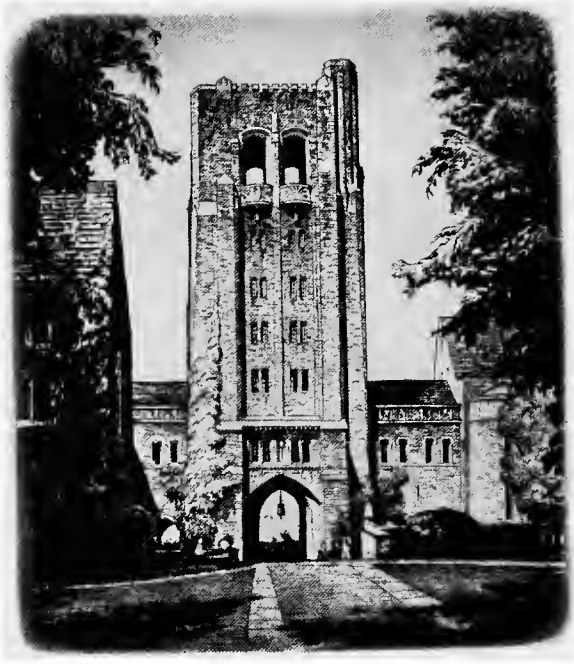

COMMENTARIES

ON

THE LAW OF PERSONS

AND

PERSONAL PROPERTY.

BEING AN INTRODUCTION TO THE
STUDY OF CONTRACTS.

BY

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EDITOR'S PREFACE.

THIS treatise, as stated by the author, was intended as an introduction to the law of contracts. In the beginning he doubtless had in mind the preparation of a more extended work, which would have embraced the whole subject of contract law. This plan, however, was not carried out. In its stead the work was confined in its scope to those topics included in the author's lectures at Columbia Law School immediately preceding the course on contracts.

These lectures form the basis of the division of subjects both as to the law of persons in the first book and the law of personal property in the second. In the law of persons the grand division of absolute and relative rights is observed throughout. The former class is divided into the rights of personal security and personal liberty, while under the latter and more numerous class of relative rights are considered those which spring from the relations of husband and wife, parent and child, guardian and ward, and master and servant. Separate chapters are devoted to citizens and aliens, infancy, the doctrine of status as affecting capacity, and finally to corporations, which closes the first book.

In considering the rights of personal security and personal liberty, the author has discussed at length, in connection with early English statutes, the rights and privileges of citizens of the United States under the Constitution and its amendments. Provisions in restraint of the general government on the one hand, and of the States on the other, are examined and explained in detail under separate subdivisions. There is also given an extended account of the writ of *habeas corpus* in the State and Federal Courts, and also separately in its relation to extradition.

The right of private property in things personal forms the subject of the latter half of the work. In the opening chapters considerable attention is paid to elementary distinctions peculiar to different forms of ownership, and to the qualifications under which all ownership exists. Chief among these qualifications are eminent domain, public necessity, and the police power. By far the more important part of the second book, however, treats of the methods of acquiring ownership, which may be by "original acquisition" or by "act of the law." Under the former mode are grouped capture, finding, occupancy, accession, confusion, copyrights, patents, and trademarks; under the latter, forfeiture, escheat, taxation, eminent domain, judgment, assignments in trust for creditors, bankruptcy and insolvency, and succession by will or in case of intestacy. To the very full treatment of wills and intestacy there is appended a section on the rights, duties, and liabilities of executors and administrators.

These subjects, various as they are, are discussed in detail, and the principles applicable to each expounded with that degree of particularity which the importance

of the subject demands. In support of the views of the text, the author has selected such authorities as seemed best to explain and fortify the position taken.

In preparing the manuscript for publication, I have not endeavored to do more than to add such late decisions and statutes as the lapse of time since its completion has made necessary. In accordance with the plan to which the notes and citations of the author conform, no attempt has been made to give a complete list of late decisions. Later authorities, except where they change or add to the rule as stated in the text, or except where it was thought they were valuable merely because recent, have been omitted. Some alterations have been made in the arrangement, and certain passages omitted altogether, because of changes in the law. With these exceptions the text remains as originally written.

The notes and citations made by the author appear below the text, and are separated by a line from those I have added.

E. F. D.

96 Broadway, New York,
October 1, 1894.

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THE LAW

OF

PERSONS AND PERSONAL PROPERTY,

BEING AN INTRODUCTION TO THE LAW OF CONTRACTS.

BOOK I.

THE LAW OF PERSONS.

CHAPTER I.

INTRODUCTORY.

A FULL treatment of the subject of Municipal Law would necessarily include a discussion and comparison of the law as it is found in the various States and Territories of the Union, as well as that expounded by the tribunals of the United States. But as the author has designed this work principally for the use of students, he has deemed it most useful for the special subject in hand to state the law upon such subject first as it is administered in England, using the term "common law" with this signification for convenience; and then to give such additions and illustrations from American decisions as have seemed most serviceable. The principles of the United States Constitution and the decisions upon constitutional questions where private rights have been affected, have also been discussed. The United States law, so far as it may conflict with a State law, is supreme, and of binding force throughout the country.[1]

The great object of law is the creation and enforcement of *legal rights*. Some writers prefer to regard the subject from a different point of view, and to regard law as a mode of establishing and enforcing *legal duties*. Whichever view is adopted the result is quite the same, for a right implies a duty and a duty implies a right. It is most convenient to consider the subject from the point of view of rights.

[1] Constitution of United States, Art. VI. § 2.

The phrase "*a* right" as here used is not equivalent in meaning to the word "right" used adjectively. The former has merely a legal signification; while the word "right" with its correlative, "wrong," has an ethical or moral meaning. The one is an expression in jurisprudence; the other, in morals. It is conceivable that a person may have a right in law, which in morals would be condemned.

The expression, "a right," in the legal sense, includes the legal power of the person in whom the assumed right resides to control the actions of others. This power of control is derived from the authority of the state, and is called "a law."

A single illustration will suffice. A. is said to own a watch. This statement implies that he can exclude, by the aid of the state, all other persons from the use or enjoyment of it. Another form of statement is, that all other persons are under a *duty* to abstain from interfering with his *right* to the watch, and his use of it.

A right is secured by a direction or command, or some authoritative expression of the will of the state, which, at the same time, supplies some mode of enforcement of the right. This last element is technically called the "sanction" of the law. In some branches of the law, *e. g.*, public or criminal, the sanction may be punishment; in others, *e. g.*, the civil, it may be prevention or remedy; again, any act opposing the right may be declared invalid. A striking instance of invalidity as a sanction is found in the constitutional law of this country, which frequently makes void the acts of individuals, or even of States, which are in opposition to a constitutional provision.

The general name of the whole group of provisions established for the enforcement of rights is "remedies" or "procedure." Rights themselves constitute the "substantive law." The whole subject may thus be arranged under two principal heads, — Substantive Law and Procedure. This last branch is called by some writers Adjective Law.

The term, a right, as used in substantive law implies, (1) a "person" in whom the right inheres; (2) a person or persons bound to submit to, or not to interfere with, the exercise of the right; and (3) a subject over which the right is claimed.

(1) The "person" who may claim the right may be either natural or artificial. The term "artificial person" is used to denote a group of individuals who when taken together constitute a single "person" in law, such as a corporation; or it may refer to a natural person who has a representative or artificial character impressed upon him. Examples of the first class are

ordinary corporations, or even States and nations.[1] Thus the United States may be regarded as an artificial person, and in this character have a right to sue in a foreign court.[2] Examples of the second class are kings, bishops, deans, etc. So a foreign prince may bring an action in the courts of another country, not merely in his individual but in his political capacity.[3]

(2) The "person" *bound to submit* to the exercise of the right may also be either natural or artificial. It should, however, be remembered that in the actual condition of law, rights may exist against some artificial persons with no adequate means of enforcement. Thus a State of this country cannot in general be sued in its own courts, and only under very special circumstances in the courts of the United States.[4]

It is a further rule that a foreign state cannot be sued in the courts of this country. This proposition has been held in the English courts.[5] The decisions of this class would no doubt be applicable here. Even if a foreign king or sovereign should come into this country, he could not be sued here for acts done by him in his sovereign character at home.[6] This exemption from suits only applies to a *sovereign* prince, and accordingly was not extended to the Khedive of Egypt, who was not deemed to be a sovereign.[7]

(3) The subject-matter over which a right may be claimed embraces the whole domain of law.

Briefly, the subject-matter of private law includes the right of the individual to the security and freedom of the person, as well as the power to labor in such manner as he may see fit, and also his property in physical objects and immaterial

[1] The Republic of Honduras *v.* Soto, 112 N.Y. 310.

[2] The United States of America *v.* Prioleau, 11 Jur. N. S. 792; United States of America *v.* Wagner, L. R. 2 Ch. App. 582.

[3] The King of Spain *v.* Hullett, 1 Cl. & F. 333.

[4] It is somewhat singular that the various American States have not apparently adopted the common-law doctrines of "the petition of right" whereby the individual can subject the sovereign to the performance of obligations growing out of contracts. This doctrine provides a mode of limiting the sovereign power in respect to the invasion of the right of private property, and is thoroughly well established in England. Thus a petition of right will lie for damages resulting from a breach of contract by the Crown, and it is immaterial whether the breach is occasioned by the acts or by the omissions of the Crown officials. Windsor & Annapolis Ry. Co. *v.* The Queen, L. R. 11 App. Cas. 607; Thomas *v.* The Queen, L. R. 10 Q. B. 31; Feather *v.* The Queen, 6 B. & S. 257. The theory of a petition of right seems to be that the sovereign power consents to abide by the decisions of its courts rendered against itself, and that this consent may be presumed as a constant thing, so that it is not necessary to show in each case an affirmative act of consent.

[5] De Haber *v.* The Queen of Portugal, — Wadsworth *v.* The Queen of Spain, 16 Jur. 164; S. C. 17 Q. B. 171.

[6] The Duke of Brunswick *v.* The King of Hanover, 2 H. L. Cas. 1.

[7] The Charkieh, 28 L. T. N. S. 513.

products. It also embraces freedom of thought and expression, but all these are to be used in subordination to the general welfare of society in accordance with just and equitable rules.

Rights, however, do not present themselves in law as mere abstract propositions. In that aspect, law would be but a system of philosophy. Rights appear in connection with acts done either by the claimant, or by others who may perhaps dispute the right. It will accordingly become necessary to consider the nature of the act done. Questions of intent will arise, or, perhaps, of negligence, accident, or capacity to do a legal act. It is the function of courts to solve these problems, and to determine what the right is, as well as the question whether it has been so attacked or violated in the particular instance as to justify the interposition of the state. The court will not, however, solve a mere abstract proposition. The matter must, in general, be presented to it through the medium of an action in which the one who alleges the existence of a right and its violation by another, must establish his allegation, while the person against whom the claim is made is so cited as to have an opportunity to deny or refute the allegations made against him.

The word person, as used in law, has a technical meaning. It is one in whom a right may inhere, and who has a standing (*locus standi*) in a court of justice to assert it. It is not synonymous with the word "individual." An individual actually alive, but "civilly" dead, is not a person in law. In like manner a slave is not a "person," since he can neither have rights in the technical sense, nor assert his "natural rights" as an individual in court.

It is now obvious, that a classification of law may be made to turn upon the various persons to whom legal rules may be applied. If the state or nation is the person in whom the right inheres, or against whom it may be claimed, the matter belongs to the domain of Public Law. If two or more nations are concerned, it is a case of International Public Law. In other words, where public persons are concerned, the case belongs to public law; if private persons are involved, the case is one of private law. These distinctions may be much interlaced, as, for instance, if a private individual should become indebted to the state. His liability would in general be the same, in such a case, as if he had incurred a similar obligation to a private person.

Public Law embraces that whole branch of law in which the state, if the matter came before a court of justice, would appear

as a party directly interested. It also includes controversies between individuals, in which doctrines of a public nature are involved so as to be necessarily considered for their solution. Under Public Law may be grouped International Law, Constitutional Law, Criminal Law, and Administrative Law. These do not fall within the range of this work except so far as they may incidentally affect private law.

Private Law includes all matters in which an individual is interested as distinguished from the state. Its rules may be applied to the state itself when seeking to vindicate a right analogous to that which a private individual might claim. Thus if the United States were to sue in a foreign court to recover property which they claimed was wrongfully detained by an individual, they would be obliged to submit to the rules ordinarily applied to individuals seeking redress in similar cases. So if a public person, *e. g.*, the Khedive of Egypt, were to use a ship for the purpose of trade, it would in the case of collision at sea be subjected to the same rules which would be applied to merchant-men owned by individuals.[1] The subject of International Private Law, Conflict of Laws, or Private International Law, — several phrases for the same thing, — belongs not to public, but to private law. The scope of the subject is to ascertain the rights or remedies of private persons either when a contract is made or to be performed in one country, and it comes up for consideration in the courts of another, or an act other than a contract occurs in one state, and is the subject of legal consideration in another.[2]

The object of this work is to serve as an introduction to the law of contracts; and upon this subject the general Municipal Law of the States of the Union will chiefly be considered.

Municipal Law has been defined to be a rule of civil conduct prescribed by the supreme power in the state. The municipal law of a State may be considered as arranging itself under four great divisions.

(1) The law of nations as applied to cases arising within the State; (2) The Constitution of the United States and the laws and treaties made under it; (3) The constitution of the State and the construction put upon it by the courts; (4) The other law of the State not embraced in the preceding divisions, including the common and statute law.

[1] The Charkieh, 28 L. T. N. S. 513.

[2] The phrase "International Private Law," now much in use, is not well chosen, since the word "International" is to be taken in an unusual sense. The expression "Application of Foreign Law" seems to be more accurate, though not all that could be desired.

The first two of these divisions will not be considered in this work, except so far as they may incidentally affect State law.

Analyzing the definition of municipal law above given, it will be seen that it is, *First*, a *rule*, or in other words a direction or command. It must be distinguished from *counsel* or *advice*, which has in it no element of compulsion. Law does not originate in a contract, but in an order from the sovereign power.

Second, It is a rule of *civil* conduct. The word "civil" is employed in the definition to distinguish it from a rule of morals or of religion. The object of law is to control the relations of the individual towards society, or of one society or state towards another.

Third, It is *prescribed*. This word principally applies to statute law, to be hereafter explained. The common law is assumed to rest upon customs prevailing among the people. These are from time to time ascertained and announced by the courts. When this announcement is made, the rule is legally regarded as having existed from time immemorial, whether it has so in fact or not. This theory frequently imposes a geat hardship upon persons who have made contracts or performed acts upon a different view of the rule governing the case.[1] A statute is said to be prescribed when it is sufficiently communicated in any manner to those for whom it is intended. This may be either by oral proclamation, writing,

[1] On this account, courts frequently refuse to change by decision an existing and long established rule of law, even though it may be incorrect in principle, being apprehensive that a reversal may be subversive of rights of property. It is wiser in such a case to allow the rule to atand, and leave it to the legislature to introduce a new rule acting only prospectively. There is certainly some variety of expression by judges on this point. Thus in a recent case the court said: "Where documents are in daily use in mercantile affairs without any substantial difference in form from time to time, it is most material that the construction which was given to them years ago, and which has from time to time been accepted in the courts of law and in the mercantile world, should not be in the least altered, because all subsequent contracts have been made on the faith of the decisions. Therefore whether one thinks that one would one's self have come to the same conclusion as the judges did in the beginning is immaterial." Pandorf *v.* Hamilton, 17 Q. B. D. 670, 674, per Lord ESHER, M. R. In another case this statement is made: "If the matter were even doubtful I should hesitate very long . . . before I laid down a different rule of construction in relation to sections of the Wills Act which have had for many years a particular construction given to them, because it is impossible to say how many persons may have acted upon the faith that that construction was correct, and rested the disposal of their property upon that belief. Of course, *if it were clear* that the construction put by the courts upon the section were *wrong*, it would be our duty, disregarding the result, to express a contrary opinion." Airey *v.* Bower, L. R. 12 App. Cas. 263, 269. This last case was one of the construction of a *statute*, but still a construction based upon common-law principles.

or printing. In modern times it is usual to print statutes either in official journals or specially authorized volumes. It is a fair deduction from this part of the definition that a statute should not, in general, go into effect until a sufficient time has elapsed after its enactment for its provisions to become known. This salutary doctrine was not recognized by the common law of England. There was a legal fiction that an entire session of Parliament, however long it might be, was to be regarded as a single day. The result was that an act which was not criminal when committed, might become so by a statute subsequently enacted during the session of Parliament which embraced the time when the act was done. This harsh rule is now, in general, done away with by statute. This is true even in England.[1] It is, however, in some States still the rule that a statute takes effect from the *earliest moment* of the day on which it is enacted.[2] In New York there is a statutory rule that a law is not to go into effect until twenty days after its passage unless some other time is fixed in the law itself.[3] (*a*) Assuming that this requisite publication has been made, ignorance of the law is no excuse for its violation. Where such ignorance in fact exists, the only relief possible is either a reduction of punishment where the court has a discretion in that respect, or an application to the pardoning power. Under this general rule, a man may be criminally liable, though he may believe in good faith that he had a legal right to do the act for which he is arraigned.[4]

Fourth, The law must emanate from the supreme power in the state. This supreme power is vested in the people, who may parcel out to the legislature legislative power as they see fit. A portion of the law-making power is delegated to the courts through the medium of decisions. It may also be conceded to local bodies, such as cities, villages, or towns. In each of

[1] Bunn *v.* Carvalho, 4 Nev. & M. 893.

[2] Arrowsmith *v.* Hornmaning, Sup. Ct. Ohio, 23 Am. Law Reg. N. S. 249, 254; Matthews *v.* Zane, 7 Wheaton, 164.

[3] This wise rule was as to its substance borrowed from the French code. The substance of the provisions in that instrument is, that laws are to be published in the official bulletin, and shall go into effect in each Department, except in that where the government is fixed, one day after official publication, increased by as many days as there are ten "myriametres" between the city where the promulgation of the law is made and the chief town of the Department. A table is annexed, showing the distances to the chief towns, and the corresponding days that precede the time when the law will take effect in each Department. In special cases, the law may be made to take effect immediately. French Civil Code, Preliminary Title, Art. 1, and Ordinance of 27 Nov., 1816. The New York rule is much simpler and more easy of application.

[4] Unwin *v.* Clarke, L. R. 1 Q. B. 417.

(*a*) See in New York, The Legislative Law, ch. 682, Laws 1892, § 43.

these instances, the true law-making power resides in "the people," who act indirectly rather than directly. There thus arises in the United States a great branch of law termed "constitutional law." Much of this consists in checks or limitations upon the power of a State legislature or of Congress to enact laws. This kind of restriction does not prevail in England.

There is an important distinction between the legislative power of Congress and that of a State legislature. The power of Congress to legislate is derived solely from a written instrument, viz., the Constitution of the United States. Its authority must be found either in the express words of the Constitution, or be reasonably implied from it. On the other hand, a State legislature has the broad power of the English Parliament; except so far as it may be restrained by the United States Constitution or the constitution of the particular State. In this last instance one does not search the respective constitutions for a *grant of power*, but only to ascertain what *restrictions* upon legislation may exist.

In a complete system of law, remedies are commensurate with rights. It is a settled maxim that "wherever there is a right there is a remedy," — *ubi jus, ibi remedium.* Remedies are of various sorts. In courts of equity they are mandatory, preventive, specific, or in other form adapted to the exigencies of the case. In courts of common law they either restore the possession of a specific thing to one entitled to it, or give *damages* to the injured party. These damages are either compensatory or vindictive. For the most part, they are *compensatory*, the prevailing principle being to give the claimant just so much money (and no more) as is equivalent to the value of his violated right. In a few instances damages are *vindictive.* In this case, the court assumes to punish the violator of a right by awarding more than compensatory damages to the injured party. Though this principle is not logical, it works well in practice in special cases where the criminal law is defective; as, for example, in cases of fraud, wanton violation of personal rights, etc.

A special fact must be noted as applicable to certain acts of a wrongful nature which may injure a particular individual, and at the same time be harmful to the public. So far as it injures an individual it is termed a *tort;*[1] so far as it harms the public, it is a *crime.* In one aspect, it is a violation of private law;

[1] French *tort*, — from the Latin *torqueo, tortum*, — a thing twisted out of order or line.

in the other, of public law. In the one case, redress is sought in the name of the party injured; in the other, in the name of the state or of the people. Any money recovered in the private action belongs to the party injured; any fine exacted for the criminal act regularly belongs to the public treasury.

By the common law, it was the rule that a civil action was suspended until a criminal proceeding for the same wrong was ended by a conviction of the offender. This rule was based upon public policy as tending to make the execution of the criminal law more efficient. There is a strong tendency in modern legislation to do away with this distinction, and to allow the two proceedings to be carried forward at the same time.[1]

[1] N. Y. Code of Civ. Pro., § 1899. The language of the section is that where the violation of a right admits of a civil and also of a criminal prosecution, the one is not merged in the other. See also Gordon *v.* Hostetter, 37 N. Y. 99. This section is quite inaccurately expressed, since it is not the case of the violation of one right, admitting of two prosecutions, but of two distinct rights, the one private and the other public.

CHAPTER II.

THE SOURCES OF THE LAW.

THE sources of American law must for the most part be sought in English law. The early colonists, having come from a country with a settled system of law, naturally made use of rules and principles with which they were familiar, at the same time rejecting any that were inconsistent with the changes in their institutions produced by the American Revolution or other causes. On their separation from the mother country, they found it necessary to make definite provision as to the relation of the law in each State to the English law. The provisions adopted in New York will serve as an illustration.

In the 35th Article of the Constitution of 1777 of that State it is ordained that "such parts of the common law of England and of the statute law of England and Great Britain, and of the Acts of the Legislature of the Colony of New York, as together did form the law of the said colony on the 19th day of April in the year of our Lord one thousand seven hundred and seventy-five" (date of the battle of Lexington) "shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same."[1] (*a*)

There are but few instances in which the courts of New York have decided that an English statute was so fully adopted as law during the colonial period, as to make it a part of the general law of the colony, within the purview of the constitutional provision just cited. A striking instance is that of statutory restriction on the power of religious corporations to sell their real estate. These restrictions, found in the statute of 13 Eliz. c. 10, and later acts, were tacitly adopted in the colony, and still prevail.[2] But in general, English statutes were repealed,

[1] The rules adopted in other States are collected in Bishop's First Book of the Law, § 58, note 4.

[2] M. A. Baptist Church *v.* Baptist Church in O. St., 46 N. Y. 131–141, 142, and cases cited.

(*a*) See Constitution of the State of New York, Art. I. § 17.

though a number of them were re-enacted, with some changes, either in form or substance.[1]

English law of the date fixed by each State is accordingly to be studied as American law.[2] An exception must be made as to the State of Louisiana. The civil but not the criminal law of that State is embraced in a code based upon the *Code Napoléon* of France.

The law of England and of the United States, in reference to its origin, is divided into two great divisions, — common law and statute law. The latter is enacted by Parliament in England, and in this country by Congress, or by State legislatures. The former is said to depend upon *custom* existing from time immemorial. It is announced from time to time by courts, as cases present themselves for adjudication. The courts also have much to do with statutes and constitutions, applying common-law rules of interpretation and construction in ascertaining their meaning and giving them due application. The prime distinction between statute and common law is, that the former has its *origin* in legislative enactment, while the latter is assumed to originate in custom, and to obtain authenticity from the decisions of courts. The law of any State of the Union may be said to consist of four parts: (1) Such rules of the law of nations as may be applicable to it separately from the general government; (2) the law and Constitution and treaties of the United States;[3] (3) the constitution of the State; (4) the ordinary municipal law of the State.

DIVISION I. — Common Law.

This expression has in law two meanings: one is that already given as contrasted with statute law; the other is a narrower sense in which certain legal rules are contrasted with other legal rules having no statutory origin, *e. g.*, *common law* as contrasted with *equity*. The wider signification is mainly adopted in this chapter.

I. *Equity.* — In the early history of English law, equity had little or no place. The legal business of the people consisted

[1] The New York statute repealing the English statutes is ch. 46 of the Laws of 1788, § 36. Its language is, "From and after May next, none of the statutes of England or of Great Britain shall operate or be considered as laws of this State."

[2] Blackstone's Commentaries were published between the years 1765 and 1770. They therefore supply a summary of the law as it was adopted by the American colonies at the time of the Revolution.

[3] Hawenstein *v.* Lynham, 100 U. S. 483, 490.

mainly in litigation involving title to the various estates in land, the redress of injuries to the person, etc.

Only simple remedies were needed for these purposes. As society advanced, and business became more complex, the scope of law required enlargement, and new remedies were necessary. The introduction of *trusts*, whereby the ownership in property was divided so that one person had the formal ownership and another the beneficial enjoyment, led to new legal principles. There were no methods known to the ordinary courts for the enforcement of such rights. A new set of tribunals came gradually into existence known as courts of "equity." A leading one of these was held by the Lord High Chancellor, who presided in the Court of Chancery, — a high court of equity jurisdiction.

These courts are largely governed by special rules worked out by precedents or decisions. Nothing is arbitrary, or merely the result of reasoning on ethical rules. The whole subject has become a matter of legal science, and must be studied in the reports of cases and in treatises on equity jurisprudence.

II. *The Roman or Civil Law as used in the Admiralty, Ecclesiastical, and Military Courts.* — The Roman law, although presented in modern times in a codified form, is not to be regarded as statutory law. The term "statute" can only be applied to law enacted by the legislature of the State where the law prevails. If any State tacitly or by judicial decision adopts the statute of another State, it is taken into the law of the adopting State as part of its common law. The Roman law has influenced English jurisprudence in a variety of ways: first, by furnishing a storehouse of principles from which the ordinary courts (law and equity) could draw, where their own rules were insufficient or imperfect; and again by supplying a whole body of law for *special* courts, viz., admiralty, ecclesiastical, and military; and finally, by the suggestion of appropriate and remedial legislation. An instance of the latter is the statute for distributing the personal property of intestates, passed in the reign of Charles II., and of general prevalence throughout this country.[1]

A sketch of the Roman law, though very brief, will accordingly be useful. This system, like all other permanent systems of jurisprudence, had an historical development. Commencing practically with the rude rules laid down in the Twelve Tables, it had expanded by legal adjudication and the written opinions

[1] 22 & 23 Car. II. c. 10; explained by 29 Id. c. 30.

and treatises of learned jurists, into a great and complicated mass of rules. It therefore became highly desirable to have its leading rules arranged in systematic form. In the meantime the empire had become divided into its Eastern and Western divisions. The most successful digest of the law, and that which has left its chief impress upon modern jurisprudence, was made in the Eastern empire under the direction of the Emperor Justinian, about the year A. D. 530. The Pandects went into effect in the year A. D. 533 (Dec. 30th).

The Roman law, as then arranged, consisted of two principal parts, — the Pandects, otherwise called the Digests, and the Institutes.

The Pandects or Digests. — The great result to be achieved in forming the Digests was to make *extracts* from the writings of the jurists of highest repute, and to classify these extracts with the name of each author attached, in fifty "books" or divisions. This work was designed for legal practitioners. Its arrangement followed existing methods then in use, viz., the prætor's edict.

Extracts were made from the works of thirty-nine jurists. It happened that these writers, in some instances, contradicted each other. It was the province of the emperor when these contradictions were called to his attention to settle the question by special decision. Some of these decisions remain. The Pandects are the principal source from which the civil or Roman law is derived, as its principles now prevail on the continent of Europe. They are readily accessible, not only in the original Latin, but in French and German translations.[1]

The Institutes. — These were also prepared under the direction of Justinian for the use of students. There was already in use by Roman students for the same purpose a work of great value, "Institutes of Gaius." Gaius was a jurist of remarkable merit. His work, having been published several hundred years before that of Justinian, had become in part obsolete. Justinian did little more than prepare a new edition of Gaius, with the obsolete portions omitted. It may be said, in conclusion, that "Justinian's work bears much the same relation to the Institutes of Gaius, as do the commentaries of Sergeant Stephen to those of Sir William Blackstone."[2]

The work of Gaius was long supposed to be wholly lost. It was, however, discovered in 1816 by the great German historian, Niebuhr, at Verona, Italy, in a palimpsest, the epistles of

[1] Select titles from the Pandects were published at the Clarendon Press, Oxford University, Eng., by Professor Holland and C. L. Shadwell, Esq., in 1881.

[2] Professor Holland.

St. Jerome being written over it. It has since been fully deciphered, and has shed great light on some perplexing features of Roman jurisprudence.[1]

The "Institutes of Justinian" is the more important of the two works to the ordinary student, as forming a portion of the *corpus juris civilis*, — "body of the Roman law." There has been in England a great revival of interest in this class of studies, and the Institutes have been reprinted a number of times within a few years past in such a form as to be useful and accessible to students.[2]

The New Code and Novels. — There had been a code containing imperial ordinances published A. D. 529. After the publication of the Institutes and Pandects, Justinian thought it desirable to have this code revised, and his decisions settling controverted points in the Pandects included. This was accomplished in the year 534. This branch of the law resembles what is now called statute law, and stands in contrast with the Pandects, which bear strongly upon their face the marks of legal discussion and the successful tracing of rules to principles.

The Novels consist of such ordinances as the emperor made in the intervening years between 535 and the close of his reign (A. D. 565). They are frequently subversive of former rules of law. They were issued from time to time as exigencies might require, and were never officially collected by him. Numbers of them were brought together and published after his death. They are not of much value to the modern student except as matter of history.[3]

The Relation of the Roman Law to the Admiralty, Ecclesiastical, and Military Jurisprudence of England. — The Roman law had but slight influence on the common law of England as administered in the superior courts. It was, however, different with the special tribunals having in charge maritime and military questions, the probate of wills of personal property, the

[1] Professor Gneist of Berlin has published the "Institutes of Gaius" in tabular form, so that their corresponding passages and differences may readily be noted. A similar publication with English translations was made in 1882, by T. Lambert Mears, Esq. (Stevens & Sons, London). See also Holland's "Institutes of Justinian, Edited as a Recension of the Institutes of Gaius." Oxford, 1881.

[2] The recent work of J. B. Moyle, Esq., of Lincoln's Inn, is strongly recommended to students. It contains the Institutes in the original, with a careful English translation and many valuable notes. (Clarendon Press, Oxford, Eng., 1883.) Reference may also be made to Sanders's Justinian.

[3] The student may find a good sketch of Roman law by Mackeldey (Dropsie's Ed. 1883). Ortolan's History is also very useful. The German writers must be resorted to for a complete mastery of the subject. Puchta's Institutionen is a work of high merit. Professor Bryce, of Oxford, has prepared an excellent article on Justinian in the Encyclopædia Britannica (9th ed.).

distribution of the estates of intestates, and matrimonial causes. The three last named topics were regarded as "ecclesiastical" questions, being determined by the bishops in their courts, or by their deputies, *e. g.*, surrogates. A great body of law has thus grown up, which in England was formerly termed ecclesiastical law, and usually in this country probate law, testamentary law, and, in respect to marriage and divorce, matrimonial law. These subjects will be considered hereafter under appropriate divisions.

Questions arising at sea are mainly governed by maritime or admiralty law. They were at first in England disposed of by a high officer termed the Lord High Admiral. By him they were assumed to be delegated to a judge in admiralty. A separate set of rules grew out of his decisions, which, when grouped together, are called "admiralty law."

The rules of the Roman law had much influence over each of these subjects. So far as these principles grew up by judicial decision they are in force, not because they are Roman law, but because by custom or judicial decision they have been incorporated into the common law, and have thus become a part of it.[1]

III. *Reports as Depositories of Rules of Law.* — It is a well settled rule of law that legal principles are to be evolved by "cases" or controversies submitted in regular form to courts of justice. A court will not pass upon a mere abstract question of law.[2]

Just complaint could be made by suitors if legal rules were not derived from regular proceedings in which there could be discussion, trials, and appeals. In the time of Charles I., Pym complained of "extra-judicial judgments and impositions of the judges without any causes before them, whereby they have anticipated the judgment which is legal and public, and circumvented one of the parties of *just remedies, in that no writ of error lies, but only upon judicial proceedings.*"[3]

It is well to state at the outset the difference between a

[1] It has been made a question how far the ecclesiastical law of England became by adoption a part of the law of the American States. It was believed in Burtis *v.* Burtis, Hopkins R. 557, that the English law concerning divorces and causes of divorce as it existed while New York was a colony, is "chiefly the ecclesiastical and not the common law of that country," and was no part of the common law which the colony adopted, nor the State after it was organized. Divorce jurisdiction was thus made to rest wholly on statute. It was, however, held in Brinkley *v.* Brinkley, 50 N. Y. 184, 190, that if by American statutes any part of the ecclesiastical jurisdiction was given to our courts, the settled principles and practice of those tribunals became a guide for our courts.

[2] Williams *v.* Hagood, 98 U. S. 72.

[3] 3 Rushworth's Historical Collections, 1135.

"record" and a "report." A record has been defined to be an authentic testimony in writing contained in rolls (formerly of parchment) preserved in a court, thence called a court of record. In these rolls are contained the judgment of the court on each case, and all the proceedings previous thereto.

It is, therefore, a history of the case. Legal principles, though involved in a judgment, are not explained or stated in the record. The report, on the other hand, contains a statement of the facts in controversy sufficient to elucidate the principle, usually, though not uniformly, an abstract of the arguments of counsel, and the reasoning and conclusion of the court set forth formally in an "opinion." The report thus serves to explain the record. At the same time the record may be resorted to with a view to test the accuracy of the report, or for the purpose of ascertaining the *precise point* involved, and necessary to be decided in order to dispose of the case.

It is a general rule of law, subject to important exceptions, that when a case has been adjudicated, particularly in the higher courts, and another case arises with similar facts involving the same principles, a like decision is to be made. In applying this rule it should be carefully noted, whether the *facts* in the two instances are *substantially the same.* The absence or presence of a fact either found or not found in the former case, may render the earlier decision inapplicable. The rule of law thus becomes so closely connected with the facts that it is difficult to state it in abstract form, although it is true that many elementary rules can be presented in a precise form so as to have a very wide application.

A distinction may be made at this point between a mere rule of law and a maxim. A rule prescribes a definite course of action, as that a deed must be written on paper or parchment, or that a negotiable note must be payable in money and not in goods. A maxim, on the other hand, is a generalization or abstract proposition, prescribing no definite course of action, but is rather a principle to which a class of acts must conform. Some of the leading legal maxims are these: "So use your own as not to injure another."[1] "No one shall profit by his own wrong," etc. They have been well classified by Mr. Broom in his work on Legal Maxims. Maxims have had great influence upon the administration of justice in courts of equity. They are collected in the standard works on equity jurisprudence.

[1] In Latin, *Sic utere tuo, ut non alienum laedas.* A judge of distinction now on the English Bench has in a number of instances deprecated the use of maxims, except in a very cautious manner.

Recurring to the decisions of the courts, further reference should be made to them considered as precedents. The general subject of precedents, both in politics and law, has been well discussed by Dr. Lieber in his work on Legal and Political Hermeneutics.[1] Here we have only to consider them as resorted to in law. It is essential to the due administration of justice that precedents should be followed unless there is some convincing reason to the contrary. It is only in this way that the law can be developed into a science. By means of this principle, a system of jurisprudence may be made to consist of a methodical collection of the principles involved in the decided cases. Still, many authorities are overruled by later decisions as not being founded on solid grounds, or as highly inconvenient in practice. Sometimes cases without being absolutely overruled are disapproved, criticised, or limited in their effect, or distinguished from the case in hand. For a knowledge of these instances, reference may be made by the student to Greenleaf's or Bigelow's Overruled Cases. Modern digests usually contain tables of this class of cases, embracing all such criticisms as have been made during the period covered by the digest.

It accordingly becomes necessary to apply fixed rules with the view of determining the value of a reported case. The following tests may be suggested as useful.

(1) Inquire by what tribunal the case was decided, whether upon argument before a full court (also called "in bank" or "in banco," or by the full bench), or by a judge at a trial with a jury, etc. Decisions made by a judge with a jury are termed "Nisi Prius" decisions,[2] and are in general of but little weight, though the high reputation of particular judges sometimes gives them authority. They are more frequently reported in England than in this country.[3]

(2) Inquire whether the case was fully and thoroughly argued by counsel. The value of a decision greatly depends upon the preparation of the case made by the respective counsel. It can scarcely be expected that a court perhaps crowded with business will make an independent investigation of the case. It is in general true that the decision is of no higher grade than the argument. Many cases are overruled for this reason, as a later

[1] 3d ed., by William G. Hammond, LL.D., St. Louis, 1880.

[2] "*Nisi Prius*" is a technical term, derived from the old writs in Latin, whereby judges were designated by the king to hold the trial court. It is explained in full in Book III. of Blackstone's Commentaries.

[3] Instances are the Reports of Campbell, Espinasse, Carrington & Payne, Carrington & Marshman, Carrington & Kirwan, and Foster & Finlason.

and more thorough discussion shows the weakness of the grounds on which the overruled decision was placed.[1]

(3) Next consider what judges held the court. Some judges have acquired such a high distinction for judicial ability that their judgments have an influence derived from their reputation. It may be in some instances that a particular judge has acquired a great reputation for acquaintance with a special branch of the law. This fact makes his decision of high value, and gives it much weight with other courts.

(4) The next inquiry is as to the grade of the court disposing of the case, whether it be inferior or a court of last resort. Referring to the English courts for illustration, it may be mentioned that there is in the outset a hearing by a court in the first instance, then a review by an appellate court, and perhaps a further review by a still higher and final appellate court, viz., the House of Lords. Similar schemes are adopted in the respective States of this country as well as in the United States courts. The courts may thus be classified into inferior and superior courts. As each of these courts has or may have reported decisions of its own, this distinction in tribunals must be attended to. Due subordination requires that the decisions of the appellate court should control those of the inferior court. Accordingly the decisions of the Court of Appeals in New York would be controlling on the Supreme Court, a subordinate tribunal. This is to some extent an arbitrary rule, and would prevail, notwithstanding that it could be shown by argument that the Supreme Court was right. The decision of the appellate court by its superior grade binds the inferior court as a matter of mere authority.

(5) The next inquiry is as to the intrinsic merits of the report itself. The ordinary and regular course is for a reporter to prepare a syllabus to be prefixed to his report containing the substance of the principles decided, as well as a statement of the facts to which the rule was applied. A reporter may and often does err, both in stating the points actually decided, and in omitting to notice some of the propositions passed upon. The syllabus is not to be trusted except as an index to the report, which should itself be consulted.

There is a special source of error in the older reports. The

[1] Important cases in the early reports were only decided after great and exhaustive discussion. In the famous case known as "Shelley's Case" the discussion occupied many days before a series of high courts, and the rule then laid down was never disturbed afterwards, though vehemently assailed from time to time by some of the ablest counsel in England.

reporters took notes then of what the judges *said* from the bench, and the art of shorthand writing being not acquired at all, or only imperfectly, the report is frequently inaccurate. There are in some instances several contemporaneous reports which may be resorted to for comparison.[1] The courts in this country at the present time, for the most part, prepare written opinions and hand them to the reporter, whereby this source of error is in the main avoided.

(6) Distinguish between what is decided and what is said by way of argument or illustration. Remarks of this latter kind dropped, as it were, by the way, are called *dicta* or *obiter dicta*, and have no force as precedents, though in course of time they may ripen into authority. These *dicta* are commonly indicated in the report by the word "*Semble*" (Norman-French), meaning "it seems," which is the modern equivalent used. The reporter indicates that the point has been actually decided by the expression, "*Held.*"

(7) There is a distinction between cases considered on the one hand as binding upon a court and on the other as arguments upon which another decision may be based. In the one case the court having a case in hand is controlled though not convinced; in the other, the court regards the prior decision simply as an element in reaching a conclusion. On this point some rules are to be noted.

Rule 1.—The decision of an appellate court is in general binding on a subordinate court as establishing a principle for its action when a similar state of facts is presented. This rule is not applied to all appellate courts, but only to those having the power to review the decisions of the subordinate court in question. For example, the tribunal in England called the "Judicial Committee of the Privy Council" is the final court of Appeal from the decisions of certain tribunals, but not from the judgments of the Queen's Bench, which is subordinated to the House of Lords. Accordingly it has been ruled that the decisions of the Judicial Committee are not binding on the Queen's Bench, though they are to be regarded with the greatest respect.[2]

[1] A work called "Repertorium Juridicum" is useful in finding the older contemporaneous reports. Published by B. Nutt in 1742. It begins with Edward I., and is said to contain forty thousand cases. The object of the index, as stated in the preface, is to find all the books in which the same case is printed, though by different names.

[2] Leask *v.* Scott, L. R. 2 Q. B. D. 376, 380. It has been further said that though they may not be theoretically binding, it is *highly undesirable*, in cases of mercantile and admiralty law coming from colonies professedly following the English law, that there should be any conflict of decision between that court and the court of appeal for other cases. The City of Chester, L. R. 9 P. D. 182, 207.

Rule 2. — A decision is also in general binding on the very court which renders it. If this were not so, the law would be uncertain and scarcely worthy of the name of a science. This doctrine is followed with great rigor by the English House of Lords, which only in very extreme cases refuses to follow a former decision, preferring to leave the rule, if unsound, to be remedied by Parliament. Upon this principle, a judgment of a lower court is held to be affirmed when there is an equal division of opinion among the judges of the appellate court.[1]

The courts in this country are not so rigorous. The Supreme Court of the United States has in a number of instances abandoned a rule once established by it, and announced a different one, and the same is true of State courts.

Still the general rule remains, that a case once recognized as law, and as a part of the jurisprudence of the State, though decided by a subordinate court, should not be overruled even by an appellate court without good reason. A rule on this subject has been recently stated in the following terms: "There are two classes of cases which must be distinguished. Where an old case is contrary to the principles of the general law, the court of appeal ought not to shrink from overruling it even after a considerable lapse of time. But when an old decided case has made the law on a particular subject, the court of appeal ought not to interfere with it, because people have considered it as establishing the law, and have acted upon it." [2]

The difference between the position of the House of Lords and that of the Supreme Court of the United States in retracing a step once taken should be noted. If the House of Lords adheres to a wrong decision once made, the inconvenience sustained by it can be remedied by act of Parliament. But if the Supreme Court has put an erroneous construction upon the United States Constitution and adheres to it after the error appears, it cannot be rectified except by an amendment to the Constitution, which it is almost impossible to obtain. This fact might lead the court in a plain case to overrule a former decision which otherwise might produce lasting evils in the administration of public affairs. Assuming that this line of reasoning is justifiable, it should be resorted to only in urgent cases where the consequences of overturning the former decision would be plainly less

[1] The rule then applied is, *Semper praesumitur pro negante*, or "he who holds the affirmative must establish it." An illustration is The Queen *v.* Millis, 10 Cl. & F. 534, affirming by an equally divided vote the judgment of a lower court that there cannot at common law be a valid marriage without a priest.

[2] Per Jessel, M. R., in Smith *v.* Keal, L. R. 9 Q. B. D. 340, 352.

harmful than the effect of the decision itself. It has been held that a decision, not in harmony with previous decisions, overrules those with which it is in conflict, whether these are commented on or not.[1]

Rule 3. — Decisions of courts of sister States are not authority, but merely arguments. The same is true of English decisions, unless they have become part of the common law of the State by adoption, and also of decisions of the Supreme Court of the United States, upon questions not arising out of the Constitution of the United States, or of the treaties and laws made under it. The rule also applies to co-ordinate courts in the same State or country.

Where the English law is adopted in a particular State, as of a particular day, *e. g.*, April 19, 1775, (as it is in New York,) the decisions of the English courts prior to that time become part *of the adopted law*, and are made binding on the courts by the act of adoption, though subject to change by the legislature. Later judicial decisions in England are substantially made by the courts of a foreign state, and are simply entitled to respect according to their merits.

A similar rule prevails in England as to the value of American decisions. It has been lately said there in substance that the English courts do not regard American decisions as authorities, but only as guides. They will have regard to the reasons given by American judges, so far as they do not conflict with decided law in England.[2]

Rule 4. — A Federal decision is sometimes binding in a State court as authority; at other times only as an argument. The United States Constitution provides[3] that the Constitution itself, the laws made in pursuance of it, and the treaties made under the authority of the United States, shall be the supreme law of the land, and that the State judges shall be bound by them. The Supreme Court of the United States is the final interpreter of the Constitution and the laws made under it. It follows that its decisions upon these subjects are binding on the highest State courts.

In other cases, the decisions of the United States courts are no more than guides or arguments in the State courts. For example, the disposition of a question of commercial law will be treated with respect in discussion in a State court, but in the end will not necessarily be followed. In this way it has frequently hap-

[1] Asher *v.* Texas, 128 U. S. 129.

[2] Cory *v.* Burr, L. R. 9 Q. B. D. 463, 469, 472.

[3] Art. VI.

pened that the decisions of the Supreme Court of the United States have been opposite to those of a State court, each court persisting, on a reconsideration of the question involved, in its special view.[1]

The effect of State decisions in the Federal courts is a somewhat complicated subject growing out of the delicate relations of the States to the Federal government. Many cases go into the United States courts solely on the ground of the different citizenship of the respective parties to the action. It would make the jurisprudence of the country intricate and highly uncertain, if in all such cases, the respective tribunals should take independent and perhaps conflicting views, so that a right which was recognized in the State court should be denied in the Federal Court or *vice versâ*.[2] An act of Congress of 1789[3] (*a*) provided "that the laws of the several States except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

Under this statute, the rights of persons and rules of property as settled in the States are, in general, guides to the courts of the United States in legal controversies.[4] The general object of the provision was to make the rules of decision in the courts of the United States the same as those of the States, though subject to some exceptions to be hereafter stated.[5] This statute does not adopt by anticipation the changes in process and proceedings which may from time to time take place in the States.[6]

It is a general rule that the Federal courts, in interpreting and construing the statutes and constitutions of States, follow any settled meaning placed upon them by the highest court of the State where they are enacted or adopted. As to statutes, this rule is announced in a great number of decisions.[7]

[1] Many cases of this kind are collected in Holt's Concurrent Jurisdiction of the Federal and State Courts. (New York, 1888.)

[2] In Knowlton *v.* Congress & Empire Spring Co., 57 N. Y. 518, the New York appellate court decided a question, whereupon the case was removed into a Federal court, and the Supreme Court of the United States declared an opposing rule. No Federal question was involved. Spring Company *v.* Knowlton, 103 U. S. 49.

[3] Ch. 20, § 34.

[4] United States *v.* Wonson, 1 Gall. 5, 18.

[5] McNiel *v.* Holbrook, 12 Pet. 84.

[6] Bank of United States *v.* Halstead, 10 Wheat. 51.

[7] Mutual Assurance Society *v.* Watts, 1 Wheat. 279; Shipp *v.* Miller's Heirs, 2 Id. 316; Rowan *v.* Runnells, 5 How. U. S. 134, 139; Parker *v.* Kane, 22 Id. 1.

(*a*) Rev. St. U. S. § 721.

So it has been held that if the highest judicial tribunal of a State adopts new views on the construction of a State statute, and reverses its former decisions, the Supreme Court of the United States will follow the later adjudication.[1] This rule rests upon the theory that the judicial department of a government is the appropriate organ for construing the legislative acts of that government, and that the construction given by the courts of a State to a statute of that State is to be received as correct, unless the statute comes in conflict with the Constitution, laws, or treaties of the United States. The cases sustaining this general proposition are extremely numerous. A few of the later ones are cited in the note.[2]

This general rule is subject to some exceptions now to be stated.[3]

(1) When a State statute is of recent origin, and no decision upon its meaning has been rendered by the State courts, its construction is an open question.[4]

(2) The opinion of a State court is not controlling unless it was necessary to construe the statute in order to reach a decision. In other words the mere *dictum* of the State court is not binding on the Federal court.[5]

(3) The Federal courts will not follow the decisions of the State courts if in so doing they would infringe on the Constitution of the United States.[6]

(4) The rules as to *remedies* in the United States courts are, particularly in cases of equity jurisprudence, based upon general principles of law as established and defined in England.[7] (*a*)

[1] Greene *v.* Lessee of Neal, 6 Pet. 291; Leffingwill *v.* Warren, 2 Black, 599.

[2] Tioga R. R. Co. *v.* Blossburg & Corning R. R. Co., 20 Wall. 137; Townsend *v.* Todd, 91 U. S. 452; Township of Elmwood *v.* Marcy, 92 U. S. 289; Peik *v.* Chicago & Northwestern R. R. Co., 94 U. S. 164; Amy *v.* Dubuque, 98 U. S. 470; County of Schuyler *v.* Thomas, 98 U. S. 169; United States *v.* Fox, 94 U. S. 315.

[3] On the general subject of exceptions and qualifications reference is made to the case of Pease *v.* Peck, 18 How. U. S. 595.

[4] Gardner *v.* Collins, 2 Pet. 58.

[5] Carroll *v.* Lessee of Carroll, 16 How. U. S. 275.

[6] Rowan *v.* Runnels, 5 How. U. S. 134; State Bank of Ohio *v.* Knoop, 16 Id. 369.

[7] See Rules in Equity ordained by the Supreme Court of the United States.

(*a*) In the Circuit and District Courts of the United States the practice in civil causes other than equity and admiralty causes is made to conform, as near as may be, to that of the State in which the courts are held. Rev. St. U. S. § 914. As to remedies in common-law causes in these courts, see §§ 915, 916. The former practice of the Court of King's Bench in England is the basis of the common-law practice in the United States Supreme Court. Supreme Court Rule 3. In the United States Circuit Court of Appeals the practice is the same as in the Supreme Court as far as applicable. Rule 8, U. S. Circuit Court of Appeals.

(5) Rules of evidence follow the law of the State where the Federal court is held.[1]

In the construction of State constitutions it is a general rule that the Federal courts will follow the highest court of a State, assuming that no conflict is claimed with the United States Constitution.[2]

It may be stated, however, by way of exception, that they may follow a settled construction existing when a contract in question was made, and reject a more recent decision by the highest court of the State. The theory on which this view rests is, that the State court's construction entered into the contract when it was made, and thus formed part of it.[3]

In determining the title to land or other real property, the courts of the United States are bound to apply the laws of the State, including the decisions of the courts, in which the court is sitting and the land is situated.[4] So it happens that where any principle of law establishing a rule of real property has been settled in the State courts, the same rule will be adopted in the Federal courts.[5] The powers of the United States courts to administer equity jurisprudence are conferred by the United States Constitution, and are not at all dependent upon the States or upon State legislation. So the Supreme Court of the United States is not bound by a decision of a State court upon a point of equity jurisprudence.[6]

In cases involving questions of commercial law and general jurisprudence, the Federal courts do not regard the decisions of the State courts as *authoritative*, but at most only as guides. In many instances, they have declined to follow them. Such questions are deemed to be cases of general commercial law, in which every court is at liberty to follow its own opinion, according to its own judgment of the weight of authority and the soundness of principle.[7] This is equally true of a commer-

[1] Ryan *v.* Bindley, 1 Wall. 66.

[2] Nesmith *v.* Sheldon, 7 How. U. S. 812; Gelpcke *v.* City of Dubuque, 1 Wall. 175; Town of South Ottawa *v.* Perkins, 94 U. S. 260. Under this principle the judgment of the highest court of a State as to the validity of a State statute, as compared with the State Constitution, is binding upon the Federal courts. County of Leavenworth *v.* Barnes, 94 U. S. 70; Railroad Company *v.* Georgia, 98 U. S. 359. It is not material whether the result be that the State statute will be thus adjudged valid or void by the United States courts. Hall *v.* De Cuir, 95 U. S. 485; Amoskeag Bank *v.* Ottawa, 105 U. S. 667.

[3] State Bank of Ohio *v.* Knoop, 16 How. U. S. 369; Gelpcke *v.* City of Dubuque, 1 Wall. 175; Taylor *v.* Ypsilanti, 105 U. S. 60.

[4] Waring *v.* Jackson, 1 Pet. 570; Miles *v.* Caldwell, 2 Wall. 35.

[5] Suydam *v.* Williamson, 24 How. U. S. 427.

[6] Neves *v.* Scott, 13 How. U. S. 268.

[7] Robinson *v.* Commonwealth Ins. Co., 3 Sumn. 220; Gloucester Ins. Co. *v.* Younger, 2 Curt. C. Ct. 322; Swift *v.*

cial question growing out of the application of a statute, where some general principle is involved not dependent upon the statute.[1]

Before closing this branch of the subject, reference should be made in more detail to some peculiarities of the English reports before the American Revolution.

These reports are only consulted occasionally. Much of the learning contained in them has become obsolete. The most venerable of them is the collection termed the Year Books. These are for the most part, so far as printed, in folio form and are in the Norman French, now an obsolete language. The cases were reported regularly from year to year by reporters paid by the government. This course was adopted for more than two centuries. All of these books have not been printed. Some of the earliest (A.D. 1292–1307) have recently been translated and printed in modern form in England under the direction of the Master of the Rolls. These books give an interesting view of the rise and growth of English law, and are worthy of the attention of the legal reader. A case in point in them may still be cited as authority. Instances are found in the New York cases of Curtis *v.* Hubbard,[2] and Althorf *v.* Wolfe.[3] After the Year Books were discontinued in the reign of Henry VIII., the system of reporting was left open to the public at large. Many worthless reports were published, while others of great excellence were supplied to the profession. One marked feature of this voluntary system was the great and undue multiplication of contemporary reports. This method led to such serious evils that in the year 1866 in England the series known

Tyson, 16 Pet. 1 ; Town of Venice *v.* Murdock, 92 U. S. 494.

[1] Town of Venice *v.* Murdock, *supra.* This subject is one of much difficulty, and apparently not yet thoroughly worked out. The recent case of Bucher *v.* Cheshire R. R. Co., 125 U. S. 555, shows the perplexities of the subject. A law of Massachusetts has for a long time (though modified recently) provided that, "whoever travels on the Lord's Day, except for necessity or charity, shall be punished by a fine not exceeding ten dollars." Gen. Stat. ch. 84, § 2. The Massachusetts court, in the construction of this statute, held that it was a bar to an action by a passenger on a railroad, not travelling for necessity or charity, for an injury occasioned by the negligence of the company. This ruling followed a long course of State decisions involving the same principle. The Supreme Court of the United States held, in a case between the same parties involving the same state of facts, that it would follow the State line of decisions, on the ground that the law was one of a *local character*, having a well-established judicial construction, (see the discussion of the general subject on pages 582–584.) A well-digested statement of the cases in which the United States courts will follow the State courts, and also those where they will exercise an independent judgment of their own, is to be found in the case of Burgess *v.* Seligman, 107 U. S. 33–35. A great number of authorities bearing upon the subject are to be found in a note at the foot of p. 34.

[2] 4 Hill, 437.

[3] 22 N. Y. 355.

as the "Law Reports" was established. This series is prepared under the direction of a council of men of high official and legal standing, including the attorney-general and solicitor-general, and has a great and deserved reputation.[1]

Reporting in the United States is in the main done by official reporters. There are, however, in some of the States, — notably New York, — publications by private persons, which are cited with approval by the courts.[2]

In addition to the reports, resort may be had for legal information to treatises, digests, abridgments, etc. For the most part, these should be regarded rather as means of consulting the reports. As a rule, when the treatise and report conflict, the latter is to be preferred. When the view of a text-writer is adopted by a court, it is not because it is itself authority, but on account of its intrinsic merit. Some works have come in this way to be highly esteemed and frequently cited. Among others may be mentioned Coke's Commentaries upon Littleton, Coke's Institutes, Blackstone's Commentaries, Kent's Commentaries, Story's Commentaries, etc.

A word should be added as to digests and abridgments. A number of these, published long ago, have become classic, and are cited as if they were authorities. An abridgment and digest do not materially differ, though in some instances the former is more detailed than the latter. The course of the author in each case is to arrange his material under appropriate general divisions with subordinate heads, and to refer to the volume and page of a report substantiating his proposition. The older writers of this class are Statham, Brooke, Dyer, Comyns, Viner, and Bacon. The leading modern English digests (for the word "abridgment" is not used by modern writers) are Harrison and Fisher, Mews with associates, Chitty, and the Digest of the Law Reports.[3] Mews's work is of great merit. It commences with 1884, with annual continuations down to and including 1892. Chitty's Digest contains equity cases and bankruptcy cases in all the courts. The first volume was published in 1883, and the last in 1889. The Law Reports Digest commences with 1865, and is continued. There is also a useful digest of admiralty cases by Pritchard. In this country the United States Digest may be referred to, containing a first

[1] Further details on the subject of reporting will be found in Wallace on Reporters. See also The Lawyer's Reference Manual, — an excellent and highly useful work, by Charles C. Soule (1884).

[2] Instances are Barbour's Reports, a series of 65 volumes, and Abbott's Reports, under the titles of "Practice Reports," and "New Cases."

[3] A very useful edition of Harrison & Fisher has been published by E. A. Jacob, Esq., of the New York Bar.

series down to 1870, with a table of cases and annual continuations commencing with 1870. There are also digests in nearly every State of the decisions of its own courts.

It is of great consequence to a student to become familiar with these works, and with the best modes of consulting them, as they are almost indispensable helps in ascertaining what decisions have been made upon the points which may happen at the time to engage his attention.

The subject of the influence of later decisions upon earlier ones now requires more detailed consideration. The line of inquiry is, how far has the later decision impaired or destroyed the technical value of the earlier one, considered as a precedent. A decision may thus be reversed, overruled, questioned, limited, or distinguished. Again, if satisfactory, it may be reaffirmed, approved, or followed. These various terms should be explained.

A decision is said to be "reversed" when the case has been removed *by appeal* from a lower to a higher court, and has in that way been overturned and held for nought. It is "overruled" when the principle on which it proceeds is declared to be unsound in law, and not to be followed. The decision itself, however, still remains. Thus a New York court may overrule a Massachusetts decision, though it cannot reverse the judgment. A decision is said to be "questioned" when some doubt is expressed as to its soundness. It may thus be questioned in a number of later cases, and finally overruled. A decision is said to be "limited" when its principle is expressed in broader terms than the case requires, and it is confined to the exact rule; and it is "distinguished" when it is not disapproved, but shown to be inapplicable to the facts of the case in hand. The word "distinguished" is sometimes an euphemism, and is employed where the former decision is really unsatisfactory. The same court thus frequently distinguishes one of its own earlier decisions from a later one, when it is not quite ready to overrule the former. A case is said to be "followed" when the later case simply yields to its authority. The word "approved" is a stronger term, and indicates satisfaction with the former decision. There are two main streams of thought in courts as to former decisions: one is the tendency to follow principles, or in other words, to adopt the results of logical thinking; the other is to submit to authority. The conflict between these tendencies leads to the distinctions that have been noticed. Cases that have long withstood assaults, and have been finally overruled, produce a profound effect upon the law, as they weave

themselves into its history, and cannot be overlooked or forgotten. Their main value to the student is to know them in order to avoid them.

DIVISION II. — Statute Law.

I. *Preliminary.* — The theory of statute law is altogether diverse from that of the common law. The great and fundamental distinction is, that while the common law can only be announced by the judiciary in the course of a legal controversy, and then only as an assumed, existing rule, governing the matter in hand, the statute law can be generated at any moment at the pleasure of the legislature, and without reference to any existing rule. The common law has an historical development. The statute law may be something novel, alien to the habits and customs of the people, and wholly arbitrary. It cannot be worked out by reasoning, but must be accepted as a fact.

Statutes are enacted in England by Parliament; in the United States by Congress and the legislatures of the States and Territories.

There is an important distinction between Parliament considered as a legislative body, and Congress. In the case of Parliament, the legislative power is vested in the King or Queen, the House of Lords, and the House of Commons; in the case of Congress the legislative power is by the terms of the Constitution vested exclusively in the Senate and the House of Representatives.[1] While the President of the United States *does not participate* in the legislative power, he has a check upon its exercise by means of the veto.

Contrasting the power of Congress to make laws with that of a State legislature, there is an important distinction depending on the origin of their authority and the mode in which it is vested. Congress derives its whole power from a written instrument, viz., the United States Constitution. If a power is not found there in express terms or by reasonable implication, it does not exist. This rule has no application to a State legislature, which does not derive its power from a written instrument, but rather by adoption by the people of the rules of the common law. It is accordingly assumed to possess all the powers of the English Parliament, except so far as it may be deprived of them by the provisions of the constitution of the State or of the United States.[2]

[1] Art. I. § 1.

[2] People *v.* Morrell, 21 Wend. 563; Butler *v.* Palmer, 1 Hill, 324; Bloodgood *v.* Mohawk, &c. R. R. 18 Wend. 9;

Statutes are either public or private, declarative or remedial, penal or, in contrast with penal, remedial in another sense.

A statute is said to be *public* when it affects the community or a class of persons. It is *private* when it affects a single person, and is in the nature of an exception to a general rule. A private statute may be in fact a contract between parties, one of whom is sometimes the State. In such a case if it impose upon a person a duty not relating to the public interest, it will not abrogate a prior contract between parties affected by it.[1]

A statute is said to be *declaratory* when its object is to make plain an existing law which is obscure, or which has fallen into disuse. A legislature in this country cannot, under the guise of a declaratory statute, introduce a new rule which interferes with vested rights.

In contrast with the term "declaratory" is the expression "remedial." A statute is said to be in this sense *remedial* when it introduces a new rule. It may either enlarge or restrain the existing rules, and in the one case it is termed an *enlarging*, and in the other a *restraining* statute. A statute is said to be *penal* when it inflicts a punishment or penalty for disobedience of its provisions. In contrast with this word "penal," it is said to be "remedial" when its office is to prevent fraud or to enhance the remedy of an injured party. The same statute may be in this sense in one respect remedial and in another penal.

The principal points to be here considered, are the rules to be followed in ascertaining the meaning of statutes, and their effect upon existing law.

II. *Rules governing the Interpretation and Construction of Statutes.* — (1) *General Rules of Interpretation.* — General rules of interpretation must be resorted to as well as special rules applicable to statutes.

Interpretation of written language is regularly governed by settled rules, otherwise the meaning of words instead of being fixed and ascertainable would depend upon conjecture. These general

Leggett *v.* Hunter, 19 N. Y. 445; Bank of Chenango *v.* Brown, 26 N. Y. 467; Cathcart *v.* Fire Dept. of N. Y., 26 N. Y. 529; Clark *v.* Miller, 42 Barb. 255; State of California *v.* Rogers, 13 Cal. 159; Bushnell *v.* Beloit, 10 Wis. 195; McMillen *v.* The County Judge of Lee County, 6 Ia. 391; Page *v.* Allen, 58 Pa. St. 338. *Contra*, People *v.* Board of Supervisors Westchester Co., 4 Barb. 64; Burch *v.* Newbury, 10 N. Y. 374, 392, 393, *per* JEWETT, J. The rule is now too well settled to be open to any doubt.

[1] Savin *v.* Hoylake Railway Co., L. R. 1 Exch. 9. POLLOCK, C. B., said, on p. 11: "A private Act of Parliament is in the nature of an agreement between the parties. Why may not an agreement be made in derogation of it, provided the agreement be not inconsistent with the public interest or morality?"

rules may be applied not merely to statutes but to contracts, wills, treaties, and other instruments of a legal nature coming up for consideration and enforcement before courts of justice.

The leading rules for the interpretation of written language are as follows: —

Rule 1. — The interpreter must take into account not only express words but reasonable implications. In nearly all writings there are ideas to be implied which it would be tedious and unnecessary to express.

Rule 2. — The words used are in general to be taken in their ordinary and popular sense. It may appear that they were used in some art or business, so as to have a technical meaning, which must then be ascertained and followed.

Rule 3. — The intention of the writer is primarily to be regarded, and the mere words or "letter" of the writing are not to be followed to the exclusion of the intention. But this rule is qualified by the next.

Rule 4. — The meaning must be contained within the writing called for convenience "the text." The interpreter cannot properly go beyond the writing in search of some supposed meaning. This would be to sacrifice a scientific method to mere conjecture.

Rule 5. — The whole of the writing or text must be taken into account. This rule is not confined in its application to a single document. It may require the examination of a series of papers perhaps written at different times by the same author upon the same general subject.

In applying these rules, the interpreter must place himself in the position of the author of the text as nearly as possible. He may find it necessary to become familiar with the period in which the author lived, with the manners, customs, and modes of thought then prevailing; and then with all the light that can be shed on the text from external sources, he must read and explain it. His sole object with these aids is to find out what the writing to be interpreted means.

Many writers and even judges use the terms "interpretation" and "construction" as equivalents. It is, however, useful to draw a distinction between them. In fact it may be said that construction begins where interpretation ends. In applying the rules of interpretation, it may be found that the interpreter is led to an unreasonable conclusion. Perhaps unexpected occasions may have arisen not strictly within the contemplation of the writer, or possibly the law may forbid the exact accomplishment of that which the writer had in mind. It is the office of construction to determine whether these variations are fatal, or

whether the text may be so enlarged in its meaning as to include such unexpected occasions, or whether the legal prohibitions may be avoided by giving the words a sense less extensive than that which the writer had precisely in mind. If the document to be interpreted be a legal one, this last point involves the doctrine of *cy pres*, or the doctrine of approximation. It is a principle frequently resorted to in the construction of wills, and sometimes of statutes, but rarely, if ever, in the case of deeds, where more rigid rules prevail.

Construction has, in its various aspects, been termed strict, liberal, and extravagant. It is said to be *strict* when the regular rules of interpretation are closely followed; and *liberal* when the meaning of the text is extended by analogy to instances not expressed, or where the literal meaning is departed from because it would lead to absurd or unreasonable results. It is said to be *extravagant* when it avoids rules and resorts to conjecture. The interpreter may perhaps abandon what *is* written on a supposed theory that such and such a thing *ought* to have been written, and that this meaning, though not contained in the writing, should prevail.

The rules of interpretation, though recognized and well understood, are constantly violated in the ordinary affairs of life, particularly in the heat of controversy. History is full of instances. In courts of justice questions of this kind are decided upon argument as propositions of law, and with a professed observance of settled rules.

(2) *Special Rules applicable to the Interpretation and Construction of Statutes.* — Rule 1. — The words used must in general be taken in their ordinary and popular sense.

For example, a statute provided that each time a locomotive engine of a railway passed over the railway at a point where it crossed a public highway, a bell should be rung or a whistle sounded, a penalty being attached to the violation of the rule.[1] It was decided that the statute applied although the railroad and highway did not cross each other upon the same level. The court gave the word "cross" its popular sense of "going over."[2] So, where a statute in England prohibited the "conducting" or "driving" of cattle through the streets of a town on Sunday, it was held that this prohibition did not extend to a case where cattle were carried in vans, but meant simply the act of conducting or driving the cattle in the ordinary manner in which cattle are driven.[3]

[1] N. Y. Laws of 1850, ch. 140, p. 232.

[2] People *v.* N. Y. Central R. R. 13 N. Y. 78; Matter of O'Neil, 91 N. Y. 516.

[3] Triggs *v.* Lester, L. R. 1 Q. B. 259.

But this rule is qualified if the statute concerns some special or technical subject, in which case the special sense applicable to that subject must be adopted. Thus a commercial tariff law must be interpreted according to the commercial sense. For example, the expression "manufactured India-rubber shoes," in the commercial tariff of 1842,[1] was held to mean such shoes made in foreign countries, as were calculated to rival some domestic manufacture here, and not those which were imported merely to furnish raw material in a more portable and useful form for other manufactures in this country.[2]

Rule 2. — The court is not to go beyond the statute in search of some sense that the legislature might be conjectured to have intended. The rule *voluit sed non dixit* may be applied. The meaning of this expression is that the legislature may have had some intention but it has not succeeded in expressing it, and so the statute is without effect. Still, it is a strong argument in favor of a specified meaning, that without it the statute would be nugatory. It is difficult to suppose that a legislature would enact a statute without any meaning.

Rule 3. — The whole of the statute must be taken into account. A cognate rule is that statutes upon the same subject must be considered together. Such statutes are said to be *in pari materia*. The principle is expressed in the following form by Mr. Barrington, "The best exposition of the meaning of an author is another part of his works, and the successive legislatures must be construed as constituting one author." [3]

The Tariff Act of 1861[4] exempted from duty "animals, living of all kinds," "birds, singing or other," etc. A later act of 1866[5] imposed a duty on all horses, cattle, etc., "and other live animals." It was decided that "birds" were not included among "animals" in the last act, as they were not in the first.[6] The fact that birds are properly speaking "live animals" did not affect the decision.

Rule 4. — Contemporaneous exposition is very strong and effective in law. The meaning of this rule is, that in interpreting a statute great authority is attributed to the construction put upon it by judges who lived at the time when the statute was made or soon after. (*a*) It is thought that they are best able to ascertain

[1] 5 U. S. Stat. at Large, 555.
[2] Lawrence *v.* Allen, 7 How. U. S. 785, 794.
[3] Barrington on Statutes, 146.
[4] 12 U. S. Stat. at Large, 193.
[5] 14 U. S. Stat. at Large, 48.
[6] Reiche *v.* Smythe, 13 Wall. 162. See also Horner *v.* The Collector, 1 Wall. 486.

(*a*) See The People *v.* Charbineau, 115 N. Y. 433; *cf.* Matter of Washington Street Asylum, Id. 442.

the intention by knowing the circumstances then existing. Even the opinions of contemporary members of the legal profession may shed light upon a case where the words of a statute are obscure or doubtful. Lord Coke has said "that in construing a statute great attention ought to be paid to the construction which the sages of the law, who lived about the time or soon after it was made, put upon it."[1]

Rule 5. — In interpreting a statute changing the existing law regard must be had to three points: the old law, the mischief, the remedy. By "mischief" is meant the evil or bad effect of the law in force at the time when the statute was enacted. The rule of construction, then, is to confine the words of the statute (even though in fact of broader signification) to the change intended to be produced. The rule aims at no more than to ascertain the true intent of the legislature. For example, it was an old rule that a bishop having church lands under his control might lease them to tenants for any term of years that he might see fit, at such a rent as he might choose. The *mischief* or bad effect of this rule was that a particular bishop might lease for a long number of years at a low rent and thus impoverish his successors. The remedy provided by a statute was that a bishop should lease only for twenty-one years. After this enactment, a certain bishop leased for his own life, which might, of course, by possibility exceed twenty-one years. It was still held that the lease was not void, as it would in any event terminate at the bishop's death and could not impoverish his successors.

Rule 6. — The reason and spirit of the statute must be followed rather than the letter. Sometimes it is said "that he who clings to the letter adheres to the bark" (*qui haeret in litera haeret in cortice*), or in other words does not penetrate to the heart of the subject. Again it is said that "the spirit of the law is the life of the law." Accordingly, if in interpreting the statute an unreasonable or highly inconvenient result is arrived at by one construction, it may lead to the rejection of it, and the adoption of another more reasonable in its nature.[2]

A statute in England gave the Queen in Council power to make orders acting upon persons having the care "of vaults or places of burial." It was held that this expression did not apply to a case where land belonged to a private owner, where there had

[1] 2 Inst. 11, 136, 181. Long and uninterrupted practice under a statute is good evidence of its construction. Power *v.* Village of Athens, 99 N. Y. 592.

[2] A court cannot, however, dispense with a statutory rule because it may appear that the policy upon which it was established has ceased. Brown *v.* Clark, 77 N. Y. 369. Still it is a strong argument against a particular construction that it would lead to manifest injustice. People *v.* Davenport, 91 N. Y. 574.

once been burials which had ceased when the statute was passed. It was said that to hold otherwise would lead to the unreasonable conclusion that if there had ever been a burial in a private ground, the owner could be prevented from making any beneficial use of it.

So, where a New York statute[1] declared that when persons travelling in carriages on a road or highway shall meet, they shall seasonably turn their carriages to the right of the centre of the road, so as to permit such carriages to pass without interference or interruption, it was decided that it had no application to the meeting of railroad cars with common vehicles. Accordingly, notwithstanding the statute, the carriage might in meeting the car turn either to the left or the right.[2] A case may be within the letter of a statute and not within the intention of the legislature.

Rule 7. — A penal statute should be construed strictly according to the literal meaning of the words, and including no cases except such as are clearly within their terms.

This rule will be considered further in connection with the next rule..

Rule 8. — Remedial statutes, as contrasted with penal, should have a large and liberal construction in order to suppress fraud or wrong, and promote the remedy of the injured party.

As a statute may be in one aspect remedial and in another penal, the same words may receive a twofold construction depending upon whether the penal side of it is before the court, or the remedial. A case arose under the English statute of 9 Anne, c. 14, which provided in substance that when £10 or upwards were lost at gaming "in one sitting" the loser could recover the money lost, while the winner should forfeit three times the amount to any one who would sue for it. The words to be interpreted were "one sitting." The facts which presented the question were that two gamesters were engaged in play for twenty-four hours consecutively, except that they adjourned for one hour to dine. There was held to be "one sitting" for the purpose of restoring the money lost, though the court said it would have been held otherwise had an action been brought for the penalty.[3]

Rule 9. — When statutes or different parts of the same statute are claimed to be contradictory, the court will strive to construe them in such a way that both may stand.[4] This rule is based on

[1] 1 R. S. 695, § 1.

[2] Hegan *v.* Eighth Ave. R. R. Co., 15 N. Y. 380.

[3] Bones *v.* Booth, 2 W. Black. 1226.

[4] Chamberlain *v.* Chamberlain, 43 N. Y. 424.

the principle that such an interpretation must be made that the subject-matter will stand rather than fail, — *ut res magis valeat quam pereat.* If it is impossible to reconcile the contradictory or repugnant expressions, a saving clause repugnant to the general scope of the statute will be declared void, or a rule hereafter to be adverted to will be followed, that the words used later in point of time will prevail.

Rule 10. — A distinction must be taken between an *exception* and a *proviso.*

If a particular clause be treated as an exception and an action be brought for a breach of the statute, it will be incumbent on the plaintiff to show in his pleadings that the defendant is not protected by the exception. But if the clause be treated as a proviso, the party sued if embraced within the general words of the statute will be answerable, unless he shows on his part that he is relieved by the operation of the proviso. The distinction becomes a rule of pleading, and shows which of the two parties to an action holds the burden of proof. One mode of distinguishing the two is to note that an exception is a part of the general words of the statute; a proviso follows after the general words, and is usually preceded by the word "provided." The distinction itself seems highly technical. There is a further question whether, if a proviso be repugnant to the general body of the act, the so-called "purview," the proviso is void. Upon this point the authorities are apparently at variance, though not perhaps really so when closely scrutinized. A proviso does not have the same effect in this respect as the "saving clause" referred to in Rule 9.

An old decision compares the case to a will, where a later clause prevails rather than an earlier one, because it is the last expression of the testator's desire; and so by analogy in the present case, the last expression of the lawgiver's intent should be heeded.[1]

The correct view seems to be that when a clause in the nature of a proviso does not destroy the "purview," but leaves that to prevail in its general scope, and at the same time withdraws from its operation some item which would otherwise be included, the proviso is valid.[2]

Rule 11. — In general a statute acts *prospectively.* It affects future and not past transactions. The general principle is, to

[1] Attorney-General *v.* Chelsea Water-Works, Fitzgibbon's R. 195; Townsend *v.* Brown, 4 Zab. 80.

[2] Savings Institution *v.* Makin, 23 Me. 360, 369, 370; Matter of N. Y. & Brooklyn Bridge, 72 N. Y. 527, 530, 531.

make the statute act retrospectively only when the words imperatively require it.[1]

To this rule there are some important exceptions. If the object of the statute be to prevent a delay or failure of justice, it may properly be allowed a retrospective operation. An act repealing the penal severities of an usury law may be construed in the same way.[2] It would seem that this principle would extend to the repeal of any penal enactment. The great object of the rule is, then, to prevent a retrospective operation of the statute if it works injustice or interferes with vested rights.[3] If, however, the words of the statute are plain, its retrospective operation must be allowed; and then a question may arise as to whether the law is not opposed to some constitutional provision upholding vested rights.

Rule 12. — A difference is to be noted between words that are "mandatory" and such as are "directory."

Words are said to be *mandatory* when an act prescribed must be done as the statute requires; they are *directory* when the act may be done in some other way or form, or at some other time. This distinction has much to do with the time when an act must be performed. It is a general rule that if an act be directed to be done on a particular day, it may be done on some other and even later day. On the other hand, where the interests of the public or of third persons are concerned, permissive words will be construed as obligatory; the word "may"[4] will be held to mean "must." (*a*)

Rule 13. — Statutes giving authority to be exercised in derogation of private right must be strictly followed.

An instance of this kind is that of land sold by law for the nonpayment of taxes. If the steps required by the statute are not strictly followed by the public authorities, the sale will be void.[5] Another important instance is that of the delegation to a village or other local authority, of the exercise of the right of eminent domain.[6]

[1] Dash *v.* Van Kleeck, 7 Johns. 477. The French Code expresses the principle without qualification: "The law only provides for the future; it has no retroactive effect." Civil Code, Art. 1, § 2.

[2] Curtis *v.* Leavitt, 15 N. Y. 9.

[3] Wadsworth *v.* Thomas, 7 Barb. 445.

[4] Livingston *v.* Tanner, 14 N. Y. 64, 67; Newburg Turnpike Road *v.* Miller, 5 Johns. Ch. 101.

[5] Striker *v.* Kelly, 2 Den. 323.

[6] Matter of the Rensselaer R. R. Co. *v.* Davis, 43 N. Y. 137. Matter of the Commissioners of Washington Park, 52 N. Y. 131.

(*a*) See Gilmore *v.* City of Utica, 121 N. Y. 561; The People *v.* Mayor of Syracuse, 59 Hun, 258; aff'd 128 N. Y. 632.

Rule 14. — Where a statute having in view the protection of the public health or morals, or the suppression of frauds, inflicts a penalty for doing an act, its commission is deemed unlawful, though not prohibited in terms. The penalty implies a prohibition. A contract to perform the act is illegal and void. It was accordingly held that one who sells liquor without a license in violation of the excise law, cannot recover the price of the liquor from the purchaser.[1]

Rule 15. — A person may waive a statutory or even a constitutional provision intended for his benefit;[2] but jurisdiction of the subject-matter of an action cannot be obtained by a court in this way, although a party may waive the statutory steps necessary to bring himself before a court which already has jurisdiction of the subject-matter.[3] Jurisdiction means the power which a court has to hear and determine a cause.[4] Such a power can be conferred by law alone, and not by the consent of the parties. But where the court has jurisdiction of the subject-matter, if a defendant submits to it, he cannot afterwards object, for example, that by law the action should have been brought in another county. His submission is a waiver of such an objection.[5]

Rule 16. — When a statute gives a remedy for a right already existing at common law, an injured party may at his election resort either to the common law or to the statutory proceeding.

This statement assumes that there has been no repeal of the common law either in express terms or by implication. The rule is applicable both to civil and criminal proceedings.[6] But if the right itself is created by the statute, and adequate means for enforcing it are provided, the proprietor of the right is confined to the statutory remedy.[7] This point is in fact covered by the succeeding rule.

Rule 17. — The expression of one thing is the exclusion of another, *expressio unius, exclusio alterius.*

This is a rule of wide application, extending to all written instruments, but is said never to be more applicable than in the case of statutes.[8] Considerable caution is to be used in the application of this principle. It may be that the statute mentions some things of a class by way of example, in which case others of the class would not be excluded. On the other hand, the words

[1] Griffith *v.* Wells, 3 Den. 226.

[2] Buel *v.* Trustees of Lockport, 3 N. Y. 197.

[3] Coffin *v.* Tracy, 3 Caines, 129; Davis *v.* Packard, 7 Pet. 276.

[4] United States *v.* Arredondo, 6 Pet. 691.

[5] Brown *v.* Webber, 6 Cush. 560.

[6] Rex *v.* Robinson, 2 Burr. 800, 805.

[7] Dudley *v.* Mayhew, 3 N. Y. 9; Donaldson *v.* Beckett, 2 Bro. P. C. 129.

[8] Broom's Legal Maxims, 652.

may be restrictive and intended to exclude all that are not enumerated. This view may easily be taken where, for example, certain specific things are taxed. The argument would be strong that other articles were not to be taxed.[1] Similar principles have been applied to statutes conferring immunities or creating exemptions from statutory liabilities. Common-law exemptions would be tacitly excluded.[2] This rule may easily be carried too far, as exceptions are often introduced as a mere matter of caution.[3] One of the Amendments to the United States Constitution was adopted to avoid any use of this rule by the court adverse to the rights of the people.[4]

Rule 18. — When words are of doubtful meaning certain circumstances may be called on to aid the interpretation, which would not be resorted to if the meaning were clear.

1. The *preamble* may be referred to in order to explain the enacting part of the statute, when doubtful; but not to restrain its meaning when clear and unambiguous.[5]

2. The *title* may be referred to for the same purpose.[6]

3. Reference in like case may be had to extrinsic circumstances.[7]

4. In construing revised or codified statutes, a mere change of language will not be regarded as evidence of an intention to vary the construction. The intent to vary must be manifest and certain.[8]

5. When one statute is referred to in another by several descriptive particulars, some of which are plainly false and others true, the former may be rejected as surplusage, provided the latter are sufficient to show clearly what is meant.[9]

6. Although a statute be inartificially drawn, effect must be given to it if the intent can be fairly made out from the words.[10]

7. Where words are obscure the intent may be inferred from the cause or necessity of the enactment.[11]

[1] The King *v.* Inhabitants of Woodlawn, 2 East, 164; Lead Company *v.* Richardson, 3 Burr. 1341, 1344.

[2] The King *v.* Cunningham, 5 East, 478.

[3] See the principle stated and qualified in Tinkham *v.* Tapscott, 17 N. Y. 141, 152, 153.

[4] U. S. Constitution, Amendments, Art. IX., "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

[5] Jackson *v.* Gilchrist, 15 Johns. 89.

[6] Cumines *v.* Supervisors of Jefferson Co., 63 Barb. 287; People *v.* Wood, 71 N. Y. 371; Pumpelly *v.* Village of Owego, 45 How. Pr. 219.

[7] Smith *v.* Helmer, 7 Barb. 416.

[8] Dominick *v.* Michael, 4 Sandf. 374; Douglas *v.* Douglas, 5 Hun, 140; Davis *v.* Davis, 75 N. Y. 221.

[9] Watervliet Turnpike Co. *v.* McKean, 6 Hill, 616.

[10] Matter of Commissioners of Washington Park, Albany, 52 N. Y. 131.

[11] People *v.* Asten, 49 How. Pr. 405; aff'd 62 N. Y. 623.

8. Inconsistent expressions must be harmonized to reach the intent.[1]

9. Grammatical rules do not prevail over the manifest sense of the language.[2]

10. A re-enactment of the same provisions in substantially the same terms as in former statutes, is deemed an adoption by the legislature of the judicial decisions on the former acts.[3]

11. Circumstances leading to the enactment of a statute may sometimes be considered in aid of its interpretation.[4]

These and like special rules, being for the most part intended to overcome doubt and remove obscurity, will not be made use of when the language is plain and unequivocal. In such a case, the title of the statute is not considered;[5] though there may be special cases, arising, perhaps, under constitutional clauses, in which the court will look to the *title* for the true construction, even though the language of the act be clear. It will, however, in such a case proceed with great caution.[6] The same general rule applies to the use of a preamble when the language of the act is clear.[7]

III. *Repeal and its Effect.* — It is of the essence of a statute, not in its nature declaratory, that it changes the existing law. The common law thus gives place to a statute, and an old statute to a new one. All statutes not amounting to contracts are thus capable of repeal. The leading principles governing repeal are embodied in the following rules: —

Rule 1. — No statute can be rendered irrepealable by a declaration of the legislature that it shall not be repealed. Nor can any existing legislature impose upon subsequent legislatures valid restrictions as to modes of legislation.[8] Each successive legislative body has plenary power over the whole field of legislation, unless restricted by constitutional provisions.

Rule 2. — Statutes may be repealed either by express words or by implication. Questions principally arise as to repeal by implication. There will in general be no repeal by implication unless the two acts are manifestly inconsistent with and repugnant to each other.[9] Where two statutes can stand together,

[1] In the Matter of N. Y. & Brooklyn Bridge Co., 72 N. Y. 527.

[2] People *v.* Gates, 56 N. Y. 387.

[3] People *v.* Green, 56 N. Y. 466.

[4] People *v.* New York & Manhattan Beach Railway Co., 84 N. Y. 565.

[5] In the Matter, etc., Village of Middletown, 82 N. Y. 196.

[6] People *v.* Davenport, 91 N. Y. 574.

[7] Constantine *v.* Van Winkle, 6 Hill, 177; Jackson *v.* Gilchrist, 15 Johns. 89.

[8] Smith *v.* Helmer, 7 Barb. 416.

[9] Bowen *v.* Lease, 5 Hill, 221.

the latter will not be held to repeal the former.[1] There must be repugnancy.[2] (*a*)

Rule 3. — Where amendments to Revised Statutes or Codes are introduced by the statement that the former statute "is hereby amended so as to read as follows," this expression is held to have been adopted for the purpose of adjusting the amended sections to the original enactments. The intent of the legislature is, that when the system after repeated amendments becomes complete, the different parts may be put together so as to form a systematic code, the portions of the amended sections, which are merely copied without change, not being considered as repealed and then re-enacted, but as having been the law all along; and the new parts are not to be taken to have been the law at any time prior to the passage of the amended act.[3]

Rule 4. — One statute may be substituted for another in a way which differs somewhat from a mere repeal. Thus if a later statute does not purport to amend a former one, but covers the whole subject, it must be regarded as a substitute, and the former is repealed.[4]

Rule 5. — A special statute, local in its application, will not be repealed by the general words of a statute general in its application, unless the intent of the legislature is manifest. The general phrases will not suffice.[5]

Rule 6. — When a repealing statute is itself repealed, the former law revives. This rule prevails whether the repeal be by express words or by implication.[6] This is a rule of logic, and is not confined to acts of the legislature, but includes resolutions passed and repealed at public meetings in general. There are in some of the States general laws restricting to some extent the operation of this principle.

Rule 7. — If a statute is repealed when proceedings under it are pending, the proceedings themselves are nullified. Thus if a statute provide a penalty for the commission of an act, and the statute be repealed, the penalty cannot be exacted for acts

[1] People *v.* Palmer, 52 N. Y. 83.

[2] Mongeon *v.* The People, 55 N. Y. 613; In the Matter of the Evergreens, 47 N. Y. 216.

[3] Ely *v.* Holton, 15 N. Y. 595; Calhoun *v.* Delhi R. R., 28 Hun, 379.

[4] People *v.* City of Brooklyn, 69 N. Y. 605.

[5] People *v.* Quigg, 59 N. Y. 83.

[6] Wheeler *v.* Roberts, 7 Cow. 536; Van Denburgh *v.* Village of Greenbush, 66 N. Y. 1; Schwab *v.* People, 4 Hun, 520.

(*a*) Repeal by implication is sometimes made impossible by statute. Thus the New York Penal Code provides that: "No provision of this Code, or any part thereof, shall be deemed repealed, altered or amended by the passage of any subsequent statute inconsistent therewith, unless such statute shall explicitly refer thereto, and directly repeal, alter or amend this Code accordingly." § 728.

committed before the repeal.[1] Even if an action had been commenced, it could not be continued, and if a conviction had been had, there could be no judgment. But a repeal after judgment does not affect the right declared by it.[2] It is quite common to find a saving clause in repealing acts, exempting pending proceedings from the operation of this rule.

IV. *Constitutional Restrictions upon Legislation.* — The power both of Congress and of the State legislatures to pass laws is to a considerable extent restrained by constitutional provisions. The powers of Congress are found solely in the United States Constitution, and Congress is restrained from legislation not therein expressly or impliedly authorized. The powers of State legislatures may be and are limited both by the United States and State constitutions.

The restrictions in the United States Constitution are of a general nature, directed against legislation unsound in theory or mischievous in practice. Similar provisions are found in State constitutions; but, besides these, there are frequently matters of detail, which are regarded as of sufficient importance to be withdrawn from legislative action. These vary much in the different States. For instance, it is provided in a number of the State constitutions that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the *title*." [3] Such a clause makes the title of constitutional importance, and if the provision is transgressed the law is void.

The following are some of the principles of construction applicable to this general subject. The courts will presume in the construction of a State constitution that a law is constitutional until one who alleges the contrary proves it beyond rational doubt.[4] The true ground on which courts interfere is that there are express constitutional provisions limiting legislative power, and controlling the will of the legislature by paramount law.[5] Accordingly, before a court will pronounce a law void, it must clearly appear that the act cannot be supported by any reasonable

[1] Powell *v.* The People, 5 Hun, 169.

[2] Hartung *v.* The People, 22 N. Y. 95; The People *v.* Board of Police, 40 Barb. 626; s. c., 39 N. Y. 506. "When an act is repealed it must be considered (except as to transactions past and closed, and possibly as to some pending cases) as if it had never existed." EARL, J., in Van Denburgh *v.* Village of Greenbush, 66 N. Y. 1, at p. 4.

[3] See Constitution of N. Y., Art. III. § 16.

[4] *Ex parte* M'Collum, 1 Cow. 550; Clarke *v.* City of Rochester, 24 Barb. 446.

[5] Cochran *v.* Van Surlay, 20 Wend. 365; Newell *v.* People, 7 N. Y. 9, 109.

intendment or allowable presumption.[1] The courts do not imply a conflict between the law and the constitution, but expect it to be clear and substantial.[2] Still an act violating the true intent and meaning of the constitution is as really prohibited as if it were within the strict letter of the instrument, and the courts will see that the constitution is not evaded, nor its intent frustrated.[3]

A law may be constitutional in one aspect and unconstitutional in another. For example, a law constituting a crime, and giving it both a future and a retrospective application, would not be wholly void. It might be sustained as to future cases, while it would be declared void so far as it was retroactive.[4]

It is quite common in the various States to amend the constitution. Such additions or alterations must be read in connection with the whole instrument. They do not supersede any existing provision to which they are not clearly repugnant.

The Amendments to the United States Constitution do not affect the States, with the exception of the Thirteenth, Fourteenth, and Fifteenth. The first ten Amendments were designed to control the action of Congress or other branches of the Federal government alone.[5]

A question has been raised in some of the States whether a law would be void as being opposed to the spirit of the Constitution. This question does not refer to a fair construction of the words used, but to a supposed "spirit" of the Constitution where the instrument itself is silent. The courts will not declare a limitation under the notion of having discovered something in the spirit of the Constitution upon a subject which is not even mentioned in it.[6]

A law cannot be pronounced invalid because it violates justice, or is oppressive or unfair, or because it is not justified by public necessity.[7] Still, the legislature may not indirectly violate the Constitution any more than directly. It cannot, for example, authorize one man to take the land of another for his private purposes, although such an act is not directly prohibited. It is indirectly prohibited by the rule that "private property can be taken for *public* use" by the payment of just compensation. This is equivalent to a declaration that it shall not be taken for

[1] People *v.* Supervisors of Orange County, 17 N. Y. 235.

[2] Matter of N. Y. Elevated R. R. Co., 70 N. Y. 327, 342; Matter of Gilbert Elevated Ry. Co. *v.* Kobbe, Id. 361.

[3] People *v.* Albertson, 55 N. Y. 50.

[4] Jaehne *v.* New York, 128 U. S. 189.

[5] Spies *v.* Illinois, 123 U. S. 131, 166.

[6] People *v.* Fisher, 24 Wend. 215, 220; People *v.* N. Y. Central R. R. Co., 34 Barb. 123; aff'd 24 N. Y. 485.

[7] Brotholf *v.* O'Reilly, 74 N. Y. 509.

private use on any terms.[1] On like grounds, the legislature cannot exercise the power of taxation for private purposes.[2]

If a law be in the end declared unconstitutional, a public officer who has acted under it will have no justification for his acts. An unconstitutional law is no law. The legislature having by the hypothesis no power to enact, the fact that it has gone through the forms of enactment is of no avail.

A question like this cannot come up in the English courts as to the power of Parliament, as its legislative capacity is wholly without restraint. It might, however, be presented there in construing the power of a colonial legislature acting under a written instrument. It might come before the Judicial Committee of the Privy Council, the court of last resort as to such questions. That court would avail itself of a principle, much resorted to in the law of corporations having restrictions upon their powers, called the doctrine of *ultra vires*. This is, that corporate acts done in excess of corporate powers are void.[3] The details of this subject will be found in such works as Cooley on Constitutional Limitations and Story or Pomeroy on Constitutional Law.

It may be well to add here that a statute is in general confined in its territorial effect to the territory of the sovereign power which enacts it. It has been said in the English courts that it must be regarded as having the words "within the dominions" inserted in it.[4] Still the sovereign power may by apt words bind its own subjects, though beyond its territorial limits. This is particularly true of cases arising at sea. It has been said that a British Parliament has no authority to legislate for foreigners out of the dominions and beyond the jurisdiction of the crown.[5]

[1] Taylor *v.* Porter, 4 Hill, 140.

[2] Weismer *v.* Village of Douglas, 64 N. Y. 91.

[3] Bank of Ontario *v.* Lambe, L. R. 12 App. Cas. 575, deciding that the Quebec Act, 45 Vict. c. 22, was *intra vires*. Harris *v.* Davies, L. R. 10 App. Cas. 279. The principle followed is, that a colonial legislature is restricted in the area of its powers. Powell *v.* Apollo Candle Company, L. R. 10 App. Cas. 282; Colonial Building Ass. *v.* Atty-Gen'l of Quebec, L. R. 9 App. Cas. 157; Hodge *v.* The Queen, Id. 117. This case concerned the power to pass certain police regulations, &c.

[4] Rosseter *v.* Cahlmann, 8 Exch. 361; s. c., 22 L. J. Exch 128. In this case POLLOCK, C. B., said "Every Act of Parliament must be understood to have the words 'within the dominions' inserted in it. An attempt was once made to make dealing in slaves a felony in every part of the world, but the opinion of all the legal authorities was, that an English Act of Parliament was binding within the realm of England only. If, indeed, the Act of Parliament had stated that all British subjects were to be bound, as is the case in some of the slave-dealing acts, or as is the case in the Royal Marriage Act with respect to the descendants of George the Second, there the case is different, but where the enactment is general, as in the present case, it does not extend beyond the English dominions." 22 L. J. Exch. p. 129.

[5] Lopez *v.* Burslem, 4 Moore, P. C. C. 300.

It is a general rule that when a statute directs an act to be done within a specified time, *e. g.*, twenty days, the time is to be computed by excluding the first day and including the last. If the last day be Sunday, the act must be done on Saturday, unless there be some provision in the statute to the contrary. The general rule becomes at times important in its application to the Statute of Limitations.[1]

This chapter may be properly closed by a reference to the mode of citing English and American statutes for the use of courts.

All of the acts passed at a session of Parliament in legal view constitute but one statute, particular laws being called chapters. The older statutes are sometimes known by the name of the town where the Parliament was held, *e. g.*, the statutes of Merton, Gloucester, etc. At other times, they are designated by the first words of the statute, in Latin, *e. g.*, *Quia emptores*. At present, they are designated by the year of the reign, *e. g.*, 45 & 46, Victoria. In this country the usual course is to designate them by the year and chapter. In many of the States, the statutes have been arranged in a codified form, known as Revised Statutes or Revised Laws. The laws of Congress have been arranged in the same manner. There are also revised statutes in England, published in fifteen volumes commencing with the reign of Henry III., and coming down nearly to the present time. In a large number of the States, the rules of procedure in the courts have been reduced to a statutory form, known as Codes of Procedure or as Codes of Civil or Criminal Procedure. The laws of each session are also published in volumes called Session Laws. In these, many special or private acts are set forth, which do not at any time appear in "Revised Statutes or Codes." If a copy of a statute is needed before publication, application may be made to the Secretary of State, as depositary of the statutes.

There is also published in England a chronological table and index of the English statutes from the earliest period to the date of publication. This is a highly useful book of reference. (*a*)

[1] Nitchie *v.* Townsend, 2 Sandf. 299; Mygatt *v.* Washburn, 15 N. Y. 316, 318, see opinion of BROWN, J. The cause of action in his view arose July 24, 1846, and the action was commenced on July 24, 1852. The statutory period being six years, the judge's opinion was that the action had been brought in due time.

(*a*) The eleventh edition of this work was published in 1890.

CHAPTER III.

THE RIGHTS OF PERSONS.

A "PERSON" in law is one who is entitled to present his claim of rights to a court of justice. His position in this respect is sometimes termed his "status." The rules of the ancient law were very strict, fixing "status" by an arbitrary standard. Of this, slavery is an instance. It is the tendency of modern law to fix one's position by contract rather than by rule, and to hold that the law should only interfere in case there is a want of capacity on the part of the individual to act or to contract.

The rights of persons are commonly divided into *absolute* and *relative*. Absolute rights are such as appertain to a person considered independently of others. They are, in the common law, the right of personal security, the right of personal liberty, and the right of private property. A violation of either of these rights constitutes a legal wrong. The word "wrong," as here used, does not involve moral obliquity, but simply means an unlawful interference with a legal right.

"Duty" is a correlative word to "right." If A. has a legal right, B. is under a legal duty not to interfere with that right. "There is no right without a duty; no duty without a right."[1] It would be possible, accordingly, to frame a system of law from the point of view of either duties or rights; but the latter is the more simple and convenient arrangement.

Before discussing the subject of personal rights specifically, it will be useful to refer to some of the great state papers or statutes in England by which such rights have been emphatically affirmed or secured.

Magna Charta, or the Great Charter, was wrested from King John by his barons, at Runnymede, June 15, 1215. It is only necessary at present to refer to one of its important provisions, which is as follows: "No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or anywise destroyed; nor will we go upon him nor send upon him but by the lawful judg-

[1] This was a favorite expression of the late Dr. Francis Lieber. He was fond of the Latin form, *Nullum jus sine officio; nullum officium sine jure.*

ment of his peers or by the law of the land. To none will we sell, to none will we deny or delay, right or justice." [1] The technical expressions, "judgment of his peers" and "law of the land" were held at an early day to mean in criminal cases (of a grave nature, viz. felonies) indictment by a grand jury, and trial by a petit or petty jury; and in civil cases, trial by jury. A grand jury by the common law consists of twenty-three persons or one less than two full juries, a majority of whom may find an indictment. An indictment is a written accusation presented under oath to the proper court. It is the result of an inquiry into the question whether there is a sufficient probability that the accused has committed a crime, to justify a trial. It is a legal device designed to prevent, as far as possible, the trial of frivolous and unfounded charges of crime. The proceeding before the grand jury is *ex parte* (evidence for the state only being heard). The indictment having been found, the trial of the charge belongs to the so-called petty jury, consisting of twelve men, and is presided over by a judge. The conclusion or verdict of the jury must be unanimous. This provision of Magna Charta does not interfere with the trial of prisoners charged with minor offences, termed misdemeanors, on the formal suggestion of a prosecuting officer, such as the Attorney-General, without an indictment. This method of proceeding is termed an information.

These theories of Magna Charta have been largely adopted in the United States and form a part of our system of national justice, as secured in one of the Amendments to the United States Constitution.[2]

The necessity of unanimity on the part of the jury is so fully recognized in this country that it has been decided in one State that a prisoner on trial for a capital offence cannot legally waive a trial by twelve jurymen, and that if he goes through the form of waiver and is convicted by eleven jurymen, the judgment will be reversed by the appellate court.[3] (*a*)

In civil cases, trial by jury was secured by the Great Charter in the common-law courts, but its provisions did not extend to the courts of equity, nor to the ecclesiastical courts or courts of admiralty where trials are had before a judge alone.[4]

[1] 1 Stubbs' Constit. Hist. of England, § 155, p. 537.

[2] Art. V. of Amendments.

[3] Cancernie *v.* People, 18 N. Y. 128.

[4] The history of the document itself is somewhat interesting. It can be traced

(*a*) But a State statute may confer upon the accused the right to waive a trial by jury, and to elect to be tried by the court, and also give the court the power to try the accused in such a case. If after such a trial he is found guilty and sentenced to death, the Fourteenth Amendment is not thereby violated. "Due process of law" refers to the law of the land in each State. Hallinger *v.* Davis, 146 U. S. 314.

The *Petition of Right* was a statute enacted at the session of Parliament, commencing March 17, 1627 (3 Car. I.). Though called a petition it was in fact a law. It contains eleven sections. The first nine sections consist of a recital of abuses in the administration of public law, violations of the Great Charter, etc. The tenth section then enacts that there shall be no compulsory loan exacted from subjects without consent of Parliament; that the people shall not be burthened with soldiers or mariners; that commissions to try persons by martial law in time of peace shall be revoked, and shall not be granted in the future. The principles of the Great Charter are also re-affirmed. It is not the office of this statute to make new provisions, but to restore to public recognition existing provisions which in the lapse of time had come to be disregarded by the government.

