118, in which the plaintiff was given a verdict of $1,000, for the insult of a conductor of the defendant company in kissing her. In this case, however, there was the technical physical contact.

20. *A.'s arm was broken through the negligence of the defendant company. The defense is that the arm would not have been broken but for a previous break which had not been properly healed, and that the amount of damages must, at least, be reduced. What should be the judgment?*

Judgment should be for the plaintiff for the full amount of the injury. The physical condition of a passenger, or of any other plaintiff, whether known to the defendant or not, in no way affects the question of liability or the measure of damages. Allison v. Chicago, etc., R. R. Co., 42 Iowa, 274. See also Brown v. Chicago, etc., R. R. Co., 54 Wis. 342.

In personal injuries, however, as in other cases, the injured person must take reasonable care to mitigate the consequences of the injury, and if the injury is aggravated or becomes permanent through neglecting to take such care, he cannot recover for the injury arising from such neglect. R. R. Co. v. Pennell, 94 Ill. 448. But if the plaintiff use reasonable care in employing a physician, the damages will not be mitigated by the fact that a more skillful physician could have prevented the aggravation of the injuries. Collins v. Council Bluffs, 32 Iowa, 324, 329; Stover v. Bluehill, 51 Me. 439.

b. Causing Death.

21. *What is the measure of damages in statutory actions by survivors in case of personal injuries causing death?*

The measure of damages is compensation for the pecuniary loss of the survivors, arising from the death of the deceased. The circumstances to be considered are the age of the deceased, the amount of his earnings, his habits, health, capacity for labor, and probable duration of life. Macon, etc., R. R. Co. v. Johnson, 38 Ga. 409, 434.

The loss of the plaintiffs must be a pecuniary one, and nothing is added as *solatium* for injury to the feelings of the survivors. Chicago, etc., R. R. Co. v. Harwood, 80 Ill. 88.

But loss of intellectual and moral training and proper nurture of a child, and the loss of her husband's care and protection by a widow, were held to be pecuniary loss. Tilley v. N. Y., etc., R. R. Co., 24 N. Y. 471; Atchison v. Twine, 9 Kan. 350.

It is not necessary that the survivors should have a *legal right* to support by the deceased, if they have been actually receiving aid from him and have a right to expect it. R. R. Co. v. Barron, 5 Wall. (U. S.) 90. But on the other hand, if the next of kin are not dependent upon the deceased for support, either in part or in whole, they can only recover nominal damages. Chicago, etc., R. R. Co. v. Sweet, 45 Ill. 197.

When the deceased is a minor child, the parent recovers the value of the child's services during minority, less the expense of his support. Ewen v. R. R. Co., 38 Wis. 613, 623.

X. SLANDER AND LIBEL.

See Torts, Ques. 29-35.

22. *What facts are to be considered by the jury in assessing damages in actions of slander and libel?*

"They are to consider the plaintiff's injured feelings and tarnished reputation, taking into consideration the nature of the imputation, the extent of its publicity, the character, condition and influence of the parties." 3 Sutherland on Damages, 645.

The defendant's social position may be shown, upon the theory that the injury is increased when the words are spoken by one of influence in the community. Humphries v. Parker, 52 Me. 502, 507. So, too, the wealth of the defendant may be shown. Trimble v. Foster, 87 Mo. 49.

The defendant may show facts tending to prove the truth of the words, although not amounting to justification, to disprove malice. Huson v. Dale, 19 Mich. 17, 36; s. c., 2 Am. Rep. 66.

XI. MALICIOUS PROSECUTION.

23. *What are the elements of damage in actions for malicious prosecution?*

The elements are: (1) "Damages to a man's fame, as if the matter whereof he be accused be scandalous; (2) Damages to the person, where a man is put in danger to lose his life or limb, or liberty; (3) Damages to a man's property, as where he is forced to spend money in necessary charges to acquit himself of the crime." Savile v. Roberts, 1 Ld. Raym. 374. (4) Any special damage may also, of course, be recovered.

For injury to the reputation the same elements are to be considered as are proper in the case of slander and libel. Sheldon v. Carpenter, 4 N. Y. 579.

XII. SPECIAL DAMAGES.

24. *A. brings suit for the wrongful detention of his horse and seeks to recover damages for the horse's loss of flesh during detention, without alleging the facts specially. Can he so recover?*

No. Special damages which may be the natural, but are not the necessary, results of the act complained of must be specially alleged in order that the defendant may know the nature of the claim against him. Stevenson v. Smith, 28 Cal. 103; Roberts v. Graham, 6 Wall. (U. S.) 578, 579.

25. *A., in bringing suit, claims to have been damaged to the amount of* $1,000, *and on the trial gets a verdict for* $1,500. *Can the verdict be modified?*

The amount claimed by the plaintiff in his declaration is the limit of his recovery, and if a verdict is rendered for a greater sum it will be error, unless the plaintiff enters a remittitur for the excess. 2 Sedgwick on Damages (8th ed.), § 1258; Enoch v. Mining & P. Co., 23 W. Va. 314.

And in cases where the amount of the verdict does not exceed that demanded, a new trial may be granted where the damages awarded are so excessive as to show passion, prejudice or incorrect appreciation of the law applicable to the case. Sedgwick on Damages (8th ed.), §§ 1320, 1321.

In New York, however, the Court of Appeals will not now consider the question of excessive damages, in cases of negligence. Gale v. N. Y. C., etc., R. R. Co., 76 N. Y. 594; Link v. Sheldon, 136 id. 1, 5.

A verdict may also be set aside, where the damages are insufficient, on the application of the same principles, as in the case of excessive damages. Sedgwick on Damages (8th ed.), § 1326. But see Pritchard v. Hewitt, 91 Mo. 547; "A new trial will not be granted solely on the ground of the smallness of the damages recovered."

If no other right is infringed by the verdict than that of nominal damages, a new trial will not be granted. But it is otherwise if nominal damages are necessary to vindicate a contested right or to carry costs. Eaton v. Lyman, 30 Wis. 41.

XIII. EVIDENCE.

26. *A physician sues for personal injuries and seeks to base the amount of damages to be recovered upon a statement showing his earnings before and after the injury. Is such evidence admissible?*

Such evidence would not be admissible for the purpose stated. The utmost care should be taken in the manner in which evidence is presented. Frequently testimony which is inadmissible for one purpose is unobjectionable for other purposes, and here, this same evidence would be admitted, if offered, not as a measure of damages, but to show the value of the time lost and the extent of the injury sustained. It is too uncertain as a basis for awarding damages, but is of assistance to the jury in determining the extent of the injury. Logansport v. Justice, 74 Ind. 378; Bierbach v. Goodyear Rubber Co., 54 Wis. 208; s. c., 41 Am. Rep. 19. See also International, etc., R. R. Co. v. Irvine, 64 Tex. 529.

DOMESTIC RELATIONS.

I. Marriage.

1. *Define marriage.*

Marriage, in the consideration of law, is a civil contract whereby a man and woman mutually engage with each other to live together during life in the relation of husband and wife. The act of marriage having been entered into the word comes afterward to denote the relation itself. Schouler, Domestic Relations, § 22.

a. Reality of Consent.

2. *A. upon a return from an excursion with B. and a number of friends in jest challenged B. to marry her. The ceremony was thereupon performed in accordance with law by a justice of the peace who happened to be present. Was there a valid marriage?*

No, there was no intent to enter into the marriage relation, and the ceremony, although legally performed, did not effectuate a valid marriage. McClurg v. Terry, 21 N. J. Eq. 225. The consent must be in legal contemplation of marriage. State v. Walker, 36 Kan. 297, 312, 323. And the parties to this agreement must contemplate the present assumption of the marriage state. Peck v. Peck, 12 R. I. 485, 488.

3. *A. and B. signed an agreement as follows: "We, the undersigned, hereby enter a copartnership on the basis of the true marriage relation, which shall continue so long as mutual affection shall exist." The parties subsequently lived together as husband and wife. Does this constitute a valid marriage?*

No, there was no consent to enter the marital relation defined by law. The contracting parties to a marriage do not define their relations toward each other; they simply consent to a new relation, the rights and obligations of which rest, not upon their agreement, but upon the general law of the state. Peck v. Peck, 155 Mass. 479; Adams v. Palmer, 51 Me. 480, 483.

4. *A. and B. are engaged to be married. B. stated that he did not believe in the marriage ceremony, and A. consented to waive it. B. thereupon placed upon her finger a ring, saying "This is your wedding ring; you are married." They therefore commenced living together as husband and wife. Are the parties legally married?*

Yes, this constitutes a binding common-law marriage, which is valid without solemnization unless expressly invalidated by statute. Bissell v. Bissell, 55 Barb. (N. Y.) 325.

5. *Would such a marriage have been binding without consummation?*

Yes, a consummation is not necessary to the validity of marriage *per verba de praesenti,* but the marriage takes effect upon the assumption of the mutual agreement. Dumaresly v. Fisly, 3 A. K. Marsh. (Ky.) 368, 377; Jewell v. Jewell, 1 How. (U. S.) 219, 234.

6. *Can a marriage be formed by a future agreement to marry, followed by cohabitation?*

The weight of authority is to the effect that cohabitation in this instance is mere illicit intercourse, and no marriage is consummated unless the cohabitation is with the express purpose of consummating the marriage, thereby changing it to a marriage *per verba de praesenti.* Chaney v. Arnold, 15 N. Y. 345; Stolz v. Doering, 112 Ill. 234, 240. The cohabitation is, however, *prima facie* proof of a present marriage. Dumaresly v. Fisly, 3 A. K. Marsh. (Ky.) 368. Some public recognition of the fact of marriage must also be made, to give effect to an informal marriage. Maryland v. Baldwin, 112 U. S. 490, 494; Dalrymple v. Dalrymple, 2 Hag. Con. 54, 76.

b. Solemnization.

7. *The statutes of the state prescribe certain forms and acts of solemnization in regard to marriage. What effect does such a statute have upon a common-law marriage?*

Statutes of this character are held to be directory unless they expressly provide that marriages are illegal without compliance with the forms prescribed. Meister v. Moore, 96 U. S. 76; Port v. Port, 70 Ill. 484, 486. Under statutes declaring marriages void which are not in conformity with its provisions, there is a presumption of law that the marriage is regular, and the burden of proving the contrary is upon the party denying the marriage. Franklin v. Lee, 30 Ind. App. 31.

c. Parties to the Marriage Contract.

I. IN GENERAL.

8. *What persons are qualified marry?*

Any person of sufficient understanding to comprehend the nature of the marriage relation, above the age of consent fixed by common law at fourteen years for males and twelve for females, may enter into a contract of marriage. Schouler, Domestic Relations, §§ 15, 20. Marriages between infants under the age of consent are inchoate and may be disaffirmed upon arriving at maturity. Parton v. Hervey, 1 Gray (Mass.), 119; Holtz v. Dich, 42 Ohio St. 23, 29.

II. MENTAL INCAPACITY.

9. *An imbecile over twenty-one years of age went away secretly and was married. Was the marriage valid?*

No, an imbecile does not possess a sufficient capacity of mind to understand the nature of the marriage agreement, and is in-

capable of binding himself by his act. True v. Ranney, 21 N. H. 52. Marriage as a civil contract like any other contract requires a sufficient capacity of mind to give intelligent consent. Turner v. Meyers, 1 Hag. Con. 414, 417. So an insane person is incapable of making a binding contract of marriage. Atkinson v. Medford, 46 Me. 510. Such a marriage is void, not voidable, though the parties live together, and although a woman should marry a man of unsound mind and live with him to his death, she would not thereby be entitled to dower. Jenkins v. Jenkins, 2 Dana (Ky.), 103. The burden of proof, however, is upon the person alleging the unsoundness of mind, as the law presumes all persons to be of sound mind until the contrary is proved. Banker v. Banker, 63 N. Y. 409. A prior judgment of lunacy is not conclusive as to the question of insanity at the time of marriage. McClurg v. Barcalow, 60 Ohio Cir. Ct. 537.

III. CONSANGUINITY AND AFFINITY.

10. *What is the rule as to marriage between relatives?*

In England the Statute of 32 Henry VIII. had the effect of fixing the degrees of consanguinity in accordance with the Levitical rule, forbidding marriages between relatives nearer than first cousins. This is the common rule of this country except where statute law has changed the rule. 1 Bishop on Marriage, Divorce and Separation, §§ 737, 749. This restriction of the English law extends to relationship by affinity, a rule which has been abrogated, however, in this country on the theory that death of the spouse is the termination of all relationship by affinity. Paddock v. Wells, 2 Barb. Ch. (N. Y.) 331. In England the rule has been altered by Stat. 7, Edward VII, chap. 47, providing that a marriage heretofore or hereafter contracted between a man and his deceased wife's sister shall not be void or voidable as a civil contract by reason of such relationship.

IV. PREVIOUS CHASTITY.

11. *A husband seeks to annul a marriage for incontinence on the part of his wife twenty years prior.*

(a) *Can he succeed?*

(b) *If the woman had been pregnant at the time of marriage, would it have been cause for annulment?*

(a) No, the fraud which will invalidate a marriage is such as negatives the consent to be married and must operate to destroy the intelligent consent which is required for marriage itself. Leavitt v. Leavitt, 13 Mich. 452. And the general rule is that misrepresentation as to previous character will not avoid a marriage. 1 Bishop on Marriage, Divorce and Separation, § 480.

(b) When a woman who represents herself as chaste is pregnant at the time of marriage, the concealment and fraud go directly to the essence of the marriage contract and afford cause for annulment. Reynolds v. Reynolds, 3 Allen (Mass.), 605, 609. But when

the husband has been guilty of illicit intercourse with a woman and is induced to marry her by assurance that the child is his, he will not be allowed to avoid the marriage even though he is not the father. Foss v. Foss, 12 Allen (Mass.), 26. And a presumption in law exists to the effect that the husband is the father of the child. Baker v. Baker, 13 Cal. 87.

d. Duress.

12. *When will duress avoid a marriage?*

The general rule is that such an amount of force as might naturally overcome one's free volition and inspire terror will render the marriage null. Schouler on Domestic Relations, § 23. The force need not be physical, and may arise from the relations of the parties, as where one acting as the guardian of a young girl compels her to marry without her free consent. Harford v. Morris, 2 Hag. Con. 423.

13. *A man is lawfully arrested on a process for bastardy and thereupon marries the complainant. Is the marriage void as being under duress?*

If the process is lawful, he is bound by his act. State v. Davis, 79 N. C. 603; Jackson v. Winne, 7 Wend. (N. Y.) 47. If, however, the process is void or the imprisonment unlawful, the marriage may be annulled. Bassett v. Bassett, 9 Bush (Ky.), 696. In general, the test seems to be whether from natural weakness or force either party is actually in a state of mental incompetence to resist pressure improperly brought to bear. Portsmouth v. Portsmouth, 3 Eng. App. 154, 156.

e. Conflict of Laws.

14. *Is the validity of the marriage governed by the law of the domicile of the parties or the place where it is celebrated?*

The *lex loci contractus* governs the validity of the marriage, which if legally contracted is good anywhere, even though it be invalid by the laws of the domicile of the parties. Commonwealth v. Kenny, 120 Mass. 87; Pearson v. Pearson, 51 Cal. 120.

II. DIVORCE.

a. Legislative Divorce.

15. *A husband left his wife and went into another state where by a special act of the legislature he was divorced from his wife. Is such a divorce good?*

Yes, the right to grant a divorce is within the legislative power. Maynard v. Hill, 125 U. S. 190. This power was first recognized by the common law of England as within the power of Parliament. Cooley on Const. Lim., par. 664. And the right has been generally recognized by the courts of this country. Cronise v. Cronise, 54

Pa. St. 255. "For more than one hundred years prior to the Revolution and many years thereafter a legislative act was the only means of obtaining a divorce in the State of New York." 2 Kent, Comm. 97.

16. *Does a special act of divorce impair the obligation of a contract under the Constitution of the United States?*

No, marriage is a contract in its inception, but having been entered into it becomes a relation and determined by the laws of the state. Adams v. Palmer, 51 Me. 481. In discussing this question the courts have followed the dicta of Judge Marshall and Judge Story in Dartmouth College v. Woodward, 4 Wheat. 518, to the effect that a legislative divorce does not impair the obligation of a contract within the purview of ar cle X of the Federal Constitution. In accordance with this reasoning it is the rule that the relative rights of husband and wife are subject at all times to changes by the laws of the state. Noel v. Ewing, 9 Ind. 37. *Contra* to this is the rule in Clark v. Clark, 10 N. H. 380, that a law changing the grounds of divorce in such a manner as to make them applicable to cases existing before the passage of the law, was retrospective and void.

b. Jurisdiction.

17. *A husband deserts his wife and she establishes a residence in another state and sues there for divorce.*

(a) *Has the court jurisdiction?*

(b) *Can the court decree alimony?*

(a) The general rule is the domicile of the husband is the domicile of the wife, but when he by committing an offense against the marriage relation or by dereliction of duty affords ground for divorce, the wife may establish an independent domicile. Ditson v. Ditson, 4 R. I. 87; Tolen v. Tolen, 2 Blackf. (Ind.) 406.

(b) This would depend upon whether the court had jurisdiction of the person of the defendant. If the defendant is not within the jurisdiction, the remedy is confined to a dissolution of the marriage, and no judgment for alimony can be enforced in any other jurisdiction. Lytle v. Lytle, 48 Ind. 200; Cooley, Const. Lim., par. 406.

18. *A wife deserts her husband and leaves the domicile of the marriage. The husband thereupon procures a divorce by default on the ground of desertion. Subsequently, in the courts of another state the wife institutes a suit against the husband, with a claim for alimony. The husband pleads in bar the prior decree. Is his plea good?*

Yes, the courts of the state of the marriage domicile had full power over the marriage relation and its judgment, and, under article IV, section 1, of the Constitution of the United States,

the courts of other states are obliged to give it full faith and credit. Atherton v. Atherton, 181 U. S. 155. The force of this judgment depends upon the fact of the domicile of matrimony, and if husband or wife desert the domicile of matrimony and establish an independent domicile in another state and under the laws of the latter state obtain a decree of divorce upon constructive service, the courts will not be obliged to give to the judgment full faith and credit, and the validity of the judgment is simply a matter of comity. Haddock v. Haddock, 201 U. S. 562. An exception to this rule is made in the case where the courts of a state acquire jurisdiction over both parties, even though it has no jurisdiction over the domicile of matrimony. In that instance, the judgment of the court is entitled to full faith and credit in the courts of other states. Cheever v. Wilson, 9 Wall. 108.

c. Cruelty.

19. *Define legal cruelty?*

Legal cruelty is such conduct as will endanger life, limb or health or creates a reasonable apprehension of bodily hurt. Odom v. Odom, 36 Ga. 386.

20. *A husband systematically treated his wife in such a manner as to make her life unhappy, although no physical force was used. His conduct seriously imperiled her health. Is such conduct ground for divorce upon an allegation of cruelty?*

Yes, if force, either physical or moral, is used to such an extent as to endanger the health, it is legal cruelty. Kelly v. Kelly, 2 P. & D. 31; Carpenter v. Carpenter, 30 Kan. 744. Mere turbulence of temper or petulance is not sufficient. Evans v. Evans, 1 Hag. Con. 35. Nor will conduct which inflicts mental suffering, however grievous, justify a divorce if it is not accompanied by injury to health. Barnes v. Barnes, 95 Cal. 171.

d. Desertion.

21. *A husband being unable to support his wife she left him by consent and all communication ceased. Is she entitled to a decree on the ground of desertion?*

No, the abandonment must be wilful and with intent to desert the wife. Ingersoll v. Ingersoll, 49 Pa. St. 249. For this reason a deed of separation has been held a good defense to a suit for divorce on the grounds of desertion. Crabb v. Crabb, L. R., 1 P. & D. 600.

22. *A statute provides that a divorce may be granted upon two years' desertion. A wife deserts her husband and after ten years offers to return and live with him. He subsequently petitions for a divorce. Is the repentance and offer to return a bar to his suit?*

No, the desertion having extended over the statutory period, the husband is not obliged to receive back his wife, nor does her re-

pentance obliterate the offense. Benkert v. Benkert, 32 Cal. 467. If the repentance had occurred before the expiration of the two years, it would have been a defense to the action. Gaillard v. Gaillard, 23 Miss. 152.

23. *When will ill treatment be a defense to a suit for divorce upon the ground of desertion?*

Ill treatment on the part of the complainant may justify the defendant in leaving the house of the complainant, even though not exercised to such an extent as to justify the defendant in seeking a divorce on the ground of cruelty. Lyster v. Lyster, 111 Mass. 327. But mere incompatibility of temper will not justify a desertion. Boyce v. Boyce, 23 N. J. Eq. 337, 348.

e. Default, Collusion and Connivance.

1. DEFAULT.

24. *What is the effect on default in an action for divorce?*

Default has no effect whatever; it neither supersedes the burden of proof nor lightens the burden resting on the complainant to prove the allegations of his complaint. Mortimer v. Mortimer, 2 Hag. Con. 310. Even the actual confession of a party will not be sufficient if unsupported by other evidence. Holland v. Holland, 2 Mass. 154. In a subsequent case it was held that if the confession is corroborated by facts which preclude a possibility of collusion, the confession may be sufficient. Billings v. Billings, 11 Pick. 461.

2. COLLUSION.

25. *In a case where justifiable cause for divorce exists, the parties enter into an agreement to procure a divorce. Is the agreement a bar to the suit?*

Yes, an agreement of this nature is held to be conclusive proof of collusion. Churchyard v. Churchyard, L. R. 1895, P. & D. 7. And where a person commits an offense for the purpose of furnishing ground for divorce, the court will presume collusion. Todd v. Todd, L. R., 1 P. & M. 121.

3. CONNIVANCE.

26. *A husband, without any agreement with his wife, places temptation in her way and then causes her actions to be watched for the purpose of obtaining a divorce. Are his actions a bar to the suit?*

Yes, the law forbids a husband to connive for his wife's downfall and then take advantage of it in a suit for divorce. Morrison v. Morrison, 136 Mass. 310. Mere knowledge of the actions of the wife without encouragement do not constitute connivance. Cochran v. Cochran, 35 Iowa, 477; Wilson v. Wilson, 154 Mass. 194.

f. Condonation and Recrimination.

27. *If a husband knowing of an offense which would justify a divorce condones the act, can he thereafter sue for divorce, alleging this act as a ground for his action?*

No, the condonation in law affords a presumption of forgiveness and bars a suit, Shackleton v. Shackleton, 48 N. J. Eq. 364, the presumption of forgiveness by condonation, however, extending only to offenses known to the other party. Alexander v. Alexander, L. R., 8 P. & D. 146. The defense of condonation is based upon the implication that the offense will not be repeated, and a subsequent breach revives the original cause of action. Robbins v. Robbins, 100 Mass. 150.

28. *A husband sues for divorce, alleging the adultery of his wife. She sets up the defense of legal cruelty. Both allegations are proved. What judgment should be given?*

The petition of divorce should be dismissed. It is the universal law that recrimination is accepted as a valid defense for a petition to divorce. 1 Bishop on Marriage, Divorce and Separation, § 338. And this without regard to the priority of the offense, so long as they are both recognized as causes for divorce. Pease v. Pease, 72 Wis. 136. The rule of condonation applies also to the defense of recrimination and the condoned offenses may not be set up in bar. Cumming v. Cumming, 135 Mass. 386.

III. HUSBAND AND WIFE.

a. The Incapacity of a Married Woman at Common Law to Contract or Convey Property.

29. *What is the effect of the contracts of a married woman at common law? Are they void or voidable?*

They are void, and no suit against her upon contract will lie. Lee v. Lanahan, 59 Me. 478. And if, subsequent to her husband's death, she makes a new promise to fulfill an engagement entered into during coverture, she will not be bound, because the original engagement is void, and therefore a new promise cannot raise an assumpsit. Lloyd v. Lee, 1 Strange, 94. An exception to this rule occurs in the instance of a wife deserted and renounced by her husband, in which instance she is recognized in law as a *feme sole*. Gregory v. Pierce, 4 Metc. (Mass.) 478; Moore v. Stevenson, 27 Conn. 14.

30. *A married woman bought a tract of land and mortgaged it back to the grantor for part of the purchase money. Was the mortgage deed good?*

No, a *feme covert* is incapable of conveying estate at common law and her deed is void. Coke Littleton, 42; Concord Bank

v. Bellis, 10 Cush. 276. If the husband had joined in the deed, an effectual conveyance of the land would have been made. Bartlett v. Bartlett, 4 Allen, 440.

31. *Can equity afford relief in validating a deed of a married woman?*

No, the deed is void *ab initio,* and therefore equity can obtain no jurisdiction to afford relief. Townsley v. Chapin, 12 Allen, 476. An exception to this occurs in transactions which the husband is a party to and by mistake fails to sign the deed, in which instance a court of equity may reform the deed and compel him to supply his signature. Kennard v. George, 44 N. H. 440. The same general rule applies to a devise by a *feme covert.* Her devise is void even though the husband assent. Marston v. Norton, 5 N. H. 205.

32. *Can a married woman enforce a suit at law?*

No, a married woman at common law was incapable of becoming a party to an action at law. Boggett v. Frier, 11 East, 301. An exception to this rule occurs where a wife by abandonment or divorce *a mensa et thoro* acquires the rights to contract as a *feme sole,* when she may enforce her rights at law. Pierce v. Burnham, 4 Metc. (Mass.) 303; Gregory v. Paul, 15 Mass. 31.

b. The Husband's Right to the Property of his Wife.

1. REAL ESTATE.

33. *What right has the husband in the real estate of his wife?*

At common law the husband upon marriage was seized of the freehold in the real estate of his wife and the usufruct was his during their joint lives, and his use was liable for his debts. Litchfield v. Cudworth, 15 Pick. 23. This estate terminated at the death of the wife unless a child was born alive during coverture when the husband had an estate by curtesy for life.

2. PERSONAL ESTATE.

34. *What are the rights of the husband in the chattels of the wife?*

The personal property of the wife held in her own right vested absolutely in the husband, who could dispose of it as he pleased. Jordan v. Jordan, 52 Me. 320; Blanchard v. Blood, 2 Barb. (N. Y.) 352. The right to her choses in action is not absolute, but conditioned upon reducing them to possession during coverture. Trott v. Colwell, 31 Pa. St. 228, 232; Hayward v. Hayward, 20 Pick. 517, 520. If the wife dies before the choses in action are reduced to possession, this right in the husband terminates and the choses go to the representative of the wife. Leakey v. Maupin, 10 Mo. 368. And likewise if the husband dies first, the choses in action remain the property of the wife and his personal representatives have no title to them. Needles v. Needles, 7 Ohio St. 432.

c. Wife's Separate Estate in Equity.

35. *How is the separate estate of a married woman created?*

A wife's separate estate in equity is created by a trust vesting in the wife the equitable title for her sole and separate use. Bispham, Prin. of Eq., par. 99. It is not necessary in the creation of such a trust for a married woman to name a trustee, for when no trustee is named the husband will be considered the trustee. Bennet v. Davis, 2 P. Wms. 316.

36. *How may a wife alienate and bind her separate estate?*

The wife may alienate her separate estate by deed or writing which operates as a direction to the trustee to convey the legal estate. Taylor v. Meads, 4 De Gex, J. & Sm. 597. The power to bind her separate estate is by the jurisdiction of equity, which will hold the specific property liable for her express and implied engagements. Murray v. Barlee, 3 Mylne & Keen, 209. Such a contract must be for the benefit of the separate estate, or the intention to bind the separate estate must appear in the contract. Yale v. Dederer, 22 N. Y. 451.

37. *How may a husband convey property to the wife?*

A husband and wife are considered as one at common law, and the only means of conveying title was by conveying to a third person who conveyed to the wife. Jewell v. Porter, 31 N. H. 34. Courts of equity have in some instances qualified this rule by upholding conveyances and contracts between husband and wife which were meritorious in their nature. Shephard v. Shephard, 7 Johns. 57; Slanning v. Style, 3 P. Wms. 337. Under modern statutes giving the right to hold and possess property as a *feme sole,* a husband may convey directly to the wife and *vice versa.* Allen v. Hooper, 50 Me. 371.

d. Certain Rights and Equities of a Wife under Modern Statutes.

1. RIGHT TO CONTRACT.

38. *A statute provided that a married woman may contract, sell, mortgage and convey her estate in the same manner as if she were single. A married woman entered into a contract of suretyship for the benefit of a corporation in which she was a stockholder. Is the contract enforceable?*

No, the contract is not one in which a married woman contracts in respect to her own property; she pledges merely her own responsibility. The test is whether the contract deals with or is for the benefit of the individual estate of the *feme covert.* The fact that she held stock in the corporation would not alter the rule because the law views the corporation as a separate legal identity. Russell v. People's Sav. Bank, 39 Mich. 671. If the statute had given a married woman the full right to contract as a *feme sole,*

the contract of suretyship would have been enforceable. Hart v. Grigsby, 14 Bush (Ky.), 542. It is the general rule under the various statutes removing the disqualifications of coverture, that the common-law doctrine prevails, so far as it has not been changed by the express provisions of a statute. Swift v. Luce, 27 Me. 285.

39. *A married woman gives a note for stock purchased by her for a farm which was sold under a statute allowing a feme covert to own property without the intercession of the trustee, when conveyed to her sole and separate use. Is she liable on the note?*

Yes, the right to hold property necessarily implies the right to enter into contracts for the benefit of the property so held. Batchelder v. Sargent, 47 N. H. 262. And under the same statute it has been held that a married woman was liable upon a note for part of the purchase price. Messer v. Smyth, 58 N. H. 298.

2. RIGHT TO MAINTAIN SUIT.

40. *Can a married woman sue for injuries to property held in her own name?*

Yes, the general rule under statutes allowing a *feme covert* to own property in her own name is that she can sue for injuries to her property as a *feme sole*. Schouler on Domestic Relations, § 158; Ackley v. Tarbox, 31 N. Y. 564. And when she is allowed to sue alone, a joinder of the husband is not only unnecessary, but improper. Wright v. Burroughs, 61 Vt. 390.

3. SEPARATE EARNINGS.

41. *What are the wife's rights in her earnings under modern statutes, allowing her to hold property in her own name?*

The right to hold property does not extend by implication to the wife's earnings. In this she is presumed to act for and in behalf of her husband. Merrill v. Smith, 37 Me. 394. The general policy of the law is not in favor of the abandonment of the matrimonial domicile by the wife for the purpose of acquiring earnings for her separate use. Douglas v. Gausman, 68 Ill. 170.

4. RIGHT OF HUSBAND TO SUE WIFE AND VICE VERSA.

42. *Can an action at law between husband and wife be enforced?*

At common law the rule was firmly fixed that no such suit could be maintained. Phillips v. Barnet, L. R., 1 Q. B. 436. Modern statutes have changed this rule so far as to allow suits to be brought between husband and wife in respect to property held in the wife's own name. Larison v. Larison, 9 Ill. App. 27, 32. Even now this right is confined strictly to actions relating to the sole and separate property of the wife, and the rule of the common law applies to all other actions. Logendyke v. Logendyke, 44 Barb. (N. Y.) 366.

e. Liability of a Husband for Purchases of his Wife upon his Credit.

43. *Action is brought against a husband for jewelry bought by the wife. What must the plaintiff prove in order to recover?*

The plaintiff must prove that the husband expressly authorized the purchases or that the articles were necessaries. Raynes v. Bennett, 114 Mass. 424. The authority of a wife to pledge her husband's credit except for necessaries depends upon her authority as his agent. Lane v. Ironmonger, 13 M. & W. 368. In the purchase of necessaries she may pledge her husband's credit without regard to the scope of her authority as an agent. Read v. Legard, 6 Exch. 636.

f. Rights and Liabilities of Husband and Wife Independent of Contract.

1. TORTS.

44. *What is the common-law rule as to the liability of the husband for the torts of his wife?*

If the tort was committed in the presence of the husband and by his direction, he alone is liable. 2 Kent, Comm. 149. If committed in the presence of the husband there is a *prima facie* presumption that it was committed under his coercion. Marshall v. Oakes, 51 Me. 308. If the tort was committed by the wife alone and without the presence or concurrence of the husband, she alone will be held liable. Head v. Briscoe, 5 Car. & P. 484.

45. *Who may recover for a tort to the wife?*

If the cause of action is the personal suffering and injury to the wife, the husband and wife must join in the suit. Laughlin v. Eaton, 54 Me. 156. An exception to this rule occurs in an action for the alienation of the husband's affection. The right of the wife to sue in her own name for this injury has long been recognized. Foot v. Card, 58 Conn. 1. And under modern statutes giving the rights of a *feme sole*, she is generally recognized as a separate legal identity and may sue upon all torts in her own name. Harris v. Webster, 58 N. H. 481.

2. CRIMES OF A MARRIED WOMAN.

46. *At the trial of a married woman for assault in the presence of her husband, the defense requested the court to charge that she was presumed to act under her husband's control. This request was refused. Was the court correct in its ruling?*

No, when a crime is committed by a wife in the presence of her husband, she is entitled to the benefit of the presumption that she was under his coercion. Commonwealth v. Egan, 103 Mass. 71. No such presumption exists in the case of murder and certain other

heinous crimes. The line of demarcation is not clearly defined, but in the crime of murder the law is well established that a wife will not be excused from her crime, although acting under the compulsion of her husband. Bibb v. State, 94 Ala. 31.

3. HUSBAND AND WIFE AS WITNESSES FOR AND AGAINST EACH OTHER.

47. *Are husband and wife competent witnesses for and against each other?*

The general rule at common law was that coverture disqualified both declarations and testimony in person (1 Greenl. Ev., par. 334), except when the crime is committed by husband or wife against the other, when the rule does not apply. Whipp v. State, 30 Ohio St. 87. The prevailing tendency of modern statutes and rulings of courts has been to remove the disqualifications except upon matters of confidence in the marital relation. Schouler on Domestic Relations, par. 53.

IV. PARENT AND CHILD.

a. The Right of Custody.

48. *Define the right of the parent to the custody of the child?*

The father is the natural and *prima facie* guardian of the child. Upon him rests the obligation of support and from that obligation there springs the reciprocal right to its custody and control. Chapsky v. Wood, 26 Kan. 650. This right of the father passes upon his death to the mother. Hammond v. Corbett, 50 N. H. 501. The right in either parent is relative and may be forfeited by reason of the parent being an unfit person to intrust with the custody of the child, and may again be assumed by proving competency to properly care for the child. Farnham v. Pierce, 141 Mass. 203.

49. *What right has the parent in the earnings of a minor child?*

The right of a parent to the earnings of a minor child is absolute. Benson v. Remington, 2 Mass. 113. Except (1) when waived by the voluntary emancipation of the minor child. Atwood v. Holcomb, 39 Conn. 270. (2) In the case of a female child by a legal marriage. Aldrich v. Bennett, 63 N. H. 415. (3) If an infant son marry, even without his parents' consent, he is entitled to his earnings so far as they are necessary to the support of himself and family. Commonwealth v. Graham, 157 Mass. 73.

50. *A daughter after arriving at the age of twenty-one years continues during life in her father's family and renders services with no agreement or understanding in regard to compensation. In a suit against the parent, can she recover?*

No, the law presumes that a continuance of the relation of parent and child exists, rather than the relation of debtor and

creditor. Munger v. Munger, 33 N. H. 581; Candor's Appeal, 5 W. & S. (Pa.) 513. This presumption may be overcome by proof of an express agreement to pay for the services rendered. Putnam v. Town, 34 Vt. 429. And if a minor child is emancipated, he may enter into such an express agreement, and the parent will then be equally bound as a stranger. Hall v. Hall, 44 N. H. 293.

b. The Parent's Liability for Necessaries Furnished to his Minor Child.

51. *A daughter of seventeen, while absent from home, became sick and at her request was attended by the plaintiff as her physician. In a suit against the father, can he recover?*

Yes, irrespective of statutes parents are required to furnish support and necessaries for their minor child, and a promise to pay in favor of a third person may be inferred from the legal duty imposed. Porter v. Powell, 79 Iowa, 151.

c. Torts to the Child.

52. *A child is injured by an ugly horse owned by a third person and as a result the father is put to expense in the care and cure of the child.*

(a) *Can he recover for such loss?*

(b) *Can he recover for the loss of services of the child?*

(a) The obligation to care for the child being placed upon the father, he is entitled to be indemnified for any expense caused by the negligent act of another. Dennis v. Clark, 2 Cush. 347.

(b) If the injury resulted in a loss of services, even though the child recovers damages for his personal injuries, the father may collect the value of the services lost. Wilton v. Middlesex R. R., 125 Mass. 130. The English doctrine recognizes the loss of services as the sole right of action and precludes a recovery unless based upon actual loss of services. Grinnell v. Wells, 7 Man. & G. 1033.

d. Torts of the Child.

53. *When is a parent liable for the tort of a child?*

A father is liable for the injuries occasioned by the infant when acting with the direct sanction and participation of the parent or in his service or employment. Schouler on Domestic Relations, par. 263. And if a parent allows his child to perform acts liable to result in damages and an injury results, the parent may be held liable. Hoverson v. Noker, 60 Wis. 511. The parent cannot be held liable for injury caused by a minor child without the consent or sanction of the parent. Hagerty v. Powers, 66 Cal. 368.

e. Illegitimate Children.

54. *What are the disabilities of illegitimate children at common law?*

An illegitimate child was considered at common law as *nullius filius* with no rights except those which he acquired and without

capacity of inheritance either from his father or his mother. Schouler on Domestic Relations, § 276. The mother or the putative father of an illegitimate child was barred from inheriting from him, and he can have no heirs except those of his own body. 2 Kent, Comm. 212; Cooley v. Dewey, 4 Pick. 93. Under the modern American rulings and statutes, the disabilities of an illegitimate child have in part been removed. The doctrine that subsequent marriage of the father and mother legitimizes the child born out of wedlock is universally accepted. Miller v. Miller, 91 N. Y. 315; Williams v. Williams, 11 Lea (Tenn.), 652. And it is generally held that an illegitimate child and his mother may inherit from each other. Heath v. White, 5 Conn. 228; Keeler v. Dawson, 73 Mich. 600.

V. INFANTS.

a. The Civil Rights and Liabilities of an Infant.

1. CAPACITY TO ACT AS A PUBLIC OFFICER.

55. *To what extent is an infant disqualified from holding office?*

The weight of authority is to the effect that an infant can hold no office where judgment, discretion and skill are required. Golding's Petition, 57 N. H. 146. Nor an office requiring personal receipt and disbursement of money. Claridge v. Evelyn, 5 B. & Ald. 81. An infant may act when the office is ministerial and requires no discretion or judgment. Moore v. Graves, 3 N. H. 408.

2. LIABILITY FOR CRIME.

56. *State the rule as to infants liable for crime.*

A child under seven years of age is conclusively presumed incapable of crime. Between seven and fourteen years only *prima facie* so, and above the age of fourteen is presumed capable like any other person. 1 Bishop, New Crim. Law, 368. When an infant under fourteen years of age is charged with crime, in order to convict, the jury should be satisfied that the infant knew the distinction between right and wrong as to the particular offense. Willis v. State, 89 Ga. 188. The crime of rape is an exception to the general rule, in that under fourteen years there is a conclusive presumption of an incapacity to commit the crime. 1 Bishop New Crim. Law, 373. The courts of several states, following the lead of Commonwealth v. Green, 2 Pick. 380, have held that the presumption is only *prima facie* and not conclusive, diminishing in force with advancing years. Williams v. State, 14 Ohio, 222; Wagoner v. State, 5 Lea (Tenn.) 352.

3. LIABILITY OF AN INFANT FOR HIS TORTS.

57. *An infant of twelve years shot a schoolmate with an arrow, thereby causing a loss of sight of an eye. Is he liable for his act?*

Yes, the law imposes upon an infant equally with an adult a liability for his tortious acts. Bullock v. Babcock, 3 Wend. (N. Y.) 391.

And so an infant of only seven has been held liable for trespass for breaking down the shrubbery in a neighbor's yard. Huchting v. Engel, 17 Wis. 237.

A distinction exists between pure torts and torts in connection with contract. Although the decisions are not uniform the principle appears to be that if the substantive ground or action is a breach of contract the infant cannot be charged by declaring on a tort. Caswell v. Parker, 96 Me. 39; Prescott v. Norris, 32 N. H. 101. But if the injury is not a breach of contract, but a distinct wrong in itself, although connected with a contract, the infant is liable. For instance, in a contract of bailment, so long as the infant keeps within the scope of the bailment, he is not liable for his negligence or lack of skill, but when he departs from the object of his bailment and commits a positive and wilful tort he is liable. Towne v. Wiley, 23 Vt. 355.

4. LIABILITY OF AN INFANT FOR NECESSARIES.

58. *An infant contracts for lodging during the college year at ten dollars a week. He subsequently ceases to occupy the room. Can he be held liable for the remainder of the year?*

No, the liability of an infant for necessaries arises not from the contract, but from the duty imposed by law. Necessaries must be actually furnished, and the agreed prices are not the basis of recovery, but the fair and reasonable value of the necessaries. So long as the infant occupied the room, it was a necessary, and he was liable for its reasonable value, but the executory contract was capable of disaffirmance like any other contract. Gregory v. Lee, 64 Conn. 407.

59. *Can an infant be held liable for necessary repairs of a house of which he is owner?*

No, the necessaries must be for his personal use, and although a contract may be for the benefit of his property he may disaffirm it. Tupper v. Cadwell, 12 Metc. (Mass.) 559.

60. *What are included in "necessaries?"*

Schouler defines the five leading elements in the doctrine of necessaries to be food, lodging, clothes, medical attendance and education. Schouler on Domestic Relations, par. 415.

In general it is considered a question of fact to be decided in each case. Ryder v. Wombell, L. R., 3 Exch. 90. The extent and scope of the doctrine are determined by the circumstances and condition in life of the infant. Strong v. Foote, 42 Conn. 203.

b. Contracts and Conveyances of an Infant.

1. IN GENERAL.

61. *What is the general rule as to contracts of an infant?*

The contracts of an infant are not void but voidable, and if upon the arrival of an infant at an age when he has a legal capacity to

contract, he confirms the contracts made in infancy, they are in all respects equal in binding force with contracts of adults. Whitney v. Dutch, 14 Mass. 457; 2 Kent, Comm. 234. This rule is based upon the principle of protection from fraud and imposition of the infant, and the other party to the contract remains bound and cannot use the plea of infancy to avoid his obligation. Johnson v. Rockwell, 12 Ind. 76.

62. *An infant signs and delivers a mortgage deed and promissory note for $1,000. Subsequently after arriving at his majority he becomes insolvent. His assignee files a bill in equity to relieve the real estate of the lien. Is the assignee entitled to relief?*

No, the right of disaffirmance is a personal one to the infant and not for the benefit of his creditors or the assignee who represents them. Mansfield v. Gordon, 144 Mass. 168. The right of disaffirmance, however, extends to privies in blood as distinguished from privies in estate, and the heirs may interpose the plea of infancy. Harvey v. Briggs, 68 Miss. 60.

63. *An infant receives property under a contract of sale and during his minority returns the property to the original owner. Can he subsequently retake the property?*

No, the right of disaffirmance exists during the infancy as well as after the arrival at majority. Edgerton v. Wolf, 6 Gray (Mass.) 453. This right is confined to rights affecting personalty, and conveyances of land cannot be avoided during minority. Emmons v. Murray, 16 N. H. 385; Zouch v. Parsons, 3 Burrows, 1794.

2. AFFIRMANCE AND DISAFFIRMANCE.

64. *What are the infant's rights and liabilities upon reaching his majority in respect to contracts made while he was an infant?*

He may either confirm or disaffirm such contracts; affirmance may be by any unequivocal act which establishes a clear intention to confirm the transaction. Ratification may be also inferred from circumstances, as when chattels are retained for a reasonable time after the infant's arriving at majority. Boyden v. Boyden, 9 Metc. (Mass.) 519. But if the infant has parted with the property, ratification will not be presumed from mere inaction. American Freehold Land Mortgage Co. v. Dyker, 111 Ala. 178. In conveyances of real estate the courts are divided as to whether mere acquiescence will effect a ratification. 22 Am. & Eng. Ency. of Law, 542.

65. *An infant purchases certain chattels and gives a mortgage upon them. The chattels are subsequently sold to a third party. Is the mortgage good?*

Yes, if an infant would rescind part of the contract. he must rescind the whole and restore title to the vendor. If he sells the property, the purchaser takes subject to the mortage. Curtis v.

MacDougal, 26 Ohio St. 66. The same rule applies to a sale and mortgage back of real estate, the whole transaction being considered as one contract. Hubbard v. Cummings, 1 Me. 11.

66. *When must an infant return the consideration?*

Upon the rescission of a contract upon reaching majority, the specific property, if still in the possession of the infant, must be returned before suit can be maintained for the consideration. Robinson v. Weeks, 56 Me. 102; Price v. Furman, 27 Vt. 268. *Contra* to this it has been held that upon the avoidance of the contract, the parties stand in the position as though no contract had been made and entered into. Tender of the property is not necessary on the part of the infant, although the vendor becomes at once entitled to retake his property. Carpenter v. Carpenter, 45 Ind. 142. If the infant has parted with the property or consideration, the law is settled that his right to recover is not thereby lost. Chandler v. Simmons, 97 Mass. 508, 514. The right of an infant to disaffirm his contract is based upon the theory of his own improvidence, and if the infant is compelled to restore the consideration the privilege of repudiation would be of least avail when most needed. Craig v. Van Bebber, 100 Mo. 584. The courts distinguish in this instance between executed and executory contracts holding in the former case that when a claimant seeks for affirmative relief, he must restore the consideration or its equal. Bartholomew v. Finnemore, 17 Barb. 428; Eureka Co. v. Edwards, 71 Ala. 248, 256.

EQUITY.

I. In General.*

1. *State briefly the origin of courts of equity.*

Owing to the many technicalities and limited development of the ancient common law, persons whose rights were injuriously affected frequently failed to obtain adequate relief. In such cases those injured would not unnaturally appeal to the king, as being the highest power in the State, and demand of him substantial justice.

In course of time so numerous became these applications that the king was obliged to delegate his authority to his most trusted adviser, who was called the lord chancellor.

A court was at length established, presided over by the above-named functionary, and a system of jurisprudence developed, wonderful alike for its symmetry and simplicity. Bispham's Prin. of Equity, chap. 1; 1 Story, Eq. Jur., chap. 2.

2. *In what cases has equity exclusive jurisdiction?*

Equity has exclusive jurisdiction in all cases where the right asserted is not recognized by courts of law. The law of trusts forms an important illustration. 2 Story, Eq. Jur., § 960; 3 Bl. Comm. 430-432.

3. *Over what matters has equity concurrent jurisdiction with courts of law?*

The jurisdiction of equity is concurrent when courts of both law and equity recognize the right, but the relief afforded by the latter is more complete.

The most important cases under this division are accident, mistake, and fraud. 3 Wait, Acts. & Defs. 161; 1 Story, Eq. Jur. (13th ed.), §§ 75-440.

4. *When has equity auxiliary jurisdiction?*

Equity is said to have auxiliary jurisdiction when it aids the common-law courts in the administration of justice without assuming jurisdiction over the subject-matter. Bills to perpetuate testimony belong to this division of equitable jurisdiction. 2 Story, Eq. Jur., §§ 1480-1481; 3 Wait, Acts. & Defs. 181.

* The student is referred to chapter 2 of Bispham's Principles of Equity for a clear and convenient summary of Equitable Jurisdiction.

5. *What is equitable conversion?*

"On the principle that equity considers that as done which ought to have been done, it is well established, that 'money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted.'" 2 Jarman on Wills, 170; Fletcher v. Ashburner, 1 Br. C. C. 497; s. c., 1 Sm. & Tudor, Cas. in Eq. 1118. On the question, whether the interpretation of a will by the courts of one State will hold as to real estate in another jurisdiction, so as to work a conversion of it, and a consequent disposal of it as personalty, see Washburn v. Steenwyk, 32 Minn. 336; Ford v. Ford, 80 Mich. 42; Page's Estate, 75 Penn. St. 87.

6. *What is meant by the "doctrine of contribution"?*

The equitable doctrine of contribution is said to arise when one of several parties who are liable for a joint debt or obligation discharges the same for the benefit of all. In such a case he has a right to call upon his co-debtors to reimburse him to the extent of their own liability. Bispham's Prin. of Equity, §§ 27, 328ff; 1 Story, Eq. Jur., §§ 492-499.

7. *What is the doctrine of marshalling securities?*

It is such an arrangement of the different funds under administration as shall enable all the parties having equities thereon to receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction, out of a portion of these funds. 1 Story, Eq. Jur., § 558; Bispham's Prin. of Equity, § 340ff; Willard's Equity (Potter's ed.), 337.

8. *What is the doctrine of subrogation?*

It is the right which a surety who pays the debt of his principal has to be substituted in the place of his creditor, as to all the securities, or means in the hands of the latter, which may be useful to enforce payment of the primary obligor. Bispham's Prin. of Equity, §§ 335-339; Dering v. Winchelsea, 1 Lead. Cas. Eq. 137, and note.

9. *What is a bill of discovery?*

At common law there was no means by which a party to an action could compel the adverse party to testify as to the matters in dispute, or by which the production of documents in his possession could be enforced. This difficulty gave rise to a rule of equity to the effect that courts of chancery would compel a discovery of the matters desired to be ascertained; in other words,

the defendant in a bill in equity was obliged to answer under oath the allegations contained in the bill. The production of documents could also be enforced, and an opportunity for their inspection afforded. "Bills of discovery, therefore, in their technical sense, are bills which are filed for the purpose of assisting one of the parties to a common-law action; and which, seeking no independent relief themselves, aim solely at arming the complainant with the necessary and proper means for asserting or defending his right or title at law." See Bispham's Prin. of Equity, chap. VIII; 2 Story, Eq. Jur., §§ 689-691.

10. *What is the object of a bill of interpleader, and under what circumstances is its use proper?*

Interpleader is the remedy given to a person who is practically in the position of a stakeholder. Two or more persons severally make claim against him for the same thing, under different titles or in separate interests. In this situation, not knowing to which of the claimants he is under obligation, and being either actually molested by one or more suits, or in fear of loss from the conflicting claims of the parties, he applies to the court to compel the claimants to work out their controversy, without further annoyance to him. He, of course, stands ready to abide by and follow whatever settlement the court may make of the rival claims. Bispham's Prin. of Equity, §§ 419-421.

11. *State generally the powers, duties, and obligations of a receiver in equity.*

A receiver is an indifferent person between the parties appointed by the court to collect and receive the rents, issues, and profits of land, or the produce of personal estate, or other things which it does not seem reasonable to the court that either party should do.

His general duty may be said to be to take possession of the estate in the room and place of the owner thereof, and, under the supervision of the court, to manage the property so as to preserve the same, and (if possible) to make it profitable for those who may ultimately be declared the owners thereof. The powers of a receiver are limited. All his actions are under the immediate control of the court; and in order to a safe custody of the estate, he must constantly apply to the court for its advice and sanction. Bispham's Prin. of Equity, §§ 576-580; Kerr on Receivers, chap. VII.

12. *In what cases and for what purposes may a court of equity appoint a receiver?*

The cases in which a receiver may be appointed are numerous. Thus, the appointment may be made (1) either because of the incapacity of the holder of the legal title; or (2) because of the

untrustworthiness of such holder; or (3) because of disputes between the legal owners; or (4) because equitable rights might be endangered by leaving the property in the hands of the holder of the legal title; or (5) because the rights of remaindermen or reversioners might be endangered. Bispham's Prin. of Equity, § 578.

13. *What is a cloud upon title, and what are appropriate equitable remedies?*

A cloud upon title is a title, or incumbrance, apparently valid, but in fact invalid. The appropriate remedy is a bill in equity praying the court to declare such title or incumbrance of no effect. 1 Wait, Acts. & Defs. 662; Bispham's Prin. of Equity, § 575.

14. *State and explain the principal maxims of equity.*

1. "Equity will not suffer a right to be without a remedy." This principle is the very foundation of equity jurisdiction, for the system had its origin in the inability of the law courts to meet the requirements of justice. Under this maxim, also, courts of equity, when they once assume jurisdiction, will administer as nearly complete a remedy as possible, though some of the questions so decided would not by themselves receive attention from those courts. Bispham's Prin. of Equity, § 37.

2. "He who comes into equity must do so with clean hands." This maxim signifies that the person seeking relief must not have been guilty of participating in the wrong from the consequences of which he asks relief. Thus, when one of several who have been engaged in a fraudulent transaction has acquired the result of the fraud, equity "will not aid the others in obtaining their share of the spoils." See Bispham, *supra*, § 61; Wheeler v. Sage, 1 Wall. 518.

3. "He who seeks equity must do equity." An illustration given by Mr. Bispham is that of a borrower at a usurious rate of interest, who comes in to ask relief from his contract. To gain standing in the court, he must return to the lender the amount borrowed, with interest at lawful rates. Bispham, *supra*, § 43, and cases cited.

4. "Between equal equities, priority of time will prevail." If A. owning land, contracts to sell it to B., and later makes the same contract with C., B.'s equity will prevail over C.'s, since it is prior in time, and both the equities run against the same person. Id., § 45. But compare Buckingham v. Hanna, 2 Ohio St. 555.

5. "Equity follows the law." See Question 29, in section on Trusts.

6. "Equity will not assist those who sleep on their rights." See Trusts, Question 40; Bispham's Prin. of Equity, § 39.

7. "Equity acts *in personam.*" See Trusts, Questions 37, 38; Bispham's Prin. of Equity, § 47; Penn v. Lord Baltimore, 1 Ves. 444; s. c., 2 Lead. Cas. Eq. 767.

II. ACCIDENT, MISTAKE, FRAUD.

15. *What is meant by the term "accident" as used in equity jurisprudence? And when will equity relieve against its consequences?*

Accident is an unforeseen and injurious occurrence not attributable to mistake, neglect, or misconduct. Smith's Manual of Equity, 36; 1 Story, Eq. Jur., § 78; Bispham's Prin. of Equity, § 174.

The principal cases of accident for which equity will afford relief, are (1) loss or destruction of a deed or other instrument, where the loss of the instrument deprives the party of some remedy at law, and he furnishes a bond of indemnity to protect other parties from possible harm arising from a subsequent discovery of the document (1 Story, Eq. Jur., §§ 83-89; Bispham's Prin. of Equity, §§ 176, 177); (2) erroneous payments of money; 1 Story, Eq. Jur., §§ 90-93; (3) penalties and forfeitures.

When the parties fix a sum certain as the amount to be paid in the event of a violation of an agreement, that sum is liquidated damages, if it is considered by the courts to be an approximation of the actual damage; otherwise it is a penalty. Such agreed sum will be regarded as a penalty (and relief will be given), (1) if the intention of the parties on the face of the instrument is doubtful; (2) even if clear language is used, if the agreement is for a larger sum to be paid for failure to pay a smaller, or where there are several things to be done or omitted, and the damage is easily ascertainable by a jury.

In other cases, it will not be regarded as a penalty, provided the intention is clear for stipulated damages, however extravagant it may seem. Sandford, J., in Bagley v. Peddie, 5 Sandf. 640; 3 Parsons on Contracts, 156-163. And see Damages, Ques. 8.

16. *What is such mistake that equity will give relief, and what is the relief obtainable?*

A mistake must have been mutual, material, free from negligence and as to an existing fact. 1 Beach, Eq. Jur., par. 49; 1 Story, Eq. Jur., §§ 140-144.

If the subject-matter is *known* to be uncertain, or if in any sense the transaction is understood to be speculative, no relief will be granted. McCobb v. Richardson, 24 Me. 82; Crowder v. Langdon, 3 Ired. Eq. 476.

As to mistakes of law, the old rule was long unquestioned, that no relief would be given (Hunt v. Rousmaniere, 1 Pet. 14); but of late, courts have frequently seized opportunities to restrict the

effect of that doctrine. Bispham's Prin. of Equity, § 188; Park Bros. & Co. v. The Blodgett & Clapp Co., 64 Conn. 28.

The remedy is by reformation (Park Bros. & Co. v. The Blodgett & Clapp Co., *supra*); cancellation (Thwing v. Hall, 40 Minn. 184); or rescission. Erwin v. Wilson, 45 Ohio St. 426.

17. *What is fraud? What is the jurisdiction of equity over it? What is the effect of fraud on a transaction or contract?*

There is no comprehensive definition of fraud. Courts always avoid setting a limit beyond which they will not go, "lest," in Lord Hardwicke's words, "other means for avoiding the equity of the court should be found out." Lawley v. Hooper, 3 Atk. 278.* The classification made by that distinguished judge in Chesterfield v. Janssen, 1 Atk. 301, is still the accepted form, and is as follows: (1) Fraud arising from facts and circumstances of imposition; (2) fraud arising from the intrinsic matter of the bargain itself; (3) fraud presumed from the circumstances and condition of the parties contracting; and (4) fraud affecting third persons not parties to the agreement. This classification is explained in 1 Beach, Mod. Eq. Jur., § 64; and Bispham's Prin. of Equity, §§ 205, ff.

The jurisdiction of courts of chancery extends to every case of fraud except one, being concurrent often with the jurisdiction of the law courts, although, as a matter of practice, not exercised in those classes of cases where the law furnishes an adequate and more convenient remedy. 1 Beach, Mod. Eq. Jur., § 65; Bispham's Prin. of Equity, § 200. The one exception, seemingly an arbitrary one, is that equity will not interfere to set aside a will, or the probate thereof, for fraud. The probate courts have exclusive jurisdiction. 1 Beach, *supra*, § 66; Broderick's Will, 21 Wall. 503.

Fraud renders a transaction or contract *voidable* at the option of the person injured, if he acts promptly after discovering the fraud. It is *not* void. A conveyance obtained by fraud, for example, passes the legal title to the grantee, and if he sells and conveys to a purchaser for value without notice, the position of the latter is unassailable. Bispham, *supra*, §§ 202, 263. And see Trusts, Questions 22, ff.

18. *What choice of remedies has a person injured by fraud?*

The remedies open to him may all be included under three methods of procedure.

Mr. Beach states them as follows (1 Beach, Mod. Eq. Jur., § 67): "He may first rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract. To maintain such action he must first restore, or offer to restore, to the other party, whatever may have been

* The essentials of *actionable* fraud will be found in the section on Torts.

received by him by virtue of the contract." Cobb v. Hatfield, 46 N. Y. 533.

"Secondly, he may retain what he has received and bring an action at law to recover the damages sustained. This action proceeds upon an affirmance of the contract, and the measure of the plaintiff's recovery is the difference between what he has received and what he should have received according to the representations." Krumm v. Beach, 96 N. Y. 398, 406.

"Lastly, he may bring a suit in equity, and in that suit have full relief. Such a suit is not founded upon a rescission, but is maintained for a rescission, and it is sufficient, therefore, for the plaintiff to offer in his bill or complaint to return what he has received and make tender of it at the trial or hearing." Gould v. Cayuga Nat. Bank, 86 N. Y. 75.

III. SPECIFIC PERFORMANCE.

19. *What is the nature and object of the equitable remedy of specific performance, and under what conditions will it be granted, in general?*

A decree of specific performance is to compel a defendant to actually do what he has agreed to. Courts of law cannot issue such decrees, because those courts do not act *in personam*, while a court of equity, if its decree is disobeyed, can imprison the defendant for contempt. Bispham's Prin. of Equity, § 29; Fry on Specific Performance (3d Am. ed.), § 3.

The most important condition necessary to an exercise of the power to grant specific performance is that there is no adequate remedy at law; i. e., that no action lies at law or that the case is such that a money payment would not compensate the other party for a breach of the contract. Thus, it is obvious that a piece of land may have special and peculiar advantages of situation and environment which no other land has and which no amount of money could reproduce. The same is only true to a limited extent of personal property, and the general rule is, therefore, that in contracts relating to realty specific performance will be granted, and in those involving personalty it will not. 2 Beach, Mod. Eq. Jur., § 636; Fry on Specific Performance, § 56.

Contracts relating to personalty will, however, be enforced specifically if the chattel has a peculiar or personal value, or when the damages are for other reasons impossible of ascertainment. In short, there is no discrimination against chattels, as such. 2 Beach, Mod. Eq. Jur., § 598; Bispham's Prin. of Equity, §§ 368-371; Fry on Specific Performance, §§ 27n., 57, ff.

The contract must also be based upon a valuable consideration. 2 Beach, *supra*, § 572; and the consideration must not be grossly inadequate. Id., § 574; Bispham, *supra*, § 374.

That the contract must also be mutual, see a good discussion of the subject in Palmer v. Gould, 144 N. Y. 671.

20. *Will equity decree specific performance of a verbal contract, which should have been in writing to comply with the Statute of Frauds?*

As a general rule, such a contract will not be so enforced; but there are three exceptions.

(1) When the Statute of Frauds is not relied upon as a defense. It is settled that that statute did not create a new requisite for the *existence* of a contract; or in other words, such a contract is not void because not reduced to writing. Browne on Statute of Frauds (4th ed.), §§ 508, 510, 515.

(2) When the contract has been so far acted upon that the parties cannot be restored to their original position. What is sufficient part performance to take the case out of the statute is often difficult to say. Entering into possession, with improvements made, is enough. Bispham's Prin. of Equity, § 385, and cases cited. Probably a notorious taking of possession in pursuance of the contract is sufficient, without more, (Browne on Statute of Frauds, §§ 467, 473ff); but it is not indispensable. Browne, *supra*, § 466.

(3) When the reduction of the contract to writing has been prevented by fraud. Bispham, *supra*, § 386. And see 2 Jones on Evidence, § 434; 1 Greenleaf on Evidence (14th ed.), § 284, and notes.

IV. INJUNCTIONS.

21. *Define an injunction, and state the difference between a mandatory and a prohibitory injunction.*

Mr. Bispham's words are: "An injunction is a writ remedial issuing by order of a court of equity, and commanding a defendant to perform some act or restraining a defendant from the commission or continuance of some act." The former is a mandatory, and the latter a prohibitory injunction. Mandatory injunctions are rarely granted, except on final decree after a hearing, because they change the status of the parties. Bispham's Prin. of Equity, § 30; 2 Beach, Mod. Eq. Jur., §§ 638, 639.

22. *What are the general principles on which injunctions are granted?*

It must appear that the party has no adequate remedy at law; that an irreparable injury will follow, if an injunction is denied (i. e., in general, one which cannot be compensated by a money payment); that the danger is imminent; and that he has a clear, undoubted right. 2 Beach, Mod. Eq. Jur., §§ 640-643; Bispham's Prin. of Equity, §§ 30, 399, ff.

EVIDENCE.*

I. In General.

a. Judicial Notice.

1. *What is judicial notice and how far does it extend?*

It is the recognition by the court, without evidence or argument, of the existence of certain facts or classes of facts.

The principal facts so noticed are:

(a) The existence and titles of all the powers in the civilized world recognized by the government of the United States, and their respective flags and seals;

(b) The general usages and customs of merchants;

(c) The seals of foreign admiralty courts and notaries public;

(d) The laws and general customs of the United States and their own particular State;

(e) The territorial extent of the jurisdiction and sovereignty exercised by their own government;

(f) The local political divisions and the general geographical features of their own country and State;

(g) All things which must have happened according to the ordinary course of nature, such as the limitation of the length of human life.

(h) Ordinary abbreviations and meaning of words in the vernacular language. Stephen's Dig. Ev., art. 58. And see for a more extended list, 1 Greenleaf on Evidence (14th ed.), §§ 4-6.

2. *In a murder trial it became important to prove the time of moonrise on a certain night. A reputable almanac was received. Did the court, by this, take notice of the time the moon rose?*

No. The fact judicially noticed was the *accuracy* of the publication. Munshower v. State, 55 Md. 11; Sisson v. R. R. Co., 14 Mich. 489. In the Maryland case the court allude to insurance tables showing the probable duration of life, weather reports and reports of the state of the market, as analogous cases.

3. *Are the laws of the different States judicially noticed by the courts of the other States, or by the Federal courts?*

The States being foreign to each other, their laws must at common law be proven as facts in the various State courts (Pelton v.

* References to Greenleaf are from the fourteenth edition. Stephen's Digest is to be found complete, in vol. 7, Am. and Eng. Ency. of Law (1st ed.), pp. 42-112

Platner, 13 Ohio St. 209; Knapp v. Abell, 10 Allen, 485); but by statute the accuracy of the official State reports is now generally recognized.

The Federal courts take notice of the laws of *all* the States, because they are created to administer the State laws, as well as those of the United States. Owings v. Hull, 9 Pet. 607, 625. But the Supreme Court when sitting to review the decision of a State Supreme Court is limited as to its judicial knowledge of State laws by that of the court from which the case came. Hanley v. Donoghue, 116 U. S. 1.

b. Burden of Proof.

4. *What is the burden of proof? Does it ever shift?*

The phrase "burden of proof" is used in two senses: (1) As the duty of bringing forward evidence in support of a given proposition; (2) As the duty of establishing a proposition as against all counter-argument or evidence.

Whichever party has an *affirmative case* has the burden of proof in the second sense, *i. e.*, the duty of ultimately establishing his case, by the balance of probabilities in a civil action, and against a reasonable doubt in a criminal prosecution. The question of which side has the affirmative case, which would be settled entirely by the pleadings if these were scientific, is determined partly by them, partly by convenience, by presumptions which have hardened into rules of law, and so on.

Clearly, in that sense, the burden of proof never shifts. After it is once fixed by these considerations, it remains with the party on whom it falls. In the first sense (the duty of going forward), the burden does shift. One side makes out at a certain stage of the proceedings a *prima facie* case. The opposing party must bring up evidence to offset this advantage, but it is evident that the duty of so doing may be sometimes with the one who must ultimately establish the affirmative case, and at other times with his adversary. The use of the one term for these two duties results in endless confusion.

See on the whole subject an extended discussion by Prof. James B. Thayer, in 4 Harvard Law Rev. 48; and also Baxter v. Camp, 71 Conn. 245.

In England, it seems that the term "burden of proof" means the duty of *going forward* with evidence. Abrath v. R. R. Co., 11 Q. B. Div. 440. In Massachusetts, it means the duty of establishing the case. Powers v. Russell, 13 Pick. 69. But in most courts it is used indiscriminately in either sense.

The point may be illustrated by the case of a will, where the capacity of the testator is questioned. The duty of ultimately establishing the mental state necessary to make a valid will is admittedly with the

executor. Barry v. Butlin, 2 Moo. P. C. 480; Crowninshield v. Crowninshield, 2 Gray, 524. That is, if at the end of the case there is a balance of probabilities against him, the executor loses. But the usual presumption of mental soundness holds, and the parties attacking the will must go forward with evidence of insanity before the executor need move at all.

c. Presumptions.

5. *Explain the terms "presumption of law" and "presumption of fact."*

These terms are expressive of two periods in the growth of the rules called presumptions. The origin of any rule of the kind lies in an observed connection between two facts. When this connection becomes fairly uniform, i. e., when it is perceived that if the fact X. is present, and the ordinary condition of things prevails, the fact Y. follows, a presumption arises that X. being shown to exist, Y. also exists. This is a presumption of fact, or, in other words, a *prima facie* rule of law. 1 Greenleaf on Evidence, 66, and note. It has the *effect* of evidence, in that when the fact X. appears, the opposing side has the burden of going forward to show that the usual condition of things is so altered that the fact Y. does not necessarily follow.*

Most presumptions cease their development at this point, but some, like that of a lost grant after twenty years' adverse user of an incorporeal hereditament, have hardened into positive rules of law, not rebuttable. Tracy v. Atherton, 36 Vt. 503. This is what is meant by a presumption of law, or conclusive presumption, though the terms, as pointed out by Austin (1 Austin's Jurisprudence, 491), are mutually contradictory. On the whole subject, see 1 Greenleaf on Evidence, 24, ff; 3 Harv. Law Rev. 148ff.

6. *What is the meaning and effect of the presumption of death after seven years' absence?*

This presumption means that after an absence for seven years, during which the person in question has not been heard of, the effect of the rule that a thing once shown to exist is presumed to continue, is exhausted, and that, therefore, unless positive evidence is brought that the person is alive, the absence unheard-from is sufficient proof of death. 1 Greenleaf on Evidence, 57.

This "presumption of death," however, does not settle or even indicate the *time* of the death. Both the beginning and end of the period are obviously out of the question as probable dates for the decease, and the result is that the party who needs to establish the exact day when

* That a presumption has the further effect of actually carrying weight as evidence see Coffin v. U. S., 156 U. S. 432, where the presumption of innocence was involved. But see *contra*, State v. Smith, 65 Conn. 283.

The rule in civil actions in Connecticut was in accordance with the United States Supreme Court doctrine, Barber's Appeal, 63 Conn. 393, but this was overruled in Vincent v. Mutual, etc., Co., 77 Conn. 288, the court acknowledging that Prof. Thayer's argument in his Treatise on Evidence, pp. 313, 539, 551, that a presumption has no weight as evidence, was unanswerable.

death occurred, must do so by other circumstances, as he best can. Nepean v. Knight, 2 M. & W. 894; State v. Plym, 43 Minn. 385. See Newell v. Nichols, 75 N. Y. 78, for an interesting discussion of the well-settled doctrine, that when two persons perish in the same disaster, their relative age and strength afford no presumption as to which one survived the other.

d. Admissions and Confessions.

7. *What is the difference between admissions and confessions, and why are they admitted as evidence?*

The only difference is that the former term is usually applied to civil transactions, and the latter to acknowledgments of crime. They at first sight seem a plain exception to the rule against hearsay, but Greenleaf points out that they are "more properly admissible as a substitute for the ordinary proof, either in virtue of the direct consent of the party, as in the case of explicit admissions, or on grounds of public policy and convenience, as in the case of those implied from assumed character or acquiescence." 1 Greenleaf on Evidence, 229; 1 Jones on Evidence, § 236.

As a rule, admissions are not conclusive; for the party making them may deny their truth, but in two cases they are conclusive in their effect. This is on the principle of estoppel, and in that stage their truth or falsity has nothing to do with the case. The two cases are, (a) solemn admissions made in the course of judicial proceedings, either by the pleadings, or expressly, as by an agreement of counsel; (b) admissions *extra judicium*, which have been acted upon or by which the party has acquired some advantage for himself. 1 Greenleaf on Evidence, 38.

8. *A.'s agent, in the course of the business in which he was employed as agent, made declarations to B. on the subject of the business. Can B. state those remarks when called as witness in a suit against A., and if so, on what ground?*

Yes. On the ground that the agent is identified with the principal, while acting within the scope of his authority. U. S. v. Gooding, 12 Wheat. 460.

The admissions of conspirators, also, are admissible against each other, their interest being joint. Queen v. Manning, 12 Q. B. D. 241; 1 Greenleaf on Evidence, 149. A mere interest *in common* is insufficient. Dan v. Brown, 4 Cow. 483, 492.

9. *Are the admissions of the transferor of an overdue note made while he was the owner of it admissible to prejudice his transferee?*

There is a conflict on this question. On the ground that the transfer of an overdue note is a mere assignment of a chose in ac-

tion, much is to be said for the admission of the transferor's declarations. Bond v. Fitzpatrick, 4 Gray, 89. But they have in some courts been ruled out, the purchaser's interests being considered by no means identical with those of his predecessor in title. Paige v. Cagwin, 7 Hill, 361; Shober v. Jack, 3 Mont. 351.

10. *What is meant by "voluntary," when it is said that confessions cannot be used against a prisoner unless voluntarily made?*

The word is highly technical. Stephen says, Digest, art. 22: "No confession is deemed to be voluntary, if it appears to the judge to have been caused by any inducement, threat or promise, proceeding from a person in authority, and having reference to the charge against the accused, whether addressed to him directly or brought to his knowledge indirectly, and provided that (in the judge's opinion) such threat or promise gave the accused reasonable grounds to suppose that by making the confession he would gain some advantage or avoid some evil in reference to the proceedings against him." Reg. v. Baldry, 2 Denison, C. C. R. 430; State v. Phelps, 11 Vt. 116, 121.

A well-settled exception to this rule should be noticed, to the effect that where a witness makes a confession on an offer of safety from the State, if he becomes the State's witness, and afterwards refuses to testify fully against his accomplices, the government is absolved from its pledge, and the confession so gained may be used against the prisoner. Such a confession is thought to be probably true, because the prisoner, being free from any danger of prosecution, would have no motive for lying about himself. Commonwealth v. Knapp, 10 Pick. 477.

e. Law and Fact.

11. *Is it true that questions of fact are exclusively for the jury, and questions of law for the court?*

No. The rule, when thus set forth, is misleading, partly because it is directly untrue, and partly because it is inaccurately stated.

It is untrue, in that frequently questions which are admittedly questions of fact are decided by the court. These are illustrated by the settlement of disputed points relative to the admissibility of evidence; such as whether a confession is "voluntary" (Commonwealth v. Culver, 126 Mass. 466); or whether a conspiracy is *prima facie* made out when declarations or acts of other persons are offered against a defendant, as a co-conspirator. Stephen's Dig., art. 4. Such decisions, though they do not mean that the existence of the subsidiary fact has been demonstrated, but only that enough has been shown to make it proper to submit to the jury the testimony offered, are, nevertheless, decisions of questions of fact. Commonwealth v. Robinson, 146 Mass. 571.

Again, the rule as stated is inaccurate, on account of the questions of fact decided by the court, but not recognized as such. One class of these is the interpretation of documents, where almost the whole matter in issue is the intention of the party or parties, a pure question of fact; yet this is always called a question of law. See Hamilton v. Ins. Co., 136 U. S. 255.

Juries came into existence after judges, and some questions of fact were retained by the latter from motives of caution and public policy. Later, the judges deprived the jury of still other questions of fact by judicial legislation. On the whole subject, see Thayer on Law and Fact, 4 Harv. Law. Rev. 147; Thayer's Cases on Evidence, 148; Keener, Quasi Con. 99.

12. *What is decided when a court says there is "no evidence to go to the jury," or when a verdict is reversed as against evidence?*

The point decided is that the evidence is so clear that reasonable and fair men can hold but one view. Bridges v. Ry. Co., L. R. 7 H. L. 213; Ry. Co. v. Converse, 139 U. S. 469. The distinction should be carefully drawn between the foregoing and what is sometimes supposed to be the meaning of such a ruling; namely, that according to the opinion of the tribunal making the decision the evidence points to a certain conclusion. "To ask 'Should *we* have found such and such a verdict?' is surely not the same thing as to ask whether there is room for a reasonable difference of opinion." Brett, M. R., in Belt v. Lawes, London "Times," March 18, 1884. If the court thinks there is room for a reasonable difference of opinion, it will not reverse a verdict, whatever its own opinion may be.

13. *X. is struck by a train while driving across the track. Is an instruction to the jury correct that he must be found negligent unless he "looked and listened" before crossing?*

The States are divided. New York holds that an omission of these precautions is in itself negligence. Lewis v. Long Island R. R. Co., 162 N. Y. 52; Rodrian v. R. R. Co., 125 id. 528. Other States maintain that no rule as to what is negligence *per se* can be laid down beforehand, and do not require these precautions invariably, because in many conceivable cases their omission would not tend to show a lack of ordinary care. R. R. Co. v. Voelker, 129 Ill. 540; Lavarenz v. R. R. Co., 56 Iowa, 689; Bishop, Non-Con. Law, 1043.

II. LEADING RULES OF EXCLUSION.

a. Matters Likely to Mislead the Jury or Complicate the Case; and Those of Conjectural Significance.

14. *A workman was injured by machinery claimed to have been run in a negligent way. The fact that after the accident*

the owners took new precautions in running it was offered, and its admission denied. Was this ruling correct?

It was, by the great weight of authority. Such a fact has only the slightest tendency to show negligence before the occurrence; it would distract the minds of the jury from the real point at issue and create a prejudice against the defendant. To admit it would put a premium on a continuance of what, in the light of the accident, appeared to be a dangerous condition of affairs. R. R. Co. v. Hawthorne, 144 U. S. 202; Morse v. R. R. Co., 30 Minn. 465.

15. *Compare the two following cases, in both of which an illness of the plaintiff was alleged to have been caused by gas escaping from the defendant's pipes.*

(1.) *Evidence excluded of illness at the same time in other houses on the same street as plaintiff's, into which gas had escaped. Emerson v. Gas Co., 3 Allen,* 410.

(2.) *Evidence admitted of illness in the same house the plaintiff was in, occurring at the same time. Hunt v. Gas Co., 8 Allen,* 169.

These two cases, decided in the same court, show that the rule as to facts which complicate the issue is one depending on the discretion of the judge. It is one of degree, of more or less. The illness in the neighboring houses was considered as of too slight significance, since other material circumstances might have been concurrent, while that in the same dwelling was sufficiently closer to the case in hand to carry it over the line.

For a discussion of this general doctrine, see Darling v. Westmoreland, 52 N. H. 401 (a leading case), where the plaintiff's horse, while being driven along the highway, was frightened by a pile of lumber, at the roadside. *Held*, that the testimony by a witness, that his horse had been similarly affected by that pile of lumber, should not have been held irrelevant. Such a fact goes to show the effect of that lumber on horses, and evidence of that character should have been admitted to an extent limited only by the wise discretion of the trial judge.

On the other hand, see Temperance, etc., v. Giles, 33 N. J. Law. 260, a case in which the plaintiff had fallen into an areaway leading from the sidewalk to a cellar. Evidence that 10,000 persons annually passed the areaway in safety was excluded, on the ground that it would lead the jury away from the case in hand, or, if accepted, would necessitate a confusing and endless inquiry into the particulars of all the 10,000 cases.

All courts agree that no investigation of such collateral cases in detail is possible; and perhaps the admission of such testimony simply to show the general fact of the safe or dangerous character of the place, approaches the golden mean. Dist. of Columbia v. Armes, 107 U. S. 519.

16. *The question being whether a drover had exercised due care, evidence of the usual practice among drovers in the same district was offered to show the proper standard of care. Is this admissible?*

Evidence of the habits of other drovers would generally be admitted, but with restrictions. The jury should be clearly instructed that such habits as are customary are by no means conclusive evidence of reasonable care, and that the question for their decision is whether the care actually taken conforms to *their* idea of the conduct of an ordinarily prudent man. Maynard v. Buck, 100 Mass. 40; Ry. Co. v. McDaniels, 107 U. S. 454.

b. Character of Parties.

17. *Define character as here used and state when evidence on the subject is admissible in criminal cases.*

Character means general reputation in the neighborhood. But though this is supposed to be an index of the person's actual disposition from which an inference as to the probability of his committing the crime may be drawn, no direct evidence of that disposition can be admitted; *i. e.*, particular incidents, showing a good or bad disposition, cannot be examined. Regina v. Rowton, Leigh & Cave, 520.

Evidence of character is admissible only when the prisoner opens the subject himself. Commonwealth v. Hardy, 2 Mass. 317; 3 Greenleaf on Evidence, § 25.

18. *When is evidence of character admissible in civil causes?*

Character here also means reputation, and the rule based on that meaning is more logically applied than in criminal procedure. Such evidence is never admitted in civil cases, unless reputation is one of the elements of the plaintiff's case, as in libel and slander. There the reputation of the plaintiff may be shown by the defendant, in order to prove that he had little, if any, to lose by the alleged libel or slander. Scott v. Sampson, 8 Q. B. Div. 491; 1 Jones on Evidence, § 148; Stone v. Varney, 7 Metc. (Mass.) 86.

In accident cases, a general reputation for carefulness is also sometimes admitted when the accident has occurred with no eye-witnesses, and no other evidence is available. R. R. Co. v. Robbins, 43 Kan. 145.

c. Rule Against Hearsay and Exceptions.

19. *What is hearsay evidence and why is it excluded?*

Hearsay is "that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person." 1 Greenleaf on Evidence, §§ 98, 100, 124.

The general rule is, that it is excluded when offered to prove the existence or the happening of the fact to which it relates; and the rule exists, not because such evidence has no probative force, but because what force it has is frequently so slight as to be misused by a jury, because there is no cross-examination, and because the door would be opened to fraud by its admission. Marshall, Ch. J., in Mima Queen v. Hepburn, 7 Cranch, 296.

It should be remembered, however, that such statements at second-hand are frequently useful and admissible for other purposes than to prove the fact to which they relate. An illustration is the admission, in a suit for malicious prosecution, of representations as to facts, made to the prosecutor before he instituted the prosecution. They tend to show that he had reasonable and probable cause for charging the crime. Bacon v. Towne, 4 Cush. 217; 1 Greenleaf on Evidence, § 100.

The exceptions which are attached to the rule against hearsay are the most important part of it. Considered as a whole they are illogical and arbitrary, but they grew up singly from hard cases, and to this is partly due their lack of system.

In exceptions 1, 2, 3, 4 and 7 (as numbered, *infra*), the declarant must be dead. Stephen's Digest on Evidence, art. 25, and the cases cited below. Logically, the permanent insanity or the absence from the jurisdiction of the declarant are equally good reasons for admitting his statements in evidence, and in many instances that principle has been laid down. Union Bank v. Knapp, 3 Pick. 96; North Bank v. Abbot, 13 id. 465; Reynolds v. Manning, 15 Md. 510, 523; Drayton v. Wells, 1 Nott & McC. (S. C.) 409.

(1) EXCEPTION AS TO REPORTED TESTIMONY.

20. *What is the scope of this exception to the rule against hearsay evidence?*

It extends to this, that evidence is admissible of what was stated by a witness, since dead, insane or out of the jurisdiction, on a former trial of substantially the same issue between the same parties or those identified in interest with them, full opportunity for cross-examination having been enjoyed by the party against whom it is offered. Here, obviously, the most important objections to hearsay are removed by the statements being under oath, and by the opportunity for cross-examination. Stephen's Dig. Ev., art. 32; Drayton v. Wells, 1 N. & McC. 409; U. S. v. Macomb, 5 McLean, 286.

(2) EXCEPTION AS TO DYING DECLARATIONS.

21. *What is the scope of this exception?*

Under this rule the declarations of a dying person, who believes himself to be in that condition (Regina v. Morgan, 11 Cox C. C.

337), are admitted in a prosecution for *homicide* (People v. Davis, 56 N. Y. 95), when they relate to the cause of the declarant's death. King v. Mead, 2 B. & C. 605. They were admitted originally on the ground that peculiar credit was due to statements made in fear of immediate death, but probably the rule can at present rest better on the necessity of the case, since it is rare that there are eye-witnesses of such crimes. It is the narrowest of all the exceptions to the hearsay rule.

(3) EXCEPTION AS TO PEDIGREE.

22. *To what classes of facts does this exception refer, and by whom must the statement be made?*

It refers to times and places of births, marriages and deaths, legitimacy, consanguinity, and the like, and rests upon the probability that the persons speaking know the facts, and have no temptation to misrepresent them. The statement must have been by someone related by blood to the person whose pedigree is in question, or by the husband or wife of a person so related. Johnson v. Lawson, 2 Bing. 86; Fulkerson v. Holmes, 117 U. S. 389, 397.

A restriction as to the time of making the declaration, which applies only to this and one other exception to the hearsay rule, is that it must have been made before any controversy arose on the point (*ante litem motam*). Berkeley Peerage Case, 4 Campb. 401.

23. *How far does this exception extend? Does it allow such evidence to establish any fact of a pedigree whenever that fact may be in issue, as, for instance, to prove the age of one alleging himself an infant?*

There is some authority that it does, (North Brookfield v. Warren, 16 Gray, 171); and logically that position is plausible. But these exceptions are not built up logically, and the weight of authority is that such evidence is good only when the case involves a question of *family*. Haines v. Guthrie, 13 Q. B. Div. 818, per Brett, M. R.; Ins. Co. v. Schwenk, 94 U. S. 593, 598; 2 Jones on Evidence, § 318.

(4) MATTERS OF PUBLIC OR GENERAL INTEREST.

24. *What is the basis and what are the limitations of this exception?*

It is founded partly on the supposition that every one is interested in such matters (and the consequent probability of the truth of the common tradition), and partly on necessity, the beginnings of public rights often lying back of the generation when the question arises. Hence, common repute on a matter of this kind, as

shown by the statements of a deceased person, is admitted. Weeks v. Sparke, 1 Man. & Sel. 679.

In America, the rule is in many States much broader, and such evidence is admitted to show the location of private boundaries, especially when a large tract has been divided up. Morton v. Folger, 15 Cal. 275; Harriman v. Brown, 8 Leigh, 707.

The statement, like those in pedigree cases, must have been made "*ante litem motam.*" 1 Greenleaf on Evidence, § 131.

(5) ANCIENT DOCUMENTS, ANCIENT POSSESSION AND THE LIKE.

25. *What is meant by saying that a document over thirty years old "proves itself"?*

This means, that if it comes from proper custody, it is admissible in evidence without further proof of its due execution. If it purports to show an exercise of ownership over land, such as a lease or a license, it is admissible to show such ownership, though no actual possession under it appears. Such documents are of slight weight, however, unless acts of possession under them or other acts under similar papers of a later date are adduced. Malcolmson v. O'Dea, 10 H. of L. Cases, 593; Boston v. Richardson, 105 Mass. 351.

(6) REGULAR ENTRIES IN THE COURSE OF BUSINESS.

26. *What was the "shop-book exception,"* formerly so prominent?*

This was a rule recognized early by the common law, and also by statute (7 Jac. I, chap. 12, cited Taylor on Evidence, 641a), by which entries in the shop-books of small tradesmen were admissible under certain restrictions in actions by them against their customers. The practice was brought to this country and flourished with more or less vigor in many of the States. See note to Price v. Torrington, 1 Smith's Lead. Cas. (8th ed.) 752, for the rules in the separate jurisdictions; also Faxon v. Hollis, 13 Mass. 427; Eastman v. Moulton, 3 N. H. 156; Vosburgh v. Thayer, 12 Johns. 461.

But the topic is of comparatively small importance, now that parties can testify in their own behalf. Shove v. Wiley, 18 Pick. 558; Anchor Milling Co. v. Walsh, 108 Mo. 277; s. c., 32 Am. St. Rep. 600.

27. *What is the rule as to entries in the books of third persons?*

The rule is that contemporaneous entries made in the regular course of business are admissible after the death of the person mak-

* Not an exception to the hearsay rule, but considered here because closely allied to that subject.

ing them, whether he made them in the course of his employment or simply as an habitual practice. Welsh v. Barrett, 15 Mass. 380; Nichols v. Webb, 8 Wheat. 326; Augusta v. Windsor, 19 Me. 317. This exception is an exceedingly useful one, and in fact is based chiefly on the extreme inconvenience of shutting out such evidence. Entries of the kind are moreover in all probability reliable and accurate.

An important extension has been made by which such entries go in as evidence, during the lifetime of the person making them. In Shove v. Wiley, *supra*, the leading case, the witness had no recollection of a certain transaction, but his entry made in the regular course of business was admitted on his swearing to habits of accuracy and care. See also Bank v. Culver, 2 Hill, 531 (and a still broader ruling — as to *any* contemporaneous memorandum, Guy v. Mead, 22 N. Y. 462).

(7) DECLARATIONS AGAINST INTEREST.

28. *Against what "interest" must the declaration be? And what is the basis of this exception?*

It must be against the *pecuniary* or *proprietary* interest of the (deceased) declarant. The reason of the exception is, that a man is very unlikely to commit himself by acknowledging that money has been paid him, or that someone else owns land of which he is in possession, when such is not the fact. Higham v. Ridgway, 10 East, 109; Currier v. Gale, 14 Gray, 504; Taylor on Evidence (8th ed.), § 670.

29. *What other features are noticeable in regard to this exception?*

The circumstance from which it derives its peculiar usefulness is, that whatever statements are bound up in the acknowledgment of indebtedness, tenancy or the like, go in with it. The acknowledgment gains them admission, and they can then be used for what they may be worth. Davies v. Humphreys, 6 M. & W. 153; Livingston v. Arnoux, 56 N. Y. 507, 519.

Oral declarations, though of less weight, are admissible as freely as written ones. Hinckley v. Davis, 6 N. H. 210; County of Mahaska v. Ingalls, 16 Iowa, 81 (per Dillon, J., containing a review of the subject). *Contra*, Lawrence v. Kimball, 1 Metc. 527.

(8) DECLARATIONS AS TO MENTAL OR PHYSICAL CONDITION.

30. *How far are such declarations admissible?*

The general rule is, that they go in, whenever intention, mental capacity, pain and the like become material; and the reason for it is thus stated in Ins. Co. v. Hillmon, (1892), 145 U. S.

285: "These expressions are the natural reflexes of what it might be impossible to show by other testimony. * * *. Such declarations are regarded as *verbal acts*." And see Waterman v. Whitney, 11 N. Y. 157, a case where declarations of a testator were brought in to show mental capacity.

It is obvious that the declarations are admitted only to show the state of mind or body at the time they were made. "All narration must be excluded." Ins. Co. v. Mosley, 8 Wall. 397. On the whole topic, see 2 Jones on Evidence, §§ 352, 353.

(9) DECLARATIONS PART OF SOME FACT ITSELF ADMISSIBLE RES GESTA).

31. *State the scope of this exception (apparent only, according to Greenleaf).*

As the heading indicates, the declaration is admissible as qualifying or explaining an act which is in itself admissible. "Where an act done is evidence *per se*, a declaration accompanying it may well be evidence, if it reflects light upon or qualifies the act." Wright v. Tatham, 7 A. & E. 361. Yet, though the declaration must be practically contemporaneous with the act, mere nearness in time is not enough. R. R. Co. v. O'Brien, 119 U. S. 99. "The declaration must not be mere narrative, * * * but must have been well calculated to unfold the nature and quality of the acts it was intended to explain." Rockwell v. Taylor, 41 Conn. 55. And see also, for full discussion, Waldele v. R. R. Co., 97 N. Y. 274.

d. Opinion.

32. *Where is the line drawn between "facts," and inferences from them, so as to exclude testimony of the latter class?*

It is not easy to lay down a rule, for every sensation involves an exercise of judgment. Whenever the conclusion is so simple as to be unconscious, that conclusion may be regarded as a fact; it is *known*, so far as anything can be. But when a conclusion is reached by a conscious process of reasoning, or when different persons might reasonably reach different conclusions, the result is an opinion, and is inadmissible. Thayer's Cases on Evidence, 672, note by Geo. C. Lewis; Ins. Co. v. Lathrop, 111 U. S. 612.

33. *Is it permissible to ask an "expert," i. e., one of special skill and knowledge on the subject in question, what is his opinion "on the evidence" in a case?*

No. The proper way to question him is to assume the truth of certain facts as a foundation for his opinion, and then ask some such question as "These being true, would so and so follow, in your opinion?" In this way the jury can see upon what facts the ex-

pert bases his judgment, and their province, viz.: to determine the effect of the evidence actually given, is not invaded. People v. McElvaine, 121 N. Y. 250; Hunt v. Gas Light Co., 8 Allen, 169.

34. *Under what restrictions is the opinion of a nonprofessional witness admissible as to the sanity of an individual?*

His judgment must be based upon personal knowledge of the circumstances involved in the inquiry, and his opinion must come in as a summary, after he has stated in more or less detail the facts on which he bases it. On these terms, by the weight of authority, the opinions of ordinary witnesses on that subject are admissible, partly because such a judgment approaches a "fact" as defined above, and partly because of the practical impossibility of a witness's bringing before a jury all the circumstances necessary for them to form a correct conclusion. Ins. Co. v. Lathrop, 111 U. S. 612; Dunham's Appeal, 27 Conn. 192; Hardy v. Merrill, 56 N. H. 227. *Contra,* Clapp v. Fullerton, 34 N. Y. 190; and also (on grounds of public policy), Commonwealth v. Fairbanks, 2 Allen, 511.

35. *How would you prove a signature genuine?*

There are at least three ways, the third of which only has raised question: (1) testimony as to its genuineness, by one who has seen the alleged author of the signature write other things (even if only once); (2) testimony by one whose acquaintance with the handwriting is gained from business dealings with the alleged author; (3) comparison, by any witness of skill in such matters, of the writing in dispute with other writings proved to be genuine. In general, the last method is allowed not only where the documents containing the writings proved to be genuine and used as a standard for comparison, are already before the court in the suit, but even where they are brought in simply for the purpose. Moody v. Rowell, 17 Pick. 490; Lyon v. Lyman, 9 Conn. 61. Some courts have shut them out in the latter case, because the proof of their genuineness tends to complicate the case. Vinton v. Peck, 14 Mich. 287. But these are in the main overridden by statute. See Rogers on Expert Testimony (2d ed.), 131.

III. WRITINGS.

a. Proof of Contents.