The *Habeas Corpus Act* was enacted in the year 1679.[1] It did not originate the writ of *habeas corpus*, but made it more effective, and a more sure safeguard of liberty. The writ itself was no doubt based on the great clause of Magna Charta already quoted. That instrument having declared that a person should not be deprived of his liberty without due process of law, this writ was devised at a very early day to relieve one who was deprived of his liberty in opposition to the statute. But it was not sufficiently effective in its provisions, and if it appeared in the course of an inquiry under it that the prisoner was detained by the order of the King, or of the Privy Council, the judges would look no further, and would refuse to grant a discharge. The statute of Charles II. required the judges, in the case of persons committed or charged with crime, to issue the writ in vacation as well as in term time, and to have it made returnable immediately, and it provided for a judicial examination of the warrant on which the prisoner was held, for the purpose of allowing him to give bail in a proper case, and with a view to his discharge if there were no legal grounds of detention. There were severe penalties imposed upon officers and keepers who should interfere with the efficient working of the writ, and also upon any one who should re-commit the prisoner, if discharged, for the same offence. These provisions made the writ truly efficacious, and the bulwark of liberty. The general provisions of this statute are adopted by re-enactment in the various

to Archbishop Laud, and is believed to have been taken from him at his impeachment, by Warner, Bishop of Rochester. It passed to his executors, who gave it to Bishop Burnet. He says, History of his Own Time, "It is now in my hands, and came very fairly to me." Sir William Blackstone saw it in the hands of Burnet's executors, and published a copy of it in Oxford, 1758. It is now in the British Museum. A facsimile may be found in the work published by the English government, called "Statutes of the Realm."

[1] 31 Car. II. c. 2.

States of this country. The original statute was, however, circumscribed in its effect in one respect, being confined to persons charged with *crime*. By later statutes in England, its provisions have been extended to other cases of arrest and detention, and there are corresponding statutes in this country.[1]

The English Parliament may, in unquiet times, suspend the privilege of *habeas corpus*, in which case one imprisoned has no means of legally inquiring whether the confinement be illegal or not. In this country there is a constitutional provision on this subject: "The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."[2]

The *Bill of Rights*, which was enacted in 1689,[3] is very important in American law, since a number of provisions are copied from it *verbatim* in the United States and State constitutions. The following clauses may be referred to: The right of the subject to petition the king; the unlawfulness of raising or keeping a standing army within the kingdom in time of peace, unless with consent of Parliament; the right of subjects to have arms for their defence; the rule that freedom of speech, and debates or proceedings in Parliament, are not to be impeached or questioned in any court or place out of Parliament; that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

There is an important advantage obtained by copying into our constitutions the very words of English state papers, because of the construction which had been previously put upon the words by the courts. Such construction may properly be regarded as becoming a part of the constitutional provision itself.

The *Act of Settlement* was a statute enacted in the Parliament summoned Feb. 6, 1700.[4] Its main object was to provide for the succession to the throne after the death of William III. and the Princess Anne of Denmark (subsequently Queen Anne), the Princess Sophia, Electress of Hanover, and the heirs of her body, being protestants. There are in this statute several provisions of general interest. One is that no person who has an office or place of profit under a king, or receives a pension from the crown, shall be capable of serving as a member of the House of Commons. Another is that the commissions of judges are to be made during

[1] There are several writs of *habeas corpus* known to the old law, the object being in each case to bring a person before a court. They are designated respectively by appropriate Latin terms. The famous writ now referred to is *habeas corpus ad subjiciendum*. The last word directs *submission* to such order as the court may make.

[2] Const. U. S. Art. I. § 9.

[3] 1 Wm. & Mary, Sess. 2, c. 2.

[4] 12 & 13 Wm. III. c. 2.

good behavior, and their salaries ascertained and established, but that upon the address of both Houses of Parliament it may be lawful to remove them; and that no pardon under the great seal shall be pleadable to an impeachment by the Commons in Parliament. These provisions had been suggested by great abuses in legislation and in the administration of justice, and were designed for their correction.

There was an imperfection in this statute, since there was no provision preventing the death of the king from putting an end to the office of a judge. It was a rule of the English law that the king was the "fountain of justice." One of the inferences from this proposition was that when the king died all of the judges went out of office. All courts were discontinued. To remedy this evil the Tenure of Judicial Office Act was passed.[1] It thus happens that the tenure of office of a judge is now during good behavior, notwithstanding the demise of the king, unless he be removed in accordance with an address or formal vote of both Houses of Parliament. The English judges are more dependent upon Parliament than the judges of the Federal Courts are upon Congress, since in the latter case a judge can only be removed by impeachment, which is a species of *trial* for an offence, while an address in England is nothing more than a vote of legislative bodies.

The statutes above referred to, with others, and with general rules of public law, make up the English Constitution. As they originate with Parliament, they do not bind it, but may at any time be repealed. Similar provisions in American Constitutions may be made to serve not merely as a check upon the executive, as in England, but also on the legislature and the judiciary. That branch of constitutional law which we term "constitutional limitations," has no existence in England, and from the nature of the case cannot have, while the present Parliamentary system continues.

These great principles of the English Constitution came to be accepted law in a number of the colonies before the Revolution. Connecticut adopted Magna Charta as early as 1639; New York, in 1691 and 1708. It was maintained firmly that taxes were not to be levied without the consent of the legislative department of the colonies. It was a prevalent view in England that no Act of Parliament was binding upon the colonies, unless they were specially named in the Act. If named, they were subject to the legislation of England, as being a portion of the country. The colonies so far as they were left to themselves legislated in their own way, not interfering with the prerogative of the king or im-

[1] 1 Geo. III. c. 23, A. D. 1760.

pairing their tie of allegiance to the mother country.[1] The power of legislation was deemed to be quite different in the case of a colony of English subjects and in that of a conquered country. In the former case, the people of the colony could only be taxed by the Parliament, or by and with the consent of some representative body of the people of the colony, properly assembled by the authority of the king or crown; in the case of a conquered country, they might be taxed under the right of conquest, without the action of Parliament or of a colonial legislature.[2]

The constitutional safeguards of the rights of individuals worked out in England appear to a considerable extent both in the United States Constitution and in those of the respective States. Only such as concern the right of personal security and freedom will be stated in this connection; such as relate principally to property will be treated hereafter.

Provisions on the subjects of personal security and personal liberty will be found both in the United States Constitution itself and in the Amendments. There is an important distinction between the effect of such *Amendments* as are prior to the Thirteenth, and the later ones, viz., the Thirteenth, Fourteenth, and Fifteenth. The first twelve concern the working of the United States government, and do not bind the action of the States.[3] A Territory, however, is governed by these Amendments.[4] (*a*) Accordingly, the first branch of the Seventh Amendment to the effect that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," does not extend to the State courts.[5]

[1] The colonists grew restive very early. Evelyn, then a member of the Privy Council, in his Diary, under date of Aug. 3, 1671, says that the council sent a trusted messenger "to inform them of the condition of the colonies, and whether they were of such power as to be able to resist his Majesty and declare for themselves as *independent of the Crown, which we were told*, and which of late years made them refractory." He adds, "Colonel Middleton, being called in, assured us they might be curbed by a few of his Majesty's first-rate frigates."

[2] Chalmers' Colonial Opinions; Opinions of Attorney and Solicitor-General on the Extension of the Laws of England to the Colonies, May 18, 1724.

[3] Livingston *v.* Moore, 7 Pet. 469, 551; Fox *v.* The State of Ohio, 5 How. (U. S.) 410, 434; Twitchell *v.* The Commonwealth, 7 Wall. 321; United States *v.* Cruikshank, 92 U. S. 542; Spies *v.* Illinois, 123 U. S. 131, 166.

[4] Webster *v.* Reid, 11 How. (U. S.) 437.

[5] Edwards *v.* Elliott, 21 Wall. 532; Walker *v.* Sauvinet, 92 U. S. 90; Pearson *v.* Yewdall, 95 U. S. 294.

(*a*) See also Reynolds *v.* United States, 98 U. S. 145, 154. In this case it seems to be recognized without question that the Sixth Amendment to the Constitution establishes the right to trial by jury in criminal cases arising in the Territories. The provisions in the Constitution relating to trial by jury are in force in the District of Columbia. Callan *v.* Wilson, 127 U. S. 540.

The latter clause of the same Amendment, which declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law," applies to a review by the Supreme Court of the United States of a trial in a State court.[1]

On the other hand, the last three Amendments which were the outcome of the civil war, bind the States, as they are expressly named. The first paragraph of the Fourteenth Amendment is of the utmost importance. After declaring what persons are citizens of the United States and of a State, it proceeds: "*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."

Turning now to the body of the Constitution, there will be found provisions of the kind now under consideration, binding the action of a State as well as of Congress, or prescribing a rule for the action of the judicial power of the United States. The whole subject is thus capable of a twofold sub-division: (1) clauses acting upon the general government; (2) clauses acting upon the States.

Constitutional Directions and Restrictions acting upon the General Government.

These are capable of classification under a number of general heads.

I. — *Restrictions upon improper or vicious legislation usurping judicial methods.*

(1) No bill of attainder shall be passed.

(2) No *ex post facto* law shall be passed.

II. — *Regulations preventing unnecessary or harmful interference by Congress with the freedom of the individual.*

(1) Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.

(2) Congress shall make no law abridging the freedom of speech or of the press.

(3) Congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances.

(4) No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

[1] Justices *v.* Murray, 9 Wall. 274.

(5) The right of the people to keep and bear arms shall not be infringed.

III. — *Restrictions affecting the administration of justice.*

(1) The privilege of the writ of *habeas corpus* shall not be suspended (except in special enumerated cases).

(2) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(3) The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

(4) In *all* criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

(5) Regulations as to the methods, progress, and results of a criminal trial.

1. 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.

2. Proceedings in *all* criminal prosecutions.

a. The accused shall enjoy the right to be confronted with the witnesses against him; *b.* to have compulsory process for obtaining witnesses in his favor; and *c.* to have the assistance of counsel for his defence; *d.* no person shall be compelled in any criminal case to be a witness against himself.

3. No person shall be subject for the same offence to be twice put in jeopardy of life or limb.

(6) General regulations.

1. No person shall be deprived of life, liberty, or property without due process of law.

2. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(7) Trials in the Federal courts in civil actions.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any

court of the United States, than according to the rules of the common law.

For purposes of explanation we shall review some of these particulars.

I. — (1) No bill of attainder shall be passed. (*a*)

The prohibition as to such legislation extends to the States as well. The meaning of the word "bill" in this clause is "law." The vicious character of such legislation consists in the fact, that it *enacts* guilt by statute, instead of establishing it by judicial proceedings and a recognized method of trial.[1] Before the adoption of the United States Constitution, bills of attainder could be validly enacted by a State legislature if there were no restrictions to prevent it in the State constitution.[2] A bill of *exemption* from liability is not a bill of attainder.[3] An Act of Congress which provided that no person should be admitted to the bar of the Supreme Court of the United States unless he took a specified oath, was declared to be within this principle.[4]

Many cases arose in New York, and other States after the Revolutionary War, under various acts of attainder passed in the States. The authorities cited show that bills of this kind directed against a class of persons are prohibited, as well as such as name individuals.

When the punishment is less than death, the statute is called a bill of pains and penalties. The prohibition equally applies whether the punishment be absolute or conditional.[5] The great object of the constitutional provision is to secure the citizen against deprivation of his rights for past conduct by legislative enactment under any form, however disguised.[6]

(2) No *ex post facto* law shall be passed. (*b*) The phrase *ex post facto* law, is borrowed from the common law, where, however, it has a different meaning from that which is attached to it in the United States Constitution. Its true sense is to be sought in the decisions of the courts in interpreting the Constitution.

[1] A striking instance of this is found in the statutes of Henry VIII. The cook of the Bishop of Rochester having mingled poison with the food prepared by him for the bishop's guests, Parliament passed a law without any judicial proceedings, — that the cook be boiled to death.

[2] Cooper *v.* Telfair, 4 Dall. 14; Hylton *v.* Brown, 1 Wash. 298, 307; De Lancey *v.* McKeen, Id. 354.

[3] Drehman *v.* Stifle, 8 Wall. 595.

[4] *Ex parte* Garland, 4 Wall. 333. See also Murphy, etc. Oath Cases, 41 Mo. 339, 388; Cummings *v.* The State of Missouri, 4 Wall. 277.

[5] Cummings *v.* The State of Missouri, *supra.*

[6] Cummings *v.* The State of Missouri, *supra.*

(*a*) Constitution of the United States, Art. I. § 9, cl. 3.

(*b*) Id.

A distinction must be taken between a law which is simply retrospective and one which is *ex post facto*. The word "retrospective" standing by itself is a broad term including all laws which act upon a past transaction, and therefore includes both civil and criminal cases. The phrase *ex post facto* is confined to such laws as act backward *upon a crime*, and operate in any way to the disadvantage of the accused. Other laws not having this element of "disadvantage" might be retrospective, but they would not be *ex post facto*.

The modes in which a law may be *ex post facto* are various. An attempt was made in an early case to classify them. According to this classification, which is useful though not exhaustive, the expression includes: (1) Every law that makes an act done before the passing of the law, which was innocent when done, criminal, and punishes such act; (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 offence in order to convict the offender.[1] These enumerations should be regarded only as instances. The broad and comprehensive principle is, that every change, be it in the substantive law or in procedure, which alters the situation of the accused to his disadvantage, is *ex post facto* and void by the rule of the Constitution.[2](*a*) The question whether the change in the law is or is not to the prisoner's disadvantage, is a question for the court. A change in the law which simply enlarges the class of persons who may be competent to testify in criminal cases does not fall within the principle.[3] Such an enlargement is but a variation in a mode of procedure, resting from time to time upon varying legislative views of public policy, and is something in which the accused has no vested right.

In accordance with this principle, it has been decided that a legislature cannot change retrospectively *the kind of punishment*, as, for example, to substitute hard labor for hanging, or *vice versa*.[4]

[1] Calder *v.* Bull, 3 Dall. 386, 390.

[2] Kring *v.* Missouri, 107 U. S. 221. This decision was made by a narrow majority of the judges. It, however, seems to be thoroughly sound and conservative. See also Hopt *v.* Utah, 110 U. S. 574, 588, 590.

[3] Hopt *v.* Utah, *supra*, p. 590. See also Gut *v.* State, 9 Wall. 35.

[4] Hartung *v.* The People, 22 N. Y. 95; Fletcher *v.* Peck, 6 Cranch, 87, 138.

(*a*) Medley, Petitioner, 134 U. S. 160.

If the law plainly reduce or remit a part of the punishment, it is not unconstitutional. This is plainly implied in the general statement that the change must operate to the prisoner's disadvantage. It has also been so held in a number of cases.[1]

It is not *ex post facto* to pass a law which requires the past history of a criminal to be taken into consideration in prescribing punishment, even though that history disclose a prior conviction for a criminal offence. The object of such a law is to have the fact brought to the attention of the court, that the prisoner is a persistent criminal towards whom mercy is misplaced, and that punishment has done him no good.[2] It has been held that a statute providing for a correction of an erroneous judgment in a criminal action is not *ex post facto*.[3]

If a law act improperly upon past offences, and at the same time provide a rule for the future, it may be void so far as it is *ex post facto*, and valid in its other applications.[4] A statute providing retrospectively for the seizing and destruction of liquors, being a *civil* proceeding, would not be *ex post facto*. The matter must be *criminal*, in order that the question may arise.[5] Every law which can be enacted by any authority in this country, whether it be by Congress, State or territorial legislature, or be found in a State constitution, will be void if *ex post facto* and may be so decided as to each instance by the Supreme Court of the United States.[6]

In accordance with these general principles, it has been held by the Supreme Court of the United States that a State statute making solitary confinement applicable to a prior criminal offence, and making the time uncertain (within a range of four weeks) as to when the sentence of death should be carried out, is unconstitutional and void.[7]

II. — (1) Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. (*a*)

It will be observed that this clause is limited by express terms to the action of *Congress*. There is nothing in the *United States Constitution* to prevent the establishment of religion by a State.

[1] Haire *v.* State of Nebraska, 16 Neb. 601; McInturf *v.* State, 20 Tex. App. 335; Garvey's Case, 7 Col. 384; State *v.* Kent, 65 N. C. 311.

[2] The People *v.* Raymond, 96 N. Y. 38.

[3] *Ex parte* Bethurum, 66 Mo. 545.

[4] Jaehne *v.* The People, 128 U. S. 189.

[5] McLean *v.* Bann, 70 Iowa, 752.

[6] As to Congress, see Constitution of the United States, Art. I. § 9, cl. 3. As to the States, Art. I. § 10, cl. 1. The nature of an *ex post facto* law is well stated in the case of Lindzey *v.* State, 65 Miss. 542.

[7] Medley, Petitioner, 134 U. S. 160.

(*a*) Art. I. of Amendments.

It was thought best by the people of the United States to leave the whole subject of religious liberty to the action of the respective States.[1]

The constitutions of the respective States so far as they refer to religion are framed in a spirit of liberality so as not to offend liberty of conscience or of worship.[2] In the constitution of New Hampshire (1792, as amended), it was required that certain officers as well as members of the legislature should "be of the *Protestant religion*."[3] In practice this test has never been applied, and the constitutional provision has been a dead letter.[4] Some of the State constitutions require that no person shall be compelled to pay tithes or taxes for supporting ministers or sustaining churches.[5]

The clause in the United States Constitution concerning religious liberty cannot be invoked by the people of a Territory to justify on the pretence of religion, immoral overt acts, contrary to the laws of Congress; as for example, plural marriages.[6] (*b*) Congress has full and complete power over the territories (subject to restrictions of the Constitution upon its legislation) and may either legislate for them directly, or declare an act of a territorial legislature void, or validate a void statute enacted by such legislature.[7]

(2) Congress shall make no law abridging the freedom of speech or of the press. (*c*)

The object of this clause, as it imports in its very phraseology, was to secure *freedom* of speech and of the press. This expression can only be fairly held to mean freedom to do a lawful act. It cannot be extended to immoral publications, as, for example,

[1] Permoli *v.* First Municipality, 3 How. U. S. 589, 609. The new States admitted since the adoption of the United States Constitution stand on the same footing as the original thirteen States. Id.

[2] Constitution of New York, Art. I. § 3, Constitution of N. J., Art. I. § 3, Conatitution of Ohio, Art. I. § 7, and other States.

[3] This expression was construed in the case of Hale *v.* Everett, 53 N. H. 9. The dissenting opinion of DOE, J., on p. 133 *et seq.*, is remarkable for its historical information.

[4] Remarke of a majority of the court, 53 N. H. p. 130.

[5] Constitution of Iowa, Bill of Rights, Art. 1, § 3, considered in Moore *v.* Monroe, 64 Ia. 367, 368. See also construction of Constitution of Ohio as to religious instruction in schools. (*a*) Board of Education *v.* Minor, 23 Ohio St. 211.

[6] Reynolds *v.* United States, 98 U. S. 145.

[7] National Bank *v.* County of Yankton, 101 U. S. 129.

(*a*) See Constitution of Wisconsin, Art. X. § 3. Also Art. I. § 18. These sections were construed in State *v.* District School Board of Edgerton, 76 Wis. 177. s. c. 29 Am. Law Reg. N. S. 286, where there is a note upon the subject of religious instruction in public schools, citing all the authorities.

(*b*) Davis *v.* Beason, 133 U. S. 333.

(*c*) Art. I. of Amendments.

obscene publications. (*a*) It has been held that the test of obscenity is, whether the tendency of the matter is to defame and corrupt the morals of those whose minds are open to such influences, and into whose hands the publications might fall. A law prohibiting the deposit of such letters in the mail is constitutional.[1] (*b*)

A letter vulgar, libellous, and imputing an atrocious crime is not necessarily obscene.[2]

(3) and (4) These provisions scarcely need comment.[3] The right to petition does not include such petitions as are in their nature malicious and designed to cause injury.[4] The clause concerning quartering soldiers in time of peace upon private citizens is not likely to be a practical subject under our system, though under an arbitrary government it might be made a means of intolerable oppression. It was inserted in the Constitution in its present form as borrowed from the "Petition of Right" adopted by the English Parliament in the time of Charles I.

(5) A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. (*d*)

This clause is drawn with considerable care, as it purports to *give the reason* for the reserved right of the people to keep and bear arms. It is, that there may be a well-regulated militia for the purpose of public security. The clause lends no sanction to

[1] United States *v.* Bennett, 16 Blatch. 338, construing U. S. Rev. St. § 3893, as amended by act of July 12, 1876. The true construction of this act has been the subject of great judicial controversy. A sealed letter is said to be within the statute in United States *v.* Gaylord, 17 Fed. R. 438; United States *v.* Hanover, Id. 444; United States *v.* Britton, Id. 731; United States *v.* Morris, 18 Fed. R. 900; and United States *v.* Thomas, 27 Fed. R. 682. An opposite view is maintained in United States *v.* Loftis, 8 Sawy. C. Ct. 194; and in United States *v.* Comerford, 25 Fed. R. 902.

[2] United States *v.* Wightman, 29 Fed. R. 636. (*c*)

[3] See *ante*, p. 51 3 and 4).

[4] Vanarsdale *v.* Laverty, 69 Pa. St. 103. The common-law right to hold public meetings and the condition under which it may be exercised is elaborately considered in an article in the Contemporary Review, March, 1889, by A. V. Dicey, Esq.

(*a*) Nor does it justify libel or slander or acts which affect the standing, reputation, or pecuniary interests of individuals. Cooley, Constitutional Limitations (6th ed.), p. 518.

(*b*) Harman *v.* United States, 50 Fed. R. 921.

(*c*) The question whether a sealed letter is within the statute, U. S. Rev. St. § 3893, as amended by the act of July 12, 1876, has been set at rest by another amendment (U.S. Statutes 1887–8, p. 496, ch. 1039, approved Sept. 26, 1888). This amendment adds the word "letter" to the former law, and it has been construed to forbid the transmission through the mails of private sealed letters of an obscene character. United States *v.* Martin, 50 Fed. R. 918; *In re* Wahll, 42 Fed. R. 822. It is interesting to note that after the passage of this amendment the United States Supreme Court, in a case arising prior to its passage, held that a private sealed letter was not within the original statute. United States *v.* Chase, 135 U. S. 255.

(*d*) Art. II. of Amendments.

the view that concealed arms may be worn, whether for the alleged purpose of self-defence or not. The act of carrying concealed weapons may lawfully be prohibited.[1]

III. — (1) The privilege of the writ of *habeas corpus* shall not be suspended (except in some specially enumerated cases).

When this privilege is suspended, there is no available method of determining before a court or judge whether an arrest is lawful. No regular action can be brought by the prisoner against the person holding him in custody. There was at one time such a writ to "replevy a man" — *de homine replegiando* — but this method is now obsolete. A suspnsion of the privilege of the writ of *habeas corpus* practically suspends all remedies for relief on the part of prisoners.

It was wise to take away from the government the power to suspend the privilege of this writ except in extraordinary emergencies where the public safety requires it. It will be observed that the language of the Constitution applies to the suspension of the *privilege* of the writ, and not to the writ itself. The legal effect of this is that the writ issues as a matter of course, and then, upon the return by the custodian of the grounds of detention, the court decides whether the applicant should proceed farther.[2]

It is not fully settled whether the power to suspend belongs to the executive or legislative branch of the government. The better opinion is that it is legislative.[3] A law was passed by Congress during the late Civil War authorizing the President to suspend it.[4] The President made a proclamation to this effect Sept. 15, 1863.[5] The Act of Congress applied to the case of a person detained by the military authorities as a volunteer in the service of the United States,[6] but not to one illegally enlisted, not charged with any offence against the government.[7]

(2) No warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (*a*)

[1] Haile *v.* The State, 38 Ark. 564; State *v.* Wilforth, 74 Mo. 528. The general subject is discussed in Andrews *v.* State, 3 Heisk. (Tenn.) 165; English *v.* State, 35 Tex. 473; State *v.* Newsom, 5 Ired. (N. C.) Law, 250.

[2] *Ex parte* Milligan, 4 Wall. 3.

[3] See authorities collected in 2 Abb. Nat. Dig. p. 649, note; also Warren *v.* Paul, 22 Ind. 276; *In re* Kemp, 16 Wis. 359.

[4] Act of 1863, 12 Stat. at Large, 755.

[5] This suspension was declared valid in the Matter of Dann, 25 How. Pr. 467. Other authorities bearing on this general subject are *Ex parte* Field, 5 Blatch. 63; McCall *v.* McDowell, 1 Abb. U. S. 212; *Re* Fagan, 2 Sprague, 91; Griffin *v.* Wilcox, 21 Ind. 370; *Ex parte* Collier, 6 Ohio St. 65.

[6] *Re* Oliver, 17 Wis. 681.

[7] People *v.* Gail, 44 Barb. 98.

(*a*) Art. IV. of Amendments.

The "probable cause" referred to in this provision must be submitted to the committing magistrate on the oath of the real accuser, and not on that of one who obtains information from him.[1] Facts must be stated in the affidavits and not mere conclusions of law.[2] It is not the policy of the United States Constitution to prohibit search-warrants, but to regulate their use.[3]

(3) and (4) The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed. (*a*)

This clause of the Constitution should be taken in connection with the Sixth Amendment: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

The meaning of the term "jury," as here used, must be ascertained in the common law. A trial jury, when the Constitution was adopted, consisted of twelve men, who could only bring in a verdict either favorable or unfavorable to the accused, when unanimous.

The jury originally consisted of witnesses to the alleged criminal act, and were of course drawn from the vicinity of the scene of the crime. This requirement of witnesses after a time disappeared, though it still remained true that the jury must be taken from the vicinage. This in the end resolved itself into a county. The Constitution proceeds upon this principle not only in the requirement of a jury, but also in the direction that they must come from the State or district. The trial must take place in the State, and the jury must come from the State, etc.

These provisions are *solely* applicable to trials in the Federal courts.[4] It for a long time remained a question whether these rules extended to the District of Columbia, it being contended by some that the constitutional requirement is solely applicable to the States, except where the crime is committed at sea. This narrow interpretation has been recently discarded by the Supreme Court. The District of Columbia, and, by parity of reasoning, other districts not within the exclusive jurisdiction of the States,

[1] In the Matter of a Rule of Court, 3 Woods, C. Ct. 502.

[2] *Re* Coleman, 15 Blatch. 406.

[3] Collins *v.* Lean, 68 Cal. 284.

[4] Nashville, &c. Railway *v.* Alabama, 128 U. S. 96, 101.

(*a*) Art. III. § 2, cl. 3, Constitution.

are governed by the constitutional provision.[1] It is further established that the word "crime," as used in the Constitution, not only includes offences of a high grade, or felonies, but also some minor offences of the rank of misdemeanors.[2]

In complying with these provisions, it is not sufficient to show that the accused is accorded *in some stage of the prosecution* the right of trial by jury. This right should, as a rule, be accorded in the trial court from the first moment, and not for the first time on an appeal; otherwise, though innocent, he might be deprived of his liberty, during the pendency of an appeal.[3]

There are some petty offences which it has been the practice for centuries for magistrates to dispose of without juries. It is to be presumed that the constitutional provision was not made for the purpose of embracing these, but rather that these were to be left in the same condition as at common law.[4]

(5) Regulations as to the methods, progress, and results of a criminal trial.

1. "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," etc.

This clause, for the purpose of *initiating* a criminal trial, divides crimes into two classes, infamous and non-infamous. In the case of infamous crimes, there must be an indictment by a grand jury, but where the crime is not infamous, there is no constitutional direction. The method may be established by law.

An infamous crime is characterized by the punishment which attends conviction. If the punishment be imprisonment in a State prison or penitentiary, with or without hard labor, the crime is infamous, and it can only be tried in case there be an indictment by a grand jury.[5]

By the term "grand jury" is meant a body of men selected by law, consisting of one less than two full juries (viz., twenty-three), whose function it is to inquire in advance of the trial of one accused of crime, whether there is sufficient apparent reason why he should be brought to trial. It is a legal device interposed between the prosecutor and the accused, with a view of shielding a prisoner from the annoyance and injury of an unfounded accusation. Twelve of the number, at least, must concur in the

[1] Callan *v.* Wilson, 127 U. S. 540, 550. As to the Territories, see Reynolds *v.* United States, 98 U. S. 145, 154.

[2] Callan *v.* Wilson, *supra*, p. 549.

[3] Id.

[4] Byers *v.* Commonwealth, 42 Pa. St. 89, 94; State *v.* Glenn, 54 Md. 572, 600, 605; Duffy *v.* The People, 6 Hill, 75; Callan *v.* Wilson, 127 U. S. 540; opinion of HARLAN, J., pp. 552, 553.

[5] Mackin *v.* The United States, 117 U. S. 348; United States *v.* De Walt, 128 U. S. 393.

indictment. The indictment is peculiar to criminal prosecutions. If the grand jury "find the indictment," it contains the charge which the accused is required to answer in accordance with legal requirements and forms. After answering (pleading) that he is not guilty, he is put upon his trial before an ordinary jury consisting of twelve men. This clause denies to the court at the trial the power to strike words out of the indictment as superfluous, without submitting the case anew to the grand jury.[1]

This system is derived by inference from the provision of Magna Charta, already cited. If the crime is not "infamous," in the sense already explained, the prosecuting officer may file a statement of the offence charged without the aid of a grand jury, in which he lays before the court the facts relevant to the alleged offence. This statement, drawn up in legal form, is termed an "information."

2. Proceedings in *all* criminal prosecutions.

a. The accused shall enjoy the right to be "confronted" with the witnesses against him.

The meaning of the word "confronted" is that the witness is to testify in the presence of the accused. The value of confrontation is that it not only enables the honest witness to correct a mistake as to the identity of an accused, but also tends to deter a dishonest one from giving false testimony. Under the constitutional rule, the accused cannot be made subject to testimony taken out of court, as, for example, under a commission in another State. The same word, or its equivalents, is found in the State constitutions to regulate the action of State courts.[2] "Dying declarations," where otherwise admissible, are not excluded by this rule.[3]

b. The right to compulsory process for obtaining witnesses in his favor.

Compulsory process for this purpose has for a long time existed in the law. The object of this provision is but to *secure* an existing right. The regular course is to summon the witness by a writ, called a "subpœna" from the fact that a *penalty is imposed* for non-observance of its requirements. If it be disobeyed, the

[1] *Ex parte* Bain, 121 U. S. 1.

[2] Constitutions: of Connecticut, Art. I. § 9; Georgia, Art. I. § 1, par. 5; Iowa, Art. 1, § 10, etc. In some of the constitutions the expression "face to face" is substituted, as in Illinois, Art. II. § 9; Delaware, Art. I. § 7; Indiana, Art. I. § 13; Kansas, Bill of Rights, § 10; Florida, Declaration of Rights, § 11. Under the word "confronted" might be presented the case where on a second trial the testimony of a witness taken on the first trial but who has since died is sought to be introduced. People *v.* Penhollow, 42 Hun, 103. And if the witnesses were absent from the second trial by the procurement of the prisoner, their previous testimony would be admitted. Reynolds *v.* United States, 98 U. S. 145.

[3] Green *v.* The State, 66 Ala. 40.

witness may be brought before the court by a process, termed an attachment, to show cause why he shall not be deemed guilty of a contempt of court, and if the facts warrant it, he may be fined for contempt as well as compelled to testify.

c. He may have the assistance of counsel for his defence.

This right was now for the first time secured by any national government, though it appears at an earlier day in some of the State constitutions.[1] Counsel were not at that time allowed in criminal cases in England, except in charges of high treason, and in trials for the inferior grade of crimes, termed misdemeanors. In charges of felonies, punishable with death, counsel were not allowed. This was so until Sidney Smith, with his brilliant sarcasm and invective and telling argument, shamed Parliament into the enactment of a law allowing counsel in the case of trials for felony.[2] The statutes allowing counsel are referred to in the note.[3] It is greatly to the credit of the framers of the New York constitution of 1777, that they were the first among English-speaking people to make the right of one accused of a felonious crime secure by constitutional provision, in opposition to the current of contemporary professional opinion in England. The words are very sweeping: "In every indictment for crimes or misdemeanors the party indicted shall be allowed counsel, as in civil actions."[4] A refusal by a court to grant delay to enable counsel to make preparation may be equivalent to a denial of the right to have counsel.[5]

d. No person shall be compelled to be a witness against himself.

This principle is settled in the common law. The sole object of asserting it in the Constitution is to make it secure and free from disturbing legislation. It has been held by the Supreme Judicial Court of Massachusetts that a prisoner is not compellable to disclose the circumstances of an alleged criminal offence, on an investigation by either house of the legislature.[6]

3. No person shall be subject for the same offence to be twice put in jeopardy of life or limb.[7]

Among the defences that may be made by the prisoner to the charges made against him, this one is singled out for constitutional protection. It is called the defence of prior jeopardy.

[1] In the Constitution of Massachusetts of 1780, Part I. Art. XII.; and in that of New York of 1777, Art. XXXIV. It does not appear in that of North Carolina of 1776.

[2] Edinburgh Review, 1826; Sidney Smith's Works (4th ed., London) Vol. iii. p. 1.

[3] 6 & 7 Wm. IV. c. 114, A. D. 1836–7, 11 & 12 Vict. c. 43, § 12; 15 & 16 Id. c. 54, § 10.

[4] N. Y. Constitution of 1777, Art. XXXIV.

[5] State *v.* Simpson, 38 La. Ann. 23.

[6] Emery's Case, 107 Mass. 172.

[7] Art. V. of Amendments.

The elements to be considered are twofold. One, that the accused has been already once in "jeopardy," and the other, that he is now being placed in jeopardy for a second time for the *same* offence. The word "jeopardy," in this connection, has a legal, not its popular, meaning. Its signification is, danger to life or limb through the outcome of a judicial proceeding against him. This danger can only culminate in actual injury through a conviction for crime and a corresponding sentence and its execution. But it may happen that the proceedings may be stopped in their initial stages, either by the prosecuting officer acting for the government, or by the order of the judge. It then becomes a momentous and difficult question, when the jeopardy referred to exists; whether, for example, at the beginning or at the close of the proceedings in court, or at some intermediate stage. As to this there is great diversity of views among the courts. A number of the State constitutions have substantially the same clause, and the State courts have been required to interpret it, as well as those of the United States.

To gain a correct interpretation, it is necessary to note that there is a great rule of the common law, that if a person has been tried on a criminal charge and either convicted or acquitted, he cannot be tried a second time. The former decision is declared to be a *bar* to any future proceeding, if the accused bring the result properly forward as a defence. The plea of conviction is called *auterfois convict*, and that of acquittal, *auterfois acquit*. This great rule of justice is found in the Roman law,[1] and pervades all systems of civilized jurisprudence. It only prevails in the common law in case of a lawful conviction or acquittal, so that if the first trial end before either of those stages is reached, the proceeding is no bar to a second trial and conviction.

Suppose then that while a trial is going on, the judge for some reason which he deems sufficient, discharge the jury, will there be a bar to a second trial? The correct answer is, that there will not be. There has been neither acquittal nor conviction. It is a case of an incomplete or abortive trial, and the prisoner may be tried again.

This question underwent the most thorough examination in England in some recent cases, both as to cases of misdemeanor and of felonies, the matter of misdemeanors being first disposed of.[2] The more difficult case was that of a trial for felony; in fact, a capital case, the trial being for murder. After the trial was closed, the jury failed to agree, and the judge, being notified

[1] The form of the rule in the Roman law is, *non bis in idem.*

[2] Regina *v.* Charlesworth, 1 B. & S. 460, s. c. 9 Cox, C. C. 44.

of their disagreement, under the special circumstances of the case directed them to be discharged. The accused being subjected to a second trial, the court decided that the former proceeding could not be urged as a bar to the second, since there had been neither a conviction nor an acquittal. It was further decided that the judge had a discretion to discharge the jury where the facts seemed to him to warrant it, and that the exercise of this discretion could not be reviewed on an appeal from his decision.[1] The court, after an exhaustive discussion, declared that there was no decision in modern times to the contrary, except one in Ireland,[2] by a majority of the court. The dissenting judge, Crampton, rendered an opinion "remarkable for sound reasoning and deep research," by which the court held that the proposition at issue was clearly established.[3] The case of Winsor *v.* The Queen dispelled many errors concerning the power of courts over juries, among others a venerable one, that if the "jurors do not agree, the judges may carry them round the circuit from town to town in a cart." It was declared that this *dictum* of a number of text-books rests on no foundation of judicial decision or actual practice.[4]

Long before this time the Supreme Court of the United States had reached a similar view under the lead of Justice Story.[5] (*a*) It was decided that the discharge of a jury from giving a verdict in a capital case without the consent of the prisoner, the *jury being unable to agree*, is not a bar to a subsequent trial for the same offence. In connection with this ruling, it was held that the trial court is invested with a *discretionary* authority of discharging the jury from giving any verdict in cases of this nature, whenever in their opinion there is a manifest necessity for such an act, or the ends of public justice would otherwise be defeated.[6]

The prevailing opinion of the State courts is to the same general effect. Reference may be made to decisions in Massachusetts,

[1] Winsor *v.* The Queen, in error, L. R. 1 Q. B. 289; on appeal, Id. 390; see O'Brian *v.* Com., 6 Bush (Ky.), 563.

[2] Conway *v.* Lynch, 7 Ir. L. R. 149.

[3] See Winsor *v.* The Queen, L. R. 1 Q. B. at p. 393. The dissenting opinion of CRAMPTON, J., in the Irish Court which produced so great an effect upon the English Bench, is printed in full in a note to the case of Queen *v.* Charlesworth, reported in 31 L. J. Magistrates Cases, pp. 25–54. The opinion commences at the foot of page 48. It is uncommonly lucid and instructive, and well worthy of the attention of the student.

[4] Winsor *v.* The Queen, L. R. 1 Q. B. p. 326.

[5] United States *v.* Perez, 9 Wheat. 579.

[6] Similar results were reached in the Circuit Courts of the United States. See United States *v.* Haskell, 4 Wash. C. Ct. 402; United States *v.* Gibert, 2 Sum. C. Ct. 19; United States *v.* Coolidge, 2 Gall. C. Ct. 364; United States *v.* Shoemaker, 2 McLean, C. Ct. 114; Kelly *v.* United States, 27 Fed. R. 616.

(*a*) See also Simmons *v.* United States, 142 U. S. 148.

Maryland, New York, Ohio, and in other States named in the note.[1] The courts that take an opposing view proceed upon the general ground that when the trial commences and the jury is "charged" to hearken to the evidence and to inquire whether the prisoner be guilty or not guilty, he is put in jeopardy. This is an entirely different principle from the theory of the English and our own Federal courts, which makes the conviction or acquittal *after the trial is ended*, the test of jeopardy. Decisions proceeding upon this view will be found in the note.[2] But the courts maintaining this doctrine admit that if the jury be discharged under the pressure of *absolute necessity*, there is no jeopardy. The difficulty in this second theory is, that the second trial court really *reviews* the conduct of the judge on the first trial, and inquires whether he exercised *his discretion* wisely. The discretion, however, is in its nature not reviewable by another tribunal. It is not the subject of appeal to a higher court.[3] Still more, it cannot be reviewed by a co-ordinate tribunal, such as a later trial court. If it be objected that the discretion is on this theory liable to abuse, the answer is, that the security which the public have for the faithful, sound, and conscientious exercise of this discretion, is the responsibility of the judges under their oaths of office.[4] This responsibility, as a rule, is a sufficient security.

Where the first trial is ineffective for any substantial reason, of an intrinsic nature, the prisoner has not been in jeopardy and may be tried again. This general rule is sanctioned by all the authorities. The following instances may be referred to: —

Cases where the court has no jurisdiction over the subject-matter of the trial;[5] (*a*) where the law under which the prisoner was arraigned and tried is unconstitutional and void, in which case there is no offence; where the judgment has been arrested by the court for inherent defects;[6] where there has been a waiver of the protection of the rule by an act of the prisoner, an in-

[1] People *v.* Goodwin, 18 Johns. 187; Com. *v.* Bowden, 9 Mass. 494; Hoffman *v.* State, 20 Md. 425; Stone *v.* The People, 2 Scammon (Ill.), 326; Dobbins *v.* State, 14 Ohio St. 493; Potter *v.* State, 42 Ark. 29; State *v.* Pool, 4 Lea (Tenn.), 363; State *v.* Honeycutt, 74 N. C. 391; Potter *v.* State, 42 Ark. 29; State *v.* Copeland, 65 Mo. 497.

[2] Com. *v.* Cook, 6 Serg. & R. 577; McFadden *v.* Com., 11 Harris (Pa.), 12; Williams *v.* Com., 2 Grattan (Va.), 568; State *v.* Waterhouse, M. & Y. (Tenn.) 278; Ned *v.* State, 7 Porter (Ala.), 188; *ex parte* Clements, 50 Ala. 459; Ah King *v.* People, 5 Hun, 297; State *v.* Moon, 41 Wis. 684.

[3] Winsor *v.* The Queen, L. R. 1 Q. B. 390.

[4] United States *v.* Perez, 9 Wheat. 579, 580.

[5] Montross *v.* The State, 61 Miss. 429; Thompson *v.* State, 6 Neb. 102.

[6] The State *v.* Clark, 69 Iowa, 196; State *v.* Sherburne, 58 N. H. 535; The People *v.* Casborus, 13 Johns. 351; Phillips *v.* People, 88 Ill. 160; State *v.* Owen, 78 Mo. 367.

(*a*) Blyew *v.* Commonwealth, 12 Ky. Law Rep. 742.

stance being a motion for a new trial, or an appeal accompanied by a reversal;[1] (*a*) where the indictment in the first proceeding is so defective that no valid judgment can be entered;[2] acquittal on a variance between the words in the indictment descriptive of the offence, and the evidence;[3] (*b*) where the first conviction or acquittal was obtained by fraud.[4] (*c*)

It is conceded by all that the constitutional rule does not apply where the jury is discharged on the following grounds: sickness of a juror,[5] or the expiration of the term of the court;[6] sickness of the judge, and adjournment of the court; absconding of the prisoner during the trial;[7] so where the judge stopped the trial for good cause.[8] Also where the trial was not finished when the term of the court closed.[9]

A rule of law gives the public prosecutor the power to ask the court to discontinue the proceedings on account of his unwillingness to continue the prosecution. This is technically called a *nolle prosequi*. A question has been raised in a number of cases whether such a proceeding is not a bar to a future indictment. The better opinion is, that it is not, there being neither conviction nor acquittal. It is a discretionary order of the court.[10]

A criminal proceeding against one accused of crime may be in some instances discontinued before reaching the trial stage; as, for example, on a preliminary inquiry before a magistrate, or on an indictment presented to a grand jury to be found by them. A dismissal of the charges in such cases is not deemed to be a case of jeopardy.[11] This rule can be derived from the general consent of the authorities that there can be no "jeopardy" until the trial jury is sworn and "charged" by the judge in the manner already described. Still, if a prisoner be *tried* before a magistrate and convicted, the conviction is a bar to proceedings in other courts.[12]

[1] People *v.* Palmer, 109 N. Y. 413; State *v.* Hart, 33 Kan. 218; People *v.* Schmidt, 64 Cal. 260.

[2] Robinson *v.* The State, 52 Ala. 587; People *v.* Clark, 67 Cal. 99.

[3] Burress *v.* Commonwealth, 27 Gratt. 934.

[4] Halloran *v.* The State, 80 Ind. 586; State *v.* Swepson, 79 N. C. 632; State *v.* Simpson, 28 Minn. 66.

[5] Mixon *v.* The State, 55 Ala.129; Doles *v.* The State, 97 Ind. 555.

[6] State *v.* Jeffors, 64 Mo. 376.

[7] The People *v.* Higgins, 59 Cal. 357.

[8] Com. *v.* McCormick, 130 Mass. 61.

[9] *In re* Scrafford, 21 Kan. 735.

[10] State *v.* Champeau, 52 Vt. 313; Patterson *v.* The State, 70 Ind. 341. But see Jones *v.* State, 55 Ga. 625.

[11] Commonwealth *v.* Hamilton, 129 Mass. 479 (case of magistrate); State *v.* Jones, 16 Kan. 608; State *v.* Whipple, 57 Vt. 637 (case of grand jury). *Ex parte* Clarke, 54 Cal. 412.

[12] Wemyss *v.* Hopkins, L. R. 10 Q. B. 378. The principle is that a man cannot be *tried* or *punished* twice for the same cause, pp. 381, 382.

(*a*) People *v.* Murray, 89 Mich. 276.

(*b*) See N.Y. Code of Crim. Pro. §§ 340, 341; Canter *v.* People, 1 Abb. Ct. App. Dec. 305; People *v.* Meakim, 61 Hun, 327.

(*c*) Shideler *v.* State, 129 Ind. 523.

The second element in "jeopardy" is now reached. This is, that the offence asserted by the second action must be identical with that in which the prisoner has been in jeopardy in the first.[1] If the two offences be distinct in their nature, there is no bar. This proposition is maintained in all the cases. Thus an acquittal upon an indictment for stealing goods is no bar to another indictment for stealing goods of a like description, unless the goods in each case be the very same.[2] When there is any doubt as to the identity of the offences the defendant is bound to show that they are identical.[3] If the two indictments are so diverse as to make it impossible to use the same evidence to sustain both, there is no case of second jeopardy.[4] However, a trial for *stealing* goods, followed by a conviction, is a bar to another action for *receiving* the same goods after they are stolen, since the two causes of action are in substance identical.[5]

The same rule is established in England as to the plea of prior conviction or acquittal. If one be indicted as a principal in an alleged felony and acquitted, he may be tried as an accessory before the fact, the two offences being distinct.[6]

It may be added that if a prisoner be acquitted, a new trial cannot be granted by the court on appeal, for errors of the judge or jury at the trial; as, for example, because evidence was improperly received or rejected, or because the verdict of the jury was against evidence.[7] A loose practice had sprung up, allowing new trials to be granted in case of acquittal. A formal decision had been rendered to that effect.[8] This anomalous decision was overruled in the case of Regina *v.* Duncan, and also by a decision in the Privy Council.[9] The old law as it had stood for centuries has, accordingly, been reinstated. This rule thus happily restored is recognized by decisions and uniform practice in this country.[10]

(6) General regulations. 1. No person shall be deprived of life, liberty, or property, without due process of law.

In quoting this expression, reference is now made solely to the words as they appear in the Fifth Amendment. These are intended

[1] Wemyss *v.* Hopkins, T. R. 10 Q. B. 378; State *v.* Wister, 62 Mo. 592.

[2] Com. *v.* Sutherland, 109 Mass. 342.

[3] Jenkins *v.* The State, 78 Ind. 133.

[4] Parchman *v.* The State, 2 Tex. App. 228.

[5] United States *v.* Harmison, 3 Sawy. C. Ct. 556.

[6] Rex *v.* Plant, 7 C. & P. 575. So an acquittal for breaking in and stealing certain goods does not bar a subsequent trial for breaking in with intent to steal the same goods. Rex *v.* Vandercom, 2 East, P. C. 519.

[7] Reg. *v.* Duncan, L. R. 7 Q. B. D. 198; s. c. 14 Cox C. C. 571.

[8] Reg. *v.* Scaife, 17 Q. B. D. 238; 18 Id. 773.

[9] Reg. *v.* Bertrand, L. R. 1 P. C. 520.

[10] See among other cases, State *v.* West, 71 N. C. 263, and People *v.* Comstock, 8 Wend. 549.

for no other purpose but to govern the action of the Federal government, the States being restrained in their action by like words in the *Fourteenth* Amendment.

The phrase "due process of law" is borrowed from English sources. Lord Coke [1] makes use of it as a gloss or interpretation put upon the famous words in the Great Charter already referred to, "the judgment of his peers and the *law of the land.*" The phrase is indefinite, as it is not stated what "*due* process of law" is. It is, however, elastic, and as questions from time to time arise, it is the proper function of the Supreme Court of the United States to decide whether they are included.

This Amendment is a restraint on the legislative as well as on the executive and judicial powers of the government.[2] It cannot properly be so construed as to leave Congress free to make any process "due process of law" by its mere will. There are two modes of proceeding in interpreting the clause. One is to see whether the "process" before the court is in conflict with a constitutional provision. If not found to be so, the court looks to the settled usages and modes of proceeding existing in England before the settlement of this country, found not to be unsuited to the civil and political condition of our ancestors in this country. This would be made to appear by their having been acted upon during the colonial period.[3]

In general, "due process of law" implies and includes a plaintiff (*actor*), a defendant (*reus*), a judge (*judex*), regular allegations, opportunity to answer, and a trial according to a settled course of judicial proceedings.[4] In special cases, by long usage these elements may not have been present. The Constitution acts upon the existing state of things, and leaves the special remedies untouched, even though they may be summary in their nature.[5]

In such rulings as these, the court does not hold that there is any "common law" extending over the entire Union. The Union has no common law.[6] Reference, however, may be made to the common law in interpreting words and phrases used in the Constitution, that system of law being familiar to the people when

[1] 2 Inst. 50.

[2] Murray's Lessee *v.* Hob. Land & Imp. Co., 18 How. (U. S.) 272, 276, per CURTIS, J.; Stuart *v.* Palmer, 74 N. Y. 183. This case construed a like provision in the State constitution.

[3] Murray's Lessee *v.* Hob. Land & Imp. Co., 18 How. (U. S.) 272.

[4] Murray's Lessee *v.* Hob. Land & Imp. Co., Id. 280.

[5] Murray's Lessee *v.* Hob. Land & Imp. Co., *supra*. These principles were applied in this case to a special method of enforcing the duty of a collector of customs to account to the United States for money received, though there was no regular method of trial resorted to. The entire opinion is highly instructive.

[6] Wheaton *v.* Peters, 8 Pet. 591; Kendall *v.* United States, 12 Pet. 524, at p. 621; Lorman *v.* Clark, 2 McLean, 568.

the Constitution was adopted. It is apparent, from these considerations, that it is impracticable to state in a mere definition the precise scope of the expression, "due process of law." It would be wiser to leave each case, as it may arise, to be disposed of by the court upon the principles already indicated.[1] No exposition has received more acceptance than that of Daniel Webster in his argument in the Dartmouth College case. He said, by the phrase "law of the land" (the equivalent of "due process of law") is meant the general law, "which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."[2]

The phrase "due process of law," will be further considered hereafter in discussing the Fourteenth Amendment.

2. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (*a*)

This clause is taken *verbatim* from the words of the "Bill of Rights" passed by the English Parliament in the reign of William and Mary. They were inserted in that instrument to prevent abuses in the administration of justice existing during the reign of the Stuart dynasty. The judges were then removable at the king's pleasure, and were servile to him, and at times cruel and even merciless in the administration of justice. The framers of the Constitution lived but a few years distant from these judicial excesses. Their enormities were fresh in memory. The clauses were incorporated into the Constitution as a precaution, and not because there was any existing need of them. Few cases have arisen calling for construction of them.

While these words were inserted in the English Bill of Rights to prevent improper encroachments by the king or his instruments, the judges, they were not placed in the United States Constitution simply to restrain executive or judicial authority. They were also intended to operate upon Congress, and to prevent the enactment of oppressive laws, whereby the acts prohibited could be done. The clause assumes that these acts could be done by force of law, were it not for the prohibition.[3] It follows that Congress can neither directly nor indirectly sanction the imposition of excessive bail, excessive fines, or cruel and unusual punishments.[4]

[1] A collection of various expositions and definitions is to be found in Stuart *v.* Palmer, 74 N. Y. 183, 191, 192.

[2] Dartmouth College *v.* Woodward, 4 Wheat. 519, at p. 581.

[3] By the Court of Errors, in Barker *v.* The People, 3 Cow. 686, at p. 701.

[4] It was declared to be a "cruel and unusual" punishment to establish by municipal ordinance that the hair of every

(*a*) Art. VIII. of Amendments.

It is not a case of unusual punishments and excessive fines to impose cumulative punishments for distinct offences in the same prosecution.[1] Nor is it so, to pass a law inflicting greater punishment for an offence committed in one part of a State than in another. There may be good reason in the varying circumstances for such a distinction.[2] It was decided in one case, that imprisonment at hard labor for two years for obtaining three dollars by means of a fraudulent device was not a cruel or unusual punishment.[3] Congress has the power to impose forfeiture of citizenship as a punishment for crime.[4] It has been decided in Virginia and Maryland that a statute inflicting stripes in the discretion of the court as a punishment is not repugnant to the Constitution.[5] It would seem, however, that if such a punishment had become obsolete, the revival of it would be an *unusual* punishment in the sense of the Constitution.

While the Amendment under consideration applies solely to national action,[6] the substance of it is repeated in a number of the State constitutions. It has been held by the highest court in New York that the infliction of the punishment of death by electricity is not a cruel and unusual punishment. It was conceded to be unusual, but denied on the evidence submitted to the court to be cruel, as all reasonable doubt was removed that the application of electricity to the vital parts of the human body in the manner contemplated by the act must result in instantaneous and painless death.[7] Reference is made in a note to a case in a State court in which the subject of excessive fines is considered.[8]

More specific reference should be made to the word "bail" as used in this Amendment. The object of it is to secure the attendance of a person under charges at a trial, or obedience to a mandate of the court. A written instrument to that effect promising to be answerable to a specified amount is executed by the person of whom the bail is required with sureties, into whose custody he is assumed to be delivered. It is a matter of necessity that discretion should be reposed in magistrates or judges as to the amount of bail to be required. If it be excessive, an application may be made to have it reduced. It should not be fixed at a sum so large as purposely to prevent giving bail.[9] Judges or

male person under sentence for crime should be cut off to a uniform length of one inch from his scalp, the object of the law being to degrade and annoy Chinamen. Ho Ah Kow *v.* Nunan, 18 Am. Law Reg. N. S. 676.

[1] State *v.* O'Neil, 58 Vt. 140, 165.

[2] Matter of Bayard, 25 Hun, 546.

[3] State *v.* Williams, 12 Mo. App. 415.

[4] Huber *v.* Reily, 53 Pa. St. 112.

[5] Commonwealth *v.* Wyatt, 6 Rand. (Va.) 693; Foote *v.* State, 59 Md. 264.

[6] Pervear *v.* Commonwealth, 5 Wall. 475.

[7] People *v.* Kemmler, 119 N. Y. 580.

[8] Blydenburgh *v.* Miles, 39 Conn. 484.

[9] United States *v.* Lawrence, 4 Cranch, C. Ct. 518.

magistrates who wilfully require excessive bail are liable to indictment or impeachment.[1]

(7.) Trials in the Federal courts in civil actions. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. (*a*)

This clause is solely applicable to the Federal courts. The expression "common law" here means the common law proper. It does not include cases in equity, in which no jury has ever been resorted to. Nor does it include cases in admiralty unless a jury was in use when the Constitution was adopted. This clause by its very terms is merely conservative. Its object was to *preserve* trial by jury, and not to make innovations.[2] Although, as has been stated, the United States has no common law, many cases may come before its courts, in which common-law questions are involved. This fact can readily be seen by the suggestion that a citizen of one State may sue a citizen of another State in a Federal court on any cause of action whatever. The jurisdiction of the court is absolutely unlimited when such parties are before it. It must then be, that if the question between these litigants be one at common law, a jury must be called; if it be an equity case, there will be no jury. It ought to be added that Congress has power to adopt the common law as a body of laws for the use of a territory over which it has exclusive legislation, as for example, the District of Columbia. In that case this clause includes all the common-law litigation of the District. Federal jurisprudence is pervaded by the common law for the purposes of the construction and interpretation of the Constitution itself, and statutes, treaties, etc., made under it, as well as the application of the authority entrusted to the general government to cases as they may arise. This is shown by the following recent expression of the Supreme Court: "There is one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court in the application of the Constitution, and the laws and treaties made in

[1] Evans *v.* Foster, 1 N. H. 374.

[2] See Parsons *v.* Bedford, 3 Pet. 433, 446, 447.

(*a*) Art. VII. of Amendments.

pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority." [1]

Restrictions in the United States Constitution upon the action of the States.

Some of these restrictions are repetitions of those laid upon Congress, such as the prohibition against bills of attainder and *ex post facto* laws.[2] It will not now be necessary to consider these further. Those to which attention will now be given are found in the Fourteenth Amendment.

The Fourteenth Amendment was adopted to dispose of questions growing out of the Civil War, and principally for the protection of those who had recently been emancipated from slavery. Still its provisions, so far as they concern the present inquiry, are not confined to them, but applicable generally to persons within the jurisdiction of the United States. Presumptively, all persons inhabiting a State are subject to its laws, and entitled to their protection. Whoever claims that an inhabitant — *e. g.*, an Indian, because, for example, he is a member of a tribe — is exempted from the "equal protection of the laws," is bound to prove the exception.[3]

Reference will only be made to the first and fifth sections of the amendment. Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

There are in the first section, several important propositions. One broadly defines citizenship of the United States and of a State.(*a*) Another declares that the privileges and immunities of a citizen of the United States shall not be abridged by a State. The third is of still wider scope. It is not confined to citizens. It em-

[1] Smith *v.* Alabama, 124 U. S. 478, 479; citing Moore *v.* United States, 91 U. S. 270.

[2] Art. I. § 10, cl. 1, Constitution.

[3] State *v.* Ta-cha-na-tah, 64 N. C. 614.

(*a*) By U. S. Rev. St. § 1993 (1878), children born abroad of American citizens are declared to be citizens of the United States. See *post*, p. 126.

braces all persons, whether citizens or aliens, whether natural persons or corporations. The shield of the Constitution protects any one who is a "person" in the eye of the law, so that he shall not be deprived by a State, of life, liberty, or property, without due process of law, nor be denied the equal protection of the laws.

It is proposed now to consider two points: deprivation by a State of life or liberty without due process of law; and denial of the equal protection of the laws. Deprivation of *property* by a State will be considered at a later stage.

The expression "due process of law" in the Fourteenth Amendment would naturally bear substantially the same meaning as in the Fifth Amendment, though a far larger number of instances would arise under the former, owing to the great number of States, and the width and scope of State, as compared with Federal legislation. A great mass of decisions will accordingly accumulate around this restriction both in the State and Federal courts. The leading decisions construing this clause are subjoined.

(1) The expression "due process of law" does not in criminal cases make an indictment by a grand jury imperative. Even felonies may be presented, if the State law so provide, by information by the prosecuting officer, without an indictment.[1]

(2) The expression does not in any way interfere with the "police power" reserved to the States. Whatever power of this sort the States had before the adoption of the Fourteenth Amendment, they still retain. The "police power" includes a great variety of rules adopted from time to time by the States, regulating on public grounds trades and occupations, and the use and management of property. Regulations of this kind are peremptory, require no judicial proceedings, and may seriously interfere with liberty in the broadest sense and the enjoyment of property. It is the province of the court to determine as cases arise whether the State action is included in the police power and is accordingly lawful, or whether it is violative of the requirement of "due process of law" in the sense of the Constitution.

(3) Unless the "police power" in some way permit, it is unconstitutional for a State to prevent persons having the general power to contract, from entering into such contracts as they may see fit. Such a proceeding is an unwarrantable interference with the liberty to follow one's business. An example is a statute prohibiting workmen from receiving wages in goods (store orders) instead of money,[2] or a seller of goods from giving a "prize" to

[1] Hurtado *v.* California, 110 U. S. 516; Rowan *v.* State, 30 Wis. 129; State *v.* Boswell, 104 Ind. 541.

[2] Godcharles *v.* Wigeman, 113 Pa. St. 431.

a purchaser,[1] or the occupants of tenement houses from making cigars in their apartments.[2] (*a*)

(4) The phrase "due process of law" looks more to substance than to form. The great point secured is, that there must be an opportunity accorded to every person to have a judicial hearing according to the nature of the case, before he can be deprived of his fundamental rights to life, liberty, or property.[3] If this opportunity be afforded, it will not be unconstitutional to provide that a class of cases shall be made to precede all others, and be disposed of with the utmost dispatch consistent with a reasonable opportunity to be heard.[4]

(5) Under this Amendment, a State is not prohibited from having one set of rules in one part of its territory and another system in another part, provided that there is no encroachment in other respects upon constitutional restrictions. It is not necessary that the laws should be territorially uniform.[5] Thus the State, within the area of large cities, may have a larger number of peremptory challenges of jurymen in criminal cases than in the rest of its territory.[6]

(6) There may be special reasons of a public nature justifying special rules. Examples are methods of confining the insane,[7] and summary proceedings to punish taxpayers who wilfully refuse to pay taxes upon personal property.[8] (*b*).

(7) The constitutional rule that there must be "equal protection of the laws" extends to domestic private corporations as well as to private individuals. Such a corporation is a "person" within the Amendment.[9] (*c*) This principle cannot be applied to a foreign corporation, including one established in another State, since it is lawful in general to impose conditions on the right of such a

[1] People *v.* Gillson, 109 N. Y. 389.

[2] Matter of Jacobs, 98 N. Y. 98.

[3] This is discussed in Clark *v.* Mitchell, 64 Mo. 564. See also Portland *v.* Bangor, 65 Me. 120.

[4] Kennard *v.* Louisiana, 92 U. S. 480.

[5] Missouri *v.* Lewis, 101 U. S. 22.

[6] Hayes *v.* Missouri, 120 U. S. 68.

[7] Matter of Ross, 38 La. An. 523.

[8] McMahon *v.* Palmer, 102 N. Y. 176.

[9] Santa Clara County *v.* So. Pac. R. R. Co., 118 U. S. 394; Pembina Co. *v.* Pennsylvania, 125 U. S. 181.

(*a*) An act of the legislature prohibiting persons engaged in mining from issuing for the payment of labor any order or paper except such as is specified in the act is unconstitutional. State *v.* Goodwill, 33 W. Va. 179; see also State *v.* F. C. Coal & Coke Co., Id. 188. The following cases, though not decided under the Fourteenth Amendment, but under a like provision in State constitutions, may also be cited. Millett *v.* People, 117 Ill. 294; Commonwealth *v.* Perry, 155 Mass. 117. Cf. Hancock *v.* Yaden, 121 Ind. 366.

(*b*) Summary abatement of nuisances according to a prescribed statutory method likewise falls within the exception. Lawton *v.* Steele, 119 N. Y. 226. See also Village of Carthage *v.* Frederick, 122 N. Y. 268.

(*c*) Charlotte, etc. R. R. Co. *v.* Gibbes, 142 U. S. 386.

corporation to engage in business elsewhere,[1] except in cases where Congress has control, as, for example, in matters of foreign or of interstate commerce. It would not be legal to make it one of the conditions that the corporation, being sued in the State court, should not remove the cause, in the manner provided by law, into the United States court.[2]

The construction of the words "equal protection of the laws" has been considered in their application to colored persons. The whole Amendment was principally designed to protect this class of persons from unfriendly legislation, tending to cripple their rights and render them unavailing.[3] Congress has power to pass laws corrective of constitutional wrongs committed by *States*, but not to declare that certain acts committed by *individuals* shall be offences.[4] Still, if individuals should transgress a right secured to one or more of the colored race by the Constitution and the laws made under it, for example, if they should intimidate a negro in the exercise of his right to vote for member of Congress, there might be valid congressional legislation on the subject.[5] It has, however, been adjudged in the State courts that a State may by its legislation separate colored from white children in its public schools so long as schools are provided for both. It is argued that the Constitution only guarantees an *equality*, not an identity, of privileges.[6] If this be the correct interpretation of the Constitution, it is unfortunate; for such discriminating legislation creates a badge of inferiority, and fails to supply the colored children with the stimulus for improvement that they would be likely to experience in the presence of white children. It would seem that not only the rights, but public privileges, of both classes of children should be the same in institutions supported by State funds supplied by indiscriminate taxation, and conducted by State officials.

The law should operate alike on all persons and property similarly situated.[7] A State law, confining the selection of jurors to white persons, is in contravention of the Constitution.[8] Special legislation in respect to private corporations must be within the general rules provided by this Amendment, such a corporation being a "person." A State may classify its railroads by the

[1] Philadelphia Fire Association *v.* New York, 119 U. S. 119; Pembina Co. *v.* Pennsylvania, 125 U. S. 181.

[2] Barron *v.* Burnside, 121 U. S. 186.

[3] United States *v.* Cruikshank, 92 U. S. 542.

[4] Civil Rights Cases, 109 U. S. 3.

[5] *Ex parte* Yarbrough, 110 U. S. 651.

[6] People *v.* Gallagher, 93 N. Y. 438. See also Cory *v.* Carter, 48 Ind. 327.

[7] Wurts *v.* Hoagland, 114 U. S. 606; Walston *v.* Nevin, 128 U. S. 578. There are some valuable suggestions as to the duty of the United States towards the colored race, in People *v.* King, 110 N. Y. 426, 427, per ANDREWS, J.

[8] Strauder *v.* West Virginia, 100 U. S. 303; *Ex parte* Virginia, Id. 339.

length of their lines, fixing a different limit of rates of passenger fares in each class.[1] It has also been held that a State may make its railroad companies liable for all damages done to an employé in consequence of the neglect of agents and other employés.[2] Similar questions have been presented on allegations of unjust discriminations as to national banks.[3]

Criminal trials by an impartial jury of twelve men have been made in their substance perpetually inviolable by State action. (*a*) A State may lawfully permit one to become a juryman who may have formed an opinion or impression unfavorable to the prisoner, based upon rumor or newspaper statements, as to the truth of which he has expressed no opinion, if he asserts that his verdict will be based only upon the account of the case which may be given by the witnesses under oath.[4]

When one is deprived of his liberty in violation of the Constitution or laws of the United States, he may be discharged by the Circuit Court of the United States on a writ of *habeas corpus*.[5] One case of wrong as between States is not reached by this Amendment. This is an instance too common in practice, where a person is unlawfully abducted by force or fraud from one State into another, and held in the latter for trial upon a criminal charge. No mode exists in the law whereby he can be restored to the State from which he was abducted, not even on the application of the State whose laws have been invaded. The most that the invaded State can do is to charge the abductors with crime, and demand their extradition.[6]

It has only been the aim, in referring to these recent decisions, to give illustrative examples. The general construction in the United States courts of the expression "due process of law" is the same as has been made in the State courts in reference to the like clause in the State constitutions.[7]

A more detailed view of "the police power" and of its relation to "due process of law" will be given in a later discussion of the subject of Property, since most of the questions that have been disposed of by the courts concern property rather than personal rights.[8]

[1] Dow *v.* Beidelman, 125 U. S. 680.

[2] Missouri Pacific R. R. *v.* Mackey, 127 U. S. 205.

[3] See, as to the legislation of Massachusetts, Bank of Redemption *v.* Boston, 125 U. S. 60. An illustrative case in taxation is found in County of San Mateo *v.* So. Pacific R. R. Co. (The R. R. Tax Case), 8 Sawy. C. Ct. 238.

[4] Spies *v.* Illinois, 123 U. S. 131.

[5] *Ex parte* Royall, 112 U. S. 181; *Ex parte* Royall, 117 U. S. 241. The circumstances under which the discharge should be made are stated in these cases.

[6] Mahon *v.* Justice, 127 U. S. 700.

[7] Munn *v.* Illinois, 94 U. S. 113.

[8] It has not been thought necessary to state the various decisions of the State

(*a*) Cf. Hallinger *v.* Davis, 146 U. S. 314.

The Rights of Persons are Absolute and Relative. Absolute rights resolve themselves, according to distinctions long since recognized in law, into the right of Personal Security, Personal Liberty, and Private Property. It is intended to treat in this connection only of Personal Security and Personal Liberty.

The more numerous class of Relative Rights will be treated in subsequent chapters under the titles of Husband and Wife, Parent and Child, Guardian and Ward, and Master and Servant.

Personal Security.

The right to Personal Security may be regarded as comprehending the right to life, limb, body, health, and reputation. When these rights are violated, the law in general provides a remedy for the injury done, or threatened to be done, both in behalf of the individual and of the State. Such injuries fall under the domain of public, as well as private law. Remedies are thus compensatory, preventive, or punitive.

When an injury to the person is threatened, self-defence is allowed. In some cases the wrong-doer may be summoned before a magistrate, and caused to enter into bonds with sureties to keep the peace, in default of which he may be committed to prison to abide the action of a criminal court. When an injury has been actually committed, compensation in damages is the usual remedy, though special methods may be resorted to in case of an injury to the health. Vindictive damages may be obtained in aggravated cases. Such damages go beyond actual compensation, and are allowed by way of example to wrong-doers.

It is the better opinion that by the common law there is no remedy in damages when life is wrongly taken, unless for the interval between the injury and the death. For causing the death itself no action will lie. This is now deemed to be a defect in the law. It was remedied in England by a statute known as Lord Campbell's Act,[1] which has been extensively copied with some modifications in the United States. That statute in substance provides for an action by the executor or administrator of the person killed, for the benefit of the latter's wife, husband, parent, or child, in that class of cases where the deceased would have had a cause of action himself had he not been killed. The damages are left to the jury, and are to be proportioned to the injury sus-

courts on this subject, since in the end the construction given by the United States court must prevail, and besides, a collection of them is not within the plan and purpose of this work.

[1] 9 & 10 Vict. c. 93, modified by 27 & 28 Vict. c. 95.

tained by the relatives above named, and are to be divided among them as the jury shall direct. The action must be brought within twelve calendar months after the death.

The principal modification of this statute found in some of the States is a clause limiting the amount of the recovery of damages so as not to exceed a fixed sum, such as $5,000 or other specified amount. Any negligence on the part of the person killed, which would have prevented a recovery of damages by him if he had lived, will be equally fatal to any recovery by his executor, etc.[1]

The subject of civil death should be referred to in this connection. At common law this was of two kinds: one where a person became a monk "professed," or "abjured the realm." Such a person, though civilly dead, did not lose his personal rights, but became incapable both of taking and holding property. His estate passed to his heirs as though he were dead. He might make his will and appoint executors. This form of civil death is practically obsolete in modern times.

The other form was a consequence of conviction of a crime of the grade of felony. In that case his land did not pass to his heirs, as in the case of "profession," or abjuration, but was forfeited to the superior lord. He could still *take* land by purchase (that is, by deed or will), but could not *hold* it as against the lord, who might institute legal proceedings to take it from him. If no proceedings were instituted, he still remained owner.

This form of civil death is still found in some of the States of this country, notably in New York[2] and California, as applied to a conviction for felony, and a sentence to imprisonment for life. Accordingly, as forfeiture to the State in such a case no longer prevails,[3] the title to the land remains in the convict as before conviction.[4] He is, however, divorced by means of the sentence, and loses the custody of his children. A pardon does not restore him to the rights of which he was deprived by the sentence.[5]

Assault and Battery. — This is a comprehensive term for an

[1] The statutes of each State must be consulted for more precise information. As to local law in New York, see Code of Civil Procedure, § 1904.

[2] Penal Code, § 708.

[3] Penal Code, § 710.

[4] Avery *v.* Everett, 110 N. Y. 317. This result was reached on a comparison of chap. 57, Laws of 1799, with 2 Rev. St. 701, § 20, and in approval of the views of Chancellor Kent in the case of Platner *v.* Sherwood, 6 Johns. Ch. 118. See also Penal Code of New York, §§ 708, 709.

[5] A proceeding in outlawry had a somewhat similar effect. The object of outlawry in criminal cases was to compel a person to come into court and plead. If he did not do so, under certain legal proceedings he was treated as civilly dead. This rule still exists in New York in cases of treason. Code of Criminal Procedure, §§ 814–826. A judgment of outlawry was reversed in England not long since (1845), after the lapse of one hundred and sixteen years. Tynte *v.* The Queen, 7 Ad. & El. N. S. 216.

injury to the person, not amounting to the taking of life. An assault is a threat to do bodily harm; a battery is the actual carrying of the threat into effect. The distinctions upon this subject are highly technical, and must be sought in the works upon torts and the decided cases.[1]

The definition of an assault and battery in a civil sense is not identical with that which prevails in criminal law. The essence of a crime being intention, where the intent is wanting no crime exists. But the object of the civil action is to afford compensation in damages to an injured party. It would embrace the case, for example, of an injury committed by a lunatic. In such a case, however, only actual damages could be recovered.

A highly aggravated case of battery may constitute the offence called "mayhem." This at common law consisted in unlawfully and maliciously depriving a person of some limb or member useful in fighting. It would include the cutting off or disabling a hand or a leg, or destroying an eye or a fore tooth. It did not embrace the destruction of a molar tooth, or the cutting off of an ear or nose. These distinctions have ceased to exist in modern law. Statutes have much enlarged the definition of maiming, which now generally includes the destruction or disfigurement of any limb or member.[2]

Duress. — This subject here presents itself as related to the law of contracts. There may be duress both by an attack upon personal security and personal liberty, and, in a modified sense, upon private property. The great feature of duress is that it takes away or impairs one of the essential ingredients of a contract, viz., assent. The discussion of this topic more appropriately belongs to treatises on the law of contracts.

Injuries to the Health or Personal Comfort. — These are termed "nuisances." The word cannot be more precisely defined. It is a generally accepted principle that an alleged nuisance must materially interfere with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes of living, but according to plain, sober, and simple notions among the people.[3] A nuisance may be either public or private. A public nuisance affects the community at large; a private nuisance affects an individual. A public nuisance may affect a single person or group of persons, and so become private as to them. An action for damages, or

[1] See Addison on Torts; Cooley on Torts; Paterson on the Liberty of the Subject (2 Vols. London: Macmillan & Co. 1877).

[2] In New York, see Penal Code, §§ 206–210.

[3] Walter *v.* Selfe, 4 De G. & Sm. 315, 322; Soltau *v.* De Held, 2 Sim. N. S. 133, 159.

other private remedy, does not lie for a public nuisance; while these remedies may be resorted to in case of a private nuisance. An injunction is also a suitable remedy; and there may be a proceeding to have the nuisance removed, or, in technical language, "abated." The remedy for a public nuisance is a criminal proceeding, by indictment or information, and in a proper case, a proceeding in a court of equity by the attorney-general.

The subject of nuisances is in modern times brought under special control by the establishment of boards of health in cities and villages, and even of State boards of health created by statute. The powers given to these boards are to some extent arbitrary, and interfere with personal rights, but they appear for the most part to be justified by the exigencies of the case. There are other injuries to the health which may be the subject of legal proceedings, such as the sale of poisons without compliance with statutory rules, or of deleterious articles of food with knowledge of their character. A physician or surgeon may be held liable for the neglectful treatment of a patient, whereby his health is injured, and in aggravated cases be subjected to criminal prosecution.[1]

Injuries to the Reputation. — These are of two general classes: *libel*, and *slander*. Libel is defamatory matter addressed to the eye; slander, to the ear. Of the two, libel is deemed to be the more aggravated. It is both a civil wrong and a criminal offence. It is classed among crimes on account of its supposed tendency to cause a breach of the peace. The only proceeding in the case of slander is an action for damages. Defamation, whether libellous or slanderous, is actionable on the ground that the party whose character is assailed has sustained an injury to his reputation, for which he should receive reparation, and the only available way of compensating him is for the court to award him a sum of money as damages.

A *libel*, considered criminally, may properly be defined to be malicious defamation by writing, printing, pictures, or signs, which is calculated to injure the living, or to blacken the memory of the dead, or to hold one up to hatred, contempt, or ridicule. This definition is too broad for a civil action, since no action for damages could be brought for "blackening the memory of the dead."

It is necessary before any legal proceeding can be had that a libel should be "published," — a technical word, meaning made known. Publication has a more extended meaning in the criminal law than in the civil. Thus, a sealed letter, addressed by

[1] Reference for more detailed information may be made to works upon torts and nuisances. Many cases of actions against surgeons for malpractice are collected in McClelland's Civil Malpractice, &c. (Hurd & Houghton, 1877).

the libeller to the party libelled, would not be actionable, as there would be no injury to the reputation in the minds of others;[1] still the defamation would be sufficiently published to be criminal, on account of its tendency to cause a breach of the peace. If, however, a letter libellous in its character is addressed by the defendant to the wife of the party libelled, the publication is sufficient as a basis for a civil action, since for this purpose the law does not regard the husband and wife as one.[2] Publication may be made indirectly as well as directly, as where one sends a libellous manuscript to the printer of a periodical, and does not restrain the publication of it;[3] or gives a newspaper man an outline with a request to publish it, and it is published accordingly, even though with some variations of language.[4]

On the subject of publication, a special view has recently been taken by the English appellate court as to venders of newspapers. It has been determined that if one sells a copy of a newspaper in the ordinary course of his business, though he is presumptively liable for a libel contained in it, he will be relieved from liability if he show that he did not know that it contained a libel, and that his ignorance was not due to his negligence, and further that he had no reason for supposing that it was likely to contain a libel.[5] Every new publication of the same libel is a new and distinct injury, and supplies a ground for a new recovery of damages.[6]

There is an important difference in American law between the mode of construing an alleged libel in a civil, as contrasted with a criminal case. In a civil case, if the words be unambiguous, the question whether the writing be actually a libel, is a *question of law* for the court, to be decided by the judge, and his decision may be reviewed by an appellate court.[7] On the other hand, if the words be ambiguous or of doubtful character, as for example, if there be a doubt whether they are words of caution rather than of express charge, their meaning should be left to the jury.[8] The understanding of parties who were made aware of the libel may become important.[9] Whether the charge is applicable to the

[1] Lyle *v.* Clason, 1 Caines, 581; Waistel *v.* Holman, 2 Hall (N. Y. Super. Ct.), 172.

[2] Wenman *v.* Ash, 13 C. B. 836. *Contra*, Wennhak *v.* Morgan, L. R. 20 Q. B. D. 635, as to the wife of the defendant.

[3] Burdett *v.* Abbot, 5 Dow, 201.

[4] Parkes *v.* Prescott, L. R. 4 Exch. 169.

[5] Emmens *v.* Pottle, L. R. 16 Q. B. D. 354.

[6] Woods *v.* Pangburn, 75 N. Y. 495.

[7] Hunt *v.* Bennett, 19 N. Y. 173; Tuson *v.* Evans, 12 Ad. & El. 733; Hunt *v.* Goodlake, 43 L. J. (C. P.) 54; Haire *v.* Wilson, 9 B. & C. 643; Darby *v.* Ousely, 1 H. & N. 1.

[8] Street *v.* Licensed Victuallers' Society, 22 W. R. 553; Hart *v.* Wall, 25 W. R. 373; Fisher *v.* Clement, 10 B. & C. 472; Lewis *v.* Chapman, 16 N. Y. 369.

[9] Dorland *v.* Patterson, 23 Wend. 422.

plaintiff, is also a question of fact, and witnesses may be examined to show who was intended.[1]

Defamation may thus be so distinct and plain as to be *libellous on its face* without any proof beyond the libel itself, — as, to charge one with "blackmailing," [2] or with conduct tending to bring one into disgrace or ridicule.[3] But a notice in a newspaper advising applicants for board at a certain place to inform themselves before locating there, of the table and characteristics of the proprietor, is not libellous *on its face*.[4] In a criminal prosecution, on the other hand, the general rule in this country is that the jury are the judges of the construction of the words used, as well as of other matters. They are declared to be judges *both of the law and of the fact*. This point is quite uncertain in the common law. In some of the American States the question is settled by statute; in others, by a provision in the State constitution.[5]

Libels on the administration of justice constitute a distinct division of this subject. Such a libel may be punished by a proceeding as for a contempt of court. In England a criminal information is resorted to.[6] The mode of proceeding in the United States is detailed in the cases in the note.[7] The peculiarity of this case is, that there is no right of an individual involved, but rather the interest of the whole community, in a reflection publicly made upon the general administration of justice.

There is no *preventive* remedy in case of a threatened publication of a libel. An injunction will not be granted.[8] The court will not interfere though the publication of the libel would be injurious to property,[9] (*a*) nor will it restrain the publication of a false imputation against a trader's solvency,[10] nor the publication of false statements that the plaintiff is an infringer of a patent.[11] (*b*)

[1] Green *v.* Telfair, 20 Barb. 11; McLaughlin *v.* Russell, 17 Ohio, 475.

[2] Robertson *v.* Bennett, 44 Super. Ct. (N. Y.) 66.

[3] Purdy *v.* Rochester Printing Co. 26 Hun, 206.

[4] Wallace *v.* Bennett, 1 Abb. N. C. 478.

[5] See N. Y. Constitution, Art. I. § 8.

[6] Rex *v.* Fleet, 1 B. & Ald. 379; The King *v.* Watson, 2 Term R. 199; Rex *v.* White, 1 Camp. 359, n.

[7] Respublica *v.* Oswald, 1 Dallas, 319; Hollingsworth *v.* Duane, Wall. C. Ct. 77.

[8] Clark *v.* Freeman, 11 Beav. 112.

[9] Prudential Company *v.* Knott, L. R. 10 Ch. App. Cas. 142.

[10] Mulkern *v.* Ward, L. R. 13 Eq. 619.

[11] Hammersmith Skating Co. *v.* Dublin Co., Irish R. 10 Eq. 235.

By the Judicature Acts in England, a provisional injunction may now be obtained in proper cases to prevent the publication of libels tending to injure one in

(*a*) But a publication made pursuant to a conspiracy to injure plaintiff's business may be restrained. Casey *v.* Cincinnati Typ. Union, 45 Fed. R. 135.

(*b*) But see Emack *v.* Kane, 34 Fed. R. 46.

The definition of *slander* is not so broad as that of libel. The false charge must fall within one of four principal heads: —

(1) That the party aspersed has committed an infamous crime or one involving moral turpitude; (2) that he has one of certain contagious diseases unfitting him for social intercourse; (3) that he is incompetent to follow his trade, profession, or employment; (4) any other imputation of a defamatory nature from which special pecuniary damage has ensued, which damage must be alleged and proved.

It may be libellous to print and publish that which it would not be slanderous to utter. Slander may more generally be classified into slander *per se*, embracing the first three classes above stated; and slander with special damage. The cases that have been noted will now be considered in their order.

(1) *A charge of having committed a crime.* — It is not necessary that the crime charged should constitute a felony, so as to be punishable with death, or in New York by imprisonment in the State prison. It may be a crime of the minor grade termed a misdemeanor if it involve moral turpitude. For example, it would be slanderous to say to another, "You have removed my landmark, and cursed be he who removes his neighbor's landmark," where it is made a crime to remove a landmark.[1] On the same principle, falsely to charge one with having written and published a libel is in itself slanderous.[2] On the other hand, in the absence of a statute it is not slander to charge one falsely with having committed a breach of trust, as that is not a crime at common law;[3] nor with having committed adultery. In these last two cases the acts specified are made crimes in some of the States by statute. In that case, the charge would be slanderous.[4] On the other hand, if the act charged were a crime with no immoral element, there would be no slander. An instance is a simple assault and battery.

his trade. Great difficulty has been experienced in applying this new rule, and it has been adjudged that the court will not grant the injunction except in the clearest cases, where a jury would say or reasonably be expected to say that the matter was libellous. Liverpool, &c. Association *v.* Smith, L. R. 37 Ch. D. 170 (Court of Appeal). (*a*) In a proper case the injunction may be granted to restrain oral as well as written defamation. Hermann Loog *v.* Bean, L. R. 26 Ch. D. 306 (Court of Appeal).

[1] Young *v.* Miller, 3 Hill, 21; Todd *v.* Rough, 10 Serg. & R. 18.

[2] Andres *v.* Koppenheafer, 3 Serg. & R. 255.

[3] McClurg *v.* Ross, 5 Binn. 218.

[4] Abshire *v.* Cline, 3 Ind. 115.

(*a*) See also Collard *v.* Marshall [1892], 1 Ch. 571; Bonnard *v.* Perryman [1891] 2 Ch. 269; Lee *v.* Gibbings 67 L. T. Rep. 263. In the last case it is said by Kekewich, J., that except in trade libels injunctions should not be issued until the case has been submitted to a jury. See also Jordan *v.* O'Connor, 27 Abb. N. C. 376.

In this branch of slander, the law infers that damage will be caused by the statement, even though, if true, the person slandered would not be subjected to punishment. The slander may consist in the injury to the reputation which would naturally flow from the charge. It will accordingly be immaterial that the crime is charged to have been committed in another State,[1] or that through lapse of time it could not be prosecuted,[2] or even if it be one that for physiological reasons could not be committed with the consequences charged, provided that the hearers thought that it could be.[3]

In interpreting the alleged slanderous words, the practice formerly was to give them the meaning most favorable to the slanderer. This was the so-called *mitior sensus*.[4] An instance or two will suffice. In one case, the words were, "Thou art a thievish rogue, and hast stolen bars of iron out of other men's windows." It was held that the words must be taken to mean bars of iron *fastened* in the windows and not loose. In this view, there was no slander, for the bars were then real estate, and one cannot steal real estate.[5] So where a person said that "Sir Thomas Holt struck his cook on the head with a cleaver and cleaved his head, so that the one part lay on one shoulder and the other on the other," it was held that there was no cause of action, since though Sir Thomas might have cleaved the head into parts, the wound might not have been mortal.[6] This absurd doctrine has long since been exploded. The correct rule is to take that meaning which the supposed utterer intended to convey. Where the words are plain and unambiguous, the ordinary signification should be given to them.[7] Where the words are ambiguous and capable of two meanings, they must be submitted to the jury to determine their meaning.[8] Words, however, will not be strained beyond their ordinary meaning so as to give a cause of action. Thus a charge that a plaintiff was *forsworn* does not mean of itself that he was guilty of perjury, but it must further be made to appear that the words were spoken of a judicial proceeding.[9] If, however, words

[1] Johnson *v.* Dicken, 4 Jones (Mo.), 580.

[2] Van Aukin *v.* Westfall, 14 Johns. 233.

[3] Kennedy *v.* Gifford, 19 Wend. 296. The analysis of this case seems to be that while the crime could itself be committed, its existence, as it was urged, was to be *inferred* from an alleged *consequence* that could not attend its commission, though the hearers thought or might have thought it could.

[4] 1 Rolle's Abr. 71.

[5] Powell *v.* Hutchins, Cro. Jac. 204.

[6] Sir Thomas Holt *v.* Astgrigg, Cro. Jac. 184.

[7] Woolnoth *v.* Meadows, 5 East, 463; Wright *v.* Paige, 3 Keyes, 581; Hayes *v.* Ball, 72 N. Y. 418.

[8] Woolnoth *v.* Meadows, Wright *v.* Paige, Hayes *v.* Ball, *supra*.

[9] Holt *v.* Scholefield, 6 Term R. 691. If the words "perjured himself" had been used there might have been a case of slan-

apparently slanderous are so much qualified as that, taking the whole statement together, no charge of crime is made, an action will not lie. Thus to say that a man who conducts himself as the plaintiff does, *would* steal does not amount to a charge of stealing.

It is not material that the words are spoken ironically, or in the form of a question, or in an indirect way. Slander may even be communicated by intonations of the voice. In this class of cases the true line of inquiry is, what was the understanding of those who heard the slanderous words or signs, and whether the fair construction of the words, etc., would warrant that understanding.[1]

(2) *Words imputing a contagious disease.* — This does not mean an imputation that the person charged has had at some former time such a disease, but that he had it when the charge was made.[2] The diseases referred to are loathsome diseases such as leprosy or the venereal disease, not such diseases as measles or scarlet fever. There are not many decisions under this branch of the subject.[3]

(3) *Words affecting a person in his trade, office, or employment.* — In order that such words be actionable *per se* they must affect the person charged *directly* in his employment, etc. Thus to say of a carpenter that he is a liar, or of a justice of the peace that he is a blackleg,[4] is not slanderous *under this head*, though the words might indirectly injure the person charged with his customers or the public. The charge must be in substance that he does not understand carpentry in the one case, or law in the other. On like grounds, it has been held not actionable to say of a keeper of a public garden that he was a dangerous man.[5] If, on the other hand, the words are spoken of the plaintiff in his professional character, the action will lie; as, for example, to say of a physician that "he is no doctor, — he bought his diploma for $50;"[6] or of a hotel-keeper that one could not get a decent meal or bed in his house.[7] Charges of dishonesty against tradesmen fall under the same rule,[8] and also charges of insolvency or bankruptcy. It is doubtful whether a charge of mismanagement against a professional man in a particular case is

der, for that expression has the technical meaning of false swearing in a court of justice. Roberts *v.* Camden, 9 East, 93.

[1] Gorham *v.* Ives, 2 Wend. 534; Sewall *v.* Catlin, 3 Wend. 291; Gibson *v.* Williams, 4 Wend. 320; Leonard *v.* Allen, 11 Cush. 241; Hayes *v.* Ball, 72 N. Y. 418.

[2] Smith *v.* Cook, 1 Alb. Law J. 162.

[3] Williams *v.* Holdredge, 22 Barb. 396; Nichols *v.* Guy, 2 Carter (Ind.), 82; Irons *v.* Field, 9 R. I. 216.

[4] Van Tassel *v.* Capron, 1 Den. 250.

[5] Ireland *v.* McGarvish, 1 Sandf. 155.

[6] Bergold *v.* Puchta, 2 Thomp. & C. (Supreme Ct. N. Y.) 532.

[7] Trimmer *v.* Hiscock, 27 Hun, 364.

[8] Griffiths *v.* Lewis, 7 Q. B. (Ad. & El.). 61.

actionable. It would appear to be the sounder rule that general incompetency must be charged. (*a*)

This rule has been so strictly interpreted in England as to hold that to charge a clergyman with incontinency is not actionable under this head, unless he is at the time in possession of some office or employment of profit.[1] On the other hand, to say of a clergyman that he came to the performance of divine service in a towering passion, and that his conduct was calculated to make infidels of his congregation, is slanderous *per se*.[2]

(4) *Defamatory matter attended with special damage.* — Here two elements are necessary: The words must be defamatory; there must be special damage.

If the words are not defamatory the fact of special damage will not suffice. In other language, words not defamatory in their nature are not actionable even though followed by special damage.[3] It thus follows that there are words of a defamatory nature, which are not *sufficiently* defamatory, when uttered *orally*, to create a cause of action unless special damage be shown.[4]

It may be useful to refer to some words of this class.[5] "Swindler," [a], "a defrauder," [b], "unprincipled," [c], "a prover under bankruptcy," [d], "a gambler" (unless illegal gambling is intended), [e], "blackleg" [f], "walked the street for a living" (spoken of a woman), [g], "self-polluted," [h], and the like, are not of themselves actionable. Let the element of "special damage" be added and they become actionable. The damage must be pecuniary in its nature. Very slight damage of this kind will suffice, such as the loss of the hospitality of friends, [i], even of a single dinner, or an opportunity to obtain employment or to marry, [k]. The damage, however, must be *directly* attributable to the slanderous words. Thus if a man were charged with incontinence, and through mental distress lost his capacity to labor, the damage would be attributable to the mental distress, and there would be no cause of action.[6] (*b*) The same rule would be adopted in the case of an

[1] Gallwey *v.* Marshall, 9 Exch. 294.

[2] Walker *v.* Brogden, 19 C. B. N. S. 65. (The case was one of libel.)

[3] Miller *v.* David, L. R. 9 C. P. 118.

[4] Kelly *v.* Partington, 5 B. & Ad. 645.

[5] These same words might be *libellous* if written and published. *a*, Saville *v.* Jardine, 2 H. Bl. 531; *b*, Richardson *v.* Allen, 2 Chit. 657; *c*, Storey *v.* Challands, 8 C. & P. 234; *d*, Alexander *v.* Angle, 4 M. & P. 870; *e*, Forbes *v.* King, 1 Dowl. 672 (libel); *f*, Barnett *v.* Allen, 3 H. & N. 376; *g*, Wilby *v.* Elston, 8 C. B. 142; *h*, Anonymous, 60 N. Y. 262; *i*, Williams *v.* Hill, 19 Wend. 305; *k*, Moody *v.* Baker, 5 Cow. 351.

[6] Terwilliger *v.* Wands, 17 N. Y. 54, overruling several earlier cases; Allsop *v.* Allsop, 5 H. & N. 534.

(*a*) See Lynde *v.* Johnson, 39 Hun, 12, and cases cited.

(*b*) Where however injury has been proved, mental suffering may be considered by the jury in awarding damages. Ward *v.* Dean, 32 N. Y. St. R. 270; Hamilton *v.* Eno, 16 Hun, 599.

action by a husband for loss of a wife's services.[1] On a similar principle, where a daughter's character had been assailed by derogatory words, and her father hearing the charge refused to give her some articles which he had previously promised her, and at the same time testified that he did not at any time believe the charge, it was held that there was no cause of action, the loss of the articles not being in point of fact attributable to the slanderous words.[2]

General principles applicable to both libel and slander. — *Malice* is a necessary ingredient in an action for defamation. It may be inferred from a publication without excuse. This is called legal malice or malice in law. Legal malice exists in the absence of any legal excuse for the publication. It is no excuse for the utterer that he merely repeated what he heard another person say,[3] or that he did not know the party traduced.[4]

There are however occasions where a person has a right to make a statement as to the character of another, and though it turn out to be false, no action will lie without actual proof of malice, which is then termed express malice or malice in fact. In some special instances no action could be brought even though there were express malice. This branch of the subject is called the doctrine of "privileged communications."

A *privileged communication* in this branch of the law is a statement made by a person who has a right to make it for certain reasons, such as the protection of his own interests or those of others; or it may be made in the course of an application for a public office in opposition to the fitness of the applicant, or in the course of legal or parliamentary proceedings. It may be that the statement, though believed to be true, was in fact false. The person making it will still be protected unless he acted maliciously, and in some instances he is protected notwithstanding malice.

Privileged communications are of two sorts, — those absolutely and those conditionally privileged. A communication of this kind is said to be *conditionally* privileged, when, though false, it is made in good faith and without malice. If it be both false and known to be so, the party making it will be liable. A communication of this kind has been defined to be "one made in good faith upon any subject-matter in which the party communicating has an *interest* or in reference to which he has a *duty*, to a person having a corresponding *interest* or *duty*, although it contains criminating

[1] Wilson *v.* Goit, 17 N. Y. 442.
[2] Anonymous, 60 N. Y. 262.
[3] Mapes *v.* Weeks, 4 Wend. 659; Inman *v.* Foster, 8 Wend. 602.
[4] Dexter *v.* Spear, 4 Mason C. Ct. 115.

matter which without this privilege would be slanderous (or libellous) and actionable;" and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation.[1] (*a*)

The following may be suggested as instances: —

(1) Charges made against persons in office to persons placed over them and having power to oversee their conduct.[2] This has been applied in England to a charge by a bishop to his clergy in convocation.[3]

(2) Reports of proceedings in courts of justice. The report should be fair, correct, and honestly made.[4] The reporter should not mix with it his own observations and conclusions.[5] This rule would not include a libellous speech by counsel given without the evidence by which it was supported.[6]

(3) Criticisms upon the acts of public men. Such acts are always open to fair and temperate criticism. This proposition does not include the imputation of unjust or corrupt motives.[7] This remark also applies to candidates for office.[8]

(4) Confidential communications respecting the conduct and character of servants, tradesmen, and persons in a fiduciary capacity.

There are several cases falling under this general head. A master may state in a temperate way the supposed character of a former servant to one who is seeking information as to his character with a view of employing him. So inquiries may be made and answered as to the solvency of a tradesman as a basis for transacting business with him. Agencies may lawfully be established for collecting such information, and they may properly communicate it to persons pecuniarily interested in knowing it.[9] (*b*) A letter from a son-in-law to a mother-in-law containing advice respecting her proposed marriage, and imputations made in good faith upon the character of the party whom she is about to marry, is privileged.[10]

[1] Harrison *v.* Bush, 5 E. & B. 344, approved in Byam *v.* Collins, 111 N. Y. 143, 150. See to the same effect Toogood *v.* Spyring, 1 Cr. M. & R. 181; White *v.* Nicholls, 3 How. U. S. 266, 291.

[2] Fairman *v.* Ives, 5 B. & Ald. 642.

[3] Laughton *v.* Bishop of Sodor & Man, L. R. 4 P. C. 495.

[4] Macdougal *v.* Knight, L. R. 17 Q. B. D. 636 (Court of Appeal).

[5] Stiles *v.* Nokes, 7 East, 493.

[6] Kane *v.* Mulvany, 2 Ir. Com. Law, 402.

[7] Parmiter *v.* Coupland, 6 M. & W. 105.

[8] Dickeson *v.* Hilliard, L. R. 9 Exch. 79.

[9] Ormsby *v.* Douglass, 37 N. Y. 477.

[10] Todd *v.* Hawkins, 8 C. & P. 88; but see Byam *v.* Collins, 111 N. Y. 143.

(*a*) But a communication made to others as well as to the person interested is not privileged. Woods *v.* Wiman, 122 N. Y. 445; Webber *v.* Vincent, 29 N. Y. St. Rep. 603.

(*b*) See Sunderlin *v.* Bradstreet, 46 N. Y. 188; Bradstreet Co. *v.* Gill, 72 Tex. 115. Cf. Johnson *v.* Bradstreet Co., 77 Ga. 172; Cossette *v.* Dun, 18 Can. S. C. R. 222.

(5) Criticisms upon literary works and works of art. There has been some difference of opinion among judges whether this class of communications to the public upon matters of public interest belongs under the head of "privileged communications." The cases are cited in a note. The later view is that, as they may be made by any person whatever to the public at large, they do not resemble closely the ordinary case of privileged communications in which particular persons only may make the statements. If there is any distinction, it is, in the opinion of an eminent judge, rather "academical than practical." The real inquiry is whether in the opinion of the jury the comment goes beyond the limits of *fair* criticism. Criticism is not fair when under the pretext of criticising an author's works, an opportunity is taken to attack his character, or it may be, to convey an imputation that he has written something which he has not written; and has, therefore, *misdescribed* the work. Either of these acts may reasonably be regarded as travelling beyond the limits of fair criticism, and would then be actionable.[1]

The next class of privileged communications includes those that are *absolutely* privileged. In this class of cases, no action will lie, even though the statement be false and known to be so, and be actually malicious.

An instance of this kind is an observation made by a judge in his judicial capacity while trying a cause;[2] or words spoken by an advocate during a trial which are pertinent to the issue;[3] (*a*) or words used by a suitor in his own defence or in an affidavit in a cause;[4] or testimony by a witness having reference to the cause in which he is called.[5]

Another class of cases of the same kind is presented in the course of legislative debate. It is a settled rule that a member of a legislative body is not to be called to account in a court of justice for alleged slanderous words uttered in the course of the performance of his legislative duties.

This doctrine is recognized in the English Bill of Rights, and

[1] Merivale *v.* Carson, L. R. 20 Q. B. D. 275 (Court of Appeal), approving Campbell *v.* Spottiswoode, 3 B. & S. 769, and disapproving Henwood *v.* Harrison, L. R. 7 C. P. 606. See also Macleod *v.* Wakley, 3 C. & P. 313, for a definition of the expression "fair criticism." For a case of a tradesman's advertisement, see Paris *v.* Levy, 9 C. B. N. S. 342.

[2] Scott *v.* Stansfield, L. R. 3 Exch. 220.

[3] Munster *v.* Lamb, L. R. 11 Q. B. D. 588; Hodgson *v.* Scarlett, 1 B. & Ald. 232; Mackey *v.* Ford, 5 H. & N. 792.

[4] Revis *v.* Smith, 18 C. B. 126; Henderson *v.* Broomhead, 4 H. & N. 569.

[5] Seaman *v.* Netherclift, L. R. 2 C. P. Div. 53.

(*a*) See the *dictum* of Brett, M. R., in Munster *v.* Lamb, to the effect that even irrelevant words spoken by an advocate in the course of a judicial proceeding are not actionable, L. R. 11 Q. B. D. at p. 605. But see Maulsby *v.* Reifsnider, 69 Md. 143.

also in the United States Constitution,[1] where the language is that "for any speech or debate in either house they" (the senators or representatives) "shall not be *questioned* in any other place." The word "questioned" has a technical meaning, and would preclude an action for slander or libel.[2] There has been doubt as to the point whether the general principle would protect a publication to the world of libellous matter in speeches of members, reports of committees, etc. There is a leading case in England which has been supposed to warrant the conclusion that there would be no such protection to printers of legislative reports.[3] The correct rule would seem to be that the official publication of parliamentary proceedings in a fair and accurate manner should be protected in the same way as proceedings in a court of justice. So a member might safely publish his speech for the information of his constituents, while he ought not to be permitted to make use of his position and privilege to publish libellous matter wantonly and without any substantial reason. More generally, a faithful report in a public newspaper of a debate in a legislative body containing matter disparaging to the character of an individual, which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question.[4] (*a*) If a communication by letter to A. be privileged, and by mistake the letter is addressed to B., it is still privileged.[5]

The true ground on which this absolute privilege of speech and publication rests is that the advantage of publicity to the community at large outweighs any private injury resulting from the publication. Individual rights are subordinated to the public good. It has recently been held at *Nisi Prius* that if a person courts the alleged slander by a question, it is privileged.[6]

Defences to actions for defamation are of two general kinds,— denial and justification. Denial puts the plaintiff to proof of his charges. Justification consists of an answer by the defendant that his charge is *true*.

It is an ancient rule in a *civil action* for defamation that the truth of the defamatory words is a complete defence, no matter

[1] Art. I. § 6.

[2] The same provision is in general found in State constitutions.

[3] Stockdale *v.* Hansard, 9 Ad. & El. 1. This decision led to an Act of Parliament, 3 & 4 Vict. c. 9, giving a summary protection to such persons.

[4] Wason *v.* Walter, L. R. 4 Q. B. 73. The subject is discussed by COCKBURN, C. J., in this case at much length and with great ability.

[5] Tompson *v.* Dashwood, L. R. 11 Q. B. D. 43.

[6] Palmer *v.* Hummerston, 1 C. & E. 36.

(*a*) A communication made to the Governor of a State concerning pending legislation is conditionally privileged. Woods *v.* Wiman, 122 N. Y. 445.

how malicious the utterer may have been. Malice is only important when the charge is false. The legal theory is that a man can have no legal right to a reputation superior to that which his conduct warrants, and that he is accordingly without remedy against one who aims to bring about a complete correspondence between the two. This reasoning is, however, rather specious than solid, particularly in that large class of cases occurring in actual life, where one has abandoned former evil practices and is leading a reformed life. A malicious disclosure of former misdeeds destroying a reputation honestly and fairly gained by later good conduct, should have no legal support. Such a reputation should be treated as a new acquisition, entitling a person to protection against mere malicious attack. Such, however, is not the law.