36. *What is the "Best Evidence" rule?*

This rule is that in proving a disputed fact, the best *legal* evidence which can be had must be produced. In practice, the application of the rule has to do almost, if not quite, exclusively with the proof of the contents of writings. "Primary" evidence of the contents, as explained below (No. 37), must be produced, or its absence accounted for; or to state the rule the other way, evidence

which on its face shows that better evidence exists, as for example, a *copy* of the document, is inadmissible, unless good reason is given for the nonappearance of the higher grade. 1 Best on Evidence, §§ 87-89; 1 Jones on Evidence, §§ 197-198.

As formerly laid down, the rule ran that one must bring the best evidence he could, and if he did that it was enough. Even as late as McKinnon v. Bliss, 21 N. Y. 218, it is stated that "the best evidence of which the nature of the case admits is always receivable," although the error of such a statement had been pointed out as early as 1794, by Christian, in the twelfth edition of Blackstone, as follows: "If the best *legal* evidence cannot be produced, then the next best *legal* evidence shall be admitted. * * * Secondary evidence is as accurately defined by the law as primary. But in general, the want of better evidence can never justify the admission of hearsay, interested witnesses," etc. See note by Prof. Thayer, in his Cases on Evidence, p. 732.

37. *What are the important classes of primary evidence in proving a document?*

(1) The document itself, the authorship being proved as shown below.

(2) Admissions made by the other party or those under whom he claims (see Ques. 7-9), and covering the same subject-matter as the document. Slatterie v. Pooley, 6 M. & W. 664; Smith v. Palmer, 6 Cush. 513, 520. But this rule is not universal. Jenner v. Joliffe, 6 Johns. 9.

(3) Duplicate originals; or any one of a number of documents all made by printing, photography or any other process of a nature to insure uniformity of result. Rex v. Watson, 2 Stark. 116; Stephen's Dig. Ev., art. 64.

38. *What are the chief classes of secondary evidence and when are they admissible to show the contents of a document?*

They are (1) copies of the original (certified or otherwise*); and (2) oral evidence of the contents by one who has seen the writing. See Stephen's Dig. Ev., art. 70.

Secondary evidence is admitted: (1) Where the original is a public document, such records being too valuable to be moved about the country. Marsh v. Collnett, 2 Esp. 665; s. c., Thayer's Cases on Evidence, 733; Delafield v. Hand, 3 Johns. 310, 313. (2) Where the original has been lost or destroyed, and a proper search has been made. Sugden v. Lord St. Leonards, 1 Prob. Div. 154 (a lost will); Davis v. Sigourney, 8 Metc. 487. (3) Where the

* By the weight of authority all classes of secondary evidence stand on an equality; that is, as soon as the absence of primary evidence is accounted for, oral evidence is as readily *admissible* as a certified copy. Doe v. Ross, 7 M. & W. 102; Goodrich v. Weston, 102 Mass. 362. *Contra, semble*, Stebbins v. Duncan, 108 U. S. 43.

original appears to be in the power of the adverse party and he refuses to produce it on notice, or without notice, if on the pleading he must be supposed to have notice. Howell v. Huyck, 2 Abb. App. Cas. (N. Y.) 423; Riggs v. Tayloe, 9 Wheat. 483, 486. (4) Under various statutory provisions.

b. Proof of Authorship.

39. *How would you prove that a document was actually executed by the person who appears to have done so?*

The inflexible common-law rule, which is still the prevailing doctrine except where modified by statute, was that when an instrument was produced, the execution of which appeared to be attested by witnesses, at least one of the witnesses should be called to prove such execution if living, competent and within the reach of the process of the court; and this rule held even if the person who appeared to have executed the document admitted the fact. Rex v. Harringworth, 4 M. & S. 350.

The witness was said to have been *selected* by the party to prove what occurred at the execution. See 1 Greenleaf on Evidence, § 569 et seq.

The exceptions to the rule are: (1) Ancient documents, which "prove themselves" (see Ques. 25); (2) Where the adverse party produces the instrument, and claims an interest under it. Pearce v. Hooper, 3 Taunt. 60. (3) Where the witness is dead, insane or beyond seas. Brigham v. Palmer, 3 Allen, 450. (4) Where the document is only incidentally in issue in the case. Demonbreun v. Walker, 4 Baxt. (Tenn.) 199.

c. Alterations.

40. *If one seeks to recover on an instrument which bears marks of alteration, what is the rule as to proof of the time when the alterations were made?*

It is stated in various ways, but most frequently that there is a presumption that the alterations were made subsequent to the execution of the instrument. The real meaning of this is that there is no presumption either way, but that the person relying on an instrument so altered must establish its genuineness. It is absurd to say the plaintiff is *always* in the wrong. See Hill v. Barnes, 11 N. H. 395 (promissory note); Ely v. Ely, 6 Gray, 439 (deed); Crossman v. Crossman, 95 N. Y. 145 (will); and 1 Greenleaf on Evidence, § 564.

41. *What is the effect of an alteration in a material part of a deed?*

The former rule, that any such alteration, by whomsoever made, avoided the instrument (Pigot's Case, 11 Co. 27), has been modified.

At present the deed is only void, if the alteration is by a party or one privy to him, without the consent of the other party. Bigelow v. Stephens, 35 Vt. 521; Gleason v. Hamilton, 138 N. Y. 353.

d. The "Parol Evidence" Rule.

42. *State the rule, the reason for its existence, and the general limitations on its operation.*

The rule is that when any agreement between parties or any transfer of property has been put into the form of a document, *i. e.*, into a *formal writing*, the terms of that written statement cannot be contradicted, altered or added to by any oral evidence which would tend to show that the parties understood or meant something different from what the written words say.*

It is assumed that, when men adopt this deliberate form of expression instead of leaving their agreement in verbal form, they mean the writing to be final, and, therefore, have used language which corresponds to their actual intentions. 1 Greenleaf on Evidence, § 275; Stephen's Dig. Ev., art. 90. This reason for the rule affects only those who are parties to the writing, and the rule consequently binds only them and their representatives. It does not shut off strangers from introducing oral testimony of the actual facts of the transaction, which may have a bearing upon their interests, even though these may be entirely contradictory to the writing. Stephen's Dig. Ev., art. 92; McMaster v. Ins. Co., 55 N. Y. 222, 234.

For obvious reasons, also, oral evidence may be used to overthrow the writing by showing fraud, duress, illegality, mistake, want of consideration or the disability of a party from infancy or the like. 1 Greenleaf on Evidence, § 284.

43. *Suppose a party wishes to show that, besides the writing, there was also a verbal agreement, as, for instance, a promise by a grantor of land to grade and build a street on land adjoining that granted. Can he do so?*

The test given by Stephen is quoted with approval in Durkin v. Cobleigh, 156 Mass. 108. "The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole transaction between them," may be proved. Stephen's Dig. Ev., art. 90. In Durkin v. Cobleigh, the agreement to build the street was admitted. See Naumberg v. Young, 44 N. J. L. 331, for a decision excluding evidence of an oral undertaking as to the condition of a boiler in a factory leased by the defendants.

* Study questions 44 and 45 in connection with this statement of the rule.

44. *It is obvious that even after a close study of a will or other instrument by itself, it does not, as a rule, clearly appear what the language employed by the parties means, or what is the scope and bearing of the document. How far may the Court enlighten itself by outside evidence* as to the circumstances surrounding the case?*

Baron Parke in Shore v. Wilson, 9 Cl. & F. 555, divides the evidence admissible, for this purpose, into two classes. The first is outside evidence to explain foreign or technical words, or those having a peculiar local usage. The second class of such evidence he describes as "every material fact which will enable the court to place itself *as near as may be in the situation of the parties*" to the instrument, is admissible. Judge Holmes, in Doherty v. Hill, 144 Mass. 468, says: "In every case the words used must be translated into things and facts by parol evidence."

We append in a note,† the first three of the rules formulated by Wigram in his Treatise on Extrinsic Evidence in Aid of the Interpretation of Wills. They apply equally to other writings. See also 1 Greenleaf on Evidence, §§ 286-289, inclusive.

45. *What is meant by the terms "patent" and "latent" ambiguity? and how does the existence of a latent ambiguity modify the general rules of admitting outside evidence?*

The meaning of these terms is thus stated by their originator, Lord Bacon. A patent ambiguity is "that which appears to be ambiguous upon [the face of] the deed or instrument." A latent ambiguity is "that which seemeth certain for anything that appeareth upon the instrument, but there is some collateral matter out of the deed, that breedeth the ambiguity." For example, "I give all my horses to my nephew John or Thomas," is obviously ambiguous in itself; but "I give all my horses to my nephew John," is by itself clear of any doubt, and only becomes ambiguous when it appears that there were two nephews by the name of John. See

* By "outside evidence" we mean evidence of *any* fact not appearing in the writing itself.

† I. A testator is always presumed to use the words in which he expresses himself *according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense*; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.

II. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances* it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable.

1 Greenleaf on Evidence, §§ 297-300, and as to the uselessness of the phraseology, 3 Harv. Law Rev. 332.

The rules governing the evidence admissible to remove ambiguities, so far as the mass of decisions can be reconciled, are apparently as follows:

1. To remove a patent ambiguity the usual rule of interpretation fixes the limit, namely, evidence to show the situation and surrounding circumstances in which the testator was, and with reference to which he presumably acted. See Ques. 42 and 44.

2. When a latent ambiguity occurs a further step is taken, which establishes the great exception to the ordinary rules of construing writings. The direct declarations of the testator, i. e., his statements of *what he meant by the words used in his will,* are to be admitted.* A prerequisite to the admission of such statements is that the words used in the will furnish a clear description of two or more persons or things, for the theory is that the testator has actually described what he means, but that by accident the words fit another person or thing equally well. "To my nephew," for example, would not be sufficient to let in the testator's direct statements. Doe d. Hiscocks v. Hiscocks, 5 M. & W. 363; Bodman v. Tract Society, 9 Allen, 447; 1 Greenleaf on Evidence, §§ 289, 290, notes, and cases cited.

IV. WITNESSES.

46. *What classes of persons were considered at common law incompetent to testify? and what are the rules at present?*

The common law excluded infidels, i. e., those not believing in a God or a punishment by Him for swearing falsely (Omichund v. Barker, Willes, 538; s. c., Thayer's Cases on Evidence, 1081); those insane; not of sound mind; or legally infamous (convicted of certain crimes); and, especially, interested persons. Thurston v. Whitney, 2 Cush. 104.

These disqualifications have been largely modified by decision and statute with this general result: (1) In many States it is provided that no one shall be incompetent on account of his opinions on religion, but he is required to make a solemn statement of the truth of his testimony, and is guilty of perjury for wilful and corrupt misstatement. 3 Jones on Evidence, §§ 732, 733; (2) Insane persons may testify in a lucid interval, if deemed by the court capable of understanding the obligation of an oath, and of giving correct answers. 3 Jones on Evidence, § 737; Coleman v. Commonwealth, 25 Gratt. (Va.) 865; (3) The evidence of children will be received, if the witness' mind is sufficiently matured to understand, in general, the meaning of an oath. 3 Jones on Evidence, §§ 738, 739; (4) Persons convicted of crime, or having an interest, are al-

* It may be noted that much of the obscurity which pervades the discussion of the subject has arisen from the use of the various names applied to such statements, "parol evidence," "extrinsic evidence," "direct testimony" and so on, when the same terms are used elsewhere in other and widely different senses.

most universally allowed to testify, the circumstances affecting them being considered to go only to their credibility. 3 Jones on Evidence, §§ 743, 748.

The work above cited, sections 730-748 has, perhaps, the clearest and most concise treatment of the subject, and references to the State statutes will be there found collected. See also 1 Greenleaf on Evidence, §§ 327-430.

47. *What are the principal classes of privileged communications? May the "privilege" be waived?*

The two leading classes are communications between husband and wife, and between attorney and client.

1. The first arises from the identity of interest and, especially, from the necessity of preserving the mutual trust and confidence of the conjugal relation. By the common-law rule, which still prevails in many States, this prohibition covers conversations between husband and wife on any subject. O'Connor v. Majoribanks, 4 Man. & Gr. 435; Dexter v. Borth, 2 Allen, 559. In other States it is limited to confidential conversations. Southwick v. Southwick, 49 N. Y. 510. Whether such testimony may be given by a husband or wife, if the other spouse consents, is not settled. 3 Jones on Evidence, § 757.

2. The reason of protecting conversations and other communications between attorney and client on professional matters is based on a choice between two evils. An occasional failure of justice is deemed better than continual uneasiness and distrust in conferences between a client and his adviser. Foster v. Hall, 12 Pick. 89; Goddard v. Gardner, 28 Conn. 172. The privilege is clearly the client's, and if he waives it, the attorney will be allowed to state what was said. Foster v. Hall, *supra;* Chirac v. Reinicker, 11 Wheat. 280, 293. And see Westover v. Aetna, etc., Co., 99 N. Y. 56.

48. *Can a witness refuse to answer a question on the ground that it will tend to subject him to pecuniary liability?*

No. It has been finally settled that the privilege of refusal extends only so far as to allow a witness to protect himself from criminal prosecution or from suffering a penalty or forfeiture. Bull v. Loveland, 10 Pick. 9; Taney v. Kemp, 4 Harr. & J. (Md.) 348; 3 Jones on Evidence, § 895.

49. *A witness has no recollection whatever of certain facts, but can swear positively as to their occurrence from their being stated in a memorandum he made at the time. May his testimony go in?*

Yes. He swears that he could not have made the entry unless the fact had been true. The evidence is generally more weighty

where the memorandum was set down for the express purpose of perpetuating the facts. State v. Rawls, 2 N. & McC. (S. C.) 331; Halsey v. Sinsebaugh, 15 N. Y. 485.*

50. *How is the credibility of a witness directly attacked?*

There are several methods: (1) A familiar course is to call witnesses who are first asked if they know the general reputation for truth and veracity of the person who has testified, and then, what that reputation is. Generally these witnesses are then asked whether they would believe him under oath. 1 Greenleaf on Evidence, § 461, note c; 3 Jones on Evidence, §§ 862-865. Sometimes, the question is whether his reputation for veracity is up to the average of mankind. State v. Randolph, 24 Conn. 368.

(2) The witness may be impeached by contradicting his statements by the testimony of other witnesses, provided those statements are *material to the issue*. In other words, you cannot impeach him by asking others about *collateral* matters merely for the purpose of contradicting him. Lawrence v. Barker, 5 Wend. 301; Pullen v. Pullen, 43 N. J. Eq. 136.

(3) A third method is by showing previous statements inconsistent with those made at the trial. Stephen's Dig. Ev., § 131; Hart v. Bridge Co., 84 N. Y. 56; and on all three methods see summary in Gaines v. Relf, 12 How. 555.

The cross-examination is, of course, in many cases, sufficient in itself to discredit the witness by bringing out his bias, interest, relationship, means of acquiring knowledge of the facts, and the like.

51. *If your own witness surprises you by testifying in an unexpected manner, may you show him to be unworthy of credence?*

As a rule, a party is not allowed to discredit his own witness. Having introduced him, he is presumed to know his character and, in a way, to vouch for him. But, in the case suggested, you may ask questions to recall to the mind of the witness the statements previously made to you, and to draw out an explanation. Bullard v. Pearsall, 53 N. Y. 230; 1 Greenleaf on Evidence, §§ 442-444; 3 Jones on Evidence, § 859, and statutes cited. And, of course, the facts in issue may always be shown by the evidence of others, even though the credit of your preceding witness be impaired thereby. Skellinger v. Howell, 8 N. J. Law, 310; Olmstead v. Winsted Bank, 32 Conn. 278.

* This species of testimony should not be confused with that noted in Ques. 27. There the memorandum is evidence in itself and goes before the jury, the oath being only to verify it as original and made in the course of business. In the case here treated, however, the oath is the evidence and is affected as to its credibility by the character of the memorandum connected with it. See note to Price v. Torrington, 1 Smith's Lead. Cas. (8th ed.) 572–573; and note, Thayer's Cas. on Ev. 531, 532.

INSURANCE.

I. Generally.

1. *Define insurance.*

Insurance is "a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against damages or loss on a certain subject by certain perils." 1 Phillips on Insurance (5th ed.), § 1.

The principles relating to contracts in general govern also in insurance, and unless it is forbidden by some statute or by public policy, an individual or a partnership, as well as a company, may enter into such a contract. May on Insurance (3d ed.), § 35.

II. Warranty, Representation and Concealment.

2. *Define a warranty and a representation in insurance, and state the effect of the falsity or violation of each.*

A warranty is a statement or stipulation, inserted or referred to in and made a *part* of the policy, upon the truth or performance of which, on the part of the insured, the validity of the contract depends.

A representation is *not* a part of the policy, but is an incidental statement or representation made by the insured, upon the faith of which the policy is issued. Daniels v. Hudson, etc., Ins. Co., 12 Cush. (Mass.) 416.

The falsity or violation of a warranty is fatal. The statements must be literally true and the stipulations fully observed, or the policy is void, and the insured cannot recover by showing that the warranty was immaterial, or that the breach of it in no way contributed to the loss, or that the false statement was made through mistake. Glade v. Ins. Co., 56 Iowa, 400.

The falsity or violation of a representation is only fatal when the falsity is in regard to facts material to the risk, and even then it need only be substantially true. Horn v. Ins. Co., 64 Barb. (N. Y.) 81; Am. & Eng. Ency. of Law (1st ed.), "Insurance," 290-296.

3. *A., when applying for a policy on his building, represents that it is used for storing hardware, which is true. Before the policy is issued he uses it for storing oil, but is asked no further question as to the use of the building. Is the policy which is afterwards issued binding?*

No. The representation is deemed to be made at the time the contract is consummated, and must be true at that time. Ins. Co.

v. Ewing, 92 U. S. 377. When the contract is consummated, however, no subsequent change of the facts represented renders the policy void. In the absence of actual stipulation to that effect, there is no representation that the building will continue to be so occupied. Frisbee v. Ins. Co., 27 Penn. St. 325; Blood v. Howard Ins. Co., 12 Cush. 472.

4. *A. makes a written application for an insurance policy, and makes certain false oral representations at the same time. Can he recover for a loss of the property?*

Yes. When the application is made in writing it is presumed that all representations are incorporated in the application, and those made orally cannot be shown. Ins. Co. v. Mowry, 96 U. S. 544.

5. *Define concealment in the law of insurance, and state its effect.*

Concealment is the intentional withholding, by the insured from the insurers, of facts material and prejudicial to the risk, which ought in good faith to be made known. The facts must be known to the insured to make the concealment intentional. Boggs v. American Ins. Co., 30 Mo. 63. And it has been held that even when known, an innocent failure to communicate facts as to which the applicant is not questioned will not avoid the policy. Washington, etc., Co. v. Ins. Co., 135 Mass. 503; Buck v. Ins. Co., 76 Me. 586.

The withholding of facts actually known avoids the policy, but whether or not the insured has such knowledge is a question for the jury (Houghton v. Ins. Co., 8 Metc. [Mass.] 114); but he must be presumed to have such knowledge as a reasonable man ought to have under the circumstances. Dennison v. Ins. Co., 20 Me. 125.

6. *A.'s policy called for the payment of premiums in installments, the policy to be suspended if payment was not made. One payment was due January 1st. On that day A. was seriously ill and unable to make payment. Loss occurred on January 2d. Would his nonpayment be excused?*

No. Physical inability of the insured is not an excuse for failure to pay the premium when due, and the policy would be void. Evans v. Ins. Co., 64 N. Y. 304; Carpenter v. Centennial, etc., Assn., 68 Iowa, 453.

Nor is the insured excused for nonpayment if the company is enjoined from doing business pending an examination of its condition. Universal L. Ins. Co. v. Whitehead, 10 Ins. L. J. 337. See Coffey v. Universal Ins. Co., id. 525.

But where the company has failed or the receiver has given no-

tice he will not receive any more premiums, or has declared the policy forfeited, or the company has changed its agent, and the premium has been paid to the former agent, of which fact the company has notice but makes no report to the insured, who acted in good faith, the nonpayment is excused and the policy may be enforced. Atty.-Gen. v. Guardian, etc., Ins. Co., 82 N. Y. 336; So. L. Ins. Co. v. McCain, 96 U. S. 84.

7. *Payment upon A.'s policy became due and he was allowed an additional week to make same during which time and before payment was made the loss occurred. Could the company be held if the policy provided that nonpayment should avoid the policy?*

The company could be held. Provisions as to the payment of the premium may be waived after the policy takes effect, by parol as well as in writing, and any act of the company which would reasonably imply that the company did not mean to insist upon an absolute performance would be a waiver. Alexander v. Continental Ins. Co., 67 Wis. 422; Union, etc., Ins. Co. v. Pottker, 33 Ohio St. 459; Lyon v. Travelers' Co., 55 Mich. 141.

III. INSURABLE INTEREST.

8. *A. takes out a policy of insurance upon a house in which he has no interest. He pays the premium in a note. Can it be collected? Suppose loss occurs after the note is collected?*

If the insured has no pecuniary interest in the house the policy is a mere wagering contract and void, even if the policy make no provision for such a case. Notes given for the payment of premiums on such a policy are, therefore, not enforceable, for lack of consideration, and no action can be maintained for loss, even if premiums are paid. Sweeney v. Ins. Co., 20 Penn. St. 337; Freeman v. Ins. Co., 38 Barb. (N. Y.) 247. But see Ins. Co. v. Johnson, 24 N. J. Law, 576. The interest must exist at the commencement of the policy; it need not exist at the time of suit. Mowry v. Ins. Co., 9 R. I. 346.

9. *What constitutes an insurable interest in property?*

If the insured would suffer pecuniary injury from the loss of the property, his interest is an insurable one. There need not be a legal title to the property. Rohrbach v. Ins. Co., 62 N. Y. 47; Merrett v. Ins. Co., 42 Iowa, 11. Thus, an equitable interest may be insured. Higginson v. Dall, 13 Mass. 94.

A vendor, who has contracted to sell, or a vendee in possession, may insure his interest. MacCutcheon v. Ingraham (W. Va.). 9 S. E. Rep. 260; Rumsey v. Phoenix Ins. Co., 17 Blatchf. (U. S.) 527, 529.

So, also, an insurable interest is held by a lessor or lessee, a mortgagor or mortgagee, a holder of a lien upon property by statute or common law, an assignor, assignee, executor, administrator, trustee for the use of the *cestui que trust*, and others having similar interests in property. An agent or consignee who is interested in the property only to the amount of his commission may also insure it in his own name and recover the entire amount of the policy, holding all beyond his own interest in trust for his principal. Aetna Ins. Co. v. Jackson, 16 B. Mon. (Ky.) 242; Williams v. Ins. Co., 15 La. Ann. 651. And similarly a common carrier, or any person responsible for goods in his custody, has an insurable interest to the extent of his liability. The Sidney, 23 Fed. Rep. 88, 92. A builder, who is not to be paid until the building is completed, has an insurable interest in the property. Franklin, etc., Ins. Co. v. Coates, 14 Md. 285, 295.

"A contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies. It is sufficient to show that the policy is not invalid as a wager policy, if it appears that the relation, whether of consanguinity or of affinity, was such, between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured." Ins. Co. v. Bailey, 13 Wall. (U. S.) 619; Rawls v. Ins. Co., 27 N. Y. 282, 289. But any person may insure *his own* life for the benefit even of a stranger. Johnson v. Van Epps, 110 Ill. 551. And it seems that the policy is good even if the premiums are paid by the other party. Aetna Life Ins. Co. v. France, 94 U. S. 561; St. John v. Ins. Co., 13 N. Y. 31 40; Hoyt v. Ins. Co., 3 Bosw. (N. Y.) 440, 446.

Any person who is dependent upon another for support has a sufficient interest in his life to support a policy, and the relation of husband and wife gives *each* an insurable interest in the life of the other. Currier v. Ins. Co., 57 Vt. 496, 500. Thus where a married woman insured her husband's life and afterwards obtained a divorce from him the insurance company cannot cancel the policy on the ground that the woman no longer has an insurable interest in his life. He is still under a natural obligation to support any children, and alimony awarded the wife would make her in effect his creditor. McKee v. Ins. Co., 28 Mo. 383.

It has also been held that the relation of parent and child is sufficient alone to establish an interest insurable by either. Grattan v. Ins. Co., 15 Hun (N. Y.), 74, 76; Reserve, etc., Co. v. Kane, 81 Penn. St. 154; Loomis v. Ins. Co., 6 Gray (Mass.), 396, 402. In the last case this position is defended "not merely because they are bound to support their lineal kindred when in need of relief, but upon considerations of strong morals and the force of natural affection between near kindred, operating more efficaciously than those of positive law," p. 399.

This principle has been denied, however. Guardian, etc., Ins. Co. v. Hogan, 80 Ill. 35. And certainly no other relationship will, *per se*, raise an insurable interest — as that of a son-in-law (Rombach v. Ins. Co., 35 La. Ann. 233); or a nephew. Singleton v. Ins. Co., 66 Mo. 63. Employers and employees have an insurable interest in the lives of each other, and a creditor may insure his debtor's life. Miller v. Ins. Co., 2 E. D. Smith (N. Y.), 268; Hoyt v. Ins. Co., 3 Bosw. (N. Y.) 440.

10. *A. has an insurable interest in the life of B. and takes out a policy upon it. He then assigns the policy to X., who has no such interest. Can the policy be enforced?*

No. The assignee as well as the man originally insured must have an insurable interest. Ins., etc., Co. v. Sturges, 18 Kan. 93; Franklin Ins. Co. v. Sefton, 53 Ind. 380.

IV. INSURANCE AGENTS.

11. *What are the powers of insurance agents?*

In insurance as well as other branches of business the general rules of agency apply, and insurance agents have such powers as they are held out by the company as exercising. Travelers Ins. Co. v. Edwards, 122 U. S. 457; Hamilton v. Home Ins. Co., 94 Mo. 353.

The provisions of the policy, however, limiting the authority of the agent, are in most jurisdictions binding. Brown v. Mass., etc., Ins. Co., 59 N. H. 298; Gladding v. Ins. Co., 66 Cal. 6; Leonard v. Ins. Co., 97 Ind. 299; Shawmut, etc., Ins. Co. v. Stevens, 9 Allen (Mass.), 332.

Some cases, however, are contrary. See Haight v. Ins. Co., 92 N. Y. 51; Carson v. Ins. Co., 39 Am. Rep. 584; s. c., 14 Vroom (N. J.), 300. There are also similar decisions in Iowa, Connecticut, Tennessee, Wisconsin and Indiana.

12. *An agent, in soliciting business, himself filled out his client's application for a policy, and inserted in it representations which he knew were false. The insured signed the application, not knowing the representations it contained, and ignorant of any limitation of the agent's authority. Can he deny that he is bound by the representations?*

The rule that a written contract cannot be varied by parol evidence will not, in most jurisdictions, prevent the insured from showing that the application was made out by the agent, and in such a case the policy could be enforced. The manner in which the insurance business is actually conducted has been considered by the courts, and they have refused to shut their eyes to the fact that the companies pay their agents large commissions upon

the premiums collected and that in making out applications the agents are acting for the companies and not for the applicant. The best view is that the companies in such cases are held just as the agents would be if they were underwriters on the policy. The Union, etc., Co. v. Wilkinson, 13 Wall. (U. S.) 222.

The courts of Massachusetts and of several other States, however, are "*contra*", on the ground that to receive evidence that a statement is not that of the person who signed, would violate the rules of evidence as to written contracts. Brown v. Ins. Co., 59 N. H. 298, 301; McCoy v. Ins. Co., 133 Mass. 82; Smith v. Ins. Co., 24 Penn. St. 320, 324; Ins. Co. v. Martin, 8 Ins. L. J. (N. J.), 134, 140, and cases there cited.

These cases seem well criticised, however, in The Union, etc., Co. v. Wilkinson, *supra*, on the ground that they make the rule of evidence "the instrument of the very fraud it was intended to prevent."

In N. Y. Life Ins. Co. v. Fletcher, 117 U. S. 519, the assured and the insurer were both innocent (the application was signed by the assured) and it was held the policy should be canceled and the premiums returned.

Where inaccuracies in the representations of the applicant are known by a general agent, either before or after the execution of the policy, it is good notice to the company, and where the agent acts with such knowledge the defense which the company would otherwise have to an action on the policy is waived. Hamilton v. Home Ins. Co., 94 Mo. 353. *Contra*, Ins. Co. v. Martin, 8 Ins. L. J. 134; s. c., 40 N. J. Law, 568; McCoy v. Ins. Co., *supra*; Smith v. Ins. Co., *supra*.

But in the case of a special agent it is always a question as to the scope of his authority, and notice to him would not be sufficient if a waiver of any of the rights of the company was beyond his power. Devens v. Ins. Co., 83 N. Y. 168.

An agent, of course, binds his company by representations made within the general scope of his authority, unless the insured knows that the agent is exceeding his powers, and also, with the same limitation, by his mistakes or express waivers. New Eng., etc., Ins. Co. v. Schettler, 38 Ill. 166, 171; Silverberg v. Ins. Co., 67 Cal. 36, 41; Gladding v. Ins. Co., 66 id. 6, 8.

13. *A policy contains a clause to the effect that the person who procures the insurance shall be deemed the agent of the insured and not of the company. Can an agent, so acting, bind the company by waivers or representations?*

Yes. The facts cannot be changed by such a stipulation, and where a duly appointed agent acts in behalf of the company it is bound if he is within the scope of his authority. Putnam v. Ins. Co., 18 Blatchf. (U. S.) 368; Deitz v. Ins. Co. (W. Va.), 8 S. E. Rep. 616; Carson v. Ins. Co., 43 N. J. Law, 300; s. c., 39 Am. Rep.

584. *Contra,* Brown v. Ins. Co., 59 N. H. 298; Shawmut, etc., Co. v. Stevens, 9 Allen (Mass.), 332; Gladding v. Ins. Co., 66 Cal. 6.

14. *A policy provides that no condition thereof shall be waived, except upon the indorsed consent of the company. An agent, in violation of one of the conditions of the policy, writes insurance on a vacant house and forwards the premium to the company, who retains the same. Can the insured recover on the policy?*

Yes. In spite of the provision as to a waiver, the condition would be waived. Haight v. Ins. Co., 92 N. Y. 51. And such a provision in general will not protect a company if an agent, otherwise competent, has waived any of the conditions. Carson v. Ins. Co. (N. J.), 39 Am. Rep. 584; American, etc., Ins. Co. v. McCrea (Tenn.), 41 id. 647; Ind. Ins. Co. v. Capehart, 108 Ind. 270; M. I. F. Ins. Co. v Gusdorf, 43 Md. 506.

A provision of this sort has even been held to be invalid and without force, whether waiver or not, on the ground that it was not a limitation on the authority of any particular agent or class of agents but upon the capacity of the corporation for future action. Lamberton v. Ins. Co. (Minn.), 39 N. W. Rep. 76; Bartlett v. Ins. Co. (Iowa), 41 id. 601. And there are many authorities to the effect that such a provision as to a waiver may itself be waived. Carr v. Ins. Co., 60 N. H. 513.

V. REINSURANCE.

15. *What is reinsurance and what is the liability of the reinsurer?*

Reinsurance is where the first insurer reinsures the risk in another company. It is a contract entered into merely for the protection of the first company, and the insured has no rights in the matter whatever. Lee v. Ins. Co., 1 Hardy (Ohio), 217, 231; Strong v. Ins. Co., 62 Mo. 289, 299.

The liability of the reinsurer is the same as that of the original insurer, and if the policy is void as against the insurer it will also be void as against the reinsurer. N. Y. etc., Ins. Co. v. Ins. Co., 1 Story (U. S.), 458. And to recover against the reinsuring company, the first company must make such proof as the insured is required to make. Yonkers, etc., Ins. Co. v. Hoffman Ins. Co., 6 Rob. (N. Y.) 316, 320.

It has been held, however, in New York, that furnishing the proofs of the original insured is sufficient, (Bowery F. Ins. Co. v. Ins. Co., 17 Wend. 359); and in Jackson v. Ins. Co., 99 N. Y. 124, 130, it was held that the reinsuring company could not defend an action on account of a misrepresentation made in obtaining the original policy.

This is certainly true where a judgment has been recovered against the first company in an action which the reinsuring company was notified to defend. Strong v. Ins. Co., 4 Mo. App. 7.

In applying for reinsurance the original company must, of course, make known any facts within its knowledge which are material to the risk, and in all ways comply with the requirements laid upon any applicant.

VI. REMEDIES.

16. *The terms of a contract of insurance have been fully settled, but the policy has not been issued. Has the insured any rights if a loss occurs?*

Yes. He may recover upon the policy. Sheldon v. Ins. Co., 25 Conn. 207; Humphrey v. Ins. Co., 15 Blatchf. (U. S.) 35, 504. There must be conclusive evidence, however, that the contract was actually made. Suydam v. Ins. Co., 18 Ohio St. 459.

17. *A policy has been issued which, by mutual mistake, does not conform to the real agreement of the parties. Would the insured have any right in case of loss?*

Yes. Such a policy may be reformed in equity, even after loss has occurred, and damages will be decreed in the same case. Hammel v. Ins. Co., 50 Wis. 240; Phoenix Ins. Co. v. Hoffheimer, 46 Miss. 645. Such a mistake, however, must be proved conclusively, and must be mutual or induced by the fraud of one of the parties. Snell v. Ins. Co., 98 U. S. 85.

Where, by fraud or mistake, a policy has been issued injurious to the company, it also may obtain a decree in equity, requiring a redelivery and cancellation of the policy; Imperial Ins. Co. v. Gunning, 81 Ill. 236; and that, too, even after an assignment of the policy for value, without notice. British Eq. Assur. Co. v. Great W. Ry. Co., 20 L. T. (N. S.) (L. R.) 422.

After a loss, however, the proper course for the company is to defend the action upon the policy. Phoenix Ins. Co. v. Bailey, 13 Wall. (U. S.) 616.

18. *A company is required by law to keep on hand* $50,000 *for the payment of losses. The company does not comply with the requirement, and is practically insolvent. What is its liability?*

In such a case the company is liable to every policy-holder for a breach of its duty, and the damages for such a breach would be the value of the policy, according to the insurance tables, showing the average expectancy of life. People v. Ins. Co., 78 N. Y. 114.

19. *A., intending to commit suicide, insures his life in his wife's favor before doing so. Could the company defend an action by the wife? Suppose the wife killed her husband to get the insurance?*

Where the policy is negotiated with the intent to commit suicide, it cannot be enforced, any more than where a man burns his property. And this would be the result, even though there was no stipulation for the avoidance of the policy by suicide. Smith v. Nat. Ben. Assn., 4 N. Y. Supp. 521.

In the second case, the wife, being no party to the contract, cannot be said to violate any condition of the policy, express or implied, but public policy would prevent her from recovering. N. Y., etc., Co. v. Armstrong, 117 U. S. 591.

20. *A fire insurance policy contains a clause giving the company the right to cancel the policy at any time. Is such a clause enforceable?*

If loss is imminent cancellation is not allowed, but in other cases such a clause is binding upon the insured. The company must, of course, return the unearned proportion of the premium. Home Ins. Co. v. Heck, 65 Ill. 111. Notice, without a return or offer to return the unearned premiums, amounts to nothing. Hathorn v. Germania Ins. Co., 55 Barb. (N. Y.) 28.

21. *Can an insurance company enforce a provision which limits the time within which an action upon its policy must be brought? Suppose the time is less than that allowed by the Statute of Limitations?*

Such a provision can be enforced, regardless of the Statute of Limitations, and the expiration of the time fixed by it is an absolute bar, unless the time is so short as to raise the presumption of fraud. Six months after cause of action arose has been held a reasonable limitation. Brown v. Ins. Co., 24 Ga. 97, 101. So, also, one year after date of fire. Thompson v. Phoenix Ins. Co., 25 Fed. Rep. 296.

And when such a stipulation is set up, the insured is barred, even if he shows that in an action actually begun within the time specified he has been nonsuited, or that such an action has been discontinued or a judgment therein stayed. Brown v. Ins. Co., 7 R. I. 301; Arthur v. Ins. Co., 78 N. Y. 462.

There may, however, be a good excuse for not bringing suit within the specified time, as when war breaks out and prevents; Semmes v. Ins. Co., 13 Wall. (U. S.) 159; or where the performance in good faith of conditions precedent to payment takes more time than that allowed; Longhurst v. Ins. Co., 19 Iowa, 364, 370; or where the delay is owing to the fault of the company. Day v. Ins. Co. (Me.), 16 Atl. Rep. 894.

The companies also have the power to provide that no suit shall be brought until the expiration of a certain time after loss. Johnson v. Ins. Co., 91 Ill. 92.

Where, however, there is an express denial of liability, it has been held, even under such a provision, that suit may be brought at once. Aetna Ins. Co. v. Maguire, 51 Ill. 342. But see Hatton v. Ins. Co., 7 U. C. C. P. 555, *contra*. See also Contracts, Question 40.

22. *A policy contains a stipulation that in case of the failure of the parties to agree upon an adjustment, the matters in dispute shall be arbitrated. Is the stipulation binding?*

No. In spite of such a stipulation, suit may be brought in the courts. Parties cannot thus substitute another tribunal for those which the law has established, or deprive the courts, so established, of their jurisdiction. Stephenson v. Ins. Co., 54 Me. 55, 70; German-American Ins. Co. v. Etherton (Neb.), 41 N. W. Rep. 406; Robinson v. Ins. Co., 17 Me. 131.

Where, however, the act incorporating the company contains a provision in regard to enforcing a claim against the company, such a provision will be recognized. Thus, a stipulation in a charter, that execution shall only be levied after a specified time, has been held to be binding. Judkins v. Ins. Co., 39 N. H. 172.

Of course, where the provisions of the policy are simply for the reference of special matters and do not divest the courts of jurisdiction, but simply raise a condition precedent to the insured's right to recover, they will be enforced like any conditions precedent. Scottish, etc., Ins. Co. v. Clancy (Tex.), 8 S. W. Rep. 630. And even where the stipulation could not originally be enforced, it is binding, if it is ratified or entered into by the parties, after loss. Kill v. Hollister, 1 Wilson, 129.

PARTNERSHIP.

I. The Creation of a Partnership.

1. *How does a partnership differ from a corporation?*

There are three conspicuous differences:

1. In a partnership the *delectus personalis* is the important consideration. A partner is chosen for his personal qualifications, and his interest is not transferable, except by consent of all the other partners. So also, if a partner dies, the firm must be wound up. Brenner v. Hirsche (Miss.), 13 So. Rep. 730.

In a corporation the condition is quite the reverse. Shares are transferable, and the death of a shareholder has no effect upon the corporation.

2. In a partnership any partner has the legal power to act for the others, and, within the scope of the business, to absolutely bind them by his action.

In a corporation, no shareholder has any power to bind the others. The whole authority rests with the board of directors.

3. In a partnership, each partner is liable for all of the firm debts.

In a corporation the liability of the stockholder, aside from statute, is only to pay money up to the par value of the stock subscribed for, and to this feature the growth of corporations in the past few years is largely due. Many partnerships have been incorporated with practically no other change. Cf. Corporations, Ques. 2.

2. *Does a participation in the profits of a firm make a man a partner? How has the law on this point developed?*

The principle was stated in 1793, and survived for years, that a man who shares in the profits is a partner, and must share the losses, regardless of the real intention of the parties. This was made the sole test. Waugh v. Carver, 2 H. Black. 235. It was there argued that by taking a part of the profits a man took part of that fund which is the proper security of the creditors. This principle produced the anomalous result of holding even a clerk a partner, if his salary depended upon the profits.

In 1808 the idea was somewhat refined by holding that a man was a partner if he shared in the *net* profits, but not if he shared in the gross profits. Day v. Boswell, 1 Camp. 329 (1808).

This whole principle was finally repudiated, however, when it was seen how extreme the results were. In Cox v. Hickman, 8 H. of L. Cas. 268, decided in 1860, a receiver for the benefit of creditors entered into an agreement with all the creditors by which they were to be paid *pro rata* from whatever profits were made. The effort to hold all the creditors as partners resulted in the final overthrow of Waugh v. Carver. In Bullen v. Sharp, L. R. 1 C. P. 86, again, Bramwell, B., says on p. 128, referring to Waugh v. Carver, "The Chief Justice * * * puts his decision on the ground that 'he who takes a moiety of all the profits indefinitely, shall, by *operation of law*, be liable to losses.' Let us hope that this notion is overruled,— one which I believe has caused more injustice and mischief than any bad law in our books."

By these cases the result was reached in England, that where a man loaned money to a firm and was to be paid from the profits, he was in no sense a partner and so in case of insolvency could come in with firm creditors in competition for the firm assets. The court saw no middle ground between holding him liable for losses as a partner, and allowing him to prove as a creditor. It seemed unjust, however, that he should compete with firm creditors for money which had been used to raise the credit of the firm, and the statute of 28 and 29 Vic., chap. 86, § 1, known as Bovill's Act, was passed and provided that the lender under such circumstances was a postponed creditor and could only get his money after other creditors were paid. This is certainly the right result and is reached in the proper way.

In a number of the States, the principle of Cox v. Hickman has been followed and a lender is not held as a partner whether he receives a proportion of the profits or not. Boston Smelting Co. v. Smith, 13 R. I. 27; Smith v. Knight, 71 Ill. 148; Williams v. Sautter, 7 Iowa, 435; Harvey v. Childs, 28 Ohio St. 319; Hart v. Kelly, 83 Penn. St. 286. See also Edwards v. Tracy, 62 id. 374, 380; Meehan v. Valentine, 12 Sup. Ct. Rep. 972. In some of these jurisdictions, it may even be possible that the lender would not be postponed.

In many of the States, however, the lender who receives a proportion of the profits has been held absolutely liable as a partner in accordance with the principles of Waugh v. Carver, and then, to avoid the results of such a principle, statutes have been passed by which a lender under such circumstances may be made simply a limited partner and liable to lose only what he puts in, if he gives proper publicity to his real relations with the firm. Thus, the same result is reached as in England, though, it would seem, in an unscientific way. The following decisions follow Waugh v. Carver, and render a limiting statute necessary. Parker v. Canfield, 37 Conn. 250; Pettee v. Appleton, 114 Mass. 114; Leggett v. Hyde, 58 N. Y. 272. But see Eager v. Crawford, 76 id. 97; Burnett v. Snyder, id. 344.

3. *What is the supposed "agency" test of the existence of a partnership?*

The "agency" test was started by the case of Cox v. Hickman, 8 H. of L. Cas. 268. Lord Wensleydale there said, p. 312: "The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject, if this true principle were kept in view." The law of partnership, however, is no branch of the law of agency, and Jessel, M. R., very properly criticised the above statement in Pooley v. Driver, L. R. 5 Chan. Div. 458. He there says, p. 476: "Then Lord Cranworth goes on to speak of agency, and I am almost sorry that the word 'agency' has been introduced into this judgment, because, of course, everybody knows that partnership is a sort of agency, but a very peculiar one. You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a *separate entity* from the existence of the partners. * * * But when you get that idea clearly, you will see at once, what sort of agency it is. It is the one person acting on behalf of the firm." Agency, therefore, results from partnership, not partnership from agency. Agency for a firm, like a division of profits, is an *attribute* of partnership, but serves as no very valuable test.

Where, however, you can be sure that there is a "separate entity" in which the title to the partnership property vests, the existence of a partnership is a certainty. In large concerns, firm property is a necessity, but in many joint ventures which cover but a short time or a single joint enterprise it would be contrary to all of the intentions of the parties to hold them partners. French v. Styring, 2 C. B. Rep. (N. S.) 357.

But even when the firm exists, there is a limit to the power of the partner to bind the firm. His authority is limited to the kind of contracts the firm was formed to enter into. The partnership relation also limits his powers. Thus, in a firm of three, two of the partners cannot contract to admit another man into the firm. Burnett v. Snyder, 76 N. Y. 344.

4. *Why cannot one partner sue another on a firm transaction, as, e. g., for money loaned the firm?*

The obstacle to the suit is that the *firm* is really the debtor. The English law, contrary to that of Europe, does not recognize the legal entity of a firm, and instead of the firm, therefore, both partners would have to be the parties defendant. But by the common law a man cannot be both plaintiff and defendant in the same action. Estes v. Whipple, 12 Vt. 373; Thayer v. Buffum, 9 Pick. 398.

On the continent, if a partner is a creditor of the firm he may sue and recover the amount due him from the firm. See Story on Partnership, (Ed. 2), chap. 8, § 1.

II. QUASI OR NOMINAL PARTNERS.

5. *A., the sole owner of property, represents that B. is his partner, and business is carried on under the firm name of A. & B. Both A. and B. fail. Should the creditors of A. or those of the ostensible firm have a preference in the satisfaction of claims out of the firm property, i. e., stock in trade and book accounts?*

A. having represented that the property belonged to the firm would not be allowed to deny that fact, and, of course, a creditor could sue A. and B. as partners on a firm debt, and satisfy his claim on execution out of the property of the ostensible firm. This is entirely upon equitable grounds, however, and the right of A.'s individual creditors to the property cannot be denied since the property actually belonged to him personally. They, therefore, could also satisfy their claims, upon execution, out of the ostensible firm property. Bankruptcy, however, operates as an execution in favor of all creditors, and in the case indicated, both the individual creditors and those of the ostensible firm should share equally, and that is the result in England. *Ex parte* Hayman, L. R. 8 Chan. Div. 11. The different States, however, differ widely in the disposition of such a case. And it may be proper to say that there is probably more discord between the States in partnership than in any other subject of the law. There is, perhaps, almost no point upon which all States agree, and unfortunately some States contradict themselves with considerable frequency.

In New York, the assignee in bankruptcy of the true owner is postponed to a subsequent attaching creditor of the ostensible owners. Kelly v. Scott, 49 N. Y. 595; Gorham v. Innis, 115 id. 87.

In Pennsylvania just the opposite view is held, and the attaching creditor of a true owner is preferred to a subsequent attaching creditor of an ostensible firm. Appeal of Scull, 115 Penn. St. 141; Stickler's Appeal, 10 Weekly Notes, 535. See also Moline Co. v. Rummell, 14 Fed. Rep. 155.

III. PARTNERSHIP PROPERTY AND THE INTEREST OF A PARTNER THEREIN.

a. Whether a Partnership can Hold the Legal Title to Property.

6. *A., meaning to transfer property to a firm, gives a deed to X., Y. & Co. Who holds the legal title?*

The answer depends upon the jurisdiction. The common law does not recognize the entity of a firm, so the title must be found in some individuals. In the following cases it is held that the title is in X. and Y., as trustees for the partnership.

NOTE. - In Taylor v. Wilson, 58 N. H 465. a mortgagee was allowed to show as against firm creditors that the obstensible firm property was the individual property of the mortgagor. In Howe v Kerr. 13 So. Rep. 730 (Miss.), a *bona fide* vendee of the true owner was protected in his purchase against the claims of firm creditors. *Contra:* Still v. Focke, 66 Tex. 716; Baylor County v Craig, 69 id. 330.

Holmes v. Jarret, Moon & Co., 7 Heisk. (Tenn.) 506; Schumpert v. Dillard, 55 Miss. 348; Beaman v. Whitney, 20 Me. 413; Morse v. Carpenter, 19 Vt. 613; Shearer v. Shearer, 96 Mass. 107, 111; Tarbel v. Bradley, 7 Abb. N. C. (N. Y.) 273, 279.

In Tarbel v. Bradley (*supra*), at p. 281, it was held the recording of a mortgage, made by one of the partners, of his interest in partnership property was not notice to a subsequent purchaser, as the mortgage was not "a conveyance affecting real estate" under the Recording Acts; and as it was not a mortgage of "goods and chattels" under the statute, it was not a chattel mortgage. Compare Van Brunt v. Applegate, 44 N. Y. 544.

It has also been held, that a deed from A. to X. Y. & Co. was wholly inoperative to pass the title and that it still remained in the grantor. Tidd v. Rines, 26 Minn. 201, 211.

In some other jurisdictions it is held, that such a deed conveys title only to X. and Y., the persons whose names appear in the firm style; Gossett v. Kent, 9 Ark. 602, 607; Winter v. Stock, 29 Cal. 407, 410; Moreau v. Saffarans, 3 Sneed, 595; and that the deed of X. and Y. will convey a good and valid title. Winter v. Stock (*supra*). On principle it would seem that title should vest in all parties *described* by the firm name, on the same ground that all parties described are parties in the case of a bill of exchange, and it is so held in several States. Sherry v. Gilmare, 58 Wis. 324, 332; Brunson v. Morgan, 76 Ala. 593. Georgia, Minnesota, Kansas and North Carolina also support this view.

The title really should vest in the firm itself, as it does in France, where the entity of the firm is recognized. Such a result, however, can only be reached by statute in this country.

b. Survivorship of the Legal Title.

7. *A. and B. are partners. A. dies. Can B. sell the firm property and give good title thereto?*

Yes. The legal title vests in the survivor, and he can pass it, but only for the proper purposes of winding up the partnership. He is regarded, in equity, as a trustee for the estate of the deceased. Martin v. Crump, 2 Salkeld, 444; Nicklous v. Dahn, 63 Ind. 87; Daby v. Ericsson, 45 N. Y. 786, 789. The survivorship of the legal title is held, however, to apply only to chattels and choses in action and does not extend to land. In the case of land practically all of the States have passed statutes making partners tenants in common of all land conveyed to them, and survivorship is not one of the incidents of tenancy in common.

c. The Partner's Interest in Firm Property.

8. *Upon the death of a partner, what right has his representative to the firm property?*

He has no right whatever to the firm property. His only right is one of an accounting, against which the Statute of Limitations to

personal actions will run. Knox v Gye, L. R. 5 H. of L. 656; King v. Wartelle, 14 La. Ann. 740.

When the statute begins to run, however, is a question decided differently in many jurisdictions. Some States, among them Illinois, Louisiana and Virginia, hold that the statute begins to run from the time of dissolution. Pierce v. McClellan, 93 Ill. 245.

Georgia, West Virginia, Tennessee and Pennsylvania hold that the statute does not run so long as any debts are due to or from the firm. Miller v. Harris, 9 Baxt. 101. Similarly, in Alabama, Arkansas, Maryland, Michigan and New Jersey the statute runs from the time of the last transaction. Brewer v. Brown, 68 Ala. 210.

In New York, the statute begins to run as soon as the surviving partner is in default, but does not begin at once upon dissolution. For a good discussion of the subject, see Gray v. Green, 41 Hun (N. Y.), 524.

The matter is more accurately understood, if one keeps in mind the fact that it is really not the representative of the deceased partner, but the *firm*, considered, in equity at least, as an entity, which has the claim against the surviving partner, who holds the legal title in trust for the firm. On principle, therefore, as in the case of any trust, the statute ought not to begin to run until the trustee, i. e., the surviving partner, shows some repudiation of the trust relation.

9. *A. wishes to sever his partnership relation with B. Is he entitled to a division of the firm property in specie?*

In most of the States a division *in specie* would be allowed, on the ground that the property belongs to the partners personally, and not to the firm considered as an entity. Hughes v. Devlin, 23 Cal. 501; King v. Wartelle, 14 La. Ann. 740; Greene v. Graham, 5 Ohio, 264. This idea, however, has produced very conflicting decisions. See, for example, Tarbel v. Bradley, 7 Abb. N. C. (N. Y.) 273-284.

10. *A., of the firm of A. & B., dies. The firm property consists of both realty and personalty. How will it be obtained by A.'s representatives?*

The personal property would be sold and divided and A.'s executor would receive his proportionate share. The realty, however, would not be converted into personalty, except for the purpose of adjusting the affairs of the partnership. A.'s heirs are held to have title to A.'s share of the specific land owned by the firm. Shearer v. Shearer, 98 Mass. 107; Hewitt v. Rankin, 41 Iowa, 35, 39.

11. *The firm of A. & B. being solvent, A. transfers his entire interest in the firm assets to B., who agrees to pay the firm debts. What effect would this have upon the claims of firm creditors?*

By the transfer, the firm would be dissolved, and firm creditors would no longer have a right against the firm assets, as such, as they had become the separate assets of the single partner. *Ex parte* Ruffin, 6 Ves. Jr. 119. Such a transfer, however, does not relieve the retiring partner from the obligation of paying firm debts, and, assuming good faith, such a transfer, by which all of the firm property is put beyond the immediate reach of firm creditors, should only be allowed when the creditors are still amply protected by the amount of property belonging to the partners. *Ex parte* Williams, 11 Ves. Jr. 3; Griffith v. Buck, 13 Md. 102; Menagh v. Whitwell, 52 N. Y. 146, 159.

d. Transfer of a Partner's Interest.

12. *A., being one of five partners, transfers all of his interest to X., a stranger. What effect would this have upon the claim of firm creditors against firm assets?*

The rights of creditors would not be affected at all. X. would only obtain by the transfer a right to an account and a share in the profits of the firm. Menagh v. Whitwell, 52 N. Y. 146, 159.

e. The Interest Passing to the Representative of a Deceased Partner

13. *A. and B., partners, purchased real estate for firm purposes. Upon A.'s death, what right has his widow to the realty?*

She only has a right after the firm debts have all been paid. Such realty is treated in equity as vesting in the partners, in their partnership relation, with the implied trust that it shall be used first for firm purposes. Dyer v. Clark, 5 Met. 562. See also Ques. 10, *supra*.

f. The Interest Passing to the Assignee of a Bankrupt Partner.

14. *A., a member of the firm of A. & B., becomes bankrupt and assigns. What right has the assignee to the firm property?*

It is held that the assignee has "no right to take the partnership property, except the share and interest of the insolvent, after the payment and satisfaction of the partnership debts." Fern v. Cushing, 4 Cush. (Mass.) 357. This result is reached by courts which in terms repudiate the entity theory of a firm, and yet such a result is impossible on common-law principles. If the partners are regarded as co-owners the assignee must obtain a right to the property itself which belonged to his assignor. Such is the result in England. Dutton v. Morrison, 17 Ves. 193-203.

g. What Interest can be Reached by the Partnership Creditors and the Separate Creditors of a Partner Respectively.

15. *A. and B. are partners. X. obtains judgment against A. individually, and execution issues. Can the sheriff seize the firm property to satisfy the execution?*

In many States the sheriff may seize the entire leviable property of the copartnership, and sell as much of the interest of the individual judgment debtor as is needed to satisfy the execution Smith v. Orser, 42 N. Y. 132; Branch v. Wiseman, 51 Ind. 1; Clarke v. Cushing, 52 Cal. 617.

But see, *contra*, Reinheimer v. Hemingway, 35 Penn. St. 432, 437.

In most States, however, equity will intervene by injunction at the instigation of the copartners to stop such a sale of partnership property. Instead of a sale a receiver will be appointed and the partnership accounts taken, in order that the real interest of the debtor partner in the proceeds may be determined. That interest only can be taken on the execution. In California, Connecticut, Mississippi and Minnesota, however, an injunction will not be granted.

16. *A., B. and C. are partners and are sued by X. on a firm debt. B. and C. defend successfully on the ground of infancy, and X. gets judgment against A. alone. Can the sheriff seize firm property to satisfy the execution?*

Yes. Though the courts persistently maintain that the property belongs to the three, they will allow the satisfaction of a firm debt on an execution against only one under the above circumstances. Whittemore v. Elliott, 7 Hun (N. Y.), 518, 520.

So also, where an action is brought against several partners, and has to be discontinued against one, on the ground that he is out of the jurisdiction. Though the judgment is not against all of the partners, firm property can be taken on execution. Inbusch v. Farwell, 1 Black (U. S.), 566.

It has been held, however, that a partner has no implied authority to confess judgment and bind his copartners; such a judgment binding only the partner confessing; and in an execution upon it, only the confessing partner's separate interest in the partnership property can be seized and sold. Rhodes v. Amsinck, 38 Md. 345, 353.

These results are eminently just. It should always be possible to collect a firm debt out of firm property. But where courts logically follow the common-law principles and refuse to recognize a firm entity, such decisions are perfectly impossible. If property belongs to A., B. and C., the whole of it cannot be sold to satisfy a judgment against A. alone. This is simply one of the many cases, where the court has to act upon the entity theory, to do simple justice, whether they recognize the fact or not.

IV. THE SEPARATE PROPERTY OF A PARTNER, AS AFFECTED BY THE PARTNERSHIP RELATION.

a. Its Liability to Process in Actions for Firm Debts.

17. *A., B. and C. are sued on a partnership debt and judgment is obtained against them. Can the judgment creditor attach the personal property of A. without exhausting the firm property first?*

Yes. So long as the courts refuse to regard the firm as an entity, and proceed upon common-law principles of holding partners liable both jointly and severally, the separate property of a partner can be taken on execution in such a case as the above. Meech v. Allen, 17 N. Y. 300-303; Cumming's Appeal, 25 Penn. St. 268.

New Hampshire is perhaps the only State *contra*. Miles v. Pennock, 50 N. H. 564.

Such a result, however, is hard on the separate partner, and gives the firm creditor more protection than he needs. He does not need the right to proceed against the separate property of a partner when there is an abundance of firm property, but in the present condition of the law the partner is powerless to object, and even equity cannot intervene except at the request of a creditor of the separate partner, who must show that there is sufficient firm property to satisfy the firm creditor. *Ex parte* Kendall, 17 Ves. 513, 520 — quoted in Meech v. Allen, 17 N. Y. 300, 304.

b. Distribution of the Separate Property of a Bankrupt Partner.

18. *A., a member of the firm of A. & B., fails. Can a creditor of the firm obtain a dividend out of the separate estate of A.?*

As a general principle, he cannot. The rule in bankruptcy is that firm creditors must be paid out of firm assets and separate creditors out of the separate assets of the individual partner. A firm creditor can only secure a dividend from the property of a separate partner when there is a deficiency in firm assets and the creditors of the partner have been paid in full, and similarly when a separate creditor of a partner seeks satisfaction from firm assets. Section 36, U. S. Bankruptcy Act, U. S. Rev. Stat. § 5121. In the above case, therefore, unless those facts existed, the creditor could obtain no dividend. Both classes of creditors can, however, *prove their claims* against the assets of the opposite class, to receive dividends only in the case of a surplus. *Ex parte* Elton, 3 Ves. Jr. 238.

It has been held, however, that where there is no firm property, and no living solvent partner, both firm creditors and separate creditors of the bankrupt partner may prove *pari passu*. *Re* Pease, 13 N. B. R. 168; *Re* Litchfield, 5 Fed. Rep. 47; Brock v. Bateman, 25 Ohio St. 609. The weight of authority, however, under the Bankruptcy Act of 1898, is against this exception to the rule. See Bankruptcy, Question 5 and cases cited.

c. Distribution of the Separate Property of a Deceased Partner.

19. *A. and B. are partners. A. dies. Can a firm creditor resort to the assets of the deceased partner in the first instance?*

In almost all jurisdictions he can. The principle has been broadly stated by the English courts, that "in the consideration of a court of equity, a partnership debt is several as well as joint." Wilkinson v. Henderson, 1 Myl. & K. 582, 588. A firm creditor may, therefore, in equity proceed against the assets of the deceased partner at once, treating the obligation as several. In almost all of the States also, this idea has been followed, though it would seem to be erroneous. A partnership obligation must be just what the parties intended it to be, and if it is only joint at law, there is no reason why it should be joint and several in equity. It also seems glaringly unjust to subject the estate of the deceased partner to the payment of firm debts, regardless of the fact that there are firm assets. This line of reasoning has led to the overruling of the English cases in New York, Ohio, Iowa, Georgia and Wisconsin. Voorhis v. Baxter, 18 Barb. (N. Y.) 592; Daniel v. Townsend, 21 Ga. 155.

Even in England, where the rule is absolutely fixed as to the right to proceed against the estate of a deceased partner, the liability of a partner is not considered several under any other circumstances, and the error in holding it so in the case of the death of a partner has been well demonstrated. Kendall v. Hamilton, L. R. 4 App. Cas. 504, 516, 520, 535, 537.

V. THE RELATION OF DEBTOR AND CREDITOR BETWEEN A PARTNERSHIP AND A PARTNER.

a. Where a Partner is Debtor to the Partnership.

20. *A., B. and C. were partners. A. borrowed money from the firm for private purposes, and then failed. Would the firm be allowed to prove against the separate estate of A.?*

A firm or an individual partner can never prove against the estate of one of its members, with two exceptions. One is where the partner has acted fraudulently. Lodge and Fendal, 1 Ves. Jr. 166; *Re* McLean, 15 N. B. R. 333; *Re* Hamilton, 1 Fed. Rep. 800, 812. The second exception is where all the creditors of the firm have been paid. A partner is then allowed to prove against the estate of a bankrupt copartner. *Ex parte* Taylor, 2 Rose. 175; Amsinck v. Bean, 22 Wall. (U. S.) 395; Olleman v. Reagan, 28 Ind. 109, 111. Such a course is generally not allowed, for the reason that the partner is competing with the firm creditors, i. e., is diminishing the probability of there being a surplus of separate assets for firm creditors.

The reason given for not allowing a firm to prove against the estate of one of its members is, that if A., B. and C., as partners, are allowed to sue A. individually, the latter is both plaintiff and defendant in the same case, which is impossible. And yet, in the case of fraud, the courts do allow just such a so-called absurdity. This simply goes to show one of the many ways in which the courts are hampered by refusing to look at a firm in a mercantile light, and to realize that the firm really is a separate entity, from which a partner can borrow, according to every understanding of business men. Once this idea was accepted by the courts, a firm could sue a partner, or be sued by him, without any difficulty.

21. *A. gives a note to his firm, A., B. and C., for money borrowed, and the firm gives a note to B., the other partner, for money due him. Both notes are indorsed to X. Can he bring suit on them?*

Yes. Though a firm could not sue a partner on his note, nor could a partner sue his firm, yet both notes may be enforced in the hands of an indorsee. Woodman v. Boothby, 66 Me. 389; Nevins v. Townsend, 6 Conn. 5; Ames, Cas. on Partnership, p. 418, note 4, cases collected.

b. Where a Partner is Creditor of the Firm.

22. *A. loans money to his firm A. & Co. Upon the bankruptcy of the firm, and the other partners, what rights has he to prove his claim for the money so loaned?*

Where the partner has loaned in fact, he can not prove in competition with the firm creditors, but can prove after them and *ahead* of the creditors of his copartner.

As a rule a partner cannot compete with creditors of the firm. There are four exceptions.

1st. Where separate property of one partner has been fraudulently dealt with as firm property. *Ex parte* Westcott, 9 Ch. App. 626; *Ex parte* Kendall, 1 Rose, 71.

2d. Where there are two distinct trades carried on by the firm and by one or more members of it, with distinct capitals. *Re* Buckhause, 2 Low. 331; *Ex parte* St. Barbe, 11 Ves. Jr. 413; *Ex parte* Sillitoe, 1 Glyn & J. 374.

3d. Where a partner, having been discharged in bankruptcy, becomes a creditor of the firm, the effect of his discharge being to release him from all individual as well as firm debts. *Re* Bidwell, 2 N. B. R. 229; *Re* Leland, 5 id. 222; Wilkins v. Davis, 15 id. 60.

4th. Where the debt sought to be proved arises from an undisputed contract apart from the copartnership and which was in existence at the time of adjudication of bankruptcy, and where there can by no possibility be any surplus of the partnership estate against

which proof is sought. *Ex parte* Topping, 4 De G., J. & S. 551; *Ex parte* Hill, 2 Bos. & P. (N. R.) 191 (note a); *In re* Marwick, 2 Ware, 229; *Ex parte* Cook, Montague's Bank Rep. 228.

VI. RELATION OF DEBTOR AND CREDITOR BETWEEN TWO FIRMS HAVING A COMMON PARTNER.

23. *A. & B. owe money to B. & C. A. & B. become bankrupt. Can B. & C. prove the debt against the assets of A. & B.?*

In actions at law, suit is generally disallowed on the ground that the common partner cannot be both plaintiff and defendant. Denny v. Metcalf, 28 Me. 389; Green v. Chapman, 27 Vt. 236. But in equity the courts do allow suit, and refrain from defeating the intention of the parties. Cole v. Reynolds, 18 N. Y. 74, 77; *Re* Buckhause, 2 Low. 331. In Cole v. Reynolds (*supra*), the court quotes with approval 1 Story's Eq. Jur. (13th ed.), § 680; "In all such cases courts of equity look behind the transactions to their substance and treat the different firms, for the purpose of substantial justice, exactly as if they were composed of strangers, or were in fact corporate companies." See Story on Partnership (6th ed.), § 235.

VII. ACTIONS BETWEEN A PARTNER AND HIS COPARTNERS.

a. A Partner Cannot Sue a Copartner Upon a Partnership Claim or Partnership Liability.

24. *A. loans money to his firm. Can he sue his copartners to recover it? Suppose A. had bought goods from his firm, could he be sued by his copartners?*

Suit could not be maintained in either case. In the first, the claim is in reality against the firm, not against the copartners; and similarly in the second case, the firm is the creditor, not the copartners. Springer v. Cabell, 10 Mo. 640; Camblat v. Tupery, 2 La. Ann. 10.

b. A Partner May Sue a Copartner Upon a Personal Claim.

25. *Upon a partial payment of firm property A. gives B. a note for* $5,000. *The firm still exists. Can B. sue?*

Yes. The claim has been put into the form of a specialty, and A. and B. are the only possible parties. The existence of a firm then becomes entirely irrelevant. Moreover, as to the $5,000 represented by the note they are no longer partners, and it is no longer firm property, because it has been taken out of the current accounts, separated from the partnership and appropriated to the partner to whom it is due. McSherry v. Brooks, 46 Md. 103, 116; Parsons on Partnership (2d ed.), 290; Rockwell v. Wilder, 45 Mass. 556, 561.

Where the firm is not a *party* to the contract a partner may sue a copartner, even though the contract relates to partnership business, as an agreement to form a partnership, or to continue it for a fixed period. Powell v. Maguire, 43 Cal. 11; Adams v. Tutton, 39 Penn. St. 447, 453; Ames, Cas. on Partnership, 462, cases collected.

c. A Partner Cannot Prove in the Bankruptcy of a Copartner in Competition with Firm Creditors.

26. *A.'s partner, B., becomes bankrupt and his separate estate is insufficient to pay his individual creditors. Can A. prove an individual claim against B.?*

Yes. It is true that whenever there is more than enough to satisfy separate creditors a solvent partner cannot prove against the estate of his copartner, unless all firm debts are paid, as he would then be competing with firm creditors by decreasing the surplus which would be left for them. *Ex parte* Maude, L. R. 2 Ch. App. 550. But when, as in the present case, there can be no surplus for firm creditors, a solvent partner may prove, as he is not then competing with firm creditors, but proving for them by increasing his own estate. *In re* Head, 1894, 1 Q. B. Div. 638, 641; *Ex parte* Topping, 4 De G., J. & S. 551.

And the partner may even prove in competition with firm creditors in the single case, where the claim is founded upon fraud or breach of trust by the bankrupt partner. *Ex parte* Westcott, L. R. 9 Ch. App. 626.

VIII. POWER OF A PARTNER TO ACT IN BEHALF OF THE FIRM.

a. Sealed Instruments.

27. *A partner, without any authority from his copartners, executes a deed intending to bind the firm. Is it bound? Suppose he had been given parol authority?*

In England and in a very few of the States, it is held, that a partner must have authority under seal in order to bind the firm by such an instrument; or as the rule is commonly expressed, the authority to execute a sealed instrument must be of equal formality. Harrison v. Jackson, 7 Term Rep. 207; *Re* Lawrence, 5 Fed. Rep. 349, 354.

But in this country it is almost universally held that the firm is bound by a deed, if there was a previous express authority for its execution or a subsequent express ratification by the copartners, even if such authority be only parol. Gwinn v. Rocker, 24 Mo. 290; Stillman v. Harvey, 47 Conn. 26; Ames, Cas. on Partnership, p. 494, cases collected; also Vol. I Am. Lead. Cas. (Hare & Wallace, 5th ed.) 554-555. Though settled law, this must be regarded as an unprincipled compromise. Either the partner

should have implied authority to execute a deed and bind the firm thereby, as he could bind it in most other transactions, or the strict rule of requiring authority under seal should be applied as in the case of agency. See Agency, Ques. 26, *supra*. There is no principle in simply requiring express authority. This limitation, however, upon a partner's implied power to dispose of firm property for firm purposes is confined to property which is transferable only by deed. When the instrument has the same effect without a seal, as in the case of personal property, the seal will be treated as a nullity. Dubois's Appeal, 38 Penn. St. 231, 236; George v. Tate, 102 U. S. 564, 569.

28. *A., without authority, executes a sealed instrument in the name of his firm. Has it any binding force whatever?*

It would, of course, have no binding force upon the *firm* (Ques. 27, *supra*), and on strict principle the instrument should be a nullity, as the partner had no authority to act for the firm, and no intention to act personally. But in accordance with the common-law conception of a partnership, the partner who executes is usually held to be bound personally. Gates v. Graham, 12 Wend. (N. Y.) 53; Harrison v. Jackson, 7 Term Rep. 207; *Re* Lawrence, 5 Fed. Rep. 349, 354; Snyder v. May, 19 Penn. St. 235, 239; Hoskinson v. Eliot, 62 id. 393, 402. But in Fisher v. Pender, 7 Jones (N. C.), 483, one of two partners signed the firm name to a bond, and it was held the firm was not bound, because the partner had no authority to bind the firm, and the partner himself was not bound, as it was not executed as his deed, but was executed and delivered as the deed of another.

In such a case as the above, the sealed instrument is also held binding upon the firm when the instrument purports to be that of the firm, but the seal is opposite the name of the partner only. It is then treated as a *simple contract* merely, with the sealed attestation of the executing partner. Cram v. Bangor House, 12 Me. 354, 358.

The firm may also, at times, be held independently of the instrument upon a *quasi* contract, where the firm obtains money or goods in exchange for the sealed instrument. Walsh v. Lennon, 98 Ill. 27, 30; Daniel v. Toney, 2 Met. (Ky.) 523.

b. Bills and Notes.

29. *State, in general, the obligation of the members of a partnership raised by negotiable paper executed by one partner in the firm name.*

It is settled law that paper issued by one partner, either actually or ostensibly for partnership purposes, binds the firm. The power in each partner to thus bind all his copartners springs from the

very existence of the firm, because it is essential to the conduct of business and is contemplated by all the partners when they embark on the enterprise. 1 Lindley on Partnership, *page 266; Blodgett v. Weed, 119 Mass. 215; Ames, Cas. on Partnership, page 496, cases collected.

The exceptions to this broad statement of the rule are based upon obvious reasons. Thus, the rule does not apply to nontrading partnerships, such as a firm of lawyers, except to a very limited extent. A strict necessity or a usage in similar partnerships must be shown by the plaintiff, for the scope of such partnerships does not carry any implied general authority to issue commercial paper. Smith v. Sloan, 37 Wis. 285; s. c., 19 Am. Rep. 757; Pease v. Cole, 53 Conn. 53.

Again, even in a trading partnership, there is no implied authority for a partner to bind a firm on negotiable paper to pay his individual debt (Dob v. Holsey, 16 Johns. [N. Y.] 34; Leverson v. Lane, 13 C. B. [N. S.] 278); nor for purposes unconnected with ordinary business dealings, such as guaranteeing the debt of a third party (Sweetser v. French, 2 Cush. 310); and one who takes such paper knowing the circumstances must show an actual authority or subsequent ratification by the other partners. See cases just cited.

If such paper comes before maturity into the hands of a *bona fide* purchaser for value the partners will be liable to him. Carrier v. Cameron, 31 Mich. 373; s. c., 18 Am. Rep. 192; Freeman's Bank v. Savery, 127 Mass. 75, 78.

It is a strict rule, moreover, that the other partners are not bound unless the signature is that of the firm, even if the proceeds actually go to the use of the partnership. Leroy v. Johnson, 2 Pet. 187; Nat'l Bank v. Thomas, 47 N. Y. 15; Ames, Cas. on Partnership, 508, cases collected.

c. Simple Contracts.

30. *A., a partner, borrows money ostensibly for his firm, but uses it personally. The lender acts in good faith. Is the firm liable?*

Yes. The partner has undisputed power to borrow for the firm, and his final use of the money would not change the firm's liability. Wagner v. Freschl, 56 N. H. 495; Kleinhaus v. Generous, 25 Ohio St. 667.

On the other hand, if the partner borrows actually and ostensibly as an individual, he alone is liable, though he afterwards applies the money for the benefit of the firm. Bank v. Sawyer, 38 Ohio St. 339; Wells v. Siess, 24 La. Ann. 178.

"A partner may, as such, bind the partnership by any simple contract, the making of which may fairly be said to fall within the scope of the firm business," e. g.:

Contracts for services. Carley v. Jenkins, 46 Vt. 721.

Hiring property. Stillman v. Harvey, 47 Conn. 26.

Contracts for insurance. Hillock v. Traders' Co., 54 Mich. 531.

Ames, Cas. on Partnership, p. 538, cases collected.

31. *The firm of A. & B. is voluntarily dissolved, and a new firm, A. & C., is formed and carries on the business without giving proper notice to the world of the change. X. contracts with the new firm, supposing that he is dealing with the old firm. Whom can he charge and why?*

Assuming in all cases X. to have no knowledge of the true facts;

1. If X. was a prior dealer he can charge A. & B. on the ground of "equitable estoppel." X. is entitled to notice of the change.

2. If he was not a prior dealer, and it can be shown that the dissolution and change was advertised, he cannot charge A. & B., as he is then chargeable with notice of the change.

3. If he was not a prior dealer and the change was not advertised, and it is shown that he in good faith entered into the contract, relying on their joint liability (that is, knowing A. & B. were partners once), he can charge A. & B.

4. He can always charge A. & C., as they have received the consideration. Scarf v. Jardine, 7 App. Cas. 345.

He is, however, put to his election. He cannot hold A., B. and C. See Ames, Cas. on Partnership, p. 541, note 3, "Prior dealers," and cases cited.

The requirements of an outgoing partner, in the matter of giving notice of his withdrawal, are most strict. He will still be held liable unless prior dealers with the firm have had actual knowledge or specific notice equivalent to knowledge. And those who are not prior dealers are also entitled to treat the firm as continuing, unless the world has received public notice of its termination, as by public advertisements.

Where a firm, which remains after the dissolution as the successor of the partnership dissolved, whether carrying on business under the same or a different name, has business relations with a stranger, who has had no dealings with the former partnership, and who had had no knowledge of such partnership, no notice of any kind is necessary to enable the retiring members of the old company to escape liability for such subsequent contracts; but it would be otherwise held, where the stranger had knowledge of the former partnership, but had no notice, actual or constructive, of its dissolution. Swigent v. Aspden, 45 N. W. Rep. (Minn.) 738; Dowzlet v. Rawlins, 58 Mo. 75; Cook v. Slate Co., 36 Ohio St. 135; Bank v. Page, 98 Ill. 109, 124; Pratt v. Page, 32 Vt. 13; Morrison v. Perry, 11 Hun (N. Y.), 33; Vernon v. Manhattan Co., 22 Wend. (N. Y.) 183, 193; Bank v. McChesney, 20 N. Y. 240; Lovejoy v. Spafford, 93 U. S. 430, 431; Lindley on Partnership (Rapalje Am. ed.), 341, 363; Wade on Notice (2d ed.), §§ 489, 490.

In Martin v. Searles, 28 Conn. 43, 47, and Strickler v. Conn, 90 Ind. 469, 471, the plaintiff was not charged with constructive notice, although the fact of dissolution was notorious in the community where he was doing business.

The same rules apply where a firm is dissolved by the bankruptcy of a partner. If proper notice is not given, any contract entered into by the solvent partner raises a claim which may be proved against the estate of the bankrupt partner. 1 Lindley on Partnership (Rapalje Am. ed.), 212, 577; Story on Partnership (7th ed.), § 313.

32. *B., of the firm of A. & B., dies, and no proper notice of the dissolution of the firm is given. X., a prior dealer, deals with A. in ignorance of the facts. Can he charge the estate of B.?*

No. The law is universally settled, that after the death of a partner the surviving partner can bind only himself, and not the estate of the deceased partner, nor the surviving partners. Marlett v. Jackman, 3 Allen (Mass.), 287, 293; Lindley on Partnership (Rapalje ed.), 337; Story on Partnership (7th ed.), §§ 317-319. It is said that death is notorious, but such reasoning is anything but conclusive, and where a partner becomes insane, though the same principle should apply, [Story on Partnership (7th ed.), § 295], Lindley on Partnership (Rapalje ed.), 213, 214, 577, is authority for the statement, that if the insanity is not known, the insane partner could be charged. Drew v. Nunn, L. R. 4 Q. B. Div. 661, confirms this statement. In Isler v. Baker, 6 Humph. (Tenn.) 85, it was held, however, that a firm note, issued by a partner after an inquisition of lunacy found against his copartner, could not be enforced against the lunatic partner.

33. *X., a dormant partner of "The A. Co.," withdraws. Can he be charged on a contract made after his withdrawal, by a party who was ignorant of the fact that he ever had been a partner?*

It is generally held that X. could be charged. The firm style implies more than one partner, and the presence of a dormant partner, though unknown, would of necessity affect the financial standing of the firm, by the presence of the capital which he had invested. Elkinton v. Booth, 143 Mass. 479; Shamburg v. Ruggles, 83 Penn. St. 148.

The rule in England and in some States (see Carter v. Whalley, 1 B. & Ad. 11; Warren v. Ball, 37 Ill. 76) is that you must have actual knowledge of the existence of the dormant partner in order to charge him after withdrawal, but this seems not to be well founded, as it overlooks the influence which a dormant partner may have upon the financial standing of the firm, though his presence is not known.

34. *A. and B. are copartners. A. becomes bankrupt and afterwards B. sells certain firm property. What rights would A.'s assignees in bankruptcy have against the property?*

None. Before the dissolution of the firm by the assignment of one of the partners, either of them had the right to bind the other

by selling firm property, but after such dissolution the solvent partner has the right to wind up the business. No action by the assignee, therefore, would be possible, because the purchaser would get good title. Fox v. Hanburg, Cowp. 445.

The power of a solvent partner to transfer firm property in the course of winding up the partnership is well established. Transfer by sale; Browning v. Marvin, 22 Hun (N. Y.), 547; Morgan v. Marquis, 9 Ex. 145. Transfer in payment of debts; Woodbridge v. Swann, 4 B. & Ad. 633.

The solvent partner, if honest and competent, and resident within the jurisdiction, has the exclusive right of winding up the partnership. King v. Leighton, 100 N. Y. 356, 392. See also Ames, Cas. on Partnership, 561, note 2, cases collected.

Similarly in case of the dissolution of the partnership by the death of one of the partners, the surviving partner or partners may transfer firm property by sale or otherwise, for the purpose of winding up the partnership. Manck v. Manck, 54 Ill. 281; Breen v. Richardson, 6 Cal. 605; Stearns v. Haughton, 38 Vt. 583. See also Ames, Cas. on Partnership, 567, note 3, cases collected.

35. *The firm of A. & B. is dissolved, and after the dissolution B. indorses a note held by the firm to X. What rights has X. against the firm?*

He would have no rights. After dissolution no one of the partners can give title to firm paper. All of the former partners must join in the indorsement to make it good. Sanford v. Nickels, 4 Johns. (N. Y.) 224; Fellows v. Wyman, 33 N. H. 351.

This result is reached upon the reasoning, that a right to transfer title by indorsement necessarily implies a right to make the former partners liable as indorsers. "It is impossible to separate the right to indorse a bill by one possessing the title, from the legal responsibility on all those having an interest in it." Yates, J., Sanford v. Nickels (*supra*). A partner may transfer firm assets, after dissolution, for any purpose of winding up the firm. Thursby v. Lidgerwood, 69 N. Y. 198, 201. But a right to charge by indorsement is not essential to the winding up of the firm, and, therefore, does not belong to B.

It would seem, however, that the courts might have held that title passed by such an indorsement, though it did not operate as a contract liability. This step has never been taken, however, except where the indorsement is of a kind to raise no liability upon the partners as indorsers. For example, a bill may be transferred by a partner after dissolution, if indorsed in the firm name, "without recourse." Yale v. Eames, 1 Met. (Mass.) 486; Waite v. Foster, 33 Me. 424, 426. A firm bill negotiable by delivery merely may also be transferred. Parker v. Macomber, 18 Pick. (Mass.) 505, 510. But see, *contra*, McDaniel v. Wood, 7 Mo. 543. So also in the case of a bill payable to

the firm and indorsed after the death of a partner by the surviving partners. Johnson v. Berlizheimer 84 Ill. 54. Glasscock v. Smith, 25 Ala. 474, 477, is *contra*, but not to be supported.

36. *One partner, without the knowledge of his copartners, makes a general assignment of firm property for the benefit of creditors. What would be the powers of the assignee?*

In almost all jurisdictions the assignee would have no powers, unless there were some extreme reasons for the partner's action. It is beyond the implied power of a partner to make an assignment, whether preferential or not, if his copartners are accessible for consultation. Holland v. Drake, 29 Ohio St. 441; *Re* Lawrence, 5 Fed. Rep. (N. Y.) 349.

The following cases are *contra*, however: Graves v. Hall, 32 Tex. 665; with preferences, Gordon v. Cannon, 18 Gratt. (Va.) 387; without preferences, High v. Lack, Phill. Eq. (N. C.) 175; Robinson v. Crowder, 4 McCord (S. C.), 519, 536; Scruggs v. Burruss, 25 W. Va. 670.

In some jurisdictions the fact that a partner is inaccessible is enough to give his copartners the power to make an assignment. Forbes v. Scannell, 13 Cal. 242, 286; *Ex parte* Daniels, 14 R. I. 500, 501.

But see *contra*, Stein v. La Dow, 13 Minn. 412; Coope v. Bowles, 42 Barb. (N. Y.) 87, 95.

The absconding of a partner, however, is evidence of authority to make an assignment. Kelly v. Baker, 2 Hilt. (N. Y.) 531; Welles v. March, 30 N. Y. 344.

And surviving partners may, of course, assign for benefit of creditors. Emerson v. Senter, 118 U. S. 3, 8; Haynes v. Brooks, 42 Hun (N. Y.), 528.

37. *After the death of A., B., his surviving copartner, deeds the firm real estate to X. for benefit of creditors. By A.'s will his share of the realty is devised to his son. Could B. give a good legal title?*

Technically he could not, as the deed, being a sealed instrument, could not be the deed of the deceased partner. But B. did transfer a good *equitable* title, and a court of equity would compel the son to convey the legal title. Shanks v. Klein, 104 U. S. 18; Easton v. Courtwright, 84 Mo. 27, 37.

Nor is this doctrine confined to a dissolution of the firm by death. It is equally true, whatever the cause of the dissolution, *e. g.*, by absconding. Dupuy v. Leavenworth, 17 Cal. 262.

38. *X. is a creditor of the firm of A. & B. He gives B. a general release. Can he then recover the whole or any portion of the draft from A.?*

No. The rule that a release to one of several codebtors discharges all is applied to partnership. Elliott v. Holbrook, 33 Ala. 659, 667. *Ex parte* Slater, 6 Ves. 146. Similarly, a covenant by a creditor not to sue one partner is a bar to an action against his copartner. Kendrick v. O'Neil, 48 Ga. 631, 635.

The release of a partner, however, will not bar an action against his copartners, if the instrument as a whole imports an intention to still hold the firm estate and that of the other partners.

39. *After the dissolution of a firm, one of the partners makes a part payment of a firm debt already barred by the Statute of Limitations. Is the debt revived as against all of the partners?*

The States are divided upon the point, but in most jurisdictions it is held that a partner cannot bind the firm, either by a part payment or a new promise. Gates v. Fisk, 45 Mich. 522; Kirk v. Hiatt, 2 Ind. 322; Mix v. Shattuck, 50 Vt. 421. The reason given for such decision is that waiving the statute is like making a new obligation, and is no necessary part of winding up a firm. But even in jurisdictions which so hold, the firm will be bound if the creditor to whom the part payment or new promise is made has had no notice of the dissolution. Gates v. Fisk, *supra;* Tate v. Clements, 16 Fla. 339, 341.

In some jurisdictions, however, the waiver of the statute will only bind the partnership, if made before the claim is barred by the expiration of the statutory period. McClurg v. Howard, 45 Mo. 365; Austin v. Bostwick, 9 Conn. 496. But in Rhode Island it is held that a partner can bind the firm by a waiver of the statute after dissolution and after the claim is actually barred. Turner v. Ross, 1 R. I. 88. See Ames, Cas. on Partnership, 618, note 2, cases collected.

40. *"Notice to one partner is notice to all." Explain.*

"When it is said that notice to one partner is notice to all, what is meant is (1), that a firm cannot, in its character as principal, set up the ignorance of some of its members against the knowledge of others, of whose acts it claims the benefit, or by whose acts it is bound; and (2), that where it is necessary to prove that a firm had notice, all that had to be done is to show that notice was given to one of its members as the agent, and on behalf of the firm." 1 Lindley on Partnership (Rapalje Am. ed.), 141, 142.

But the firm should not be affected by the knowledge of a partner, if the firm claims, not through his act, but through the act of a copartner. But see *contra*, Stockdale v. Keyes, 79 Penn. St. 251.

d. Judicial Proceedings.

41. *Can a partner begin an action in the firm name without consulting his copartners? Who would have the power to discontinue?*

The common-law rule prevails, that *no* action can be brought in the *firm name*, but any partner can bring a firm suit in the name of all the partners without any consultation whatever.

After the action has been begun, any partner who objected would have the power to enter a discontinuance, unless he were acting fraudulently. Noonan v. Orton, 31 Wis. 265, 274; Loring v. Brackett, 3 Pick. 403.

42. *A. makes a contract ostensibly for his firm. Can he sue on it in his own name?*

No. Under such circumstances all of the partners must be joined as parties plaintiff, whether they appear by name in the contract or not. Vail v. West. Va. Co., 110 U. S. 215; May v. West. Union Tel. Co., 112 Mass. 90.

If a partner is *in fact* acting for his firm, all of the partners *may* be properly joined as plaintiffs, though the defendant did not know that the partner was acting in his representative capacity, but the partner may sue alone. Alexander v. Barker, 2 Cromp. & J. 133, 138; Badger v. Daenieke, 56 Wis. 678.

If, however, a partner makes a contract actually and ostensibly on his own behalf, he must sue in his own name. Agacio v. Forbes, 14 Moo. P. C. 160.

Dormant partners may be joined as plaintiffs, though they need not be. Robson v. Drummond, 2 B. & Ad. 303, 307. See also Wright v. Herrick, 125 Mass. 154.

43. *A. brings suit against X. & Co. and serves the papers only upon X. Is the service good?*

No. Service on one partner at common law is not service upon the firm or other partners. Scott v. Bogart, 14 La. Ann. 261; 1 Lindley on Partnership (Rapalje Am. ed.), 272; Story on Partnership (7th ed.), § 114; Rice v. Doniphan, 4 B. Mon. (Ky.) 123; Bowin v. Sutherlin, 44 Ala. 278, 281.

Service on one of the partners *after* dissolution is certainly not sufficient. Newton v. Heaton, 42 Iowa, 593, 597; Hall v. Lanning, 91 U. S. 160.

But in any jurisdiction where by statute you can proceed in the firm name, service upon any partner is good service upon the firm, and by some statutes service may even be made upon an employee.

44. *A partner confesses judgment against his firm. Against what property can execution issue?*

Execution could not issue against any firm property. A partner has no power to confess judgment against the firm. Soper v. Fry, 37 Mich. 236. Execution against firm property will be perpetually enjoined, Christy v. Sherman, 10 Iowa, 535; or set aside, Morgan v. Richardson, 16 Mo. 409, 411; Ellis v. Ellis, 47 N. J. Law, 69, 71; or cannot be enforced, Shedd v. Bank, etc., 32 Vt. 709, 716. *Contra*, Ross v. Howell, 84 Penn. St. 129.

The partner so confessing would be individually bound by the confession. Stevens v. Bank, etc., 31 Barb. (N. Y.) 290; Ellis v. Ellis, *ante*. See Story on Partnership (7th ed.), § 114; Lindley on Partnership (Rapalje Am. ed.), 272.

45. *In a firm of three partners, two object to the signing of a contract, a fact which the other contracting party knows. He, nevertheless, signs a contract with the third partner. Is the contract enforceable? Suppose only one partner objected?*

The weight of authority is that if *one* partner objects, (and certainly if the majority does) the firm cannot be charged. Moffitt v. Roche, 92 Ind. 96; Matthews v. Dare, 20 id. 248, 273; Faigley v. Stoneberger, 5 W. & S. 564, 566.

The reason given is that the power of one partner to bind the others is not essential to the constitution of a partnership; it is an implied power only, and may, therefore, be controlled by a partner who wishes to protect himself against claims created contrary to his assent and express directions.

On principle, the firm should be bound even where the objection is known. If a partner is not observing his duty to his firm, acting negligently or fraudulently, the remedy is a dissolution. The following cases hold the firm is bound, despite the objections of the other partners. Wilkins v. Pearce, 5 Den. (N. Y.) 54; Campbell v. Bowen, 49 Ga. 417. The reason given is: the power of one partner to bind the others is an incident to the copartnership relation, and must exist while the relation endures.

A contract made by a *majority* of the partners will, in the absence of bad faith, bind the minority, although the objection is known to the other contracting party. Johnston v. Dutton, 27 Ala. 245, 252; Staples v. Sprague, 75 Me. 458. See Fisher v. Murray, 1 E. D. Smith (N. Y.), 341, 344.

Any partner, however, may receive payment of a firm debt, and this, although other partners object and the objection is known to the debtor. Steele v. Bank, etc., 60 Ill. 23. And see also Gillilan v. Ins. Co., 41 N. Y. 376, where payment was made to an insolvent partner after notice to the debtor of such insolvency.

46. *Is a firm liable for the torts of the partners?*

Partners, like individuals, are responsible for the negligence of their servants while engaged in the business incidental to their employment, and if one partner does an act consistent with his relations to the firm, he is considered in its performance as the servant of the firm. Gwynn v. Duffield, 66 Iowa, 708, 712. In other words, if the partner commits a tort while acting in his representative capacity, the firm is liable. The firm was held liable for the torts of a partner in the following cases:

Negligence Linton v. Hurley, 14 Gray (Mass.) 191.

Conversion: Durant v. Rogers, 87 Ill. 508.

Fraud: Castle v. Bullard, 23 How. (U. S.) 172, 183; Chester v. Dickerson, 54 N. Y. 1, 11; White v. Sawyer, 16 Gray (Mass.), 586.

Malicious prosecution: McIlroy v. Adams, 32 Ark. 315; Rosenkraus v. Barker, 115 Ill. 338.

Libel: Lothrop v. Adams, 133 Mass. 471; Noodling v. Knickerbocker, 31 Minn. 268.

The sole question is, whether the man was acting as a partner. If not, of course the firm is in no way liable. Rosenkraus v. Barker, 115 Ill. 331; Gwynn v. Duffield, 66 Iowa, 708; Noodling v. Knickerbocker, 31 Minn. 268.

47. *A partner transfers firm property to his separate creditors who know of the fraud. Can the property be recovered by action in trover?*

On common-law principles it cannot be. The firm cannot sue as such, and when all partners are joined as plaintiffs then the fraudulent partner is barred by his own fraud and so the honest partners are barred also.

In England, even a surviving innocent partner is barred. Jones v. Yates, 9 B. & C. 532. There is always relief in equity, however. Midland R. R. Co. v. Taylor, 8 H. of L. Cas. 751; 2 Lindley on Partnership (Rapalje Am. ed.), 562, 568. Story on Partnership, §§ 220-222. And in the following States relief is given at law: Alabama, Connecticut, Georgia, Illinois, Indiana, Kentucky, Kansas, Missouri, New York, North Carolina, Tennessee, Wisconsin. See Purdy v. Powers, 6 Barr 492.

48. *A trustee was a member of a firm of attorneys and employed his own firm in trust business. Would the trust estate be liable for the firm charges?*

No. In practically all jurisdictions a trustee is not allowed to employ himself or his firm, whether honest or not. It would raise an antagonism between the man as trustee and as individual in-

volving a temptation to act too frequently or to pay too much. Christophers v. White, 10 Beav. 523; Matthison v. Clarke, 3 Drury, 3.

In Massachusetts and Pennsylvania, however, a trustee may employ himself, and in other jurisdictions the rule has been practically avoided by allowing the trustee to employ his copartner as an *individual*, and if the transaction is honest it will stand. The proceeding, however, is dangerous.

e. Liability of Firm for Breaches of Trust.

49. *Property is deposited with a firm for investment, as a trustee, and one partner misappropriates it. Is the firm responsible?*

Yes. The firm has agreed to keep the property safely. Herr v. Sharp, 83 Ill. 199; Sadler v. Lee, 6 Beav. 324; Gilchrist v. Brande, 58 Wis. 184.

50. *A trustee, in entering a firm, uses the trust estate as capital. What right has the cestui que trust against the firm?*

None. The firm being innocent as to the nature of the fund invested is treated as a purchaser for value. Hallenback v. More, 44 N. Y. Super. Ct. 107; 1 Bates on Partnership, § 481. The knowledge does not bind the firm as he is cheating the firm, not acting for it.

But where a partner, who is a trustee, uses his *cestui's* money in firm business to the knowledge of his partners or under such circumstances as to charge them with knowledge, the partners are liable. Guillon v. Peterson, 89 Penn. St. 163, 170. See also *In re* Ketchum, 1 Fed. Rep. 815, 828; Hitchcock v. Peterson, 14 Hun, (N. Y.) 390.

f. Dissolution.

51. *What are grounds for the dissolution of a firm?*

Most partnerships are for a fixed term of years, when they expire, as of course.

Partnerships at will expire upon notice to all the other partners. Peacock v. Peacock, ,16 Ves. 49; Wheeler v. Van Wart, 9 Simons, 193. When a partnership for a fixed term continues by tacit agreement it becomes a partnership at will on the old terms, so far as applicable. Sayston v. Hack, 52 Md. 173, 189.

The court will decree a dissolution:

(1) If the object of the firm is impossible. Jennings v. Braddeley, 3 Kay & Johns. 78; Baring v. Dix, 1 Cox Ch. (Ky.) 213; Story on Partnership (7th ed.), § 290.

(2) When one partner becomes insane. Sayer v. Bennet, 1 Cox Ch. (Ky.) 107; Isler v. Baker, 6 Humph. (Tenn.) 85.

(3) When one partner's health is seriously impaired. Casky v. Casky, 18 Cent. L. J. 358; Story on Partnership (7th ed.), § 291.

(4) When the partners cannot agree. Harrison v. Tennant, 21 Beav. 482. See Fairthorne v. Weston, 3 Hare, 387; Lindley on Partnership (Rapalje Am. ed.), 961.

(5) When one partner is guilty of grave misconduct. Essell v. Hayward, 30 Beav. 158; Story on Partnership (7th ed.), § 288.

(6) When all partners desire. Story on Partnership (7th ed.), § 268.

There are some causes which dissolve a firm *per se* without any decree of court.

(1) Death of a partner. Pearce v. Chamberlain, 2 Ves. Sr. 33.

(2) Breaking out of war between the countries where the persons who are in partnership reside. Griswold v. Washington, 15 Johns. (N. Y.) 57.

(3) The assignment by one partner of all his interest in the partnership is *ipso facto* a dissolution of the partnership, though the assignment is made to another partner. Marquand v. Manuf. Co., 17 Johns. (N. Y.) 525; Horton's Appeal, 13 Penn. St. 67.

It has been questioned, however, whether a partnership for a term of years is *ipso facto* dissolved by such an assignment. Ferrero v. Bihrlmeyer, 34 How. Pr. (N. Y.) 33; Waller v. Davis, 59 Iowa, 103.

As to the right of a partner to dissolve a partnership, formed for a term of years, see Skinner v. Dayton, 19 Johns. (N. Y.) 513, 537, where the court said: "There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership, as to all future contracts, by publishing his own volition to that effect."

g. Winding up a Firm.

52. *Upon forming a firm, A. put in* $5,000 *capital, B.* $1,000 *and C. his skill. After all the firm creditors have been paid, the firm has lost* $1,000, *and, in addition, A. has loaned the firm* $1,000. *How would you wind up the firm?*

First, A. must be paid his $1,000, as any other creditor. Wood v. Scoles, L. R. 1 Chan. App. 369. The total loss of the firm would then be $2,000, which would be apportioned among the three partners equally. Except by *stipulation*, profits and losses are distributed according to numbers and not in proportion to capital invested. Whitcomb v. Converse, 119 Mass. 38, 43; Jones v. Butler, 87 N. Y. 613, 616.

53. *Can a partner obtain the appointment of a receiver when it is not desired to wind up the firm?*

Yes. A receivership does not necessarily lead to a winding up; it may be necessary to protect the property. Sheppard v. Oxen-

ford, 1 Kay & Johns. 491. Nor does an accounting. Fairthorne v. Weston, 3 Hare, 387. Nor an injunction. Hall v. Hall, 12 Beav. 414.

54. *A. dies, and at that time his share in A. & Co. is worth* $10,000. *His surviving copartners do not wind up the firm and at the end of three years the share is worth* $20,000. *Can the executor recover it?*

Yes. It was the duty of the survivors to wind up the firm and the executor could not consent to any other course. If the firm is not wound up, the estate is entitled to the profit of going on. Brown v. de Tastel, Jacob, 284. So also the assignee of a bankrupt partner. Crawshay v. Collins, 15 Ves. Jr. 218.

The profits will not necessarily be divided equally, however, if the skill of the continuing partners is mainly responsible for the increase. Willett v. Blanford, 1 Hare, 253.

h. Duties of a Partner to His Firm.

55. *What are the main duties of a partner to his firm?*

1. He must consider only the interests of his firm, and not compete with it. He cannot buy from himself for the firm, nor from the firm for himself, nor in any way make his interests antagonistic to those of the firm. Bentley v. Craven, 18 Beav. 75; Marshall v. Johnson, 33 Ga. 500; Bank Co. v. Edson, 56 Barb. (N. Y.) 84, 89; Lindley on Partnership (Rapalje Am. ed.), 514; Story on Partnership (7th ed.), § 175.

2. He must work for nothing. No service will entitle him to compensation other than by division of profits. Caldwell v. Leiber, 7 Paige (N. Y.), 483; Heath v. Waters, 40 Mich. 457, 465; King v. Hamilton, 16 Ill. 190; Drew v. Ferson, 22 Wis. 651.

A surviving partner is not entitled to compensation for winding up firm business. Beaty v. Wray, 19 Penn. St. 516.

3. He cannot enter into any rival business, and if he does so, he must account for the entire profits to his firm. Caldwell v. Leiber, 7 Paige (N. Y.), 483, 494; Bank Co. v. Edson, 56 Barb. (N. Y.) 84, 89. But see MacDowell v. MacDowell, L. R. 8 Ch. Div. 345; Drew v. Beard, 107 Mass. 64; Wheeler v. Saye, 1 Wall. (U. S.) 518, 528.

If a partner uses firm money in another business, he must, of course, account to his copartners for profits. Love v. Carpenter, 30 Ind. 284; Pomeroy v. Benton, 57 Mo. 531; Long v. Majestro, 1 Johns. Ch. (N. Y.) 305.

i. Special Partner.

56. *What are the incidents of a special partnership?*

1. A special partner risks only his contribution. Wild v. Davenport, 48 N. J. Law, 129.

2. He has no title to firm assets, and nothing can be taken on execution by his separate creditors. Harris v. Murray, 28 N. Y. 574.

3. He can buy from the firm and sell to it. 4 Abb. Pr. 107.

4. He can sue or be sued by the firm. Clapp v. Lacey, 35 Conn. 463.

5. He is postponed to all creditors, but can keep any collateral he may have as security, and has priority over all other partners in distribution of capital surplus upon winding up. Clapp v. Lacey, *supra;* Hayes v. Bement, 3 Sandf. 394.

On the whole subject, see Parsons on Partnership (4th ed.), chap. 17.

PLEADING AT COMMON LAW.

I. Forms of Actions.

1. *What are the forms of actions at common law?*

They are ten in number.

(1) Debt.
(2) Detinue.
(3) Covenant.
(4) Special *assumpsit.*
(5) General *assumpsit.*
(6) Trespass.
(7) Trover.
(8) Replevin.
(9) Case.
(10) Ejectment.

2. *What is the action of debt?*

It is that form of action which lies to recover a *certain* sum of money. It differs from the action of *assumpsit* in that the sum for which the action is brought must be definitely known or readily ascertainable, an element not requisite to the latter action. The action may arise on a simple contract, as money lent; on a specialty, as a bond or other sealed instrument; on a record, as a judgment of court; or on a statute fixing a penalty. 1 Chitty on Plead. (16th Am. ed.) 159 (*121).

3. *What is the action of detinue?*

Detinue is an action to recover specific chattels, or, if that is impossible, their value. "The gist of the action is the wrongful *detainer* and not the original taking. It lies against any person who has the actual possession of the chattel, and who acquired it by lawful means, as either by bailment, delivery or finding. It is a common doctrine in the books, that this action cannot be supported if the defendant *took* the goods *tortiously,*" but the soundness of this view has been questioned. 1 Chitty on Plead. (16th Am. ed.) 178 (*137).

4. *Define the action of covenant.*

It is that form of action which lies to recover damages for breach of a contract under seal. It is frequently a concurrent remedy with

debt, but never with *assumpsit*. It is the only proper action where the damages are not liquidated and the contract is one under seal. 1 Chitty on Plead. (16th Am. ed.) 169.

5. *Define the action of special assumpsit.*

It is an action for the recovery of damages resulting from a breach of an express contract not under seal. 1 Chitty on Plead. (16th Am. ed.) 143 (*111).

6. *Define the action of general assumpsit. What are the common counts?*

General *assumpsit* is an action which proceeds upon the same theory as special *assumpsit*, except that the promise of the defendant, on which the plaintiff bases his right to sue, is a fictitious one. The existence of a debt was thought sufficient consideration to raise a promise to pay, and so to allow an action in general *assumpsit* in certain cases where debt was ill adapted.

The common counts are:

I. *Indebitatus* counts:
   (a) Money counts.
      1. Money paid to defendant's use.
      2. Money had and received.
      3. Money lent.
      4. Interest.
   (b) Any state of facts on which a debt may be founded, as;
      1. For use and occupation.
      2. For board and lodging.
      3. For goods sold and delivered.
      4. For goods bargained and sold.
      5. For work, labor and services.
      6. For work, labor and materials.

II. *Quantum meruit.*

III. *Quantum valebat.*

IV. Account stated.

1 Chitty on Plead. (16th Am. ed.) 445 (*351), *et seq.*

7. *Define the action of trespass.*

Trespass is an action for the redress of immediate injuries committed, with at least some degree of force, upon the person or property of the plaintiff. 1 Chitty on Plead. (16th Am. ed.) *186.

8. *Define the action of trover.*

In substance it is a remedy to recover the value of personal property wrongfully converted by another to his own use; the form supposes that the defendant might have come lawfully by it, and if

he did not, yet by bringing this action the plaintiff waives the trespass; no damages are recoverable for the act of taking; all must be for the act of converting.

The action of *trover* or *conversion* was, in its origin, an action of trespass on the case for the recovery of damages against a person who had *found* goods and refused to deliver them on demand to the owner, but *converted* them to his own use; from which word, *finding* (*trouver*), the remedy is called an action of trover. 1 Chitty on Plead. (16th Am. ed.) 210.

9. *Define the action of replevin.*

It is an action brought through the medium of the sheriff to recover chattels, and may be brought in any case when the owner has goods taken from him by another. The title and right of possession of the property are the matters to be tried; its value is not in issue; the plaintiff recovers on the strength of his own title, not the weakness of the defendant's. He must have the general property in the goods taken, or a special property therein. 1 Chitty on Plead. (16th Am. ed.) *183.

10. *Define the action of case.*

Case, in its comprehensive form, had its origin in the Statute of Westminster, 2, 13 Edw. I, c. 24, which provided as follows:

"And whensoever, from henceforth, it shall fortune in the chancery, that in one Case a Writ is found, and in like Case falling under like Law and requiring like Remedy, is found none, the Clerks of the Chancery shall agree in making a Writ; or the Plaintiffs may adjourn it until the next Parliament, and let the Cases be written in which they cannot agree, and let them refer themselves until the next Parliament, by Consent of men learned in the Law, a writ shall be made, lest it should happen after that the court should long time fail to minister Justice unto Complainants."

The intention of the statute was to allow the statement to the court of a case for which there was no existing form. Such cases were generally those in which the injury was consequential, and the practical difference between this action and that of trespass, which it closely resembles, is that in trespass, the plaintiff seeks redress for an *immediate* injury, whereas, as stated, the injury is *consequential* in case, as, for example, where the injury arises from maintaining a public nuisance. 1 Chitty on Plead. (16th Am. ed.) 139, 191 (*107, *148), *et seq.*

11. *Define the action of ejectment.*

"This action lies for the recovery of the possession of real property in which the lessor of the plaintiff has the *legal interest*, and a *possessory right*, not barred by the Statute of Limitations. It is not a *real* action nor a mere *personal* action, but is what is termed

a *mixed* action, partly for the recovery of the thing or property itself, and partly to recover damages." Although the damages in an action of this nature are, as a rule, merely nominal, yet in some cases, between landlord and tenant, such damages are, in effect, the full amount of the mesne profits up to the time of trial. *Ejectment* is an action founded upon a legal fiction, being brought in the name of a nominal plaintiff, whose supposed right to the possession is founded on a supposed demise made to him by the party or parties who bring the suit.

The action cannot be commenced until the real plaintiff's *right of entry* has accrued. "The action is only sustainable for what in fact or in point of law amounted to an *ouster* or dispossession of the lessor of the plaintiff. But such *ouster* may and usually is effected by merely *holding over;* and an intermediate tenant may be sued for the holding over by his under-tenant, though against his will." 1 Chitty on Plead. (16th Am. ed.) 273. See also Real Property, Ques. 83.

II. THE PLEADINGS.

a. Generally.

12. *What are the regular parts of pleading?*

The regular parts of pleading are: First, the *declaration;* second, the *plea;* third, the *replication;* fourth, the *rejoinder;* fifth, the *sur-rejoinder;* sixth, the *rebutter;* seventh, the *sur-rebutter;* eight, *pleas puis darrein continuance.*

13. *What are the general requisites of a declaration?*

The general *requisites* or *qualities* of a declaration are: First, that it *correspond* with the process, and, in bailable actions, with the *affidavit* to hold to bail; second, that it contain a statement of *all the facts* necessary in point of law to sustain the action, and no more; and, third, that these circumstances be set forth with certainty and truth. 1 Chitty on Plead. 244; Com. Dig. Pleader, C. 13; Co. Lit. 303 *a;* Plowd. 84, 122.

b. Demurrers.

1. GENERAL RULES.

14. *The plaintiff declares upon a contract and fails to allege performance of the conditions precedent. What should the defendant do?*

He should demur to the declaration. When either party, at any stage of his pleadings, fails to state good legal grounds why he should win, the other party should demur, i. e., serve a notice that the plea is not sufficient in law, leaving the question to the court, whether, *acknowledging the truth of the facts alleged,* the party

has a right to judgment. Under such circumstances, the court passes solely upon a question of law. 1 Chitty on Plead. (16th Am. ed.) 830 (*693.)

15. *The plaintiff's declaration, though good in substance, contains a conclusion of law. How should the defendant proceed?*

He should file a special demurrer. A defect in form cannot be taken advantage of on a general demurrer.

Originally, there was but one form of demurrer and it brought up all questions of sufficiency, both as to form and substance. This rule proved harsh, however, as a man was frequently thrown out of court on some technical defect in form, which he was not prepared to meet as he had no notice of the ground of the demurrer. The statute of 27 Eliz., chap. 5, § 1, was, therefore, passed, which provided "That from henceforth (1585), after demurrer joined and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, defect, or want of *form*, in any * * * pleading * * * except those only which the party demurring shall specially and particularly set down and express, together with his demurrer." As a result of this statute the *special demurrer* was introduced, which concluded by setting out the special defects *in form* of which the party was seeking to take advantage, and the old form, or *general demurrer*, thereafter only tested the substance of the pleading, i. e., its sufficiency in law. The one exception to this was that the form of a plea in abatement was tested by a general demurrer. Walden v. Holman, 2 Ld. Raym. 1015. This was probably due to the peculiar nature of such a plea. See Ques. 22, 23, *infra*.

The statute of Elizabeth was particularly needed, as a judgment sustaining a demurrer was final, and a party often suffered a severe penalty for a formal defect in his declaration. Though he might generally bring a new suit, the delay was often fatal. The rule also worked both ways, and where a defendant demurred to a declaration and the demurrer was overruled, judgment was entered against him at once for the damages or other relief demanded. He was deemed to have had his chance in court, and if he preferred to rely upon a defect in the other pleadings rather than answer the facts alleged, he must abide by the result. Where the action is to recover a specific sum, as upon a promissory note, the plaintiff has judgment at once for that sum, but where damages are claimed, as for injury to property, their amount is determined by a subsequent inquiry. Maine v. Peck, 60 Me. 498, 501. At the present day, however, the *special* demurrer is little used, as an amendment of the pleadings is universally allowed, upon the payment of costs, where a pleading is held bad.

16. *A declaration is good in form and substance. The plea is good in form but bad in substance. The plaintiff demurs specially. Judgment for whom?*

Judgment would be given for the plaintiff. A special demurrer includes also a general demurrer, and where the plea is bad in substance, the plaintiff is given judgment on the merits, though the formal defects which he alleges specially do not exist. Maine v. Peck, 60 Me. 498.

17. *Is a demurrer a plea, strictly speaking?*

No. It has been stated to be "so far from being a plea, that it is an excuse for not pleading." Haiton v. Jeffreys, 10 Mod. Rep. 280; s. c. Ames, Cas. on Pleading, 6.

18. *For what purposes does a demurrer admit the facts of the declaration?*

The admission is solely for determining the question of the plaintiff's right in law to recover in that specific case, granting the truth of what he alleges. Barber v. Vincent, Freem. 531; s. c., Ames, Cas. on Pleading, 3.

19. *What are the exceptions to the rule that a demurrer admits the truth of facts as stated?*

There are four exceptions to the rule:

(1) The demurrer does not admit what the court, as a court, knows to be impossible or untrue. Thus, it does not admit an allegation that stones are thrown *gently*, nor does it admit facts which have been found to be untrue by a jury *in the same action*. Cole v. Mannder, 2 Rolle's Abridgment, 548; s. c., Ames, Cas. on Pleading, 2; Tresham v. Ford, Cro. Eliz. 830; s. c., Ames, Cas. on Pleading, 3.

(2) A demurrer does not admit a conclusion of law. Such conclusions are improperly included in any pleading. They are for the court to draw, and form no part of a cause of action or defense. Millard v. Baldwin, 3 Gray, 484; s. c., Ames, Cas. on Pleading, 10; Rex v. Knollys, 1 Ld. Raym. 10; s. c., Ames, Cas. on Pleading, 4.

(3) A demurrer does not admit immaterial allegations. Scovill v. Seeley, 14 Conn. 238; s. c., Ames, Cas. on Pleading, 9.

(4) A demurrer does not admit facts so that the admission is *evidence* against the party demurring in the same or any other action. Stinson v. Gardiner, 33 Me. 94.

2. Effect of Demurrer in Opening the Record.

20. *A.'s declaration is bad in substance and form; B.'s plea is bad in substance but good in form; A.'s replication is good in both substance and form; B. demurs specially. Judgment for whom?*

Judgment would be given for B. A demurrer at any stage of the pleadings opens the whole line of pleading, and the court then gives judgment against the party who was guilty of the first defect in substance. Here, though B.'s plea is bad in substance, yet A.'s declaration is also bad in substance, and he loses. Anon., 2 Wilson, 150; s. c., Ames, Cas. on Pleading, 24; Piggot's Case, 3 Rep., Part 5, 29 a; s. c., Ames, Cas. on Pleading, 23.

The fact that A.'s declaration was bad in form would not help B. though his demurrer was a special one. A special demurrer only takes advantage of formal defects in the pleading immediately preceding it; as to other pleadings it serves as a general demurrer only. Defects in form are waived, if not taken advantage of immediately.

It must be remembered, however, that though the whole record is opened by a demurrer, the court will not put together all of the pleadings of the plaintiff, to make a good declaration for him. He cannot get judgment, if his *declaration* does not state a good cause of action, even though his replication may make up the defect. Marsh v. Bulteel, 5 B. & Ald. 507; s. c., Ames, Cas. on Pleading, 26.

21. *A. declares in assumpsit. B. pleads* (1) *nonperformance of contract by A.;* (2) *a set-off which is bad in substance. A. demurs to the first plea and replies to the second. How much of the record is opened by the demurrer?*

Only the declaration and plea (1) are opened. When it is said that the demurrer opens the whole record, it only means that it opens that part of the record which the demurrer terminates. Littledale, J., says in such a case: "We must treat the count, plea and replication, and the count, plea and demurrer as distinct records and give judgment as upon each without reference to the other." Davies v. Penton, 6 B. & C. 216; s. c., Ames, Cas. on Pleading, 28.

22. *A.'s declaration is bad in substance. B. puts in a plea in abatement (see Ques. 23), which is bad in substance. A. demurs. Is the whole record opened?*

No. This is the only exception to the rule, that the whole record is opened by a demurrer. Upon a demurrer to a plea in abatement, the sufficiency of the plea alone is considered. This exception is probably explained by the fact that a judgment upon a demurrer to a plea in abatement was unlike all other judgments

on demurrers and was not final, the defendant being allowed to plead a second time, or demur. The defendant, therefore, was not injured by the demurrer's being confined to the plea. Hastrop v. Hastings, 1 Salk. 212; s. c., Ames, Cas. on Pleading, 24.

There is one other apparent exception to the rule that the whole record is opened, in the case of a discontinuance. A. sues X., Y. and Z. X. and Y. put in pleas, bad in substance, but Z. does not appear. A. replies to X. and Y., but fails to ask for judgment against Z. by default. X. and Y. demur. Though the pleas of X. and Y. are the first pleadings bad in substance, judgment is given for them, on the ground that A., having made a discontinuance, is out of court and cannot demand judgment. Tippet v. May, 1 Bos. & P. 411; s. c., Ames, Cas. on Pleading, 25.

c. Dilatory Pleas.

23. *What were dilatory pleas and into what classes were they divided?*

They were pleas which were intended to delay the case temporarily or to end it entirely, by having the declaration abated. Such pleas were divided into three classes:

(1) Pleas to the jurisdiction of the court over the subject-matter of the suit or the parties. Such a plea, if sustained, was a final termination of the action, so far as that court was concerned.

(2) Pleas in suspense of the action, as that the plaintiff was outlawed or under some other disability. Such plea, if sustained, suspended the action until the disability was removed.

(3) Pleas in abatement, such as that the plaintiff was a fictitious person, or was dead, or that he or the defendant was misnamed, or that a necessary party was not joined, or that another action for the same cause was pending; any one of these pleas, if sustained, ended the particular suit, but another could be brought in the same court provided the defect could be avoided.

It was not enough, however, that the plea in abatement should simply state the fact that the declaration was erroneous. If it alleged a misnomer or the nonjoinder of a necessary party, the correct name or the necessary party must be specified.

Chitty on Plead. (16th Am. ed.), *462, *473.

d. Traverse.

24. *What are the requisites of a traverse, in general?*

A traverse must be a direct denial of some allegation of *fact* which is to be found in the pleading of the opposite party, either actually expressed or necessarily implied, and which fact is material to the plaintiff's right to recover. If the traverse is not direct, i. e., is argumentative, it is bad on special demurrer for defective form, and if it denies immaterial allegations it is bad on

general demurrer for defect in substance. Gilbert v. Parker, 2 Salk. 629; s. c., Ames, Cas. on Pleading, 85; Walker v. Jones, 2 Cr. & M. 672; s. c., Ames, Cas. on Pleading, 89.

Where, however, a party has so mingled material and immaterial facts in his plea, that they cannot be separated, a traverse which of necessity covers both will not be held bad on demurrer. Sir Francis Leke's Case, Dyer, 365, *placitum* 32; s. c., Ames, Cas. on Pleading, 78.

A conclusion of law can never be traversed. Questions of law are for the court, not the jury. Foshay v. Riche, 2 Hill (N. Y.), 247; s. c., Ames, Cas. on Pleading, 89.

A traverse must always end with a tender of issue, and the opposing party must either join issue or demur. A party need not join issue, however, when the traverse is in such form as to make him prove more than is necessary, to give him a right of recovery. Thus, when a plaintiff, declaring in a policy of insurance, alleges that his ship, tackle and other furniture were lost, and the defendant denies that the ship, *and* tackle *and* other furniture were lost the traverse is bad on general demurrer. The plaintiff would be entitled to recover, if anything was lost, whereas, if he joined issue, he would be forced to prove the loss of all. Goram v. Sweeting, 2 Saund. 205; s. c., Ames, Cas. on Pleading, 79.

The traverses are the general issue, specific traverse, special traverse and replication *de injuria*.

e. General Issue and Specific Traverse.

1. SPECIAL ASSUMPSIT.

25. *What are the general issue and the specific traverses in special assumpsit?*

The general issue is *non assumpsit*, which denies the contract *as alleged* in the declaration. It is used when the defendant defends upon the ground that he made no promise at all, or did not make the promise alleged, or that there was no consideration for the promise, or a different consideration from that stated, or that the plaintiff has omitted to state conditions precedent. Lyall v. Higgins, 4 Q. B. 528; s. c. Ames, Cas. on Pleading, 46; Sieveking v. Dutton, 3 C. B. 331; s. c., Ames, Cas. on Pleading, 48; Brind v. Dale, 2 M. & W. 775; s. c., Ames. Cas. on Pleading, 40.

The specific traverses in special *assumpsit* are a denial of performance on the plaintiff's part, a denial of the existence or performance of conditions precedent, and a denial of a breach by the defendant. *Non assumpsit* by its terms only denies the contract, and not the breach. Smith v. Parsons, 8 Car. & P. 199; s. c., Ames, Cas. on Pleading, 91; De Pinna v. Polhill, 8 Car. & P. 78; s. c., Ames, Cas. on Pleading, 92.

2. GENERAL ASSUMPSIT.

26. *What are the general issue and the specific traverse in general assumpsit?*

The general issue here, as in special *assumpsit*, is *non assumpsit*. As the promise sued upon is one which is implied by law from the existence of a debt, the general issue denies the facts from which the law would raise a promise. Gardner v. Alexander, 3 Dowling, 146; s. c., Ames, Cas. on Pleading, 97; Hayselden v. Staff, 5 A. & E. 153; s. c., Ames, Cas. on Pleading, 50.

The specific traverse could be used only to deny the breach, which would amount to a plea of payment. See Gould on Pleading (2d ed.), 329-332.

3. DEBT.

27. *What are the general issue and specific traverse in debt?*

The general issue is *nunquam indebitatus*, which denies the existence of the debt. Where payment was made at the time of delivery of goods, the general issue is good, as it is held that no debt ever arose. Bussey v. Barnett, 9 M. & W. 312; s. c., Ames, Cas. on Pleading, 98.

No specific traverse is possible in debt. The allegation of the breach in a declaration in debt, though necessary, is merely formal, and cannot be traversed. Goodchild v. Pledge, 1 M. & W. 363; s. c., Ames, Cas. on Pleading, 37.

4. TRESPASS.

28. *What are the general issue and the specific traverses in trespass?*

The general issue is *not guilty*, which denies that the defendant was guilty of the alleged *act* of trespass. Gibbons v. Pepper, 1 Ld. Raym. 387; s. c., Ames, Cas. on Pleading, 58. The question of the wrongfulness of the act cannot be raised under the general issue, as any act of interference is technically a trespass. Knapp v. Salsbury, 2 Camp. 500; s. c., Ames, Cas. on Pleading, 100.

The specific traverse is used in a case of trespass to real or personal property, to deny the possession of the property by the plaintiff. In a case of personal property, the plea is "not possessed," and in real property, "not the close of the plaintiff." These traverses do not deny the *right of possession*. Actual possession is enough to maintain the action. Slocombe v. Lyall, 6 Exch. 119; Squires v. Seward, 16 How. Pr. (N. Y.) 478. Where the action is brought for personal injury there is no specific traverse. The general issue covers all material allegations.

5. TROVER.

29. *What are the general issue and the specific traverse in trover?*

The general issue is *not guilty*, which denies both the act and the fact that it was wrongful. Young v. Cooper, 6 Exch. 259; s. c., Ames, Cas. on Pleading, 63.

The specific traverse is *not possessed* and denies either *possession* or *right of possession*, according to the plaintiff's claim. Thus, the defendant must plead that the plaintiff was *not possessed*, if he wishes to show that he had a lien upon the plaintiff's goods. Owen v. Knight, 4 Bing. N. C. 54; s. c., Ames, Cas. on Pleading, 105.

6. DETINUE.

30. *What are the general issue and the specific traverse in detinue?*

The general issue is *non detinet*, which denies the act of actual detention. Thus the plea would be good, where the defendant had offered to give up the goods. Clements v. Flight, 8 L. T. 166; s. c., Ames, Cas. on Pleading, 66.

The specific traverse is *not possessed*, which denies the plaintiff's right to possession, and anything affecting that right may be shown under that plea, except a lien or a joint interest, which must be pleaded in excuse. Mason v. Farnell, 12 M. & W. *674; Richards v. Frankum, 6 id. 420; s. c., Ames, Cas. on Pleading, 110.

7. REPLEVIN.

31. *What are the general issue and the specific traverse in replevin?*

The general issue is *non cepit*, and denies the *taking in the place alleged*, the place being an essential part of the wrongful act.

A specific traverse is not used in replevin, as the defendant wants to secure the return of the goods, and so must put in an *avowry*, or cognizance, which is practically a cross-declaration. To the avowry, however, the plaintiff may put in a specific traverse. Thus, where the defendant, in his avowry, alleges that he distrained for rent in arrears the plaintiff may plead *rien en arrere*. Hill v. Wright, 2 Esp. 669; s. c., Ames, Cas. on Pleading, 113.

8. CASE.

32. *What are the general issue and specific traverse in case?*

The general issue is *not guilty*, which denies only "the breach of duty or *wrongful* act, alleged to have been committed by the defendant, and not the facts stated in the inducement." *Not guilty*, indeed, admits the inducement, i. e., those facts which show the

plaintiff's right, as that he owns a mill, and has a right to the water of the stream. The general issue in such a case would simply deny the diversion of the water. Frankum v. Earl of Falmouth, 2 A. & E. 452; s. c., Ames, Cas. on Pleading, 114.

The specific traverse is used to deny any *material* allegation in the inducement. Lewis v. Alcock, 3 M. & W. 188; s. c., Ames, Cas. on Pleading, 121.

f. Special Traverse.

33. *What is a special traverse and what is its object?*

A special traverse is a plea in which the party first denies indirectly, and then denies directly, that the facts alleged by the opposing party are true. The clause of indirect denial in this plea is known as the *inducement* (a very different meaning from the usual one which the word has), and the direct denial is called the *absque hoc* clause, from the words that were used to introduce it. Thus, if A. should plead that X. was an Englishman, B.'s special traverse would be that X. was a Frenchman, *absque hoc*, that he was an Englishman.

The object of the special traverse is to put upon the record, and so directly before the court, facts which could not otherwise be shown except as evidence. The special traverse cannot be used, however, in place of the general issue, or of any traverse of that nature. Horn v. Lewin, 2 Salk. 583; s. c., Ames, Cas. on Pleadings, 135.

34. *What are the general characteristics of the special traverse?*

The characteristics of the plea are:

1. After the Hilary Rules (1834), it must conclude to the country, i. e., tender issue.

2. If it is good in both its parts, or even if the *absque hoc* clause alone is good, it cannot be pleaded to. Like any other traverse, it forced the opposing party to either join issue or demur. Thorn v. Shering, Cro. Car. 586; s. c., Ames, Cas. on Pleading, 130.

3. If the *absque hoc* clause is bad in substance for denying immaterial allegations or for any other reason, it may be disregarded, and the inducement, since it tenders no issue, may be traversed or otherwise pleaded to. Mayor v. Richardson, 2 H. Bl. 182; s. c., Ames, Cas. on Pleading, 138.

4. If either part of the plea is bad in form, i. e., if the inducement is not an *indirect* denial, or if the *absque hoc* clause does not *directly* deny the same facts, the plea is bad on special demurrer. So also, if the plea contains anything but the direct and indirect denials. Huish v. Philips, Cro. Eliz. 754; s. c., Ames, Cas. on Pleading, 130; Anon., 3 Salk. 353; s. c., Ames, Cas. on Pleading, 135.

5. If either part of the plea is good in substance, the whole plea is good on general demurrer.

g. Replication de Injuria.

35. *What was the cause of the introduction of the replication de injuria and in what actions could it be used?*

Originally a defendant could put in but one plea to a declaration, but by the Statute of 4 Anne, chap. 16, § 1 it was provided that the defendant might, "with the leave of the same court, plead as many several matters thereto as he shall think necessary for his defense." As against this added advantage of the defendants, the plaintiff was allowed, in certain cases, to put in issue several allegations of the plea. This was done by the replication *de injuria*, or in its longer form *de injuria sua propria absque tali causc* (of his own wrong, without such cause). This was much broader than the specific traverse and in general terms denied the *material* allegations of the entire plea. Crogate's Case, 8 Rep. 66; s. c., Ames, Cas. on Pleading, 143. As its name and the reason for its origin show, such a plea was only possible in a replication.

This replication was only possible in trespass, case, replevin and *assumpsit*, and in those actions was absolutely limited to cases where the plea was by way of confession and avoidance *in excuse*. And even where all of these requisites had been complied with, the replication could not be used, where it would put in issue (1) title or interest in land; (2) matter of record; or (3) authority for the acts from the plaintiff himself. In such cases a specific traverse was necessary. Crogate's Case, 8 Rep. 66; s. c., Ames, Cas. on Pleading, 143; Fursdon v. Weeks, 3 Lev. 65; Comyns' Dig. Pleader, F. 22, p. 166.

h. Confession and Avoidance.

36. *Under what circumstances does a defendant plead by way of confession and avoidance, and into what classes are such pleas divided?*

Where the defendant finds that the declaration does not present a case for a demurrer and contains no allegations which can be traversed, he must defend by showing that, in spite of the truth of the declaration, there are reasons why he should not be liable for damages in the action. This is called a plea by way of confession and avoidance. It is not necessary, however, to confess, in terms, the truth of the facts alleged in the declaration. The matter in avoidance alone need be stated, and the declaration is admitted. on the theory that a party admits what he does not deny. Wise v. Hodsall, 11 A. & E. 816; s. c., Ames, Cas. on Pleading, 59.

Pleas by way of confession and avoidance are divided into two classes: (1) pleas in discharge; and (2) pleas in excuse. Pleas in discharge confess the facts, and also confess that they once constituted a good cause of action, but then show that the defendant has been discharged from the liability, as by payment, release, bankruptcy or the action of the Statute of Limitations. Goodchild

v. Pledge, 1 M. & W. 363; s. c., Ames, Cas. on Pleading, 37; Gould v. Lasbury, 1 C. M. & R. 254; s. c., Ames, Cas. on Pleading, 34.

Pleas in excuse admit the facts of the declaration, but show additional facts, in excuse, on account of which no cause of action ever arose. Such pleas differ somewhat in the different kinds of action.

i. Pleas in Excuse.

1. SPECIAL ASSUMPSIT.

37. *Give an example of a plea in excuse in special assumpsit. What does it admit?*

Perhaps the most common case of a plea in excuse, in special *assumpsit*, is where a collateral agreement is pleaded, as that the defendant limited his liability to a certain time. Smart v. Hyde, 8 M. & W. 723; s. c., Ames, Cas. on Pleadings, 42.

By such a plea the defendant admits the contract and *breach*, as alleged, but shows that the breach was not wrongful. If the defendant wishes to *dispute* the consideration or the performance by the plaintiff, he cannot plead in confession and avoidance. Brind v. Dale, 2 M. & W. 775; s. c., Ames, Cas. on Pleading, 40.

2. GENERAL ASSUMPSIT.

38. *What is admitted by a plea in excuse in general assumpsit? Give an example of such a plea.*

There is no such thing in general *assumpsit* as a plea of confession and avoidance in excuse, for whatever would amount to an excuse would prevent the law from raising a promise. Credit not expired, and anything else in excuse would, therefore, be included in a plea of the general issue. Gould on Pleading (2d ed.), 329–332; Wetherell v. Everets, 17 Vt. 220.

3. DEBT.

39. *What is admitted by a plea in excuse in debt? Give an example of such a plea.*

The plea admits the existence of the debt, and the nonpayment, and sets up new matter justifying the nonpayment. Hayselden v. Staff, 5 A. & E. 153; s. c., Ames, Cas. on Pleading, 50. Credit not expired is, probably, properly pleaded as a plea in excuse. See Bussey v. Barnett, 9 M. & W. 312. After about 1830, however, no one brought debt, and by the Judicature Act (1875), it was extinguished in England.

4. TRESPASS.

40. *What is admitted by a plea in excuse in trespass? Give examples of such a plea.*

The plea admits the commission of the act, and, in the case of trespass to real or personal property, admits the *possession* of the property in the plaintiff.

The common pleas are *ownership* in the case of personalty, and *liberum tenementum,* (the defendant's close), in the case of realty. In trespass to the person, the plea is *son assault demesne* (plaintiff's assault first). Wise v. Hodsall, 11 A. & E. 816; s. c., Ames, Cas. on Pleading, 59.

When the defendant wishes to show that the act was done involuntarily, as that he was run away with, he must plead not guilty, as it was really not his act. Gibbons v. Pepper, 1 Ld. Raym. 387; s. c., Ames, Cas. on Pleading, 58.

5. TROVER.

41. *What is admitted by the plea in excuse in trover? Give an example of such a plea.*

Owing to the nature of the action, there can be no plea in excuse in trover. The whole gist of the action is the wrongfulness of the defendant's acts; and after admitting that, which he must do if he admits the conversion, the defendant cannot then go on and excuse it. If the act was not wrongful, the defendant must plead *not guilty,* and if the plaintiff was not possessed of the goods, the defendant must traverse his possession specifically. Young v. Cooper, 6 Exch. 259; s. c., Ames, Cas. on Pleading, 63; Dorrington v. Carter, 1 Exch. 566; s. c., Ames, Cas. on Pleading, 61.

6. DETINUE.

42. *What is admitted by the plea in excuse in detinue? Give an exantple of such a plea.*

The plea would admit the right of possession in the plaintiff and absolute detention upon the part of the defendant. Where both of these facts do not exist there is no cause of action. Under such circumstances, there is little opportunity for a plea in excuse. If the right of possession in the plaintiff is to be questioned it should be done by the plea of *not possessed.* The cases hold, however, though it would seem contrary to principle, that where the defendant claims a lien upon goods he must plead in excuse, though that fact raises the question of the right of possession. Mason v. Farnell, 12 M. & W. 674.

7. CASE.

43. *What is admitted by the plea in excuse in case? Give an example of such a plea.*

As in trover and in detinue, so in case, the gist of the action is the wrongfulness of the defendant's act. There is little chance, therefore, for the plea in excuse, which would admit the substance of the declaration. The only instance in which such a plea is used, in an action on the case, is a plea of truth to an action for slander or libel.

III. DUPLICITY.

44. *What is the rule in regard to duplicity and how is it enforced?*

The whole idea of common-law pleading was that the case must go to the jury upon a single issue. Any declaration, therefore, which presented two or more distinct grounds to support the same claim, or any subsequent plea which contained two or more distinct answers to any previous allegation, was bad for duplicity. The defect was merely a formal one, however, and must be taken advantage of upon special demurrer. Humphreys v. Bethily, 2 Vent. 198, 222; s. c., Ames, Cas. on Pleading, 187.

Many pleas which at first glance seem to be double, will be found not to be so, because one part is really surplusage, and mere surplusage never makes a pleading double. Gaile v. Betts, 3 Salk. 142; s. c., Ames, Cas. on Pleading, 186; Robinson v. Rayley, 1 Burrow, 316; s. c., Ames, Cas. on Pleading, 188.

Where a replication *de injuria* is pleaded to a plea which is bad for duplicity, the replication is not double. It is treated as a separate traverse to each defense.

IV. DEPARTURE.

45. *Define departure.*

A plaintiff is guilty of departure when he states one cause of action in his declaration, and then, abandoning that, states another in his replication. So a defendant is guilty of the same fault if he states one ground of defense in his plea and another in his rejoinder. Anon., Dyer, 253; s. c., Ames, Cas. on Pleading, 208; Winchelsea v. Higden, 2 Barnardiston, 193; s. c., Ames, Cas. on Pleading, 213.

To be fatal, however, the departure must be in the statement of some material fact. Thus, where the declaration assigns a certain date for a contract and the replication assigns a different date, the departure is not fatal where the exact date is immaterial. Cole v. Hawkins, 1 Strange, 21; s. c., Ames, Cas. on Pleading, 212; Legg v. Evans, 6 M. & W. 36; s. c., Ames, Cas. on Pleading, 220.

Where the subsequent pleading merely states additional facts which reinforce the former one, there is, of course, no departure. Thus, where the declaration sets out a contract of apprenticeship, and the plea alleges infancy at the time of making the contract, the replication can set out a custom of London that infants can bind themselves as apprentices, without being defective. Mole v. Wallis, 1 Lev. 81; s. c., Ames, Cas. on Pleading, 209.

Where a declaration alleges no cause of action, it is held a departure if the replication supplies the necessary allegations. It would probably be more accurate, however, to say that the plaintiff loses on demurrer because his declaration is bad in substance.

46. *Is departure a defect in form or substance?*

Departure is held to be a defect in substance, and is always fatal on general demurrer. When there is a departure from the declaration there is, unquestionably, a defect in substance, but when the rejoinder departs from the plea and sets up a new defense it is hard to see why this is more than a defect in form, in any case. The rule is settled, however, that in all cases a departure is a defect in substance, and so fatal on general demurrer. Winchelsea v. Higden, 2 Barnardiston, 193; s. c., Ames, Cas. on Pleading, 213.

V. NEW ASSIGNMENT.

47. *What is a new assignment and what is its purpose?*

A new assignment is a more exact statement of the cause of action which must be made by the plaintiff in his replication when his declaration has been drawn in such general terms that the defendant has misconceived the cause of action and hence has answered in his plea to a different matter from that intended to be stated by the plaintiff. Spencer v. Bemis, 46 Vt. 29.

The purpose of the new assignment was to simplify the issues for the jury, and the rules of common-law pleading required it for this purpose.

A new assignment was simply a declaration. It admitted nothing which was stated in the plea, but merely passed it over in silence. The pleadings then proceeded as usual. Norman v. Westcombe, 6 L. J. R. Ex. 164; s. c., Ames, Cas. on Pleading, 246.

48. *Can a plaintiff both reply and new assign at the same time?*

It depends upon the declaration. Where that alleges but a single act on the part of the defendant, the plaintiff cannot both new assign and reply. Spencer v. Bemis, 46 Vt. 29. And when the act is stated in definite terms and the plea *meets* the allegations no new assignment is possible. Any change would then be a departure. Taylor v. Smith, 7 Taunt. 156; s. c., Ames, Cas. on Pleading, 238. But when the plaintiff has alleged several acts on the part of the defendant, who has answered some in his plea, but missed others, the plaintiff may reply to those which have been answered, and new assign as to those which have been missed. Prettyman v. Lawrence, Cro. Eliz. 812; s. c., Ames, Cas. on Pleading, 233. Indeed if the plaintiff does not new assign in such a case, but simply joins issue on the plea, he will be confined in his proof to those acts to which the defendant has correctly pleaded. Beyond that his declaration has practically been abandoned by his failure to new assign. Rogers v. Custance, 1 Q. B. 77; s. c., Ames, Cas. on Pleading, 251; Monprivatt v. Smith, 2 Camp. 175; s. c., Ames, Cas. on Pleading, 235.

49. *A.'s declaration alleges that B. broke and entered his close called Black Acre. B. pleads that Black Acre was his close. On trial it is shown that both A. and B. own a close called Black Acre? Judgment for whom?*

Judgment must be given for B., as he has proved his plea. The plaintiff must make sure that his declaration is being answered. Huddart v. Rigby, L. R. 5 Q. B. 139; s. c., Ames, Cas. on Pleading, 260.

VI. MOTIONS BASED ON THE PLEADINGS.

a. Arrest of Judgment.

50. *When will judgment be arrested and what is the effect of such action by the court?*

The court will, upon motion, arrest judgment when the plaintiff has obtained a verdict, but has done so upon pleadings which are bad in substance. It is then too late for the defendant to demur, but a motion in arrest of judgment has the same effect in opening the whole record, and if the plaintiff's pleadings are defective in substance he will not be allowed to take advantage of his verdict. Brooke v. Brooke, Siderfin, 184; s. c., Ames, Cas. on Pleading, 266.

The effect of an arrest of judgment is that the case stops where it is and each party pays his costs. The plaintiff must begin again if he wishes to prosecute his suit. 1 Chitty on Plead. (16th Am. ed.) 830 (*693).

51. *Suppose a plaintiff gets a verdict upon a traverse of an immaterial point in the plea. Will the judgment be arrested?*

No. A repleader, however, will be awarded. The reason given for not arresting judgment is that the plaintiff may have a better answer to the plea. This seems rather weak reasoning, however, as the replication would have been fatally bad upon demurrer. The point, however, is settled. Gordon v. Ellis, 7 Man. & G. 607; s. c., Ames, Cas. on Pleading, 268.

52. *A. obtains a general verdict with general damages upon a declaration containing several counts, some of which are bad in substance. Will the judgment be arrested?*

No. The plaintiff is entitled to judgment on the good counts and the fault is with the jury in not specifying the counts upon which the verdict was given. The plaintiff should not be forced to begin again, but a *venire de novo*, which summons a new jury, will be awarded. Leach v. Thomas, 2 M. & W. 427; s. c., Ames, Cas. on Pleading, 266.

b. Non Obstante Veredicto.

53. *When is a motion granted for judgment non obstante veredicto?*

Such a motion is granted when the defendant, in some one of his pleas, has confessed the plaintiff's cause of action, but has obtained a verdict upon some immaterial issue which has been joined. Lacy v. Reynolds, Cro. Eliz. 214; s. c., Ames, Cas. on Pleading, 275. The motion will also be granted when the plaintiff has obtained a verdict upon some material traverse and the defendant has succeeded upon an immaterial issue. Couling v. Coxe, 6 D. & L. 399; s. c., Ames, Cas. on Pleading, 283.

The courts, however, refused to take the final step of granting the motion, where there was a single immaterial traverse to the declaration on which the defendant had succeeded. Duke of Rutland v. Bagshawe, 19 L. J. R. (N. S.) C. L. 234. On principle, they should have held that the cause of action had been confessed by not being denied.

The motion for judgment *non obstante* has almost universally been made by the plaintiff, though there seems no reason, in principle, for this.

c. Repleader.

54. *When will a motion for a repleader be granted, and what is its effect?*

A repleader will be ordered at the motion of either party, but only after verdict, in certain cases where the parties have gone to trial on an immaterial issue. The effect of granting a repleader is that the pleadings must begin anew from the point where the first immaterial pleading appears upon the record, and each party must pay his own costs. Staple v. Heydon, 6 Mod. 1; s. c., Ames, Cas. on Pleading, 293.

PROPERTY; PERSONAL.*

I. Nature.

1. *What are the different classes of personal property?*

They are two, chattels real and chattels personal. Chattels real are those rights in real property of which the duration is fixed or ascertainable, and, therefore, regarded as transitory: Leases for years are practically the only instance.

Chattels personal are things that are movable. They are also described as "any property whatever, except real estate, or some property therein." Robinson on Elementary Law, 152. Chattels personal are subdivided into choses in possession and choses in action. The former are those of which the owner actually has the enjoyment; the latter are those of which he has not the possession, but only a bare right to possession, and are so called because by an action or suit at law the possession may be gained. 2 Bl. Com. 384-388, 396; Schouler on Pers. Prop. 25, ff.

An annuity to X. and his heirs may be used as personalty, but if not bequeathed it goes to the heir. Aubin v. Daly, 4 B. & Ald. 59. Shares of stock in a corporation, though its property is real estate, are personalty. They are merely a right to share in profits. Hutchins v. State Bank, 12 Met. 421; Slaymaker v. Bank, 10 Barr, 373.

II. Acquisition.

a. By Operation of Law.

2. *Name and describe the principal titles acquired by operation of law.*

By marriage, by judicial decree, by the Statute of Limitations, and by occupancy.

On marriage, at common law, the title to all the wife's choses in possession vested immediately and absolutely in the husband. Her choses in action he could reduce to possession if he wished, and if he exercised the right they also became his absolutely. The wife gained no right at all to her husband's chattels, but she owned her clothing and ornaments purchased for her use, called *paraphernalia*. 2 Bl. Com. 433-436; Schouler on Pers. Prop. 113.

The respective rights of husband and wife as the law now stands can only be ascertained after a study of the statutes of the State where the question arises.

* Under this head only those topics relating to personal property are treated which are not touched upon in the sections on Torts, Real Property (the latter including various incidents of chattels real and the subject of Wills and Administration), Sales, etc.

Title by judicial decree includes several subdivisions: (a) A judgment in trespass or trover against one wrongfully in possession of a chattel, while it vests a right to damages in the plaintiff, also vests a title to the thing itself in the defendant, because no second action can be brought. 2 Bl. Com. 436, and note (Sharswood); Smith v. Smith, 51 N. H. 571. (b) The title gained by a purchaser at a sheriff's sale on execution comes under this head. The purchaser gets only whatever title the judgment debtor had. Griffith v. Fowler, 18 Vt. 390. (c) Title of an assignee in an involuntary bankruptcy obviously belongs in the same category.

Title by adverse holding for a period of time, the length of which is regulated by statute in each State, is similar to title gained in the same way to real estate. See Real Property, Ques. 14 and 15. The title once gained is perfect and good against all the world, and this applies both to the chattel *and* its increase produced during the adverse possession. Bryan v. Weems, 29 Ala. 423 (slaves); Chapin v. Freeland, 142 Mass. 383.

Title by occupancy is the title by which one owns that which, at the time it was acquired, was owned by no one. Animals *ferae naturae* are held by this title. Property in them lasts only while they are within the power or control of the party taking them. Young v. Hichens, 6 Q. B. 606; Buster v. Newkirk, 20 Johns. 75.

b. By Act of the Parties.

3. *What are the principal titles of this general description?*

Title by sale, by gift, by accession or confusion, and by bequest. Sale is considered under other heads, and title by bequest or intestacy under Wills. See Questions on Real Property, Nos. 40, ff.

To make a gift complete, it must be by deed, or there must be a delivery, actual or symbolical. Cochrane v. Moore, 25 Q. B. Div. 57; Noble v. Smith, 2 Johns. 52 (leading American case). A *donatio causa mortis* is a gift made by a donor in expectation of death, to hold good if he dies of that illness, and to be void if he recovers. Delivery has always been essential to this. Ward v. Turner, 2 Ves. Sr. 431; Noble v. Smith, *supra.*

4. *Accession. A. cut saplings on B.'s land, without knowing he was over the boundary between his land and B.'s, and by his labor turned them into barrel hoops. While standing, the wood was worth* $25, *as barrel hoops,* $800. *B. brought replevin. What is the proper decision?*

B. cannot retake them. For although, as a rule, one who takes another's goods has no right to hold them and cannot pass any title to a third person, in this case the property cannot be reclaimed by the original owner, because the taker has immensely increased its value by expending his labor and skill upon it. The measure of

damages is that of compensation for the wood as it was when taken. Wetherbee v. Green, 22 Mich. 311; s. c., 7 Am. Rep. 653; Herdic v. Green, 55 Penn. St. 176; s. c., 93 Am. Dec. 739.

In the case supposed, the taking was innocent. The rule, when the trespass was wilful, probably is that no amount of labor by the wrongdoer will prevent the original owner from reclaiming the goods or their value as thus enhanced. Silsbury v. McCoon, 3 Comst. 379, overruling 4 Denio, 425. By this rule, the principle which in civil suits gives compensation *only*, is disregarded for the sake of punishing the offender, but it is apparently well settled. Livingstone v. Rawyards Coal Co., 5 App. Cas. 25, 39; Wooden Ware Co. v. United States, 106 U. S. 432; Ry. Co. v. Hutchins, 32 Ohio St. 571.

5. *Confusion. A. and B. owned a cargo of cotton. The vessel was wrecked, and on the bales which were saved the distinguishing marks of ownership were obliterated. To whom would they belong?*

They would be divided between A. and B. in the proportion in which they contributed to the original cargo, because the mingling was *accidental.* Spence v. Ins. Co., L. R. 3 C. P. 427.

The title to goods intermingled so that those belonging to different persons cannot be distinguished depends upon *how* they came to be mixed. If the mixing was lawful or accidental each takes in proportion to his contribution; and even if tortious, the rule is the same, if the goods are of uniform quality. Hesseltine v. Stockwell, 30 Me. 237; Ryder v. Hathaway, 21 Pick. 298.

If the mixing is tortious and the goods of unequal value, the injured party can take with a free hand; Fuller v. Paige, 26 Ill. 358; Smith v. Morrill, 56 Me. 566; and, perhaps, hold all. See Ryder v. Hathaway, *supra.*

III. POSSESSION.

a. Judicial Process.

6. *A. and B. owned, in common, a chattel, which was seized by a sheriff on execution against A. and sold entire, the purchase money being handed to the judgment creditor. For what is the sheriff liable to B.?*

He is liable to him in either trespass or trover, for, although he was justified in taking possession in the beginning, he only had a right to dispose of A.'s interest. By his abuse of this right he became a trespasser *ab initio.* Melville v. Brown, 15 Mass. 82. The trespass takes effect from the beginning, because he acted by authority of the law, which B. could not resist, and which must, therefore, be strictly pursued. The Six Carpenters Case, 8 Co. 290; s. c., 1 Smith's L. C. 216.

A sheriff, however, so long as he keeps within the bounds of his authority, can hold possession, and enforce his right by the possessory actions against *anyone* interfering with it. Casher v. Peterson, 4 N. J. 317; Whitney v. Ladd, 10 Vt. 165 (where property held jointly and attached on a claim against one co-owner was protected from seizure by the other).

b. Bailment.

7. *When does a bailee have a right to retain goods to enforce payment for his services?*

A bailee has a lien (1) when by law he is compelled to take the goods, e. g., a common carrier; Skinner v. Upshaw, 2 Ld. Raym. 752; (2) by mercantile custom; Vail v. Durant, 7 Allen, 408; s. c., 83 Am. Dec. 695 (factor); (3) by labor done, enhancing the value of the article; Morgan v. Congdon, 4 N. Y. 552; and (4) by statutes which have generally given a lien for such services as those of a liveryman or an agistor. See note, 13 Am. & Eng. Ency. of Law (1st ed.), 945.

If a future time for payment is fixed no lien can attach, for such an understanding is inconsistent with a lien and destroys it. Chase v. Westmore, 5 M. & S. 180; Wiles, etc., Co. v. Hahlo, 105 N. Y. 234; s. c., 59 Am. Rep. 496.

8. *What are the advantages and disadvantages incident to holding by a lien?*

The advantage is that the owner will probably be induced to pay what is due for the sake of getting his goods.

The chief disadvantage arises from the fact that a (specific) lien is divested if possession is given up; Mulliner v Florence, 3 Q. B. Div. 484; 1 Jones on Liens, § 20; and is this: that any expense incurred in keeping the property must be borne by the bailee. British, etc., Co. v. Somes, E. B. & E. 353; aff'd, 8 H. L. Cas. 338; 1 Jones on Liens, § 972. Moreover, at common law the property could not be sold to pay the charges. 1 Jones on Liens, § 335; Briggs v. R. R. Co., 6 Allen, 246. But statutes have been adopted almost universally, providing for a sale after a certain length of time and after notice.

9. *X. steals Y.'s horse, rides him to an inn, runs up a bill and leaves without paying it. Can the innkeeper hold the horse against Y. for this indebtedness?*

It depends on whether the landlord received the horse as the property of X. He is compelled to receive the goods of any traveler and to become liable for them, and the protection of the lien, even against the true owner, has been accorded to him since very early times. Robinson v. Walter, 3 Bulst. 269 (1616); Threfall v. Borwick, L. R. 7 Q. B. 711; 1 Jones on Liens, 499.

The same privilege is not accorded to a *carrier*, in this country at least. It is said that he can tell in advance the amount of his charge and should insist upon his right to prepayment: that it is for the benefit of an owner that his horse should be fed, but very likely none at all that his goods should be transported; and that there is no obligation on the carrier to take goods for anyone but the owner. Fitch v. Newberry, 1 Doug. (Mich.) 1; Robinson v. Baker, 5 Cush. 137.

10. *What is the difference between a specific and a general lien?*

A particular or specific lien is one which "attaches to specific property, as security for some demand which the creditor has in respect to *that* property." 1 Jones on Liens, § 14. This is the common kind and is favored by the courts.

A general lien is less frequently allowed and is not favored. It holds property as security for obligations from the owner which do not necessarily arise from any demand the creditor may have in respect to that property; "it is for a general balance of accounts." The most conspicuous example of such a lien is that of a factor. See 1 Jones on Liens, § 17.

11. *Define a pledge.*

A pledge of property holds a position between a lien and a chattel mortgage. The title does not pass to the pledgee as it does to a mortgagee; but, on the other hand, the pledgee has more extensive rights and a more advantageous position than one holding by a lien. "A deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt." Halliday v. Holgate, L. R. 3 Ex. 299; Wood v. Dudley, 8 Vt. 430.

On default of payment of the debt, it is well settled that the pledgee may sell the property "without a judicial process and decree of foreclosure, upon giving the debtor reasonable notice to redeem," and may thereby pass a good title. Parker v. Brancher, 22 Pick. 40, 46; Stearns v. Marsh, 4 Denio, 227.

PROPERTY; REAL.*

I. Tenure and Estates.

1. *What was the feudal system?*

It was the system of holding land prevailing in England from the Norman Conquest (1066) until the Restoration (1660). By it, the king owned all the land. He granted the *use* (called a feud or fee) of portions of the land to various subjects, who held at first at will, later for life, and finally by an estate of inheritance, and who paid to the Crown services, military at first, but made pecuniary later. These men parceled out what they had to others, who in turn owed services to them; and, as the estate became hereditary, other burdens, such as payments by the tenant on coming into his inheritance, or on marriage of his daughter, were added.

This granting out of the lands to subordinate holders (known as subinfeudation) went so far that the lords found great difficulty in enforcing the feudal duties owed them. To correct the evil, the Statute of *Quia Emptores* (1290) was passed, providing that when land was granted away by a tenant, the one receiving it should owe his duties to the lord of the tenant and not to the grantor himself. At the Restoration, Charles II was forced to give the final blow to the burdensome system. Almost all tenures were reduced to free and common socage, i. e., a tenure for a *fixed*, *money* payment, in stead of an uncertain amount of services or work. See Tiedeman on Real Property, § 20; 1 Washburn on Real Property, bk. 1, chap. 2.

2. *By what tenure is land held in the United States?*

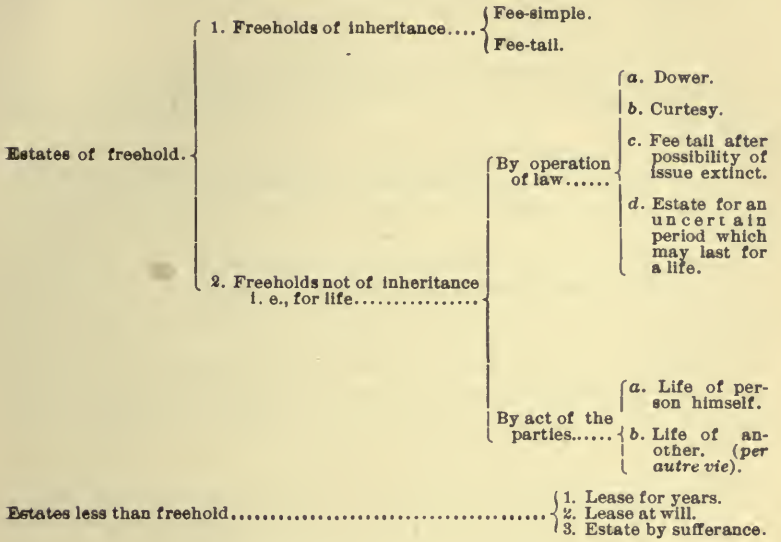
Practically all the land is owned allodially, i. e., absolutely. But there still remains the right of escheat to the State when a man dies without heirs; and, of course, the State has the right to take by eminent domain lands needed for public uses. Tiedeman on Real Property, § 25. And see 1 Washburn on Real Property, pp. 63-67.

3. *Define "freehold," and draw up a table of estates, based on the quantity of interest.*

"A freehold is an estate which is to endure for an uncertain period, and which must, or at least may, last through the lifetime

* References to Tiedeman on Real Property are to the first edition, and to Washburn on Real Property to the fourth edition.

of some person." Tiedeman, § 26. It is a life estate or any greater one.



4. *Define the freeholds of inheritance.*

"Tenant in fee-simple is he which hath lands or tenements to hold to him and his heirs forever." Lit., § 1. "Tenancy in fee-simple is the highest estate known to the law and is absolute." Tiedeman on Real Property, § 36.

An estate-tail is to a man and some class of his heirs, such as his heirs male of his body, or his heirs by a certain wife. Tiedeman, § 48. For estates tail in United States, see Tiedeman, § 52.

5. *Define the freeholds not of inheritance.*

Dower is the right of a wife to the life enjoyment, after the husband's decease, of one-third of any estate of inheritance, of which the husband was seized at any time during the coverture, provided it was such an estate that her issue, had she had any, could have inherited it. Williams on Real Property (13th ed.), 235; Tiedeman on Real Property, § 115.

Curtesy is the corresponding right of a husband in *all* the estates of inheritance of his wife, with the added requirement that issue capable of inheriting the property must have been born alive. Tiedeman, § 101; 1 Bouvier's Law Dict., p. 416.

Fee-tail after possibility of issue extinct is illustrated by this case:— Estate to A. and his heirs had by wife B. B. dies without issue had; A. has the estate in question.

An example of an estate, which is a life estate because it *may* last for a lifetime, is one to A., so long as X. remains unmarried. See Tiedeman on Real Property, § 60

6. *Define the estates less than freehold.*

An estate for years is one for any *definite* period of time. Its duration is ascertainable. 1 Washburn on Real Property, p. 436 (4th ed.).

After a contract for a lease, but before entry by the lessee, he has no estate in the land; what he has is a right of entry (which is assignable), called an *interesse termini*. Tiedeman on Real Property, § 174.

Estates at will are, as their name implies, leases by one to another, determinable at any time, by either party. The lessee has no interest which can be assigned. Lit., § 68; Tiedeman on Real Property, § 212.

A tenant at sufferance is one who comes in rightfully, but holds over without right, such as tenant *per autre vie*, holding after the end of the life on which his estate depended. Co. Lit. 57, b; Tiedeman on Real Property, §§ 225, 226.

7. *State the difference between a reversion and a remainder; and between a vested and a contingent remainder.*

A reversion is that remnant of an estate which remains in a person after he has transferred to another some lesser estate, such as an estate for years out of a life estate, or a life estate out of a fee. Co. Lit. 22, b; Tiedeman on Real Property, § 385.

A remainder is a future estate, created at the same time as another and precedent estate (known as the particular estate), and to be enjoyed on the termination of the latter. Co. Lit. 143, a; Tiedeman on Real Property, § 396.

As to the difference between a vested and a contingent remainder, the statement by Leake, Digest Land Law, 48, is very clear. "A remainder limited to an uncertain person or upon an uncertain condition and so long as the uncertainty lasted, became known as a contingent remainder. A remainder limited absolutely and to a determinate person, or which had become absolute and certain in ownership by subsequent events, was a vested remainder." Thus, an estate to A. for life, remainder to B. in fee, B. being alive, creates a vested remainder in B. An estate to A. for life, remainder to B.'s eldest son, B. then having no son, creates a contingent remainder. See 2 Washburn on Real Property, pp. 539-542 (4th ed.); 4 Kent, Com. *pp. 202-206; 2 Bl. Com., chap. 11, pp. 163-171.

A contingent remainder, if it ever becomes a vested one, must obviously become so during the continuance of the particular estate, since it is limited to take effect immediately on the ending of that estate. It becomes vested by the remainderman's coming into

being, or by the happening of the event on which his right depends. In creating a contingent remainder, the supporting or particular estate must be a freehold, because otherwise the seisin would be in abeyance.

8. *How are estates classified according to the number of owners?*

Estates held in severalty (i. e., by one person), in coparcenary (a peculiar estate no longer of importance), in joint-tenancy, and in common.

In joint tenancy, the owners "have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same possession." Its distinguishing characteristic is the right of survivorship. By this, on the death of one joint tenant, his interest passes to the remaining ones, regardless of his heirs or devisees, or of claims to dower or curtesy. The estate has, as a consequence, been done away in most States, except for trustees. Tiedeman on Real Property, §§ 236-238; 2 Bl. Com. 180-182.

Tenants in common hold by distinct titles, and each has simply an undivided share. There is, therefore, no survivorship; each share descends to heirs like an estate in severalty, and is freely devisable. Tiedeman on Real Property, § 329; 1 Washburn on Real Property, bk. 1, chap. 13, § 3.

9. *Define seisin and livery of seisin.*

Seisin signifies simply *possession*, under a title, or at least a claim, of freehold; one is never "seized" of a term for years. Seisin is a question of fact. When no one is in possession of the land, the seisin is in the person having the right of property, and is then seisin in law, but this disappears as soon as an actual possession begins, by one claiming a freehold. The seisin, therefore, can never be in abeyance. See Tiedeman on Real Property, §§ 24, 396; 1 Washburn on Real Property, p. 58.

Livery of seisin was the term used to describe the ceremony of handing over the seisin from one to another. The two went on the land with witnesses, and a twig or piece of turf, sometimes a ring, was handed over as a delivery of the possession. The transfer took effect immediately, and this furnished one reason why a freehold could not at common law be created to begin *in futuro*. Tiedeman on Real Property, § 770; 2 Bl. Com. 314-316.

Whether the transferor had a right to pass the seisin or not, the transferee took it. If someone else had a superior right, he was by that act disseised. A disseisin is, in general, effected by any open entry and occupation, under a claim of a freehold right, with the intention to shut out the true owner, and his actual exclusion. In technical language, the possession gained must be

notorious, exclusive and adverse. The disseisor acquires a perfect title immediately against all but the true owner, and against him also after the running of the Statute of Limitations. Tiedeman on Real Property, §§ 693-700; 3 Washburn on Real Property, pp. 125-129.

II. ACQUISITION OF TITLE WITHOUT A CONVEYANCE.

a. Operation of Law.

10. *Enumerate and define the principal estates which are acquired by the operation of law purely.*

The principal titles so acquired are those of dower, curtesy, escheat and accretion.

Dower and curtesy have already been defined (Ques. 5, *supra*). Escheat is the title by which the State takes the real estate of one dying intestate, and without heirs. It is feudal in origin, and reversionary in character. 3 Washburn on Real Property, pp. 46, 49.

Title by accretion is the title which the owner of land gains to other land, gradually added thereto by the operation of natural causes, such is the ordinary flow of a river. Tiedeman on Real Property, §§ 685, 686; Deerfield v. Arms, 17 Pick. 41; Cook v. McClure, 58 N. Y. 437.

The time-honored division of titles into title by descent and title by purchase may here be noticed. Title by descent is that by which an *heir-at-law* holds the realty of his deceased (intestate) relative; title by purchase, includes practically all other titles, comprising even a title acquired by gift. Opinions differ as to the class to which dower and curtesy belong. 3 Washburn on Real Property, 4, 5.

The question sometimes arises, whether an heir to whom land is *devised* takes it by descent or purchase. The test is found in Clerk v. Smith, 1 Salk. 241, and is this: Does he take the same *estate* that the law would have given him, if the ancestor had died intestate? If so, he is in by descent.

11. *What are the English canons of descent, and how far are they of force in the United States?*

They are the rules by which the heirs were ascertained and the descent of real estate governed, at common law.

1. Inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum*, but shall never lineally ascend.

2. The male issue shall be admitted before the female.

3. Where there are two or more males in equal degree, the oldest only shall inherit, but the females of equal degree all together.

4. The lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

5. On failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

6. The collateral heir of the person last seised must be the next collateral kinsman of the whole blood.

7. In collateral inheritances, the male stocks shall be preferred to the female, unless the lands have in fact descended from a female. See 3 Washburn on Real Property, pp. 10-12, for explanation in detail of these canons.

In the United States, though the canons are applied, unless changed by the Legislature, there are statutory provisions everywhere, which have no uniformity and are constantly altered. In general, it may be said, that the first, second, third and seventh canons are done away.

The fourth is also done away, in cases where all the heirs are of equal degree. When they are of unequal degree, the common-law rule is applied. For example, A. has children B. and C., of whom B. has two children, and C. three. B. dies. Then A. dies intestate. His heirs are B.'s children, and C., and as they are of unequal degree, the property goes *per stirpes*, i. e., half to C. and half to the children of B. If B. and C. had both been dead at A.'s death, the five children would have each taken one-fifth, the division being *per capita*.

Canon number 5 is modified by a preference to lineal ancestors, if living, over collateral branches; number 6 is not in force, but the changes in it have not been so sweeping as in the others. See 3 Washburn on Real Property, pp. 12-16, and his summary of the statutes in the various States, p. 21.

12. *What was the common-law method used in computing the degree of relationship between two persons, for determining the descent of real estate? Is it in force?*

The degree was obtained at common law by counting the generations from the common ancestor to that one of the persons in question who was farthest from him. Thus an uncle and nephew were related in the second degree, the common ancestor being the grandfather of the nephew.

At present, in this country, the civil-law rule, which has always been followed for finding the "next of kin," i. e., the distributees of the personalty of an intestate, prevails. This consists in adding together the number of degrees between each of the two persons and the common ancestor. An uncle and nephew under this calculation are related in the third degree. 3 Washburn on Real Property, p. 10.

13. *How may a right of dower be lost or barred?*

The statutes of the respective States must be examined for details, but the following are the leading ways in which a dower right

disappears: (1) by elopement, unless condoned by the husband; (2) by the wife's joining the husband in his transfers of land; (3) by a provision in lieu of dower, either by jointure in the husband's lifetime, or by the husband's will. In the last case, the widow has an election between the provision by will and her ordinary dower rights. Tiedeman on Real Property, §§ 127, 128, 147, 148.

b. By Operation of Law, Against the Will of the Former Owner.

14. *Name and define briefly the titles so gained against the will of the previous owner.*

The principal titles so acquired are those by eminent domain, taxation, execution, bankruptcy, liens, and lapse of time. Eminent domain and taxation are sufficiently treated under another head (Constitutional Law); execution and bankruptcy explain themselves; a lien upon land "does not imply an estate in it, but a mere right to have it, in some form, applied towards satisfying a claim upon it." 2 Washburn on Real Property, p. 34. A lien is, therefore, not strictly a source of title.

Titles by lapse of time are two: (1) Title to corporeal real estate, gained by a holding adverse to the real owner for a prescribed number of years, the essentials of which have already been noted (under disseisin, Ques. 9, *supra*). 3 Washburn on Real Property, pp. 125-129, 134-138, 141. (The Statutes of Limitation vary widely in the different States, the time required ranging from five to twenty-one years; 3 Washburn on Real Property, 166, note); (2) Title by prescription, which corresponds to that by the Statute of Limitations, but arises from the user, for a stated time, of an *incorporeal* hereditament.

Originally, it was necessary in order to gain a title by prescription to prove that the right had been enjoyed from the time of legal memory (i. e. Richard I), but the impossibility of such proof soon compelled a change. The courts adopted the doctrine that a lost grant would be presumed from an exercise of the right after a period of years. At present, the rule is that this presumption becomes conclusive after the lapse of the same number of years which bars an action to recover corporeal real property; thus achieving the desirable result of uniformity in the acquisition of all titles by lapse of time. Tiedeman on Real Property, § 599, note; Tracy v. Atherton, 36 Vt. 503; Wallace v. Fletcher, 30 N. H. 434. Traces of the old theory of the lost grant still appear in some States. Lamb v. Crosland, 4 Rich. (S. Car.) 536; Parker v. Foote, 19 Wend. 309, (*dictum*).

15. *It has been sometimes urged that the operation of the Statute of Limitations was simply to bar the remedy of the person shut out of his land, and that, consequently, even after*

the statutory period had elapsed, a relinquishment or abandonment by the wrongdoer would restore the former rights of the previous owner. Is this position tenable?

No. The title is as completely gone as if there had been an express deed to the adverse holder. The great object of the statute was to put a stop to litigation based on rights arising far in the past, and the construction claimed would go to frustrate that purpose. The former owner is a "stranger," after the statute has run. School District v. Benson, 31 Me. 381; Hughes v. Graves, 39 Vt. 359.

16. *Would the statute begin to run in either of the following cases:* (1) *A lessee for years determines to hold adversely to his lessor, and does various acts indicating this intention;* (2) *A. puts up a fence on what he honestly thinks is the line between his land and that of B., and treats the land so inclosed as his own; in fact, he has included some land belonging to B.?*

In (1), the answer depends on whether the acts in disaffirmance of the lessor's title are brought clearly to his knowledge. If they are positive acts, like a refusal to pay rent, and are clearly brought home to the lessor, the statute, by the great weight of authority, will begin to run in favor of the lessee. Willison v. Watkins, 9 Pet. 48; Sherman v. Trans. Co., 31 Vt. 162, 177. *Contra*, De Lancey v. Ga Nun, 9 N. Y. 9.

As to (2), there is the same weight of authority that A. will have the benefit of the statute. In a leading case it is admitted that the intention of the possessor to enter and claim *adversely* is necessary, but it is held that "the person who enters on land, believing and claiming it to be his own, *does* thus enter and possess." The fact that he is not morally in the wrong should not put him in a worse position than an intentional wrongdoer. Indeed, the motive is immaterial. French v. Pearce, 8 Conn. 439; Yetzger v. Thomas, 17 Ohio St. 130. *Contra*, Grube v. Wells, 34 Iowa, 148.

17. *A. took possession of part of a tract of land, having a paper title to the whole tract. His deed was not good, but he held the part he first occupied for the full statutory period, with a claim of right to the whole. To how much did he gain title by adverse possession?*

To the whole tract, under the doctrine of constructive possession. The doctrine, though well settled, is peculiar to this country, and perhaps arose from the existence of woodland, connected with farms, but seldom used. There must be a deed accurately describing the whole of the premises, and the tract must be of moderate extent; that is, the origin of the rule requires its application to be made with reasonable limitations. Jackson v. Woodruff, 1 Cow. 276; Bailey v. Carleton, 12 N. H. 9.

18. *Disabilities. A. is a woman who is disseised at six years of age, married at eighteen, becomes a widow at forty. A statute gives a disseisee fifteen years to assert his right, and if he is under a disability, such as infancy or coverture, at the time the right of entry first accrued, gives five years in addition after the removal of such disability. Can A., when discovert, bring suit to eject the disseisor?*

No. The only disability of which she could take advantage was the one arising from her infancy. This is because that was the only one existing at the time the disseisin occurred. No disability arising after that time can affect the case. Bunce v. Wolcott, 2 Conn. 27; Eager v. Commonwealth, 4 Mass. 182.

19. *A statute provides that adverse possession, to gain title, must continue fifteen years. A., the owner of land, is disseised by B., who holds for ten years, when he is, in turn, thrust out by C., who holds five years. Does C. gain a good title as against A.?*

In other words, can successive disseisors tack their holdings together to make up the requisite time?

The cases are in conflict. It is on all hands admitted that any "privity of estate," between the successive holders, i. e., any transfer from the prior wrongdoer to his successor by descent, devise or grant, will suffice to give the successor the advantage of the time during which his predecessor held adversely. Sawyer v. Kendal, 10 Cush. 241; Overfield v. Christie, 7 S. & R. 173.

When, however, the case suggested in the question has come up, the decisions have been diverse. In Massachusetts, separate successive disseisins are not allowed to be tacked. Sawyer v. Kendal, *supra*. But in other States, following the spirit of the statute, which was to quiet titles and cut off the rights of persons dilatory in enforcing them, the opposite conclusion has been reached, a necessary qualification being added, that there must be no interval between the holdings of the two wrongdoers. Fanning v. Wilcox, 3 Day (Conn.), 258; Shannon v. Kinny, 1 A. K. Marsh, 3.

III. TITLE BY VOLUNTARY CONVEYANCE, INTER VIVOS.

a. Form of Conveyance.

20. *What were the conveyances known to the common law?*

To follow Blackstone's well-known summary, dividing them into *primary* conveyances, or those transferring some estate to one having no other interest in the property, and *secondary*, in which an estate previously created is modified or extinguished, they are these: *Primary*, (1) feoffment; (2) gift; (3) grant; (4) lease; (5) exchange; (6) partition. *Secondary*, (1) release; (2) confirmation; (3) surrender; (4) assignment; (5) defeasance. 2 Bl. Com. 309, 310.

In all transfers of a freehold estate (in possession) in corporeal real property, the ceremony of livery of seisin (Ques 9, *supra*), was an essential part; the transfer was either a feoffment, creating a fee; a gift, creating a fee tail; or a lease for life; according to the words used at the ceremony. Tiedeman on Real Property, §§ 769, 770.

This transfer by livery of seisin is the only method of primary common-law conveyance capable of creating a freehold or of transferring a freehold in possession, and in this lies the reason that freeholds could not be made to commence *in futuro* at common law. Tiedeman, *supra*.

Grant was a transfer by deed, and was used to convey corporeal freehold interests when livery of seisin was impossible from lack of possession (e. g., in conveying a remainder), and to convey *any* interest in incorporeal hereditaments. The rule was that whatever *could* be conveyed by livery, *must* be; and all realty which was transferable in that way was said to *lie in livery;* all other hereditaments *lay in grant*. Tiedeman, *supra*, § 771; 3 Washburn on Real Property, 352.

The term *lease* was applied to estates for life as well as for a fixed period of years. A term for years was transferred by a parol agreement, and entry. Before entry the lessee had only an *interesse termini*. Tiedeman on Real Property, § 772 (Ques. 6, *supra*).

A *release* is a conveyance of one's estate in lands to another who holds already some estate *in possession*, as by a reversioner to a life tenant where there is no outstanding intermediate estate, or by one joint tenant to another. Except between two tenants in common the transfer is by deed, livery of seisin not being used because the grantee's actual possession, even that of a tenant for years, was considered to render that ceremony unnecessary. Tiedeman on Real Property, § 773; 2 Bl. Com. 324, 325.*

Surrender is the converse of release, namely, a transfer by one in possession of a particular estate to one holding an immediate reversion or remainder, e. g., when there is an estate to A. for life, remainder to B. for life, remainder to C. in fee, A. can surrender to B., because B.'s remainder is immediate to A.'s estate. A., however, by the operation of these rules, cannot make a surrender to C., but would convey to him by livery. Tiedeman on Real Property, § 773.

The other forms of transfer named above need not be considered here in detail.

21. *What is a surrender by operation of law?*

When a lessor and lessee perform acts which indicate an intention to abandon the lease, a surrender by operation of law takes place, and the lease is terminated. The most common ways in which such

* The chief importance of release in this country is in its descendant, the familiar quitclaim deed, the status of which is set forth in Tiedeman, § 781, and 3 Washburn on Real Property, p. 359. In general, it may be said that the quitclaim is recognized as a primary conveyance, and will pass the whole interest which the grantor was at the time capable of transferring.

a surrender takes place are (1) a new lease between the parties, the enjoyment of which is incompatible with the continuance of the old lease; Tiedeman on Real Property, § 198, and cases; (2) the delivery and acceptance of possession of the premises (e. g., by handing over the key) to the lessor; Dodd v. Acklom, 6 Man. & G. 673; (3) a lease to a third party to whom the lessee hands over possession. Nickells v. Atherstane, 10 Q. B. 944. See Auer v. Penn, 99 Penn. St. 370, for a discussion of what is sufficient acceptance by a landlord to effect such a surrender.

22. *What forms of conveyance arose under the Statute of Uses (1536)? and what was the general scope and purpose of that Act?*

Under the Statutes of Mortmain persons were forbidden to transfer their estates to religious orders, and the latter, to avoid this prohibition, resorted to a device by which an ordinary common-law transfer was made to one person (called feoffee to uses) to hold to the use or benefit of another (called the *cestui que use*). The *legal* title, with all rights and responsibilities, was held by the former, and the equitable interest, which meant the right to enjoy all the benefits of the estate, by the latter. Courts of law declined to recognize the rights of the *cestui que use*, but these were protected by courts of equity, which compelled the feoffee to uses to hold for the benefit of the *cestui*. Tiedeman on Real Property, §§ 438-440.

The Statute of Uses was passed to prevent the great number of frauds and evasions of various feudal duties perpetrated under the system of uses as it then prevailed. It provided that wherever any person stood seized or possessed of any estate to the use of any other person, such other person should from thenceforth be seized or possessed, (as the case happened to be), of such lands or hereditaments in a like estate as he had had the use in the same. Tiedeman on Real Property, § 459, note.

For a time, therefore, all such equitable interests in land in the country were abolished, but by a narrow construction of the statute it was held that after a transfer to A. to the use of B. to the use of C., the statute would operate only to move the legal estate from A. to B., leaving it in B.'s hands subject to a trust for C. Tiedeman, *supra*, § 459.

Under the statute three new forms of conveyance arose; bargain and sale, covenant to stand seized, and lease and release.

A bargain and sale was as follows: A., the owner of land, agreed with a purchaser to sell him the land for money paid, or its equivalent. By this agreement, A. held the legal title subject to the use of B., and the Statute of Uses, without any livery of seisin, or any transmutation of possession, passed it from A. to B. Tiedeman, *supra*, § 776.

A covenant to stand seized was the same, except in the nature of the consideration. The covenantee must be a near relative or

the wife of the covenantor, the transfer taking effect through this *good* consideration of blood or marriage. Tiedeman, § 775.

A conveyance by lease and release was devised to evade the Statute of Enrollments (1536), which provided that all transfers of a *freehold* by bargain and sale should be in writing and enrolled in one of the King's courts. The process of lease and release was as follows: a bargain and sale was made for *one year*, which created a legal estate for that time in the bargainee with a reversion in the bargainor, but which required no enrollment because it was not a freehold; the reversioner promptly gave a common-law release to the tenant for years, and thus the publicity of an enrollment was avoided. Tiedeman, § 778.

23. *What forms of conveyance prevail in the United States?*

It would be impossible to even outline the rules of conveyancing which are in force, but the legal title to land can be passed by any of the methods mentioned above, unless a statute prohibits its use. The general tendency is toward simplicity, and the ancient and salutary doctrine is everywhere recognized that when parties actually go through a certain form, though they think they are going through another, a construction will be made to carry out their intention so far as possible. See Tiedeman on Real Property, §§ 779-781; 2 Washburn on Real Property, pp. 438-454; Roe v. Tranmer, 2 Wils. 75.

b. Description of Property Conveyed.

24. *A. conveys to B., by a deed in which the land is described by fixed and well-known monuments, and also by courses and distances, but the descriptions do not agree. Which prevails?*

The description by monuments. Measurements and computations are often inaccurate, but fixed monuments remain. Pernam v. Wead, 6 Mass. 131; Preston v. Bowmar, 6 Wheat. 580. And the rule holds though the monuments are set up by the parties after the deed is drawn. Lerned v. Morrill, 2 N. H. 197. When courses and distances conflict, the one which is more precise prevails. Preston v. Bowmar, *supra*.

25. *What is the rule of construction when land is granted bounded "on" a highway or a nonnavigable stream?*

It is universally agreed that by such a description the title to the *center* of the way or stream is conveyed. It is an arbitrary ruling as to intention, but is adopted from public policy, to prevent a mass of almost useless litigation at some future time when the street might be abandoned, and the remote heirs of the first grantors might assert their title to the small strips and gores of land which would result from a contrary interpretation. Sleeper v. Laconia, 60 N. H. 201; Champlin v. Pendleton, 13 Conn. 23

The rule applies also to private ways; Fisher v. Smith, 9 Gray, 441; artificial streams; Warren v. Southworth, 6 Conn. 471; and to streets not yet laid out, but indicated on a map from which lots are sold. Gould v. Eastern Ry. Co., 142 Mass. 85. But see Bangor, etc. v. Brown, 33 Me. 339.

To prevent the application of the rule in question, probably nothing short of a direct statement in the deed to that effect would be sufficient. Champlin v. Pendleton, *supra;* Cox v. Freedley, 33 Penn. St. 124.

c. Incidents of Leasehold Interests.*

26. *By the statute of a State all leases for a time longer than three years were to be in writing. A. made a parol lease to B. for seven years, B. to enter March* 1, 1870, *and quit February* 15, 1877. *B. entered and paid rent. On September* 1, 1872, *A. gave B. notice to quit on March* 1, 1873, *and, on his holding over, brought ejectment. What decision?*

The defendant wins. Such a lease is only inoperative as to the *duration* of the lease. All the other terms, such as the amount of rent, dates of payment, time of year to quit, etc., hold good. A. should have given a notice, to quit on February 15th. Doe d. Rigge v. Bell, 5 T. R. 471; Barlow v. Wainwright, 22 Vt. 88.

The statutes of the various States on the subject are quite varied and no general statement can here be given of their provisions, as to the length of time for which a lease may be validly made by word of mouth, notice to quit, and the like.

27. *Suppose B. is occupying land as a tenant from year to year, and holds over after the expiration of the year. What is his relation to the landlord?*

If B. does nothing to indicate that he considers himself a trespasser, the landlord may treat him as such or not as he likes. If the latter receives rent, or does nothing for a considerable time, B. will be a tenant on the same terms as before. Conway v. Starkweather, 1 Den. 113; Wolff v. Wolff, 69 Ala. 549.

d. Incorporeal Hereditaments.

28. *Explain and distinguish the terms "exception," "reservation" and "implied grant."*

To explain by illustration, A. grants lands to B. and his heirs, "excepting the homestead." B. does not take the homestead. The title to it never passes to him, and, therefore, A. still owns it as he did before, without using the word *heirs* in his exception. This is a real exception, according to the exact meaning of the term.

* See also Ques. 84, 85 and 86 of this section.

A "reservation" is properly of *rent* or something of the kind, something issuing out of the land.

An easement is not the subject of an exception or a reservation, not being part of the land or issuing out of it. When A., granting land to B., wishes to enjoy an easement in that land, B. ought in strictness to grant it back "to A. and his heirs," for such a right is not *a separable part* of the thing granted and cannot be kept back by the grantor.

See 3 Washburn on Real Property, pp. 440-442; Doe v. Leck, 4 Nev. & M. 807.

In practice, however, all these terms have been loosely used for one another until great confusion has arisen: with the result that even where A. transferred, by a *deed poll,* part of his land, "reserving to myself a right of way," it was held after A.'s death that his heirs still had the right of way, just as if the grantee had granted it back "to A. and his heirs." Winthrop v. Fairbanks, 41 Me. 307.

For discussion of "implied grants" see Ques. 29, last two paragraphs.

29. *What easements pass by a deed of land without mention?*

First. All *true* easements, i. e., all easements attached to and enjoyed in connection with the land transferred, where the servient tenement is not owned by the grantor. Such rights are attached to the dominant estate and go with it when it is transferred, though not named or referred to. 2 Washburn on Real Property, p. 303; Kent v. Waite, 10 Pick. 138.

Second. Ways of necessity. Such a way arises over land of the grantor when the land he has transferred would be inaccessible without it. It depends on the principle that a grant carries with it whatever rights are *necessary* to the enjoyment of the thing granted. 2 Washburn on Real Property, pp. 332, 333; Leonard v. Leonard, 2 Allen, 543. The necessity need not be absolute; it is sufficient if the labor and expense requisite to gain access by some other means are excessive and disproportionate to the value of the land. Pettengill v. Porter, 8 Allen, 1.

Third. Continuous and apparent easements. X. owns Blackacre and Whiteacre, and uses a certain drain through Whiteacre, in connection with Blackacre. If he sells the latter to Y., retaining the former, the right to use the drain through Whiteacre passes to Y. by an "implied grant" and X. cannot close it. This is the rule *against a grantor* for all easements which are continuous and apparent, that is, for all those easements which are reasonably necessary to the beneficial enjoyment of the part granted, and are at the time of the grant used by the owner of the tract for the benefit of the part granted. 2 Washburn on Real Property, pp. 313-316; Simmons v. Cloonan, 81 N. Y. 557; Mitchell v. Seipel, 53 Md. 251.

Whether in the converse case, where the *quasi*-servient estate (Whiteacre) is granted, and the grantor after a full and uncondi-

tional conveyance of it seeks to enforce an easement (in favor of Blackacre) against his grantee as *impliedly reserved*, there is a conflict. Probably the Massachusetts cases represent the prevailing American rule, namely, that there is no such implied reservation, unless the easement be one of strict necessity; that is, such necessity that a similar privilege cannot be secured by reasonable expense. Carbrey v. Willis, 7 Allen, 364; Warren v. Blake, 54 Me. 276.

e. Covenants in Deeds.

30. *What covenants as to title are generally inserted in a deed?*

1. The covenant of seisin, which states that the grantor is lawfully seized.

2. The covenant of right to convey, which declares that the grantor has a valid right to convey.

3. The covenant against incumbrances, which states that there are no liens or claims upon the property in favor of third persons.

4. The covenant of quiet enjoyment, which provides that the grantee shall be protected from all annoyance caused by a defective title.

5. The covenant of warranty, which binds the grantor to forever warrant and defend the estate granted against all (existing) claims.

6. The covenant of further assurance, which provides that the grantor shall do all that is essential to the completion of the title.

The last covenant, though a useful one, is not often employed, and, in fact, the covenant of warranty is frequently the only one.

Numbers 1, 2 and 3 are statements of present fact. If untrue, they are broken as soon as made, and rights of action on them immediately accrue. Greenly v. Wilcocks, 2 Johns. (N. Y.) 1; Mitchell v. Warner, 5 Conn. 497. *Contra*, Backus v. McCoy, 3 Ohio St. 211.

The others are *in futuro*, and until broken they run with the land, i. e., they pass from the original grantee by a transfer of the land from him to another, so that when they are broken the latter can bring suit in his own name against the warrantor or his heirs. 3 Washburn on Real Property, pp. 447-449; Withy v. Mumford, 5 Cow. 137. Indeed, the person who is evicted from the land by the breach of the warranty is the *only* one who can sue. Booth v. Starr, 1 Conn. 244; Withy v. Mumford, *supra*.

31. *Covenants other than those for title are frequently inserted in deeds; e. g., to repair, to build party walls and the like. If the deed is a lease, when will these covenants run with the land?*

The test to apply is whether the covenant affects the nature, quality or value of the estate, i. e., whether it is or is not collateral to the relation of the parties as landlord and tenant. The commonest of those which will run are, perhaps, those to make repairs, or to pay for improvements made by the lessee. Spencer's Case,

5 Co. 16, a; s. c., 1 Sm. L. C. (8th ed.) 89; Hansen v. Meyer, 81 Ill. 321. But it has even been held that a covenant to occupy a house on the premises during the term runs with the land. Tatem v. Chaplin, 2 H. Bl. 133.

32. *State, in outline, the position of assignees of the lessor or the lessee as to such covenants.*

These cases are governed by the Stat. 32 Henry VIII (part of *our* common law), which applies only to covenants in *leases;* this act gives, in certain circumstances, the same right of suit to assignees of lessors or lessees, as the original parties have by the covenants.

If a covenant is such as to run with the land (see Ques. 31), the assignee of all the premises for the whole term of the lease, or of part for the whole term, is bound by the covenants. Holford v. Hatch, 1 Doug. 183; Patten v. Deshon, 1 Gray, 325, 329, 330; Overman v. Sanborn, 27 Vt. 54. If the assignment covers less than the above, he is only a sublessee, and not liable to the lessor. Holford v. Hatch, *supra;* Patten v. Deshon, *supra.*

The assignee of the reversion of part or of the whole of the premises can also sue or be sued on the covenants. Twynam v. Pickard, 2 B. & Ald. 105.

An assignee is bound, though the word "assigns" is not used in the original covenant, *provided* the covenant has to do with something *in esse* at the time of the lease, e. g., to repair a house then standing. But if the thing is not *in esse*, as in a covenant to build a wall on the land, the express words "the lessee (or lessor) or his assigns," must be used. This has been established since Spencer's Case, 5 Co. 16, a; s. c., 2 Gray's Cas. on Property, 406; Hansen v. Meyer, 81 Ill. 321.