At this point there is a wide difference between a criminal and a civil action for libel. The ground upon which the criminal action proceeds is, that the publication of the libel tends to a breach of the peace. There is an old remark to the effect that "the greater the truth, the greater the libel." The meaning of this apparent paradox is, that the publication of the truth against a person is more likely to provoke a personal attack than the publication of a falsehood; in the latter case, the person libelled might confide in his own integrity of purpose, and power in course of time to "live down" the falsehood, while in the former, he might conclude that he had no resource except to challenge or chastise the traducer. Accordingly, in the criminal action it must appear that the defendant uttered the truth, and that his motives were good, and that the ends sought to be attained by him were justifiable, whereupon, and not otherwise, he will be acquitted.

The theory of a justification in civil actions is, that it tacitly admits the fact that the slanderous charge was made, but claims that it was not legally wrong to make and publish it, because it was true. It must be set up by the defendant in his answer; it cannot otherwise be proved at the trial. It is a rule of the common law, that one who "justifies" can introduce no evidence *tending* to prove the truth, unless it actually proves it. The result of this rule is, that he cannot reduce the damages by any evidence tending to prove the truth of the charge. The same rule is applied if he does not justify. This rule was thought too harsh and was abrogated in the Code of Procedure of New York,[1] and this course has been followed by other States. Under the existing theories, a defendant may set up in his answer, and prove at the trial, whether

[1] See also N. Y. Code of Civ. Pro. § 535.

he "justify" or not, "mitigating circumstances" of the kind already stated, as well as others.[1] While this may not be faultless logic, since strictly speaking mitigating circumstances admit the charge to be untrue, while a justification affirms that it is true, it is a convenient rule in practice, avoiding the rigor of the former rule which was said "to bind the defendant hand and foot, and to hand him over in that condition to the jury."

One who justifies defamation must prove his case with great accuracy. He must prove the *very thing* charged, and not some equivalent thing. It will not be enough to prove misconduct of a similar character to that alleged. Thus if the offence charged were perjury, he must prove all the particulars technically necessary to constitute the charge of perjury, such as an oath regularly administered, a judicial proceeding, testimony false and known to be false and material to the questions in hand. Accordingly, a charge of perjury before a grand jury cannot be justified by proof of perjury in an application to a magistrate on a search-warrant.[2] If a justification is attempted and fails, it is deemed to be a wilful repetition of the defamatory charge, and serves to enhance the damages.[3] (*a*)

Mitigating circumstances are sometimes introduced in evidence, not to establish the charge, but to reduce the damages that the plaintiff claims to have sustained. The following leading instances may be suggested: —

(1) The general bad character of the plaintiff. The *general* character is commonly in issue in this class of cases.[4] It will not be permitted to show that there were rumors that he had committed the particular offence charged.[5]

The distinction is between giving evidence of the plaintiff's *general* character, and his general reputation as to the commission of specific acts. The former is admissible; the latter not. It may be shown that the plaintiff is himself a common libeller, but not that he has published a *distinct* libel against the defendant.[6]

(2) The defendant may show in mitigation, provocation by the plaintiff, such as expressions either oral or written calculated to

[1] Bush *v.* Prosser, 11 N. Y. 347; Bisbey *v.* Shaw, 12 N. Y. 67.

[2] Palmer *v.* Haight, 2 Barb. 210.

[3] Fero *v.* Ruscoe, 4 N. Y. 162. See *ante*, p. 91.

[4] Stone *v.* Varney, 7 Met. 86; Paddock *v.* Salisbury, 2 Cow. 811.

[5] Waithman *v.* Weaver, 11 Price, 257, n.; Matson *v.* Buck, 5 Cow. 499; Wolcott *v.* Hall, 6 Mass. 514; Mapes *v.* Weeks, 4 Wend. 659; Inman *v.* Foster, 8 Wend. 602.

[6] Maynard *v.* Beardsley, 7 Wend. 560; May *v.* Brown, 3 B. & C. 113.

(*a*) Cf. Marx *v.* The Press Pub. Co., 134 N. Y. 561; Holmes *v.* Jones, 121 N. Y. 461; Cruikshank *v.* Gordon, 118 N. Y. 178.

provoke him.[1] These must relate to the defamation published by the defendant. They must, moreover, be so recent as to raise a fair presumption that the feelings and passions excited by the publication continue. The principle on which provocation is admitted is the same as it would be if a blow were inflicted in the heat of passion.

(3) It may be shown on behalf of the defendant that he was insane,[2] or intoxicated,[3] though such evidence would be of no avail if he repeated the charge when he regained his reason or became sober.

(4) Another mitigating circumstance is retraction and apology.[4] This should be full and ample, and as public as the charge.

(5) Such conduct on the part of the plaintiff as would have induced a reasonable man to suppose him guilty of the thing charged.[5] (*a*)

(6) Evidence bearing on the motives of the defendant explanatory of his conduct and tending to disprove actual malice.[6]

But the defendant cannot show by way of mitigation that the plaintiff's father provoked him;[7] nor that he is poor;[8] nor that he is a great and reckless talker and that no one believes him; although it was ruled in one court that a defendant might prove by way of mitigation that he was so besotted by a long course of dissipation and that his character was so depraved, that no one who knew him would believe him. This decision, however, is very unsatisfactory, as it allows a person to take advantage of his own baseness of character. If the decision had been directed to *mental incompetency* instead of *depravity of character*, no complaint could have been made of it.[9]

There remains to be mentioned the subject of Slander of the Title and Quality of Property. This applies to both real and personal property,[10] including copyright, shares of stock, etc.[11] The

[1] Tarpley *v.* Blakey, 2 Bing. N. C. 437; Watts *v.* Fraser, 7 Ad. & El. 223; Child *v.* Homer, 13 Pick. 503.

[2] Yeates *v.* Reed, 4 Blackf. (Ind.) 463.

[3] Howell *v.* Howell, 10 Ired. (N. C.), 84.

[4] Hotchkiss *v.* Oliphant, 2 Hill, 510. The statute, 6 & 7 Vict. c. 96, provides that when a libel is published in a public newspaper the defendant may plead that it was so published without actual malice and without gross negligence, and that before the commencement of the action or at the earliest opportunity afterwards, he had inserted a *full apology* in the newspaper. The defendant is thereupon allowed to pay a sum of money into court by way of amends.

[5] Minesinger *v.* Kerr, 9 Barr (Pa.), 312. *Contra*, Watson *v.* Moore, 2 Cush. 133; Haywood *v.* Foster, 16 Ohio, 88.

[6] Taylor *v.* Church, 8 N. Y. 452.

[7] Underhill *v.* Taylor, 2 Barb. 348.

[8] Case *v.* Marks, 20 Conn. 248.

[9] Gates *v.* Meredith, 7 Ind. 440.

[10] Wren *v.* Weild, L. R. 4 Q. B. 730.

[11] Malachy *v.* Soper, 3 Bing. N. C. 371; Like *v.* McKinstry, 3 Abb. App. Dec. (N. Y.) 62 (growing crops).

(*a*) Bronson *v.* Bruce, 59 Mich. 467.

essential ingredients of the case are that there must be a false statement as to title, published without lawful occasion, accompanied by special damage. Proof of special damage is equally necessary whether the disparaging words are written or oral. Written disparagement in such a case is not defamation of the owner but of his property, and he can only claim to be injured when his property is in some way harmed.[1] Malice, express or implied, is a necessary ingredient in the case. It will be a privileged statement if made in good faith on lawful occasion and without malice.[2]

The same principle by the recent English cases is extended to depreciation of the *quality* of goods which a tradesman has for sale. The rule is laid down that an untrue statement disparaging a man's goods, published without lawful occasion and causing him special damage, is actionable.[3]

Personal Liberty.

The right to personal liberty is a great and primordial right protected not only by the law, but by constitutional provisions, beyond the clauses of Magna Charta already referred to. One of these is the provision that excessive bail shall not be required.[4] Another is the right of the people to be secure in their persons, houses, etc., against unreasonable searches and seizures, and that no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the persons or things to be seized.[5] This Amendment was aimed at the abuse in England called "general warrant," whereby a person might be arrested without cause and without being named when the warrant was issued by a magistrate. The provision, preventing the suspension of the writ of *habeas corpus*,[6] except in cases of rebellion or invasion, should also be referred to. Similar provisions are found in State constitutions.

Where personal liberty is violated, the law provides both a compensative and preventive remedy. Compensation is awarded as the result of an action for damages, called an action for false

[1] Kendall *v.* Stone, 5 N. Y. 14; Malachy *v.* Soper, 3 Bing. N. C. 371.

[2] Wren *v.* Weild, 10 B. & S. 51; Like *v.* McKinstry, 3 Abb. App. Dec. (N. Y.) 62, s. c. 4 Keyes, 397; Steward *v.* Young, L. R. 5 C. P. 122.

[3] Western Counties Company *v.* Lawes Chemical Company, L. R. 9 Exch. 218. This case explains the case of Young *v.* Macrae, 3 B. & S. 264, by the statement that in the latter case there was no express affirmation that the disparaging statement was untrue, pp. 222, 223.

[4] U. S. Cons. Art. VIII. of Amendments.

[5] Art. V. of Amendments.

[6] U, S. Cons. Art. I. § 9, cl. 2.

imprisonment. The principal preventive remedy, and the only one in practical use, is the writ of *habeas corpus*.

The issue of the writ of *habeas corpus* is not merely a matter of judicial discretion. A party imprisoned is entitled to it. It is called a "writ of right," and has been so ever since Magna Charta.[1] Its provisions were eluded or substantially disregarded in England until the time of Charles II. The statute of 31 Car. II. c. 2, already referred to, restored it to its proper efficacy. This act has been in substance copied by legislatures in this country. There is a series of such statutes in New York, commencing with the year 1787. The first act was a transcript of the statute of Charles II. Later laws have beneficially extended the operation of the original enactments.[2] It will not be possible, without too much detail, to state the various statutes in the respective States. Only an outline of the English statute will be given, with some special modifications of it in this country. The topics will be arranged under the following heads: I. Who may be an applicant for the writ. II. The mode of procedure down to the decision of the court or judge. III. Remand or discharge. IV. Special rules as to *habeas corpus* questions in the Federal courts. V. *Habeas corpus* and extradition.

I. *The Applicant.* — The question as to the person who may apply for the writ is determined by the language of the statute in each State. Under the English act of Charles II. it could only be applied for on behalf of one charged with a *criminal offence*, though that is no longer the rule there. In New York all persons restrained of their liberty under any pretence whatever may apply, with the following exceptions: (1) Where the detention is by process of the courts of the United States having exclusive jurisdiction; (2) or on the final judgment or decree or order of any court of civil or criminal jurisdiction, or on process based upon such judgment, etc., except in a proceeding to punish a person for contempt.[3] The distinction is thus taken between a mandate of a *United States court*, which need not be final, and other judicial decrees or orders which, in order to prevent the application for the writ, must be final. These exceptions rest upon the supposition that the court or tribunal has *jurisdiction* over the subject on which it professes to act. If it has no jurisdiction, the proceeding is simply void, and its invalidity may accordingly be

[1] It is a writ of the common law. *Ex parte* Besset, 6 Ad. & El. N. S. 481, *per* Denman, C. J.

[2] See Laws of 1787, ch. 39; Laws of 1801, ch. 65; Rev. Laws of 1813, ch. 57; Laws of 1818, ch. 277. *a*)

[3] Code of Civ. Pro. §§ 2015, 2016.

(*a*) See Code of Civ. Pro. (§§ 1991, 2008-2066).

tested by this writ.[1] The writ will not run in favor of an alien enemy, — a prisoner of war.[2]

II. *Method of Procedure.* — There should be a petition verified by oath (affidavit). This should be made by the party himself, unless it is shown that he is so coerced as to be unable to make one.[3] When it may be made by some person acting in his behalf,[4] it should set forth facts showing that the state of things exists which the statute contemplates as grounds for the application. It may be addressed either to the court or to a judge at chambers. The act of issuing the writ is purely ministerial, and in no sense judicial.[5]

When the petitioner is not prohibited by law from prosecuting the writ, it should be awarded to him.[6] It must be signed, or it need not be obeyed. In substance it directs the person to whom it is addressed, to "have the body" of the prisoner with the time and cause of the detention before the court or judge, as the case may be, at a specified time and place, to do and receive what shall be considered right, and to have then there the writ itself.[7] Special provisions are commonly found as to the service of the writ both as to persons and time. If the writ is not obeyed, an "attachment" will issue for the disobedience. An attachment, as here intended, is a proceeding based upon the theory that a contempt of court has been committed, and the party is taken into close custody.[8] An attachment may also be granted for an evasive or insufficient "return" to the writ.[9]

It is an incident to this class of proceedings that a person who is committed upon warrants and the like is entitled to have a copy of the papers upon proper demand.[10] If the custodian of the prisoner desires to resist the discharge, he may state in writing the facts on which he claims the right of detention. This statement is technically called "a return." Care should be taken to make the return sufficiently full and complete, or an attachment

[1] People *v.* Jacobs, 66 N. Y. 8; People *v.* Neilson, 16 Hun, 214; People, *Ex rel.* Tweed *v.* Liscomb, 60 N. Y. 559.

[2] Rex *v.* Scriever, 2 Burr. 765.

[3] *In re* Parker, 5 M. & W. 32.

[4] Rex *v.* Roddam, Cowper R. 672. This was a case of a *habeas corpus* to testify.

[5] Nash *v.* People, 36 N. Y. 607.

[6] A heavy penalty is imposed in New York upon either judge or court that does not award the writ when properly applied for, each member of the court forfeiting $1,000 to the use of the petitioner. Code of Civ. Pro. § 2020.

[7] In New York a similar writ called a writ of *certiorari* is sometimes granted. Code of Civ. Pro. §§ 2022 and 2041.

[8] *Ex parte* Bosen, 2 Lord Kenyon, 289. This rule is applied in England even against a peer of the realm. Rex *v.* Earl Ferrers, 1 Burr. 631. See also N. Y. Code of Civ. Pro. § 2028.

[9] King *v.* Winton, 5 Term R. 89.

[10] Huntley *v.* Luscombe, 2 B. & P. 530; Sedley *v.* Arbouin, 3 Esp. 174. See penalty in New York Code of Civ. Pro. § 2065.

will issue for insufficiency. In New York the substance of the return is specifically laid down by the statute.[1]

The prisoner is allowed by the practice in this country to deny the facts stated in the return. In such a case he is said to "traverse" or deny the return. Such a denial will raise an issue or question of fact to be decided by the court or judge. (*a*) Facts that are not traversed or denied are deemed to be admitted, and are to be taken as true.[2] (*b*) In this case the question to be considered is one of law, viz., whether the facts, as stated in the return, constitute a sufficient ground for detention.

III. *Remand and Discharge.* — The question before the tribunal will be whether to remand the prisoner or to discharge him. It may be that the party, though subject to be remanded, is entitled to give bail, and be discharged from imprisonment on that ground.[3]

This point presents an inquiry into the true office and function of a writ of *habeas corpus*. Its language is in substance a direction to the custodian of the applicant to bring the body of the person imprisoned before the court or judge to do and receive what is considered just. Its function is to inquire into the cause of detention, and then to remand or to discharge as the rules of law may require. There are two general classes of cases: one, where the right of detention is claimed upon legal papers alleged to authorize detention, such as warrants by magistrates, final commitments, and the like; and the other class, where the right of detention is claimed without any documentary authority, but upon general principles of law, such as the claim of a father to the custody of a child.

In the first class of cases the court does not look beyond the apparent or "colorable" power of the magistrate or other lawful authority issuing the writ or mandate. The writ of *habeas corpus* is not a writ of review.[4] Any errors committed by the tribunal whose proceedings are under review cannot be considered in this manner, but only by some method of appeal. (*c*) The great in-

[1] Code of Civ. Pro. § 2026.

[2] Matter of Da Costa, 1 Parker Cr. 129.

[3] See in New York, Code of Civil Procedure, §§ 2043, 2045–2047.

[4] This point is considered in an elaborate note prepared by the reporter, a distinguished lawyer, Mr. Nicholas Hill, in 3 Hill, 647, in an Appendix to the case of People *v.* McLeod, 1 Hill, 377; and 25 Wend. 483.

(*a*) In New York when a traverse is interposed to the return, though the traverse is not demurred to, the issue is made up and no further pleading is required. In the Matter of Simon, 37 N. Y. St. Rep. 48.

(*b*) People *v.* Protestant Episcopal House of Mercy, 128 N. Y. 180.

(*c*) People *v.* Protestant Episcopal House of Mercy, *supra*.

quiry is as to the existence and validity of the process.[1] (*a*) There would be substantially two inquiries: one, did the tribunal have jurisdiction; the other, have the forms required by law been complied with?[2] When any new fact arises after conviction, entitling a party to a discharge, such as a pardon by the governor, that may be considered on this writ. So a court or judge may determine whether the execution issued in the case is warranted by the judgment.

These general rules rest upon the assumption that the court or tribunal, whose proceedings are the subject of inquiry, had *jurisdiction* over the matter in hand. Without this, the whole proceeding is a nullity, and any detention under it is unlawful. A judge cannot give himself jurisdiction by a decision that he possesses it.[3] (*b*) He must actually and in fact have it.

If the prisoner is remanded, he must be sent to the place from which he came, and not to some other place.[4] The order of remand should be simple and not encumbered with conditions imposed by the judge.

The second class of cases will now be considered. In a contest, for example, between a father and mother for the custody of a child by means of *this writ*, the court simply examines the question as to whether the child is deprived of *its liberty*. A somewhat arbitrary distinction is made to the effect that the court will only interfere when the child is under fourteen years of age. If above that age, the child is at liberty to exercise its discretion as to its place of abode, and the court will so declare.[5] When under that age, the custody is by common law awarded to the father,[6] on the ground that he is the legal guardian, and that the child is under "legal restraints," unless under legal custody. The whole subject is much affected by statute. This will be adverted to under the topic of Parent and Child.[7]

It should be noted that a court of chancery, acting as general guardian of infants and of their interests, has a far more extensive control over the matter of custody than can be exercised by means of the writ of *habeas corpus*.[8]

[1] People *v.* Cassels, 5 Hill, 164; Bennac *v.* People, 4 Barb. 31.

[2] People *v.* Sheriff, 29 Barb. 622.

[3] Devlin's Case, 5 Abb. Pr. 281.

[4] People *v.* Cowles, 4 Keyes, 38; s. c. 3 Abb. App. Dec. 507.

[5] *In re* Connor, 16 Ir. C. L. R. 112.

[6] The King *v.* Ward, 1 W. Bl. 386; Rex *v.* Clarke, 1 Burr. 606; *In re* Pearson, 4 Moore, 366; Rex *v.* Greenhill, 4 Ad. & El. 624.

[7] The New York law was carefully considered in People *v.* Porter *alias* Cooper, 1 Duer, 709.

[8] See Parent and Child, *post*, pp. 233-267.

(*a*) See People *v.* Protestant Episcopal House of Mercy, 128 N. Y. 180.

(*b*) Cf. People *v.* Protestant Episcopal House of Mercy, 133 N. Y. 207.

If there appears to be no proper ground of restraint the court makes a declaration that the party detained is at liberty to go where he pleases, unless in the case of infants under fourteen, in which case the direction would regularly be that the custody be awarded to the father.[1]

When discharged the prisoner should not be re-arrested on the same state of facts for the same cause. The subject, having been passed upon judicially, is *res adjudicata*, and must stand as final unless there be an appeal in some form. Statutes mark out in what cases a different state of facts may justify a re-arrest.[2] It is made a crime to violate this rule.

It is in accordance with the spirit on which the writ is framed, that if persons are confined on a criminal charge, and are not indicted within a brief period, they are to be discharged unless satisfactory reasons are given for the delay. Similar rules are applied to persons indicted and not tried within a reasonable time.

There are cases in which there may be serious danger that the requirements of the writ may be eluded unless more active measures are resorted to than the writ commonly allows. A statute exists in New York to meet this difficulty, permitting a *warrant* to be issued which would at once bring the prisoner before the court or judge to be dealt with according to law.[3]

IV. *Habeas Corpus in the United States Courts.* — The courts and judges of the United States are authorized to issue writs of *habeas corpus*, but the Supreme Court *only* when exercising appellate jurisdiction.[4] (*a*) As the United States courts issue the writ under the common law, and not under any statute, a previous decision refusing a discharge is no bar to a subsequent application.[5]

The Federal courts can bring up a prisoner from jail when he is committed for trial before a United States court; or in custody under color of United States authority; or in custody for an act done or omitted in pursuance of United States authority; or

[1] Rex *v.* Greenhill, 4 Ad. & El. 624; N. Y. Code of Civ. Pro. § 2043. An *order* of discharge is substituted for the old "*writ* of discharge." Id. § 2048.

[2] N. Y. Code of Civ. Pro. § 2050.

[3] N. Y. Code of Civ. Pro. §§ 2054, 2055. On the general subject, see §§ 2015–2066.

[4] *Ex parte* Watkins, 7 Pet. 568; *ex parte* Milburn, 9 Pet. 794 n.; Matter of Metzger, 5 How. U. S. 176; *In re* Kaine, 14 How. U. S. 103.

[5] *Ex parte* Kaine, 3 Blatch. 1.

(*a*) Except in cases affecting ambassadors, other public ministers or consuls, or those in which a State is a party. *Ex parte* Hung Hang, 108 U. S. 552. See also *ex parte* Parks, 93 U. S. 18; *ex parte* Yerger, 8 Wall. 85. As to the power of the United States Circuit Court of Appeals to issue the writ, see *In re* Boles, 4 C. Ct. App. 1.

where his detention is in violation of the United States Constitution, treaties, or laws; or, being a revenue officer, is in custody on account of an act done or omitted under color of his office or under color of any revenue law; or, being a citizen or subject of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order, or sanction of any foreign state, the validity and effect of which depend upon the law of nations, or unless the writ is necessary to bring the prisoner into court to testify.[1]

The Supreme Court will not grant the writ to review convictions by the inferior United States courts, as it has no appellate jurisdiction in criminal cases, but will discharge the prisoner where the lower court had no jurisdiction;[2] nor will that court issue the writ to determine the question whether a father has a right to the custody of a child rather than the mother.[3] (*a*)

Very important questions arise as to the use of the writ where there is a conflict of jurisdiction between a Federal and a State court. It is easy to see that some legal machinery must be resorted to in order to prevent a clashing of authority, so that State courts shall not improperly interfere with persons held in custody by order of United States courts or *vice versâ*. A leading mode of making these separate jurisdictions independent and efficient is the writ of *habeas corpus*.

The general rule is that where a person is properly in custody under State authority, the Circuit Court of the United States (the highest court of original jurisdiction) has no authority to take the accused by *habeas corpus* from such custody, nor has a State court authority to remove a defendant from the custody of a court of the United States.[4]

It is now, after great diversity of judicial opinion, a well-settled rule that a *habeas corpus* issued by a State court or judge has no effect within the limits of the authority assigned to the United States by the Constitution.[5] Should a State writ of *habeas corpus* issue to a United States marshal having a person in custody under United States process, he would properly make a return of the facts to the State court, etc., which could then

[1] U. S. Rev. St., §§ 751–753, 643.

[2] *Ex parte* Kearny, 7 Wheat. 38; *ex parte* Parks, 93 U. S. 18.

[3] *Ex parte* Barry, 2 How. U. S. 65.

[4] United States *v.* Rector, 5 McLean, 174.

[5] Ableman *v.* Booth, 21 How. U.S. 506.

(*a*) The District Courts of the United States have no authority to issue the writ in such a case. *In re* Burrus, 136 U. S. 586. As to the power of the Circuit Courts, the question seems to be in doubt. Id.

proceed no further.[1] It is enough that the prisoner is held under authority or color of authority of the United States.[2] This rule has been applied to the case of an enlisted soldier when held by an officer acting under authority of the United States, and claiming to hold him in that character.[3] The correct view is that the several State governments are distinct and independent of each other, and of the general government. If a dispute arise between them as to their enactments or jurisdiction, the State governments must give way until the tribunals of the United States have settled the question. Accordingly, no State judge has a right to issue a writ of *habeas corpus* for the discharge of a person held under the authority of, and by an officer of, the general government.[4] This principle was applied in the case cited to a State *habeas corpus* issued to effect a discharge of an alleged enlisting minor from the custody of a recruiting officer of the United States. Other cases in which the courts of the United States have reviewed an arrest or detention under the order of State authorities will be found collected in a note.[5]

The United States *habeas corpus* act provides among other things for the release of persons who are in custody for an act done "in pursuance of the laws of the United States." This has been held to include the case of a judge who, while travelling to perform circuit duty in a Circuit Court of the United States, was violently assaulted and put in danger of his life, and protected by a United States marshal, who killed the assailant. The court held that it was within the power of the President to take measures for the protection of the judge, and that the department of justice was the proper one to set in motion the means of protection, and that the marshal had proper authority to protect and defend the judge. It was determined that there is a "peace" of the United States as well as of a State (resembling the common-law notion of "the king's peace"), and that the United States marshal in upholding it stands in the same relation as the sheriff does in maintaining peace in a county. Accordingly, there was no crime committed against California, the State where the killing took place.[6]

The Supreme Court of the United States has power to dis-

[1] Tarble's Case, 13 Wall. 397. The Revised Statutes of the United States must be consulted, §§ 751–766, both inclusive.

[2] Matter of Farrand, 1 Abb. U. S. 140.

[3] *Re* Neill, 8 Blatch. 156.

[4] Tarble's Case, 13 Wall. 397.

[5] Electoral College of South Carolina. 1 Hughes, 571; *Ex parte* Tatem, Id. 588; *Ex parte* McCready, Id. 598; *Re* Bull, 4 Dill. 323; Brown *v.* United States, 2 Am. L. T. N. S. 464; *Ex parte* Thompson, 15 Am. Law Reg. N. S. 522; United States *v.* McClay, 23 Int. Rev. Rec. 80; *Ex parte* Robinson, 1 Bond, 39; United States *v.* Doss, 11 Am. Law Reg. N. S. 320.

[6] *In re* Neagle, 135 U. S. 1.

charge on *habeas corpus* a party held under a judgment of an inferior court of the United States acting without jurisdiction.[1] This rule would apply to a case of imprisonment under an unconstitutional law of Congress. An arrest under such a law would be substantially a wrongful arrest, and if a court should render a judgment in a criminal case upon it, and a corresponding sentence, it would be without jurisdiction. It could be so adjudged by the Supreme Court in the exercise of its appellate jurisdiction.[2] But if the court, *e. g.*, a court-martial, has jurisdiction over the offence and power to inflict the sentence given, the Supreme Court will not interfere.[3] The jurisdiction of the Supreme Court is limited *to the single question* of the power of the inferior court to commit the prisoner by reason of the act for which he has been convicted.[4]

The power of the Federal Courts to bring up on *habeas corpus* a prisoner held under arrest upon a State law claimed to be unconstitutional is a subject which has assumed much importance since the adoption of the Fourteenth Amendment to the United States Constitution.

It being now settled that an unconstitutional law is void and no law,[5] a person held under color of such a law of a State is detained illegally and without right. He can, accordingly, test the validity of the law by a writ of *habeas corpus*. An act of Congress authorizes the Supreme, Circuit, and District courts of the United States to issue such a writ for the purpose of inquiry into the cause of restraint in specified cases. One of these is, where being in jail the prisoner is in custody in violation of the Constitution or of a law or treaty of the United States.[6] The statute confers both upon the Circuit Court and the Supreme Court, the power to issue the original writ.(*a*) If the writ be issued by the Circuit Court, an appeal can be taken to the Supreme Court.[7] Each court has the power in its discretion to discharge the prisoner in advance of his trial in the State court, and if he is convicted, the power, in the exercise of a like discretion, to discharge him summarily on *habeas corpus*, or to leave him to his appeal to a higher State court, and if that fails,

[1] *Ex parte* Lange, 18 Wall. 163.

[2] *Ex parte* Siebold, 100 U. S. 371; *Ex parte* Virginia, Id. 339.

[3] *Ex parte* Mason, 105 U. S. 696.

[4] *Ex parte* Rowland, 104 U. S. 604; *Ex parte* Curtis, 106 U. S. 371; *Ex parte* Yarbrough, 110 U. S. 651.

[5] *Ex parte* Siebold, 100 U. S. 371, 376.

[6] U. S. Rev. St. §§ 751–753, etc.; also ch. 353, Laws 1885.

[7] The appeal could not be taken as the law stood in 1884. *Ex parte* Royall, 112 U. S. 181. Appellate jurisdiction was conferred by ch. 353 of the laws of 1885. *Ex parte* Royall, 117 U. S. 241.

(*a*) Cf. *ante*, p. 99.

to entertain a new application for a discharge. As between the State and United States courts conflicts should, if possible, be avoided. Due comity or forbearance is a principle of right and of law.[1] (*a*) It might, accordingly, be a wise exercise of discretion on the part of a Federal court to delay all action until the State court had finished its dealing with the case. Still, if the circumstances require it, the Federal court may proceed at once to dispose of the case.[2] A writ of *habeas corpus* is in its nature a civil proceeding, even where it is used to get rid of a criminal prosecution.[3]

V. *Habeas Corpus and Extradition.* — By the term "extradition," in modern law, is meant the mode provided by treaty, or other agreement or constitutional provision, whereby fugitives from justice found in a particular country or State are delivered to the authorities of the country or State where the crime is alleged to have been committed.

The principal cases to be considered arise between one State or Territory of the United States and another State or Territory, and also between the United States considered as a nation and a foreign country. The first of these will be termed "Interstate Extradition," and the other "Foreign Extradition."

The necessity of extradition treaties or ordinances grows out of certain rules of public law. One is, that the crime in question is committed solely against the law of the State in which the alleged criminal is at the time of its commission. The element of locality is deemed to have entered so fully into the case that the trial can only be had in that State. Another rule is, that the injured State has no right to enter by its officials into the territory of the State where the offender may happen to be, with the view of arresting and capturing him. Such an act, no matter what the motive may have been, would be a gross violation of international law. Finally, the State or country where the fugitive is, is under no duty imposed upon it by the rules of international law, to surrender him. This is certainly the prevailing view of able jurists, though not without dissent.[4]

[1] Covell *v.* Heyman, 111 U. S. 176, 182; *Ex parte* Royall, 117 U. S. 241 (*Habeas corpus* in the Circuit Court). Application by the same petitioner by original writ. Id. 254.

[2] *Ex parte* Bridges, 2 Woods, C. Ct. 428.

[3] *Ex parte* Tom Tong, 108 U. S. 556.

[4] This question was first brought to the attention of the Supreme Court of the United States in the case of Holmes *v.* Jennison, 14 Pet. 540 (1840). The question arose on a writ of *habeas corpus* issuing from the court of Vermont addressed to a sheriff who made a "return" that Holmes was held under the warrant of the governor of the State for delivery to the authorities of Lower Canada for a crime al-

(*a*) Cook *v.* Hart, 146 U. S. 183; *In re* Wood, 140 U. S. 278.

(1.) *Interstate Extradition.*(*b*) — This is provided for in the United States Constitution.[1] The words are these: "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

This provision was supplemented by an act of Congress passed Feb. 12, 1793. It is now incorporated into the Revised Statutes.[2] The section referred to provides that whenever the executive authority of a State or Territory making, in substance, the demand for surrender upon any other State or Territory, produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory certified as authentic by the governor, etc., charging the person demanded with having committed a crime, it shall be the duty of the executive authority of the State or Territory to which the person charged with committing the crime has fled, to cause him to be arrested and secured. Notice of the arrest is to be given to the demanding executive or his agent, and delivery is to be made to such agent when he shall appear.

For the sake of brevity, in the further development of the subject, the Territories will be assumed to be included in the term "States," and the States affected by the surrender will be

leged to have been committed there by him. Holmes was remanded to custody by the Vermont court, and its decision was brought under review in the Supreme Court of the United States. The judges of that court were equally divided in opinion upon some of the questions in the case. The majority of the court were of the opinion that a *State* of the Union had no power under the Constitution of the United States to surrender a fugitive from justice to a foreign power. The United States, they thought, is the sole organ of political communication with a foreign country. (opinion of TANEY, C. J., concurred in by Justices STORY, MCLEAN, and WAYNE, pp. 561–579. See also the note of the reporter at the end of the case, p. 598.) It was decided in Matter of Metzger, 5 How. U. S. 176, that the surrender of fugitives from justice is a matter of conventional arrangement between States, and that no obligation is imposed by the law of nations. See also United States *v.* Davis, 2 Sumn. 482. (Mem.). A different view was taken by Chancellor KENT in the Matter of Washburn, 4 Johns. Ch. 106, where he held that it was the law and usage of nations to deliver up offenders charged with felony and other high crimes to the nation from which they had fled. This opinion must be regarded as overruled in this country. (*a*)

[1] Art. IV., § 2, cl. 2.

[2] § 5278.

(*a*) See United States *v.* Rauscher, 119 U. S. 407, 411, 412.

(*b*) Mr. Moore, in his work on extradition, says that the use of the term "Extradition" to describe the surrender of fugitives from justice by one State of the Union to another is inaccurate and misleading. The proper term, in his opinion is "Rendition." Moore on Extradition, § 516.

termed respectively the "demanding State" and the "asylum State."

The following are the material points to be considered: —

(*a*) The crime by reason of which the demand for surrender may be made. (*b*) The indictment or the affidavit presented on the part of the demanding State. (*c*) The requirement that the person demanded must be a fugitive from justice. (*d*) The duty of the asylum State. (*e*) The mode of discharging the duty, including the executive warrant.

(*a*) The *crime* for which the demand may be made is not specifically named in the Constitution. The correct construction is, that it is a crime under the laws of the demanding State.[1] It includes not merely the higher grade of crimes, known as felonies, but also misdemeanors.[2]

(*b*) *The Indictment or Affidavit.* — While either a State or Territory[3] may make a demand, the so-called "Cherokee nation" cannot, as it is neither a State nor a Territory.[4] The word "indictment" here refers to the ordinary finding by a grand jury that a specific crime has been committed by a particular person named therein, while an affidavit means a written statement under oath containing detailed allegations, which, if true, would amount to a charge of crime.

The functions of a writ of *habeas corpus* are for the most part called into requisition to test the legal validity of these instruments. The courts of the United States, as well as of a State, may upon this writ consider the question whether the indictment or affidavit is so framed as to contain a sufficient charge of crime. The question of the *truth* or *falsity* of the charges is not before the court. Their truth is for the time being assumed. The *sufficiency* of the statement is really a matter of interpretation of a written document, and this is regularly a question of law.[5] The reason why the prisoner can bring the matter before a *United States* tribunal is, that the prisoner is held under color of authority derived from the Constitution and laws of the United States.[6]

The jurisdiction of the courts of the asylum State, or other State where the prisoner happens to be, is not excluded, since though the prisoner is held under authority derived from the Federal law, he is not held by an officer of the United States.[7]

[1] Kentucky *v.* Dennison, 24 How. U. S. 66.

[2] *Ex parte* Reggel, 114 U. S. 642.

[3] As to a Territory, see *Ex parte* Reggel, *supra*.

[4] *Ex parte* Morgan, 20 Fed. R. 298.

[5] Roberts *v.* Reilly, 116 U. S. 80, 95.

[6] Roberts *v.* Reilly, *supra*, p. 94.

[7] Robb *v.* Connolly, 111 U. S. 624.

In testing the validity of the indictment, regard is had to the law of the State where it was found, though it may not conform to technical rules prevailing in the law of the asylum State.[1] It is not within the power of the executive of the asylum State to decide upon the sufficiency of the indictment.[2] It is a matter for the judiciary to determine whether the indictment or affidavit presents a *prima facie* case.[3] If so, the fugitive should be surrendered. The facts to that extent must be set out in the papers.[4] A "complaint" in an action is not necessarily equivalent to an affidavit, and if it is claimed to be, a copy should be produced to the court for its inspection.[5]

(*c*) *The Person demanded must be a Fugitive from Justice.*— The most comprehensive description of a "fugitive" is found in a recent case.[6] It is there said that to be a fugitive in the sense of the extradition law, "it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a State committed that which, by its laws, constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offence, he has left its jurisdiction, and is found within the territory of another." More briefly, one is a fugitive if he committed the crime in one State, and when wanted by its authorities, he *is found* in another State.

The course of reasoning in the above statement of the law seems to be, that from the fact that he is *found* in another State, it may be conclusively presumed that he *fled* from justice. Otherwise, the words of the Constitution will not be fully carried out, since it is required *both* that "he shall flee from justice and be found in another State."[7] (*a*)

The question whether one is a fugitive or not is a question of fact, to be determined by the governor of the asylum State. It is not settled whether his decision is conclusive.[8] There are some decisions to the effect that it is not, and that the

[1] *Ex parte* Reggel, 114 U. S. 642.
[2] People *v.* Byrnes, 33 Hun, 98.
[3] *Ex parte* Reggel, *supra*; Roberts *v.* Reilly, 116 U. S. 80, 95.
[4] Smith *v.* State, 21 Neb. 552.
[5] State *v.* Richardson, 34 Minn. 115.
[6] Roberts *v.* Reilly, 116 U. S. 80, 97.
[7] Art. IV. § 2, cl. 2.
[8] Roberts *v.* Reilly, *supra*, p. 95.

(*a*) One who personally, within a State, has set in motion the machinery for crime, and departs from the jurisdiction before its consummation, is a fugitive from justice. *In re* Cook, 49 Fed. R. 833.

governor's determination may be reviewed on a writ of *habeas corpus*.[1](a)

(*d*) *The Duty of the Asylum State.* — It is the duty of the governor, as representing that State, to comply with the demand for the extradition of the fugitive. There is, however, no mode of enforcing this duty. The Constitution has not conferred any power in this respect, although it provides that the fugitive "*shall* be delivered up." The whole matter is left in substance to the discretion of the governor, guided or influenced by a sense of public duty and expediency.[2]

(*e*) *The Mode of Discharging the Duty, including the Warrant.* — Assuming that the governor of the asylum State has determined to deliver up the fugitive, his regular course is to issue his warrant to a sheriff or sheriffs requiring that the fugitive be arrested and delivered to the agent of the demanding governor to be carried to the State within whose jurisdiction the crime is alleged to have been committed.[3]

It is at this stage of the proceedings that the writ of *habeas corpus* is actually resorted to for the purpose of testing their validity. It is not seemly for the court to interfere while the proceedings are pending before the governor; but when he has taken final action, the prisoner has a right to a judicial decision, upon the question whether in issuing his warrant the governor has complied with the rules and forms of law, and if not, the prisoner is entitled to a discharge. The regular course is to have all the proceedings returned to the court, including the indictment or affidavit, and warrant. It has been made a question whether the governor of the asylum State has not a discretion to return simply the warrant, and so withhold from examination the indictment or affidavit. Such a course would seem but scant justice to the prisoner.

The New York courts take the following position on this important subject: If the return to the writ of *habeas corpus* not only includes the warrant, but also the indictment or

[1] *In re* Mohr, 73 Ala. 503. In Jones *v.* Leonard, 50 Iowa, 106, it was held that it may be shown that the prisoner is not a fugitive. In Wilcox *v.* Nolze, 34 Ohio St. 520, it was ruled that evidence might be offered to show that the prisoner had not been in the demanding State.

[2] Kentucky *v.* Dennison, 24 How. U. S. 66.

[3] In the case of Roberts *v.* Reilly, 116 U. S. 80, the papers that were before the court are fully detailed by the reporter, and may be resorted to for the purpose of making applications for extradition, since the Supreme Court determined that the prisoner was properly held under them. A form of requisition and a warrant of arrest and surrender are to be found in the report of Kingsbury's Case, 106 Mass. 224, 227.

(*a*) *In re* Cook, 49 Fed. R. 833.

affidavit on which the application for extradition was made, the court may examine into the sufficiency of the statements made in those papers.[1] On the other hand, if nothing is returned but the executive warrant, and this contains a recital of facts sufficient in themselves to constitute a charge of crime, there will be a sufficient ground for remanding the prisoner to custody, and the court can only look to the warrant.[2]

With due submission, these cases cannot be reconciled with the view of the Supreme Court of the United States, which holds that a determination of the point whether a crime is charged is a *question of law*, and is always open upon the face of the papers to *judicial* inquiry, on an application for a discharge under a writ of *habeas corpus*.[3] Surely a governor of a State cannot finally adjudicate a question of law. Moreover, principle requires that the papers on which any prisoner is held should always be open to the examination of a court or judge, so that the *cause* of detention may be tested by judicial rules and methods. It is the indictment or affidavit, and not the warrant, which constitutes the *charge*.[4]

The right of the demanding State to obtain the fugitive is in no way superior to that of the asylum State to detain him to answer for crimes committed there. If held by law in the latter State to answer for the violation of its laws, the governor may properly decline to deliver him until its demands are satisfied.[5]

It has been decided that the prisoner will not be discharged, though he was induced by stratagem to come into the State where the crime was committed.[6] The asylum State cannot demand the return of the prisoner, even though he were taken away by force, if he be held at the time under an indictment in the demanding State. It has been held that if a prisoner be surrendered to a demanding State, and the prosecution against him fail, that State may become an asylum State, and surrender him to another State demanding him for an alleged crime.[7] (*a*)

[1] People *v.* Brady, 56 N. Y. 182.

[2] People *v.* Pinkerton, 77 N. Y. 245; People *v.* Donohue, 84 N. Y. 438, 442, 443.

[3] Roberts *v.* Reilly, 116 U. S. 80, 95.

[4] Tullis *v.* Fleming, 69 Ind. 15. People *v.* Byrnes, 33 Hun, 98.

[5] The cases are collected in notes to Taylor *v.* Taintor, 16 Wall. 366, 370, 371. He may even be detained in a civil suit. Troutman's Case, 4 Zab. 634.

[6] *Ex parte* Brown, 28 Fed. R. 653.

[7] Hackney *v.* Welsh, 107 Ind. 253.

(*a*) See Matter of Hope, 7 N. Y. Crim. Rep. 406, where the governor of New York revoked a warrant issued on the application of the governor of Delaware for the arrest of one who had been extradited from a third State by the State of New York, and after conviction served out his term.

Again, if a surrendered prisoner be tried and discharged, he may be arrested and tried without being permitted to leave the State, for another and distinct offence.[1]

Some cases intimate that one extradited can only be tried for the particular offence with which he was charged, on the application for his surrender.[2] (*a*) However this may be, if one had been illegally and by force brought from a foreign country into one State, he may be lawfully surrendered by that State on demand, to any other State, on the usual application for "interstate extradition."[3] There was no international wrong in this case, in violation of a treaty or otherwise. There was nothing but private and individual wrong in bringing the prisoner into the first State. (*b*)

A State may to a certain extent supplement the legislation of Congress upon this subject, by providing a mode of arresting a person within its limits provisionally, to await the order of a demanding State.[4] Still, there can properly be no *surrender* of a fugitive from justice, unless proceedings have been commenced against him in the State in which the crime is alleged to have been committed.[5]

This view of "interstate extradition" may be fitly closed by an extract from a letter of Oliver Cromwell, as Lord Protector, written in 1653 to the inhabitants of Rhode Island. After several directions, he closes with the following injunction: "Particularly not to harbour, entertain, or countenance any malefactors, who, after misdemeanours committed, shall, for declining the justice of any of the said four governments" (meaning the New England colonies), "make escape, and *fly* to you for shelter and protection, but *to render them up* to the law."[6] Here is the substance of the existing article of the United States Constitution.

[1] State *v.* Stewart, 60 Wis. 587; but see *In re* Cannon, 47 Mich. 481.

[2] An opposing view is taken in the United States Dist. Ct. for N. J., in Matter of Noyes, 17 Alb. L. J. 407, citing cases.

[3] Ker *v.* The People, 110 Ill. 627.

[4] See in New York, Laws of 1839, ch. 350 (*c*); *Ex parte* Rosenblat, 51 Cal. 285; *Ex parte* Cubreth, 49 Cal. 435.

[5] *Ex parte* White, 49 Cal. 433; State *v.* Hufford, 28 Iowa, 391.

[6] 2 Thurloe's State Papers, Ed. Birch, p. 2 (1742).

(*a*) The following authorities support the view that the prisoner can only be tried for the offence for which he was extradited. *Ex parte* McKnight, 48 Ohio St. 588; *In re* Fitton, 45 Fed. R. 471. See also *In re* Cook, 49 Fed. R. 833; *contra*, Williams *v.* Weber, 28 Pac. R. 21; People *v.* Cross, 135 N. Y. 536, aff'g 64 Hun, 348. That he cannot be arrested in a civil suit until he has had a reasonable opportunity to return, see Matter of Baruch, 24 Abb. N. C. 109; Moletor *v.* Sinnen, 76 Wis. 308.

(*b*) See Mahon *v.* Justice, 127 U. S. 700.

(*c*) This statute is repealed. See Laws 1886, ch. 593, § 1, subdiv. 14. The subject is now regulated by Code of Crim. Pro. §§ 827–834.

(2) *Foreign Extradition.*— By this expression, as here used, is meant the delivery under rules of law by one *nation* to another of fugitives from justice.

It was at one time supposed by some jurists that a nation was under an obligation by the rules of international law to deliver up for trial to another nation on demand a fugitive from its criminal justice.[1] The better opinion now is that there is no obligation in such a case, though a nation or State of the Union may in the exercise of its discretion repel criminals from another country seeking an asylum there, and deliver them up to the authorities of the country whence they came.[2] So, a foreign State might have a statute of its own, without any international obligation in the case, authorizing the delivery of such fugitives. Still, there would be no strict extradition in such cases, as there would be no obligation upon the asylum State to continue its policy. It might abandon it at any time. True extradition only exists when there is a *right* of one State or country to *demand* from another its fugitives from justice, with a corresponding *duty* on the part of the asylum State.

This *duty* to deliver fugitives is to be derived as a practical matter from treaty,[3] and extends only to offences specifically named therein. The United States have various treaties with foreign nations on this subject. These treaties, however, having been made at various times and under differing circumstances, show no uniformity either in the crimes named or in the rules governing extradition. The offences most commonly provided for are murder, robbery, forgery (including counterfeiting of money), arson, and embezzlement of public moneys in various forms.[4] In a considerable number of treaties, political offences are expressly excluded.[5] Citizens of the asylum State are not to be delivered in quite a number of instances.[6] In each case of extradition reference must be made to the particular treaty under which it is demanded.

Important questions of a judicial nature have been presented to the courts in reference to this form of extradition. A leading one is whether, if a person be extradited under a treaty, he can be tried for any other offence than that for which an application

[1] Matter of Washburn, 4 Johns. Ch. 106.

[2] See English cases cited in Matter of Washburn, *supra*, p. 111; also Adriance *v.* Lagrave, 59 N. Y. 110.

[3] United States *v.* Rauscher, 119 U. S. 407.

[4] A very useful classification may be found in the "Analytical Index" to the government publication entitled "Treaties and Conventions concluded between the United States and other Powers, etc." (1889) pp. 1413–1416.

[5] Treaties and Conventions, *supra*, p. 1415.

[6] Id.

for his extradition was made. To determine this question resort must be had to the treaty and the laws of Congress bearing upon it. Even though the crime may have been committed against the law of a State, the extradition must be negotiated through the Federal government, and not by that of a State.[1] A treaty is in this country the supreme law of the land, as distinguished from a contract between the nations that enter into it.[2] Where treaties regulate the mutual rights of citizens and subjects of the contracting parties, and these rights are of a nature to be enforced in a court of justice, the treaty will be resorted to for a rule of decision of the case before it, in the same manner as a statute might be. The solution of the question under discussion is simply one of the reasonable *construction or interpretation* of a particular treaty, and the laws made to carry it more fully into effect.

A case in which the application of this rule was made has been recently decided by the Supreme Court of the United States. It arose under the treaty of 1842 with Great Britain.[3] The court referred to the caption of the treaty, which provides for the giving up of criminals, fugitives from justice, in "certain cases."[4] These cases are specifically enumerated, viz., murder, piracy, etc., seven crimes in all. It further refers to the fact that a requisition could only be made for one of the enumerated crimes, and that it must be shown, on an examination before a proper tribunal, that the fugitive was demanded for such a crime, and that the examining magistrate must be satisfied by such evidence as the law of the State of the asylum requires, of his guilt. The result is, that there is no reason to doubt that the fair purpose of the treaty is, that the prisoner shall be delivered up to be tried for that offence *and no other*.[5] The words of two sections of the Revised Statutes[6] were also referred to as enough of themselves to "set the point at rest." It was declared that the obvious meaning of these sections is, in reference *to all treaties of extradition made by the United States*, that the party shall not be delivered up by the United States government to be tried for any other offence than that charged in the extradition proceedings, and that when brought into this country on extradition proceedings he shall not

[1] United States *v.* Rauscher, 119 U. S. 407; People *v.* Curtis, 50 N. Y. 321.

[2] Foster *v.* Neilson, 2 Pet. 253, 314; Head-Money Cases, 112 U. S. 580, 598, 599.

[3] Treaties and Conventions (1889), p. 437 (Art. X.).

[4] These words, in "certain cases," on which the court laid much stress, are, singularly enough, wholly omitted in the publication of 1889.

[5] United States *v.* Rauscher, 119 U. S. 422–424.

[6] U. S. Rev. St., §§ 5272 and 5275.

be arrested or tried for any other offence than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. These sections were declared to be binding on the judiciary.[1]

If any State court takes a different view of this question, its decision will be subject to review in the United States court by a writ of error, or a writ of *habeas corpus* from a Federal judge or a Federal court may be resorted to on behalf of the prisoner.[2] The rights of persons, extradited under a treaty, can in accordance with this decision be fully enforced by the judicial branch of the United States government.[3] A recent English case treats this decision as final in reference to American law.[4]

The principle announced in the foregoing decision cannot be made available unless the prisoner is brought here under the provisions of a treaty. Accordingly, if he were taken by mere lawless violence from an asylum country, and brought into one of the States of the Union, he could be tried there for his crime, if the law of that State did not forbid. There would in such circumstances be no question of "extradition," and the United States court would have no jurisdiction.[5] As a further question of construction, reference may be made to such words in a treaty as a crime "committed within the *jurisdiction* of either" nation.[6] Some nations by statute make it criminal for their own subjects to commit certain acts within a foreign country. It has been held judicially that the offence was committed "within the *jurisdiction*" of the demanding State, though beyond its own territories. The reason of this view is, that a State or nation is supposed to have jurisdiction over its own citizens or subjects wherever they may be.[7]

Another question has arisen involving the meaning of the term "crime," as applied to enumerated offences, such as

[1] People *v.* Rauscher, 119 U. S. 423, 424, referring to United States *v.* Caldwell, 8 Blatch. 131; United States *v.* Lawrence, 13 Blatch. 295; and Adriance *v.* Lagrave, 59 N. Y. 110, with disapproval; and with approval to Commonwealth *v.* Hawes, 13 Bush (Ky.), 697; Blandford *v.* State, 10 Tex. App. 627, and State *v.* Vanderpool, 39 Ohio St. 273.

[2] *Ex parte* Royall, 117 U. S. 241, 251.

[3] The court, in support of its views, referred to diplomatic discussions, articles in law magazines, and treatises of repute. 119 U. S. 415, 417.

[4] *In re* Woodall, 57 L. J. (M. C.) 72.

[5] Ker *v.* Illinois, 119 U. S. 436.

[6] Treaty with Great Britain of 1842, Art. X.

[7] *In re* Stupp, 11 Blatch. 124. An opposing opinion by the Attorney-General is to be found in a note to this case. The English court holds that if one, being in England, sets in motion causes which culminate in a crime out of England, he may be extradited, since he is *found* in England. It is not necessary that he should have *fled*. Queen *v.* Nillins, 53 L. J. (M. C.) 157.

forgery, for example, in the treaty between the United States and England. The word "forgery" had in the common law a settled meaning. Statutory crimes have been created in a number of the American States giving to newly described offences the name "forgery." The question then is whether the treaty word "forgery" includes these cases. The English courts contend that it does not, and that there can be no extradition for that class of offenees.[1] On a similar principle, the words "crime or offence," in a treaty with China, were limited in meaning so as to include only such ordinary crimes and offences as are generally punishable under the laws of civilized nations, and not to extend to such as are peculiar to the law of China.[2]

The meaning of such a word as forgery might present itself in another aspect. It might, for example, be found in a treaty with Mexico. That country makes the Roman law the basis of its jurisprudence, and the Supreme Court has held that the common law of England can scarcely be said to be the only criterion by which to construe the language of a treaty with Mexico.[3]

The mode of obtaining by means of extradition the possession of one charged with a treaty crime is pointed out by supplementary legislation carrying out into details the treaty provision.[4] The treaty and the statute are to be read together to obtain a full view of the proceedings. The leading section of the Revised Statutes is § 5270, which provides that "whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If on such hearing he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or

[1] *In re* Windsor, 6 B. & S. 522; *Re* Twiman, 5 B. & S. 645; s. c. 9 Cox, C. C. 522.

[2] Attorney-General *v.* Kwok-a-Sing, L. R. 5 P. C. 179; s. c. 12 Cox, C. C. 565.

[3] Benson *v.* McMahon, 127 U. S. 457, 466.

[4] The English act is 33 & 34 Vict. c. 52, termed the "Extradition Act of 1870." In this country, see U. S. Rev. St., §§ 5270–5276.

convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue, upon the requisition of the proper authorities of such foreign government, for the surrender of such person according to the stipulations of the treaty or convention, and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

The following are the requisites to be observed.

(*a*) There must be a complaint on oath stating the facts necessary to constitute the alleged crime. It is not necessary that there should be a demand or requisition made in the outset by the foreign government. The initiative provided by the statute will suffice,[1] though the treaty provide for requisitions. In the case cited, the complaint was made by the consul-general of the country (Mexico) where the crime was committed.

(*b*) There must be a warrant by the commissioner or other officer for the apprehension of the alleged criminal, so that evidence of his criminality may be judicially heard and considered.

(*c*) Treaties provide that the prisoner shall only be delivered up when the fact of the commission of the crime shall be so established that the laws of the country in which the person is found would justify his apprehension[2] and commitment for trial if the crime had been there committed. The proceeding before the commissioner closely resembles that which constantly takes place in criminal law, when a preliminary examination is held before an examining magistrate for the purpose of determining whether a prisoner ought to be held for trial. The commissioner does not try the prisoner. His sole function is to determine whether he is to be tried in the foreign country. If he holds the evidence to be sufficient to sustain the charge, he so certifies to the Secretary of State, at the same time transmitting a copy of all the testimony.

(*d*) The commissioner thereupon issues his warrant for the commitment of the person charged to jail, there to remain until surrender is made, which must be within a time prescribed by law.[3]

The regularity of all the proceedings may be determined upon

[1] Benson *v.* McMahon, 127 U. S. 457, 460. It, however, appeared by the correspondence between the foreign government and its officers that it was the purpose of the foreign government to have the prisoner tried for his offence. But a *preliminary mandate* from the foreign government is not necessary unless made so by the treaty. Castro *v.* De Uriarte, 16 Fed. R. 93.

[2] This word in the English Extradition Act, § 8, has been construed liberally, and includes *detention* of one already in custody, though originally arrested without warrant. Reg. *v.* Weil, L. R. 9 Q. B. 701.

[3] U. S. Rev. St. § 5273.

a writ of *habeas corpus* issuing from a Federal court.[1] The main question to be determined upon the writ is whether the commissioner had jurisdiction to hear and decide upon the complaint. If so, the next inquiry will be whether there was sufficient legal ground for committing the prisoner to await the requisition of the foreign authorities. The court, in a hearing upon the writ, will not treat it as a "writ of error," and will not look into questions regarding the introduction of evidence in the same manner as on an appeal.[2] From the case cited, it appears that there need be no "requisition" by the foreign government until the prisoner has been held for trial by the commissioner.

(*e*) The final requisite is the warrant surrendering the prisoner to the agent of the demanding State. The warrant is issued by the Secretary of State under his hand and official seal.[3]

The former mode of procedure is simplified by an act of Congress passed Aug. 3, 1882.[4] This act was occasioned by some difficulties which had arisen concerning the introduction in evidence here of depositions of witnesses, warrants of magistrates, and other papers taken in the foreign country. The statutes of Congress had not been framed with sufficient breadth or precision.[5] The existing law provides that such depositions, etc., or the copies thereof, shall be received for all the purposes of the hearing if they shall be sufficiently authenticated so as to entitle them to be received *for similar purposes* by the tribunals of the foreign country from which the accused shall have escaped. The expression "for similar purposes" means for the purpose of determining in the foreign country whether an alleged fugitive should be extradited from that country.(*a*) Whatever rule the foreign country applies in such matters in extradition cases, the United States will reciprocate. The certificate of the principal diplomatic or consular officer of the United States residing in the foreign country, will be proof that the documents already referred to, or copies of them, are authenticated as required by this act.[6]

[1] The writ was obtained from the Circuit Court of the United States in the case of Benson *v.* McMahon, and an appeal from its decision was taken to the Supreme Court. 127 U. S. 458, 459.

[2] Id. 461, 462.

[3] U. S. Rev. St. § 5272.

[4] Chap. 378, Laws of 1882, 22 U. S. Stats. at Large, 215.

[5] The law before 1882 is collated and lucidly explained in the case of *In re* Fowler, 18 Blatch. 430 (1880).

[6] Reference may be made, for further information on the general subject, to

(*a*) The words "for similar purposes," in the Act of August 3, 1882, mean "as evidence of criminality," and depositions or other papers authenticated in the manner prescribed are not admissible in evidence on the hearing on the part of the accused. *In re* Luis Oteiza y Cortes, 136 U. S. 330.

The writ *de homine replegiando* existed at common law, though it has now fallen into disuse. Its peculiarity was, that it raised a question which could be tried by *a jury*, while the questions arising upon a writ of *habeas corpus* are to be disposed of by a *court* or *judge*. The framers of the New York Revised Statutes attempted to adapt this writ to the trial of the question whether a person claimed to be a fugitive slave was so in fact. The statute was held by the State court to be unconstitutional, as contrary to the United States Constitution and the legislation of Congress upon the subject of fugitive slaves.[1] There is nothing at present in the way of reviving this writ by legislation, so far as its revival would not interfere with constitutional provisions.

The writ of *ne exeat* is a writ which operates as a restraint upon personal liberty, and prevents a person from withdrawing from the limits of the State unless he gives sufficient security to abide the order of the court. It is a remedy in equity jurisprudence. It can only be granted when the court would have a right to enforce its decree against the person, and commit him for contempt if the order were disobeyed. It is a discretionary writ, and granted with much caution. The theory of it is that the decrees of an equity court are, as a rule, only enforceable against the person, and a defendant by withdrawing from the State might practically render the decree of the court ineffectual. There was a great difference of professional opinion upon the point whether this writ had been abolished in New York by statute, until the subject was settled by the Code of Civil Procedure.[2] Technically speaking, the *writ* is abolished. The substance of it, however, remains in later sections, whereby the same relief can now be obtained by *order* which formerly could be had by the *writ*.

The subject of Personal Liberty may be closed with a brief reference to the right of *religious worship* and to *freedom of speech* and of the *press*. The first of these may be regarded as

Clarke on Extradition, Spear on Extradition, Wheaton's International Law by Lawrence, Wheaton's International Law by Dana, Hurd on Habeas Corpus, etc. The work of Mr. Spear received high commendation from the Supreme Court of the United States, in the case of People *v.* Rauscher, 119 U. S. p. 417.

[1] Jack *v.* Martin, 12 Wend. 311, 324; on appeal, 14 Wend. 507. The difficulty was that the writ was framed to *try*, as a matter of fact, the question whether the person was a slave, instead of ascertaining whether there was sufficient apparent ground for the *claim* that he was one, in order to return him to the State from which he was alleged to have fled, where the question of his freedom would properly be tried.

[2] § 548, Collins *v.* Collins, 80 N. Y. 24. See also §§ 550, 551.

a *right* in the United States. The First Amendment to the United States Constitution provides that Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof.* A similar clause is found in State constitutions. The language of the New York constitution is that "the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State to all mankind." [1]

It was not the object of the provision in the United States Constitution to allow the plea of religious liberty to be used as a cloak for the violation of law and good order. The right of governmental interference commences "when principles break out into overt acts, against peace and good order." [2] This doctrine was applied to the case of polygamous marriages in the Territory of Utah, contrary to § 5352 of the Revised Statutes of the United States.[3] The court, having held this law constitutional, further said: "So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in fact to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." [4]

The people of the United States are to be congratulated that the Supreme Court so successfully drew the line between a false belief which is to be tolerated and the acts dictated by the belief and derived from it, which may properly be prohibited and punished by society.

Like views must be entertained of *liberty of speech and of the press*, secured by the First Amendment to the United States Constitution. This fairly includes all modes of communicating thought by oral words, or by writing, or printing, or other signs. Still, the liberty thus conceded is subject to the qualification that it must not be used to encourage practices dangerous to the welfare or safety of the State. This view is enforced by provisions of the Penal Code of New York, which prohibit the sale or loan of inde-

[1] Constitution of the State of New York, Art. I. § 3. There is a useful qualification to that clause in the constitution: "But the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices, inconsistent with the peace or safety of this State."

[2] Preamble to a Virginia statute, 12 Hening's Stat. 84.

[3] Reynolds *v.* United States, 98 U. S. 145.

[4] Reynolds *v.* United States, *supra*, p. 166.

cent or immoral books or pictures, or the conveying of oral information as to the means of obtaining any indecent article or thing.[1]

A like result is accomplished in an indirect manner by statutes of Congress prohibiting the carrying of indecent matter in the mails, and punishing any one who knowingly deposits it in the post-office to be carried by mail.[2] (*a*) The ground of this legislation is that Congress has exclusive control over mail-matter and may in the exercise of this power exclude such matter from the mail.[3] This would be the only ground for its legislation as to the States, though in such places as the District of Columbia and the Territories, where it has exclusive power of legislation, it might be rested on the general ground of the public welfare and safety. The Supreme Court of the United States[4] in upholding this legislation, subjected it to the qualifications that sealed letters and packages could as a rule only be opened and examined under warrant issued upon oath or affirmation,[5] and that freedom of the press could not be interfered with *by Congress* by limiting the circulation of newspapers *in any other way* than by excluding them from the mail. *State* legislation may accordingly be called into requisition for this purpose so far as it does not infringe upon the *State* constitution.

[1] Penal Code, § 317, as amended by ch. 380 of the Laws of 1884, and ch. 692 of the Laws of 1887.

[2] U. S. Rev. St. § 3893.

[3] United States *v.* Bott, 11 Blatch. 346; United States *v.* Foote, 13 Blatch. 418; United States *v.* Kelly, 3 Sawy. C. Ct. 566; *Ex parte* Jackson, 96 U. S. 727.

[4] *Ex parte* Jackson, *supra*.

[5] As prescribed by the Fourth Amendment.

(*a*) See also Laws of 1888, ch. 1039; 25 Stats. at Large, 496.

CHAPTER IV.

CITIZENS AND ALIENS.

THIS subject will be treated under two general divisions, — citizens and aliens.

DIVISION I. — CITIZENS.

The term "citizen" is used in the common law, and has a definite meaning attributed to it by writers on political science. One of the earliest works having a marked influence upon English ideas is that of the French writer, Bodin, on the Republic, in six books, first published in 1576. This was translated into English by Richard Knolles, and published in London in 1606. The sixth chapter of the first book treats of citizens and how they differ from strangers. He defines a citizen to be a free subject holding of the sovereignty of another man. He argues from this definition that a slave is no citizen nor is a stranger coming into another seigniory. Some citizens are natural; others are naturalized.[1] Of natural citizens, some are free-born, some are slaves. Such slaves being set at liberty instantly become citizens. The naturalized citizen is he who hath submitted himself to the sovereignty of another, and is so received into the number of citizens. There are thus three modes of becoming a citizen, — free birth, naturalization, and enfranchisement. Accordingly, he continues, we must agree with Plutarch, that they are to be called citizens that enjoy the right and privileges of a city (or state). This is to be understood according to the condition and quality of every one: the nobles as nobles; the commoners as commoners; the women and children in like case according to the age, sex, condition, and deserts of every one of them.[2] Using the same laws, magistrates, and customs are the true marks of a true citizen.[3] He then discourses concerning the "immunities and privileges"[4] of a citizen. He makes a remark which has a singular sound when applied to the United States, viz., that

[1] Page 48. (References are to Knolles's Ed., 1606.)

[2] Page 53.

[3] Page 54.

[4] Page 59. This is a phrase found in the United States Constitution.

in a popular state, where every citizen *is in a manner partaker of the majesty of the state*, they do not easily admit strangers unto the freedom of citizens.[1] He affirms the perpetuity of citizenship. He says, "It hath and shall be always lawful to all princes by the right of their majesty and power to keep their citizens at home."[2] Accordingly, the freedom of a citizen is not lost nor the power of a prince over his subject, by changing of the place or country. He cites a decree of the parliament of Paris made June 14, 1554, which adjudged that a Frenchman having dwelt fifty years in Venice, continued still subject to the French king, and was received into the succession of his next kinsmen.[3] He is however of opinion that if a Frenchman go to Spain to live and renounce his allegiance to France, and there have a son born, this son is not a Frenchman, without naturalization.[4] He sums up by saying that it is the acknowledgment and obedience of the free subject towards his sovereign prince and the "tuition" (protection), justice, and defence of the prince toward the subject, which maketh the citizen. This is the essential difference of a citizen from a stranger, — as for other differences, they are casual and accidental. He finally proceeds to say that the subject *wheresoever he be* is bound to the laws of his prince, . . . "for the power to tie and bind a subject is not tied unto places."

These words are not specifically common law, but they are the summary of the ripe conclusions of a leader of political thought, at the time when the common law was in a state of formation. They express the views of continental Europe as to the nature and scope of allegiance, and the meaning of citizenship as the outcome of the same feudal and governmental principles as were recognized at the time in England.

The correct theory of allegiance, by the rules of the common law, was greatly discussed in Calvin's Case.[5] The case grew out of the union of the crowns of England and Scotland on the accession of James I. to the English throne. Calvin was born *after* this union, in Scotland, and the question was whether he was a natural-born citizen of England. Such a person was called a *postnatus*. All those born before the union were termed *antenati*. It was conceded that such persons born in Scotland were aliens in England. It was held that the *postnati* were citizens, on the ground that the test was *allegiance*, and where persons in two countries owed allegiance to the same king, they were each his

[1] Page 60.
[2] Ib.
[3] Page 63.
[4] Ib. This seems to be inconsistent with his former view that no one can divest himself of his allegiance without his sovereign's consent.
[5] Coke's Rep. (Pt. 7) p. 1.

subjects and he owed them protection. "Allegiance is not tied down to places."[1] The Scotchman (*postnatus*) could therefore freely acquire land in England, though Scotland had then a different parliament and was governed by different laws. The theory of Calvin's Case was that allegiance was a *personal tie* between the king and subject, and that the king was not for this purpose to be regarded in his political capacity only.[2] In a republic, the allegiance must necessarily exist only between the nation or state and the individual.

A different question will arise when two nations once under the same allegiance are separated, or a part of a state's territory is severed from it; as the town of Calais in France was separated from England in Queen Mary's time, or the American colonies from England. A similar question will arise as to those who are citizens before the separation, and those who are born afterwards in the respective countries (*antenati* and *postnati*). All of those who were previously citizens have an election to determine to which country they will belong. If they adopt one, they become aliens as to the other.

In applying this principle to the American colonies, a difference of opinion developed itself between the English and the American courts. The English courts fixed upon the date of the treaty of peace in 1783, as the day for final separation; the American courts adopted the date of the Declaration of Independence in 1776. By the American theory an Englishman who came to the United States to reside after July 4, 1776, was an alien.[3] All the English or Americans in this country when the war broke out might elect to become either citizens of England or of America,[4] but not of both countries.[5] A person might lose the right of election by remaining in the new state or country for a time while it was in a condition to extend to him that protection which the doctrine of allegiance implies, as for example, where he remained until 1777.[6] The court, however, refused to apply this last doctrine to one who remained in New York until a short time before the evacuation by the British in November, 1783, the colony being all that time under the control of the British.[7]

These rules will not affect vested rights acquired before the separation.[8] A revolution in government does not *of itself* destroy vested rights of property. They must be confiscated by law.

[1] Bodin, p. 63.

[2] Calvin's Case, p. 10 *a*.

[3] Jackson *v.* Wright, 4 Johns. 75.

[4] Jackson *v.* White, 20 Johns. 313, 322.

[5] Orser *v.* Hoag, 3 Hill, 79.

[6] M'Ilvaine *v.* Coxe's Lessee, 4 Cranch, 209, 211.

[7] Inglis *v.* Trustees of Sailor's Snug Harbor, 3 Pet. 99, 124.

[8] Kelly *v.* Harrison, 2 Johns. Cas. 29, 31.

The right to make a subsequent acquisition of real property will depend upon the allegiance due at the time of the acquisition. These matters may be regulated by treaty, as, for example, the treaty between the United States and England in 1794.[1]

By *local allegiance*, an expression borrowed from the common law, is meant the duty of any person temporarily in a country to submit himself for the time being to the law of the place where he may happen to be. When he withdraws from the country, if he is not a citizen, local allegiance is at an end.

There has been some question made of late years as to the liability of one who, not being in a given State or country, sets in motion a cause which results in a breach of law and perhaps a crime in such State. The view of the New York Court of Appeals[2] was that the general doctrine of allegiance was not sufficiently comprehensive to meet the exigencies of such a case, but that the stranger coming into the State might be prosecuted there on the ground that the act committed was an offence against the higher law of nature which the State should punish in order to protect its own citizens.

The correct application of this principle was greatly discussed in a famous English case known as the Franconia case.[3] The case involved the question whether the English courts could try and punish Keyn, in command of the German ship, the Franconia, which being on a sea voyage ran into a British ship through negligence, two and a half miles from the beach of Dover, England, and caused the death of a passenger. The element of *locality* entered into the case, as a German commander could not be tried in an English court for manslaughter, committed on the high seas more than three miles from land. The question, however, remained whether he was liable if the act were committed *within* three miles of the shore. The appellate court, consisting of thirteen judges, while conceding that by the common law the *ordinary criminal courts* had no jurisdiction beyond low-water mark, except in the case of land-locked waters, such as harbors, etc., decided by a narrow majority (seven to six) that the *admiralty criminal jurisdiction* extended over the high seas from low-water mark seaward over all persons *on board British ships* and no others. The six judges in the minority were of the opinion that the admiralty criminal jurisdiction extended over *all* persons in *any* and *all* ships within a marine league of the coast. The result of the decision was that no British court has

[1] Munro *v.* Merchant, 26 Barb. 383; (on appeal) 28 N. Y. 9.

[2] Adams *v.* The People, 1 N. Y. 173.

[3] Regina *v.* Keyn, L. R. 2 Exch. Div. 63–239.

any jurisdiction whatever over a crime committed by a foreigner on board a foreign ship on the high sea, even though within three miles of the British coast.[1]

Another question of importance is, how far a foreign ship of war is liable to our jurisdiction, while in one of our harbors. Some jurists maintain the theory of "ex-territoriality," which is an assertion that the doctrine of local allegiance cannot be applied. They maintain that a ship of war resembles a floating island, and that when in a foreign port, the law of the port does not attach to it. This is asserted to be a rule of international law. On the other hand, it is maintained with equal positiveness by others, that every nation has absolute and exclusive sovereignty within its own limits, including its own ports and harbors, and that by consequence all restrictions upon its full power must be derived from the consent of the nation itself.[2] The question took on a highly practical shape in a case where a fugitive slave sought refuge on an English ship of war lying in a port where slavery existed, and the question was whether the commander was bound to deliver him to the local authorities. On this point, the opinion of the English jurists who were consulted was greatly divided, and the point remains undetermined.[3] The weight of argument would seem to be with those who contend that the principle of "ex-territoriality" is at least not to be pressed so far as to excuse citizens or subjects from obedience to their own local law.

There is one further question to be noticed here. This is, whether a foreigner committing an offence against the local law of the State where he may be, can relieve himself from liability to prosecution by pleading the command of the State to which he belongs, and thus raise the question to the rank of an international inquiry. This question was fully considered by a New

[1] The opinions in Regina *v.* Keyn were of great length, occupying 176 octavo pages of the report. The controversy led to the statute of 41 & 42 Vict. c. 73, 1878, called "The Territorial Waters Jurisdiction Act." This statute declares that the jurisdiction of England over offences extends over the open sea within a marine league of the coast, over foreigners on foreign ships or over offences committed by means of foreign ships; but no proceedings of a criminal nature against such a foreigner are to be instituted without the consent of a secretary of state and a certificate that he deems them expedient. The word "offence" as used in this statute is defined to mean any act, neglect, or default which, if committed within the body of a county in England, would at the time be punishable by an indictment. This comprehensive definition seems to make it useful for all persons sailing within a marine league of the British coast to be acquainted with the whole body of the English criminal law.

[2] The Schooner Exchange *v.* M'Faddon, 7 Cranch, 116, 136.

[3] See a Report of a Royal Commission on Fugitive Slaves, referred to in 2 Stephen's Hist. of the Criminal Law of England, p. 44.

York court in the case of an Englishman who, while a rebellion existed in Canada, had, as was claimed, unlawfully killed an American citizen within the jurisdiction of New York. It was held by the State court that he was liable to prosecution for the alleged crime though his act was avowed and adopted by Great Britain.[1]

It is quite plain that this theory under our complex system of government might enable a single State through the action of its criminal courts to involve the entire nation in a war with a foreign power. Accordingly, with a view of avoiding all danger, Congress has passed a statute requiring notice in any such case to be served on the attorney-general of the United States of any writ of *habeas corpus* which may be applied for in behalf of such a person. An appeal may be taken from the final decision upon the writ to the Circuit Court of the United States for the district in which the cause is heard, and thence to the Supreme Court of the United States.[2]

The merits of this question were not settled by the case of People *v.* McLeod, since the prisoner when tried proved an *alibi* and was acquitted. The correct doctrine seems to be that the adoption by the government of the act of one of its citizens makes such act, by a species of ratification, a governmental one, and brings the whole subject within the domain of international law. The act, if wrongful, thus becomes a national wrong. It may be a cause of war; it cannot properly be treated as a crime. It has been decided in a number of English cases that an individual acting in this manner is not under any civil responsibility.[3] It would seem still more plain that he would not be criminally liable to the foreign State or to any component part of it. If the act be a wrong, it is one for which a municipal court of justice cannot afford a remedy, and by parity of reasoning cannot punish.[4]

[1] People *v.* McLeod, 25 Wend. 482. The correspondence between the English and American authorities may be found in a note at page 487. See also People *v.* McLeod, 1 Hill, 377.

[2] See U. S. Rev. St. §§ 762–766.

[3] Buron *v.* Denman, 2 Exch. 167; Secretary of State *v.* Kamachee, &c. 13 Moore, P. C. C. 22, 86.

[4] There are some good remarks upon this point in 2 Stephen's Hist. of the Criminal Law of England, pp. 61–65. There is a growing tendency in Europe to legislate upon the wrongful acts of citizens committed abroad. This statement is well illustrated by the "Foreign Jurisdiction" Acts in England, 6 & 7 Vict. c. 94; 29 & 30 Id. c. 87; 35 & 36 Id. c. 19, as amended by 38 & 39 Id. c. 51, § 6, and c. 85. The sixth section of chapter 51 of the statutes of 1875 (38 & 39 Vict.) is particularly noticeable. It authorizes "Her Majesty to exercise power and jurisdiction over *her subjects* within any islands and places in the Pacific Ocean not being within Her Majesty's dominions nor within the jurisdiction of any civilized power, in the same and as ample manner as if such power or

SECTION I. *The Acquisition of Citizenship.* (1) *By Birth.* — Citizens are either natural-born or naturalized. One who is born in the United States or under its jurisdiction is a natural-born citizen without reference to the nationality of his parents. Their presence here constitutes a temporary allegiance, sufficient to make a child a citizen.[1]

A difficult question exists in the common law as to the citizenship of a child of English parents, born abroad. The New York Court of Appeals has decided that such a person was a citizen on the ground that the duty of allegiance passed by descent, the child following the condition of the father, and that the question in this country is to be determined by the common law as it existed at the time of the adoption of the United States Constitution.[2] Sir Francis Bacon, in the great case of the *antenati* already referred to, was a strong advocate of this opinion and accepted all its consequences. He said, "If a man shall look narrowly into this point he shall find a consequence that may seem at the first strange, but cannot well be avoided, which is, that divers families of English men and women plant themselves at Rouen or at Lisbon and have issue, and their descendants do intermarry among themselves without any intermixture of foreign blood, such descendants are naturalized to all generations, for every generation is still of liege parents and therefore naturalized, so as you may have whole tribes and lineages of English in foreign countries."[3] Sir Francis Bacon's deduction will not now readily be accepted as law. The opposing theory that persons born abroad of American parents are aliens, unless there is a naturalizing statute in their aid, is powerfully sustained by a distinguished jurist, the late Horace Binney.[4] His proposition may be briefly summed up thus: birth here confers citizenship; birth abroad causes alienage. On this view the citizenship of the parents is of no consequence. Citizenship assumes a territorial character. The sole inquiry is who had the sovereignty over the territory where the child was born at the time of its birth?

jurisdiction had been acquired by the cession or conquest of territory," etc. The later statute of 41 & 42 Vict. c. 67 (1878) gives jurisdiction over British subjects in *any* vessel within one hundred miles of the coast of China or Japan, without reference to the fact whether the ship is British. This is a clear assertion of the right of Parliament to exercise jurisdiction over British subjects as to criminal acts no matter where committed, and an implied affirmance of the view that the allegiance of a subject is a personal tie having no dependence on times or places. These statutory powers are directed to be carried into effect, by the orders of the Queen in Council. Such orders have already been issued, being framed with great comprehensiveness as well as precision of detail. See 38 & 39 Vict. c. 51, § 6.

[1] Lynch *v.* Clarke, 1 Sandf. Ch. 583.

[2] Ludlam *v.* Ludlam, 26 N. Y. 356.

[3] Hargrave's State Trials, 81.

[4] 2 Am. Law Reg. 193. "The *Alienigenæ* of the United States."

Mr. Binney's article has been said to have led to the enactment of a statute by Congress, Feb. 10, 1855. This law is now a section of the Revised Statutes of the United States.[1] The substance of it is that all children born out of the limits and jurisdiction of the United States whose fathers were citizens thereof at the time of their birth, are citizens of the United States, but the rights of citizenship shall not descend to children whose fathers never resided in the United States.[2] If Mr. Binney's views in the article referred to are correct, this statute created a new class of citizens; if not, then it took away the rights of citizenship from a large number of persons, — children of American fathers who never resided in the United States. The first sentence of the Fourteenth Article of the Amendments to the United States Constitution should be noticed. This is, that "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." It may be thought that there is an implication in this statement that *no other* persons can be citizens except such as are born or naturalized here. The more correct view would seem to be that a constitutional provision of this kind is not intended to abridge existing rights, but rather to confirm such as are specified. In that view, the controversy concerning natural-born citizens remains unaffected except by § 1993 of the Revised Statutes. (*a*)

(2) *By Naturalization.* — The whole subject of naturalization is vested in Congress by the United States Constitution. Its language is, "Congress shall have power to establish an *uniform* rule of naturalization."[3] It is judicially decided that the word "uniform" makes the power exclusive in Congress, and that the States have no power to naturalize citizens.[4]

In carrying out this power Congress has conferred the right not only upon United States tribunals, but also upon State courts to act as the means of naturalizing.[5] This power is conferred upon a court of any of the States, having common-law jurisdiction, a seal, and a clerk. The State courts are not bound to exercise jurisdiction in such cases, but may do so if they will; when they act, they for this purpose perform a judicial function for the United

[1] § 1993.

[2] This language is qualified by § 2172, which provides that the children of persons who *now are* or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered citizens thereof.

[3] Art. I. § 8, cl. 4.

[4] Chirac *v.* Chirac, 2 Wheat. 259, 269; Thurlow *v.* Massachusetts, 5 How. U. S. 504, 585.

[5] U. S. Rev. St. § 2165.

(*a*) See *ante*, p. 72, note (*a*).

States. Only the *court* can naturalize; the clerk cannot do so.[1] The court renders a *judgment* which is entered in the usual manner on the records. When once entered all inquiry is closed; like other judgments it is complete evidence of its own validity.[2]

The following requirements apply to naturalization:[3] —

First. Declaration of Intention. — The alien must make a declaration before the proper court two years prior to his admission to citizenship, that it is his intention in good faith to become a citizen, and to renounce all allegiance to foreign states or sovereignties, and particularly by name to that state of which he is at the time a citizen or subject. This preliminary declaration is not required from the following classes of persons: (1) From applicants who are minor residents of this country for three years next preceding their majority, though they cannot be naturalized unless they have resided five years within the United States including the three years of minority; (2) aliens of full age who have enlisted in the army (whether regular or volunteer forces) and been honorably discharged; (3) aliens in the country prior to June 18, 1812. This last provision has practically become obsolete from lapse of time.

The "declaration of intention" may be made before the *clerk* of the court as well as the court itself.

Second. Admission to *Citizenship.* — It is a rule that an alien cannot be admitted as a citizen unless he has *resided* in the United States five years at least preceding his admission, and within the State or Territory where naturalized one year at least. The fact of residence must be proved by other evidence than the applicant's own oath. There are two exceptions to the requirement of five years' residence. One is, when the applicant has enlisted in the army and been honorably discharged, in which case the time is reduced to one year; the other exception is in the case of seamen in the merchant service, who may be admitted within three years after their declaration of intention.

There is a special rule applicable to declarants who die before they are actually naturalized. In such a case the widows and children are considered as citizens on taking the oaths prescribed by law.[4]

An applicant must also make it appear that he is a man of

[1] Matter of Clark, 18 Barb. 444.

[2] Spratt *v.* Spratt, 4 Pet. 393; McCarthy *v.* Marsh, 5 N. Y. 263; Ritchie *v.* Putnam, 13 Wend. 524; *In re* McCappin, 5 Sawy. C. Ct. 630. The elements necessary to a record of naturalization are considered in Matter of Coleman, 15 Blatch. 406. Where there is no record, oral evidence of naturalization is inadmissible. Dryden *v.* Swinburne, 20 W. Va. 89.

[3] U. S. Rev. St. §§ 2165–2174.

[4] U. S. Rev. St. § 2168.

good moral character and attached to the principles of the Constitution of the United States. He must also renounce any title of nobility which he may have. Naturalization of a husband includes that of the wife and minor children. Marriage of an alien woman (if she belongs to the class or race entitled to be naturalized) to a citizen constitutes her a citizen.[1] A court cannot make naturalization retroactive.[2] An alien will not be presumed to be a citizen by residence within this country for any time no matter how long.[3] Congress may also naturalize by a general statute, as in the case of citizens of Texas, who were made citizens of the United States by virtue of the collective naturalization effected by the act of Annexation of Dec. 29, 1845.[4]

SECTION II. *Special Rules as to Citizenship under the United States Constitution.* — The object of this subdivision is to bring together the rules growing out of the following clauses in the Constitution: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;"[5] and also the first part of the second sentence of Article Fourteenth of of the Amendments, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." These two clauses, many years apart in point of time, should be considered separately.

(1) *The Provision in Art. IV. of the Constitution.* — This clause refers to "privileges and immunities" which are fundamental, which belong of right to the citizens of all free governments, and which have been at all times enjoyed by the citizens of the several States. It does not, for example, require a State to permit the citizens of other States to share in its fisheries which are the property of the State.[6] No privileges are secured except those which belong to *citizenship*.[7] The Supreme Court is not disposed to lay down any general formula upon this subject, but to leave the meaning of the words to be determined in each case upon a view of the rights asserted or denied in the litigation.[8]

Some of the instances in which this clause has been applied will now be adverted to. A State cannot withhold from a citizen of another State a license to sell goods which it grants to its own citizens.[9] The same rule would be applied to similar discrimina-

[1] U. S. Rev. St. § 1994; Kelly *v.* Owen, 7 Wall. 496; 14 Opinions of Attys-Gen'l, 402.

[2] Dryden *v.* Swinburne, 20 W. Va. 89.

[3] Hawenstein *v.* Lynham, 100 U.S. 483.

[4] Citizenship, 13 Opinions of Attys-Gen'l, 397.

[5] Art. IV. § 2, cl. 1.

[6] McCready *v.* Virginia, 94 U. S. 391; Corfuld *v.* Coryell, 4 Wash. C. Ct. 371.

[7] Conner *v.* Elliott, 18 How. U. S. 591.

[8] McCready *v.* Virginia, 94 U. S. 391, 395; Conner *v.* Elliott, *supra*, 593.

[9] Bliss' Petition, 63 N. H. 135; State *v.* Lancaster, Id. 267.

tions in a revenue law.[1] If a license to sell be required, but no distinction is made between residents and non-residents, the law will be constitutional.[2] (*a*) Again, it is not an interference with the equal rights of citizens to require persons practising medicine to obtain a certificate from the State Board of Health.[3] (*b*)

The test in all this class of cases is the presence or absence of discriminations in the regulations unfavorable to citizens of another State. The decisions turning upon this point are quite numerous and uniform in upholding the rights of citizens of other States.[4]

Licenses required by a State of citizens of another State as a prerequisite to pursuing a commercial avocation in the legislating State will be unconstitutional as an unauthorized interference with interstate commerce. (*c*) This rule has been applied in a number of cases in favor of commercial drummers.[5] In the case last cited in the note, the principle was extended to an act passed by the so called "Legislative Assembly of the District of Columbia" (which is but a municipal body created by Congress), though strictly speaking there was no commerce between *States* within the *words* of the Constitution.

Distinctions are made in some State statutes between the right of residents and non-residents to bring actions in the State courts. An instance of this kind occurred in a recent New York case, in which it was held that the statute was not unconstitutional.[6] (*d*)

[1] Ward *v.* Maryland, 12 Wall. 418; Oliver *v.* Washington Mills, 11 Allen, 268; Rash *v.* Halloway, 82 Ky. 674.

[2] State *v.* Long, 95 N. C. 582.

[3] State *v.* Dent, 25 W. Va. 1.

[4] Paul *v.* Virginia, 8 Wall. 168; The John M. Welch, 18 Blatch. 54; State *v.* Furbush, 72 Me. 493; State *v.* McGinnis, 37 Ark. 362; McGuire *v.* Parker, 32 La. An. 832. A recent case in which the constitutional rule was declared not to be violated is Kimmish *v.* Ball, 129 U. S. 217, 222.

[5] Robbins *v.* Shelby Taxing District, 120 U. S. 489; Asher *v.* Texas, 128 U. S. 129; Stoutenburgh *v.* Hennick, 129 U. S. 141.

[6] Robinson *v.* Oceanic Steam Nav. Co., 112 N. Y. 315; construing § 1780 N. Y. Code of Civil Procedure.

(*a*) A liquor license law providing that the vender must be a male inhabitant of the State is not in conflict with this clause of the Constitution of the United States. Welsh *v.* The State, 126 Ind. 71. See also Trageser *v.* Gray, 73 Md. 250.

(*b*) Craig *v.* Board of Med. Examiners, 29 Pac. R. 532.

(*c*) The general subject is discussed in the following cases: American Fertilizing Co. *v.* Board of Agriculture, 43 Fed. R. 609; Leisy *v.* Hardin, 135 U. S. 100; McCall *v.* California, 136 U. S. 104; Norfolk R. R. *v.* Pennsylvania, Id. 114; Minnesota *v.* Barber, Id. 313. See also Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217; Horn Silver Mining Co. *v.* New York State, 143 U. S. 305; Ficklen *v.* Shelby Co. Taxing District, 145 U. S. 1; People *v.* Wemple, 29 Abb. N. C. 85. Discriminations made against non-residents of certain counties of a State are not necessarily invalid. Rothermel *v.* Meyerle, 136 Pa. St. 250.

(*d*) See Robey *v.* Smith, 30 N. E. Rep. 1093; Shirk *v.* City of La Fayette, 52 Fed. R. 857, holding that a statute prohibiting the appointment of a non-resident

(2) *The Prohibition in Fourteenth Amendment.* — This Amendment grew out of the civil war, and its provisions regarding citizenship were designed to provide suitable rules for the protection of the emancipated race. The Supreme Court has said that the pervading purpose found in all the recent Amendments and without which none of them would have been suggested, was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[1] The negro by means of them became a citizen of the State and of the United States. The Amendment is predicated upon supposed *State* laws or *State* proceedings opposed to it, and is directed to the correction of their operation and effect.[2] The Amendment does not refer to the wrongful acts of individuals unsupported by State authority, in the shape of laws or executive or judicial proceedings. It was the denial of rights for which the *States* as such alone could be responsible which was the great and fundamental wrong intended to be remedied.[3] (*a*)

Several cases have arisen to which these rules were applied. In one, persons of color were denied the accommodations of an inn or hotel; in another, a colored person was refused a seat in the dress circle of a theatre; (*b*) in another, the wife of a colored person was refused a seat in a ladies' car upon a railroad. The court, holding that in none of these cases was there any *State* interference with the rights of the individual, denied that the facts brought any of them within the scope of the Amendment. The court expressly reserved the question whether, if these acts had been done by a State, there would have been any abridgment of privileges and immunities of citizens by the acts in question.[4] The point on which the case turned was that the State by *State* action had denied no "privileges or immunities" of United States citizenship.

This clause is much broader in its scope than that in the Constitution itself.[5] The latter only refers to the case where a State

[1] Slaughter-House Cases, 16 Wall. 36, 71.

[2] Civil Rights Cases, 109 U. S. 11, 12.

[3] See also United States *v.* Cruikshank, 92 U. S. 542; Virginia *v.* Rives, 100 U. S. 313; *Ex parte* Virginia, Id. 339.

[4] Civil Rights Cases, 109 U. S. 3.

[5] Art. IV. § 2.

as trustee in "a deed, mortgage, or other instrument in writing, except wills," is unconstitutional.

(*a*) State legislation for the protection of citizens in their civil rights from the wrongful acts of individuals is not uncommon, and would seem to be competent. Baylies *v.* Curry, 128 Ill. 287; Ferguson *v.* Gies, 82 Mich. 358; Donnell *v.* Mississippi, 48 Miss. 661.

(*b*) Younger *v.* Judah, 19 S. W. Rep. 1109.

interferes with the privileges or immunities of a citizen of another State. The Fourteenth Amendment embraces all citizens of the United States whether they be citizens of another State, or of that making the law. In other words, the privileges and immunities referred to are those of every citizen of the United States without any reference to State citizenship.

The term "citizen" in this clause does not include a private corporation.[1] At the same time a corporation is a "person" under the clause of this Amendment which prevents a State from depriving a "person" of life, liberty, or property without due process of law.[2] The word "citizen" is confined to natural, as distinguished from artificial persons, while the word "person" includes both.

"Citizenship" must be regarded as a condition or state, and exists irrespective of age or sex. It must not be confounded with the right to vote, which is conferred as a rule upon only a small portion of the citizens. The Constitution of the United States deals with the elective franchise, however, in one highly important respect. It declares that the franchise shall not be abridged by a State on account of race, color, or previous condition of servitude.[3] This prevention of discrimination is a constitutional rule, though the right of suffrage itself is not a necessary attribute of national citizenship.[4]

Citizenship is important in a judicial point of view as determining in certain cases the right to bring actions or to defend them in the courts of the United States rather than of the States. As this is not a question of personal rights, but rather of the choice of tribunals in which rights may be vindicated, it is merely adverted to in this connection.

DIVISION II. — ALIENS.

All persons not being citizens or subjects are aliens.[5] They are, in general, subject to certain disabilities. These are either political in their nature (such as an incapacity to hold office or to vote at public elections) or pertain to the acquisition of land. As to the acquisition of personal property, or the power to make contracts, no distinction is made between citizens and aliens, unless the latter are "alien enemies."

[1] Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181.

[2] Minneapolis & St. Louis Railway Co. *v.* Beckwith, 129 U. S. 26.

[3] Art. XV. of Amendments.

[4] United States *v.* Reese, 92 U. S. 214.

[5] Members of the Indian tribes are not citizens, nor are they aliens. The tribes as such are to be regarded as "domestic dependent nations," and fall to a certain extent within the class of subjects.

I. *Disability to Acquire Land.* — The disability to acquire land is one existing at common law. Although it is removed in some of the American States, it exists in others, and should be noted here. A distinction must be taken between the right to acquire by *purchase* and by *descent.*

(1) *Acquisition by Purchase.* The word "purchase," in the law of real estate, includes every mode of acquisition other than descent. There are two principal forms of purchase, — conveyance or deed, and will or devise.

An alien may take land *by deed*, and hold it against the grantor and his heirs, but not against the State. If the State does not institute proceedings against him, he is safe.[1] Even an officer of a court holding the title in trust cannot raise the question of alienage and interfere with the title.[2] The State can take the land from the alien by a proceeding called "inquest of office." This is an inquiry set in motion by an executive officer before some tribunal with a jury. There must be a proceeding resulting in a trial and a *judgment*, so that the land of a subject may not be wrongfully taken from him under the plea that he is an alien. To this end there should be the intervention of a jury. The result of the proceeding in favor of the State is called "office found." An office found for the king in England puts him in immediate possession without the trouble of a formal entry.[3] In New York, a proceeding analogous to an inquest of office is instituted by the attorney-general.[4]

The title of the alien is thus *defeasible.* This element of defeasibility passes with the land though it be conveyed to a citizen, on the general doctrine that one can convey no greater interest than he possesses.[5] These rules interfere with the collection of debts by an alien from the debtor's land. He cannot safely purchase it at a judicial sale. A citizen may purchase in such a case, and agree with the alien to convey it as the latter may direct. An alien who has taken a mortgage cannot purchase the land on a foreclosure except through the help of a statute.[6]

The rights of an alien to real estate are affected by the doctrine of "equitable conversion." It is a rule of a court of equity that if an owner of land direct it to be sold and converted into money and paid over to a specified person, it shall be deemed to

[1] Jackson *v.* Beach, 1 Johns. Cas. 399; Jackson *v.* Lunn, 3 Johns. Cas. 109.

[2] Matter of Leefe, 4 Edw. Ch. 395.

[3] 3 Bl. Com. 259, 260, where the whole subject is explained.

[4] Code of Civ. Pro. §§ 1977–1981. The title of the alien may be made good by a special act of the legislature.

[5] The People *v.* Conklin, 2 Hill, 67, 71.

[6] In New York if he is entitled to hold land and conveys it and takes a mortgage for the purchase-money, he may re-acquire it on a foreclosure. 1 R. S. 721, § 19.

be money for the purpose of vesting it in the person specified. The converse rule will be applied in case money be directed to be laid out in land. If this rule were applied to the case of an alien, he would be allowed to take the proceeds of the sale of the land directed to be sold. It is the *direction*, and not the actual sale, which gives the land the qualities of personal property.[1] This principle does not allow the alien to take a trust in the land, but only to take the proceeds arising from the sale.[2]

If money were directed to be laid out in land for the alien he would be under the same disability as he would be under in taking the land itself.[3] On a similar principle, he would not, as husband, be entitled to an interest resembling an estate by the curtesy in money which had been directed by a testator to be laid out in land for the use of his wife; nor, under like circumstances, would an alien wife at common law be entitled to dower.[4]

Reference should be made in this connection to a peculiar statutory trust in New York and some other States, whereby an owner of land may vest it in a trustee to receive the rents and profits, and apply them to the use of one or more persons during their lives as the statute may prescribe.[5] The interest of the beneficiary is made inalienable. At the same time, the statute provides that he shall have *no interest in the land*, but only in the income. Under such a trust, it has been decided that an alien may lawfully be a beneficiary, since by the very terms of the statute he has no interest in the land, but only in the income (which may be assumed to be money) derived from it.[6]

In the common law, *title by will or devise* does not differ from that created by a deed. In some of the States, among others, New York, a devise to a person who at the testator's death is not authorized to hold real estate, is void.[7] It will be observed that the phraseology is peculiar. It does not include all aliens, but only those who *are in existence* at the time of the testator's death. Accordingly, if a devise be made to a person not then in being, *e. g.*, an unborn child, but who came into being after the testator's death, the common law prevails, and the land vests in the person described as it would have done had there been a transfer by deed.[8]

[1] Craig *v.* Leslie, 3 Wheat. 563; Meakings *v.* Cromwell, 5 N. Y. 136; Anstice *v.* Brown, 6 Paige, 448.

[2] Leggett *v.* Dubois, 5 Paige, 114.

[3] Beekman *v.* Bonsor, 23 N. Y. 298.

[4] But by the United States Revised Statutes this principle will not be applied to an alien woman married to a citizen, since by her marriage she becomes a citizen. § 1994.

[5] 1 R. S. 728, § 55. In New York no more than two lives can be specified in the instrument creating the trust. 1 R. S. 723, § 15.

[6] Marx *v.* McGlynn, 88 N. Y. 357, 376.

[7] 2 R. S. 57, § 4.

[8] Wadsworth *v.* Wadsworth, 12 N. Y. 376.

(2) *Title by Descent.* — The alien acquires no title whatever by descent. No inquest of office is necessary. The distinction between this case and that of purchase is, that in the case of purchase the land is acquired by the alien's own act, while in the case of descent, the acquisition is made by act of the law. It would be an absurdity if one rule of law should give the estate to the alien, and then another rule of law should withdraw it from him. Accordingly, he takes nothing whatever. The same principle applies to all legal estates, *e. g.*, dower or curtesy. By force of this rule one citizen cannot trace his title to land by descent from another citizen through an intermediate alien. Thus where a grandfather being a citizen owns land and dies, a grandson who is also a citizen cannot inherit from the grandfather if the father be an alien. This rule does not prevent a brother from inheriting from a brother, when the father is an alien. The reason of this last proposition is that inheritances did not *ascend* at the common law, and the brother did not derive his *brother's estate* through the father, though he obtained his *relationship* to his brother in that manner.[1] The rule will also be applied in favor of the children of brothers.[2]

The rule that one cannot claim to inherit through an alien was modified in England, before the American Revolution, by the statute of 11 & 12 Wm. III. c. 6, in case the intermediate alien be dead when the descent takes place. This act is re-enacted in New York.[3] It applies both to lineal and collateral relatives. The language of the statute is that "no person capable of inheriting shall be precluded from such inheritance by reason of the alienism of any ancestor of such person."[4] The statute cannot be applied in case the alien ancestor through whom title would regularly be derived is living, when the owner of the land dies. The object of the act was not to abolish the principle that no one can be the heir of a living person, but to change the technical rule that every person in the line of descent must have been a citizen.[5] Moreover, the general principle itself is not applicable where a claimant as heir can make out his title *independent of* and not *through* an alien. Thus, if a man have two sons, the elder an alien, and the younger a citizen, the younger may at common law inherit from the father the whole estate to the exclusion of the elder brother.[6]

[1] Collingwood *v.* Pace, 1 Sid. 193; 1 Ventris, 413; Kynnaird *v.* Leslie, L. R. 1 C. P. 389. In this last case the reason of the rule in Collingwood *v.* Pace, *supra*, is fully explained.

[2] McGregor *v.* Comstock, 3 N. Y. 408.

[3] 1 R. S. 754, § 22.

[4] See McCarthy *v.* Marsh, 5 N. Y. 263.

[5] McLean *v.* Swanton, 13 N. Y. 535; M'Creery *v.* Somerville, 9 Wheat. 354.

[6] Jackson *v.* Jackson, 7 Johns. 214; Jackson *v.* Green, 7 Wend. 333; 2 Bl. Com. 251–255.

If an estate be vested by deed in a husband and wife jointly (tenancy by the entirety) and one be a citizen and the other an alien, if the citizen die first the alien takes the whole estate, not by any descent, but as an incident to the original conveyance (viz., survivorship), and the alien would hold the *whole estate*, subject, however, to an inquest of office on the part of the State.[1] This principle would also seem to apply to cases of joint tenancy, since the survivor takes the whole estate.

II. *Special Questions concerning Alienage.* — There are several questions of a special nature concerning alienage which may be conveniently considered at this point.

One of these is the effect of a marriage between a female citizen and an alien. Assuming the correctness of the common-law rules of citizenship, such a marriage cannot affect the *status* of the wife. She cannot be released from her existing allegiance except by the act of the State of which she is a citizen. Under the laws of Congress her children, if born abroad, will be aliens unless their father has become a citizen or has at some time resided within the United States. It may be urged in opposition to this view that she may lawfully "expatriate" herself. This point will be considered hereafter under the topic of "expatriation." (*a*)

The effect of existing treaties between the United States and other countries upon alienage should also be mentioned. Under the treaty-making power, the President and Senate of the United States may negotiate treaties which will give aliens belonging to the nation with whom the treaties are made, the right to hold land in the States and Territories of the Union, in a manner differing from that prescribed by the general rules governing aliens. The treaties become the supreme law of the land, and are binding upon the States in this as well as other respects.

Various treaties have been made with European and South American states, giving special privileges to their citizens as to holding and disposing of land in this country. It is not the policy of these treaties to stand in direct opposition to the policy of a State of the Union as to the disabilities of alienage, but for the most part to permit the heirs who are disqualified by alienage from holding land to sell the land, and withdraw the proceeds. This capacity is limited as to time. The periods vary. In some cases two or three years are named; in others, a reasonable time; in others still, the "longest period allowed by law." It is provided in a large number of treaties that succession

[1] Wright *v.* Saddler, 20 N. Y. 320.