33. *In a transfer of land in fee with these covenants (i. e., covenants other than for title), when will the covenants run with the land, so that transferees of the grantor or grantee can sue or be sued?*

The subject is in a confused condition, the technical objection that no relation of contract exists between the new owner and the original covenantee of his predecessor being balanced against the advantage of supporting a policy of mutual benefit to adjacent estates, according to the wishes of the parties who made the covenant.

The rule *at law* may be summarized as follows:

1. The covenant must be such as directly relates to the land, and does not attach to it some new and unusual incident. Ackroyd v. Smith, 10 C. B. 164.

2. If that fundamental requirement is satisfied, and if privity of estate existed between the original covenanting parties, the general rule is, benefits run; burdens do not. That is, *either* the owner of the land benefited *or* his assigns can sue the other party to the cove-

nant, but the *assigns* of the latter are free. Austerberry v. Oldham, 29 Ch. Div. 750, 780; Plymouth v. Carver, 16 Pick. 183.

3. Even burdens will run if the covenant is in aid of an easement or profit already existing between the lands of the parties. Morse v. Aldrich, 19 Pick. 449; Fitch v. Johnson, 104 Ill. 111.

4. And the later cases tend to the position that the intention of the covenanting parties must control, and that benefits and burdens will both run when their intention to that effect appears, provided the condition stated in (1) is observed. Mott v. Oppenheimer, 135 N. Y. 312; Savage v. Mason, 3 Cush. 500; and note by Holmes, J., 4 Kent's Com. (12th ed.), p. 480.

In equity the rule, speaking generally, is that assigns who take with notice are bound. Tulk v. Moxhay, 2 Phil. 774; Hayward v. Brunswick, 8 Q. B. Div. 403; Tallmadge v. Bank, 26 N. Y. 105. With our registry system the equitable and legal rules thus approach each other closely. Mott v. Oppenheimer, 135 N. Y. 312.

f. Execution of Deeds.

34. *How must a deed be executed so as to become operative?*

"Execution" means signing, sealing and delivery. Thorp v. Coal Co., 48 N. Y. 255. The signing, though dispensed with at common law, and probably not required by the Statute of Frauds, is now necessary in most of the States, and always advisable. 3 Washburn on Real Property, pp. 270, 271.

Sealing is everywhere an essential, although in many States it has become a very slight thing. Originally, an adhesive substance with an impression upon it was requisite; now, in most States, a piece of colored paper, or even a scroll with "L. S." inside is sufficient. 3 Washburn on Real Property, pp. 273, 274.

"Delivery" does not necessarily include a passing of something material from the grantor or obligor to the other party. It is a question of intention; and if any words or acts show the intention that the instrument shall be at that time operative, that is a good delivery. See Xenos v. Wickham, L. R. 2 H. L. 296, 312, per Blackburn, J.; Somers v. Pumphrey, 24 Ind. 231, 239, ff.

What effect the registry of a deed should have as evidence of intention to deliver is not well settled. Those courts which see most clearly the value of the registry system hold that the presumption of intention from such an act can only be overthrown by the strongest evidence of a contrary intention. Mitchell v. Ryan, 3 Ohio St. 377. But in other States, no presumption whatever arises from such record. Barnes v. Barnes, 161 Mass. 381 (a reluctant decision).

35. *What part does acceptance by the grantee play in the delivery of a deed?*

The rule stands that acceptance (the consent to receive) is as essential as the intention to deliver on the part of the grantor, but

it is well settled that no formal, *express* assent is needed. Tiedeman on Real Property, § 813. If the conveyance is beneficial to the grantee, many courts hold that his acceptance is presumed, unless dissent is shown. Mitchell v. Ryan, 3 Ohio St. 377; Merrills v. Swift, 18 Conn. 257; Jones v. Swayze, 42 N. J. Law, 279. And in these cases the grantees were even ignorant of the transaction. See, *contra*, Maynard v. Maynard, 10 Mass. 456; Welch v. Sackett, 12 Wis. 243.

36. *What is an escrow?*

It is a deed delivered by the grantor to a third party to be delivered over to the grantee upon the performance of some condition annexed thereto. Whether it is an escrow or is the grantor's deed "presently," depends upon his intention when he makes the first delivery. An escrow is not revocable by the grantor, and on the second delivery it takes effect by relation, for most purposes, from the date of the first delivery. 3 Washburn on Real Property, pp. 298-305; Ruggles v. Lawson, 13 Johns. (N. Y.) 285; Cook v. Brown, 34 N. H. 460.

g. Estoppel.

37. *What does "title by estoppel" mean?*

This means, that where A., not having title, conveys a specific piece of land to B. with warranty, the title, if it subsequently comes to A., "inures to the benefit" of B. Bouvier's Law Dict., Estoppel; and on the whole subject of such acquisition of title, Rawle on Covenants for Title, chap. 9. Whether this means that the subsequently acquired title actually *passes* to B., or merely that A. is estopped to set it up as his own, is a mooted question. Washburn stands for the former view; 3 Washburn on Real Property, p. 109; and Tiedeman for the latter. Tiedeman on Real Property, § 730.

38. *Suppose after a conveyance, as suggested in No. 37, B. conveys to C., who is evicted by the owner of the paramount title, can C. sue A. on the covenant?*

The question has caused much controversy: for how can a covenant run with the land, when the grantor had no title to transfer? On the other hand, the covenant would fail when most needed, and the warrantor would be the better off, the worse his title was. A middle course is taken in New York, where the covenant is held to run, if the grantor had *possession* at the time. Beddoe v. Wadsworth, 21 Wend. (N. Y.) 120. In Massachusetts, seisin in the grantor is necessary. Slater v. Rawson, 1 Met. 450; s. c., 6 id. 439. In Illinois, the covenant attaches to the land, if the original covenantee *takes* possession. Wead v. Larkin, 54 Ill. 489.

h. Dedication.

39. *What are the two essential elements of the acquisition of a title by dedication?*

They are: 1. An intent on the part of the owner of the fee simple to allow the public the use of the land (generally for highway purposes, and sometimes for a park, or the like). This may be shown by any significant words or acts, nothing in the nature of a deed being necessary.

2. An acceptance by the public. This is not necessarily a formal one, but may be effected simply by user by the public. Tiedeman on Real Property, § 611; Pope v. Town of Union, 18 N. J. Eq. 282.

A user for less than the period of prescription will probably suffice for an acceptance of the owner's dedication. Noyes v. Ward, 19 Conn. 267; Denning v. Roome, 6 Wend. (N. Y.) 651.

IV. RIGHTS IN LAND OF OTHERS.

40. *Define easement, and dominant and servient tenement, and distinguish between an easement and a profit or common.*

An easement is a right in the land of another, whereby his enjoyment is restricted, either negatively, where he must refrain from using his land in a manner otherwise lawful, or affirmatively, where the owner of the easement has the right to the *use* of the other man's land for certain purposes. An example of the negative easement is that in a party wall, and of the affirmative, a right of way.

An easement always exists for the benefit of some piece of land, and is always appurtenant to that land; i. e., a grant by X. of a right of way over his land to A. and his heirs, without attaching it to any land belonging to the grantee, would not create an *easement*, but only a mere personal right. See No. 29, *supra*.

The land to which an easement is attached is the dominant tenement, and that which is subject to it is the servient tenement. Tiedeman on Real Property, § 597.

A profit *a prendre*, or common, differs from an easement in that its owner can go upon the servient tenement and *take away* part of it, such as gravel or ore. The chief examples are common of pasture, or the right to pasture cattle on the land of another, and common of estovers, or the right to take wood necessary for fuel, repairs, or fencing on the dominant tenement. Id., § 591.

41. *How are easements acquired? and how may they be lost or extinguished?*

They are gained by prescription (see No. 14), or by grant, express or implied. An easement by express grant may be the subject of a separate deed, or it may be "reserved" (see No. 28) to a grantor, when he sells. As to implied grants, see No. 29.

Easements are lost, (1) by formal release; (2) by merger of the dominant and servient tenements in the same person; (3) by abandonment, i. e., by nonuser, even for a short period of time, if coupled with acts showing an intention to permanently abandon; Canny v. Andrews, 123 Mass. 155; Pratt v. Sweetser, 68 Me. 344; (4) by a change in the dominant tenement, substantially altering the nature or *quantum* of the servitude; Harvey v. Walters, L. R. 8 C. P. 162; 2 Washburn on Real Property, 372; or (5) by license, (even *parol*), from the owner of the dominant tenement to the owner of the servient to do some act inconsistent with the continuance of the easement. This is given effect, though no writing passes, because the trend of the common law is against incumbrances on land. Winter v. Rockwell, 8 East, 308; Morse v. Copeland, 2 Gray, 302. On the whole topic of extinguishment, see 2 Washburn on Real Property, pp. 370-374.

42. *X. owns a right of way over Y.'s land, which falls out of repair. Who must maintain it?*

X. The right of way is his property and he must take care of it. He may even enter upon adjacent portions of the land through which the way runs, if necessary in the process of repairing. Prescott v. White, 21 Pick. 341.

The above rule applies to all easements, but the case of party walls (i. e., where parties erect a wall on the line between two lots for the common support of adjoining buildings, each owning his half of the wall and an easement of support in the other half), furnishes a partial exception. There, if the wall falls out of repair, either one may, if he so choose, renew it and compel the other to pay his share of the expense. Campbell v. Mesier, 4 Johns. Ch. (N. Y.) 334; Pierce v. Dyer, 109 Mass. 374.

43. *X. had, by deed, a right of way "to a stable and loft, and the open space under said loft, and then used as a woodshed," etc., and he converted the "loft and space underneath" into a cottage. The owner of the servient tenement claimed that X. had no right to pass and repass to this cottage. Was he right?*

The court so held in Allan v. Gomme, 11 Ad. & E. 759. A right of way must be confined strictly to the terms of the grant, and it is obvious in the above case, that the number of persons using the way and their manner of using it, would be a much greater burden on the owner of the servient estate than before the change.

So, in the case of a way arising by prescription, if the user during the statutory period is only for agricultural purposes, the right gained is a right of way for those purposes, and no others. Tiedeman on Real Property, § 608, and cases cited; Wimbledon, etc. v. Dixon, 1 Ch. Div. 362; s. c., 3 Gray's Cas. on Property, 259; French v. Marstin, 24 N. H. 440; s. c., 57 Am. Dec. 294.

44. *What are the easements of light and air? and of support?*

If A.'s windows overlook B.'s land for the period of prescription, by the rule of the common law B. must thereafter refrain from putting up anything on his land which will obstruct the passage of light and air, in the quantity and quality in which they have come to A.'s windows during that time. This easement can still be gained by prescription in England, but the doctrine has been repudiated almost everywhere in this country. It is considered that such an acquisition is not adapted to the rapid change and growth of cities in this country. Tiedeman on Real Property, §§ 612, 613; Keats v. Hugo, 115 Mass. 204; Parker v. Foote, 19 Wend. (N. Y.) 309.

The right of lateral support is the right of a landowner to have his land supported in its natural position by the land adjacent (or subjacent): that is, that the adjacent owner shall not excavate so that the land falls in. This is a "natural right," not dependent on grant or covenant, and is absolute, i. e., no amount of care by the adjacent owner will excuse him if his digging causes damage to his neighbor's land. Humphries v. Brogden, 12 Q. B. 739; s. c., 2 Gray's Cas. on Property, 66; Gilmore v. Driscoll, 122 Mass. 199.

Speaking generally, no recovery can be had, in this country, for damage to *buildings*, caused by such excavation, unless negligence appears. The right only pertains to the soil. Lasala v. Holbrook, 4 Paige, 169; Schultz v. Byers, 53 N. J. Law, 442.

45. *State, in outline, the right of a landowner as to* (1) *water in a spring or well,* (2) *surface water,* (3) *water in a defined stream.*

As to (1) and (2), his right is absolute, to use it as he likes: the water is still *part* of the land. The case of Broadbent v. Ramsbotham, 11 Ex. 602, is exactly on the point, and represents settled law. The defendant drained off a swamp, and a well which sometimes overflowed and spread itself on the surrounding ground, (both on his own land). The plaintiff claimed damage from the diversion of these supplies from a water-course near by. The court said (per Alderson, B.):

"No doubt, all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook, but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. *He cannot, it is true, do so, if the water has arrived at, and is flowing in some natural channel, already formed. But he has a perfect right to appropriate it before it reaches such a channel.* In this case a basin is formed in his land, which belongs to him, and the water from the heavens lodges there." See also Curtiss v. Ayrault, 47 N. Y. 73.

The question causing the most discussion in regard to surface water has been whether a man could keep off (*e. g.*, by a wall) the surface water coming naturally from his neighbor's land. The weight of authority is that he may protect his land; otherwise his right to improve his property or change its condition would be abridged. Public policy also forbids such a hindrance to the improvement of land. Gannon v. Hargadon, 10 Allen, 106; Barkley v. Wilcox, 86 N. Y. 140. *Contra*, that such flow of water is necessarily incidental to lower land, and that *sic utere tuo*, etc., applies. Gillham v. R. R. Co., 49 Ill. 484; Ogburn v. Connor, 46 Cal. 346.

As to (3), the rule is that each riparian owner has a "natural easement" in the stream, for the use of a reasonable amount of the running water. What is reasonable depends on the circumstances of each case; it is a question of degree, and means (in general) that the supply of those below must not be *materially* diminished. Pitts v. Lancaster Mills, 13 Met. 156; Chrisman v. Wheaton, 24 Penn. St. 298. Nor can the riparian proprietor corrupt its quality, or set it back on land above. Washburn v. Gilman, 64 Me. 163; s. c., 18 Am. Rep. 246; McCoy v. Danley, 20 Penn. St. 85. But by express grant, or by a continuance, during the statutory period of prescription, of an unreasonable user, a true easement against the other riparian owners who are concerned may be gained. Tiedeman on Real Property, § 617, and cases cited.

46. *What is the difference between a license and an easement?*

A license, *pure and simple*, is nothing but an excuse for a trespass, revocable at any time, and personal to the parties, i. e., expiring at the death of either. It is revocable, even if acted upon, because otherwise such a license might be made equivalent to a grant of an easement, to the confusion of titles, and the subversion of the Statute of Frauds. Wood v. Leadbitter, 13 M. & W. 838; Cook v. Stearns, 11 Mass. 533.

An easement descends to the heirs of the owner as part of the land to which it is attached, is an actual *interest* in the land which is subject to it, and is, of course, not revocable by the owner of the servient estate, when once existent. Morse v. Copeland, 2 Gray, 302; Tiedeman on Real Property, §§ 651-653.

V. WILLS AND ADMINISTRATION.

a. In General.

47. *Trace in outline the changes in the common law as to the right to dispose of property at death.*

1. As to realty. Under the feudal law, no devise at all was allowed, except in certain places by local custom. Then the Stat. 32 Henry VIII (1540) allowed the devise, by a will in writing, of all realty, except that held in military tenure. The Statute of Frauds

(1677) removed that exception, and required in addition to the *writing* that the will should be signed by the testator, and attested by at least three witnesses. (See the statute, 4 Gray, Cas. on Prop. 124.) The Wills Act (1837) reduced the number of witnesses to two. (See the statute, 4 id. 127.)

2. Personalty. All personal property was, at common law, freely devisable. The Statute of Frauds required writing, and the Wills Act added the attestation of two witnesses.

Thus, the provisions for disposition of the two kinds of property have been steadily approaching each other. The statutes in our States are somewhat varied, but they generally follow the details and wording of the Statute of Frauds, with modifications from the Wills Act. See the text of the various statutes, and Tiedeman on Real Property, § 872.

48. *Suppose a will is made in Alabama, disposing of personalty in various States and of realty in New York. What law governs as to questions arising under the will?*

As to the realty, the *formal* requirements of the *lex loci rei sitae*, or place where the real estate is situated, must be complied with to make a valid devise of it. Story on Conflict of Laws (8th ed.), § 474; United States v. Crosby, 7 Cranch, 115.

Questions of *interpretation*, and questions regarding the disposal of personalty, are settled by the law of the domicile of the testator. This is because they depend upon his intention, and he is supposed to be acquainted with the laws of his domicile, and to intend to make his will speak in accordance with them. Personal estate, moreover, depends for its *situs* upon the domicile of its owner. Story on Conflict of Laws, § 749, h; Ford v. Ford, 80 Mich. 42; Washburn v. Van Steenwyk, 32 Minn. 336. But see Clarke's Appeal, 70 Conn. 195.

49. *What is the probate of a will?*

It is a decision, by the court having charge of probate matters, stating that X. made a will.

The probate also recognizes X.'s designation of an executor if he appointed one, and without it the executor cannot prove his title as such. Dixon v. Ramsay, 3 Cranch, 319. When probate is granted, or an administrator appointed, the title of the executor or administrator takes effect, by relation, from the death of the deceased person. Foster v. Bates, 12 M. & W. 226; Newcomb v. Williams, 9 Met. 525, 533.

Wills of real estate now go through the Court of Probate in the same manner as wills of personalty, and when probated, they become in most States conclusive evidence of their own due execution in any matter arising collaterally. Schouler on Executors and Administrators, § 59, and cases cited; 3 Washburn on Real Property, p. 508; and especially, 1 Woerner, Amer. Law of Adm., § 228.

50. *What is a nuncupative will?*

It is an oral will of personalty made *in extremis,* and valid only when made by a seaman or soldier, in actual service. Bouv. Law Dict.: Prince v. Hazelton, 20 Johns (N. Y.) 502.

51. *Can a married woman dispose of property by will?*

At common law, all her chattels vested in her husband absolutely so they were not hers to be disposed of: and speaking generally, any will she might make of real estate was also void. Cutter v. Butler, 25 N. H. 343; Adams v. Kellogg, Kirby (Conn.), 195; s. c., 1 Am. Dec. 18.

The state of the law on the subject varies according to the interpretation of the numerous and diverse statutes on the subject, the tendency being, of course, to free women from restrictions. See 3 Washburn on Real Property, p. 510.

52. *Explain the following terms as used in statutes concerning wills: "of full age;" "publication;" "the will speaks at testator's death."*

"Of full age," means, in the majority of the States, that a person must be over twenty-one years of age to make a valid will of *any* property. In some of the others, a distinction based on the kind of property disposed of is drawn, and *personalty* may be bequeathed at eighteen. See Schouler on Wills, § 43.

"Publication," means a declaration by act or word, by the testator, that the paper presented to the witnesses for attestation is his will. It is not required everywhere. Bouv. Law Dict.

The will speaks at the death, rather than at the time of execution, i. e., property acquired after the will is made (even land) is included in its operation.

The fact that land is thus included depends on statute, for since a will is a grant, it could, at common law, transfer only what the testator held at the time the will was executed. 1 Jarman on Wills, p. 602, note.

53. *State, generally, what is sufficient mental capacity for making a valid will.*

A rule on the subject, by Redfield, Ch. J., in Converse v. Converse, 21 Vt. 168, is perhaps as comprehensive as need be:

"A testator must, undoubtedly, retain sufficient active memory to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their more obvious relations to each other, and be able to form some rational judgment in relation to them. * * * But there must, undoubtedly, be some limit. When one is confessedly in a condition to be constantly liable to commit ludicrous mistakes in regard to the most

simple and familiar subjects, he ought not to, and cannot, make a will."

He need not have such a capacity as to justify his engaging in a complex or intricate business, but he must be capable of understanding the nature of the transaction, and the disposition of his property effected by the will. See Hopper's Will, 33 N. Y. 619, 624.

b. Fraud and Undue Influence.

54. *What is undue influence?*

The classical definition is in Hall v. Hall, L. R. 1 P. & D. 481; viz., "That which overpowers the volition, without convincing the judgment. * * * In a word, the testator may be led, but not driven." See also Haydock v. Haydock, 33 N. J. Eq. 494.

Persuasion, appeals based on ties of kindred or on obligations for past services, or even an influence of an immoral character, may be used on a testator. They are not such "undue" influence as will invalidate a will, unless they amount to coercion or fraud. Boyce v. Rossborough, 6 House of Lords Cas. 2, 47-49; Children's Aid Society v. Loveridge, 70 N. Y. 387, 394.

55. *What effect on this question has the fact that a large bequest has been made to one in confidential or fiduciary relations with the deceased, as, for example, a religious adviser?*

This has been the subject of endless controversy. The weightier authorities hold that there is raised a strong suspicion of undue influence, such that it calls for explanation from those supporting the will. That is as much weight as such a gift can have on the decision of the question, for although it is unlikely that people will in their lifetime rob *themselves* for their friends, *non constat*, that they will not give their property, at death, to those friends rather than to their relatives. In other words, the mere fact of a large bequest to a person in such a relation to the deceased is not enough, *of itself*, to throw upon those supporting the will even the burden of going forward with evidence to disprove undue influence. Parfitt v. Lawless, L. R. 2 P. & D. 462; Bancroft v. Otis, 91 Ala. 279; s. c., 24 Am. St. Rep. 904, 911 (overruling 80 Ala. 129).

Some courts, however, insist that the same rule holds as with gifts *inter vivos* under the conditions supposed, namely, that the beneficiary must *establish*, by a clear preponderance of evidence, that the transaction was entirely fair, especially when he participated in the preparation of the instrument. Richmond's Appeal, 59 Conn. 226; Garvin v. Williams, 44 Mo. 465.

c. Incorporation by Reference.

56. *Suppose a will is made containing this clause: "My silver to go to the persons specified in a paper marked Exhibit*

A, and addressed to my executors, to be deposited with this will." Would a paper, so referred to, be entitled to admission to probate as part of the will, if it were found deposited therewith?

No. Two requisites are necessary to incorporate in a will an unwitnessed paper of a testamentary character: (1) That the reference to it in the will shall be sufficiently clear and definite to enable the court to identify the paper offered as the one referred to; (2) that the document shall be referred to as existing, and shall actually *be* existent, at the time the will is executed.

In the case supposed, the description of the paper is sufficiently clear, but the words look to the future, so the second requisite is not satisfied. Allen v. Maddock, 11 Moo. P. C. 427; s. c., 4 Gray, Cas. on Property 198; Newton v. Seaman's Friend Soc., 130 Mass. 91.

If, subsequently to the execution of the will, the list had been made out, and then a codicil executed republishing the will, the list would have been incorporated, the codicil furnishing the requisite testamentary formalities, and the original will providing the description. Goods of Sunderland, L. R. 1 P. & D. 198; s. c., 4 Gray, Cas. on Property, 217.

d. Competency of Witnesses.

57. *Suppose a witness to a will becomes insane subsequently to his attestation. Can the will be probated?*

It is now well settled that the condition existing at the time of the *execution* of the will is the one to look at. If the witness was credible (i. e., competent) at that time, his attestation is good, whatever may happen later. Richardson v. Richardson, 35 Vt. 238; Sears v. Dillingham, 12 Mass. 368; Schouler on Wills, § 351.

58. *What is the effect of an attestation by one who takes a legacy or a devise under the will?*

At common law, an attestation by a person so situated was of no effect whatever, and the will was void unless there were a sufficient number of witnesses without the subscriber in question. But now, by statute in England and most of the States, such a result is avoided by a provision that the gift to such witness shall be void, but the rest of the will shall stand. Schouler on Wills, § 357; 1 Jarman on Wills, 71-73, Bigelow's note.

Whether a gift by the will to the husband or wife of an attesting witness is void, under those statutes, is not settled. That it is void, see Winslow v. Kimball, 25 Me. 493.

That the witness is disqualified by interest, and the whole will void, see Sullivan v. Sullivan, 106 Mass. 474.

e. Attestation.*

59. *What is meant by signing "in the presence" of the testator?*

The rule is, that signing in the room where the testator is is *prima facie* good, as a signing in his presence, and signing in another room is *prima facie* bad. Schouler on Wills, § 342; 1 Jarman on Wills (5th Am. ed.), p. 224, note. The testator need not actually *see* the signing by the witnesses. It is sufficient if it takes place where he can take cognizance by his senses (sight *or* hearing) of what is being done, if he will. Newton v. Clarke, 2 Curt. 320; Riggs v. Riggs, 135 Mass. 238; Reynolds v. Reynolds, 1 Speers (S. C.), 253; s. c., 40 Am. Dec. 599.

60. *What is a sufficient signing?*

Any mark made with the intention that it shall be the signature of the person, *e. g.*, initials, is a signing. Thus, if a witness writes part of his name, leaving it incomplete *intentionally*, and later writes the remaining part, the completion is a good signing. Hindmarsh v. Charlton, 8 H. L. Cases, 160; Chase v. Kittredge, 11 Allen, 49, 59. An acknowledgment to the witnesses by a *testator*, of his signature previously made, is as good as a signing in their presence; Baskin v. Baskin, 36 N. Y. 416; but not so with a witness, for his signature is to *attest the execution* of the will. Hindmarsh v. Charlton, *supra;* Chase v. Kittredge, *supra.*

f. Revocation.

61. *How may a will be revoked?*

Here again the statutes must be carefully examined. Under the provisions of the Statute of Frauds (chap. 3, VI) as to the revocation of wills of realty, to which the statutes of the majority of the States conform without distinction between realty and personalty, the following methods are good: (1) By some other will or codicil, in writing, or other writing of the testator, signed in the presence of at least three witnesses (either expressly revoking the former will, or inconsistent with it); (2) By burning or tearing, cancelling or obliterating the will; and (3), not found in that statute but implied by the courts, a revocation by a vital change in circumstances, such as marriage and a child born. See Schouler on Wills, § 381; and cases cited in succeeding questions.

62. *What two elements are necessary to a revocation by burning or tearing?*

They are: (1) An actual burning or tearing by the testator, or at his direction, of some part of the paper, a very little being suffi-

* The provisions of the Statute of Frauds on this point are considerably altered by the Wills Act. The date of English cases is therefore important. In studying American cases the wording of the statutes under which they arise should be carefully, even minutely, scrutinized.

cient. Bibb v. Thomas, 2 W. Bl. 1043; Dan v. Brown, 4 Cow. 483, 490. (2) The *animus revocandi*. This must be found, for revocation is in its essence an act of the mind, the requirement of burning or the like being demanded only as an outward sign or symbol of that intention. Schouler on Wills, § 384; and cases just cited.

63. *What is cancellation?*

The word refers literally to the lattice effect produced by drawing lines back and forth across a page. It is clear that such cross lines may be a good cancellation, though the words remain legible; and indeed, the extreme doctrine, that the words "This is cancelled", written on the same page, are sufficient, has been laid down. Warner v. Warner, 37 Vt. 356. *Contra* to this, and holding that lines drawn to effect a concellation, must carry weight by what they *do*, and not by what they *say*. Ladd's Will, 60 Wis. 187, with a discussion of the authorities.

The *animus revocandi* is, of course, as necessary here as with burning or tearing; and it may be remarked that cancellation as a means of revocation is omitted from the Statute of Victoria (see §§ 20, 21), and from the Codes of many States.

64. *What sort of change in circumstances will operate as a revocation?*

The cases of implied revocation were never numerous, but the noticeable case was (and still is) that of the will of an unmarried man, who afterwards married and had a child born. The courts said that they would annex to the will the tacit condition, that that total change of circumstances should operate as a revocation, if no provision had been made for the wife and child. Marston v. Fox, 8 Ad. & El. 14. See the statute books for the present regulations, many making marriage sufficient of itself to revoke the will.

g. Probate and Administration.

65. *What is an executor de son tort?*

At common law the term was applied to one who acted towards the estate of a deceased person as if he were the rightful executor or administrator. Read's Case, 5 Co. 67; s. c., 4 Gray, Cas. on Property, 466. He became liable to creditors to the extent of the value of the goods he took possession of, and, in general, held the position of an ordinary executor, with the exception that he could not retain from the assets for any debt due himself. Alexander v. Lane, Yelv. 137; s. c., 4 Gray, Cas. on Property, 468; Oxenham v. Clapp, 2 B. & Ad. 309.

The modern rule, aided by statute, shows a regard to the good faith of the acts done, the character of the property dealt with (i. e., whether perishable or otherwise) and the relationship to the

deceased of the party so acting. Schouler on Executors and Administrators, §§ 188, 189; Perkins v. Ladd, 114 Mass. 420.

66. *Suppose A. dies, leaving B. executor, and then B. dies before closing up A.'s estate, but leaves C. his executor. What position, toward A.'s estate, does C. hold?*

He has no connection with A.'s estate, in most of the States. The Probate Court will appoint for A.'s estate an administrator *de bonis non* (*administratis*), who will carry on A.'s estate, according to A.'s will. His full title is administrator *de bonis non cum testamento annexo.*

If A. had died *intestate*, and his administrator had also died, the succeeding appointee would have been an administrator *de bonis non.* Schouler on Executors and Administrators, § 128.

67. *Suppose a forged will is admitted to probate and a debtor of the estate pays his debt to the executor under that probate. Later, the true will is brought to light and probated. The new executor tries to collect the debt over again. Can he do so?*

No. The former executor was acting under the order of the court, and if he had sued the debtor the latter would have had to pay. Such payments must be protected, for the person acting for the estate was an executor *de facto*, and "every person is bound to pay deference to a judicial act of a court having competent jurisdiction." Allen v. Dundas, 3 Term Rep. 125; Kittredge v. Folsom, 8 N. H. 98.

68. *What rights of action survive a man's death so that his personal representative can bring suit upon them?*

1. All rights founded on contracts broken in the lifetime of the deceased, even though relating to real estate. Raymond v. Fitch, 2 C. M. & R. 588.

2. Rights founded on torts (though without an accompanying breach of contract), which diminished the value of the decedent's personal estate, (by virtue of Stat. 4 Edw. III, chap. 7). Baker v. Crandall. 78 Mo. 784; s. c., 47 Am. Rep. 126. But in both (1) and (2), if the *substance* of the injury was really physicial, as when the only injury to the deceased was medical expenses, or an injury to the feelings, the action does not survive. Chamberlain v. Williamson, 2 M. & S. 408 (breach of promise); Wolf v. Wall, 40 Ohio St. 111.

3. There are various modern statutory enlargements of the common-law rule, the commonest of which is that permitting recovery for a wrongful act, or neglect, causing death. In this case, however, the executor sues as trustee for the widow, children or next of kin, and not to recover assets for creditors. Whitford v. R. R. Co., 23 N. Y. 465; Richardson v. R. R. Co., 98 Mass. 85.

69. *What is the rule as to the survival of claims against a man existing at the time of his death?*

At common law, actions founded in contract survived, those founded in tort did not. Schouler on Executors and Administrators, §§ 366, 370; Jenkins v. French, 58 N. H. 532. But statutes in many of the States alter this, to include at least a recovery of damages to the personal estate of the plaintiff, which are chargeable to the deceased. Schouler on Executors and Administrators, § 373.

70. *What is the title by which an executor holds the personal property of the deceased? Is it safe to buy of him?*

An executor is a "legal trustee," so to speak. He holds the title to the estate, not in his own right, but for the benefit of creditors of the deceased, and others entitled; in other words, his own personal creditors cannot take the goods belonging to the estate. Farr v. Newman, 4 Term Rep. 621.

It is safe to buy of him, because it is within the ordinary line of duty for him to sell, in order to pay the debts of the deceased. To enable him, therefore, to sell readily, purchasers must be protected. Whale v. Booth, 4 Term Rep. 625, note; Hutchins v. Bank, 12 Met. 421. But notice that the sale is not for a proper purpose will render the buyer liable to account for the property so acquired. Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150; Hutchins v. Bank, *supra*.

h. Legacies and Devises.

71. *Define lapsed and void legacies and devises, and state the effect of their lapsing or being void.*

A lapse occurs by the death of the legatee or devisee before that of the testator.

Void legacies or devises are those which are of no effect from illegality, nonexistence of a grantee competent to take, or the like.

Lapsed and void *legacies* go to the residuary legatee because a will of personalty speaks from the death of the testator, and so takes effect upon the personalty in his possession at that time, rather than as it existed when the will was made. Lapsed and void *devises*, on the other hand, go to the heirs-at-law, for the reason that in a will of realty the intent of the testator at the *date* of the will must be considered, and that as he has then specifically pointed out someone other than the residuary devisee, the latter is shut out. Tiedeman on Real Property, § 885; Greene v. Dennis, 6 Conn. 292.

And this distinction between realty and personalty is unfortunately continued in some States, even where, by statute, a will of realty speaks from the death. Massey's Appeal, 88 Penn. St. 470;

Van Cortlandt v. Kip, 1 Hill (N. Y.), 590. *Contra*, Thayer v. Wellington, 9 Allen, 283; Drew v. Wakefield, 54 Me. 291.

72. *Explain the terms "abatement" and "ademption," and distinguish the latter from "advancement" and "satisfaction."*

When the property left by a testator is not sufficient to meet his legacies and devises and also to pay his debts, the question arises, "Which legacies or devises shall be sacrificed to pay the debts?" or in other words, "Which ones shall *abate?*"

In the absence of directions in the will on the subject, the order of abatement is as follows:

1. The residuary estate, including even real estate, if realty and personalty are blended by the will into one residuary fund. (But see Lupton v. Lupton, 2 Johns. Ch. (N. Y.) 623; Gridley v. Andrews, 8 Conn. 1.)

2. General legacies.

3. Specific legacies and devises, including residuary devises, if separated from residuary *bequests.*

2 Woerner, Am. Law of Administration, §§ 451, 452; Corwine v. Corwine, 24 N. J. Eq. 579; Lewis v. Darling, 16 How. 1, 10.

The abatement in each of these several classes is, of course, *pro rata.* Titus v. Titus, 26 N. J. Eq. 111.

These rules are not uniform, and the student should examine the statutes of his own State.

An ademption or "taking away" of a legacy takes place when, (on account of the occurrence of certain events), it has either become impossible to carry out the directions of the will, *or* the courts presume a change of intention on the part of the testator, and, therefore, disregard the will in that particular. Thus, if X. gives Y. by will his "horse, Ned," and subsequently X. sells that horse or the horse dies, the legacy is *adeemed.* There is nothing left upon which the will can operate. Harvard, etc. v. Tufts, 151 Mass. 76; Blackstone v. Blackstone, 3 Watts (Penn.), 335.

The above is an ademption of a *specific* legacy and is wholly independent of the motive or intention of the testator. When, however, the will gives a certain sum of money and the testator, subsequently, in his lifetime, makes a gift to the legatee, it is entirely a question of his intention whether the legacy is adeemed or not. If the testator is *in loco parentis* to the legatee and the gift is of the same nature as the legacy, or is made to accomplish a specific purpose named as the object of the testamentary gift, it is held that this shows the testator's intention to anticipate either wholly or *pro tanto* the gift in the will; the court presumes that one *in loco parentis* means to treat alike *all* those to whom he owes the parental duty, and intends the gift *inter vivos* to be in lieu of the legacy and not in addition to it. Langdon v. Astor, 16 N. Y. 9; Richards v. Humphreys, 15 Pick. 133.

"Advancement," when correctly used, means a gift made under similar circumstances, except that the gift is substituted for the share to which the donee would be entitled as distributee on the death of the donor *intestate*. Johnson v. Belden, 20 Conn. 324.

"Satisfaction," which is often used to describe what is really an ademption, properly refers to a gift by will by which a person extinguishes a *prior obligation*. To this, of course, the consent of the other party to the obligation is essential, which is not true of an ademption. In the latter, since a will creates no obligation whatever, the testator is only exercising his power to do as he chooses with his own, while in the former he is doing what he is already bound to do, but in a different way, and subject to the assent of his obligee. 1 Pom. Eq. Jur., § 524.

VI. MISCELLANEOUS TOPICS; INCLUDING FIXTURES AND MORTGAGES.

a. Fixtures.

73. *What is a fixture?*

A satisfactory definition is admittedly almost impossible, for the cases use the term in so many different senses. Bouvier's is as follows (and is substantially that given by Baron Parke in Hallen v. Runder, 1 C. M. & R. 266): "Personal chattels affixed to real estate, which may be severed and removed by the party who has affixed them or by his personal representatives, against the will of the owner of the freehold." This points out the salient feature essential to a fixture, viz., that it be *annexed* but *removable*, and so is perhaps as acceptable a description as there is, although in many cases there is talk of fixtures as if there were two classes, those removable and those not removable. Articles not removable are real estate and nothing else.

Whether fixtures are real or personal estate has been much discussed, especially in regard to those annexed by a tenant for years. The most acceptable result is probably that they are real estate while affixed, and that the right of the tenant to remove them is a right to turn the real estate of the landlord into personal estate of the tenant, during the term. Hallen v. Runder, *supra*.

Though this right can be attached on *fieri facias* (Poole's Case, 1 Salk. 368), the sale of it is not a sale of real estate, for the real estate belongs to the landlord. Neither is it a sale of personal estate, because the chattels are annexed and have, temporarily at least, lost thereby their character as goods and chattels. Mackintosh v. Trotter, 3 M. & W. 184. But see Bostwick v. Leach, 3 Day (Conn.), 476.

74. *Upon what circumstances does the removability of a thing attached to the freehold depend?*

It is a question of the intention of the person who annexed them, though sometimes, as when bricks are built into a house,

the fact that removal would involve a reduction into materials settles conclusively that the intention was to make a permanent addition to the realty. Whitehead v. Bennett, 27 L. J. Ch. 474.

The leading considerations are the character of the article annexed and the use to which it is put, the mode of annexation, and the relation to the land held by the party annexing, i. e., whether owner in fee or tenant. For example, if the question arises between mortgagor in possession and mortgagee (on a foreclosure) as to annexations made before the mortgage, the advantage is with the mortgagee, for articles so affixed to the freehold were probably for its permanent improvement; and the same advantage holds for the heir against the executor, or the vendee against the vendor. Crane v. Brigham, 11 N. J. Eq. 29.

On the other hand, if the party annexing is a tenant only, the advantage is with him, for there is every reason to think he wishes to subserve his own convenience rather than enhance the value of the realty. Capen v. Peckham, 35 Conn. 88. (Both cases give a general discussion.)

75. *In what classes of cases is removal of articles annexed to the land most freely allowed?*

In cases arising between *landlord and tenant;* (a) where the annexation has been for purposes of domestic use or convenience; Grymes v. Boweren, 6 Bing. 437; Vaughen v. Haldeman, 33 Penn. St. 522; and (b) where the annexation has been for purposes of *trade.* The latter is the largest exception to the general rule and is based partly on the presumption that the tenant intended only a temporary attachment, and partly on the public policy of fostering the growth and development of trade. It includes such articles as vats, some kinds of engines, counters, and the like, and is a doctrine universally recognized. Van Ness v. Pacard, 2 Pet. 137; Guthrie v. Jones, 108 Mass. 191. But if severance will necessitate material injury to the freehold, no removal is allowable. Buckland v. Butterfield, 2 Brod. & B. 54 (conservatory attached to a house); 1 Washburn on Real Property, p. 148.

In all cases the removal must be made before the expiration of the lease, or within a reasonable time thereafter if it ends at a time not previously determinable, e. g., the death of a tenant for life. Tiedeman on Real Property, § 7, and notes; Torrey v. Burnett, 38 N. J. Law, 457; Watriss v. Bank, etc., 124 Mass. 571.

b. Mortgages.

76. *Under the strict rules of the common law, what was the relation of the mortgagor and mortgagee as to the land mortgaged? What is it now?*

At common law a mortgage furnished a perfect example of a condition subsequent. The full legal title was vested in the mort-

gagee, subject only to be divested by the performance of the condition by the mortgagor. The latter held only a sort of reversionary interest, conditional upon his payment of the debt or performance of the obligation to secure which the transfer was made, on or before the "law day," or time limited for so doing. Upon his failure to so act, the mortgagee's estate instantly became absolute, in spite of any accident or mistake, and even if the value of the land was far in excess of the mortgage debt. Tiedeman on Real Property, §§ 296, 299; 2 Washburn on Real Property, pp. 96, 100.

Their present relation grows out of the recognition by courts of equity of the real nature of the transaction, viz., that it is merely a security for the doing of the act named as the condition. Equity, in view of the facts of the case and the frequent harshness with which the rules of law operated, introduced a system of its own, which protected the interests of the mortgagor, while doing no injustice to the mortgagee. This was by allowing the former, after breach of the condition named in the mortgage, to redeem the land by payment of the debt with interest. Being recognized only in courts of equity this right was known as the *equity of redemption.* Tiedeman, *supra*, §§ 299, 300; 2 Washburn on Real Property, p. 97.

In the various States, various positions are taken, the divergence being due to the different degrees in which the equitable treatment of the case has forced itself upon the law courts. In New England, New Jersey, Alabama and some other States, a mortgage is still regarded as actually conveying the legal title of the land. In numerous other States, headed by New York and California, it is held to create a lien only. Tiedeman on Real Property, § 301. The statutes and decisions of each State, however, must be studied, to find the exact stage of development there prevailing.

77. X., who owed Y. a sum of money, conveyed Blackacre to him by an absolute deed. There was a verbal understanding that if X. paid the debt within a year, Y. should retransfer the land. Some weeks after the year expired, X. made tender of the debt, with interest, and demanded a conveyance. Y. refused to comply. May the facts of the transaction be shown?

It is well settled that they may in spite of the "parol evidence" rule, and irrespective of fraud, mistake or accident, the ordinary grounds for equitable action. Any legal evidence, written or verbal, may be used, the object being to "look through the forms of a transaction and give effect to it, so as to carry out the substantial intent of the parties." Horn v. Ketcltas, 46 N. Y. 605; Sweet v. Parker, 22 N. J. Eq. 453.

Such an arrangement is frequently hard to distinguish from an agreement that the grantor of land may repurchase. If the grantor remains in possession and pays interest on the sum due the grantee, it is strong evidence that the deed is intended

as security only. But if these elements are absent, or if other evidence overbalances them, the effect of the transaction will be an absolute conveyance with a contract for repurchase. Obviously, in the latter case, the grantor is in a less advantageous position, for there is no "equity of redemption" after the stipulated time passes, and he must also show an agreement satisfying the Statute of Frauds to enable the court to compel a reconveyance. Tiedeman on Real Property, §§ 304, 305, 307; Hogan v. Jaques, 19 N. J. Eq. 124, 128. It should be noted that in a few States parol proof to show an absolute deed was intended as a mortgage is only admitted when fraud, accident or mistake appear. Tiedeman, *supra;* Brainerd v. Brainerd, 15 Conn. 575. But see French v. Burns, 35 Conn. 359.

78. *What is the meaning of the maxim, "Once a mortgage, always a mortgage"?*

It refers especially to cases where the parties have agreed, on the execution of a mortgage (or subsequently), that title shall vest absolutely in the mortgagee, if the debt is not paid at the time it becomes due by the terms of the deed. In short, they endeavor to bargain away the protection of the equity of redemption. Such an agreement is unenforceable. The possibilities for duress and oppression, arising from the embarrassed condition of the mortgagor, are so great that courts of equity refuse to recognize the validity of agreements of the kind described. Henry v. Davis, 7 Johns. Ch. (N. Y.) 40; Bailey v. Bailey, 5 Gray, 505.

79. *X. mortgages his land to Y. Y. dies, and X. pays up the debt. Who gives the release of the mortgage, Y.'s administrator or his heir?*

At common law, since the time of Charles II, the mortgage has been considered as personal assets, and as, therefore, going to the executor; but the title to the land was held to vest in the heir as trustee for the personal representative. 2 Washburn on Real Property, p. 141. The equitable doctrine, however, has been so far developed that even in the States holding that the mortgagee is the owner of the legal title, his heir is shut out. A conveyance from him transfers nothing, and land acquired by a mortgagee's administrator, under foreclosure, is distributed as personalty. Taft v. Stevens, 3 Gray, 504; Pierce v. Brown, 24 Vt. 165.

In New York and the States following it in holding the mortgage a lien only, the heir of the mortgagee, of course, takes nothing whatever.

80. *What sort of property is the equity of redemption?*

As its name implies, and as explained above, it was originally recognized only in equity. At present, it is almost everywhere held

to have all the qualities of a legal estate, such as liability to sale on execution; White v. Whitney, 3 Met. 81, 84; Punderson v. Brown, 1 Day, 98; dower to the wife of the mortgagor; Hinchman v. Stiles, 9 N. J. Eq. 454; and the like. And see Norwich v. Hubbard, 22 Conn. 587.

81. *How does a mortgagee realize upon the security, if the debt is not paid?*

As explained above (No. 76), at common law the mortgagee's title became absolute if the debt was not paid by the time set. Under the equitable rule, however, a foreclosure is necessary to fix the additional time thus available to the mortgagor. At present the two commonest kinds of foreclosure are known respectively as strict foreclosure and equitable foreclosure.

By the former a decree is passed forever barring the mortgagor from making redemption unless he does so within a time named. This is obviously nothing but a more or less lenient application of the common-law rule, and renders the title of the mortgagee absolute in the same way. Brainerd v. Cooper, 10 N. Y. 456; 2 Washburn on Real Property, pp. 237, 238.

By equitable foreclosure the land is sold, in a manner varying in the different States, and the proceeds applied to the satisfaction of the debt. The surplus, if any, belongs to the mortgagor. See a long note, 2 Washburn on Real Property, at the end of book 1, chap. 16, giving a summary of the process of each State.

c. Emblements.

82. *X. is tenant for the life of Y. He plants, during the spring, a field of corn. Early in the summer his estate is terminated by the death of Y. May he enter thereafter to take the corn? And may he take fruits which were ripening when his estate ended?*

X. may enter, until the following spring, to care for and gather the corn, but not to take the product of the fruit trees. Crops which require care and labor (*fructus industriales*), and which have been planted by the tenant of an estate of uncertain duration (except estates at sufferance), but not harvested when the estate is terminated, are called emblements. He is allowed to enter and gather such crops, both because he could not foresee the end of his estate, and to encourage husbandry by insuring to him the results of his exertions. 1 Washburn on Real Property, bk. 1, chap. V, § 3; Debow v. Colfax, 5 Halst. 128. The rule applies only to crops which are ordinarily of *annual* growth. Graves v. Weld, 5 B. & Ad. 105.

But these considerations do not apply to those products requiring no cultivation, such as fruits. See 1 Washburn, *supra*.

d. Ejectment.

83. *Describe the action of ejectment.*

This is of the class of mixed actions; that is, by it the *possession* of land is recovered, and also damages for the period during which the injured party has been ousted.

In its origin this action was used by a tenant for years to recover possession of his term when he had been ejected: but from its simplicity compared with common law "real" actions it was applied to the purpose of trying *title* to the premises by the following process: The claimant X. would make an entry on the land, and there make a lease to Y., who would remain until ejected by the person in possession or by a *casual ejector*, Z. Y. would then sue the one who had thrown him out. To succeed he must show four things; title in X., lease to himself, entry and ouster. The title of the claimant was thus brought necessarily though incidentally into issue.

Before long, the formal entry, lease and ouster were found cumbersome and were given up. An action was brought by X. against the casual ejector in the form, *Y. on the demise of X. v. Z.*, but Y. and Z. and the entry, lease and ouster were fictitious. To bring in the real defendant notice was sent him in the name of Z., stating that Z. had been sued and that judgment would be entered up unless he paid attention to the warning and came in to defend. The court, on his confessing the lease from X. to Y., and Y.'s entry and ouster, admitted him as a co-defendant, and the question of the title of X. thus became the only issue. Later, the interposition of Z. fell into disuse, and the suit was brought directly against the real defendant. The cardinal rule, governing the action, is that the plaintiff must recover by the strength of his own title rather than by the weakness of the defendant's; for mere possession is sufficient against anything but a superior title. See 3 Bl. Com. 199-206; 1 Chitty on Plead. 187, ff.

e. Waste.

84. *What is waste?*

Liability for waste attaches to a tenant for life or years in favor of the remainderman or reversioner, and accrues on his doing or suffering to be done upon the premises that which "does a lasting damage to the freehold or inheritance, and tends to the permanent loss of the owner in fee." 1 Washburn on Real Property, p. 140. Originally, estates in dower or curtesy were the only ones subject to it, the theory being that as the law created those estates it ought to protect the owners of future estates.

Waste is either *voluntary*, as by tearing down a house, or *permissive*, as by allowing it to go to decay for want of repair, and at common law it extended to any *alteration*, such as taking out a partition or changing woodland into meadow. Whether the inheritance has suffered is, however, a pure question of fact, and the application

of the rule varies with the location of the premises, their condition and local usage. Clearing land of timber, for example, would in some cases, be *necessary* for good husbandry. A tenant who has been freed from the restriction is said to hold "without impeachment of waste." See on the whole subject, 1 Washburn on Real Property, bk. 1, chap. V, § 4 (summary of statutes, p. 157, note); Agate v. Lowenbein, 57 N. Y. 604; Keeler v. Eastman, 11 Vt. 293.

Damages now are generally limited to actual loss suffered, and if irreparable injury is threatened, equity will grant an injunction to restrain the tenant. 1 Washburn, *supra*, p. 160, and cases.

f. Eviction.

85. *Give the difference between actual and constructive eviction.*

Actual eviction consists in physically depriving the tenant of his estate, either in whole or in part.

Constructive eviction takes place when the landlord does some act which tends to render the leasehold untenantable, or which will prevent its being used for the purposes for which it was leased, but does not corporeally deprive the tenant of the land. Gilhooley v. Washington, 4 N. Y. 217; Dyett v. Pendleton, 8 Cow. 727; Bartlett v. Farrington, 120 Mass. 284.

86. *State the effect upon the tenant's liability to pay rent, of an eviction by the landlord and an eviction by a stranger.*

The following rules are said by Washburn to govern: "If there has been an eviction from the whole premises by the *lawful* act of a stranger, the whole rent of the premises is suspended. If such eviction be from a part only of the premises, the rent will be apportioned and a part suspended, according to the relative value of the premises from which the tenant is evicted. But if the eviction be by act of the lessor, or by his procurement and authority, the rent of the entire premises will be suspended while such eviction continues, whether it be of the whole premises or of a part of them." (And on such eviction by the lessor the tenant has also the option to terminate the lease entirely.) 1 Washburn on Real Property, p. 533; Leishman v. White, 1 Allen, 489.

VII. RESTRAINTS ON ALIENATION.

1. *A devised land to B. for life, with the condition that if B. alienated, the land should go to C. in fee, and with the condition that if C. alienated, the land should revert to A. B. conveyed to D., who shortly after obtained a conveyance from C. also. What interests do A. and D. take?*

A. takes nothing. D. takes a fee simple. The law upholds provisions for forfeiture or for a gift over upon alienation when imposed on a *life estate*. Hurst v. Hurst, L. R., 21 Ch. Div. 278; Bull v. Kentucky Bank, 90 Ky. 452; Waldo v. Cummings, 45 Ill. 421. Such provisions are good as applied to involuntary as well as to voluntary alienation, for a testator has power "to declare effectually that the bequest shall cease on the happening of an event which would subject it to the claims of creditors and then to give it a different direction." Comstock, J., in Bramhall v. Ferris, 14 N. Y. 41. This rule, as shown by the foregoing authorities, applies alike to realty and to personalty. Accordingly B.'s conveyance to D. was invalid and the effect of it was to vest the fee in C. C.'s conveyance to D., however, passed the fee to D., for the forfeiture clause which was attached to C.'s estate was invalid. In the case of a *fee simple* a general and unlimited condition of forfeiture upon alienation cannot be imposed. In re Dugdale, L. R., 38 Ch. Div. 176; Potter v. Couch, 141 U. S. 296. This again applies to personalty, except chattels real, as well as to realty. Bradley v. Peixoto, 31 Ves. Jr. 324. Hence C., having an alienable fee, has conveyed to D. validly.

In general it may be said that the closer the relation between the grantor and grantee the more readily provisions for forfeiture upon alienation are upheld. Thus, in the case of a lease, where the close relation of landlord and tenant exists, such provisions are extremely common and their validity is perfectly settled. "It is reasonable that a landlord should exercise his judgment with respect to the person to whom he intrusts the management of his estate." Ashurst, J., in Roe d. Hunter v. Galliers, 2 T. R. 133. As noted above, such provisions are good in the case of life interests, and they are also valid as applied to estates tail. Gray, Restraints on Alienation (2d ed.), § 75. The condition is, however, destroyed if the entail is barred by a common recovery, and a provision restraining the suffering of a recovery is invalid. Dawkins v. Lord Penrhyn, L. R., 6 Ch. Div. 318.

Where the estate is a fee provisions for forfeiture are sometimes held to take effect in special cases. Provisions which, while permitting alienation, *restrict the persons* to whom the estate can be alienated, have been upheld, even where the restriction was a very sweeping one. Doe d. Gill v. Pearson, 6 East, 173; see Jauretche v. Proctor, 48 Pa. St., at p. 472. Other authorities turn on the degree of the restriction: "the test is whether the condition takes away the whole power of alienation substantially; it is a question of substance and not of mere form."

In re Macleay, L. R., 20 Eq. Cas. 186, at p. 189. Some courts apparently will not enforce the condition under any circumstances. Schermerhorn v. Negus, 1 Denio (N. Y.), 448; Williams v. Jones, 2 Swan (Tenn.), 620.

It is sometimes said that even in case of a fee a clause of forfeiture on alienation will be enforced if it is limited in time, as by a restriction to cases of alienation within twenty years or within A.'s life. Pearson v. Dolman, L. R., 3 Eq. Cas. 315. The weight of authority is, however, to the contrary. Potter v. Couch, 141 U. S. 296; In re Rosher, 26 Ch. Div. 801; to same effect where the restraint was absolute with no clause of forfeiture, Mandlebaum v. McDonnell, 29 Mich. 78. Similarly, in case of a fee, where a forfeiture clause is aimed not at alienation in general, but merely at alienation in certain specified ways, it has been held that this limitation made the clause valid. See Jessel, M. R., In re Macleay, L. R., 20 Eq. Cas. 186, at p. 189. Such is not, however, generally accepted law. Gray, Restraints on Alienation (2d ed.), § 55 *et seq.;* Ware v. Cann, 10 B. & C. 433.

2. *The owner of land conveyed to trustees to the use of A. for life, until he should voluntarily or involuntarily alienate; then to the use of B. in fee, and if B. died without having alienated, then to C. in fee. A. was adjudicated a bankrupt and shortly after B. died intestate, A. being still alive. To whom does the land go?*

The heirs at law of B. get a fee simple. A.'s interest being a life estate, the forfeiture clause is good and takes effect as soon as title passes to A.'s trustee in bankruptcy. Camp v. Cleary, 76 Va. 140; p. 336, *supra.*

Upon B.'s death the forfeiture clause, if valid, would operate to carry his fee to C. But the effect of the restraint on the estate in B.'s hands, if valid, would be to prevent his devising his fee, and equally to prevent its descent according to the laws of devolution in case of his death intestate. Both these results are, by the weight of authority, held to be illegal, as an attempt to give a fee, and at the same time to withhold two of the chief incidents of a fee,—namely, the capacity to be devised and to be inherited. Holmes v. Godson, 8 De G. M. & G. 152; Theobald, Wills (5th ed.), p. 550; Van Horne v. Campbell, 100 N. Y. 287. In Holmes v. Godson, *supra,* Turner, L. J., said:

"* * * The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that in the event of an owner in fee dying intestate the estate shall go to his heir, and this disposition tends strictly to contravene the law, and to defeat the policy on which it is founded. On principle, therefore, I think the disposition bad. * * * It is plain, on looking at the cases, that if a man says the estate shall go over if you do not dispose of it by deed, he says, you shall not have that power which the law gives of disposition by will."

Accordingly, in the case supposed, the forfeiture clause is invalid and the estate consequently descends to the heirs of B.

In connection with clauses of forfeiture upon bankruptcy or other involuntary alienation the distinction should be noted between such cases and cases where a grantor attempts to provide that a life estate shall not be subject to the claims of the grantee's creditor. "There is an obvious distinction between a disposition to a man until he becomes a bankrupt and then over, and an attempt to give him property and to prevent his creditors from obtaining any interest in it although it is his." Lord Eldon in Brandon v. Robinson, 18 Ves. Jr. 429. The latter class of limitation is good only in the equitable life estates known as "spendthrift trusts." See p. 340, *infra*.

It is held to be violative of public policy and, therefore, void for a man to settle property *upon himself* with a limitation over upon his bankruptcy, etc. Higinbotham v. Holme, 19 Ves. Jr. 87; Synge v. Synge, 4 Ir. Ch. N. S. 337. But "a variety of cases * * * have established that, though there cannot be a settlement of the husband's own estates so as to make his life interest cease in the event of his becoming a bankrupt, * * * yet the wife's estate may be so settled." Shadwell, V. C., in Lester v. Garland, 5 Sim. 205. While it is thus settled that a man cannot limit property to himself to go over on his *involuntary* alienation, the law is in conflict where the gift over is conditioned on his *voluntary* alienation. See Phipps v. Ennismore, 4 Russ. 131; Knight v. Browne, 30 L. J. Ch. 649.

3. *A. settled money on trustees to accumulate the income and to pay it, together with the principal, to his son, B., when he should reach twenty-five and not before. A. settled a similar sum in trust for his wife, C., providing that she should receive the income but not the principal, and should have no power to anticipate or to convey her interest. A. died when B. was nineteen. Two years later B. became bankrupt and C. thereupon conveyed for value all her interest to his trustee in bankruptcy for the benefit of his creditors. What interests do the creditors get?*

They get the entire interests of both B. and C. Here we are dealing not with forfeiture or gifts over upon alienation, but with absolute prohibition on alienation. Both in legal and in equitable estates, a prohibition against the alienation of a fee in realty or an absolute interest in personalty is invalid as repugnant to the nature of the estate. Winsor v. Mills, 157 Mass. 362; Lovett v. Gillender, 35 N. Y. 617. Similarly, a provision attached to a present absolute gift that the donee shall be excluded for a time from possession, or that the income accumulate for a time is, generally, bad, for there

again, it is attempted to qualify an absolute gift by withholding one of its inherent incidents. The donee at his majority, or his creditors, may get possession without waiting for the time fixed by the donor. Saunders v. Vautier, 4 Beav. 115; Sanford v. Lackland, 2 Dill. (U. S.) 6; see Oxley v. Lane, 35 N. Y. 340; *contra* is Claflin v. Claflin, 149 Mass. 19. "The principle is simply this: That where property is given, granted, or bequeathed to certain individuals to be used, appropriated and applied for their benefit, and in such manner that no other person or persons have any interest in it, they thereby become in effect the absolute owners of it, and may exercise all the rights belonging to them in that relation." Merrick, J., in Smith v. Harrington, 4 Allen (Mass.), 566. In the case supposed, B.'s fund is, accordingly, subject to the claims of the creditors.

Restraints on alienation are, however, good when the gift is to a married woman. "The object of the doctrine was to give a married woman the enjoyment of property independent of her husband; but to secure that object, it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate, to real property as much as to personal." Lord Lyndhurst in Baggett v. Meux, 1 Phil. 627. But the reason of this rule and, therefore, the rule itself cease to apply when the married woman becomes a widow. Accordingly the restraint is then no longer valid. Barton v. Briscoe, Jac. 603; see Robinson v. Randolph, 21 Fla. 629. In the case supposed, therefore, C.'s conveyance passes her interest to the trustee in bankruptcy.

In general, restraints on the alienation of an interest for life are also bad. The courts are less inclined to support such an absolute stifling of the alienation of property than they are to support a forfeiture or gift over on alienation. Thus, if land is given to A. for life without power to anticipate or sell, the restraint is invalid and the property may be voluntarily or involuntarily conveyed by A. The doctrine applies alike to realty and to personalty. McCleary v. Ellis, 54 Iowa, 311; Bridge v. Ward, 35 Wis. 687; Brandon v. Robinson, 18 Ves. Jr. 429. So in case of a trust to pay income to A. for life A.'s creditors can reach his interest, even though the time and amount of payments be in the trustee's discretion (Green v. Spicer, 1 Russ. & M. 395), though not if the trustee have and exercise a discretion to exclude A. from participation. Lord v. Bunn, 2 Y. & C. C. 98. As regards legal interests for life or years the invalidity of such restraints admits of practically no exception. Hahn v. Hutchinson, 159 Pa. St. 133; Wellington v. Janvrin, 60 N. H. 174. As regards equitable interests the rule holds good in England (Brandon v. Robinson, 18 Ves. Jr. 429; Graves v. Dol-

phin, 1 Sim. 66), but in the United States it is subject to the exception of spendthrift trusts. See *infra*.

4. *A. bequeathed a fund to trustees to pay the income to B. for life, to be free from the claims of B.'s creditors. B. became bankrupt. May the creditors reach the fund?*

No, according to the weight of authority. It will be observed that the case is not one of a limitation over on bankruptcy; on the contrary the beneficial interest in the fund is to remain in B. in spite of his bankruptcy. Under the ordinary rule, the restraint would, accordingly, be bad. See p. 339, *supra*. The case presents, however, one of the so-called spendthrift trusts, which are in most of the United States (not in England), held to be valid and free from the claims of creditors. This doctrine allows an equitable life estate in realty or personalty to be given in such a way that while the donee has the full beneficial interest in it, it is not subject to the claims of the donee's creditors. Overman's Appeal, 88 Pa. St. 276; Broadway Bank v. Adams, 133 Mass. 170; Smith v. Towers, 69 Md. 77; *contra*, Tillinghast v. Bradford, 5 R. I. 205; Jones v. Reese, 65 Ala. 134. "The decisions and *dicta* in ten states* are against the validity (of spendthrift trusts), and in twelve states† are for it; while in two states‡ they are conflicting." Gray, Restraints on Alienation (2d ed.), § 177A. The United States Supreme Court, by an elaborate dictum in the case of Nichols v. Eaton, 91 U. S. 716, supported the doctrine. For an exhaustive discussion of the theory and authority relating to spendthrift trusts see Gray, id., § 175 *et seq.*

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* Rhode Island, New York, North Carolina, South Carolina, Georgia, Alabama, Ohio, Kentucky, New Jersey, and Arkansas.

† Pennsylvania, Massachusetts, Illinois, Maine, Maryland, Mississippi, Vermont, Missouri, Tennessee, Delaware, Indiana, and Virginia.

‡ Wisconsin and Connecticut.

VIII. Rule Against Perpetuities.

1. *What is the Rule against Perpetuities, its Object and History?*

As the development of conveyancing, especially by the machinery of uses, executory devises, and trustees to preserve contingent remainders, rendered possible limitations which might fetter property for excessively long periods, or indeed forever, public policy made it advisable to fix a limit of remoteness beyond which a deed or devise could not be operative. This is provided by the so-called Rule against Perpetuities, which arose, by judicial legislation, during the seventeenth century. The question raised by the rule is always whether the vesting of a given interest is, or by any possibility may be, too remote from the instrument creating it. "The rule requires every future estate limited to arise by way of shifting use or executory devise to be such as must necessarily arise within the compass of existing lives and twenty-one years thereafter, with the possible addition of the period of gestation, in the case of some person entitled being a posthumous child." Williams, Real Property (17th Am. ed.), p. 465. "The terms of the rule do not import that the limitation must necessarily vest within the specified time, but only that it must necessarily vest within that time, if it vests at all." Challis, Real Property, *146.

To determine the validity of such limitation *the time when the interest will vest* is considered from the standpoint of *the instrument creating it.* If, in any contingency, the time of vesting *may be* more remote from that instrument than the rule allows, the gift is void, "even if, in its actual event, it should fall greatly within that limit." Williams, Real Property (17th Am. ed.), 466. In the earlier form of the rule, a single life was the limit of remoteness allowed, then the twenty-one-year period was added, (Stephens v. Stephens, Cas. temp. Talbot, 228; 2 Barnard K. B. 375), whether or not there was an actual infancy (Cadell v. Palmer, 1 Cl. & F. 372), and finally the period of gestation, when a child *en ventre sa mère is a party* in interest. Long v. Blackall, 7 T. R. 100.

The rule is often said to be a means of preventing restraints on alienation. See, for instance, Christ's Hospital v. Grainger, 1 Macn. & G. 460, at p. 464. It seems, however, to be directed really against remoteness of limitation. "An executory limitation to take effect on the happening of an eve which may not take place within a life in being and twenty-one years, is not made valid by the fact that a person in whose favor it is made can release it." Cotton, L. J., In re Hargreaves, 43 Ch. Div. 401.

The rule applies to personal as well as to real property, to legal as well as to equitable estates, and probably to contingent remainders as well as to limitations by shifting use and executory devise. On the last point see Gray, Rule against Perpetuities (2d ed.), § 284 *et seq.;* but *cf.* Cole v. Sewell, 2 H. L. C. 186, at pp. 230, 231; and see 1 Perry, Trusts (5th ed.), § 385, as to contingent remainders in equity. The English courts hold that the

right to re-enter where the condition of a grant is broken is within the rule. Thus where trustees held property for a hospital subject to a proviso that if the property were converted to any other use, it should revert to the grantor's heirs, it was held that the proviso violated the Rule against Perpetuities, and was void. In re Hollis's Hospital, 1899, 2 Ch. 540. The law in America appears to be contrary. Tobey v. Moore, 130 Mass. 448; see First Universalist Society v. Boland, 155 Mass. 171; Cowell v. Springs Co., 100 U. S. 55; but see 1 Am. L. Rev. 265.

Where a limitation is void for remoteness, all estates limited to follow it are also void. 1 Jarm. Wills (5th Am. ed.), 522.

2. *A. devised land to his son X. for life with remainder to X.'s children for life in equal shares to be held in severalty with cross-remainders, and with remainder in fee to the person whom the survivor of X.'s children should by will appoint. Are the limitations good?*

The life estate to X. and the remainders to his children are clearly good, since all vest at the time of X.'s death, and, therefore, at the expiration of one life. The cross-remainders vest at the same time (Gray, Rule against Perpetuities (2d ed.), § 207), and are consequently good also.

The power of appointment is, however, too remote. In considering the validity of powers, two tests must be applied. (1) The donee of the power must be ascertainable, and the time when the power is to be exercised must fall within the limit of the rule. In re Hargreaves, 43 Ch. Div. 401. (2) The persons in whose favor the power actually is exercised must be within the limit of the rule. Blight v. Hartnoll, 19 Ch. Div. 294. In the case supposed the first test shows the power to be invalid, for the donee of it might be a child born after A.'s death, and as he is to exercise the power by will, it may be carried far beyond the limit of the rule. Thus it is not enough that the donee of the power be born, or even that he take the power within the limit of the rule. The power must be such that if exercised at all, it must be exercised within the period of the rule, otherwise it is bad from the beginning.

The fact that the terms of a power are so broad as to admit of its exercise in favor of objects too remote does not invalidate the power; but if it be actually so exercised the appointment is invalid.

In the case supposed above only a single life, that of X., is used as the "measuring rod." Any reasonable number of lives in being may, however, be used equally well, provided the limitations must vest within twenty-one years of the dropping of the longest of the lives. See Thellusson v. Woodford, 4 Ves. Jr. 227, at pp. 313, 320. Thus a gift to trustees for the use of the youngest child of any one of the eight living brothers of the donor, upon his reaching twenty-one, is valid. Statutes have, however, in many states limited the number of lives which may be used as the measure — usually to two. New York Real Property

Law, § 32; 1 Wis. Ann. Stat. (S. & B.'s ed.), § 2039. These statutes generally make the existence of restraints on alienation beyond the period of the rule the test of validity rather than the degree of remoteness, and impose various other limitations on the creation of future estates. Stimson, Am. Stat. Law, Art. 144.

3. *A. devised land to X. for life with power to appoint the fee to any person by deed or will. X., by deed, exercised the power in favor of his daughter, Y., who was born after A.'s death, adding that the gift was to take effect upon her marriage. Was there a valid exercise of the power?*

A power of appointment derives its efficacy from the instrument creating the power and accordingly, to test its remoteness, the exercise of the power must be read as part of the original creating instrument. In the present case, if A.'s *original devise* had been to Y. upon the death of X., it would have been valid, but if to Y. upon her marriage, it would clearly have been too remote, because the marriage might not take place until more than twenty-one years after X.'s death, which would carry it beyond the period of the rule. Accordingly, the *appointment* to Y. upon her marriage would ordinarily be too remote. The present case is, however, peculiar in that X. has an unlimited power of appointment by deed or will. The donee of such a power is held to be practically the owner of the fee, since he has absolute control of it, and he is, therefore, allowed to make any gift which the absolute owner of the fee might make, even though such gift be too remote from the instrument creating the power. Sugden, Powers (8th ed.), p. 394; Gray, Rule against Perpetuities (2d ed.), § 477.

In this connection should be noted also a class of decisions holding that where an absolute gift is made, followed by a provision that the vesting be postponed to a period more remote than allowed under the rule, the qualifying provision will be rejected and the gift be treated as absolute. "The author of the limitations intends the prior absolute gift to prevail, except so far only as it is effectually superseded by the subsequent qualifying one." Lewis, Perpetuities, 535. Under this doctrine also, it would seem that the gift to Y. might be upheld. Ring v. Hardwick, 2 Beav. 352.

4. *A testator bequeathed $20,000 to trustees to invest and apply the income to the purchase of books for a public library in a certain town when and so soon as such library should be established, and if such library should not be established or should thereafter cease to exist, then to apply the income to the support of a certain orphan asylum. Are the gifts valid under the rule?*

Yes. It is clear that the establishment of the library might be at a period much more remote than that limited by the Rule against Perpetuities; and that the contingency on which the gift to the orphan asylum depended might be even more remote. But both are

charitable objects, and the gifts will be upheld though in ordinary cases they would be held to violate the rule. In the case of the first gift, the trustees will hold for a reasonable time to await the establishment of a library. Sinnett v. Herbert, L. R., 7 Ch. App. 232; Chamberlayne v. Brockett, L. R., 8 Ch. App. 206. When the contingency on which the second gift depends happens, the use will shift and the asylum take. Christ's Hospital v. Grainger, 1 Macn. & G. 460; Storrs Agric. School v. Whitney, 54 Conn. 342.

Some authorities take the position simply that the rule does not apply to gifts for charity. Yeap Cheak Neo v. Ong Cheng Neo, L. R., 6 P. C. 381, at p. 394; see Hopkins v. Grimshaw, 165 U. S. 342, at p. 355. Others bring the cases within the doctrine of *cy-pres** and avoid raising the questions under the rule. "If the court, however, can see an intention to make an unconditional gift to charity (and the court is very keen-sighted to discover this intention), then the gift will be regarded as immediate, not subject to any condition precedent, and, therefore, not within the scope of the Rule against Perpetuities. The mode pointed out by the testator is only one way, though the preferable way, of carrying out the charitable purpose; and if it cannot, with regard to the general charitable intention, be carried out in that way, it will be carried out *cy-pres*." Gray, Rule against Perpetuities (2d ed.), § 607; see Allen v. Stevens, 161 N. Y. 122. Whatever view be adopted, such cases as that supposed above, where charity is throughout the object, are not treated as subject to the rule. It should be noted in this connection that, where the gift is to a noncharitable object with a gift over to a charity on a too remote contingency, or *vice versâ*, the ordinary Rule against Perpetuities is applied and the gift over held void. Commissioners of Charitable Donations v. DeClifford, 1 Dr. & W. 245; Brattle Square Church v. Grant, 3 Gray (Mass.), 142; see Hopkins v. Grimshaw, 165 U. S. 342, at p. 355.

In addition to cases of gifts to charity a further exception to the rule should be noted, namely, that of limitations in fee tail. Obviously, these violate the rule, since the estate is to vest, not by descent, but by virtue of the creating instrument, in successive generations indefinitely. Such an estate was, however, readily destructible at common law at the will of the tenant through the machinery of a common recovery. Therefore, limitations in fee tail made by the grantor are operative only until a tenant chooses to destroy them, and this fact is held to remove the reason for objecting to their remoteness.

Similarly, the validity of limitations to follow *immediately* on an estate tail is upheld since a recovery which bars the entail will also extinguish those interests. Challis, Real Property, p. *146; Goodwin v. Clark, 1 Lev. 35; Heasman v. Pearse, L. R., 7 Ch. 275. But if an interval exists between the determination of the estate tail and the subsequent limitation the latter is bad, since, during such interval, it would be indestructible. Gray, Rule against Perpetuities (2d ed.), § 446.

*"The rule of *cy-pres* is a rule for the construction of instruments in equity, by which the intention of the party is carried out *as near as may be*, when it would be impossible or illegal to give it literal effect." Bouv. Law Dict.

5. *A testator left money to trustees to pay $1,000 annually to each of the children of A., whenever born, from and after the time of their marriage. At the time of the testator's death, A. was living and had then two children, one of whom was married. Is the gift valid?*

This is not a case of an immediate gift with enjoyment postponed, for the children's interest is not to *vest* until marriage. The gift, furthermore, is to a *class*,—the children of A. In such cases ordinarily the gift is bad if too remote as to any member of the class. Pearks v. Moseley, L. R., 5 App. Cas. 714. "It is the period of vesting and not the description of the legatees, that produces the incapacity. * * * The bequests in question are not made to individuals but to classes; and what I have to determine is whether the class can take." Grant, M. R., in Leake v. Robinson, 2 Mer. 363, at pp. 388, 390. Accordingly, a gift such as that supposed would ordinarily be void. An exception is, however, made in cases where a definite share is set off to each member of the class. There the gift will be held divisible, and such members of the class as come within the limit of remoteness may take. See Storrs v. Benbow, 3 DeG. M. & G. 390, at p. 397; Boughton v. Boughton, 1 H. L. C. 406, at p. 414. So in the case supposed the married child of A. takes at once and the other will take upon marriage.

Clearly, as applied to children of A., born after the testator's death, the time of vesting might be too remote. Such children therefore would not take.

Where an immediate gift to a class is made it is held that the class is closed upon the execution of the deed, or, if the gift is by will, upon the death of the testator, for the gift is to vest at that time. Thus a devise to the children of A., who attain twenty-five years of age, is confined to such children of A. as are born at the time the will takes effect. "A gift to a class not preceded by any life estate is a gift to such of the class as are living at the death of the testator." Malins, V. C., in Picken v. Matthews, L. R., 10 Ch. Div. 264, at p. 267. By thus shutting out afterborn children the gift is saved from the vice of remoteness.

Where, however, the gift to the class is preceded by a particular estate, such as to defer its vesting until the expiration of the particular estate, the class is not considered closed until the particular estate has terminated. "Where the legacy is given * * * with any suspension of the time so as to make the gift take place * * * at a future period, then such children shall take as are living at that period." Lord Thurlow in Singleton v. Gilbert, 1 Cox Ch. Cas. 68, at p. 71. This may, of course, render the gift too remote.

Where each member of a class is to take on a certain contingency—attaining a specified age, etc.—the class closes when the contingency first happens to one of its members. Andrews v. Partington, 3 Bro. Ch. 401; see Hoste v. Pratt, 3 Ves. Jr. 730. These somewhat arbitrary rules are rules of convenience designed to fix an early and definite time when the class can be closed and the number of shares be known.

QUASI-CONTRACTS.

I. Nature of the Obligation.

1. *What are the sources of quasi-contracts, and how is the designation appropriate?*

Quasi-contracts may be said, in general, to rest:

1. Upon a record of court.
2. Upon a statutory, official or customary duty.
3. Upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another.

It has long been settled, that a man might bring an action in *contract*, to recover the amount of a money judgment; O'Brien v. Young, 95 N. Y. 428, 432; or that where a statute directed the payment of certain money for the support of paupers, an action in contract would lie for the money. Millford v. Commonwealth, 144 Mass. 04. An innkeeper or common carrier can also be forced by suit to perform his customary duty towards an individual, and an insane person can be sued in contract for necessaries furnished him.

From these illustrations, the appropriateness of the designation is most apparent. In all of these cases there is a duty placed upon a man to *do* something, but in no one of them is there a contract based upon the *agreement* of the parties. The duty is only *quasi*-contractual. It exists solely by operation of law and is always independent of any real agreement, and often counter to expressed intentions. The obligation is one of an equitable character only. Keener on Quasi-Contracts, 16-20. The greater majority of cases in which recovery is allowed, in *quasi*-contract, are based upon the principle of unjust enrichment. The courts are loath to allow a defendant to keep property which he ought not to have, and to which the plaintiff is really entitled. They will not interfere, however, when that is not the real state of facts. If the defendant no longer has the property, and has changed his position so that he would be a loser, if forced to pay the plaintiff, a case of unjust enrichment is not presented. 4 Harv. L. Rev. 310, and note 1, cases collected; Curnen v. Mayor, 79 N. Y. 511.

II. FAILURE OF CONSIDERATION.

a. Mistake.

1. MISTAKE OF LAW OR FACT.

2. *A. pays B.* $1,000, *being mistaken as to the material facts on which the debt was supposed to arise. Can he recover the amount so paid?*

Yes. It has always been held that a man should not be allowed to keep money for his own unjust enrichment, which has been paid him through a mistake of the *facts*. Keener on Quasi-Contracts, p. 26 *et seq.*

3. *A statute fixed the value of sterling money in the currency of the State. Through a mistake, as to this law, A. paid B. more money than was due him. Could he recover it?*

No. It is fixed law in England, and in most of the States of this country, that money paid under mistake of *law* cannot be recovered. Bilbie v. Lumley, 2 East, 469; Clarke v. Dutcher, 9 Cow. (N. Y.) 674. The law in Connecticut is *contra*. Northrop v. Graves, 19 Conn. 548. Georgia, Kentucky and South Carolina are doubtful. Keener on Quasi-Contracts, p. 85.

Previous to the decision of Bilbie v. Lumley (*supra*), the law was to the effect that a recovery was allowed whether the mistake was of law or fact. The courts saw no reason for a distinction, and no sound reason ever has been advanced. The reason usually given is that a man is presumed to know the law. In the case of a crime or a tort, the ignorance of the law cannot, of course, be advanced by the guilty party, to excuse him for the wrong done. Public policy demands that statutes shall be enforced. But there is certainly no public policy which demands that a man, who has become possessed of another's property, shall be allowed to keep it. A fiction is sometimes resorted to by courts for the sake of working justice, but here so preposterous a fiction as a presumption that a man knows all the law is set up to work injustice. This rule is attacked on all sides, but unfortunately the objections were only urged after the law had become fixed.

The weakness of the present state of the law is the more manifest, when it is remembered that recovery for mistake, though allowed in courts of law, is really an equitable action, and yet a court of equity has never held that there was a distinction between a mistake of law and a mistake of fact, though there are some *dicta* that equity will allow recovery. See Daniell v. Sinclair, 6 App. Cas. 181; Canedy v. Marcy, 13 Gray, 373, 377; Kennard v. George, 44 N. H. 440, 446.

4. *A promised to give B. a note bearing interest. By a mistake, the interest clause was omitted, but A., in ignorance of that*

fact, paid the interest for a year, and now sues to recover the amount so paid. Should he succeed?

No. Whether the mistake be one of law or fact, recovery is only allowed in a case where the defendant has been unjustly enriched. When he is entitled to the payment in good conscience, a court will not deprive him of it, even though they could not have put him in possession of it originally. Buel v. Boughton, 2 Den. 91.

On the same principle, money paid in ignorance of the fact that the Statute of Limitations has run cannot be recovered. Hubbard v. Hickman, 4 Bush (Ky.), 204.

5. *A. pays B., an agent, $100, by mistake, for which neither party is responsible. B. pays to his principal, who is now insolvent, so that B. must bear the entire loss personally if A. recovers the money. Should a recovery be allowed?*

The law is that a recovery is possible. Corn Exchange Bk. v. Nassau Bk., 91 N. Y. 74. On principle, however, the result should be otherwise. The defendant has so changed his position, that the unjust enrichment no longer exists. Blake v. Metzgar, 150 Penn. St. 291; Keener on Quasi-Contracts, p. 67.

Where, however, in such a case, the mistake was due to the plaintiff's negligence, his recovery should be barred. Walker v. Conant, 65 Mich. 194. But if the defendant has not changed his position, the negligence is generally held to be no bar to the plaintiff's recovery. Devine v. Edwards, 101 Ill. 138; Brown v. Road Co., 56 Ind. 110-115.

6. *A. agrees to pay B. $1,000 per year for the use of a patented process. After two years, A. learns that the patent was not good and sues for the money paid. Should he recover?*

No. The law is settled, both in England and the United States, that a recovery under such circumstances will not be allowed. The plaintiff has had the enjoyment of what he stipulated for, and would never have assumed those privileges, except upon the contract. Taylor v. Hare, 1 B. & P. N. R. 260. This case has been almost universally followed. But see Keener on Quasi-Contracts, p. 37.

6, *a. A., who is in partnership with B., acting without authority, but for a firm purpose, makes a sealed contract with X. for the construction of a dam. A. and B. dissolve partnership, and X. sues A. and B. as partners. Can he recover against both?*

Yes. While B. is not liable upon the contract, still X. has an equitable claim for his work, labor and materials, and so far as these benefited the firm before dissolution, B. is liable. Van Deusen v. Blum, 18 Pick. (Mass.) 229.

2. MISTAKE AS TO VALIDITY.

7. *A. is a bona fide holder of a bill of exchange, drawn upon B., in which the drawer's name is forged. B. pays the bill before he learns of the forgery, and then seeks to recover the money. Should he succeed?*

No. It is a question of who shall suffer the loss, and the courts will not transfer it from one party to the other, when both are equally innocent. A. has in no way acted against conscience, and having the legal title to the money, may keep it. Price v. Neal, 3 Burr. 1354; Leather v. Simpson, L. R. 11 Eq. 398. See also 4 Harv. L. Rev. 297-310.

The reason often given for refusing to allow B. to recover is that he should know the signature of his drawer, and was negligent in not discovering the forgery. The insufficiency of this explanation is manifest, however, from the fact that the result could not be changed by showing that the forgery was such that no one could detect it. The better reason is that where both parties are innocent, the law will not interfere and the loss will be allowed to remain where it fell. So, also, in the above case, if B. had accepted the bill but refused to pay it on discovering the forgery, the court would not interfere with A.'s legal rights, and he could force B. to honor his acceptance. Bass v. Clive, 4 Maule & Selw. 13.

Where, also, a forged bill or note is *sold* before maturity, the good faith of the vendor will not avail him, and the purchaser can recover damages from him. A vendor warrants the validity of his paper. Delaware Bank v. Jarvis, 20 N. Y. 226; Gurney v. Womersley, 4 E. & B. 133.

8. *A. paid a bill drawn on him in which the signatures were all good, but the body of the bill had been changed by increasing the amount. Could A. recover the money so paid to a bona fide holder of the bill?*

Yes. There should be no distinction, on principle, between forgeries of signatures and in the body of the paper; but it is generally held in this country, that a forgery in the body will allow recovery. Bank of Commorce v. Union Bank, 3 N. Y. 230. See Bills and Notes, Ques. 19.

9. *A., acting in good faith, buys a note which was properly made by B., but the indorsement to A. is a forgery. B. pays at maturity, and then, learning of the forgery, sues to recover. Should he succeed?*

Yes. No matter what the good faith of A., he must show a good title to his paper, which he could never get by a forged indorsement. Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287. See Bills and Notes, Ques 19.

3. MISTAKE AS TO TITLE.

10. *A., acting in good faith, sells B. a horse, which A. has in his possession, and a piece of land, without an express warranty of title in either case. If A. has no title to either the horse or the land, what are B.'s rights?*

In the case of the horse, B. could recover the money paid. In England the recovery is based on failure of consideration. Morley v. Attenborough, 3 Ex. 500, 513-514; Gurney v. Womersley, 4 E. & B. 133. In the United States, the general rule is that possession of personal property implies title, and in every case of the sale of personal property *in possession* there is an implied warranty of title in the vendor. Burt v. Dewey, 40 N. Y. 283, 284; Dorr v. Fisher, 55 Mass. 271, 273. There is, however, no implied warranty when the goods are in the possession of a third party. Benjamin on Sales, §§ 607, 630, 641.

B. could not, however, recover the money paid for the land. Where realty is purchased, the warranty must be expressed, if there is to be a right to recover. Of course, A. could not keep the money if he knew of his defect of title at the time of the sale. Clare v. Lamb, L. R. 10 C. P. 334.

The difference between the sales of personalty and realty, in that the vendor is held to warrant one and not the other, is due to historical reasons. Originally, it was held that an express stipulation was necessary in every case, or otherwise the maxim *caveat emptor* was applied with full vigor. Broom's Maxims, 768. In the case of realty the old rule has survived and a man must still have a warranty deed, or he has no warranty at all.

4. MISTAKE AS TO EXISTENCE OF SUBJECT-MATTER.

11. *A. gives B. a deed, without warranty, to certain land, acting bona fide. It afterwards appears that there is no such land as that described. Can B. recover the money paid?*

Yes. Though there was no warranty, it is held that the property must, at least, be in existence in order to enable a vendor to keep the money. Hitchcock v. Giddings, 4 Price, 135.

Similarly, if A. sells B. goods under a mutual mistake as to their identity, and B. finds, for instance, that he has secured a domestic bill of exchange, instead of a foreign one, for which he contracted, he can recover the money paid. Gompertz v. Bartlett, 2 F. & B. 849.

b. Failure of Defendant to Perform Contract.

1. DEFENDANT RELYING UPON STATUTE OF FRAUDS.

12. *A. made an oral agreement with B., by which A. was to make improvements on B.'s land, and B. was to give A. a lease*

for two years. After the improvements, B. refused to give the lease, saying that the contract could not be enforced under the Statute of Frauds. What are A.'s rights, if any?

A. may recover the amount by which B. has actually been benefited by the improvements. The Statute of Frauds is a complete bar to an action for specific performance, or any other action based upon the contract, as such, but the court will not allow the defendant to set up the statute, and still keep the benefits conferred by the plaintiff in expectation of the performance of the contract. Williams v. Bemis, 108 Mass. 91; Gray v. Hill, Ry. & M. 420.

13. *A. agreed orally to convey a piece of land to B., if the latter would make him a monument. When the monument was completed, A. declined to take it and refused to convey the land, and B. sued for the work done on the monument. Could he recover?*

No. Recovery in such a case is based solely upon the unjust enrichment of the defendant, and here, though the plaintiff has been at an expense, the defendant has not been enriched. Dowling v. McKenney, 124 Mass. 478.

2. PERFORMANCE IMPOSSIBLE.

14. *A. paid freight, in advance, for carrying his goods to a certain port. The ship was lost at sea, and A. sues for a return of the freight paid. Would he succeed?*

Yes. The fact that the performance of the contract is impossible does not give the defendant the right to retain the benefits received, but to which he was only entitled upon the safe delivery of the goods. Griggs v. Austin, 3 Pick. 20. The English rule, however, is *contra*. Byrne v. Schiller, L. R. 6 Ex. 319.

15. *A. paid* $100 *for a proposed patent which B. was about to take out. B. died before the patent could be perfected. Can A. recover the money paid?*

Yes. The estate would be unjustly enriched, if allowed to keep money for which no equivalent had been rendered. Knowles v. Bovill, 22 Law Times Rep. 70.

3. DEFENDANT RELYING ON ILLEGALITY OF CONTRACT.

16. *A. delivered to B.* $500 *with which to make a bet. B. kept the money himself, and A. sues for its return. Can he recover?*

No. Where both parties are engaged in an illegal transaction, the law will not help either out of any loss that may arise. Morgan v. Graff, 5 Den. 364; Keener on Quasi-Contracts, 268.

Where a transaction takes place on Sunday, contrary to a statute, the same result is reached. Thompson v. Williams, 58 N. H. 248.

17. *A. loaned money to the B. Company, contrary to the statute under which the company was incorporated. He now sues for the payment of the loan. What relief, if any, is he entitled to?*

He is entitled to recover the amount by which the company is actually the richer, for receiving A.'s money. There is no public policy here, as in the cases above, which keeps the court from acting; but on the other hand, A. could not recover on the contract, as the statute would be a perfect defense. The recovery must, therefore, be in *quasi*-contract for the amount of the enrichment only, and if the property for which the loaned money has been expended has depreciated in value, A. must suffer the loss. *In re* Cork, etc., Ry. Co., L. R. 4 Ch. App. 748.

18. *When are parties not "in pari delicto" so as to bar a plaintiff, in spite of the fact that a statute has been violated?*

1. When the statute was enacted for the benefit of a class of persons to which the plaintiff belongs. Smith v. Bromley, 2 Doug. 696.

2. Where the statute imposes a penalty for its violation upon the defendant only. Smart v. White, 73 Me. 332; Tracy v. Talmage, 14 N. Y. 162.

3. When the illegality depends upon facts known to the defendant, but unknown to the plaintiff. Louisiana v. Wood, 102 U. S. 294.

4. FAILURE TO PERFORM WILFUL OR WITHOUT EXCUSE.

19. *A. gave B. $5,000 on B.'s promise to deliver certain goods. B. failed to deliver, and A. sues for the return of the money, as the goods have greatly depreciated. Can he recover?*

Yes. In spite of the fact that A. here has a perfectly good cause of action on the contract, the courts hold that he may, at his election, sue in *quasi*-contract, for money had and received. Nash v. Towne, 5 Wall. (U. S.) 689.

The rule of allowing a plaintiff to sue in *quasi*-contract, when he has a good cause of action outside of equitable grounds, upon the contract itself, was started in Dutch v. Warren, 1 Str. 406, and is now generally fixed law. On principle, however, the rule is a bad one, and allows the plaintiff to sue for the breach of the contract when its performance would have been for his benefit, and to choose *quasi*-contract when a return of the money paid is more advantageous. Performance of the contract was the only thing originally considered by the parties, and the plaintiff should be limited to recovering damages for the nonperformance, reserving the principles of *quasi*-contract for application

where there is no way of recovering on an express contract. The only ground on which the rule can be supported is, that this election allowed the plaintiff is in the nature of a penalty put upon the defendant for a failure to perform. Keener on Quasi-Contracts, 298-299.

The courts have, however, held that in the case of a sealed instrument, where the plaintiff has rendered services or delivered property, there can be no election, and that the action can be based upon the contract; McManus v. Cassidy, 66 Penn. St. 260; though they still allow an election where the performance by the plaintiff has consisted of the payment of money. Ballow v. Billings, 136 Mass. 307.

The amount of the recovery allowed in such a case of breach of contract is limited to the contract price actually paid by the plaintiff. Porter v. Dunn, 61 Hun (N. Y.), 310; s. c., 131 N. Y. 314, 320. This again shows the inconsistency of the rule, as the defendant should restore the amount of his enrichment, be it more or less than the amount paid, if recovery were properly allowed on *quasi*-contractual principles. Thus, if, in the case put, the breach had been in the investment of the $5,000 in stocks worth $7,000 at the date of suit, $7,000 ought to be the amount recovered, as it would represent the real enrichment. Keener on Quasi-Contracts, 301.

c. Failure of Plaintiff to Perform Contract.

1. FAILURE IN CONDITION OF CONTRACT.

20. *A., who is under contract to work for one year, leaves his employment willfully, and without excuse, at the end of six months. Can he force his employer to pay for six months' work at the contract price?*

No. *Quasi*-contractual principles for preventing an unjust enrichment are not to be so applied as to defeat the express conditions of a contract. The idea of the parties was that A. must work the entire year to entitle him to payment. Stark v. Parker, 2 Pick. 267.

A contrary rule, however, has obtained in Iowa, Indiana, Kansas, Nebraska, New Hampshire, North Carolina and Texas, in all of which States the principle of Britton v. Turner, 6 N. H. 481, is law. See also Contracts, Ques. 32.

21. *A. agreed to build B. a house, according to specifications. Certain of the specifications were unintentionally disregarded. What are A.'s rights?*

It is generally held that where a plaintiff has honestly endeavored to perform a contract, an unintentional breach will not prevent a recovery on a *quantum meruit* for what was actually done, though he could not recover on the contract, and would be liable for the breach of the contract. Hayward v. Leonard, 7 Pick. 181; Keener on Quasi-Contracts, 230; Pinches v. Church, 55 Conn. 186.

2. PLAINTIFF RELYING UPON STATUTE OF FRAUDS.

22. *A. pays B.* $1,000, *on an oral contract that B. shall convey to him certain land. B. is ready to convey, but A. refuses to accept and sues for the return of the* $1,000, *basing his right to rescind upon the ground that his contract was within the Statute of Frauds. Could he recover the money?*

No. There is no reason for allowing the plaintiff to recover the purchase money, on the ground of the statute, so long as the defendant stands ready to perform in accordance with the original contract. Thomas v. Brown, 1 Q. B. Div. 714; Sennett v. Shehan, 27 Minn. 328.

A contrary result was reached in King v. Welcome, 5 Gray, 41, and Bernier v. Cobat Mfg. Co., 71 Me. 506, but these cases are without support. Keener on Quasi-Contracts, 234.

3. PLAINTIFF'S PERFORMANCE IMPOSSIBLE.

23. *A. agrees to work for B. for a year. At the end of six months he is disabled. Can he recover for the work already done?*

Yes. He could recover the value of the services rendered to B. during the six months, though he has no action on the contract itself. The disability of A. was not in the minds of the parties, and it would be an inequitable enrichment to B., if he should pay nothing. Wolfe v. Hawes, 20 N. Y. 197; Green v. Gilbert, 21 Wis. 395.

Where the sickness should have been foreseen, however, recovery has been refused. Jennings v. Lyons, 39 Wis. 553.

If the complete performance of the contract by the plaintiff is prevented by law, a recovery is also allowed for the benefits conferred by the part performance. Jones v. Judd, 4 N. Y. 411. See also Contracts, Ques. 32.

24. *A. agreed to plaster B.'s house. Before the work was completed the house was burned. Could A. recover for the work done?*

In such a case B. has never *realized* any benefit from A.'s work, though it may be said that his property was made valuable at the time the property burned. Still, in the United States, recovery is generally allowed. Cleary v. Sohier, 120 Mass. 210; Hollis v. Chapman, 36 Tex. 1.

In Niblo v. Binsse, 3 Abb. Ct. App. Dec. 375, 381, the reason for a similar decision was stated to be that the defendant had agreed to keep the building in existence. If this were true, however, the plaintiff need not resort to *quasi*-contract, but could recover for a breach of the special contract, a position impossible to maintain. Keener on Quasi-Contracts, 254.

The English law is *contra*, and, in case of fire, no recovery whatever is allowed for the work done in partial performance of the contract. Appleby v. Myers, L. R. 2 C. P. 65.

No recovery will be allowed in such a case, however, where the impossibility of the performance has been brought about through the fault of the plaintiff. Parker v. Scott, 82 Iowa, 266.

III. BENEFIT CONFERRED WITHOUT REQUEST.

a. Intentionally.

25. *A. paid the necessary funeral expenses of X., and seeks to collect the amount so expended from the executor of X., who was absent, at a distance, when X. died. Can A. recover?*

Yes. There is a legal obligation imposed upon an executor or administrator to bury a deceased testator or intestate, and A. having fulfilled this obligation, under the circumstances of B.'s absence, could recover in *quasi*-contract. Patterson v. Patterson, 59 N. Y. 574.

To make a recovery possible, it is necessary, as here, that there should have been a necessity for A.'s action. If he had been simply officious and could have notified B. perfectly well, he would not be allowed to recover (Quin v. Hill, 4 Demarest, 69; Keener on Quasi-Contracts, 349), unless B's previous course had been one of neglect, which would render a notification useless. Cunningham v. Reardon, 98 Mass. 538.

It is also necessary that A. should have made his expenditure with the expectation of charging the defendant. Keener on Quasi-Contracts, 350.

26. *A. sent an order for goods to B., who owed him money. B. had sold out his business to X., who filled A.'s order in good faith, and now sues for the value of the goods furnished. Can A. plead, as set-off, his claim against B.?*

Yes. Though X. acted in good faith, A. cannot be deprived of the set-off, which he would have had if the goods had been furnished by B., as A. intended. Boulton v. Jones, 2 H. & N. 564.

If X. had not acted in good faith, but had attempted to force himself upon A. as a creditor, he could not have recovered, even if there had been no question as to set-off. Boston Ice Co. v. Potter, 123 Mass. 28.

b. Unintentionally.

27. *A took possession of B.'s land, upon the oral agreement that B. would convey it to him. While in possession he improved the land, and now seeks to recover for the improvements, B. having refused to convey, and having evicted him, repudiating*

his agreement on the ground of the Statute of Frauds. Can A. recover, and if so, in law or in equity?

A. can recover the benefits derived by B. by reason of the improvements, but his action must be brought in equity. Courts have almost universally refused a recovery at law for work and labor, on the ground that A. was working for himself, not for B., and that a request by B., which must be raised to support the count of work and labor, could not be implied. Cook v. Daggett, 2 Allen, 439; Welsh v. Welsh, 5 Ohio St. 425.

The courts in reaching such a result, however, have overlooked the fact that there manifestly is an unjust enrichment, and have resorted to an unneccessary technicality. Keener on Quasi-Contracts, 369.

If A. had not been evicted, he could not recover, it would seem, even in equity. He must be disturbed in his own enjoyment of the improvements before he can charge B. for the benefits to the land, even if B. has refused to convey.

28. *A. took possession of B.'s land, upon the oral agreement that B. would convey. A. now refuses to accept the conveyance, though B. is ready to convey, upon the ground of the Statute of Frauds, but sues for improvements made to the land while he was in possession. Can he recover?*

There is some conflict, but the better decisions are that no recovery is possible. When B. is ready to convey, there is no reason for allowing A. to refuse what he contracted for and yet give him compensation for improvements, which will be his if he stands by his contract. Gillet v. Maynard, 5 Johns. (N. Y.) 85; Farnam v. Davis, 32 N. H. 302. See also Ques. 12, 13 (*supra*).

29. *A., under mistake of fact, supposing that he owned certain land, improved it. Can he recover from the owner for such improvements, upon learning of his mistake?*

There is unquestionably an unjust enrichment, and by a few decisions a recovery in equity is allowed. Bright v. Boyd, 1 Story, 478, 494; Union Hall Assn. v. Morrison, 39 Md. 281. These decisions are exceptional, however, and it is usually held that no recovery is possible. Haggerty v. McCanna, 25 N. J. Eq. 48; O'Conner v. Hurley, 147 Mass. 145, 148; Isle Royale Mining Co. v. Hertin, 37 Mich. 332.

IV. Benefit Conferred at Request But Not in Performance of Contract.

30. *A., supposing that she was B.'s legal wife, lived with him as such for five years. Upon learning that B. had another wife living, she sues for work and labor. Can she recover?*

Yes. B. has been unjustly enriched by the services which were rendered only on account of his fraud, and though A. did not ex-

pect compensation at the time, B. would not be allowed to use his own fraud, as a defense. Fox v. Dawson, 8 Martin (La.), 94; Higgins v. McNally, 9 Mo. 493.

Massachusetts, however, holds *contra*. Cooper v. Cooper, 147 Mass. 370.

This is a very different case from one where both parties know the facts and a gratuity is intended. In such a case the plaintiff cannot change her mind and sue for compensation later. There is then no unjust enrichment on which a recovery could be allowed. Wyley v. Bull, 41 Kan. 206; Doyle v. Trinity Church, 133 N. Y. 372.

Recovery might also have been refused, if B. had acted in *bona fide* ignorance of the fact that his wife was alive. It might be said in that case, that the enrichment of B. was not unjust. See Burrows v. Ward, 15 R. I. 346 (*semble*).

31. *A. made a contract with B., for personal services, which proved ambiguous in its terms, and each thought that the terms were to be construed differently. What rights has A. to wages for the work done?*

He cannot recover on the contract, as there really was no contract at all, owing to the lack of mutuality. He would be allowed the market price of his labor, in *quasi*-contract. Turner v. Webster, 24 Kan. 38.

V. WAIVER OF TORT.

32. *A. stole B.'s horse and sold it for* $100. *Has A. any means of securing the money?*

Yes. In spite of the fact that B. may call upon the vendee to give up the horse, he may also "waive the tort" of A., and sue him in *quasi*-contract, for money had and received. Keener on Quasi-Contracts, 170, and cases cited.

The term "waiver of tort," though generally used, is misleading. The plaintiff really waives nothing. He simply has an election to sue in tort or *assumpsit* as he elects. Keener on Quasi-Contracts, 159.

The mere sale of the converted property is not sufficient to allow recovery. The defendant must actually have received the money for the goods sold. Moody v. Walker, 89 Ala. 619, 621; Budd v. Hiler, 27 N. J. Law, 43.

33. *A. converted B.'s goods and used them. Can B. waive the tort, and sue for goods sold and delivered in quasi-contract?*

The courts are almost equally divided, but the better view is that the count will be sustained. The courts which refuse to allow the count go on the ground that the fiction of a sale is more than the court has the power to raise, where there is a mere tort; but if

B. had sold the goods, the same courts would allow an action for money had and received, which is no less fictitious. Keener on Quasi-Contracts, 192-195.

The States allowing the count of goods sold and delivered are California, Georgia, Illinois, Indiana, Kansas, Michigan, Mississippi, New York, North Carolina, Tennessee, Texas, West Virginia and Wisconsin.

Contra, are Alabama, Arkansas, Delaware, Maine, Massachusetts, Missouri, New Hampshire, Pennsylvania, South Carolina and Vermont. See Keener on Quasi-Contracts, 193, note 3, cases collected.

34. *A. sells goods to B. on six months' credit, but later finds that B.'s representations which induced the sale were fraudulent. Can he sue at once in quasi-contract for goods sold and delivered?*

Yes. The basis of every contract is good faith. If the special contract be voidable on the ground of fraud, the plaintiff may disregard it, and bring *assumpsit* for goods sold. Wilson v. Foree, 6 Johns. (N. Y.) 110. Massachusetts, however, holds *contra.* Allen v. Ford, 19 Pick. 217.

35. *A. unlawfully dispossesses B. of his land, and B. then sues A. for use and occupation to recover the rental value of the property while A. was in possession. Can he recover?*

No. The doctrine of *quasi*-contracts has not been extended to this class of cases, for purely historical reasons. It was a principle of the common law that a plaintiff should pursue his highest remedy, and *indebitatus assumpsit* was not allowed in such a case. By the common law, debt was the proper action for the recovery of rent due, and as that was considered a higher remedy than *indebitatus assumpsit,* the latter count was not allowed in any action for the collection of rent. The common counts, in general, have, therefore, been disallowed in such cases. Keener on Quasi-Contracts, 191.

36. *A.'s goods were converted by B. and C. A. sues B. in assumpsit and gets judgment which, however, is unsatisfied. Can A. then sue C. in a count for money had and received, the goods having been sold?*

Yes. Where there is a right of action against two persons, the election as to one should not affect the plaintiff's right as to the other, and he may sue him in either form of action he sees fit. In the case of several tort-feasors the plaintiff's resources are only exhausted when he has obtained judgment and satisfaction from one or an unsatisfied judgment against all. Huffman v. Hughlett, 11 Lea (Tenn.), 549, 554; Keener on Quasi-Contracts, 208-213.

New York, however, holds the contrary. The fiction of the count for money had and received is there carried to the extent of saying that by the use of such a count, the plaintiff has "decided to sell the property," and so has no right of action against a second converter. Terry v. Munger, 121 N. Y. 161, 166.

Where there is but one converter, and the plaintiff has prosecuted his action *to judgment* in either trover or *assumpsit*, he is held to have made a final election of remedy on the principle that a man must not be twice vexed for the same cause. Bradley v. Brigham, 149 Mass. 141, 145.

An unsatisfied demand is not an election. Valpy v. Sanders, 5 C. B. 887. Nor an action actually begun, if discontinued before judgment. Keener on Quasi-Contracts, 204 *et seq.* *Contra*, however, is Thompson v. Howard, 31 Mich. 309, 312.

VI. RECOVERY OF MONEY PAID BY COMPULSION.

a. Under Legal Process.

37. *A. recovers judgment against B., and issues execution, whereupon B. pays. On appeal, the judgment is reversed. Can B. recover the money on a count for money had and received?*

Yes. B. was forced to pay money, which A. cannot now keep in good conscience. Clark v. Pinney, 6 Cow. (N. Y.) 297.

The recovery is equally under compulsion, so as to allow recovery, if judgment has simply been entered and paid without execution issuing. Scholey v. Halsey, 72 N. Y. 578.

So also a man may recover money which he has paid to avoid unlawful arrest, or to be released therefrom. Heckman v. Swartz, 64 Wis. 48.

b. To Avoid Injury to Plaintiff's Business.

38. *A. wrongfully claims* $500 *from B., and threatens to cut off the water supply of B.'s mill if the claim is not paid. Can B. recover the money so paid?*

Yes. Though the plaintiff's property or person is not threatened with molestation, a threatened injury to his business is considered a sufficient compulsion to allow of a recovery of the money so paid on an unjust claim. Westlake v. St. Louis, 77 Mo. 47; Carew v. Rutherford, 106 Mass. 1.

c. To Induce the Performance of a Duty.

39. *A sheriff unlawfully exacted money from B., as a condition to issuing a warrant. Can B. recover the money, as paid under duress?*

Yes. The refusal of the sheriff to perform his duty, without payment, is sufficient duress to allow recovery. Dew v. Parsons, 2 B. & Ald. 562.

SALES.

I. Generally.

1. *Define a sale and state its requisites.*

A sale is the transfer of the absolute or general property in a thing for a price in money. Benjamin on Sales (6th Am. ed.), § 1.

The requisites of a sale are: (1) A mutual agreement, as in all contracts; (2) competent parties; (3) a money consideration; (4) a transfer of the absolute or general property in the thing sold from the seller to the buyer.

The money price is what distinguishes a sale from an exchange, or barter. 2 Kent's Com. 477. The price must be real and not nominal, and must be fixed or susceptible of computation. When the parties agree that the price shall be appraised by third parties, the price, when fixed, becomes a part of the contract, but until it is so fixed, property cannot pass even when one of the parties prevents the appraisal, unless the property has been delivered to the buyer, when the price would be its reasonable value.

A transfer of property is *necessary*. Thus, where a vessel is put up at auction and bid in by the owners' agent to prevent loss, there is no sale. Barker v. Marine Ins. Co., 2 Mason (U. S.), 369.

2. *How far does the rule of caveat emptor apply to sales?*

The rule is applicable in almost all cases. The general rule is that no one can make a valid sale except the owner or his lawful representative, and the real owner may recover from one claiming by a sale from a person not the owner. Benjamin on Sales (6th Am. ed.), §§ 641, 965.

There is one great exception to this rule, however, in the case of negotiable securities. The transfer of such a security to a *bona fide* purchaser for value, without notice, vests a good title in the purchaser, though the seller had no title whatever. Benjamin on Sales (6th Am. ed.), § 15. See Bills and Notes, Ques. 13-24.

3. *A. contracts to sell certain goods, which, unknown to him, have been destroyed by fire. Has a sale taken place?*

No. The last requisite of a sale, the transfer of property, is impossible, if the property has ceased to exist.

"There must be a thing sold, which forms the subject of the contract. If, then, ignorant of the death of my horse, I sell it, there is no sale for want of the thing sold. For the same reason, if, when we are in Paris, I sell you my house, both being ignorant that it has been wholly, or in great part, burnt down, the contract is null, because a house, which was the subject of it, did not exist; the site and what is left of the house are not the subject of our bargain, but only the remainder of it." Pothier, *Contrat de Vente*, 4; Benjamin on Sales (6th Am. ed.), § 76.

4. *Can a farmer make a good sale of his anticipated crop of potatoes a month after they are planted?*

The general question of whether a valid sale can be made of property not yet in existence depends upon the character of the property. If it has a potential existence and represents the natural product of property *already belonging* to the seller, it may be the subject of a sale. On this ground a growing crop may be sold. Briggs v. U. S., 143 U. S. 346.

It has even been held in some jurisdictions that there may be a sale of crops to take effect at a future day, even if they are not yet planted or sowed, particularly if the buyer takes possession before the intervention of third persons. Everman v. Robb, 52 Miss. 653; s. c., 24 Am. Rep. 682. Alabama and Indiana have also so held. See also Colten v. Willoughby, 83 N. Car. 75; s. c., 35 Am. Rep. 564, where it was held, that crops must have been planted, though they need not have sprouted.

But in Comstock v. Scales, 7 Wis. 159, it was held that a mortgage could not operate upon a crop which did not yet present the appearance of growing corn, having but just been planted, and held it error to instruct the jury that as soon as the grain was sowed it became the subject of mortgage. See also to the same effect, Cressey v. Sabre, 17 Hun (N. Y.), 120; Hutchinson v. Ford, 9 Bush (Ky.), 318; s. c., 15 Am. Rep. 711. A similar principle is shown in Milliman v. Meher, 20 Barb. (N. Y.) 37; Redd v. Burrus, 58 Ga. 574; Shaw v. Gilmore, 81 Me. 396.

5. *A. sells property to B. which he does not own at the time but acquires later. Who holds the title to the property when it is so acquired?*

The better view is that A. would have the title but would hold it in trust for B. The title cannot pass to B. at the time of the contract, as A. has no title to give, and it does not pass when the property is acquired, as A. does nothing to pass it. Equity will, however, impress a trust upon the property. But to vest even the beneficial interest in B., the property must be described in the contract in such a manner as to be capable of identification. Equity will not enforce this trust

against third persons who are *bona fide* purchasers from A. Hurst v. Bell, 72 Ala. 336.

It has been held that there is no difference between the rule in equity and at law, and that in the above case the legal title would pass to B. when the property was acquired. Moody v. Wright, 13 Met. (Mass.) 17; s. c., 46 Am. Dec. 706. But this view is certainly not accurate on strict principles and has been very properly criticised in Brett v. Carter, 2 Low. (U. S.) 458.

II. SALE DISTINGUISHED FROM OTHER CONTRACTS.

a. FROM BAILMENTS.

6. *A. sends grain to B.'s mill, under the agreement that he shall receive an equivalent amount of flour in exchange, though not made from the identical grain. Before the flour has been returned, the grain is destroyed by fire. Upon whom does the loss fall?*

Upon B. The transaction is a sale of the grain, and title passes to B. upon the delivery of the grain. He must, therefore, suffer the loss by fire, and is still a debtor to return the flour. Woodward v. Semans, 125 Ind. 331; Reherd v. Clem, 86 Va. 374.

On the other hand, the transaction would be a bailment if the flour were to be made out of the identical wheat delivered. Inglebright v. Hammond, 19 Ohio, 337; s. c., 53 Am. Dec. 430; Ashby v. West, 3 Ind. 170.

The above cases bring out the exact distinction between a sale and a bailment. When the identical thing delivered is to be returned it is a bailment, though the property may be returned in an entirely different form. But where the other party is not required to return the specific property in any form, but may give entirely different property of an equal value, as cider for apples, or flour for wheat, the transaction is a sale.

In Slaughter v. Greene, 1 Rand. (Va.) 3; s. c., 10 Am. Dec. 488, the court held exactly *contra* to the above decisions upon the case put in the question, maintaining that a miller was liable as bailee and not as owner in case of fire. Seymour v. Brown, 19 Johns. (N. Y.) 44, also holds the same way, but that case was expressly overruled in Smith v. Clark, 21 Wend. (N. Y.) 83.

Where goods are delivered to be returned within a reasonable time, if not suitable, there is a bailment until the expiration of such time, but after that time title passes unless the buyer has given notice of disapproval. Hunt v. Wyman, 100 Mass. 198; Childs v. O'Donnell, 84 Mich. 533.

But where the right of return depends solely upon the option of the purchaser and not upon the fitness of the goods, title passes at once subject to the right of return. Such is the case where a wholesale dealer sells goods to a retailer to be returned by him if not sold. Story on Sales, § 249; Crocker v. Gullifer, 44 Me. 491.

b. FROM PLEDGE OR MORTGAGE.

7. *A. borrows $500 from B.; subsequently A. transfers to B. property, valued at $500. When would the transaction be a pledge and when a sale?*

The test applied in these cases is this: If the debt, on account of which the transfer is made, is not satisfied by the delivery, the transaction is a pledge or mortgage; if it is extinguished, it is a sale. Benjamin on Sales (6th Am. ed.), p. 9.

Again, suppose A. delivers property to B., who pays A. $100, and at the same time A. reserves the right to reclaim the goods on payment of a fixed price. If. B. can compel the payment the transaction will be held a loan or pledge of the goods, especially if the fixed price is the same amount paid on delivery. If it is optional with A. whether or not he will pay the price and reclaim the goods, the transaction is a sale and title passes, the vendor holding only a right to repurchase which he will lose if he does not exercise it in the time limited. Benjamin on Sales (6th Am. ed.), p. 7.

c. FROM CONSIGNMENT.

8. *A. consigns goods to B. to be sold by him at such prices as he (B.) may fix, but A. to receive the invoice price. What is the transaction?*

Where the consignee fixes the terms and is liable for a fixed price, the transaction is a sale. Braunn v. Keally, 146 Penn. St. 519.

Where, however, the consignor regulates the price and terms of sale the consignee is an agent and the contract one of bailment merely. Nutter v. Wheeler, 2 Low. 346.

III. THE PASSING OF TITLE.

9. *In a sale of goods, when does the title pass?*

The title passes as soon as the contract is concluded by which the parties intend to give and acquire title. And this is the case regardless of the fact that the goods may still be in the hands of the seller, or are unpaid for. Tome v. Dubois, 6 Wall. (U. S.) 548; Webber v. Davis, 44 Me. 147.

In deciding whether or not the title has passed by the contract the intention of the parties is the first and only consideration. Lester v. East, 49 Ind. 588; Cook v. Van Horne, 76 Wis. 520.

The question of when the title passes is one of the utmost importance. When property is destroyed which has been the subject of a contract of sale, the settling of the question of whether or not title has passed determines upon whom the loss must fall, and the settlement of the same question often determines also the rights of creditors or of a subsequent purchaser from one of the parties. Lingham v. Eggleston, 27 Mich. 324; Ricker v. Cross, 5 N. H. 570.

A distinction must always be noted between cases where A. sells to B., and cases in which he only *agrees* to sell. In the latter, B. is not the loser if the goods are lost; and he has only a right of action for damages if the contract is broken. Zwisler v. Storts, 30 Mo. App. 163.

IV. RULES FOR CONSTRUING INTENTION AS TO THE PASSING OF TITLE.

10. *What are the rules for determining when title passes, in cases where the intention of the parties is not distinctly expressed?*

In contracts for the sale of property the parties often fail to express their intention as to when title shall pass, or express it too imperfectly to allow of enforcement. In such cases there are certain well-recognized rules of construction which are followed to determine when the title passes.

a. Sale of Specific Chattel Unconditionally.

Where the subject of the contract is agreed upon and is ready for immediate delivery, the law presumes an immediate passing of title. This rule is never questioned where the price has been paid or where credit is expressly given. In Martindale v. Smith, 1 Q. B. 395, Lord Denman said: "The sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession, till that price be paid. But that default of payment does not rescind the contract." It is held in many jurisdictions, that where the sale is for cash, payment is a condition precedent to a passing of title. Hammett v. Linneman, 48 N. Y. 599. Massachusetts, Minnesota, Vermont, Michigan, Texas and Arkansas are among the States holding similarly. The better view, however, seems to be that held by the English courts, and by some of the States, that in such a case title passes at once, reserving to the seller, however, a lien upon the goods for the purchase price. By this doctrine the seller is secured as to the price, but the risk of loss is placed upon the buyer, who is the party in default. Magee v. Billingsley, 3 Ala. 679. This view is favored by the courts of Maine, North Carolina, Maryland and New Jersey.

But in all jurisdictions holding that payment is a condition precedent, the jury may find that the condition is waived, if the seller makes a complete delivery, without expressly reserving title. Farlow v. Ellis, 15 Gray (Mass.), 229; Parker v. Baxter, 86 N. Y. 586.

b. Sale of Specific Chattel Conditionally.

Where, by the agreement, anything remains to be done by the seller to put the goods into a deliverable condition, title will not pass until such work has been done. Thus, the testing of a ma-

chine, if agreed upon, would be a condition precedent to the passing of the title; and in general, where the price depends upon the quantity or quality of the goods, the weighing, measuring or testing of them are conditions precedent to the passing of the title. Thus, as in the rule above, the law throws upon the party in default the risk of the loss of the goods, so long as he is in default. Foster v. Ropes, 111 Mass. 10; Locke v. Priestly, etc., Co., 71 Mich. 263, 266.

c. Where Chattels are not Specified.

1. GENERALLY.

Where the subject of the contract is not specified, but consists, *e. g.*, of goods to be manufactured or goods not forming a specific lot, title does not pass until there is an appropriation of them to the contract. Courtright v. Leonard, 11 Iowa, 34; Benjamin on Sales (6th Am. ed.), § 310.

2. PART OF A UNIFORM MASS.

Where, however, the contract is for the sale of a portion of a uniform mass, as 100 barrels of flour from a total of 500 barrels, it has been held by some courts that no appropriation is necessary to pass title. Kimberly v. Patchin, 19 N. Y. 330, is the leading American case favoring this view. And the same view is held in Virginia: Pleasants v. Pendleton, 6 Rand. 473; in Florida: Watts v. Hendry, 13 Fla. 523; in Kansas: Kingman v. Holmquist, 36 Kan. 735; and in Michigan: Wagar v. Detroit, etc., R. R. Co., 79 Mich. 648; Merchants, etc., Bank v. Hibbard, 48 id. 118.

But this view is not good on principle and is contrary to the great mass of authority, an appropriation being held necessary in such a case in almost all of the jurisdictions Ferguson v. Northern Bank, 14 Bush (Ky.), 555, and authorities cited. In Blackburn on Sales, p. 20, the learned author says: "Until the parties are agreed as to the specific identical goods, the contract can be no more than a contract to supply goods answering a particular description; and since the vendor will fulfill his part of the contract by furnishing any parcel of goods answering that description, it is clear that there can be no intention to transfer the property in any particular lot of goods more than another, until each has ascertained which are the very goods sold."

An apparent exception to this rule exists in the case of grain in elevators. The depositor of 1,000 bushels may in such a case sell that amount and give a good title to it without separating it from the common mass. This rule is explained by the understood custom of the trade to sell grain in that way, which custom raises a presumption of the intention of the parties to pass a title *in common*, whereas the ordinary presumption is that the parties intend to pass title *in severalty*, for which separation and an appropriation is necessary. Tiedeman on Sales, § 88; Cushing v. Breed, 14 Allen (Mass.), 380; s. c., 92 Am. Dec. 777; Merchants, etc., Bank v. Hibbard, 48 Mich. 118.

3. SUBSEQUENT APPROPRIATION.

Where the goods forming the subject of the contract are not specified, there may yet be a later appropriation made with the consent of the buyer, which supplies the only element lacking to complete the sale. Where A. orders B. to ship "1,000 bushels of wheat," there is no sale, but B. has implied authority to appropriate grain of the quality ordered, and when he makes such an appropriation by delivering the grain to the carrier, the sale becomes complete and title passes. But to make a delivery to a *carrier* such an appropriation as to pass the title and throw the risk of loss upon the buyer, the seller must have parted with control over the goods. Until he does so he may change his mind. Reed v. Phila., etc., R. R. Co., 3 Houst. (Del.) 176; Robinson v. Pogue, 86 Ala. 261.

In Aldridge v. Johnson, 7 E. & B. 885, a leading case on the point of subsequent appropriation, there was a contract for the purchase of 100 quarters of barley out of bulk in a granary. The buyer agreed to send his own bags, which were to be filled and taken to the station. The seller filled part of the bags and then, in anticipation of bankruptcy, emptied them again into the bulk. The court held that the filling of the bags was an appropriation which passed the title. Campbell, Ch. J., said: "As soon as each sack was filled with barley, *eo instanti*, the property in the barley in the sacks vested in the plaintiff."

There is also a sufficient appropriation, where, in the execution of a contract, A. consigns goods to B., or where A. delivers goods to a warehouseman, under the agreement, express or implied, that he shall hold the goods as bailee for the buyer. The St. Joze Indiano, 1 Wheat. (U. S.) 208; Hunter v. Wright, 12 Allen (Mass.), 548.

It must be remembered, however, that an appropriation is not made when the seller merely expresses his intention to select certain goods, no matter how definite his intention may be. Thus, where A. had agreed to sell a boat-load of coal, and to fill the boat, it was held, that title did not pass until the boat was completely full. Hayes v. Pittsburg, etc., Co., 33 Fed. Rep. 552.

The seller must exercise the power of appropriation in accordance with the terms of the contract. The title will not pass, if he sends a larger quantity of goods than ordered, or a smaller quantity, or goods of a different quality. In such cases there is no consent, by the buyer, to the appropriation.

In Cunliff v. Harrison, 6 Exch. 903, A. ordered ten hogsheads of claret and B. sent fifteen.. A. refused to keep any of the hogsheads, and it was held that the action for goods sold and delivered would not lie, as no specific hogsheads had been appropriated according to the contract and so no property had passed.

4. GOODS TO BE MANUFACTURED.

Where the goods are to be manufactured upon the order of the buyer, the same principles apply, and the title does not pass until

the goods are finished and appropriated to the contract. Goddard v. Binney, 115 Mass. 450; Moody v. Brown, 34 Me. 107.

The rule is not altered by a provision in the contract for the payment of the price by installments, at various stages of the work. Wollensak v. Briggs, 119 Ill. 453; Wright v. Tetlow, 99 Mass. 397; Andrews v. Durant, 11 N. Y. 35; s. c., 62 Am. Dec. 55. But see Sandford v. Wiggins Ferry Co., 27 Ind. 522, which, contrary to the other States, follows the rule laid down by the English courts, that where a vessel is being built and paid for in installments at certain stages of the work, the title to the part built passes upon the payment of each installment. But the soundness of this rule is seriously questioned by the English courts themselves. Clarke v. Spence, 4 A. & E. 448.

And the rule also remains the same, even when the entire price is prepaid, or where the buyer superintends the work. Halterline v. Rice, 62 Barb. (N. Y.) 593.

A few of the States hold that, where an appropriation is made by the seller, a subsequent acceptance of the manufactured article is necessary by the buyer before title passes. Moody v. Brown, 34 Me. 107; s. c., 56 Am. Dec. 640; Rider v. Kelley, 32 Vt. 268; s. c., 76 Am. Dec. 176. But principle and the weight of authority are against this view. If the goods are made in accordance with the terms of the contract for their manufacture, no other assent is necessary to the appropriation of the goods to the contract, and title passes at once upon that appropriation. Bookwalter v. Clark, 11 Biss. (U. S.) 126; Higgins v. Murray, 73 N. Y. 253.

d. Reservation of Jus Disponendi.

It is to be constantly kept in mind that all of the above rules are merely rules of *construction*, as to the intention of the parties regarding the passing of title, and are of application only when that intention is expressed solely by the acts or circumstances referred to. As has been stated before, where the parties, by their contract or their actions, have expressed their intention unequivocally as to when title shall pass, these rules have no application whatever. If, for instance, the seller ships goods and takes a bill of lading, making the goods deliverable to himself, no appropriation of the goods to the contract will pass the title to the buyer. The bill of lading rebuts any possible presumption as to the passing of the title, and shows that the seller intended to retain the *jus disponendi* of the goods. So, also, where the seller draws a bill of exchange on the buyer to be paid or accepted before the bill of lading is to be delivered, the seller's intention to keep control of the goods is equally clear, and no inferences can be drawn against it. Daws v. Nat. Exch. Bank, 91 U. S. 618; Nat. Bank v. Merchants' Nat. Bank, id. 92.

But if the seller sends the bill of lading to the buyer, and does not attach to it the bill of exchange, the title will pass, though the bill is not honored. *Ex parte* Banner, 2 Ch. Div. 278.

V. PLACE WHERE SALE TAKES PLACE.

11. *A State statute forbids the sale of liquors within the State. A salesman for a New York house takes an order in that State and the liquors are sent from New York C. O. D. Has the statute been violated?*

No. The sale, i. e., the transfer of title, takes place, as shown above, at the place where the goods are shipped, and thus appropriated to the contract. The terms C. O. D. do not prevent the title from passing, but simply give the seller a right to withhold delivery until the purchase money is paid. Commonwealth v. Fleming, 130 Penn. St. 138; State v. Hughes, 22 W. Va. 757; Tegler v. Shipman, 33 Iowa, 194.

The State of Vermont, almost alone, has held the contrary view, viz.: that title passes when the goods are delivered by the carrier to the consignee, and that the sale is, therefore, a violation of the statute. State v. O'Neil, 58 Vt. 160. In this same case, 144 U. S. 333, the Supreme Court held that the place where the sale took place was not a Federal question, and that the ruling of the Vermont court could not be reviewed, but the three dissenting justices held, that the sale took place where the liquors were separated and shipped.

VI. PERFORMANCE OF CONTRACT.

a. Delivery.

1. THE PLACE.

12. *A. sells two parcels of goods to B., and notifies him that they are ready to be taken away. B. does not come for them and A. brings an action for goods bargained and sold to recover the price of one parcel, and sues for goods sold and delivered as to the other parcel. B. defends both actions by pleading that A. has not delivered the goods. How should the cases be decided?*

The law, in the absence of express stipulation, does not require the seller to make an *actual* delivery of the goods, but simply to place the goods within the buyer's power, so that he may at once remove them. A., therefore, had made a sufficient delivery to sustain an action for goods bargained and sold, although the goods had not left his possession. Smith v. Wheeler, 7 Oreg. 49; Benjamin on Sales (6th Am. ed.), § 1018.

On the same principle, where the contract is silent upon the subject, the place where the goods are at the disposal of the buyer is where they are when sold, "unless some other place is required by the nature of the article, or by the usage of trade, or the previous course of dealing between the parties, or is to be inferred from the circumstances of the case." Hatch v. Standard Oil Co., 100 U. S. 134; Benjamin on Sales (6th Am. ed.), § 1022.

But to sustain an action for goods sold and delivered, an actual delivery is necessary; and in the second action, therefore, B.'s de-

fense would be good. Atwood v. Lucas, 53 Me. 508; s. c., 89 Am. Dec. 713.

Where the seller is required to send the goods to the buyer, delivery to a carrier is equivalent to delivery to the buyer himself, and passes title. The carrier is the agent for the buyer for the transportation. Benjamin on Sales (6th Am. ed.), §§ 490, 491, 1040.

The goods, however, must be forwarded in the usual way supposed to be in the contemplation of the parties. Comstock v. Affoelter, 50 Mo. 411. And the seller must put the goods in proper condition for transportation, and have a proper bill of lading issued, etc. Finn v. Clark, 12 Allen (Mass.), 522; Benjamin on Sales (6th Am. ed.), § 1029. He must also follow shipping directions explicitly, where there are any, or he will be liable for any loss which may occur. Wheelhouse v. Parr, 141 Mass. 593; Benjamin on Sales (6th Am. ed.), p. 912 b. And the buyer must be given notice of the time and place of shipment. Bradford v. Marbury, 12 Ala. 520.

2. TIME OF DELIVERY.

13. *By the contract of sale A. is to call for the goods sold within ten days. He does not call for them within that time, and when he does call for them later, delivery is refused. What remedy has he?*

He has none. Where the time is fixed by the contract, it controls, and A. having failed to call for the goods within the time required by the contract, cannot compel delivery later. Blossom v. Shotter, 66 Hun (N. Y.), 48; aff'd, 128 N. Y. 679. So also where the seller fails to make delivery within the specified time, the buyer need not accept the goods, if offered at a later time. Cleveland Rolling Mill Co. v. Rhodes, 121 U. S. 255.

In equity, however, time is not always deemed to be of the essence of the contract, unless the parties have so treated it or it follows necessarily from the circumstances of the contract. Carter v. Phillips, 144 Mass. 100.

Even where one tender of the goods has been refused for good reason, if the time for delivery has not expired the seller may still tender another delivery, which must be accepted, if good. Borrowman v. Free, 4 Q. B. Div. 500.

The time of delivery may be postponed at the verbal request of either party, but in such a case either buyer or seller may still insist upon the performance of the contract at any time, *unless* the agreement of postponement is a new contract reduced to writing, so as to satisfy the Statute of Frauds. Hickman v. Haynes, L. R. 10 C. P. 598; Benjamin on Sales (6th Am. ed.), §. 216.

But if the agreement for the performance of the contract at a different time is made after the time for performance has passed, a new consideration is necessary. Hill v. Blake, 48 N. Y. Super. Ct. 253; aff'd, 97 N. Y. 216.

3. RIGHT TO INSPECT.

14. *A. notifies B. that goods sold to him are ready for delivery, but when B. seeks to inspect them he is not allowed to open the cases. He then refuses to accept delivery. Has he a good defense to an action for goods bargained and sold?*

Yes. The seller must give the buyer an opportunity to examine the goods to ascertain that they are in accordance with the terms of the contract, and without such an opportunity the delivery is not valid. Isherwood v. Whitmore, 11 M. & W. 347; Erwin v. Harris, 87 Ga. 333; Benjamin on Sales (6th Am. ed.), § 1042, p. 912 c.

4. DELIVERY BY INSTALLMENTS.

15. *A. contracts for the sale of* 5,000 *tons of rails, agreeing to ship* 1,000 *tons per month. He ships but* 400 *tons in the first month, and* 800 *tons in the second. Must the buyer go on with the contract?*

No. Where the contract of sale is entire, delivery to be made by installments, a failure to deliver (or accept) a single installment gives the injured party a right to rescind the entire contract, and sue for the damages of the breach. Norrington v. Wright, 115 U. S. 188, and cases there discussed.

But where the contract is not entire, but consists of several independent agreements, a breach of one gives no right to rescind. Johnson v. Allen, 78 Ala. 387; s. c., 56 Am. Rep. 34.

5. CONSTRUCTIVE DELIVERY.

16. *A. contracts to sell certain bulky goods to B., and as a delivery of them delivers the key of the warehouse where they are stored. B. objects to the form of delivery. Is his objection good?*

No. Where goods cannot well be delivered manually a constructive delivery will suffice. Lord Ellenborough says in Chaplin v. Rogers, 1 East, 192:

"Where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by the delivery of other *indicia* of property." See also Benjamin on Sales (6th Am. ed.), §§ 1043, 1044. The act relied upon as a constructive delivery should, however, be indicative of a purpose to pass the property absolutely to the buyer. Barrett v. Turner, 2 Neb. 172. Thus, there is good constructive delivery in the case of a transfer of a warehouse receipt; Davis v. Russell, 52 Cal. 611; or of a bill of sale; Whipple v. Thayer, 16

Pick. (Mass.) 25; or of a bill of lading for goods in transit. Benjamin on Sales (6th Am. ed.), § 1044.

So, also, where cattle are roaming at large, collecting them and branding with buyer's name is held sufficient delivery. Walden v. Murdock, 23 Cal. 541; s. c., 83 Am. Dec. 135.

b. Acceptance.

17. *A. ships B. certain goods, and B. sends word that he will not accept the goods as they were not shipped within the time agreed. He later writes, complaining of the amount of freight charged, and saying that he will do the best he can to sell the goods. Have the goods been accepted?*

Acceptance is more than a mere *receipt* of the goods. It includes a receipt in accordance with the terms of the contract, and with an intention to retain the goods. If the goods are not tendered in accordance with the terms of the contract, the buyer need not return them, and is protected if he simply notifies the seller of his nonacceptance, and that the goods are held at the seller's risk. Wartman v. Breed, 117 Mass. 18; Benjamin on Sales (6th Am. ed.), p. 912 d. But if the conduct of the buyer is such as to show an acceptance and an intention to retain the goods, he is bound. In the case put, the second letter would be a sufficient acceptance and would be a waiver of all former objections. Hayner v. Sherrer, 2 Ill. App. 536; Benjamin on Sales (6th Am. ed.), § 1051.

So also a buyer is bound, if he does not exercise his right to reject the goods within a reasonable time; Hirshorn v. Stewart, 49 Iowa, 418; Treadwell v. Reynolds, 39 Conn. 31; or if he does any act in connection with the goods which he would only be entitled to do as owner. Brown v. Foster, 108 N. Y. 387. In such cases, the buyer is held to have waived any objections which he may have had a right to make.

Even when goods are sent without being ordered, the party to whom they are sent may render himself liable for the price of the goods, by exercising the rights of ownership over them. Bartholomae v. Paull, 18 W. Va. 771; Schouler on Personal Property (2d ed.), § 407.

Acceptance may, however, be conditional upon some further act to be done by the seller, in which case the buyer is not liable for the goods until the condition has been performed. Belt v. Stetson, 26 Minn. 411.

18. *A. orders certain cards, subject to his acceptance of a proof. Proof is submitted and approved and the cards are then delivered with a material misprint which had been overlooked by A. A. refuses to accept the cards. Has the printer any remedy?*

Yes. He can recover the contract price for the cards. Acceptance once made is conclusive and binding upon the purchaser.

Giles Lithographic, etc., Co. v. Chase, 149 Mass. 459. And a buyer not only waives any objection as to the quality of the goods by acceptance, but he also waives objection as to quantity, or that the goods were not delivered within the time required. Story on Sales (4th ed.), § 405; Benjamin on Sales (6th Am. ed.), § 1051, note; Baldwin v. Farnsworth, 10 Me. 414; s. c., 25 Am. Dec. 252. The buyer may, however, show a qualified acceptance and a reservation of a right to claim damages for delay. Bock v. Healy, 8 Daly (N. Y.), 156; Baldwin v. Farnsworth, 10 Me. 414. But see Adams v. Helm, 55 Mo. 468 (*contra*).

19. *After accepting goods, A. finds that there has been a breach of warranty in a certain particular. Under what circumstances, if any, can he obtain redress for such a breach?*

The acceptance of goods is not a waiver of a right to sue for a breach of warranty, unless the breach was manifest at the time the goods were received. Except under such circumstances A. could recover the injury suffered in the above case. Clements v. Smith, 9 Gill (Md.), 156; Bagley v. Cleveland, etc., Co., 21 Fed. Rep. 164.

20. *A. sells certain goods to B. without fixing any terms for payment. A. refuses to deliver without a cash payment, and B. sues for nondelivery. Can he recover?*

No. "Where no time is agreed on for payment, it is understood to be a cash sale, and the payment and the delivery are immediate concurrent acts, and the vendor may refuse to deliver without payment, and if the payment be not immediately made the contract becomes void." 2 Kent's Com. (13th ed.) *497.

Where, however, credit is to be given by the contract, the buyer has a right to the possession of the goods at once, and the seller has no right of action until the time of credit has expired, and an agreement to pay before the expiration of the time of credit is void for want of consideration. Heritage v. Lawrence, 2 F. & F. 532.

If the seller makes delivery without requiring payment, credit will be implied, and the buyer has a reasonable time after a demand, for making payment. Anstedt v. Sutter, 30 Ill. 164.

21. *A. sends goods to B., with a request to "remit as soon as received." B. sends the money by mail and it is never received. A. sues for the price of the goods. Can he recover?*

The purchaser is discharged, if he makes payment as directed by the seller, and it is held that in such a case as the above, the language of A. would, under ordinary circumstances, authorize B. to send the money by mail. When such a course is authorized, either expressly or by a course of dealing, the buyer

is discharged when he has deposited the money in the mail. From that time the money is at the risk of the seller. Gurney v. Howe, 9 Gray (Mass.), 404; Benjamin on Sales (4th Am. ed.), § 710.

VII. AVOIDANCE OF THE CONTRACT.

22. *Upon what grounds may a contract of sale be avoided?*

Upon four grounds:

a. Mistake.
b. Failure of consideration.
c. Fraud.
d. Illegality.

a. Contracts of sale, like all other contracts, can only be effected by mutual assent; and where, through some mistake of fact, each was assenting to a different proposition, there is no binding contract. Raffles v. Wichelhaus, 33 L. J. Exch. 160; Stoddard v. Ham, 129 Mass. 383. See also Contracts, Ques. 3, 9.

b. Where a note is given in payment of goods and is due before the goods are to be delivered, if it is not paid at maturity the goods need not be delivered. The seller can refuse to deliver the goods and avoid the contract on the ground of failure of consideration. Bruce v. Burr, 5 Daly (N. Y.), 510.

c. A contract of sale may be rescinded on the ground of fraud, where the plaintiff can show (1) that the alleged representations were made; (2) that at the time they were made they were false, and the purchaser knew them to be so; (3) that they were such as would deceive a prudent man; (4) that they were believed by the seller, and induced him to part with his property. Gregory v. Schoewell, 55 Ind. 101.

d. The illegality of a contract is also a good ground for avoiding it. Thus, in the States where Sunday contracts are held illegal, actions based upon such contracts cannot be maintained in a court of law or equity, either to enforce the obligation or to secure its fruits in favor of either party. Myers v. Meinrath, 101 Mass. 366.

VIII. BREACH OF THE CONTRACT.

a. By the Seller.

1. GENERALLY.

23. *A. agrees to sell B. certain goods, but fails to transfer title to B., or to deliver the goods. The value of the goods has increased, and B. sues for the possession of the goods. Under what circumstances can he obtain them?*

Under no circumstances. Where title has not passed, the purchaser's only right of action is for damages for a failure to deliver the goods. Boutell v. Warne, 62 Mo. 350. For the measure of damages under such circumstances, see Damages, Ques. 10-13.

Where title has passed, the buyer may sue for damages for non-delivery or may maintain trover; and in some cases, where the subject of the sale has a peculiar value and cannot be replaced in the general market, the buyer may even enforce specific performance. Benjamin on Sales (6th Am. ed.), § 1340; Bispham's Eq. (5th ed.) § 365; Adams v. Messenger, 147 Mass. 185. See Equity, Ques. 19.

2. BREACH OF WARRANTY.

24. *What is the meaning of a warranty in the law of sales?*

The word "warranty," as used in the law of sales, means a *collateral* agreement surviving the passing of the title, that the goods shall be of a special quality. A warranty does not prevent the passing of the title, and a breach of it gives the buyer a right of action after the title has so passed.

In contracts the word has a widely different meaning, not signifying a *collateral* agreement, but a part of the contract, and a condition of it; but in sales the word should be limited to the above meaning. Heyworth v. Hutchinson, L. R. 2 Q. B. 447.

25. *A. sells B. certain specific goods, with an express warranty as to their good condition. Their condition proves not to be as warranted, and B. refuses to pay for them and offers to return them. A. refuses to take them back and sues for the contract price. Can B. defeat the action upon proof of his offer to return the goods? What effect will be given to the breach of warranty?*

By the rule, as fixed in most jurisdictions, where the title has passed to B., A. would not be forced to take the goods back. A sale with a warranty is not a sale upon a condition precedent with a right to return the goods if the warranty is broken. The warranty is merely a collateral agreement, a breach of which gives the other party the right to recover in damages. Street v. Blay, 2 B. & Ad. 456; Heyworth v. Hutchinson, L. R. 2 Q. B. 447. B.'s offer to return the goods would not, therefore, be a good defense, in most jurisdictions.

It is not to be taken for granted, however, that in every case of a warranty there is no chance to return the goods, even though the goods are specific. The fact that they are specific only raises a presumption that the title does pass and the passing of the title is the test. Thus, in criticising Heyworth v. Hutchinson, *supra*, Benjamin holds that the goods were not specific, and that title did not pass, and on that ground differs with the case. Benjamin on Sales (6th Am. ed.), § 1345. It is to be noticed, however, that the court was specifically given the right to construe the facts (p. 450), and they held that the goods were specific.

In a number of jurisdictions it is held that there is a right to return the goods, and that the warranty is in the nature of a condition precedent. Bryant v. Isburgh, 13 Gray, 607. Though not technically correct, this view corresponds with the general ideas of ordinary purchasers, and is perhaps more sensible. A purchaser does not care to have poor goods upon his hands. This view is held in Pennsylvania, Massachusetts, Maine, Wisconsin, Illinois, Iowa. See Benjamin on Sales (6th Am. ed.), §§ 623-634, 1341.

The original idea was, that a warranty was an agreement so separate from the contract of sale itself, that the buyer could only obtain redress for a breach of warranty by a cross-suit, and could not even set it up in defense, to reduce the damages. This rule, however, has yielded to the influence of common sense and convenience; and to prevent litigation and expense it has been repeatedly held in the United States, without statutory provisions, that where a warranty has been broken by fraud or otherwise, such facts may be relied upon in defense to an action upon such contracts, to mitigate damages. Withers v. Greene, 9 How. (U. S.) 213, 224-231; Benjamin on Sales (6th Am. ed.), § 1343.

26. *A. sold cotton to B. "to arrive," and guaranteed it equal to sample. If the quality was inferior a fair allowance was to be made, as fixed by arbitration. Upon arrival the cotton proved to be of an entirely different kind, requiring different machinery, and B. refused to accept it, or to submit to arbitration on the question of allowance. Can he be compelled to accept the cotton and sue for breach?*

No. An agreement to accept the decision of an arbitrator, fixing an allowance for the difference in the value of the goods, does not apply where there is a difference in *kind*, but only where the difference is in quality. Azemar v. Casella, L. R. 2 C. P. 431, and ib. 677.

27. *A. sold ice to B., without inspection, to be shipped. When it arrived it was found to be poor and not salable. A. sued for the value of the ice. Could he recover?*

No. In such a contract of sale, there is an implied warranty, as the courts usually express it, that the goods sold will be merchantable. Perhaps it is as well, however, to say that the *meaning of the contract* is, that the goods will be fit to put upon the market. Murchie v. Cornell, 155 Mass. 60.

28. *A. sold certain goods to B., supposing them to be as represented, and insisting that they should be examined before the purchase. B. only examined part of the goods and then paid for all of them. Later, he discovered that part had been fraudu-*

lently packed, and sues for the damages sustained. What would be his measure of damages? Suppose A. had been the manufacturer?

Where A. is not the manufacturer and knows no more about the goods than B., the latter would have no right of recovery. When there is an opportunity of examination and there is no fraud on the part of the seller, there is no warranty, and the rule of *caveat emptor* applies. Barnard v. Kellogg, 10 Wall. 383; Benjamin on Sales (6th Am. ed.), § 641.

It is, however, held in a few States, that a seller, even if not a maker, is liable for defects in goods, though latent, where he is told for exactly what purpose the goods are bought. In such States there is held to be an implied warranty of fitness, and the seller must lose, if the goods are not suitable for the purpose. Benjamin on Sales (6th Am. ed.), § 993, and cases cited.

If, however, A. were the manufacturer and so knew all about the goods sold, he would be held liable unless the defects were perfectly apparent. In the case of a manufacturer, the law implies a warranty that the goods shall be reasonably fit for the purpose for which they are designed, and they must conform with the specifications furnished him by the buyer. Kellogg Bridge Co. v. Hamilton, 110 U. S. 108.

But when the defect is perfectly apparent, the buyer by acceptance consents to the quality of the goods as furnished and waives all right of objection. Gaylord Mfg. Co. v. Allen, 53 N. Y. 515. See also Dounce v. Dow, 64 id. 411.

29. *A. sold a slave to B., with express warranty. B., at the time of the sale, has notice that the slave is suffering from hernia. He later sues for damages sustained by reason of the defect. Can he recover?*

Yes. The theory of a waiver of a warranty by accepting the property sold with knowledge of the defect only applies in the case of an *implied* warranty. In the case of an express warranty, the buyer may take the goods, if he desires, and rely upon his rights under the warranty to recover damages. Story on Sales (3d ed.), §§ 354, 355; Stucky v. Clyburn, Cheves Law (S. C.), 186; s. c., 34 Am. Dec. 590.

The soundness of such a rule is still more evident, when the defect is not discovered until after goods have been used in part. Day v. Pool, 52 N. Y. 416.

30. *A. was paid for certain iron which he was to make and ship, the iron to be of a specified quality. When B. received the iron he found that the quality was not as ordered, and he refused to accept it and sued for the price. Should he recover?*

Yes. Title would pass to B. when the goods were delivered to the carrier, only if the goods were of the quality ordered. If

they are of that quality they cannot be returned, but B. could not be forced to accept the goods without inspection, and the right to inspect includes also the right to reject, if the goods are not as contracted for. Pope v. Allis, 115 U. S. 363, 371-373. If the goods are destroyed *en route*, it is then a matter of evidence whether or not the goods were of the quality called for by the contract.

The principles are settled, that where the sale "is of existing and specific goods, with or without warranty of quality, the title at once passes to the purchaser, and where there is an express warranty, it is, if untrue, at once broken, and the vendor becomes liable in damages, but the purchaser cannot for that reason either refuse to accept the goods or return them. If the contract is executory and the goods yet to be manufactured, no title can pass until delivery or some equivalent act, to which both parties assent, and when offered, the vendee may reject the goods as not answering the bargain, but if the sale was with warranty, he may receive the goods, and there the same consequences attach as in the former case, and among others, the right to compensation, if the warranty is broken." Brigg v. Hilton, 99 N. Y. 517, 529.

b. By the Buyer.

31. *A. contracts with B. for the sale of certain goods. Before the title has passed, B. refuses to perform the contract. What rights has A.? Suppose the goods are already in B.'s possession?*

The buyer's breach of contract may consist either in a refusal to accept the goods or to pay for them. In either case the seller has a right of action for a breach of the contract. Benjamin on Sales (6th Am. ed.), § 1117.

Where the goods are already in the possession of the buyer, the seller may replevy them, or sue for their conversion. Story on Sales (4th ed.), § 440; Salomon v. Hathaway, 126 Mass. 482.

In the case of a refusal to accept the goods, no special tender is necessary. James v. Adams, 16 W. Va. 267. The plaintiff must, however, prove that he was ready and willing to perform his part of the contract. Thus, a mere notice that the seller is ready to deliver is not a sufficient proof of a tender to entitle the seller to recover. It proves only a willingness to deliver and not that he had the goods on hand *ready* for delivery. Lassen v. Mitchell, 41 Ill. 101; Newberry v. Furnival, 46 How. Pr. (N. Y.) 139.

The measure of damages in such a case is the difference between the agreed price and the market price at the time and place of delivery.

"Where the contract to deliver goods at a certain price is broken, the proper measure of damages, in general, is the difference between the contract price and the market price at the time when the contract is broken, because the purchaser having the money in his hands may go into the market and buy: So if a contract to accept

and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them." Tindal, Ch. J., in Barrow v. Arnaud, 8 Q. B. 595, 609.

As to what is the market value, see Damages, Ques. 11.

32. *A. orders of B. a water wheel of peculiar make and of a kind not kept in stock and not available for general sale. After the wheel is finished and tendered, A. refuses to accept it. What is the measure of damages?*

It has been held in such a case that the measure of damages is the contract price. In Bookwalter v. Clark, 11 Biss. (U. S.) 126, upon these facts, the court said:

"The case does not turn in my judgment upon the question as to whether the title to the goods has passed from plaintiffs to defendant. If the plaintiffs have fulfilled their contract and delivered or tendered delivery, this is all they can do; and if the defendants refuse to accept the goods, and being made to order they are presumably not marketable, I think the plaintiffs are entitled to recover as their true measure of damages for nonfulfillment, the contract price of the article, though it be conceded that no title has passed. The title, I think, in such cases should pass upon the rendition of judgment."

There are some *dicta* and a number of cases agreeing with the case cited, but they are not supported by principle or the weight of authority. The measure of damages, where title has not passed, should always be the actual damage suffered from a refusal to accept, regardless of whether the goods are manufactured to order or not. If the goods are not marketable the damages are increased by that fact in accordance with the terms of the rule just stated, but it is only when the title has passed by the contract, that the seller can claim the contract price *as such*. When the buyer refuses to allow the title to pass, the action is for such refusal, and the damages should be assessed on that basis. It is only in an action for goods bargained and sold, or for goods sold and delivered, that the contract price is recoverable, and "the principle concisely stated is this, that a count for goods bargained and sold can only be maintained where the property has passed." Tindal, Ch. J., in Elliott v. Pybus, 10 Bing. 512. See 21 Am. & Eng. Ency. 581, *et seq.*

Where the title has passed to the buyer, even if he has not obtained possession, the seller may pursue his legal remedies against the goods, or sue the buyer upon his refusal to pay. O'Brien v. Jones, 47 N. Y. Super. Ct. 67; Lewis v. Greider, 49 Barb. (N. Y.) 606; Story on Sales (4th ed.), § 436.

When, however, the seller has once lost possession, he becomes merely a creditor, and has no right of action against the goods.

The pleadings, where the title has passed, must be on the common counts for goods bargained and sold or goods sold and delivered, according as the possession of the goods has not or has passed. Benjamin on Sales (6th Am. ed.), §§ 1126, 1127. And the complaint must allege a complete performance. Moses v. Banker, 2 Sweeny (N. Y.), 267.

In defending the action, the buyer may as in any contract set up a breach of a warranty, a defect in the goods, default on the part of the seller giving a right to rescind, or he may show an inferior quality of the goods in mitigation of damages. "The burden of proof is upon the plaintiff to show that there was a completed sale, and that the goods sold complied with the terms of the contract." 21 Am. & Eng. Ency., pp. 592-595, and cases cited.

33. *A. contracts with B. for the sale of certain goods. B., later, refuses to accept the goods, which are still in A.'s possession. Has A. a right to sell the goods* (1) *if title has passed;* (2) *if title has not passed?*

If B. refuses to accept the goods without good cause, A. may, after waiting a reasonable time, and after notice to B. of his intention, resell the goods and hold B. responsible for the loss sustained. O'Brien v. Jones, 47 N. Y. Super. Ct. 67. In that case the court said:

"It is common to insert provision for resale in the terms of sale. But I think it may be stated as the settled rule in the United States, though not perhaps in England, that where the price remains unpaid, the right to resell exists, even in the absence of any express stipulation, and the purchaser is responsible for any loss that may occur, although he did not consent to the resale."

The resale must, however, be conducted in such a manner and at such a time and place as will bring the fair market value of the goods. Reckly v. Tenbroeck, 63 Mo. 563.

"The law in such case constitutes the seller, in possession of the goods, the agent of the buyer for the purpose of such sale. As such agent, he must act in good faith and take proper measures to secure as fair and favorable a sale as possible." Lewis v. Greider, 49 Barb. (N. Y.) 606.

It is not absolutely necessary for the seller to give the buyer notice of the time and place of the resale in addition to the notice of his intention to resell, but it is very desirable to do so in order to show good faith. Lindon v. Eldred, 49 Wis. 305; Holland v. Tea, 48 Mich. 218.

The question of whether or not title has passed does not affect the right of the seller to resell. The above rules are applied in both cases indiscriminately, in this country, though it is otherwise in England. 21 Am. & Eng. Ency., p. 596, note 1, and p. 598. See Benjamin on Sales (6th Am. ed.), § 1125.

34. *A. sells certain goods to B. and gives him possession before he is paid. Under what circumstances would he have a lien for the price?*

He could not have a lien under any circumstances, after he had parted with possession of the goods. "The right of lien depends on the possession, and to maintain it a vendor must have the actual or constructive possession of the goods. After they come into the possession of the buyer according to the terms of the contract, the lien is extinguished, and the goods cannot be reclaimed on the buyer's becoming insolvent." Parks v. Hall, 2 Pick (Mass.) 212. But see Benjamin on Sales (6th Am. ed.), § 1135.

A lien for the contract price cannot exist, by its very nature, until title has passed to the buyer. "The existence of a vendor's lien always presupposes that the title to the goods has passed to the vendee, since it would be an incongruous conception that a vendor might have a lien upon his own goods." Conrad v. Fisher, 37 Mo. App. 382. When title has passed, it exists without any special stipulation to that effect. In a sale of goods where nothing is specified as to delivery or payment, the vendor has a right to retain the goods until payment of the price. He has in all cases a lien, unless he has waived it. Benjamin on Sales (6th Am. ed.), § 1130.

It must be remembered, however, that such a lien extends only to the *contract* price, and not to any other claims held against the buyer, even if they arose in connection with the same goods. Tiedeman on Sales, § 119.

35. *How may a lien for the price of goods be divested?*

Such a lien may be divested:

1. By payment of the price in full, or tender. Corv v. Barnes (Vt. 1391), 21 Atl. Rep. 384. Part payment, however, will not operate to release any part of the goods. The lien is upon all of the goods for the entire price. Story on Sales (4th ed.), § 282.

2. By waiver on the part of the seller, either express, or implied from the giving of credit or the taking of other security. Benjamin on Sales (6th Am. ed.), § 1130; Chambers v. Davidson, L. R. 1 P. C. 296. Where, however, the security taken proves worthless, or the buyer becomes insolvent, the lien will revive, if the goods are still in the possession of the seller. Milliken v. Warren, 57 Me. 50.

3. By delivery of the goods. As stated above, the existence of the lien presupposes possession.

IX. CONDITIONAL SALES.

a. Distinguished from Bailment, Lease, Mortgage and Consignment.

36. *Define a conditional sale as distinguished from* (1) *a bailment;* (2) *lease;* (3) *mortgage; and* (4) *consignment.*

A conditional sale is a contract, the purpose of which is the passage of title from seller to buyer upon the performing of some

agreed condition, or a contract by which the vendor has a right to rescind upon the failure on the part of the buyer to perform some condition subsequent. Sellers frequently, especially in States where there are statutes requiring the registration of conditional sales, endeavor to cover up a conditional sale by misnaming the transaction, in order to deprive buyers of the power of disposing of property so sold, or prevent creditors of the buyers from levying upon them. The courts will, however, look at the real intention of the parties and give the contract its full force.

1. Thus, where A. transfers property to B., and reserves the title solely for the purpose of protecting himself until the payment of the agreed price, the transaction is a sale, though called a bailment. Sumner v. Woods, 67 Ala. 139.

In some instances courts have made a distinction between a bailment with an option to buy at a fixed price, and a contract of sale reserving title until the price has been paid, holding, in the first case, that property does not pass in favor of purchasers of the bailee, and in the second, that the property may be transferred to *bona fide* purchasers, and is subject to execution in a suit against the buyer, after it has been delivered. Crist v. Kleber, 79 Penn. St. 290; Rowe v. Sharp, 51 id. 26. See also Bean v. Edge, 84 N. Y. 510. In most jurisdictions, however, both of these transactions are, it would seem rightly, held to be conditional sales. 21 Am. & Eng. Ency., p. 631, note 1, cases cited.

2. Where a piano, the price of which is $700, is delivered to A. who pays $50 in cash and signs a contract to pay $50 per month, *rent*, for thirteen months, such an agreement is a sale, not a lease, and the piano may be levied upon by A.'s creditors. Murich v. Wright, 46 Ill. 487; Lucas v. Campbell, 88 id. 447. In Murich v. Wright (*supra*), the court said: "It was a mere subterfuge to call this transaction a lease. * * * It was a conditional sale, with a right of rescission on the part of the vendor in case the purchaser should fail in the payment of his installments, a contract legal and valid as between the parties, but made with the risk on the part of the vendor of losing his lien in case the property should be levied upon by creditors of the purchaser while in possession of the latter."

It is not, however, a conditional sale, where A. agrees to take goods for a certain time, and at the end of that time to pay for them, or return them and pay for their use for the period. In such a case there is the necessary element of compensation for the use of the thing let. Herryford v. Davis, 102 U. S. 235.

3. The question of whether a transaction is a mortgage or a conditional sale is practically settled by the real intention of the parties, and if the relation of debtor and creditor never existed between the parties, it is a conditional sale and not a mortgage. Conway v. Alexander, 7 Cranch (U. S.), 218.

Thus, where a conveyance was absolute in form and a separate paper gave a right to repurchase by a certain day, and where the transaction was not connected with a loan and there was, in fact,

no debt, such a transaction is a conditional sale, and not a mortgage. Mitchell v. Wellman, 80 Ala. 16.

4. Upon the same principle, a transfer of goods, which reserves a lien upon the goods for the purchase price, is none the less a conditional sale for being called a consignment.

b. Conditions to Passage of Title.

37. *A. contracts for the sale of certain goods to B. "to arrive," the goods being then at sea. The vessel is lost. Upon whom does the loss of the goods fall?*

The loss must fall upon A., as title never passed to B. The question of the performance of a condition precedent in sales is the same as that in other contracts; and where, by the contract, there is a condition precedent to the passage of title, that condition must be fulfilled before the title will pass. Thus, in the above case the arrival of the goods is a condition precedent to the passing of title, and the goods must arrive before A. can be relieved of the liability for their loss. Russell v. Nicoll, 3 Wend. (N. Y.) 112; Rogers v. Woodruff, 23 Ohio St. 632.

On the same principle, title to the goods will not pass where something remains to be done to the goods. Frost v. Woodruff, 54 Ill. 155. See also Ques. 7 (2) and (3) (*supra*).

So where the contract calls for delivery, at stated times, of a certain part of the goods of a fixed quality, the buyer may repudiate the entire contract, if the conditions as to delivery are not carried out by the seller. Cleveland Rolling Mill Co. v. Rhodes, 121 U. S. 255; Norrington v. Wright, 115 id. 188. Where, however, the contract is separable and not entire, a failure to deliver one installment will not be a breach of the condition as to the whole transaction. Scott v. Kittanning Coal Co., 89 Penn. St. 237; Blackburn v. Reilly, 47 N. J. Law, 290; s. c., 54 Am. Rep. 159.

On the same principle, payment may be the condition precedent. Christian v. Bunker, 38 Tex. 234. And where the contract calls for the delivery of notes in payment or where payment is made by check, the notes or check must be honored before title passes to the buyer, provided that such is the expressed intention of the parties. Watertown, etc., Co. v. Davis, 5 Del. 192, 218; Hirschorn v. Canney, 98 Mass. 149; Cole v. Berry, 42 N. J. 308 at 313. See Benjamin on Sales (16th Am. ed.) p. 27, note 17.

If payment is to be made in installments, the last one must be paid.

The delivery of the goods at a specified time or place may also be a condition precedent, the failure to perform which will give the buyer the right to rescind. Jones v. U. S., 96 U. S. 24.

Where goods are delivered on approval, to be bought if satisfactory, title of course does not pass until the goods are accepted, and until that time they remain at the seller's risk. Pierce v. Cooley, 56 Mich. 552.

38. *A. sells a horse to B., giving B. a right to return him in two days if he does not answer the description given. After the two days have elapsed, A. brings action for the agreed price, and B. defends, on the ground that the horse did not prove to be as described. Who should have judgment?*

Judgment must be given for A. Such a contract as above, with a condition subsequent, passes the title absolutely, subject only to be defeated by the return of the horse. But where the time for the performance of the condition is fixed, the sale becomes absolute when that time has elapsed, and the buyer becomes liable for the price. Moore v. Piercy, 1 Jones (N. Car.), 131.

In the above case, or in any other where the buyer acquires a good title subject to be defeated only by the nonperformance of a condition subsequent, a *bona fide* purchaser who buys before the title is so defeated acquires a perfect title. Dearborn v. Turner, 16 Me. 17; s. c., 33 Am. Dec. 630; McKinney v. Bradlee, 117 Mass. 321.

c. Rights of Third Parties.

39. *A. sells property to B., conditioned that title shall not pass until the goods are paid for. While B. is in possession of the goods his creditors levy upon them. Can A. protect himself?*

Yes. In the absence of fraud, such a condition is binding and A. can replevy the goods. Bradshaw v. Warner, 54 Ind. 58, 62; King v. Bates, 57 N. H. 446; Gould v. Howell, 32 Ill. App. 349; Cole v. Berry, 42 N. J. Law, 308, at 313; Wadley v. Buckingham, 80 Wis. 230. He must act within a reasonable time, however. Marston v. Baldwin, 17 Mass. 606.

In many States there are statutes requiring conditional sales to be recorded, and in such jurisdictions, unless the contract, or written evidence of it, is recorded, such a condition as to the vesting of the title is not valid, as against an attaching creditor or a *bona fide* purchaser, unless he has knowledge of the facts. Such statutes are in force in Arizona: Rev. Stats. (1887), §§ 2030-2038; Connecticut: (1895) § 212 (based upon Lee, etc. v. Cram, 63 Conn. 433); Georgia: Code (1895), § 2776; Iowa: Code (1897), § 2905; Kansas: Laws 1889, chap. 255; Maine: Rev. Stats., chap. 111, § 5: Minnesota: Gen. Stats. (1894), § 4149; Missouri: Rev. Stats. (1889), §§ 1255, 5180; Nebraska: Comp. Stats., chap. 32, § 26; North Carolina: Laws 1891, chap. 240, p. 195; New Hampshire: (1896) chap. 140, § 23; New Jersey: Gen. Stat. (1896), p. 891; New York: Laws 1884, chap. 315, § 1; South Carolina: Rev. Stats. (1893), § 2154; see also Talmadge v. Oliver, 14 S. Car. 522; Texas: Rev. Stats. (1895), §§ 2546-2549; Vermont: Stats. (1894), § 2290; Virginia: Code (1887), § 2462; West Virginia, Code of 1887, chap. 74, § 3, and Wisconsin, Rev. Stats. (1898), § 2317.

In some States the courts have refused to enforce the rule against *bona fide* purchasers, even without statutory enactments. Hide,

etc., Bk. v. West, 20 Ill. App. 61; Vaughn v. Hopson, 10 Bush (Ky.), 337; Dias v. Chickering, 64 Md. 348; Patchin v. Biggerstoff, 25 Mo. App. 534; Weber v. Diebold, etc., Co. (Colo. 1892), 29 Pac. Rep. 747; Stadtfield v. Huntsman, 92 Penn. St. 53.

X. BONA FIDE PURCHASERS.

40. *A. purchases a stolen horse at auction in good faith, and sells him to B., who is also ignorant of the theft, for a valuable consideration. Can the owner hold B. responsible for the value of the horse?*

Yes. The general rule is that the buyer, whether *bona fide* or not, acquires no better title than his vendor had. The rule of *caveat emptor* applies and casts upon the buyer the risk of title. Robinson v. Skipworth, 23 Ind. 311; Fawcett v. Osborn, 32 Ill. 425; s. c., 83 Am. Dec. 282.

So, if the goods are sold under judicial process, if the goods sold belong to another person than the one against whom the execution was levied, or if the property was exempt, or if the proper formalities were not observed, a *bona fide* purchaser obtains no title. Arendale v. Morgan, 5 Sneed (Tenn.), 703; Cooper v. Newman, 45 N. H. 339; Miller v. Thompson, 60 Me. 322.

On the same principle a bailee cannot give a good title. Sanders v. Wilson, 19 D. C. 555. Nor can an agent or factor, even if he has authority to sell, give a good title if he exceeds his authority, *e. g.*, when he sells goods in payment of his own debts. Gray v. Agnew, 95 Ill. 315. In many jurisdictions, however, Factors' Acts have been passed by which *bona fide* purchasers from factors who have been intrusted with the possession of the goods and documents of title, will acquire a good title if the purchase was made in the regular course of business without notice of the factor's real relation to the goods.

There are, however, some exceptions to this rule. A *bona fide* purchaser for value of negotiable instruments acquires a good title. See Bills and Notes, Ques. 14-16, *supra*. Again, one who has obtained the legal title to property by fraud, which title is voidable by the true owner, can pass to a *bona fide* purchaser for value a perfect and unassailable title. Carme v. Rauh, 100 Ind. 247; Tiedeman on Sales, § 329. Where also a principal holds out his agent as having authority, a *bona fide* purchaser gets a good title against the owner. Story on Sales (4th ed.), § 199.

41. *A. buys goods from B., who is a debtor of his, and pays no money, but credits the agreed price on B.'s debt. Can he claim the protection of a bona fide purchaser upon such a transaction?*

No. The general rule is that a pre-existing debt is not such consideration as to make a man a holder for value. In a few jurisdic-

tions, however, a pre-existing debt is good consideration. It is held to be such in *Missouri, Illinois, Wisconsin* and *Maine*. 21 Am. & Eng. Ency., p. 575, note, and cases cited.

To be a *bona fide* purchaser "the purchaser must exercise ordinary care and discretion; must give a valuable consideration; and must take the goods in good faith and without notice of the defects in the seller's title." 21 Am. & Eng. Ency., p. 574.

Actual notice of the defects in the seller's title is not necessary. If the purchaser has reason to believe from all the circumstances that the transaction is not proper, but makes no attempt to find out the facts, he cannot claim to be a purchaser in good faith. Loeb v. Flash, 65 Ala. 526; Green v. Humphrey, 50 Penn. St. 212. See Bills and Notes, Ques. 16.

XI. STOPPAGE IN TRANSITU.

42. *Who has the right to stop goods in transit, and under what circumstances may the right be exercised?*

The right of stoppage *in transitu* belongs only to vendors, or to persons in a position similar to that of vendors. Thus, an agent who was personally paid for the goods shipped, or bought them on his own credit, may stop the goods. Seymour v. Newton, 105 Mass. 272. A third person, who has advanced the price on behalf of the purchaser and has taken an assignment of the bill of lading, may also stop the goods in transit.

A vendor has a right to stop goods only in case of the insolvency of the vendee, while the goods are still in the hands of the carrier, *qua* carrier, and have not, therefore, come into the actual possession of the vendee. The right thus comes into existence after the vendee has acquired title and right of possession, but before he has actual possession. Such a right is an equitable extension of the vendor's lien, under which he can repossess himself of the goods for his protection. The right is based upon the "reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts." D'Aquila v. Lambert, 2 Eden, at p. 77; Blum v. Marks, 21 La. Ann. 268; Babcock v. Bonnell, 80 N. Y. 244.

The effect of the stoppage *in transitu* is only such as is required for the vendor's protection, as suggested above. The sale is not thereby rescinded, but the vendor regains his lien upon the goods for the purchase price, and is again placed in the same position as if he had never parted with possession. Newhall v. Vargas, 13 Me. 93; s. c., 29 Am. Dec. 489; Patten's Appeal, 45 Penn. St. 151.

43. *A. sells goods to B. and receives part payment at once. While the goods are in transit, B. becomes insolvent. Has A. the right to stop the goods?*

Yes. A part payment of the purchase price does not deprive the vendor of his right to stop the goods. He still has the right to

protect himself as to the balance of the purchase price. Howatt v. Davis, 5 Munf. (Va.) 34; s. c., 7 Am. Dec. 681.

So also the right exists, though the vendor has received conditional payment, as by bills of exchange, even though he may have negotiated them and they are outstanding unmatured. Benjamin on Sales (6th Am. ed.), §§ 1138-1140.

44. *A. ships goods to B. at Philadelphia. After the goods have arrived there, A. notifies the railroad not to deliver them to B. Would the carrier be liable in case of a delivery?*

Yes. The goods can only be stopped while in transit, and they are held to be in transit until the consignee has taken possession of them by some positive act, or so long as the carrier still holds them *as carrier*. Blackman v. Pierce, 23 Cal. 509; Chandler v. Fulton, 10 Tex. 2; s. c., 60 Am. Dec. 188. The right to stop does cease, however, where the carrier "by agreement between himself and the consignee undertakes to hold the goods for the consignee, not as carrier, but as his agent, and the same principle will apply to a warehouseman or wharfinger." *Ex parte* Cooper, L. R., 11 Ch. Div. 68, C. A.; Hall v. Diamond, 63 N. H. 565.

45. *"First" and "second" bills of lading are issued for certain goods. The carrier delivers the goods upon the presentation of the "second" bill of lading, without knowledge that the holder is not entitled to them, and that the holder of the "first" is the rightful owner. Is the carrier guilty of conversion?*

No. When the carrier has no notice of another indorsement of a bill of lading he is protected by a delivery to any person holding a good bill of lading, whether it be a "first" or "second," and is not bound, at his peril, to ask for the other parts of the bill. Glyn Mills v. East. & West. Ind. Dock Co., 7 App. Cas. 591; Benjamin on Sales (6th Am. ed.), § 1284.

46. *A. sells goods to B., and sends him a bill of lading entitling him to the delivery of the goods. B. indorses the bill to C. for value, and, later, becomes insolvent before the goods have arrived. Can A. exercise the right of stoppage in transitu?*

No. In case of the purchase of the goods and a transfer of the bill to a *bona fide* purchaser for value during the transit, the right to stop the goods is defeated. Lickbarrow v. Mason, 1 Smith's L. C. (8th ed., 1879), 753. By the common law, as fixed by that leading case, the indorsement, if made by a factor or consignee, was only valid in case of a sale, and the right to stop the goods was not defeated in case of a pledge, as a factor's authority was held not to extend a right to pledge. But now, by the Factors Acts, uniformly in force, a pledge by a factor is binding upon the consignor and defeats his right to stop the goods, at least, to the extent of

the money loaned; and by the Bills of Lading Acts, any indorsee of a bill of lading has all rights of action upon the bill in his own name. 1 Smith's L. C. (8th ed. 1879), p. 823; Daniel on Neg. Inst. (4th ed.), §§ 1730, 1751; Benjamin on Sales (6th Am. ed.), § 1285.

To cut off the vendor's right of stoppage *in transitu*, however, the transfer of the bill of lading must, both by common law and statute, be to a *bona fide* third person.

The fact that the third person knows that the vendee has not paid for the goods will not necessarily deprive him of the rights of a *bona fide* transferee of the bill of lading. Cuming v. Brown, 9 East, 506. But he must act without knowledge of facts which would make the transfer of the bill of lading dishonest. Rosenthal v. Dessau, 11 Hun (N. Y.), 49. Thus, to show that the third person was not acting in good faith it may be shown that he knew of the insolvency of the consignee. Loeb v. Peters, 63 Ala. 243; s. c., 35 Am. Rep. 17.

In some jurisdictions, it is held that a pre-existing debt is not good consideration for the transfer of a bill of lading so as to cut off the vendor's right to stop the goods. Fee v. Kimball, 45 Me. 172; Chandler v. Fulton, 10 Tex. 2; Lesassier v. Southwestern, 2 Woods C. C. 35. See also Loeb v. Peters, 63 Ala. 243.

Of course, where the vendor makes the goods deliverable to himself by the bill of lading, and thus retains the *jus disponendi* of the goods, he is always protected and does not need to resort to stoppage *in transitu*. Ogg v. Shuter, 1 C. P. Div. 47. See Ques. 10, d, *supra*.

47. *A., as vendor, consigns goods to B., and sends him the bill of lading. B. indorses the bill to C. to secure an advance and then becomes insolvent. Can A. stop the goods in transitu?*

The courts give relief in such a case in their efforts to protect an unpaid vendor where they can do so without prejudice to a *bona fide* indorsee.

Where the goods are *pledged*, the legal title would remain in the consignee (pledgor), and the stoppage of the goods would be effectual to the extent of entitling the vendor to the goods remaining after the pledgee had been satisfied to the amount of his advance. But the courts have gone still farther and have held that where the transfer of the bill of lading is absolute in form, and the consignee has no *legal* title whatever left in the bill of lading or the goods which it represents, still *in equity* the consignee retains the general property, and the right of stoppage remains so far as to entitle the vendor to any surplus proceeds after the indorsee has been satisfied for his advance, and the vendor may even insist that the indorsee shall, if possible, satisfy his claim out of other security before resorting to the goods.

In re Westzinthus, 5 B. & Ad. 817; Spalding v. Ruding, 6 Beav. 376. See also Berndtson v. Strang, L. R., 4 Eq. 486; and Kemp v. Falk, 7 App. Cas. 573.

48. *A. consigns goods to B., who, before he has paid for them, sells them to C., and indorses to him the bill of lading. B. then becomes insolvent before C. has paid him for the goods, and A. claims the right, by stopping the goods, to have C. pay him the money which he owes B. Is the claim a good one?*

No. The right to stop *in transitu* terminates as soon as the buyer has parted with the title to the goods. The right of the seller is to protect himself by stopping goods belonging at law, or at least in equity, to the buyer, but where the bill of lading has been indorsed, and transferred to a *bona fide* sub-purchaser, for value, the buyer no longer has any interest to which the right of stoppage can attach. Benjamin on Sales (6th Am. ed.), § 1287.

This question has been discussed by the English courts in *Ex parte* Golding Davis, 13 Ch. Div. 628, and *Ex parte* Falk, 14 id. 446, but the judges were widely divided in their opinions. The former case is probably overruled in effect by the latter, in which the point is certainly established that the absolute transfer of the bill of lading is necessary to terminate the right of stoppage. *Ex parte* Falk went to the House of Lords, under title of Kemp v. Falk, L. R. 7 App. Cas. 573, and at p. 582 of that case Lord Blackburn says:

"No sale, even if the sale had actually been made with payment, would put an end to the right of stoppage *in transitu*, unless there were an indorsement of the bill of lading. Why any agreement to sell, unless it was made in such a way as to pass the right of property in the goods sold, should be supposed to put an end to the equitable right to stop them *in transitu*, I cannot understand. I am quite clear that it does not." And Lord Selborne, at p. 577, is equally emphatic that the right to stop is terminated when such a transfer takes place.

XII. STATUTE OF FRAUDS.

a. In General.

[By the common law, previous to 1677, it lay within the power of a jury to find a contract for the sale of goods, regardless of the amount involved or the manner in which the contract was proved. The juries had enormous power, could not be fined, and control of them by a new trial was incomplete. During the Commonwealth many reforms had been planned, and in 1677 one of these was embodied in the statute of 29 Chas. II, chap. 3, known as the Statute of Frauds. By that statute juries were prevented from finding a sale, save under certain circumstances. In so far as such causes operated for the enactment of the statute, they are, of course, now nonexistent. In many commercial cen-

ters it is considered disreputable to reply upon the statute, and it is, on the whole, an inconvenience. Its provisions are in full force, however, in England, and a similar statute is in force in probably every State, except Rhode Island and Texas.* 1 Stimson Am. Stat. Law, § 4144, stats. cited.

It is probably not inaccurate to say that the Statute of Frauds of every State has been shaped upon the model of the original statute. The different States have different provisions as to the maximum amount of an oral contract which may be enforced, and in the different jurisdictions various rules of construction obtain, but the principle of such legislation is best illustrated by a study of the original statute.]

49. *What are the provisions of 29 Chas. II, chap. 3, as to sales?*

Section 17 of the act dealt with the subject of sales. It enacted as follows:

"And be it enacted, that from and after the said four-and-twentieth day of June (A. D. 1677), no contract for the sale of any goods, wares or merchandise, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

50. *How is the phrase "Contract for the sale of any goods," etc., construed?*

The English courts were years in construing the above phrase, and only in comparatively recent times has the construction been finally determined. Up to 1861 it was an open question as to what contracts were for "work and labor," and so not within the statute, and what contracts were for the sale of goods. The rule was finally settled in Lee v. Griffin, 30 L. J. Q. B. 252; s. c., 1 B. &. S. 272. That action was brought by a dentist to recover £21 for two sets of artificial teeth, made for a deceased woman of whom the defendant was executor. It was held that the contract was for the sale of the teeth. Crompton, J., expressed the rule, as follows:

"When the contract is such that *a chattel is ultimately to be delivered* by the plaintiff to the defendant, when it has been sent, then the cause of action is goods sold and delivered."

Blackburn, J., said: "If the contract be such that *it will result in the sale of a chattel*, the proper form of action, if the employer refuses to accept the article, when made, would be for not accepting. * * * If Benvenuto Cellini had contracted to execute a work of

* In Texas, where the old Spanish law has prevailed, the seventeenth section of the Statute of Frauds has never been in force. See Rev. Stats. Texas, 1879, tit. 46, art 2464. In Rhode Island that section has not been in force since 1751. Hobart v. Littlefield, 13 R. I 341.

art for another, much as the value of the skill might exceed that of the materials, the contract would have been, nevertheless, for the sale of a chattel."

This construction of the statute seems obvious to-day, and is most satisfactory.

The doctrine of Lee v. Griffin has been followed in Connecticut, Minnesota, and to a qualified extent in New Hampshire. Atwater v. Hough, 29 Conn. 508; s. c., 79 Am. Dec. 229; Brown v. Sanborn, 21 Minn. 402; Prescott v. Locke, 51 N. H. 94. In the last case they hold, that if the services of a *particular person* are required, then it is a contract for work and labor.

In Finney v. Apgar, 31 N. J. Law, 266, and Goddard v. Binney, 115 Mass. 450, the rule of Lee v. Griffin has been rejected.

The fact that the contract is executory and calls for future delivery of the goods does not, in most jurisdictions, take it out of the statute, but there are numerous cases holding that a contract to furnish articles *to be manufactured*, or prepared in a prescribed manner, is not affected by the Statute of Frauds. See Benjamin on Sales (6th Am. ed.), § 94, and cases cited.

In New York it is held, that an agreement of sale is not within the statute, unless the goods are in existence at the time. The fact that something remains to be done does not prevent the transaction from being a sale, but the article must be *in solido*, at the time of the contract. Cooke v. Millard, 65 N. Y. 352. See also Mattison v. Westcott, 13 Vt. 258, *accord*; Higgins v. Murray, 73 N. Y. 252.

In Massachusetts, there is still another rule, which was finally established by Lamb v. Crafts, 53 Mass. 356. Shaw, Ch. J., said there:

"The distinction, we believe, is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise when the article is made pursuant to the agreement." See also Goddard v. Binney, 115 Mass. 450. This rule is the one most widely adopted in the United States. Hight v. Ripley, 19 Me. 139; Meincke v. Falk, 55 Wis. 427.

b. "Goods, Wares and Merchandise."

51. *Are shares of stock, choses in action, crops and growing trees "goods, wares and merchandise," within the provisions of the statute?*

Stocks. There is force in the argument that the statute should be construed as applying only to such property as was considered under the head of "goods, wares and merchandise" at the time of its enactment, but the courts have generally gone upon the theory that any *chattel* was included under the head of "goods, wares and

merchandise" and have extended the meaning of that phrase to cover certain kinds of property not originally specifically intended, on the ground that contracts for the sale of such property are clearly within the spirit of the statute. Most courts, therefore, hold stocks to be within the provisions of the statute. Pray v. Mitchell, 60 Me. 430; Tisdale v. Harris, 20 Pick. (Mass.) 9. See also Somerby v. Buntin, 118 Mass. 279; Mayer v. Childs, 47 Cal. 142. There is some conflict, however, on the point. See Boardman v. Cutter, 128 Mass. 388. And the law of England is well settled, *contra*. Humble v. Mitchell, 11 Ad. & E. 205.

On the same principle as stocks; accounts (Walker v. Supple, 54 Ga. 178), checks (Beers v. Crowell, Dudley (Ga.), 28), bank bills (Gooch v. Holmes, 41 Me. 523, 528), and promissory notes (Pray v. Mitchell, 60 Me. 430, 435), are held to be included in "goods, wares and merchandise." But the words of the statute have never been extended to an incorporeal right such as a franchise. Blakeney v. Goode, 30 Ohio St. 350.

Choses in action. These are generally held to be within the statute. Benjamin on Sales, § 111, note 1. In New York the statute expressly adds "things in action," to the phrase. 2 Rev. Stat. 136, § 3. So also California, Minnesota and some other States.

Crops. In the consideration of contracts for the sale of things growing in the soil, the question presents itself, whether or not the contract transfers any interest in real estate. If it does, the seventeenth section of the act does not apply, but the fourth section of the act is operative. That section provides: "That no action shall be brought, whereby to charge any person * * * upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto lawfully authorized."

It will be noticed that this section differs from the seventeenth, in that a written memorandum is required in all cases, whereas under the seventeenth section, no memorandum is required, if the value is under £10, or if there has been a part acceptance or an earnest has been given to bind the bargain. A case, therefore, frequently depends entirely upon the question, whether a contract is for the sale of "goods, wares and merchandise," or an "interest in or concerning land."

In the sale of anything that is attached to the soil, Blackburn makes the question of when property is to pass the test, holding that if the thing is first to be severed from the soil, and then sold, it is an executory contract for the sale of goods, not then existing as such. But if the property is to pass before severance from the realty, it is a contract of sale, but not a contract for the sale of goods. Blackburn on Sales, 9, 10.

This test, however, though accurate on principle, has been applied by only a few courts in this country.

In questions as to the so-called "*fructus industriales*," i. e., all crops of grain, vegetables, etc., the annual results of cultivation of the soil, it is almost universally held that these are personal property, and can be sold as such before maturity, no matter how long they need to remain in the earth for the completion of growth. Davis v. McFarlane, 37 Cal. 634; Smith v. Bryan, 5 Md. 141; Benjamin on Sales (6th Am. ed.), 117, note 5, cases cited.

Trees. In questions of "*fructus naturales*," there is considerable authority, that a sale of them in their growing state is not a sale of an "interest in land," unless they are to continue to be attached to the soil, and to derive benefit from it. Marshall v. Green, 1 C. P. Div. 35; Cain v. McGuire, 13 B. Mon. (Ky.) 340. The jurisdictions in accord are Connecticut, Maryland, Massachusetts. 8 Am. & Eng. Ency. (1st ed.) p. 698, note 4.

In other States, however, it is held that all sales of *fructus naturales* are within the fourth section of the statute, a broad distinction being made between *fructus naturales* and *fructus industriales*. The States holding this distinction are Indiana, Michigan, Missouri, New Hampshire, New Jersey, New York, Pennsylvania, Vermont and Wisconsin. 8 Am. & Eng. Ency. (1st ed.) p. 700, note 1.

c. "Price of Ten Pounds."

52. *A. agrees to take all of the produce of a certain piece of land, at a fixed price per bushel. The number of bushels is unknown. Would the contract be within the statute?*

If, when the total price to be paid became fixed, it exceeded the statutory limit, the contract would be within the statute. The fact that the parties to the contract cannot know whether or not the price will exceed the limit is immaterial. Brown v. Sanborn, 21 Minn. 402.

Where different articles are bought at the same time, the statute applies, if the total price exceeds the statutory limit, provided the whole is really one transaction. Jenness v. Wendell, 51 N. H. 63.

d. Acceptance and Actual Receipt.

53. *Is acceptance, under the statute, an act preceding or following the receipt of the goods sold?*

A buyer may accept goods sold, so as to bring the contract within the statute, either after the delivery, at the time of it, or before. Cusack v Robinson, 1 B. & S. 299; Wilcox Co. v. Green, 72 N. Y. 17. But there must, of course, be a complete contract before any acceptance is possible. Proctor v. Jones, 2 Car. & P. 532.

54. *What constitutes acceptance, under the statute?*

In England, the acceptance under the statute is treated as the mere identification of the goods which are the subject of the contract. Page v. Morgan, 15 Q. B. Div. 228. But the weight of authority in the United States is that acceptance under the statute must "be by some unequivocal act done on the part of the buyer, with the intent to take possession of the goods as owner." Remick v. Sandford, 120 Mass. 309.

A buyer may, however, so act in regard to the goods as to be estopped to deny his acceptance of the goods, as where the goods are unreasonably detained, or where ownership is asserted by a resale of the goods or some similar act. Greene v. Merriam, 28 Vt. 801. Browne on Statute of Frauds, § 316 g.

55. *Will an acceptance of goods, without a receipt of them, be sufficient, under the statute?*

No. "This provision is not complied with unless the two things concur: the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both." Blackburn on Sales (2d ed.), 16; Benjamin on Sales (6th Am. ed.), § 139.

56. *What constitutes "actual receipt" of goods, under the statute?*

Before there can be an actual receipt of goods, the seller must have parted with his lien, and the buyer must be possessed of them, so as to cut off the right of stoppage *in transitu*, and with the intention of holding them adversely to the seller. Proctor v. Jones, 2 Car. & P. 532; Stone v. Browning, 68 N. Y. 598; Hinchman v. Lincoln, 124 U. S. 38. Where the goods are bulky or for any reason are not capable of physical delivery, a delivery of a warehouse receipt or other similar document to the buyer will not be a receipt by him, within the statute, until the warehouseman or other bailee of the goods has attorned to the buyer. Williams v. Evans, 39 Mo. 201; King v. Jarman, 35 Ark. 190, 198; s. c., 37 Am. Rep. 11.

Of course, as in the case of acceptance, the buyer can so act as to be estopped to deny his receipt of the goods, as where he resells them. Chaplin v. Rogers, 1 East, 192.

e. "Earnest" and "Part Payment."

57. *How do earnest and part payment differ?*

Earnest is money or money's worth given by the buyer to the seller, to be forfeited to the latter if the buyer does not carry out his bargain. Artcher v. Zeb, 5 Hill (N. Y.), 200. For the history of Earnest, see Howe v. Smith, 27 Ch. Div. 89.

In part payment there must be an actual transfer of money or money's worth, but without the agreement to forfeit. That which is given in earnest may be accepted in the end as part of the payment, but earnest and part payment are not the same thing. "That earnest and part payment are two distinct things is apparent from the seventeenth section of the Statute of Frauds, which deals with them as separate acts, each of which is sufficient to give validity to a parol contract." Per Fry, J., in Howe v. Smith, 27 Ch. Div. 102.

f. "Note or Memorandum in Writing."

58. *A. sells certain goods to B., and several days after obtains from B. a memorandum of the transaction, from which, however, one of the essential terms of the sale is omitted. Can parol testimony of the omitted term be introduced to satisfy the requirements of the statute? Would the memorandum satisfy the statute, without such testimony?*

Parol testimony cannot be introduced to prove any term which has been omitted from a memorandum. The memorandum itself must contain all of the essential terms of the contract. Fry v. Platt, 32 Kan. 62; Lee v. Hills, 66 Ind. 474. Missouri, however, allows missing terms of a memorandum to be supplied by parol testimony. Lash v. Parlin, 78 Mo. 391; Ellis v. Bray, 79 id. 227.

The memorandum must also be certain, and where it is claimed to contain some terms which were not adopted in the contract, parol evidence as to which terms were actually adopted is inadmissible. Brodie v. St. Paul, 1 Ves. Jr. 326. In short, the memorandum to satisfy the statute must be complete.