(*a*) See *post*, p. 139.

duties or taxes are not to be larger than those imposed upon natives.[1]

There are certain special rules as to aliens in the various States of the Union. The rule is well settled that in general the capacity to hold land, or to convey or to devise it, as well as the capacity of the grantee or devisee or relative to take or inherit it, depends on the law of the State where the land is situated. This proposition must, as has been stated, be qualified by a recognition of the power of Congress to give the capacity by naturalization or by treaty. The States may accordingly adhere to the common law, or by statute or constitutional provision give more or less full capacity to aliens to take and hold land. Any privileges of this kind will be local and territorial in their character, having no effect in any other State.

The legislation of the States has been very diverse upon this subject. In a few States the common law still prevails without any legislation.[2] In a large majority of the States the disability of alienage has been partly, but in general not wholly, removed. In some of the States the disability is removed or modified as to resident aliens, but continued as to non-residents. The details are so various that they cannot be conveniently brought within the compass of a note, but should be sought in the statutes themselves.[3] In several of the States the disability of alienage is entirely removed, so that an alien can take and hold land as freely as a citizen.[4]

[1] References may be conveniently made for details to the "Analytical Index" of "Treaties and Conventions between the United States and other Powers" (1889), p. 1422.

[2] Notably Vermont.

[3] See in New Hampshire, Laws of 1853, ch. 135, § 1; Stat. 1867, p. 253. In Connecticut, R. S. of 1866, p. 537 (*a*). In New York there has been a series of statutes. A principal feature of them is, that a resident may file with the Secretary of State a deposition prescribed by law, of his intention to become a citizen, and stating that he has taken the preliminary steps (*b*). If he dies before naturalization, his heirs, if aliens, may succeed to his interest by filing a similar deposition. There is also ameliorating legislation in Delaware, Maryland, Indiana, Nevada, Kentucky, Oregon, California, Michigan, Missouri, Virginia, West Virginia, Texas, South Carolina, Arkansas, Tennessee, Pennsylvania, Iowa, and Mississippi.

[4] The States referred to are Massachusetts, Rhode Island, Maine, New Jersey, Ohio, Illinois, Minnesota, Nebraska, Wisconsin, Kansas, Georgia, Colorado, Florida, and Louisiana.

(*a*) See New Hampshire Public Statutes, ch. 137, §§ 16, 17, Connecticut General Statutes, §§ 15, 16.

(*b*) This requirement is now necessary only in the case of males of full age. See Laws of 1875, ch. 38, amending ch. 115, Laws of 1845, Rev. St. (8th ed.) pp. 2425, 2426. As against every claimant except the State the title of an alien heir is good without making the deposition. Stamm *v.* Bostwick, 122 N. Y. 48. Foreign-born children, and their descendants, of a woman born in the United States but married to an alien and residing abroad, may take and hold real estate in the same manner as citizens of the United States,

There is observable a reactionary tendency, particularly in some of the western States, owing in part to the fact that, by their liberal policy, very large properties have been acquired by aliens, who are suspected of not being disposed to make use of them in the manner most useful to the community where the lands are situated. This feeling found expression in Congress in a law passed in 1887,[1] making it unlawful for aliens, unless they have declared their intention to become citizens, to take or hold real estate in the Territories or the District of Columbia, except so far as it has been acquired by inheritance or in the ordinary course of justice in the collection of debts created before the passage of the act. This law is not to interfere with existing treaties. Restrictions are also imposed upon the power of foreign corporations to acquire land, as well as upon all corporations more than twenty per cent. of whose stock is owned by persons not citizens of the United States. There are other restrictions upon the corporate power of acquisition of land not necessary to be stated in this connection. This legislation is prospective in its character, having no disturbing effect upon existing titles. Violation of the statute leads to forfeiture, to be enforced by the attorney-general of the United States.

III. *Alien Enemies.* — Thus far it has been assumed that an alien, whether under or free from disability, is a friend. In time of war with the country of which he is a subject or a citizen, new questions will arise.

Two distinct cases of disability may exist in time of war. One is, where a citizen of this country is domiciled in the country with which the United States are at war. Such a person, though not strictly an enemy, is to be deemed so with reference to the seizure of so much of his property concerned in the trade of the enemy as is connected with his foreign residence. This character, gained by foreign residence, may be shaken off as soon as he puts himself in motion to leave the foreign country with no intention of returning there.[2] Leaving this special case out of view, an alien enemy is subject to the following disabilities.

(1) *He has no standing in our courts.* He cannot prosecute any suit in the courts of this country. He cannot sustain a claim in a prize court.[3] There is an exception to this rule where the

[1] Ch. 340, Laws of 1887.

[2] The Venus, 8 Cranch, 253.

[3] The Emulous, 1 Gall. 563; Johnson v. Thirteen Bales, &c. 2 Paine, 639. He

provided the title is derived through such woman or an ancestor who was a citizen of the United States. Laws of 1889, ch. 42. By a still later statute any person may inherit or take real property in New York, notwithstanding the fact that he is a non-resident alien, if the title is derived from a citizen of the United States. Laws of 1893, ch. 207.

cause of action arises out of a trade licensed by the United States, since the right to sue is an incident to the right to trade and to contract.[1] Such a license may sometimes be presumed, as, for example, where a merchant resided here before the war, and continued to do so until the time of the commencement of the action.[2] An alien domiciled here before the war, and continuing here, owes allegiance, and, if he gives "aid and comfort" to the enemy, is liable to prosecution for treason.[3]

(2) *His contracts as to the matter of legality.* Two general cases must be considered: *first*, contracts between citizens of the foreign State, not in aid of the war, and afterwards sought to be enforced in our courts. Such a contract is valid and enforceable here. This rule was applied to contracts made in the Confederate States during the late Civil War.[4] If such a contract had been made in aid of the rebellion it would have been treated as void by our courts.[5] The *second* class includes contracts between citizens of two countries at war with each other. Such a contract is contrary to public policy and void. It will be invalid even after peace is established, because it is void in its inception.[6]

If a valid contract were made in time of peace, a subsequent war would not make it void in its inception. The right of action will be suspended during the war, but will in general revive after peace is declared. There may be special cases in which the contract is dissolved. An instance may be that of a policy of life insurance, with payments of premiums to be made at recurring intervals during the war. While the war continues, the payments must be suspended. A difference of opinion prevails as to the point whether this state of things dissolves the contract, or whether it revives in time of peace. The Supreme Court of the United States has decided that the entire contract in this particular case is dissolved, owing to the peculiar nature of the contract of life insurance when based upon periodical payments by the insured.[7] The time of payment is material and of the essence of the contract.[8] So an agent, having authority before

may sue in an admiralty as distinguished from a prize court. United States *v.* Shares of Stock, 5 Blatch. 231.

[1] Crawford *v.* The Wm. Penn, Pet. C. Ct. 106; Uspariche *v.* Noble, 13 East, 332.

[2] Otteridge *v.* Thompson, 2 Cranch, C. Ct. 108.

[3] Carlisle *v.* United States, 16 Wall. 147.

[4] Wilmington R. R. Co. *v.* King, 91 U. S. 3; Lockhart *v.* Horn, 1 Woods, 628.

[5] Desmare *v.* United States, 93 U. S. 605.

[6] Hart *v.* United States, 15 Ct. of Claims, 414; Craft *v.* United States, 12 Ct. of Claims, 178; Griswold *v.* Waddington, 16 Johns. 438; Willison *v.* Patteson, 7 Taunt. 439; Matthews *v.* McStea, 91 U. S. 7; Ins. Co. *v.* Davis, 95 U. S. 425.

[7] New York Life Ins. Co. *v.* Statham, 93 U. S. 24; Ins. Co. *v.* Davis, 95 U. S. 425.

[8] New York Life Ins. Co. *v.* Statham, Ins. Co. *v.* Davis, *supra.*

the war to collect debts in the enemy's country, may *with the consent* of the creditor continue to do so after the war, so that the payment will be a discharge to the debtor; but without such consent the agency is absolutely terminated.[1] In the case cited in the note it was said, "that war suspends all commercial intercourse between the citizens of two belligerent countries or States, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years that any further discussion of that proposition would be out of place."[2] A different view of the rule governing life insurance in such a case has been taken by the New York Court of Appeals, where it was decided that the payments were only suspended during the war, and that the right to make them, with interest added, revived in time of peace.[3]

It seems that the lawfulness of commercial intercourse in such cases may depend on the place of one's domicile. Thus, one who fled from the Confederate States when the war broke out might, by an agent appointed before the war, carry on ordinary commercial intercourse within the lines of the enemy, while this would not be true of one who, being domiciled in one of the loyal States, was at the time living within the States of the Confederacy.[4]

IV. *The Right of Expatriation.* — The right to expatriate one's self, and thus become an alien, has been largely discussed. If the common-law doctrine of allegiance is to be sustained there can be no absolute right of this kind, nor can any such right be conceded by a nation consistently with the power of a society of men to continue its national existence. A nation with the absolute right of expatriation once established, would not be a coherent and single body, but a mere aggregation of individuals without any tie binding them together. In time of war it could not resort to a compulsory draft, nor could there be any adequate security for the fulfilment of treaties or other public engagements. The state, on its part, might with equal propriety claim the right to repudiate a citizen at pleasure. Jurists and judicial tribunals have refused to recognize any absolute right of expatriation, and have declared that the *assent of the nation* is in some form necessary. Legislative bodies have made declarations upon this subject of a different character. By the Revised Statutes of the United States,[5] it is recited that "whereas the right of expatriation is a natural and

[1] Ins. Co. *v.* Davis, 95 U. S. 425.
[2] Id. p. 429.
[3] Sands *v.* N. Y. Life Ins. Co., 50 N. Y. 626.
[4] Quigley *v.* United States, 13 Ct. of Claims, 367.
[5] § 1999.

inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed," it is accordingly and finally declared that "any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is inconsistent with the fundamental principles of the Republic."

It will be observed that the main object of this provision is not to declare the right of American citizens to expatriate themselves, but that it seeks to affirm that the citizens of other countries may do so. It is addressed to officers of the United States and *not to courts*. The courts having established a different rule, the law could scarcely be changed by a mere legislative affirmation of a principle so abstract and unlimited in its terms as that contained in the section referred to.

CHAPTER V.

HUSBAND AND WIFE.

Preliminary remarks as to the "domestic relations." — By the expression "domestic relations" is meant four great classes of relations, — husband and wife, parent and child, guardian and ward, and master and servant. Out of these spring "relative rights," as distinguished from the mere absolute or strictly personal rights previously considered. One of these relations — husband and wife — is derived wholly from contract. Another — master and servant — is at the present time a pure contract relation, except in the case of apprentices, which is governed largely by legal or statutory rules. The other two have no contract element. They have in law certain legal or equitable rules attached to them. It is not enough that out of these spring certain natural or moral obligations. Before they can be enforced in a court of justice they must ripen into legal rights. In a broad sense, it may be said that all of these rights have their origin in the family or family relation, and that all still show traces of their origin. Questions arising in respect to them will not necessarily be solved by an appeal to the law of contracts. Each branch of the subject must be studied by itself, and to a considerable extent (particularly in the rules governing marriage) from an historical point of view.

Owing to these complex rights, a wrongful act by a third person may be both a violation of an absolute right and of a relative right. Thus, if a wife be injured by the negligent act of a stranger, an action may be brought for the injury by her, and an independent action for the loss of her services and society by her husband. Similar rules are extended to injuries to a child or servant depriving a parent or a master of their services. Sometimes an injury may be done to the relative right where there is no violation of the absolute right. An instance is that of the seduction of a daughter while in her father's service. While no legal right of the daughter may have been violated, owing to her consent, the father may still sue for loss of service.

The first relation which will be considered is that of *husband and wife*. As the topic is an extensive one, it will be presented under three divisions, treating of the Creation, the Dissolution, and the Legal Consequences of the relation.

DIVISION I. — *The Creation of the Relation of Husband and Wife.*

SECTION I. *Capacity to Contract Marriage.* — It is a general rule of law that capacity to contract is presumed, and one attacking a contract must show incapacity. Cases of incapacity to enter into a marriage contract are divisible into two principal classes: one involves a lack of power to consent; the other assumes the mental power, but denies capacity to make the contract on grounds of public policy.

Instances of the first class are defect in age, idiocy, and insanity. Under this head may also be conveniently stated cases where the mental power is sufficient, but the will is not exercised in the particular instance owing to force or fraud. Cases of the second class are consanguinity, affinity, and prior marriage. Here may also be placed the case of corporeal impotence. These are of general application, except affinity. There may also be local incapacities, such as a prohibition of one divorced for adultery to marry during the life of the other party, or that members of a royal family shall not marry without the consent of the monarch.[1] We shall first consider the disabilities arising from *lack of power to contract.*

(1) *Defect in age.* — The rule of the common law is that the male must be fourteen and the female twelve years of age. If either party be under that age, the marriage may by common law be treated as void by either party when the incapacitated person arrives at the proper age. This rule of the common law is not founded in a true sense of justice, as it enables an adult to marry a minor and then break the contract at will.[2] If the ages of the parties be sufficient, consent of parents or guardians is unnecessary at common law.[3] The common law on this subject is the ecclesiastical law. It was in conformity with the spirit of the Romish Church, which abrogated the "paternal authority" of the Roman or civil law, and placed it in the

[1] 12 Geo. III. c. 11.

[2] It is changed by statute in New York, so that only the infant can bring an action for divorce. Nor will any such divorce be granted if, after full age is attained, the parties freely cohabit as husband and wife. Code Civ. Pro. § 1744.

[3] By ch. 24, Laws of 1887, the age of consent in New York to a marriage is eighteen in the case of males and sixteen in the case of females.

hands of the Church. So that the marriage of males of fourteen and of females of twelve was unquestionably valid by the law of England, before the statutes on the subject, with or without the consent of the parents.[1] By statute in New York the marriage of a female under sixteen may be declared void if it took place without the consent of her father or other guardian.[2]

(2) *Mental unsoundness.* — In deciding the question whether a person has sufficient mental capacity to contract a marriage, the question for the court is whether the mind of the party was diseased when the contract was entered into. If so, the court will not inquire as to the extent of the derangement.[3] The court does not, as in many testamentary cases, deal with varieties or degrees of strength of mind. The question is one simply of health or disease of mind. If any contract more than another is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage, — an act by which the parties bind their property and their persons for the rest of their lives.[4] In other cases it is said that the same degree of mental power which will enable him to make a deed or will is sufficient to enable him to enter into a marriage.[5]

It is an important question whether the marriage (in case of the insanity of one of the parties) is utterly void, or only voidable at the election of the insane party or of some relative or other person interested to avoid the marriage. Many of the cases say that it is absolutely void.

There are, however, serious objections to this view. One is that the question of invalidity may be raised, not by a direct proceeding, but collaterally, and by any person. This would be highly inconvenient in practice. Respectable authorities hold that it cannot be raised collaterally. Another objection is that this view enables the other party, being of sound mind, to enter into a marriage to subserve some purpose of his own, it may be, sinister, and then, after accomplishing it, to repudiate the contract at will. Nothing can be more repugnant to justice, and even to public decency, than such a view. There are some forcible remarks in a recent English decision upon this point.[6] All the cases agree that a divorce in such a case is

[1] Sherwood *v.* Ray, 1 Moore, P. C. C. 353, 398. In this case the arguments of counsel are most able and instructive.

[2] Code of Civ. Pro. § 1742.

[3] Hancock *v.* Peaty, L. R. 1 P. & D. 335; 36 L. J. (Mat. Cases) 57. If the mind be sound at the time of the marriage, it suffices. Banker *v.* Banker, 63 N. Y. 409.

[4] Hancock *v.* Peaty, *supra*, p. 341.

[5] Atkinson *v.* Medford, 46 Me. 510.

[6] In Hancock *v.* Peaty, *supra*, p. 341, it is said, "It may well be that cases might arise in which the husband should

suitable and proper. It is difficult to see how a divorce court would have jurisdiction in a direct proceeding to declare the contract void, when it was already before any such declaration utterly void.

The New York statute referred to in the note has set this matter at rest by providing that an action to annul the marriage can only be maintained in behalf of the idiot or lunatic, or some relative having an *interest* to avoid the marriage.[1]

It is a rule of the common (ecclesiastical) law that relatives or others having a pecuniary interest in avoiding a voidable marriage may become plaintiffs in a divorce court in a suit to annul the marriage.[2] The case cited in the note was that of a marriage alleged to be void on account of affinity, but the reasoning extends to other cases of voidable marriages.

(3) *Force and fraud.* — The case of a marriage obtained by force is not now often presented to the courts except in a criminal aspect. Statutes must be consulted upon this subject.[3] (*a*)

A marriage obtained by fraud is voidable, and not void. The defrauder will not be allowed to take advantage of his wrongful act. The divorce can only be obtained by the injured party, or by some person interested to avoid the marriage.[4] The fraud here intended does not consist merely in disingenuous representations concerning property or social position;[5] it must be

be shown to have entered into the marriage contract with a full knowledge that the woman he was taking as his wife was insane, and in such a case it might be doubted whether he would not be estopped from coming into this" (divorce court), "or any other court, to disaffirm his own act and allege her to be insane whom, with a knowledge of all the facts, he had treated as sane, when it served his purpose to do so."

[1] Code of Civ. Pro. § 1746. "An action to annul a marriage, on the ground that one of the parties thereto was an idiot, may be maintained at any time during the life-time of either party by any relative of the idiot who has an interest to avoid the marriage.

"§ 1747. An action to annul a marriage on the ground that one of the parties thereto was a lunatic, may be maintained at any time during the continuance of the lunacy, or after the death of the lunatic in that condition and during the life of the other party to the marriage by any relative of the lunatic who has an interest to avoid the marriage. Such an action may also be maintained by the lunatic at any time after restoration to a sound mind; but in that case the marriage shall not be annulled if it appears that the parties freely cohabited as husband and wife after the lunatic was restored to a sound mind."

[2] Sherwood *v.* Ray, 1 Moore P. C. C. 353. The whole subject of "interest" for this purpose is thoroughly discussed by counsel in this case. The argument of Mr. Austin is particularly noticeable. See also Faremouth *v.* Watson, 1 Phill. 355.

[3] The English law is found in 24 & 25 Vict. c. 100, § 54, as modified by 27 & 28 Vict. c. 47. For New York law, see Penal Code, § 281.

[4] In New York, see Code of Civ. Pro. § 1750, containing substantially the same provision as in the case of insanity.

[5] Wakefield *v.* Mackay, 1 Phill. 134 n.; Klein *v.* Wolfsohn, 1 Abb. N. C. 134; Clarke *v.* Clarke, 11 Abb. Pr. 228.

(*a*) For a late case upon this subject, see Cooper *v.* Crane, [1891] P. 369.

deception going to the very substance of the contract. An instance is the case where a man is induced to marry a woman at the time pregnant by another man, and the pregnancy is misstated or concealed.[1]

The second class of cases, embracing those where there is no want of capacity to the act of consent itself, will now be adverted to.

(1) *Consanguinity and affinity.* — These may be grouped together. Marriages between close relatives are void by the laws of all civilized nations as opposed to public policy and decency. The degree of relationship is not fixed with definiteness, but varies in different States or countries. The marriage would in general be unlawful between lineal relatives, and, in the collateral line, between brother and sister. As to more remote collateral relatives there is a diversity of regulation. Thus, in some States a marriage between uncle and niece and nephew and aunt would be incestuous; in others, not.[2] (*a*) Marriages in violation of the rules respecting consanguinity are deemed incestuous, and the parties are made liable to criminal prosecution.[3]

By the common law such marriages are voidable and not void. A divorce must be obtained while both the parties are living. The prohibition was originally derived from the canon or ecclesiastical law, finally converted into statute law in the reign of Henry VIII. The Acts of Parliament in that reign only made the marriage voidable, and adopted the rule that the divorce must be had during the life of *both* parties, and could only be questioned during the life of both parties.[4] At the present time in England incestuous marriages are *utterly void* to all intents and purposes whatever.[5]

[1] Scott *v.* Shufeldt, 5 Paige, 43. In this case, a white woman had a mulatto child born to her, and at the same time, concealing the fact, stated to a white man that he was the father of the child, and he, believing it, married her. Sloan *v.* Kane, 10 How. Pr. 66; Ferlat *v.* Gojon, 1 Hopkins (N. Y.), 478. Meyer *v.* Meyer, 49 How. Pr. 311.

[2] For example, there is no prohibition of such a marriage in New York, while there is in Alabama. See Campbell *v.* Crampton, 18 Blatch. 150.

[3] See in New York, Penal Code, § 302.

[4] Innocentius, Institutionea Canonici, 1432.

[5] 5 & 6 William IV. c. 54, passed Aug. 31, 1835.

The law of England was in a singularly unsettled condition upon this subject at the time of the American Revolution. The so-called "prohibited degrees" are first mentioned in 25 Henry VIII. c. 22, entitled "An Act concerning the King's Succession," passed to legalize the king's divorce from Queen Catharine and to bastardize the Princess Mary. The "prohibited degrees" will be found in section 3. The 28 Henry VIII. c. 7, repealed the former Act. It was passed to establish the divorce from Anne Boleyn and to bastardize the Princess Elizabeth. In it the

(*a*) Such marriages are now incestuous and void in New York. See Laws, 1893, ch. 601.

A leading instance, under the English statutes, of a marriage prohibited by affinity is that between a man and his deceased wife's sister. The act of William IV., already alluded to, having made these marriages utterly void, the courts have held that such a marriage is not only void when contracted in England, but that it creates a personal disability, following an Englishman wherever he goes. This is true in the case of a naturalized as well as native Englishman.[1] The rule extends to a marriage of a man with the daughter of a half sister of his deceased wife, and to illegitimate sisters as well as legitimate.[2] Disqualification to marry by reason of affinity does not prevail in this country.

An important inquiry has arisen as to the point whether incapacity to marry on the ground of consanguinity by the law of the domicile will be recognized as fatal in the place where the marriage takes place. The better view would seem to be that in all questions of capacity involving the validity of the marriage in the courts of the place where contracted, the law of that place should govern.[3] It is quite a different question as to the view

"prohibited degrees" were again stated. Another Act, passed in the same year, refers to and confirms the former statute. 28 Henry VIII. c. 16. Next came the 32 Henry VIII. c. 38, that all marriages should be lawful between persons that were not prohibited by "God's laws" to marry; and "that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees." It is said that the phrase "Levitical degrees" is used in this Act instead of "prohibited degrees" (the phrase used in the earlier statutes) for the purpose of rooting out the doctrine of "spiritual affinity," which prevented godfathers from marrying their godchildren without license from the Pope. After Queen Mary's accession, and during her reign and that of Philip and Mary, all the prior legislation as to "prohibited degrees" was repealed. 1 Mary, sess. 2, c. 1; 1 & 2 Philip & Mary, c. 8, §§ 16, 17, 19.

In Queen Elizabeth's reign the statute of Philip & Mary was repealed, and some of the older statutes revived. In this revival much confusion was occasioned, there being a double act to recognize nothing which impaired Queen Elizabeth's title to the throne and at the same time to continue the prohibited degrees of consanguinity. 1 Eliz. c. 1, §§ 2, 10, 11.

The best conclusion from all this variety of enactments is, that the statute 32 Henry VIII. c. 38, and 28 Id. c. 16, remained in force by revival, and that the prohibited degrees are the "Levitical degrees." Brook *v.* Brook, 9 H. L. Cases, 193. A table of these, compiled from the statutes of 25 Henry VIII. c. 22, and 28 Henry VIII. c. 7, are given by Lord Coke in his Institutes. 2 Inst. 683, and 2 Coke upon Littleton, p. 235 n., and see also 3 Burns's Ecclesiastical Law (3d ed.), 402.

[1] Brook *v.* Brook, 9 H. L. Cases, 193; s. c. 3 Sm. & G. 481; Sherwood *v.* Ray, 1 Moore, P. C. C. 398; Mette *v.* Mette, 1 Sw. & T. 416; Fenton *v.* Livingstone, 3 Macqueen, H. L. Cases, 497, 544. Similar rules prevail in the case of other statutory prohibitions. Sussex Peerage Case, 11 Cl. & F. 85, 137. Penal disabilities, however, do not follow the person in this manner.

[2] Regina *v.* Brighton, 1 B. & S. 447.

[3] This point was greatly considered in Sottomayor *v.* De Barros, L. R. 2 P. D. 81; also on appeal L. R. 3 P. D. 1, and again L. R. 5 P. D. 94. There the marriage was contracted in England between two Portuguese who could not legally marry in Portugal, being first cousins; but could, had they been English, have married in England. The lower court held that an English court was not bound to recog-

to be taken of the same facts in the courts of the country where the parties are both domiciled. It is still more clear that the incapacity cannot be considered where one of the parties was domiciled in the place of the marriage, and the other abroad.[1]

(2) *Corporeal impotence.* — This is a cause of divorce involving the validity of the marriage contract. The marriage is not void, but voidable, and can only be questioned during the life of both parties.[2] The grounds on which invalidity may be urged are that as one of the incidents to marriage is consummation and the procreation of children, where consummation is impossible, the parties should not be tied together without the will of the injured party. "Impotence" may be maintained on two grounds: one is malformation of body (and this is the most common case); the other is such a permanent mental condition as to the act of consummation (*e. g.*, hysteria) as makes it impossible.[3]

Mere wilful refusal of consummation is not of itself proof of impotence, though after a long period it may lead to an inference of it. The incapacity must be permanent, else there is no valid ground for divorce.[4] Some of the additional rules on the subject are that the incapacity must have existed at the time of the marriage. Mere sterility will not suffice.[5] If there is a probability that capacity can be produced by a slight surgical operation, the marriage will not be declared void; but the court cannot compel the wife to submit to it.[6] Refusal to submit to inspection is a circumstance that may be taken into account in reaching a conclusion, and may lead to a divorce.[7]

A presumption of impotency in English law arises from a cohabitation of three years without consummation. This is called the rule of "triennial cohabitation." It does not arise from a shorter period, and when it has arisen, it may be

nize the incapacity, the marriage having taken place in England. L. R. 2 P. D. 81. The appellate court reversed the decision, holding that the English court must recognize the foreign disqualification, where both parties were domiciled abroad. On a new trial in the Probate Court the case developed the fact that only one of the parties was domiciled abroad. The Lord President, in a convincing argument, held that the foreign law should not be considered. His reasoning, however, is equally applicable to the case where both of the parties are domiciled abroad. L. R. 5 P. D. 94. It is impossible, on a careful survey of the whole subject, to avoid the conclusion that the appellate court, in L. R. 3 P. D. 1, reached an erroneous conclusion.

[1] Sottomayor *v.* Da Barros, L. R. 5 P. D. 94. Simonin *v.* Mallac, 2 Sw. & T. 67.

[2] A. *v.* B., L. R. 1 P. D. 559; P. *v.* S. 37 L. J. (Prob. & Mat.) 80.

[3] P. *v.* L., L. R. 3 P. D. 73 n.; G. *v.* G., L. R. 2 P. & D. 287.

[4] S. *v.* E., 3 Sw. & T. 240. In this case the impotency was not congenital.

[5] Devanbagh *v.* Davanbagh, 5 Paige, 554, 556, 557.

[6] Devanbagh *v.* Davanbagh, 6 Paige, 175.

[7] L. *v.* L., L. R. 7 P. D. 16.

rebutted.[1] This rule does not at all affect the case where malformation is affirmatively proved. Great delay frequently occurs in this class of cases. This is not a strict bar to the action, but renders it necessary that the evidence should be highly clear and satisfactory.[2] Delay may also lead to the inference of bad faith, and require explanation.[3]

In New York this troublesome branch of the subject is settled by statute. An action must be commenced before two years have expired since the marriage.[4]

(3) *Polygamy.* — This is prohibited by the laws of all civilized nations. A polygamous marriage is, in general, utterly void, so that no divorce is necessary. Such a marriage is criminal, punishable in the early English statute of 1604 by death.[5] There is an exception in the Act in favor of those whose husband or wife shall remain continually beyond the seas by the space of seven years together, or whose husband or wife shall absent himself or herself for seven years within her majesty's dominions, the one not knowing the other to be living within that time. There are other exceptions in favor of those who have been divorced in the ecclesiastical court.

This statute has been the model of much American legislation upon this subject. The rules in New York are in substance the same, except that five years are substituted for seven, and another exception is added in favor of one who has been sentenced to imprisonment for life. This is on account of the doctrine of "civil death" prevailing in that State. The punishment is reduced to imprisonment in the State prison for not more than five years. The text of the statute is found in a note.[6]

[1] Marshall *v.* Hamilton, 10 Jur. N. S. 853; F. *v.* D., 4 Sw. & T. 86.

[2] Castleden *v.* Castleden, 9 H. L. Cases, 186.

[3] Ewens *v.* Ewens, 9 Jur. N. S. 1301.

[4] Code of Civ. Pro. § 1752. This is practically a statute of limitations. Kaiser *v.* Kaiser, 16 Hun, 602.

[5] 1 Jac. I. c. 11. The preamble to this act is curious: "For as much as divers evil disposed persons, being married, run out of one county into another, or into places where they are not known, and there become to be married, having another husband or wife living, to the great dishonor of God, and utter undoing of divers honest men's children and others, Be it therefore enacted," etc.

There are still earlier statutes, 4 Edw. I. St. 3; 18 Edw. III. St. 3, c. 2; 1 Edw. VI. c. 12, § 16. The foregoing statutes, as well as earlier and later acts, were repealed by 9 Geo. IV. c. 31, in connection with 24 & 25 Vict. c. 95. The existing law is found in 24 & 25 Vict. c. 100, as modified by 27 & 28 Vict. c. 47.

[6] In case of the absence of one of the parties for the period of five years, and the belief of the other party that he or she is dead, the marriage is not wholly void, but only from the time that it is so declared by a court of competent authority. 2 R. S. 139, § 6.

Penal Code, §§ 298–302, both inclusive. § 298: "A person who, having a husband or wife living, marries another person, is guilty of bigamy and is punishable by imprisonment in a penitentiary or State prison for not more than five years.

"§ 299. The last section does not extend,

Similar legislation is found in other States. There is also important legislation by Congress as to the territory of Utah.

(4) *Prohibition of mixed marriages, or of so-called "miscegenation."* — Legislation of this kind is found in a number of the American States as applicable to marriages between whites and persons of African descent. This legislation is founded upon a local theory of public policy, and a belief that such marriages have an injurious effect upon society.[1] Under the Virginia law, the party claimed to be a negro must have one fourth negro blood. If he have one drop less, the marriage is not unlawful.[2] The North Carolina act on this subject is said in a recent case to be still in force.[3] The prohibition in Texas does not apply to miscegenation without previous marriage between the parties.[4] In Tennessee the marriage between a white person and one of mixed blood to the third generation is void *ab initio*.[5] Such a marriage will be respected in North Carolina if marriage takes place in another State where the husband is domiciled, and the parties come there to reside;[6] but this will not be the case if the parties simply go abroad to evade the North Carolina law and then return.[7] By the laws of Georgia, white and colored persons cannot marry.[8] (*a*) It is presumed that if a white man and colored

1, To a person whose former husband or wife has been absent for five years successively, then last past, without being known to him or her within that time to be living, and believed by him or her to be dead; or, 2, To a person whose former marriage has been pronounced void or annulled or dissolved by the judgment of a court of competent jurisdiction for a cause other than his or her adultery; or, 3, To a person who, being divorced for his or her adultery, has received from the court which pronounced the divorce permission to marry again; or, 4, To a person whose former husband or wife has been sentenced to imprisonment for life."

§ 300. This refers to the lawfulness of a trial in the county in which the defendant is arrested, as well as that in which the offence was committed.

§ 301. "A person who knowingly enters into a marriage with another which is prohibited to the latter by the foregoing provisions of this chapter, is punishable by imprisonment in a penitentiary or State prison for not more than five years, or by a fine of not more than one thousand dollars, or both."

A person may lawfully marry again *on the very day* that he is divorced. In such a case there would be no crime committed. Merriam *v.* Wolcott, 61 How. Pr. 377.

[1] Kinney *v.* Commonwealth, 30 Gratt. 858; Green *v.* State, 58 Ala. 190. In Kinney *v.* Commonwealth, *supra*, the parties left Virginia and went for a few days to the District of Columbia, married, and returned. It was decided that the law of the domicile should govern, and the marriage was not only declared void, but the parties were punished criminally. See also Frasher *v.* State, 3 Tex. App. 263; Exr. of Dupre *v.* Boulard, 10 La. Ann. 411.

[2] McPherson *v.* Commonwealth, 28 Gratt. 939.

[3] State *v.* Hairston, 63 N. C. 451; State *v.* Reinhardt, Id. 547.

[4] Moore *v.* State, 7 Tex. App. 608.

[5] Carter *v.* Montgomery, 2 Tenn. Ch. 216.

[6] State *v.* Ross, 76 N. C. 242.

[7] State *v.* Kennedy, Id. 251.

[8] Scott *v.* State, 39 Ga. 321. The law-

(*a*) State *v.* Tutty, 41 Fed. R. 753.

woman should leave a State where their marriage was prohibited, and should marry in a State where there was no such prohibition, the courts of the latter State would not hold the marriage void on account of its opposition to the law of their domicile.

Interesting questions have arisen upon the point whether if slaves intended to marry, but were prohibited from doing so by the law of their domicile, and afterwards lived together, a marriage could be inferred. Subsequent cohabitation is evidence of ratification.[1] This doctrine would not apply unless they had intended, while in slavery, to live as husband and wife, so far as the law would permit.[2] In some of the former slave States such marriages have been validated by statute since slavery was abolished. Such legislation is valid.[3] (*a*) The Kentucky court has held that a declaration before a clerk of the county by two former slaves legalized their "customary" marriage. It did not institute a new marriage.[4]

The principle is well stated as follows: emancipation gave to the slave his civil rights; and a contract of marriage, legal and valid by the consent of the master and the moral assent of the slave, although dormant during the slavery of the parties, produced from the moment of their freedom all the effects which result from such contracts among free persons.[5] The relation assumed in the above proposition must continue down to the moment of emancipation. (*b*) The correct rule seems to be that if, after the emancipation, the parties live together as husband and wife, and if before emancipation they were married in the form which either usage or law had established for the marriage of slaves, the subsequent mutual acknowledgment should be held to constitute a valid marriage.[6]

fulness of restrictions upon the marriages of different races, etc., is discussed in Lonas *v.* State, 3 Heisk. 287.

[1] Ross *v.* Ross, 34 La. Ann. 860; Washington *v.* Washington, 69 Ala. 281.

[2] Downs *v.* Allen, 10 Lea, 652; Washington *v.* Washington, *supra*.

[3] Laws of North Carolina, 1866, ch. 40, and Code § 1281, construed in State *v.* Whitford, 86 N. C. 636. See Ordinance of Ala., Sept. 29, 1865; Rev. Stat. of Ky., Supplement 1866, No. 37, approved Feb. 14, 1866, construed in Brown *v.* McGee, 12 Bush, 428. Laws of Ala. 1868, Ordinance No. 23, approved Nov. 30, 1867, amended Dec. 31, 1868, construed in Jackson *v.* State, 53 Ala. 472.

[4] Dowd *v.* Hurley, 78 Ky. 260.

[5] Pierre *v.* Fontenette, 25 La. Ann. 617. On this theory no validating statute would be necessary. See also Minor *v.* Jones, 2 Redf. 289; Jones *v.* Jones, 45 Md. 144; Haden *v.* Ivey, 51 Ala. 381; State *v.* Adams, 65 N. C. 537.

[6] Jones *v.* Jones, 36 Md. 447, 456.

(*a*) Livingston *v.* Williams, 75 Tex. 653; Scott *v.* Raub, 88 Va. 721; Clement *v.* Riley, 33 S. C. 66. The statutes in North Carolina were intended to operate only where the cohabitation was exclusive. Branch *v.* Walker, 102 N. C. 34.

(*b*) See Cantelou *v.* Doe, 56 Ala. 519.

SECTION II. *The marriage contract itself.* — (1) *Its essential elements.* — One essential element in a marriage contract is present consent to *a marriage.* This does not mean present assent to a cohabitation or mere act of living together, but to a marriage. It is accordingly of consequence to determine the true meaning of a marriage.

A marriage may properly be defined to be the union for life of a man and woman having the capacity to marry, to the exclusion of all other persons. It must be the intent of the parties to constitute such a relation. But the intent alone is not enough. A rule of law must then attach which prevents them from dissolving the relation even by mutual consent, or in any other manner than that which the law permits. Marriage is then initiated by contract. It, however, creates a condition or *status* over which the mere will of the parties no longer has any control. (*a*)

In order that the subject be thoroughly understood, it must be studied *historically.* The development or evolution of this branch of the law must be sought, not merely in the law of contracts, but also in the law of the Church, or the canon law. At the time of William the Conqueror, ecclesiastical questions were separated from those of a temporal nature, and were disposed of exclusively in the ecclesiastical courts. Marriage and divorce were treated as ecclesiastical questions. In this way a system of marriage and divorce law was developed by churchmen, who had recourse to the canon law for principles to guide their decisions. This system came to the American States by adoption, and with some modifications still prevails. There is thus a churchly or Christian element in this law which is peculiar to itself.[1]

The essential elements of a marriage contract are these: —

First. There must be a true and serious assent. A marriage entered into as a joke, and so understood by both parties, is no true marriage.[2] Still, if the outward signs of a true intent were present, it would seem that it could not be claimed that there was no real intent, as that is to be derived from expressions and outward acts.

[1] Maine's Ancient Law, 11th Ed. pp. 158, 159. It is there said that the canon law "in no one particular departs so widely from the spirit of the secular jurisprudence as in the view it takes of the relations crested by marriage." And again, "the English common law borrows far the greatest number of its fundamental principles (upon the subject of marriage) from the jurisprudence of the canonists," p. 159.

[2] McClurg *v.* Terry, 21 N. J. Eq. 225. Swinburne on Spousals, Sect. XI. par. 33.

(*a*) Legislation annulling the relation of marriage is not within the prohibition of the Constitution of the United States against the impairment of contracts. Maynard *v.* Hill, 125 U. S. 190; State *v.* Tutty, 41 Fed. R. 753.

Second. The marriage cannot be made by future words (*verba de futuro*), but only by present words (*verba de præsenti*). The former would be an executory contract to marry, — an engagement, — and not an actual marriage. This principle will not be changed even though the words of future promise be followed up by cohabitation. At one time, in England, the ecclesiastical courts would order a marriage in such a case. That could not be done in any of the American States, as there is no ecclesiastical tribunal here having compulsory power of this kind. The jurisdiction existed in England by reason of the fact that the ecclesiastical court was a true court established by law. Owing to the difference in our position, it is the prevailing view that such a case is simply a promise to marry; and if cohabitation ensue, it is but a case of seduction.[1] (*a*) This principle is particularly applicable where the parties looked forward to a formal ceremony, and did not agree to become husband and wife without it.[2]

Third. There must be freedom of will, absence of fraud, duress, etc. These have been sufficiently considered under the topic of "capacity."

(2) *The form and requisites of the contract. — Foreign marriages.* — The question as to the form of a marriage is one of great difficulty. This grows out of the inquiry as to the influence of the canon law upon the subject of form. There are two general modes of proving a marriage, — direct and indirect. The evidence is direct when an actual marriage is shown by testimony of eye-witnesses. It is indirect when the marriage is inferred from the acts of the parties and accompanying circumstances.

Direct evidence. — There are certain cases in which direct evidence is necessary. These are prosecutions for bigamy and for "criminal conversation,"[3] and perhaps an action for divorce.[4]

[1] Cheney *v.* Arnold, 15 N. Y. 345, where the whole subject is reviewed. Turpin *v.* Pub. Adm., 2 Bradf. 424; Duncan *v.* Duncan, 10 Ohio St. 181; Robertson *v* State, 42 Ala. 509; Peck *v.* Peck, 12 R. I. 485; Hebblethwaite *v.* Hepworth, 98 Ill. 126.

[2] Peck *v.* Peck, 12 R. I. 485; Port *v.* Port, 70 Ill. 484.

[3] The meaning of this expression is a *civil* action brought by a husband against an alleged adulterer for the seduction of a wife.

[4] There may be other cases. This point is discussed in Collins *v.* Collins, 80 N. Y. 1, 10. See also Bishop on Marriage, Divorce, and Separation, vol. II. §§ 742–758.

(*a*) A presumption of marriage may sometimes be raised by a contract *per verba de futuro* followed by cohabitation; but this is rebutted by proof that cohabitation was not intended as a consummation of the contract. Stoltz *v.* Doering, 112 Ill. 234; Cartwright *v.* McGown, 121 Ill. 388. See also Bishop on Marriage, Divorce, and Separation, vol. I. §§ 353–377.

The point would then arise, what would it be necessary to prove in such a case.

According to the rules of English law, as laid down by the highest court, there is no sufficient direct evidence of a marriage unless it took place in the presence of a priest. The "priest" here intended is one in holy orders recognized by the Church of England. It was accordingly held, after great consideration, that a marriage in Ireland by a regularly-placed minister of the Presbyterian church, according to the rites of that church, at his dwelling-house, was void, so that a subsequent marriage entered into by one of the parties with a third person, both of the parties to the prior ceremony being still living, was not a case of bigamy.[1] The priest must be a third person. It will not be sufficient that the priest is the bridegroom, and goes through the form of marrying himself to the woman.[2] The theory on which the case proceeds is that the priest is not simply present to perform the religious ceremony, but is there as well to be a witness to the contract, and that he may prevent the marriage from taking place in case any just impediment is brought to his knowledge.[3]

These judgments, made since the American Revolution, are not binding on our courts, though deserving of great respect from the high character of the judges, and the great research and ability displayed. If, however, Queen *v.* Millis is to be accepted as a correct view of the English common law, it can scarcely be claimed that it could ever have been adopted in this country. There were in the early settlement of the American States few priests of the kind referred to in this decision. After the Revo-

[1] This was the result of the famous case of Queen *v.* Millis, 10 Cl. & F. 534; House of Lords, 1844. The judges, six in number, were equally divided in opinion. This resulted according to the rule in that court in an affirmance of the decision of the lower court. This question could not have been presented by a case arising in England, since the mode of constituting a marriage was there regulated by statute. 26 Geo. II. c. 33, as modified by 3 Geo. IV. c. 75, 4 Geo. IV. c. 17, and Id. c. 76. As that statute did not extend to Ireland, the question was one at common law. The result in Queen *v.* Millis was in opposition to the opinions of many of the earlier English judges, and particularly to the theory of the great case of Dalrymple *v.* Dalrymple, 2 Hagg. Consist. Rep. 54. The decision in Queen *v.* Millis led to a statute (7 & 8 Vict. c. 81) legalizing such marriages.

[2] Beamish *v.* Beamish, 9 H. L. Cases, 274.

[3] The decisions in Queen *v.* Millis and Beamish *v.* Beamish establish that the early marriage law in England was essentially different from that which prevailed at the same time in continental Europe. It is conceded on all hands that until the decree of the Council of Trent, A. D. 1563, the general law of western Europe did not require a priest to attend. Even since that decree the priest attends as a *witness* simply, and the marriage will be valid, even though he dissent from it. The substance of the decree is found in 9 H. L. Cases, 317–320.

lution, to hold with this decision would be to affirm that it was part of the common law of each American State that a marriage is void as to all civil rights, including legitimacy of children, unless there was present a priest of a foreign church established by foreign law, or one recognized by that church as a priest. Such a conclusion would lead to a practical absurdity.

There is respectable authority in the British courts for holding that the rule is not to be applied in the colonies where there are no priests.[1] It must be more clearly so under the relations existing between the American States and England. It would seem, therefore, that whether the theory of Lord Stowell be adopted,[2] or that of the court in Queen *v.* Millis, the result is the same in this country. This is that the presence of a minister is not by our common law necessary to the validity of a marriage. The main ingredient is consent. If this consent is given in words having an immediate effect (*verba de præsenti*), the marriage is complete. If the future tense be employed, the contract is an engagement to marry, and nothing more, even though it be followed by cohabitation.[3] (*a*)

Indirect evidence and presumptions. — By indirect evidence is meant the case where facts and circumstances are shown, such as usually attend the state of marriage, and which, by a process of reasoning, might lead the mind to the conclusion that a marriage had taken place. This evidence may be resorted to even

[1] Maclean *v.* Cristall, Perry's Oriental Cases, 75. See *dicta*, Beamish *v.* Beamish, *supra*.

[2] Dalrymple *v.* Dalrymple, 2 Hagg. Consist. Rep. 54.

[3] The cases maintaining this point are now very numerous. See Hayes *v.* People, 25 N. Y. 390; Van Tuyl *v.* Van Tuyl, 8 Abb. Pr. N s. 5; Wright *v.* Wright, 48 How. Pr. 1; Bissell *v.* Bissell, 55 Barb. 325; Guardians of the Poor *v.* Nathans, 2 Brews. (Pa.) 149; People *v.* Taylor, 1 Mich. (N. P.) 198; Richard *v.* Brehm, 73 Pa. St. 140; Dickerson *v.* Brown, 49 Miss. 357; Hutchins *v.* Kimmell, 31 Mich. 126; Floyd *v.* Calvert, 53 Miss. 37; Davis *v.* Davis, 7 Daly, 308; Hynes *v.* McDermott, 7 Abb. N. C. 98.

In Massachusetts the canon law was never adopted, and it was never received as common law that parties could marry without an officiating minister or magistrate. The acts of the legislature sustain this rule, except in the case of Friends or Quakers. Commonwealth *v.* Munson, 127 Mass. 459.

The case of Denison *v.* Denison, 35 Md. 361, adopts the view taken in Queen *v.* Millis, and exacts solemnization by a priest. See also Dyer *v.* Brannock, 2 Mo. App. 432, 444–449.

(*a*) See also, as upholding the general rule, Gall *v.* Gall, 114 N. Y. 109; State *v.* Cooper, 103 Mo. 266; Mathewson *v.* Phœnix Iron Foundry, 20 Fed. R. 281, and cases cited; Matter of Hamilton, 2 Connolly, 471; The State *v.* Walker, 36 Kan. 297; Teter *v.* Teter, 101 Ind. 129; *contra*, Norcross *v.* Norcross, 155 Mass. 425; Peck *v.* Peck, Id. 479. Common-law marriages are valid under statutes regulating the marriage ceremony, unless such statutes expressly declare them void. State *v.* Bittick, 103 Mo. 183. But the opposite view is taken in Beverlin *v.* Beverlin, 29 W. Va. 732.

in States where a *ceremonial* marriage is required, since it leads to the conclusion that such a marriage has taken place. One attacking the marriage will, however, be allowed to show that there was no marriage, and so rebut the presumption.

The presumption in favor of marriage when parties live together as husband and wife is very strong, and this presumption must be met by strong, distinct, and satisfactory disproof. (*a*) This is particularly true after the lapse of a great length of time.[1] The language of Lord Campbell is "that a presumption of this sort in favor of marriage can only be negatived by disproving every reasonable possibility."[2]

Some of the circumstances which tend to raise a presumption of marriage are these: —

First, cohabitation, or the act of living together as husband and wife. Such cohabitation raises the presumption of marriage. A court will not suppose the relation of the parties to be illicit, but, in the absence of evidence to the contrary, will assume it to be lawful.[3] (*b*)

This principle is subject to this qualification: that if the cohabitation be in its origin illicit or meretricious, it will be presumed to continue to be so,[4] unless there is evidence that this relation ceased, and a new and lawful relation commenced by mutual consent. (*c*) A subsequent cohabitation after such a change of intent might raise a presumption of a marriage.[5]

Under this rule, if parties enter into a void contract of marriage, and the impediment to marriage is removed, a marriage may be presumed from subsequent cohabitation, etc.[6] It has been decided, however, that this principle cannot be applied to uphold a marriage, where one of the parties had committed bigamy, though the other was innocent, as a new marriage could not be presumed after the bigamous relation ceased, since the innocent party would have no motive to remarry. This seems to be a highly technical doctrine, since the whole subject of

[1] Piers *v.* Piers, 2 H. L. Cases, 331.

[2] Id. p. 380.

[3] Ferrie *v.* Pub. Adm., 3 Bradf. 151; s. c. 4 Bradf. 28; Caujolle *v.* Ferrie, 23 N. Y. 90.

[4] Cunninghams *v.* Cunninghams, 2 Dows Rep. 482. The presumption in this case is but slight. Caujolle *v.* Ferrie, 23 N. Y. 90.

[5] Lapsley *v.* Grierson, 1 H. L. Cases, 498; Hill *v.* Hibbit, 19 W. R. 250.

[6] Rose *v.* Clark, 8 Paige, 574. See also a learned note in 18 Am. Law Reg. 639.

(*a*) Hynes *v.* McDermott, 91 N. Y. 451.

(*b*) State *v.* Schweitzer, 57 Conn. 532; see also Degnan *v.* Degnan, 43 N. Y. St. Rep. 646.

(*c*) Harbeck *v.* Harbeck, 102 N. Y. 714; Vincent *v.* Vincent, 16 Daly, 534.

presumptions is a fiction in favor of marriage, and a presumed public policy. The decision has also the bad effect of leaving an innocent woman in a worse position than she would have been in, had she known of the bigamy; for in that case, when the former wife died, there would be a motive to marry, and a marriage might be presumed. [1]

Second, general reputation raises a presumption of marriage.[2] If the repute be divided, it may be established by preponderating repute.[3] In Scotland, "habit and repute" are proof that the parties have interchanged that consent which constitutes the contract.[4]

Third, declarations of the parties to the marriage. These may be admitted as evidence to prove, and in some instances to disprove, a marriage. This kind of evidence would not be sufficient to establish a marriage in a trial for polygamy. A general statement may now be made that marriage may for most purposes be proved by evidence of acts of recognition, matrimonial cohabitation, general reputation, and declarations of the parties.[5]

The rule applies in favor of one who sues for injury causing a *husband's* death.[6] The repute, etc., should be shown to exist in the domicile of the parties.[7] Cohabitation and reputation should go together. One alone will not suffice.[8]

Fourth, in special cases, when there is no better evidence, hearsay, such as recognition of the marriage, has been admitted as evidence.[9] (*a*) Under the present law of New York, an alleged wife may testify to recognition on the husband's part, introduction to his relatives, etc.[10] When a presumption of marriage is once raised, it will not be rebutted by the fact that there was a subsequent actual marriage of the parties, even though the subsequent marriage should be in the wife's maiden name.[11] It is a rule that reputation proper to be shown in the case cannot go beyond the range of knowledge of the cohabitation.[12]

[1] O'Gara *v.* Eisenlohr, 38 N. Y. 296.

[2] Doe *v.* Fleming, 4 Bing. 266.

[3] Lyle *v.* Ellwood, L. R. 19 Eq. 98. But see Barnum *v.* Barnum, 42 Md. 251.

[4] Campbell *v.* Campbell, L. R. H. L. 1, Sc. App. 182.

[5] The cases on this point are very numerous, and it is scarcely necessary to cite them.

[6] Lehigh R. R. Co. *v.* Hall, 61 Pa. St. 361.

[7] Com. *v.* Omohundro's Adm., 2 Brews. (Pa.) 298.

[8] Cargile *v.* Wood, 63 Mo. 501.

[9] Chamberlain *v.* Chamberlain, 71 N. Y. 423.

[10] People *v.* Bartholf, 24 Hun, 272.

[11] Betsinger *v.* Chapman, 88 N. Y. 487.

[12] Badger *v.* Badger, Id. 546.

(*a*) Eisenlord *v.* Clum, 126 N. Y. 552.

It cannot be shown by general reputation that marriage did not exist,[1] though when reputation of a marriage is asserted, it may be shown in answer that there is a divided reputation, and that among some friends it was reputed that the connection was illicit instead of matrimonial.[2] The principle on which recognition rests requires that it should be open, public, and continuous. The policy of the law is opposed to a secret marriage. It is difficult to establish it without clear evidence.[3] The question whether *direct* evidence of marriage must be given in an action for divorce was recently discussed in the New York Court of Appeals, but not decided.[4]

In various States there are statutes prescribing the registration of marriages in some public office. In that case there is authority for holding that an official certificate from the register's office will be evidence of the marriage. It is in general ordained in the statute itself that it may be used in evidence. It will not, however, be the only means of establishing the marriage. The testimony of witnesses may be resorted to, or evidence of cohabitation and repute as before.

Rules for determining the validity of foreign marriages.— By the phrase "foreign marriages" is here meant such as are made in one jurisdiction, while their validity is questioned in another. This may happen under differing systems of law in the same country, as where a Scotch marriage is assailed in an English court.[5] This matter involves the doctrine of "conflict of laws," or "international private law," as it is sometimes called. It can only be considered incidentally here. Two principal questions arise: one is, the validity of the marriage where the forms and ceremonies differ from those of the place where the parties are domiciled, or where the trial is had; the other, where conflicting rules of public policy prevail in the two jurisdictions, as to the propriety of the marriage itself.

As to the first question, the general rule is that the validity of marriages as to form is governed by the law of the place where the contract is entered into. If valid there, it is valid everywhere. If void there, it is in like manner void everywhere. An illustration is the requirement of the presence of a priest. This is a branch of a so-called "comity" or courtesy of nations, which recognizes the validity of acts done in other nations or jurisdictions. Lord Stowell has well stated the rule in a cele-

[1] Bartlett *v.* Muslinar, 28 Hun, 235.
[2] Badger *v.* Badger, *supra.*
[3] Cunningham *v.* Burdell, 4 Bradf. 343.
[4] Collins *v.* Collins, 80 N. Y. 1, 10.
[5] Scotch "common law" is mainly derived from the Roman law, and widely differs in most respects from the common law of England.

brated case,[1] which arose in Scotland. He said, this case "being entertained in an English court, it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss Gordon's" (the alleged wife's) "marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland."[2]

This doctrine of comity has been carried so far as to uphold in the courts of the State where the parties reside, marriages contracted elsewhere, in evasion of the law of the domicile as to matters of form.[3] (*a*) These have been called, in England, "Gretna Green" marriages, from the fact that English people, being desirous to evade certain burdensome marriage ceremonies of the English law, crossed the border to Gretna Green or other place in Scotland, and after a marriage without ceremonies, valid there, returned to England.[4] A statute in the country of the domicile may make such a marriage void there, though it may still be valid in the place where it was contracted.[5]

As to the second class of cases, a different rule prevails. A nation or State is not bound to sacrifice its views of public policy to a spirit of courtesy towards other States or nations. This is particularly true where there is a statute in the country of the domicile prohibiting the marriage. In such a case the marriage may be valid in the State where contracted, and yet void in the domicile. An instance is the rule in England already referred to, that an Englishman shall not marry a deceased wife's sister, nor a member of the royal family without the consent of the reigning monarch. A penal disability stands upon a different footing. That is supposed to be *territorial* simply in its effect, unless the words of the statute indicate that it is

[1] Dalrymple *v.* Dalrymple, 2 Hagg. Consist. R. 54.

[2] Id., pp. 58, 59.

[3] Compton *v.* Bearcroft, 2 Hagg. Consist. R. 444 *n.*; Scrimshire *v.* Scrimshire, Id. 395, 412, 413; Medway *v.* Needham, 16 Mass. 157.

[4] Lord Chancellor Eldon, when young, was married in this manner; but afterwards went through a ceremonial marriage at Newcastle, England.

[5] Gretna Green marriages are now practically abolished, as a residence of one of the parties in Scotland of twenty-one days is now necessary. 19 & 20 Vict. c. 90.

(*a*) Gardner *v.* Attorney-General, 60 L. T. R. 839. A marriage celebrated in Japan, according to its laws, between a British subject with an Irish domicile of origin, and a Japanese woman, which is valid in Japan, is valid in England. Brinkley *v.* Attorney-General, L. R. 15 P. D. 76. See also Smith *v.* Smith, 52 N. J. Law, 207.

to have a more extended operation. An instance is a statutory prohibition that one divorced for adultery shall not marry again during the life of the other party. A marriage in another State where there is no such rule will be valid in the State prohibiting it, unless there are words in the statute including a marriage abroad.[1] (*a*)

Independent of prohibitory statutes, a court in a civilized country will not recognize a polygamous marriage. This is so repugnant to the general sentiment of mankind that it could not be tolerated that a court of justice should enforce claims of right founded upon it. In England, it has been placed on the ground that it is not a Christian marriage, and that an English divorce court will not enforce matrimonial obligations growing out of marriages that are not in their nature Christian.[2]

DIVISION II. — *Annulment, Dissolution, and Judicial Separation.*

A proceeding for these purposes is termed a divorce. A divorce may be either total or partial. When total, it may be either an annulment or a dissolution. When partial, it is called divorce *a mensa et thoro* (from bed and board). These will now be considered in their order.

SECTION I. *Annulment.* — There is an important distinction in total divorce between a case of annulment and one of dissolution. An annulment is for a cause existing at the time of the marriage, making it voidable. The effect of it in general is to adjudge that there not only is not now, but that there never has been, a marriage. Accordingly, the children are illegitimate. The wife has no claim even to alimony from her supposed husband's estate for her support. The English divorce court maintains under the statutes that in a suit for nullity, alimony *pendente lite* may be continued until the decree for divorce is made *absolute.*[3] The reason is, that there is no divorce until that time. Lapse of time is no bar by the ecclesiastical law to a suit of this kind, on the ground that the function of the court is simply to pass a *declaratory sentence* that the marriage is null and void.[4]

[1] Thorp *v.* Thorp, 90 N. Y. 602; Van Voorhis *v.* Brintnall, 86 N. Y. 18.

[2] Hyde *v.* Hyde, L. R. 1 P. & D. 130.

[3] S., falsely called B. *v.* B., L. R. 9 P. D. 80.

[4] Duins *v.* Donovan, 3 Hagg. Ecc. 301, 305; Johnston *v.* Parker, 3 Phill. 39.

(*a*) See also Moore *v.* Hegeman, 92 N. Y. 521; Wilson *v.* Holt, 83 Ala. 528; *contra*, Pennegar *v.* State, 87 Tenn. 244.

The principles governing a divorce for nullity have been applied to a case where A., being engaged to be married to a lady, had induced her to accept bills of exchange which he neglected to pay, and when the holders threatened to make her a bankrupt, represented that the only way to avoid the proceedings, as well as exposure, was to marry him; accompanying his representations with some threats leading to the conclusion that she did not act with freedom in marrying him. Under the circumstances, the marriage was declared to be null and void.[1] The court seems to have gone upon the view that undue influence and moral restraint, operating upon the will of the lady, were sufficient to avoid the marriage upon her application.

A special case not governed by general principles of law is sometimes presented where a statute provides that a marriage shall only be void from the time that it is so declared by a court of competent jurisdiction.[2] In this case, the woman would have been wife from the time of the marriage until the time of annulment, and the children in existence prior to that time would be legitimate.[3]

In an action or suit for annulment, counsel fees may be allowed by the court to enable a wife to prosecute or defend it, but not alimony *pendente lite*. The last is only allowable when the existence of the marriage is satisfactorily established.[4] (*a*)

The ecclesiastical court may make a decree of "confrontation" in an action for nullity of marriage;[5] but cannot make such a decree in cases of dissolution.[6]

SECTION II. *Dissolution.* — A marriage may be dissolved by the death of one of the parties, by legislative act, judicial decree,

[1] Scott *v.* Sebright, L. R. 12 P. D. 21.

[2] In New York, 2 R. S. 139, § 6, this doctrine is applied to a case of a second marriage where the first husband or wife had absented himself or herself for five successive years without being known to the other party to be living. It would not be *legal* adultery in such a case for the parties to the second marriage to cohabit after knowledge was obtained that the first party was living, until a judgment of annulment was declared. Valleau *v.* Valleau, 6 Paige, 20.

[3] There is an important qualification to the subject of legitimacy in the New York Code of Civil Procedure, § 1745, whereby the children of an innocent party to a bigamous marriage are declared to be the legitimate children of *that* parent, who is entitled to their custody and to appoint a guardian of their persons by will.

[4] Collins *v.* Collins, 80 N. Y. 1. The English rule is different. S., falsely called B. *v.* B., L. R. 9 P. D. 80.

[5] Enticknap *v.* Rice, 4 Sw. & T. 136.

[6] Hooke *v.* Hooke, Id. 236. A decree of confrontation means an order directing a party to come before witnesses for the purpose of identification.

(*a*) Meo *v.* Meo, 15 N. Y. Civ. Pro. R. 808. But alimony has been allowed the wife in an action brought by the husband to annul the marriage. Lee *v.* Lee, 4 N. Y. Civ. Pro. R. 321; O'Dea *v.* O'Dea, 31 Hun, 441; Isaacsohn *v.* Isaacsohn, 3 Month. Law Bul. 73.

and, in some States, by a sentence to imprisonment for life for crime. Divorce by legislative act was at one time in England the only mode of dissolving a marriage. This method has now disappeared there, a regular court of divorce having been established. The power of a State legislature to grant divorces of this kind exists in this country, except where it has been withdrawn by constitutional provision, as it has been in New York.[1] A sentence to imprisonment for life is a divorce in New York and California. A subsequent pardon will not re-establish the marriage relation.[2] The only case which it will be necessary to consider at any length is divorce by judicial decree.

The whole subject of judicial divorce for a cause arising after the marriage was in England, until 1857, vested in the ecclesiastical courts, subject to review by the king in Privy Council. At present there is a court of Divorce and Matrimonial Causes.[3] The law upon this subject is to be found in the reports of ecclesiastical courts, and those of the Judicial Committee of the Privy Council.[4] There being no ecclesiastical court in this country, its jurisdiction, if it exist, must be vested by statute in some other court. This is usually the Court of Chancery.

The ecclesiastical law is, however, as far as recognized in those courts, a branch of the common law of England. It is not an absolute equivalent to the "canon law." It differs from the canon law in several important respects. It is frequently called by English lawyers and judges the "king's ecclesiastical law."[5] It has been held in New York that while the English ecclesiastical law is no part of the common law of the State,[6] yet when, by the statutes, any part of the jurisdiction exercised by those courts is given to the State court, the settled principles and practice there become a precedent and guide here, so that the grant of jurisdiction carries with it by implication the powers indispensable to its proper exercise.[7] (*a*)

[1] Const. of New York, Art. I. § 10.

[2] 2 R. S. 139, §§ 5, 7. "Civil death," with its consequences, is considered in the case of Avery *v.* Everett, 110 N. Y. 317.

[3] See 20 & 21 Vict. c. 85.

[4] At one time the Appellate Court was a large and unwieldy body, called the "Court of Delegates." This has been so long superseded that it is unnecessary to do more than refer to it. It is described in 3 Blackstone's Commentaries, 66. Its jurisdiction was withdrawn by 2 & 3 Wm. IV. c. 92, and by 3 & 4 Id. c. 41.

[5] See remarks of the Lord Chancellor and of LORD COTTENHAM, in Queen *v.* Millis, 10 Cl. F. 534.

[6] Burtis *v.* Burtis, Hopkins, 557.

[7] Brinkley *v.* Brinkley, 50 N. Y. 184; Griffin *v.* Griffin, 47 N. Y. 134, 137. It is further decided that the courts of New York have no common-law jurisdiction over the subject of divorce, and that their authority is confined altogether to the exercise of such express and incidental powers as are conferred by statute. Erkenbrach *v.* Erkenbrach, 96 N. Y. 456.

(*a*) Chamberlain *v.* Chamberlain, 63 Hun, 96; Dickenson *v.* Dickenson, Id. 516.

The subject may be considered under the following heads: —

I. The parties to the action.

II. Methods of procedure, including alimony *pendente lite*, counsel fees, and expenses.

III. Defences: (1) denial; (2) recrimination; (3) condonation; (4) procurement; (5) connivance; (6) collusion; (7) delay in prosecution, including statute of limitations.

IV. Effect of the divorce: (1) support of wife; (2) legitimacy and (3) custody of children; (4) property rights; (5) penal disabilities.

V. Foreign divorces.

I. *The parties to the action.* — One may have a good cause of action for a divorce, and yet not be able to present it to the court. He may, for example, be a non-resident, or the party from whom the divorce is sought may be a non-resident. These points are now in most instances regulated by statute in the respective States. In New York there is no action for dissolution except for adultery.[1]

A question may be presented, whether if one of the parties becomes a lunatic after the offence is committed, the case can go forward. It was first held in the English court of divorce that if the defendant has become insane, an action for adultery cannot be prosecuted. The court thought that such an action was in the nature of a criminal proceeding, *quasi in pœnam*. The party may be deprived of *status* by reason of it. Divorce, it was said, was not a strict right like remedies for breaches of ordinary contracts, but rather *ex gratia*, depending largely on notions of public policy.[2] This case was distinguished from an action for a partial divorce, as there is no change of *status* (the parties still remaining married). Such a divorce, it is agreed, may go forward notwithstanding the insanity of the defendant.[3] On an appeal to the House of Lords, this decision was reversed, on the ground that adultery, though a grievous sin, is not a crime at common law, and that the analogies and precedents of

[1] See Code of Civil Procedure, § 1756. This section makes the jurisdiction of the court turn upon any one of four points: (1) residence of *both* parties in the State where the offence was committed; (2) marriage within the State; (3) residence of plaintiff within the State when the offence was committed *and* when action was commenced; (4) commission of the offence within the State, and residence of the injured party within the State when the action was commenced.

[2] Mordaunt *v.* Mordaunt, L. R. 2 P. & D. 109; Bawdon *v.* Bawdon, 2 Sw. & T. 417.

[3] Parnell *v.* Parnell, 2 Hagg. Consist. R. 169. But see on the general subject, Mansfield *v.* Mansfield, 13 Mass. 412; Broadstreet *v.* Broadstreet, 7 Mass. 474; Wray *v.* Wray, 19 Ala. 522.

criminal law have no authority in a divorce court.[1] (*a*) The court carefully abstained from expressing an opinion as to an action brought *in behalf* of a lunatic.[2] The lunatic defendant in this case was represented by a guardian *ad litem*.

If a plaintiff dies in the course of an action for a divorce, it cannot be continued. Nor can a suit be brought after the death of one of the parties without a statute to that effect. It has recently been said, "that a man can no more be divorced after his death than he can after his death be married or sentenced to death."[3] There are in some American States statutes allowing a divorce in some instances after the death of one of the parties.[4] The jurisdiction of a court over an absent defendant will be considered under the head of "foreign divorces."

II. *Methods of procedure, including alimony pendente lite, counsel fees, and expenses.* — Some preliminary remarks should be made upon the subject of stating the plaintiff's case. There are two opposite dangers against which the court must guard in a divorce case. One is, that both parties may desire the divorce, and may resort by mutual consent to collusive methods to procure it. Such conduct would be a fraud upon the court, and, if ascertained, a decree obtained by collusion would be set aside.[5] The other danger is that in a contested suit corrupt testimony may be offered by one party against the other, who may not be able, owing to surprise, to defend himself. It is to meet this latter danger that some special rules prevail as to the statement of the case in the pleadings. The general rule is that the plaintiff should specify the place and time, where and when, and the person with whom, the offence was committed. This strictness may be dispensed with when the plaintiff is

[1] Mordaunt *v.* Moncreiffe, L. R. 2 Sc. & Div. App. Cas. 374.

[2] It is now settled that a committee of a lunatic may petition for a divorce on his behalf on the ground of adultery. Baker *v.* Baker, L. R. 5 P. D. 142.

[3] Per BOWEN, L. J., in Stanhope *v.* Stanhope, L. R. 11 P. D. 103, 108.

[4] See §§ 1746–1750 of the New York Code of Civil Procedure, as applied to certain cases of nullity,— *e. g.*, idiocy, lunacy, force, or fraud.

[5] In England, an officer called a queen's Proctor may intervene and allege collusion. Barnes *v.* Barnes, L. R. 1 P. & D. 505; 23 & 24 Vict. c. 144, § 7 (*b*). He may also intervene to show cause why an intermediate decree should not be made final, and may adduce fresh evidence for that purpose. Crawford *v.* Crawford, L. R. 11 P. D. 150.

(*a*) Insanity as a defence to an action for a divorce was considered in Hanbury *v.* Hanbury, 61 L. J. P. 115; Yarrow *v.* Yarrow, Id. 69.

(*b*) By § 8 of thia atatute it waa provided that the Act should continue in force until July 31, 1862, and *no longer;* but by c. 81 of 25 & 26 Vict. § 8 of the former Act was repealed, and the operation of the Act was made perpetual. By 36 & 37 Vict. c. 31, § 1, the operation of 23 & 24 Vict. c. 144, § 7, was extended so as to include actions for nullity as well as for divorce.

unable to make his allegations with particularity. In this case he should state his inability to be specific, and then state the facts as particularly as his means of knowledge will permit.[1]

Questions as to the evidence necessary to obtain divorce are peculiar in their nature. Letters or admissions of the defendant, made at the time of the offence charged, may be of great weight, as characterizing the acquaintance with an alleged paramour. Contemporaneous letters or entries in a diary showing guilty familiarity may be sufficient.[2] It was a rule in the English ecclesiastical court not to grant a divorce on the mere admissions of the alleged guilty party. This rule is not binding upon the existing divorce court, though evidence of this kind should be received with great circumspection.[3] Still a confession may be received in evidence.

The subjects of *alimony pendente lite, counsel fees, and expenses* may be considered separately. Alimony *pendente lite* is a creature of the ecclesiastical courts in England. The power of the courts there is now vested in the court of Divorce and Matrimonial Causes.[4] (*a*). It is a reasonable construction, as has been seen, that when the power of divorce is vested in a court, the general principles of the ecclesiastical law follow, and attach themselves to the new jurisdiction.[5] Questions concerning alimony arise both in cases of divorce from the bonds of matrimony (*a vinculo*), and in cases of judicial separation (*a mensa et thoro*). It will be convenient to consider the subject as applicable to both at the same time.

The following are the rules of law governing this subject:—

Rule 1.— The true mode of ascertaining the principles governing alimony is to examine the rules prevailing in the ecclesiastical courts of England. We cannot inquire whether these are antiquated or inelastic. The precedents must be followed as they exist. Whether they should be expanded or not is a question for the legislature.

[1] Mitchell *v.* Mitchell, 61 N. Y. 398, and cases cited (p. 403), illustrating the general rule.

[2] Lovedan *v.* Loveden, 2 Hagg. Consist. R. 1.

[3] Williams *v.* Williams, L. R. 1 P. & D. 29; Robinson *v.* Robinson, 1 Sw. & T. 362, 393. In this case the confessions were in a diary; and the court held that as the wife was a woman of strong passions and flighty disposition, it would not, under the special circumstances, draw the usual inferences of adultery from the statement in her diary of exchanged kisses and other endearments.

[4] 20 & 21 Vict. c. 85.

[5] Brinkley *v.* Brinkley, 50 N. Y. 184, 190; Griffin *v.* Griffin, 47 N. Y. 134.

(*a*) This court was superseded by the Probate Divorce and Admiralty Division of the High Court of Justice, which was created by the Judicature Act of 1873, 36 & 37 Vict. c. 66.

Rule 2. — Alimony *pendente lite* is allowed upon the general ground that otherwise during the action the wife would have no adequate means of support. Her common-law remedy (hereafter considered) to incur bills with tradesmen on the husband's credit, is hampered if not suspended. If away from home when the action is brought, she cannot properly return; if at home, cohabitation is suspended. She needs immediate funds, and if circumstances warrant, access to a court to increase her allowance. Adequate support and efficiency in supplying it are the guiding principles. (*a*)

Rule 3. — It follows that if the wife has sufficient means from other sources, whether from her own estate or not, she has no standing in court to make the application for alimony *pendente lite*.

Rule 4. — The allowance made is not so large as permanent alimony.[1] The principle is to give the wife enough to live in *decent* retirement. Her reputation being under a cloud, she should not seek publicity.

Rule 5. — The judge is said to have a *discretion* in awarding alimony. This means a discretion governed by rules and precedents, and if the judge does not follow them, the decision may be reviewed on appeal.[2]

Rule 6. — Still, the court is not to proceed in a niggardly and parsimonious manner. She should have sufficient to enable her to live with decency and dignity. She is still *wife*, and ought to be treated accordingly until, by the judgment of the court, she is decreed to be an outcast from the family.

Rule 7. — There is a distinction between the wife as plaintiff and as defendant in respect to this allowance. If the wife be defendant, she must defend herself against the charges in the bill or complaint, or must disclose the nature of her defence before she will be awarded alimony.[3] (*b*)

[1] Lawrence *v.* Lawrence, 3 Paige, 267.

[2] Leslie *v.* Leslie, 6 Abb. Pr. N. S. 193.

[3] Lewis *v.* Lewis, 3 Johns. Ch. 519; Osgood *v.* Osgood, 2 Paige, 621; Williams *v.* Williams, 3 Barb. Ch. 628.

(*a*) Alimony may be awarded after a decree of divorce pending the determination of an appeal from the decree. McBride *v.* McBride, 119 N. Y. 519. But see Kamp *v.* Kamp, 59 N. Y. 212; Winton *v.* Winton, 31 Hun, 290.

Under § 1769, of the N. Y. Code of Civil Procedure, authorizing the court to award such sums as alimony as may be necessary to enable the wife to carry on or defend the action, an allowance may not be made to defray expenses already incurred. McCarthy *v.* McCarthy, 137 N. Y. 500.

(*b*) Pettee *v.* Pettee, 45 N. Y. St. R. 549. In an action of divorce brought by the wife where all the charges of adultery are made on information and belief, and are positively denied by the defendant, alimony will not be granted. Moriarty *v.* Moriarty, 32 N. Y. St. R. 115.

Rule 8. — If the requisite case is made out, the allowance will be made, even though the husband be a poor man.[1] And if the circumstances require it, the payment may be ordered to be made from daily earnings.[2]

Rule 9. — The amount of the allowance in England is frequently one-fifth of the income, though when the husband is affluent, no more will be allowed than is sufficient for the wife's uses.[3]

It is common in these cases to make an allowance to the wife for *counsel fees* and *expenses* of the litigation. This allowance proceeds upon different principles from that of alimony *pendente lite*. The amount of " suit money " must depend to some extent upon the breadth and severity of the litigation. It is laid down by some writers that the wife should receive money enough from the husband's estate to be placed upon an equality with him as to the means of prosecuting her case.[4]

While this rule is abstractly just, there may be serious doubt whether its tendency would not be to promote useless litigation. The wisest course would seem to be to leave each case to the discretion of the court, depending upon its special circumstances and the result of the judicial precedents. It is a rule not to make this allowance where the wife has sufficient means of defence from other sources. This is not a mere matter of discretion, but a rule of law.[5] Authorities showing the amount of allowance usual in such cases may be found in the note.[6] Counsel fees may be allowed at various stages in the progress of the action or at its conclusion. On a second application the court would require evidence that the amount of the first allowance had been applied to the purpose for which it was made.

[1] Purcell *v.* Purcell, 3 Edw. Ch. 194.

[2] Kirby *v.* Kirby, 1 Paige, 261.

[3] Accordingly, where the husband's income was equivalent to $40,000 *per annum*, the court stopped with $5,000 *per annum*. Edwards *v.* Edwards, 17 L. T. N. S. 584. The specific rate of twenty per cent does not seem to prevail in thie country. The allowance in one New York case was $3,000 *per annum*. Forrest *v.* Forrest, 5 Bosw. 672, 676, 677. In another case $50 per week wae allowed. Leslie *v.* Leslie, 6 Abb. Pr. N. S. 193. Again, there was an allowance of $35 per week, which, under the circumstances, was not deemed excessive. De Llamosas *v.* De Llamosas, 62 N. Y. 618. In each of these cases the husband was a man of large means and had an abundant income. There may be special reasons for making the amount larger than usual, as where the wife's health was endangered, and provision was made by the court for enabling her to travel with a view to recuperation. Lynde *v.* Lynde, 4 Sandf. Ch. 373 ; s. c. 2 Barb. Ch. 72.

[4] Bishop on Marriage, Divorce, and Separation, vol. II. § 976.

[5] Collins *v.* Collins, 80 N. Y. 1; Beadleston *v.* Beadleston, 103 N. Y. 402.

[6] Forrest *v.* Forrest, 5 Bosw. 672; North *v.* North, 1 Barb. Ch. 241 ; Griffin *v.* Griffin, 47 N. Y. 134 ; New York Code of Civ. Pro. § 1769.

III. *Defences.* — These may be grouped into two general classes. First, those which deny the charge altogether; second, those which by implication admit it, and at the same time deny that the plaintiff is entitled to any relief by reason of his conduct. Such defences are misconduct on the plaintiff's part, condonation, procurement, collusion or connivance, and lack of diligence in prosecution.

(1) *Denial.* — If the charge be denied, an issue of fact is presented to be tried by a judge alone or by a judge and jury, as the local practice may require.[1] The local books of practice should be examined for the details of the subject. Under this issue merely, if the plaintiff proves his charges, the divorce is obtained; if not, the case is dismissed.

(2) *Recrimination.* — This defence consists of a countercharge by the defendant against the plaintiff, and is in the nature of a cross action. (*a*) The recriminatory charge should be set forth with the same particularity as if it were an original cause of action.[2] The defendant may make use of a recriminatory charge by supplemental answer, even though the act was committed after the action was commenced.[3] (*b*) Should the defendant prove his case and the plaintiff fail, the defendant will have a divorce from the plaintiff. Should each party establish his case, no divorce will be granted.[4]

(3) *Condonation.* — This is a technical expression meaning *conditional forgiveness*. The condition is, that the offence is not to be repeated. Should it be, the condoned offence is *revived*, even though the new offence be committed beyond the jurisdiction of the court.[5] It has been questioned whether a subsequent act of

[1] In New York it is tried by a jury, unless the parties consent to a reference or a trial by the judge alone. Code Civ. Pro. §§ 1012, 1757. A referee may be appointed to hear and determine the whole issue. It is not, however, enough that the parties select the referee; his appointment must be sanctioned by the court.

[2] Morrell *v.* Morrell, 3 Barb. 236.

[3] Smith *v.* Smith, 4 Paige, 432.

[4] In a recent English case of very aggravated misconduct on the part of the husband, a divorce was granted to the wife under the rules now prevailing there, though she had been guilty of adultery. The husband by violence had driven her into a life of shame. Coleman *v.* Coleman, L. R. 1 P. & D. 81. It should be observed, however, that there is a certain discretion given to the divorce court by 20 & 21 Vict. c. 85, § 31. This is a regulated discretion, and not a free option. Morgan *v.* Morgan, L. R. 1 P. & D. 644. The cases are very few in which the court would visit with the penalty of divorce a guilty wife whose husband is also guilty of adultery. Barnes *v.* Barnes, L. R. 1 P. & D. 572.

[5] *Per* WALWORTH, Chancellor, in Johnson *v.* Johnson, 4 Paige, 460, 471.

(*a*) N. Y. Code of Civ. Pro. § 1770; Bleck *v.* Bleck, 27 Hun, 296; Van Benthuysen *v.* Van Benthuysen, 15 Civ. Pro. R. 234. Under a statute making cruelty as well as adultery a ground for a divorce, a husband proved to have been guilty of cruelty was refused a divorce sought on the ground of adultery, though the adultery was established. Pease *v.* Pease, 72 Wis. 136. See also Handy *v.* Handy, 124 Mass. 394; Tillison *v.* Tillison, 63 Vt. 411.

(*b*) Blanc *v.* Blanc, 67 Hun, 384.

cruelty would revive a condoned cause of action for adultery. It was held in the English ecclesiastical courts that it would. However, it is to be noted, that in those courts, both adultery and cruelty were only grounds for a partial divorce, and so, legally speaking, the two causes of action were of the same grade. But in a State where adultery is a ground for dissolution, and cruelty only for a separation, it has been thought that the English rule should not be followed.[1] Still, the soundness of this theory is doubtful, since "condonation" is a word wholly derived from the ecclesiastical courts, and its meaning there certainly is forgiveness *upon condition* that there shall neither be adultery nor cruelty.[2] (*a*) It has also been said, that a condoned act of adultery may be revived by subsequent improprieties short of, but tending to, adultery.[3]

To constitute a condonation, there must be full knowledge of the facts. A condoning husband must thoroughly believe in his wife's adultery.[4] Again, the acts of forgiveness must be followed up by full re-instatement of the offender to his or her former position.[5] Mere words of forgiveness, however strong, amount only to "imperfect" condonation.[6]

Condonation once proved is a blotting out of the offence imputed so as to restore the offending party to the same position as before.[7] Accordingly, it has been held in some cases that if the other party should subsequently commit the offence, the party condoned could have a divorce.[8] It would scarcely be just to establish such a rule in a positive form. A wife who had forgiven her husband in a known act of adultery might, by his example, be more easily led astray. The English rule seems more consonant with reason. This is to consider all the circumstances in determining whether the condonee shall be allowed to maintain the action.[9]

Regularly speaking, condonation should be set up in the pleadings. The English court has held that if proved at the hearing it will be noticed by the court though not specially pleaded.[10] In a recent English case it is said that condonation by a husband of a

[1] Johnson *v.* Johnson, 4 Paige, 460, s. c. 14 Wend. 637; Burr *v.* Burr, 10 Paige, 20.

[2] Dent *v.* Dent, 4 Sw. & T. 105.

[3] Winscom *v.* Winscom, 3 Sw. & T. 880.

[4] Ellis *v.* Ellis, 4 Sw. & T. 154, 157.

[5] Keats *v.* Keats, 1 Sw. & T. 334.

[6] Peacock *v.* Peacock, Id. 183.

[7] Keats *v.* Keats, *supra*, p. 356.

[8] Morrell *v.* Morrell, 1 Barb. 318.

[9] Story *v.* Story, L. R. 12 P. D. 196. See also Rose *v.* Rose, L. R. 8 P. D. 98.

[10] Curtis *v.* Curtis, 4 Sw. & T. 234.

(*a*) See Moore *v.* Moore [1892], P. 382. In this case the wife had obtained a decree *nisi* in a suit for divorce, and believing that the marriage was dissolved, went through the form of marriage with another man, with whom she cohabited until his death. She then resumed cohabitation with the respondent, her former husband, but he being guilty of cruelty, she petitioned to make the decree absolute, which was granted by the court. See also Timerson *v.* Timerson, 2 How. Pr. N. S. 526.

wife's adultery is a fact of every-day occurrence, as the records of the divorce court abundantly show.[1] Condonation may be proved either by express words of forgiveness or it may be inferred from acts. Cohabitation may lead to the inference of condonation, but the inference may be repelled by other circumstances.[2] (*a*) The inference is more readily made against a husband than against a wife, since the latter is more often in a state of dependence and without perfect freedom to act.[3] (*b*)

These elements should always be present in every case of condonation: Full knowledge of the facts, belief in guilt, pardon, and re-instatement of the party forgiven, in his former position. Condonation by a husband is no bar to a claim for damages by him against an adulterer.[4]

(4) *Procurement.* — There is a general resemblance between procurement, connivance, and collusion as defences in the fact that they assume conduct on the part of a complainant contributing or leading up to the commission of the offence. Procurement implies active participation in its commission, and intentional encouragement of licentious conduct or privity with the adulterer. Connivance is passive, — the offence is winked at. Collusion has more special reference to the object sought to be attained by the acts of the complainant, — viz., aid in obtaining a divorce. Connivance may be the act of one party; collusion is the act of two or more parties to deceive the court.[5]

(5) *Connivance.* — This defence is proved either by wilful neglect on the husband's part in protecting the wife from the solicitations of an adulterer, or extreme negligence in permitting such an intimacy as is likely to lead to adulterous intercourse.[6] Mere imprudence on the husband's part is not connivance; and in determining whether it exists, the honesty of the husband's intention rather than the wisdom of his conduct is to be regarded.[7] Still, "toleration," or passive sufferance of adultery for a length of time is a waiver of legal remedy.[8] If a husband consents to adultery with A. and it is committed with B. the husband can have no relief. The court requires two things, — that a man shall come with pure hands himself, and shall have exacted a due purity on

[1] Baker *v.* Baker, L. R. 5 P. D. 142, 150.

[2] Whispell *v.* Whispell, 4 Barb. 217.

[3] Wood *v.* Wood, 2 Paige, 108.

[4] Pomero *v.* Pomero, L. R. 10 P. D. 174.

[5] Crewe *v.* Crewe, 3 Hagg. Ecc. 130 n.

[6] Gilpin *v.* Gilpin, 3 Hagg. Ecc. 150.

[7] Hoar *v.* Hoar, 3 Hagg. Ecc. 137; Rix *v.* Rix, Id. 74.

[8] Crewe *v.* Crewe, 3 Hagg. Ecc. 123; Moorsom *v.* Moorsom, Id. 87; Gipps *v.* Gipps, 3 Sw. & T. 116; s. c. 11 H. L. Cases, 1.

(*a*) Hall *v.* Hall, 60 L. J. P. 73.

(*b*) Shackleton *v.* Shackleton, 48 N. J. Eq. 364.

the part of his wife; and if he has relaxed as to one man, he has no right to complain of another.[1]

(6) *Collusion.* — It has been said that this is extremely difficult to define. The leading element is an attempt to deceive the court by committing the offence, not from ordinary motives, but for the special purpose of obtaining a divorce. In a recent case the husband promised the wife to commit the offence for the purpose of a divorce, and instructed the wife how to detect him; and she, acting accordingly, obtained the evidence. It was held to be a clear case of collusion.[2] (*a*) Collusion in committing the offence must be distinguished from collusion in obtaining the decree of divorce. The latter form might exist though no offence had ever been committed.

There is an English statute[3] which creates a new bar to a divorce, — viz., neglect or misconduct on the part of the husband *conducing* to the wife's adultery. This is held to be something that might not amount to connivance, and yet might lead to a wife's lapse from virtue. It is applied to acts preceding her first fall from virtue.[4] (*b*)

(7) *Delay in prosecution, including the statute of limitations.* — Delay in prosecuting may be so great as to lead to the inference that the husband or wife is insensible to the wrong done, and may practically amount to condonation. The present statute law of England makes an "unreasonable delay" a bar to an action.[5] In determining what is "unreasonable delay" the court will consider such facts as the poverty of the petitioner,[6] unwillingness on the part of the wife to subject her mother to the scandal of a public exposure, and a consequent forbearance to take proceedings until her death,[7] and other matters of the same general kind by way of excuse.[8] (*c*) Still, an *unexplained* delay of two years

[1] Lovering *v.* Lovering, 3 Hagg. Ecc. 85, 87.

[2] Todd *v.* Todd, L. R. 1 P. & D. 121, 124.

[3] 20 & 21 Vict. c. 85, § 31.

[4] St. Paul *v.* St. Paul, L. R. 1 P. & D. 739; Baylis *v.* Baylis, Id. 395. See Hawkins *v.* Hawkins, L. R. 10 P. D. 177.

[5] 20 & 21 Vict. c. 85, § 31.

[6] Ratcliff *v.* Ratcliff, 1 Sw. & T. 467, 473; Wilson *v.* Wilson, L. R. 2 P. & D. 435.

[7] Newman *v.* Newman, L. R. 2 P. & D. 57.

[8] Harrison *v.* Harrison, 3 Sw. & T. 362; Pitt *v.* Pitt, 33 L. T. N. S. 136; Mason *v.* Mason, L. R. 8 P. D. 21.

(*a*) An agreement between the parties to a divorce suit to withhold from the court pertinent and material facts which might have been adduced in support of a counter charge, is collusive, even though the facts suppressed might not be sufficient to establish the counter charge. Butler *v.* Butler, L. R. 15 P. D. 66.

(*b*) See also Lander *v.* Lander, 63 L. T. R. 257; Starbuck *v.* Starbuck, 61 L. T. R. 876.

(*c*) In Newman *v.* Newman, the court held that the delay of eighteen years on the part of the wife, out of consideration for her mother's feelings, *was* unreasonable; but granted the divorce in the exercise of the discretion given by the statute. See also Beauclerk *v.* Beauclerk, 60 L. J. P. 20.

after full knowledge of the facts has been held to be unreasonable, and sufficient ground for dismissal of the case.[1] This matter is regulated in some of the American States by statute. The substance of them is, that the party must sue within a specified time after discovery of the offence.[2]

IV. *Effect of the Divorce.* — (1) *The support of the wife.* — If the wife be found guilty, no allowance can be made to her from the husband's estate for her future support. If she be innocent, an allowance is regularly, and as a matter of course, made from the husband's estate. This is called alimony, or permanent alimony, to distinguish it from alimony *pendente lite.*

Alimony is a periodical allowance to the wife from the husband's estate. The amount is variable, depending upon the husband's means, his conduct towards the wife, the conduct of the wife, and the claims of children. It originated in the ecclesiastical courts, and was applied there to cases of limited divorce or judicial separation. It has been extended to dissolution for the husband's fault. In other words, alimony granted to a wife on dissolution of the marriage was derived by analogy from the rules prevailing in the law of limited divorce, while alimony in cases of limited divorce was in no respect derived from the law applicable to cases of dissolution. Accordingly, when the divorce court in England was enabled by statutes in cases of dissolution to make a "proper provision" in her favor, resort was had to the rules of the ecclesiastical court in cases of separation to determine what that provision should be.[3]

The leading rules as to permanent alimony are these: —

Rule 1. — The allowance is made while the wife remains single and chaste (*dum sola et casta vixerit*), and no longer.[4]

[1] Nicholson *v.* Nicholson, L. R. 3 P. & D. 53.

[2] See in New York Code of Civ. Pro. § 1758. The time fixed is within five years after the discovery by the plaintiff of the offence charged. If a wife lives in open and notorious adultery with a paramour, the husband's right to a divorce will be barred at the expiration of five years, though the adultery was continued down to the time of the commencement of the action. Valleau *v.* Valleau, 6 Paige, 207.

[3] Sidney *v.* Sidney, 4 Sw. & T. 178.

[4] This rule differs from the New York theory holding that the wife, after the dissolution, is under no obligation, as far as alimony is concerned, to remain chaste. Forrest *v.* Forrest, 3 Bosw. 661. It is a little difficult to see how this New York case can be reconciled with equitable principles, as a claimant for equitable relief must come into court with pure hands. (*a*)

(*a*) The doctrine was reaffirmed by the same court in Forrest *v.* Forrest, 8 Bosw. 640. See also Cole *v.* Cole, 142 Ill. 19.

There is no absolute rule in the English courts that the *dum sola et casta* clause shall be inserted in the decree for alimony. The court in each case determines what is reasonable, having regard to all the circumstances. Wood *v.* Wood [1891], P. 272; Lander *v.* Lander, Id. 161; Weller *v.* Weller, 63 L. T. R. 263.

Rule 2. — The wife's ill-conduct before the decree may be taken into account in diminishing the allowance, and will perhaps wholly do away with it.

Rule 3. — The right to alimony is a question for *the court*, not for a *jury*.

Rule 4. — The court has no right where dower is allowed to a divorced wife to require her to relinquish her dower as a condition to granting alimony.[1] (*a*)

Rule 5. — Alimony can only be granted to a wife, not to a mistress.[2]

Rule 6. — The amount of alimony is about one third of the husband's income until a full competence is awarded. It may in special circumstances amount to as much as $10,000 per year, as where the husband is wealthy and has treated the wife with great brutality.[3] This amount was calculated upon a fixed income. Where the income is fluctuating (as in the case of a husband who is an artist), an inquiry into the average income for several years past may be had, the object being to ascertain present income.[4] The allowance may be made to commence at the date of the action or of the decree.[5] (*b*)

Rule 7. — The order may direct security for payment to be made a lien upon the husband's real estate.[6] It would be a contempt of court not to give security, when so directed. The court in England may sequester the husband's income, even though it be that of a retired officer in the navy.[7] A court of equity may also grant an injunction and appoint a receiver to protect the wife.[8] A bill in equity may be brought for arrears of alimony after the wife's death.[9] (*c*)

[1] Forrest *v.* Forrest, 6 Duer, 102, 150–154.

[2] See Donnelly *v.* Donnelly, 8 B. Mon. 113. The exact ruling in this case applied to dower, but the principle seems to be the same.

[3] Burr *v.* Burr, 10 Paige, 20; s. c. 7 Hill, 207.

[4] Williams *v.* Williams, L. R. 1 P. & D. 370.

[5] Forrest *v.* Forrest, 6 Duer, 102, 148–150.

[6] Forrest *v.* Forrest, *supra*.

[7] Dent *v.* Dent, L. R. 1 P. & D. 366; Clinton *v.* Clinton, Id. 215.

[8] Sidney *v.* Sidney, 17 L. T. N. S. 9.

[9] Stones *v.* Cooke, 3 L. J. N. S. Ch. 225.

(*a*) A separation agreement providing for the periodical payment of an allowance to the wife through a trustee, is not affected by a subsequent decree for divorce and alimony granted the wife. Galusha *v.* Galusha, 116 N. Y. 635; Clark *v.* Fosdick, 118 N. Y. 7.

(*b*) In several States of the Union statutes exist which provide for a division of the husband's property upon a divorce, which may be made separately, or accompanied with alimony. The basis of this division is largely a matter of judicial discretion. For a full discussion of the subject, see Bishop on Marriage, Divorce, and Separation, vol. II. §§ 1115–1139.

(*c*) A court of equity will not lend its aid to compel the appropriation of alimony awarded a wife in a decree of divorce to the payment of a debt contracted by her,

Rule 8. — Alimony is in the nature of a wife's separate estate, and her attorney may have a lien upon the fund for costs.[1]

Rule 9. — Alimony is obtained by motion. This motion can be made in England after the final decree of divorce.[2] (*a*)

(2) *Legitimacy of children.* — Of course, no question can be raised upon this point except in case of the divorce of the wife for her adultery. Nor can it be presented in her case except as to children unborn when the offence is charged to have been committed. It is a rule of court in New York that all questions as to legitimacy of children must be set up in the complaint and tried as separate issues. The court has power to decide upon the legitimacy of the children begotten and born after the commission of the adultery charged in the complaint or bill.[3] The legitimacy of all children born before the commencement of the action will be presumed.[4] The rule laid down in the famous Banbury Peerage Case[5] was that marital intercourse is to be presumed where personal access is not disproved, though the presumption may be rebutted by satisfactory evidence; and unless the presumption of access be rebutted, the husband must be taken to be the father of the child, unless there was a physical or natural impossibility in the way of paternity. (*b*) This rule would be applied even though acts of adultery were shown.[6] While the application of this rule may result in a declaration of the legitimacy of spurious offspring, it is made to rest on grounds of public policy to prevent undue disturbance of the peace of families, and the possible rejection from inheritance of legitimate heirs. If, however, non-access of the husband is shown, the presumption of legitimacy will be rebutted.[7] The evidence for the purpose of repelling the presumption must be "strong, distinct, satisfactory, and conclusive."[8] It must be such as not

[1] *Ex parte* Bremner, L. R. 1 P. & D. 254.

[2] Covell *v.* Covell, L. R. 2 P. & D. 411. This case would not be followed in New York as the jurisdiction depends on statute, and the statute does not go so far. Kamp *v.* Kamp, 59 N. Y. 212; Erkenbrach *v.* Erkenbrach, 96 N. Y. 456.

[3] Cross *v.* Cross, 3 Paige, 139.

[4] Id.

[5] Banbury Peerage Case, 1 Sim. & Stu. 153. Also in full in Nicholas' Law of Adulterine Bastardy, pp. 289–551, both inclusive.

[6] King *v.* Luffe, 8 East, 193; Head *v.* Head, 1 Sim. & Stu. 150; on appeal, Turn. & Russ. 138.

[7] Cross *v.* Cross, 3 Paige, 139; Van Aernam *v.* Van Aernam, 1 Barb. Ch. 375.

[8] *Per* Lord Lyndhurst in Morris *v.* Davies, 5 Cl. & F. 163, 265; Bosvile *v.* Atty-Gen'l, L. R. 12 P. D. 177.

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and actually subsisting prior to the date of the decree. Romaine *v.* Chauncey, 129 N. Y. 566.

(*a*) Cf. McBride *v.* McBride, 119 N. Y. 519; Chamberlain *v.* Chamberlain, 63 Hun, 96.

(*b*) Burnaby *v.* Baillie, L. R. 42 Ch. D. 282.

to produce mere doubt, but conviction.[1] It is a further rule of public policy that neither the husband nor the wife can be allowed to testify as witnesses to the non-existence of sexual intercourse.[2]

Where a man marries a woman at the time pregnant, and there is no fraud, he admits that he is the father.[3] In one case of this kind, where the facts were peculiarly strong, it was said that the presumption of paternity was next to insuperable. Still, the presumption is, after all, one of fact, and capable of being rebutted by clear evidence.[4]

(3) *Custody of children.* — This subject is for the most part now regulated by statute. By the common law, the father has in general the custody of the children. He may vindicate his right to them by the writ of *habeas corpus*. The court or judge may give directions concerning custody until the child is fourteen, or, by some decisions, until sixteen.[5] A court of equity also has power to control the custody of children under the footing of a trust. A court of *divorce* has no control *as such*. Its function is to decree a judicial separation between the parties, or by statute to dissolve the marriage in specified cases. The custody of children is not a regular incident to this jurisdiction. Independent of statutes it would seem that the only remedy after a divorce would be a resort to a writ of *habeas corpus* or to a proceeding in equity.

As it is convenient that the divorce court should be able to dispose of questions of this kind, statutes have been passed in England and in this country conferring jurisdiction upon specified courts. The jurisdiction is to be exercised either while the action is pending, or on the final decree, or after it.[6]

Under these statutes the court has power to make an order for access to the children in favor of either of the parties.[7] (*a*)

[1] Plowes *v.* Bossey, 2 Drew. & Sm. 145, 149. This case is strongly illustrative of the rule.

[2] King *v.* Sourton, 5 Ad. & Ell. 180; Atchley *v.* Sprigg, 10 Jur. N. S. 144. This rule has been relaxed in England by a recent statute, permitting husbands and wives to give evidence on proceedings instituted in consequence of adultery. 32 & 33 Vict. c. 68. *In re* Yearwood's Truste, L. R. 5 Ch. Div. 545.

[3] Montgomery *v.* Montgomery, 3 Barb. Ch. 132. There is now a statute in England permitting a person whose legitimacy may be disputed, to commence an action to establish legitimacy, 21 & 22 Vict. c. 93, and 22 & 23 Id. c. 61, § 7. The proceeding is instituted in the Court for Divorce and Matrimonial Causes, and may result in declaring a marriage valid. Shilson *v.* Atty-Gen'l, 22 W. R. 831. It cannot be resorted to to determine whether the petitioner is *heir* to a third person, Mansel *v.* Atty-Gen'l, L. R. 2 P. D. 265.

[4] Gardner *v.* Gardner, L. R. 2 App. Cas. 723.

[5] Mellinson *v.* Mallinson, L. R. 1 P. & D. 221; Ryder *v.* Ryder, 2 Sw. & T. 225; Queen *v.* Howes, 30 L. J. Mag. Cases, 47.

[6] See in England, 20 & 21 Vict. c. 85, § 35; 22 & 23 Vict. c. 61, § 4; 24 & 25 Vict. c. 86, § 9.

[7] Thompson *v.* Thompson, 2 Sw. & T. 402.

(*a*) Handley *v.* Handley [1891], P. 124.

As a father is entitled to the custody of the children from the mother's breast, the court will not take away his right without good cause.[1] At this stage of the proceedings the court can only make an interim order.[2] When the mother makes an application for access, the court must be satisfied that she is influenced by maternal affection and has no indirect objects in view.[3] The whole matter is left to the divorce court with a broad discretion, and it has a wider power than the common-law court has on *habeas corpus*. It may pay attention to the interests of the children, and, regarding their health, may deny the mother access to them.[4]

The first English statute was limited in its effect, and the court's jurisdiction was spent when it made its *final decree*. No further order concerning custody could be made.[5] A later statute gave the court power to make orders of custody *after* final decree in all kinds of divorce proceedings, whether for judicial separation, nullity, or dissolution.[6]

It is further to be observed upon this general subject that the innocent party has a *primâ facie* right to the custody of the children,[7] and that the court exercises a discretionary power exceeding that which is exercised by courts of law and equity in the custody of infants.[8] If the wife be unfit to have the custody, even though she be successful, the court may award it to some third person.[9] The court has regularly in view the superior claims of the husband to the custody of his children, but awards it to the wife, when successful, on the following general grounds: *First*, When the custody of the children would be a *solace* to her.[10] Accordingly, she could not claim the custody of an idiot child of the age of twelve.[11] *Second*, Where the husband is leading a notoriously dissolute life, the custody is awarded to the wife.[12] *Third*, The wife is the natural person to have the care of daughters. In the case of sons, the court may, in acting for their welfare, leave them in the custody of the father, where he is attached to them,

[1] Cartlidge *v.* Cartlidge, 2 Sw. & T. 567.

[2] Cubley *v.* Cubley, 30 L. J. Mat. Cases, 161.

[3] Codrington *v.* Codrington, 3 Sw. & T. 496.

[4] Philip *v.* Philip, 41 L. J. Prob. & Mat. 89.

[5] Curtis *v.* Curtis, 1 Sw. & T. 192 (decision upon 20 & 21 Vict. c. 85, § 35).

[6] 22 & 23 Vict. c. 61, § 4. This statute is much more comprehensive than § 1771 of the New York Code of Civil Procedure, which allows no application for custody *after* judgment, except in the case of judicial separation.