The fact that the memorandum was made three days later would not affect it, however. It may be made at any time before action is brought. Heidman v. Wolfstein, 12 Mo. App. 366.

59. *What are the terms of a contract of sale, which must appear in a memorandum?*

The memorandum (1) must show who are the parties. Grafton v. Cummings, 99 U. S. 100. (2) Must identify the goods sold. Lente v. Clarke (Fla.), 1 So. Rep. 149. (3) Must state the price to be paid, if any has been agreed upon. Fulton v. Robinson, 55 Tex. 401. (4) Must state the conditions of the contract, if any. McElroy v. Buck, 35 Mich. 434. (5) In many States the memorandum must also state the consideration for the defendant's promise to sell. The cases so holding have been based upon the principle that the statute required the memorandum of an *agreement*, and that the consideration was a necessary part of any binding agreement. This rule was established in Wain v. Warlters, 5 East, 10. See also Browne on Statute of Frauds, § 406. The States requiring the consideration to be stated are: Alabama, Colorado,

Delaware, Georgia, Kansas (*semble*), Maryland, Minnesota, Montana, New Hampshire, New Jersey, New York, Wisconsin. The statutes expressly require the statement of the consideration in Alabama, California, Minnesota, Nevada and Oregon.

On the other hand, the following States hold that the consideration need not be stated in the memorandum: Arkansas (*semble*), Connecticut, Florida, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Nebraska (*semble*), North Carolina, Ohio, Tennessee, Texas, Vermont, Virginia. The statutes provide that the consideration need not be stated, in Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New Jersey and Virginia. 8 Am. & Eng. Ency. (1st ed.) 727, note 4.

60. *Is it necessary that a memorandum, in order to satisfy the statute, should be made expressly for that purpose?*

No. Any paper which contains the necessary facts satisfies the requirements of the statute. Thus, a bill of parcels, a receipt for money, an account stated, or a sheriff's return on an execution, may be a sufficient memorandum. 8 Am. & Eng. Ency., p. 711.

61. *A., in order to satisfy the statute, offers at the trial several letters signed by B., which, taken together, contain all of the terms of the contract? Can the letters be construed together as a memorandum?*

Yes. A memorandum may consist of any number of papers, but in order to comply with the terms of the statute, the separate papers, if all signed, must be connected physically, or by reference or internal evidence, so that no parol evidence is necessary to establish their connection with the contract. If some of the papers are unsigned they may still be used to make up the memorandum, if they are connected (with some paper which is signed) in the way just mentioned. Studds v. Watson, 28 Ch. Div. 305. See Beckwith v. Talbot, 95 U. S. 289; Grafton v. Cummings, 99 id. 100.

The signature to the memorandum need not, however, be very formal. It may be printed or stamped, and may be by mark or initials. Drewry v. Young, 58 Md. 546; Hubert v. Moreau, 2 Car. & P. 528; Salmon, etc., Co. v. Goddard, 14 How. (U. S.) 446.

In connection with the signature of a memorandum, it is important to notice that the statute only requires that it should be signed by the "parties to be charged." It is not necessary that there should be a memorandum upon which both parties could be held. Marqueze v. Caldwell, 48 Miss. 23; Alabama, etc., Ins. Co. v. Oliver (Ala.), 2 So. Rep. 445. Michigan, however, is *contra*, and requires the signature of both parties. Wilkinson v. Heavenrich, 58 Mich. 574; s. c., 55 Am. Rep. 708.

g. "Agents."

62. *Can a memorandum be signed by a third person, as agent for both parties, so as to satisfy the contract?*

Yes. Any person who is authorized to sign by both parties can execute a memorandum binding upon both. It is customary in many transactions for a third person to act. Thus, a broker is agent for both parties, if his position is known to both. North v. Mendel, 73 Ga. 400; s. c., 54 Am. Rep. 879. So also an auctioneer is an agent for both parties at the time of the sale. Springer v. Kleinsorge, 83 Mo. 152. But after the sale he has not the further authority to bind the buyer by signing a memorandum, and is simply the agent of the seller. Meers v. Carr, 1 H. & N. 484. And it has even been held that, when acting for the seller, a subsequent memorandum signed by the auctioneer is insufficient. Price v. Durin, 56 Barb. (N. Y.) 647.

h. Effect of Statute.

63. *What is the effect of the Statute of Frauds?*

The question of the effect of the statute upon contracts to which it applies is one upon which courts have differed widely. The weight of authority, however, is that the statute simply affects the *remedy*, preventing (if it is set up) the enforcement of the contract or the recovery of damages for its breach, but not rendering the contract void. It is held, therefore, that only parties to the contract can set up the statute as a defense. Simmons v. More, 100 N. Y. 140; Wright v. Jones, 105 Ind. 17.

XIII. FRAUD.

64. *A. sells goods to B., by bill of sale, but retains possession of the goods. Execution is issued upon a judgment against A., and these goods are seized under it. Can B. make good his claim to the goods?*

The question is decided differently in different jurisdictions. In all States it is regarded as suspicious when a vendor keeps possession of goods capable of delivery, that fact being indicative of an attempt to defraud creditors. The difference in the rules adopted by the several States rests upon the varying weight which is given to this evidence of fraud.

1. In some States it is held that the possession of goods after sale is a conclusive badge of fraud, as a rule of law, and that no evidence of good faith can affect this conclusion. The States so holding are Illinois, Florida, Iowa, Kentucky, California, Connecticut, Delaware, Nevada, Vermont, Colorado.

2. A second view is, that possession of the goods after the sale is *prima facie* a fraud *in law*, and if unexplained becomes a fraud, as a rule of law for the court to lay down in all cases, and not to be submitted to the jury. This view prevails in Indiana, Missouri,

Montana, New Hampshire, Pennsylvania, Wisconsin, New York, and in the United States courts.

3. The third view, which is most generally recognized as the sound one, is that where the possession of goods does not accompany the act or instrument of transfer, the possession of the goods by the vendor is *prima facie* evidence of fraud *for the jury*, sufficient to warrant, but not necessarily sufficient to require, the finding that the sale was fraudulent; that the question of fraud is always for the jury, and never for the court. The courts so holding are, Alabama, Arkansas, Georgia, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, West Virginia.

For an exhaustive collection of cases on the whole subject, see Benjamin on Sales (Bennett's 6th ed.), p. 458. In some cases a distinction has been made between a mortgage and an absolute sale, and between public and private sales. See Benjamin on Sales (Bennett's 6th ed.), § 489, with cases collected for all jurisdictions.

65. *A., by making fraudulent misrepresentations as to his financial standing, induces B. to sell him some goods. A., at once, resells the goods to a bona fide purchaser for value. Can B. retake the goods?*

By the best authority he cannot. Title would pass to A. as B. intended that it should, and A.'s fraud would only render the title voidable as between the parties. A. could, therefore, transfer title, and any *bona fide* purchaser for value would take title, free from the taint of fraud. Paige v. O'Neal, 12 Cal. 483; Mears v. Waples, 3 Houst. (Del.) 581. See also Ques. 40, *supra*.

66. *A. orders goods by mail from B., fraudulently representing himself as a well-known merchant. He receives the goods and immediately sells them to a bona fide purchaser for value. Who has title to the goods?*

B. never parted with title to the goods. He never intended to give title to A., but to the person A. represented himself to be. A. never having had title, could transfer none. Cundy v. Lindsey, 3 App. Cas. 459; compare Holmes, Com. Law, 312-313; Alexander v. Swackhamer, 105 Ind. 81.

XIV. FACTORS' ACTS.

The New York act, which is a representative statute, provides:

Section 1. That every person *in whose name* any merchandise shall be shipped, shall be deemed the true owner, so far as to entitle the consignee of such merchandise, acting in good faith, to a lien thereon (1) for any money advanced or negotiable security given by such consignee for the use of the person in whose name

the shipment is made; and (2) for any money or negotiable paper received by the person in whose name such shipment shall have been made, for the use of the consignee.

§ 2. The consignee so advancing money must not have notice *by the bill of lading, or otherwise,* that the person in whose name the shipment was made was not the actual and *bona fide* owner thereof.

§ 3. Every factor or other agent *intrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt* for the delivery of any *such* merchandise (referring to section 1); and every such factor or agent, not having the documentary evidence of title, who shall be *intrusted with the possession* of *any* merchandise *for the purpose of sale,* or as security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, etc., by such other person on the faith thereof.

§ 4. The pledgee of goods, as security for an antecedent debt, shall not acquire any greater right or interest in the goods than was possessed or might have been enforced by the agent at the time of making the pledge.

§ 5. Nothing contained in the last two preceding sections shall prevent the true owner of merchandise, so deposited, from receiving the same, upon repayment of money advanced, and satisfying such lien as exists in the favor of the agent who deposited the same, nor from recovering any balance in the hands of the pledgee, resulting from the sale of such merchandise.

§ 6. The act shall not authorize a common carrier, warehouse keeper, or other person to whom property may be committed *for transportation or storage only,* to sell or hypothecate the same. Laws N. Y., 1830, chap. 179; Rev. Stat. (Banks' 9th ed.) page 2006. Similar statutes have been passed in many States. Pennsylvania, Brightly's Purd. Dig. (12th ed.) 867; Ohio, Rev. Stat. 1880, § 3216; Massachusetts, Pub. Stat. 1882, p. 417; Rhode Island, Pub. Stat. 1882, p. 332; Maine, Rev. Stat. 1871, p 326; Maryland, Rev. Code, p. 291; California, Civ. Code, 1897, §§.2367-2369, § 2991.

The agent must be an agent in a mercantile transaction; a clerk or servant is not such an agent. Benjamin on Sales (6th Am. ed.), §§ 20-21, and cases cited.

67. *Has an agent, intrusted with goods with authority to sell, authority to receive payment?*

Yes. "An agent authorized to sell personal property, which he has in his possession, and can deliver, must, in the absence of any known limitation upon his authority, be authorized to receive the price." but he has no authority to receive payment before it is due. Whiton v. Spring, 74 N. Y. 169, at 173; Seiple v. Irwin, 30 Penn. St. 513.

68. *A., a cotton broker, obtains possession of goods by fraud from B. and sells them to C., who is innocent of A.'s defective title. In an action in trover by B. against C., C. relies on the Factors' Act to perfect his title. Judgment for whom, and why?*

Judgment should be for the plaintiff. A. never obtained title and the goods were not intrusted to him *as agent* of B. The Factors' Act, therefore, does not apply. Hollins v. Fowler, L. R. 7 H. L. 757, at 763; First Nat. Bk. of Toledo v. Shaw, 61 N. Y. 283, at 298.

69. *What is the effect of indorsing a warehouse receipt?*

There is considerable conflict of opinion. In a few States, warehouse receipts are, by statute, made negotiable by indorsement — New York, Massachusetts, Illinois, Kentucky.

In California the same effect is given to the transfer of a warehouseman's receipt as is given to the transfer of a bill of lading. Davis v. Russell. 52 Cal. 611. See Benjamin on Sales (6th Am. ed.), § 1213.

SURETYSHIP.

[NOTE.—To assist in keeping the parties clearly in mind, in forming the questions the letter C. has been used in every case to represent the creditor, P. the principal debtor and S. the surety.]

I. NATURE OF CONTRACT.

1. *What elements are necessary to constitute suretyship?*

(a) There must be three parties,—a creditor, or obligee; a principal debtor, or obligor; a surety.

(b) There must be two obligations running to the creditor,—one from the principal debtor, and one from the surety.

(c) As betweeen principal debtor and surety, the former must be the person ultimately liable.

A surety is "one who is bound with and for another who is primarily liable and who is called the principal." Webster's Dict.

Suretyship is "the obligation of a person to answer for the debt, default, or miscarriage of another." Bouvier's Law Dict.

The obligation is contractual in its nature and it usually arises out of express contract, though it may also be created by operation of law, as in Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574 (where the assignment of a non-negotiable contract was considered to place the assignor in the position of a surety to the other contracting party for the assignee), or by estoppel, as in Lynch v. Smith, 25 Cal. 103 (where one whose name had, without his authority, been signed as surety on a bond, after knowledge of that fact, stood by and allowed the obligee to act to his prejudice on faith of such signature). The general principles of contract are applicable to its creation. The promise of the surety may be before, after, or simultaneous with that of the principal. As in any other contract consideration is, of course, necessary.

The foregoing will distinguish suretyship from:

(1.) Novation,—where the liability of the original debtor is extinguished and never coexists with that of the new obligor. In novation there are never two simultaneous obligations running to the obligee, for "if debtor, creditor, and a third party agree that the third party shall be substituted for the debtor, the debtor is exonerated." Coltman, J., in Bird v. Gammon, 3 Bing. N. C. 883.

(2.) Indemnity,—where the contract is to protect the indemnitee against his *liability to another*,—not to guarantee the discharge of another's liability to him. Indemnity is best illustrated by the common

casualty insurance, where an employer is insured against liability to his employees for personal injury or where a shipowner is insured against liability for collision, etc.

(3.) Assignment of a chose in action where the assignor guarantees payment. Here the assignee (creditor) can sue only in the name of his assignor and accordingly has no direct right of action against the debtor, as required by paragraph (b) *supra*. In States where the assignee of a chose in action is, by statute, given the right to sue the obligor in his own name, the situation approaches very near to suretyship. Such statutes, however, merely alter the form of remedy, and under them, as at common law, the assignee takes subject to all defenses good against his assignor. The obligor might, therefore, successfully defend, leaving the assignor still liable on his guaranty of the debt. The assignor's obligation in such cases is, therefore, something more than that of a mere surety.

(4.) Transactions where B. at A.'s request, and on his promise to pay, delivers goods to or confers some other benefit on C. Here A. is the only person liable and clearly no suretyship exists.

See Stillman v. Dresser, 22 R. I. 389, and Watson v. Perrigo, 87 Me. 202.

2. *Distinguish between suretyship proper and guaranty.*

The word suretyship is broadly used to include both suretyship proper or strict suretyship and guaranty. The distinction is, however, often important.

In both suretyship proper and guaranty, two persons are liable to one obligee in case of nonperformance of a single obligation for which performance, as between themselves, one only is responsible. In suretyship they are equally and primarily liable, as against the obligee; both have assumed the obligation in absolute terms, and either or both may be sued immediately upon default. In guaranty, on the other hand, the obligation of the guarantor is avowedly secondary and conditional on default by the principal. The obligee may, for most purposes, treat a surety as a principal debtor; he need not notify him of the principal's default nor need he seek first to enforce the principal's liability. In other words, "the surety is bound with his principal as an original promisor," whereas "the contract of a guarantor is his own separate contract. It is in the nature of a warranty by him that the thing guaranteed to be done by the principal debtor shall be done, not merely an engagement jointly with the principal to do the thing. The original contract of the principal is not his contract and he is not bound to take notice of its nonperformance, and therefore the creditor should give him notice,— and it is universally held that, if the guarantor can prove that he has suffered damage by the failure to give such notice, he will be discharged to the extent of the damage thus sustained. It is not so with a surety." Mc-

Millan v. Bull's Head Bank, 32 Ind. 11. Perhaps the most important practical difference between suretyship and guaranty arises in connection with the Statute of Frauds, *infra,* pp. 404 *et seq.*

II. NOTICE OF ACCEPTANCE OF THE GUARANTY AND OF DEFAULT BY THE PRINCIPAL.

3. *S. gave P. a letter promising that any one who should make advances to P. for the carrying on of P.'s business during the ensuing year, might look to S. for payment if P. failed to pay. C. made such advances in reliance on the letter, and, on P.'s default, sued S., who pleaded that C. had never given him notice of his acceptance of the guaranty. Is the defense valid?*

Yes. According to the weight of authority, where a continuing guaranty or general letter of credit is given, it is held to be an offer which ripens into a contract only when acceptance is communicated to the offerer. See Davis v. Wells, Fargo & Co., 104 U. S. 159. "A party giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate in great measure his course of conduct, and his exercise of vigilance in regard to the party in whose favor it is given. Especially it is important in case of a continuing guaranty, since it may guide his judgment in recalling or suspending it." Lee v. Dick, 10 Pet. 482; De Cremer v. Anderson, 113 Mich. 578; Bishop v. Eaton, 161 Mass. 496, *accord; cf.* Lennox v. Murphy, 171 Mass. 370.

The doctrine set forth above seems open to theoretical objection. The principle of contracts is firmly settled that an offer to become bound if A. performs a specified act (an offer for a unilateral contract) is accepted by A.'s performance without more, and that no notice or promise need be given by A. Thus in Lennox v. Murphy, *supra,* the court said, by Holmes, J.: "There is no universal doctrine of the common law, as understood in this commonwealth, that acceptance of an offer must be communicated in order to make a valid simple contract." See also Langdell, Summary Contract, § 2. The requirement that the guarantor receive notice of acceptance is the outcome rather of business convenience than of strict theory. "When a proposition is made by a man for a thing to be done for himself, he must know, when done, that it is done on his proposition. But where he proposes his responsibility for a thing to be done for another, he may not know that it is done, or, even if he does, he will not know whether it was done on his proposition, or on the sole credit of the third person, or on some other security." Collamer, J., in Oakes v. Weller, 13 Vt. 106. Professor Langdell says: "Sometimes the consideration for a promise is of such a nature that the promisor will have no sure means of knowing whether

or not it has been performed, unless he is informed by the promisee; and this will frequently be a sufficient reason for holding the offer to contain an implied condition that notice shall be given of the performance of the consideration within a reasonable time after it is performed. * * * Thus, if A. offers to B. to become guarantor for C. to a certain amount, if B. will give C. credit to that amount, A. will become guarantor as soon as the credit is given, but his guaranty may reasonably be held to be conditional upon his receiving notice within a reasonable time afterwards that the credit has been given." Summary Contract, § 6; and see to same effect, Bishop v. Eaton, 161 Mass. 496.

Where the guaranty is "absolute,"— that is, where the circumstances do not imply notice of acceptance as a condition of liability,—such notice is not required. Bechtold v. Lyon, 130 Ind. 194; Boyd v. Snyder, 49 Md. 325. The line which marks these cases has never been satisfactorily defined and the doctrine is sometimes applied to cases indistinguishable on the facts from those in which such notice is required, as in City Bank v. Phelps, 86 N. Y. 484.

It is generally held, too, that the guarantor of an obligation whose terms are specific and certain is not entitled to notice of acceptance, the circumstances in such case not being such as to leave the guarantor in doubt as to the existence and extent of his liability. "The distinction is between an offer to guarantee a debt about to be created, the amount of which the party making the offer does not know and it is uncertain whether the offer will be accepted so that he may be ultimately liable, and the case of an absolute guaranty, the terms of which are definite as to its extent and amount. In the latter case no notice is necessary to the guarantor, whereas in the former case the contract is not completed until the offer is accepted." Allen v. Pike, 3 Cush. (Mass.) 238. As a corollary of the doctrine that a guarantor is entitled to notice of acceptance, it is generally held that in case of a general or continuing guaranty, notice of acceptance must be followed, when the transaction is ended, by notice of the extent of the advances which have been made. See 1 Brandt, Suretyship (3d ed.), § 211.

4. *C. made advances to P. in reliance on S.'s promise that he would pay any such advances, up to $6,000, if P. did not. Due notice of acceptance and of the amount of the advances was given to S. P. made default, and C. brings action against S. without giving him notice of P.'s default and without any proceedings against P. beyond demand. Can C. recover?*

Yes, if S. has not been damaged by C.'s failure to give notice. It is well settled by the great weight of authority that in cases of guaranty, where the guarantor's liability is avowedly secondary, it is the duty of the creditor to give notice of the principal's default; Globe Bank v. Small, 25 Me. 366; McDougal v. Calef, 34 N. H. 534; but it is equally settled that failure to do so is not a defense unless it has damaged the guarantor, as by making his remedy against the principal less easy or by postponing adjustment until the principal is insolvent. "The laches of the plaintiff and the

loss of the defendant must concur to constitute a defense." Matthews, J., in Davis v. Wells, Fargo & Co., 104 U. S. 159; see Furst & Bradley Co. v. Black, 111 Ind. 308. Nor is C.'s failure to sue P. a defense to S., for S.'s promise was not conditional upon anything except P.'s default. C.'s duty was to make such demand upon P. as to put him in default, and his right against S. thereupon accrued.

In cases of strict suretyship, as distinguished from guaranty, the surety who, on the face of the instrument, is absolutely liable, is not entitled to notice of the principal's default, nor to await the issue of proceedings against the principal. Where true guaranty exists the guarantor is, as already stated, entitled to such notice. This rule is, however, frequently relaxed, especially in cases of the guaranty of negotiable paper. Roberts v. Hawkins, 70 Mich. 566; Lowe v. Beckwith, 14 B. Mon. (Ky.) 184. It is impossible to lay down a rule which will reconcile all the cases. In each the court endeavors to ascertain what the parties intended and to act accordingly. "The rights and duties of parties to guaranties must from the variety of circumstances under which they have been entered into be materially governed by the particular circumstances of each case." Story, J., in Wildes v. Savage, 1 Story, 22, at p. 35.

Whether the guarantor is also entitled to insist that the creditor's legal remedy against the principal be exhausted before suit is brought against him must depend upon the precise terms of the obligation. Where the guaranty is of the "payment of a debt" it is absolute and the guarantor is liable at once. Jackson v. Decker, 14 N. Y. App. Div. 415, at p. 422; Peterson v. Russell, 62 Minn. 220. Where it is a guaranty that a debt will be "collected" it is held that all legal remedies against the principal must be exhausted before "collection" has failed, and that such remedies must be promptly enforced. Northern Insurance Co. v. Wright, 76 N. Y. 445. The guarantor's undertaking in such case is "that the claim is collectible by due course of law." Peckham, J., in Salt Springs Nat. Bank v. Sloan, 135 N. Y. 371. Such proceedings need not, according to the weight of authority, be had, if it clearly appears that the principal is insolvent; Brackett v. Rich, 23 Minn. 485; and see Allen v. Rundle, 50 Conn. 9; but in some States even this relaxation of the rule is not admitted. Craig v. Parkis, 40 N. Y. 181; Salt Springs Nat. Bank v. Sloan, *supra*.

III. STATUTE OF FRAUDS.

5. *What effect has the Statute of Frauds on contracts of suretyship and guaranty?*

The statute provides that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another, unless the agreement upon which such action shall be brought, or some memorandum or note

thereof shall be in writing, and signed by the party to be charged therewith," etc.

The statute has no application to cases of strict suretyship. It is applicable only when the defendant's promise is a secondary and collateral one,—that is, in cases of true guaranty. "* * * If the agreement be such that two persons * * * do at the same time become co-debtors to the seller for the price, then * * * the case is not within the Statute of Frauds. * * * But if it be such that one, at the time, becomes debtor to the seller and the other security only for the debt, it is within the Statute of Frauds. * * * The class of special promises required to be in writing includes only such as are secondary and collateral to, or in aid of the undertaking or liability of some party whose obligation, as between the promisor and promisee, is original or primary." Gibbs v. Blanchard, 15 Mich. 292. Thus a maker of a note, though he sign as surety, and though as between himself and other makers he is in fact a surety, assumes a primary obligation, not within the statute, and this even though he add the word "surety" to his signature. Perkins v. Goodman, 21 Barb. (N. Y.) 218; Casey v. Brabason, 10 Abb. Pr. (N. Y.) 368. But one who "guarantees" that the note of another *will be paid,* assumes a secondary liability, collateral to that of the maker, and his undertaking is within the statute. Furbish v. Goodnow, 98 Mass. 296; see also Halsted v. Francis, 31 Mich. 113.

By some courts it is held that, under the statute, the writing must express the consideration. Deutsch v. Bond, 46 Md. 164; Drake v. Seaman, 97 N. Y. 230; see also Barney v. Forbes, 118 N. Y. 580. Others take the contrary view. Patmor v. Haggard, 78 Ill. 607; Sanders v. Barlow, 21 Fed. Rep. 826. In some jurisdictions the form of the statute specifically requires it. Moses v. Lawrence County Bank, 149 U. S. 298. "The general rule deducible from the cases seems to be that the consideration must be stated where the statute expressly so requires, or where the agreement is required to be in writing, such term being construed generally to include the consideration; but where the statute merely requires that the promise, or agreement, be in writing, the consideration, which is no part of the promise, need not be expressed." 29 A. & E. Ency. (2d ed.) 870.

6. *P. bought from C. a jeweled watch on credit for $500. At the time of the sale, S. orally promised C. that if he would give P. the credit he (S.) would pay the debt if P. did not. X., on the same consideration and at the same time, promised C. that if P. did not pay he (X.) would do so, out of $1,000 belonging to P., deposited with him as security. P. made default. Are S. and X. liable? Would they be if P. were* (a) *a married woman;* (b) *an infant?*

X. is liable in all the cases supposed. P.'s obligation was an absolute one to pay. X.'s was merely to pay from a particular fund. X.'s promise therefore was not an *unlimited* one to "answer the debt" of P., and therefore was not collateral to P.'s promise. To such a qualified guaranty the Statute of Frauds has no application. Lippincott v. Ashfield, 4 Sandf. (N. Y.) 611. That the fund from which X. was to pay was greater than the amount of the obligation is not material.

In the first case supposed, S. is not liable. His promise is a simple guaranty and, being oral, is protected by the statute.

(a) Had P. been a married woman, incapable of contracting, there would have been no primary obligation to which the promise of S. could have been collateral. "Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed." Lord Selborne in Lakeman v. Mountstephen, 7 Eng. & Ir. App. Cas. 17; see also Kilbide v. Moss, 113 Cal. 432. Accordingly the Statute of Frauds would have no application and S. would be liable. See Browne, Stat. of Frauds (5th ed.), § 156; Kimball v. Newell, 7 Hill (N. Y.), 116.

(b) If A. had been an infant his obligation, though voidable, would seem on principle to be sufficient to support a collateral promise, and to make the contract of S. a "promise to answer for the debt of another" within the statute. "It is voidable only at the option of the infant, and until so avoided, it is a valid debt." Dexter v. Blanchard, 11 Allen (Mass.), 365; Browne, Stat. of Frauds (5th ed.), § 156. In that view, which is supported by the apparent weight of authority, S. would not be liable. Scott v. Bryan, 73 N. C. 582; Brown v. Farmers' Bank, 88 Tex. 265. There is, however, important authority to the contrary. Chapin v. Lapham, 20 Pick. (Mass.) 467; King v. Summitt, 73 Ind. 312; Harris v. Huntbach, 1 Burrows, 373. In the last case, Foster, J., said: "The infant was not liable, and therefore it would not be a collateral undertaking. It was an original undertaking of the defendant to pay the money." See Brandt, Suretyship (3d ed.), § 69, This reasoning seems bad on principle since the infant's contract is not void, but in the States where this view is adopted S. would be liable, since the statute would afford him no defense.

7. P., a contractor, erecting a building for S., owed $1,000 *for steel supplied for the building, and C. refused to supply more until the debt was paid. S. orally promised C. that if C. would deliver the remainder of P.'s order, and give P. the assistance necessary to finish the building on time he (S.) would pay C. for all the steel on completion of the work if P. did not. C. did so and then brought action against S. on his promise. Is the Statute of Frauds a defense to S.?*

No. The statute does not apply, according to the weight of authority, because S.'s promise was made on a new and substantial

consideration moving from C. and to obtain for himself certain definite results,— the delivery of the steel and the completion of the building on time. It would be against conscience to allow him, after receiving these benefits and causing C. to undergo the corresponding detriment, to evade his own obligation under the technical plea of the Statute of Frauds. "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business interest of his own involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another." Clifford, J., in Emerson v. Slater, 22 How. (U. S.) 28; see also Williams v. Leper, 3 Burr. 72; Leonard v. Vredenburgh, 8 Johns. 29.

It is difficult to find a sound legal basis upon which to rest the doctrine that the Statute of Frauds does not apply where a "new and original consideration" is present as between creditor and guarantor. Of course, the mere fact that there is consideration for the guarantor's promise does not suffice to take the case out of the statute, for a guaranty, like any other contract, cannot exist at all without consideration. Moreover, there is no warrant in the statute for making the value or nature of the consideration the test of the statute's applicability. The doctrine must be considered as a piece of judicial legislation and as a manifestation of the elastic principle, more usually enunciated by courts of equity, that the law "will not permit the Statute (of Frauds) to be made an instrument of fraud." Lord Selborne, in Maddison v. Alderson, L. R., 8 App. Cas. 467. "He does not undertake as a mere surety for the maker, but on his own account, and for a consideration which has its root in a transaction entirely distinct from the liability of the maker. * * * 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." Brown v. Curtiss, 2 N. Y. 225. The substantial transaction intended by the parties in such cases is not suretyship or guaranty, but a new and original contract for the benefit of S.

In the same way are to be regarded cases where a person, being under a liability to pay, discharges that liability in some way involving a guaranty of another's debt, as where S., who owes P. $100, agrees to pay P.'s debt of $100 to C.; or where S., being indebted to C. in the sum of $100, discharges his liability by a guaranty of P.'s note for $100, held by C. In such cases S. is primarily paying his own debt not P.'s, and the Statute of Frauds does not apply. Dyer v. Gibson, 16 Wis. 580; see Durham v. Manrow, 2 N. Y. 533, at p. 538.

In this connection, too, should be noted the case of *del credere* factors. The principal who sells through such a factor may sue him for the price of goods sold by him and, according to the great weight of authority, he may also recover the price of such goods in a direct action against

the purchaser. The situation is not the ordinary one of guaranty, for the factor's obligation to pay the principal is primary and absolute. He has also the added right, not usually accorded a guarantor or a surety, of suing the principal debtor (the purchaser) without first paying himself. His promise, accordingly, is not within the Statute of Frauds. Swan v. Nesmith, 7 Pick. (Mass.) 220; Sherwood v. Stone, 14 N. Y. 267; 2 Kent Comm. 625, n.

IV. RIGHTS OF SURETY IN CONNECTION WITH AND AFTER PAYMENT.

8. *C. held three $1,000 notes of P. secured by mortgage. S. and X., in the order named, indorsed the first note for P.'s accommodation and they became co-indorsers of the second, also for P.'s accommodation. P. made default on all notes, whereupon C. obtained and collected judgment against S. on them. What are S.'s rights?*

Against P. he has of course the ordinary action of indorser against maker. As an alternative he may sue P. at law to obtain *indemnity* on a common count for money paid to his use. Martin v. Ellerbe's Administrator, 70 Ala. 326. In equity he has several rights. (1) He may bring action against P. on the notes in the name of C., to whose rights he is *subrogated*. See Miller v. Stout, 5 Del. Ch. 259. (2) He may sue X. on the second note for *contribution* and thus compel X. to share the loss, *infra*, p. 410. He has no right against X. on the first note for the reason that X., being a subsequent indorser, is not a cosurety with him, and therefore, as between them, S. is the one liable on that note. See Brandt, Suretyship (3d ed.), § 286; *cf.* Robertson v. Deatherage, 82 Ill. 511. (3) After C. has realized in full on *all three* notes, but not before, S. may in equity reach the mortgage and apply it to his relief. Kortlander v. Elston, 52 Fed. Rep. 100. If S. and X. had each paid half of the first and second notes, they would share the mortgage, X. being entitled to a three-quarter interest in it, by virtue of the fact that his rights are prior to those of S. on the first note and equal on the second.

1. The right of sureties most frequently sued on is that of *subrogation*. Upon payment the surety may stand in the shoes of the creditor and prosecute the original obligation in the creditor's name with the same force and effect, and subject to the same defenses, as though the creditor were suing in his own right. Brandt, Suretyship (3d ed.), § 324 *et seq.*; Swarts v. Siegel, 117 Fed. Rep. 13. This right only accrues to the surety when the creditor has been paid in full, Garmett v. Blodgett, 39 N. H. 150; Musgrave v. Dickson, 172 Pa. St. 629, and extends only so far as to reimburse the surety. Sheldon, Subrog. (2d ed.), § 105. In practice a surety frequently takes from the creditor an assignment of his claim and thereupon sues in his own name. This

is not necessary, however, as payment *ipso facto* works an equitable transfer of the creditor's right to the surety (Wilson v. Kimball, 27 N. H. 300), and without an assignment he may sue in the creditor's name. The few authorities to the contrary do not represent the general law. The creditor stands in the position of a trustee and if, on payment by the surety, he releases the principal, the surety may, it would seem, in equity set aside the release and sue in the creditor's name in spite of it. See Smith v. Rumsey, 33 Mich. 183. On principle, and according to the weight of authority, the surety in the case of a specialty becomes a specialty creditor when subrogated. Stearns, Suretyship, § 266; *cf.* Smith v. Rumsey, 33 Mich. 183. In some jurisdictions this rule is established by statute. 19 & 20 Vict., chap. 97, § 5; *cf.* Ala. Code, 1896, § 3888.

Similarly, a surety who has paid the debt is entitled by subrogation to any securities held by the creditor for the performance of the principal's obligation and to any judgment on such obligation recovered by the creditor against the principal. Lewis v. Palmer, 28 N. Y. 271; Townsend v. Whitney, 75 N. Y. 425.

A surety upon payment is also subrogated to the creditor's rights and securities as against other sureties. He may thus reimburse himself fully from any other sureties who are, as against him, primarily liable, and he may similarly recover *pro rata* from cosureties. Felton v. Bissell, 25 Minn. 15, see Lidderdale v. Robinson, 12 Wheat. (U. S.) 594; Sheldon (2d ed.), Subrog., § 140 *et seq.* It is also generally held that the surety of a surety (i. e. a person who has agreed with a surety to save him harmless) if he pays the debt, is entitled to subrogation and indemnity against the principal debtor. McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274; Hall v. Smith, 5 How. (U. S.) 96.

It has already been noted that subrogation presupposes that the creditor has been fully paid. The right may never be used by the surety to the prejudice of the creditor. It is a doctrine of equity, (Moore v. Watson, 20 R. I. 495), designed to work justice to the surety, but not to enable him to indemnify himself at the expense of the creditor. Stearns, Suretyship, § 262; Crump v. McMurty, 8 Mo. 408.

2. An express contract of *indemnity* is, in practice, frequently made by the principal to the surety. In the absence of this, however, the fact of payment by the surety and the relation of the parties, as already noted, gives rise to an implied contract of indemnity upon which suit at law lies as an alternative to the enforcement of the right of subrogation. Such a suit is, of course, in the surety's own name. The right to bring it arises *pro tanto*, upon payment by the surety of any part of the principal's debt. Bullock v. Campbell, 9 Gill (Md.) 182; Wilson v. Crawford, 47 Iowa, 469. The Statute of Limitations runs from the time of the actual payment by the surety. Thayer v. Daniels, 110 Mass. 345. Recovery is limited to the amount actually paid by the surety. Brandt, Suretyship (3d ed.), § 233; Coggeshall v. Ruggles, 62 Ill. 401. The surety of a surety may, according to the weight of au-

thority, maintain a direct action for indemnity against the principal. See Hall v. Smith, 5 How. (U. S.) 96. The right of indemnity requires that the surety became so at the request of the principal debtor, express or implied. Osborn v. Cunningham, 4 Dev. & Bat. (N. C.) 423.

A surety who has paid may also obtain indemnity by the cancellation or set-off *pro tanto* of a debt owed by him to the principal debtor. Merwin v. Austin, 58 Conn. 22. His right does not, however, extend beyond his proportionate share of the original debt. Cosgrove v. McKasy, 65 Minn. 426.

3. As between cosureties there is a similar implied contract of *contribution*, whereby they are to bear the loss equally, unless some other division is expressly agreed on. Like indemnity, contribution is of equitable origin, but may now be enforced by action at law (see Lansdale v. Cox, 7 T. B. Mon. (Ky.) 401), in the surety's name, or, as already noted, by means of the equitable right of subrogation in the creditor's name. The principle of contribution was stated by Alderson, B., in Pendlebury v. Walker, 4 Y. & C. Ex., at p. 441, as follows: "Where the same default of the principal renders all the cosureties responsible, all are to contribute; and then the law superadds that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety." In Craythorne v. Swinburne, 9 Rev. Rep. 264 (another report in 14 Ves. 160), Lord Eldon said: "In the case of Deering v. Earl of Winchelsea, * * * it is decided that, whether they are bound by several instruments or not, whether the fact is or is not known, whether the number is more or less, the principle of equity operates in both cases; upon the maxim that equality is equity; the creditor, who can call upon all, shall not be at liberty to fix one with payment of the whole debt; and upon the principle, requiring him to do justice, if he will not, the court will do it for him."

There is some authority, which does not, however, represent the general law, to the effect that in equity the right of a surety to contribution from a cosurety exists only where the principal is insolvent. See 1 Brandt, Suretyship (3d ed.), § 316.

9. *S. executed a bond making him surety for P.'s debt of $10,000 to C. Subsequently X. executed a second bond whereby he became P.'s surety for the same debt, and he received from P. for his security a mortgage on land worth $5,000. When the debt fell due, S. and X. each paid C. $5,000 in discharge of it, and thereafter P. paid X. $2,500 by way of partial reimbursement. What rights has S. against X.?*

It is well settled that sureties for the same debt, who become so before suit brought, are cosureties, even though they assume their obligations at different times, by different instruments, and for different considerations, and even though each is ignorant of the

other. See Sohram v. Werner, 85 Hun (N. Y.), 293; Golson v. Brand, 75 Ill. 148. The rule is different as between the surety for a debt and one who, in the course of legal proceedings to recover the debt from the principal, becomes surety for the principal debtor on an appeal bond, etc. In such a case the obligations of the two sureties are essentially different in tenor; they are not cosureties and no right of contribution exists between them. Dunlap v. Foster, 7 Ala. 734; Friberg v. Donovan, 23 Ill. App. 58; and see Cowan v. Duncan, Meiggs (Tenn.), 470. In the case supposed, however, S. and X. are cosureties. A surety is entitled, by virtue of his right of contribution, to share *pro rata* in security given by the principal to a cosurety prior to the discharge of the debt; and this, according to the weight of authority, even though the security was expressed to be solely for the benefit of the surety receiving it. Steel v. Dixon, 17 Ch. Div. 825; Stearns, Suretyship, § 279 *et seq.*, § 291; Commissioners of McDowell Co. v. Nichols, 131 N. C. 501, *contra*. In Steel v. Dixon, Fry, J., said: "* * * As between cosureties there is to be equality of the burden and of the benefit * * *. Each surety must bring into hotchpot every benefit which he has received in respect of the suretyship which he undertook, and if he has received a benefit by way of indemnity from the principal debtor, it appears to me that he i bound, as between himself and his cosureties, to bring that into hotchpot, in order that it may be ascertained what is the ultimate burden which the cosureties have to bear, so that the ultimate burden may be distributed between them equally or proportionably as the case may require." It follows that S. is entitled to share equally with X. in the benefit of the mortgage.

X. is, however, entitled to keep the $2,500 free of any claim by S. When the creditor has been paid by the cosureties ratably, the rights of contribution as between themselves become fixed as of that time and "each becomes an independent creditor of the principal for the amount paid by him" (1 Brandt, Suretyship (3d ed.), § 299), and is entitled to keep for his own use any reimbursement which his diligence may thereafter obtain from the principal. Harrison v. Phillips, 46 Mo. 520; see also Messer v. Swan, 4 N. H. 481. It is somewhat difficult to assign a valid theoretical reason for this difference in the rights of contribution before and after payment of the creditor. The distinction must, seemingly, rest on the practical ground that it is advantageous to fix the rights of the parties as soon as possible and end the constant arising of new equities to be adjusted. See 16 Harv. L. Rev. 439.

10. *S. was surety for P. on a bond to C. for $5,000. C. was indebted to P. in the sum of $2,000, and S. was indebted to P. in the sum of $1,000. C. sues S. on the bond. What are the rights of S.?*

(1) He may file a bill in equity to compel P. to pay the bond and, pending such payment, may perhaps temporarily enjoin the

prosecution of C.'s action. See note *infra*. (2) He may retain the $1,000 which he owes P. as security for the performance of P.'s duty to free him from liability to C., or it would seem that he may, if he prefers, pay it to C. Scott v. Timberlake, 83 N. C. 382; McKnight v. Bradley, 10 Rich. Eq. (S. C.) 557; and see Richardson v. Merritt, 74 Minn. 354.

He may not at law use C.'s debt to P. as a set-off, according to the weight of authority, especially where P. is not before the court, because that right is one belonging to P., not to S., and it lies in P.'s "election to determine whether it shall be used defensively, or whether he will bring his own action for the damages, or whether he will forego his claim altogether. The defendants (sureties) have no control over him in this respect and cannot borrow and avail themselves of his rights." Lasher v. Williamson, 55 N. Y. 619. If both principal and surety are in court and plead the set-off it will be allowed (Mahurin v. Pearson, 8 N. H. 539), and it is generally held that the surety may in equity bring in all the parties and thereupon avail himself of a set-off in favor of his principal. Stearns, Suretyship, § 117; see also Bechervaise v. Lewis, L. R., 7 C. P. 372.

Where the creditor is insolvent, it has been held that a surety may in equity obtain the right to use his principal's claim against the creditor as a set-off, even though the principal be not before the court. Edmunds' Assignee v. Harper, 31 Gratt. (Va.) 637, under Virginia statute; see Coffin v. McLean, 80 N. Y. 560. And the same has been held where the principal is insolvent. Jarrett v. Martin, 70 N. C. 459.

In addition to the rights of subrogation, indemnity, and contribution already referred to, a surety may, in a proper case, compel his principal to pay the debt before the creditor collects from the surety, and thus obtain *exoneration*. "Sureties also are entitled to come into a court of equity after a debt has become due, to compel the debtor to exonerate them from their liability by paying the debt." Story, Eq. Jur., § 327; and see Bechervaise v. Lewis, L. R., 7 C. P. 372. This right exists only in equity and does not arise until the principal debtor's obligation has matured. American Bonding Co. v. Logansport &c. Gas Co., 95 Fed. Rep. 49. The right is enforced by a bill *quia timet* and is in the nature of specific performance of a contract to save the surety harmless. Frequently an express contract of exoneration is given by the principal debtor, and in such cases equity will specifically enforce it. Ranelaugh v. Hayes, 1 Vern. 189. Whether the courts will, in aid of the surety's exoneration, temporarily enjoin the creditor from prosecuting suit against the surety, pending proper steps to compel the principal to give exoneration is not definitely settled. Such an injunction has been denied in the Federal courts, on the ground that it would be an obstruction of the creditor's right to enforce the surety's liability. American Surety Co. v. Lawrenceville Cement Co., 96 Fed. Rep. 25, at p. 30. A contrary view seems to be hinted by the court in Wolmershausen v. Gullick, L. R. 1893, 2 Chan. 514.

V. DISCHARGE OF SURETY.

1. Use of Principal's Defenses.

11. *P. purchased a horse from C., who warranted it to be sound. P. promised to obtain and deliver to C. certain chattels in payment, and S. at the same time agreed with C. that if P. did not perform his agreement, he (S.) would perform it. P., having made default, C. sues S., who pleads (1) that the warranty as to the horse was broken, and (2) that P. was insane at the time of the contract. Demurrer to each plea. What judgment?*

Judgment for S. on the first plea, and for C. on the second. Either of these pleas would be a defense to P., the principal. It is frequently stated that whatever is a defense to the principal is also a defense to the surety. See Ames v. Maclay, 14 Iowa, 281. But this is far from universally true. "The surety is not entitled to every exception which the principal debtor may urge. He has a right to oppose all which are inherent to the debt, not those which are personal to the debtor." Porter, J., in Baldwin v. Gordon, 12 Martin (La.), 378. The rule may be stated with substantial accuracy by saying that defenses available to the principal debtor which arise from the act or default of the creditor, are also defenses to a surety who was known to the creditor as such. Thus if the contract between principal and creditor is illegal, that fact is a defense to the surety. Mound v. Barker, 71 Vt. 253. So if the principal's obligation was created by the fraud or duress of the creditor, the surety may defend on that ground (Putnam v. Schuyler, 4 Hun (N. Y.), 166; Osborn v. Robbins, 36 N. Y. 365; but *cf.* Hazard v. Griswold, 21 Fed. Rep. 178), and so if the creditor release the principal, p. 414 *infra*. Similarly in the case supposed, the defense of failure of consideration due to C.'s default is available to S. Sawyer v. Chambers, 43 Barb. (N. Y.) 622; Scroggin v. Holland, 16 Mo. 419; Gunnis v. Weigley, 114 Pa. St. 191; Cooper v. Joel, 1 DeGex. Fich. & Jo. 240; Ohio Thresher & Engine Co. v. Hensel, 9 Ind. App. 328.

But where the principal has a defense not arising from any act or omission of the creditor, it will not avail the surety. Thus the infancy or coverture of the principal cannot be set up by the surety (Kuns' Executor v. Young, 34 Pa. St. 60; Winn v. Sanford, 145 Mass. 302), except where the infant has disaffirmed the contract and returned the consideration, as in Baker v. Kenneth, 54 Mo. 82; nor is the insanity of the principal at the time of contracting a defense to the surety. Lee v. Yandell, 69 Tex. 34. Similarly the surety on a corporation's contract may not plead that the contract was *ultra vires* of the corporation. Yorkshire Railway Wagon Co. v. Maclure, L. R., 19 Ch. Div. 478; Weare v. Sawyer, 44 N. H. 198.

In cases where the principal contract is usurious, that fact is a

defense to the surety if the law makes usurious contracts void. Prather v. Smith, 101 Ga. 283; Harrington v. Findlay, 89 Ga. 385. Such cases are merely one species of the illegal contracts, noted above. Even where usury is a defense personal to the obligor, and to be used only at his option, it would seem that his surety may plead it. See Chapuis v. Mashot, 91 Hun (N. Y.), 565.

In this connection may be noted that if a principal debtor successfully defends, on the merits, a suit by the creditor on the obligation, equity will enjoin the enforcement by the creditor of a judgment recovered against the surety on the same obligation. Ames v. Maclay, 14 Iowa, 281.

12. *P. was indebted to C. by simple contract in the sum of $1,000. S. executed a sealed guaranty of the debt. Seven years later, C. sued S. on the guaranty. (1) What are the rights of S.? (2) What would they be if P. had been discharged in bankruptcy; and (3) if P. had received a formal release from C.?*

(1) S. has no defense. The Statute of Limitations would be a defense to P. against C. but the guaranty, being a specialty, is not barred by the lapse of seven years, and the fact that the statute runs in favor of a principal debtor does not, according to the weight of authority, release the surety. Nelson v. First Nat. Bank, 69 Fed. Rep. 798. In this case the surety has lost his right of *subrogation,* since the creditor no longer has any rights against the principal to which he can be subrogated. His right of *indemnity* is, however, still perfect, for the statute starts to run against that only when the surety actually pays. Hall v. Thayer, 12 Metc. (Mass.) 130.

(2) If P. has been discharged in bankruptcy, S. is still liable to C., but has no right over against P. beyond the right to prove his claim in bankruptcy as a creditor, since P. has been released by the discharge. Cochrane v. Cushing, 124 Mass. 219; Mace v. Wells, 7 How. (U. S.) 272.

(3) If P. has been released by the act of C., the release inures to the benefit of S. Stearns, Suretyship, § 102. Such a release destroys S.'s right of subrogation, since there no longer exists any right in favor of C. to which he can be subrogated, and for this reason S. is discharged.

In general, it may be said that discharge of a principal debtor by any cause other than the act of the creditor does not discharge the surety; but that any act by a creditor which results in the complete or partial discharge of the principal debtor releases the surety *pro tanto.* "The creditor can do no act by which he reduces the principal's liability, without at the same time reducing the surety's liability, at least to the same extent. But the rule is very different where the law

reduces or absolves the principal's liability, without the fault or procurement of the creditor." Stone, J., in Bean v. Chapman, 62 Ala. 58. This principle would not, of course, apply to a case where there is nothing to indicate to the creditor that one of two several obligors is only a surety.

Participation by a creditor in a composition of his debtor's creditors, which results in the debtor's discharge under a statute, is not a discharge to the debtor's surety. Cilley v. Colby, 61 N. H. 63. The case is treated like one of bankruptcy rather than of voluntary release by the creditor. *Cf.* Paddleford v. Thacher, 48 Vt. 574, and American Bank v. Baker, 4 Metc. (Mass.) 164.

The theoretical basis of the surety's discharge in these and similar cases is that by the act of the creditor one of the surety's rights — subrogation, indemnity, contribution, or exoneration — has been impaired. The surety is a favorite of the law and any act by the creditor which causes him such prejudice works his discharge.

It is also held that where a creditor's release to his debtor expressly reserves his rights against the surety the surety remains liable, the release being construed merely as a personal covenant that the creditor will not himself sue the principal debtor. The surety's rights against him, accordingly, remain unimpaired. Bateson v. Gosling, L. R., 7 C. P. 9; see Dupee v. Blake, 148 Ill. 453; *cf.* Commercial Bank v. Jones, L. R. 1893, A. C. 313; see *supra*, tit. Bills and Notes, ques. 27. In such cases, while the creditor would have no right to sue the principal for his own use, equity would doubtless keep alive the creditor's right against the principal where the surety sought to use it by subrogation.

2. The Giving of Time to the Principal Debtor.

13. *P. owed C. $1,000, S. being surety. Before the money was due, C. agreed with P., who was insolvent, that he would extend the time of payment three days if P. would get X. to secure the debt by first mortgage on certain land of X., worth $10,000. P. did so. The debt being unpaid after the extension, C. sues S., alleging that the transaction benefited S. by bringing in another surety. What are S.'s rights?*

S. is absolutely discharged. Where a creditor, by a binding contract, extends the principal obligor's time for performance, the surety is released, because his right of subrogation is prejudiced during the period of such extension. The court will not inquire whether or not the surety is actually damaged, nor whether he receives counterbalancing advantages. This is universally law. 1 Brandt, Suretyship (3d ed.), § 376; Froude v. Bishop, 25 N. Y. App. Div. 514; United States v. Am. Bonding Co., 89 Fed. Rep. 925. In the leading case of Rees v. Berrington, 2 Ves. Jr. 540, the court said: "He (the surety) has a right the day after the bond is due to come here and insist upon its being put in suit: The obligee has suspended that, till the time contained in the notes runs

out: Therefore, he has disabled himself to do that equity to the surety which he has a right to demand. * * * You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement."

A surety is not discharged, however, if the creditor had no notice that he is a surety and not a principal obligor (Wilson v. Foot, 11 Metc. (Mass.) 285), nor if the agreement to give time does not amount to a valid and enforceable contract (Lowman v. Yates, 37 N. Y. 601), nor if it is a mere forbearance, not in pursuance of a binding contract. Bank of Uniontown v. Mackey, 140 U. S. 220. Similarly, a waiver by a creditor, without consideration, of defaults in performance by the principal debtor is not sufficient to relieve a surety. Michigan SS. Co. v. American Bonding Co., 104 N. Y. App. Div. 347.

In analogy to the cases of release by the creditor, noted above, p. 415, it is held that if, in extending his debtor's time, a creditor expressly stipulate with the debtor that his right against the surety be reserved, the surety will still be bound, and his right of subrogation accordingly kept alive. Brandt, Suretship (3d. ed.), § 413.

3. Creditor's Loss of Security.

14. *S. became surety for P.'s unsecured debt to C. of $1,000 due July 1st. Thereafter, and before the debt became due, C. advanced $1,000 more to P., payable June 1st, in consideration of P.'s executing to him a mortgage on land worth $3,000 as security for both debts. P. paid the $1,000 due June 1st and C. thereupon canceled the mortgage. S. was ignorant of the entire transaction. What are his rights when sued by C. for the $1,000 due July 1st?*

S. is released. A surety has, as part of his subrogation, a right to the benefit of all securities held by the creditor. If this right is prejudiced by the wilful act of the creditor, the surety is discharged *pro tanto,* the burden of proof as to the extent of the injury being on the creditor. Allen v. O'Donald, 23 Fed. Rep. 573; Baker v. Briggs, 8 Pick. (Mass.) 122; Fielding v. Waterhouse, 8 J. & S. (N. Y.) 424. It is immaterial whether or not the surety knew of the existence of the security (Mayhew v. Crickett, 2 Swanst. (Eng.) 185), and equally so whether it was given at or after the time when he became surety. Holland v. Johnson, 51 Ind. 346; see Freaner v. Yingling, 37 Md. 491. Newton v. Chorlton, 2 Drewry, 333, *contra,* does not represent the weight of authority. When P. executed the mortgage, S.'s right in it became vested, and C. was in the position of a trustee. Upon payment, S. would have been entitled to reimbursement from the security. The cancellation of the mortgage, therefore, effected the surety's release to the extent of the value of the abandoned security, and as that value was more than the amount of the debt the discharge was complete.

So a surety is discharged where the security is improperly used by the creditor, as where it is sold privately instead of at public sale. Holmes v. Williams, 177 Ill. 386. It has been held that a surety is discharged if the creditor releases security, whether or not the creditor knew him to be a surety. Templeton v. Shakley, 107 Pa. St. 370; Martin v. Taylor, 8 Bush (Ky.), 384. On principle, it would seem that this holding is erroneous, and it is opposed to the weight of authority. Cases collected, 27 Am. & Eng. Ency. of Law (2d ed.), 518.

The release of security does not, in all cases, operate as a discharge of the surety. If the circumstances are such that a release of security by the creditor has certainly worked no damage to the surety he is not discharged (Neff's Appeal, 9 W. & S. (Pa.) 36; Hardwick v. Wright, 35 Beav. 133), but, as stated above, the surety is given the benefit of any doubt, and the creditor must prove that the surety has not been injured. Dunn v. Parsons, 40 Hun (N. Y.), 77; Fielding v. Waterhouse, 8 J. & S. (N. Y.) 424. Indeed, some cases go so far as to say that the surety's right to discharge is absolute, and that the courts will not inquire whether he is actually damaged. See Antisdel v. Williamson, 165 N. Y. 372. Where the surety has in his hands funds of the principal sufficient to indemnify him it would seem that he is not discharged by a release of security because he is not damaged. See Thomas v. Wason, 8 Colo. App. 452.

By analogy to cases of release of security it is held that where a piece of work is done under contract, payments to be made in instalments as the work progresses, the contractor's surety is discharged if the employer pays an instalment before the contractor has completed the specified portion of the work. Taylor v. Jeter, 23 Mo. 244; Village of Chester v. Leonard, 68 Conn. 495.

As a surety's right of subrogation involves a right in securities held by the creditor, so his right of contribution from cosureties involves a similar right in securities held by them. See pp. 410, 411, *supra*.

15. *C. recovered judgment against P., who owned a tract of land. By statute, judgments were a lien for ten years on lands of the judgment debtor. C. allowed eleven years to go by, and then sued S. on a bond which he had executed as P.'s surety. Has S. a defense?*

Yes, according to the weight of authority, he is discharged up to the extent of the value of the lost lien. As already noted, a creditor ordinarily owes a simple surety no duty of diligence in suing the debtor, p. 404, *supra*. Mere failure on C.'s part to bring action would not have discharged S., for S. should have paid the debt and brought suit himself. But the judgment, once recovered, was a lien on P.'s land, and C., having thus obtained security, was bound to be diligent in preserving and realizing on it. Clow v. Derby Coal Co., 98 Pa. St. 432; Sherraden v. Parker, 24 Iowa, 28; Stearns, Suretyship, p. 137 *et seq.*

The law is by no means settled as to cases where security is lost by the creditor's inactivity, or by his neglect to take measures to perfect and realize on it. Some courts apply the principle that a creditor owes no duty of diligence to the extent of holding that he may passively allow security to slip from his fingers (Wasson v. Hodshire, 108 Ind. 26; *cf.* Freaner v. Yingling, 37 Md. 491), and need not take active steps to enforce it. Carver v. Steele, 116 Cal. 116. In Pennsylvania it is held that allowing a judgment lien to expire, as in the case supposed above, does not discharge the surety. Kindt's Appeal, 102 Pa. St. 441. The weight of authority is, however, believed to be to the contrary, and the creditor is considered in a measure a trustee of the security. See City Bank v. Young, 43 N. H. 457; Hayes v. Ward, 4 Johns. Ch. (N. Y.) 122. So it has been held that a surety is discharged to the extent of his injury if the creditor lose security by failure to give notice of dishonor of a note (see City Bank v. Young, 43 N. H. 457, at p. 462); by negligent failure to collect a claim (see Wakeman v. Gowdy, 10 Bosw. (N. Y.) 208; Word v. Morgan, Sneed (Tenn.), 79; by failure to give notice of an equity, which neglect resulted in the extinction of the equity by a sale for value without notice (Strange v. Fooks, 4 Giff. 408); by failure to record an assignment and to exercise a right of entry (Wulff v. Jay, L. R., 7 Q. B. 756; but see N. Y. Exch. Bank v. Jones, 9 Daly (N. Y.), 248); by delaying to enter judgment on a verdict, where the debtor became insolvent during the delay (Hayes v. Little, 52 Ga. 555, construing a statute); and, in general, by failure to "account not only for the money he has actually made out of the pledge, but also for the moneys he might, ought, and should have made out of the pledge, and he must allow for that whether he made them or not, and if by laches he has diminished the value of the pledge he is bound to allow for the sum he ought to have made." Blackburn, J., in Polak v. Everett, L. R., 1 Q. B. D. 669.

It has even been held that where a creditor fails in this duty the surety is discharged, even though the creditor was ignorant that he was a surety and not a joint debtor. Holt v. Bodey, 18 Pa. St. 207; *contra*, Parsons v. Harrold, 46 W. Va. 122; Guild v. Butler, 127 Mass. 386, *semble*. The decisions *contra* seem right on principle. Of course, where a surety has expressly stipulated for diligence on the part of the creditor, in preserving and realizing on securities, he is discharged in every jurisdiction if this duty is neglected by the creditor. Walker v. Goldsmith, 7 Oreg. 161.

4. Alteration of Contract or Change in Circumstances Affecting Risk.

16. *S. became surety for P. on a lease to P. of sixteen acres of land at a fixed rental. It was later agreed between P. and the lessor, C., that two acres should be surrendered in consideration of C.'s making a separate lease to P. of another six-acre lot without rental. C. sues S. counting on the lease as originally made and also as modified. Has S. a defense?*

Yes. To suit on the modified lease he may plead nonassumpsit; to suit on the original lease he may plead the modification which has altered it.

The terms *alteration* and *variation* are used almost interchangeably in the cases. Irrespective of nomenclature, however, a distinction between two classes of cases should be borne in mind. (1) Those where the original agreement between principal and creditor has been changed or altered — either by physical alteration on the face of a written instrument or by collateral contract rescinding or modifying all or a part of the original agreement; and (2) those where, while the original contract remains unchanged, its performance as between creditor and principal is not in precise accordance with its terms, or where the principal and creditor have in the course of performance brought about a condition of affairs not fairly to have been expected by the surety. In the first class of cases, where the contract has been altered without his consent or ratification, it is clearly open to the surety to defend a suit on the altered contract on the ground that he never made such a contract. City of New York v. Clark, 84 N. Y. App. Div. 383. "*Non haec in foedera veni* is an answer in the mouth of the surety from which the obligee can never extricate his case, however innocently or by whatever kind intention to all parties he may have been actuated." Bethune v. Dozier, 10 Ga. 235. He may equally defend a suit on the *original* contract by pleading its alteration or partial rescission, and this defense is in some jurisdictions absolute (Antisdel v. Williamson, 165 N. Y. 372; Polak v. Everett, L. R., 1 Q. B. D. 669), and everywhere is valid if the change might work him injury. In the second class of cases the defense of non-assumpsit is not available, for the original contract remains unchanged, and the question is merely whether the surety's risk has been unfairly increased by actions of the principal and surety *dehors* the contract. See pp. 420, 421, *infra.*

17. *P. made a note to C. for $1,000, guaranteed by S., and payable in six months with six per cent. interest. After delivery, C. and P. by agreement struck from the note the words "six per cent." and substituted the words "four per cent." Is S. discharged?*

This is clearly a case of alteration, and indeed of physical alteration on the face of the instrument. S. never guaranteed a four per cent. note, yet the change can by no possibility injure him, and works, in fact, an actual decrease of his liability. The cases are irreconcilable. In Cambridge Savings Bank v. Hyde, 131 Mass. 77, where a similar change was made by indorsement on the back of a note, the court held that such indorsement constituted a mere collateral agreement, which could not hurt the surety, and therefore did not discharge him, but distinguished the case from one where the change was made on the face of the note by erasure or interlineation, which destroyed the identity of the contract.

Morton, J., said: "Where the act of which the surety complains is a new agreement, changing some of the terms of the original agreement, we think the true rule is that, if such new agreement is or may be injurious to the surety, or if it amounts to a substitution of the new agreement for the old, so as to discharge and put an end to the latter, the surety is discharged. But if the change in the original contract from its nature is beneficial to the surety, or if it is self-evident that it cannot prejudice him, the surety is not discharged." The weight of authority seems, however unfortunately, to be opposed to this view, and to hold that the surety is entitled to stand on the strict letter of the contract and to decline to be bound if any alteration is made even though there is no erasure. Antisdel v. Williamson, 165 N. Y. 372; Weir Plow Co. v. Walmsley, 110 Ind. 242; Driscoll v. Winters, 122 Cal. 65. In cases of erasure or other physical change in the face of an instrument, made with the creditor's consent, the weight of authority holds the surety discharged, irrespective of any fraudulent intent on the part of the creditor. Hewins v. Cargill, 67 Me. 554; Coburn v. Webb, 56 Ind. 96; Wood v. Steele, 6 Wall. (U. S.) 80, (where the change was made by the principal debtor without creditor's knowledge). The rule, however, has been relaxed by some courts where the alteration was made innocently. Milbery v. Storer, 75 Me. 69.

The strictness of the rule as to erasure is doubtless connected with the "technical common-law principle that the obligation of a specialty has no existence apart from the document itself." 16 Harv. Law Rev. 512. It is also based on considerations of policy which forbid a man who has been guilty of spoliation to produce the mutilated document as evidence of his right. "To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument as to the party sought to be wronged." Swayne, J., in Wood v. Steele, 6 Wall. (U. S.) 80. Of course this argument fails of its reason where the erasure or interlineation has taken place by accident or by the act of a stranger. In such case, according to the better view, the actual *contract* between the parties is unaltered and its proof is not prevented by such damage to the written evidence of it. The true contract may be shown. Anderson v. Bellenger, 87 Ala. 334; U. S. v. Spaulding, 3 Mason (U. S.), 478; 1 Greenl. Ev., § 566.

18. *F. was employed by C. as bookkeeper, and S. executed a fidelity bond for him in that capacity. Subsequently P., while retaining his position as C.'s bookkeeper, became his cashier also. P. thereafter embezzled certain money of C., and concealed it by false entries as bookkeeper. C. now sues S. on the fidelity bond to recover the amount of P.'s embezzlement. Is S. liable?*

No. Kellog v. Scott, 58 N. J. Eq. 344. The court held that the terms of the fidelity bond, while not covering employment as

cashier, were broad enough to make S. liable for "abstractions either by the bookkeeper himself in any capacity, or by another, if the abstractions were intentionally concealed from the employer by means of the false entries made by the bookkeeper." Nevertheless, P.'s added duties as cashier created "a material change by act of the parties without knowledge of the surety, in the nature of the duties of the employee, and it was a change that materially altered the duties of the employment, so as to affect the peril of the surety," and therefore he was discharged. It is noteworthy that this is not a case of alteration or modification of the original contract; the decision rests purely on the ground that circumstances attended the execution of the contract not fairly to have been contemplated by the surety. It is a case of variation of risk.

Similar reasons underlie the case referred to *supra*, p. 417, where the surety on a building contract is held discharged when the employer pays the builder an instalment of the price before, under the contract, it has been earned. General Steam Navig. Co. v. Rolt, 6 C. B. N. S. 550; see also Dickson v. MacPherson, 3 Grant's Ch. 185.

It is to be noted that many so-called cases of alteration and variation in reality involve no question of the law of suretyship, but merely one of interpretation of the surety's contract. For instance, where an official's bond secured his fidelity in his "said appointment" it was held that a reduction of his salary did not discharge the surety, for the reason that the amount of the salary had never been a term of the surety's contract. Frank v. Edwards, 8 Wels. Hurl. & Gor. 214. So in the frequent cases of sureties on builders' contracts where changes are made in the specifications during progress of the work the true question is usually whether the proper interpretation of the surety's contract makes these specifications a term of his obligation. If so, alteration of them alters the contract and he is discharged; if not, his liability continues unless there are special circumstances which vary his risk and raise an equity in his favor. See United States v. Freel, 186 U. S. 309; reported below in 99 Fed. Rep. 237, and 92 Fed. Rep. 299; Fuller Co. v. Doyle, 87 Fed. Rep. 687. A similar question of interpretation is shown in Reese v. United States, 3 Wall. (U. S.) 13.

5. Fraud, Misrepresentation or Concealment of Material Facts.

19. *S. was surety on a fidelity bond for P., a cashier employed by C. P. became a defaulter and thereupon C. sued S. on the bond. Plea, that since the execution of the bond and prior to such default, P. had been guilty of embezzlement to the knowledge of C., who had nevertheless retained him as cashier upon his making restitution, but without informing S. of the facts. Demurrer. What judgment?*

Judgment for S. By continuing P. in the employment after actual knowledge of his dishonesty, C. has released the surety. "If the dishonesty had existed before the surety became bound,

and the master had concealed it, the surety would not have been liable, and the cases are the same in principle. Moreover, upon discovering the dishonesty, the master had a right to discharge the servant, but by continuing him in the service he lost that right." 1 Brandt, Suretyship (3d ed.), § 477.

Such cases fall within the general rule that any dealing on the part of a creditor which unfairly burdens the surety or prejudices his remedy will discharge him. They illustrate the peculiar care with which the courts guard the rights of a surety against abuse. An employer is bound to disclose to one who becomes surety to him for an employee any known previous dishonesty of the employee in the service. Third Nat. Bank v. Owen, 101 Mo. 558; see Franklin Bank v. Stevens, 39 Me. 532. He must also reply fully and fairly to the inquiries made by the surety before binding himself. Bank of Monroe v. Anderson Co., 65 Iowa, 692. Also, he must disclose any circumstances peculiarly within his knowledge, with respect to the surety's risk, which make the particular case exceptional. "There may be circumstances known to the party taking a guaranty for another, of so decisive a character that it could not be supposed that if known to the surety he would have entered into the obligation, and in such a case the party taking the security cannot withhold the information and enforce the obligation." Andrews, J., in Howe Machine Co. v. Farrington, 82 N. Y. 121. This doctrine is not, however, carried so far as to discharge an employee's surety because he is not informed of prior derelictions on the part of the employee of which the employer had no knowledge, even though he was negligent in not finding them out. Bowne v. Mt. Holly Nat. Bank, 45 N. J. Law, 360; Williams v. Lyman, 88 Fed. Rep. 237. Graves v. Lebanon Nat. Bank, 10 Bush (Ky.), *contra*, 23, does not represent the general law. Nor does his duty to disclose include "circumstances which may indirectly affect the liability of the surety, such as the skill or the want of it; the industry or indolence; the care or negligence; the wealth or poverty of the party for whose faithfulness or responsibility a surety is sought. * * * The effects which result from such personal qualities are matters for which the surety ordinarily assumes the responsibility." Rice, J., in Franklin Bank v. Stevens, 39 Me. 532. That the principal debtor is a gambler need not be disclosed (Atlas Bank v. Brownell, 9 R. I. 168); nor, according to the weight of authority, need the fact that the principal is insolvent. Roper v. Sagamon Lodge No. 6, 91 Ill. 518; and see Farmers' Bank v. Braden, 145 Pa. St. 473; *contra*, Small v. Currie, 2 Drewry, 102, *semble*. It would seem, moreover, that the courts are slow to discharge the sureties on an official bond running to the government, even where the discharge would be allowed in the case of a private obligation. See U. S. v. Kirkpatrick, 9 Wheat. (U. S.) 720; 27 Am. & Eng. Ency. (2d ed.) 526.

So, in general, where an obligor is so far in default that the obligee has the right to terminate the contract, a guarantor or a surety known

to the obligee to be such may insist that the obligee exercise his right terminate the contract, and thus prevent the accumulation of further damages for the surety to pay. Hunt v. Roberts, 45 N. Y. 691; Phillips v. Foxall, L. R., 7 Q. B. 666.

20. *C. leased a house to P. at an annual rental payable in advance, the lease reciting that the house stood on certain land belonging to C. At C.'s request S. became P.'s surety. To an action by C. for rent, S. pleaded that in fact the house encroached one inch on the adjoining lot, which belonged to X. Demurrer. What judgment?*

Judgment for S. The lease misrepresented a material fact to the prejudice of S. Of course, if C. knew and concurred in this misrepresentation, S. would clearly be discharged. But even if C. was ignorant of the encroachment the result is the same. A surety has a right to rely on the recitals of the principal obligation, Stone v. Compton, 5 Bing. N. C. 142; see Frisch v. Miller, 5 Pa. St. 310. The creditor, by becoming a party to the obligation and requesting S. to do so, indorses such recitals. If he misrepresents any material matter to the surety to induce him to bind himself, the surety is discharged and the fact that the creditor acted in good faith makes no difference. Willis v. Willis, 17 Sim. 218; Molson's Bank v. Tuslay, 8 Ont. 293.

In the case supposed, the lease might be rendered valueless if X. chose to maintain ejectment, and the surety did not bargain for this risk. The result might well be different, however, if the suit were for rent for past occupancy. If in fact P. had occupied the premises undisturbed for a year, S. would doubtless be liable to make good that year's rent.

Of course, any actual fraud or unfair dealing practiced on the surety by the creditor to induce him to become bound may be set up by him in avoidance of his obligation. Biest v. Brown, 3 Giff. 450.

The distinction should be borne in mind between cases of the obligee's actual misrepresentation of a fact and those where he asserts that a certain result will take place, or a certain state of affairs come to pass. If such statements are merely of his expectation, failure to make them good will not discharge the surety. If, on the contrary, they are promises, embodying an essential portion of the performance on the obligee's side, their breach will work the surety's release on the ground of failure of consideration or breach of implied or express condition. Thus neglect by an employer to carry out his expressed intention of regularly auditing an employee's accounts is held not to release the surety on the employee's fidelity bond (Benham v. United Guarantee and Life Assurance Co., 7 Wels. Hurl. & Gor. 744; *cf.* Emery v. Baltz, 94 N. Y. 408); whereas failure to apply a note to discharge a particular obligation as promised does release the surety. Farmers' Bank v. Hathaway, 34 Vt. 538; see 'Ham v. Greve, 34 Ind. 18.

21. *C. loaned a sum of money to P., and S. became P.'s surety. It was, however, understood between P. and C. that the money should not be actually advanced, but, instead, a debt of the same amount owed by P. to C. should be canceled, and this was done. S. was not informed of this. Is he discharged?*

Yes. Doughty v. Savage, 28 Conn. 146. "One who becomes a surety for another must ordinarily be presumed to do so upon the belief that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the ordinary risks attending it, and the party to whom he becomes a surety must be presumed to know that such will be his understanding and that he will act upon it unless he is informed that there are extraordinary circumstances affecting the risk." Franklin Bank v. Cooper, 36 Me. 179. An obligee must let the surety know fairly the real nature of the transaction. Such a perversion of it as this subjects the surety to liability under circumstances very different from those attending a *bona fide* loan where the principal debtor actually receives and controls the money. It is a variation of the surety's risk. In a similar case, the court, in holding the surety discharged, said: "A party giving a guarantee ought to be informed of any private bargain made between the vendor and vendee of goods which may have the effect of varying the degree of his responsibility." Per Abbott, C. J., in Pidcock v. Bishop, 3 Barn. & Cress. 605. "The effect of the bargain was to divert a portion of the funds of the vendee from being applied to discharge the debt which he was about to contract with the plaintiffs, and to render the vendee less able to pay for the iron supplied to him." Per Holroyd, J., id.

22. *P. was indebted to C. in the sum of $1,000 and C. agreed to accept P.'s note at six months with interest, provided S. would indorse the note. S. did so at P.'s request, P. falsely representing that the note was secured by a mortgage of P.'s house to C. Has S. a defense to a suit by C. on the note?*

No. Rothschild v. Frank, 14 N. Y. App. Div. 399. This is a case of fraud on the surety by the principal debtor, the creditor being innocent. Such fraud forms no defense as against a creditor who has in good faith and for consideration taken the surety's obligation. Western New York Life Ins. Co. v. Clinton, 66 N. Y. 326. So if the surety signs an obligation in blank and the principal fraudulently fills in a greater sum or other terms than those agreed to by the surety, or, in violation of his promise to the surety, fails to get cosuretics, these facts do not prejudice an innocent creditor. Butler v. United States, 21 Wall. (U. S.) 272; Ward v. Hackett, 30 Minn. 150. A surety in his dealings with the principal must protect himself and cannot at the creditor's expense avoid the consequences of a failure to do so.

Two classes of cases should be noted in this connection. (1) If facts exist sufficient to charge the creditor with constructive notice of the principal's fraud on the surety, or to put him on inquiry, the surety is released. Thus it is held that where in the body of an obligation it is recited that A. and B. are to be sureties, and the obligation is actually executed by A. and X. as sureties, that fact is enough to put the creditor on inquiry and to release the surety. Woodin v. Durfee, 46 Mich. 424; *cf.* Dair v. U. S., 16 Wall. (U. S.) 1.

(2) If, after the surety has signed, the obligation is altered by the principal or by a stranger, the surety is, of course, not liable on the altered contract, and may defend under a plea of *non-assumpsit*. Wood v Steele, 6 Wall. (U. S.) 80; *supra*, p. 419.

6. Notice of Revocation or Death of Surety.

23. *S. promised C. that if he would from time to time make advances to P. as P. asked for them during the ensuing year, S. would guarantee their repayment up to $10,000. After $5,000 has been so advanced, S. notified C. that he would not guarantee any further advances. What are the rights of the parties?*

The notice frees S. from liability for further advances. His promise to C. was merely an *offer* for a unilateral contract, and was unsupported by consideration. Upon C.'s actually making advances and giving notice of them, p. 402, *supra*, it became a completed contract binding upon S. to the extent of such advances. As to the balance not yet advanced, however, it still remained a mere offer, subject to revocation at the will of the offerer in accordance with the general principles of contract. Offord v. Davies, 12 C. B. N. S. 748; Jordan v. Dobbins, 122 Mass. 168. In the same way such an offer is revoked by the death of the offerer. Jordan v. Dobbins, *supra*. In the case last cited the court said:

"Until it is acted upon, it imposes no obligation and creates no liability of the guarantor. After it is acted upon, the sale of the goods upon the credit of the guarantee is the only consideration for the conditional promise of the guarantor to pay for them. It is of the nature of an authority to sell goods upon the credit of the guarantor, rather than of a contract which cannot be rescinded except by mutual consent. Thus such a guarantee is revocable by the guarantor at any time before it is acted upon. * * * The provision that it shall continue until written notice is given by the guarantor that it shall not apply to future purchases affects the mode in which the guarantor might exercise his right to revoke it, but it cannot prevent its revocation by his death."

24. *In consideration of C.'s appointing P. as his factor for a period of ten years, S. guaranteed to C. that P. would faithfully account for all goods intrusted to him during that time. At the end of a year S. became suspicious of P.'s honesty and gave C. notice to procure another surety, saying that he would no longer*

be responsible. Two months later S. died. C. took no steps to procure another surety, and when, five years later, P. failed to account for certain goods, C. sued S.'s executors on the guaranty. Are they liable?

Yes. There was a completed contract, whereby, for a consideration, S. bound himself for a definite stated period. Such a contract, like any other, cannot be terminated by mere notice, nor is it abrogated by the death of the surety. "The death of an individual surety does not operate to revoke an engagement on his part in the nature of a continuing guaranty for a specified period of time, and in the event of a default by his principal within that period, the estate of the surety is liable after his death. Where the consideration for a guaranty is given once for all, the guaranty does not cease upon the death of the guarantor." W. Bartlett, J., in Holthausen v. Kells, 18 N. Y. App. Div. 80; affd., 154 N. Y. 776. *A fortiori* this is so, if the guaranty binds the guarantor, his "heirs, executors, and administrators." Hecht v. Weaver, 34 Fed. Rep. 111.

As already pointed out, pp. 422, 423, *supra,* where an obligor is so far in default that his obligee may refuse to go on with the contract, the guarantor may by notice require him to do so, and fix the extent of his own liability as of that time.

The law is not firmly settled as to how far a guarantor's liability is terminated by his death, or may be terminated by notice in cases where he has made a guaranty indefinite in time and amount, and where the principal is not in default. In Lloyd's v. Harper, 16 Ch. Div. 290, a father guaranteed his son's obligations as a member of Lloyd's Association in consideration of his admittance to that body. Thereafter the father died and his estate was sued on the guaranty. It was held liable. James, L. J., said: "Here the consideration is given once for all, just as in the case of the granting a lease in which a third party guarantees the payment of the rent and the performance of the covenants. * * * If the testator could at any time have determined the guaranty he could have determined it the next day. The moment the son was admitted to the status of an underwriting member, if the father was at liberty to say, 'I withdraw the guaranty,' then the guaranty would have been utterly futile and idle. If it could not be determined by him the next day there would be no time at which he could have a power of determining it." In that case the guaranty was indefinite as to amount, and as to time was only limited by the extent of the son's life. While the point decided was only as to the effect of the guarantor's death, the case may fairly be considered as authority for the proposition that a completed contract of guaranty for which the stipulated consideration has been given is not determinable by notice or by the guarantor's death, even where time and amount are indefinite. On principle it would seem that the law should be so, and that in the absence of contrary provisions, express or implied, in the contract, a guaranty made for consideration should not be determinable by notice

or by the guarantor's death merely because the obligation is not limited by fixed bounds of time and amount. Calvert v. Gordon, 3 Man. & Ry. 124; Balfour v. Grace, 1902, 1 Ch. Div. 733. Nevertheless, it has been intimated by high authority that in the absence of such limits, a guarantor may free himself upon giving reasonable notice to the obligee. Finch, J., in Emery v. Baltz, 94 N. Y. 408; O'Brien, J., in Reilly v. Dodge, 131 N. Y. 153. In neither of these cases was the point actually decided. Such a doctrine seems just if applied only to cases where "the consideration is fragmentary, supplied from time to time and, therefore, divisible." Lush, L. J., in Lloyd's v. Harper, *supra*. The courts, in cases where the obligation is indefinite as to time and amount, will at all events strain to construe the guarantor's promise as a mere offer, revocable until acted on, or to find in the contract an implied term that it shall end upon the guarantor's death or upon reasonable notice. Coalhart v. Clementson, 5 Q. B. D. 42.

In cases where the obligation of a surety is joint with that of the principal or of cosureties the weight of authority holds that the surety's estate is not liable for defaults occurring after his death. Pickersgill v. Lahens, 15 Wall. (U. S.) 140; Davis v. Van Buren, 72 N. Y. 587; *contra*, Susong v. Valden, 10 S. C. 247; Hudelson v. Armstrong, 70 Ind. 99. And where a creditor elects to take a joint judgment, instead of a joint and several judgment, against a surety and others, and the surety thereafter dies, his estate is not chargeable. United States v. Price, 9 How. (U. S.) 83.

TORTS.

I. Nature and Classification of Torts.

1. *What is a tort?*

A tort is a private or civil wrong or injury arising independent of any contract, for which the appropriate remedy is a common-law action. Clerk & Lind. on Torts (2d ed.); p. 1.

2. *Give a classification of torts with regard to the rights which they infringe.*

CLASSIFICATION OF RIGHTS AND TORTS.

RIGHTS.			TORTS.
Absolute	Personal Security	Life, Limb, Body	Assault and battery.
		Health	Nuisance.
		Reputation	Malicious prosecution. Libel. Slander.
	Personal Liberty		False imprisonment.
	Private Property	Real	Violations of incidental rights. Nuisance. Injury by fire. Trespass.
		Personal	Trespass. Conversion.
Relative	Public	Arising from relation of public officers to the community	Violation of official duty.
	Private	Arising from relation of: Husband and wife	Abduction. Enticement. Seduction
		Parent and child	
		Guardian and ward	
		Master and servant	
Statutory			Violation of.
Indirect modes of violating different classes of rights			Negligence. Fraud and deceit.

Chase's Notes on Torts, 2 Col. Jur. 144.

"Where a right exists there must be a corresponding duty to observe that right, and a tort may be spoken of either as a breach of duty or an infringement of a right." Clerk & Lind. on Torts, p. 6.

3. *How do torts resemble and differ from contracts?*

Torts resemble contracts in that they are private acts.

Torts differ from contracts by these qualities: that parties jointly committing torts are severally liable, without the right to contribution from each other; that the death of either party, as a rule, destroys the right of action; that persons under personal disabilities to contract are nevertheless liable for their torts. Clerk & Lind. on Torts (2d ed.), 37, 53; Hilliard on Torts (4th ed.), § 2; Spaulding v. Oakes, 42 Vt. 343.

It has been held, however, that the rule that there is no contribution between tort-feasors only applies in cases where the person seeking contribution must be presumed to have known that he was doing an unlawful act. Armstrong Co. v. Clarion Co., 66 Penn. St. 218; Bailey v. Bussing, 28 Conn. 455.

4. *How do torts resemble and differ from crimes?*

Torts resemble crimes in that they infringe the same rights. 3 Shars. Bl. Com. 122.

Torts differ from crimes in that the specific wrongful intent, necessary for a crime, is almost never necessary for a tort. A tort is said to be a private wrong, while a crime is a public one; but this distinction, although a correct one, does not prevent the same act from being considered both a tort and a crime, a familiar instance of this being the case of an assault and battery. 3 Shars. Bl. Com. 122.

5. *In what cases must the wrongful intent be proved in actions in tort?*

In malicious prosecution and fraud, an actual intent to injure or deceive must be established. Dietz v. Langfitt, 63 Penn. St. 234, 240; McKown v. Hunter, 30 N. Y. 625, 627; Bowden v. Bowden, 75 Ill. 143, 147; Hill v. Reifsnider, 46 Ind. 555. In libel and slander, the actual intent to injure need not be shown, if the defamatory matter was such as naturally to do injury. Moore v. Stevenson, 27 Conn. 14; Hatch v. Potter, 7 Ill. 725, 728; Smart v. Blanchard, 42 N. H. 137, 151; Pennington v. Meeks, 46 Mo. 217; Haire v. Wilson, 9 B. & C. 643.

6. *A. brings an action in tort, and can show no special damage. In what cases could he recover?*

He could recover at least nominal damages, except in an action for slander or libel where the words were not actionable *per se*. In that case special damage must be alleged in the declaration and proved at trial. Ellicottville, etc. v. Buffalo, etc., R. R. Co., 20 Barb. (N. Y.) 644; Allsop v. Allsop, 5 H. & N. 534.

II. TORTS AFFECTING THE PERSON.

a. Assault and Battery.

7. *At a public meeting A., advancing toward B., told him that if he said another word he would knock him down. B., fearing the threat, desisted. Was this an assault?*

There would be an assault here. The condition of silence was one that A. had no right to impose, and if B. refrained from speaking, through fear, he would have a right of action. Read v. Coker, 13 C. B. 850, 860. To constitute an assault, there need be no actual contact. An assault is any lawful physical force, partly or fully put in motion, creating a reasonable apprehension on the part of the person towards whom the action is directed, of immediate physical injury. 2 Bishop's Crim. Law (7th ed.), § 23.

8. *A. pointed a gun at B. The gun was empty, but B. thought it was loaded. Was A.'s act an assault? Suppose B. knew that the gun was not loaded. Suppose A. said he would shoot, but did not raise his gun?*

The apparent intention of the assaulting party is the thing to consider in the first case. The force was partly put in motion and caused reasonable fear, and would be an assault.

If B. knew that the gun was not loaded, there would not be a reasonable fear, and so no assault. Beach v. Hancock, 27 N. H. 223.

Words alone will not constitute an assault, and if A. did not raise the gun there would be no act on which to base an action. Warren v. State, 33 Tex. 517; Smith v. State, 39 Miss. 521.

9. *A reached, through a crowd, to strike B., but struck C., by mistake, and only grazed the clothing of B. D., also in the crowd, was negligently jostled. Could B., C., or D. sue for battery?*

A battery in general consists in the unpermitted (by the person or by the law) application of force by one man to the person of another, either hostilely without bodily harm, or negligently with bodily harm. Bigelow on Elements of Torts, 101.

B., therefore, would have a right of action owing to the hostility.

C. also would have a right of action. Pure accident is not generally ground for an action, but if the accident happens during a wrongful act, the law will not protect the wrongdoer. James v. Campbell, 5 Car. & P. 372.

D. would have no cause of action, unless actually injured by the jostling, as there was no hostility towards him. Cooley on Torts, 162.

b. Consent.

10. *A and B. agree to spar to a finish. A. sues B. for injuries, and B. pleads volenti non fit injuria. Can A. recover?*

If prize fights were illegal in the jurisdiction in which the fight took place the action could be maintained. Ordinarily consent is a good defense, but the law will ignore it, if the act consented to be illegal. Either A. or B. could, therefore, sue. Cooley on Torts, 162; Bishop on Non-Contr. Law, § 196.

Bishop objects to the doctrine of consent not being a defense in civil cases, even when the act is illegal. He agrees that in criminal prosecutions it should be no defense, but argues strongly that where a man is suing civilly the breach of the peace is not under consideration, and that the man who has consented should not afterwards recover. Bishop on Non.-Contr. Law, § 196.

11. *A. sues B., on the ground that B. has seduced her. Is consent a good defense?*

In the case of seduction, consent is a good defense. The explanation of this is historical. At common law, such sexual intercourse was not treated as a crime. In many States this has been changed by statute, and a woman is given a right of action. Hamilton v. Lomax, 26 Barb. (N. Y.) 615.

12. *A., being told that he is legally bound to submit to a physical examination, does so. It later appears that he was not so bound. If he sues the examiner for assault, is his consent a good defense?*

It would be. Consent given under mistake of law is still consent. Force or fear of violence is necessary to give a right of action. Latter v. Braddell, 50 L. J. Com. Law (N. S., Part 2), 448 and 166.

c. Accident.

13. *A., while using a gun in self-defense, accidentally shot B., who was standing by. Can B. recover?*

B. could not recover, if A. were not negligent. An accident means in law that which is unavoidable by the use of ordinary caution and skill. Morris v. Platt, 32 Conn. 75-80, 84.

14. *A., while separating two fighting dogs, struck B., without negligence. A. was under no duty to separate the dogs. Can B. recover?*

Here A. was doing something that he might equally well have let alone, but the act being lawful, he is not, even in that case, held to extraordinary care. A. is only held to "the kind and degree of care reasonably necessary to the exigency." Brown v. Kendall, 6 Cush. (Mass.) 292, 297.

d. Duress.

15. *A. is pushed through B.'s window by a third party. Can B. sue A.? Suppose A. breaks the window, on being threatened with physical violence if he does not?*

A. would not be liable in the first case, but would be in the second. There is no duress, unless physical force is applied.

"That is a man's act which he wills to do, exercising a choice between acting and forbearing, and the strongest moral compulsion still leaves freedom of such choice." Clerk & Lind. on Torts (2d ed.), 7.

Duress is more of a defense in criminal law. There is surprisingly little authority on the subject in torts.

e. Self-Defense — Short of Endangering Life.

16. *A. had threatened to kill B., and had made one attempt to do so. B., knowing of the threat, shot and killed A. the first time he saw him. Was the plea of self-defense good?*

Previous threats or acts, no matter how violent, will not justify an assault. "To excuse a homicide, the danger of life, or great bodily injury, must either be real, or honestly believed to be so, at the time, and upon sufficient grounds." Rippy v. State, 2 Head (Tenn.), 217; Shorter v. People, 2 N. Y. 193, 197.

17. *Counsel for defendant asked court to charge that defendant had a right to strike if he actually believed that the plaintiff was going to strike first. Counsel for plaintiff asked for a charge that defendant had no right to strike unless he was actually in danger. Which charge should be allowed?*

Neither charge would be correct. The first charge does not state that the belief was reasonable. Shorter v. People, 2 N. Y. 193, 197, 201; State v. Bryson, Harrigan & Thompson's Cases, 249.

The second charge would deprive a man of the right of striking, when he had reasonable grounds to believe that he was in danger. Self-defense would be of no value if a man had to find out absolutely whether he was in danger or not. Shorter v. People, 2 N. Y. 193, 201.

An impending blow need not be *struck* to give a right of self-defense; it is sufficient if there is a threatened evil, or one which appears as if it were ready to fall. Shorter v. People, *supra.*

18. *It was argued by counsel that when defendant was attacked he should have retreated, rather than have met force with force. Is the argument sound?*

No. When attacked, a man need only retreat to avoid killing his assailant. In other cases he may return blow for blow, and is

only liable for unnecessary force. State v. Sherman, 16 R. I. 631; Cooley on Torts, p. 165.

19. *A. caught B.'s horse by the bridle, without intending to injure B., and B. struck him. Was B. acting in self-defense?*

Yes. A man has a right to move, as well as to be free from personal violence. B. was justified in endeavoring to obtain his release, using no more violence than was necessary for that purpose. Rowe v. Hawkins, 1 F. & F. 91.

20. *A. was assaulted by B., but used excessive force in repelling him, and B. recovered damages for his injuries. A. now sues for B.'s assault upon him. Can he recover?*

New York holds that if one party has already recovered, the other is barred. Elliot v. Brown, 2 Wend. (N. Y.) 497. See Cooley on Torts, 165, criticising New York doctrine.

New Hampshire holds that it is the same as if there were two assaults at different times. Vermont supports this view. The assaulted party recovers for the assault and battery first committed upon him, and the assailant recovers for the excess of force used beyond what was necessary for self-defense. Dole v. Erskine, 35 N. H. 503, 510; Cade v. McFarland, 48 Vt. 47.

See also Bishop on Non-Contr. Law, § 200.

f. In Protection of Property — Short of Endangering Life.

21. *A. entered B.'s land quietly, and B., without warning him, put him off the land with appropriate force. Would A. have a right of action?*

Yes. When a man enters quietly, he must be warned before force can be used of any kind, and after a warning, the owner must begin with the least force appropriate. If a man enters with force, however, there is no need of a warning. Green v. Goddard, 2 Salk. 641: Comm. v. Clark, 2 Met. 23; Wall v. Lee, 34 N. Y. 141.

g. Use of Force in Defending Person or Property to an Extent Endangering Human Life.

21a. *When may one, in defense of person or property, use means endangering human life?*

One may justify the killing of a wrongdoer to prevent the commission of a felony upon his own person; Shorter v. People, 2 N. Y. 193; or property; 1 Bishop on Criminal Law (7th ed.), §§ 853, 857, 875; or that of another; 1 Bishop, *supra*, § 877; Regina v. Rose, 15 Cox, C. C. 540; Cooper's case, Croke Car. 544; People v. Cook, 39 Mich. 236; if under the existing circumstances he believes, on reasonable grounds, that that is the only way to prevent it.

See Criminal Law, Ques. 4.

If he is attacked, however, outside of his own house, he cannot take the life of his assailant unless he has retreated "to a wall or ditch", provided he can do so in the course of the combat without endangering his own life. State v. Donnelly, 69 Iowa, 705; Stoffer v. State, 15 Ohio St. 47. He may kill without retreating if under the existing circumstances he had reasonable grounds for believing there was imminent danger of great personal injury to himself, *and* did in fact believe it. Shorter v. People, *supra;* State v. Donnelly, *supra.*

In the defense of real or personal estate, it is not permissible, except to prevent a felony, to take human life. The disparity between the wrong and the remedy is too great and if the property cannot be preserved without such extreme measures, it must be yielded up and recourse had to the ordinary processes of law. Commonwealth v. Donahue, 148 Mass. 529; State v. Zellers, 2 Halst. (N. J.) 220; 1 Bishop, *supra,* §§ 857, 861, 875, 876; Ques. 16-21, *supra.*

But outside of all of these rules stands the case of the defense of the dwelling-house. A man's house is his castle. In its defense he can kill one who attacks it, without retreating, and whether he owns the house or is merely a sojourner therein. Cooper's Case, *supra;* State v. Patterson, 45 Vt. 308; 1 Bishop, *supra,* §§ 858, 859, 877.

h. Recaption of Personalty.