[7] In a special case, the custody of one of them was given to the father, though he was the party complained of. Martin *v.* Martin, 29 L. J. Prob. & Mat. Cases, 106.

[8] Marsh *v.* Marsh, 1 Sw. & T. 312.

[9] Chetwynd *v.* Chetwynd, 35 L. J. Mat. Cases, 21.

[10] Barnes *v.* Barnes, L. R. 1 P. & D. 463.

[11] Cooke *v.* Cooke, 3 Sw. & T. 248.

[12] March *v.* March, L. R. 1 P. & D. 437.

discontinues immoral practices, and is engaged in profitable business.

In all of these, and other instances, the court has a wide discretion, and must consider the circumstances of each case.[1] The court has power to enforce an order for custody, if disobeyed, by a writ of sequestration.[2] The New York statute[3] concerning custody does not materially differ from the English in its general scope, though it does not allow an order for custody in case of dissolution of the marriage to be made after final judgment, as the English statute does. In this respect it is less liberal than the former corresponding provision of the New York Revised Statutes.[4] The discretionary power given by the statute to the court of original jurisdiction cannot be reviewed by the Court of Appeals.[5]

(4) *Effect on property rights.* — It will be seen hereafter that the rules of the common law give to the husband certain interests in the wife's property, both real and personal. The wife also has a right of dower in her husband's land, and, in case she survive him, by force of a statute of long standing (Statute of Distributions) takes an interest as widow in the personal estate of which he dies intestate. There are frequently marriage settlements, made in view of marriage, providing both for the husband and wife, and even for children of the marriage. An important inquiry then arises as to the effect of a dissolution of a marriage for adultery upon the rights which were acquired, with the expectation that the marriage would continue unbroken during the lives of both parties.

A divorce court would have *no inherent* power to disturb property relations as thus acquired. A statute would be requisite to adapt their property interests to the changed relations of the parties growing out of the divorce. The substance of the New York regulations is, that where the wife is complainant, she becomes, upon a divorce in her favor, sole and absolute owner of her real estate, as well as of goods and things in action in any manner belonging to her. Where the husband is complainant, he retains all the rights in the wife's property which belonged to him at the time of the decree, as though the marriage had continued. A guilty wife is declared not to be entitled to dower in

[1] Symington *v.* Symington, L. R. 2 Sc. & Div. App. 415.

By 36 & 37 Vict. c. 12 (The Infants' Custody Act of 1873) the ordinary courts (law and equity) have increased power over the custody of children, proceeding upon principles of equity. *In re* Taylor, L. R. 4 Ch. Div. 157.

[2] Allen *v.* Allen, L. R. 10 P. D. 187.

[3] Code of Civ. Pro. § 1771.

[4] Erkenbrach *v.* Erkenbrach, 96 N. Y. 456, construing the Revised Statutes as to this point. See also Kerr *v.* Kerr, 9 Daly, 517.

[5] Price *v.* Price, 55 N. Y. 656.

her husband's estate, or any part thereof, nor to any distributive share in his personal estate.[1] (*a*)

This legislation as to the distributive share of a guilty wife in the personal estate of her husband is superfluous and unnecessary, since a divorced woman cannot be said to be a "widow," even though she survive her former husband, and could have no "distributive share," whether innocent or guilty. The statute presents an instance of that over-caution which may mislead, and is sometimes as dangerous as neglect.[2] It is quite different with dower, since a woman on her marriage obtains an *inchoate* right of dower in all lands of which her husband becomes "seized" of an estate of inheritance *during the marriage*. Accordingly, as to any lands so *owned by him prior to the divorce*, the inchoate right would attach, and the divorced wife would, notwithstanding her misconduct, obtain a vested right on her survival, unless the statute prevented it.[3] Of course the divorced wife would have no dower in lands acquired by the husband *after* the divorce, as she would not be married at the time of acquisition, and this rule would prevail whether she were innocent or guilty. The courts of some other States regard the right of dower as wholly done away with by a divorce, unless it be preserved by some special statutory rule.[4]

[1] New York Code of Civ. Pro. §§ 1759, 1760, embodying the provisions formerly contained in 2 R. S. 146, §§ 45–48, which were repealed by Laws of 1880, ch. 245.

[2] Estate of Ensign, 103 N. Y. 284, 287.

[3] Wait *v.* Wait, 4 N. Y. 95, as explained in Estate of Ensign, 103. N. Y. 287, 290.

[4] Barber *v.* Root, 10 Mass. 260; Hood *v.* Hood, 110 Mass. 463; Rice *v.* Lumley, 10 Ohio St. 596; Lamkin *v.* Knapp, 20 Ohio St. 454; Barrett *v.* Failing, 111 U. S. 523. Legislation in England affecting (in case of divorce for adultery) marriage settlements made in reference to the continuance of the marriage, is worthy of notice. Under the first Divorce Acts (20 & 21 Vict. c. 85), the court had no power to alter a settlement. Norris *v.* Norris, 1 Sw. & T. 174. Under the later Divorce Amendment Act (22 & 23 Vict. c. 61 § 5), the court has power to deal with all deeds whereby property is settled upon a woman in her character of wife, and to be paid to her while she continues wife. Worsley *v.* Worsley, L. R. 1 P. & D. 648. The theory is, that if a wife commits adultery and the marriage is dissolved, she is no longer a wife, and the court can within the spirit of the statute deal with the settlement. Owing to the peculiar language of the statute, it only confers jurisdiction where there has been issue of the marriage, and they are living. Bird *v.* Bird, L. R. 1 P. D. 231; Corrance *v.* Corrance, L. R. 1 P. & D. 495 (*b*). The principles on which the court varies the

(*a*) A decree of divorce rendered by a court of a sister State, having jurisdiction of the subject-matter and the parties, in an action brought by the husband, will not deprive the wife of her then existing dower rights in New York, if the divorce were for any other cause than adultery. Van Cleaf *v.* Burns, 118 N. Y. 549. This is so even though the effect of the decree under the statutes of the State where it is rendered be to deprive her of dower. Id. 133 N. Y. 540.

(*b*) By 41 & 42 Vict. c. 19, § 3, the court may vary marriage settlements where there are no children of the marriage, Yglesias *v.* Yglesias, L. R. 4 P. D. 71.

The court has power to vary a marriage settlement although the petitioner and re-

There are some cases in the English courts of equity holding that a marriage settlement on general principles of law is annihilated at the moment that the marriage contract is dissolved, and that even an innocent husband or other party under it would have no further rights in it.[1] The better opinion, however, is that the husband or wife does not lose the advantages of a settlement in his favor by the mere fact of the dissolution of the marriage.[2]

(5) *Penal disabilities.* — It has been thought advisable in some States to prohibit the guilty party from marrying again during the life of the other party. This is the law of New York.[3] The provision is in the nature of a penalty. In the absence of clear words in a statute expressing the intent that such a marriage shall not be contracted beyond the limits of the State, it will be assumed by the court, at least in New York, that a marriage within the State only was prohibited. Accordingly, where the prohibited party went from New York to Connecticut in evasion of the law, was married, and returned to New York, the marriage was pronounced valid, the court finding in the statute no clear expression of the will of the legislature that the marriage should not be contracted beyond the State limits.[4] Such a marriage, contracted within the State, is utterly void,[5] and is bigamous, punishable by imprisonment in the State prison.[6]

This question is treated from a different point of view in England. It is considered that such a penalty follows the person

settlement are to direct a certain portion of the income, regularly payable to the wife, to be applied in case of divorce for her adultery to the benefit of the children or husband. March *v.* March, L. R. 1 P. & D. 440. It takes into account the fortune of the wife, the pecuniary ability of the husband, and the conduct of the parties. Chetwynd *v.* Chetwynd, 11 Jur. N. S. 958. It will not deprive a husband of any benefit he derived from the settlement. Thompson *v.* Thompson, 2 Sw. & T. 649. The benefit of the children and parents are solely regarded. Sykes *v.* Sykes, L. R. 2 P. & D. 163. Where the divorce is for the husband's adultery, it may extinguish his interest in the wife's fortune. Gladstone *v.* Gladstone, L. R. 1 P. D. 442. One great object of varying the settlement is to prevent, as far as may be just and practicable, the innocent party being damaged in a pecuniary sense by the decree of dissolution. Maudslay *v.* Maudslay, L. R. 2 P. D. 256. Where the settlement is in its terms irrevocable, the court reluctantly interferes, and will not do so beyond what justice in the case requires. Smith *v.* Smith, L. R. 12 P. D. 102, 104.

[1] Wilkinson *v.* Gibson, L. R. 4 Eq. 162; Swift *v.* Wenman, L. R. 10 Eq. 15; Fussell *v.* Dowding, L. R. 14 Eq. 421.

[2] Fitzgerald *v.* Chapman, L. R. 1 Ch. D. 563; Burton *v.* Sturgeon, L. R. 2 Ch. D. 318; Evans *v.* Carrington, 2 De G. F. & J. 481, 490.

[3] Code of Civ. Pro. § 1761.

[4] Moore *v.* Hegeman, 92 N. Y. 521; Van Voorhis *v.* Brintnall, 86 N. Y. 18; Thorp *v.* Thorp, 90 N. Y. 602.

[5] Cropsey *v.* Ogden, 11 N. Y. 228.

[6] People *v.* Faber, 92 N. Y. 146.

spondent were domiciled in Scotland and the settlements were made in Scotch form. Forsyth *v.* Forsyth [1891], P. 363; Nunneley *v.* Nunneley, L. R. 15 P. D. 186.

while his original domicile continues, as it is a disability attaching to the person, but that if the dissolution of the marriage be complete, either party, being now unmarried, is free to change the place of domicile, and there to follow its law in relation to a later marriage.[1] (*a*)

The question whether a party divorced for adultery is prohibited from remarrying the party from whom the divorce was had, is still open and undecided in the New York courts.[2] The Code of Civil Procedure now provides that the *prohibition* contained therein shall not *prevent* the remarriage of the parties to the action.[3] It would seem that they could lawfully remarry were it not for a positive prohibition, and that since this proviso was adopted, the marriage would be valid.

If a man thus prohibited should marry a woman ignorant of the fact, he would be liable to her in damages in an action for fraud.[4]

V. *Foreign divorces.* — By a "*foreign* divorce" is meant one obtained in a different State or jurisdiction from that in which it is brought under judicial consideration. The question may arise as well in the case of a divorce obtained in one State of the Union and considered in another, as in that of one obtained in a foreign country and under review here. Where such a divorce is in all respects regular, the comity of nations would require that the decree should be respected and upheld in another State or country. It might be assailed, however, on several distinct grounds.

(1) It might be urged that the decree assumed, without legal right, to divorce persons who were not married within the State; in other words, that no divorce could be had except in the courts the State where the marriage took place; or, (2) that the *domicile* of the parties, or one of them, was the true test of jurisdiction, and that the domicile was not in this instance sufficiently established; or, (3) that the defendant was absent from the State where the divorce was had, and could not, on that account, be regarded as under the control of the court, unless he volun-

[1] Scott *v.* Atty.-Gen'l, L. R. 11 P. D. 128.

[2] See remarks of the court in Moore *v.* Hegeman, 92 N. Y. 521, 528, 529.

[3] Code of Civ. Pro. § 1761.

[4] Blossom *v.* Barrett, 37 N. Y. 434. In this case nine thousand dollars was recovered.

(*a*) If the statute prohibits marriage within a certain time after the decree of divorce, — *e. g.* six months, — the marriage tie is not completely dissolved until the lapse of the time limited. Accordingly, the guilty party could not acquire a fresh domicile in another country prior to the expiration of the statutory period so as to enter into a valid second marriage. Warter *v.* Warter, L. R. 15 P. D. 152.

tarily submitted to it; or, (4) that there was fraud in the proceedings and that no rule of the "comity of nations" could be based upon a fraud. Each of these cases will now be considered.

(1) The first of these views has assumed importance owing to a decision of the English House of Lords known as "Lolley's Case."[1] This was an indictment for bigamy under the following circumstances: Lolley had been married in England to A., and a divorce having been procured by her in Scotland, on the ground of his adultery, permitting either party to marry again, he subsequently married B., also in England. Both parties were in Scotland when the divorce took place. The case is loosely reported; but it would appear that Lolley and his wife were all the time *domiciled* in England, though temporarily resident in Scotland, with a view to obtaining the divorce.[2] The twelve judges of the Superior courts were consulted, and it is stated[3] that they were unanimously of the opinion that no sentence or act of any foreign country or state could dissolve an English marriage *a vinculo matrimonii* for grounds on which it was not liable to be so dissolved in England. In a subsequent case, Lord Chancellor Eldon said that he understood the decision to be that as by the English law marriage was indissoluble, a marriage contracted in England could not be dissolved in any way except by act of the legislature.[4]

Lolley's Case has met with much criticism. It has not been specifically overruled, but its authority has been greatly weakened. It is held not to apply to a case where a domiciled Scotchman marries an English woman in England, and the marriage is dissolved in Scotland upon a ground for which, by English law, no divorce could be granted.[5] This decision is wholly adverse to the interpretation which Lord Eldon put upon the case in the decision already cited. Lolley's Case is now confined in its effect to the case where the domicile is English "from the beginning to the end of the transaction." In that aspect it may properly be sustained, and it has in accordance with this view been recently held that, if a person having an English domicile goes to another country or State (in this case Kansas) to *reside*, without abandoning his *domicile*, and obtains a divorce for a cause not recognized in England, it will have

[1] Rex *v.* Lolley, Russ. & Ry. Cr. Cases, 237; also cited in Tovey *v.* Lindsay, 1 Dow's Rep. 117, 124.

[2] This is the explanation given by Lord Blackburn in Harvey *v.* Farnie, L. R. 8 App. Cas. 43, 59.

[3] Russ. & Ry. Cr. Cases, p. 239.

[4] Tovey *v.* Lindsay, 1 Dow's Rep. 117, 124.

[5] Harvey *v.* Farnie, L. R. 6 P. D. 35; affirmed in the House of Lords, L. R. 8 App. Cas. 43.

no effect there.[1] In the same spirit, it has been said by LORD BLACKBURN,[2] that there is no case either in England or Scotland which decides that Lolley's Case is not right, as he understands its principle, which he declares to be that parties domiciled in England, going to Scotland temporarily, cannot obtain a divorce which will be valid in England, the Scotch court having in such a case no jurisdiction over the matter. It may accordingly be laid down as a prevailing and acknowledged rule that the courts of the State where the parties are domiciled in good faith have jurisdiction to divorce them according to the law of the domicile, however much that may differ from the law of the place of the marriage.[3]

(2) It is now generally conceded by jurists that the true place of jurisdiction over questions of divorce is the country where the parties are at the time domiciled, whether that be the place of marriage or not.[4] (*a*) This proceeds upon the ground that while a marriage originates in contract, yet, as soon as it is entered into, there springs up a cluster of legal rules establishing the *status* of the parties, and which the parties cannot shake off by mutual consent as they can in an ordinary contract. So the capacity of the wife to act and contract is usually much impaired, if not entirely denied. These rules *are no part of the marriage contract.* They are mere rules of law, varying in different States and countries. Public convenience and a true policy requires that these should be prescribed by the law of the domicile, and that the whole subject of *status* should be relegated to that law.

[1] Briggs *v.* Briggs, L. R. 5 P. D. 163.

[2] Harvey *v.* Farnie, L. R. 8 App. Cas. 43, 59.

[3] Cheever *v.* Wilson, 9 Wall. 108; Barber *v.* Root, 10 Mass. 260; Kinnier *v.* Kinnier, 45 N. Y. 535.

[4] The court of divorce in England holds that it has juriadiction over divorces in case of foreign marriagea where the husband *resides* in England, although not technically domiciled there. In one case the hnsband was a French consul who retained his French domicile though he resided in England. Niboyet *v.* Niboyet, L. R. 4 P. D. 1.

In a still more recent case the facts were these: An Engliah lady consented to marry the aon of a Neapolitan nobleman on condition of alwaya having, after marriage, *a residence* in England, and reaiding there aix montha each year. The partiea accordingly took up a residence in London, but ultimately the husband, having committed adultery, abandoned his English residence, leaving the wife residing in London. It was held that the English divorce court had jurisdiction over the absent huaband. It would seem, however, that as the husband was never *domiciled* in England, but only resident there, such a divorce, though valid for English purposes, would not be recognized as binding upon the huaband in the country of domicile, according to the views prevailing in this country or even in England. Santo Teodoro *v.* Santo Teodoro, L. R. 5 P. D. 79. The rule giving effect elsewhere to a decree made in the tribunals of the domicile has been applied to a case of divorce for nullity (impotency), where the cause of divorce made the contract voidable. Turner *v.* Thompson, L. R. 13 P. D. 37.

(*a*) See Goulder *v.* Goulder [1892], P. 240.

The "domicile" here meant is not mere inhabitancy, but includes an intent to abide in the State. A residence simulated for the purpose of obtaining a divorce will not suffice.(*a*) This is a species of fraud upon the court, as it shows the alleged domicile to be unreal, and asserted for the purpose of evading the effect of the law appropriate to the condition of the parties. It has accordingly been decided that a decree of divorce under a statute of another State authorizing a divorce between husband and wife, neither of whom is domiciled there, is of no force or effect in the State where the parties are domiciled.[1]

(3) In considering the question of the *absence* of the defendant from the State when the divorce proceedings are instituted, two distinct instances may be referred to: one, where both parties are domiciled in the State where the divorce is sought, or *forum*, and the other where only one is domiciled there.

Where both parties are domiciled in the *forum*, and one is absent, the jurisdiction of the court continues over both. One, by withdrawing from the State for a temporary purpose (it may be to avoid a divorce), does not defeat the jurisdiction of the court.[2] Accordingly, the court of the domicile may by appropriate means seek to notify the absent party of the pending proceedings, and if he does not appear, a divorce may be obtained which will be recognized in other States.

The more difficult case is where the parties have separate domiciles. Though the domicile of the wife usually follows that of the husband, yet for the purposes of divorce it may be distinct. The question then arises whether when the husband or wife commences in the court of his or her domicile a proceeding for divorce against the absent party, the decree or judgment in his or her favor will be recognized in the courts of the domicile of the absent party. The correct rule here seems to be that as the court acts only upon *status*, it cannot declare the *status* of the absent non-domiciled defendant. It may declare the *status* of its own citizen, but not of the foreign citizen. There is accordingly nothing to prevent the absent party from commencing another divorce proceeding in the court of his or her domicile.

[1] Van Fossen *v.* State, 37 Ohio St. 317; People *v.* Dawell, 25 Mich. 247; State *v.* Armington, 25 Minn. 29; Litowitch *v.* Litowitch, 19 Kan. 451. The opinion of COOLEY, J. in People *v.* Dawell, *supra*, is particularly satisfactory. The Scotch law goes to a great length, holding that the mere presence of a party in a country renders him amenable to the jurisdiction of a divorce court. Utterton *v.* Tewsh, Ferguson's R. 23.

[2] Hunt *v.* Hunt, 72 N. Y. 217. In this case the wife was the absent party, but the principle appears to be equally applicable to an absent husband.

(*a*) Bonaparte *v.* Bonaparte [1892], P. 402.

Each may thus have a decree fixing *status* in the courts of their respective domiciles.[1]

The result is that a judgment of divorce where the defendant is absent and not domiciled is of no effect beyond the *forum* where it is rendered. There may be some difference of opinion as to the point whether a defendant without the State, who receives *actual* notice of the proceedings, would not be bound. This would, however, seem to be immaterial since the decisive fact remains that the foreign court has no power to make a decision affecting his or her *status*. It is important to distinguish carefully between two questions: one whether a court in a particular State has power to grant a divorce that will be valid *within the limits of the State itself;* the other, whether if it be valid within the State, it will be recognized *elsewhere*. The first question is one for the most part depending on the local statutes conferring jurisdiction, since the divorce jurisdiction belonged to the ecclesiastical courts in England, and there are no such courts here. The second question is not statutory, but depends upon the comity of states, or private international law.

Decisions in accordance with the view that the foreign court cannot in such cases dispose of the *whole* question of *status*, and that only the *status* of the person domiciled within its jurisdiction can be affected, have been made in England, New York, Pennsylvania, New Jersey, Maine, Massachusetts, Michigan, etc. Some of the cases are referred to in the note.[2] (*a*)

The defendant may, however, *appear* in the action, and *submit* to the jurisdiction of the court, in which case the judgment would not merely be locally binding, but would be regarded as

[1] People *v.* Dawell, 25 Mich. 247, opinion of Cooley, J.

[2] People *v.* Baker, 76 N. Y. 78; O'Dea *v.* O'Dea, 101 N. Y. 23; Cook *v.* Cook, 56 Wis. 195; People *v.* Dawell, 25 Mich. 247; Shannon *v.* Shannon, 4 Allen, 134; Lyon *v.* Lyon, 2 Gray, 367; Ralston *v.* Ralston, 13 Phila. 30; Love *v.* Love, 10 Phila. 453; Bishop *v.* Bishop, 30 Pa. St. 412. The injured party must seek redress in the *forum* of the defendant unless the defendant has removed from what was before the common domicile of both. Reel *v.* Elder, 62 Pa. St. 308; Coddington *v.* Coddington, 20 N. J. Eq. 263. In Cross *v.* Cross, 108 N. Y. 628, the court declined to hear further discussion, treating the matter as fully settled by prior decisions, p. 630. Shaw *v.* Atty-Gen'l L. R. 2 P. & D. 156. Mr. Dicey, in his excellent work on Domicil, refers this class of cases (where an absent defendant is served with notice of the proceedings by publication in the local papers) to a violation of the rules of natural justice, p. 239. While this view is undoubtedly correct, a still broader proposition may be maintained (as already suggested) that the foreign court *has no power* to declare the *status* of the absent non-domiciled defendant.

(*a*) Williams *v.* Williams, 130 N. Y. 193. In the Matter of House, 40 N. Y. St. R. 286; Munson *v.* Munson, 60 Hun, 189. See, however, Thompson *v.* Thompson, 11 L. R. A. 443; Anthony *v.* Rice, 19 S. W. R. 423; Smith *v.* Smith, 43 La. Ann. 1140.

valid in the courts of the defendant's domicile.[1] This is particularly true if the absent defendant goes to the State where the case is pending.[2] So if an attorney-at-law should *assume* to appear for an absent defendant without authority, the act would perhaps not be strictly void, but binding until repudiated; or, in other words, voidable.[3]

A divorce, treated as utterly void in the court of the domicile, would result in such a manner that a person marrying according to the decree might be regarded in the courts of the domicile as having committed adultery, and be liable to an action for divorce. This view would not be taken if both parties had assented to the void proceeding, since there would be grounds for regarding the act of marriage as a connivance or procurement of the adultery, and so a bar to the divorce.[4]

(4) The last ground on which a foreign divorce may be assailed is *fraud* in the proceedings in which it was obtained. The case here intended to be considered is that of actual fraud upon the foreign court. In this case the foreign court itself would presumably treat the divorce as void, and it could not be expected to receive any greater respect abroad than it would have at home.[5]

It has been frequently urged that there is a distinction between the recognition to be given judgments of courts of sister States and that due to those of the courts of foreign countries, owing to an Article of the United States Constitution, providing that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."[6] It is, however, settled that this clause is not applicable where the courts of the sister State had no jurisdiction, or where the judgment was obtained by fraud. A judgment rendered by a court without jurisdiction is not in truth a judgment, but is a mere arbitrary prescription without force in another *forum*. It would not have force even in a court of the same State, and much less in a tribunal of another State. The cases on this subject are numerous, and in modern times quite harmonious.[7] (*a*)

[1] Cheever *v.* Wilson, 9 Wall. 108.

[2] Jones *v.* Jones, 108 N. Y. 415.

[3] Elliott *v.* Wohlfrom, 55 Cal. 384. But see *contra*, Kerr *v.* Kerr, 41 N. Y. 272.

[4] Loud *v.* Loud, 129 Mass. 14; Palmer *v.* Palmer, 1 Sw. & T. 551.

[5] Kerr *v.* Kerr, 41 N. Y. 272. See opinion of GROVER, J., p. 278.

[6] Art. IV. § 1.

[7] Borden *v.* Fitch, 15 Johns. 121; Kerr *v.* Kerr, 41 N. Y. 272; Thompson *v.* Whitman, 18 Wall. 457–461.

(*a*) In some jurisdictions a judgment may be impeached *collaterally* for fraud. Kerr *v.* Kerr, 41 N. Y. 272; Vadala *v.* Lawes, L. R. 25 Q. B. D. 310. In others it is necessary to bring a direct proceeding to set the judgment aside. In the courts of the United States in an action at law upon a judgment, fraud, being an equitable defence, cannot properly be pleaded. Christmas *v.* Russell, 5 Wall. 290; Buller *v.* Lidell, 43 Fed. R. 116; Maxwell *v.* Stewart, 22 Wall. 77.

SECTION III. *Judicial Separation or Limited Divorce.* — This form of divorce prevailed from an early period in the English ecclesiastical courts, and still exists there in the divorce court. It has been recognized in some of the American States, including New York. Many of the rules governing it are analogous to those prevailing in the law relating to dissolution of marriage. The leading grounds for this form of divorce at present are cruelty and desertion.

I. *Cruelty.* — Cruelty, or *sævitia*, cannot easily be defined, so as to state whether it amounts to a cause for divorce. There may be acts of cruelty, and yet not of the grade required to justify judicial interference. For that purpose, the wrongful acts must be grave and weighty, and show that as matters stand, the duties of married life cannot properly be discharged. To constitute "cruelty" in this sense, when acts of violence are relied upon, they must be of such character as to endanger safety or health, or to cause reasonable apprehension.[1] (*a*) Cruelty is, in general, a cumulative charge. It must evince a continued want of self-control, and be referrible to permanent causes. In a case where the charges were confined to three days in a cohabitation of three years, they were held not to be sustained.[2] It is accordingly important to show a *course* of unkind treatment.

However, actual personal violence is not the only kind of maltreatment for which this form of divorce may be granted. There may be moral as well as physical force systematically exerted to compel a wife's submission, and to such a degree as to break down her health. In such a case there would be legal cruelty.[3] (*b*).

The following classes of acts are not regarded as *legal* cruelty, — neglect, silence, shunning the wife's company, indifference, aversion to her society, or cessation of matrimonial intercourse, — whether practiced separately or in combination, there being no personal violence or words of menace.[4] The same view was taken in a case where a husband constantly railed and swore at his wife, and refused to provide delicacies ordered by the doctor, and on several occasions beat her child

[1] Milford *v.* Milford, L. R. 1 P. & D. 295, 299; Whispell *v.* Whispell, 4 Barb. 217.

[2] Plowden *v.* Plowden, 23 L. T. N. S. 266.

[3] Kelly *v.* Kelly, L. R. 2 P. & D. 31; affirmed on appeal, Id. p. 59; Paterson *v.* Paterson, 3 H. L. Cases, 308.

[4] Paterson *v.* Paterson, 3 H. L. Cases, 308; Cousen *v.* Cousen, 4 Sw. & T. 164.

(*a*) Fowler *v.* Fowler, 33 N. Y. St. R. 746.

(*b*) Bethune *v.* Bethune [1891], P. 205; Glass *v.* Wynn, 76 Ga. 319; Lutz *v.* Lutz, 31 N. Y. St. R. 718; Jones *v.* Jones, 62 N. H. 463.

in her presence.[1] So acts committed under excitement occasioned by an acute disorder of the brain are not sufficient acts of cruelty, if on the cessation of the disorder the excitement terminates. It would be otherwise if the disease resulted in a new condition of the brain, rendering the party liable to ungovernable fits of passion, and making cohabitation dangerous.[2] This principle cannot be extended to acts committed by an insane person.[3] (*a*) Again, habitual drunkenness is not a sufficient ground for a divorce for "cruelty," even though it destroy domestic comfort.[4] (*b*) Particular acts of misconduct may, however, be considered.[5]

Such acts as the following have been regarded as acts of cruelty: Wilful communication to the wife of a loathsome disease;[6] ill-treatment of children in the wife's presence, if carried so far as to affect her health, may perhaps be cruelty. Such acts must directly shock the wife's sensibility. Such a case has been termed "constructive cruelty."[7] There are also certain acts of indignity and insult which have been adjudged to be cruelty, such as wilful spitting in the wife's face. Such an act as this will have weight depending on the way it is received,— as, for instance, whether it is resented or not at the time.[8] This act would be sufficient for a divorce if accompanied with other acts of indignity, such as pushing and dragging her about a room.[9] A similar remark may be made of unfounded charges against the wife's chastity, known by the husband to be false.[10] The same view was taken of an assault upon the wife in a public street, leading a passer-by to suppose that she was a prostitute.[11] In cases of this kind the court has taken into consideration the position in which the husband has placed the wife in the family, and the authority and control exercised under his direction by the servants over her.[12]

The husband may also have a divorce for the wife's cruelty. There is no reason why the court should not protect the husband

[1] Birch *v.* Birch, 42 L. J. N. S. Prob. & Mat. 23.

[2] Curtis *v.* Curtis, 1 Sw. & T. 192, 213.

[3] Hall *v.* Hall, 3 Sw. & T. 347.

[4] Hudson *v.* Hudson, Id. 314.

[5] Power *v.* Power, 4 Sw. & T. 173.

[6] N—— *v.* N——, 3 Sw. & T. 234; Boardman *v.* Boardman, L. R. 1 P. & D. 233.

[7] Suggate *v.* Suggate, 1 Sw. & T. 489; Birch *v.* Birch, 42 L. J. N. S. Prob. & Mat. 23; Manning *v.* Manning, 6 Ir. Rep. (Equity) 417.

[8] Waddell *v.* Waddell, 2 Sw. & T. 584.

[9] Saunders *v.* Saunders, 1 Robertson, Ecc. 549.

[10] Durant *v.* Durant, 1 Hagg. Ecc. 733, 769.

[11] Milner *v.* Milner, 4 Sw. & T. 240.

[12] Anthony *v.* Anthony, 1 Sw. & T. 594.

(*a*) Cohn *v.* Cohn, 85 Cal. 108.

(*b*) Anonymous, 17 Abb. N. C. 231.

where the wife's passions are so little under control that she habitually uses personal violence towards him, which leads to a well-founded apprehension of bodily injury. So the moral effect of the wife's violence may be so serious that the court will interfere and not drive the husband to the necessity of meeting force by force.[1] A husband cannot, however, obtain a divorce for cruelty on the same state of facts as a wife. He must show such a continued course of bad conduct on her part as will satisfy the court that it is unsafe for him, with a due exercise of his marital power, to cohabit with her. As he is legally the head of the family, he may show efforts on her part to subvert his place in the household by proving acts of misconduct towards children, visitors, and servants.[2]

II. *Desertion.* — This is a good ground for a decree of judicial separation in England as well as in New York and other States. In some States there may be an absolute divorce on this ground. The cause in England is "desertion without cause for two years and upwards." The words of the New York statute are "abandonment of the plaintiff by the defendant" and "where the wife is plaintiff, the neglect or refusal of the defendant to provide for her."

The word "abandonment" is practically equivalent to "desertion." The fair construction of the statute is that "abandonment" by either party is a good ground for an application for divorce by the other. There is a clear distinction made between abandonment and the refusal or neglect of the husband to provide for the wife. He may support her, and still abandon her.[3] (*a*) The principal element in a case of desertion is the intent. Assuming that the charge is against the husband, it is the rule that the wife is entitled to his society and protection. If he refuse to live with her without reasonable cause, he may be said to have deserted her. (*b*) The case will not be changed by the fact that he gives her an allowance.[4]

Some principles governing this subject may be stated.

(1) The act relied on as desertion must have been done against the will of the complainant.[5]

[1] White *v.* White, 1 Sw. & T. 591; Prichard *v.* Prichard, 3 Sw. & T. 523; Forth *v.* Forth, 15 W. R. 1091.

[2] Perry *v.* Perry, 1 Barb. Ch. 516. There was at one time some doubt in New York whether, owing to the condition of the statutes, the husband could have such a divorce. (See Perry *v.* Perry, 2 Paige, 501.) This point is now settled in the husband's favor by § 1762 of the Code of Civil Procedure.

[3] Yeatman *v.* Yeatman, L. R. 1 P. & D. 489.

[4] Macdonald *v.* Macdonald, 4 Sw. & T. 242.

[5] Ward *v.* Ward, 1 Sw. & T. 185.

(*a*) Clearman *v.* Clearman, 15 N. Y. Civ. Pro. R. 313.

(*b*) Williams *v.* Williams, 130 N. Y. 193.

(2) Ill conduct on the husband's part compelling the wife to leave him may constitute a case of desertion.[1] (*a*)

(3) Desertion consists in actually and wilfully bringing to an end an existing state of cohabitation. If cohabitation has ceased by mutual adverse acts or consent, "desertion "cannot take place until their common life and home have been resumed.[2]

(4) If, however, there is at first merely absence of one of the parties for a special reason, with no general intent to cease cohabitation, and afterwards the absent party ceases to correspond with the other, and shows by acts an intent not to resume conjugal relations, the facts will constitute desertion.[3] (*b*)

(5) One party cannot urge against the other that separation is desertion, when it is involuntary, or caused by the act or default of the party complaining.[4] (*c*)

(6) If the desertion be in itself complete, a subsequent offer to return will not avail, as the deserted party has a legal right and cause of action of which he cannot be deprived without his consent.[5] In determining whether the desertion is complete under this rule, regard may properly be had to the circumstances and manner of departure.[6]

Under the New York statute, neglect by the husband to provide for the wife is a ground for an action for a limited divorce by her without desertion. On this branch of the subject there is but little adjudication.[7]

Cruelty of the husband will not affect his right to a divorce for the wife's adultery.[8] (*d*) The same rule applies to a husband's desertion.[9]

III. *Procedure in actions for limited divorce.* — The mode of conducting the action is substantially the same as in a case of dissolution, and reference may be made to what has been stated

[1] Gravea *v.* Graves, 12 W. R. 1016.

[2] Fitzgerald *v.* Fitzgerald, L. R. 1 P. & D. 694; Townsend *v.* Townsend, 42 L. J. N. S. Prob. & Mat. 71; Cooper *v.* Cooper, 33 L. T. N. S. 264.

[3] Henty *v.* Henty, 33 L. T. N. S. 263; Stickland *v.* Stickland, 35 L. T. N. S. 767; Gatehouse *v.* Gatehouse, L. R. 1 P. & D. 331.

[4] Buckmaster *v.* Buckmaster, L. R. 1 P. & D. 713; Keech *v.* Keech, Id. 641; Crabb *v.* Crabb, Id. 601.

[5] Cargill *v.* Cargill, 1 Sw. & T. 235.

[6] Cook *v.* Cook, 13 N. J. Eq. 263; Rogers *v.* Rogers, 18 N. J. Eq. 445. Many authorities on this general subject are collected in Uhlmann *v.* Uhlmann, 17 Abb. N. C. 236.

[7] Code of Civ. Pro. § 1762; Ahrenfeldt *v.* Ahrenfeldt, Hoffman's Ch. 47.

[8] Forster *v.* Forster, 1 Hagg. Consist. R. 144, 146.

[9] Morgan *v.* Morgan, 2 Curteis Ecc. 679.

(*a*) Dickinson *v.* Dickinson, 62 L. T. R. 330.

(*b*) Drew *v.* Drew, 64 L. T. R. 840.

(*c*) Williams *v.* Williams, 130 N. Y. 193.

(*d*) Cf. p. 167 *ante*, note (*a*).

under that head.[1] Alimony may be allowed *pendente lite* and "suit money" for carrying on the litigation in the same general manner.

The defences will be either denial of the charges made, or recrimination, condonation, lapse of time, etc. A recriminatory charge will embrace misconduct on the part of the complainant.[2] (*a*) Nothing will be impertinent which is material as an absolute defence, or which bears upon the question of costs or the amount of alimony. It will be proper to inquire into the general course of conduct of the parties as relevant to the inquiry.[3] The adultery of the plaintiff will be a bar to this kind of divorce.[4] The defence of condonation may also be referred to; cruelty may be forgiven as well as adultery. New acts of cruelty will revive the original cause of action. It is not necessary that the same grade of wrongful acts should be repeated in order to produce this result. There is an implied promise by the wrong-doer that the injured party shall be treated in all respects in a kindly manner. The original charge may be revived even though the new acts may not be of themselves sufficient to justify a separation.[5] (*b*)

Where the wife is successful, permanent alimony is awarded, depending for its amount upon the estate of the husband, the grade of ill-treatment sustained by the wife, and the claims of others upon him for support.[6] Where the wife is in fault, no permanent alimony will be allowed her.[7] The same general rules extend to applications for the custody of the children as in actions for dissolution. The decree may provide for a separation for a definite period, — as, for example, five years,[8] — or it may be permanent.[9]

Such a divorce as this leaves the parties still husband and wife. It was originally resorted to with the hope of reconciliation. Experience shows that the condition is dangerous to virtue, and the expediency of such a system may well be doubted. Any children

[1] *Ante*, pp. 163 *et seq.*

[2] Hopper *v.* Hopper, 11 Paige, 46.

[3] Whispell *v.* Whispell, 4 Barb. 217.

[4] N. Y. Code of Civ. Pro. § 1765; Burdell *v.* Burdell, 2 Barb. 473.

[5] Burr *v.* Burr, 10 Paige, 20.

[6] Id.

[7] Perry *v.* Perry, 2 Barb. Ch. 311; Palmer *v.* Palmer, 1 Paige, 276.

[8] Bedell *v.* Bedell, 1 Johns. Ch. 604.

[9] Barrere *v.* Barrere, 4 Johns. Ch. 187. The form of decree in this case has been declared to be a good precedent. Pool *v.* Pool, 2 Edw. Ch. 192.

(*a*) Cruel and inhuman conduct on the part of the plaintiff may be set up not only as a defence but as a counterclaim, which, if proved, will entitle the defendant to a decree for separation and reasonable support. Waltermire *v.* Waltermire, 110 N. Y. 183. See also Ortmann *v.* Ortmann, 52 N. W. R. 619.

(*b*) Subsequent cohabitation is not a condonation of acts of cruelty in the sense that it is of adultery, though it is evidence of condonation. Doe *v.* Doe, 52 Hun, 405; Cox *v.* Cox, 23 N. Y. St. R. 691.

born while the decree continues operative will be presumed to be illegitimate, since it will be presumed that the parties have obeyed the decree of the court.[1] Still, the contrary may be shown by evidence and the legitimacy of the child established. The parties may apply to be discharged from the decree.[2] If reconciled, a repetition of the offence does not revive the cause of action on which the decree or judgment was founded.[3]

DIVISION III. — *The Legal Consequences of the Marriage Relation.*

By the common law, a single woman, called a *feme sole*, may freely make contracts, and do all acts for the disposition of lands and goods which any man in the same circumstances may do. Her mode of action is sometimes affected by rules of decency and decorum. Thus, in rendering homage to her feudal lord, while a man would say to him, "I become your man," she was not required to say, "I become your woman," but simply, "I do homage unto you."[4]

On her marriage, her legal capacity to act was seriously impaired by reason of considerations of public policy. Her legal existence was practically suspended, or merged in that of her husband. They were now called "baron and feme." It was a consequence of this suspension that she could not contract with third persons (except that she might in some instances act as agent) nor with her husband. Contracts made between them while single were dissolved by the marriage. The husband could not convey land to her, though he might, where the right to devise land existed, leave it to her by will, since the devise did not take effect until the marriage was at an end. Upon marriage he became immediate owner of her tangible personal estate, had a right to collect for his own use her rights of action, and to take for his own benefit, while they lived, the rents and profits of her real estate. On his part, he became liable for her debts and other obligations incurred before marriage, and responsible for her wrongs or torts committed before or during marriage, and was also under a legal duty to sustain her during marriage.

The statements just made are only true in an unqualified

[1] Parishes of St. George and St. Margaret, 1 Salk. 123.

[2] Barrere *v.* Barrere, 4 Johns. Ch. 187.

[3] Lord St. John *v.* Lady St. John, 11 Ves. 526, 532; Fletcher *v.* Fletcher, 3 Brown, C. C. 619 n. Lord Chancellor Eldon said in the case first cited that it had been decided that where the parties "come together, *there is a complete end of it*, and that can never again be made a cause of complaint for the same purpose."

[4] Comyn's Digest, Baron & Feme (A1); Coke upon Littleton, 66 *a* (§ 87).

manner in a court of law as distinguished from equity. Courts of chancery (or equity) at an early day established an artificial system of rights in the wife's favor, depending upon the doctrine of "trusts for her separate use." Her rights and capacities thus became to a certain extent a matter of form rather than of substance, since by placing her property under a mere technical trust, she might have powers of disposition and control of it substantially equivalent to those possessed by a single woman.

Not long before the middle of the present century, this subject began to attract the attention of legislatures in this country. At first the statutes were framed on the idea of withdrawing the ownership of the wife's property from her husband as a mere result of the marriage, and with a view to enable her to exercise the ordinary acts of ownership over it, such as conveying, mortgaging, or devising it. The general power to make contracts was still withheld. There is now a tendency to confer this also, and to assimilate the capacity of a married woman to transact business, and to make contracts, to that of a single woman. The general power to make contracts, already conceded in several States, is not likely to be long denied elsewhere.

It will, however, for a long period be necessary for the theoretical or even practicing lawyer to be familiar with the early law. The statutes are prospective in their character, and do not abrogate past transactions involving vested rights. Moreover, the scope of modern legislation cannot be fully understood without an intimate acquaintance with the rules of the common law.

SECTION I. *The rights of the husband in the wife's property.*

Subsection I. *At common law.* — In considering the rights of the husband over the wife's property *at common law*, six forms of ownership may be noted.

(1) *Her real estate owned in fee.* In this case, the husband is entitled to the rents and profits while *both* live. He is technically said to have an estate for the *joint lives* of himself and his wife. Should he die first, the wife is absolute owner; should he outlive her, the estate descends to her heirs, free from all claim on his part. The interest of the husband during their joint lives can be sold by him or seized by his creditors.

When a child of the marriage is born alive during the life of the wife, a different rule prevails. He then has an estate for *his own life*, outlasting the wife's life, if he survive her. This is called "tenancy by the curtesy of England," or simply "tenancy by the curtesy."

Neither of these estates, while conferring upon the husband a right to the rents and profits of the land, confers the absolute

ownership of the land upon him. This still remains in the wife, subject to her husband's partial interest.

At the death of the wife the husband, being tenant by the curtesy, stands towards the wife's heirs in the position of a life tenant. Should he commit any wilful injury to the property beyond what a reasonable use of it would permit, he is guilty of "waste," which would result in forfeiture, by means of an "action of waste." By a technical rule, the heirs could only proceed against *the husband* for such waste, notwithstanding a sale of his estate by him. There is no legal relationship or "privity" between the heirs and the purchaser. In like manner, if the heirs conveyed their interest, the purchaser from them could not sue the husband. This last case was at an early day changed by statute.[1] (*a*) But if both parties (husband and heirs) convey their respective interests, the assignee of the heirs can bring his action of waste for a forfeiture against the assignee of the husband, there being privity of estate between them.[2]

While the husband can, in a proper sense, only convey his life estate to a grantee, he sometimes wrongfully assumes to do more and to convey the wife's entire estate. Possession taken under such a conveyance, and held in accordance with the rules governing adverse possession, might divest the estate of the wife or her heirs, as the case might be, and convert it into a right of action; and this would be barred by the statute of limitations, if the action were not brought to recover the property within the time allowed by law after the husband's death.

(2) *An estate in land, granted to the husband and wife after marriage.* This is called an estate by the entirety. Each is supposed to own the whole. On the death of either, the survivor takes the whole estate absolutely. This rule does not apply where the estate is conveyed to them before marriage. So, according to some authorities, it would not be extended to cases where there were words in the instrument showing that a different estate was intended, — *e. g.* a tenancy in common.

(3) *A life estate in land.* Under this head there are two instances. The first is where the wife owns an estate for her own life. In this case the husband's interest ceases with the wife's life, although he is entitled to the emblements, or crops produced by labor and capital, growing at the time of her death. In the second case, if the person (called *cestui que vie*) by whose

[1] 1 Cruise's Digest, 173; so in New York, 1 R. L. 62 (1313).

[2] Walker's Case, 3 Coke, 22 *a*; Bates *v.* Shraeder, 13 Johns. 260; Foot *v.* Dickinson, 2 Met. 611.

(*a*) See Code of Civ. Pro. §§ 1651–1659.

life the duration of the estate is measured, outlives the wife, and she dies before the husband, he takes the estate as "occupant." By statute, in some States, including New York, the remaining interest is treated as personal property, in which view he would usually succeed to it as administrator. If the wife should outlive the husband, any unexpired interest would belong to her.

(4) *Rights of action.* Under this head would be included notes, bonds, book accounts, and other claims enforceable by action. The husband by common law has a right to collect these by an action for his own use. He is in such a case said "to reduce them to possession." It is not easy to define this expression. Its general signification is to bring the right of action into such complete control that he can be regarded as owner. The meaning is shown by instances. Recovery of judgment in their joint names is not a reduction into possession,[1] nor is a collection of interest upon a debt. The receipt of the principal by him would be. The same rule would be applied to a release of the debt, to the debtor. This is a plain act of dominion or ownership. So the same rule applies to a change in the nature of the debt, as where a new security is taken in the husband's name by way of substitution for the wife's claim. There are cases in which the husband may have an election to sue alone or in their joint names; in such a case a judgment recovered in his own name would be a "reduction into possession," while one recovered in their joint names would not be.[2]

Still another mode of reducing to possession is for the husband to sell the right of action to a purchaser for a valuable consideration. The purchaser in such a case becomes owner without collecting the debt, provided that the husband had himself the power of immediate enforcement of the claim. But if the interest of the wife were at the time of the sale *future* or *reversionary*, so that the husband could not himself then collect the claim, it is the view of many authorities that the sale is not binding upon the wife, if she survive.[3] If there was fraud practised on the husband in such a sale, the right to rescind it would vest in him, and on his death would pass to his executors.[4] The test question thus becomes capacity to enforce the right of action.

Again, the husband's creditors may seize upon the wife's rights of action as a means of payment of their claims. Still, they would

[1] Searing *v.* Searing, 9 Paige, 283.

[2] Hilliard *v.* Hambridge, Aleyn, 36; Brashford *v.* Buckingham, Cro. Jac. 77; Searing *v.* Searing, *supra.*

[3] Some of these cases are, Ashby *v.* Ashby, 1 Collyer, 553; Box *v.* Box and Box *v.* Jackson, Drury (Sugden's Dec.) 42; s. c. 2 Con. & Lawson, 605; Rogers *v.* Acaster, 14 Beav. 445; Duberley *v.* Day, 16 Beav. 33.

[4] Widgery *v.* Tepper, L. R. 7 Ch. D. 423.

only acquire the power to reduce them into possession. There is, however, an important distinction between this case and that of a purchaser from the husband. The latter may acquire a title without collecting them, while if a creditor does not collect them during the husband's life, they will revert to the wife should she survive. The reason of the distinction between the two cases is, that the husband's act is a voluntary transfer, while the proceeding of the creditors is against his will, or in legal phrase, *in invitum*.

The various claims of husband, purchaser, or creditor are subject to an important qualification. The court will, in a proper case, require a reasonable provision to be made from the property for the support of the wife and children, whether she has a life estate or an absolute interest.[1] This is particularly clear when it becomes necessary for either of the above-named parties to ask the aid of a court of equity. The well-established rule that "he who seeks equity must do equity" will cover the case. It is quite immaterial whether the husband, a purchaser, or a creditor may seek relief. Instances of this kind are legacies or distributive shares of an intestate's estate. The New York authorities go still farther, and will not permit a party to recover even in a court of law without making a suitable provision for a wife. The equity court will, if the case require it, interfere by injunction.[2]

Should the husband not reduce the wife's right of action into possession, and die leaving her surviving, it belongs to her absolutely by survivorship.[3] On the other hand, should he, under the same circumstances, survive, the things in action would belong to him beneficially, subject to the payment of the wife's debts. He could no longer, however, enforce them in *his own* name, or in his name joined with his wife's, since they would pass *in form* to his wife's administrator. Should he be, as is usually the case, the administrator, he would take the rights of action, in the first instance, *as the wife's representative*, and after discharging his duties in that character, the residue would belong to him individually. His position would be nearly analogous to that of a father administering on the personal estate of an only child, and entitled, after settling claims, to the residue, — the only difference being that the father takes the residue by the statute of distributions, and the husband by common law. If, instead of the husband, some other person were the administrator, the latter would settle the estate, and account to the husband for the residuum *as*

[1] Taunton *v.* Morris, L. R. 11 Ch. D. 779. In this case the *entire* income of the fund (£500 per year) was settled on the wife.

[2] Van Epps *v.* Van Deusen, 4 Paige, 64. 74.

[3] Gaters *v.* Madeley, 6 M. & W. 425.

trustee. So if the husband should, though surviving the wife, die before actually administering the estate, an administrator *de bonis non* would be appointed on the wife's estate, and then, acting as trustee for the husband's estate, pay over the surplus to the administrator of that estate. Accordingly, there is no real connection between the husband's right to the administration and his right to the residue. He might be deprived of the administration and still be *cestui que trust* of the residue.[1] This view of the husband's rights was sanctioned by the New York courts, though on somewhat different grounds, as the theory of a trust for the husband or his representatives was not developed.[2] The wife's rights of action may in equity become the property of the husband by a contract between them to that effect, based on a valuable consideration. In such a case he is in substance a purchaser of them, and his title does not depend upon any act on his part reducing them to possession.

(5) *Chattels real*. This expression includes leases of land.

[1] This point has occasioned some difficulty in the courts, but the result is as above stated. The clearest exposition of the law is found in the case of Atty-Gen'l *v.* Partington, in the Exchequer Chamber, 10 Jur. N. S. 825, 827, 828; S. C. 33 L. J. Exch. 281; 3 H. & C. 193. The theory of the subject was there directly involved, the question being whether the *husband's administrator* was liable to a succession duty though the wife's administrator held the assets. Of course he could not so be liable, unless he was an equitable owner. In a very able opinion by WILLES, J., it was *held* that the husband's administrator *was liable to pay the succession duty*, as beneficial owner. A single sentence from the report in the Law Journal, p. 287, will show the theory of the decision. "As the surviving husband is entitled to letters of administration of his wife's estate, and to reduce such property (if not reduced into possession during the coverture) into possession as her administrator but for his own benefit, so it has further been long established that the circumstance of his death, before he has so reduced the property into possession, shall not affect the title thereto, but *that the representative of the wife shall hold the property in trust* for the representative of the husband." The case of Fleet *v.* Perrins, L. R. 3 Q. B. 536; on appeal, L. R. 4 Q. B. 500, does not at all conflict with Atty-Gen'l *v.* Partington, *supra*. The wife's administratrix there brought an ordinary action for money had and received against a debtor to the wife's estate. It was claimed that the action was misconceived (L. R. 3 Q. B. 540), and should have been brought by the husband's administrator. The equitable right of the husband's estate to the proceeds of the suit was not involved. The duty of the wife's administrator, as there held, to be the formal plaintiff against such a debtor is in precise accord with the theory of Atty-Gen'l *v.* Partington. Elliott *v.* Collier, 3 Atkyns, 526, before LORD HARDWICKE, is very strong and clear in the husband's favor. The court said that the right to the thing in action vested in the husband *before administration was taken out*, and that the wife's administrator (other than the husband) acts as *trustee* for the husband. See also Betts *v.* Kimpton, 2 B. & Ad. 273; Proudley *v.* Fielder, 2 My. & K. 57. The trust element in favor of the husband's representatives, though the representatives of the wife must sue, was treated with great clearness by LORD TENTERDEN in Betts *v.* Kimpton, *supra*, 276. The same rule was extended to personal property held by the wife in equity for "her sole and separate use." On her death, it passed to her husband. Proudley *v.* Fielder, *supra*, 57, 58.

[2] Robins *v.* McClure, 100 N. Y. 328.

The right of the husband to these depends on special rules. The husband is so far owner that he can dispose of them as he pleases, by act taking effect in his lifetime. He cannot leave them to a legatee by his will, to the prejudice of his wife's claim, if she survive. On the death of either, if the lease be then vested in the wife, it belongs absolutely to the survivor.[1]

(6) *Tangible personal property.* This vests in the husband at the moment of the marriage, wherever the property may be. Reduction to possession is not necessary. This rule does not include property held in trust or under any fiduciary relation, though he may in some instances perform trusts in his wife's behalf, — as, for example, he may act as administrator where she is entitled to be administratrix. Where the husband acts in this manner and wastes the trust estate, he is technically guilty of a "devastavit," and her separate estate will be liable, since it is said to be an "act of folly on her part to marry a man who would waste trust property." The legatees will be held to diligence in pursuing their remedy against her.[2] He also is liable for breach of trust committed by her whether before or after marriage.[3] While they both live, they may be sued jointly for waste committed by her, and his estate may thus be made chargeable as well as hers.[4] If he die first, his assets will continue chargeable in equity.[5]

Subsection II. *Statutory changes.* — An important preliminary remark is, that the statutes regulating this subject cannot constitutionally interfere with vested rights. Any interest that had been actually acquired by the husband by force of the marriage would still remain vested in him.[6] The rules of the statutes could be applied to property of the wife acquired after the statutes took effect,[7] without reference to the question whether the parties were or were not married before their enactment. The right of the husband to take the wife's estate is not an incident of the marriage contract, but is derived from a rule of law; and this rule can at any time be abrogated by the legislature if there be no interference with vested rights. The legislation upon this topic is very extensive and radical, both in England and in a number of the States in this country. The details must be sought in treatises upon this subject. The general result may be indicated in the fol-

[1] Moody *v.* Matthews, 7 Ves. 174, 183; Wildman *v.* Wildman, 9 Ves. 174, 177; *In re* Bellamy, L. R. 25 Ch. D. 620.

[2] Adair *v.* Shaw, 1 Sch. & Lef. 243; Clough *v.* Bond, 3 M. & C. 490, 497; Bunce *v.* Vander Grift, 8 Paige, 37.

[3] Bunce *v.* Vander Grift, *supra.*

[4] Bunce *v.* Vander Grift, *supra*, and cases cited.

[5] Id.

[6] Westervelt *v.* Gregg, 12 N. Y. 202; Norris *v.* Beyea, 13 N. Y. 273.

[7] Thurber *v.* Townsend, 22 N. Y. 517.

lowing propositions, observing the same order used in treating of the rules of the common law.

(1) The husband, where this legislation prevails, has no longer an estate for life in the wife's estate in lands held in fee. He cannot take to his own use the rents and profits while he lives. He is, however, according to the New York authorities, tenant by the curtesy after the wife's death, as at common law, unless she conveys her property or disposes of it by will in a manner inconsistent with his claim.[1] (*a*)

(2) Similar rules apply to the wife's life estate in land. He would have no interest in it, nor in her estate for the life of another, except that if she died owner and without a will he might take it as her successor.

(3) This general legislation, emancipating the wife's property from the husband's ownership and control, does not affect an estate "by the entirety." It still remains true that there is a theoretical unity between the husband and wife sufficient to sustain this estate. Accordingly, it remains as at common law.[2] (*b*)

(4), (5), and (6). The wife's rights of action, chattels real, and personal property may be grouped together for the purposes now under consideration. In each the wife is owner, without any right of control on the husband's part, and may sell or bequeath them. If she die owner, and without a will, the husband becomes administrator, and, after the payment of her debts, retains the residue for his own benefit, except so far as there may be special legislation to the contrary. It was not the object of the statutes to disturb the course of succession to the wife's property,[3] but rather to give her the absolute control over it, if she saw fit to exercise it.

This subject has had much attention in the New York courts, for it was urged against the husband's right that his title at common law depended upon his being administrator upon his wife's estate, and that as the statute requiring him to take out letters of administration upon her estate had been repealed, his

[1] Hatfield *v.* Sneden, 54 N. Y. 280.

[2] Bertles *v.* Nunan, 92 N. Y. 152. In this case the subject of the continuance of the doctrine of the unity of husband and wife, notwithstanding legislative action, is considered, pp. 159, 160; Bram *v.* Bram, 34 Hun, 487; Zorntlein *v.* Bram, 100 N. Y. 12.

[3] McCosker *v.* Golden, 1 Bradf. 64; Lush *v.* Alburtis, Id. 456; Ransom *v.* Nichols, 22 N. Y. 110.

(*a*) In England, notwithstanding the Married Women's Property Act of 1882, a husband is still entitled on his wife's death to an estate by the curtesy. Hope *v.* Hope [1892], Ch. 336.

(*b*) Stelz *v.* Shreck, 128 N. Y. 263; Miner *v.* Brown, 133 N. Y. 308; Hiles *v.* Fisher, 67 Hun, 229.

title to her personal assets by succession could no longer be maintained. The common-law rule has been examined already, and it has been shown that the husband's rights to his wife's personal estate by succession do not depend upon his being administrator, but upon a general rule of substantive law. The principal decisions to this effect will be found in a note.[1] The right of the husband to take the wife's estate by succession has been so far modified in New York[2] as to provide that if she leave surviving descendants, and the husband survive, he has the same distributive share in the wife's personal property as a widow has in her husband's personal estate.[3] (*b*)

SECTION II. *The duties or obligations which the husband assumes by the marriage.*

Subsection I. *To pay the wife's ante-nuptial debts.* — At *common law* this obligation arises from the rule that the legal existence of the wife is merged in that of the husband. The

[1] Ransom *v.* Nichols, *supra;* Ryder *v.* Hulse, 24 N. Y. 372; Olmsted *v.* Keyes, 85 N. Y. 593, 602; Robins *v.* McClure, 100 N. Y. 328. In this last case it was held that the fact that the husband was appointed executor, and qualified as such, did not affect his rights.

[2] Laws of 1867, ch. 782; 2 R. S. 98, § 79.

[3] The principal New York statutes affecting the right of a married woman to hold and dispose of property are: Laws of 1848, ch. 200; Laws of 1849, ch. 375; Laws of 1860, ch. 90; Laws of 1862, ch. 172. Capacity to make contracts is conferred by Laws of 1884, ch. 381, § 1 (*a*). There is a comprehensive and carefully drawn statute in England, 45 & 46 Vict. c. 75, 1882, making very radical changes in the legal rules previously governing the relation of husband and wife. This act will be referred to hereafter. As far as property is concerned, it declares that the wife shall hold as her own all real and personal property which belonged to her at the time of her marriage, and all acquired after marriage, including wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill. (§ 2.) The intervention of a trustee is not necessary to the acquisition of property. (§ 1.) She is allowed the same civil remedies against all persons, including her husband, for the protection and security of her property as a single woman, and in certain cases may cause criminal proceedings to be instituted against him for this purpose. (§ 12.) The husband may in like manner cause criminal proceedings to be instituted against the wife. (§ 16.) In these cases, each of the parties may give evidence against the other (consult amendment 47 & 48 Vict. c. 14, 1884). These statutes are called the "*Married Women's Property Acts* of 1882 & 1884."

(*a*) By Laws of 1892, ch. 594, amending Laws of 1884, ch. 381, a married woman may now contract with her husband as well as with third persons, except to alter or dissolve the marriage relation or to relieve the husband from liability to support her. For other statutes, see Laws of 1887, ch. 537, and Laws of 1890, ch. 51. By the latter act a married woman is given a right of action in her own name for injuries to property, person, or character, and for injuries arising out of the marital relation. The same act makes her liable for torts committed by her without the husband's coercion, and relieves him from liability for such torts. See also Code Civ. Pro. § 450, as amended by ch. 248, Laws of 1890.

(*b*) If she leave no descendants, the rule remains as at common law. Robins *v.* McClure, 100 N. Y. 328.

action must be brought against both and the judgment obtained against both.[1] This fixes the husband's liability, so that if the wife die after judgment and before execution, the husband will still be liable. He cannot set up the defence of infancy; if he could, there would be no mode of collecting the debt, as the wife cannot (at common law) be sued alone.[2] The action must be brought and carried forward to judgment while the wife lives, so that if she die during the progress of the action and before judgment, he is discharged *as husband*.[3] These rules are applied without reference to the question whether the husband receives property by his wife or not. They depend upon the theoretic unity of the parties. The husband may still be liable after the wife's death as *administrator* upon her estate, but then only as to assets received by him in that character.

The wife in all such cases is the true debtor. She may be sued alone after the husband's *death*.[4] A question has, however, been raised whether, after the husband's *bankruptcy*, property settled upon her to her sole and separate use can be taken by a creditor to pay her debt contracted before marriage. It is assumed in this inquiry that the husband is living. The solution of this question depends on the true theory of the liability of a married woman's "separate estate" for the payment of her debts. The old doctrine was that such an estate can only be made liable by an "appointment" on her part. Opinions diverge as to whether the mere creation of the debt before marriage can be treated as an *implied* appointment binding the estate after marriage. That is the view in the English cases, in which implications have been pressed very far.[5] The New York court held under a similar state of facts that the wife was not liable, since there was no sufficient evidence of intention on her part to charge the debt upon her separate estate.[6] The New York doctrine was cited recently to the English court of equity, but it was not followed.[7]

By *statute* it has been provided in New York that while the action for the wife's debts contracted before marriage is still to be brought against both husband and wife, yet that the judg-

[1] Mitchinson *v.* Hewson, 7 Term R. 344.

[2] Roach *v.* Quick, 9 Wend. 238.

[3] Williams *v.* Kent, 15 Wend. 360.

[4] Woodman *v.* Chapman, 1 Camp. 189.

[5] Chubb *v.* Stretch, L. R. 9 Eq. 555; s. c. 39 L. J. Ch. 329; Biscoe *v.* Kennedy, 1 Brown Ch. 17 n.

[6] Vanderheyden *v.* Mallory, 1 N. Y. 452. There are *dicta* in this case on the general subject of the wife's liability after her husband's death.

[7] Chubb *v.* Stretch, *supra*, pp. 558, 561. In this case there was some evidence that Mrs. Stretch settled the property on herself to her separate use to avoid her creditors; still, the bill did not seek to set aside the settlement as a fraud on creditors. See 39 L. J. Ch. 329. It was decided on general principles of law.

ment and execution only affect her separate estate, unless the husband has acquired her property, in which case he is liable to the extent of the assets received from her.[1] This legislation does not apply to debts of this class contracted before the statute, assuming that the parties were then married.[2] A similar statute exists in England.[3]

Subsection II. *Duty or obligation of support or maintenance.* — It is the legal duty of a husband to maintain his wife in accordance with her station. This duty grows out of the contract of marriage, which is deemed to be a continuing contract, from which recurring obligations spring. His obligation may also be referred to the fact of cohabitation when the parties live together. In this point of view, a man may become liable to support a woman who is not his wife. This is an instance of estoppel. This liability may be terminated by a discontinuance of cohabitation, while the duty to maintain a wife cannot be removed by any act of the husband.

The ordinary way in which a wife may make her husband liable is by incurring bills for necessaries with tradesmen and others, who may then sue the husband on the theory of an implied contract. This action may be resorted to for the purpose of *testing* the validity of a contested marriage, since the alleged husband's liability where there is no cohabitation or recognition depends on the question whether the parties are in fact married.[4]

The circumstances under which the liability of the husband may arise are various.

(1) *Where the parties cohabit.* Where a husband and wife live together, and he makes her a sufficient allowance for dress, etc., he is not in general liable for necessaries supplied to her without his knowledge.[5] (*a*) The question whether goods supplied in such a case are necessaries suitable to her "estate and

[1] Laws of 1853, ch. 576, Rev. St. (8th ed.) p. 2602.

[2] Berley *v.* Rampacher, 5 Duer, 183.

[3] 37 & 38 Vict. c. 50, and 45 & 46 Vict. c. 75, § 14. The rule is, however, extended to wrongs committed by her before marriage as well as to contracts made prior to that time. See Bell *v.* Stocker, L. R. 10 Q. B. D. 129 as to 37 & 38 Vict.

[4] Thelwall *v.* Yelverton, 14 Irish Com. Law R. 188. The object of the action in this instance was to determine the validity of the alleged marriage of Major Yelverton, the plaintiff having supplied the alleged wife with board, lodging, etc.

[5] Reneaux *v.* Teakle, 8 Exch. 680; Jolly *v.* Rees, 15 C. B. N. S. 628; Debenham *v.* Mellon, L. R. 5 Q. B. D. 394; on appeal, 6 App. Cases, 24.

(*a*) In several of the United States statutes have been passed making "family expenses" chargeable upon the property of both husband and wife. For these expenses they may be sued either jointly or severally. See Revised Code of Iowa, § 2214; Rev. Statutes of Illinois, ch. 68, § 15. See Illingworth *v.* Burley, 33 Ill. App. 394; Laws of Oregon (Hill), § 2874.

degree" depends partly on the rate at which he lives and allows her to live, and partly on the supply of similar articles which she may have had on hand when ordering the goods in question.[1] There are two quite distinct classes of questions: one, whether he would be liable by a mere rule of law without any assent on his part, or even against his assent; the other, whether if he assented by approving of her purchases, or if he had had knowledge of them and did not dissent, he would be liable without reference to the point whether the goods purchased were in fact necessaries. In reading the decisions great care must be taken to keep this distinction steadily in view.

Attending to the first question at the outset, it is a settled rule that if a tradesman supply a wife clandestinely with such articles as jewelry *unnecessary* for her station in life, and there is *no* evidence of the husband's assent, he is not liable.[2] In any event the tradesman cannot sue in an action *in a court of law* for money lent wherewith to buy necessaries. She has no *implied* authority to borrow money on the husband's credit.[3] (*a*) Still, a money-lender would have a remedy in a court of equity for such part of the borrowed money as she actually applied to the purchase of necessaries. The lender in such a case is allowed in equity to stand in the same position as the tradesman, and to recover under the same circumstances as he could recover in case he had sold the goods to her on credit.[4]

As to the second inquiry, it is clear that it is a mere question of fact. A husband may by assent impliedly authorize a wife to purchase goods for her use, even though of a highly extravagant kind, which she would have no authority to purchase as necessaries against his consent.[5]

It is a further rule, when goods are necessaries, that the credit must be given to the husband. If it be given to the wife, *to the exclusion of the husband's liability*, the tradesman cannot recover from the husband.[6] The facts of the case must be plain, or the husband will not be relieved on this ground.[7]

The term "*necessaries*" is to some extent of fluctuating meaning, and depends largely on the circumstances of each case. What

[1] Morgan *v.* Chetwynd, 4 F. & F. 451; Cockburn, Ch. J.

[2] Montague *v.* Benedict, 3 B. & C. 631; s. c. Montague *v.* Baron, 5 D. & R. 532.

[3] Knox *v.* Bushell, 3 C. B. N. S. 334; Paule *v.* Goding, 2 F. & F. 585.

[4] Jenner *v.* Morris, 3 De G. F. & J. 45; s. c. 7 Jur. N. S. 375; Deare *v.* Soutten, L. R. 9 Eq. 151.

[5] Waithman *v.* Wakefield, 1 Camp. 120; Reid *v.* Teakle, 13 C. B. 627.

[6] Bentley *v.* Griffin, 5 Taunt. 356.

[7] Jewsbury *v.* Newbold, 26 L. J. Exch. 247.

(*a*) Anderson *v.* Cullen, 16 Daly, 15.

may be "necessaries" under one state of facts will not be under another. Suitable food, clothing, shelter, and medical attendance would be or ought to be deemed necessaries for all. Furniture has been regarded as falling under this head.[1] In certain cases, costs and expenses of legal proceedings might be included, as where he had committed or threatened to commit acts of personal violence upon her, and she had resorted to legal proceedings for her protection against such wrongful acts or threats.[2] The English cases hold that if the wife has reasonable grounds, in order to protect herself from injuries, to apply for a limited divorce, the husband will be liable for the necessary expenses in an action on an implied contract.[3] (*a*) This rule would not include proceedings to punish the husband, for these could not be placed under the head of "necessaries."

A question has been raised in England as to whether the husband is bound to pay one who, on his refusal, pays the funeral expenses of his deceased wife. It was decided that he is under a legal duty to provide for her suitable interment, and upon his neglect of it a third person may pay the expenses and collect them from the husband by action, on the theory of an implied contract.[4]

It is no defence to an action for necessaries that the husband is a lunatic. The authority of a wife to pledge the husband's credit is substantially the same, whether the husband be a lunatic or not.[5]

(2) *Desertion by the husband.* Desertion by the husband does not relieve him from liability. If she be unprovided for, a party may supply her with necessaries, or even with money, if she apply it to her support. The husband will be liable *in equity* in the latter case.[6]

(3) *Expulsion of the wife from the husband's home.* Where the wife is without fault and the husband compels her to leave him, she carries with her an agency to obtain necessaries. This is a

[1] Hunt *v.* De Blaquiere, 5 Bing. 550.

[2] Williams *v.* Fowler, M'C. & Y. 269; Turner *v.* Rookes, 10 A. & E. 47; Shepherd *v.* Mackoul, 3 Camp. 326.

[3] Brown *v.* Ackroyd, 5 E. & B. 819; Wilson *v.* Ford, L. R. 3 Exch. 63; Stocken *v.* Patrick, 29 L. T. N. S. 507.

[4] Ambrose *v.* Kerrison, 10 C. B. 776; Bradshaw *v.* Beard, 12 C. B. N. S. 344.

[5] Read *v.* Legard, 6 Exch. 636; Richardson *v.* Dubois, 18 W. R. 62.

[6] Deare *v.* Soutten, 21 L. T. N. S. 523.

(*a*) The authorities in the different States as to the liability of the husband in an independent action at law for the expenses of divorce proceedings are not in harmony. That he is liable, see Gassett *v.* Patten, 23 Kan. 340; Sprayberry *v.* Merk, 30 Ga. 81; McCurley *v.* Stockbridge, 62 Md. 422; Porter *v.* Briggs, 38 Iowa, 166. *Contra*, Kincheloe *v.* Merriman, 54 Ark. 557; Clarke *v.* Burke, 65 Wis. 359; Cooke *v.* Newell, 40 Conn. 596; Ray *v.* Adden, 50 N. H. 82; Dow *v.* Eyster, 79 Ill. 254. See Bishop on Marriage, Divorce, and Separation, Vol. II. § 974.

presumption of law incapable of being rebutted.[1] She has an authority of necessity to pledge his credit for goods supplied to her.[2] The rule will not be affected by any warning to tradesmen not to trust her, whether by general advertisement in the newspapers or particular notice to individuals.[3] It is impossible for him to rid himself of his marital responsibility by violating his duty towards her. Ill treatment of the wife will lead to the same result. Should he so treat her that it would be no longer safe for her to remain in his house, she will be justified in leaving it, and will then carry with her a power to incur on his credit bills for her support according to his condition.[4] Such conduct is equivalent to turning her out of his house, and she has remedies similar to those which she would have in that case.[5]

It was at one time held that she would not be justified in leaving even though the husband brought a mistress into the house.[6] This absurd proposition has since been practically overruled.[7]

(4) *Where the wife leaves her husband against his consent and without cause.* If a wife, though virtuous, leave her husband against his consent, and without sufficient cause, his liability for her support is suspended during her absence ;[8] but if she offer to return and he refuse to receive her, his liability revives from the time of his refusal. This rule is applied without reference to the time of absence. In one case the wife was absent twelve years, under aggravating circumstances. She then unexpectedly offered to return. He, having declined to receive her, was held liable for her support.[9]

(5) *Effect of the adultery of the wife.* This inquiry is made without reference to a divorce. The mere fact that a wife is an adulteress does not relieve the husband from liability. If he leave her in his house, he will be liable unless the tradesmen know the circumstances under which she is living.[10] So if he cohabit with her, knowing her misconduct. In such a case he cannot turn her away for the same cause, since there would be a condonation of the offence. But if she leave his house with an adulterer, he is not bound to receive her again ; and under such circumstances she would have no implied power to pledge his

[1] Harrison *v.* Grady, 12 Jur. N. S. 140.
[2] Johnston *v.* Sumner, 3 H. & N. 261.
[3] Harris *v.* Morris, 4 Esp. 41.
[4] Emery *v.* Emery, 1 Y. & J. 501.
[5] Baker *v.* Sampson, 14 C. B. N. S. 383.
[6] Horwood *v.* Heffer, 3 Taunt. 421.
[7] Houliston *v.* Smyth, 3 Bing. 127 ; Sykes *v.* Halstead, 1 Sand. 483 ; Pomeroy *v.* Wells, 8 Paige, 406.
[8] Blowers *v.* Sturtevant, 4 Den. 46 ; M'Cutchen *v.* M'Gahay, 11 Johns. 281.
[9] M'Gahay *v.* Williams, 12 Johns. 293. This rule would be modified now by a divorce on the ground of desertion, which could not be obtained at the time of this decision.
[10] Norton *v.* Fazan, 1 B. & P. 226.

credit with tradesmen. They would be regarded as having legal notice by reason of her separation from him of the grounds of her absence. Actual notice would not be necessary.[1] It has been decided that in such a case the adultery may be proved by the testimony of the wife.[2]

(6) *Separation by mutual consent and without divorce.* This proposition includes the case where the husband and wife, being unable to agree or to live together, enter into an agreement to live apart, and carry the agreement into practical effect by separating. It is usual in such a case to make definite provision for the wife's support. The nature and manner of entering into such an agreement will be noticed hereafter. The general rule is that if it be faithfully kept by the husband, the wife's implied authority to bind him for necessaries is suspended during its continuance. Here, too, tradesmen are legally bound to know the reasons why the parties live apart, and actual notice to them is immaterial.[3] If no means are provided for the wife, and she cannot maintain herself, it may properly be inferred that the husband intended to allow her to pledge his credit.[4] If an allowance is made by mutual stipulations, she cannot pledge his credit on the plea that it is inadequate to her wants. Her agreement will stand in the way of any such claim.[5] If, however, the stipulated allowance is not paid, her authority to bind him will revive, to be suspended again on the resumption of the payment.[6] (*a*)

The question remains whether there is any other mode whereby the wife may obtain support except by pledging the husband's credit (actions for divorce not being referred to in this inquiry). It has been decided in New York that the superintendents of the poor cannot apply to the criminal court (Court of Sessions) for a summary remedy which may be resorted to in cases where parents or children do not support their relatives, since the wife is not a relative in the sense of the poor law.[7] The regular remedy is to pledge the husband's credit. An action in equity will not lie to enforce the husband's liability except in aid of the regular action where judgment has been obtained and not collected.[8] Where, however, the husband absconds from his wife, leaving her chargeable on the public for support, his prop-

[1] Cooper *v.* Lloyd, 6 C. B. N. S. 519.

[2] Id.

[3] Mizen *v.* Pick, 3 M. & W. 481.

[4] Ross *v.* Ross, 69 Ill. 569; Emmet *v.* Norton, 8 C. & P. 506.

[5] Biffin *v.* Bignell, 7 H. & N. 877; Willson *v.* Smyth, 1 B. & Ad. 801.

[6] Hunt *v.* De Blaquiere, 5 Bing. 550.

[7] Pomeroy *v.* Wells, 8 Paige, 406.

[8] Griffin *v.* Griffin, 47 N. Y. 134; Erkenbrach *v.* Erkenbrach, 96 N. Y. 456.

(*a*) McKinney *v.* Guhman, 38 Mo. App. 344.

erty may be seized and appropriated to her maintenance.[1] Statutory provisions sometimes give summary proceedings in such cases and inflict penalties.[2]

Subsection III. *Liability for the wife's torts or wrongs.* — There are two cases falling under this head: one is where the wrong is committed before marriage, and the other after marriage.

I. *Where the wife commits an actionable wrong before marriage.* In this case the husband is liable on substantially the same principle as that which makes him responsible for the performance of her contracts. They must be united as defendants in the action; judgment will be obtained against both by name. If the judgment is regularly enforced by imprisonment, he must endure it, for the court will not leave her in prison alone. If the tort be personal, such as an assault and battery, libel or slander, the action must, to bind him, be brought and judgment recovered while both live. Should he survive her, he will not be liable as her administrator, for such a cause of action dies with the person, though she would be liable if she survived him.[3]

II. *A wrong committed by the wife after marriage.* There are two instances under this head. (*A*) Where the wrong was committed by the husband's order and in his presence. In this case it is his wrong, and he alone is liable. He could be sued for it after her death.[4] (*B*) Where the act is not committed in his presence and by his direction, the wrong is hers, and he may be sued for it, but in this case with the wife as a co-defendant.[5] In order to make him personally liable, judgment must be obtained during the wife's life. She will remain liable for the wrong as the author of it after his death. (*a*)

Since the wife has become by modern statutes the owner and manager of her separate estate, new questions have arisen as to

[1] See N. Y. Code Crim. Pro. § 921.

[2] See, in England, 5 Geo. IV. c. 83, § 3; 31 & 32 Vict. c. 122, § 33. In New York a husband who actually abandons his wife without adequate support, or leaves her in danger of becoming a burden upon the public, is declared to be a "disorderly person," and is brought under the supervision of magistrates. Code of Crim. Pro. § 899.

[3] The general rule has not been abolished in New York. Fitzgerald *v.* Quann, 109 N. Y. 441.

[4] Cassin *v.* Delany, 38 N. Y. 178.

[5] Fitzgerald *v.* Quann, 109 N. Y. 441; Mangam *v.* Peck, 111 N. Y. 401. The rule was applied in this last case to fraud on the wife's part.

(*a*) This rule is now changed in New York by statute. See Laws of 1890, ch. 51, § 2. "A husband shall not be liable in damages for his wife's wrongful or tortious acts, nor for injuries to person, property, or the marital relation, caused by the acts of his wife, unless the said acts were done by actual coercion or instigation of the husband; and such coercion or instigation must be proved in the same manner as any other fact is required to be proved; but in all cases embraced in this section the wife shall be personally liable for her wrongful or tortious acts." See also Code of Civ. Pro. § 450, as amended by Laws of 1890, ch. 248.

her liability for injuries committed in the course of its management. Thus it has been held in New York that as the husband has no longer any interest in his wife's land, she will be liable *alone* for the trespasses of her cattle straying from her land, and doing damage to the property of others.[1] (*a*)

Leaving out of view such special questions as these, it still appears to be true that the husband is liable with the wife, or alone, as the case may be, for all her personal torts, notwithstanding recent legislation. (*b*) That has not yet gone so far as to destroy the legal unity of husband and wife.[2] Accordingly, a married woman cannot bring an action against her husband for an injury to her person and character, although she now may do so in her own name for any such injury by a third person, nor can she be sued for such a cause of action without making him a co-defendant.[3] (*c*)

Subsection IV. *Liability for the wife's crimes.* — A distinction is taken between crimes of the higher grade, such as treason, murder, and robbery, and those of an inferior rank. When a wife commits an offence of the first class, she is liable to conviction, and cannot shield herself by the plea that she obeyed the command of her husband. In the other class of cases the prevailing rule is that if the offence is committed in the presence of her husband she is presumed to be under coercion, and consequently not responsible. This, however, is only a presumption, and it may be repelled by evidence that the husband did not command the commission of the offence. Under such circumstances, she alone will be liable.[4] (*d*)

SECTION III. *The capacity of the wife to make contracts.*

Subsection I. *At common law.* — It is a general rule of the common law that a wife cannot bind herself by contract. Thus the promissory note (independent of statute) made by a married woman is absolutely void.[5] The first statutes in New York

[1] Rowe *v.* Smith, 45 N. Y. 230.

[2] See remarks of the court in Bertles *v.* Nunan, 92 N. Y. 159, 160.

[3] Fitzgerald *v.* Quann, 33 Hun, 652; affirmed in 109 N. Y. 441. This decision was placed upon the ground that statutes in derogation of the common law are to be construed strictly, and they were not sufficiently clear to show an intention to abrogate the common-law rule. But see Martin *v.* Robson, 65 Ill. 129, *contra*. In England the husband is not liable for the wife's torts committed after marriage. 45 & 46 Vict. c. 75.

[4] Under the Penal Code of New York, § 24, "it is not a defence to a married woman charged with crime that the alleged criminal act was committed by her in the presence of her husband."

[5] Yale *v.* Dederer, 18 N. Y. 265.

(*a*) Quilty *v.* Battie, 135 N. Y. 201.

(*b*) See, however, as to the present law in New York, *ante*, p. 205, note (*a*).

(*c*) See in New York, Laws of 1890, ch. 51, § 2.

(*d*) United States *v.* Terry, 42 Fed. R. 317.

enlarging the wife's capacity to act did not give her power to make contracts. She only came within the purview of those acts when she had a separate estate.[1] Without that, she was left in the same position as at common law. Later statutes have been more liberal.[2] (*a*)

The disability to contract is not, says LORD HARDWICKE, for want of judgment, but because she is under the power of her husband.[3] To this general rule of incapacity there are several exceptions, a number of which have been long rooted in the law.

Exception I. A wife may acquire real estate by purchase, but cannot hold it against her husband's consent. At his death she has the capacity to disagree to such a purchase or to affirm it.

Exception II. At a very early period she was able to convey her real estate by a fictitious proceeding of a judicial nature, termed a "fine." An action was assumed to be brought by an intending purchaser which, *in form*, included as defendants both the husband and wife. In this proceeding it was claimed that the land belonged to the plaintiff (the purchaser). The husband and wife appeared in court and had an admission entered on the records that the land did not belong to them, and that the plaintiff was the owner. This fact, by a technical doctrine (estoppel), precluded them from claiming the estate in opposition to the record in court.[4] The practical result was that the purchaser became the owner. Safeguards were adopted as early as the reign of Edward I. to prevent the wife from being misled. A private examination was required by the court, apart from the husband, to ascertain whether she acted of her own free will. This rule was in time relaxed, so that the wife could appear before commissioners out of court instead of in court, and her statement could be certified by them to the court.

The method of conveying the estates of married women by "fine" did not exist in practice in the colony of New York before the Revolution. This fact led to much doubt and controversy as to the validity of conveyances made by married women. A statute was passed by the colonial legislature, in

[1] Ballin *v.* Dillaye, 37 N. Y. 35.

[2] Laws of 1884, ch. 381. There was no general capacity to contract until that act. Linderman *v.* Farquharson, 101 N. Y. 434.

[3] Hearle *v.* Greenbank, 1 Ves. Sr. 298, 305.

[4] This was by no means the only effect of a fine. The subject is well and tersely explained in note 171, Butler's Ed. to Coke upon Littleton. See also 5 Cruise's Digest, tit. 35, ch. 5.

(*a*) See also Laws of 1887, ch. 537; Laws 1892, ch. 594.

1771, confirming in favor of purchasers in good faith titles previously made without the wife's acknowledgment before a commissioner such as that required in England by the law of fines.[1] The act of 1771 was affirmed in the State Constitution of 1777.

The act of 1771, above referred to, not only cured defects, if any, in prior conveyances, but established a rule for the future. It then became necessary that a married woman, in executing a conveyance, should comply with that rule in the English law of fines, which required a private examination apart from her husband. It was required, if she were a resident of the State, that she should appear before designated officers, or magistrates authorized to take her acknowledgment, and to acknowledge privately, and separate and apart from her husband, that she executed the conveyance freely and without fear of or compulsion by her husband. This acknowledgment was not required if she were a non-resident of the State. In that case she could convey as if she were a single woman. The same rule was applied where she did not act in her own right, but under a power conferred upon her by another, except that if the instrument granting her the power required her to execute it by *deed*, it must be acknowledged; for it is only by the prescribed form of acknowledgment that a married woman can execute a "deed."[2] When the acknowledgment already referred to is required by law, a deed executed without it is void as to the wife.[3] This defect could not be healed by a subsequent acknowledgment, for this would only cause the instrument to take effect from the time of the acknowledgment. If in the mean time a regular conveyance had been made to another, the title of the latter would prevail. The rule cannot be evaded by antedating the deed as though it were executed before marriage, and by executing it in the wife's maiden name.[4] If a married woman be a minor, a compliance with the statute of acknowledgments will not make her conveyance valid. Her infancy is a separate and independent ground of invalidity.[5]

The fact of private acknowledgment can only be proved by an official certificate. A material defect in the certificate cannot

[1] Ch. 1484, Feb. 16, 1771; amended, ch. 1609, March 8, 1773. Constantine *v.* Van Winkle, 6 Hill, 177 (reversing 2 Hill, 240); Van Winkle *v.* Constantine, 10 N. Y. 422. In these cases the Colonial history of this subject is thoroughly sifted, and satisfactory results are reached. See also Meriam *v.* Harsen, 2 Barb. Ch. 232.

[2] Jackson *v.* Edwards, 7 Paige, 386, 402; on appeal, 22 Wend. 498.

[3] Jackson *v.* Stevens, 16 Johns. 110; Jackson *v.* Cairns, 20 Johns. 301; Gillet *v.* Stanley, 1 Hill, 121.

[4] Galliano *v.* Lane, 2 Sandf. Ch. 147.

[5] Bool *v.* Mix, 17 Wend. 119; Sandford *v.* McLean, 3 Paige, 117; Sherman *v.* Garfield, 1 Den. 329.

be supplied by external evidence.[1] The rule required an *agreement* to convey to be acknowledged as well as the conveyance itself.[2]

The law of New York did not require the husband to unite with his wife in a conveyance, so as to make it valid as to her.[3] So stood the law in New York until the year 1848. In that year the rule underwent a radical change, applicable to future conveyances. It was provided in substance that a married woman might acquire and convey real estate as if she were a single woman, and it was further provided that it should not in any way be subject to the disposal of her husband. The effect of this legislation was deemed to be that a private acknowledgment was no longer necessary to the conveyance of a wife's estate.[4] The act, however, did not extend to a release of a married woman's inchoate right of dower, and as to that a private acknowledgment remained necessary.

The whole subject of private acknowledgments is swept away in New York by more recent legislation, all statutes requiring it being repealed;[5] in fact, it has practically disappeared from American law. It has also been abrogated in England by the "Married Women's Property Act of 1882" (45 & 46 Vict. c. 75).[6]

It is a settled rule that one of the parties to a marriage cannot, by common law, convey to the other. This is a technical rule growing out of the legal unity of husband and wife. It is modified in a court of equity where the conveyance is made for a valuable consideration. The consideration converts the grantor into a trustee for the grantee.

The practical result in such a case is that though there is no true transfer of title, a trust is fastened upon the property which a court of equity will protect and enforce. Leaving this special case out of view, and supposing the transaction to be in substance a voluntary conveyance or a mere gift, it will be void both in law and in equity, since no trust can be raised for want of a

[1] Elwood *v.* Klock, 13 Barb. 50. In England a certificate of acknowledgment, made twenty years after the wife made the acknowledgment, has been upheld. *In re* Chalker, 47 L. J. C. P. Div. 378.

[2] Knowles *v.* McCamby, 10 Paige, 342.

[3] Firemen's Ins. Co. *v.* Bay, 4 Barb. 407; on appeal, *sub. nom.* Albany Fire Ins. Co. *v.* Bay, 4 N. Y. 9.

[4] Blood *v.* Humphrey, 17 Barb. 660; Andrews *v.* Shaffer, 12 How. Pr. 441; Yale *v.* Dederer, 18 N. Y. 265, 271; Wiles *v.* Peck, 26 N. Y. 42, 46, 47.

[5] Laws of 1879, ch. 249, as amended by Laws of 1880, ch. 300.

[6] This statute was applied by the court to a settlement made under the prior statute of 40 & 41 Vict. c. 18, § 50 (1877), though in that act a private examination was required. Riddell *v.* Errington, L. R. 26 Ch. D. 220; but in the later case of Harris' Settled Estates, it was determined that the new rule was only applicable to property acquired after the act of 1882 went into effect. L. R. 28 Ch. D. 171, 174.

pecuniary consideration.[1] A valid transfer may be made by a conveyance by one of the parties to a third person, who may, in turn, convey to the other party to the marriage.[2] In conveying to the third person, the object of the conveyance may be stated in the instrument.[3] In New York, since June 6, 1887, a conveyance may be made directly to the husband or wife by the other party, without the intervention of a third person.[4] This act is in express terms made prospective.

A word may be added as to the effect of a married woman's conveyance, in case she has no interest in the land at the time of the conveyance, but subsequently becomes owner. There is a marked contrast in this respect between a conveyance by a woman when single and when married. If she were single, and had made a covenant of warranty, the subsequently acquired land would have passed to the grantee by force of the covenant. Being married, her deed will operate, notwithstanding the covenant, only as a transfer of what she owned at the time.[5] The reason of this is, that the covenant operates as a contract; but a married woman cannot make a contract. It would seem, accordingly, that wherever the law gives a married woman capacity to contract, she may, by means of a covenant of warranty, transfer her subsequently acquired possessions; in other words, she may covenant with the same effect, as if she were a single woman.

Exception III. Another exception to the incapacity of the wife to contract exists, according to some authorities, where she is a resident in a particular country, and her husband is a non-resident alien, in the sense of having never resided there.[6] Later cases in England have thrown doubt upon this doctrine. It now appears to be decided there that it is not enough that the husband is a non-resident alien. He must also be civilly dead.[7]

The American cases are more liberal. Some maintain that if a husband abandons his wife, and she supports herself by her labor, she has a common-law capacity to contract.[8] But the

[1] White *v.* Wager, 25 N. Y. 328; Winans *v.* Peebles, 32 N. Y. 423. It was held, however, in Hunt *v.* Johnson, 44 N. Y. 27, that a deed of gift from a husband to a wife would be sustained in equity on account of his duty to support her, which would be a consideration.

[2] Jackson *v.* Stevens, 16 Johns. 110; Dempsey *v.* Tylee, 3 Duer, 73; Meriam *v.* Harsen, 2 Barb. Ch. 232.

[3] Lynch *v.* Livingston, 6 N. Y. 422.

[4] Laws of 1887, ch. 537.

[5] Jackson *v.* Vanderheyden, 17 Johns. 167; Teal *v.* Woodworth, 3 Paige, 470; Carpenter *v.* Schermerhorn, 2 Barb. Ch. 314.

[6] M'Arthur *v.* Bloom, 2 Duer, 151; Kay *v.* de Pienne, 3 Camp. 123; Walford *v.* de Pienne, 2 Esp. 554.

[7] Barden Keverberg, 2 M. & W. 61; Boggett *v.* Frier, 11 East, 301; De Wahl *v.* Braune, 1 H. & N. 178.

[8] Abbot *v.* Bayley, 6 Pick. 89; Gregory *v.* Pierce, 4 Met. 478.

elopement of the wife gives her no right to make contracts. Nor does the fact that they live apart under articles of separation. They still remain husband and wife. LORD MANSFIELD attempted to introduce into the law a more lax doctrine in the case of separation,[1] but his views have not been followed.[2] So the judicial separation of the parties does not restore to the wife her capacity to contract.

Subsection II. *Special statutory rules.* — There have grown up from time to time in New York special statutory exceptions since 1849, which may be enumerated as showing the steady progress of legislation in removing the incapacity of married women to perform valid legal acts.

(1) By the Laws of 1850, ch. 91, she may deposit money in a savings bank, and may receive payments upon the deposits. (*a*)

(2) She may take and hold a life insurance policy upon her husband's life. The amount of the insurance money may be made payable to her in case she survives, and if she does not survive her husband, to her children. The premium may be paid by the husband, but should not exceed five hundred dollars per annum, since all in excess of that sum will create a trust for the husband's creditors.[3] (*b*) If the statutes be followed, such a policy cannot be reached by the husband's creditors.[4]

The husband, in taking out such a policy, acts as the agent of those for whom it is taken, and they acquire a vested interest in it as soon as it is delivered to him, even though they have no knowledge that the insurance has been taken out.[5] He would

[1] Corbett *v.* Poelnitz, 1 Durn. & East, (Term R.) 5.

[2] Beach *v.* Beach, 2 Hill, 260.

[3] The laws upon this subject are: Laws of 1840, ch. 80; 1858, ch. 187; 1862, ch. 70; 1866, ch. 656; 1870, ch. 277; 1873, ch. 821; 1879, ch. 248.

[4] Bloomingdale *v.* Lisberger, 24 Hun, 355.

[5] Whitehead *v.* N. Y. Life Ins. Co., 102 N. Y. 143; Baker *v.* Union Mut. Life Ins. Co., 43 N. Y. 283.

(*a*) This statute was re-enacted in substance by the same act that repealed it. See Laws of 1875, ch. 371. This act was in turn repealed by ch. 402, § 1, par. 33, of the Laws of 1882, and re-enacted by ch. 409, Laws of 1882. The provision seems to have been omitted from the Banking Law of 1892, ch. 689, Laws of 1892. (See Art. III. § 114.)

(*b*) An action is maintainable in equity by a judgment creditor, during the life of the policy, to adjudge and declare a lien upon the policy in his favor, where the amount of premiums paid by the husband is in excess of $500 per annum. In such an action the husband and wife may be restrained from transferring the policy, except in subordination to the lien of the creditor. A like judgment may be rendered as to the future contingent interests of children. Stokes *v.* Amerman, 121 N. Y. 337. See also Masten *v.* Amerman, 20 Abb. N. C. 443. As to following partnership funds fraudulently used by one partner for the payment of premiums on policies for his wife's benefit, see Holmes *v.* Gilman, 138 N. Y. 369; Shaler *v.* Trowbridge, 28 N. J. Eq. 595.

have no power to surrender the policy, since his agency would not extend so far. (*a*) Before the statute, it was quite doubtful whether the wife and children had an insurable interest in the life of the husband and father.[1]

A policy would, in its nature, be assignable by those having an interest in it. The early acts by implication took away the power of assignment. The policy was deemed inalienable on grounds of public policy.[2] (*b*) A policy, in its terms made payable to a wife without naming the children, would, if the husband survived, belong to him as survivor.[3] This would be true on the common-law ground of the husband's title to a wife's chattels in case of his survivorship. The later statutes provide for an assignment with the husband's written consent, and also for a surrender.[4]

Assuming that the policy is inalienable, and that an attempt of the wife to transfer it will have no legal effect upon her right, still her creditors could not claim that the assignment made in the lifetime of her husband was fraudulent as to them.[5] The rule of inalienability has been held to apply, whether the premiums were paid by the husband, wife, or third person.[6] Since the statute of 1879, the policy may be assigned with the husband's written consent as above stated. The act of joining in the assignment is a sufficient consent.[7] Such an assignment would be valid to the extent of the wife's interest, even though there were a clause in the policy making the insurance money payable to the children in case the wife did not survive the husband.[8] But if the prescribed event happened, the children's interest would not be affected, since their contingent right would have become vested.[9]

There are similar provisions in Massachusetts and in other States. Under the law of England, policies of life insurance may be issued in the name of a wife. The statute is more compre-

[1] Ruse *v.* Mut. Benefit Life Ins. Co., 23 N. Y. 516; but see remarks of ANDREWS, J., in Brummer *v.* Cohn, 86 N. Y. 11.

[2] Wilson *v.* Lawrence, 76 N. Y. 585; Eadie *v.* Slimmon, 26 N. Y. 9; Barry *v.* Equitable Life Assurance Soc., 59 N. Y. 587; Brummer *v.* Cohn, 86 N. Y. 11.

[3] Olmsted *v.* Keyes, 85 N. Y. 593.

[4] Laws of 1873, ch. 821; Laws of 1879, ch. 248.

[5] Smillie *v.* Quinn, 90 N. Y. 492.

[6] Frank *v.* Mutual Life Ins. Co., 102 N. Y. 266.

[7] Anderson *v.* Goldsmith, 103 N. Y. 617.

[8] Id.

[9] *Dictum* in Fowler *v.* Butterby, 78 N. Y. 68.

(*a*) But such a surrender will prevent a recovery by the wife in an action on the policy, if she, or her husband as her agent, has failed to perform one of its essential conditions. Schneider *v.* U. S. Life Ins. Co., 123 N. Y. 109.

(*b*) Brick *v.* Campbell, 122 N. Y. 337.

hensive than those in New York, and permits a wife to take out a policy for the benefit of her husband and children, or any of them. There are provisions to prevent fraud upon creditors, and also for allowing the insured to appoint from time to time a trustee of the moneys payable under the policy, and when none is appointed, constituting the insured a trustee for the beneficiaries.[1]

(3) The right of a married woman to a patent for her own invention is conceded to her by statute, and she may perform all acts in relation to it as if she were sole and unmarried.[2]

(4) She has rights as a stockholder in a corporation and the capacity of voting as a stockholder upon all shares of stock belonging to her.[3]

(5) She has also a right to her earnings, including the profits of a business carried on on her separate account. The statutes give her a right to collect her earnings by action.[4] This rule does not allow her to claim compensation from her husband for services rendered in his family. (*a*) She cannot validly contract with her husband, as against his creditors, — *e. g.*, for services in attending upon and nursing his mother in sickness.[5]

(6) She has the general control of her separate estate, may bring actions or be sued concerning it, and become responsible for costs.

(7) She may carry on a trade or business, and make contracts respecting it as a single woman may do.[6] (*b*).

[1] 45 & 46 Vict. c. 75, § 11 (1882).
[2] New York, Laws of 1845, ch. 11.
[3] Laws of 1851, ch. 321.
[4] Laws of 1860, ch. 90; Laws of 1862, ch. 172.
[5] Coleman *v.* Burr, 93 N. Y. 17.
[6] Laws of 1860, ch. 90; 1862, ch. 172.

(*a*) Blaechinska *v.* Howard Mission, 130 N. Y. 497. The legislation in New York upon the subject of the rights of married women has not deprived the husband of the common-law right to avail himself of a profit or benefit from the services of the wife. Porter *v.* Dunn, 131 N. Y. 314.

(*b*) By ch. 90, Laws of 1860, and ch. 172, Laws of 1862, a married woman could maintain an action in her own name for damages to her person or character, the same as if she were sole. These provisions were, however, repealed by ch. 245, §§ 36, 38 of the Laws of 1880.

By § 450 of the Code of Civil Procedure, as amended in 1879, it was provided that, in an action or special proceeding, a married woman should appear, prosecute, or defend alone or joined with others as if single. It was decided under this section that a wife might maintain an action in her own name against one who had enticed away her husband, and deprived her of his society. Bennett *v.* Bennett, 116 N. Y. 584. See, however, as to actions to recover for personal injuries, Ball *v.* Burleson, 23 Abb. N. C. 332.

By ch. 248, Laws of 1890, amending § 450 of the Code, and ch. 51, Laws of 1890, the husband is no longer a necessary or proper party to an action or special proceeding to recover damages for an injury to the person, estate, or character of the wife.

A survey of these specified instances shows that they carry with them no *general* power to make contracts. That power was only allowed in special instances, and for well-defined purposes. The effect of them was summed up by the Court of Appeals, in 1882, as follows: A married woman cannot bind herself by contract, unless, *first*, the obligation was created by her in or about carrying on her trade or business; *second*, the contract relates to, or is made for, the benefit of her separate estate; or, *third*, the intention to charge her separate estate is expressed in the instrument or contract by which the liability is created; or, *fourth*, the debt was created for property purchased by her.[1]

A much more radical change in the law was produced in 1884.[2] This statute provides that a married woman may contract to the same extent, with like effect, and in the same form as if unmarried, and that she and her separate estate shall be liable whether the contract relates to her separate business or not. The act, however, has no application to any contract between husband and wife. (*a*).

Important questions have been presented as to the capacity of the wife to enter into certain contracts with her husband, notwithstanding the exception found in the act of 1884, just referred to. Prominent among these is the inquiry, whether the husband and wife can become partners *as between themselves.* It will scarcely be denied that they might by their acts make themselves liable to third persons, as if they were partners.[3] As to this point, the authorities are irreconcilable. They are referred to in the note.[4] (*b*)

It would seem, however, that a married woman can be an agent for her husband, and that, reciprocally, her husband can be an agent for her, and that each may be a general as well as

[1] Saratoga County Bank *v.* Pruyn, 90 N. Y. 250.

[2] Laws of 1884, ch. 381.

[3] See the reasoning of the court in Noel *v.* Kinney, 106 N. Y. 74, 80, 81.

[4] Bitter *v.* Rathman, 61 N. Y. 512; Noel *v.* Kinney, 106 N. Y. 74; s. c. 19 Abb. N. C. 239; Kaufman *v.* Schœffel, 37 Hun, 140; Graff *v.* Kinney, Id. 405.

(*a*) This act waa amended by Laws of 1892, ch. 594, and § 2 of the statute of 1884 exempting contracts between husband and wife from the operation of the act, was expressly repealed. The statute of 1892 practically provides that the wife may contract with her husband or any other person to the same extent, with like effect, and in the same form as if unmarried. See *ante*, p. 198, note (*a*).

(*b*) A later case in the Court of Appeals, Suau *v.* Caffe, 122 N. Y. 808, decided that under ch. 90, Laws of 1860, a wife cannot escape liability on the ground of coverture, where husband and wife assume to carry on business as partners, and contract debts in the course of such business.

See, however, Lowenstein *v.* Salinger, 42 N. Y. St. Rep. 414. All doubt upon the subject would seem to be removed by the amendment to Laws of 1884, ch. 381. See ch. 594, Laws of 1892.

a special agent for the other. The wife can dispose of her own interest in property owned by them jointly, and her husband's interest on the theory of agency; and the same line of remark applies to the husband. This would practically result in a partnership if they bought and sold merchandise with a view to sharing the profits. The doubt accordingly seems to be unfounded, and the husband and wife may be partners both between themselves and as to third persons.

A statute quite as sweeping and comprehensive was passed in England in 1882; 45 & 46 Vict. c. 75. This is a clearly drawn and well guarded act. It declares her contract to be binding on her "separate property," and includes in that expression all that she owns at the time or may subsequently acquire.

SECTION IV. *The view taken by courts of equity of the wife's "separate estate," and the relation to this of recent legislation.*

Courts of equity at an early day established two *trusts* in favor of married women which gave her a power of control over property which she did not possess without them. One was called the "trust for separate use," and the other, the "pin money" trust. By means of these she could hold property independently of her husband or dispose of it and manage it in direct contravention to the rules of the common law. It has been said that the court by this means clearly violated the rules of property as between husband and wife, but that the jurisdiction thus exercised accorded with popular feeling, and prevailed.[1] This doctrine was first established in favor of a wife who was living apart from her husband by a deed of separation, or in a case where he was a spendthrift.[2] At a later period the principle was extended to other cases.

A *Separate Use Trust* may be attached in equity to both real and personal property. It is of more importance to the wife in personal than in real estate, since in the former the title would vest absolutely in the husband if there were no trust, while in the latter he would have at most but a life estate.

The trust for "separate use" is not to be confounded with the wife's separate property, which is not placed under such a trust.

[1] Spence's Equity Jur., 596; Adams on Equity, 43.

[2] Sanky *v.* Golding, Cary's R. 124, 21st year of Queen Elizabeth; Fleshward *v.* Jackson, Tothill's Rep. 94. The case is short, and is here transcribed: "Money given to a *feme covert* for her maintenance. Because her husband is an unthrift, the husband pretends the money to be his; but the court ordered that the money should be *at her disposing.*" 21 Jac. I. Another case in the same volume is Georges *v.* Chancie, Id. p. 97. "A *feme covert being separated*, having an allowance of two hundred pounds, she improved it and disposed of it by her will." 15 Car. I. There is a number of cases in this volume, pp. 93–96, in which the wife sues without her husband, and in the name of a next friend, and sues the husband himself.

Thus if a wife should acquire land by descent, she would own it (subject to her husband's life estate), but there would be no trust. More than this, there might even be a trust estate vested in the wife, without being a trust for her "separate use." This latter trust is created by an agreement, or perhaps by a will, in which the intention is sufficiently disclosed. This leads to the inquiry, — how the "separate use" trust may be created. Some usual forms will now be stated.

(1) *By antenuptial settlement.* Such an agreement made before marriage and founded upon it, whether made by the proposed husband or some third person, is based upon a valuable consideration. The wife, acting in good faith, may hold the property as against the claims of the settlor's creditors, unless they have interests or liens in and upon the property itself.[1]

(2) *Postnuptial settlement.* Property may in like manner be settled upon the wife by the husband or others after marriage. The marriage in this case is not a valuable consideration, since it has already taken place. Some new and independent consideration is necessary to make it valid as to the creditors of the settlor. She might, for example, part with her own property on the faith of the settlement.[2]

An agreement to settle property, made in legal form, will in the view of the court be equivalent to an actual settlement. Such a transaction is a trust. If a conveyance be made in this way directly between the parties, though void in law, it will be upheld in equity.[3] (*a*)

A settlement made after marriage without pecuniary consideration is a mere gift. It is not binding upon existing creditors of the settlor,[4] but this rule has been in later years relaxed so far as to uphold it, in case the settlor retains sufficient property of intrinsic value to pay his creditors. It is, however, binding on the settlor himself, including the husband.[5] (*b*) It will be exempted

[1] Bradish *v.* Gibbs, 3 Johns. Ch. 523; Magniac *v.* Thompson, 7 Pet. 348. The principles on which an antenuptial settlement between persons of large means should be construed, were stated in Gorham *v.* Fillmore, 111 N. Y. 251.

[2] Livingston *v.* Livingston, 2 Johns. Ch. 537.

[3] Simmons *v.* McElwain, 26 Barb. 419; Garlick *v.* Strong, 3 Paige, 440.

[4] Reade *v.* Livingston, 3 Johns. Ch. 481.

[5] Martin *v.* Martin, 1 N. Y. 473.

(*a*) But see Shaffer *v.* Kugler, 107 Mo. 58. A husband may make a valid gift to his wife of his interest in a contract for the purchase of land. Fruhauf *v.* Bendheim, 127 N. Y. 587.

(*b*) A voluntary conveyance from a husband to his wife is valid as against subsequent creditors, unless made with intent to defraud them, or secretly, or with a view of embarking in some new or hazardous business. Neuberger *v.* Keim, 134 N. Y. 35.

from the claims of subsequent creditors, if made in good faith and with sufficient notoriety.

(3) *Settlement made with a view to separation.* Such a transaction will be upheld if made with a view to *immediate* separation. There has been much diversity of opinion upon this point, though the rule now seems to be fully settled.[1] (*a*) Courts of equity will grant the usual remedies resorted to for the enforcement of contracts in this class of cases, — *e. g.*, specific performance, injunction, etc. It is, however, essential that a separation should in fact take place, and be intended to take place, otherwise the instrument will be void.[2] The effect of the instrument is next to be noticed.

A wife living apart from a husband under a deed of separation is no longer subject to his authority.[3] The deed will not be invalidated by the subsequent adultery of the wife, unless she had induced her husband to execute it in contemplation of illicit intercourse, which would be a species of fraud.[4] It is, however, avoided by the parties coming together again.[5] (*b*) But a clause in the deed that the parties may visit each other in case of sickness will not vitiate it, though an actual visit might have that effect.[6] The court does not authorize or sanction these agreements; at most it only tolerates them.[7]

Stipulations depriving the husband of the custody of the children will in general be void as opposed to public policy and the welfare of the children.[8] If, however, it appears in the particular case that the conduct of the father is injurious to the child, this view will not be taken.[9] (*c*)

An agreement contemplating a voluntary *future* separation is void as opposed to public policy. It is immaterial whether such an agreement is made before or after marriage.[10]

[1] Hunt *v.* Hunt, 4 De G. F. & J. 221; Wilson *v.* Wilson, 1 H. L. Cases, 538; Pollock on Contracts, 4th ed. 265, 266; Sanders *v.* Rodway, 16 Beav. 207; Gibbs *v.* Harding, L. R. 5 Ch. App. Cas. 336.

[2] Hindley *v.* Westmeath, 6 B. & C. 200.

[3] Rex *v.* Mead, 2 Ld. Kenyon, 279.

[4] Evans *v.* Carrington, 2 De G. F. & J. 481.

[5] Shelthar *v.* Gregory, 2 Wend. 422.

[6] Carson *v.* Murray, 3 Paige, 483.

[7] Rogers *v.* Rogers, 4 Paige, 516.

[8] Vansittart *v.* Vansittart, 4 K. & J. 62; on appeal, 2 De G. & J. 249.

[9] Swift *v.* Swift, 4 De G. J. & S. 710; on appeal, 11 Jur. N. S. 458.

[10] H. *v.* W., 3 K. & J. 382; Cartwright *v.* Cartwright, 3 De G. M. & G. 982; Bindley *v.* Mulloney, L. R. 7 Eq. 343.

(*a*) See, on the general subject, Clark *v.* Fosdick, 118 N. Y. 7; Duryea *v.* Bliven, 122 N. Y. 567; Galusha *v.* Galusha, 116 N. Y. 635.

(*b*) Zimmer *v.* Settle, 124 N. Y. 37.

(*c*) A stipulation in a separation agreement that the husband shall be allowed to visit and associate with the children is a material part of the contract, and if violated by the wife, a recovery for her benefit under the contract cannot be sustained. Duryea *v.* Bliven, 122 N. Y. 567.

A valid separation deed would naturally assume one of two forms: one, an agreement with trustees to pay a sum of money to the wife. This could be enforced by the trustees in an ordinary common-law action. Another method is to place a fund under the control of the trustees, the income to be applied to the wife's maintenance. This would be a trust for her separate use, enforceable in equity.[1]

Reference should be made to particular clauses that are sometimes inserted in separation deeds. One is that the wife shall remain chaste and virtuous, known as the *dum casta* clause. Where this is wanting, the court cannot set it aside, on account of the unchastity of the wife.[2] Should it appear on the deed that a covenant was drawn with the intent that the wife might be at liberty to commit adultery, it would be void.[3]

There is sometimes a clause in the deed that the wife shall not "molest" the husband. Adultery alone is not a breach of this clause, even though followed by the birth of a child. There must be some act done with an intent to annoy the husband, and it must be an act which is in fact an annoyance. It would seem that if the wife palmed off a child, known by her to be spurious, as the child of the husband, there would be evidence of molestation to go to the jury.[4]

A deed of this kind may be made between the parties, while an action for limited divorce is pending, to the effect that the property of the husband shall be sold, and from the net proceeds after payment of his debts, one third shall be given to the wife, and that they shall live separate. On such an agreement, she may bring an action against the husband to recover her portion of the proceeds. The consideration of such an agreement is the release of the husband's liability for the support of the wife. Such an agreement is not opposed to public policy.[5]

(4) *Other methods than a settlement.* The "separate use" trust may be created by will as well as by deed. A father may, for example, devise property to trustees to pay the income to his married daughter's separate use, and free from her husband's control. Whatever the form may be, a court of equity will carry out the intention of the creator of the trust, so far as that may be consistent with the rules of law.

[1] 2 Spence's Equity Jur. 526.

[2] Bradley *v.* Bradley, L. R. 7 P. D. 237; Fearon *v.* Aylesford, L. R. 14 Q. B. D. 792 (Ct. of Appeal).

[3] Evans *v.* Carrington, 2 De G. F. & J. 481; also *per* COTTON, L. J., in Fearon *v.* Aylesford, *supra.*

[4] Fearon *v.* Aylesford, *supra.* The case in the lower or divisional court is reported in L. R. 12 Q. B. D. 539. On pp. 540,541, will be found a form of separation deed containing the molestation clause.

[5] Pettit *v.* Pettit, 107 N. Y. 677.

As has already been stated, it is usual, in adopting any of the various methods just described, to name a trustee to act for the wife. This, however, is not a vital point, except, perhaps, in a separation deed. It is a general rule that if no trustee be named, or if one be named and be incapable of serving, or even if none be thought of, the trust will not fail. It is a rule that "no trust shall fail for want of a trustee." Should the husband, in opposition to this rule, assert a claim to the property, he might be declared a trustee by the court.[1]

A *Pin Money Trust* is designed to provide the wife with annual means for dress, decoration, and ornament. It is not merely an allowance for these purposes to the wife, but a trust created by a settlement. It is very common in England, "occurring almost every time that a marriage takes place among persons of large fortune."[2] It differs in its nature from the ordinary trust for the wife's separate use, in the fact that while the latter absolutely belongs to the wife, and the husband has no right to inquire into the expenditure, in the "pin money trust" (where created by the husband, at least) he has an interest that the money shall not be saved or hoarded by the wife, but shall be expended annually for his credit and pleasure, as well as for hers. Accordingly, the court will not aid the wife in collecting arrears beyond a year and a fraction, nor in case of her death will it allow her personal representatives to enforce the trust.[3] The rule will be applied though the wife be a lunatic, and so unable personally to direct her expenditure of the money.

The rights of the wife over property held in trust for her separate use. — The power of a married woman to bind her separate estate grows out of the "power of disposal;" and in determining whether she has encumbered or transferred it, the inquiry will be, whether she has exercised that power. It is, therefore, not true that she is liable in all respects as if she were single. Thus she is not liable in respect to mere wrongs (or torts) committed by her, unless they are in some way connected with her estate.[4] (*a*) In general, however, unless restricted by

[1] The case of Rogers *v.* Rogers, 4 Paige, 516, appears to hold that a trustee or third person is vitally necessary to the validity of a separation deed. This case is based on the older authorities opposed to these deeds. The ruling in Rogers *v.* Rogers, in view of the later decisions, seems over technical and of doubtful authority. See Miller *v.* Miller, 16 Ohio St. 527.

[2] Howard *v.* Digby, 2 Cl. & F. 634, 670; *per* the Lord Chancellor.

[3] Howard *v.* Digby, *supra*. The Lord Chancellor said of this trust (p. 678), the husband "has a right to have the pleasure of it, to have the credit of it, to be spared the eye-sore of a wife's appearing as misbecomes her station." This case is also reported in 8 Bligh, 224.

[4] Wainford *v.* Heyl, L. R. 20 Eq. 321.

(*a*) This rule has been changed in New York by statute. See Laws of 1890, ch. 51.

the instrument creating the trust, she may dispose of her estate as freely as if she were single. What she disposes of is her trust interest. By such a disposition she does not in any way disturb the title of the trustee. She substitutes in her stead another person, for whom the trustee in turn holds, and to whom he becomes responsible. This substitute may be her husband, or any third person. It results that while her real estate, to which she had the legal title, could not be disposed of except by a private acknowledgment, her trust estate could be, without that formality.

This capacity is not impaired by the fact that a particular mode of dealing with the property is pointed out in the instrument creating the trust. Other modes are not interfered with, unless specially prohibited.[1] The power of disposition includes the capacity to mortgage, as well as to sell,[2] and her ownership includes the interest of the property, as well as the principal.

As to the *mode of disposal*, very little difficulty exists when resort is had to ordinary and well-understood methods of transfer, such as conveyances, mortgages, leases, etc. The obscurity begins when some informal method is adopted; and the inquiry is, whether it may be regarded as a case of disposal for the purpose of giving some effect to her act. For example, the married woman executes an ordinary promissory note or indorses it. Looked at as *a contract*, this is void (when there is no enabling statute). Can it then be construed by the court as a *mode of disposal* of her separate estate, in the absence of a single word to that effect? The later English authorities hold that it can be, on the ground that, without that view, the instrument will be wholly ineffective, and that a correct rule of construction is to give an instrument some effect, rather than to declare it nugatory. This view is adopted in some of the American courts.

The New York courts, followed by those of some other States, adopted a more technical and rigorous doctrine. The theory there maintained is that there must be words indicative of an *intention* to dispose of the separate estate, unless the engagement is for the benefit of the separate estate, or for her own benefit on the credit of her separate estate.(*a*) For example, she could

[1] Jaques *v.* Methodist Episcopal Church, 17 Johns. 548.

[2] Demarest *v.* Wynkoop, 3 Johns. Ch. 129.

(*a*) It is the English doctrine that a married woman must have some separate property at the date of the contract by which she purports to bind her separate estate in order to make her separate estate liable. Stogdon *v.* Lee [1891], 1 Q. B. 661. See also Lee *v.* Cohick, 39 Mo. 672.

not by a mere promissory note make herself liable for her husband's debts. There must be words *in the note*, such as "I charge my separate estate."[1] The same rule is applied to a mere indorsement.[2] The fact that she gives her husband a promissory note to be discounted at a bank does not raise any presumption that it was for the benefit of her estate, and it will not be a charge upon it without words indicative of such an intention.[3]

These propositions, since the statute of 1884, ch. 381, already referred to, are to be taken with the qualifications made necessary by its provisions; for since that statute she may make contracts as if she were at the time unmarried.(*a*) The statute will not be retroactive, so as to make transactions valid which were invalid when they took place.

Assuming that a married woman has power to deal with her separate estate, some important practical consequences are to be noted. She may become her husband's creditor. She may be a surety for his debts, having the ordinary remedies of sureties against him. Whether in making advances for him she will be a surety or not will depend upon her intention. This intention may be presumed from circumstances. If she joins with her husband in a mortgage upon her land, the presumption is that she is a surety.[4](*b*) The cases in the notes show how she may proceed to reimburse herself for her expenditures as surety.[5] Had the money been appropriated to her use, as in making improvements upon *her* land, the case will lack the necessary elements of suretyship.[6]

On similar principles, she might buy up claims against him, enforce them as creditor, obtain judgment, and sell his property on execution, and if the husband should make an assignment of his estate in payment of his debts, his wife might be included as a creditor.[7]

[1] Yale *v.* Dederer, 18 N. Y. 265; s. c. 22 Id. 450, and 68 Id. 329. This is the leading case upon this subject.

[2] Corn Exch. Ins. Co. *v.* Babcock, 42 N. Y. 613.

[3] Saratoga County Bank *v.* Pruyn, 90 N. Y. 250.

[4] Loomer *v.* Wheelwright, 3 Sandf. Ch. 135.

[5] Neimcewicz *v.* Gahn, 3 Paige, 614; on appeal Gahn *v.* Niemcewicz, 11 Wend. 312; Hawley *v.* Bradford, 9 Paige, 200.

[6] Dickinson *v.* Codwise, 1 Sandf. Ch. 214.

[7] Danforth *v.* Woods, 11 Paige, 9.

(*a*) Bowery Nat. Bank *v.* Sniffen, 54 Hun, 394. See also Laws of 1892, ch. 594.

Under § 1273 of the Code of Civil Procedure a married woman may confess judgment if the debt was contracted for the benefit of her sole and separate estate, or in the course of business carried on by her on her sole and separate account. This section was not repealed by ch. 381, Laws of 1884, as a judgment is not a contract within the meaning of that statute. White *v.* Wood, 49 Hun, 381.

(*b*) Barrett *v.* Davis, 16 S. W. R. 377.

After the courts of equity had established the doctrine that a married woman could deal with her separate property as if single, it was found that this theory sometimes practically defeated the very purpose for which separate estates were intended. The wife had the capacity to give the property to her husband, so that in an indirect way he might succeed in placing himself in the same, or even in a more favorable position as to her property than he held at the common law. Moreover, these separate estates could be squandered or wasted by ill-judgment or extravagance on the wife's part, and the intentions of parents or other friends to provide a permanent source of income be frustrated. To remedy these defects in the system, the *clause against anticipation* was devised.[1] The meaning of this is, a clause preventing the woman from disposing of, or impairing the capital of a fund set apart for her use, and confining her to the income as it accrues. "A married woman having power to alien" in the language of LORD ELDON "is a mere creature of equity to the extent to which the settlement constitutes her a *feme sole* and no farther."[2] Where this clause is inserted in a settlement, a wife cannot dispose of the capital of property held by a trustee for her *separate use*. Such a clause affecting her other property would be void under the same circumstances as if she were single.[3] The clause against anticipation may be imposed while a woman is single in contemplation of marriage; it will be inert until marriage takes place; it will be effective during marriage, and will become inoperative during widowhood; but if drawn with apt words will revive on a subsequent marriage, and remain operative during its continuance.[4] (*a*)

This clause (against anticipation) is continued in force in England, notwithstanding the recent legislation enlarging the capacity of married women to act and to contract.[5]

This clause is unnecessary in New York and some other States, by reason of a statutory trust, which may be created, not merely

[1] LORD THURLOW is said to have devised the clause against anticipation. Taylor *v.* Meads, 4 De G. J. & S. 597, 604.

[2] Jackson *v.* Hobhouse, 2 Merivale, 483, 487; Brandon *v.* Robinson, 18 Ves. 429, 434; Tullett *v.* Armstrong, 1 Beav. 1, 23; on appeal, 4 M. & C. 390, 393.

[3] Baggett *v.* Meux, 1 Colly. 138.

[4] Tullett *v.* Armstrong, 4 M. & C. 390, 406.

[5] Married Women's Property Act of 1882. 45 & 46 Vict. c. 75, § 19; Pike *v.* Fitzgibbon, L. R. 17 Ch. D. 454. Cf. Myles *v.* Benton, 14 L. R. (Ir.) 258.

(*a*) A different rule prevails in Pennsylvania. Quin's Estate, 144 Pa. St. 444.

A restraint upon the alienation of an income given to a married woman is of no avail unless the income is given to her for her separate use. Stogdon *v.* Lee [1891], 1 Q. B. 661.

in favor of married women, but of any and all beneficiaries. This is a conveyance of property to a trustee to receive its rents, profits, or income, and to *apply* them *to the use* of the beneficiary during his life, or for a shorter period. The interest of the beneficiary is made inalienable. It cannot even be destroyed by order of the court.[1] The trust can be made applicable both to real and personal property.[2] The expression "apply to the use" of the beneficiary has been construed to mean no more than to "pay over" to him.[3] The income of a fund cannot in this manner be withdrawn wholly from the beneficiary's creditors. They may claim any surplus beyond what is necessary to yield him a fair support.[4]

Many difficult questions of *interpretation* and *construction* arise in marriage settlements. Prominent among these is the inquiry whether if the parties be domiciled in one country, and married in another, the law of the domicile is to be regarded or the law of the place of the marriage. Questions might also arise, when the domiciles of the parties were different, as to which law should be followed. In general, the construction of instruments affecting real estate depends upon the law of the place where it is situated, while if personal property, the law of the place of the contract is to be regarded. In a marriage settlement, regard is to be had in the first instance to the law of the husband's domicile.[5]

But the parties may contract that their rights shall be subject to some other law, and this contract will bind them. In this case, the construction depends upon the intention of the parties, as disclosed in the terms of the settlement.[6]

By the statute law of New York all contracts made in contemplation of marriage remain in full force after the marriage takes place.[7]

SECTION V.—*Other rights and disabilities.*

There are grouped together in this section several cases of a miscellaneous nature.

Power of a married woman to make a will.—(1) Of real property.—A married woman has no power by general rules of law to make a will of real property. The power to devise land did not exist in the early law, except in special localities

[1] Douglas *v.* Cruger, 80 N. Y. 15.

[2] Graff *v.* Bonnett, 31 N. Y. 9.

[3] Leggett *v.* Perkins, 2 N. Y. 297.

[4] Williams *v.* Thorn, 70 N. Y. 270; citing and distinguishing a number of earlier cases.

[5] Dicey on Domicil, 273; Duncan *v.* Cannan, 18 Beav. 128; Byam *v.* Byam, 19 Id. 58; Le Breton *v.* Miles, 8 Paige, 261.

[6] Este *v.* Smyth, 18 Beav. 112; see Chamberlain *v.* Napier, L. R. 15 Ch. D. 614.

[7] Laws of 1848, ch. 200, § 4.

in England, where it prevailed by local custom. The general power was first conferred by statutes passed in the reign of Henry VIII.[1] Married women were expressly excepted in the statute of 34 & 35 Henry VIII. c. 5 (§ 14), so that their disability to devise land continued.

The power to devise was not, according to some authorities, conferred by implication when courts of equity recognized the unrestricted ownership by the wife of her separate estate. To meet this difficulty, if it existed, the following device was resorted to. The owner of real property in settling it upon a married woman, or in bestowing it upon her in any form, would confer upon her a "power" or authority to dispose of it, or, more specifically, to devise it by her will. This power might be created by herself while single, or it might be originated by others. In either case, she derived her authority from one who was not at the time under any incapacity. The making of the will by her (called the "execution of the power") by a legal fiction related back to the time when the power was created. Accordingly, if she had, while single, conferred the power upon herself, when married it would be considered that the single woman made the will through the instrumentality of the married woman.[2]

The more modern English authorities hold that no *special* words creating a power are necessary. These maintain that a married woman, when not restrained from alienation, has in equity the same power of disposal over her "separate estate" by deed *or will* as she would have if free from the disability of coverture. Assuming that a power is necessary, the general words "instrument in writing" will include a will.[3] If an estate be given to a married woman for her separate use for life, with full power to dispose of the remainder by deed or will, she has in equity the entire interest.[4]

(2) As to personal property. — It is conceded that any restrictions which may exist as to devises of real estate do not extend to personal property. The will as to this property takes effect as one of the modes of exercising the right and power of disposal, unless there be some statutory provision to the contrary.

The Revised Statutes of New York[5] withdrew from the wife capacity to make a will of personal property at least, unless

[1] 32 Henry VIII. c. 1, and 34 & 35 Henry VIII. c. 5.

[2] Peacock *v.* Monk, 2 Ves. Sr. 190; Bradish *v.* Gibbs, 3 Johns. Ch. 523; Remarks of DENIO, J., in Wadhams *v.* Am. Missionary Soc., 12 N. Y. 415, 422.

[3] Taylor *v.* Meads, 4 De G. J. & S. 597; Adams *v.* Gamble, 12 Irish Ch. 102; Sugden on Powers, 173 (8th ed.).

[4] London Chartered Bk. of Australia *v.* Lemprière, L. R. 4 P. C. App. 572.

[5] 2 R. S. 60, § 21, 3d ed.

a "power" were given to her. Whether a power would suffice is not settled. This was a reactionary statute, and out of harmony with the general progress of the law. It was repealed in 1849.[1] At present a married woman has in New York the power to dispose of all her property by will, unless there be some restraint by agreement or statute. It is, however, necessary to be familiar with the former law to solve questions arising while it was in force.

Right of either party to the society of the other. — There is no direct method in this country by which a court can compel a wife to reside with her husband. The writ of *habeas corpus* cannot be used for this purpose.[2] In England, a suit could be maintained in the ecclesiastical court for "the restitution of conjugal rights." The same rule applies to the existing divorce court. (*a*) Its object is to compel a deserting party to return to matrimonial cohabitation. Nothing can be pleaded as a bar to such a suit, except such facts as would entitle the party defendant to a decree for judicial separation,[3] or to a divorce for the wife's adultery.[4] This proceeding is not known in this country. If a husband use forcible means to compel a wife to live with him he may be resisted as a wrong-doer.[5] (*b*)

A husband will have an action against a person who wrongfully entices his wife away from him, or "harbors" her, so that she may not return. (*c*) The basis of the action is a wrongful *intent.* The word "harboring" involves active interference, and does not refer to the mere act of providing a wife with food and shelter from motives of affection or humanity. A father may be liable as well as a stranger, though a stronger case would have to be made out against him.[6] Thus he would not be

[1] Laws of 1849, ch. 375. See Wadhams *v.* Am. Missionary Soc., 12 N. Y. 415.

[2] People *v.* Mercein, 8 Paige, 47.

[3] Burroughs *v.* Burroughs, 2 Sw. & T. 303.

[4] Hope *v.* Hope, 1 Sw. & T. 94.

[5] Pillow *v.* Bushnell, 5 Barb. 156.

[6] Hutcheson *v.* Peck, 5 Johns. 196; Schuneman *v.* Palmer, 4 Barb. 225; Bennett *v.* Smith, 21 Barb. 439; Barnes *v.* Allen, 30 Barb. 663; White *v.* Ross, 47 Mich. 172.

(*a*) For examples of such suits see Smith *v.* Smith, L. R. 15 P. D. 47; Field *v.* Field, L. R. 14 P. D. 26; Mason *v.* Mason, 61 L. T. R. 304.

(*b*) The Queen *v.* Jackson, [1891], 1 Q. B. 671.

(*c*) Since the enactment of statutes allowing the wife to sue in her own name for injuries suffered to person, property, or character, an action may be maintained in most of the States of the Union by the wife for loss of her husband's society and the alienation of his affection. Bennett *v.* Bennett, 116 N. Y. 584; Baker *v.* Baker, 16 Abb. N. C. 293; Jaynes *v.* Jaynes, 39 Hun, 40; Breiman *v.* Paasch, 7 Abb. N. C. 249; Haynes *v.* Nowlin, 129 Ind. 581; Warren *v.* Warren, 89 Mich. 123; Warner *v.* Miller, 17 Abb. N. C. 221; Churchill *v.* Lewis, Id. 226; Foot *v.* Card, 58 Conn. 1; *contra*, Duffies *v.* Duffies, 76 Wis. 374; Van Arnam *v.* Ayres, 67 Barb. 544; Doe *v.* Roe, 82 Me. 503.

liable if he acted in good faith, believing mistakenly that she was cruelly treated.[1] It has been held that a husband may maintain an action against a druggist for clandestinely selling to his wife from time to time quantities of laudanum to be used as a beverage, to the detriment of her health.[2]

If the wife be injured by a third person, so that the husband loses her services or society, he has a cause of action for loss of service. She may, under the recent statutes, sue for the personal injury sustained by herself without joining the husband's name. If the injury caused instantaneous death, no action will lie by the husband, unless there be a statute allowing it.[3] Should there be an interval between the injury and the death, during which the husband lost her services and society, there would be a cause of action in his favor.[4] On similar grounds, the husband will have an action against an adulterer for the seduction of his wife, in which exemplary damages may be recovered.[5]

Rights of the parties to a marriage under the "Civil Damage Act." — The phrase "Civil Damage Act" is in common use to indicate statutes of recent origin prevailing in a number of the States, giving to husband or wife, parent or child, the right to recover damages for an injury done by an intoxicated person to one standing either in marital or filial relations, from the person who sold or gave the intoxicating liquors to the wrongdoer. In some cases the statute includes the owner of the premises where the liquor is sold. Though this legislation extends to parent and child as well as husband and wife, yet the decisions are much the most numerous where the wife is the injured person, and on that account the subject is considered now. The statutes in the various States are not identical in language, though they bear a close resemblance.[6] (*a*)

The following principles of a general nature have been decided under these acts: —

(1) This legislation is not unconstitutional. The State Legislature, having control of the subject of the traffic in intoxicating liquors, may make such regulations as are in its judgment best calculated to prevent the evils resulting from intoxication,

[1] Smith *v.* Lyke, 13 Hun, 204.
[2] Hoard *v.* Peck, 56 Barb. 202.
[3] This point in its general atatement belongs under the topic of "Injury causing death."
[4] Philippi *v.* Wolff, 14 Abb. Pr. N. S. 196.
[5] Smith *v.* Masten, 15 Wend. 270.
[6] For the New York Statute, see Laws of 1873, ch. 646.

(*a*) See also Laws of 1892, ch. 401, § 40, and ch. 403, § 2.

and accordingly to make a liquor seller responsible for consequential damages resulting from the sale.[1]

(2) The statute in some States permits the action to be brought against the seller and the owner of the premises on which the sale is made. (*a*) The seller will be liable even though the liquor be sold by the bartender against his instructions.[2] The owner is not made liable unless he knew of the sale of ardent spirits on the premises, or permitted it.[3] (*b*) It is not necessary, however, that the strict relation of landlord and tenant exist. The owner will be liable if it appear that he knowingly permitted the sale on the premises.[4] Where notice is required to the liquor seller, as in some statutes, it is enough to follow the substance of the statute without using its very language.[5] (*c*)

(3) The injury done by the sale may be of three kinds: to the person, to the property, or to the means of support. The principal decisions have been made upon the "means of support." This does not mean merely a cause of action existing against the intoxicated person, and extended by the statute to include the seller, etc., but it embraces a wholly new cause of action.[6] It must be made to appear that the claimant had his means of support so far reduced as no longer to have adequate means of maintenance.[7] A wife may maintain the action on this basis. So also may a husband for injury to his "means of support" by the intoxication of his wife.[8]

If death results, there may be, according to some authorities, a sufficient injury to "the means of support" by the death to make the action maintainable.[9] The Massachusetts court does

[1] Bertholf *v.* O'Reilly, 74 N. Y. 509.

[2] Smith *v.* Reynolds, 8 Hun, 128; George *v.* Gobey, 128 Mass. 289.

[3] Mead *v.* Stratton, 8 Hun, 148; Loan *v.* Etzel, 62 Iowa, 429. This rule should only be applied to those who control the letting of the property. Castle *v.* Fogerty, 19 Ill. App. 442.

[4] Mead *v.* Stratton, 87 N. Y. 493; Bertholf *v.* O'Reilly, 8 Hun, 16; affirmed, 74 N. Y. 509.

[5] Kennedy *v.* Saunders, 142 Mass. 9; construing Pub. Stats. ch. 100, § 25. See also Tate *v.* Donovan, 143 Mass. 590.

[6] Volans *v.* Owen, 74 N. Y. 526.

[7] Hill *v.* Berry, 75 N. Y. 229; Quain *v.* Russell, 8 Hun, 319; s. c. 12 Id. 376; Schneider *v.* Hosier, 21 Ohio St. 98.

[8] Moran *v.* Goodwin, 130 Mass. 158.

[9] Jackson *v.* Brookins, 5 Hun, 530; Mead *v.* Stratton, 87 N. Y. 493; Davis *v.* Standish, 26 Hun, 608. This rule has even been extended to the case of the suicide of the intoxicated person. Blotz *v.* Rohrbach, 42 Hun, 402; Neu *v.* McKechnie, 95 N. Y. 632.

(*a*) Under some statutes the liquor seller's bondsmen are made liable. Wardell *v.* McConnell, 23 Neb. 152; Doty *v.* Postal, 87 Mich. 143.

(*b*) Knowledge of the agent at the time of the letting is imputable to the landlord. Hall *v.* Germain, 131 N. Y. 536.

(*c*) Notice to the liquor seller is now required in New York. Laws of 1892, ch. 401, § 40, and ch. 403, § 2.

not follow this line of decisions.[1] The theory of the New York court is that it is not essential to show that the act of the intoxicated person causing the injury was the natural, reasonable, or probable consequence of the intoxication.(*a*) It is enough to show that the act was done while the person was intoxicated in whole or in part by liquors sold by the defendant. The intoxicated person may, accordingly, commit suicide, and so deprive his wife of the "means of support," or he may murder another, and so deprive that person's wife of the "means of support." In either case, the liquor seller will be liable, and his liability is not affected by the fact that the intoxicated person was committing a crime.[2] Similar principles have been applied in favor of the intoxicated person himself, where he became frozen while intoxicated.[3]

(4) A difficult question is raised where the intoxication is created by the sales or gifts of several distinct persons, no one of which is sufficient, while each contributes to the result. The New York statute seems to provide for this case by declaring that the person shall be liable who caused the intoxication "in whole or in part." The correct rule would seem to be that either of the sellers is liable, and that he cannot defend himself by urging that he did not *wholly* cause the drunkenness. Any such construction would greatly impair the beneficent effect of the statute.[4] Some courts hold that the sellers in such a case may be sued jointly.[5] This principle has not been adopted in New York.[6] The wife and the children may sustain distinct injuries under this class of statutes. In such a case, a recovery by the wife would not preclude an action in behalf of the children.

(5) The seller will be equally liable whether he sell with or without a license.(*b*) If he have a license he runs a risk that the liquor sold may, either in whole or in part, intoxicate the purchaser; in which case he must submit to an action for resulting damages. There is, however, this distinction, that if he

[1] Barrett *v.* Dolan, 130 Mass. 366.
[2] Neu *v.* McKechnie, 95 N. Y. 632.
[3] Buckmaster *v.* McElroy, 20 Neb. 557.
[4] Bryant *v.* Tidgewell, 133 Mass. 86; Steele *v.* Thompson, 42 Mich. 594; Boyd *v.* Watt, 27 Ohio St. 259.
[5] Rantz *v.* Barnes, 40 Ohio St. 43; O'Leary *v.* Frisbey, 17 Ill. App. 553; Roose *v.* Perkins, 9 Neb. 304.
[6] Jackson *v.* Brookins, 5 Hun, 530.

(*a*) It must appear, however, that the liquor was furnished to the individual whose intoxication caused the injuries complained of. Dudley *v.* Parker, 132 N. Y. 386.

(*b*) This is not the rule in all States. In Michigan a recovery cannot be had unless the liquor causing the intoxication was furnished in violation of law. Peacock *v.* Oaks, 85 Mich. 578.

sell without a license, he may be liable to exemplary damages. This is particularly true if he has sold for a long time without a license.[1]

The theory of this legislation appears to be sound. It goes upon the ground that the domestic relations create rights in favor of each party to the relation, which in certain cases are not dependent for their existence on the absence of fault in the other party, but which may be enforced against a third person, notwithstanding the wrong, neglect, or consent of the other party to the relation. It is on this ground that a father may sue for the seduction of a daughter, or a master for the seduction of a servant, or a husband for the seduction of a wife, notwithstanding the consent or participation of each in the wrong. This statute is an extension of an existing principle to a new class of instances growing out of the sale and acceptance of intoxicating liquors, and the intoxication resulting from their use, and the consequent injury to one standing in one of the relations already referred to. The cases which permit the intoxicated party himself to sue proceed on a different and more questionable principle.

The wife's right to protection from personal violence. — It was formerly laid down as a rule that the husband might correct his wife by the infliction of blows to a moderate extent.[2] This rule is, however, contrary to the general tenor of professional and judicial opinion at the present day.[3] The wife may compel the husband to give bonds to keep the peace under such circumstances. She cannot, however, bring a civil action for damages against him for an assault or other personal wrong.[4] A wife, after being divorced from her husband, cannot sue him for an assault committed during the marriage.[5] Should she be unlawfully imprisoned by him, the court will grant her the writ of *habeas corpus*.[6]

A married woman's right to her husband's surname. — Marriage confers a name upon a woman which becomes her actual name, and she can only obtain another by reputation of such a character and extent as to obliterate her married name.[7]

[1] Neu *v.* McKechnie, 95 N. Y. 632.

[2] Bracton aaya a man's "wife is under the rod." Vol. I. 47. Twiss' Ed. A. D. 1878. Thia doctrine was followed in North Carolina in a recent case to this extent, that a man may whip hia wife with a switch as large as his finger, but not larger than his thumb, without being guilty of an assault. State *v.* Rhodes, Phillips Rap. (N. C.) 453 (1868).

[3] People *v.* Winters, 2 Park. Cr. 10.

[4] Schultz *v.* Schultz, 89 N. Y. 644, reversing Schultz *v.* Schultz, 27 Hun, 26.

[5] Phillips *v.* Barnet, L. R. 1 Q. B. D. 436.

[6] *In re* Cochrane, 8 Dowl. 630. The circumstances under which the court will refuse the writ are stated in this case. See also Lord Vane's Case, 13 East, 171, n.

[7] Fendall *v.* Goldsmid, L. R. 2 P. D. 263.

The domicile of the husband is that of the wife. — It is a general rule that the domicile of the wife is that of the husband, and so continues after widowhood until she acquires a new one.[1] It has even been said that the husband may establish his domicile in any part of the world, and that it is the duty of the wife to follow him.[2] This rule may have an important effect upon the wife's capacity to contract under the recent "Married Women's Acts." The general capacity of the wife depends upon the law of the domicile, and the husband may, by his sole act, according to this theory, enlarge or impair this capacity, or modify it from time to time.

The rule is subject to some qualifications. It does not fully apply to actions for divorce, in which a wife may obtain a separate domicile from that of the husband. So if a wife has been judicially separated from her husband, she may become a citizen of a different State, so as to enforce the decree in a United States court.[3]

The fact that the parties live apart under a separation deed does not give the wife the power to acquire a domicile of her own.[4] It was considered doubtful whether even a judicial separation would lead to the inference that the wife might change her domicile by her own act.[5] Under the English law, the wife must, as a rule, seek her remedy for matrimonial wrongs in the courts of the country where her husband is domiciled.[6] Under recent decisions, the capacity of a married woman, being an infant, to deal with her property, depends upon the law of her domicile, instead of the place where the contract is made.[7]

Husband and wife as witnesses for or against each other. — The rules of the common law are very rigorous in excluding the testimony of the parties to a marriage, either for or against each other, both in civil and criminal cases. This is both on the ground of their legal identity, and from rules of public policy. One is a technical ground, and the other matter of substance. Considered as a rule of public policy a wife should not be allowed in an action after the husband's death against his exec-

[1] Bloxam *v.* Favre, L. R. 9 P. D. 130; *In re* Cooke's Trusts, 56 L. J. Ch. 637.

[2] Hair *v.* Hair, 10 Rich. (S. C.) Eq. 163. This rule does not apply to the case where a husband leaves his domicile and resides abroad in order to avoid his creditors. Pitt *v.* Pitt, 4 Macq. H. L. Cases, 627.

[3] Barber *v.* Barber, 21 How. U. S. 582.

[4] Warrender *v.* Warrender, 2 Cl. & F. 488; Dolphin *v.* Robins, 7 H. L. Cases, 390. This is an important case.

[5] Remarks of Lord Kingsdown. 7 H. L. Cases, 420.

[6] Firebrace *v.* Firebrace, L. R. 4 P. D. 63. See also Yelverton *v.* Yelverton, 1 Sw. & T. 574.

[7] *In re* Cooke's Trusts, 56 L. J. Ch. 637, following Sottomayor *v.* De Barros, L. R. 3 P. D. 1.

utors to disclose *confidential* communications made during the marriage.[1] Were the sole ground of exclusion "legal identity" there would be no reason for refusing to receive the wife's testimony in that case.[2] The rule does not apply where the marriage turns out to be void, even though it may have been supposed by the parties to be valid.[3] So a kept mistress may give evidence against her protector.[4]

There are certain special cases where *the wife* may give testimony, as where the husband is prosecuted criminally for acts of violence against her. This is from the necessity of the case, as otherwise the crime would, in general, go unpunished, and the wife would fail of protection. There are also cases where there is a secret fact in which her testimony is allowable, as, for example, where an action is brought by a husband against a carrier for loss of baggage, and the wife having packed the trunk, is alone acquainted with its contents.

Reference must also be made to declarations made by a wife out of court, as evidence against the husband. As she may be his agent for certain purposes, she may make declarations and admissions out of court in connection with the agency, which will be as binding on him as if made by any other agent, and which can be proved in evidence against him.[5] Declarations made by her are in like manner in a proper case admissible in his favor.[6]

So in actions for *criminal conversation* brought by the husband, letters written by her to him and others prior to the alleged illicit intercourse showing the state of her feelings towards him are admissible in his behalf if there is no reason to suspect collusion between them.[7]

Statutes are found both in England and in this country relaxing these rules. It is now the law in England that either husband or wife are competent and compellable to give evidence for or against each other in civil actions, except that neither of the parties shall be required to disclose communications made during the marriage by one to the other. This rule is not extended to criminal proceedings, nor, except with modifications, to a proceeding instituted in consequence of adultery.[8]

Under the existing New York law, a husband and wife are not

[1] Doker *v.* Hasler, Ryan & M. 198.
[2] Beveridge *v.* Minter, 1 C. & P. 364.
[3] Wells *v.* Fletcher, 5 C. & P. 12.
[4] Batthews *v.* Galindo, 4 Bing. 610.
[5] Clifford *v.* Burton, 1 Bing. 199; M'George *v.* Egan, 5 Bing. N. C. 196; Meredith *v.* Footner, 11 M. & W. 202.
[6] Walton *v.* Green, 1 C. & P. 621.
[7] Willis *v.* Bernard, 8 Bing. 376; Trelawney *v.* Coleman, 1 B. & Ald. 90.
[8] 16 & 17 Vict. c. 83, modified by 32 & 33 Id. c. 68.

in general excluded or excused from giving testimony for or against each other.[1] There are the following exceptions: neither of them is competent to testify against the other in 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 allegations of adultery; neither party can be compelled, or without the consent of the other allowed, to disclose a confidential communication made during the marriage. In an action for criminal conversation, the wife is not a competent witness for her husband, but is for the defendant, except that she cannot, without the husband's consent, disclose confidential communications had with her husband.[2]

Similar provisions are now quite generally adopted in the several States, for the details of which the statutes of the States respectively should be consulted.

The wife's right of dower in the husband's real estate.— This is only mentioned here for the sake of completeness, as the treatment of it more appropriately belongs to a work upon real estate. Dower at common law is a right given to a wife in case she survive her husband to have an estate for her life in one third of all the land in which he was seized of an estate of inheritance at any time during the marriage. During the marriage it is but an inchoate right; after the husband's death it is a right of action until her interest is assigned or set apart to her; whereupon it becomes an estate in the land. There are many distinctions on this subject, making it an important and intricate branch of real property law.

[1] Code of Civ. Pro. § 828; Code of Crim. Pro. § 392.

[2] Code of Civ. Pro. § 831.

CHAPTER VI.

PARENT AND CHILD.

CHILDREN from a legal point of view are of two classes, — legitimate and illegitimate. Their respective rights will be considered under these two divisions. A third division will be devoted to adopted children.

DIVISION I. — *Legitimate Children.*

Legitimate children are those who are born in wedlock or within a competent time afterwards. The legal maxim is, "He is the father who is shown to be such by the marriage" (*pater est quem nuptiæ demonstrant*). It is not necessary to legitimacy that a child should be conceived in wedlock. It is enough that he is born after marriage, the fact of the marriage being an implied admission by the husband that he is the father.

The first section of this division treats of the duties of parents; the second of their power and authority; and the third of the relations of children towards parents.

SECTION I. *The Duties of Parents towards Children.* —

I. *Maintenance.* — The *duty* here intended is not merely a moral, but a legal duty. There is a marked distinction between this case and that of husband and wife. The duty of the husband to maintain his wife springs out of contract, upon which, it is true, the law grafts certain implied obligations; the duty of the father is in no respect derived from contract. Whatever legal duty there may be, seems to be a duty towards society, — a duty not to bring a child into the world so as to make him a burden upon his fellows. Accordingly, legislation is proper which compels a parent to sustain a child, makes him obnoxious to the poor laws in case he does not, and if he absconds, sequesters his property.

This is the basis of the English statute passed in the reign of Queen Elizabeth.[1] This act provided a mode whereby the father and grandfather, the mother and grandmother, and the children of poor persons, if they were of sufficient pecuniary ability, should

[1] 43 Eliz. c. 2, § 7 (A. D. 1601).

maintain their poor relatives according to a rate fixed by the justices of the peace of the county where they lived, under the penalty of a specified forfeiture.

This is the basis of similar legislation in this country. The New York statute omits the mention of grandfather and grandmother, thus confining the statutory duty to parents and children. There are detailed measures for enforcing the obligation.

A husband is by general rules of law under no legal duty to maintain the children of his wife by a former husband.[1] (*a*) If he takes them into his family as if they were his children, he cannot subsequently compel them to pay for past support.[2] Nor can they under like circumstances claim payment for any services rendered in the family.[3] As their relation depends on tacit consent, either party may break it off at any time; whereupon all further obligation is terminated. The same rule applies to a widow on remarriage as to the children of a former husband.[4] This rule is a defect in the law, which has been corrected in England by statute.[5] Rules of this kind have a local effect, and do not follow the parties into other countries. Thus it is a rule in France that a father-in-law must make an allowance to a needy son-in-law for his support. This is a statute analogous to poor-law legislation, and has no extra-territorial effect.[6]

The settled English opinion is, that, independent of all statutes, the father cannot legally be compelled to sustain his children. The test of his liability would be found in the following facts: The father refuses to sustain his child; the latter applies to a tradesman to supply him with necessaries in the same general manner that a wife does when support is refused by a husband. The tradesman then sues the father. Can he recover? The answer would be in the negative. The son has no agency in such a case to bind the father.[7]

The American decisions are in a more confused condition, some holding with the English authorities and others maintaining that a child not supplied with necessaries may bind the father by con-

[1] Elliott *v.* Lewis, 3 Edw. Ch. 40; Hillman *v.* Stephens, 16 N. Y. 278; Cooper *v.* Martin, 4 East, 76.

[2] Sharp *v.* Cropsey, 11 Barb. 224.

[3] Williams *v.* Hutchinson, 5 Barb. 122; 3 N. Y. 312.

[4] *Re* Besondy, 32 Minn. 385.

[5] 4 & 5 Wm. IV. c. 76. The husband under that act muat maintain the prior children of his wife, whether legitimate or illegitimate, as a part of his family, until they attain the age of 16, or until the wife's death. § 57.

[6] De Brimont *v.* Penniman, 10 Blatch. 436.

[7] Shelton *v.* Springett, 11 C. B. 452; Mortimore *v.* Wright, 6 M. & W. 482.

(*a*) In the Matter of Ackerman, 116 N. Y. 654; Brown's Appeal, 112 Pa. St. 13.

tracting with tradesmen.[1] Whatever may be the correct rule in principle, it is well settled that if a father furnishes a child reasonably with necessaries, the tradesman cannot assume to supply him and recover. He is bound to know the true state of things.[2]

Slight acts on the part of the father recognizing a child's agency will, even under the English rule, be sufficient to bind him. Thus, where a father had seen without objection his son (a boy at school) wearing a suit of clothes which the father had not himself purchased for him, it was held to be a question for a jury whether the father had not authorized their purchase.[3] So it might be fairly claimed if a father had sent a son to a boarding-school or college that he had thereby tacitly contracted with the proper persons to pay his necessary bills.

Whatever obligation the father may be under to tradesmen and others on refusal to pay bills, it would regularly cease on the child's attaining the age of twenty-one. The statute of Elizabeth and cognate legislation would, however, be still applicable in case he became chargeable to the public under the poor laws.[4] The court of Chancery has no *direct* power to compel a parent to support a minor child.[5] The court, however, in the exercise of its general authority over infants and their estates may grant an allowance to a father for the support of the child from the income of property belonging to the child, and may in a proper case encroach upon the principal. It is not necessary that the fund should have been transferred to the child with a view to his support during infancy; it is enough that the fund belongs to him.[6] Some decisions maintain that such an allowance will not be made if the father is of sufficient pecuniary ability to supply the necessary support.[7] Other cases adopt the more reasonable

[1] Cases following the English view are Raymond *v.* Loyl, 10 Barb. 483; White *v.* Mann, 110 Ind. 74; Gotts *v.* Clark, 78 Ill. 229; McMillen *v.* Lee, Id. 443; Freeman *v.* Robinson, 38 N. J. Law R. 383; Kelley *v.* Davis, 49 N. H. 187; Gordon *v.* Potter, 17 Vt. 348; *contra*, Clark *v.* Clark, 46 Conn. 586; Stovall *v.* Johnson, 17 Ala. 14; Dennis *v.* Clark, 2 Cush. 347; Gilley *v.* Gilley, 79 Me. 292; Porter *v.* Powell, 79 Iowa, 151.

[2] Van Valkinburgh *v.* Watson, 13 Johns. 480.

[3] Law *v.* Wilkin, 6 Ad. & El. 718; Jordan *v.* Wright, 45 Ark. 237.

[4] Parents neglecting to provide for their children according to their means are declared to be "disorderly persons" in the New York Code of Criminal Procedure, and are subject to the proceedings provided for in §§ 899–913.

[5] Matter of Ryder, 11 Paige, 185. In this case there was a petition to the court on the part of a young man of 20, and in perfect health, for an order directing his mother to supply him with means to obtain a professional education. The order was refused.

[6] Stretch *v.* Watkins, 1 Mad. 253; Adams on Equity, 287.

[7] Addison *v.* Bowie, 2 Bland (Md.), 606, 619; Tompkins *v.* Tompkins' Ex'rs, 18 N. J. Eq. 303; Myers *v.* Myers, 2 McCord (S. C.), Ch. 214; Dawes *v.* Howard, 4 Mass. 97; Newport *v.* Cook, 2 Ashmead (Pa.) 332.

rule that the question is a relative one, and that due regard must be had to the relative wealth of the parent and child, and the claims of others upon the father's estate.[1] There may, for example, be claims upon a father of a second family of children, which should properly be taken into account.[2]

It was at one time held that the allowances could be only prospective.[3] It is the usual practice to make them so. Still there is no rule that they shall not be retrospective. It is now held, that if a special case be proved, the court may *direct an inquiry* as to the propriety of allowing for past maintenance, and if the facts warrant it, the order will be made.[4] The charge may be made upon reversionary as well as present interests, and a plan is adopted in the English courts under which a life insurance policy may protect the interests of others in case the infant's interest should fail to vest. If trustees holding a fund for the maintenance of infants have power by the trust deed to pay the income to the father, the court will not in general interfere with their discretion.[5] If, however, they act without the exercise of sound judgment, or improvidently, the court may interfere.[6]

But the court has gone so far in the exercise of its general powers as not only to appropriate the income, but even to break in upon the principal. This result was first reached in 1873 in Howarth's case.[7] (*a*)

The question has been raised whether an allowance can be made for the children from the mother's separate estate while

[1] Matter of Burke, 4 Sandf. Ch. 617.

[2] Matter of Kane, 2 Barb. Ch. 375.

[3] Andrews *v.* Partington, 2 Cox Eq. Cases, 223.

[4] *Ex parte* Bond, 2 M. & K. 439; Matter of Kane, 2 Barb. Ch. 375, 380, 381.

[5] Brophy *v.* Bellamy, L. R. 8 Ch. 798.

[6] Davey *v.* Ward, L. R. 7 Ch. D. 754; *In re* Roper's Trusts, L. R. 11 Ch. D. 272. By the Conveyancing Act of 1881 (44 & 45 Vict. c. 41, § 43), which, together with the Conveyancing Act of 1882 (45 & 46 Vict. c. 38, § 64), repealed the previous act upon the subject (23 & 24 Vict. c. 145, § 26), the court may make an allowance, in certain cases, for an infant's maintenance from a fund held in trust upon a contingency, such as the attainment of the age of twenty-one years. This act is held only to be applicable when the infant is entitled to both income and principal on the happening of the prescribed event. *In re* Judkin's Trusts, L. R. 25 Ch. D. 743.

[7] *In re* Howarth, L. R. 8 Ch. 415. Opinion of LITTLE, V. C., note to page 416. This case is doubted in Cadman *v.* Cadman, L. R. 33 Ch. D. 397.

(*a*) In New York it is provided that where rents and profits of real estate are directed to be accumulated for the benefit of an infant entitled to an expectant estate, and the infant is destitute of other means of support and education, the Supreme Court, or in certain cases a Surrogate's Court, may direct a suitable sum out of the rents and profits to be applied to his maintenance and education. 1 R. S. 726, § 39, as amended by Laws of 1891, ch. 172. A like provision exists as to an accumulation of the income of personal property. 1 R. S. 774, § 5, as amended by Laws of 1891, ch. 173.

the father is living. In general it would not be, as it is the father's duty to support them.[1] When the mother is a widow having property, no substantial reason can be found, why a distinction should be made between her case and that of the father, and the same general rights should be conceded to her as to allowances from the child's estate.[2]

II. *Protection.* — The father is not so much under a legal duty as he is invested with a right, to protect his child. He may aid him in litigation and not be guilty of maintenance. So if a child be assaulted by another person, the father may protect him to the fullest extent, proceeding, if necessary, so far as to take the life of the assailant.

Modern statutes provide not only for the protection of children from the acts of third persons, but also against the wrongs of the parents themselves, or of those in whose custody the children may have been placed by the parents.[3] Reference should be made to the so-called "Factory Acts" in England and in some of the American States, prohibiting the labor of children in certain employments, and in others regulating the hours and places of labor.[4] (*a*)

III. *Education.* — This so-called "duty" is for the most part one of imperfect obligation. Under the public school systems of many of the American States a full opportunity is given to all children to obtain an elementary education. To do so is not, however, usually made compulsory. The amount and kind of education is for the most part left to the choice and even to the caprice of the parents. Some of the States have introduced a compulsory element into their systems of education, particularly in the case of the indigent classes or of truant and idle children. The statutes of the respective States should be consulted for details. The extent of compulsory education in New York is stated in a note.[5]

[1] Hodgens *v.* Hodgens, 4 Cl. & F. 323.

[2] Matter of Bostwick, 4 Johns. Ch. 100.

[3] See New York Penal Code, §§ 287–293. There is legislation of a similar nature in other States. See also, in England, 35 & 36 Vict. c. 38, as to the protection of infants intrusted to persons to be nursed or maintained.

[4] See the Factory Act of 1833, 3 & 4 Wm. IV. c. 103, and many amendatory statutes down to 41 & 42 Vict. c. 16 (1878).

[5] All children between the ages of eight and fourteen are required to attend school for fourteen weeks each year, — eight of which shall be consecutive, — or to be instructed regularly at home in certain specified branches of study. There are provisions authorizing trustees of schools or boards of education to see that the com-

(*a*) See also 54 & 55 Vict. c. 75, and as to the law in New York, Vol. IV. Rev. Stats. 8th ed. pp. 2620–2623; Laws of 1889, ch. 560; Laws of 1890, ch. 398; Laws of 1892, ch. 673; and Laws of 1893, ch. 173.

These propositions, in a general way, sum up the common-law duties and obligations of the father. He is not bound to leave his estate to his child either by will or by the laws of succession. He may convey it away, if so disposed, or may devise or bequeath it by his will to strangers. So if he have several children, he may bestow all his property upon one or more, leaving the others destitute. There is a marked difference between these rules and those which prevail under the Roman law, which makes a child a necessary successor to a portion of the father's estate on his death.[1] This rule prevails in the State of Louisiana.

There are also States where a special statutory rule may interfere with the perfect liberty of testamentary disposal. A marked instance is found in the New York law in respect to a devise or bequest to a charitable organization or association.[2] This, in substance, prohibits a husband, wife, parent, or child from giving by will more than one half of his or her property to such an association where either husband, wife, parent, or child may survive. If the testator gives his estate to a number of charitable societies, they can only take in the aggregate one half of his estate.[3] This statute does not affect a bequest made in another State of the Union to a charitable society domiciled in New York.[4] In determining the point whether one-half of the testator's estate has been devised, etc., it must be treated as if converted into money at his death, and the money value ascertained. It may be that it consists in part or wholly of life interests. The value of these may be ascertained from the recognized annuity tables.[5] The widow's right of dower must be deducted in case of a husband's will, as that does not belong to the husband.[6] The amount of his debts must also be deducted.

Liability for torts of the child. A father is not liable for the wilful torts of his minor child committed without his direction or consent. A well-known illustration is the case where the child wilfully set a dog upon another's person or property to his injury.[7]

pulsory sections of the act are carried into effect. It is generally conceded that the provisions of this act are of but little practical effect. A well-devised law upon this subject is greatly needed. Laws of 1874, ch. 421, as amended by Laws of 1876, ch. 372

[1] Mackelday's Roman Law (Dropsie's Ed.), § 706 (1883).

[2] Laws of 1860, ch. 360.

[3] Kearney *v.* Missionary Society, 10 Abb. N. C. 274; Chamberlain *v.* Chamberlain, 43 N. Y. 424.

[4] Crum *v.* Bliss, 47 Conn. 592.

[5] Hollis *v.* Drew Theol. Seminary, 95 N. Y. 166.

[6] Chamberlain *v.* Chamberlain, 43 N. Y. 424, 440.

[7] Tifft *v.* Tifft, 4 Denio, 175; Schlossberg *v.* Lahr, 60 How. Pr. 450; Wilson *v.* Garrard, 59 Ill. 51; Paulin *v.* Howser, 63 Ill. 312.

Duty of a mother to maintain her minor children. This case is considered separately from that of the father, as the law is not clear. What is referred to is the duty of a mother, who is a widow, to maintain her minor children. Upon this point there is a great conflict of opinion in the cases. They are extensively collated in the opinions (prevailing and dissenting) in the case in the Supreme Court of New York cited in the note.[1] The result there arrived at was that the mother was liable. This view was adopted by the Court of Appeals in a later decision.[2] The argument depended largely on the proposition that the widowed mother was entitled to the services of the minor child, and was under a corresponding duty of maintenance.

A father does not escape liability for the support of his children by permitting them to remain with the mother after a divorce.[3] Still, the better opinion is, that he is not liable if the custody of the child has been given to the mother by a decree of the Supreme Court of the State.[4] In the case cited, there was a decree for divorce, and an order taking the care and custody of the child from the husband and giving it to the wife. The court said[5] that with these decrees in force, the husband had no right to take the child, and to support it or to employ any one else to support it without the mother's consent, and that no contract by the husband in favor of the plaintiff (who had furnished necessaries to the child) could be implied.[6] (*a*)

SECTION II. *The Power or Authority of Parents over Children.* — These may be classified under three heads: I. The right of custody; II. The right of discipline and training; III. The right to the services of a minor child.

I. *The right of custody.* — By this is meant the right of

[1] Gray *v.* Durland, 50 Barb. 100. The dissenting opinion is on page 211.

[2] Furman *v.* Van Sise, 56 N. Y. 435. See Girls' Industrial Home *v.* Fritchey, 10 Mo. App. 344.

[3] Courtright *v.* Courtright, 40 Mich. 633.

[4] Brow *v.* Brightman, 136 Mass. 187.

[5] Id. p. 189.

[6] This is a much-mooted question. The case in Massachusetts seems correct, particularly if there be an absolute divorce. Stanton *v.* Willson, 3 Day, 37, holds the opposite view, but this was not followed in Finch *v.* Finch, 22 Conn. 411, which agrees with Brow *v.* Brightman, *supra.* The Supreme Court of Ohio in Pretzinger *v.* Pretzinger, 45 Ohio St. 452, follows Stanton *v.* Willson; while the English Court of Queen's Bench holds the husband still liable in the case of a voluntary separation and a judicial order authorized by statute, giving the mother the custody of a child. Bazeley *v.* Forder, L. R. 3 Q. B. 559.

(*a*) Where no provision is made in the decree of divorce for the custody of the child, an action may be maintained by the mother against the father for its support. Gilley *v.* Gilley, 79 Me. 292. But see Ramsey *v.* Ramsey, 121 Ind. 215.

control and possession of the child's person. When the child is of tender years, the law wisely (except in cases of abuse) concedes the exclusive possession of the child to one or the other of the parents instead of strangers. After it reaches riper years, the wish of the child itself may be consulted by the court in determining the question of custody. Still, there must, in the last resort, be a determining authority vested in the State as sovereign to limit the parent's power when not exercised for the child's welfare, and perhaps even to take away his control altogether. There are thus regularly two classes of questions to be considered judicially: one, what is the right of a parent to custody when no special element of the child's welfare is presented; the other, what is the right when the question of the child's own welfare is involved. The first of these questions can be fairly presented upon a writ of *habeas corpus;* the other can be more broadly and fully considered by a *court of equity.*

Custody under the writ of habeas corpus. The great use and object of this writ is to relieve a person from unlawful restraint. When applied to the case of an infant or other person not *sui juris*,[1] the legal theory is that he is under *unlawful* restraint when he is not allowed to be in the custody of the person legally entitled to it. It is the function of the writ to remove him from improper custody, and to place him in the care of the one designated by law to have charge of him. This rule will, in general, be applied where the child is too young to determine for himself in what custody he should be. The age at which he would have the power of self-determination is arbitrarily fixed at fourteen in the case of males.[2] If under that age, the judge or court acts for him; if beyond that age, after setting the child free to act, it allows him to go where he pleases.

A brief account of the historical development of this rule may be useful. The earliest case is said to be Rex *v.* Johnson.[3] The child was nine years of age. The court at first thought that it could only see if the child was under restraint. It was finally held that as the child was young, and had no judgment of her own, she should be delivered to the guardian, who took possession of her in court. It is stated in Rex *v.* Smith,[4] that the court subsequently "repented" of this decision. When this was

[1] The expression "*sui juris*" refers to the capacity of a person to act for himself; when that capacity is wanting, he is said to be "not *sui juris*."

[2] It is however held that the father has the custody of a daughter until she is *sixteen*. Reg. *v.* Howes, 7 Jur. N. S. 22.

[3] 1 Strange, 579.

[4] 2 Id. 982 (7 Geo. II.).

mentioned in a later case to LORD MANSFIELD, he remarked that the decision was right.[1] The King *v.* De Manneville[2] is a later and decisive case. The father and mother were not on friendly terms; the former having obtained possession of the child (then eight months old) by stratagem, the court refused to take it from him on the application of the mother. There was no claim that it was sustaining injury for want of maternal nurture. This case was followed by one where the facts were still more unfavorable to the father.[3] He lived with a mistress in adultery, though *he did not bring her in contact with the children.* It was decided that as there was no cruelty nor corruption shown, the court would not deprive the father of his natural guardianship. The rule is stated in this case clearly by COLERIDGE, J., to this effect. When the child is too young to make a choice, the court refers to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, *no restraint exists.* The presumption is in favor of the father; if cruelty or corruption is shown, or reasonably to be apprehended, a counter-presumption arises. In the case of *Ex parte* Skinner,[4] the child was of the age of six; the husband treated *the wife* with cruelty, living with an adulteress. These facts were held to be not sufficient to deprive the father of the child's custody *by means of the writ of habeas corpus.* In fact, the court interferes by the writ only in cases of very gross misconduct,[5] even if at all.[6] If immorality is a ground, it must be such that the morals of the child are *seriously endangered.* The great difficulty of the question is shown in *Ex parte* Skinner.[7] When the father is dead, the mother is the guardian by nurture, and similar principles will be applied in her case.[8]

The difficulties and perplexities attending this subject have led, in England, to an act of Parliament which provides that in questions relating to the custody and education of infants, the *rules of equity shall prevail.*[9] Since this act, the courts of law exercise concurrent jurisdiction with the courts of equity over the custody of infants, but apply the rules of equity.[10]

The common-law rules as to the function of the writ of *habeas*

[1] Rex *v.* Delaval, 3 Burrow, 1436.

[2] 5 East, 221.

[3] Rex *v.* Greenhill, 4 Ad. & El. 624.

[4] 9 J. B. Moore, 278.

[5] *In re* Pulbrook, 11 Jur. 185.

[6] There is a *dictum* in the case of *In re* Hakewill, 12 C. B. 223, that a *court of law* has no jurisdiction under any circumstances to deprive a father of the right of custody.

[7] 9 J. B. Moore, 278.

[8] Reg. *v.* Clarke, 7 El. & B. 186.

[9] 36 & 37 Vict. c. 66, § 25 (10). Compare with this the "Infants' Custody Act" (1873); 36 & 37 Vict. c. 12, § 1.

[10] *Re* Goldsworthy, L. R. 2 Q. B. Div. 75.

corpus in this class of cases have frequently been asserted in the New York courts.[1] (*a*)

The Revised Statutes[2] provide that if the parties live in a *state of separation* without being divorced, the mother may apply to the *Supreme Court* for the custody of the child by writ of *habeas corpus*. This gives the court a new power over the custody of the children.[3] The separation provided for in the statute is by *mutual consent*, and does not include the case where the wife lives apart from the husband by her own act, and without good cause.[4] Proceedings under this statute must be had before the court as such, and not merely before a judge out of court.[5]

A final remark upon this branch of the subject is, that where a child is of sufficient age to choose for itself, the court will simply set it free from restraint, so that it may go where it will. It will not be remanded to the custody of its parent.[6]

Power of a court of equity. The authority of a court of equity as to the custody of children rests on a wholly different basis. It was the theory of the English law that the king, as *parens patriæ*, had the care of those who are not able to take care of themselves, particularly in cases where it is clear that some protection should be thrown around them. The right of the father, viewed from this standpoint, is not personal, but derived from the State. It is not so much a power as a *trust*. In that aspect, it is expected that he will properly take care of and rear his child with due regard to his education and training in letters, morals, and religion. When this trust is grossly violated, the court will interfere, and appoint a person in the place of the father to take charge of the child, and superintend its education, etc. The possession of property is not essential to the exercise of this jurisdiction, though the lack of it may create some practical difficulty.[7] Wellesley *v.* Beaufort (cited in the note) was a thoroughly considered case. The husband brought an adulteress into the family, and trained his children in immoral practices. The children were removed from his custody. The same rule has been applied where the father's conduct is professedly grounded upon irreligious and immoral principles.[8]

[1] People *v.* Chegaray, 18 Wend. 637; People *v.* Wilcox, 22 Barb. 178; Wilcox *v.* Wilcox, 14 N. Y. 575.

[2] 2 R. S. 148, 149.

[3] People *v.* Chegaray, 18 Wend. 637; People *v.* Mercein, 8 Paige, 47.

[4] People *v.* Olmstead, 27 Barb. 9.

[5] People *v.* Humphreys, 24 Barb. 521.

[6] People *v.* Cooper, 1 Duer, 709.

[7] Johnstone *v.* Beattie, 10 Cl. & F. 42; De Manneville *v.* De Manneville, 10 Ves. 52; Wellesley *v.* Beaufort, 2 Russell, 1, 20; s. c. 2 Bligh, N. S. 124; 1 Dow & Clark, 152.

[8] Shelley *v.* Westbrooke, Jacob, 266, n.

(*a*) People *v.* Walts, 122 N. Y. 238; In the Matter of Feeney, 30 N. Y. St. R. 382.

A similar rule was applied under the special circumstances of the case where a husband deserted his wife, and joined a religious sect with peculiar doctrines, the members of which lived by themselves (the "Agapemone").[1]

Still, the court has no power to deprive the father of the custody of the child merely because it is for the latter's benefit,[2] nor *merely* on the ground of his peculiar religious opinions, nor on account of poverty, passionate temper, or harshness in conduct. It is not enough that removal from the father would be better for the children, but it must appear to be essential to their safety and welfare.[3] (*a*) The jurisdiction is not confined to residents, but extends to citizen parents, though the children may be born and reside abroad.[4]

These principles are now much modified in England by the Infants' Custody Act, taking effect April 24, 1873. The object of the act is to vest the court with a discretionary power, which it does not possess by its inherent jurisdiction, to interfere with the common-law right of the father to custody, when children are not more than sixteen years of age, and to place them in the control and custody of the mother.[5] (*b*) The "Besant" case, cited in the note, is instructive as showing the grounds on which the court will now exercise its discretion.

A father cannot, by the rules of the court, make a valid contract to renounce the custody of his children. This rule is derived from the fact that his control and custody are in the nature of a trust. Such an agreement is contrary to public policy.[6] (*c*) This principle would not affect the right of the court to hold that he, by his voluntary act, had abandoned the care of the child, or to give force to his consent when his conduct had been so grossly objectionable as to justify the court in taking the child away from him.[7] So he may have permitted the child to be brought up by a wealthy relative, and to have acquired just expectations of obtaining future benefits from such rela-

[1] Thomas *v.* Roberts, 3 De G. & S. 758.

[2] Curtis *v.* Curtis, 5 Jur. N. S. 1147.

[3] *In re* Fynn, 2 De G. & S. 457.

[4] Hope *v.* Hope, 4 De G. M. & G. 328.

[5] 36 & 37 Vict. c. 12. Some cases arising under this statute are: *In re* Taylor, L. R. 4 Ch. Div. 157; *In re* Besant, L. R. 11 Ch. Div. 508; *In re* Holt, L. R. 16 Ch. Div. 115.

[6] *In re* Andrews, L. R. 8 Q. B. 153; Swift *v.* Swift, 34 Beav. 266; S. C. 34 L. J. Ch. 209; People *v.* Mercein, 3 Hill, 399.

[7] Swift *v.* Swift (on appeal), 34 L. J. Ch. 394; Andrews *v.* Salt, L. R. 8 Ch. 622.

(*a*) See Richards *v.* Collins, 45 N. J. Eq. 283.

(*b*) *In re* Elderton, L. R. 25 Ch. Div. 220.

(*c*) Washaw *v.* Gimble, 50 Ark. 351; Brooke *v.* Logan, 112 Ind. 183.

tive. The court in such a case does not think it right that the father should arbitrarily interfere, and disappoint the expectations which have been raised.[1] But a court will not deprive the father of his right because some stranger has conferred a benefit, such as an estate, upon the child, upon condition that the guardianship shall be relinquished.[2] The result in such a case would be that if the husband did not renounce the guardianship vested in him by law, the estate would not vest in the child. Such a condition will be interpreted strictly.

One of the results of the right of custody is, that the father may, in general, remove the child beyond the jurisdiction of the court.[3] Still, the right of removal beyond the State may turn upon the point whether the infant has been made, through judicial proceedings, a "ward of the Court of Chancery." In such a case the English decisions do not permit a removal with a view to permanently residing abroad, except in cases of imperative necessity, as, for example, where a constant residence in a warmer climate is essential to health.[4] (*a*) In such cases a plan for the infant's education is usually sanctioned by the court.[5] Where such wards are taken abroad temporarily, security that they will be brought back may be required.[6] The clandestine removal of such a ward may amount to a criminal contempt of court. Persons are sometimes made "wards of court" with a view of applying these principles to their cases.[7] In the case cited in the note, a father having six sons, and being about to emigrate to Canada, was restrained on special grounds from taking with him one son, but allowed to take the rest. The court will not compel an infant ward to be taken out of the country.[8] In the case cited the child was an orphan, and both a British subject and an American citizen.

II. *The right of discipline and training.* — This topic is closely allied to the right of custody. The father could not fully discharge his trust obligations without this accompanying right. One of the results is that he may, to a reasonable extent, administer corporal punishment to a minor child. The power

[1] Hill *v.* Gomme, 1 Beav. 540; s. c. 5 M. & C. 250.

[2] Vanartsdalen *v.* Vanartsdalen, 14 Pa. St. 384.

[3] Wood *v.* Wood, 5 Paige, 596. The father will not be restrained in such a removal except in a clear case of abuse of his authority, when he will be enjoined from removing him.

[4] Campbell *v.* Mackay, 2 M. & C. 31; Wyndham *v.* Ennismore, 1 Keen, 467.

[5] Id.

[6] Biggs *v.* Terry, 1 M. & C. 675; *Re* Medley, 6 Ir. R. Eq. 339 — where a form of security may be found.

[7] Vidler *v.* Collyer, 47 L. T. 283.

[8] Dawson *v.* Jay, 3 De G. M. & G. 764.

(*a*) But see Elliott *v.* Lambert, L. R. 28 Ch. D. 186; Stetson *v.* Stetson, 80 Me. 483.

thus conferred upon the father may be delegated to a schoolmaster, who may exercise it under the same limitations. If either father or schoolmaster, in administering such punishment, exceed the bounds of moderation, he will be liable to an action for damages at the suit of the child, and even to a criminal prosecution on behalf of the public.

The topic of *moral and religious education* is one of much importance, and involves the mode of parental training for the duties of citizenship. It has received great attention in the English courts.

The general rule of the English Court of Chancery is that an infant is to be brought up in the religion of the father.[1] (*a*) So if the father be dead, the child is presumed to have the father's religion, and his corresponding civil and social status, and it is accordingly the duty of a guardian to bring up the child in the father's religion.[2]

The Court of Chancery has jurisdiction to restrain a father from interfering with the religious education of his child in special cases, but will not exercise it unless the interference of the father will be injurious to the happiness and welfare of the child.[3]

The general rule above stated will be qualified in cases where the father, or if he be dead, the relatives of a different religion, have consented to his education in another faith until the doctrines of the religion in which he has been reared have taken a strong hold upon his mind.[4] In these and kindred cases the rule may be applied that though the father had an original right, he has abdicated it in favor of those who have conducted the practical education of the child.[5] This rule was not applied to a case where the *court*, owing to the delicate health of a young child, had directed it to continue with the mother and her relatives, they being Protestants, the father having been of the Roman Catholic religion, and dying while the child was only a few months old. It was directed that when at the age of seven, and capable of receiving religious education, it should be trained in the Roman Catholic religion.[6]

[1] *In re* Newbery, L. R. 1 Ch. App. 263.

[2] Skinner *v.* Orde, 8 Moore, P. C. C. N. S. 261; S. C. L. R. 4 P. C. 60; Hawksworth *v.* Hawksworth, L. R. 6 Ch. 539.

[3] *In re* Meades, 5 Ir. R. (Eq.) 98; Davis *v.* Davis, 10 W. R. 245.

[4] Stourton *v.* Stourton, 8 De G. M. & G. 760.

[5] Hill *v.* Hill, 8 Jur. N. S. 609; *In re* Garnett, 20 W. R. 222; Andrews *v.* Salt, L. R. 8 Ch. 622.

[6] Austin *v.* Austin, 4 De G. J. & S. 716; S. C. 34 Beav. 257.

(*a*) See also 54 & 55 Vict. c. 3, § 4.

There may be cases in which the court will protect the conscientious convictions of a minor child, though adverse to the religious doctrines and declared wishes of a living father. Such a power should only be exercised in an extreme case, and with great caution.[1] When the father is dead, it is the general duty of guardians to give the children the same religious training as the father would have adopted had he been living. If this rule is not followed, it is a ground of removal from office.[2] (*a*) The fact that it will be more to the pecuniary interest of the child to train him in one religion than another, cannot properly influence the guardian.[3]

Notwithstanding the rules already stated, the father may *abandon* or abdicate his right to control the religious education of his children. This will depend upon his acts. The fact that he has made children wards of the court is not in itself an abdication.[4] In some instances there are ante-nuptial agreements between husband and wife as to this subject. These do not control the court.[5] (*b*) They will, however, be taken into account in determining whether the father has abandoned his rights.[6] Instances of abandonment will be found in the note.[7]

III. *Right to the services of a minor child.* — A father has a right to the services of his child, and if he be employed by others, to recover his wages.[8] The father might lose his right to sue for wages by an implied assent that the son should receive them; as, for instance, if the latter should enter into a contract to that effect, with his father's knowledge, the father might then be estopped from claiming them. By a New York statute, the parent must notify the employer within thirty days after the commencement of the service that he claims the wages; otherwise, payments made to the child will be valid.[9] (*c*)

[1] *In re* Grimes, 11 Ir. R. (Eq.) 465.

[2] *Re* Hunt, 2 Con. & L. 373.

[3] Talbot *v.* Shrewsbury, 4 M. & C. 672. Reference may also be made to Skinner *v.* Orde, 8 Moore, P. C. C. N. S. 261, and to Austin *v.* Austin, 4 De G. J. & S. 716.

[4] Agar-Ellis *v.* Lascelles, L. R. 10 Ch. D. 49.

[5] Andrews *v.* Salt, L. R. 8 Ch. 622.

[6] Id.

[7] Hill *v.* Hill, 8 Jur. N. S. 609; *Re* Garnett, 20 W. R. 222; *Re* Clarke, L. R. 21 Ch. D. 817; *Re* Walsh, 13 L. R. Ir. 269. In *Re* Besant, L. R. 11 Ch. D. 508, a child was removed from the custody of the mother, because she had published an obscene book.

[8] Shute *v.* Dorr, 5 Wend. 204; Wentworth *v.* Buhler, 3 E. D. Smith, 305.

[9] Laws of 1850, ch. 266; see Clinton *v.* Rowland, 24 Barb. 634.

(*a*) This rule is not changed by the Guardianship of Infants Act, 49 & 50 Vict. c. 27, which, after the death of the father, constitutes alone or with others the mother the guardian. *In re* Scanlan, L. R. 40 Ch. D. 200.

(*b*) *In re* Nevin [1891], 2 Ch. D. 299.

(*c*) See McClurg *v.* McKercher, 56 Hun, 305.

The subject of "emancipation" must here be referred to. This is a popular rather than an accurate expression. It means the case where the child receives his wages by the father's consent and supports himself.(*a*) He may accordingly sue his employer and collect the wages to his own use.[1] Emancipation seems to be in its nature simply a license, and to be revocable.[2](*b*) The contrary seems to be held in Pennsylvania.[3]

It would seem that he cannot withdraw his consent after wages are earned.[4] It is quite plain that if the child, notwithstanding its "emancipation," became sick and unable to work, the father would be required to support it.[5] Emancipation is a question of fact, and may be inferred from circumstances as well as shown by express words.[6]

When a child is emancipated, the father's creditors cannot insist that the child's earnings shall be applied to pay the father's debts. The right of the father is a personal one, and may be waived.[7] The right of the mother, being a widow, to claim the services is not fully settled. It is acknowledged in New York,[8] but denied in Pennsylvania, and in some other States.[9]

Actions for loss of service. The most important question that arises in practice is the right of a parent to bring an action for damages for loss of the child's services caused by the wrongful act of a third party. This is a question quite distinct from that of the right of the child to bring an action for the damage sustained by himself. This last named cause of action would be an action for an injury to an *absolute* right, and would be governed by the same rule as if there were no parent. The present inquiry is, whether beyond the right of the child to sue in his own name, there is an action by the parent to sue in his name, and to hold whatever damages may be recovered to his own use.

It is well settled that such an action will lie. It cannot, however, be maintained for an injury caused in *carrying out a contract* with the child, as, if a child were a passenger on a rail-

[1] McCoy *v.* Huffman, 8 Cow. 84. It is there said that a father "may *emancipate* his child," p. 85.

[2] Clark *v.* Fitch, 2 Wend. 459. The opinion in this case was written by the same judge (SAVAGE, Ch. J.) who wrote in McCoy *v.* Huffman, *supra.*

[3] Gilkeson *v.* Gilkeson, 1 Phil. 194.

[4] Torrens *v.* Campbell, 74 Pa. St. 470.

[5] Clark *v.* Fitch, 2 Wend. 459.

[6] Canovar *v.* Cooper, 3 Barb. 115; Baker *v.* Baker, 41 Vt. 55; Dierker *v.* Hess, 54 Mo. 246.

[7] Johnson *v.* Silsbee, 49 N. H. 543; Atwood *v.* Holcomb, 39 Conn. 270; Lord *v.* Poor, 23 Me. 569.

[8] Furman *v.* Van Sise, 56 N. Y. 435.

[9] Railway *v.* Stutler, 54 Pa. St. 375; South *v.* Denniston, 2 Watts, 474, 477.

(*a*) Kain *v.* Larkin, 131 N. Y. 300; Stanley *v.* Natl. Union Bank, 115 N. Y. 122.

(*b*) Soldanels *v.* Mo. Pacific Ry. Co., 23 Mo. App. 516.

road pursuant to a contract made by himself, and were injured by the carrier's negligence, the father, not being a party to the contract, would have no cause of action. The reason of this rule is that the railroad company had no contract with the father; and, in general, no one can sue for a breach of duty in carrying out a contract, except one who is a party to it.

(1) An action by a father for the seduction of a daughter.

(2) Other actions for injury to a child.

(1) The action by a father for the seduction of a daughter is based in general upon a loss of service. There are cases in which the claim has been rested upon an assumed trespass upon the land of the father for an improper purpose, the fact of seduction being used in aggravation of damages. Much the more common theory of the action is "loss of service."

This seems, at first sight, to be a very narrow and technical ground. Still, practical justice is done by this view, as the service is used only to give a basis for the action, while the damages may be made by the jury proportionate to the real wrong and disgrace caused to the father and to his family, so far as pecuniary damages can give compensation in such a case. The consent of the daughter prevents her from recovering from the seducer upon the maxim *volenti non fit injuria*, unless the act were connected with a breach of promise of marriage, and then the action must be based upon breach of the contract, and the seduction proved in aggravation of damages. The consent of the daughter, however, does not prejudice the father's right of action, since his right *to her services* cannot be taken away without *his* consent. It certainly cannot be claimed with reason that if *force* is used there is no action by the father.[1] It is, in fact, immaterial whether the daughter consents or not. (*a*) The father does not recover as such, but only in the capacity of one to whom *service is due*. There are two cases to be considered separately. One is where the daughter is a minor, and the other where she is an adult. In the first case the father can maintain an action, even though she does not live in the family, or even though she be in the employment of another, receiving wages to her own use. It is enough that he is *entitled* to her services. No acts of service are necessary in this case.[2] (*b*) The English

[1] Lawrence *v.* Spence, 29 Hun, 169 and cases cited.

[2] Clark *v.* Fitch, 2 Wend. 459; Hewitt *v.* Prime, 21 Id. 79; Mulvehall *v.* Millward, 11 N. Y. 343.

(*a*) If the consent of the parent is obtained by fraud, it furnishes no defence to an action against the seducer for loss of service. Lawyer *v.* Fritcher, 130 N.Y. 239.

(*b*) Simpson *v.* Grayson, 54 Ark. 404; Mohry *v.* Hoffman, 86 Pa. St. 358.

courts do not go so far, but hold that the father cannot recover even in the case of a minor daughter, where she has left his family without the intention to return.[1] If she has been discharged from service with another, and was returning home when seduced, the action will lie.[2] (*a*)

When a father has lost *the right* to the minor daughter's services, no action will lie,— as, for example, in the case where she is seduced while apprenticed to another.[3] But if the seducer had caused her to be apprenticed to him, having in view her seduction, there would be no bar to an action.[4] A stepfather, or other person standing in place of a parent, may recover when the actual relation of service and employment exists.[5] When the daughter is over twenty-one, the decisions are uniform. There must be actual service. Slight acts are sufficient.

The loss of service in each case must be the direct and proximate consequence of the unlawful intercourse. In a case where the daughter's fault became public, and she was made sick by the exposure, it was held that the sickness was due to the exposure, and the action would not lie.[6]

The damages, when the action is *by the parent*, may be exemplary, and given as a solace to his wounded feelings, and to atone in a measure for the disgrace to the family, and without reference to the fact that the father is a man of bad character.[7] If the action were brought by a mere master or employer having no capacity to be injured beyond the worth of the services lost, compensation could be recovered only for the loss actually sustained.[8] The action is personal, and the cause of action does not survive to the executors in case of the father's death. (*b*)

It may be added, though not strictly belonging to this topic, that seduction is made, under specified circumstances, a crime, both under the laws of several of the States, including New York, and by Act of Congress.[9]

[1] Dean *v.* Peel, 5 East, 45.

[2] Terry *v.* Hutchinson, L. R. 3 Q. B. 599.

[3] Dain *v.* Wycoff, 7 N. Y. 191.

[4] Dain *v.* Wycoff, 18 N. Y. 45.

[5] Bartley *v.* Richtmyer, 4 N. Y. 38.

[6] Knight *v.* Wilcox, 14 N. Y. 413.

[7] Dain *v.* Wycoff, 18 N. Y. 45.

[8] Lipe *v.* Eisenlerd, 32 N. Y. 229, 238.

[9] By Revised Statutes of the United States, §§ 5349–5351, both inclusive, it is made a crime for any of the officers or crew

(*a*) See Gladney *v.* Murphy, 26 L. R. Ir. 651.

(*b*) The common-law rule that there must be a loss of service to entitle a parent or guardian to sue for the seduction of the child is abolished by statute in several States, and an action is maintainable on proof of seduction alone. Stoudt *v.* Shepherd, 73 Mich. 588 ; Franklin *v.* McCorkle, 16 Lea, Tenn. 609 ; Felkner *v.* Scarlet, 29 Ind. 154. So in some States the daughter may herself prosecute an action as plaintiff for her own seduction. Dodd *v.* Focht, 72 Iowa, 579, and authorities *supra*.

(2) *Other actions for injury to a child.* If the child, when thus injured, is of sufficient age to render acts of service, the action is maintainable. If, however, the injury is temporary, and the child is too young at the time the injury is inflicted to render service, substantial damages cannot be recovered by the parent.[1] If, on the other hand, the injury be *permanent*, prospective damages are recoverable by the parent up to the time when the child would have reached twenty-one years of age. Such damages are necessarily, to a considerable extent, conjectural, since the child might not have attained his majority, even had the injury not occurred, or have been able to render service, and the parent might not live till that time; still, the whole matter must, at a trial, be submitted to the jury.(*a*) Expenses attributable to the injury, actually incurred, or immediately necessary,(*b*) are also recoverable by the parent, but not such as are prospective. These can only be recovered, if at all, by an action in the child's own name.[2]

It has been held in one case to be a rule of law that if a young child be wrongfully killed by another, the parent can recover damages for loss of service up to the time when the child would have attained twenty-one had he lived.[3]

This decision has met with much criticism in later decisions.[4] The importance of the decision is seriously diminished by modern statutes, allowing actions by persons standing in various

of an American vessel during a voyage to seduce and have illicit connection with any female passenger. Conviction cannot be had on the testimony of the female alone. The subsequent intermarriage of the parties may be pleaded in bar of the conviction. In New York, the woman must be unmarried, and seduced by means of a promise of marriage, and must be of previous chaste character. N. Y. Penal Code, §§ 284–286. Under this act it is not material that the promise was made some time prior to the illicit intercourse. Armstrong *v.* The People, 70 N. Y. 38. The crime may be committed, even though the accused effected his object by means of a conditional promise that if the girl would permit the illicit connection he would marry her. Boyce *v.* The People, 55 N. Y. 644; Kenyon *v.* The People, 26 N. Y. 203. It is no defence that after the alleged act of seduction the female has had unlawful connection with another (Boyce *v.* The People, *supra*), nor that pregnancy did not follow. The Penal Code, § 282, also makes the *abduction* of females in certain instances criminal.

[1] Castanos *v.* Ritter, 3 Duer, 370.

[2] Cuming *v.* B. C. R. R. Co., 109 N. Y. 95. The action in this case was brought by the mother. See also Hussey *v.* Ryan, 64 Md. 426; Dennis *v.* Clark, 2 Cush. 347. The English cases do not seem to allow recovery for such expenses unless the child is at the time old enough to render acts of service. Grinnell *v.* Wells, 7 Man. & G. 1033; Hall *v.* Hollander, 4 B. & C. 660.

[3] Ford *v.* Monroe, 20 Wend. 210.

[4] Green *v.* Hudson River R. R. Co., 2 Abb. Ct. App. Dec. 277; Carey *v.* Berkshire R. R. Co., 1 Cush. 475.

(*a*) Dollard *v.* Roberts, 130 N. Y. 269.

(*b*) Dollard *v.* Roberts, *supra*; Barnes *v.* Keene, 132 N. Y. 13.

relative positions to recover compensation in case of injuries to those with whom they are connected, causing death. As this right is a statutory one, the statutes must be consulted for details. Some general principles governing this legislation may properly be stated here, although it is not confined to the case of a parent seeking to recover for the loss of a child.

At the common law no action would lie for an *injury causing death.* None could possibly be maintained by the person killed. The better opinion is that none could be brought for loss of service, unless for such as should be suffered in an interval between the injury and death. Where the death was instantaneous, no action would lie on behalf of any one.[1]

This defect in the law was remedied in England by a statute known as Lord Campbell's Act.[2] The substance of this act has been enacted in many of the States. The leading points in it are these: —

(1) When a party injured would have had an action against a wrong-doer if death had not ensued, the latter is liable to an action notwithstanding the death of the party injured.

(2) The action is to be brought by the executor or administrator of the person deceased, for the benefit of the wife, husband, parent, and child of such person.

(3) The jury may give damages proportioned to the injury, and may divide them, after deduction of costs, among the beneficiaries above named by their verdict.

(4) There cannot be more than one action for the same subject matter of complaint. (*a*)

(5) The action must be commenced within twelve calendar months after the death. (*b*)

The second statute permits the parties in interest, or one or more of them, to sue where there is no action brought by the executor or administrator within six months, and also allows the person causing the injury to pay the money into court under certain regulations.

[1] *Per* LORD BLACKBURN in Seward *v.* "Vera Cruz," L. R. 10 App. Cases (H. L.) 59, 70.

[2] So called from the name of its principal promoter, 9 & 10 Vict. c. 93, amended 27 & 28 Id. c. 95. See also N. Y. Code of Civ. Pro. §§ 1902–1905.

(*a*) A recovery, in an action under Lord Campbell's Act, is not a bar to a subsequent action on contract by the personal representative, for damages to the estate of the deceased during his lifetime, caused by the breach of contract which resulted in death. Daly *v.* D. W. & W. Ry. Co., 30 L. R. Ir. 514; Bradshaw *v.* Lancashire Ry. Co., L. R. 10 C. P. 189; Cf. Pulling *v.* Great Eastern Ry. Co., L. R. 9 Q. B. D. 110; Cregin *v.* Brooklyn Crosstown Ry. Co., 75 N. Y. 192.

(*b*) The limitation in New York is two years from the date of death. Code of Civ. Pro. § 1902.

The following leading rules prevail in the construction of this and similar statutes.

Rule I. If the injured party, had he lived, could not successfully have maintained an action, the executor or administrator cannot. One prominent result is, that if the person killed was guilty of negligence *contributing to the injury*, no recovery is allowed.[1] The expression "contributory negligence" means that neglect on the part of the person injured, without which the death would not have happened. He is thus in a sense the author of the injury and consequent death. This rule is not applied in the case of young children injured or killed, with the same severity as in the case of adults. Thus, it has been held not to be negligence in itself for the parents of an intelligent child four and a half years old to permit it to play in the crowded streets of a city without an attendant, the child having no other place for amusement.[2] Special circumstances might exist which would make the question one of fact, to be decided by a jury.

Rule II. The amount of damages to be recovered in the action is to be determined by the jury under all the circumstances subject to such review as is allowed by the practice of the court in the case of excessive damages. In the case of a child, it would seem that the damages are not necessarily limited to its minority.[3] In some States there is a positive limitation beyond which the verdict may not go, — as, for example, $5,000. It is clear that the father may recover the whole value of the child's services up to majority, within the statutory limit, if any.[4]

Rule III. The statute has but a local effect, and the injury must occur within the State where the action is brought, or if not, within a State having a statute of the same kind.

Rule IV. The object of this legislation was to give a *personal* action for damages for a *personal* injury. It cannot be properly extended to an action in a court of admiralty *against a ship* for injuries done, without clearer words in this or some other statute.[5] (*a*)

[1] This rule is not applied under the Massachusetts statutes to a passenger. Merrill *v.* Eastern R. R. Co., 139 Mass. 252.

[2] Birkett *v.* Knickerbocker Ice Co., 110 N. Y. 504. See as to contributory negligence in this class of cases, Batcheler *v.* Fortescue, L. R. 11 Q. B. D. 474.

[3] Birkett *v.* Knickerbocker Ice Co., 110 N. Y. 504.

[4] McGovern *v.* N. Y. Central R. R. Co., 67 N. Y. 417.

[5] Seward *v.* Vera Cruz R. R., L. R. 10 App. Cas. 59. There were words in another act giving the court of admiralty jurisdic-

(*a*) An action *in personam* against the owners of the vessel will lie in the Admiralty Division. The Bernina, L. R. 12 P. D. 58; aff'd, 13 App. Cas. 1.

Rule V. Mere mental suffering from the death of a child is not an element of damage under these statutes.[1] There must be true damages, and if none are shown, only nominal damages can be recovered.[2] Conjectural damages are not recoverable,—such as that the party killed was in the line of promotion, and would have received higher wages.[3]

Independent of Lord Campbell's Act and others resembling it, the right of a parent to recover damages is so far affected by the act of the child, that if the latter, by an act of negligence contributing to the injury, could not himself recover, the father cannot. As has been seen, this doctrine of negligence is not to be applied to a very young child, where the parent or other person having it in charge is not negligent.[4] Where there is doubt as to the capacity of the child to exercise care, and so avoid the effect of the negligent acts of another, the whole question will be submitted to the jury. As a general rule, persons doing acts which may, when they are negligent, result in injury to young children, are bound, if they are aware of their presence, to exercise more care to avoid injuring them than in the case of mature persons.[5]

The cause of action in this class of cases is founded in tort.[6]

Where the injury causing death *was committed on the high seas*, obscure questions are presented, involving the power of the States to legislate upon matters occurring upon the high seas, if the ship belongs to one who is domiciled within the State. The following propositions have been decided: (1) The court of admiralty has no jurisdiction in such a case independent of statute. (*a*) This result was reached by holding, in the first instance, that by the common law no action lies in a common-law court for any injury which results in death;[7] and next, by an adjudication that there is no distinction between the admiralty law and the strict common law on this point.[8] (2) The law of the State will be appli-

tion over claims "for damage done by any ship." These words were not sufficient to include a case under Lord Campbell's Act.

[1] Galveston *v.* Barbona, 62 Tex. 172.

[2] Atchison, &c. R. R. *v.* Weber, 33 Kan. 543.

[3] Brown *v.* Chicago, R. I. & P. R. R. Co., 64 Iowa, 652.

[4] Mangam *v.* Brooklyn R. R. Co., 38 N. Y. 455.

[5] O'Mara *v.* Hudson River R. R. Co., 38 N. Y. 445; Ihl *v.* R. R. Co., 47 N. Y. 317.

[6] Robinson *v.* Oceanic S. N. Co., 112 N. Y. 315.

[7] Insurance Co. *v.* Brame, 95 U. S. 754.

[8] The Harrisburg, 119 U. S. 199 and many cases cited in the opinion.

(*a*) The Wydale, 37 Fed. R. 716; Welsh *v.* The North Cambria, 39 Fed. R. 615; The Alaska, 130 U. S. 201; The Oregon, 45 Fed. R. 62. A libel *in rem* for damages incurred by loss of life will not be entertained by the District Court of the United States, sitting as a court of admiralty, where the local law which gives a right of action to the personal representatives of the deceased does not expressly create a lien. The Corsair, 145 U. S. 335.

cable where a citizen of such State is wrongfully killed on board of a vessel on the high seas, where the vessel was registered at a port within the State.[1] This decision involves the further propositions that the law of the State extends even to acts done on the high seas, if not in conflict with the maritime jurisdiction of the United States, and that there is no such conflict of jurisdiction.[2] (*a*)

A parent may proceed under the *Civil Damage Act* for injuries caused by the sale of intoxicating drinks to his child. The principles governing this subject have already been considered in the fifth section of the chapter on the law of husband and wife.[3]

The father, however, as such, has no *right to the estate* of the child derived by inheritance, bequest, or from other sources. If there be money belonging to him in the hands of an executor or administrator, he cannot, as father, demand it.[4] He must claim it, if at all, in the character of guardian, after giving the usual bonds. Should he reside out of the State, he must be appointed guardian here.[5] Should he, as father, assume to sell his child's goods, he would convey no title to the purchaser.[6]

SECTION III. *The Relation of the Child towards the Parent.*— This topic may be considered under three subdivisions.

I. Status or domicile. II. Rights of child as such. III. Duties of children towards parents.

[1] McDonald *v.* Mallory, 77 N. Y. 546.

[2] This point is by no means acquiesced in by all students of maritime law. The New York court at first decided differently in the case of Kelly *v.* Crapo, 45 N. Y. 86. This decision was reversed in Crapo *v.* Kelly, 16 Wallace (U. S.) 610, apparently on the ground that the ship, though on the high seas, might be a part of the *territory* of a State, and, for some purposes, as completely so as if she had been physically within the bounds of that State. This may be conceded to be the general rule of maritime law, and yet it may not be applicable to this country, by reason of the maritime jurisdiction conferred by the Constitution upon the United States. The whole matter thus depends upon the true construction of the Constitution. This is singularly vague and indefinite as to the *legislative* power of Congress over maritime subjects, though the *judicial power* is conferred in very broad and comprehensive terms. It extends "to *all* cases of admiralty and maritime jurisdiction." Art. III, § 2. It would seem reasonable to hold that the legislative power was by implication exclusively vested in Congress, without reference to the clause concerning foreign or interstate commerce, as being legislation necessarily of a national character or for national purposes. The opposite view leads to the almost whimsical conclusion that each State, no matter how far from the ocean, has for certain purposes its own maritime law. The difficulties attending this view are forcibly stated in a pamphlet written by R. C. McMurtrie, published April 4, 1889.

[3] *Ante*, pp. 226 *et seq.*

[4] Genet *v.* Tallmadge, 1 Johns. Ch. 3; s. c. Id. 561.

[5] Williams *v.* Storrs, 6 Johns. Ch. 353. In New York a legacy under $50 may be paid to a father for the use of a minor child. Code of Civ. Pro. § 2746.

[6] Fonda *v.* Van Horne, 15 Wend. 631.

(*a*) Cf. Walsh *v.* The North Cambria, 40 Fed. R. 655.

I. *Status or domicile.* — The domicile of a legitimate child at his birth is in general that of the father, or, if he be dead, that of the mother. He belongs to the class of dependent persons, and his domicile may be changed from time to time by the person upon whom he is dependent.[1] If no such change be made, the "domicile of origin" continues during infancy, and even after majority, until he change it by his own act.[2] Though there have been doubts expressed by some authorities whether the mother can change the child's domicile, the better opinion is that, in general, if the father be dead, and the mother (not having married again) acquire a new domicile, it is communicated to the infant.[3] If both parents be dead, the power to change the domicile resides in the grandfather if living, and if not, in the grandmother, if she be alive.[4] The authority vests in one who is guardian *by nature.* If a female infant marry, the domicile, on general principles of law, follows that of the husband.[5] If the mother, having an infant child by a first husband, deceased, marries again, the domicile of the child continues during infancy to be the same as at its father's death.[6] The same general principles prevail in the law of continental Europe.[7]

II. *Rights of child as such.* — The consideration of this topic has for the most part been anticipated in treating of the *duties* of parents, since these are but another form of stating the rights of the child. There are a few other cases to be considered. (1) A child does not have at common law any right of action when a father is injured by the wrongful act of another. Under the statute for "injury causing death," an action may be brought by an administrator to recover for the benefit of the next of kin, among whom he may be included. He may also have a statutory remedy under the Civil Damage Act.[8] (2) There are instances in which statutes confer benefits upon a child in that character. An instance is found in the copyright laws, under which it is provided that if an author having taken out a copyright for twenty-eight years dies before it is renewed, a renewal may be taken for the benefit of the widow or *children.*[9] So under the Homestead laws of a number of the States, the benefits of the

[1] Somerville *v.* Somerville, 5 Ves. 750; Sharpe & Crispin, L. R. 1 P. & D. 611.

[2] Dicey on Domicil, 107.

[3] Potinger *v.* Wightman, 3 Merivale, 67; Johnstone *v.* Beattie, 10 Cl. & F. 42, *per* LORD CAMPBELL; Ryall *v.* Kennedy, 40 N. Y. Super. Ct. 347; Lamar *v.* Micou, 112 U. S. 452, 470.

[4] Lamar *v.* Micou, 114 U. S. 218.

[5] Dicey on Domicil, 104.

[6] Cumner *v.* Milton, 3 Salk. 259; Lamar *v.* Micou, 112 U. S. 470, 471; Brown *v.* Lynch, 2 Bradf. 214.

[7] 1 Burge's Colonial & Foreign Laws; Phillimore's International Law. See also works on the "Conflict of Laws."

[8] *Ante,* pp. 226 *et seq.*

[9] U. S. Rev. St. § 4954.

Homestead act accrue to minor children by special mention in the statute.[1] Similar provisions are found as to setting apart in the settlement of an estate certain items for the benefit of a widow and minor children.

III. *Duties of children towards parents.* — It is not intended to consider in this connection moral obligations, but only legal duties, — such as are capable of enforcement in a court of justice.

The principal duties of this sort are maintenance and protection.