22. *A. has been in peaceable possession, under bona fide claim of title, but the property in fact belongs to B. Has B. a right of forcible recaption?*

Where the possession has been peaceable, there is a conflict in authority. England seems to allow force in such a case. Blades v. Higgs, 30 L. J. Cas. Crim. Law (Part 2), 347. Sterling v. Narden, 51 N. H. 217, *accord.* The American authority, however, tends to the other view. McLeod v. Jones, 105 Mass. 403, 405; Richardson v. Anthony, 12 Vt. 273; Stephenson v. Little, 10 Mich. 433.

It would seem, on principle, that a compromise would be best, allowing forcible recaption (1) when the other party was not holding under *bona fide* claim of right, as in case of a purchaser from a thief, with notice; or (2) when the owner will lose his property, if recaption is not allowed, as where the property is being taken out of the jurisdiction and a legal process will be too late.

The law is settled that the rightful owner may retake his goods if he does not have to use force, and may use force if the recaption is *immediate.* Commonwealth v. Donahue, 148 Mass. 529, and cases above cited. The owner is always liable for excessive force, however. Commonwealth v. Donahue, *ante.*

i. Use of Force to Regain Realty.

23. *A.'s tenant, on expiration of term, refused to quit. A. put him out by force. Has the tenant a right of action?*

Three views have been taken on this point.

1. The tenant may not only recover for personal injury, but may also maintain trespass *quare clausum fregit*, against the owner. Hillary v. Gay, 6 Car. & P. 284.

2. The tenant may not maintain trespass *quare clausum*, but may maintain trespass for force to person and damages to goods. Newton v. Harland, 1 Man. & Gr. 644.

3. The tenant may maintain an action for assault and battery, but he is not entitled to damages for the expulsion, when he is a tenant at will. Pollen v. Brewer, 7 C. B. Rep. (N. S.) 371.

Either the first or the third view must be adopted. The second view is untenable, as the expulsion and entry are parts of the same act. In England the authority is distinctly in favor of the third view. In the United States there is a conflict of authority, but the decisions are tending against the English view, and in favor of the person forcibly ejected. Mosseller v. Deaver, 19 Am. St. Rep. 540, note, 543-547. The American view seems right. Private war ought not to be encouraged as a substitute for legal proceedings.

It is not advisable to use force, even in States where the English rule is followed, as action will usually be brought for excessive force. But in almost every State there is a summary proceeding, under the Landlord and Tenant Act, which will compel the tenant to appear before a justice and show cause why he should not be put out, and, if the tenant appeals, he has to give security for rent so that the landlord is secure.

If a landlord gets into the premises peaceably, there is conflict of authority whether he can then use force or not. Cooley on Torts, 322-327.

24. *What is a forcible entry?*

There must be either actual physical force used in and on the premises (the force must be more than technical), or the force must be directed or threatened to be directed against the person of the tenant. Butts v. Voorhees, 13 N. J. Law, 13; Mason v. Powell, 38 N. J. Law, 576.

j. Liability of Vendor of Chattels for Injuries to Other Parties Than His Immediate Vendee, but Caused by His Negligence.

25. *A., a wholesale druggist, sold belladonna, labeled as dandelion. After several resales, B. purchased it, and C. used it and was injured. Can C. recover?*

Yes. Although A. did not contract with C., he owed him a duty, provided that he was of the class of persons who would naturally use the article sold. In Thomas v. Winchester, 6 N. Y. 397,

the court seems to limit the decision to the case of "deadly" medicines. See Loop v. Litchfield, 42 N. Y. 351. But this seems weak reasoning. The fact that one medicine is less dangerous than another is no reason for limiting the *class* of persons to whom the duty of care is due. Clerk & Lind. on Torts (2d ed.), 401; Blood Balm Co. v. Cooper, 83 Ga.. 457; Schubert v. J. R. Clark Co., 51 N. W. Rep. (Minn.), 1103.

In general to enable any one but the first vendee to recover, it must appear:

1. That the defendant sent the article out with a negligent misrepresentation as to its nature or fitness.

2. That the plaintiff used the article, relying upon this misrepresentation.

3. That plaintiff acted reasonably in so relying.

4. That the plaintiff used the articles in a manner and for a purpose intended by the defendant, or which the defendant ought to have contemplated as probable.

5. That plaintiff, even though not specifically in defendant's mind when he sold the article, was one of the class of persons by whom he intended the article to be used or whom he ought reasonably to have contemplated as likely to use it.

6. That there was no intervening negligence of third persons or contributory negligence of the plaintiff breaking the casual connection between the defendant's negligence and plaintiff's damage.

Curtin v. Somerset, 140 Penn. St. 70, 77. Compare Losee v. Clute, 51 N. Y. 494; Savings Bk. v. Ward, 100 U. S. 195; Heaven v. Pender, L. R. 11 Q. B. Div. 503.

k. Duty of Care on Part of Occupier of Land or Buildings.

1. TOWARDS PERSONS ON HIGHWAY ADJACENT.

26. *A. dug a hole in his land, twenty feet from the highway. B. fell into it, having accidentally deviated from the road. Under what condition can he recover?*

On principle B. could recover if the hole was dangerous to a man using ordinary care, the distance from the street not being the test. Norwich v. Breed, 30 Conn. 535. But perhaps on authority the excavation must substantially adjoin the highway. Hardcastle v. South Yorkshire R. R. Co., 4 H. & N. 67, 74; Hounsell v. Smyth, 7 C. B. (N. S.) 731, 742.

2. TOWARDS A TRESPASSER.

26a. *A.'s horse trespassed on a railroad track and was injured. The engineer was negligent after seeing the horse. Can A. recover?*

A. should be allowed to recover here.

In general, there is no duty to keep land in condition to be trespassed upon. Lary v. Cleveland, etc., R. R. Co., 78 Ind. 323.

And probably there is no duty to warn a trespasser of dangers not readily apparent. Cooley on Torts, 660. But after the presence of the trespasser is known, the owner must take reasonable care. Rockford, etc., R. R. Co. v. Rafferty, 73 Ill. 57; Fritz v. R. R. Co., 22 Minn. 404; Darling v. Boston, etc., R. R. Co., 121 Mass. 118. There is a conflict of authority as to whether the owner owes any duty to a trespasser, when his presence is not known. The Ohio court would say that a railroad company must use ordinary care in keeping a lookout for trespassers. R. R. Co. v. Smith, 22 Ohio St. 227. *Contra,* R. R. Co. v. Hummell, 44 Penn. St. 375. See Kay v. Penn. R. R. Co., 65 Penn. St. 269, 275.

3. TOWARDS LICENSEES AND INVITED PERSONS.

27. *A., in attending a regular church service, was injured by the defective condition of the grounds. Could he recover?*

Recovery should be allowed here, as it is proper to treat A. as an invited guest. Davis v. Central Cong. Soc., 129 Mass. 367. Under similar facts an English court held that A. was a mere licensee, and so the defendant was under no duty to keep the premises in order. Southcote v. Stanley, 1 H. & N. 247. The American view seems better, that the occupier of land owes a duty of care to a guest.

The general law may be summarized as follows:

1. The occupant is under no duty to have his land in a safe condition for a licensee. Hounsell v. Smyth, 7 C. B. (N. S.) 731, 743; Vanderbeck v. Hendry, 34 N. J. Law, 467, 472.

2. The occupant, after giving permission, owes a duty not to make land more dangerous, without giving notice, especially if dangers are concealed. Gautret v. Egerton, L. R. 2 C. P. 371, 375; Kay v. Penn. R. R. Co., 65 Penn. St. 269, 273.

3. The occupant owes a duty to warn licensee of concealed dangers existing at time of permission, and known to occupant. Foulkes v. R. R. Co., 5 C. P. D. 157; Gautret v. Egerton, *supra;* White v. France, 2 C. P. D. 308.

4. The occupant is not liable for failure to use reasonable care to ascertain whether or not there are any such dangers. Sullivan v. Waters, 14 Ir. C. L. R. 460; Eaton v. Winnie, 20 Mich. 156.

5. The occupant is bound to give the licensee benefit of such knowledge as he has, but is not bound to acquire knowledge. Sullivan v. Waters, *supra.*

6. If the person is present on business or in the exercise of a legal right, the occupier owes a duty to warn him as to all known dangers and those which should have been known. Indermaur v. Dames, L. R. 1 C. P. 274; White v. France, L. R. 2 C. P. D. 308; Carleton v. Franconia Co., 99 Mass. 216. See also Bigelow on Torts (3d ed.) [Students' ser.]), 288-300; Clerk & Lind. on Torts, 420.

l. Injuries by Animals.

28. *A.'s menagerie car was wrecked in a railroad accident, and in spite of every effort a lion escaped, and injured B. Can B. recover?*

B. could recover here. A man keeps wild animals at his peril, and when injury is done by them, he is liable, even if they have always been gentle before. If the injury is done by a domestic animal, the plaintiff must show that the defendant knew of the tendency of the animal to do the damage. Filburn v. People's, etc., Co., L. R. 25 Q. B. Div. 258.

If the *scienter* is proved, the defendant is liable, irrespective of negligence. Reynolds v. Hussey, 64 N. H. 64; Cooley on Torts, 343.

m. Defamation.

29. *Define libel, slander, and publication.*

Libel is defamatory matter addressed to the eye.

Slander is defamatory matter addressed to the ear. Addison on Torts (6th Am. ed., Baylies), 168.

Slander and libel differ in that:

1. Slander is a civil wrong only, but libel is a criminal wrong as well, as tending to provoke a breach of the peace. Addison on Torts (6th Am. ed., Baylies), 166.

2. Truth is always a defense to a civil suit for libel or slander. Bradley v. Heath, 12 Pick. (Mass.) 163; George v. Jennings, 4 Hun (N. Y.), 66; Root v. King, 7 Cow. (N. Y.) 613; Mundy v. Wight, 26 Kan. 173. But, at common law, in a criminal suit for libel, the truth is no defense. State v. Burnham, 9 N. H. 34; Cooley on Torts, 207. This rule, however, has been changed in many States by statute. See Art. 1, § 8, N. Y. Constitution.

3. Spoken words, if not actionable *per se*, are actionable only on proof of special damage; Bassell v. Elmore, 48 N. Y. 561; Terwilliger v. Wands, 17 N. Y. 54; but written words, if libelous, are under some circumstances actionable *per se*. Pollard v. Lyon, 91 U. S. 225; Cooley on Torts, 205, 206.

Publication formerly meant writing, but now also includes a speaking of the communication. This publication must be to a third person, or in his presence, so that he can understand it. Hail v. Fuller, 2 Hun (N. Y.), 519; Kiene v. Ruff, 1 Iowa, 482; Mielenz v. Quasdorf, 68 id. 726; Miller v. Butler, 6 Cush. (Mass.) 71. There is no action for writing libelous matter to the man himself. Spaits v. Poundstone, 87 Ind. 522, 524; Sheffill v. Van Deusen, 13 Gray (Mass.), 304. But where two persons compose the letter and mail it, the rule is otherwise. Miller v. Butler, 6 Cush. (Mass.) 71.

30. *What classes of spoken words are actionable per se?*

Of the five classes of slander, there are four classes which are actionable *per se:*

"Oral slander, as a cause of action, may be divided into five classes, as follows: (1) Words falsely spoken of a person, which impute to the party the commission of some criminal offense, involving moral turpitude, for which the party, if the charge be true, may be indicted and punished; (2) words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society; or (3) defamatory words falsely spoken of a person which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment; (4) defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade; (5) defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage." Clifford, J., in Pollard v. Lyon, 91 U. S. 225, 226.

31. *What is necessary to constitute special damage?*

1. The damage must occur through the action of a third person, as a result of the defamation.

2. It must be the loss of a temporal benefit of some pecuniary value, which would otherwise have been conferred upon the plaintiff, even though gratuitously.

3. The defamation must be the cause of the damage in the legal sense. Gough v. Goldsmith, 44 Wis. 262, 264; Shutleff v. Parker, 130 Mass. 293, 297.

4. *Quaere.* Can an action be maintained for special damage, by reason of false words not defamatory in their nature (as that a man is a Democrat), but spoken to injure, and from which injury arises? It would seem that the action should be allowed. Lynch v. Knight, 9 H. L. C. 577, at p. 600. If there was no intent to injure in such a case, recovery has been refused. Miller v. David, L. R. 9 C. P. 118, 126.

32. *A. made a defamatory statement in regard to B., but for the express purpose of benefiting him. Can B. recover?*

Yes. Malice, in its legal sense, has no moral element. It means simply a wrongful act done intentionally, and without any just cause. The word is misleading. Addison on Torts (6th ed., Baylies), 180; 6 Am. L. R. 593, 609-610.

33. *What are "privileged communications"?*

Privileged communications, in the law of libel and slander, are defamatory communications held excusable because made in the

performance of some legal, moral, or social duty, or the legitimate protection of one's business interests, or for other like causes. They are of two classes:

1. Those absolutely privileged.
2. Those conditionally privileged.

In the *first* class the privilege exists, even though the statements be made with express malice. This includes statements, whether written or oral, made in legislative and judicial proceedings. Garr v. Selden, 4 N. Y. 91. But the statement must be pertinent and material to the issue. Moore v. Bank, 123 N. Y. 420; McLaughlin v. Cowley, 131 Mass. 70; Miner v. Detroit Post, 49 Mich. 358, 364. Moreover, a witness or counsel enjoys this absolute privilege only if he believed the statement to be relevant. Smith v. Howard, 28 Iowa, 51, 55; White v. Carroll, 42 N. Y. 161, 166.

The *second* class includes such statements as those made by an employee to his principal in the line of business duty or those made in response to inquiries regarding the character of a servant. Child v. Affleck, 9 B. & C. 403; Lewis v. Chapman, 16 N. Y. 369; Howland v. Blake Co., 156 Mass. 543. In this class, if actual malice can be proved it does away with the privilege. Addison on Torts (6th ed., Baylies), 181-184; Hamilton v. Eno, 81 N. Y. 116, 125. In case of a candidate for public office, see State v. Balch, 31 Kan. 465.

34. *A., the defendant, wrote defamatory statements concerning the plaintiff, B., to X., under circumstances which made the publication of the letter to X. privileged. By mistake the letter was placed in the wrong envelope and sent to Y., who read it. Has B. a cause of action against A. for libel?*

No. The letter, in its inception, being privileged the legal implication of malice is rebutted, and in the absence of malice in fact on the part of the defendant, the publication to Y., though made through the negligence of the defendant, was privileged also. Tompson v. Dashwood, L. R. 11 Q. B. Div. 43.

35. *What is "fair comment"?*

Fair comment is, in effect, a plea that the statement is privileged. Clerk & Lind. on Torts (2d ed.), 516, 530.

The subjects of fair comment are:

1. Matters *per se* of interest to the public; fair and true reports of judicial and legislative proceedings.

3. Matters laid open to the public by the voluntary act of the person concerned, such as fair comment and criticism of the acts of public men, public performances or published writings or works of art. Addison on Torts (6th ed., Baylies), 1881; Cooley on Torts, 218.

n. Malicious Prosecution.

36. *What must be proved to sustain an action for malicious prosecution?*

To sustain an action for malicious prosecution the plaintiff must prove four things:

First, that the defendant instituted or instigated the prosecution.

Second, that he did it with malice.

Malice means actual malice, and is a question for the jury. They *may* find its existence from evidence showing lack of probable cause, but are not absolutely bound to do so.

Third, that the defendant acted without reasonable or probable cause. Whether probable cause existed or not is a question of law for the court, if the facts are uncontroverted. If the facts are uncertain or in dispute, it is a mixed question of law and fact. Farnam v. Feeley, 56 N. Y. 451. Probable cause is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged.

Fourth, that the previous proceeding has terminated, and that the termination was in favor of the defendant therein, who is plaintiff in the second suit. Cardival v. Smith, 109 Mass. 158; Brown v. Randall, 36 Conn. 56; Fay v. O'Neil, 36 N. Y. 11.

III. Torts Affecting Personal Liberty.

a. Imprisonment.

37. *B., a tax collector, told C. that he arrested her, knowing that she would not pay otherwise. B. had no right to make an arrest. C. paid and sues for false imprisonment? Can she recover?*

Yes. There need be no actual force to constitute imprisonment; words are sufficient if they in fact impose a restraint upon the person. It is enough if the payment was made under constraint. Pike v. Hanson, 9 N. H. 491.

38. *A. stopped B., on a foot-path, and told him that he could not go in that direction. B. sued for false imprisonment. Could he recover?*

No. A prison must have some boundaries. Blocking progress in one direction does not constitute imprisonment. Bird v. Jones, 7 Q. B. Rep. 742, 744.

b. Arrest Without Warrant.

39. *A. was arrested without a warrant by B., a policeman, who had reason to believe that A. had been stealing. Can A.*

recover in an action of assault? Suppose B. had been a private person?

A. could not recover in an action against the policeman. If he has reasonable grounds to believe that a felony has been committed he may arrest on suspicion merely, though no felony has actually been committed.

Had B. been a private person he would only be protected if he could show not only that he had reasonable ground of suspicion, but also that a felony had actually been committed. Burns v. Erben, 40 N. Y. 463; Beckwith v. Philby, 6 B. & C. 635, 638; Addison on Torts (6th ed., Baylies), 152.

Any one may arrest without a warrant to prevent the commission of a felony. Handcock v. Baker, 2 Bos. & Pul. 260.

The fact that, in any case, there was time to get a warrant does not take away the right to arrest without one. Cooley on Torts, 174.

40. *Suppose, in the question above, A. had actually been committing a misdemeanor?*

Neither an officer nor a private person can arrest for a *past* misdemeanor, without a warrant. Both can arrest for a misdemeanor which is being committed, provided it is also a breach of the peace. If not, no arrest without a warrant is allowed. Booth v. Hanley, 2 Car. & P. 288; 1 Bishop on Criminal Procedure (4th ed.), §§ 167, 169-171.

IV. TORTS AFFECTING REALTY.

a. Trespass.

41. *A. cuts grass on B.'s land, honestly thinking that he is on his own land. Is his honesty a defense to an action of trespass?*

No. The cutting was intentional, and the fact that A. did not mean to trespass makes no difference. In such cases a man acts at his peril. Basely v. Clarkson, 3 Levinz, 37.

42. *A.'s cow was loosed by B. and trespassed upon C.'s land, with no fault on A.'s part. Is A. liable?*

Yes. As B. did not actually drive the cow upon C.'s land, A. would be liable. Noyes v. Colby, 30 N. H. 143, 154.

As a general rule the owner is absolutely liable for such injury done by animals which are the subject of ownership, and which are by nature likely to stray, and likely to do damage while straying, unless he can show that his neighbor was bound to fence, and had failed so to do. Addison on Torts (6th ed., Baylies), 128.

If an animal, belonging to a class not likely to do damage, has a propensity to do damage, the general rule is that the owner is liable, after

he knows of it. Campbell v. Brown, 19 Penn. St. 359; Kertschacke v. Ludwig, 28 Wis. 430; Brice v. Bauer, 108 N. Y. 428.

43. *A. was driving an ox along the highway when it escaped without negligence on his part and did damage to B.'s property. Is A. liable?*

No. This is the one exception to the absolute liability of owners. There is less chance of damage in such a case, as the animal will be driven off at once. Moreover, the exception is "absolutely necessary for the conduct of the ordinary affairs of life." Tillett v. Ward, 10 Q. B. Div. 17.

44. *A.'s dog enters B.'s land, and injures B.'s crops. Is A. liable?*

Save by statute, A. would not be liable for the trespass of his dog. Brown v. Giles, 1 Car. & P. 118; Cooley on Torts, 341.

The general reasons for this are:

1. The difficulty of restraining dogs.
2. The slightness of damage done.
3. The common usage not to restrain them.
4. The fact that they are not considered the chattels of the owner, so far as to be subjects of larceny. Read v. Edwards, 17 C. B. (N. S.) 245, 260-261, per Willes, J. Dogs are now the subject of larceny by statute in most States.

If the dog was known to be accustomed to do a certain kind of damage the owner would probably be liable. Dictum by Nelson, C. J., Brill v. Flagler, 23 Wend. (N. Y.) 354.

b. Necessity.

45. *A., finding the road blocked by a fallen tree, drove around it, on B.'s land. He could have avoided the trespass by going a mile around. Is he liable?*

A. would be liable, unless, under all the circumstances, it was reasonable to drive on B.'s land. He cannot go on merely for convenience. Campbell v. Race, 7 Cush. 408, 413.

It has been said that where one knows a highway is blocked and there is another way reasonably available to him he must go this way and not trespass on plaintiff's property; and a traveler is not bound to remove obstructions, if it would materially delay him. Morey v. Fitzgerald, 56 Vt. 487, 490.

46. *A. enters B.'s building and blows it up to prevent the spread of fire? Is A. liable?*

This matter is generally regulated by statute, but even at common law a private person may destroy property to prevent the spread of fire, if the damage to be done by explosives is not disproportionate

to that to be avoided, and if there is reasonable ground for believing that the fire will spread without such destruction. Surocco v. Geary, 3 Cal. 69-73.

Entry is also justifiable in case of a fireman, policeman, or sheriff; to build a division fence; or to prevent the spread of contagious diseases. Seavey v. Preble, 64 Me. 120.

An entry to *save* property from damage by water or fire is also justifiable. Proctor v. Adams, 113 Mass. 376.

c. Acting at Peril. Duty of Insuring Safety.

47. *A. built a reservoir on his land, and with no negligence on his part, the water escaped and injured B. Can he recover?*

By the law, as established by Fletcher v. Rylands, he could recover. L. R. 1 Exch. 265; s. c., L. R. 3. H. L. 330. Although, in that case, the facts would probably have warranted a finding of negligence, the case was decided on the supposition of no negligence. The case stands for the point that the person who brings on his land, for his own purpose, anything which will be dangerous if it escapes, must keep it in at his peril and if he does not he must be held liable for any damage which occurs as the natural consequence of its escape.

There are, however, two exceptions to the rule in the English courts. First, where the escape is caused by the act of God, as if the reservoir had been struck by lightning; and, second, where the damage arises from the wrongful act of a third person. Nichols v. Marsland, L. R. 2 Ex. Div. 1; Box v. Jubb, L. R. 4 Ex. Div. 76.

The argument by which the decision of Fletcher v. Rylands is reached seems hardly tenable. The analogies used are exceptional, or, as in the case of an innkeeper's liability, are based on public policy, and no attention is paid to the opposing analogies. The case also keeps up the distinction between real and personal property which seems illogical and should be allowed to die a natural death. If damage is done to a person, there must be negligence or intent to injure, and why not in case of injury to realty? Austin on Juris. (5th Eng. ed.) 57-58; Clerk & Lind. on Torts, 341. The old maxim, "*sic utere tuo ut alienum non laedas*," often used to support the case, does not advance the argument very far. After "*laedas*" is defined the maxim is of no further use. In the use of property, *damage* is often done legally. The question is whether a legal right has been infringed. The maxim "determines no right and defines no obligation." Auburn, etc., Plank Road Co. v. Douglass, 9 N. Y. 444, 445-446. See 9 Harv. Law Rev. 13-18.

If there is to be any rule in the direction of that advanced by Blackburn, J., it should not be broader than to hold a man liable where he brings anything on his land which is *likely to escape*, and *likely to do damage if it escapes*. At present there is a tendency to restrict liability where negligence or intent is absent.

The rule of Fletcher v. Rylands is followed in Massachusetts and Minnesota, but see Smith v. Faxon, 156 Mass. 589, 597, where the former decisions seem to be overruled in effect.

New York, New Jersey and New Hampshire repudiate the rule. Losee v. Buchanan, 51 N. Y. 476; Marshall v. Welwood, 38 N. J. Law, 339, 341; Brown v. Collins, 53 N. H. 442, 446. The New Jersey and New Hampshire cases are the best answers to the English case.

d. Liability for Fire and Explosives.

48. *A. set fire to brush on his land, and with no fault on his part, B.'s land was injured. Is A. liable?*

No. Where fire is set for lawful purpose, and there is no negligence, the defendant is not liable in this country. Bachelder v. Heagan, 18 Me. 32. In England, Fletcher v. Rylands would hold a man to absolute liability.

49. *A.'s powder-mill blows up, and B. sues for damage. A. proves that he was not negligent. Is that a perfect defense?*

No. It depends upon the location of the mill whether it constitutes a private nuisance or not. A man cannot manufacture gunpowder in all places, however careful he may be, and the jury is to say whether the place was reasonable. If not, A. would be liable absolutely. But if the place was a proper one, B. would have to prove negligence before he could recover. Heeg v. Licht, 80 N. Y. 579.

V. TORTS AFFECTING PERSONALTY.

a. Trespass.

50. *A.'s horse was tied at a public hitching-post. B. untied the horse to make room for his own. Is B. liable in trespass? Suppose B. had acted by mistake, thinking it was his horse?*

B. would be liable in both cases. The fact that he had an equal right to the post originally would give him no right to remove A.'s horse. Bruch v. Carter, 32 N. J. Law, 554. Here, as in other cases in trespass, it is a question of what a man has *done*, not what he intended. Hobart v. Hagget, 12 Me. 67.

51. *A.'s dog had been worrying B.'s sheep, and B. shot him just after he ran out of the pasture. A. sues in trespass. Judgment for whom?*

Judgment would be for A. B. cannot kill for revenge, but only for protection. Wells v. Head, 4 Car. & P. 568.

To justify the killing of an animal that must also be the only reasonable way to protect the property. Livermore v. Batchelder, 141 Mass. 179.

52. *A.'s cow was trespassing on B.'s land, and B. drove her off with a dog. The cow was injured. Is B. liable?*

It would depend upon the dog. If it was a proper dog to use for such a purpose, and B. used proper diligence in recalling him when the cow was driven off, he would not be liable. Clark v. Adams, 18 Vt. 425.

b. Conversion.

53. *Define conversion.*

Conversion consists in any unauthorized dealing with the goods of another by one who is actually, or constructively, in possession, whereby any one of three things happens. Either:

1. The nature or quality of the goods is essentially altered. Dench v. Walker, 14 Mass. 499; Clerk & Lind. on Torts (2d ed.), 207.

2. The person having the right of possession is deprived of all substantial use of the goods permanently, or for an indefinite time. Clark v. Rideout, 39 N. H. 238; Spooner v. Holmes, 102 Mass. 503, 506; Spooner v. Manchester, 133 id. 270.

3. The owner is deprived of all substantial use of the goods temporarily, or even momentarily, by one acting in denial of the owner's (i. e., the plaintiff's) title to the goods. Bristol v. Burt, 7 Johns. (N. Y.) 254; Perham v. Coney, 117 Mass. 102; (compare Spooner v. Manchester, *ante*); M'Combie v. Davies, 6 East, 538; Cooley on Torts, 448.

A merely negligent injury is not conversion. Hawkins v. Hoffman, 6 Hill, 586; Packard v. Getman, 4 Wend. 613; Mulgrave v. Ogden, Cro. Elizabeth, 219.

But the fact that a man is acting *bona fide* will not help him if he actually exercises dominion over the goods of another. An innocent purchase from a thief is a conversion. Pease v. Smith, 61 N. Y. 477.

A man may also be guilty of a conversion when he is merely acting as the agent of another. Stephens v. Elwall, 4 M. & S. 259.

In Baldwin v. Cole, 6 Modern, 212, Holt, C. J., said, that a demand and a refusal would alone constitute a conversion, but that has been repeatedly overruled and is not law. Demand and refusal can never be more than evidence of conversion, and not even that if the goods are not actually in the hands of the party of whom they are demanded. Smith v. Young, 1 Camp. 439.

54. *A. converted B.'s goods, and then brought them back to B., uninjured, and offered to return them. B. refused them. Can he still sue for conversion? Suppose B. had accepted them?*

A right of action once vested could not be taken away by an offer to return. Carpenter v. Ins. Co., 22 Hun (N. Y.), 47. And even if the return had been accepted, B. would still have a right of action and the return would only go in mitigation of damages. Greenfield Bk. v. Leavitt, 17 Pick. (Mass.) 1.

c. Necessity.

55. *A., being a passenger in a boat, threw over B.'s goods to prevent loss of life. Is A. liable for the loss?*

No. One acting under such circumstances has a good defense. Mouse's Case, 12 Coke's Rep. 63; The Gratitudine, Rob. Adm. 196, 210; Carver on Carriage of Goods by Sea (2d ed.), § 15.

VI. TRESPASS AB INITIO.

a. Trespass Affecting the Person.

56. *A. put one of his employees off his premises, using excessive force The jury was charged, that if A. used more force than was necessary, he became a trespasser ab initio. Was this correct?*

No. The principle of trespass *ab initio* applies only to acts under a special and particular authority given by law, and not to acts which a man may do generally. Esty v. Wilmot, 15 Gray, 168, 170.

b. Trespass Affecting Realty.

57. *A. entered B.'s land, by express authority, to cut wood. He exceeded his authority, and B. sues him as a trespasser ab initio for the entry, and all the damage done. Judgment for whom?*

Judgment should be given for A. The doctrine of trespass *ab initio* only applies when authority is given by *law*, as where an officer enters to attach property. In such a case the officer must not use the law as an instrument of oppression or abuse his authority, but must conform to all the legal regulations, or he has no justification, even for the entry. But when, as here, there is an express authority or an authority given in *fact*, even if it has been procured by fraud, a defendant is only liable for the excess. Jewell v. Mahood, 44 N. H. 474; Allen v. Crofoot, 5 Wend. (N. Y.) 506.

58. *A., being a guest at B.'s inn, stole B.'s goods. Indictment was for entering with intent to steal. Was it good?*

No. The doctrine of trespass *ab initio* will not be extended to criminal cases. State v. Moore, 12 N. H. 42, 45-49.

59. *A. refused to pay for a meal at a hotel after eating it. B. sues him as a trespasser on the premises. Can he recover?*

No. Although A. is held to enter a hotel by the authority of law, and a guest cannot ordinarily be refused admission, still it is held that a mere nonfeasance is not such a violation of the authority as to make a man a trespasser *ab initio*. Six Carpenters' Case, 8 Coke's Rep. 146; Ross v. Philbrick, 39 Me. 29.

c. Trespass Affecting Personalty.

60. *A. took B.'s horse lawfully, as an estray, and then used him. Has B. any right of action?*

Yes. He could sue A. as a trespasser for the use and the original taking. Although the taking was lawful the subsequent use of the horse was not, and would make A. a trespasser *ab initio*. Oxley v. Watts, 1 Term Rep. 12.

VII. DEFENSE AND JUSTIFICATION.

a. Defense That Plaintiff Was a Wrongdoer.

61. *A. and B. were racing on the highway, contrary to statute, when A. intentionally ran into B. In an action by B., A. pleads that B. was a wrongdoer, and so is barred. Is the plea good? Suppose A. had simply been negligent?*

The fact that a man is acting illegally does not give others the right to treat him as an outlaw, and he still has a right not to be intentionally injured. Welch v. Wesson, 6 Gray (Mass.), 505.

A. would also be liable for a negligent injury to B., unless B.'s wrongdoing was the proximate cause of the injury. Spofford v. Harlow, 3 Allen, 176.

It is only where compliance with the plaintiff's request would involve the affirmance of his wrong as if it were a right, that his suit will be rejected. Bishop Non.-Contr. Law, § 59; McGrath v. Merwin, 112 Mass. 467. But where the wrongdoing of the plaintiff simply brought him into a position where the injury was suffered, and was not otherwise a cause of it, he can recover. White v. Lang, 128 Mass. 598.

b. Justification. Defendant Acting in a Judicial Capacity.

62. *Complaint that the defendant, acting as a judge, maliciously and contrary to law, decided a case against the plaintiff. Demurrer. Judgment for whom?*

Even in a malicious and corrupt decision a judge only renders himself liable to impeachment. Pratt v. Gardner, 2 Cush. (Mass.) 63. Except that he is liable for a refusal to grant a writ of *habeas corpus*, if good cause is shown on the face.

It would make a difference, however, whether the case was wrongly decided in a question on the merits or on the jurisdiction.

The general result of the authorities may be stated as follows:

1. When a judge, acting within his jurisdiction, is deciding upon the merits of a case, he is not liable for errors in fact or in law. Bradley v. Fisher, 13 Wall (U. S.) 335.

2. When a judge is deciding whether he has jurisdiction or not, he is not liable for mistakes in fact or in law, unless he knew or ought to

have known that he had no jurisdiction. Grove v. Van Duyne, 44 N. J. Law, 654; Cooley on Torts, 173, n.

There is, however, considerable conflict of authority as to the second statement.

Some distinction has been made between cases where a judge acted in excess of jurisdiction, and where there was no jurisdiction at all, but such a distinction is not tenable. The same distinction has also been made as to the liability of judges of superior and inferior courts, the latter being the more strictly held. There is much conflict of authority, but such a distinction has no foundation in principle. Cooley on Torts, 416. An equal protection should be extended to all persons who are called upon to act in a judicial capacity.

c. Justification. That Defendant Was an Officer Acting Under Process.

63. *If an officer is acting under process, what is necessary to constitute a perfect justification?*

1. He must be an officer *de jure*. Short v. Symms, 150 Mass. 298.
2. He must have in his possession the process he acts upon. Galliard v. Laxton, 2 B. & S. 363, 372.
3. He must follow the directions of the writ or statute under which he proceeds. Ross v. Philbrick, 39 Me. 29; Smith v. Gates, 21 Pick. (Mass.) 55; Sackrider v. McDonald, 10 Johns. (N. Y.) 253.
4. The process must be fair on its face. State v. Weed, 21 N. H. 263, 271.

To be fair on its face:

(a) The process must issue from a court having legal power to issue process in such cases.

(b) The process must be substantially in legal form.

(c) The process must contain nothing on its face to notify the officer that it was issued without legal authority. Campbell v. Sherman, 35 Wis. 103, 109; Cooley on Torts, 460.

If all these points exist an officer is protected, even though from outside sources the officer knows that the process is actually void. Cooley on Torts, 46; People v. Warren, 5 Hill (N. Y.), 440. This seems best, as such officers should not be allowed to judge in such matters.

64. *A. has goods in his possession which are supposed to belong to B., and C. calls upon a sheriff to attach them, giving him a bond of indemnity. A. threatens to hold the goods with force saying that they are his. What shall the sheriff do?*

In some jurisdictions, if A. actually did own the goods, he would be allowed to defend them by the use of force. Commonwealth v. Kennard, 8 Pick. (Mass.) 133. In such a jurisdiction the sheriff would be in a difficult position, as he must either act and be attacked, or refrain from acting and be sued by C., who has

given the bond of indemnity. Whether or not force can be used against a sheriff in such a case must depend upon the jurisdiction, but as a matter of practice certainly it would seem better not to allow force, as a man is not likely to lose his property by having a sheriff take it, and the creditor's bond is always good security. See State v. Downer, 8 Vt. 424; State v. Richardson. 38 N. H. 208.

65. *A sheriff acts under a statute which is afterwards held unconstitutional. Is he liable for his acts?*

He would be held so in most jurisdictions. An unconstitutional law is said to be no law. Campbell v. Sherman, 35 Wis. 103; Kelly v. Bemis, 4 Gray (Mass.), 83.

Such a principle is, however, very severe, and may in time be modified so as to hold the action of the officer voidable, not void. See Henke v. McCord, 55 Iowa, 378; Sessums v. Botts, 34 Tex. 335, 338.

If a ministerial officer refuses to act because he thinks that a statute is unconstitutional, he is liable for such refusal, unless the statute is in fact unconstitutional. Clark v. Miller, 54 N. Y. 528.

VIII. PROXIMATE CAUSE.

66. *Through the negligence of the A. Co., B.'s goods were delayed in transportation, and while so delayed were damaged by a freshet. But for the negligence of the A. Co. the goods would not have been where they could be injured. Would the A. Co. be liable for the damage?*

By the general weight of authority the A. Co. would not be liable. The negligence is held not to be the proximate cause of the damage. Denny v. N. Y. C. R. Co., 13 Gray, 481.

Much difficulty has been experienced in framing a rule to determine when a cause is proximate. The most widely accepted rule at present, which is applied in the case above, is that a man's act is the proximate cause of those consequences which naturally flow from it. By Pollock: "Natural and probable consequences are those which a person of average competence and knowledge, having the like opportunities of observation, might be expected to foresee as likely to follow." Pollock on Torts (2d ed.), p. 28. This is not a logical definition, but a guide to common sense, Ib., p. 33.

The application of this rule does not require that the damage should have been foreseen in the precise form in which it happened. It is enough that the result was natural. Nor is the causal connection, under the rule, broken by the mere intervention of ordinary natural forces. A man is bound to foresee an ordinary wind or rain. Bevan on Negligence, 74 and 83.

Another rule for determining liability is that the last human wrongdoer shall be liable. Wharton on Negligence (1st ed.), Appendix, p.

823, and §§ 85-97, 134-145; Condict v. Grand Trunk R. R. Co., 54 N. Y. 500, 504.

Still a third rule was advanced in Gilman v. Noyes, 57 N. H. 627, 631, where it was held that a man was liable if the damage would not have happened, "but for" his act. This rule has been justly criticised in that it would make "everybody responsible for everything."

No rule has yet been framed which will meet all cases, unless it be the rule of Wardlaw, J., in Harrison v. Berkley, 1 Strobh. L. (S. Car.) 525, where he says, in effect, that the doer is responsible for natural results, these being those which happen without an extraordinary conjunction of natural causes. This rule acts retrospectively. If the result is natural, a man would be held for it, even if it were not probable, as where a man intended to shoot a man, who was at a distance at which it was most improbable that he could hit him. In such a case the wrongdoer would undoubtedly be held, but this result could not be reached by the natural and probable consequence rule.

The courts apply a broader rule where the tortious act was intentional, even though the specific result which followed was not intentional, and they frequently refuse to be bound by its limitations where the defendant's act was specifically forbidden by law or was immoral, even though it would not subject him to a criminal prosecution.

The rule of holding the last human wrongdoer is objectionable, in that it would seriously affect business enterprise to hold a man in such a case as was put in the question. This, however, was done in Condict v. Grand Trunk R. R. Co., 54 N. Y. 500. The rule also is partial as there is often more than one wrongdoer.

IX. NEGLIGENCE. STANDARD OF CARE. DEGREES OF NEGLIGENCE.

67. *Cold weather of unprecedented severity caused the defendant company's water pipes to burst. Can they be held for damages done?*

No. There must be negligence on the part of the defendants to render them liable. Men engaged in ordinary business are not insurers and are not required to foresee the unprecedented.

"Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do;" provided, of course, that the party whose conduct is in question is already in a situation that brings him under the *legal duty* of taking care. That is, to render a defendant liable there must be: (1) A legal duty to use care. (2) That duty must be due from the defendant to the plaintiff. (3) There must be a breach of that duty. (4) There must be damage resulting, in the legal sense. (5) And such damage must be suffered by the plaintiff. Blyth v. Birmingham Water Works Co., 11 Ex. Rep. 781; Pollock on Torts, 392.

68. *Are there degrees of care or of negligence?*

The best answer seems to be that there are no degrees of care or of negligence, but the courts are constantly talking about slight and ordinary and great care, and gross negligence. The right view seems to be that the law requires a man to use *due* care, in all circumstances, or, as it was expressed in Meredith v. Reed, 26 Ind. 334, 336, all *care* is ordinary care; such care as a prudent, careful man would take under like circumstances. The degree of care is always in proportion to the danger to be apprehended.

X. CONTRIBUTORY NEGLIGENCE.

69. *A negligently tethered his horse on the highway, and B., driving negligently, ran into the horse and injured him. In an action by A., B. pleads contributory negligence. Is the plea good?*

No. The plaintiff is only barred if his negligence was part of the proximate cause of the damage. Here the plaintiff's negligence was merely an antecedent. It afforded the defendant an *opportunity* of doing the wrong, but was not the immediate cause of the loss. The cause is to be distinguished from the occasion. The man who has the last clear chance of avoiding the injury is solely responsible. Pollock on Torts (4th ed.), 418, 421; Davies v. Mann, 10 M. & W. 546; Radley v. London, etc., R. Co., L. R. 1 App. Cas. 754.

"Although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover." Per Parke, B., in Davies v. Mann, *supra*. This is the usual charge to a jury, and is correct in all cases, except where both parties were negligent at the same time. Pollock on Torts (4th ed.), 418.

70. *A. was injured by the combined negligence of B. and C. He sues B. alone, and B. pleads that C. was also in fault. Will the plea defeat the action?*

No. It makes no difference that a third person was also in fault. A defendant can only plead the contributory negligence of the plaintiff himself. Matthews v. L. S. T. Co., 58 Law Journal Rep. Q. B. D., N. S., 12 (pt. 2).

71. *A. said that he would strike the first man that did not get out of his way, and struck B. In an action by B., he pleads contributory negligence in that B. did not get out of his way. Is the plea good?*

No. Contributory negligence has nothing to do with an intentional battery. One is not bound to use any care to avoid such a

battery, either by retreating or in any other way. Steinmetz v. Kelly, 72 Ind. 442.

XI. DECEIT.

72. *What allegations must be found in a good declaration in deceit?*

The material allegations are:

"1. That the defendant has made a representation in regard to a material *fact;*

"2. That such representation is false;

"3. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;

"4. That it was made with intent that it should be acted on;

"5. That it was acted on by complainant to his damage; and,

"6. That in so acting on it the complainant was ignorant of its falsity; and reasonably believed it to be true." Southern Development Co. v. Silva, 125 U. S. 247, 250; Litchfield v. Hutchinson, 117 Mass. 195; Marsh v. Falkers, 40 N. Y. 562; Meyer v. Amidon, 45 id. 169; Brackett v. Griswold, 112 id. 454, 467.

It is immaterial whether the defendant was, or expected to be, personally benefited, or was in collusion with the person who did get the benefit; it is sufficient if the plaintiff was damaged. Hubbard v. Briggs, 31 N. Y. 518, 529; Schwenk v. Naylor, 102 id. 683; N. Y. Land Co. v. Chapman, 118 id. 288; Birsternd v. Farrington, 36 Minn. 320; Kuth v. Goldson, 22 Ill. App. 457.

73. *A. made a statement, honestly believing it to be true, but he was negligent in so believing, and B., who acted in reliance upon it, was injured. Has B. a right of action?*

No. An honest belief, though negligent, is held to be a good defense. Derry v. Peek, L. R. 13 App. Cas. 337. But there is some disagreement in this country. See Furnas v. Friday, 102 Ind. 129; Terhune v. Dever, 36 Ga. 648, 651.

But want of reasonable grounds of belief is very strong evidence of want of belief, though not, by itself, sufficient proof of it.

In New York and New Jersey the fraudulent intent must be established. Addington v. Allen, 11 Wend. (N. Y.) 375, 387; Meyer v. Amidon, 45 N. Y. 169; Salisbury v. Howe, 87 id. 128; Cowley v. Smyth, 46 N. J. Law, 380. In Massachusetts where the defendant has the means of knowledge, but makes a statement, having no knowledge, upon which the plaintiff acts, he is liable. Cole v. Cassidy, 138 Mass. 437. The intent to deceive is presumed where the defendant has knowledge that his statements are false. Hudnut v. Gardner, 59 Mich. 341. "If a party recklessly makes a false representation, of the truth or falsehood of which he knows nothing, for the fraudulent purpose of inducing another, in reliance upon it, to make a contract, or do an act to his prejudice, and the other party

does so rely and act upon it, the party making the false representation is liable for the fraud, as much as if he had known it to be false." Beebe v. Knapp, 28 Mich. 53, 76.

74. *A. made a representation, intending to deceive B. C. acted upon it and was injured. Can C. recover?*

No. To make a man liable he must intend that his representation shall be relied upon. There must be something to connect the persons making the representations (the defendants) with the party complaining that he has been injured and deceived by them. Thus, where a fraudulent prospectus is issued by a company; "the purchaser of shares in the market upon the faith of a prospectus which he has not received from those who are answerable for it, cannot, by action upon it, so connect himself with them as to render them liable to him for the misrepresentations contained in it, as if it had been addressed personally to himself." Peek v. Gurney, L. R. 6 H. of L. 377, 399; Addington v. Allen, 11 Wend. (N. Y.) 375, 383; McCracken v. West, 17 Ohio St. 16; Simar v. Canaday, 53 N. Y. 298; Cooley on Torts, 494, and cases cited.

75. *A. was deceived, acting partly upon a representation by B., and partly upon other information. Can B. be held?*

Yes. A. need not rely *entirely* upon the false representation in order to sue. Tatton v. Wade, 18 C. B. 371. It is generally held that the representation must be such that no action would have been taken without it, i. e., that it forms a material inducement. Safford v. Grout, 120 Mass. 20, 25; Addington v. Allen, 11 Wend. (N. Y.) 375, 382.

It has, however, been held that if the representations *contributed* to the formation of the conclusion, it is enough. Shaw v. Stein, 8 Bosw. (N. Y.) 157, 159; Hubbard v. Briggs, 31 N. Y. 518, 532.

76. *A., while trading horses with B., said that his horse would sell for* $150. *B. finds that he can't get* $100 *for the horse and sues for deceit. Can he recover?*

The mere praising of one's goods, by a party to a contract, is not actionable. Harvey v. Young, Yelv. 21. In general, such words do not affect the purchaser, and this fact has crystallized into law, so that no action is now allowed, even where a man does rely upon them. Chrysler v. Canaday, 90 N. Y. 272; Poland v. Brownell, 131 Mass. 138; Hartman v. Flaherty, 80 Ind. 472.

The theory on which the courts base their opinions is that of negligence in the plaintiff. Law v. Grant, 37 Wis. 548; Mooney v. Miller, 102 Mass. 217, 220; Hobbs v. Parker, 31 Me. 143; Stewart v. Emerson, 52 N. H. 301, 314. But this theory is not satisfactory. The rule that a man is not liable for "puffing" his property is due to the fact that

such statements are not generally relied upon. Where the same statements are made by third persons they may be actionable, as plaintiff is much more likely to rely upon them. Burr v. Willson, 32 Minn. 206, 210. See Law v. Grant, 37 Wis. 548, 567.

But the rule that "puffing" is not actionable does not apply to misrepresentations of facts, affecting the value of the property, as to its condition or quality, and from which the vendee would form his own estimate of value. Ellis v. Andrews, 56 N. Y. 83; Davis v. Heard, 44 Miss. 50; Busler v. Farrington, 36 Minn. 320. Nor where the vendor has by artifice prevented the vendee from making an examination of the property, or further inquiry in respect to it. Simar v. Canaday, 53 N. Y. 298; Burr v. Willson, 22 Minn. 206, 210. Nor where the vendor assumed the peculiar knowledge of an expert. Eaton v. Winnie, 20 Mich. 156, 166, and cases cited.

TRUSTS.

I. General Nature of Trusts.

1. *Define a trust.*

A trust involves the law of property and the law of contracts; it means property held by one person for the benefit of another. In the legal sense there are always three parties concerned in its creation, the grantor, who gives up some property or right; the grantee, i. e., the trustee to whom the property or right is granted; and the one beneficially interested, or the *cestui que trust.*

But the grantor and *cestui* are often identical; and, again, one who declares himself trustee of some property for another may thus fill the place of both grantor and grantee. The trust once created, the trustee and the *cestui* are the only persons involved. The grantor, as such, has then nothing to do with it. Lewin on Trusts, chap. 1; 1 Perry on Trusts,* §§ 28, 38.

2. *What may be the subject-matter of a trust, and what are the relations of the trustee and cestui que trust towards it?*

The subject-matter of a trust is always some specific, existing *res*, the title of which is held by the trustee, to be dealt with by him for the benefit of the *cestui.*

This *res* may be anything which courts recognize as property, a chattel, a legal or an equitable claim on another party, land, etc. 1 Perry on Trusts, §§ 67-69.

Whatever it is, the trustee has a complete legal title. 1 Perry on Trusts, § 321. And this holding the *res* and *dealing with it for the cestui,* according to the terms of the trust, are the characteristics of his position. Id., § 427.

The *cestui* has the "equitable interest," which does not mean an interest in the trust-*res* itself, but a personal right against the trustee to compel the latter to deal with the trust property according to the express and implied terms of the trust as it was created. Id., §§ 282, 298, 300, 304, 843, ff. See 1 Harv. Law Rev. 1, 9.

3. *Distinguish express trusts, implied trusts, resulting trusts and constructive trusts.*

"Express trusts are also called direct trusts. They are generally created by instruments that point out directly and expressly the

* The references to Perry on Trusts are to the 3d edition.

property, persons, and purposes of the trust; hence they are called direct or express trusts in contradistinction from those trusts that are implied, presumed, or construed by law to arise out of the transactions of parties. As express trusts are directly declared by the parties, there can never be a controversy whether they exist or not. In such trusts these questions arise: Are they legal or illegal, and, what is the construction of the various terms and provisions which they contain?

"Implied trusts are trusts that the courts imply from the words of an instrument, where no express trust is declared, but such words are used that the court infers or implies that it was the purpose or intention of the parties to create a trust.

"Resulting trusts are trusts that the courts presume to arise out of the transactions of parties, as if one man pays the purchase money for an estate, and the deed is taken in the name of another. Courts presume that a trust is intended for the person who pays the money.

"A constructive trust is one that arises when a person clothed with some fiduciary character, gains some advantage to himself, by fraud or otherwise. Courts construe this to be an advantage for the *cestui que trust* or a constructive trust." 1 Perry on Trusts, §§ 24-27.

II. A TRUST DISTINGUISHED:

a. From a debt.

4. *If A. deposits a matured note in a bank, indorsed "for collection" or "for deposit," what is the relation of the bank to him?*

Before collection. the bank is presumptively a trustee, i. e., it holds the legal title of the note, to deal with it for the customer. Bank v. Hubbell, 117 N. Y. 384. And the rule is the same when the indorsement is in blank. St. Louis Co. v. Johnston, 133 U. S. 566.

After collection. the relation is debtor and creditor, for there is no duty to deal with the identical money collected, but only to hand over an equal amount. Bank v. Bank, 16 Wall. 483, 501.

5. *What relationship is indicated between two parties, by the regular payment of interest on money transferred from one to the other?*

It tends strongly to show that the relation is that of debtor and creditor, rather than that of trustee and *cestui que trust.* If money is paid by A. to B. for investment, B. is a trustee, and need exercise only care and diligence in dealing with it for investment; the interest may be high or low, and will probably vary in amount; again, if it is left with B. for a specific purpose. as to hand over to C.. no interest at all would be due. The regular payment of interest at a fixed rate, however, indicates that the one so paying is a *debtor,*

is free to use the money as he likes, and is absolutely liable for its repayment. *Ex parte* Broad, 13 Q. B. Div. 740.

6. *A. deposits a note in a New York bank for collection. It is sent to a Chicago bank for that purpose, and is collected, but the Chicago bank fails before remittance. Who loses?*

The decisions are irreconcilable. Some courts hold that the New York bank is liable, thus putting it in position of guaranteeing the solvency of the Chicago bank. Van Wart v. Woolley, 3 B. & C. 439; Ex. Bk. v. Nat. Bk., 112 U. S. 276, at 287-290; Bank v. Bank, 118 N. Y. 443, 447.

Another line of cases take the more logical ground that the New York bank was trustee of the note itself, (for A. as *cestui*); that it was still a trustee when the collection was made by the Chicago bank, the subject-matter (or trust *res*) being then its claim upon the latter for the proceeds, and that as its position throughout was thus that of trustee, it can only be held liable in case it has been lacking in ordinary diligence and care in the transaction. Bank v. Scovil, 12 Conn. 303; Aetna Co. v. Bank, 25 Ill. 243; Fabens v. Bank. 23 Pick. 330.

7. *A. deposits* $500 *in a bank to meet a coming obligation to B. Does the bank hold this money, meanwhile, in trust for A.?*

No. The obligation of the bank is not that it shall use that identical money for the purpose described. The bank promises to pay B. out of its general assets, and if it fails, A. can only prove as an ordinary creditor. In re Barned's Co., 39 Law Journal, Chanc. 635; Simonton v. First Bank, 24 Minn. 216. *Contra,* Johnson v. Whitman, 10 Abb. Pr. (N. S.) 111.

b. From an Assignment.

8. *X. owes Y.* $100. *Y. assigns the debt to Z. What rights does Z. get, and how does he enforce them?*

He gets a legal right to sue at law in Y.'s name. He must use this action at law, and cannot go into equity, unless Y. is preventing the collection of the claim. Y. is not a trustee for Z.; he has no active duty to deal with any property for Z.'s benefit. His duty is to keep quiet and allow Z. to use his name to enforce the debt. Hammond v. Messenger, 9 Simon, 327; Walker v. Brooks, 125 Mass. 241; Chicago Co. v. Nichols, 57 Ill. 464.

9. *What would be the effect of payment of the debt by X. to Y., the assignor and original creditor, X. knowing of the assignment?*

X. would be liable to pay again, to Z., as if he had not made the payment to Y. Such payment would be good at *law,* but on Z.'s

suing in Y.'s name, if X. set up a plea of payment, Z. would reply that in equity X. had no right to pay, since he knew of Y.'s assignment to Z. Ins. Co. v. Messenger, 21 N. J. Eq. 107.

On the other hand, if Y. were a trustee for Z., and X. paid him a debt due him as such trustee the payment would be good. X. would be discharged whether he knew that Y. held the debt in trust for Z. or not. Thomassen v. Van Wyngaarden, 65 Iowa, 687.

c. Trust Distinguished from an Executorship.

10. *X. bequeathes his livestock to Z., and devises his farm to his executor, Y., to be sold for the benefit of Z. Is there a trust of the farm or the stock, or both?*

There is a trust of the farm only. Y., being executor, does, to be sure, take the legal title to the stock under the will, and he holds it for the benefit of the legatee, just as he holds the legal title to the farm for the benefit of Z. The reason that he is not a trustee of the stock when his relation towards it is virtually that of trustee is historical; the duties of executors have for generations been defined, and they include the care of personalty; they do not include the care of real estate, and Y. could not, therefore, *as executor,* assume to perform the duty mentioned as to the farm His duties are so similar to those of trustees that executors have been sometimes called "legal trustees." See Hewson v. Phillips, 11 Ex. 699; Drake v. Price, 5 N. Y. 430.

III. CREATION OF A TRUST.

a. By Declaration, Without Transfer.

11. *How is a trust created by declaration, without transfer of title?*

This takes place when a person *makes himself trustee* for another. The words "I declare myself trustee for X.," or any equivalent expression showing an intention to thereby assume the position of trustee, are sufficient to give an equitable right to X. in any property of the declarant which he may mention in the declaration. If the subject-matter of the declaration is land, the words must be in writing (see section d, *infra*), but the important point is that one may bind himself thus as trustee, without any consideration whatever. *Ex parte* Pye, 18 Ves. 140; Gerrish v. New, etc., Inst., 128 Mass. 159; 1 Perry on Trusts, § 96, and cases. The *intention* is the determining element, and the primary question is thus one of fact; Jones v. Lock, L. R. 1 Ch. 25, cited at length in 1 Perry on Trusts, § 99, n.; the difficulty being to distinguish a declaration of a trust from a declaration of a mere intention to make a gift.

12. *X. said to Y.: "I give you these bonds and show you how to cut the coupons so you can use the money yourself." He*

did not hand them over, however, but gave Y. the money as the coupons were cashed, from time to time. The intention was to transfer some interest to Y. What title, if any, did he get?

Y. got no title of any kind. He did not get a *legal* title, because there was no delivery of the bonds, either actually or by deed; nor an *equitable* claim on X., because no court will enforce as a trust, what is only an uncompleted gift. Milroy v. Lord, 4 DeG., F. & J. 264; Peters v. Co., 72 Iowa, 405; Connor v. Trawick's Administrator, 37 Ala. 289; Baltimore Co. v. Mali, 65 Md. 93.

b. By Transfer to Another, with a Declaration of Trust for a Third Person.

13. *Take the following cases and point out which create a trust, and which merely express a wish or desire, on the part of the grantor, to benefit the third person named:* (1) *"I devise Blackacre to X., in trust for Y.;"* (2) *"to X., hoping he will keep the estate in the family;"* (3) *"to X., recommending that he dispose of it at death to Y. and Z.;"* (4) *"the residue to X., my desire being that she shall distribute it as she thinks will be most agreeable to my wishes."*

(1) is, of course, a clear trust, and is the language that should always be used when a trust is intended; (2) was held not a trust; 1 Br. Ch. Cas. 142; (3) was regarded as creating a trust; 2 Ves. Jr. 333; and (4) as giving the property to the grantee for herself. 5 Ch. Div. 225.

Cases like (3) and (4) are clearly irreconcilable when "recommending" is strong enough to charge the grantee with a duty, but "my desire" is not. Of late, the tendency is to give to expressions of hope, confidence and the like, merely their natural force, and to find a trust only where a legal duty, and not simply an honorable obligation, is imposed. See In re Diggles, 39 Ch. Div. 253 (1888); Bristol v. Austin, 40 Conn. 438, 447 (1873); Warner v. Bates, 98 Mass. 273, 277; Perry on Trusts, §§ 114, 115.

c. Constructive Trusts.

These arise from the operation of law. They have already been defined (Ques. 3), and they are noticed incidentally in this section under various topics.

d. The Effect of the Statute of Frauds, 29 Car. II, c. 3, §§ 7-9.*

14. *A. made a lease for years to B., who was to hold it as trustee for C. B. became bankrupt, and then, for the first time,*

* Even where a trust need not be *created* by a written instrument, a writing of some kind is necessary to *prove* it in nearly all the States. Kentucky, Tennessee, Ohio and Virginia being the chief exceptions. See Ames, Cases on Trusts (2d ed.), 176, note.

acknowledged the trust in writing. Does the statute apply to chattels real, and if so, who has here the beneficial interest?

The statute applies to all estates in land; and B. holds as trustee for C., to the exclusion of B.'s creditors. In other words, the acknowledgment of the moral duty having been made, the statute is satisfied, and the acknowledgment takes effect, by relation, from the date of the conveyance. Gardner v. Rowe, 2 Sim. & Stu. 346; Norton v. Mallory, 63 N. Y. 434.

15. *Suppose A. transfers to B. a bond secured by a mortgage on land, B. admitting, verbally, a trust for C. This creates, under the Statute of Frauds, a valid trust as to the money due, since the bond is personal estate. What becomes of the mortgaged land?*

B. holds that also in trust for C., to the extent of the debt it secures. Writing is unnecessary, because the statute does not apply to chattels personal. This establishes the trust so far as the bond is concerned, and the mortgage is carried along with it. It is a mere security, and passes as incidental to the debt. Danser v. Warwick, 33 N. J. Eq. 133; Robbins v. Robbins, 89 N. Y. 251; Childs v. Jordan, 106 Mass. 321.

16. *A. made a will, leaving all his real estate to B. absolutely. He read it to B., and stated to him that he was to hold the property in trust for C. What is the effect of these words?*

They impose a trust on the property in favor of C. Story, Eq. Jur. 781; Williams v. Vreeland, 29 N. J. Eq. 417. Logically, an oral declaration should have no more force in such case than in a transfer *inter vivos*. Equity would not allow B. to *keep* the land, but unless he acknowledged his moral duty to C., the beneficial interest should go, by a resulting trust, to A.'s heirs. The courts are probably influenced by the desire to effectuate the testator's intention.

IV. THE TRUSTEE.

17. *Who may be appointed trustee?*

The creator may, of course, appoint anyone he chooses, infant, bankrupt or lunatic; but as equity will never suffer a trust to fail for lack of a trustee, the courts frequently have occasion to appoint persons to the position. The three classes named above are not regarded as desirable incumbents, and courts have also hesitated to appoint (1) a near relative of the *cestui;* Parker v. Moore, 25 N. J. Eq. 228, 240; (2) a married woman, Parker v. Moore, *supra;* or (3) the husband of one of the beneficiaries, *Re* Hattatt's Trusts, 18 Week. Rep. 416, though this is done at times, on the husband's undertaking to give up the position, if he survives all his co-trustees.

18. *Suppose X. dies while sole trustee of real estate, and the title descends to his infant son, ten years old. What are the cestuis to do?*

Originally the only decree that could be made was that the infant should convey when he came of age. Whitney v. Stearns, 11 Met. 319. But the statutes, both here and in England, allow the chancery courts to vest the infant's title in a suitable person. Livingston v. Livingston, 2 Johns. Ch. (N. Y.) 537. And the same process of confiscation is applied to a lunatic trustee.

19. *Can a trustee resign at his own convenience?*

No. Having once accepted the trust, he cannot avoid its duties, except by permission of the court, or of all the *cestuis*. Perry on Trusts, §§ 276, 280; Veazie v. McGugin, 40 Ohio St. 365.

V. THE CESTUI QUE TRUST.

20. *Who may be a cestui?*

Anyone. The right of the *cestui* against the trustee is simply one species of property, and whoever can take a legal title can also take this equitable right. 1 Perry on Trusts, §§ 60, 65.

21. *A testator bequeathed a thousand dollars to his executors in trust, to have masses said for the repose of his soul. Does the absence of a cestui que trust, capable of enforcing the trust, render it invalid?*

It does, in many States. It is considered that there is only an imperfect obligation on the trustee, and the doctrine is carried so far, that though he may be capable and willing to live up to his moral duty, he is not permitted to do so against the wish of those who would be entitled, if the trust failed. Holland v. Alcock, 108 N. Y. 312, 322; Me. Church v. Clark, 41 Mich. 730.

In England and some of our own States the trust is regarded as valid, and the trustee allowed to fulfill the wish of the testator. *In re* Dean, 41 Ch. Div. 552 (beneficiaries were testator's horses and dogs); Ross v. Duncan, 6 Miss. 305; Cleland v. Waters, 19 Ga. 35, 61.

In the case of charitable trusts, however, a *cestui* capable of taking the legal title is not necessary, or in fact possible.

"Charitable" has a technical meaning, which is laid down in Stat. 43 Eliz., chap. 4, in broad terms, and which has received a liberal interpretation. Its nature and the general character of such a trust appear in Mr. Justice Gray's definition, as follows:

"A charity is a gift to be applied for the benefit of an indefinite number of persons, either by bringing their minds under the influence of religion or education, by relieving their bodies from disease, suffer-

ing or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." Jackson v. Phillips, 14 Allen, 539, 556. Property so given is relieved from the rule against perpetuities. 2 Perry on Trusts, §§ 736, 737. But see Levy v. Levy, 33 N. Y. 97, 130. And courts will use every legitimate effort to support such disposal of it. Inglis v. Sailors, etc., 3 Pet. 99, 117.

VI. TRANSFER OF THE TRUST PROPERTY.

a. By the Trustee.

22. *M., trustee for X. of two pieces of land, without power to sell, sold and conveyed one of them to A., who paid value, but had knowledge of the trust. M. gave the other to B., who knew nothing of X.'s interest. What are the rights of X.?*

Both A. and B. hold the land as trustees for X. These trusts are "constructive;" i. e., they arise by operation of law, and are founded on principles of natural justice.

A. is charged with the trust for X., by his knowledge of X.'s rights. He knew he had no right to buy of M.

As to B., he has paid nothing, so it is no hardship to him that X.'s rights in the property remain undisturbed.

The principle, for which it is scarcely necessary to cite any of the multitude of cases, is that one taking property from a trustee is only protected when he takes it for a valuable consideration, *and* without notice of the trust. 1 Story Eq. Jur. pp. 415, 416; 1 Perry on Trusts, §§ 217, 218; Paige v. O'Neal, 12 Cal. 483, 498; Cogel v. Raph, 24 Minn. 194; Tompkins v. Powell, 6 Leigh, 576.

If the purchaser receives notice at any time before the full payment of the consideration, he is not considered a purchaser in good faith. 1 Perry on Trusts, § 221; Phelps v. Morrison, 21 N. J. Eq. 195. And this is true, even if the legal title has passed before the buyer is affected with knowledge of the trust. Wells v. Morrow, 38 Ala. 125; Abell v. Howe, 43 Vt. 403.

23. *Suppose T., who has purchased in good faith and for value from the trustee, sells to A., who, as in question* 22, *has notice of the trust?*

A. acquires a perfect title, free from the trust. Pierce v. Faunce, 47 Me. 507; Filby v. Miller, 25 Penn. St. 264.

This is because T., as a *bona fide* purchaser for value, had a perfect title, free from any claim of the *cestui*. He can, therefore, deal with it as freely as if no trust had ever existed. This right of his to sell necessarily means that other people can safely buy, even if they knew the trust relation had been violated.

If the *trustee*, however, regains the property by fair means from T. or any subsequent holder, the equitable right of the *cestui* again attaches to it. Troy Bank v. Wilcox, 24 Wis. 671; 2 Pom. Eq. Jur. 754.

24. *The above questions refer to trusts of property in possession. Is the bona fide purchaser protected also, when the res, (the subject-matter of the trust), is a chose in action?*

For example, suppose A.'s agent, B., makes a contract for A., but in his own name, and then sells the contract to C., who has no notice of the agency. Can A. set up his right against C.?

The decisions are irreconcilable. All agree that C. must stand in B.'s shoes, so far as B.'s relations with the other party to the contract go, but the question is whether the "latent equity," which existed in favor of A. against B., binds also the purchaser from B. That it does, see Bush v. Lathrop, 22 N. Y. 535; Downer v. Bank, 39 Vt. 25; Cave v. Mackenzie, 46 L. J. Rep. (Ch.) 564, the position of these courts being that the buyer must take the position of the seller *in toto*. On the other side is the strong consideration, that B. had full control, legally, and passed to C. by the assignment a power of attorney to use his name to sue, and do every other thing incidental to the enjoyment of the subject-matter of the transfer. The doctrine of *bona fide* purchase ought from this standpoint to protect him. Starr v. Haskins, 26 N. J. Eq. 414; Sleeper v. Chapman, 121 Mass. 404; 1 Harv. Law Rev. 1, 9-12.

25. *What is the meaning of "for valuable consideration" and "without notice"?*

The former merely means, that the contract of transfer must be for a valuable consideration (see the section on Contracts, *supra*), and that a consideration of love and affection, which will support a deed in certain cases, will not be sufficient to cut off the *cestui's* right in the property transferred.

The reason that the purchaser is not protected, when he takes with actual knowledge or constructive notice of the trust, is his dishonesty in buying under such circumstances. "Constructive notice" means the existence of circumstances, such that the court will presume notice, e. g., the recording of a deed, *lis pendens*, and the like. See 1 Perry on Trusts, §§ 222, 223; 1 Story Eq. Jur. 400.

The question also arises on a sale of stock, or other property standing in the name of "A. B., Trustee," whether the buyer must inquire as to the trustee's power of disposition under the terms of the trust. It is certain that he must, at least, make reasonable inquiry into the facts. Shaw v. Spencer, 100 Mass. 382, 390; Third Bank v. Lange, 51 Md. 138. Probably he must find out at his peril, for the full protection of the *cestui* ought to be insured. Shaw v. Spencer, *supra*, (*semble*).

b. Transfer of the Equitable Interest by the Cestui.

26. *X., the cestui que trust, under a trust of personal property, assigned his interest to Y. Later, X. made a second assignment of it to Z. The latter notified the trustee, however, before Y. did so. Does Y. or Z. prevail?*

The authorities are in conflict. In some States such an assignment is not good as against subsequent assignees, unless the debtor, or trustee, is notified of the transaction. Bishop v. Holcomb, 10 Conn. 444; Weed v. Boutelle, 56 id. 570.

This is based on the so-called "deceit," arising from the failure of the prior assignee to give notice.

Contra, taking the more rational position, that the first assignee *has* the property, and that there is nothing left for the assignor to dispose of to the second assignee, see Thayer v. Daniels, 113 Mass. 129; Williams v. Ingersoll, 89 N. Y. 508, 523; 1 Harv. Law Rev. 1.

Where the second assignee makes inquiry of the trustee before buying, and is led to purchase, because informed that, so far as the trustee knows, the estate is not incumbered, he has a stronger case; Dearle v. Hall, 3 Russ. 48; Spain v. Hamilton, 1 Wall. 604; but even then it would seem that the reasoning of Thayer v. Daniels (*supra*), would hold good against his claim.

In case the trust is of *land*, the invariable rule is that the prior assignee will prevail. "Equity follows the law." Phillips v. Phillips, 2 De G., F. & J. 208; 1 Perry on Trusts, § 438.

27. *X., a cestui, assigned his equitable interest to Y., and later released for value all that interest to the trustee, who had, of course, the legal title. The trustee had no notice of the assignment to Y. Can he hold the property for himself?*

Yes. His having the *legal title* is decisive of the case, according to the maxim, "Between equal equities the law will prevail." It is like a release for value by a creditor to his debtor after an assignment of the debt, of which assignment the debtor is ignorant; the debtor is free from further liability. Newman v. Newman, 28 Ch. Div. 674. See also Shirras v. Caig, 7 Cranch, 34; Boswell v. Goodwin, 31 Conn. 74.

c. Death of Trustee or Cestui Que Trust.

28. *Where does the title to the trust property go when the trustee dies intestate?*

As a rule, trust property is vested jointly in two or more persons, so that on the death of one the remaining trustees take the title by survivorship. When, however, a sole trustee dies intestate, the title descends to his heir, or to his personal repre-

sentative if the trust *res* is personalty. 1 Perry on Trusts, § 343. It is, of course, still subject to the rights of the *cestui*, the new holder having paid no value.

In a few States, Alabama and New York among them, the title vests in the court in such a case.

When the trustee leaves a will, the question becomes simply one of intention,— "Did he mean to include the trust property or not?" 1 Perry on Trusts, § 335. The devisee, like the heir of an intestate trustee, is constructive trustee, and holds the property exactly as the deceased held it.

29. *What happens when the cestui dies intestate?*

Although, strictly speaking, the equitable estate is only a personal claim against the trustee, an equitable chose in action, yet, equity follows the law, and the rules applicable to the descent or distribution of the legal title of any trust property govern also the disposition of the equitable interest when its owner dies; in short, if the trust *res* is realty, the heir-at-law of the *cestui* takes, and if it is personalty, the administrator succeeds to the rights of the deceased. See Freedman's Co. v. Earle, 110 U. S. 710, 713.

30. *Does the wife (a) of a trustee, or (b) of a cestui, have dower rights?*

The wife of a trustee does not have them. White v. Drew, 42 Mo. 561; Greene v. Greene, 1 Ohio, 535, 542. (Nor the husband curtesy when his wife was trustee. King v. Bushell, 121 Ill. 656.)

The wife of a deceased *cestui que trust*, however, now enjoys dower rights, almost everywhere, though originally she was denied them. 1 Perry on Trusts, § 324; Barnes v. Gay, 7 Iowa, 26. (The husband also has curtesy. Tillinghast v. Coggeshall, 7 R. I. 383, 394.)

d. Bankruptcy.

31. *Trustee bankrupt. Do his assignees get the title to the trust property?*

No. It has been long settled, that they do not. Rhoades v. Blackiston, 106 Mass. 334; Kip v. Bank, 10 Johns. (N. Y.) 63. Nor do the assignees of a bankrupt executor take the goods of the deceased. Farr v. Newman, 4 Term Rep. 629.

32. *Suppose a cestui que trust becomes bankrupt. Property has been given to trustees for the life of this beneficiary, with the provision that the "profits shall be paid into the cestui's own hand, in order to render his interest nonassignable." Can creditors reach this?*

This is called a "spendthrift trust," and the authorities are at variance as to the rights of creditors of the *cestui*. The English

courts and those of many States hold that creditors can reach the property, because the beneficiary took it with its natural incidents, including the power of alienation, in spite of the language by which the trust was created. Brandon v. Robinson, 18 Ves. 429; Tillinghast v. Bradford, 5 R. I. 205; Hobbs v. Smith, 15 Ohio St. 419.

Other States, led by Massachusetts, hold that a testator has the right to leave the property with any conditions he may see fit; and that, therefore, he can give a life interest in the *enjoyment of the proceeds* of property, withholding other usual property rights in it. Broadway Bank v. Adams, 133 Mass. 170; Meek v. Briggs, 87 Iowa, 610; Barnes v. Dow, 59 Vt. 530.

Even in Massachusetts, a clear intention to withhold the power of alienation from the beneficiary is necessary. Maynard v. Cleaves, 149 Mass. 307.

In New York and some other States such a beneficiary, though bankrupt, is entitled as against his creditors to a sufficient income to support him in a condition "suitable to his station in life." Tolles v. Wood, 99 N. Y. 616. On whole subject, see Gray, Restraints on Alienation, §§ 134-277, a.

VII. ADMINISTRATION OF A TRUST.

a. In General.

33. *Give some illustrations to show that, so far as the legal title is concerned, the trustee is the only person recognized as the owner of the property.*

When the Statute of Limitations has run against a claim, held for the *cestui* by the trustee, the *cestui* is also barred, though an infant or under other disability. Wyck v. East India Co., 3 P. Wms. 309; Meeke v. Olpherts, 100 U. S. 564.

The trustee is the one to vote on shares of stock held in trust. *Re* Jacob Barker, 6 Wend. (N. Y.) 509.

He is the one to be assessed for taxes; Latrobe, Trustee, v. Mayor, etc., of Baltimore, 19 Md. 13; and to be sued; e. g., for a nuisance. Schwab v. Cleveland, 28 Hun (N. Y.), 458.

34. *What is the duty of the trustee as to care of the trust res, investment, etc.?*

The trustee is bound only to use "ordinary" care in his management of the property.

Where property is given him "to invest," the law lays down a rather narrow limit beyond which he cannot go; some States prohibiting railroad stocks. King v. Talbot, 40 N. Y. 76 (*contra*, Dickinson, Appellant, 152 Mass. 184). Loans on mere personal security are scarcely ever justifiable. Vreeland v. Schoonmaker, 16 N. J. Eq. 512, 530; Clark v. Garfield, 8 Allen, 427. In all cases,

when it once appears that there has been a breach of trust, the trustee becomes liable for loss from *any* cause. 1 Perry on Trusts, § 444.

Temporary deposits in banks have raised similar questions, the settlement of which emphasize the delicate nature of the fiduciary relation between the *cestui* and the trustee.

It is held, that a deposit in the trustee's own name, even for a short time, renders him liable for any loss; *In re* Arguello, 97 Cal. 196; State v. Greensdale, 106 Ind. 364; that, while a deposit as trustee is proper, it will become a breach of trust if allowed to remain a long time; Cann v. Cann, 33 Week. Rep. 40 (fourteen months); Barney v. Saunders, 16 How. 535, 545 (ten months), since this is practically a loan to the bank; and that any mingling of the trust property with his personal funds will entail the same liability. 1 Perry on Trusts, §§ 447, 463. Statutes generally point out what are proper investments for trustees.

35. *Suppose a trust estate is sold by auction. Can the trustee bid?*

No. The fact that each bidder stimulates the competition is offset by the possibility of collusion. The general principle is that a person acting in a fiduciary capacity must not bring his interest into collision with that of the beneficiary. The former has so much advantage from his position that the law protects him from temptation. Marsh v. Whitmore, 21 Wall. (N. Y.) 178; Fulton v. Whitney, 66 N. Y. 548.

b. Remedies.

36. *By what kind of proceeding can a cestui proceed against a delinquent trustee?*

In general, only by a bill in equity; and this is to be preferred, even if the courts of common law had jurisdiction, on account of its flexibility. 2 Perry on Trusts, § 843.

An action at law for money had and received will lie, however, (1) where a sum of money has been collected by the trustee and he *acknowledges* that it is held for the *cestui*. The trustee there practically becomes a debtor as to that amount. Topham v. Morecraft, 8 E. & B. 972; Boughton v. Flint, 74 N. Y. 476, 481. (2) *A fortiori*, when a final account is rendered by the trustee. Johnson v. Johnson, 120 Mass. 465. (3) Where the trust is one of money, e. g., where A. puts funds in B.'s hands to pay A.'s creditors. Putnam v. Field, 103 Mass. 556; Phelps v. Conant, 30 Vt. 277, 283.

In all these cases, the plaintiff may, of course, proceed by a bill in equity, if he chooses. Hooper v. Holmes, 11 N. J. Eq. 122.

37. *Suppose the trustee is out of the jurisdiction so that he cannot be served with process?*

This presents no obstacle to the success of the *cestui*, provided the trust *res* is in the jurisdiction of the court; for, although formerly the court was powerless in such a case, on account of its decrees being *in personam* only, it is now enabled, by a statutory extension of the principle that equity will not suffer a trust to fail for lack of a trustee, to appoint a new trustee to carry out the duties of the absent one. Felch v. Hooper, 119 Mass. 52; Arndt v. Griggs, 134 U. S. 316.

If the trustee is within the jurisdiction, but the trust *res* outside, there is no difficulty. It is a case of the normal operation of the rule that equity acts upon the person. The trustee must obey the decree, wherever the property is situated, or be punished for contempt of court. Earl of Kildare v. Eustace, 1 Vern. 405, 419; Cole v. Cunningham, 133 U. S. 107, 116.

38. *Suppose there is a third person involved in the breach of trust for which relief is sought, e. g., a purchaser, with notice of the trust. What is the proceeding there?*

Under the general rule, that since the trustee holds the legal title to the trust property the *cestui* must work out his rights through him, the bill would necessarily allege the refusal or inability of the trustee to bring suit against such purchaser, and then ask a reconveyance from the purchaser to the *cestui* himself (or to a new trustee, if the trust were a continuing one). R. R. Co. v. Nolan, 48 N. Y. 517.

39. *Suppose the cestui prefers not to follow the trust property into the hands of the third party, as, for instance, if trust property, worth* $5,000 *has been sold for* $6,000. *Can the trustee retain the* $1,000?

Clearly not. The rule is strictly applied, that the trustee shall make nothing by the breach of his duty. All profits coming to the trustee from his dealings with the trust *res* inure to the benefit of the *cestui*. Perry on Trusts, § 427; Barney v. Saunders, 16 How. 535, 542.

When the loss is of money, the rule is usually to compute interest at the highest legal rates, and for a loss in speculation or trade, compound interest is reckoned. McKnight v. Walsh, 23 N. J. Eq. 136; 2 Story Eq. Jur. 1277, 1278. This is, of course, in case the *cestui* elects to sue for the breach of trust, rather than for the original *res* with the profits it has actually gained.

40. *What rules prevail in equity, in regard to the running of the Statute of Limitations, as between the trustee and the cestui que trust?*

There is a vast mass of more or less conflicting decisions on the subject, but the leading principles seem to be as follows:

1. The statute has no application to express trusts, for the trustee does not hold adversely to the *cestui*. Perry on Trusts, § 863, citing a multitude of cases. But the trust must be clearly established, and a great lapse of time may so affect the proof of its existence and character, that equity will refuse relief. 2 Story Eq. Jur. 1520a, (13th ed.); Prevost v. Gratz, 6 Wheat. (U. S.) 481.

2. Where the trust is constructive (except as in (3), *infra*), or where law and equity have concurrent jurisdiction, the rule is that equity follows the law; the legal bar is conclusive. Williams v. McKay, 40 N. J. Eq. 190, 197; Kane v. Bloodgood, 7 Johns. (N. Y.) 90 (a general discussion by Chancellor Kent).

3. If the cause of action has been concealed through a fraud, involving moral turpitude, the statute will not run in equity, till the injured party has discovered it or would have done so, if he had exercised proper diligence. Gibbs v. Guild, 9 Q. B. Div. 59; Troup v. Smith, 20 Johns. (N. Y.) 32, 47. This rule has been held to apply, even in cases where a concurrent remedy which had existed at law has been barred. Gibbs v. Guild, *supra;* Sherwood v. Sutton, 5 Mason, 143. And see 1 Perry on Trusts, § 230.

4. An actual repudiation of his duty by a trustee (even in an express trust), brought distinctly to the knowledge of the *cestui*, will start the statute. Philippi v. Philippi, 115 U. S. 151; Merriam v. Hassam, 96 Mass. 516.

PLEADING AND PRACTICE UNDER NEW YORK CODE OF CIVIL PROCEDURE.

I. Pleadings.

a. Summons.

1. *What facts are essential to give a court jurisdiction?*

Jurisdiction is the right to adjudicate, concerning the subject-matter in a given case. "To constitute this, there are three essentials: first, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present actually, or by service; and third, the matter decided must be in substance and effect within the issue." Bishop, Code Practice, § 116.

2. *How is a civil action in a court of record commenced?*

A civil action is commenced *by service of a summons.* But from the time of the granting of a provisional remedy the court acquires jurisdiction and has control of all the subsequent proceedings. This latter mode of acquiring jurisdiction is, however, conditional and liable to be divested in a case where the jurisdiction is made dependent upon some act to be done after the granting of the provisional remedy. The summons is deemed the mandate of the court. Code Civ. Pro., § 416.

3. *What are the requisites of a summons in a civil action?*

The summons must contain the title of the action, specifying the court in which the action is brought, the names of the parties to the action, and if it is brought in the Supreme Court, the name of the county in which the plaintiff desires trial, and it must be subscribed by the plaintiff's attorney, who must add to his signature his office address, specifying a place within the State where there is a post-office. If in a city, he must add the street and street number or other suitable designation of the particular locality.

There are special requirements in the form of the summons in two classes of cases.

1. In actions, either by the people or by a private person, to recover a penalty or forfeiture, given by a statute, if a copy of the complaint is not delivered to the defendant with a copy of the summons,

Note—The questions of this chapter are answered on the authority of the New York Code of 1908.

a general reference to the statute must be indorsed upon the copy of the summons so delivered in the following form: "According to the provisions of," etc., describing the statute and specifying the section, if different sections thereof impose forfeitures or penalties for different acts. Code Civ. Pro., § 1897. People v. O'Neil, 54 Hun (N. Y.), 610. Where the action is brought by a common informer, the summons must be served by an officer authorized by law to collect on execution issued out of the same court and such officer must, immediately after service, file it with his certificate of service with the clerk of the court or the magistrate who issued it, as the case requires. Such a summons, once issued, cannot be countermanded by the plaintiff before service. Code Civ. Pro., § 1895.

2. In matrimonial actions, except where the summons and a copy of the complaint are personally served upon the defendant, final judgment cannot be entered in favor of plaintiff on defendant's default, 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 separation," as the case may be, or words to the same effect. The certificate or affidavit of service must affirmatively show a compliance with this requirement and set forth a copy of the words so added to the summons. Code Civ. Pro., § 1774.

A summons may be served either alone or with a copy of the complaint, or with a notice stating for what sum judgment will be taken in case of the default of the defendant in appearing and answering. If the action is for a sum certain, and the complaint is not served with the summons, such a notice should always be added to the summons, as it enables the plaintiff, in case of default, to have judgment entered by the clerk of the court for the amount specified in the notice. If the summons is served alone, and the defendant does not appear, the claim must be proved in court or before a justice thereof or a referee. Code Civ. Pro., §§ 419, 1212, 1214, 1215.

But in order to entitle a plaintiff to take judgment by default, for the amount named in the notice or demanded in the complaint, the cause of action must be for a sum certain or capable of calculation, arising on a contract, express or implied. Code Civ. Pro., § 420.

The form of a summons is as follows:

SUPREME COURT — NEW YORK COUNTY:

JOHN DOE, Plaintiff,
against
RICHARD ROE, Defendant.

Summons — With Notice.

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 March 15, 1908.

JOHN S. WOODRUFF,
Plaintiff's Attorney.

Post-office address and office, No. 45 Broadway, New York city.

NOTICE.— Take notice, that upon your default to appear or answer the above summons, judgment will be taken against you for the sum of five hundred (500) dollars, with interest from September 5, 1896, and with costs of this action.

JOHN S. WOODRUFF,
Plaintiff's Attorney.

Code Civ. Pro., §§ 417, 418.

4. *What is the necessary procedure in bringing an action against a defendant whose name is unknown in part or in whole?*

Where the plaintiff is ignorant of the name or part of the name of a defendant, he may designate that defendant, in the summons; and in any other process or proceeding in the action, by a fictitious name, or by as much of his name as is known, adding a description, identifying the person intended. Where the plaintiff demands judgment against an unknown person, he may designate that person as unknown, adding a description tending to identify him. When the name, or the remainder of the name, of the person becomes known, an order must be made by the court, upon such notice and such terms as it prescribes, that the proceedings already taken be deemed amended, by the insertion of the true name, in place of the fictitious name or part of name, or the designation as an unknown person; and that all subsequent proceedings be taken under the true name. Code Civ. Pro., § 451.

5. *What course should be pursued where a man is made a party of record, but no personal claim is made against him?*

Where a personal claim is not made against a defendant, a notice, subscribed by the plaintiff's attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that a personal claim is not made against him, may be served with the summons. If the defendant so served unreasonably defends the action, costs may be awarded against him. Code Civ. Pro., § 423.

6. *Who may serve a summons?*

The summons may be served by any person, other than a party to the action, except where it is otherwise specially prescribed by law. Code Civ. Pro., § 425. For one such exception, see Code Civ.

Pro., § 1895, and Ques. 3 (*supra*). Personal service of a summons can be made only by a person eighteen years of age or upwards. Genl. Rules Prac. 18.

7. *Draw an affidavit of service of a summons and a copy of complaint.*

..... Court.
..... County.

JOHN DOE, Plaintiff,

against

RICHARD ROE. Defendant.

Affidavit of Service of Summons and Complaint.

COUNTY OF NEW YORK, *ss.:*

John H. Jones, being duly sworn, says that he is a clerk in the office of James Smith and is twenty-three years of age; and that on the 10th day of April, 1897, at 846 Broadway, borough of Manhattan, city of New York, he served the summons in this action, a copy whereof is hereto annexed, together with a copy of the complaint therein mentioned, upon Richard Roe, the defendant in this action, by delivering copies of the same to such defendant, personally, and leaving the same with him. He further says, that he knew the person served, as aforesaid, to be the person mentioned and described in said summons as the defendant in this action.

JOHN H. JONES.

Sworn to before me, this 11th day
of April, 1898.
ALFRED M. BLACK,
Notary Public (110), *New York County.*

For the necessary allegations in an affidavit of service of summons and complaint in matrimonial actions, see § 124, Bishop, Code Practice, and Genl. Rules Prac. 18.

8. *How may a party, leaving the State, provide for the service of papers in suits prosecuted against him during his absence?*

When a resident of the State of full age is about to leave the State, he may execute and file with the clerk of the county where he resides, a written designation of another resident of the State as a person on whom may be served papers for the commencement of a civil proceeding against him during his absence. Such designation must be properly acknowledged and accompanied by the written consent of the person designated, also properly acknowledged. The

occupation and residence of both parties must be stated, and such designation remains in force for three years, if no other period is stated therein, notwithstanding the return to the State of the person making it. Service made on the person so designated has the same effect as though made on the person making the designation (if no period is stated, notwithstanding the return of the person designating to the United States). It may be revoked at any time by either party, and is revoked of necessity by the death or incompetency of either one of them. Code Civ. Pro., § 430.

9. *How may service of a summons be made upon a domestic corporation?*

Personal service of the summons upon a defendant, being a domestic corporation, must be made by delivering a copy thereof, within the State, as follows:

1. If the action is against the mayor, aldermen, and commonalty of the city of New York, to the mayor, comptroller, or counsel to the corporation.

2. If the action is against any other city, to the mayor, treasurer, counsel, attorney, or clerk; or, if the city lacks either of those officers, to the officer performing corresponding functions, under another name.

3. In any other case, to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent. Code Civ. Pro., § 431; Greater New York Charter, § 263.

10. *How may service of a summons be made upon a foreign corporation?*

Personal service of the summons, upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the State, as follows:

1. To the president, vice-president, treasurer, assistant treasurer, secretary, or assistant secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose by a writing, under the seal of the corporation, and the signature of its president, vice-president, or other acting head, accompanied with the written consent of the person designated, and filed in the office of the Secretary of State. The designation must specify a place within the State as the office or residence of the person so designated.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in the first subdivision of this section, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation within the State. Code Civ. Pro., § 432.

11. *What substitutes are there for personal service of a summons?*

(1) *Substituted service.* Where a summons is issued in any court of record, an order for its service upon a resident defendant may be made upon proof by affidavit of a person not a party to the action or by the return of the sheriff of the county where the defendant resides, that diligent effort has been made to serve the summons on the defendant, and that the place of his sojourn cannot be ascertained, or, if he is within the State, that he avoids service, so that personal service cannot be made. In such a case, the order must direct service of the summons by leaving a copy thereof, and of the order at the residence of the defendant, with a person of proper age; or if admittance cannot be obtained nor such person found to receive it, by affixing the same to the defendant's door and by depositing another copy thereof in the post-office of the place where the defendant resides, postpaid, addressed to him at his residence; or, upon proof that no such residence can be found, service of the summons may be made in such manner as the court may direct. Service must be made and the order and affidavits filed within ten days after the order is granted; otherwise the order becomes inoperative. On the filing of an affidavit showing service according to the order, the summons is deemed served. Code Civ. Pro., §§ 435–437. This order may be granted by the court or a judge thereof.

(2) *Service by publication or without the State.* An order for such service may be made in the cases specified in section 438 of the Code of Civil Procedure. The most usual cases are those where the defendant is not a resident of the State, or is a foreign corporation; and those where he has left the State or concealed himself therein with intent to defraud his creditors or to avoid service. The order must be founded on a verified complaint stating a cause of action, and on affidavits proving the facts required by sections 438 and 439 of the Code. The order must direct that the summons be published in two newspapers designated by the judge at least once a week for six successive weeks, accompanied by a notice in the following form:

"To : The foregoing summons is served upon you, by publication, pursuant to an order of" (naming the judge and his official title) *"dated the day of , 19 , and filed with the complaint, in the office of the clerk of at ."*

The order must also direct service of the summons, complaint, and a copy of the order on the defendant personally without the State, at the plaintiff's option, instead of publication, in which case a notice must be served with the summons similar to the above save that the words "without the State of New York" must be substituted for the words "by publication." The order must also contain a direction that, on or before the day of first publication, the plaintiff deposit in a specified post-office one or more sets of the

summons, complaint, and order, postpaid and directed to the defendant at a place therein specified; or else a statement that the judge, being satisfied by the affidavits upon which the order was granted, that the plaintiff cannot, with reasonable diligence, ascertain a place or places, where the defendant would probably receive matter transmitted through the post-office, dispenses with the deposit of any papers therein.

The summons, complaint order, and papers upon which the order was granted must be filed with the clerk before the service or first publication; and service must be made without the State, or publication begun, as the case may be, within three months after the order is granted.

For detailed provisions, see Code Civ. Pro., §§ 435–445. See also Bishop, Code Practice, § 130.

b. Complaint.

12. *What is the first pleading on the part of the plaintiff, and what must it contain?*

The plaintiff's first pleading is the complaint, and it must contain:

1. The title of the action, specifying the name of the court in which it is brought; if it is brought in the Supreme Court, the name of the county which the plaintiff designates as the place of trial, and the names of all the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting each cause of action, without unnecessary repetition.

3. A demand of the judgment to which the plaintiff supposes himself entitled. Code Civ. Pro., §§ 478, 481.

13. *How many, and what causes of action, may be joined in the same complaint?*

The complaint may set forth two or more causes of action, but the statement of the facts constituting each cause of action must be separate and numbered.

The plaintiff may unite two or more of the following causes of action in the same complaint (whether they are legal or equitable) where they are brought to recover:

1. Upon contract, express or implied.

2. Upon personal injuries, except libel, slander, criminal conversation or seduction.

3. For libel or slander.

4. For injuries to real property.

5. Real property in ejectment with or without damages for the withholding thereof.

6. For injuries to personal property.

7. Chattels with or without damages for the taking or detention thereof.

8. Upon claims against a trustee, by virtue of a contract or by operation of law.

9. Upon claims arising out of the same transaction or transactions connected with the same subject of action, and not included in one of the above subdivisions.

But it must appear on the face of the complaint (1) that all the causes of action so united belong to one of the foregoing subdivisions; (2) that they are consistent with each other; (3) that they do not require different places of trial; (4) and that, except as otherwise prescribed by law, they affect all the parties to the action. Code Civ. Pro., §§ 483, 484. As to the joinder of causes of action as against an executor or administrator in his representative capacity with causes of action against him personally, see Code Civ. Pro., § 1815.

c. Verification.

14. *Who may verify a pleading? Draw a verification of a complaint made by an attorney upon information and belief.*

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.

The affidavit of verification must be to the effect, that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true: Where it is made by a person, other than the party, he must set forth, in the affidavit, the grounds of his belief, as to all matters not stated upon his knowledge: and the reason why it is not made by the party. Code Civ. Pro., §§ 525, 526.

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

John Jones, being duly sworn, says: I am the attorney for (the plaintiff) above named. I have read and know the contents of the foregoing (complaint) and the same is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe it to be true. The source of my information and the grounds of my belief are statements made to me by the plaintiff, and an inspection by me of correspondence between the parties to this action relating to the transaction set forth in the complaint.