(1) *Maintenance.* It has been held that, at common law, a child having means is under no duty to support an indigent parent, but that such an obligation, so far as it exists, depends wholly on statute.[2] (*a*) The duty is, however, frequently enjoined in the poor laws, commencing in England with the statute of Elizabeth, already referred to when treating of the duties of parents.[3] In that statute the duty to sustain grandparents was also prescribed, as it was in New York at one time.[4] The present law only mentions parents.[5] Accordingly, a tradesman cannot supply an indigent parent with necessaries, even though the child may have declined to support the parent, and sue the child on the theory of an implied contract.[6] If, however, the goods were supplied at the child's request, he would be liable by reason of the request.[7] (*b*)

(2) *Protection.* A child may lawfully aid or "maintain" his parent in litigation. So he can justify an assault and battery committed in the parent's defence, the latter being first assailed and resisting the attack when the child interfered.[8]

DIVISION II. — *Illegitimate Children.*

It is not easy to define legitimacy. The most general form of expression is that condition in which a child is whose parentage is fully recognized by law. It is sometimes stated that one who is "born out of wedlock" is illegitimate. This description does not suffice, for it is now well settled in a number of States that one may be legitimate who is born out of wedlock, — as, for example, by the subsequent intermarriage of his parents. This fact would not necessarily confer upon the person so legitimated the

[1] The statutes are collected in 1 Washburn on Real Property (5th ed.) pp. 357–365.

[2] Dawson *v.* Dawson, 12 Iowa, 512; Edwards *v.* Davis, 16 Johns. 281.

[3] *Ante* pp. 233 *et seq.*

[4] *Ex parte* Hunt, 5 Cow. 284.

[5] Code of Crim. Pro. § 914.

[6] Cook *v.* Bradley, 7 Conn. 57; Lebanon *v.* Griffin, 45 N. H. 558.

[7] Lebanon *v.* Griffin, *supra.*

[8] Obier *v.* Neal, 1 Houston (Del.), 449.

(*a*) Herendeen *v.* DeWitt, 49 Hun, 53.

(*b*) Id.

right to be heir to lands in a State where subsequent intermarriage did not confer legitimacy.

There are three cases in which the question of illegitimacy may arise: I. Where the mother is at the conception, as well as at the birth of the child, an unmarried woman; II. Where the mother, being a married woman, the husband is not the father, or deemed in law to be so; III. Where the mother at the time of the child's birth is a widow.

I. By the Roman law, when the parents were unmarried at the birth of a child, their subsequent intermarriage would make it legitimate. This rule did not prevail in the common law of England.

The clergy of the Middle Ages favored this rule of the Roman law and desired to establish it in England by statute in the reign of Henry III.[1] The earls and barons are said to have cried out with one voice that they were unwilling to change the law of England, as it had hitherto existed and been approved. There thus was as to this point a marked antagonism between the clergy and the secular courts. Bracton,[2] writing in the reign of Henry III., says, "It is to be known that if any one has natural children by any woman, and afterwards contracts matrimony with her, the children already born are legitimated by the subsequent marriage and are reckoned fit for all lawful acts, — *nevertheless, only for those* which *regard the sacred ministry*, but they are not legitimate for those which *regard the realm, nor are they adjudged to be heirs who can succeed to their relatives, on account of a custom of the realm which is of a contrary import.*" It has been a settled rule of the common law ever since his day that no one can inherit except one whom *wedlock* shows to be heir. *Hæres est quem nuptiæ demonstrant.* With these general remarks we reach the subject of *retroactive legitimacy*.

This expression is used to include the case where the parents of an illegitimate child subsequently intermarry, and the subsequent marriage produces a retroactive effect and makes the child legitimate from its birth.

This theory is derived from the civil or Roman law, and has been adopted in the countries of continental Europe and in Scotland. The theories on which it proceeds may not be perfectly uniform. It is only proposed to give a cursory view of the ground on which the Roman law rests. That law assumed that there was an *inchoate contract* between the parties, which, when perfected by marriage, was drawn back to the period of the com-

[1] Stat. of Merton, 20 Henry III. c. 9. [2] 1 Twiss' Bracton, 503.

mencement of the contract, and that in this manner the child was made legitimate. A fiction of law is resorted to, called the doctrine of "relation."

Some important qualifications of the principle of retroactive legitimacy are derived from this theory. One is, that when the child was conceived, the parties must have had the capacity to enter into a contract of marriage. They must be under no disability to contract, and there must not be an immoral element in the transaction beyond the unlawful intercourse, such as that the man was a married man. Moreover, there must not be an intermediate marriage with another party. It was in the view of the Roman jurists an *incomplete contract* followed up by a complete one, with the fiction that the subsequent complete contract was to be referred back to the date when the original incomplete contract was made.[1]

The doctrine of the common law was different. The *status* created by bastardy was indelible, except by act of Parliament. No repentant acts of the parties could make the intercourse lawful from the beginning.

The States of the American Union are quite divided in their policy upon this subject. Some of them adhere to the common law, — *e. g.*, New York. Others, with more or less variations follow the Roman law, while adopting the general principle of retroactive legitimation.

Difficult questions thus arise where interstate problems are presented, depending upon the effect of the domicile of the father. It is conceded that the domicile of the father is in general the controlling fact in determining legitimacy. The difficulty is in the following cases: Where the domicile is in one State, and the birth of the child and perhaps the subsequent marriage in another; or, where the putative father was domiciled in one country when the child was born, and in another when the marriage took place. So it is a question whether retroactive legitimacy will affect the inheritance of real estate, when a different law prevails in the place where the land is situated from that of the domicile. Reference may be made to the following propositions as adjudicated.

(1) The law of the domicile ought to prevail, even though the child was born and the parents intermarried in another country.[2]

[1] Merlin, Répertoire de Jurisprudence, Art. Légitimation. *In re* Wright's Trust, 2 Kay & J. 595. The rules of the Roman law have recently been thoroughly considered by the House of Lords, and the distinction between subsequent legitimation as a matter of right and by imperial rescript stated and applied to the law of Malta. Gera *v.* Ciantar, L. R. 12 App. Cas. 557 (1887).

[2] Munro *v.* Munro, 7 Cl. & F. 842.

(2) If the father has changed his domicile between the time of the birth of the child and the marriage, the law of the domicile at birth may control.[1] (*a*)

(3) If a bastard child of an English father be born out of the Queen's dominions, being an alien at birth, the subsequent intermarriage of his parents will not make him a British subject.[2]

(4) The question as to the effect of a marriage following the law of the domicile upon real estate situated in another country has been viewed differently by high courts. There is a strong opposition between the theory of the English and of the New York courts. The question arose in England whether if a Scotchman owning land in England should marry the mother of his illegitimate child, the latter could inherit the father's land in England.[3] Under the rules of the "comity of nations," the child was clearly legitimate.[4] The real question was, whether the child was an *heir* under English definitions of that word; and it was held that he was not an "heir," for no one can be an "heir" unless *born* in lawful wedlock.

As it is a settled rule that the right to inherit real estate depends upon the law of the place where the land is situated, it followed that he could not be an heir to English land. Accordingly, one might be a legitimate child, and yet not be an English heir.[5] (*b*) The New York court has refused to follow the English cases, maintaining that an acquired legitimacy confers the capacity to inherit land everywhere, and that it is not necessary that one claiming an inheritance should be *born* in lawful wedlock.[6] (*c*)

[1] *In re* Wright's Trust, 2 Kay & J. 595. In this case, the domicile at birth was English; at the time of marriage, French. Both systems of law were considered by the court.

[2] Shedden *v.* Patrick, 1 Macq. App. Cas. 535, 612.

[3] Birtwhistle *v.* Vardill, 7 Cl. & F. 895.

[4] *Re* Dorr's Estate, 27 L. J. Ch. 98, 100; s. c. 4 Drewry, 194; Skottowe *v.* Young, L. R. 11 Eq. 474, 477.

[5] Birtwhistle *v.* Vardill, 2 Cl. & F. 581; s. c 7 Id. 895 and 9 Bligh, N. S. 32.

[6] Miller *v.* Miller, 91 N. Y. 315. The court seems to have been mistaken in its opinion (p. 322) that the English rule was derived from the Statute of Merton. In the so-called Statute of Merton the nobles *refused* to change the then existing common law. Consult Dicey on Domicil, 187–191. Smith *v.* Dorr's Adm. 34 Pa. St. 126, and Lingen *v.* Lingen, 45 Ala. 410, are *contra*.

(*a*) Cf. *In re* Grove, L. R. 40 Ch. D. 216.

(*b*) This doctrine does not prevent a child born out of lawful wedlock in another country, who has been legitimated by the subsequent marriage of his parents there, from taking a devise of real estate in England left to the "children" of his father. *In re* Grey's Trusts [1892], 3 Ch. D. 88.

(*c*) Stack *v.* Stack, 6 Dem. 280. See also note to Simmons *v.* Bull, 56 Am. Dec. 261.

II. *Where the mother is married, but the husband is not the father.* — This is called by a leading writer on this subject an instance of "adulterine bastardy."[1] A rule of public policy now becomes potent and discourages an inquiry into the facts so as to bastardize the issue. It is not enough that an adulterer may have been the father; the proof must be so strong as to establish the fact that he must have been the father. The rules of the ancient law were extremely strict in favor of legitimacy, as shown by a remarkable decision in the Year Book of 32–33 Edward I. (A. D. 1304), cited in a note.[2]

At one time, bastardy could not be established unless it appeared that the husband had been beyond the "four seas" (surrounding England). This rule has been exploded,[3] and the real inquiry now is, whether the husband could have been the father. If the husband have access to the wife, the child will be legitimate, unless there be proof of impotency or other evidence equally convincing. There has been much confusion in the cases, owing to the fact that the word "access" has two significations; one, the *opportunity* for sexual intercourse, — *e. g.* by their living in the same house, — and the other, sexual intercourse itself. Where there has been access of the latter sort it will be conclusively presumed that the husband was the father, even though it be established that an adulterer has also had like intercourse. But if "access" be used simply in the sense of an opportunity for sexual intercourse, it may be shown by circumstantial evidence that it did not in fact occur, in which case the child might be declared illegitimate. In other words, the fact of sexual intercourse may be proved or disproved like any other fact. At the same time, if the *opportunity* as between husband and wife exists, the presumption of law is that it took place, and the evidence to

[1] Sir Harris Nicolas, Treatise on the Law of Adulterine Bastardy, London, 1836.

[2] Year Books of the Reign of King Edward I., translated by Alfred J. Horwood, under direction of the Master of the Rolls (London, 1864). The reporter says (32 & 33 Edw. I. p. 62), "I remember how once a damsel brought an assise of Mordancester on the death of her father, &c., and the tenant said that she was not the next heir; the assise came and said that the father of her who brought the assise did, after he had married her mother, go beyond sea, and remain there for three years; and that afterwards when he returned to his own country he found her, who then brought the assise, born only a month before he got to his inn; wherefore they of the assise [jury] said clearly that she was not next heir, because she was not his daughter, &c.: but notwithstanding that, — for the privacies of man and wife cannot be known, and he may have come into the country by night and have begotten her on his wife, — it was decided by the Justices that she should recover."

[3] King *v.* Luffe, 8 East, 193, "until the year 1717, . . . a child born in wedlock could not be bastardized unless the parties were separated by a sentence of divorce, by evidence of the husband's *impotency*, or of his absence from the realm when it was begotten." Nicolas' Treatise, 280.

the contrary offered to rebut the presumption must be strong, distinct, satisfactory, and convincing. This is the result of the famous Banbury Peerage Case in England.[1] (*a*)

In this country the distinctions taken in the English courts have not been definitely established. It has been held in Louisiana that nothing can impugn the legitimacy of a child born during marriage, except proof that it was impossible for the husband to have been the father.[2] Other courts state that the legal presumption can only be rebutted by evidence that shows "beyond all reasonable doubt" that the husband could not have been the father.[3] In other cases it is held that illegitimacy must be made clearly to appear.[4] Others follow the course of the later English decisions.[5] Neither the husband nor wife, on grounds of public policy, can be a witness to prove non-access.[6] (*b*) Nor will their declarations made out of court be sufficient to establish illegitimacy.[7]

Illegitimacy may be proved by physical facts, such as that while the husband and wife are white persons the child is a mulatto.[8]

Where the parties live apart by the decree of the court, the presumption is against legitimacy, though proof may be offered to the contrary.

III. *Where the mother at the time of the child's birth is a widow.* — The same general questions may arise under this head as under the last subdivision, with the additional inquiry whether too long a period has not elapsed since the husband's death to admit of the supposition of legitimacy. No particular time is

[1] This case is reported in full in Nicolas' Treatise, in an Appendix. It was followed in Morris *v.* Davies, 5 Cl. & F. 163, where the topic is discussed at great length. See also The Barony of Saye and Sele, 1 H. L. Cas. 507. Mr. Nicolas insists that this is a great departure from the common law, while the court claims that it is a proper deduction from the abandonment of the "rule of the four seas."

[2] Vernon *v.* Vernon's Heirs, 6 La. Ann. 242.

[3] Phillips *v.* Allen, 2 Allen, 453; Stegall *v.* Stegall's Adm. 2 Brock (U. S. Cir. Court) 256, 264.

[4] Dennison *v.* Page, 29 Pa. St. 420; Cannon *v.* Cannon, 7 Humph. (Tenn.) 410.

[5] Commonwealth *v.* Stricker, 1 Browne (Pa.), Appendix 47; State *v.* Shumpert, 1 S. C. 85; Wilson *v.* Babb, 18 Id. 59.

[6] Tioga County *v.* So. Creek Township, 75 Pa. St. 433.

[7] Dennison *v.* Page, 29 Pa. St. 420; Bowles *v.* Bingham, 2 Munford (Va.), 442.

[8] Watkins *v.* Carlton, 10 Leigh (Va.), 560. It has, however, been held that if the mother were an Indian it would not be enough to prove illegitimacy to show that the child was "colored," since the color would be presumptively attributed to its Indian blood. Illinois L. & L. Co. *v.* Bonner, 75 Ill. 315.

(*a*) Burnaby *v.* Baillie, L. R. 42 Ch. D. 282; Bosvile *v.* Attorney-General, L. R. 12 P. D. 177.

(*b*) Burnaby *v.* Baillie, *supra*; People *v.* Court of Sessions of Ontario County, 45 Hun, 54; Watts *v.* Owens, 62 Wis. 512. But see State *v.* McDowell, 101 N. C. 734.

fixed by any rule of law (in the absence of a statute),[1] and resort must be had to the testimony of experts in physiology. Approved works on Medical Jurisprudence may be consulted.

There is a peculiar rule of the common law, to the effect that if the mother has married again so soon after the death of her husband that either husband might be the father, the child is more than ordinarily legitimate, and may choose his parent as between the two husbands. No case of that kind has found its way into the American reports.

The legal rights and duties of the parents of illegitimate children. The principal duty of the father of an illegitimate child is that of support. He has no right in morals or in law to bring such a child into being and to cast the burden of his support during infancy upon society.

By an early English statute[2] two justices of the peace could in their discretion make orders both for the punishment of the mother and reputed father and for the relief of the parish where the child was born. They were authorized to charge the parents with the weekly payment of money or other sustentation. If the order was not obeyed, the parents were committed to jail, unless they put in sufficient surety to obey the order of the justices or else to appear at the next general sessions of the peace to be held in the county and to abide the order there made. This is in its nature a criminal proceeding, and is followed in substance in this country.[3] (*a*)

These old statutes have been repealed in England and those referred to in the note[4] have taken their place. There is still a general resemblance to the old methods. Infancy is no defence to an action on the undertaking given as security by the putative or reputed father.[5]

The principal right of a parent of an illegitimate child is that of custody. The mother is entitled to the custody rather than the father.[6] (*b*) If the putative father obtains possession of the child

[1] By the New York Code of Criminal Procedure, § 838, a child is illegitimate if a husband is separated from the wife and mother for a whole year previous to its birth.

[2] 18 Eliz. c. 3. There was a number of English statutes on this general subject down to about the time of the American Revolution.

[3] Reference may be made in New York to the Code of Criminal Procedure, § 838, and subsequent sections, where proceedings in bastardy are detailed at length.

[4] 7 & 8 Vict. c. 101; 8 & 9 Id. c. 10; 21 & 22 Id. c. 67; 35 & 36 Id. c. 65, § 2; 36 & 37 Id. c. 9.

[5] The People *v.* Moores, 4 Den. 518.

[6] *Ex parte* Knee, 1 Bos. & Pull. N. 521. After the mother's death, the putative father is entitled, except under special circumstances, to the child's custody. *In re* Kerr, 24 L. R. (Ir.) 59.

(*a*) See also in New York, 1 Birdseye's Rev. State. 246.

(*b*) Barnardo *v.* McHugh, 61 L. J. (Q. B. D.) 721; Queen *v.* Nash, L. R. 10 Q. B. D. 454; Friesner *v.* Symonds, 46 N. J. Eq.

by force or fraud, the court will order it to be restored to the mother.[1] The court will issue a writ of *habeas corpus* to bring up the child on the mother's application, if it be within the age of nurture, and award it to her, unless sufficient reason be shown to the contrary.[2] If the child have sufficient discretion to judge for itself, the court will not interfere.[3] The father cannot shake off his liability for the support of the child by demanding the custody and meeting with a refusal.[4]

Status of an illegitimate child. The *status* of an illegitimate child is summed up in the statement that he is in law the son of no one, — *filius nullius, filius populi, filius terræ.* He has no capacity to inherit land from his father, mother, or collateral relatives, nor to take personal property by succession from an intestate relative. He has no name by succession, but only that which he may acquire by reputation. For example, he would not be regarded as a "child" under a statute which permits a "child" to bring an action for injury to a father.[5] Still, he might by reputation gain the name of "child" of one who had no legitimate children.[6] So he may be legally described by referring to him in connection with his mother.[7] The result of these rules is that he is not domiciled where his putative father is, but takes the domicile of his mother at the time of his birth.[8] But if the mother be unknown, the domicile is where he is born. The domicile may be changed from time to time during infancy by the act of the mother.[9]

An illegitimate child, notwithstanding these artificial rules, is for some purposes recognized as having blood relatives. Thus, an illegitimate person cannot marry a blood relative of any nearer degree than a legitimate person.[10]

Rules of public policy as affecting such children. The law discourages the procreation of such children, but at the same time countenances and permits provision to be made for them when once in existence.

Accordingly, all contracts and grants made in view of illicit

R. 148; Rex *v.* Soper, 5 Term R. 278; Rex *v.* Moseley, 5 East, 224 n.; People *v.* Landt, 2 Johns. 375; Carpenter *v.* Whitman, 15 Id. 208; Matter of Doyle, Clarke's Chanc. R. (N. Y.) 154; People *v.* Kling, 6 Barb. 366.

[1] Robalina *v.* Armstrong, 15 Barb. 247.

[2] Rex *v.* Hopkins, 7 East, 579; Robalina *v.* Armstrong, 15 Barb. 247.

[3] *In re* Lloyd, 3 M. & G. 547.

[4] Carpenter *v.* Whitman, 15 Johns. 208.

[5] Dickinson *v.* North Eastern Ry. Co., 2 H. & C. 735.

[6] Wilkinson *v.* Adam, 1 Ves. & B. 422.

[7] Crook *v.* Hill, L. R. 3 Ch. Div. 773.

[8] Dicey on Domicil, 5.

[9] Id. 97.

[10] Hains *v.* Jeffell, 1 Ld. Raymond, 68; approved of in People *v.* Lake, 110 N. Y. 61, where it was held that under the New York Penal Code, § 302, incest may be committed by a father with an illegitimate daughter.

relations, and all provisions made for such children as may come into existence by means of such relations, will be declared null and void. (*a*) An example is a future estate in land to vest in a prospective illegitimate child.[1] A similar provision in favor of one in existence and sufficiently described would be upheld.[2]

So a court of equity will enforce a trust created by a father in favor of such a child.[3] Still, it has been held that the ordinary conveyance termed a "covenant to stand seized," which has the consideration of duty and affection to uphold it as between a father and legitimate child, has no *consideration* to uphold it in a like conveyance to illegitimate offspring. The natural love and affection in the latter case is not equivalent in law to the same affection in the former case, supported as it is by legitimacy.[4]

It is well settled that if the reputed father promise to pay money to the mother in consideration that she will maintain the child, or relinquish its custody and management, and she act accordingly, the promise will be binding upon him.[5] Where such an agreement purported to bind the father to support a child (nearly six years old) "until it was able to do for itself," it was held that it must be in writing in order to comply with the Statute of Frauds.[6]

The New York Court of Appeals further holds that the *natural obligation* arising out of the relation of the father to the child is a sufficient consideration for a contract on his part to pay for its support and maintenance.[7] Having once made the agreement, he continues to be bound by it until he renounces the child or otherwise notifies the persons so supporting and maintaining it that he will no longer be liable to them.[8]

Establishment of legitimacy by a direct legal proceeding. By the common law, there is no mode of establishing legitimacy by a direct proceeding for that purpose. This is a serious defect, as it leaves the matter of determining one of the most important relations of life subject to distressing uncertainty, and that, frequently, for many years. This defect has been to some extent remedied in England by the legislation referred to in the note.[9]

[1] Crook *v.* Hill, L. R. 3 Ch. Div. 773.

[2] Id.

[3] Williamson *v.* Codrington, 1 Ves. Sr. 511; Knye *v.* Moore, 1 Sim. & Stuart, 61.

[4] Fursaker *v.* Robinson, Precedents in Chan. 475; s. c. Gilbert, Eq. R. 139. But see Todd *v.* Weber, 95 N. Y. 181.

[5] *In re* Plaskett, 30 L. J. (Ch.) 606; Jennings *v.* Brown, 9 M. & W. 496; Hicks *v.* Gregory, 8 C. B. 378; Smith *v.* Roche, 6 C. B. (N. S.) 223; Todd *v.* Weber, 95 N. Y. 181, and cases cited.

[6] Farrington *v.* Donohoe, 1 Ir. R. C. L.) 675.

[7] Todd *v.* Weber, *supra.*

[8] Todd *v.* Weber, *supra;* Cameron *v.* Baker, 1 C. & P. 268; Nichole *v.* Allen, 3 C. & P. 36.

[9] 21 & 22 Vict. c. 93. Any natural-born subject of the Queen, or any person

(*a*) Thompson *v.* Thomas, 27 L. R. (Ir.) 457.

Such legislation might well be copied in substance by the States of this country.

American statutes modifying the rules of the common law as to illegitimacy. Statutes have been passed in some of the States which, while they recognize in general the disabilities of illegitimacy, to some extent modify them. The statutes of New York provide that if an illegitimate person die without descendants, his estate shall descend to his mother, and if she be dead, to the relatives of the intestate on the part of the mother, as if the intestate had been legitimate,[1] and, further, that illegitimate children, *in default of lawful issue*, shall take by succession from their mother both real and personal property, as if they had been legitimate.[2] (*a*) In some instances special statutes are enacted making a specified illegitimate person legitimate, while the general law remains unaffected. Such a law, if passed with the father's consent, would apparently be constitutional if vested rights were not affected, — as, for example, if an illegitimate son were legitimated before his father's death. The legitimate children could not legally complain because a prospective heir had been added to their number by legislative act.[3]

whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in England or Ireland, or claiming property situated in England, may apply by petition to the court of divorce praying for a decree that the petitioner is the legitimate child of his parents and that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage. He is also allowed to ask for a decree that his own marriage is valid. Notice of the application must be given to the Attorney-General, who is deemed to be a respondent in the proceeding. The court has power to order such persons to be summoned to attend the proceedings as it may see fit. The decree is not binding upon persons not cited or made parties, though the representatives of persons cited are bound. An appeal lies to the House of Lords. See 22 & 23 Vict. c. 61, § 7. The court has no jurisdiction under this act to declare the petitioner to be the *heir* of another person. Mansel *v.* Atty-Gen'l., L. R. 2 P. D. 265. It may declare a marriage valid, where the woman had previously gone through a ceremony of marriage with a man whose wife was living at the time. Shilson *v.* Atty-Gen'l., 22 W. R. 831. It cannot decide upon a claim to a title of honor, such as a baronetcy. Frederick *v.* Atty-Gen'l., L. R. 3 P. & D. 196. It may declare a foreign divorce to be void, and as a consequence a later marriage between the same parties to be invalid. Shaw *v.* Atty-Gen'l., L. R. 2 P. & D. 156.

[1] 1 R. S. 753, § 14.

[2] Laws of 1855, ch. 547, modifying 1 R. S. 754, § 19; Ferrié *v.* Pub. Adm., 3 Bradf. 249.

[3] Beall *v.* Bealls, 8 Ga. 210. In this case the father's consent was presumed from the circumstances of the case. One of the methods of legitimation in the Roman law was by "imperial rescript" at the solicitation of the father. This usually occurred only when the father could not enter into marriage with the mother and there were no legitimate children. Mackeldey, Rom. Law, § 599.

(*a*) See Bunce *v.* Bunce, 27 Abb. N. C. 61.

DIVISION III. — *Adopted Children.*

The common law provides no mode whereby children can be legally adopted. Such modes are established by the Roman law and are sufficiently stated in Book I. of the Institutes of Justinian, title eleven.[1] There were two methods recognized in that system; one by imperial rescript, and the other by judicial order. The former was resorted to when the person to be adopted was independent of paternal authority; the latter when he was dependent, or under power (*potestas*). In this last case the adopted person still remained under the power of his father, though he was entitled to share in the succession of his adopting father, if he died intestate. The adoption of a person not being under the power of a parent was called "arrogation," which was always to be made under certain conditions showing the propriety of the act, while security must be given to a public agent that if the adoptee died within the age of puberty, the adopter would return the property received with him to the persons who would have been entitled to succeed to his estate in case no adoption had taken place. The adoptee was in most respects in the same position as if he had been a legitimate child of the adopter. The fiction of parentage was consistently carried out. The adopter must be older than the adoptee, as it would be "unnatural" for a son to be older than his father. He must even be eighteen years older, since that age was assumed to be the time at which he could have been father. A person might adopt a person as "grandson" without having had either a son or an adopted son, though the consent of the father of the proposed grandson would be requisite.[2]

Persons who were impotent could adopt, but not those who had been mutilated. Women could not adopt except to comfort them for the loss of children who had been taken from them.

The leading principles of the Roman law of adoption have been borrowed in a number of the American States, New York being one of them. A brief sketch of the New York law is given below.[3]

[1] The translation by J. B. Moyle is very faithful and clear. Vol. II. p. 15 (Clarendon Press, Oxford, 1883).

[2] Mackeldey's Roman Law (Dropsie's ed.), §§ 592, 594.

[3] Laws of 1873, ch. 830, as amended by Laws of 1887, ch. 703; Laws of 1888, ch. 485, and Laws of 1889, ch. 58, concerning the adoption of children in orphan asylums and charitable institutions. See Laws of 1884, ch. 438.

Adoption is defined to be a legal act whereby an adult person takes a minor into the legal relation of child. The leading rules are, —

I. Any minor child may be adopted by

Adoption without legal authority creates simply a voluntary relation between the parties, which may be terminated at will. The adopting parent, while the relation continues, cannot demand payment for the child's support, nor can the latter make any claim for services.[1] The transaction may assume, under special circumstances, such a form that the father of the child cannot even, without the aid of a statute, revoke the consent given to the adoption without legal reason.[2]

any adult, except that neither husband nor wife can adopt without the other's consent unless they have been lawfully separated.

II. The consent of the minor of over twelve years of age is necessary.

III. The consent of the living parents or parent of a legitimate child, or of the mother of an illegitimate child, is necessary, except that if the father or mother be deprived of civil rights, or divorced for adultery or cruelty, or adjudged to be insane or an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect, consent is not necessary, though in this class of cases consent should be given by the person having the child in lawful custody. There may also be such an abandonment by the parent as to forfeit all claim to the custody of the child, in which case also consent is not necessary. Laws of 1873, ch. 830, § 11, as amended by Laws of 1889, ch. 58.

IV. The proposed adopter, the adoptee, and the persons whose consent is necessary, should, in order to give the transaction a legal character, appear before the county judge of the county where the adopter resides, and the requisite consents be signed, and a proper agreement executed. The appearance is dispensed with in case the parent is a non-resident. Laws of 1888, ch. 485.

The judge is required to examine each person appearing before him, separately, and if satisfied that the "moral and temporal" interests of the child will be promoted by the adoption, he will make an order setting forth the reasons for it, and directing that the child shall thenceforth be regarded and treated as the child of the person adopting.

V. The effect of an adoption must be regarded from two points of view, (1) as between the adopter and the adoptee; (2) as between the child and its real parents.

(1) The adoptee takes the name of the adopter. The two henceforth sustain the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance. The heirs and next of kin of an adopted child are the same as if he were the legitimate child of the adopter. To this general rule there is a single exception. This is that in the case of future interests in property arising under deeds, wills, and trusts dependent upon the adopter dying without heirs, the adoptee shall not be deemed to sustain the legal relation of child to the adopter, so as to defeat the rights of the "remainder man," the person who is to take the future estate under the circumstances above described. In like manner, in case of the death of the child, the adopter will, for the purpose of inheritance, sustain the relation of parent to it. Laws of 1887, ch. 703, amending the earlier statute.

(2) The real parents of the adopted child are henceforward relieved from all parental duties, and have no rights over the child.

VI. A child, once adopted, cannot be deprived of the rights thus obtained, except by the same sanction and consent required for the act of adoption, and all proceedings for such abrogation shall be in writing, signed by the county judge or justice of the Supreme Court, and recorded in the office of the county clerk. Laws of 1873, ch. 830, § 13.

For other legislation upon this subject the statutes of the various States should be consulted.

[1] Brown *v.* Welsh's Ex'r, 27 N. J. Eq. 429; Ela *v.* Brand, 63 N. H. 14.

[2] Janes *v.* Cleghorn, 54 Ga. 9.

CHAPTER VII.

GUARDIAN AND WARD.

THE title "guardian" is now appropriated to the case of one who has legal charge of an infant or a minor. The term frequently includes the parents, but is more specifically used to designate one who acts in the place of a parent, and who is either designated by him, or appointed by a court, or recognized as such by some rule of law.

The relation of guardian and ward was recognized and well defined in the Roman law. Its rules are instructive, and are stated in a preliminary section.

SECTION I. *Rules of Roman Law as to Guardianship.* — The Roman law distinguished between two classes of persons intrusted with the care of others who were not able to take care of themselves: one, tutors, and the other, curators. Tutorship applied to immature persons, such as boys under fourteen years of age, and girls under twelve. Curatorship extended to all other persons who, for special reasons, needed care, — such as idiots, the insane, the deaf, dumb, and blind, and prodigals. Thus the tutor answered closely to our present guardian, while the curator corresponded with the "committee" or "conservator" of a lunatic or habitual drunkard of the present time. Our present concern is with the "tutor" or guardian, and the topics to be referred to may be arranged under the following heads:

I. His appointment; II. The general character of his duties; and, III. His accountability.

I. *His appointment.* — A tutor could be appointed by the will of a parent in the same manner as a father can now create a testamentary guardian. The appointment could be made to include children born after the execution of the will (called *postumi*). An imperfect appointment of this kind could in some cases be confirmed by the proper magistrate, though this would after all appear to be a case of public appointment. A tutor could be appointed conditionally, or for a specified time, or for a specific purpose, — such as to aid his ward in contracting a marriage, or in carrying forward a particular law suit. The

later jurists thought that such a special appointment was *inelegans* or in "bad form," and inclined to the opinion that the appointment must be general. Statutes commencing as early as the Twelve Tables gave the power of appointment to magistrates or other public officers.

II. *The general character of his duties.* — A ward could do some acts without the guardian's consent, as where the act would improve his condition, but not where it would make it worse. In other words, the ward could acquire rights, but could not incur liabilities. Accordingly, he could not, without the sanction of his guardian, enter into bilateral contracts, nor undertake the performance of a trust. Assuming that the sanction of the guardian was necessary, it should be made to accompany the ward's act, and not be a subsequent ratification. The guardian, having thus important powers, was required to give security, to be approved by the proper authority, for the performance of his duties. The magistrate, if of inferior rank, was made personally liable if he allowed him to act without sufficient security. This rule was not extended to testamentary guardians, as the confidence which the testator had reposed in them was considered a sufficient guarantee of their capacity and fidelity.

It is interesting to trace in the law the progress of ideas in regard to this relation. It was at first deemed rather the *right* of a particular person to be a guardian. Finally, it came to be regarded as a *trust*, and a public duty or office, which one appointed to was bound to accept, unless exempted in the same general way as certain classes of persons were exempted from holding office. It was a branch of this notion of trust that the guardian could not represent the ward in any conflict of interest between them, but a special person should be appointed in such a case to act for the ward.

III. *His accountability.* — Accountability to the ward was rigidly exacted. The guardian could be made to render an account before the proper magistrate. If it appeared that he had wilfully wasted the assets, he could be punished criminally. His act in that case was infamous. It was not so if he had acted negligently.

The guardian could be removed on "suspicion" even before he commenced his administration. Want of faithfulness to his trust was a sufficient ground, even though he were perfectly solvent, or offered to give security. No guardian could be removed simply because he was poor, provided that he was faithful and diligent. It was a sufficient charge to show that, having means, he did not provide the ward with a sufficient

maintenance. In fact, as a usual rule, he performed his duty when he paid over the income of the property he had in charge to the immediate friends of the ward. His misconduct in the main was that of a defaulting trustee. An accusation against him was open to any one, even to the female relatives, who might strive to save a youth from suffering harm "without seeming to be more forward than becomes their sex."

SECTION II. *The different Kinds of Guardians in English and American Law.* — Guardians are of various sorts; they may be classified under two general heads: first, those created by a mere rule of law; second, those appointed by some lawful authority. Those of the first class are: (1) guardians by nature; (2) by nurture; (3) in socage; (4) by estoppel. Those of the second class are: (1) testamentary guardians; (2) guardians appointed by the court of chancery; (3) probate or surrogate's guardians; (4) guardians *ad litem* and special guardians.

Guardians created by law. — (1) *Guardianship by nature* is another expression for the authority of the father. He has the care of the child's person, but not necessarily of his estate. This guardianship at common law was confined to the heir apparent.

(2) *Guardianship by nurture* extended to the other children, but did not last beyond the age of fourteen. The mother would be entitled to this form of guardianship in case of the father's death. It was also confined to the person, and did not include the child's estate.

There is no basis for drawing these distinctions in this country, since all the children are equally "heirs apparent."

(3) The phrase *in socage* is a technical expression, referring to one of the principal tenures of land under the feudal system in England. While that system prevailed, land was held in England from some superior lord under two principal tenures; one was military, called "knight service;" the other was non-military, requiring fixed and certain services, called "socage." The former was highly favorable to the guardian, and very burdensome to the ward; the other was designed for the benefit of the ward, and the guardian corresponded to our modern notion of a trustee. The former continued until the ward was twenty-one years of age; the latter, until he was fourteen. At the time of the English rebellion nearly two thirds of the land was held under the military tenures. These became extremely unpopular as being oppressive and unjust, and were abolished in 1660, at the time of the restoration of Charles II. (12 Car. II. c. 24, 1660), and all land then subject to military tenures was thenceforth held in free and common socage. From this time

forward, guardianship ceased to be a method of transferring the rents and profits of land to the pocket of the guardian for his own use, and became a trust enforceable like other trusts in the Court of Chancery.

The leading rules governing guardianship in socage are these: —

1. It must be committed to a relative who can by no possibility inherit the land under guardianship in case of the ward's death. This rule is founded on the supposition that a relative who could inherit might be induced to take the ward's life. The old proverb was, "One must not commit the lamb to the wolf to be devoured." The courts formerly held that the rule was based on sound policy and humanity. The modern view is that it is the product of unnecessary suspicion and of too low a view of the motives of the average man.[1] It could not well exist in a country like ours, where all of one's blood relatives may by possibility inherit, and it has accordingly been discarded.

2. This guardianship only exists when the ward has real estate. Still, if he also has personal property, that will be included. (*a*)

3. It regularly continues until the ward is fourteen, when he may call the guardian to account. Still, if no other guardian be appointed, it may tacitly continue until the ward is twenty-one.[2]

4. It is a personal trust, and cannot be assigned by the guardian to another.

In New York this form of guardianship is regulated by statute.[3] This statutory guardianship is more extensive than at common law, that being confined to lands acquired by descent. At common law, as applied to our rules of inheritance, a father could not be guardian in socage to his child, as he may inherit from him;[4] under the statutes he may be.[5] He may lease the land to a tenant so long as he continues guardian, the lease

[1] Dormer's Case, 2 P. Wms. 262.

[2] Byrne *v.* Van Hoesen, 5 Johns. 66; Emerson *v.* Spicer, 46 N. Y. 594, 596; Jackson *v.* Combs, 7 Cow. 36.

[3] The guardianship vests by a rule of the statute, (1) in the father; (2) if there be no father, in the mother; (3) in default of a parent, in his nearest and eldest relative of full age, not being under legal incapacity. Where several relatives are of the same degree of consanguinity, males are preferred to females. The powers of such a guardian are superseded by the appointment of a testamentary guardian or of a general guardian by the proper court. 1 R. S. 718, 719.

[4] Jackson *v.* Combs, 7 Cow. 36.

[5] Fonda *v.* Van Horne, 15 Wend. 631, 633.

(*a*) Cf. Foley *v.* Mut. Life Ins. Co., 64 Hun, 63.

being defeasible on the appointment of another guardian and his election to avoid it.[1] The powers of the guardian are also pointed out in the statutes.[2]

(4) The meaning of the expression *guardianship by estoppel* is, that a person who is not a guardian may so interfere with the estate of an infant as to be prevented from denying that he is a guardian. He sustains the liabilities of a guardian without being a guardian in truth. The object of this rule is to give the infant the same remedies against such a person as he would have against a guardian. He can accordingly be regarded as having acted in a fiduciary character. Still, he may be treated by the infant as a mere wrong-doer, so that the result is that the infant has an *election* to treat him as a guardian or as a wrong-doer.[3] If several persons jointly take the profits of the infant's land without authority, the accounting should be had against them as if they had been joint guardians.[4]

Guardians appointed. — (1) *Testamentary guardians* did not exist at common law, but originated in the English statute before referred to.[5] It grew out of the abolition of the military tenures. The lands having been converted into socage tenure, minors came to have power to control their estates at the age of fourteen. As too much liberty was thought likely to be injurious, it was deemed wise to limit their power by authorizing fathers to appoint guardians by will or instruments of that nature. The Court of Chancery does not appear to have exercised the power of appointment of guardians until 1696. Since that time its jurisdiction has been constantly resorted to, while the testamentary guardianship also exists, at least in some of our States. The substance of the English statute is, that a father, whether of full age or a minor, may by deed or will dispose of the custody of his children during their minority or for a shorter period to any person either "in possession or remainder,"[6] and that this guardian shall be entitled to take the rents and profits of the ward's land for the latter's benefit while the guardianship continues, and also to have the custody and management of his personal estate.

These words of the statute permit the father, in case he appoints

[1] Emerson *v.* Spicer, 46 N. Y. 594.

[2] See in New York, 2 R. S. 153, §§ 3 and 20.

[3] Van Epps *v.* Van Deusen, 4 Paige, 64; Sherman *v.* Ballou, 8 Cow. 304; Blomfield *v.* Eyre, 8 Beav. 250; Boddy *v.* Lefevre, 1 Hare, 602 n., and cases cited.

[4] Wyllie *v.* Ellice, 6 Hare, 505.

[5] 12 Car. II. c. 24, §§ 8, 9. This statute was drawn by Lord Chief Justice HALE. See Eyre *v.* Shaftsbury, 2 P. Wms. 102, 125.

[6] The expression "remainder" means, "to commence at his death or at a later day."

two or more guardians, to authorize a survivor to appoint another in place of one deceased.[1] The statute does not include illegitimate children.[2] The *mother* of such a child has no power to act under the statute.[3]

The power of this kind of guardian is that of a guardian in socage. He is entitled to the custody of his ward, even as against the mother (subject to the discretion of the court),[4] and may resort to a writ of *habeas corpus* to obtain possession of the ward's person in the same general way as a father may.[5] (*a*)

A testamentary guardian is not regularly required to give security, the rule being that "he whom the father has trusted may be trusted by the court."[6] Where there are suspicious circumstances, security will be required, and modern decisions in England have placed them nearly on a footing with other guardians.[7]

The court does not remove a testamentary guardian without cause.[8] The English statute of 12 Car. II. is substantially re-enacted in New York. The power would not exist without a statute. The statute is intended solely for wills or deeds of residents, and is strictly local.[9] The further provision is made that if the father be dead, having made no appointment, the mother may constitute a testamentary guardian,[10] and, if she survive her husband for one year, may displace by deed or will a testamentary guardian appointed by him.[11]

A law of 1862 required the assent of the mother to a valid appointment by the father.[12] This rule has not been expressly repealed, though it has been held to be repealed by implication by the law of 1871, referred to in the note.[13] A married woman has no power by deed or will to appoint her husband testamentary guardian of her children.[14]

The Code of Civil Procedure provides detailed regulations for recording these appointments, — the "qualifications" of such a guardian, the special cases where security will be required for an

[1] In the Goods of Parnell, L. R. 2 P. & D. 379.
[2] Sleeman *v.* Wilson, L. R. 13 Eq. 36.
[3] *Ex parte* Glover, 4 Dowl. Pr. Cas. 291.
[4] Talbot *v.* Shrewsbury, 4 M. & C. 672.
[5] *In re* Andrews, L. R. 8 Q. B. 153; Rex *v.* Isley, 5 A. & E. 441.
[6] Child *v.* Child, Finch, 360.
[7] Blake *v.* Blake, 2 Sch. & Lef. 26.
[8] Beaufort *v.* Berty, 1 P. Wms. 702; Dillon *v.* Mount Cashel, 4 Bro. P. C. 306.
[9] Wuesthoff *v.* Germania Life Ins. Co., 107 N. Y. 580.
[10] Laws of 1871, ch. 32.
[11] Laws of 1888, ch. 454.
[12] Laws of 1862, ch. 172, § 6.
[13] Thomson *v.* Thomson, 55 How. Pr. 494.
[14] Beardsley *v.* Hotchkiss, 96 N. Y. 201, 215.

(*a*) See People *v.* Walts, 122 N. Y. 238.

inventory of assets, for the judicial settlement of his accounts, his removal from office, his resignation, and the appointment of a successor.[1]

A grandfather cannot appoint a guardian to his grandchild. Accordingly, if he direct in his will that the rents and profits of land be applied by his *executors* to the education of his grandchild during his minority, the executors and not the guardian appointed by the court are entitled to apply the rents and profits according to the will.[2]

(2) *General guardians appointed by the Court of Chancery* constitute a second class of guardians by appointment. The Court of Chancery, in England, exercises this power on an assumed delegation of authority from the king as *parens patriæ*. There are several matters deemed to be under the care and superintendency of the king, — such as charities and the custody of idiots, lunatics, and infants. The king is supposed, under this doctrine, to have the care of all such persons as are not able to care for themselves.[3]

This authority of the court over infants must be considered to have existed from its origin. Though taken away for a time by the statute which created the Court of Wards and Liveries, yet when that court was abolished, in 1660, the authority returned, though its exercise was for a time dormant.

A court of equity in this country would have the same power as the Court of Chancery in England. In a number of the States the jurisdiction in law and equity is in the same court. This, in New York, is the Supreme Court. There are two classes of cases needing distinct consideration: one is where the infant is under fourteen; and the other, where he is fourteen and upwards.[4] In the first class of cases the jurisdiction of the court is broad and practically unlimited. The relatives have no control. They attend on an application for an appointment merely to give the court information of the fitness of a person to be selected by itself and to protect the infant's interests.[5] The court in making an appointment will consider the welfare of the child, his

[1] Code of Civ. Pro. §§ 2851–2860, both inclusive.

[2] Fullerton *v.* Jackson, 5 Johns. Ch. 278; Hoyt *v.* Hilton, 2 Edw. Ch. 202.

[3] Cary *v.* Bertie, 2 Vern. 333; Eyre *v.* Shaftsbury, 2 P. Wms. 102, 119; Butler *v.* Freeman, Ambler's R. 301; *per* LORD HARDWICKE. Mr. Hargrave in a note to Coke upon Littleton, 88b, regards the explanation given in the law books as to the origin of the jurisdiction of the court as unsatisfactory, and deems it as an usurpation which was generally acquiesced in from the necessity of the case, the first authentic instance of appointment being in Hampden's Case, in 1696.

[4] See, for the mode of appointment and other matters, Rules 52, 53, 54, and 59 of the Supreme Court of New York.

[5] Underhill *v.* Dennis, 9 Paige, 202.

attachments and mode of education, the wishes of deceased parents, the probability that another appointment will soon be necessary, and other matters of the same kind, which would naturally influence a sound judgment.[1] It is common to appoint relatives when they are suitable persons. The court is not limited by the technical rules prevailing in the case of guardianship in socage.[2]

When the infant is fourteen and upwards, the court will be largely guided by his wishes. Its function, in general, is to give judicial sanction to his action.[3] So he may apply at this time for the removal of a guardian previously appointed, and the substitution of one chosen by himself. The court, however, may, in its discretion, deny his application.[4]

Before an appointment is made, an inquiry should be had as to the amount of the infant's property, and the guardian be required to give bonds for the faithful performance of his duties. The amount of the security will depend upon the value of the estate. The rules of the court will, in general, fix the amount.[5] Where the security first taken turns out to be insufficient, an additional amount may be required.[6]

The guardian may be removed on good grounds, such as unfitness, insolvency, fixed habits of intemperance, etc.[7] An appointment may also be revoked where the court has acted improvidently in making it.

(3) *Probate or surrogate's guardians* are the third class of guardians existing by appointment. The ecclesiastical court in England (to which the surrogate or probate court in this country corresponds) had no power to appoint a guardian, except a guardian to conduct a litigation (*ad litem*). "The guardian appointed by the spiritual court was nothing at all, for they appoint anybody guardian in that court for the mere purpose of appearing."[8] The power of the surrogate, etc., to appoint a general guardian, is accordingly statutory. If the judge does not follow the statute, his errors will be corrected on appeal. The surrogate is a county officer, and has jurisdiction only in his own county, while the jurisdiction of the Court of Chancery

[1] Bennett *v.* Byrne, 2 Barb. Ch. 216.

[2] Morehouse *v.* Cooke, Hopkins R. 226.

[3] This may flow from an idea, at one time prevailing, that an infant might appoint his guardian by deed executed by himself. The last Lord Baltimore, who died in 1771, when eighteen appointed by deed a guardian of his proprietary interests in Maryland under the advice of two eminent barristers. Hargrave's note to Coke upon Littleton, 88 b.

[4] Matter of Nicoll, 1 Johns. Ch. 25; Matter of Dyer, 5 Paige, 534.

[5] Bennett *v.* Byrne, 2 Barb. Ch. 216.

[6] Monell *v.* Monell, 5 Johns. Ch. 283.

[7] Kettletas *v.* Gardner, 1 Paige, 488.

[8] Rex *v.* Delaval, 3 Burr. 1434, 1436 (6th par.).

in England is general, and that of the corresponding court here, extends throughout the State. In complicated cases the equitable jurisdiction is the more satisfactory of the two.[1]

The general mode of proceeding is substantially the same as in the case of a chancery guardian. An ancillary guardian is provided for by the statute of New York, when the infant, residing out of the State, has property within the State. A convenient method is thus provided whereby a guardian appointed elsewhere can act within the State.[2]

The surrogate or probate guardian is under the general superintendence of the court of equity (in New York the Supreme Court), and he may be removed by the latter court for good cause.[3] An appeal lies also from the decision of the surrogate's court refusing to make an appointment,[4] as well as from his order making an appointment.[5]

(4) *Guardians ad litem and special guardians* may be appointed by any court having jurisdiction over infants, as each court has, as incidental to such jurisdiction, power by the appointment of a guardian to protect the infant's interest pending a litigation. This is true even of a court of inferior grade, such as that of a justice of the peace.[6] Such a person is termed a guardian *ad litem*. He may be the general guardian, or some officer of the court qualified to protect the ward's interests. He cannot act without an appointment, even though he be a general guardian. The mode of appointment is either regulated by statute or by a rule of court.[7] (*a*)

A special guardian has substantially the same functions as a guardian *ad litem*, and the words are frequently used without discrimination. The phrase "special guardian" is sometimes employed where there is no litigation, or no interest adverse to that of the infant, as where there is an application pending in court for the sale of his land.[8] His character in this case is entirely distinct from that of a general guardian, so that if he should be guilty of breach of trust in his special char-

[1] The jurisdiction of the surrogate's court in New York is found in the Code of Civil Procedure, § 2472, and the mode of appointment, etc., in §§ 2821–2850, both inclusive.

[2] Code of Civ. Pro. §§ 2838–2841.

[3] *Ex parte* Crumb, 2 Johns. Ch. 439.

[4] Kellinger *v.* Roe, 7 Paige, 362.

[5] Underhill *v.* Dennis, 9 Id. 202.

[6] Mockey *v.* Grey, 2 Johns. 192.

[7] Rules 50 and 51 of the Supreme Court of New York.

[8] Rules 55 and 57 of the Supreme Court of New York.

(*a*) The omission to appoint a guardian *ad litem* for an infant plaintiff before the bringing of the action, is not a jurisdictional defect, but a mere irregularity, and an appointment may, in the discretion of the court, be made *nunc pro tunc*. Rima *v.* Rossie Iron Works, 120 N. Y. 433.

acter, his sureties on his bond as general guardian would not be liable.[1]

SECTION III. *The Powers of Guardians.* — There is an important distinction between the rights of a guardian over personal property and over real estate. As to the personal property, he has the ownership or title *in trust* for the infant. He may, for example, receive legacies and shares of an intestate's estate coming to the infant.[2] He may sell to a purchaser in good faith, who will hold the goods, even though the guardian misappropriate the proceeds.[3] The infant's remedy is against the unfaithful guardian. With the real estate it is quite different. The guardian has only the right to lease it and receive the rents and profits during the regular continuance of the guardianship. The general rule was first established as to guardians in socage; and testamentary and chancery guardians have the same power in this respect.[4] (*a*)

But no guardian has a power to sell the ward's land. There is no mode at common law by which that can be sold except through an act of the legislature, a so-called "private act,"[5] or by general statute. Without that, the Court of Chancery can make no valid order of sale. Such general statutes are to be found in the various States of the Union. The statute, however, is the measure of the court's authority, and if it is transcended, the excess will be void.[6] There is an exception to this rule where the property directed to be sold is *equitable* in its nature, and the sale is for the infant's support and maintenance.[7] Another exception is where the sale is made incidentally, for the purpose of enforcing the rights of other parties, as in the foreclosure of a mortgage or partition of lands.[8] The course of proceeding in New York is detailed in the Code of Civil Procedure,[9] and the court rules.[10]

[1] Muir *v.* Wilson, Hopkins, R. 512; Clark *v.* Montgomery, 23 Barb. 464. The rules of the Supreme Court, already referred to, should also be consulted.

[2] Genet *v.* Tallmadge, 1 Johns. Ch. 3.

[3] Field *v.* Schieffelin, 7 Johns. Ch. 150.

[4] A general guardian also has power to authorize an action for the recovery of an infant's land, and to provide for the compensation of counsel. Matter of Hynes, 105 N. Y. 560.

[5] Powers *v.* Bergen, 6 N. Y. 358.

[6] Baker *v.* Lorillard, 4 N. Y. 257; Rogers *v.* Dill, 6 Hill, 415.

[7] Pitcher *v.* Carter, 4 Sandf. Ch. 1; Wood *v.* Mather, 38 Barb. 473.

[8] Adams on Equity, 284, and cases cited.

[9] §§ 2348–2364.

[10] Rules of the Supreme Court, 55–59.

(*a*) In New York a general guardian to whom, as such, a mortgage has been assigned, may bring an action of foreclosure without joining the infant; and having bought in the property at the sale as general guardian, he may sell it without leave of the court. Bayer *v.* Phillips, 17 Abb. N. C. 425.

The substance of this legislation is that the land may, by judicial order, be conveyed, mortgaged, or leased either to pay debts or for the infant's maintenance or necessary education, or because the property is unproductive, or for the purpose of raising funds to preserve and improve it, or where there is other special reason for sale, or for the purpose of fulfilling a contract or enforcing a trust.[1] The application is made by a guardian or some relative or friend, and if the infant is fourteen and upwards, he joins in the petition. Where the application is made to pay debts or for the infant's supposed benefit, the particulars and value of the property must be stated in the petition, the amount of its income as well as the disposition that has been made of the personal property, and the amount of the debts. The court must appoint a special guardian, who files a specified bond.[2] The matter is then referred to a referee appointed by the court, who examines into the truth of the statements in the petition in a specified manner, and reports and files his report. Then the court makes a final order, directing the land to be sold, mortgaged, or leased, as the case may be, by the special guardian. In negotiating the sale, etc., the special guardian makes, in the first instance, a preliminary agreement, subject to the approval of the court. If that is obtained, a conveyance, etc., is executed, except that if the case is one where the proper course is to direct a conveyance in the first instance, the guardian must report the conveyance on oath.

The proceeds of the sale, though in form money, are deemed in law to be real estate, so that the infant will have no greater power over them than if they were in fact land. This statutory rule proceeds upon the equitable theory of "reconversion." All that is not needed for the special purposes for which the land is sold is assumed by a fiction of law to be converted back into land. The infant, owing to his disability, is not allowed to elect to take the proceeds of the sale as an adult might do.[3] They are to be invested in the same manner as trust moneys for his benefit, so far as they are not needed to pay his debts or for his support or that of his family. The kind of investment must be reported to the court upon oath. There are also provisions for the disposition of future estates, as well as those of a temporary nature.

There is a very important restriction upon the power of the court to order a sale, to the effect that no order of sale, lease,

[1] §§ 2345, 2346, and 2348.

[2] §§ 2351 and 2352.

[3] See Snell's Equity, Conversion and Reconversion, Chaps. IX. & X. (9th ed.) This work is a reproduction of the lectures of a distinguished jurist, Mr. Birkbeck.

or mortgage can be made contrary to the provisions of a will by which it was devised, or of a conveyance or other instrument by which it was transferred to the infant. If such an order were made, it would be void, and the purchaser would obtain no title.[1]

It is a general remark that as the jurisdiction of the court is statutory, it must be strictly followed.[2] It should be observed that the present statute requires that certain things "must" be done. It would appear that this language makes the acts prescribed *vital.* Accordingly, if the statutory direction be not complied with, a purchaser under the proceeding will obtain no title.[3] (*a*)

In case a sale is desired that cannot be had under the authority of these sections, a private act of the legislature must be resorted to.[4] The general power of the legislature to pass such statutes in the case of sales of land of infants, lunatics, and other incompetent persons has been frequently affirmed by the courts as a branch of the doctrine of *parens patriæ.*[5] It has been said to be a most necessary, useful, and beneficent power, which should by no means be fettered.[6]

It is the opinion of some jurists that a guardian has the same power to change the domicile of the ward as a parent. The point, however, is not definitely adjudicated, and the law is uncertain.[7] His authority in most respects is analogous to that of a father. He may, for example, direct the religious education of his ward in the same general manner.[8]

As a general rule the authority of a guardian is local, not extending beyond the jurisdiction of the country or of the State

[1] Code of Civ. Pro. § 2357; Rogers *v.* Dill, 6 Hill, 415; Muller *v.* Struppman, 6 Abb. N. C. 343.

[2] Battell *v.* Torrey, 65 N. Y. 294; Matter of Valentine, 72 Id. 184.

[3] Thus it is said in § 2349 that the infant, if fourteen and upwards, *must* join in the petition; in § 2350, that the petition *must* be verified, and that it *must* set forth the grounds of the application, etc.

[4] The subject of "Private Act," as it exists at common law, is well treated in Cruise's Digest, Greenleaf's ed. Vol. II. 873. It is in substance a conveyance of land made under sanction of Parliament, p. 877. Acts of this kind are still frequently passed by the New York legislature. An instance is Laws of 1874, ch. 73.

[5] Rice *v.* Parkman, 16 Mass. 326; Clarke *v.* Van Surlay, 15 Wend. 436; Cochran *v.* Van Surlay, 20 Id. 365.

[6] Sohier *v.* Mass. General Hospital, 3 Cush. 483, 497.

[7] Dicey on Domicil, 100; Potinger *v.* Wightman, 3 Mer. 67; Douglas *v.* Douglas, L. R. 12 Eq. 617, 625; *per* GRAY, J., in Lamar *v.* Micou, 112 U. S. 472.

[8] *Re* Browne, 2 Ir. Ch. 151.

(*a*) Even though the statutory requirements were complied with, and the infant received a fair value for his interest, yet the sale will be void where the proceeding was resorted to not for the benefit of the infant, but to cure a defect in the title. Weinstock *v.* Levison, 26 Abb. N. C. 244.

where he is appointed, though for some purposes he is recognized abroad. If the infant has property in another State, an appointment must be made there to receive and manage it, though the same person may be appointed in both States. The presence of assets in a State is a sufficient basis for the appointment of a guardian there. Accordingly, a court in one State would not direct an executor to pay over a legacy to a person appointed guardian in another State of the Union.[1] (*a*)

Guardianship over the person is governed by different considerations. Thus, the ward of a French guardian might be temporarily in one of our States. There would seem to be no good reason why the French guardianship should not be so far recognized as to permit the ward to be controlled as to his personal conduct, or to be withdrawn from the State to France by the guardian.[2]

The English court has refused to allow a New York guardian to withdraw from England the child of an English father and an American mother, but this action was taken on the special ground that an English court would not send an English citizen abroad.[3] However, a foreign guardian would not, it is presumed, be allowed to exercise any more power over the ward than is permissible by our laws; as, for example, personal chastisement, even though he did not exceed what was allowable by his own law.[4]

The result worked out in Nugent *v.* Vetzera, cited in the note, was, that while the court would leave the foreign guardian in full possession of the person of his ward, it would appoint English guardians over the property within the jurisdiction.[5]

Section IV. *The Duties of Guardians.* — The duties of a guardian may be summed up in the statement that as to the ward's property he must be regarded as a trustee, while as to his person, though not technically a trustee, his relations are of a confidential and fiduciary nature.

It will be useful, in this connection, to advert to the doctrine of an infant becoming a "ward of the Court of Chancery." While under the rule of *parens patriæ* all infants in the State or

[1] Morrell *v.* Dickey, 1 Johns. Ch. 153; McLoskey *v.* Reid, 4 Bradf. 334.

[2] Nugent *v.* Vetzera, L. R. 2 Eq. 704; Di Savini *v.* Lousada, 18 W. R. 425.

[3] Dawson *v.* Jay, 3 De G. M. & G. 764, explained in Nugent *v.* Vetzera, *supra*, 713.

[4] Johnstone *v.* Beattie, 10 Cl. & F. 42, 114.

[5] It is very difficult to reconcile this case with Johnstone *v.* Beattie, *supra*.

(*a*) West *v.* Smither, 3 Dem. 386. As to ancillary letters of guardianship, see *ante*, p. 276.

country are under the care of the court, that care remains dormant unless it is in some appropriate manner called into exercise. The way in which the aid of the court is regularly invoked is by commencing a suit called "filing a bill." This point is fully considered by a number of the judges in the case cited in the note.[1] The mere act of "filing the bill" makes him a ward of the court. Then it becomes the direct duty of the court to provide for his care and protection. As it cannot do this personally, it appoints a guardian who is an *officer* of the court, for the purpose of doing that for the court which the court cannot do personally.[2] He is subject to the order of the court much as a parent or testamentary guardian would be. In making the appointment, there is a preliminary inquiry into the facts by a master in chancery, who considers who are proper persons to be guardians, and as to what will be a proper maintenance for the infant, and what scheme of education should be adopted.[3] The infant, as soon as the bill is filed, becomes a "ward of the court," whether guardians are appointed or not.[4] (*a*)

One of the consequences of this doctrine is that the ward cannot be withdrawn from its jurisdiction without its leave, (*b*) nor can any person knowingly marry a female ward without leave, without being guilty of a contempt of court.[5] (*c*)

The American cases and statutes use the same expression "ward of the court," but the severe rules of the English practice do not often seem to be followed as to the ward asking leave to go out of the jurisdiction. There are but few cases in this country in which it has been decided that the marriage of the ward, without leave, was a contempt of court. A case of this general character was decided in the New York court by Chancellor Kent.[6] (*d*)

The specific duties of the guardian are in the main these: — (1) To make proper investments of the ward's funds. (2) To

[1] Johnstone *v.* Beattie, 10 Cl. & F. 42.

[2] Id. p. 85.

[3] Id. p. 86.

[4] Id. p. 91.

[5] Lord Campbell mentioned a case of Jeffreys *v.* Vantiswarts, where female infants, wards of court, having arrived at years of discretion, and having property and relatives in Dantzic, were not allowed to go there unless their guardian would enter into an undertaking that they would return within a specified period, and would not marry without leave of court. 10 Cl. & F. 128.

[6] Aymar *v.* Roff, 3 Johns. Ch. 49. Reference is made in the report to Eyre *v.* Countess of Shaftsbury, 2 P. Wms. 111, 112.

(*a*) See also Simpson, Law Relating to Infants, Chap. XI. § 7.

(*b*) *In re* Callaghan, L. R. 28 Ch. D. 186.

(*c*) See Bolton *v.* Bolton [1891], 3 Ch. 270; *In re* Leigh, L. R. 40 Ch. D. 290.

(*d*) See *Ex parte* Martin, 2 Hill Eq. (S. C.) 71.

account to a court of equity. (3) To take no position adverse to his ward's interests. (4) To properly train him so as to make him a useful citizen.

(1) It is a general rule that the property of the ward should be kept in a productive condition. If money is paid in to the guardian, it should be seasonably invested or he will be personally charged with the interest. In this respect he is subject to the rules usually applied to trustees.

(2) The guardian may account to the court annually. The object of this form of accounting appears to be to inform the court of the condition of the ward's affairs.[1] So he may be called on by the ward to account. This may be done when the ward attains majority.[2] When a guardian is removed, it is a matter of course to call upon him to account and to pay over amounts on hand to his successor.[3] A court of equity has general jurisdiction over this subject, but statutes of course may authorize an accounting before a probate or other court, particularly when the guardian is appointed there. This does not include, in New York, the representatives of a deceased guardian, who account in equity.[4] In making up an account, a guardian charges himself with what he has received, and credits himself with what he has properly paid out. In this he may include reasonable amounts paid for legal services. He is also entitled to commissions, which in some States are fixed by law, and in others are allowed by the court.[5] There are statute provisions in New York concerning the accounting of guardians appointed by the surrogate.[6] These are construed by the Court of Appeals in a recent case.[7] The accounting by the guardian is not conclusively binding until one year after the ward attains majority.[8] The meaning of the word "accounting" is technical. It is a legal proceeding before a court. The exhibition of his accounts out of court by a guardian to a ward is not an accounting.[9] If a guardian on an accounting is indebted to the ward, he is not to be regarded as a mere debtor, but rather as a defaulting trustee, and liable to proceedings allowable as against such a person, — *e. g.*, imprisonment.[10]

(3) The duty of the guardian not to act adversely to his

[1] See Matter of Hawley, 104 N. Y. 250; 1 Bl. Com. 463.

[2] Seaman *v.* Duryea, 11 N. Y. 324.

[3] Skidmore *v.* Davies, 10 Paige, 316.

[4] Farnsworth *v.* Oliphant, 19 Barb. 30.

[5] In New York the commissions are fixed by statute. No other charges for *services* can be made except those allowed by law. Collier *v.* Munn, 41 N. Y. 143; Morgan *v.* Hannas, 49 N. Y. 667.

[6] Code of Civ. Pro. §§ 2842–2850.

[7] Matter of Hawley, 104 N. Y. 250.

[8] Matter of Van Horne, 7 Paige, 46.

[9] Rapalje *v.* Hall, 1 Sandf. Ch. 399.

[10] Seaman *v.* Duryea, 10 Barb. 523.

ward's interests is but a branch of a wider topic, embracing all persons having trust obligations to discharge. There are, however, some special rules applicable to guardians. In dealings between trustees in general and their beneficiaries the court exacts the utmost fairness and good faith. This rule is applied in the case of guardians until time enough has elapsed for the ward to become emancipated from the guardian's influence, notwithstanding the ward has reached his majority, and, theoretically speaking, the relation between the parties is at an end. Where undue advantage is taken by a guardian of his relation to the ward to obtain his property, either by deed or will, it may be regarded as a case of "undue influence," leading a court of equity to set the transaction aside in the same manner as transactions in general of the same kind between trustees and their beneficiaries.[1]

(4) It is the duty of a guardian to give a proper training to his ward. This means, in some instances, training in habits of industry. He ought not to leave his ward in idleness when he is capable of earning his own living.[2] He should, in general, where he has charge of the ward's person, be regarded as standing in the place of a father, and should give him such an intellectual training as his means and position in life would generally require, and at the same time attend to his moral and religious education, though this last remark should be qualified by the statement that regard should be had to the expressed wishes of a deceased parent in conducting his religious training.

It may be added that guardianship may be committed to two or more persons, who are then termed joint guardians. They are governed by the general principles and rules applicable in the case where only one person is guardian.

[1] See 1 Story on Eq. Jur. 324–327 (13th ed.); 3 Pomeroy on Eq. Jur. § 1088.

[2] Clark *v.* Clark, 8 Paige, 152.

CHAPTER VIII.

INFANCY.

THE object of this chapter is to bring together certain topics in the law of infancy which do not involve the *relation* of parent and child, or that of guardian and ward. They are questions applicable to all infants as to their capacity to contract, to commit wrongs or crimes, or to submit to pecuniary burdens, to invoke the protection of the law, etc. These will be treated simply from the point of view that the person under consideration is an infant, and without any inquiry as to the existence of the parental relation or of guardianship.

SECTION I. *Infancy Considered as a Status.* — The capacity of infants to do civil acts is for the most part fixed by positive law. The rule requiring a prescribed age to be reached is an arbitrary one, but at the same time based on mental ability and experience, as shown in average cases. No judicial inquiry will be had upon the point whether the particular person in question was in fact of sufficient capacity to act at an earlier age. This arbitrary rule is a matter of *status*. The age fixed by different systems of law is not the same, nor is it always the same in a particular jurisdiction for all kinds of acts.

The rule in the common law of England fixes the age of capacity to make most contracts at twenty-one. There is a marked exception in the case of marriage, where the age of a male is fixed at fourteen and a female at twelve. Capacity to commit a wrong or a crime is not governed by the rule applicable to contracts. The requisite age in these cases will be referred to hereafter.

A person legally reaches in law the age of twenty-one the day before the twenty-first anniversary of his birth. This rule is based on the proposition that the law does not regard a fraction of a day. This is not an unvarying rule, since fractions of a day are for some purposes carefully distinguished, but it applies to

the present case.[1] This rule seems to have been derived from the Roman law.[2]

Questions of the conflict of laws arise when an infant, being domiciled in one State, makes a contract, will, or other instrument in another, and the rule for capacity is different in the respective States. The case of most difficulty occurs in the law of contracts. One opinion is that capacity in such a case is to be determined by the law of the place where the contract is made. Thus, if a person, being domiciled in New York, where the age of capacity is twenty-one, is temporarily in Vermont, where the age is eighteen, a contract made at that age in the latter State will, on this theory, be binding on him, not only there, but in the New York courts.[3]

The capacity to make a will of personal property depends on the law of the testator's domicile, while that of a will of real estate or a conveyance of it is governed by the law of the place where the land is situated.

An opposing view of much weight is that the capacity of an infant to enter into a contract is governed by the law of his domicile, and that if he had not sufficient capacity there, a contract made elsewhere, where he temporarily happened to be, would be void, even though the law of such State sustained his capacity.[4] It has been also decided that even if his capacity is governed by the law of the place where the contract is made, he cannot, while remaining in his domicile, authorize an agent in a State where he would have capacity, if he were himself there, to make a binding contract.[5]

[1] The principle seems to be that where there are no conflicting rights, fractions of a day should not be noticed; if there is such a conflict, then the smallest differences of time will be regarded to prevent injustice. Cases on this subject are collected in 23 Am. Law Register, N. S. 254–259.

[2] "In the Roman law the computation of time is by moments, or there is civil computation. In the latter, regard is had to the calendar day on which the event occurs with which the computation of time commences. This calendar day is wholly included in the time to be computed. So that in the subsequent year in which it expires the day preceding the corresponding calendar day is regarded as the last. Thus, a person born on January 1st, 1863, completes the fourteenth year of his life after midnight of Dec. 30, 1876." Mackeldey's Roman Law (Dropsie's ed.), 163. Late cases in common law are Bardwell *v.* Purrington, 107 Mass. 419; Phelan *v.* Douglass, 11 How. Pr. 193; see Metcalf on Contracts, 38.

[3] There is, however, but little decision to this effect. See Thompson *v.* Ketcham, 8 Johns. 189. Male *v.* Roberts, 3 Esp. 163, may be noted. Mr. Dicey expresses some doubt as to the correctness of this decision. Dicey on Domicil, 177.

[4] Sottomayor *v.* De Barros, L. R. 3 P. D. 1, 5; and see Mette *v.* Mette, 1 Sw. & T. 416; Remarks of Judges in the House of Lords in Cooper *v.* Cooper, L. R. 13 App. Cas. 88, pp. 99–108.

[5] Kohne's Estate, 1 Parson's Select Eq. Cases (Penn.), 399. One who has not capacity to contract cannot, by making an agreement to perform a contract in a place where he would have capacity, bind himself. Cooper *v.* Cooper, L. R. 13 App. Cas. pp. 99, 106, 108.

Capacity to make a will of personal property depends on the law of the infant's domicile, while real estate can only be disposed of by will, if in accordance with the law of the place where it is situated.

SECTION II. *The Capacity of Infants to make Contracts.* — I. *General rule.* — There has been much uncertainty of expression, and even variety of opinion, in the decisions as to whether the contract of an infant is in general *voidable* or *void.*

This is a highly important inquiry. If the contract be *void*, it is a mere nullity. It does not bind the opposite party, being an adult, though the infant desire to maintain it, and it is incapable of ratification by him. On the other hand, if *voidable*, it is binding on the adult, if the infant so elect, and may, under circumstances to be hereafter stated, be confirmed by him, so as to make it binding upon himself.

The prevailing opinion now is, that nearly every contract made by an infant is voidable, rather than void. There may be a few exceptions, but these are not as yet very well defined.

The rule that an infant's contract, except for necessaries, etc., is voidable, extends both to executed and executory contracts, — such as conveyances or purchases of land, leases, sales, and purchases of personal property, credits of all kinds, mortgages, contracts of service, partnerships, trading in general, etc. Each and all of these may in general be repudiated, and, under proper circumstances, may be confirmed. The effect of this principle cannot be avoided by any indirect methods.[1] (*a*) It has often been attempted where an infant has committed a fraud in making a contract, or perhaps an act of negligence, to hold him liable on the ground that he has committed a tort or wrong, and that he is not excused from that. This, however, is but an *indirect* way of making him liable upon a contract. It is quite plain that if he had become an innkeeper, and then lost the goods of a guest through negligence, he would not be liable for the loss, since the negligence is but a mode of carrying out the business of keeping an inn, — a business which he cannot bind himself to carry on properly. So a fraud in making a contract is but an element in the contract; and if he has no binding power to make the principal thing, it is difficult to see how he is bound by a specific act which forms a part of it.[2] (*b*) One who sues for the fraud affirms that it was

[1] An infant is not estopped by his declarations that he is of age. Sims *v.* Everhardt, 102 U. S. 800; Conrad *v.* Lane, 26 Minn. 389. But see *post*, p. 287.

[2] See, on the general subject, Studwell *v.* Shapter, 54 N. Y. 249; Merriam *v.* Cuningham, 11 Cush. 40; Burley *v.* Russell, 10 N. H. 184; Gilson *v.* Spear, 38 Vt. 311.

(*a*) Nash *v.* Jewett, 4 L. R. A. 561; Radley *v.* Kennedy, 37 N. Y. St. R. 612.

(*b*) Stern *v.* Meikleham, 56 Hun, 475.

made in the course of a contract, when there is no contract. The logical position in such a case is for the other party to disaffirm the contract, to insist that owing to the fraud there is no contract, and then reclaim from the infant what he has received under it. The authorities, however, are not in accord upon the subject. Reference is made to them in the note.[1]

There are cases in courts of equity which decide that if an infant in the course of making a contract affirms that he is of age, he shall be precluded from denying such affirmation to the prejudice of the other party who relied upon his statement. These cases are anomalous and contrary to principle, and only to be followed because they are decided and have become precedents.[2] The fallacy in these decisions is that they proceed upon the theory of an affirmance instead of a disaffirmance of the contract, and upon the ground that the court will not permit an infant "to take advantage of his own fraud" and will hold him to his representations.[3]

II. *An infant's capacity to contract for necessaries.* — By the term "necessaries" is meant all that class of objects which are essential to the comfort, health, or training of the infant, as determined by the courts. The items would embrace food, clothing, shelter, medical treatment and medicine, and education. These are in a general way needed by all infants; great variety in the kind and quality of these "necessaries" will be recognized by the courts, depending upon the social position of the infant, or on other special ground. It thus becomes requisite to ascertain in the trial of such a question the functions of a jury as distinguished from those of the judge. The rule is that the classes of things necessary for an infant will be determined by the judge, while the question whether the particular person before the court needed the goods purchased by him is for the jury. The judge in discharging his duty may come to the conclusion that the goods are presumptively not necessaries. An example

[1] Among those which favor the position taken in the text are Bartlett *v.* Wells, 1 B. & S. 836; Wright *v.* Leonard, 11 C. B. N. S. 258; Price *v.* Hewett, 8 Exch. 146; De Roo *v.* Foster, 12 C. B. N. S. 272. It is suggested in some of the cases that a court of equity would grant relief in some instances; but only on the ground of the fraud, and not upon the contract. See Bartlett *v.* Wells, *supra;* Heath *v.* Mahoney, 7 Hun, 100; and Hewitt *v.* Warren, 10 Hun, 560, are to the same effect. The cases holding the contrary view are collected in Eckstein *v.* Frank, 1 Daly, 334.

[2] See Vaughan *v.* Vanderstegen, 2 Drewry, 363, 379; Clarke *v.* Cobley, 2 Cox Eq. 173; Esron *v.* Nicholas, 1 De G. & S. 118; Savage *v* Foster, 9 Mod. 35; *In re* King, 3 De G. & J. 63. Much dissatisfaction was expressed with the rule in this last case, by Lord Justice Turner. Ib., p. 69.

[3] Pollock on Contracts (1st Eng. ed.), 56, and cases cited.

is a bill for cigars. So if goods belong to a class usually necessary, but are so costly and extravagant as to be beyond any ordinary range of expenditure, they will be presumptively not necessaries. The effect of such a view would be that the seller would be required to give affirmative evidence that they were in the particular instances necessary. If he did not do this, the case would not reach the jury, but would be dismissed.[1]

A few additional instances of goods presumptively not necessaries are given, — dinners to friends, confectionery,[2] ices, game, a chronometer, even for a lieutenant in the navy,[3] betting-books,[4] a horse used as a hunter.[5] Affirmative proof might make these or similar articles necessaries. Thus, the purchase of a horse, apparently not necessary, might be made so by proof that exercise on horseback was needful to the purchaser's health.[6] In the same way, if the infant holds a place or post which usually requires a certain line of expenditure, he may be liable up to the usage. Thus an infant captain in the army might be liable for a livery for his servant, though not for cockades ordered for the soldiers of his company.[7] The same principle has been applied in England to the expenses of preparing a marriage settlement.[8] (*a*)

Moreover, goods may be necessary in point of style and quality, and yet unnecessary in quantity. If four coats per annum were necessary, and the infant purchased ten, he would not be liable for the superfluous six. The tradesman is bound at his peril to ascertain whether he has more than he needs,[9] and it will be immaterial whether he has paid for those that he first acquired or not. It has, however, been held that the necessity for inquiry on the part of the tradesman may be dispensed with by the conduct of the parties.[10]

[1] Ryder *v.* Wombwell, L. R. 4 Exch. 82, reversing L. R. 3 Exch. 90. The infant, a young man of wealth, purchased on credit at a high price a pair of shirt-sleeve studs, composed of crystals adorned with diamonds and rubies, and a silver goblet for presentation to a friend. No evidence having been offered to show why it was exceptionally necessary for the infant to have these articles, the appellate court held that the case should have been dismissed. This case has had much influence in other branches of the law in drawing the line between the functions of the jury and of the judge.

[2] Wharton *v.* Mackenzie, 5 Q. B. 606; Brooker *v.* Scott, 11 M. & W. 67.

[3] Berolles *v.* Ramsay, Holt, 77.

[4] Jenner *v.* Walker, 19 L. T. N. S. 398.

[5] Skrine *v.* Gordon, 9 Ir. R. (C. L.) 479.

[6] Hart *v.* Prater, 1 Jur. 623.

[7] Hands *v.* Slaney, 8 Term R. 578.

[8] Helps *v.* Clayton, 17 C. B. N. S. 553. See also Hill *v.* Arbon, 34 L. T. N. S. 125.

[9] Mortara *v.* Hall, 6 Sim. 465; Burghart *v.* Angerstein, 6 C. & P. 690.

[10] Dalton *v.* Gib, 5 Bing. N. C. 198.

(*a*) An infant is liable for the amount of a premium which, as an apprentice, he agreed to pay his master for instruction. Walter *v.* Everard [1891], 2 Q. B. 369; De Francesco *v.* Barnum, L. R. 45 Ch. D. 430.

No particular form of contracting is necessary. The infant may be bound on an implied contract and without express words.[1] So he may become indirectly liable, — as, for example, to a person who at his request paid the creditor who supplied him with necessaries. Should he borrow money wherewith to buy necessaries and not use it for this purpose, he would not be liable to the lender; but if he did so use it, the lender would be allowed by a court of equity to stand in the place of the seller and to collect an amount equal to the *reasonable value* of the necessaries purchased with the money lent.[2] (*a*) Still, if he gave the lender a deed to secure his advances, the deed might not be sustained.[3]

The term "necessaries" includes the support of an infant's wife and children.[4] The liability of the infant may turn upon the question to whom the tradesman *gives credit*. The infant may receive the goods, and yet the contract not be made with him. Thus, if the credit were expressly given to a stranger, no implication would arise of liability on the infant's part.[5]

The law does not bind the infant to pay the price which the tradesman may set upon the goods, nor even the price which he may have agreed to pay. It is always an open question as to the real value of the goods supplied, on the infant's part, though the tradesman, being an adult, is bound by the price which he has fixed. It will not change the case though the infant give his note or bond.[6] (*b*) It is a question of *capacity*, and he has no capacity to make general contracts, but only to acquire the necessaries of life at their real value.

If the contract be valid, the infant is bound in the same way as an adult. A judgment against him will not only bind his present but future acquisitions. It would seem to follow that he might be liable for a fraud in making such a contract, as he has the capacity to make the contract itself.[7]

III. *Ratification by an infant of voidable contracts.* — Assuming that the contract of an infant is voidable and not void, the sub-

[1] Gay *v.* Ballou, 4 Wend. 403.

[2] Marlow *v.* Pitfeild, 1 P. Wms. 558.

[3] Martin *v.* Gale, L. R. 4 Ch. D. 428. The validity of the deed in such a case could not be placed upon the ground that it was for the *benefit* of the infant to have the necessaries. In the case above cited the decisions are criticised which seem to maintain that a contract for the infant's benefit is regularly binding on him. Martin *v.* Gale, *supra*, pp. 430, 431.

[4] Chapple *v.* Cooper, 13 M. & W. 252.

[5] Duncomb *v.* Tickridge, Aleyn, 94; Sinklear *v.* Emert, 18 Ill. 63; Ellicott *v.* Peterson, 4 Md. 476.

[6] Johnson *v.* Boyfield, 1 Ves. Jr. 314; Clarke *v.* Cobley, 2 Cox Eq. 173; Martin *v.* Gale, L. R. 4 Ch. Div. 428.

[7] It is not known that any case has decided this proposition, though it seems reasonable.

(*a*) Kilgore *v.* Rich, 83 Me. 305.

(*b*) *In re* Soltykoff [1891], 1 Q. B. 413.

ject of *ratification* becomes one of great consequence. If the contract is properly ratified, it will be binding on both parties. The only question open to discussion is, what will amount to a ratification. The clearest way of discussing this subject is, to treat the various cases which may arise, and which will admit to some extent of different considerations, separately.

(1) *Conveyances of real estate.* — The law in this respect is quite strict. At the common law, there were two classes of conveyances to be noted in this connection. One class assumed a judicial form, such as fines and recoveries. In this case, if an infant came into court and admitted that the title was in another, he was bound by the judgment entered against him accordingly, which could only be reversed by writ of error for error in fact. This could not be tried by the jury, but only by the court. The infant was obliged to appear in person to be tried by the inspection of the judges. This could only be done during infancy.

On the other hand, in the ordinary case where the conveyance was made out of court, the infant might *enter* upon the land in spite of his conveyance during infancy, but could bring no action to recover the land itself as his own until after he came of age. The reason of this was, that he had an election during the whole of his infancy to affirm or disaffirm the transaction. If he brought an action to disaffirm during infancy and was successful, the judgment would be binding upon him, and thus shorten the period of election which the law would otherwise give him.[1] As fines and recoveries have disappeared from the law, an infant who has conveyed may now enter upon his land to receive the profits during minority, but can bring no action to divest the title until he is of age. Before bringing his action, he must do some proper act showing his disaffirmance of the conveyance, — such as making entry upon the land, giving notice, executing a deed to some other person, etc.[2] (*a*) A conveyance to another would be proper when the first grantee is not in possession claiming title.[3]

One of the consequences of these principles is that mere inaction on the infant's part after he attains majority, is not evidence of ratification.[4] (*b*) Accordingly, his grantee would not under such

[1] *Per* LORD MANSFIELD, in Zouch *v.* Parsons, 3 Burr. 1794, 1808.

[2] Allen *v.* Allen, 2 Drury & Warren, 107. There are many decisions to this effect in New York and other States, collected in Bool *v.* Mix, 17 Wend. 119.

[3] Jackson *v.* Carpenter, 11 Johns. 539; Dawson *v.* Helmes, 30 Minn. 107.

[4] Irvine *v.* Irvine, 9 Wall. 617; Welch *v.* Bunce, 83 Ind. 382; Thomas *v.* Pullis, 56 Mo. 211; Huth *v.* Carondelet Marine Ry. Co., Id. 202.

(*a*) See, however, Craig *v.* Van Bebber, 100 Mo. 584.

(*b*) Hill *v.* Nelms, 86 Ala. 442.

circumstances obtain a perfect title until, say, twenty years after the infant reaches majority. The reasoning upon this point is, that the infant's cause of action is not finally fixed until majority, and then he has the period allowed by the statute of limitations in which to bring his actions, which is in most States twenty years,[1] but in some much less, as in Nebraska.[2] (*a*) This rule prevails in the English courts.[3] Should the infant die during infancy, the right to disaffirm would be transmitted to his heirs. The same general rules apply to leases of land made by an infant.[4] In either of the cases discussed, he may after majority ratify the transaction by affirmative acts, — *e. g.*, by executing a confirmatory deed,[5] or in case of a lease, by receiving rent after majority.[6]

(2) *Purchases and leases of real estate.* — A new element is found in this case, for the infant has the benefit of the transaction, particularly if he is in possession. The enjoyment of the property is an implied ratification. The rule accordingly is, that he shall have a reasonable time in which to disaffirm. When that time elapses, ratification will be presumed.[7]

(3) *Sales, mortgages, and purchases of personal property, and other contracts having in them the element of mutuality.* — The technical rule prevailing in the law of real estate, that the infant cannot rescind until majority, is not followed in this class of cases. He may rescind during minority, as well as after he becomes of age.[8]

A great variety of cases arises where there are in a contract mutual engagements and stipulations entered into between infants and adults, in which the question of ratification might be presented owing to the acts of the infant after majority, or perhaps owing to mutual acts. If, for example, an infant after majority, should continue to receive benefits under a contract which was in the outset voidable by reason of his incapacity, it would seem that ratification should be presumed after the lapse of a reasonable time. It is the new and *affirmative act* which leads to the inference of ratification. This theory might be applied to a marriage settlement in which there were mutual promises as between the settlor

[1] See cases *supra;* also Voorhies *v.* Voorhies, 24 Barb. 150; Urban *v.* Grimes, 2 Grant's Cases (Pa.), 96; Prout *v.* Wiley, 28 Mich. 164; Green *v.* Green, 69 N. Y. 553.

[2] O'Brien *v.* Gaslin, 20 Neb. 347.

[3] Thomas *v.* Thomas, 2 Kay & J. 79. But see remarks of court in Beardaley *v.* Hotchkiss, 96 N. Y. 201, 211.

[4] Slator *v.* Brady, 14 Ir. C. L. 61; Slator *v.* Trimble, Id. 342. He cannot avoid the lease until majority.

[5] Story *v.* Johnson, 2 Y. Colly. 586.

[6] Smith *v.* Low, 1 Atk. 489.

[7] Hook *v.* Donaldson, 9 Lea, 56; Henry *v.* Root, 33 N. Y. 526.

[8] Towle *v.* Dresser, 73 Me. 252.

(*a*) See Searcy *v.* Hunter, 81 Tex. 644; Ihley *v.* Padgett, 27 S. C. 300.

and the beneficiary.[1] So if he applied for shares in a stock company during infancy, and sold them after majority (even though the sale were for the purpose of avoiding liability) he would be held to have ratified his purchase.[2]

(4) *Ratification of indebtedness and of promises to pay money incurred and made during infancy.* — This subject branches out into much detail. The whole consideration which the infant received for his promise may have been expended during minority, or it may have been useless to him, or perhaps detrimental. Whether this were true or not, his promise to pay was voidable, and could not have been enforced against him had he claimed in proper form his disability. The question then is, what is the effect of the new promise.

Still he does not appear to be *legally bound* to rescind until he attains majority. Accordingly, if he should wait until that event happened, he would have a reasonable time[3] before acquiescence could be inferred from mere inaction. It would seem that mere acquiescence, *unattended* by circumstances arising after majority, from which ratification could be inferred, would not be enough until the statute of limitations operated in favor of a vendee as a bar to an action by the infant. It has been held that the retention of the consideration for which a note has been given, after the infant comes of age, is not a ratification of the note.[4]

The following points should here be separately noticed.

1. Is it necessary that the infant, when he makes the new promise, should *know* that the former one is invalid *in law?* As to this point, there is much conflict in the decisions. It was stated in an early English case that such knowledge on the infant's part is necessary,[5] and this has been followed by a number of American courts.[6] Other courts have decided that, as an adult, he is *bound* to know the law, and it is accordingly immaterial whether he knew it in fact or not.[7]

In this diversity of view, the better opinion would seem to be that the party promising should *know* that he was discharged. The promise is not unfrequently made immediately after he be-

[1] *In re* Smith, 38 L. T. N. S. 466; Cornwall *v.* Hawkins, 41 L. J. (Ch.) 435.

[2] *Ex parte* Ebbetts, 39 L. J. (Ch.) 158.

[3] Chapin *v.* Shafer, 49 N. Y. 407.

[4] Benham *v.* Bishop, 9 Conn. 330; Catlin *v.* Haddox, 49 Conn. 492.

[5] Harmer *v.* Killing, 5 Esp. 102.

[6] Petty *v.* Roberts, 7 Bush (Ky.), 410; Curtin *v.* Patten, 11 Serg. & R. 305; Hinely *v.* Margaritz, 3 Pa. St. 428; Norris *v.* Vance, 3 Rich. (S. C.) 164; Turner *v.* Gaither, 83 N. C. 357.

[7] Morse *v.* Wheeler, 4 Allen, 570; Ring *v.* Jamison, 66 Mo. 424; Ring *v.* Jamison, 2 Mo. App. 584, and *semble*, Cheshire *v.* Barrett, 4 McCord (S. C.), 241. But see Baker *v.* Disbrow, 3 Redf. 348; on appeal, 18 Hun, 29, and 79 N. Y. 631. This was a case of *cestui que trust* and *trustee*. See on that point, Adair *v.* Brimmer, 74 N. Y. 539, 554.

comes of age, before he has acquired any knowledge of legal rules. He is readily entrapped into promises, which he would not have made with maturer judgment, to pay for a consideration which ought never to have been supplied to him. The lessons of experience show that the safeguards attending these promises should be strengthened rather than weakened.

2. The promise should be direct and unequivocal. It must be made to the creditor or his agent,[1] and should at least be an explicit admission of an existing liability.[2] Some of the cases cited require an express promise. The action may be brought on the old promise,[3] though it is held in some cases that it may be brought on the new one, using the old as a consideration.

3. It must be accepted by the creditor with any qualifications made by the promisor. Thus if he make a conditional promise, — *e. g.*, "to pay when he is able," — the creditor cannot enforce it without proving his ability.[4]

4. A promise made by another in his name, and without authority, may be ratified after majority so as to make him liable.[5]

5. The infant should know all the facts which are material to the ratification, so that he can fairly judge whether it is prudent to make it.[6]

Whatever restrictions have been placed upon the new promise have been found, in the opinion of many jurists, insufficient to protect the infant from rash and unguarded promises after majority. Statutes on this basis have been enacted in England and adopted in several of the American States, requiring the ratifying promise to be in writing.[7] (*a*)

[1] Bigelow *v.* Grannis, 2 Hill, 120.

[2] Goodsell *v.* Myers, 3 Wend. 479; Proctor *v.* Sears, 4 Allen, 95; Wilcox *v.* Roath, 12 Conn. 550; Millard *v.* Hewlett, 19 Wend. 301; Edgerly *v.* Shaw, 25 N. H. 514.

[3] Whitney *v.* Dutch, 14 Mass. 457, 461; Jackson *v.* Mayo, 11 Mass. 147.

[4] Everson *v.* Carpenter, 17 Wend. 419; Proctor *v.* Sears, 4 Allen, 95.

[5] Ward *v.* Steamboat "Little Red," 8 Mo. 358; Hall *v.* Jones, 21 Md. 439.

[6] Kay *v.* Smith, 21 Beav. 522. This is an instructive case.

[7] 9 Geo. IV. c. 14, § 5, known as Lord Tenterden's Act; see in Maine, Public Laws of 1845, ch. 166, construed in Thurlow *v.* Gilmore, 40 Me. 378; Gen. Stats. of Kentucky, ch. 22, § 1, construed in Stern *v.* Freeman, 4 Metcalfe, 309. The statute 9 Geo. IV. c. 14, § 5 is now repealed in England. The existing law there makes contracts of infants which were formerly voidable absolutely void, and for the most part rejects the doctrine of ratification. See 37 & 38 Vict. 62 (1874), called "The Infants' Relief Act." There are not many decisions

(*a*) As to the Infants' Relief Act, 1874, see Smith *v.* King [1892], 2 Q. B. 543.

There is a tendency in several cases to place a strict construction upon this statute and to exclude from its operation contracts not therein specifically mentioned. Duncan *v.* Dixon, L. R. 44 Ch. D. 211; Whittingham *v.* Murdy, 60 L. T. R. 956. Where the contract is partly executed, and the infant has received a benefit thereby which he is unable to return, he cannot recover under this statute money paid by him to the defendant. Valentini *v.* Canali, L. R. 24 Q. B. D. 166.

IV. *Disaffirmance of a contract during infancy or afterwards.* — Assuming that an infant's contract is voidable, he has the power to *disaffirm* it during infancy (in most cases), or within a reasonable time afterwards. He would in some cases proceed affirmatively, by setting aside or repudiating the contract; at other times he would wait until he was sued, and use the fact of infancy as a defence. At this point a rule becomes applicable, to the effect that he must return the consideration which he received from the other party to the contract, for "infancy is to be used as a shield and not as a sword." The rule means that he must return the consideration if he is able to do so. (*a*) If he has wasted it during infancy he will be excused, and may disaffirm without return. (*b*) Were it not so, the advantage of the principle relieving infants from liability would be in a large measure lost, as the infant would be liable for the most extravagant expenditure by proof that he had defaced or ruined goods that he had purchased.[1] If the property has been injured, he need only return it in its injured condition.[2] This rule could not be applied to a case where, after majority, he had put it out of his power to restore the consideration.[3]

Right to recover back money paid. — The view at one time prevailed that if an infant had voluntarily paid money upon an intended contract, and then refused to go on with it, he could not recover back the money. The action to recover back is derived from courts of equity, and it was assumed that it was not inequitable for the holder of the money to retain it, so long as he was ready to go forward with the contract.[4] The later view is that

reported giving construction to this Act. Mr. Pollock is of opinion that it reduces all voidable contracts of infants ratified at full age, whether the ratification be formal or not, to the position of agreements of imperfect obligation, — that is, which cannot be *directly enforced*, though valid for other purposes. Pollock on Contracts (4th Lond. ed.), p. 62. This legislation seems to interfere unnecessarily with the liberty of adults to make contracts. The act of 9 Geo. 14, c. 14, above cited, requiring a memorandum in writing, seems to be the more judicious legislation.

[1] For the general principle, see Cogley *v.* Cushman, 16 Minn. 397; Bryant *v.* Pottinger, 6 Bush, 473; Smith *v.* Evans, 5 Humph. 70; Badger *v.* Phinney, 15 Mass. 359; Heath *v.* West, 28 N. H. 101; Bartholomew *v.* Finnemore, 17 Barb. 428; Kitchen *v.* Lee, 11 Paige, 107; Betts *v.* Carroll, 6 Mo. App. 518. The modification of the rule where the consideration of the contract is wasted is found in Green *v.* Green, 69 N. Y. 553; Tucker *v.* Moreland, 10 Pet. 58, 74; Gibson *v.* Soper, 6 Gray, 279, 282; Chandler *v.* Simmons, 97 Mass. 508; Bartlett *v.* Drake, 100 Mass. 174; Dill *v.* Bowen, 54 Ind. 204; Brantley *v.* Wolf, 60 Miss. 420; White *v.* Branch, 51 Ind. 210.

[2] Whitcomb *v.* Joslyn, 51 Vt. 79.

[3] Middleton *v.* Hoge, 5 Bush, 478.

[4] Wilson *v.* Kearse, Peake's Add. Cases, 196; M'Coy *v.* Huffman, 8 Cow. 84; Weeks *v.* Leighton, 5 N. H. 343.

(*a*) But see Morse *v.* Ely, 154 Mass. 458; Clark *v.* Van Court, 100 Ind. 113.

(*b*) Craig *v.* Van Bebber, 100 Mo. 584; Harvey *v.* Briggs, 68 Miss. 60.

this rule can only be applied when the infant has received *some* benefit from the contract. If he has received no benefit, the money can be recovered back.[1] (*a*) Some cases in which the infant has been precluded from recovery by reason of receiving some benefit are found in a note.[2]

Rescinding contract of service. — An infant sometimes makes a contract to serve for a fixed time at a specified salary, and then before the time elapses repudiates the contract, and seeks to recover from his employer the reasonable value of his services. The difficulty in this case is, that owing to the doctrine of the "entirety" of the contract, one must regularly perform in full before he can recover anything from the other party. This rule of law is not here applied, however. The infant has a legal right to rescind the contract. On repudiating it the contract is supposed to have had no existence. Nothing remains but the fact that he has worked for his employer for a time with his assent. From this fact the law *infers* or implies a promise on the employer's part to pay the reasonable value of his services.[3] The effect of this rule will be qualified by the fact that he has received compensation for his services from time to time as he rendered them.[4]

Who can take advantage of an infant's inability. — The first question to be considered in this connection is, whether the infant's contract is void or voidable. If the contract be void, it is no contract, and accordingly it binds neither party. Each may raise the question of invalidity. If it be voidable, only the infant and those in *privity* with him can raise the question.[5] The term "privity" includes all who represent him on his death, such as heirs, next of kin, etc. It does not include the creditors of the next of kin, the rule of disaffirmance being for the benefit and protection of the infant. If both parties are infants, the contract may be avoided at the election of either party. The rule may be illustrated by the case of mutual promises to marry. If

[1] Corpe *v.* Overton, 10 Bing. 252; Medbury *v.* Watrous, 7 Hill, 110.

[2] Holmes *v.* Blogg, 8 Taunt. 35, 508. *Ex parte* Taylor, 8 De G. M. & G. 254, 258; Page *v.* Morse, 128 Mass. 99.

[3] Whitmarsh *v.* Hall, 3 Denio, 375; Lufkin *v.* Mayall, 25 N. H. 82, overruling Weeks *v.* Leighton, 5 N. H. 343; Judkins *v.* Walker, 17 Me. 38; Hoxie *v.* Lincoln, 25 Vt. 206; Lowe *v.* Sinklear, 27 Mo. 308; Danville *v.* Amoskeag Mfg. Co., 62 N. H. 133.

[4] Wilhelm *v.* Hardman, 13 Md. 140; Mountain *v.* Fisher, 22 Wis. 93; Taft *v.* Pike, 14 Vt. 405.

[5] Beardsley *v.* Hotchkiss, 96 N. Y. 201, 211, and Everson *v.* Carpenter, 17 Wend. 419; Taft *v.* Sergeant, 18 Barb. 320; Henry *v.* Root, 33 N. Y. 526; Walsh *v.* Powers, 43 N. Y. 23; Chapin *v.* Shafer, 49 N. Y. 407; Sparman *v.* Keim, 83 N. Y. 245.

(*a*) Mordecai *v.* Pearl, 63 Hun, 553; aff'd, 136 N. Y. 625.

an adult promises to marry an infant, the adult is bound, if the infant does not elect to disaffirm, which the latter may do;[1] if both the man and woman are infants, each may elect not to be bound. A ratification by both, after majority, would not be a new contract (as it would be, had the original agreement been void), but rather a confirmation of the promises made during their mutual infancy. Still it cannot be denied, under the decisions, that the new engagements might be so made as to be new promises instead of a ratification of the old promise.[2]

SECTION III. *Capacity to do and perform civil Acts other than Contracts.* — There are obligations devolving upon an infant either by some rule of law or by statute. Thus he may, as heir to an ancestor, be called upon to carry out a contract made by the latter during his life, or he may enlist in the army or the navy under the statutes of the United States.

It is a general rule that if an infant voluntarily does that which he could legally be required to do, his act is binding. Such an act as conveying land held as trustee, or discharging from record a mortgage which has been paid, or assigning dower in land to a widow is here intended. The act done must not be unnecessarily detrimental to him. Thus, if he should assign more land for the widow's dower than she was entitled to, the assignment could be corrected by the proper court. Statutes permit infants to be bound as apprentices, and require them to sustain their illegitimate children. In such a case as that last named, a bond given by the infant for the support of the child will be valid.[3]

Minors of the age of sixteen and upwards may be enlisted in the army with the written consent of parents or guardians. Without that consent, no minor can be enlisted.[4] Minors between the ages of fourteen and eighteen can be enlisted in the navy until they are twenty-one, with the consent of their parents or guardians. At the age of eighteen, they may be enlisted for the regular time of enlistment (five years) without parental consent.[5] When they are once held under the authority of the Federal government they are under the control of the United States and cannot be discharged by a writ of *habeas corpus* issuing from a State court or magistrate.[6]

[1] Hunt *v.* Peake, 5 Cow. 475; Hamilton *v.* Lomax, 26 Barb. 615.

[2] Ditcham *v.* Worrall, L. R. 5 C. P. Div. 410; Coxhead *v.* Mullis, L. R. 3 C. P. Div. 439. There might in such a case be a question for the jury as to a matter of fact. Northcote *v.* Doughty, L. R. 4 C. P. Div. 385. This might be an important distinction in States which require a *ratification* by an infant to be *in writing*, for this would not extend to a new promise. See cases *supra*.

[3] People *v.* Moores, 4 Den. 518.

[4] U. S. Rev. Stat. §§ 1116–1119.

[5] U. S. Rev. Stat. §§ 1418–1420, as amended by 21 Stat. L. 331, § 2.

[6] Tarble's Case, 13 Wall. 397. This is a leading case, establishing the boundary

The principal instances of incapacity to act on the part of an infant beyond such as have already been stated are these. He is not in general eligible to public office.[1] Should he assume to execute the duties of such an office, he might be regarded as a trespasser.[2] He cannot by his own act change his domicile. He cannot by common law act as administrator until seventeen, and in New York, by statute, until twenty-one. (*a*) Administration should be committed to another during minority. If the office be inadvertently conferred upon him by the probate court, he will not be liable to account for goods received during infancy, but will be liable as trustee for all assets received after majority.[3] He cannot make a will of real estate. (*b*) He cannot appoint an attorney nor appear in court by attorney,[4] but only by guardian *ad litem*, or some similar representative recognized by the court. It may be added that he is protected from liability by some special rules. One is that he is not affected by the doctrine of *estoppel in pais*, in the courts of common law, though that principle has been applied to him to some extent in the equity and bankruptcy courts. Another rule is, that the statute of limitations does not begin to run against him as a creditor until he attains majority. He is, by a special exception in the statute, under a disability which leads to this result.

SECTION IV. *Special Rules in Courts of Equity for the Protection of Infants.* — Marriage settlements is a subject over which equity has cognizance. There are two classes of cases to be considered. One is where a female infant is a ward of the Court of Chancery. In this class of cases the court will compel the husband, on marriage, to make a settlement upon her from her personal estate. The reason is that as the personal property of the wife, by common law, belongs to the husband, or can be reduced by him to possession, without such an exercise of jurisdiction the court could not protect its ward.

The other class of cases is that of voluntary settlements of property made either by male or female infants. One of these may assume the form of a relinquishment of dower by the intended wife in her prospective husband's lands. This was sanctioned by a statute passed in the reign of Henry VIII.,[5] if made in a prescribed manner. This statute is in general re-enacted in our

between the jurisdiction of the Federal and State courts in an important class of cases.