The reason this (complaint) is verified by me is that (the plaintiff) is not within the county where I reside and have my office.

JOHN JONES.

Sworn to before me, this 15th
day of December, 1908.

JAMES SMITH,
Notary Public, etc.

15. *When must a pleading be verified?*

It is usually not necessary, but should be done if possible, for it necessitates the verification of each subsequent pleading, and moreover allows the plaintiff, in certain cases, if the defendant has not appeared, to take judgment by default without application to the court.

But the verification *may be omitted,* even when the complaint was verified, 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 proof of a fact admitted or alleged therein.

A demurrer also need not be verified, nor the general answer of an infant by his guardian ad litem. Code Civ. Pro., § 523. And in an action for *divorce* the answer of the defendant may be made without verifying it, notwithstanding the verification of the complaint. Code Civ. Pro., § 1757. But a defense, which does not involve the merits of the action, shall not be pleaded unless it is verified. Code Civ. Pro., § 513. After the recovery of a judgment against joint debtors as prescribed in section 1932 of the Code, an action may be maintained against one or more of the joint debtors who were not parties to the original action to procure a judgment charging their property with any sum remaining unpaid on the original judgment. In such an action the complaint must be verified. Code Civ. Pro., §§ 1937, 1938.

d. Notice of Appearance.

16. *How must a defendant appear in an action, and what is the effect of a voluntary appearance on his part?*

When the defendant is served with a summons only he must serve a notice of appearance upon the plaintiff's attorney within twenty days after service of the summons is complete, exclusive of the day of service. A notice of appearance entitles him only to notice of the subsequent proceedings, *unless* within the same time he demands the service of a copy of the complaint. This demand may be incorporated into the notice of appearance. When he is served with a copy of the complaint he must serve a copy of a demurrer or of an answer upon the plaintiff's attorney, within the same time. Code Civ. Pro., §§ 421, 422, 479.

17. *Draw a notice of appearance and demand.*

SUPREME COURT — NEW YORK COUNTY.

JOHN DOE, Plaintiff

vs.

RICHARD ROE, Defendant.

Notice of Appearance and Demand.

SIR.— Please to take notice, that the defendant, Richard Roe, appears in this action, and that I am retained as attorney for him therein, and demand that a copy of the complaint and all papers in this action be served on me, at my office, No. 45 William street, Borough of Manhattan, New York city.

September 12, 1898.

Yours, etc.,
HENRY K. JONES,
Attorney for Defendant.

Office and post-office address, 45 William street, Borough of Manhattan, New York city.

To JAMES E. SMITH, Esq.,
Plaintiff's Attorney.

e. Demurrer.

18. *Upon what grounds and when may a defendant demur to a complaint?*

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. Code Civ. Pro., § 488; Bishop, Code Practice, § 210. Any of the above objections which do not appear on the face of the complaint may be raised by answer. Code Civ. Pro., § 498.

19. *What must a demurrer specify?*

The demurrer must distinctly specify the objections to the complaint; otherwise it may be disregarded. An objection, taken under subdivision first, second, fourth, or eighth above, may be stated in the language of the subdivision; an objection, taken under either of the other subdivisions, must point out specifically the particular defect relied upon. Code Civ. Pro., § 490.

An objection under subdivision 2 or 8 is not waived by a failure to demur and may be taken advantage of in the first instance at the trial by a motion to dismiss. Objections made under the other subdivisions are waived unless taken by demurrer or answer as may be appropriate. Code Civ. Pro., § 499.

20. *Upon what grounds may the plaintiff demur to a counterclaim upon which the defendant demands an affirmative judgment?*

Upon the following grounds:
1. That the court has not jurisdiction of the subject thereof.
2. That the defendant has not legal capacity to recover on 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, Code of Civil Procedure.
5. That the counterclaim does not state facts sufficient to constitute a cause of action. Code Civ. Pro., § 495.

21. *Upon what grounds may the defendant demur to a reply?*

The sole ground of demurrer to a reply, or to a separate traverse to, or avoidance of, a defense or counterclaim contained in the reply, is that it is insufficient in law upon its face. Code Civ. Pro., § 493.

f. Answer.

22. *What must an answer contain?*

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition. Code Civ. Pro., § 500.

23. *What facts may be proved under a denial?*

All those facts which show the plaintiff's averments to be untrue. Facts which are consistent with their truth, but show no cause of action, are new matter to be pleaded. Dubois v. Hermance, 56 N. Y. 673.

24. *A. sued B. on a contract under seal. The answer is a general denial. Can B. introduce evidence of failure of consideration?*

No. Consideration is presumed, and proof of failure of consideration must be set up affirmatively as a defense. Dubois v. Hermance, 56 N. Y. 673; Forgotston v. Cragin, 62 N. Y. App. Div. 243.

But should the complaint set up a contract made upon a stated consideration, the plaintiff must prove the consideration, and under a general denial the defendant may disprove the plaintiff's allegation by showing the want of consideration.

25. *What must a partial defense state?*

A partial defense must be expressly stated to be a partial defense to the entire complaint, or to one or more separate causes of action therein set forth. Code Civ. Pro., § 508.

26. *May a defendant set up more than one defense or counterclaim in his answer?*

Yes. A defendant may set forth, in his answer, as many defenses or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defense or counterclaim must be separately stated, and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer. Code Civ. Pro., § 507; Bishop, Code Practice, § 187.

The same matter may constitute both a defense and a counterclaim, and may be pleaded in both ways. Matter occurring after the service of the complaint and before the answer is put in, may also be pleaded. Lansing v. Ensign, 62 How. Pr. 363; Heckeman v. Young, 29 St. Rep. 55.

27. *A. sued B. on a judgment recovered in this State. B. sets up that the judgment was fraudulent, and a foreign tribunal having jurisdiction of the person had so adjudged. Is the defense a proper one?*

Yes. Equitable defenses include all matters which would authorize an application to the Court of Chancery for relief against a legal liability, but which, at law, could not have been pleaded in bar. Dobson v. Pearce, 12 N. Y. 156.

28. *What is the result where an answer admits part of the plaintiff's claim?*

Where the answer of the defendant, expressly or by not denying, admits a part of the plaintiff's claim to be just, the court, upon the plaintiff's motion, may, in its discretion, order that the action be severed; that a judgment be entered for the plaintiff for the part so admitted; and if the plaintiff so elects, that the action be continued, with like effect, as to the subsequent proceedings, as if it had been originally brought for the remainder of the claim. Code Civ. Pro., § 511.

29. *What is a negative pregnant?*

A negative pregnant is an evasive answer to an allegation, by answering it literally without answering the substance of it. If, for example, a complaint alleged that plaintiff loaned defendant $100, and the answer denied that the plaintiff loaned the defendant $100, such an answer, though perhaps literally true, would not in substance be a denial at all; for it might still be true that the plaintiff had loaned the defendant $99. He should deny that plaintiff loaned him $100 *or any other sum.* Salinger v. Lusk, 7 How. Pr. 430; Davison v. Powell, 16 id. 467.

30. *What third pleading is open to a defendant besides demurring or answering?*

There is no third pleading possible. A defendant who pleads at all must either demur or answer. Code Civ. Pro., § 487. He may also, before demurring or answering, make motions for various kinds of relief,— as, for example, to set aside service of the summons (if he has not appeared generally), to compel the plaintiff to separately state and number his causes of action, etc.

g. Counterclaim.

31. *Define a counterclaim, and state when it may be set up?*

A counterclaim must tend in some way to diminish or defeat the plaintiff's recovery, and it must be one of the following causes of action against the plaintiff, or in a proper case against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action.

1. A cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action:

2. In an action upon contract, any other cause of action on contract existing at the commencement of the action.

The latter counterclaims, however, are subject to the following rules:

1. If the action is founded upon a contract which has been assigned by the party thereto, other than a negotiable promissory

note or bill of exchange, a *demand existing* against the party thereto or an assignee of the contract *at the time of the assignment thereof,* and belonging to the defendant in good faith before notice of the assignment, must be allowed as a counterclaim to the amount of the plaintiff's demand, if it might have been so allowed against the party or the assignee while the contract belonged to him.

2. If the action is upon a negotiable promissory note or bill of exchange which has been assigned to the plaintiff after it became due, a demand existing against a person who assigned or transferred it after it became due must be allowed as a counterclaim to the amount of the plaintiff's demand, if it might have been so allowed against the assignor while the note or bill belonged to him.

3. If the plaintiff is a trustee for another, or if the action is in the name of a plaintiff who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested. Code Civ. Pro., §§ 501, 502; Bishop, Code Practice, §§ 195–203.

h. Reply.

32. *When is a reply necessary?*

When the answer contains a counterclaim the plaintiff, if he does not demur, may reply to the counterclaim. The reply must contain a general or specific denial of each material allegation of the counterclaim controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief, and it may set forth in ordinary and concise language, without repetition, new matter, not inconsistent with the complaint, constituting a defense to the counterclaim. Code Civ. Pro., § 514.

33. *In what cases and on whose application may the court require a reply to be made?*

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. Code Civ. Pro., § 516.

34. *What matters may the plaintiff join in his reply?*

A plaintiff may join in the same reply a denial of the counterclaim and new matter, not inconsistent with the complaint, in avoidance of it. 1 Nichols N. Y. Prac. 990. But he cannot set up a new cause of action against defendant by way of reply. Cohn v. Husson, 66 How. Pr. 150.

i. General Provisions as to Pleadings.

1. FRIVOLOUS PLEADING.

35. *Define a frivolous pleading and a sham defense, and state how each is dealt with.*

A frivolous pleading is one obviously, and upon its face insufficient as matter of law, and so clearly bad that the defect appears upon a mere inspection, and indicates that it was interposed in bad faith. A sham defense is one so clearly false in fact that it does not in reality involve any matter of substantial litigation. 1 Rumsey's Practice (2d ed.), pp. 379, 382.

If a demurrer, answer or reply is frivolous, the party prejudiced thereby, upon a previous notice to the adverse party, of not less than five days, may apply to the court or to a judge of the court for judgment thereupon, and judgment may be given accordingly. Code Civ. Pro., § 537.

Upon such a motion the pleading is not stricken out, but whatever action may be had in respect to it, whether condemned as frivolous or not, it remains a part of the record and makes a part of the judgment-roll. Briggs v. Bergen, 23 N. Y. 162; Strong v. Sproul, 53 N. Y. 497.

A *sham* answer or defense may be stricken out by the court on motion, upon such terms as the court deems just. Code Civ. Pro., § 538.

"A pleading to be stricken out must be false in the sense of being a mere pretense set up in bad faith and without color of fact." Farnsworth v. Halstead, 18 Civ. Pro. Rep. 227, 228.

The practice on a motion to strike out an answer as sham is to prepare affidavits and move on notice to defendant's attorney. Opposing affidavits showing the answer is true in fact, or might be true, and that it was interposed in good faith and not for delay, may be presented by the defendant. Bishop, Code Practice, § 224.

36. *Can a verified pleading, containing a denial of a material allegation, be stricken out?*

No. A verified pleading, containing a denial of any material allegation of the complaint, though not a general denial, cannot be stricken out, because it raises an issue and gives the defendant the right to a trial by jury; and this right is secured by the Constitution, § 2, art. I. Thompson v. Erie Ry. Co., 45 N. Y. 468; Wayland v. Tysen, id. 281.

2. AMENDMENTS.

37. *When may pleadings be amended of course?*

Within twenty days after a pleading, or the answer or demurrer or reply thereto, is served, or at any time before the period for answering it expires, the pleading may be once amended by the party, of course, without costs, and without prejudice to the proceedings

already had. But if it is made to appear to the court, that the pleading was amended for the purpose of delay, and that the adverse party will thereby lose the benefit of a term, for which the cause is or may be noticed, the amended pleading may be stricken out, or the pleading may be restored to its original form, and such terms imposed as the court deems just. Code Civ. Pro., § 542.

In amending, a party may substitute an entirely different cause of action from that originally pleaded. Brown v. Leigh, 49 N. Y. 78. But the amendment must be of the pleading served. He cannot, without application to the court for leave, withdraw a demurrer and substitute an answer in its place. Cashman v. Reynolds, 123 N. Y. 138. Nor can he, without motion, withdraw an answer and serve a demurrer. Finch v. Pindon, 19 Abb. Prac. 96.

The fact that either party has noticed the case for trial makes no difference in the right to amend. Ostrander v. Conkey, 20 Hun, 421; Clifton v. Brown, 27 Hun, 231.

38. *Must a copy of the amended pleading be served?*

Yes. Where a pleading is amended, a copy thereof must be served upon the attorney for the adverse party. A failure to demur to, or answer, the amended pleading, within twenty days thereafter, has the same effect as a like failure to demur to, or answer the original pleading. Code Civ. Pro., § 543.

39. *In what other way may a pleading be amended?*

1. By application to the court before trial for leave to amend.

Such application should be made upon notice and affidavits, and may be granted upon such terms as the court sees fit to impose. Code Civ. Pro., § 723.

2. By application to the court during the trial because of a variance between the proof and the pleading.

Where the variance is not material the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs. Code Civ. Pro., § 540.

But an amendment cannot be allowed upon any application which will change the issue or bring in a new cause of action, subject to this limitation, that the court may make the pleading conform to the facts proved, and may permit the insertion of material additional allegations. 1 Nichols N. Y. Prac. 1029; Smith v. Rathbun, 75 N. Y. 122.

3. In rare cases application to amend may be made after judgment and even in the appellate court. Code Civ. Pro., § 723; 1 Rumsey's Practice (2d ed.), p. 371.

40. *What is a material variance between the pleadings and the proof?*

It is a variation which actually misleads the adverse party, to his prejudice, in maintaining his action or defense, upon the merits,

and this he must prove to the court. Code Civ. Pro., § 539. In other instances a variance is not fatal. Thus, in an action for goods sold and delivered, the plaintiff would be allowed to amend and show a delivery to a third person *by order of the defendant.* Rogers v. Verona, 1 Bosw. 417. So also in an action on a contract for services, at a stated rate, the plaintiff could show the value of the services. Sussdorff v. Schmidt, 55 N. Y. 319.

41. *What are the functions of supplemental pleadings?*

Section 544 of the Code of Civil Procedure provides: Upon the application of either party, the court may, and, in a proper case, must, upon such terms as are just, permit him to make a supplemental complaint, answer or reply, alleging material facts which occurred after his former pleading, or of which he was ignorant when it was made; including the judgment or decree of a competent court, rendered after the commencement of the action, determining the matters in controversy, or a part thereof.

The object of a supplemental pleading is to set up facts consistent with and in aid of the original pleadings which have occurred or come to the knowledge of the party since the action was begun or the original pleading served. Facts which have occurred since the commencement of the action cannot be proved unless so set up. Tiffany v. Bowerman, 2 Hun, 643; Holyoke v. Adams, 59 N. Y. 233; Hall v. Olney, 65 Barb. 27.

II. MOTIONS ON THE PLEADINGS.

42. *When is a motion to dismiss on the pleadings made?*

A motion to dismiss on the pleadings is made after the jury is sworn and before the case is stated to the jury by the opening counsel. A similar motion may also be made, after the case has been opened, on the pleading and opening.

43. *What are the usual grounds for such motions?*

(1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the court is without jurisdiction of the subject-matter; (3) that the answer does not state a defense. Bishop, Code Prac. § 424; Eaton v. Wells, 82 N. Y. 576.

The objections specified may be taken by demurrer, but they are not waived if not so taken; Code Civ. Pro., § 499; and may be raised upon motion at any stage of the case before evidence supplying the defect is heard. Abbott, Trial Brief, Civil Issues, 2d ed., p. 77. Scofield v. Whitelegge, 49 N. Y. 259; Sheridan v. Jackson, 72 N. Y. 170. See also Ques. 19 (*supra*).

III. PARTIES.

44. *Can an infant be a party plaintiff or defendant?*

An infant can bring suit by a guardian *ad litem* who will be appointed by the court, upon the application of the infant if he is

fourteen years of age or upwards; or, if he is under that age, upon application of his general or testamentary guardian, if he has one, or of a relative or friend. Notice of the application must be given to the guardian, if there is one, or to the person with whom the infant resides in cases where the application is made by a relative or a friend. Code Civ. Pro., §§ 469–470.

An infant must also *appear* by guardian. Code Civ. Pro., § 471.

45. *May a married woman bring an action without joining her husband as a party plaintiff?*

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, or on account of the wrongful acts of the wife committed *without the instigation* of her husband. Code Civ. Pro., § 450.

46. *How must an executor sue and be sued?*

"An action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, or an action or special proceeding, hereafter commenced against him, except where it is brought to charge him personally, must be brought by or against him in his representative capacity. A judgment, in an action hereafter commenced, recovered against an executor or administrator, without describing him in his representative capacity, cannot be enforced against the property of the decedent, except by the special direction of the court, contained therein." Code Civ. Pro., § 1814.

47. *Under what circumstances may a party sue or defend as a poor person?*

A poor person not being of ability to sue, who alleges that he has a cause of action against another person, may apply by petition for leave to prosecute as a poor person, and to have an attorney and counsel assigned to conduct his action. The petition must state:

1. The nature of the action brought or intended to be brought.

2. That the applicant is not worth one hundred dollars besides the wearing apparel and furniture necessary for himself and his family, and the subject-matter of the action.

It must be verified by the applicant's affidavit, unless the applicant is an infant under the age of fourteen years, and in that case by the affidavit of his guardian appointed in said action, and supported by a certificate of a counselor-at-law to the effect that he has examined the case and is of the opinion that the applicant has a good cause of action.

The court to which the petition is presented may, by order, admit him to prosecute as a poor person, and assign to him an at-

torney and counsel to prosecute his action, who must act therein without compensation. Code Civ. Pro., §§ 458–460.

So also a defendant in an action involving his right or interest in real or personal property may petition in the same manner and enjoy the same privileges. Code Civ. Pro., § 463.

48. *What is the necessary proceeding where a party, who ought to join as a party plaintiff, refuses to allow his name to be used?*

All of the parties in interest may be joined in an action. Those who are united in interest must be joined as plaintiffs or defendants, except as otherwise prescribed in the Code. But where a party who ought to be joined as a plaintiff will not consent thereto, he may be made a defendant, the reason therefor being stated in the complaint. Code Civ. Pro., § 448.

49. *A. has a claim upon a contract with X., which he assigns to B. Who should sue for a breach of the contract?*

The action must be brought in the name of the assignee, he being the real party in interest. But the section expressly provides that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted; and a person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust. Code Cov. Pro., § 449.

50. *What claims may be assigned?*

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 transferrer, 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. Code Civ. Pro., § 1910.

IV. BILLS OF PARTICULARS.

51. *What is a bill of particulars?*

A bill of particulars is a statement, verified or not, depending on the form of the order on which it is granted, apprising either the plaintiff or defendant of the particulars of the charge which he is expected to meet. It cannot be used as a means of discovery of the evidence to be relied upon by the other side. Ball v. Pub. Co., 38 Hun, 11. In case of failure to comply with an order directing a

bill of particulars, the court shall preclude the party in default from giving evidence of the part or parts of his affirmative allegation of which particulars have not been delivered. Code Civ. Pro., § 531.

52. *When may a bill of particulars be granted?*

"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 apprised 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 in his power." Tilton v. Beecher, 59 N. Y. 176, 187.

53. *How is a bill of particulars procured?*

It is customary to ask the attorney for the other side for a bill of particulars; if he declines, the proceeding is by motion at Special Term, upon notice. The bill of particulars may be verified or not, depending upon whether there is a provision in the order to that effect.

V. SUBPŒNA.

54. *How is a subpœna served? What are the rights of a witness attending upon subpœna?*

A subpœna is served by showing the original and delivering and leaving with the witness personally a copy. A witness is entitled to fifty cents for each day's attendance, and if he lives more than three miles from place of trial, to eight cents a mile for each mile, going to the place of trial. Code Civ. Pro., §§ 852, 3318.

55. *What is a subpœna duces tecum?*

"A subpœna *duces tecum* is the proper form of subpœna to compel a witness to bring with him and produce on the trial a book or paper in his possession. It differs from the ordinary subpœna only in that it contains a direction to the witness to bring with him the book or document, which must be intelligibly described." It must be served, however, five days before attendance is required. Code Civ. Pro., § 867; Bishop, Code Practice, § 394.

VI. TENDER.

56. *What are the Code provisions as to a tender?*

Where the action is for a sum certain or to recover for involuntary injury to person or property, the defendant may tender the plaintiff, before trial, such a sum of money as he considers sufficient, together with costs. If the money is not accepted, it must be paid into court, and notice in writing of such payment served upon the plaintiff before the trial, and within ten days after the tender. If, upon trial, the amount so paid into court proves sufficient

the plaintiff cannot recover costs or interest from the time of tender, but must pay the defendant's costs from that time. Code Civ. Pro., §§ 731–733.

While tender must be unqualified and unconditional, it may be restricted by such conditions as by the terms of the contract are conditions precedent or concurrent to the payment of the debt. Halpin v. Ins. Co., 118 N. Y. 165.

VII. OFFER OF JUDGMENT.

57. *How is an offer of judgment made?*

An offer of judgment is made in writing, by service upon the attorney for the plaintiff or defendant, before trial.

58. *What must an offer of judgment contain?*

It must contain an offer that judgment be taken for a certain sum of money or for other relief therein specified; certain relief in equity or in a foreclosure suit, together with costs to date, and it must be definite in its terms. It must be subscribed by the party — in which case it is to be acknowledged; or by the attorney — in which case he must annex his affidavit to the effect that he is authorized to make it on behalf of his client.

If this offer is accepted a written notice of acceptance is served on the attorney for the offering party within ten days and the clerk must then enter judgment, without notice to the other side, on the filing of the summons, complaint and offer with proof of acceptance.

59. *What is the effect of failure to accept an offer of judgment, within ten days?*

If notice of acceptance is not given, the offer cannot be given in evidence upon the trial; and if the party to whom the offer was made fails to recover a more favorable judgment he cannot recover costs from the time of the offer, but must pay costs from that time. Code Civ. Pro., §§ 738–740.

VIII. TIME.

60. *How must the time required by the Code for doing any act in an action or special proceeding brought in a court of record be computed?*

Such time must be computed by excluding the first day and including the last day.

If the last day is Sunday or a public holiday other than a half holiday it must be excluded.

Where the act is required to be done within two days, and an intervening day is Sunday, or a public holiday other than a half holiday, it must be excluded. Stat. Const. Law, § 27.

61. *Can the time fixed by the Code for doing an act be extended by the court?*

The time for serving a pleading or taking any other proceeding in an action after its commencement can, before the expiration of such time, and, except as otherwise prescribed by law, after its expiration be extended beyond the limit allowed by the Code in the court's discretion, except that a court, or a judge, is not authorized to extend the time, fixed by law, within which to commence an action; or to take an appeal; or to apply to continue an action, where a party thereto has died, or has incurred a disability; or the time fixed by the court, within which a supplemental complaint must be made, in order to continue an action; or an action is to abate, unless it is continued by the proper parties. A court, or a judge, cannot allow either of those acts to be done, after the expiration of the time fixed by law, or by the order, as the case may be, for doing it; except that when a party entitled to appeal from a judgment or order, or to move to set aside a final judgment for error in fact, dies before the expiration of the time within which the appeal may be taken, or the motion made, the court may allow the appeal to be taken, or the motion to be made, by the heir, devisee, or personal representative of the decedent, at any time within four months after his death. Code Civ. Pro., §§ 781–785.

62. *What notice of motion is required by the Code?*

If notice of a motion, or of any other proceeding in an action, before a court or a judge, is necessary, it must, if personally served, be served at least eight days before the time appointed for the hearing, unless the attorneys for the respective parties reside or have their offices in the same city or village, in which case the notice may be five days; or unless the court, or a judge thereof, or a county judge of the county where the action is triable or in which the attorney for the applicant resides, upon an affidavit showing grounds therefor, makes an order to show cause, why the application should not be granted; and, in the order, directs that service thereof, less than eight days before it is returnable, be sufficient. A copy of the affidavit on which such an order to show cause is granted must be served with the order. Code Civ. Pro., § 780. Genl. Rules Prac. 37.

63. *Within what time must the following notices be given:* (1) *Notice of argument;* (2) *Notice of taxation of costs;* (3) *Notice of trial?*

1. Eight days is the regular notice of motion at Special or Trial Term, unless the attorneys for the respective parties reside or have their offices in the same city or village, in which case five days is sufficient, or unless an order to show cause be granted; enumerated cases in the Appellate Division, First Department, fifteen days before the beginning of the term (Rule 5 of App. Div. First

Dept.); appeals from orders, Appellate Division, First Department, eight days (Rule 4, id.) Genl. Rules Prac. 37, 40.

Notice of motion in the City Court is in general four days. For special provisions, see Code Civ. Pro., § 3161.

2. Two days' notice of taxation of costs must be given, if the attorneys reside or have offices in the city or town where costs are taxed; otherwise five days' notice must be given. But in the City Court of New York, one day's notice is sufficient, if all attorneys reside or have their offices in New York city, otherwise two days' notice must be given. Code Civ. Pro., §§ 3263, 3161.

3. Fourteen days' notice of trial before the beginning of the term must be given, unless it is served by mail, when sixteen days' notice before the day of trial is required. Code Civ. Pro., §§ 798, 977. But in City Court of New York, five days only is required. Code Civ. Pro., § 3161.

64. *What are the general provisions of the Code as to the time in which papers are to be served, or notice given, when service is made through the mail?*

Where it is prescribed in this act, or in the general rules of practice, that a notice must be given, or a paper must be served, within a specified time, before an act is to be done; or that the adverse party has a specified time, after notice or service, within which to do an act; if service is made through the post-office the time so required or allowed is double the time specified; except that service of notice of trial may be made, through the post-office, not less than sixteen days before the day of trial, including the day of service. Code Civ. Pro., § 798.

IX. PROVISIONAL REMEDIES.

65. *Name the general provisional remedies in an action.*

The Code declares the general provisional remedies to be five in number — viz.: Arrest, injunction, attachment, appointment of a receiver, and deposit, delivery or conveyance of property.

a. Arrest.

66. *What are the general Code provisions relating to arrest?*

There are two great classes in which this order will be granted.

1. Where the right to arrest depends upon the nature of the action.

2. Where it depends partly upon extrinsic facts.

The first class embraces the following cases:

a. To recover a fine or penalty.

b. 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.

c. 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.

d. 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 of 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. Code Civ. Pro., § 549.

An order for arrest, under this section, can be granted at any time before final judgment but cannot be granted afterwards. Code Civ. Pro., § 551.

The second class includes all actions 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 nonresidence or departure there is danger that a judgment or an order requiring the performance of the act will be rendered ineffectual. Code Civ. Pro., § 550. This division is intended as a substitute for the writ of *ne exeat*, which is abolished by section 548 of the Code. An order under it can only be granted by the court, and is always in its discretion, but may be granted or served either before or after

final judgment unless an appeal is pending, secured in such manner as to stay execution. Code Civ. Pro., § 551.

One of the chief objects in granting an order of arrest is to prevent the judgment which the plaintiff may subsequently recover from being rendered ineffectual, by the court's not having jurisdiction over the person of the defendant.

It may be generally stated that in a case where arrest may be obtained because of the nature of the action (class 1, *supra*), before judgment, execution against the person may be obtained after judgment.

In all cases, except those of the second class, the order of arrest must be obtained from a judge of the court in which the action is brought, or from any county judge. Code Civ. Pro., § 556.

The papers necessary to present to obtain an order of arrest are: (1) Summons, (2) Order of Arrest, (3) Affidavit, (4) Undertaking, with two sureties for an amount of not less than $250, and in any case, at least one-tenth of the amount of bail required by the order. A complaint is not necessary, and when served may, if verified, be regarded as an affidavit, but it is better to serve both. Code Civ. Pro., § 559; Bishop, Code Practice, § 234.

Where the affidavit is made upon information and belief, the reason must be shown why it was not made on knowledge, and the residence of the informants should be stated with the reasons why their affidavits cannot be obtained. Jordan v. Harrison, 13 Civ. Pro. 447.

The affiant should also state the sources of his information and the grounds of his belief.

When the affidavit of a third person is needed to use upon the motion, and he will not give it voluntarily, his deposition may be obtained under section 885. But when there is not time to wait for this, an affidavit on information and belief may be used.

A woman cannot be arrested on *mesne* process, except (1) where the order can be granted only by the court; that is, in a case provided for by section 550 (*supra*); and (2) in an action to recover damages for "a wilful injury to person, character or property." Code Civ. Pro., § 553.

When a defendant has been arrested under an order granted in accordance with the above provisions he may, at any time before he is in contempt, where the order can be granted only by the court, or, in any other case, at any time before execution against his person, must, be discharged from arrest, either upon giving bail, or upon depositing the sum specified in the order of arrest. The defendant may give bail, or make the deposit immediately upon his arrest, at any hour of the day or night; and he must have reasonable opportunity to seek for and to procure bail, before being committed to jail. Code Civ. Pro., § 573.

A witness who is in good faith subpœnaed or ordered to attend for examination, where his attendance can be enforced by attachment or commitment, is privileged from arrest in a civil action

or special proceeding while going to, returning from and remaining at the place of trial. Code Civ. Pro., § 860. So also a party to an action and a party enticed into the State. See Bishop, Code Practice, § 232.

If the defendant offers sufficient bail he must be released; the sheriff has no discretion in the matter. Code Civ. Pro., §§ 573–576; Arteaga v. Conner, 88 N. Y. 403.

67. *What are the qualifications of bail?*

1. Each of the bail must be a resident of and a householder or freeholder within the State.

2. Each of them must be worth the sum specified in the order of arrest, exclusive of property exempt from execution; but the judge on justification may allow more than two bail to justify, severally, in sums less than that specified in the order, if the whole justification is equivalent to that of two sufficient bail. Code Civ. Pro., § 579.

b. Injunction.

68. *What are the general Code provisions relating to injunctions?*

In New York, the old writ of injunction is abolished. A temporary injunction *may* be granted by order. Code Civ. Pro., § 602.

"An injunction by order is a provisional remedy, and temporary in its character. It assumes a *pending litigation* in which all questions are to be settled by a judgment, and operates only until the judgment is rendered. If by that a permanent injunction is granted, the temporary one is, of course, ended, and equally so if a permanent injunction is in the end denied." Jackson v. Bunnell, 113 N. Y. 216. If a judgment, which disposes of the action, does not award a permanent injunction, one cannot be subsequently granted upon affidavits.

An injunction cannot be obtained as a matter of right; its issuance depends upon the discretion of the court or judge. The Court of Appeals cannot review the exercise of this discretion, except where the papers show on their face facts which make an injunction improper according to settled adjudications. Hudson R. Tel. Co. v. Watervliet, etc., Co., 121 N. Y. 397; McHenry v. Jewett, 90 id. 60.

There are two divisions under which all injunctions are classed by the Code.

1. Where the right depends on the nature of the action.

2. Where the right depends on extrinsic facts.

The first division includes all cases 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. Code Civ. Pro., § 603.

The second division includes two classes of acts.

(a) Where it appears by affidavit that the defendant during the pendency of the action is doing, procuring, suffering or threatening an act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render judgment ineffectual. Code Civ. Pro., § 604, subs. 1.

(b) Where it appears by affidavit that the defendant during the pendency of the action is about to remove or dispose of his property with intent to defraud the plaintiff. Code Civ. Pro., § 604, subs. 2. An affidavit includes a verified pleading. Code Civ. Pro., § 3343, subd. 11.

An injunction order may generally be granted by the court in which the action is brought, or by the judge thereof, or by any county judge; where it is granted by a judge, it may be enforced as the order of court. Code Civ. Pro., § 606.

In Campbell v. Ernest, 64 Hun (N. Y.), 188, it is held, that the relief provided for by § 604, subs. 1, will be granted only in actions involving the rights of the parties to something which constitutes the subject of the action in respect to which the plaintiff claims some rights and seeks some special relief, and that it has no application to an action where a money judgment only is sought. See also Jerome Co. v. Loeb, 59 How. Pr. 509.

The injunction order may be granted to accompany the summons, or at any time after the commencement of the action and before final judgment. Code Civ. Pro., § 608.

The order may be granted either upon or without notice, except in special instances. The order can be granted only upon notice (1) when directed against a State officer, or board of State officials to restrain the performance of a duty imposed by statute (Code Civ. Pro., § 605); (2) when it suspends the general and ordinary business of a corporation or to restrain an officer thereof from the performance of his duties (Code Civ. Pro., § 1809); (3) against the Board of Health of New York city (Greater New York charter, § 1260), and (4) in all cases after the defendant has answered. Code Civ. Pro., § 609. This section provides that when notice is given, the judge may enjoin the defendant until the hearing and decision of the application.

Where an order of injunction has been granted *ex parte*, an *ex parte* application may be made on the papers on which it was granted, to vacate or modify it, to the judge who granted it, or to the Appellate Division. Such an application cannot be made without notice to any other judge except upon proof by affidavit of the disability or absence of the judge who granted the order and that the delay caused by giving notice will expose the applicant to great injury. Code Civ. Pro., § 626. As a general rule, a party must make his application on notice. The above section is aimed to meet a case where there is some statutory restriction or some irregularity or insufficiency in the papers.

c. Attachment.

1. WHEN GRANTED.

69. *What are the general Code provisions relating to attachments?*

A warrant of attachment may be granted against the property of one or more defendants in an action "to recover a sum of money only" as damages for one of the following causes:

1. Breach of contract, express or implied, other than 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. Code Civ. Pro., § 635.

To entitle the plaintiff to such a warrant he must show, by affidavit, to the satisfaction of the judge granting the same, the following facts:

1. That one of the causes of action specified above 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; or

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 when, for the purpose of procuring 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, with his knowledge and acquiescence, as to his financial responsibility or standing; or when the defendant being an adult and a resident of the State, has been continuously without the United States 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, 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. Code Civ. Pro., § 636.

3. An attachment may also be granted against the property of one or more of the defendants;

Where the action is brought to recover money, funds, credits, or other property, held or owned by the State, or held or owned, officially or otherwise, for or in behalf of a public governmental inter-

est, by a municipal or other public corporation, board, officer, custodian, agency, or agent, of the State, or if 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 in the obtaining, reception, payment, conversion, or disposition of which, without right, he has aided or abetted; or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same; or the aiding or abetting thereof; or in an action in favor of a private person, or a corporation, brought to recover damages for an injury to personal property, where the liability arose, in whole or in part, in consequence of the false statements of the defendant, as to his responsibility or credit, in writing, under the hand or signature of the defendant, or of his authorized agent, made with his knowledge and acquiescence. In order to entitle the plaintiff to a warrant of attachment, in a case specified in this section, he must show, by affidavit, to the satisfaction of the judge granting it, that a sufficient cause of action exists against the defendant, for a sum stated in the affidavit. Code Civ. Pro., § 637.

The United States statutes for the organization of national banks contain a provision that "no attachment, injunction or execution shall be issued against such association, or its property, before final judgment in any suit, action, or proceeding in any State, county or municipal court." Rev. Stat. U. S., § 5242.

It has been held that an attachment cannot be obtained against the stock of a *foreign* corporation, under section 647 of the Code, at least where the defendant is not a resident of the State. Plimpton v. Bigelow, 93 N. Y. 592.

A warrant of attachment is obtained by presenting to a judge an affidavit (which includes a verified pleading, Code Civ. Pro., § 3343, subd. 11), a warrant of attachment and a satisfactory bond. It is customary to serve a summons. See Code Civ. Pro., § 416, and Ques. 2 (*supra*). The warrant is subscribed by the attorney, and if the application is granted, by the judge. These papers and copies are given to the sheriff and he attaches the property in the following way: In the case of real property, by filing a notice and description of the property with the county clerk. In the case of personal property, capable of manual delivery including bonds, promissory notes, etc., by taking the same into his actual custody and by serving a copy of the warrant and affidavits upon the person from whose possession the property is taken. In the case of other personal property, by leaving a certified copy of warrant and notice showing the property attached, with the person holding the same. If the property attached consists of a simple demand, these papers are left with the person against whom it exists; if of stock of a corporation, with the president, secretary, cashier, or managing agent thereof; if of an interest in the estate of a decedent, with the executor or administrator. Code Civ. Pro., § 649.

The warrant may be granted by a judge of the court, or a county

judge, and may accompany the summons, in which case the summons must be served personally within or without the State or publication be begun within thirty days after the granting of the warrant. The affidavit in this case will state that the plaintiff "is about to commence an action" for the cause stated. Code Civ. Pro., § 638; Storber v. Thudium, 44 Hun (N. Y.), 70; Am. Bank v. Voisin, id. 85.

The question of the *sufficiency* of the affidavit is not, as a rule, gone into when the warrant is granted; this question comes up on motion to vacate the attachment, which is heard at Special Term. See *infra*.

The bond must be for $250, at least, to secure the defendant for costs and damages if the attachment is vacated, and must have two sureties or be that of a surety company; and it is no defense to an action on this bond, that the court did not have power to grant the attachment for want of jurisdiction or for any other cause. Code Civ. Pro., § 642.

The plaintiff procuring the warrant must, within ten days after the granting thereof, cause the affidavits, upon which it was granted, to be filed in the office of the clerk. Code Civ. Pro., § 639; Lewis v. Douglass, 53 Hun (N. Y.), 587.

2. THE AFFIDAVIT.

An affidavit which states a mere *opinion* will not be sufficient, however emphatic its language may be. Where the facts are stated upon information and belief the grounds and sources thereof must be thoroughly explained, and certainly in every case where the affidavit is made upon personal knowledge it will be insufficient. unless it is so drawn that if the facts alleged are not true the affiant may be prosecuted for perjury. In Hoormann v. Climax Cycle Co., 9 App. Div. 579, 587, the court said:

"The true test of the sufficiency of an affidavit is the possibility of assigning perjury upon it, if false. People ex rel. Cook v. Becker, 20 N. Y. 354. This test is essentially applicable to affidavits used to secure attachments."

The Code does not require, however, that the affiant must have personal knowledge. An affidavit made by the agent or the attorney of the attaching creditor, averring that the facts required "to be shown by section 636 of the Code exist, as affiant is informed and believes, stating the source of his information and the grounds of his belief, is sufficient to confer jurisdiction on a judge to grant an attachment. * * * * * If the source of information be a person, it must be by one whom the court can see *probably* had personal knowledge of the facts communicated, and the means by which the communication is made must be one which experience has shown to be usually reliable, and one which a prudent man would employ in a matter of importance to himself." Murphy v. Jack, 76 Hun (N. Y.), 356.

Thus, information may, it would seem, be derived by cable; Ladenburg v. Com. Bank, 148 N. Y. 202; Reichenback v. Spethmann, 5 Law Bull. 42. It may be derived by telephone. Murphy v. Jack, 142 N. Y. 215. See also People v. McKane, 143 id. 455, 474.

If the information is derived from conversation over the telephone, it is essential that the affiant recognize the voice of the plaintiff and that he so state in his affidavit. Murphy v. Jack, 142 N. Y. 215.

Even where the affidavit is upon knowledge, the courts in the First Department will hold it insufficient unless fact appear indicating that the deponent was in a position to have such knowledge. 1 Rumsey Prac., 2d ed., 631.

It is sufficient if the affidavit furnishes evidence from which the judge may be lawfully satisfied of the truth of the matters required to be shown. Lamkin v. Douglass, 27 Hun (N. Y.), 517.

3. JURISDICTION.

"Nonresidents, as well as residents, may sue out an attachment, but if the defendant is a foreign corporation, an attachment cannot be obtained by a nonresident or another foreign corporation unless it appears by affidavit that a cause of action exists in favor of the plaintiff for a breach of a contract made within the State, or relating to property situated within the State at the time of the making thereof." (2 Nichols N. Y. Prac. 1383.)

An affidavit upon which a warrant of attachment is granted, if sufficient to call upon the court to exercise its discretion, will suffice to give jurisdiction. Van Loon v. Lyons, 61 N. Y. 24; Schoonmaker v. Spencer, 54 id. 366; Murphy v. Jack, *supra;* Waterbury v. Waterbury, 76 Hun (N. Y.), 51.

4. VACATING OR MODIFYING THE WARRANT.

The defendant, or a person who has acquired a lien upon, or interest in, his property, after it was attached, may, at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative. Code Civ. Pro., § 682.

And at any time after appearance by the defendant and before final judgment he may apply to the judge or court who granted the warrant for an order to discharge the attachment, as to the whole or a part of the property attached. Code Civ. Pro., § 687.

Irregularities in the affidavit on which the warrant of attachment was granted which are not specified in the notice of motion to set aside the attachment, cannot be relied upon in support of the motion. 2 Nichols Prac. 1520.

Where the defendant in his affidavit, attached to the notice of motion to vacate, sets forth additional facts, however unimportant,

and does not simply move to vacate upon the papers on which the warrant was granted, the plaintiff, under section 683, is entitled to put in additional affidavits, tending to sustain any ground for the attachment recited in the warrant. Godfrey v. Godfrey, 75 N. Y. 434; Steuben Co. Bank v. Alberger, id. 179; Kneeland on Attachments, § 519. When the application is made on the papers on which the warrant was issued, no additional affidavits can be read in support of the attachment or to defeat it. Buhl v. Ball, 41 Hun (N. Y.), 61; Smith v. Arnold, 33 id. 484; Sutherland v. Bradner, 34 id. 519. The notice of motion must specify any irregularity upon which the motion is based (Genl. Rules Prac. 37), but when it is based on the merits, the notice need specify no special grounds. Walts v. Nichols, 32 Hun (N. Y.), 276.

5. ATTACHMENT OF PARTNERSHIP PROPERTY.

Partnership property may be levied upon under an attachment against one partner. Code Civ. Pro., § 693; Smith v. Orser, 42 N. Y. 132. But partnership choses in action, such as debts due to the firm, cannot be seized. Barry v. Fisher, 8 Abb. Pr. (N. S.) 369.

Only the interest of the debtor partner can be seized; that is, his distributive share on liquidation. Staats v. Bristow, 73 N. Y. 264.

The other partners can obtain a release of the goods from the attachment, by giving a bond securing the payment of any judgment that may be recovered before the attachment is vacated. Code Civ. Pro., §§ 693, 694.

d. Replevin.

1. NECESSARY PAPERS.

70. *What are the general Code provisions relating to replevin?*

An action of replevin is commenced by the service of a summons. The chattel may, however, be replevied before the service of the summons, in which case the court acquires jurisdiction as in other provisional remedies. Code Civ. Pro., § 1693. See also Ques. 2 (*supra*).

The necessary papers in order to replevy goods are,

1. An affidavit. Code Civ. Pro., § 1694. This is ordinarily made by the plaintiff, but it may be made by his agent or attorney, if the material facts are within his personal knowledge; or if the plaintiff is not within the county where the attorney resides or has his office, or is not capable of making the affidavit. Code Civ. Pro., § 1712. When it is made by his agent or attorney it must state the source of information and the grounds of belief, and the reason why it is not made by the plaintiff as in the case of an affidavit for attachment.

2. The requisition. This is a direction to the sheriff to replevy the goods, and is in these words:

"To the sheriff of ..... You are hereby required to replevy the chattels described in the within affidavit, from the defendant.

Dated, ... 19 .

....,

Plaintiff's Attorney.

This is deemed the mandate of the court and may be directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the chattel is found. Code Civ. Pro., § 1694.

3. An undertaking. There must be two sureties or a surety company. The obligation is for twice the value of the chattels as stated in the affidavit, and the sureties are bound, first, for the prosecution of the action; second, for the return of the chattels to the defendant, if such return is adjudged, or if the action abates or is discontinued; third, for the payment of any sum awarded to the defendant by the judgment. Code Civ. Pro., § 1699.

2. THE AFFIDAVIT.

The affidavit must contain allegations of the following facts, Code Civ. Pro., § 1695:

1. That the plaintiff is the owner of the chattel, or is entitled to the possession thereof by reason of a special property right, in which case the facts showing such property right must be set forth. Depew v. Leal, 2 Abb. Pr. 131.

2. The wrongful detention by the defendant; and where demand is necessary, that it has been made. McAdam v. Walbrau, 8 Civ. Pro. 451.

3. The alleged cause of detention, 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 the 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. Code Civ. Pro., § 1695.

Where the affidavit describes two or more chattels of the same kind, the number, bulk, weight, quantity or measurement of the chattels must be stated. Code Civ. Pro., § 1697.

3. RIGHTS OF THE DEFENDANT.

After the chattels have been replevied and a copy of the affidavit, requisition and undertaking served, the defendant may (1) except to the plaintiff's sureties at any time within three days; (2) demand a return of the property.

If he does neither, the sheriff must deliver the goods to the plaintiff unless a claim to the chattel, supported by affidavit, is made by a third person, in which case the sheriff is entitled to indemnity from the plaintiff against such claim. Code Civ. Pro., §§ 1703, 1704, 1706, 1709. The defendant cannot both except to the plaintiff's sureties and demand a return of the property; excepting to the sureties is a waiver of the right to reclaim. Hofheimer v. Campbell, 59 N. Y. 269.

The demand for a return of the goods must be based upon: (1) An affidavit. (2) An undertaking.

The affidavit may be on information and belief; Lange v. Lewi, 58 N. Y. Super. Ct. 265; and must allege that defendant is the owner of the chattel, or lawfully entitled to its possession by virtue of a special property, stating the facts in the latter case.

The undertaking must have two sureties, or a surety company. The obligation must be for twice the value of the chattel as stated in the *plaintiff's* affidavit (therefore the necessity of stating actual value by plaintiff), and the sureties are bound (1) to deliver the chattel to plaintiff, if delivery thereof is adjudged, or the action abates, because of defendant's death; (2) for the payment to the plaintiff of any sum which the judgment awards against the defendant. Code Civ. Pro., § 1704.

A defendant may even be arrested in an action 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. Code Civ. Pro., § 549, subd. 2.

e. Receivers.

71. *What are the general Code provisions relating to receivers?*

In addition to the cases where the appointment is specially provided for by law, a receiver of property which is the subject of an action in the Supreme Court, or a County Court, may be appointed by the court in either of the following cases:

1. Before final judgment, on the application of a party who establishes an apparent right or interest in property in the possession of the adverse party, and there is danger that it will be removed beyond the jurisdiction of the court or lost, materially injured, or destroyed.

2. By or after final judgment to carry the judgment into effect, or to dispose of the property according to its directions.

3. After final judgment to preserve the property during the pendency of appeal.

The word "property" includes rents, profits, or other income, and increase of property, real or personal. Code Civ. Pro., § 713.

Notice of an application for appointment of a receiver before judgment must be given to the adverse party, unless he has failed to appear and the time limited for his appearance has expired. But in cases where service of summons without the State, or by publication, has been allowed, the court may in its discretion appoint a temporary receiver. Code Civ. Pro., § 714.

The papers necessary to present to the court to procure the appointment of a receiver are (1) petition; (2) affidavit; (3) order.

A receiver appointed by or pursuant to an order or a judgment, in an action in the Supreme Court, or a County Court, or in a special proceeding for the voluntary dissolution of a corporation, may take and hold real property, upon such trusts and for such purposes as the court directs, subject to the direction of the court, from time to time, respecting the disposition thereof. Code Civ. Pro., § 716.

The common cases in which a receiver is appointed under the above section are:

1. In cases of executors and administrators, and trustees. Turner v. Crichton, 53 N. Y. 641.

2. In cases of mortgages and liens. Rider v. Bagley, 84 N. Y. 461.

3. In cases of partnerships. McElvey v. Lewis, 76 N. Y. 373.

4. In creditors' actions. Code Civ. Pro., § 1877.

5. In actions relating to real property. King v. King, 41 N. Y. Super. Ct. 516.

6. In actions to wind up corporations. Code Civ. Pro., § 1788. See Code Civ. Pro., § 1810.

f. Deposit, Delivery or Conveyance of Property.

72. *What are the general Code provisions relating to deposit, delivery or conveyance of property?*

Where it is admitted by the pleading or examination of a party that he has in his possession or under his control money or other personal property capable of delivery, which, being the subject of the action or special proceeding, is held by him as trustee for another party, or which belongs or is due to another party, the court may in its discretion grant an order, upon notice, that it be paid into or deposited in court or delivered to that party, with or without security, subject to the further discretion of the court.

If a party refuses to obey such a mandate as is described above, or one of the same nature, he may be punished for contempt; and the court may direct the sheriff to take and deposit or deliver the money or personal property, or convey the property in accordance with its direction. Code Civ. Pro., §§ 717, 718.

X. LIS PENDENS.

73. *What is the object of filing a notice of pendency of an action?*

The object is to give constructive notice to all the world, from the time of filing the notice that a suit is pending in a certain court, in which the title to the property described in the *lis pendens* is involved; and to warn all persons who purchase or acquire liens upon the property during the pendency of the action that they take title subject to the final decree of the court in reference thereto. Code Civ. Pro., § 1671.

74. *What must a lis pendens contain, and where should it be filed?*

The names of the parties to the action and the object thereof, together with a description of the property affected thereby. Such a notice should be filed in the clerk's office of every county where the property is situated, and it may be filed with the complaint before the summons is served, or at any time before final judgment. Code Civ. Pro., § 1670.

75. *In what actions is it advisable to file such a notice?*

In an action brought to recover a judgment affecting the title to or the possession, use, or enjoyment of real property, the plaintiff may, when he files his complaint, or at any time before final judgment, file a *lis pendens*, and in all such cases it is advisable so to do. Code Civ. Pro., §§ 1670–1674.

76. *In what actions must such a notice be filed?*

In actions for the foreclosure of mortgages. The notice must be filed at least twenty days before final judgment of sale. Code Civ. Pro., § 1631. Genl. Rules Prac. 60.

XI. INTERPLEADER.

77. *In what actions may a defendant interplead other parties under the Code?*

1. Actions to recover upon a contract.
2. Actions of ejectment.
3. Actions to recover a chattel. Code Civ. Pro., § 820.

78. *What must a defendant show to obtain an order to interplead another person in his place?*

He must apply before answer and show by affidavit:

1. That a person not a party to the action makes a demand against him.
2. That the demand is made in reference to the same debt or property.
3. That there is no collusion.

The court may then grant an order substituting the person so claiming in place of the defendant, and discharging the latter from liability on his paying into court the amount of the debt, or delivering the possession of the property or its value to such person as the court directs.

Where, also, the defendant disputes his liability or asserts some interest in the subject-matter of the controversy, he may ask for an order joining any other claimants as codefendants in the action.

The granting of such an order may be on certain terms, and is in the discretion of the court. Code Civ. Pro., § 820.

XII. EVIDENCE.

79. *To what extent and with what qualifications are parties and persons interested in the event of an action competent to testify in the New York courts?*

As a general rule, all parties and persons interested may testify in their own behalf; but upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or person interested in the event, or a person from, through, or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through, or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. A person shall not be deemed interested by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding or interested in the event thereof.

It may also be stated that a husband or a 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. Code Civ. Pro., §§ 828, 829, 831.

80. *Under what circumstances may a clergyman, physician, or attorney testify as to professional confidences?*

A clergyman shall not be allowed to disclose confessions made to him, as such, enjoined by the rules or practice of his religious body, unless such restriction be expressly waived at the examination by the person so confessing, or by stipulation of his attorney in advance of the examination, nor shall an attorney or his clerk, stenographer, or other employee, be allowed to disclose any pro-

fessional communication made to him by his client, nor his advice thereon unless the client makes a similar waiver. Code Civ. Pro., §§ 833, 835. No physician or registered nurse shall be allowed, in the absence of a similar waiver from the patient, to disclose any information which he acquired in a professional capacity, and which was necessary to enable him to act in that capacity save that (1) if the patient is a child under sixteen and the information indictates that he has been the victim of a crime, the testimony may be given where the crime is the subject of inquiry, and (2) testimony may be given as to the mental or physical condition of a deceased patient, except such facts as would tend to disgrace his memory, when the witness' disqualification has been waived by the personal representatives of the deceased, or the party in interest where the validity of the will of the deceased is in question. Code Civ. Pro., §§ 833–836.

XIII. TRIALS; INCLUDING JURORS AND JURIES.

81. *What are the civil actions in which a jury trial is a matter of right?*

In each of the following actions an issue of fact must be tried by a jury, unless a jury trial is waived or a reference is directed:

1. An action in which the complaint demands judgment for a sum of money only.

2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel. Code Civ. Pro., § 968.

82. *What issues are triable without a jury?*

An issue of law, in any action, and an issue of fact in an action not specified in the last question, or wherein provision for a trial by jury is not expressly made by law, must be tried by the court, unless a reference or a jury trial is directed. Code Civ. Pro., § 969.

83. *State the general rules governing the granting of new trials in civil actions, and the manner of making application for a new trial.*

1. The judge, presiding at a trial by a jury, may, in his discretion, entertain a motion, made upon his minutes, at the same term, to set aside the verdict or a direction dismissing the complaint and grant a new trial upon exceptions; or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence, or contrary to law. Code Civ. Pro., § 999.

2. Upon order of such judge, during the same term, exceptions taken at a trial by jury may be brought on for hearing in the first instance at the Appellate Division, and the judgment suspended meantime. Such hearing is brought on by a motion for a new trial at the Appellate Division. Code Civ. Pro., § 1000.

3. Where, after trial by referee or by court without a jury, an

interlocutory judgment is directed; and further proceedings before the court, a judge, or a referee are necessary before final judgment can be entered; a motion for a new trial upon exceptions may be made at the Appellate Division after entry of the interlocutory judgment and before the hearing directed therein. Code Civ. Pro., § 1001.

4. Except as above, motions for a new trial must be made at Special Term. If made upon an allegation of error in a finding of fact or ruling of law, such motion must be made before the expiration of time to appeal, and before the trial judge unless he specially directs otherwise, or unless he is dead or disqualified. Code Civ. Pro., § 1002.

It is not necessary to make a case, for the purpose of moving for a new trial, upon the minutes of the judge, who presided at a trial by jury; or upon an allegation of irregularity, or surprise; or where a party intends to appeal from a judgment entered upon a referee's report, or a decision of the court upon a trial, without a jury, and to rely only upon exceptions, taken as prescribed in section 994 of this act. Code Civ. Pro., § 998.

In general, motions for new trial will be granted where there has been material error or irregularity in the conduct of the trial, and frequently where the moving party has since the trial discovered new and important evidence.

84. *In what cases may there be a compulsory reference in issues of fact?*

Where the trial will require the examination of a long account on either side, and will not require the decision of difficult questions of law. Dane v. Ins. Co., 21 Hun (N. Y.), 259; Code Civ. Pro., § 1013. In an action triable by the court without a jury, a reference may be made to decide the whole issue, or any of the issues; or to report the referee's finding upon one or more specific questions of fact involved in the issue. Code Civ. Pro., § 1013.

85. *What are the qualifications of a trial juror with respect to age and property?*

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.

But a person who was assessed on the last assessment-roll of the town for land in his possession, held under a contract for the purchase thereof, upon which improvements, owned by him, have been made to the value of $150, is qualified to serve as a trial juror, although he does not possess either of the qualifications specified in subdivision third of the last paragraph, provided he is qualified in every other respect. Code Civ. Pro., §§ 1027, 1028.

There are also certain special provisions as to the qualification of jurors in the counties of New York, Kings and Queens. See Code Civ. Pro., §§ 1027, 1078, 1079–1125, 1126–1162.

XIV. ACTIONS BY STATE WRIT.

86. *What are the State writs?*

The Code enumerates them as follows:

The writ of (1) *habeas corpus* to bring up a person to testify or to answer; (2) the writ of *habeas corpus* and the writ of *certiorari* to inquire into the cause of detention; (3) the writ of *mandamus;* (4) the writ of prohibition; (5) the writ of assessment of damages, which is substituted for the writ heretofore known as the writ of *ad quod damnum;* (6) and the writ of *certiorari,* to review the determination of an inferior tribunal, which may be called the writ of review. Code Civ. Pro., § 1994.

a. Habeas Corpus to Testify.

87. *What are the general provisions of the Code relating to the writ of habeas corpus to testify?*

A court of record, other than a Justices' 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. Code Civ. Pro., § 2008.

b. Habeas Corpus and Certiorari to Inquire into Cause of Detention.

88. *What are the general Code provisions relating to the issuing of the writs of habeas corpus and certiorari, to inquire into the cause of detention?*

A person imprisoned or restrained in his liberty, within the State, for any cause, or upon any pretense, is entitled, except in one of the cases specified in the next section, to a writ of *habeas corpus,* or a writ of *certiorari,* as prescribed in this article, for the purpose of inquiring into the cause of the imprisonment or restraint, and, in a case prescribed by law, of delivering him therefrom. A writ

of *habeas corpus* may be issued and served under this section, on Sunday; but it cannot be made returnable on that day. Code Civ. Pro., § 2015.

A person is not entitled to either of the writs specified in the last section, in either of the following cases:

1. Where he has been committed, or is detained, by virtue of a mandate, issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court.

2. Where he has been committed, or is detained, by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding, instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process, issued upon such a judgment, decree, or final order. Code Civ. Pro., § 2016.

89. *What discretion is allowed in granting a writ of habeas corpus or certiorari?*

A court or a judge, authorized to grant either writ, must grant it without delay, whenever a petition therefor is presented, as prescribed in the foregoing sections of this article, unless it appears, from the petition itself, or the documents annexed thereto, that the petitioner is prohibited by law from prosecuting the writ. For a violation of this section, a judge, or, if the application was made to a court, each member of the court, who assents to the violation, forfeits to the prisoner $1,000, to be recovered by an action in his name, or in the name of the petitioner to his use. Code Civ. Pro., § 2020.

90. *What is the form of the writs of habeas corpus and certiorari?*

The writ of *habeas corpus*, issued as prescribed in this article, must be substantially in the following form, the blanks being properly filled up:

"The People of the State of New York,

To the Sheriff of," etc. [or "to A. B."]

"We command you, that you have the body of C. B., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said C. D. is called or charged, before ....," ["the Supreme Court, at a Special Term or term of the Appellate Division thereof, to be held," or "F. F., justice of the Supreme Court," or otherwise, as the case may be] "at .... on ...." [or "immediately after the receipt of this writ,"] to do and receive what shall then and there be considered, concerning the said C. D. And have you then there this writ.

"Witness, ..., one of the justices" [or "judges"] "of the said court," [or "county judge," or otherwise, as the case may be,] "the .....day of ....., in the year ....." Code Civ. Pro., § 2021.

The writ of *certiorari,* issued as prescribed in this article, must be substantially in the following form, the blanks being properly filled up:

"The People of the State of New York,

To the Sheriff of," etc. [or "to A. B."]

"We command you, that you certify fully and at large, to ....." ["the Supreme Court, at a Special Term or term of the Appellate Division thereof, to be held," or "E. F., justice of the Supreme Court," or otherwise, as the case may be,] "at ....., on ....." [or "immediately after the receipt of this writ,"] "the day and cause of the imprisonment of C. D., by you detained, as it is said, by whatsoever name the said C. D. is called or charged. And have you then there this writ.

"Witness, ..., one of the justices" [or "judges"] "of the said court," [or "county judge," or otherwise, as the case may be,] "the .....day of ....., in the year ....." Code Civ. Pro., §§ 2022.

91. *When may a writ of certiorari issue upon application for a writ of habeas corpus?*

Where an application is made for a writ of *habeas corpus,* as prescribed in this article, and it appears to the court or judge, upon the petition and the documents annexed thereto, that the cause or offense, for which the party is imprisoned or detained, is not bailable, a writ of *certiorari* may be granted, instead of a writ of *habeas corpus,* as if the application had been made for the former writ. Code Civ. Pro., § 2041.

c. Mandamus.

92. *What are the general provisions of the Code in regard to a writ of mandamus?*

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.

Except where special provision therefor is otherwise made in this article, a writ of *mandamus* can be granted only at Special Term of the court held within the judicial district, embracing the county, wherein an issue of fact, joined upon an alternative writ of *mandamus,* is triable. Code Civ. Pro., §§ 2067, 2068.

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. Code Civ. Pro., § 2070.

The alternative writ of *mandamus* is governed by chapter 6 of the Code, relating to a complaint, as to the statement of facts, joinder of several causes of action and demand for judgment. The person upon whom the writ is served may either make a return or demur to it, or demur to any separate offense alleged, the demurrer being in like form as to a complaint, and make a return to the remainder. Code Civ. Pro., § 2076.

The provisions of chapter 6 of the Code, relating to the form and contents of an answer, apply in general to a return, and each complete statement of facts assigning a cause why a writ ought not to be obeyed must be separately stated and numbered as a separate defense. Code Civ. Pro., § 2077.

Where a return to an alternative writ of *mandamus* has been filed, the attorney for the defendant making it must serve, upon the attorney for the people or the relator, a notice of the filing thereof. Where the people or the relator demur to the return, or to a part thereof, a copy of the demurrer must be served upon the attorney for the defendant, within twenty days after the service of such a notice. Where the defendant demurs to the writ, or to a part thereof, a copy of the demurrer must be served upon the attorney for the people or the relator, within the time prescribed by law for filing it. Code Civ. Pro., § 2081.

Except as otherwise expressly prescribed in this act, the proceedings after issue is joined, upon the facts or upon the law, are, in all respects, the same as in an action; the final order is deemed a final judgment and may be entered and enforced, with respect to such parts thereof as are not enforced by a peremptory *mandamus*, as a final judgment in an action. Code Civ. Pro., § 2082.

d. Prohibition.

93. *What are the general provisions of the Code in regard to a writ of prohibition?*

A writ of prohibition is either alternative or absolute. 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. Code Civ. Pro., § 2091. Where it is directed to a judge or judges of the Supreme Court it can be granted only by the Appellate Division in the Judicial Department where the action is pending, or, if no term of the Appellate Division in that department is in session, in the adjoining department. Code Civ. Pro., § 2093.

Except as otherwise specially prescribed by law, an absolute writ of prohibition cannot be issued, until an alternative writ has been issued and duly served, and the return day thereof has elapsed. The alternative writ must be directed to the court in which, or to

the judge before whom, and also to the party in whose favor, the proceedings to be restrained were taken, or are about to be taken. It must command the court or judge, and also the party, to desist and refrain from any further proceedings in the action or special proceeding, or with respect to the particular matter or thing described therein, as the case may be, until the further direction of the court issuing the writ; and also to show cause, at the time when, and the place where, the writ is made returnable, why they should not be absolutely restrained from any further proceedings in that action, special proceeding, or matter. The writ need not contain any statement of the facts or legal objections, upon which the relator founds his claim to relief. Code Civ. Pro., § 2094.

Where the alternative writ has been duly served upon the court or judge, and upon the party, the relator is entitled to an absolute writ, unless a return is made by the court or judge, and by the party, according to the exigency of the alternative writ, or within such further time as may be granted for the purpose. The return must be annexed to a copy of the writ; and it must be either delivered in open court, or filed in the office of the clerk of the county where the writ is returnable. Where the party makes a return, the court or judge must also make a return. Code Civ. Pro., § 2096.

Pleadings are not allowed upon a writ of prohibition. Where an alternative writ has been issued, the cause may be disposed of without further notice, at the term at which the writ is returnable. If it is not then disposed of, it may be brought to a hearing, upon notice, at a subsequent term. The relator may controvert, by affidavit, any allegation of new matter contained in the return. The court may direct the trial of any question of fact by a jury, in like manner and with like effect as where an order is made for the trial, by a jury, of issues of fact, joined in an action triable by the court. Where such a direction is given, the proceedings must be the same as upon the trial of issues so joined in an action. Code Civ. Pro., § 2099.

e. Assessment of Damages.

94. *What are the general provisions of the Code relating to the writ of assessment of damages?*

Whenever the governor of the State is authorized by law to take possession of any real property within the State, for the use of the people of the State, and he cannot agree with the owner or owners thereof for its purchase, he may cause application to be made to the Supreme Court, at a Special Term thereof, for a writ of assessment of damages, which must be granted accordingly. Code Civ. Pro., § 2104.

The writ must describe the real property to be taken, with the like certainty as is required in a complaint in an action of ejectment. It must command the sheriff, to whom it is directed, to inquire, by the oaths of twelve men of his county, qualified to act as trial jurors in a court of record, whether the owner or owners of

the real property, or any of them, will sustain any damages by the taking thereof, for the use of the people of the State; and, if so, the amount thereof; and that he return the writ to the Supreme Court, without delay, with the finding of the jury thereupon. Code Civ. Pro., § 2107.

f. Certiorari to Review.

95. *What are the general provisions of the Code relating to the writ of certiorari, to review the determination of an inferior tribunal?*

The writ of *certiorari* regulated in this article is issued to review the determination of a body or officer. It can be issued in one of the following cases only, except where issued by an appellate court to supply a diminution or other defect of the record.

1. Where the right to the writ is expressly conferred, or the issue thereof is expressly authorized, by a statute.

2. Where the writ may be issued at common law, by a court of general jurisdiction, and the right to the writ, or the power of the court to issue it, is not expressly taken away by a statute. Code Civ. Pro., §§ 2120, 2124.

A writ of *certiorari* cannot be issued, to review a determination made, after this article takes effect, in a civil action or special proceeding, by a court of record, or a judge of a court of record. Code Civ. Pro., § 2121.

Except as otherwise expressly prescribed by statute, a writ of *certiorari* cannot be issued, in either of the following cases:

1. To review a determination, which does not finally determine the rights of the parties, with respect to the matter to be reviewed.

2. Where the determination can be adequately reviewed, by an appeal to a court, or to some other body or officer.

3. Where the body or officer making the determination is expressly authorized, by statute, to rehear the matter, upon the relator's application, unless the determination to be reviewed was made upon a rehearing, or the time within which the relator can procure a rehearing has elapsed. Code Civ. Pro., § 2122.

A writ of *certiorari* can be issued only out of the Supreme Court, excepting a case where another court is expressly authorized by statute to issue it. Code Civ. Pro., § 2123.

The questions involving the merits, to be determined by the court upon the hearing, are the following, only:

1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.

2. Whether the authority conferred upon the body or officer, in relation to that subject-matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination.

3. Whether, in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.

4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court, as against the weight of evidence. Code Civ. Pro., § 2140.

XV. ARBITRATION.

96. *What is an arbitration?*

The investigation and determination of a matter or matters of difference between contending parties by one or more unofficial persons, chosen by the parties, and called arbitrators or referees. Code Civ. Pro., §§ 2365–2386.

97. *What, under the Code, may be submitted to arbitration?*

All civil controversies, which might be the subject of an action, except (1) where one of the parties to the controversy is an infant or a person incompetent to manage his own affairs; (2) or where the controversy arises respecting a claim to an estate in real property, in fee or for life; but the restriction in relation to real property does not prevent the submission of a claim to an estate for years, or other interest for a term of years, or for one year or less, in realty, or of a controversy respecting the partition of real property between joint tenants or tenants in common; or of a controversy respecting the boundaries of lands or the admeasurement of dower. The submission must be made by an instrument in writing duly acknowledged or proved. It may provide that a judgment of a court of record therein specified may be entered upon the award. Code Civ. Pro., §§ 2365–2366.

The award or decision of the arbitrators may be made a judgment of the specified court, upon application of the attorney for the successful party; but no award will be allowed to be valid or binding which was procured by fraud or undue influence, or where the arbitrators showed evident partiality, were guilty of misconduct in excluding material evidence or in any other respect, or where the arbitrators exceeded their powers or imperfectly executed them. Code Civ. Pro., §§ 2373, 2374.

XVI. SUPPLEMENTARY PROCEEDINGS.

98. *What are the necessary allegations in an affidavit to obtain an order to examine a judgment debtor in supplementary proceedings?*

1. That the plaintiff recovered a judgment for more than $25, exclusive of costs, against the defendant, and the date thereof.

2. That the judgment-roll was filed in the county clerk's office on a certain day.

3. That execution was issued from a court of record to the sheriff of the county where the defendant resides, or where at the time of the beginning of the proceedings he had a regular place for the transaction of business in person, or if the defendant is not at the time of the execution a resident of the State, to the sheriff of the county where the judgment or transcript is filed, and was returned wholly or partly unsatisfied within ten years.

4. That the judgment remains wholly or partly unpaid.

5. That no previous application for an order for the examination of the judgment debtor has been made. Code Civ. Pro., §§ 2435, 2458; Genl. Rules Prac. 25.

To obtain an order for examination of a judgment debtor, in supplementary proceedings, it is necessary that the action from which the judgment results should have been begun by *personal service* of the summons on, or appearance of, the judgment debtor, or by substituted service in accordance with section 436 of the Code. Code Civ. Pro., § 2458. At any time after the issuing of execution against property under section 2458 of the Code, and before the return thereof, the judgment creditor, upon proof by affidavit that the judgment debtor has property which he unjustly refuses to apply to the satisfaction of the judgment, may obtain an order, requiring the judgment debtor to attend for examination. Code Civ. Pro., § 2436.

XVII. LIMITATION OF ACTIONS.

99. *What are Statutes of Limitation?*

Statutes of Limitation are statutes passed defining the periods within which claims must be placed in suit. 2 Bouvier's Law Dict. 55. Such statutes act upon the remedy by depriving the person to whom the obligation is due of the right of suing after a certain time. 2 Bouvier's Law Dict. 242.

100. *Must the Statute of Limitations be pleaded to be available?*

Yes. The objection, that the action was not commenced within the time limited, can be taken only by answer. The corresponding objection to a defense or counterclaim can be taken only by reply, except where a reply is not required, in order to enable the plaintiff to raise an issue of fact, upon an allegation contained in the answer. Code Civ. Pro., § 413.

101. *What are the time limitations for bringing different actions under the Code?*

1. Actions for the recovery of real property.

(a) By the people.

"The people of the State will not sue a person for or with respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless either:

1. The cause of action accrued within forty years before the action is commenced; or,

2. The people, or those from whom they claim, have received the rents and profits of the real property or of some part thereof, within the same period of time" (Code Civ. Pro., § 362), except in the case of an action to recover real property after the judicial annulment of letters patent. The period is then twenty years. Code Civ. Pro., § 364.

(b) By individuals.

An action to recover real property, or the possession thereof, cannot be maintained by a party, other than the people, unless the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action. Code Civ. Pro., § 365.

2. Actions other than for the recovery of real property.

Within twenty years.

1. Judgments of a court of record are conclusively presumed to be satisfied after twenty years except as against a person who within twenty years from that time has made a payment, or written and signed an acknowledgment of indebtedness as to some part, of the amount recovered; or some person claiming through such a person. Such a judgment may be made a lien upon land of the judgment debtor for ten years, if it is docketed in the county where the land is situated. Code Civ. Pro., §§ 376, 1251.

2. An action to redeem from a mortgage may be maintained by the mortgagor or person claiming under him any time within twenty years after the breach of a condition or nonfulfillment of a covenant contained in the mortgage. Code Civ. Pro., § 379.

3. An action upon a sealed instrument must be brought within twenty years.

But where the action is brought for breach of a covenant of seizin, or against incumbrances, the cause of action is, for the purposes of this section only, deemed to have accrued upon an eviction, and not before. Code Civ. Pro., § 381.

The following actions must be commenced within the following periods after the cause of action has accrued.

Within six years.

1. An action upon a contract, obligation, or liability, express or implied, except a judgment or sealed instrument.

2. An action to recover upon a liability created by statute, except a penalty or forfeiture.

3. An action to recover damages for an injury to property or a personal injury, except in a case where a different period is provided by the Code.

4. An action to recover a chattel.

5. An action to procure a judgment other than for a sum of money, on the ground of fraud, in a case where the Court of Chancery formerly had jurisdiction. The cause of action in such a case is not deemed to have accrued until the discovery, by the plaintiff or the person under whom he claims, of the facts constituting the fraud.

6. An action to establish a will. Where the will has been lost, concealed, or destroyed, the cause of action is not deemed to have accrued until the discovery, by the plaintiff or the person under whom he claims, of the facts upon which its validity depends.

7. An action upon a judgment or decree rendered in a court not of record, except where a transcript shall be filed pursuant to section 3017, and also, except a decree heretofore rendered in a Surrogate's Court of the State. The cause of action is deemed to have accrued when final judgment was rendered. Code Civ. Pro., § 382.

Within three years.

1. An action against a sheriff, coroner, constable, or other officer for nonpayment of money collected upon execution.

2. An action against a constable, upon any other liability incurred by him, by doing an act in his official capacity or by the omission of an official duty (except an escape).

3. An action upon a statute for a penalty or forfeiture, where the action is given to the person aggrieved or to that person and the people of the State, except where the statute imposing it provides a different limitation.

4. An action against an executor, administrator, or receiver, or against the trustee of an insolvent debtor, appointed as prescribed by law in a special proceeding instituted in a court or before a judge, brought to recover a chattel or damages for taking, detaining, or injuring personal property by the defendant or the person whom he represents.

5. An action to recover damages for a personal injury resulting from negligence. Code Civ. Pro., § 383.

Within two years.

1. An action to recover damages for libel, slander, assault, battery, seduction, criminal conversation, false imprisonment, or malicious prosecution.

2. An action upon a statute for a forfeiture or penalty to the people of the State. Code Civ. Pro., § 384.

Within one year.

1. An action against a sheriff or coroner upon a liability incurred by him by doing an act in his official capacity or by the omission of an official duty, except the nonpayment of money collected upon an execution.

2. An action against any other officer for the escape of a prisoner, arrested or imprisoned by virtue of a civil mandate. Code Civ. Pro., § 385.

A cause of action is deemed to have accrued on a current account from the time of the last item proved in the account, on either side. Code Civ. Pro., § 386.

An action upon a statute for the recovery of a penalty or forfeiture given wholly or partly to any person who will sue upon the same, must be begun within one year after the commission of the offense; but if the action is not commenced within the year by a private person, the attorney-general or the district attorney of the county where the offense was committed, may prosecute the claim any time within two years thereafter in the name of the people. Such an action as the foregoing is called a *qui tam* action. Code Civ. Pro., § 387.

All actions not otherwise provided for must be commenced within ten years after the cause of action accrues. Code Civ. Pro., § 388.

102. *What disabilities are excluded from the time within which to commence actions other than for the recovery of real property?*

If a person, entitled to maintain an action, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, is, at the time when the cause of action accrues, either:

1. Within the age of twenty-one years; or,

2. Insane; or,

3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life;

The time of such a disability is not a part of the time limited for commencing the action; except that the time so limited cannot be extended more than five years by any such disability, except infancy; or, in any case, more than one year after the disability ceases. Code Civ. Pro., § 396.

If, when a cause of action accrues against a person, he is without the State, the action may be commenced within the time limited therefor, after his return into the State. If, after a cause of action has accrued against a person, he departs from the State, and remains continuously absent therefrom for the space of one year or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the State under a false name, the time of his absence or of such residence within the State under such false name is not a part of the time limited for the commencement of the action.

This provision does not apply, however, in a case where the

defendant has designated a person upon whom to serve the summons. Code Civ. Pro., § 401.

It is necessary that a person should become a *nonresident* to prevent the statute's continuing to run, and he must remain such for the entire year. First Nat. Bk. v. Bissell, 24 St. Rep. 909.

103. *What disabilities are excluded from the time within which to commence an action for the recovery of real property?*

If a person, who might maintain an action to recover real property, or the possession thereof, or make an entry, or interpose a defense or counterclaim, founded on the title to real property, or to rents or services out of the same, is, when his title first descends, or his cause of action or right of entry first accrues, either:

1. Within the age of twenty-one years; or,

2. Insane; or,

3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life;

The time of such a disability is not a part of the time, limited in this title, for commencing the action, or making the entry, or interposing the defense or counterclaim; except that the time so limited cannot be extended more than ten years, after the disability ceases, or after the death of the person so disabled. Code Civ. Pro., § 375.

But a person cannot avail himself of a disability, unless it existed when his right of action or of entry accrued. Code Civ. Pro., § 408.

The provision that the time cannot be extended more than ten years after the disability ceases, does not operate so as to limit the right of action to *less* than twenty years. If an infant was one day old when the right of action arose he would have ten years after he arrived at twenty-one, or thirty-one years in all. If he was twenty years old, and should be allowed but ten years after reaching twenty-one, he would have but eleven years in all, which would be contrary to the statute allowing twenty years, so he would have twenty years after reaching the age of twenty-one; or twenty-one years in all, within which to bring his action. Howell v. Leavitt, 95 N. Y. 617.

104. *What constitutes adverse possession of real estate?*

1. Where it was entered upon under claim of title based on a written instrument.

For the purpose of constituting an adverse possession, by a person claiming a title founded *upon a written instrument*, or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases:

a. Where it has been usually cultivated or improved.

b. Where it has been protected by a substantial inclosure.

c. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purposes of husbandry, or for the ordinary use of the occupant.

Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time, as the part improved and cultivated. Code Civ. Pro., §§ 369, 370.

2. Where held under claim of title not written.

Where there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely. Code Civ. Pro., § 371.

For the purpose of constituting an adverse possession, by a person claiming title, not founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others.

a. Where it has been protected by a substantial inclosure.

b. Where it has been usually cultivated or improved. Code Civ. Pro., § 272.

XVIII. EXECUTIONS.

105. *How many kinds of executions are there?*

There are four kinds of execution, as follows:

1. Against property.
2. Against the person.
3. For the delivery of the possession of real property with or without damages for withholding the same.
4. For the delivery of the possession of a chattel, with or without damages for the taking or detention thereof.

An execution is the process of the court, from which it is issued. Code Civ. Pro., § 1364.

106. *To what counties may executions issue?*

An execution against property can be issued only to a county, in the clerk's office of which the judgment is docketed. An execution against the person may be issued to any county. An execution for the delivery of the possession of real property, must be issued to the county where the property, or a part thereof, is situated. An execution for the delivery of the possession of a chattel, may be issued to any county where the chattel is found; or to the sheriff of the county where the judgment-roll is filed. Executions, upon the same judgment, may be issued at the same time, to two or more different counties. Code Civ. Pro., § 1365.

107. *What are the general requisites of an execution?*

An execution must intelligibly describe the judgment, stating the names of the parties in whose favor, and against whom, the time when, and the court in which, the judgment was rendered; and, if

it was rendered in the Supreme Court, the county in which the judgment-roll is filed. It must require the sheriff to return it to the proper clerk, within sixty days after the receipt thereof. It must be made returnable to the clerk, with whom the judgment-roll is filed, except where it is issued out of another court upon the filing of a transcript, in which case the execution must be returnable to the clerk with whom the transcript is filed. Code Civ. Pro., §§ 1366, 1367.

108. *What is required by an execution against property?*

It must substantially require the sheriff to satisfy the judgment, out of the personal property of the judgment debtor; and if sufficient personal property cannot be found, out of the real property, belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter. Code Civ. Pro., § 1369.

109. *What is required by an execution against the person?*

An execution against the person must substantially require the sheriff to arrest the judgment debtor, and commit him to the jail of the county, until he pays the judgment, or is discharged according to law. Except where it may be issued, without the previous issuing and return of an execution against property, it must recite the issuing and return of such an execution, specifying the county to which it was issued. Code Civ. Pro., § 1372.

110. *When may an execution issue of course?*

The party recovering a final judgment, or his assignee, or his personal representatives in case of his death may have execution thereupon, of course, at any time within five years after the entry of the judgment. Code Civ. Pro., §§ 1375, 1376.

After the lapse of five years from the entry of a final judgment, execution can be issued thereupon, in one of the following cases only:

1. Where an execution was issued thereupon, within five years after the entry of the judgment, and has been returned wholly or partly unsatisfied or unexecuted.

2. Where an order is made by the court, granting leave to issue the execution. Code Civ. Pro., § 1377.

Where a judgment debtor dies after judgment, execution may, speaking generally, be issued upon leave of court, after the expiration of one year from the appointment of his personal representatives against any property on which the judgment is a lien. Execution against real property subject to the judgment lien cannot be issued for three years after the appointment of such personal representatives. Code Civ. Pro., § 1380.

111. *Where and how is a sale of property on execution conducted?*

A sale of real or personal property, by virtue of an execution, or pursuant to the directions contained in a judgment or order, must be made at public auction, between the hour of nine o'clock in the morning and sunset. Code Civ. Pro., § 1384.

XIX. APPEALS.

a. Generally.

112. *When may a party appeal?*

A party aggrieved may appeal, in a case prescribed in the Code, except where the judgment or order, of which he complains, was rendered or made upon his default. Code Civ. Pro., § 1294.

113. *How is an appeal taken?*

An appeal must be taken, by serving, upon the attorney for the adverse party, and upon the clerk, with whom the judgment or order appealed from is entered, by filing in his office a written notice to the effect that the appellant appeals from the judgment or order, or from a specified part thereof. Code Civ. Pro., § 1300.

114. *In what cases may the amount of the security, upon appeal, be limited or dispensed with?*

Where an appeal is taken to the Court of Appeals, or the Appellate Division, the court in or from which an appeal is taken may order, in its discretion and upon notice to the respondent, that the security required to stay execution be dispensed with or limited in the following cases:

1. Where the appellant is an executor, administrator, trustee, or other person acting in another's right, security may be dispensed with or limited, in the discretion of the court.

2. The aggregate sum, in which one or more undertakings are required to be given, may be limited to not less than $50,000, where it would otherwise exceed that sum.

Where the appeal is from an inferior court to the Supreme Court or from a determination in a special proceeding, the court *to* which an appeal is taken may exercise the same power. Code Civ. Pro., § 1312.

115. *In what cases is security upon appeal unnecessary?*

Upon an appeal, taken by the people of the State, or by a State officer, or board of State officers, or a board of supervisors of a county, the service of the notice of appeal perfects the appeal, and stays the execution of the judgment or order appealed from, without an undertaking, or other security. Code Civ. Pro., § 1313.

So also in the case of an appeal by a domestic municipal corpora-

tion, except that a court may, where the appeal is to the Supreme Court, the Appellate Division, or the Court of Appeals, in its discretion require security to be given. Code Civ. Pro., § 1314.

b. To the Court of Appeals.

116. *In what cases may an appeal be taken to the court of Appeals?*

An appeal may be taken to the Court of Appeals, in a case where that court has jurisdiction, as prescribed in sections 190 and 191 of the Code. Code Civ. Pro., § 1324.

Those sections provide as follows:

§ 190. The Court of Appeals has exclusive jurisdiction to review upon appeal every actual determination made prior to the last day of December, eighteen hundred and ninety-five, at a General Term of the Supreme Court, or by either of the Superior City Courts, as then constituted, in all cases in which, under the provisions of law existing on said day, appeals might be taken to the Court of Appeals. From and after the last day of December, eighteen hundred and ninety-five, the jurisdiction of the Court of Appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the Appellate Division of the Supreme Court in either of the following cases, and no others:

1. Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them.

2. Appeals may also be taken from determinations of the Appellate Division of the Supreme Court, in any department where the Appellate Division allows the same, and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the Court of Appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the Court of Appeals shall certify to the Appellate Division its determination upon such questions.

§ 191. The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions:

1. No appeal shall be taken to said court, in any civil action or proceeding commenced in any court other than the Supreme Court, Court of Claims, County Court, or a Surrogate's Court, unless the Appellate Division of the Supreme Court allows the appeal by an order made at the term which rendered the determination, or at the next term after judgment is entered thereupon, and shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

2. No appeal shall be taken to said court from a judgment of affirmance hereafter rendered in an action to recover damages for a

personal injury, or to recover damages for injuries resulting in death, or in an action to set aside a judgment, sale, transfer, conveyance, assignment, or written instrument, as in fraud of the rights of creditors, or in an action to recover wages, salary, or compensation for services, including expenses incidental thereto, or damages for breach of any contract therefor, or in an action upon an individual bond or individual undertaking on appeal, when the decision of the Appellate Division of the Supreme Court is unanimous, unless such Appellate Division shall certify that, in its opinion, a question of law is involved which ought to be reviewed by the Court of Appeals, or unless in case of its refusal so to certify, an appeal is allowed by a judge of the Court of Appeals.

3. The jurisdiction of the court is limited to a review of questions of law.

4. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals.

117. *Within what time must appeals to the Court of Appeals be taken?*

An appeal to the Court of Appeals, from a final judgment, must be taken, within one year after final judgment is entered, upon the determination of the Appellate Division of the Supreme Court, and the judgment-roll filed. An appeal to the Court of Appeals, from an order, must be taken within sixty days after service, upon the attorney for the appellant, of a copy of the order appealed from, and a written notice of the entry thereof. Code Civ. Pro., § 1325.

118. *What security is necessary to perfect an appeal to the Court of Appeals?*

To render a notice of appeal, to the Court of Appeals, effectual, for any purpose, except in a case where it is specially prescribed by law that security is not necessary, to perfect the appeal, the appellant must give a written undertaking, to the effect, that he will pay all costs and damages, which may be awarded against him on the appeal, not exceeding five hundred dollars. The appeal is perfected, when such an undertaking is given and a copy thereof, with notice of the filing thereof, is served, as prescribed in this title. Code Civ. Pro., § 1325.

119. *What security is necessary to stay the execution of judgment, pending an appeal to the Court of Appeals?*

The security required for a stay depends upon the nature of the order or judgment appealed from: (1) If the appeal is from a money judgment, or order directing its payment, the undertaking must secure the sum which may be directed to be paid, if the order or judgment is affirmed, or the appeal dismissed. (2) If the appeal

is from an order or judgment for delivery of a document or personal property; or (3) of a chattel, the undertaking must be in a sum fixed by the court below that the appellant will obey the direction of the appellate court. But in (2) a stay is obtained if the document or personal property is brought into the court below, or placed in the custody of some person designated by the court. (4) If the execution of a conveyance or other instrument is directed, the instrument must be executed and deposited with the clerk of the court below, to abide the direction of the appellate court, before a stay is obtained. (5) If the appeal is taken from a judgment, or order, which directs the sale or delivery of real property, or entitles the respondent to the immediate possession of real property, it does not stay the execution of the judgment or order, until the appellant gives a written undertaking, to the effect that he will not, while in possession of the property, commit, or suffer to be committed, any waste thereon; and if the property is in his possession, or under his control, the undertaking must also provide that, if the judgment or order is affirmed, or the appeal dismissed, and there is a deficiency upon a sale, he will pay the value of the use and occupation of the property, or the part thereof as to which the judgment or order is affirmed, from the time of taking the appeal, until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a specified sum, fixed by the judge of the court below. Code Civ. Pro., §§ 1327–1331.

120. *How is an undertaking executed and served?*

Each undertaking must be executed by at least two sureties, and must specify the residence of each surety therein. A copy thereof, with a notice showing where it is filed, must be served on the attorney for the adverse party with the notice of appeal, or before the expiration of the time of appeal. Code Civ. Pro., § 1334. Where a surety company authorized by the laws of this State to do business is on the bond no other surety is necessary. Code Civ. Pro., § 811.

121. *Under what circumstances may a respondent except to the sureties upon an undertaking?*

He may always do so if he sees fit. It is not necessary that the undertaking should be approved; but attorney for the respondent may, within ten days after the service of a copy of the undertaking with notice of the filing thereof, serve upon the attorney for the appellant, a written notice that he excepts to the sufficiency of the sureties. Within ten days thereafter, the sureties, or other sureties in a new undertaking to the same effect, must justify before the court below, or a judge thereof, or a referee appointed by the same, or a county judge. At least five days' notice of the justification must be given. Code Civ. Pro., § 1335.

122. *What questions are brought up for review in an appeal to the Court of Appeals?*

An appeal to the Court of Appeals from a final judgment or from an order granting or refusing a new trial in an action, where the appellant stipulates that upon affirmance judgment absolute shall be rendered against him, brings up for review in that court only questions of law; but where the justices of the Appellate Division from which an appeal is taken are divided upon the question as to whether there is evidence supporting, or tending to support, a finding or verdict not directed by the court, a question for review is presented. In any action on an appeal to the Court of Appeals, the court may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to. Code Civ. Pro., § 1337.

Upon an appeal to the Court of Appeals from a judgment, reversing a judgment entered upon the report of a referee, or a determination in the trial court; or from an order granting a new trial, upon such a reversal; it must be presumed that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the contrary clearly appears in the record body of the judgment or order appealed from. Code Civ. Pro., § 1338.

c. To the Appellate Division of the Supreme Court.

123. *When may a party appeal to the Appellate Division?*

An appeal may be taken to the Appellate Division of the Supreme Court from a final judgment rendered in the Supreme Court or in any Superior City Court, prior to the first day of January, eighteen hundred and ninety-six, and from a final judgment rendered in the Supreme Court after said day, as follows:

1. Where the judgment was rendered upon a trial by a referee, or by the court without a jury, the appeal may be taken upon questions of law, or upon the facts, or upon both.

2. Where the judgment was rendered upon the verdict of a jury, the appeal may be taken upon questions of law.

An appeal may be taken to the Appellate Division of the Supreme Court, from an order, made prior to the first day of January, eighteen hundred and ninety-six, in an action upon notice, at a Special Term or Trial Term of a Superior City Court, or of the Supreme Court, or at a term of the Circuit Court, and from an order made at a Special Term or Trial Term of the Supreme Court, after said day, in either of the following cases:

1. Where the order grants, refuses, continues, or modifies a provisional remedy; or settles, or grants, or refuses an application to resettle a case on appeal or a bill of exceptions.

2. Where it grants or refuses a new trial; except that where specific questions of fact, arising upon the issues, in an action triable by the court, have been tried by a jury, pursuant to an order for

that purpose, as prescribed in section 971 of this act, an appeal cannot be taken from an order, granting or refusing a new trial, upon the merits.

3. Where it involves some part of the merits.

4. Where it affects a substantial right.

5. Where, in effect, it determines the action, and prevents a judgment, from which an appeal might be taken.

6. Where it determines a statutory provision of the State to be unconstitutional; and the determination appears from the reasons given for the decision thereupon, or is necessarily implied in the decision.

An order, made upon a summary application, after judgment, is deemed to have been made in the action, within the meaning of this section. Code Civ. Pro., §§ 1346, 1347.

124. *Within what time must an appeal to the Appellate Division be taken, and what is required to obtain a stay?*

An appeal, authorized by this title, must be taken within thirty days after service, upon the attorney for the appellant, of a copy of the judgment or order appealed from, and a written notice of the entry thereof. Security is not required to perfect the appeal, but except where it is otherwise specially prescribed by law, the appeal does not stay the execution of the judgment or order appealed from, unless the court, in or from which the appeal is taken, or a judge thereof, makes an order, directing such a stay. Execution of a judgment for the recovery of money only shall not be stayed without security for more than thirty days after the service upon the attorney for the appellant of a copy of the judgment and written notice of the entry thereof. Code Civ. Pro., § 1351.

The appellant may also obtain a stay by giving security, as required in an appeal to the Court of Appeals. Code Civ. Pro., § 1352.

Speaking generally, an appeal may also be taken to the Appellate Division from a County Court or any other court of record possessing original jurisdiction. Code Civ. Pro., § 1340.

d. To the Supreme Court.

125. *What appeals may be taken to the Supreme Court?*

Appeals from inferior and local courts in the county of New York and in Buffalo may be taken to the Supreme Court. Code Civ. Pro., § 1340.

Appeals from the inferior courts of Manhattan and the Bronx in the city of New York are heard by the Appellate *Term* of the Supreme Court, composed of justices of the Supreme Court appointed by the Appellate Division under the authority of section 1344.

XX. MISCELLANEOUS PROVISIONS.

126. *What are ancillary letters testamentary, or ancillary letters of administration with the will annexed?*

They are letters granted by a Surrogate's Court upon a will bequeathing personal property made by a person who resided without this State at the time of execution, or at the time of his death, which has been admitted to probate in the foreign country or within the State or territory of the United States where it was executed, or where the testator resided at the time of his death. Code Civ. Pro., § 2695.

127. *What are ancillary letters of administration?*

They are letters of administration granted by a Surrogate's Court upon the estate of an intestate who resided, prior to his death, without this State, and who left personal property within the jurisdiction of the Surrogate's Court granting the letters. Code Civ. Pro., § 2696.

128. *What must always be stated in an affidavit, upon an application to obtain an ex parte order?*

Under rule 25 of the New York Gen. Rules of Practice, whenever application is made *ex parte,* on affidavit to a judge or court for an order, the affidavit shall state whether any previous application has been made for such order, and if made, to what court or judge, and what order or decision was made therein, and what new facts, if any, are claimed to be shown. And for the omission to comply with this rule, any order made on such application may be revoked or set aside.

129. *How is a discovery of books and papers obtained?*

By order of the court or judge authorized to make an order in the action, on a verified petition. Code Civ. Pro., § 805. See Genl Rules Prac. 14, 15, and 16.

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