[1] Claridge *v.* Evelyn, 5 B. & Ald. 81.

[2] Green *v.* Burke, 23 Wend. 490, and cases cited on pp. 503, 504. The infant in this case had been chosen as constable.

[3] Carow *v.* Mowatt, 2 Edw. Ch. 57.

[4] Bennett *v.* Davis, 6 Cow. 393.

[5] 27 Henry VIII. c. 10, §§ 6–9.

(*a*) See in New York, 2 R. S. 75, § 32. (*b*) See in N. Y., 2 R. S. 57, § 1.

States. It creates a "jointure." The act creating such an interest is termed the Statute of Jointures. The details will be found under that head in works upon real estate. Courts of equity uphold *informal* settlements of this kind, where they are made in good faith and a competent, certain, and reasonable provision is settled upon the infant wife. These are termed equitable jointures.[1] Or again, the settlement may be of the intended wife's estate upon the intended husband, or *vice versa*. The Statute of Jointures does not extend to this case, and its validity depends on general principles of law. A settlement of real estate is in its nature a conveyance, and, according to rules already stated, if made by an infant, must be voidable on attaining majority. But there is the disability of marriage, in case of a settlement made by the intended wife, to be added to that of infancy. Accordingly, she might avoid the settlement after the coverture ceases, and after attaining majority.[2] The settlement may, however, be confirmed after majority and during marriage by a confirmatory deed.[3] The only way to effect an absolutely binding settlement is to have some general statute or a private act of the legislature. There is now in England a general statute upon this subject, authorizing infants, with the sanction of the Court of Chancery, to make binding settlements of their real and personal estates.[4]

There is a statutory provision in New York that *all* contracts made in contemplation of marriage shall remain in full force after such marriage takes place (*a*). It has been adjudged in one case that this language includes infants (*b*). This has not yet been decided by the courts of last resort. It would seem that such general words are not to be construed to give capacity to those who are at the time incapable to do a valid act, and that they were tacitly excluded.

[1] McCartee *v.* Teller, 2 Paige, 511. This is an instructive case. See also Buckingham *v.* Drury, 3 Brown Parl. Cas. 492; Wilmot's Opinions, 177. By the Revised Statutes of New York there is no distinction between legal and equitable jointures.

[2] Temple *v.* Hawley, 1 Sandf. Ch. 153; Jones *v.* Butler, 30 Barb. 641. It is said in Temple *v.* Hawley, *supra*, that the preponderance of opinion is, that the wife cannot avoid the deed during coverture. See Beardsley *v.* Hotchkiss, 96 N. Y. 201.

[3] Temple *v.* Hawley, *supra*.

[4] 18 & 19 Vict. c. 43. This statute renders valid a post-nuptial as well as an ante-nuptial settlement made with the required sanction. Powell *v.* Oakley, 34 Beav. 575. It does not, however, alter the *status* of the infant in respect to capacity to convey property. *In re* Armit's Trusts, 5 Ir. R. Eq. 352. The management of the real estate of infants' estates under settlement is regulated in great detail in England by 44 & 45 Vict. c. 41 (Conveyancing Act of 1881). It is brought under the provisions of the "Settled Estates" Act of 1877.

(*a*) Laws of 1848, ch. 200, § 4; Rev. Stat. 8th ed. p. 2601.

(*b*) Wetmore *v.* Kissam, 3 Bosw. 321.

A court of equity protects the rights of infants and does not allow the answer of a guardian *ad litem* in a suit to be used to their prejudice. A properly drawn answer submits the rights of the infant to the court. No decree will be made against him on the admissions of the guardian to his prejudice. The answer is a mere pleading.[1] The guardian will be made to respond in damages if he does not do his duty towards the infant.[2] The rule of the court is that a decree against an infant does not bind him until six months after his majority.[3] A direction to the contrary must be inserted in the decree, or this rule will be applied.[4] His rights can be examined in a new suit brought by him as well as by an appeal or review of the first proceeding. This doctrine is termed the right of the "parol to demur." It has been much modified by statute.[5] The doctrine has some application in courts of law.[6]

A question of some importance arises as to the effect of having no guardian *ad litem* appointed. Will this vitiate the proceedings against the infant altogether so as to make them a nullity, or is it only error, which must be taken advantage of in the same action by appeal or other appropriate mode of review? It is settled as a general rule that the failure to appear by guardian is not a mere irregularity, but is so erroneous that a court will set aside a judgment — *e. g.*, of foreclosure — on account of it;[7] (*a*) still, it is not an absolute nullity. The questions involved in the proceeding cannot be treated as though they had not been disposed of. In other words, the judgment or decree rendered cannot be "attacked collaterally" or "disregarded."[8] The mode of appearance is a local question, and depends on local law.[9]

A court of equity will enforce against infants, considered as property owners, the obligations usually incident to ownership. They hold property subject to public burdens, — *e. g.*, taxes. In some respects it will be important to inquire whether they acquired ownership by *act of the law* or by their *own act.* By "act of the law" is meant such a case as inheritance of land from an ancestor.

[1] Bulkley *v.* Van Wyck, 5 Paige, 536; Stephenson *v.* Stephenson, 6 Paige, 353.

[2] Knickerbocker *v.* De Freest, 2 Paige, 304.

[3] 1 Daniell Ch. Pr. (5th ed.) p. 174.

[4] Wright *v.* Miller, 1 Sandf. Ch. 103.

[5] This right is abolished in England by 11 Geo. IV. & 1 Wm. IV. c. 47, § 10.

[6] Derisley *v.* Custance, 4 Term R. 75; Plasket *v.* Beeby, 4 East, 485.

[7] McMurray *v.* McMurray, 60 Barb. 117.

[8] Colt *v.* Colt, 111 U. S. 566.

[9] Id. It is said in this case, that it appears to be the local law of Connecticut that the appointment of a guardian *ad litem* is not necessary.

(*a*) The omission to appoint a guardian before the beginning of the action may be remedied at the trial by the entry of an order of appointment *nunc pro tunc.* Rima *v.* Rossie Iron Works, 120 N. Y. 433. See *ante*, p 276.

As the law casts the land upon the infant, it makes him legally competent to bear the burdens imposed upon it. He can only escape the obligation by ceasing to own the property; on the other hand, where the property is acquired by his own act, and the acquisition is voidable, he will escape liability by disaffirming the contract. If he does not do this, but remains owner, he cannot escape liability. This case may be illustrated by a *subscription* for railway shares.[1] The rule, however, could not necessarily be applied to a case where an infant had taken a *transfer* of shares from an adult, as the latter might be bound to transfer to one who would by law be capable to assume the liability which the statute imposes, and accordingly the transferor would still be liable to an "*official liquidator*" in case of the insolvency of the company. There might be a difficulty in maintaining this view if the proceedings were against the infant and he did not repudiate the transaction.[2]

Reference may now be made to some questions involving the rights of unborn children. It has been held that if a suit be commenced, and an infant be born during its progress, the court will, if justice require it, make him a party to it.[3]

Again, questions of construction in a will may involve the rights of unborn children. A leading modern instance is the case of a testator making bequests to two existing reputed children of his mistress, M. L., and to "all other children which he might have or *be reputed* to have by M. L. then born or thereafter to be born." A child was born of M. L. after the execution of the will and before the testator's death, and was acknowledged by him. The court held that this third child was entitled as a legatee.[4] In a later case the mother, being also a mistress, made the bequest in favor of "after born" children, and the same decision was made. In the first case the woman was pregnant when the will was made, and in the later, not. This fact was deemed immaterial.[5]

SECTION V. *Statutory Protection to Infants.* — There is an important class of statutes of this kind both in England and in this country, showing an increased disposition on the part of legislatures to so control the contracts of infants as to prevent them from

[1] *In re* Constantinople & Alexandria Hotel Co., L. R. 5 Ch. App. 302, 303, n. 1. LORD ROMILLY, M. R., said, "I am not aware of any case in which an infant has been relieved from shares which have been allotted to him *on his own personal application.*"

[2] See Capper's Case, L. R. 3 Ch. App. 458; Mann's Case, Id. 459, n. 1. Curtis's Case, L. R. 6 Eq. 455; Costello's Case, L. R. 8 Eq. 504; Symons' Case, L. R. 5 Ch. App. 298; Weston's Case, Id. 614; Richardson's Case, L. R. 19 Eq. 588.

[3] The George and Richard, L. R. 3 Adm. 466; Scruby *v.* Payne, 34 L. T. N. S. 845.

[4] Occleston *v.* Fullalove, L. R. 9 Ch. App. 147.

[5] *In re* Goodwin's Trust, L. R. 17 Eq. 345.

rendering service, etc., to the injury of their health and to the risk of their limbs or lives. In the same spirit are conceived the acts providing against cruelty to children. These acts will be stated more in detail.

The object of the so-called *Factory Acts* as passed by the English Parliament is to give protection to children and women employed in factories and workshops against injury from machinery, to secure good drainage and ventilation, to provide education for employees under thirteen years of age, and to regulate the hours of labor, meal-time, and overwork, etc. The statutes branch out into much minuteness of detail.[1] This legislation is of course apparently open to the objection that it interferes with the right of employers freely to contract with their workmen. It seems, however, to be justified by the circumstances of the case, particularly in its application to children.[2] There is similar legislation in this country.[3]

There is other legislation concerning children and a growing tendency to provide against acts endangering the health, life, or morals of young children, and to make it highly penal for parents and others having charge of them to abandon them or to neglect to provide properly for them. Reference to such legislation will be found in the note.[4]

SECTION VI. *Liability of an Infant for his Torts.* — By a "tort" is here meant such a wrongful act unconnected with a contract as gives an injured party a right to recover damages or to obtain other suitable redress, but is not for the time being, at least, treated as a crime. Infancy is no excuse for the commission of such an act.

[1] See 41 & 42 Vict. c. 16 in connection with former acts. See also 54 & 55 Vict. c. 75 and 55 & 56 Vict. c. 62.

[2] A good general view of the history of this legislation is found in the 9th edition of the Encyclopædia Britannica, title "Factory Acts."

[3] The legislation in New York upon this general subject is to be found in ch. 409 of the Laws of 1886, as amended by ch. 462 of the Laws of 1887; ch. 560, Laws of 1889; ch. 398, Laws of 1890; and ch. 673, Laws of 1892. The substance of these laws is, that no child under the age of fourteen shall be employed in any manufacturing establishment. "A manufacturing establishment" does not include an employer employing less than five persons, except in cities. A register must be kept entering the name, birthplace, age, and residence of every employee under the age of sixteen, and these facts must be proved by affidavit, as prescribed in the Act of 1887, and kept on file by the employer. There are provisions for the enclosure of hoisting shafts, protecting of elevator ways, construction of fire-escapes, cleaning of machinery while it is in motion, for suitable wash-rooms and closets, and the time to be allowed for the noon-day meal (not less than forty-five minutes). A factory inspector, with an assistant and deputies, is created with provisions for carrying the statute into effect. Further details should be sought in the statutes.

[4] Penal Code of New York, §§ 282, 287, 288, 289, 290 *a*, 291, 292, 292 *a*, 292 *b*, 293. See also § 887.

It has already been stated that an infant is not liable for a tort arising out of a contract. The meaning here is, that the wrong must not be committed as a mode of carrying out the contract. If an infant makes use of a contract as an occasion or opportunity to commit a tort, he will not be excused. Thus, if an infant, having hired a horse, should, through inexperience or negligence, drive him immoderately, or otherwise injure him, there would be no action.[1] On the other hand, if he should wilfully maltreat the animal, he would be liable.[2] The contract in this last case would simply supply an *opportunity* for the commission of the wrong. So he would be liable if he had been instructed by the owner not to use the horse in a particular way, — such as to jump fences on a steeplechase, — and he violated the directions to the owner's injury.[3] It is enough that the wrongful act is independent of the contract.[4] So if he hires a horse to go to one place, but goes in a different direction, he is held in law to have converted the animal to his own use. If an adult did this he would be liable to an action for conversion.[5] In like manner an infant would be liable.[6] It has already been shown that if an infant practises a fraud in making a contract, he cannot be sued in an action which involves the affirmance of the contract. The better opinion is, that the injured party may disaffirm the contract on the ground that there was no true contract, and so recover back the goods in an appropriate action (replevin), or bring an action in conversion for their value.[7]

It is a general rule of law that one whose goods have been unlawfully converted and sold may waive the wrong and bring an action to recover the price received, by a species of ratification. This rule is applied to infants who are wrongdoers.[8]

The rule of liability for torts has been applied to a case where a missile, thrown by a lad in sport, caused injury. The theory is that the injured party is entitled to compensation for damages, even though there be in fact no malicious intent.[9] The commission of the tort is not excused on the ground that the infant's father commanded him to commit it.[10]

[1] Eaton *v.* Hill, 50 N. H. 235.

[2] Id.

[3] Burnard *v.* Haggis, 14 C. B. N. S. 45; Walley *v.* Holt, 35 L. T. N. S. 631.

[4] Campbell *v.* Stakes, 2 Wend. 137.

[5] Fish *v.* Ferris, 5 Duer, 49.

[6] Homer *v.* Thwing, 3 Pick. 492; Towne *v.* Wiley, 23 Vt. 355; Vasse *v.* Smith, 6 Cranch, 226; Walker *v.* Davis, 1 Gray, 506. But see Penrose *v.* Curren, 3 Rawle (Penn.), 351.

[7] Nolan *v.* Jones, 53 Ia. 387; Mathews *v.* Cowan, 59 Ill. 341. For a discussion of the general subject, see Ferguson *v.* Bobo, 54 Miss. 121.

[8] Elwell *v.* Martin, 32 Vt. 217; Shaw *v.* Coffin, 58 Me. 254. So if he had given his note by way of settlement it has been held that he could be sued upon the note. Ray *v.* Tubbs, 50 Vt. 688.

[9] Peterson *v.* Haffner, 59 Ind. 130. See Conway *v.* Reed, 66 Mo. 346.

[10] Humphrey *v.* Douglass, 10 Vt. 71.

SECTION VII. *Liability for Crimes.* — The responsibility of an infant for the commission of a crime depends upon his capacity to form a criminal intent. There is an arbitrary rule of the common law that an infant under seven years of age cannot commit crime of the grade of felony.[1] Between the ages of seven and fourteen he may or may not be capable, as the evidence shows discretion, or capacity to understand the nature of the act and its wrongfulness.[2] After the prescribed age of fourteen he is presumptively capable.

The rule of incapacity extends to cases of criminal neglect as well as to positive wrongs. For example, a child of one or two years of age cannot be charged with crime for allowing a nuisance to remain upon his property.[3]

Formerly the punishment for crimes committed by infants (having capacity) was the same as in the case of adults. The modern law is more humane and philosophical. The present practice, when the infant criminal is under a prescribed age (*e. g.*, sixteen), is to commit him for care and training to institutions known as reformatories, houses of refuge, industrial schools, or juvenile asylums. These are regulated in England and the various States of this country by local statutes.[4]

Under a beneficent provision of the New York law, a male who is between the ages of sixteen and thirty, convicted of felony, who has not been previously convicted of felony, may, in the discretion of the court, be sentenced to a *reformatory prison* known as the New York State Reformatory at Elmira.[5]

[1] The New York Penal Code is broader. Its language is that a child under the age of seven years cannot commit a crime, § 13.

[2] State *v.* Learnard, 41 Vt. 585. The extreme age of presumptive incapacity is reduced in New York to twelve, § 19. There is a special rule in the case of rape. Penal Code, § 279.

[3] People *v.* Townsend, 3 Hill, 479.

[4] In New York see Penal Code, §§ 700, 701, and 713. In England see 29 & 30 Vict. c. 117, Reformatory Schools Act; also 37 & 38 Vict. c. 47 and the Industrial Schools Act of the same year, 29 & 30 Vict. c. 118.

[5] Penal Code, § 700.

CHAPTER IX.

THE DOCTRINE OF STATUS AS AFFECTING THE CAPACITY OF PERSONS OF UNSOUND MIND (INCLUDING IDIOTS AND LUNATICS, AS WELL AS HABITUAL DRUNKARDS AND PRODIGALS).

THE principal object of this chapter is not to consider the rules of law which seem to test mental unsoundness, but to discuss the matter of placing persons ascertained to be of unsound mind under the care of guardians, conservators, or committees, or by whatever name such overseers may be called, as well as the legal effect of such guardianship upon the capacity of the ward to do future legal acts. Briefly stated, the topic concerns the "status" or legal condition of this class of persons.

It is well to premise, that questions of capacity to do legal acts may be presented to a court of justice under two leading conditions: one where capacity is contested, and there is no guardian, and the other, where the act is done by one at the time under guardianship.

It is a rule that every court having the power to dispose of a matter in which the validity of a contract or other legal act comes in question, has jurisdiction incidentally to decide upon the capacity of a person performing the act under consideration. The validity of a deed, will, marriage or contract might be respectively in issue in one case before a court of law, in another before a court of equity, and again before a probate court; and if insanity were set up to overturn the transaction, the court having control of the controversy could lawfully determine whether a party to the transaction had sufficient mental capacity to perform it. Such a determination would, however, only dispose of the particular case, so that all the questions could be raised anew in a different action between other parties. This multiplicity of possible actions might be a very good reason, when mental unsoundness is assumed, for determining directly the capacity of the individual to do legal acts.

It should be added that such a person might, if not under guardianship, dissipate his estate, or destroy it altogether, by mere acts of insane folly, or might commit wrongs injurious to others, who would be entitled to compensation from his estate.

It is, accordingly, a highly beneficent thing to have a method whereby sanity can be directly tested, so that sanity or insanity is the direct and practically the sole object of inquiry. If a person in such a proceeding is found to be insane, he may be made a ward of a court of equity, while his guardian will in future represent him in needful legal acts. An inquiry upon this topic will naturally lead to a discussion of the jurisdiction of the court, the mode of proceeding, and the effect of the adjudication.

SECTION I. *The Jurisdiction of the Court.* — The correct view seems to be, that this was derived from the same source as the power over infants. This has been explained as the doctrine of *parens patriæ*. What is meant is, that the king had the power of protection over idiots and lunatics, as he had over infants, and that this passed by delegation to the Court of Chancery.

There has been a difference of opinion among jurists upon this question, some maintaining that there was no original power vested in the king, at least over the idiots' or lunatics' *lands*, but that his authority rested upon a statute passed in the reign of Edward II., concerning the royal prerogative.[1] It would, however, appear from the reports in the Year Books of Edward I., that the power was then admitted to exist in the court so fully that discussion of it was thought unnecessary. This controversy is practically set at rest by a case decided in the year 1304, in the reign of Edward I., and of course a number of years before the statute of Edward II., on which the jurisdiction of the court has by many jurists been supposed to rest. This case was not known to the legal profession until very recently, the report of it having been first published in the year 1864. The case is subjoined in full.

"One A. demanded certain tenements against one Piers, which Piers vouched to warranty one D. — whose body and part of whose lands (*because he was an idiot*) *were in the king's hands*, and part of whose lands were in the hand of, &c., and part, &c. — to be summoned in the county of Dorset. — *Malberthorp*," (of counsel objects): "You vouch one D., who is an idiot, and *in ward to the king;* and *vouching an idiot is like vouching an infant*, in which latter case one shall not be received to vouch without showing a specialty; and this by reason of the hardship that would ensue to the demandant, as thereby his right would be delayed, for the parol would demur without day; therefore let them show the deed by virtue whereof they vouch. — BEREFORD, J. You are saying nothing wonderful. — *Friskeney*," (of counsel for the other side): "See here the deed (and it contained a warranty).

[1] 17 Edw. II. c. 9 & 10. See Hume *v.* Burton, 1 Ridgeway's Parl. C. 204, 224.

BEREFORD, J. Go and adieu without day, &c. And the king is to be spoken with, &c." [1]

This venerable case, decided nearly six hundred years ago, discloses the fact that idiots were then in wardship to the king, *because they were idiots*, in the same way as infants; that the rules applicable to the disabilities of an infant in court were applied to them; and that these rules were at that time so well established as to be instantly conceded by the judge in response to the counsel representing the idiot, but that the king as guardian was to be spoken with.

The statute of Edward II., already referred to, must be regarded simply as declaratory of existing law, except so far as new rules were introduced by it. An arbitrary and wholly unjust distinction was established by it, to the effect that the king could take the profits of an idiot's land to his own use, except as to supplying him with necessaries, while in the case of a lunatic there was deemed to be a trust.[2] It would result that a court of equity has jurisdiction over persons of unsound mind from the simple fact of their mental unsoundness, although their unsoundness has not yet been judicially determined by the court.[3] There are important statutes on this subject both in England and in this country.[4] (*a*)

SECTION II. *The Mode of Proceeding.* — The proceeding in such a case is not a trial; it is in the nature of an inquiry before commissioners appointed by the Court of Chancery. The form of the existing commission arose from the form of writs originally granted by the king.[5] An application for a commission is made by petition. The commissioners act with a jury, and hear testimony, and make up a verdict or finding.[6] This is returned to the court for its action, which may be either by way of confirmation, or it may be set aside, if improperly executed.[7]

[1] Year Book, 32 & 33 Edw. I. Published under direction of the Master of the Rolls. Lond. 1864, p. 272.

[2] See 17 Edw. II. c. 9 & 10.

[3] Vane *v.* Vane, L. R. 2 Ch. D. 124; *In re* Brandon's Trusts, L. R. 13 Ch. D. 773. Independent of the case cited from the Year Book, *supra*, the jurisdiction of the court is very obscure and the decisions irreconcilable.

[4] See in England 16 & 17 Vict. c. 70; 18 & 19 Id. c. 13; 25 & 26 Id. c. 86; 45 & 46 Id. c. 82. In New York there are detailed regulations in the Code of Civil Procedure, §§ 2320–2344.

[5] Rochfort *v.* Ely, 1 Ridgeway's Parl. C. 524, 539.

[6] In New York there must be not less than twelve nor more than twenty-four jurymen. At least twelve must concur in a finding. Code of Civ. Pro. §§ 2330, 2331.

[7] *Ex parte* Roberts, 3 Atkyns, 5; *Ex parte* Cranmer, 12 Ves. 445, 454.

(*a*) See also 52 & 53 Vict. c. 41; 53 & 54 Vict. c. 5 as amended by 54 & 55 Vict. c. 65.

If the alleged lunatic is found to be of unsound mind, there may be a "traverse" on his part. The meaning of this is, that he may have the subject examined, not as an inquiry, but tried after the usual methods of an action, by having an issue. This is a right which cannot properly be denied.[1] In England, the course was to send the case out of the Court of Chancery to a court of law. The course sanctioned by CHANCELLOR KENT here has been, to retain the case in the Chancery Court, and to direct the question to be tried in the court of law.[2] Other persons besides the alleged lunatic aggrieved by the decision may, in the discretion of the court, be allowed to traverse the finding.[3]

If the lunacy has been properly found, and the lunatic is subsequently restored to reason, an application may be made to have the commission "superseded." In such a case it is usual in England for the Chancellor in person to examine the lunatic, and so satisfy himself of his restoration. In this country this course may be taken, or the subject may be referred to a master in Chancery or referee, who will report to the court.[4] (*a*)

An inquisition of lunacy may be "suspended" without being "superseded." By "suspension" is meant removing the effect of the finding as to certain acts, but allowing it to stand in other respects.

For example, it might be so far suspended as to enable the party to make a will, but still remain operative as to other transactions. Such a suspension would not of itself establish the fact that the will was validly made by a person having capacity, but it would remove the *artificial incapacity* produced by the operative force of the inquisition, and allow after the testator's death a general inquiry into his mental condition when the will was made.[5]

SECTION III. *The Effect of the Adjudication.* — The regular effect of an adjudication of mental unsoundness is to deprive the person in question of capacity to do future legal acts. The inquiry is henceforward not open as to whether or not he is really unsound in mind. He has an artificial condition impressed upon him, and may be well enough styled a "legal lunatic." If he were declared an habitual drunkard, he would be so legally, whether

[1] *Ex parte* Wragg, 5 Ves. 450.

[2] Matter of Wendell, 1 Johns. Ch. 600. There is a form of an order for trial on p. 603. See the Code of Civ. Pro. §§ 2334, 2335, for the present practice in New York.

[3] Matter of Fust, 1 Cox Eq. 418.

[4] Matter of Hanks, 3 Johns. Ch. 567.

[5] See Wait *v.* Maxwell, 5 Pick. 217.

(*a*) The commission of lunacy cannot be superseded in such a proceeding after the death of the lunatic. In the Matter of Owens, 44 N. Y. St. R. 306; aff'd, 136 N. Y. 642. For the tests of a recovery from lunacy, see Matter of Brugh, 61 Hun, 193.

he were so in fact or not.[1] Future contracts would accordingly be void.[2] (*a*) There is a difference of opinion as to the point whether this rule extends to wills. Some courts hold that one under guardianship is competent to make a will, if restored to reason, though the letters of guardianship have not been superseded.[3] (*b*) Others hold a more rigorous view, and deem the act of the lunatic after the guardianship to be void. In one case it is said that the lunatic (*i. e.*, one judicially declared to be so) should for most if not all purposes be regarded as civilly dead.[4] And in this spirit all gifts, contracts, bonds, etc., are void, and his capacity to enter into such transactions is suspended until he is permitted by order of the court to resume the control of his property.[5] The courts in some States hold that an inquisition only makes a *prima facie* case.[6] The true view undoubtedly is that the whole matter resolves itself into *capacity* to contract. One judicially declared insane has no such capacity.

There is a highly important inquiry as to the effect of a finding of lunacy when the insanity is dated back by the jury holding the inquisition. For example, the finding might be that A. is a lunatic or of unsound mind, and has been for the last two years. During that period he may have made contracts, conveyances, etc. The expression used in the decisions is, that the prior contract is in such a case "overreached" by the inquisition. The point then is, whether such a finding will make the contract so overreached utterly void. The correct view is that it will not. Such a conclusion would be highly inequitable and unjust, since the opposite party to the contract had no opportunity to be heard, unless in some form he had been permitted to deny or "traverse" the inquisition. The authorities, however, hold that the antedated insanity raises a presumption that the contract is void. This seems sufficiently severe, and even illogical, since nothing should ever be presumed in this artificial way against one not a party to the proceeding, who, when he made the contract, had in

[1] This point is ably stated by the Supreme Court of Pennsylvania in Imhoff *v.* Witmer, 31 Pa. St. 243.

[2] Id.

[3] Stone *v.* Damon, 12 Mass. 488; Leonard *v.* Leonard, 14 Pick, 280, 284; Breed *v.* Pratt, 18 Id. 115.

[4] McNees *v.* Thompson, 5 Bush (Ky.), 686.

[5] L'Amoureux *v.* Crosby, 2 Paige, 422; Fitzhugh *v.* Wilcox, 12 Barb. 235; Beverley's Case, 4 Coke, 124 (*a*); Rannels *v.* Gerner, 80 Mo. 474; Griswold *v.* Butler, 3 Conn. 227; Imhoff *v.* Witmer, 31 Pa. St. 243.

[6] Hill *v.* Day, 34 N. J. Eq. 150; Keys *v.* Norris, 6 Rich. S. C. Eq. 388. It is made so by statute in Ohio. See Messenger *v.* Bliss, 35 Ohio St. 587.

(*a*) Carter *v.* Beckwith, 128 N. Y. 312.

(*b*) Stevens *v.* Stevens, 127 Ind. 560; Rice *v.* Rice, 50 Mich. 448; s. c. 53 Mich. 432.

his favor the presumption that he was contracting with a person competent to contract.[1] (*a*)

The regular result of an inquisition is the appointment of a guardian, in some States called a "committee," in others "a conservator," and again an "overseer." The term "committee" is to be preferred, as it is found in the common law.

The committee has charge sometimes of the estate alone, at other times of the person alone, or it may be of both. The property of the lunatic is properly deemed to be in the custody of the court (*custodia legis*), and the committee is its officer.[2] His position is much like that of a receiver in the case of the judicial administration of a trust. His right to sue in his own name or to be sued as committee is generally a matter of local regulation.[3]

Important questions arise as to the theory on which the lunatic's estate should be managed by the court, whether for the lunatic's benefit, or for his representative's. The correct theory is to manage it for the best interests of the lunatic, without special reference to his representatives. Thus, if he were a man of wealth and social position, the aim of the court would be to keep up a mode of life and habit of expenditure closely resembling that which he had adopted while sane, and in that aspect, for example, to hire such a pew in a church as he had then hired, and to continue the appropriations for charitable purposes which he had been accustomed to make.[4] This general theory has recently been carried so far in England by the Court of Appeal as to hold that it has jurisdiction to order a "debt of honor" to be paid out of the lunatic's estate. It was not the case of a gambling debt, which was called a "debt of dishonor," but a voluntary obligation which a man of honorable sentiments had engaged to pay, and had already in part discharged. The estate of the lunatic was large, there were no creditors, and the next of kin did not object to the action of the court.[5]

The expenditure must in all such cases be made under the

[1] On this general subject see Hart *v.* Deamer, 6 Wend. 497; Osterhout *v.* Shoemaker, 3 Hill, 513; Demilt *v.* Leonard, 11 Abb. Pr. 252; Rogers *v.* Walker, 6 Pa. St. 371; Willis *v.* Willis, 12 Pa. St. 159. Under the present New York Statute the finding must be limited to the time of the inquiry, and it cannot properly be found that incapacity has existed for any definite period in the past. Code of Civ. Pro. § 2335. *In re* Demelt, 27 Hun, 480.

[2] Adams *v.* Thomas, 81 N. C. 296.

[3] Bolling *v.* Turner, 6 Rand. (Va.), 584. For the New York law as to his powers and duties, see Code Civ. Pro. § 2337 and §§ 2339–2344. He is required to file inventories and render accounts much in the same way as an executor or administrator.

[4] May *v.* May, 109 Mass. 252.

[5] *In re* Whitaker, L. R. 42 Ch. Div. 119.

(*a*) Hughes *v.* Jones, 116 N. Y. 67.

sanction of the court. The mere fact that a vendor continues of his own motion, and with full knowledge of the facts, to sell to the lunatic merchandise which he had been accustomed to sell him, would not give him a cause of action, either against the lunatic or the committee.[1]

Similar general rules are applied in several of the States to spendthrifts and habitual drunkards.[2]

Several inquiries may be suggested concerning the effect of guardianship in one State over the person or property of the lunatic in another State or country. (1) It is a general rule, that a committee appointed in one State has no power to act in another State.[3] It has, however, been held that a foreign curator may bring actions in England for money due to the lunatic, or receive money and give a good discharge for it. His case might be likened to that of a foreign assignee in bankruptcy who takes the title to the bankrupt's estate by an assignment operating by a rule of law.[4] The case seems to belong to the topic of the "comity of States or nations," and the foreign court may have some discretion in the matter.[5] (2) The better opinion is that the domicile which the lunatic had when judicially declared to be insane continues. His case has been likened to that of father and child. There is, however, no close resemblance between the two cases. The relation between the parties is purely an artificial one, established for certain purposes, and may suddenly be put an end to by restoration to reason. The father's guardianship is a natural one, and in the absence of misconduct on his part continues during minority. Whether the committee can fix the lunatic's domicile or change it to a State or country different from his own, is not fully settled. There are cases which seem to hold that he can,[6] but they are strongly criticised by Mr. Dicey as unsound in principle.[7]

[1] Western Cement Co. *v.* Jones, 8 Mo. App. 373.

[2] As to habitual drunkards in New York, see Code of Civ. Pro. §§ 2320, *et seq.* The case is assimilated to that of lunacy.

[3] Matter of Perkins, 2 Johns. Ch. 124; Matter of Taylor, 9 Paige, 611; Rogers *v.* McLean, 31 Barb. 304; Matter of Houstoun, 1 Russ. 312.

[4] Scott *v.* Bentley, 1 K. & J. 281.

[5] As to discretion, see *In re* Garnier, L. R. 13 Eq. 532.

[6] Holyoke *v.* Haskins, 5 Pick. 20; Anderson *v.* Anderson, 42 Vt. 350.

[7] Dicey on Domicil, p. 132.

It has recently been decided in the Supreme Judicial Court of Massachusetts that one against whom proceedings for the appointment of a guardian are pending, may so far change his domicile to another State as to give the latter State jurisdiction of the original probate of his will, and that the determination of the foreign court will be given effect to in Massachusetts. This decision seems to rest mainly on the essentially *local* character of this kind of guardianship. Though conclusive in the State where it is created, it has no force elsewhere, and State comity requires the act done in a State where there is no guardianship to be recognized as valid, even in a State where guardianship exists. The law of the place of the new domicile thus triumphs in its own forums

The court in the State where the property is, has, by reason of its presence, power to act in reference to it, though the lunatic may reside abroad.[1] The jurisdiction of the court over feeble-minded persons does not necessarily rest upon the fact that judicial proceedings have been entered upon to appoint a custodian or curator; it is rather derived from the fact of their feeblencss or unsoundness of mind and the necessity of their being cared for.[2] The court may order an insane foreigner found within its jurisdiction to be returned to his foreign domicile.[3]

The details of practice as to the modes of appointing committees in lunacy and their methods of suing and being sued, may be found in the books on Chancery practice. Their power to contract and to do other acts independent of the commission, will be found in works on contracts and wills. The works on criminal law must be consulted in matters of crime. The various writers on medical jurisprudence will supply valuable information upon the theories and signs of insanity applicable to all these branches of law.

Other Cases of Incapacity. — Reference may be made in this connection to the relation of the Indian to the State and the United States. This subject involves the power of the executive department to make treaties with the Indians, as well as the power of Congress over them in the States and within the Territories. The only branch of the subject to be considered in this connection is the *status* of individual Indians.

It is settled law, that so long as Indians maintain their tribal organization and relations, which may be termed a state of semi-independence and pupilage, the United States has the power of controlling them. It may exercise this control either by treaties, as in the past, or by Acts of Congress.[4] An Act of Congress accordingly is valid which gives jurisdiction to the courts of the Territories over specified crimes committed by Indians within the Territories, or to the courts of the United States for the same crimes committed on an Indian reservation within a State of the Union.[5] A State has no power over such an Indian, for the Indians, under

over the law of the State where the guardianship exists. Talbot *v.* Chamberlain, 149 Mass. 57.

[1] Matter of Ganse, 9 Paige, 416.

[2] Malin *v.* Malin, 2 Johns. Ch. 238; Matter of Barker, Id. 232; *in re* Barlow's Will, L. R. 36 Ch. D. 287. In this last case there was no judicial determination of insanity, but *statutory* powers of management were conferred in a colony which were not recognized in the court in England.

[3] Matter of Colah, 3 Daly, 529; s. c. 11 Abb. Pr. N. S. 209 (Parsec Merchant's Case).

[4] United States *v.* Kagama, 118 U. S. 375.

[5] Id.

the conditions mentioned, owe no allegiance to a State within which their reservation may be established, and the State gives them no protection.[1]

The result seems to be, that a tribal Indian can only be deemed a "person" by force of some action of the United States. Views of State courts on the capacity of tribal Indians to sue and to be proceeded against seem to be overruled or superseded by this decision of the United States court. When the tribal relation has been broken up, it would appear that an Indian, being born in the country, would be a citizen of the United States and of the State where he resides, and entitled to all the rights of citizens.[2] (*a*)

The following points have been decided in the circuit courts of the United States. An Indian is so far a "person" that he is entitled to a writ of *habeas corpus* in the Federal courts under the cases prescribed by law for the issuance of that writ.[3] He must be regarded as a freeman.[4] A white man does not obtain the *status* of an Indian by adoption by an Indian tribe, and his offspring belong to the white race.[5] An Indian tribe has no power to "naturalize" a white man so as to make him legally an Indian.[6]

[1] United States *v.* Kagama, 118 U. S. 375.

[2] United States Const. XIVth Amendment, § 1.

[3] United States *v.* Crook, 5 Dillon, 453.

[4] *Ex parte* Reynolds, 5 Dillon, 394.

[5] *Ex parte* Reynolds, *supra;* United States *v.* Rogers, 4 How. U. S. 567.

[6] The general subject of the "legal status" of an Indian is discussed in a pamphlet published by Robert Weil, Seligman Fellow, in Columbia College, New York, 1889.

(*a*) But he is not a citizen within the Fourteenth Amendment to the Constitution, even though he has abandoned his tribal relations, if he has not been naturalized, taxed, or recognized as a citizen either by the United States or by a State. Elk *v.* Wilkins, 112 U. S. 94.

CHAPTER X.

MASTER AND SERVANT.

THIS subject will be treated in three principal divisions, — I. Slavery; II. Apprenticeship; III. Service arising out of contract.

DIVISION I. — *Slavery.*

The great and striking feature in this form of service is, that it is compulsory, existing by a *mere rule of law*, without any element of contract, and that there are attendant upon it certain extraordinary facts highly burdensome to the servant, — such as absence of compensation, unlimited service, feeble restraints against violence to the person, and perhaps the notion of property or ownership in the master. It is emphatically a legal, or jural, relation, — a creature of positive law and opposed to natural justice. It presents important questions of *status* in reference to its legal recognition in other States where slavery does not exist.

An attempt to give slavery a rational basis is found in the Roman law. It was admitted that it was contrary to the law of nature, but it was held to exist by the so-called "law of nations" (*jus gentium*). There were several modes by which a free person became a slave. One was by falling *under the power of a foreign nation*, either by capture in time of war, or coming into the possession of a people with whom there was no friendly treaty or intercourse. Another leading method was the case of a free person of twenty years of age and upwards allowing himself collusively to be sold as a slave, with the intention of sharing the price received by the seller and then claiming his freedom. To meet this fraud, the magistrate would adjudge him to be a slave, thus protecting the title of the purchaser.[1] Slavery might also exist as a punishment for crime. There was a peculiarity in this case, — viz., that the "slave" had no master. He was termed a slave of punishment (*servus pœnæ*). An instance was a person

[1] Institutes of Justinian, Book I. Title III.

condemned to labor in the mines.[1] The *status* of slavery having thus originated, would pass by birth or succession to children, the general rule being that the child followed the condition of the mother, whatever might be that of the father.[2]

Slavery having been abolished in the United States by constitutional amendment, it is now a matter principally of historical interest. Some questions of a legal character may still arise as to the status in a particular State of a slave owned elsewhere. The prevailing view is that slavery, being contrary to natural justice and only existing by positive law, has no claim to international recognition. If a master voluntarily bring his slave into a country where slavery does not exist, he becomes free. This is especially the case where the local law declares that slavery shall not exist. This doctrine was held very early in France, where the French court determined a case against an ambassador of Spain, who had brought a slave into France.[3] The same point was ruled in the State of New York while slavery existed in this country as against a Kentucky master who passed through New York *in transitu* with his slaves to another State.[4]

The Thirteenth Amendment to the United States Constitution, abolishing and prohibiting slavery, makes an exception as to involuntary servitude for crime. It would appear that this form of "servitude" might still be created by a State, though no occasion has yet arisen for deciding the point.

[1] This form of slavery was abolished by Justinian, Novel 22, 8.

[2] Bodin, the French political philosopher, writing in 1576, though trained in the Roman law, repudiates the theory that slavery can be rested on captivity in time of war, saying, "that the good and noble heart would always rather choose to die honestly than unworthily to serve as a base slave." His whole treatment of the subject is masculine and noble. He gives a terrible picture of the manumitted men of his day that is worth reproducing: "I have seen the lord of the White Rock in Gascony claim not only to have right over his manumitted subjects, but also that they were bound to trim his vines, to till his grounds, to mow his meadows, to reap and thresh his corn, to carry and recarry whatever he should command them, to repair his decayed houses, to pay his ransom and also the four accustomed payments used in this realm; but also that if without his leave they should change their dwelling-places wherein they were born, he might lead them home again in a halter." Knolles' Trans., 1606.

[3] Bodin, ch. 5, p. 42. He says, "The slaves of strangers, so soon as they set their foot within France, become frank and free, as was by an old decree of the court of Paris determined against an ambassador of Spain who had brought a slave with him into France." In another case cited in the same connection, he says "that the *host of the house* where the master was staying, understanding the matter, persuaded the slave unto his liberty."

[4] Lemmon *v.* The People, 20 N. Y. 562.

DIVISION II. — *Apprenticeship.*

The term "apprentice" is generally used in this country to designate a class of persons who labor for others under statutory conditions or requirements in order to learn some trade or vocation. An apprentice in such a case differs from a servant in this, that the employment of the former is regulated by positive rules of law, while the obligations of the latter depend wholly upon contract. If there were no restrictive statutes in a particular State, the apprenticeship would be governed by the general rules of the law of contracts.

Apprenticeship had its origin in the Middle Ages in connection with membership of the trade guilds. Many trades could only be practised by those who had the "freedom" of the guild. This could only be obtained by an apprenticeship to some member of the guild for a time varying according to local usage. The number of persons following a trade could thus be practically limited by rule. The rules governing guilds were rigorous. They prevailed in continental countries as well as in Great Britain.

This subject may be considered under two aspects: *first*, where the apprenticeship is created by mere contract, and *second*, where it is created by statute. In the first case, assuming that the apprentice is a minor, it would still be necessary that he should enter into the contract.[1] His father must also assent, as he is entitled to the child's custody and his services. The contract of the infant will not be void on account of his infancy, but only voidable. It would not be absolutely binding on him, as it would not fall within the class of necessaries. It is still plainer that an adult could not be bound unless he executed the agreement.[2] Should a father enter into covenants for the conduct of the son, he would be liable, from his own estate, if the covenants were broken.[3] In order to constitute an apprenticeship, there must be mutual agreements to *teach and to learn a trade*. A mere agreement on the one hand to serve and on the other to supply food, clothing, and support will be a contract of hiring instead of an apprenticeship.[4] In other respects than these the general law of contracts may be resorted to for rules applicable to the case.

The subject of apprenticeship by *statute* presents two distinct cases: one, where the apprenticeship is voluntary in its origin; the other, where it is compulsory. The special rules governing

[1] Rex *v.* Annesby, 3 B. & Ald. 584.

[2] Rex *v.* Ripon, 9 East, 295.

[3] Cuming *v.* Hill, 3 B. & A. 59. Apprenticeship by contract is recognized in Crombie *v.* McGrath, 139 Mass. 550.

[4] Rex *v.* Billinghay, 5 A. & E. 676.

this branch of the subject were worked out in England in construing a statute passed in the reign of Queen Elizabeth.[1] The English courts did not favor this legislation, applying it only to trades that existed at the time of its enactment. New trades were left to the general law of contracts. Any compulsory features of trade apprenticeship were abolished in 1814, under the influence of the writings of Adam Smith and his followers.[2] There were still compulsory features in cases that might arise under the Poor Laws. English decisions rendered while apprenticeship was compulsory will be useful in disposing of cases in this country involving apprenticeship in general.

Voluntary apprenticeship will be considered under the following heads: I. Method of creation; II. Effect of the relation; III. Remedies for breach of the agreement; IV. Dissolution.

I. *Method of creation.* — The statute of Elizabeth provided that none should be apprentices except minors.[3] The term of service should in general be seven years.[4] The relation must be created by an indenture (or instrument under seal).[5] No agreement constituted an apprenticeship without an indenture.[6] There might be two or more masters named in the indenture. If one died during the continuance of the apprenticeship, the party bound would become the apprentice of the survivor.[7] (*a*) If the term mentioned in the indenture was less than seven years, it was voidable and not wholly void.[8]

The contract of the master being to teach a trade to the minor, it contains certain implied conditions, — *e. g.*, that the apprentice is ready and willing to be taught,[9] and also that he shall continue in a state of ability to perform his contract. If he is prevented from doing that by permanent illness, he is excused.[10]

The contract is personal, and would regularly terminate with the death of the master.[11] This result might be prevented by words in the indenture continuing the apprenticeship to the master's representatives in case of his death.[12] There is also an implied con-

[1] 5 Eliz. c. 4, §§ 25-48.
[2] 54 Geo. III. c. 96.
[3] 5 Eliz. c. 4, § 36.
[4] Id. § 26.
[5] See Id. §§ 25, 28, 30, 32, etc.
[6] Rex *v.* Margram, 5 Term R. 153; Phelps *v.* P. C. & S. R. R. Co., 99 Pa. St. 108.
[7] Rex *v.* St. Martin's, Exeter, 2 A. & E. 655.
[8] Gray *v.* Cookson, 16 East, 13.
[9] Raymond *v.* Minton, L. R. 1 Exch. 244.
[10] Boast *v.* Firth, L. R. 4 C. P. 1.
[11] Baxter *v.* Burfield, 2 Strange, 1266.
[12] Cooper *v.* Simmons, 7 H. & N. 707. In case of a master's death, his estate would be liable for the support of the apprentice.

(*a*) A contract of apprenticeship is not invalid by reason of the fact that the master is a corporation. Burnley Equitable Co-operative and Industrial Society *v.* Casson [1891], 1 Q. B. 75.

dition that the contract shall be performed at the place where the business was carried on at the time of the execution of the indenture.[1]

Apprenticeship is to be treated as a fiduciary relation. The master cannot assign the apprentice to another master by his own act.[2]

II. *Effect of the relation.* — (1) *Rights and duties of the master.* — It is common to insert in the indentures certain promises and obligations which each of the respective parties undertakes towards the other. A question of some difficulty then arises, whether the failure to observe these provisions is vital to the contract or only a ground of action for damages or for other relief suitable to the breach of that particular clause. The court in determining this point looks at the nature of the clause violated and the general purpose of the contract. On the part of the master it would be held to be vital that he should *continue to follow the trade* which he had engaged to teach the apprentice.[3] The same rule would be applied if the masters were partners, and one of them should retire.[4] A partial withdrawal from business might not have that effect.[5] On the other hand, misconduct by an apprentice might not determine the relation.[6] Permanent desertion on the apprentice's part would suffice.[7] (*a*) There might be a special clause in the indenture making misconduct on the part of the apprentice vital.[8] The master could not order the apprentice to do an unlawful act, — as, for example, being apprenticed to a barber, to shave customers on Sunday.[9]

A master is entitled to the earnings of the apprentice, and can bring an action against one who entices him away or harbors him after desertion.[10] So the master might waive the wrongful act, and simply sue the enticer for the work and labor done by the apprentice.[11]

(2) *Rights and duties of the apprentice.* — These depend on the statute and the covenants in his behalf in the indenture. An apprentice can only be required to render the service for which

[1] Eaton *v.* Western, L. R. 9 Q. B. D. (C. A.) 636.
[2] Baxter *v.* Burfield, 2 Strange, 1266.
[3] Ellen *v.* Topp, 6 Exch. 424.
[4] Couchman *v.* Sillar, 22 L. T. N. S. 480.
[5] Batty *v.* Moaka, 12 L. T. N. S. 832.
[6] Philips *v.* Clift, 4 H. & N. 168.
[7] Hughes *v.* Humphreys, 6 B. & C. 680.
[8] Weatwick *v.* Theodor, L. R. 10 Q. B. 224.
[9] Phillips *v.* Innes, 4 Cl. & F. 234.
[10] Foster *v.* Stewart, 3 M. & S. 191.
[11] Lighthy *v.* Clouston, 1 Taunt. 112.

(*a*) It is a good defence to an action for breach of a covenant in an apprenticeship deed that the apprentice while in the master's service was an habitual thief. Learoyd *v.* Brook [1891], 1 Q. B. 431.

he was indentured.[1] He has a right to be treated with kindness. The master is, to a certain extent, *in loco parentis*. If he were assaulted by the master, and had reasonable ground for apprehending serious bodily harm, he would be justified in leaving the service.[2] The courts in England will not uphold an agreement of apprenticeship which is not for the infant's benefit. Accordingly, a clause that wages which would otherwise be payable to him should not be paid if the master's business should be interrupted by a turn-out, cannot be upheld, even though he is allowed during the turn-out to be employed in other ways.[3]

III. *Remedies for breach of the agreement.* — In an apprenticeship regulated by statute, the remedies for breach of the contract are generally to be sought in the statute itself. These are not merely the ordinary remedies provided in contract law, but are frequently penal, or even of a criminal aspect. Penal legislation for breach of contract would not be justifiable in case a servant were an adult. The foundation of such laws rests in the infancy of the servant and the power of the State under the *parens patriæ* doctrine to regulate his conduct while in a condition of disability.

IV. *Dissolution.* — In England, since the statute of 54 Geo. III. c. 96, this subject is placed on the footing of contract law. The contract will be dissolved upon any act on the part of one of the parties which substantially defeats the purpose of the contract. In this country, wherever the old theory of the statute of Elizabeth prevails, stringent rules concerning dissolution are to be looked for in the statute itself.[4]

Compulsory (or parish) apprenticeship was from an early date based on an entirely different theory from that of trade apprenticeship. It was in substance a branch of the Poor Laws. Apprenticeship, in this aspect, was a mode of taking care of pauper children. Its compulsory features have continued down to the present time, notwithstanding the disappearance of the compulsory element in ordinary trade apprenticeships. The earliest statute on the subject was passed in the reign of Queen Elizabeth.[5] The same kind of legislation was continued down to 7 & 8 Vict. c. 101. Such children are now bound out by a board of guardians of a union or parish, while the Poor Law commissioners may pre-

[1] McPeck *v.* Moore, 51 Vt. 269.

[2] Halliwell *v.* Counsell, 38 L. T. N. S. 176.

[3] Meakin *v.* Morris, L. R. 12 Q. B. D. 352.

[4] Thus in New York, trade apprenticeships cannot be cancelled or annulled except in the case of death, or by the order or judgment of the county or Supreme Court for good cause. Laws of 1871, ch. 934.

[5] 43 Eliz. c. 2, § 5.

scribe the duties of the masters and the terms or conditions to be inserted in the indentures, though the rules are rather treated as directory than vital.[1] An infant *parish* apprentice and his master, it would seem, cannot by mutual consent vacate the indenture.[2]

Apprenticeship under American law. — In the various States of the Union the distinction between voluntary and parish apprentices is substantially recognized.

Apprenticeship must, in general, be created by indenture in the form authorized by the statute of the State. If not so created, it will be, in some States, voidable and in others void.[3] A writing without seal is not an indenture.[4] The courts differ as to the power of a father at common law to bind out the child during minority without his consent.[5] Under the statutes, he must, as a rule, execute the instrument required.[6] When the statute is complied with, the articles of apprenticeship are binding on the infant.[7] In some States the consent of the parent or guardian is required. This requirement would not be construed to create a personal obligation on the parent's part.[8] Still, if the parent or guardian executed the instrument, he might be personally liable for the wrongful acts of the apprentice. Unless the statute were specific, it would not in general be necessary to name the particular trade in which the apprentice was bound to serve.[9]

I. *Rights and duties involved in the relation. — As between the master and the apprentice.* — (1) There are commonly in the indenture covenants on each side, — the master on his part agreeing to teach, and the servant to learn, the trade, etc. A breach of one of these promises does not necessarily subvert the relation. The covenants in that aspect are independent.[10]

[1] Queen *v.* Inhab. of St. Mary Magdalen, 2 E. & B. 809.

[2] King *v.* Gwinear, 1 A. & E. 152; Remarks of Parke, B.

[3] See Luby *v.* Cox, 2 Harr. 184; Bolten *v.* Miller, 6 Ind. 262; Tague *v.* Hayward, 25 Ind. 427; Fowler *v.* Hollenbeck, 9 Barb. 309; Brown *v.* Whittemore, 44 N. H. 369; see in New York, Laws of 1871, ch. 934.

[4] Commonwealth *v.* Wilbank, 10 Serg. & R. 416; Hall *v.* Gardner, 1 Mass. 172; Squire *v.* Whipple, 1 Vt. 69.

[5] Day *v.* Everett, 7 Mass. 145, 147; Van Dorn *v.* Young, 13 Barb. 286; Commonwealth *v.* Baird, 1 Ashm. (Pa.) 267; United States *v.* Bainbridge, 1 Mason, 71, 78.

[6] Matter of McDowle, 8 Johns. 328; Ivins *v.* Norcross, 3 N. J. Law, 977; Balch *v.* Smith, 12 N. H. 437; Pierce *v.* Massenburg, 4 Leigh (Va.), 493.

[7] Woodruff *v.* Logan, 6 Ark. 276; Kingwood *v.* Bethlehem, 13 N. J. Law, 221.

[8] Whitmore *v.* Whitcomb, 43 Me. 458. See People *v.* First Judge of Livingston, 2 Hill, 596. See 2 R. S. (New York) 154, § 2, as to consent. The law of 1871, ch. 934, requires the parent to *execute the indenture.*

[9] Fowler *v.* Hollenbeck, 9 Barb. 309; People *v.* Pillow, 1 Sandf. 672. The New York statute of 1871, ch. 934, is very distinct, stating that *it shall not be lawful* to take the apprentice unless the statutory requirements are complied with.

[10] Powers *v.* Ware, 2 Pick. 451.

(2) The age of the child is commonly inserted in the indenture. As a general rule, the *master* would not be allowed to show that the age inserted was not the true age,[1] though the apprentice would.[2] (3) The master has a right to the custody of the apprentice, and may resort to a *habeas corpus* as against one wrongly depriving him of it,[3] though the court will in some cases set the apprentice free and leave the master to his remedy by action.[4] (4) The master is entitled to the earnings of the apprentice, but not to such as are obtained from extraordinary service for others, wholly beyond the line of his duties; as, for example, salvage money,[5] or bounty,[6] or prize money.[7] A master may waive this right by allowing him freely to depart from his service.[8] The apprentice could not recover from his master, even upon a promise to pay him, for extra work which his indentures bound him to perform. Such a promise would be without consideration.[9] (5) The master may, in the way of discipline, correct the servant in a moderate manner.[10] (6) The relation is to some extent purely personal. Thus, the agreement to teach ends with the life of the master, and does not bind his representatives. The master is only bound to use reasonable diligence in giving instruction.[11] If he fails to do what the law requires of him, the apprentice may sue for damages.[12] (7) The master is bound to pay for necessary medical attendance in case of the sickness of the apprentice.[13] (8) The master has no right to remove the apprentice to another State, unless the removal is provided for in the indenture, or arises from the nature of the contract, as in the case of an apprentice to serve at sea.[14] But the courts of the State into which the apprentice is removed will, in their discretion, refuse, on *habeas corpus*, to take the apprentice from the master.[15] When the master is sued for a removal, he may show in his defence that the plaintiff assented.[16] It is in general true that an apprenticeship made in another State is not obligatory. So far as apprenticeship creates a *status* or

[1] McCutchin *v.* Jamieson, 1 Cranch, Cir. Ct. 348; Hooka *v.* Perkins, Busbee, N. C. Law, 21.

[2] Drew *v.* Peckwell, 1 E. D. Smith, 408.

[3] Commonwealth *v.* Beck, 1 Browne (Pa.), 277.

[4] Commonwealth *v.* Harrison, 11 Mass. 63.

[5] Mason *v.* Blaireau, 2 Cranch, 240, 270; Randall *v.* Rotch, 12 Pick. 107.

[6] Kelly *v.* Sprout, 97 Mass. 169.

[7] Carsan *v.* Watts, 3 Doug. 350.

[8] Lewis *v.* Wildman, 1 Day, 153.

[9] Bailey *v.* King, 1 Whart. (Pa.) 113.

[10] Commonwealth *v.* Baird, 1 Ashm. (Pa.) 267.

[11] Wright *v.* Brown, 5 Md. 37.

[12] Adams *v.* Miller, 1 Cranch, Cir. Ct. 5.

[13] Easley *v.* Craddock, 4 Rand. (Va.) 423.

[14] Commonwealth *v.* Edwards, 6 Binn. (Pa.) 202; Commonwealth *v.* Deacon, 6 Serg. & R. 526; Coffin *v.* Bassett, 2 Pick. 357.

[15] Commonwealth *v.* Hamilton, 6 Mass. 273.

[16] Burden *v.* Skinner, 3 Day, 126.

condition, it is local, depending on grounds of local policy.[1] (9) The master has, in general, no right to assign the apprentice to another. The reason is, that the relation creates a personal trust.[2] A note given for an assignment would, therefore, have no valid consideration.[3] An attempt to assign, according to some authorities, may, however, as between the assignor and assignee, create a valid contract whereby the one may have a cause of action against the other.[4] If the apprentice consented to serve the new master, he might gain a settlement in the place where the latter resided. So if the master die, the apprentice cannot be assigned by his executors.[5] In some States an apprentice bound by the overseers of the poor may be assigned without his consent.[6]

Rights of the master as to third persons. — The principal points that might be presented under this head are, the right of the master to sue third persons for loss of service caused, *e. g.*, by seducing, enticing, or harboring the apprentice, or to sue for his wages. Two classes of questions may arise: one, as to his right to sue the third person on a contract, and the other, for a tort.

As to actions on contract, it is laid down in some of the cases that the master can hold a third person for the wages of an apprentice earned in the service of such third person, whether he knew of the existence of the apprenticeship or not.[7] Where, however, the action is for enticing away or harboring the apprentice, it must appear that the enticer knew of the relation.[8]

As between the father and the master. — The right of the father to sue the master is in general derived from the covenants in the indenture, — as, for example, that the master will pay wages.[9] In like manner, if the father enter into a covenant for the good conduct of the child, he will be personally liable. This is but a common instance of A. undertaking that B. shall do a particular thing. In such a case A. is responsible, although

[1] Hines *v.* Howes, 13 Met. 80; Commonwealth *v.* Edwards, 6 Binn. 202; Commonwealth *v.* Deacon, 6 Serg. & R. 526; United States *v.* Scholfield, 1 Cranch, Cir. Ct. 255.

[2] The cases to this effect are numerous. Tucker *v.* Magee, 18 Ala. 99; Huffman *v.* Rout, 2 Metc. (Ky.) 50; Hudnut *v.* Bullock, 3 A. K. Marsh (Ky.), 299; Hall *v.* Gardner, 1 Mass. 172; Davis *v.* Coburn, 8 Id. 299; Handy *v.* Brown, 1 Cranch, Cir. Ct. 610.

[3] Allison *v.* Norwood, Busbee, N. C. Law, 414.

[4] Nickerson *v.* Howard, 19 Johns. 113; Guilderland *v.* Knox, 5 Cow. 363.

[5] Commonwealth *v.* King, 4 Serg. & R. 109.

[6] So in Vermont, Phelps *v.* Culver, 6 Vt. 430.

[7] James *v.* LeRoy, 6 Johns. 274. But see Ayer *v.* Chase, 19 Pick. 556; Bardwell *v.* Purrington, 107 Mass. 419.

[8] Stuart *v.* Simpson, 1 Wend. 376.

[9] Caden *v.* Farwell, 98 Mass. 137.

he has no available mode of compelling B. to do the thing in question.[1]

As between the father and the apprentice, if the relation has been legally constituted, the right to custody, discipline, wages, etc., is lost. He cannot sue for the seduction of a daughter, for he is no longer entitled to her services.[2] It may be added that the *status* of the apprentice is fixed by that of the master. He cannot change his domicile by his own act.[3]

II. *Dissolution.* — The apprenticeship, in the absence of an opposing statute, can be dissolved by mutual consent. It may also be dissolved by act of the government, — as, for example, by an enlistment in the army. The employment by the government constitutes a personal contract with the soldier, and a prior apprenticeship must give way.[4] Statutes frequently provide a mode of dissolution by the medium of a resort to the action of magistrates or of a court.[5]

III. *Compulsory apprenticeship under the Poor Laws.* — The system of taking charge of pauper or destitute children is extensively prevalent in this country. The methods of taking charge of such children are various. In some States, courts of probate have charge of them.[6]

In one State a Court of Chancery has charge of such cases.[7] In other States it is the overseers of the poor. In New York various modes prevail, depending upon special and local statutes, conferring the authority upon orphan asylums, juvenile asylums, reformatories, etc. In some instances, institutions of this kind have statutory power under certain regulations to bind out children resident in New York in other States of the Union. This kind of legislation has been decided to be valid as to the Juvenile Asylum in the city of New York.[8]

The power conceded in New York to reformatory societies to apprentice pauper and truant children particularly to employers in other States in the agricultural districts, has proved highly beneficent in its practical workings. It is for the interest of the public that the statute should receive a liberal construction in favor of the institution acting in good faith for the welfare of the child.

[1] Mead *v.* Billings, 10 Johns. 99 ; Bull *v.* Follett, 5 Cow. 170 ; Woodrow *v.* Coleman, 1 Cranch, Cir. Ct. 171.

[2] Dain *v.* Wycoff, 7 N. Y. 191.

[3] Maddox *v.* State, 32 Ind. 111.

[4] Johnson *v.* Dodd, 56 N. Y. 76, 81.

[5] See in New York Laws of 1871, ch. 934, § 4.

[6] Spears *v.* Snell, 74 N. C. 210 ; Ballerger *v.* McLain, 54 Ga. 159 ; Cockran *v.* State, 46 Ala. 714.

[7] Howry *v.* Calloway, 48 Miss. 587.

[8] Matter of Forsyth, 66 How. Pr. 180 ; People *v.* New York Juvenile Asylum, 2 N. Y. Supreme Ct. R. (T. & C.) 475 ; affirmed in 59 N. Y. 629.

DIVISION III. — *The Law of Master and Servant, as arising out of Contract.*

Under this general head will be considered the ordinary case of master and servant, as well as acts of service where the technical relation of "master and servant" does not exist.

SECTION I. *The Relation itself.* — It is first necessary to distinguish the relation of master and servant from other relations wherein acts of service are rendered.

(1) The great and fundamental distinction between a servant and an agent is, that the former is principally employed to do an act for the employer, not resulting in a contract between the master and a third person, while the main office of an agent is to make such contract. Servants may make contracts incidentally, while agents may in the same way render acts of service. The principal distinction between them, however, is as above stated.

(2) It is important to distinguish between a servant and a contractor. Here there is not necessarily any difference in the thing to be done; it is in the mode of doing it. Thus, a canal company might excavate the bed of its canal either by employing servants or contractors. The leading distinction is, that the contractor follows an independent employment, and works for the particular person employing him as he would for any other person having work of a similar kind to be done. As a rule, a contractor only stipulates that he will accomplish a certain result or end, and the employer cannot control the mode of attaining it, while the master of a servant can direct the means as well as the end.[1] Still, there may be cases where a person usually exercising an independent employment may for the time being act as a servant. In this case, if the course of conduct is in accord with the usual action of servants, the contractor will be treated for legal purposes as a servant.

(3) It may be conceded in a particular case that a person is a servant, and yet it may be doubtful to which of two supposable masters he is attached as servant. Thus, it has been decreed to be a difficult point to determine mastership in a case where A. supplied a pair of horses and a driver to B., who owned a carriage, and the driver, while driving the horses and carriage in which B. was at the time, by negligence injured C. The solution of the difficulty is found by ascertaining who selected the driver, who paid him his wages, and under whose control he regularly was while acting in that capacity. A., in the case supposed, would

[1] See Forsyth *v.* Hooper, 11 Allen, 419.

accordingly be his master. In general, one may be in the employment of one person, and by his consent render acts of service to another without becoming in any legal sense the servant of the latter.

(4) There is a distinction between the relation of master and servant and that of one who simply performs acts of service for another. The expression "an act of service" may have a broad meaning, and include many cases not embraced in the strict relation of master and servant. Thus, a physician in compounding a prescription, or an attorney in drawing a deed, renders an act of service, though the facts scarcely create the ordinary relation of master and servant. It is not easy to draw the line with exactness. Some leading elements in difficult cases may be noted. An important circumstance is that the alleged servant performs a series of acts of service for the same person of the same general kind. Another leading fact is that the alleged servant renders services exclusively to a particular employer. Thus, if one should have a horse shod by a blacksmith on a single occasion, it would not be a case of master and servant; yet if the man gave his entire time for a fixed period to shoeing an employer's horses, the relation thus constituted might be close to that of master and servant.

Again, if one who was alleged to be a servant had a large discretion in the mode of performing his duties, — as, for example, if he followed a profession, — he could not be properly regarded as a servant in the ordinary meaning of the word.

The question whether one is in a legal sense a servant will become highly important when it is sought to hold an alleged master responsible for the negligent acts of the supposed servant, under the rule of *respondeat superior*, to be hereafter considered.

(5) The distinction between a servant and a partner is a question which frequently arises in commercial law, where it is claimed that one apparently a servant has become a partner with his employer on the ground that he has participated in the profits of the business. The general rule is that if the relation is one usually occupied by a servant, its nature is not changed by the fact that the employee is paid for his services from the profits. The details of this point belong to the law of partnership.

(6) An interesting question sometimes arises, whether a servant having a specific duty assigned to him, can, by employing a sub-servant or associate to aid him, without the knowledge or assent of his employer, render the latter liable for the negligent acts of the sub-servant, injurious to third persons. The correct principle would seem to be, that, if the act to be done would

fairly require the assistance of another, the authority to obtain it might be presumed to be delegated to the servant, otherwise not.[1]

The relation between master and servant a personal one. — This relation is clearly personal and is not assignable. On the death of either party, the relation is at an end. It is not subverted from the beginning, but ceases to exist for the future.[2] The servant's representatives may recover for the services actually rendered.[3] The theory is that there is an implied term or condition in the contract that it shall only be entire if the capacity to render the service continues. A similar principle would be applied if the servant were permanently disabled.[4] Temporary incapacity does not terminate the contract.[5]

The relation must exist before the act of service is performed. — The character and duties attaching to the employment must regularly be known and defined in advance of the acts of service, and the servant who is to perform them is selected accordingly. This is particularly the case where the claim is that an alleged master is liable to third persons. Accordingly, the English court refused to recognize the existence of the relation in a case where a chairman of a public meeting, having general power to preserve order, used words to the effect that persons creating a disturbance should be brought to the front, and certain persons were mistakenly seized by the stewards of the meeting and brought forward. The court said that the chairman was not liable for injuries received by these persons, on the ground that the relation of master and servant did not exist between him and the stewards, and the words used did not authorize the latter to exercise their judgment so as to make the chairman liable for damages.[6] This proposition does not prevent a subsequent ratification by an alleged master of the acts of one who conducts himself as his servant without authority, though such a ratification will only be binding on the master when made with full knowledge of the facts.

SECTION II. *Rights and Duties involved in the Relation as between the Parties.* — I. *The duties of the servant towards the master.* — (1) The first duty is to continue in the master's service during

[1] The case of Althorf *v.* Wolfe, 22 N. Y. 355, seems at first sight to go still further, and to allow a recovery simply on the ground that the servant employed a subservant, p. 361. The drift of the reasoning in that case, however, is that it was the duty of the master as owner of fixed property, such as real estate, to see that the ice upon his roof should not be cast therefrom upon one passing by, and that he was liable for the act irrespective of the relation of master and servant. So interpreted, the decision seems correct.

[2] Farrow *v.* Wilson, L. R. 4 C. P. 744.

[3] Stubbs *v.* Holywell Ry. Co., L. R. 2 Exch. 311.

[4] Wolfe *v.* Howes, 20 N. Y. 197; Spalding *v.* Rosa, 71 Id. 40.

[5] Cuckson *v.* Stones, 1 Ell. & Ell. 248.

[6] Lucas *v.* Mason, L. R. 10 Exch. 251.

the employment. This duty varies with the term of the hiring. This may be indefinite or for a fixed period, — *e. g.*, for a year certain. An indefinite hiring is presumed by the English courts to be for a year.[1] The rule, however, is not an inflexible one.[2] This rule does not prevail in this country. To constitute a strict yearly hiring, the time must be fixed. (*a*) Assuming that the hiring is for a fixed period, at a specified salary, the servant must work for the entire period, unless prevented from doing so by the act of the master, in order to recover anything. This is called the principle of the "entirety of the contract." The rule will be the same though a monthly or other periodical rate be named for the payment of wages. The naming of a monthly rate in a hiring for a year is deemed to be but a method of arriving at the annual wages. If, however, the wages be *payable monthly*, and the time of hiring is for a longer period, — *e. g.*, a year, — wages will be *earned* at the expiration of each month, and can be collected. This case is a composite one, — an annual hiring with monthly payment of wages. The contract would still be entire as to all compensation unearned at the time of any breach of it by the servant.

Another view as to the "entirety of the contract" has been broached in a few decisions. This is, in substance, that though the servant wilfully and without cause leaves before his term expires, and before wages are earned under the contract, he ought to recover the value of the services actually rendered. This view would confound the *rescinding* of a contract with the *breach* of it. When an express contract is rescinded by mutual consent, there is room for the theory that, as the express contract *is out of the way*, a contract may be implied on the part of the master to pay the reasonable value of the services. But when the express contract is simply *broken* by the servant, it remains outstanding at the election of the master as a *broken* contract, but still a subsisting one. There is no room for an implied contract in such a case.[3]

(2) The next duty of the servant is to have sufficient skill to perform the service undertaken by him. If he hires himself out as a house painter, he tacitly affirms that he knows the business according to the average skill and ability of house painters.[4]

[1] Fawcett *v.* Cash, 5 B. & Ad. 904; Beeston *v.* Collyer, 4 Bing. 309.

[2] Fairman *v.* Oakford, 5 H. & N. 635.

[3] Nelichka *v.* Esterly, 29 Minn. 146; Kohn *v.* Fandel, Id. 470.

[4] Searle *v.* Ridley, 28 L. T. N. S. 411.

(*a*) If, however, one enter the employ of another under a contract for a year's service at a yearly salary, and continue in the employment after the expiration of the year, the presumption is that the parties have assented to a continuance of the contract for another year at the same salary. Adams *v.* Fitzpatrick, 125 N. Y. 124, and cases cited.

Much more will this be true if he expressly affirms that he possesses the skill, etc.[1] Want of the requisite skill is a case of failure of consideration, so that it may be reasonably said that there is no contract.[2] He may, accordingly, be discharged on that ground alone.

(3) It is the duty of the servant to refrain from acts of misconduct which would substantially subvert the object of the contract. Misconduct on his part is governed by much the same principle as that of incompetency. If it is of such kind as substantially to defeat the object of the contract, the servant has no valid claim to continue in service, and he may be lawfully discharged. The misconduct intended is either moral misconduct,[3] wilful disobedience, impertinence, or habitual neglect.[4] If a good cause of discharge exists, the master may avail himself of it as a defence, even though he did not know of it at the time.[5] Some acts which have been held to be sufficient grounds for discharge are cited in a note.[6]

(4) The servant is under an obligation to respond in damages to his master for all injuries done the latter by breach of duty. This is a remedy additional to the right of discharge. Where the master has been caused to respond to a third person in damages, he will in turn have a remedy over against the servant. So the master may notify the servant to appear and defend any action brought against himself on that account; such a course will make the judgment binding on the servant, whether he actually pays attention to the notice or not.[7] (*a*)

II. *The duties of the master towards the servant.* — (1) The first duty is to continue him in service where not in fault, and to pay his stipulated wages. This duty becomes more apparent

[1] Harmer *v.* Cornelius, 5 C. B N. S. 236.

[2] Id.

[3] Singer *v.* McCormick, 4 W. & S. 265.

[4] Callo *v.* Brouncker, 4 C. & P. 518.

[5] Willets *v.* Green, 3 C. & K. 59.

[6] Habitual intoxication. Gonsolis *v.* Gearhart, 31 Mo. 585. Refusal to obey orders. Churchward *v.* Chambers, 2 F. & F. 229; Spain *v.* Arnott, 2 Stark. 256; Railey *v.* Lanahan, 34 La. Ann. 426. In some cases it has been held that it must be shown that disobedience was wilful or that it occasioned a loss to the master. Cussons *v.* Skinner, 11 M. & W. 161. Absence without leave. Turner *v.* Mason, 14 M. & W. 112. Assuming to be a partner Amor *v.* Fearon, 9 A. & E. 548. Impertinence. Ridgway *v.* Hungerford Market Co., 3 A. & E. 171. Immorality. Atkin *v.* Acton, 4 C. & P. 208. Breach of duty as to management of business. Smith *v.* Thompson, 8 C. B. 44; Bray *v.* Chandler, 18 Id. 718.

[7] Chicago City *v.* Robbins, 2 Black (U. S.) 418; Robbins *v.* Chicago City, 4 Wall. 657; Veazie *v.* Penobscot R. R. Co., 49 Me. 119; City of Portland *v.* Richardson, 54 Me. 46. These cases are not strictly in point, but establish the rule stated in the text in analogous cases.

(*a*) The servant is also under a duty not to disclose trade secrets acquired during the course of his employment. Merryweather *v.* Moore [1892], 2 Ch. 518.

when the hiring is for a fixed period. If, in such a case, the servant is wrongfully discharged by the master without being permitted to earn wages, a leading remedy is not to sue for "wages," but for damages for a wrongful discharge. There are three possible remedies in such a case: one is, if wages are actually earned, to sue for wages *as such;* another, if they have not been earned, is to sue for not being permitted to earn wages; a third, to rescind the contract, and to sue for the value of the services actually rendered up to the time of the wrongful discharge. This last is called a *quantum meruit.* The first and second remedies principally require elucidation.

An illustration will make the meaning plain. A. makes a contract with B. to serve at a specified salary, *payable monthly* (say $100 per month), for two years commencing January 1st, 1889. Having served two months and ten days, A. is wrongfully discharged. He has for the two months a cause of action for *wages;* for the twenty-two months he has no cause of action for *wages,* but a single *indivisible* cause of action for damages for not being permitted to work. Should he essay to divide this last claim into parts, and to sue monthly for a corresponding portion of the sum payable during the entire period, a recovery of a judgment in one action would be a bar to all further actions, owing to a rule that a single cause of action is in law indivisible. This is stated as the better opinion, though the cases are not absolutely harmonious.[1]

One of the principal consequences of this theory is, that the servant in suing for *damages* must make it appear that what he claims is attributable to the wrongful act of the master. Accordingly, he must have used reasonable diligence to obtain employment elsewhere of the same general kind. Want of reasonable diligence in this respect may diminish his claim, if not defeat it altogether.[2] He is not bound to look for or accept employment of another kind.[3]

(2) The master must use due care in providing the servant with suitable tools and instruments of labor, and in affording him reasonably safe means of ingress and egress to and from the place of labor. He does not absolutely warrant that the tools so fur-

[1] The leading authorities favoring the view in the text are Fewings *v.* Tisdal, 1 Exch. 295; Elderton *v.* Emmens, 6 C. B. 160; on appeal, 4 H. L. Cas. 624, 645; Goodman *v.* Pocock, 15 Q. B. 576; Beckham *v.* Drake, 2 H. L. Cas. 579, 606; Moody *v.* Leverich, 4 Daly, 401; Howard *v.* Daly, 61 N. Y. 362; Chamberlin *v.* McCallister, 6 Dana (Ky.), 352; Weed *v.* Burt, 78 N. Y. 191.

[2] This is a general rule applicable to the law of damages and not peculiarly to be referred to contracts of service, though it is often presented there. Howard *v.* Daly, 61 N. Y. 362, 371; Emmens *v.* Elderton, 4 H. L. Cas. 624, 646; Costigan *v.* Mohawk & H. R. R. Co., 2 Den. 609; Johnson *v.* Meeker, 96 N. Y. 93, 97.

[3] Fuchs *v.* Koerner, 107 N. Y. 529.

nished shall be sound, but he does agree to use all reasonable means to test their soundness, and, in general, to exercise due care to secure the safety of his servants while engaged in his service.[1] (*a*) Thus, he should use approved tests to ascertain the quality of his machines;[2] he should see that the machinery is appropriate for the purpose for which it is used; he should not permit it to be used, where dangerous in its nature, without proper guards;[3] he should not set it in motion without notice, to the servant's injury, while he is at work upon it.[4] In constructing machinery, he must employ competent persons. If he does that, he will not be liable, if the construction be defective, so long as he is not aware of it.[5]

The enumerations above made sufficiently disclose the principle governing the master's liability. There must be *no neglect* on the master's part. Notice of defects in tools, etc., or knowledge of them, thus becomes material. Thus, should he in the outset provide machinery of a stanch and appropriate kind, and it should become worn by use so as to be unsafe, it would be important to show that he knew of its defective condition and did not repair it. This would be evidence of negligence on his part. As a broad statement, he might be liable for negligence as to an unsound article which he, knowing its unsound state, intrusted to the servant as a means of rendering service. So personal interference by the master with the work may make him liable, — as where he directs it to be done in a particular manner, which turns out to be unsafe.[6] In general, his duty is performed when he furnishes suitable tools and implements of labor, unless there is some defect in them which he does not remedy. Dulness in an instrument requiring an edge is not of itself a defect, where the master supplies means of sharpening it, even though the servant intrusted with the duty of sharpening it is neglectful in discharging it.[7]

[1] Paterson *v.* Wallace, 1 Macq. H. of L. Cases, 748; Brydon *v.* Stewart, 2 Id. 30.

[2] Murphy *v.* Phillips, 35 L. T. N. S. 477.

[3] Weems *v.* Mathieson, 4 Macq. H. of L. Cases, 215.

[4] Watling *v.* Oastler, L. R. 6 Exch. 73.

[5] Potts *v.* Port Carlisle Dock & Ry. Co., 2 L. T. N. S. 283; Stringham *v.* Hilton, 111 N. Y. 188.

[6] Roberts *v.* Smith, 2 H. & N. 213; Clarke *v.* Holmes, 7 H. & N. 937.

[7] Webber *v.* Piper, 109 N. Y. 496.

(*a*) The principle is well stated in the following cases: Carlson *v.* Phœnix Bridge Co., 132 N. Y. 273; Kern *v.* De Castro & Donner Sugar Ref. Co., 125 N. Y. 50; Augerstein *v.* Jones, 139 Pa. St. 183; Higgins *v.* The Mo. Pac. Ry. Co., 43 Mo. App. 547. So it is the duty of the employer to provide for the safety of his servants by the establishment of proper rules and regulations where the necessity for such a precaution may reasonably be foreseen. Ford *v.* Lake Shore & Mich. Southern Ry., 124 N. Y. 493; Abel *v.* Pres. etc. Del. Canal Co., 128 N. Y. 662; Morgan *v.* Hudson River Ore & Iron Co., 133 N. Y. 666; Berrigan *v.* N. Y. Lake Erie Ry. Co., 131 N. Y. 582.

To this whole doctrine of the master's liability there is a very important qualification. The servant must not himself be negligent in such a way as to contribute to the injury. Such negligence is termed "contributory," and it is fatal to recovery. For example, if the staff of a railway company was not sufficient, one who worked for it with knowledge of the insufficiency could not recover for an injury directly attributable to it.[1] So if he were using a machine known to be unsafe,[2] or working on a railway track in a highly dangerous and dark place without a light, or signal from passing trains, and without any slackening of speed by a train as it passed him.[3]

This rule may be qualified by the fact that the servant has complained of the defect in the tools, etc., and the master has promised to make speedy repairs, and the servant has continued his work temporarily in reliance upon this promise. The exact limits of this last proposition are not yet clearly defined in the cases.[4] In fine, the knowledge of the master and the want of knowledge on the servant's part together constitute the cause of action, and it is necessary for the servant to allege and prove both.[5]

(3) The master must use reasonable care and diligence in the selection of co-servants, and should discontinue the employment of negligent and incompetent co-servants when the negligence and incompetence is known to him. The ground of liability in this case is not that the *technical* relation of servant and co-servant exists. It is the broad principle that the master must not be negligent in performing that which he has undertaken with a servant to do. As the master cannot in general superintend personally the work and co-operate with his servant, where co-operation is needful, he tacitly agrees to use due care in selecting proper and competent persons to act in his stead. If he does this, and these associates in labor are guilty of negligence, it is not the negligence of the master. A master accordingly does not *warrant* the competency of his servants.[6] He does, however, undertake to use reasonable skill in selecting them.[7]

[1] Skipp *v.* E. C. Railway Co., 9 Exch. 223.

[2] Dynen *v.* Leach, 26 L. J. Exch. N. S. 221.

[3] Woodley *v.* Metropolitan Railway Co., L. R. 2 Exch. Div. 384.

[4] See Holmes *v.* Worthington, 2 F. & F. 533; Holmes *v.* Clarke, 6 H. & N. 349; (on appeal) 9 L. T. N. S. 178. But cf. Assop *v.* Yates, 2 H. & N. 768; Griffiths *v.* Gidlow, 3 Id. 648; Smith *v.* Dowell, 3 F. & F. 238.

[5] Griffiths *v.* London, &c. Docks Company, L. R. 12 Q. B. Div. 493; (on appeal) 13 Id. 259.

[6] Wilson *v.* Merry, L. R. 1 Sc. App. Cas. 326. Though this was a Scotch Appeal, the principles are the same on this point as in English law, p. 334. See also Bartonshill Coal Company *v.* Reid, 3 Macq. H. L. Cas. 282, for a luminous exposition by LORD CRANWORTH; Tarrant *v.* Webb, 18 C. B. 797; Wigmore *v.* Jay, 5 Exch. 354.

[7] Wiggett *v.* Fox, 11 Exch. 832, and cases *supra*. The cases are extremely

When due care in selection has been exercised, the master is not responsible for an injury done by the carelessness of one servant to another, where the two are engaged in a *common employment.* An action can only be brought by the injured servant against his co-servant. This proposition was first established in the leading case of Priestley *v.* Fowler,[1] but is now firmly established both in English and American law, where there is no countervailing statute.[2]

The rule above stated is subject to some important qualifications.

First, The two servants must be in the same "common employment." The meaning of this expression is that they are not engaged in different employments, but in the same general employment. For example, all the persons engaged in the operating of a railroad would be deemed to be in the same general employment, and this would include a carpenter who was repairing a station-house with reference to workmen engaged in turning a locomotive at a turn-table.[3] If the two persons are working for the same employer for one common object, it is not necessary that they should be engaged on the same piece of work.[4] Some of the persons who have been said to be co-servants in this sense are these: driver and guard of a stage-coach; steersman and rowers of a boat; engineman and switchman; drawer of red hot iron from a forge and hammerer;[5] guard of railway train and track repairers, etc.[6]

There is much judicial controversy upon the point whether this rule gives way in case one of the servants holds a superior position to the other, so that the latter is bound to obey the orders of the former. There are two theories on this subject. One may, for convenience's sake, be called the *Scotch* theory. This holds that exoneration of the master does not take place where the servant occasioning the injury is placed in superintendence, control, or authority over the other.[7] The *English* theory is, that there is no

numerous, and it is unnecessary to collect them.

[1] 3 M. & W. 1.

[2] Besides the cases already cited, see Waller *v.* South Eastern R'way Co., 2 H. & C. 102; Hutchinson *v.* The York, &c. R'way Co., 5 Exch. 343; Searle *v.* Lindsay, 11 C. B. N. S. 429; Brown *v.* Maxwell, 6 Hill, 592; Coon *v.* Syracuse & Utica R. R. Co., 5 N. Y. 492; Sherman *v.* R. & S. R. R. Co., 17 Id. 153; Boldt *v.* N. Y. C. R. R. Co., 18 Id. 432; Farwell *v.* B. & W. R. R. Co., 4 Met. 49; McCosker *v.* Long Island R. R. Co., 84 N. Y. 77; Curran *v.* Merchants' Manuf. Co., 130 Mass. 374; Murphy *v.* Boston & Albany R. R. Co., 88 N. Y. 146.

[3] Morgan *v.* Vale, &c. Railway Company, L. R. 1 Q. B. 149.

[4] Charles *v.* Taylor, L. R. 3 C. P. Div. 492.

[5] Bartonshill Coal Co. *v.* Reid, 3 Macq. H. L. Cas. 282.

[6] Waller *v.* South Eastern Railway Co., 2 H. & C. 102.

[7] M'Aulay *v.* Brownlie, 22 Dunlop,

distinction as to the exemption of the common employer from liability to answer for an injury to one of his workmen by another, in consequence of their being workmen of different classes or grades.[1]

The American cases generally are in accord with the English view. Many of them have presented the instance of a foreman having charge of a gang of laborers, or superintending the completion of some works, but having no general control over the men.[2] If, however, the person alleged to be a co-servant, was in fact the *representative* of the employer, being a so-called *alter ego*, the rule gives way, and the master is liable for the negligence of one thus substituted in his place.[3] A general agent may be brought under this rule.[4]

Some of the American courts adopt the Scotch doctrine, and hold that if one of the servants be superior to the others, without being an *alter ego*, the master will be liable. (*a*) This view does not seem to rest upon sound principle.

On the other hand, the courts in a number of the States, and those of very high authority, adhere steadfastly to the rule of *alter ego*, as long as the fellow-servants are in the same common employment.[5] The cases on this subject are very numerous as well as conflicting. This growing divergence of judicial opinion is to some extent attributable to a decision of the Supreme Court of the United States, to the effect that a conductor having charge of a freight train on a railroad is not a fellow-servant of the engi-

975; Somerville *v.* Gray & Co., 1 McPherson, 768; cited in Wilson *v.* Merry, L. R. 1 Sc. App. Cas. 338.

[1] Wigmore *v.* Jay, 5 Exch. 354; Gallagher *v.* Piper, 16 C. B. N. S. 669; Feltham *v.* England, L. R. 2 Q. B. 33.

[2] McDermott *v.* Boston, 133 Mass. 349; Flynn *v.* Salem, 134 Id. 351; Hart *v.* New York Dry Dock Co., 48 N. Y. Super. Ct. 460; Keystone Bridge Co. *v.* Newberry, 96 Pa. St. 246; Chicago & T. R. R. Co. *v.* Simmons, 11 Ill. App. 147.

Murphy *v.* Smith, 19 C. B. N. S. 361; Ross *v.* Chicago, &c. Ry., 2 McCrary C. Ct. 235; Henry *v.* Brady, 9 Daly, 142.

[3] Mitchell *v.* Robinson, 80 Ind. 281. See also Miller *v.* Union Pacific R. R. Co., 17 Fed. R. 67; Gravelle *v.* Minneapolis & St. Louis R. R. Co., 3 McCrary C. Ct. 352; Gunter *v.* Graniteville Manuf. Co., 18 S. C. 262.

[5] Doughty *v.* Penobscot Log Driving Co., 76 Me. 143; Cassidy *v.* Maine Central R. R. Co., Id. 488; Scott *v.* Sweeney, 34 Hun, 292; Brazil & C. Coal Co. *v.* Cain, 98 Ind. 282; Foley *v.* Chicago, R. I. & P. R. R. Co., 64 Ia. 644; Pease *v.* Chicago & N. R. R. Co., 61 Wis. 163. The mate and master of a ship were declared to be fellow-servants in Mathews *v.* Case, 61 Wis. 491; Fraker *v.* St. Paul M. & M. R. R. Co., 32 Minn. 54; Willis *v.* Oregon Ry. & Nav. Co., 11 Ore. 257; Clifford *v.* Old Colony R. R. Co., 141 Mass. 564; Reese *v.* Biddle, 112 Pa. St. 72; Kirk *v.* Atlanta, &c. R. R. Co., 94 N. C. 625; Conley *v.* Portland, 78 Me. 217; Loughlin *v.* The State, 105 N. Y. 159; Baltimore Elevator Co. *v.* Neal, 65 Md. 438; Johnston *v.* Pittsburgh & W. R. R. Co., 114 Pa. St. 443.

(*a*) East Tenn., &c. Ry. Co. *v.* De Armond, 86 Tenn. 73; Northern Pac. Ry. Co. *v.* Peterson, 51 Fed. R. 182.

neer so as to preclude a recovery by the latter against the company for an injury resulting from the conductor's negligence.[1] Some late cases in other courts, proceeding on a similar principle, will be found in a note.[2](*a*) An employee who has the power to hire, direct the work of, and discharge servants engaged with him in a common employment, may properly be treated as an *alter ego*, so as to make the employer liable for acts of negligence causing injury to such servants.[3](*b*)

A peculiar rule applies in cases arising under the maritime law, which imposes on the owners of a vessel the duty to render such care and medical aid to seamen employed thereon as circumstances will admit. The master acts in such a case for the owners, and if he fails to perform this duty towards a mate, the fact that the master and mate of the ship are fellow-servants will not relieve the owners from liability to the mate.[4]

It still remains to consider the case where the servants are under the same master but not under a common employment. In this case, the master is liable, if one through negligence injures another. The fundamental basis of non-liability of the master is that the misconduct of a fellow-servant is one of the risks which an employee assumes in fixing the rate of wages. This would not be applicable if he was injured by a servant not in the same common employment, as no estimate could be made by the servant injured of the co-servant's possible negligence.

[1] Chicago, Milwaukee, & S. P. R. R. Co. *v.* Ross, 112 U. S. 377. There was strong dissent in this case, the judges standing five to four. See also Northern Pacific R. R. Co. *v.* Herbert, 116 U. S. 642.

[2] Darrigan *v.* N. Y. & N. E. R. R. Co., 52 Conn. 285 (case of a train dispatcher); Zeigler *v.* Danbury & Norwalk R. R. Co., Id. 543; Moon's Adm'r *v.* R. & A. R. R. Co., 78 Va. 745; Central R. R. Co. *v.* De Bray, 71 Ga. 406; East Tenn. & W. N. C. R. R. Co. *v.* Collins, 85 Tenn. 227.

[3] McDermott *v.* Hannibal & St. Joseph R. R. Co., 87 Mo. 285; Clowers *v.* W. St. L. & P. R. R. Co., 21 Mo. App. 213; McKune *v.* Cal. So. R. R. Co., 66 Cal. 302; Patton *v.* Western N. C. R. R. Co., 96 N. C. 455, 462.

[4] Scarff *v.* Metcalf, 107 N. Y. 211.

(*a*) The liability of the master to his servant for the acts of other servants in the same employment is, by the later authorities, made to depend upon the *character of the act* in question rather than upon the rank of the employee performing it. If it is done pursuant to a duty owed by the master to his servants, he is liable for negligence in its performance; while if it pertains only to the duty of an employee, the master is free from liability for the manner in which it is performed. Crispin *v.* Babbitt, 81 N. Y. 516, 521; Benzing *v.* Steinway & Sons, 101 N. Y. 547; Loughlin *v.* Stste of New York, 105 N. Y. 159; Hussey *v.* Coger, 112 N. Y. 614; Gabrielson *v.* Waydell, 135 N. Y. 1; Dube *v.* Lewiston, 83 Me. 211; Galveston, &c. Ry. Co. *v.* Smith, 76 Tex. 611; Taylor *v.* The Evansville, &c. Ry. Co., 121 Ind. 124; Lindvall *v.* Wooda, 41 Minn. 212.

(*b*) Palmer *v.* Mich. Cent. Ry. Co., 93 Mich. 363; Nix *v.* Texas Pacific Ry. Co., 82 Tex. 473; Baldwin *v.* St. Louis Ry. Co., 75 Ia. 297. Cf. Webb *v.* Richmond & Danville Ry. Co., 97 N. C. 387.

Second, The alleged co-servants must be employed by the *same master*. This point is illustrated by the case where two railroad companies use the same track, and a servant of one is injured by the negligence of the servant of the other. The master in such a case is liable.[1]

Third, If the master works with the servant, and so in a sense holds a double character, that of master and co-operating workman, his position as master prevails, and he is liable for negligence causing injury.(*a*)

Fourth, If the rules and regulations of the master are so framed as to bring the co-servants into collision without their fault, the master is the real author of the injury, and is responsible.

Effect of contributory negligence on the part of the servant. — Notwithstanding that a case of injury would in its general facts make the master liable, yet if the negligence of the injured servant contributes to his injury, he cannot recover. The leading instance of this kind is the case of negligence imputed to the injured servant from continuing to work without complaint with a fellow-servant after knowledge of the latter's incompeteney.[2] But a single act of negligence of a servant does not necessarily charge the master with notice of his incompetency so as to make him liable.[3] In other words, it might be the proper course at a trial to submit the question of negligence as a matter of fact to a jury.[4]

The injured party must allege in his complaint and prove at the trial his ignorance of his fellow-servant's negligent habits,[5] as well as that the master did not use care in selection, or that the servant was retained after knowledge by the master of his shortcomings.[6] The general principle governing the subject is, that the master is presumed to do his duty, and that the servant must rebut this presumption by showing fault on the master's part, as well as that he was free from fault.[7] It is a rule in the United States courts that in determining the question of contributory negligence on the servant's part, regard must be had to the cir-

[1] Smith *v.* N. Y. & Harlem R. R. Co., 19 N. Y. 127; Warburton *v.* G. W. R. R. Co., L. R. 2 Exch. 30.

[2] Hatt *v.* Nay, 144 Mass. 186.

[3] Baltimore Elevator Co. *v.* Neal, 65 Md. 438.

[4] Skerritt *v.* Scallan, 11 Ir. R. (C. L.) 389; Hoey *v.* Dublin & B. J. R'way Co., 5 Ir. R. (C. L.) 206; Frazier *v.* Penn. R. R. Co., 38 Pa. St. 104.

[5] Lake Shore & M. S. R. R. Co. *v.* Stupak, 108 Ind. 1.

[6] Ind. B. & W. R. R. Co. *v.* Dailey, 110 Ind. 75.

[7] Cahill *v.* Hilton, 106 N. Y. 512.

(*a*) As to the liability of the master for the injury of a servant caused by the combined negligence of a fellow-servant and himself, see Kaiser *v.* Flaccus, 138 Pa. St. 332; Young *v.* Shickle, &c. Co., 103 Mo. 324; Rogers *v.* Leyden, 127 Ind. 50.

cumstances of the case and the exigencies of his position, and that the question should not be withheld from the jury, unless the evidence so conclusively establishes contributory negligence that the court would, in the exercise of a sound discretion, be compelled to set aside a verdict in the plaintiff's favor.[1]

It only remains to notice the case of one who places himself in the position of a co-servant by volunteering to aid a servant, in the absence and without the knowledge of the master. Such a person must for the time being be deemed to be in no better condition than a co-servant, for the purpose of having a remedy against the master. In fact, he is in a worse position, for as to him the master is under no duty whatever, — under, for example, no duty of careful selection, of the faulty co-servant.[2] A person so interfering is in law an intruder, though his motives may have been innocent. Legislation upon this subject is referred to in a note.[3] This legislation does not, however, affect the principle of contributory negligence, which is an inference from a legal rule frequently stated in the form of a maxim, — *volenti non fit injuria.* (*b*)

Acts which the master is not bound to do as between him and his servant. — It is intended to group together under this head some propositions decided by the courts adverse to the master's responsibility. If the master has performed the duties imposed upon him by law, as to providing suitable tools, means of ingress and egress, etc., he is not liable for injury occasioned to the servant by the happening of one of the risks attendant upon the employment. The servant is assumed to have taken that into

[1] Kane *v.* Northern Central R. R. Co., 128 U. S. 91. See also Northern Pac. R. R. Co. *v.* Mares, 123 Id. 710.

[2] Degg *v.* Midland R. R. Co., 1 H. & N. 773.

[3] Reference should be made to important recent legislation in England materially modifying the former law. This is the so-called "Employers' Liability Act of 1880," 43 & 44 Vict. c. 42. This Act is highly favorable to the workman, and, among other things, practically does away with the rule making a foreman a fellow-servant with those under his directions, and disentitling the latter to recover for injuries sustained by the former's negligence. Millward *v.* Midland R. R. Co., L. R. 14 Q. B. Div. 68. (*a*) The workman may "contract himself out of the Act" as to recovering compensation which it allows for injuries sustained, and thus leave himself in the same position as before. Such a contract is not held to be void as against public policy. Griffiths *v.* Dudley, L. R. 9 Q. B. Div. 357. This Act does not embrace all sorts of servants, but such as are enumerated. "The Factory Acts" are also to be noted as supplying protection to the workman while engaged in various enumerated kinds of work. 3 & 4 William IV. c. 103; 7 & 8 Vict. c. 15; 41 & 42 Vict. c. 16, and 54 & 55 Vict. c. 75.

(*a*) Several States of the Union have enacted similar though less comprehensive statutes, for the particulars of which the laws of these States should be consulted.

(*b*) See Wild *v.* Waygood [1892,] 1 Q. B. 783.

account in fixing the rate of wages. An instance is the breaking away of a portion of a railway engine.[1]

If the servant is sick, and needs medical treatment, the master is not bound to supply it. If he does do so, and sends for a physician without the servant's direction, he will be liable to the physician, and cannot charge the expense to the servant.

He is not required to certify as to the servant's character when he leaves him. If he does so, and makes defamatory statements to one who has a right to know if they are true, he will not be responsible if they are false, provided that he acts in good faith; if he knowingly makes a false statement, he will be liable in an action for defamation.

SECTION III. *Rights of Third Persons against the Master.* — The object of this section is, in substance, to consider the duties of a master towards "third persons." These so-called third persons may be of two principal classes, one being persons with whom the master has made a *contract* to do an act, and has also employed a servant as an instrument to carry out the contract; the other class being mere strangers.

I. *Where the master is under a contract.* — In this case the master will be responsible as a contracting party to see that the agreement is performed. If he makes use of servants for this purpose, he is still *bound* to see that the contract is carried out, and is liable for their wilful and unauthorized acts violating the contract. An example is found in the case of a railway, where a conductor wilfully stops a train and retards the journey of the passengers.[2] The same principle has been applied to acts of violence committed by conductors, stage-drivers, and the like, upon *passengers*, the master being under an *implied contract* to treat a passenger while under his care with civility and propriety. The case accordingly is not at all analogous to that of wilful injuries inflicted by the servants of carriers upon strangers.[3] (*a*)

[1] Saxton *v.* Hawksworth, 26 L. T. N. S. 851. See also Hudson *v.* Ocean Steamship Co., 110 N. Y. 625.

[2] Weed *v.* Panama R. R. Co., 17 N. Y. 362; Blackstock *v.* N. Y. & Erie R. R. Co., 20 N. Y. 48.

[3] Goddard *v.* Grand Trunk R'way, 57 Me. 202; Moore *v.* Fitchburg Railroad, 4 Gray, 465; Mil. & Miss. R. R. Co. *v.* Finney, 10 Wis. 388; Bryant *v.* Rich, 106 Mass. 180. This distinction was lost sight of in Isaacs *v.* Third Ave. R. R. Co., 47 N. Y. 122; but the error was rectified in Stewart *v.* Brooklyn R. R. Co., 90 N. Y. 588.

(*a*) Palmeri *v.* Manhattan Ry. Co., 133 N. Y. 261; Dwinelle *v.* N. Y. Cent., &c. Ry. Co., 120 N. Y. 117; Mulligan *v.* N. Y. & Rockaway Beach Ry. Co., 129 N. Y. 506. A railroad company is liable to a passenger for the negligence or wrongful acts of the servants of a sleeping-car or parlor-car company, when done in the performance of the duties and obligations of the railroad company under its contract. Dwinelle *v.* N. Y. Cent. Ry. Co., *supra*; Thorpe *v.* N. Y. Cent. Ry. Co., 76 N. Y.

II. *Duties of the master towards strangers.* — (1) It has already been stated that a distinction is to be taken between a servant and a contractor, and the characteristics in each case have been pointed out. It still remains to consider in more detail the difference between the liability of a master and that of one who employs a contractor.

According to the present law, if an employer contracts with a person to do a piece of work which it is lawful to do, and which the employer is not under a duty to perform in a particular manner, and the contractor in turn employs sub-contractors or servants, the original employer is not liable to a third person for an injury sustained from the negligent act of the sub-contractor or servant of the contractor. The remedy in such a case is to be sought against the contractor or his subordinates, as the facts of the case may require.

This doctrine is inconsistent with some early decisions, which are accordingly overruled. The most noted of these is Bush *v.* Steinman.[1] In that case A., being the owner of a house, contracted with B. to repair it for a fixed sum. B. made several sub-contracts, and D., the servant of one of the sub-contractors, negligently deposited lime in the road in front of A.'s premises, whereby the plaintiff, E., was injured. The court held that A. was liable as being substantially the master of D., the wrongdoer. The case is not only abandoned in England, but discarded in this country.[2] (*a*)

If, however, the contractor does not act as such, but places himself in the position of a servant for the time being, the employer will be a master and responsible.[3] The contractor employing servants is to be regarded as a master, and liable for their acts in the same way.

There is a qualification to the rule that an employer is not liable for the acts of a contractor. The act to be done must not be unlawful or illegal. If it be of that nature, the contractor and employer will be jointly liable as wrong-doers.[4] (*b*)

[1] 1 Bos. & P. 404.

[2] Steel *v.* South Eastern Railway Co., 16 C. B. 550; Reedis *v.* London & N. W. R'way Co., 4 Exch. 244; Hobbit *v.* London & N. W. R'way Co., 254; Blake *v.* Ferris, 5 N. Y. 48; Pack *v.* Mayor, &c. of N. Y., 8 N. Y. 222; Kelly *v.* Mayor, &c. of N. Y., 11 N. Y. 432.

[3] Sadler *v.* Henlock, 4 Ell. & B. 570; Holmes *v.* Onion, 2 C. B. N. S. 790.

[4] Ellis *v.* Sheffield Gas Co., 2 Ell. & B. 767; Clark *v.* Fry, 8 Ohio St. 358.

402; Penn. Co. *v.* Roy, 102 U. S. 451; Williams *v.* Pullman Car Co., 40 La. Ann. 417.

(*a*) Long *v.* Moon, 107 Mo. 334; Hackett *v.* The Western Union Tel. Co., 80 Wis. 187; Bibb's Adm'r *v.* N. & W. R. R. Co., 87 Va. 711; Rome, &c. Ry. Co. *v.* Chasteen, 88 Ala. 591; Powell *v.* Construction Company, 88 Tenn. 692; Charlock *v.* Freel, 125 N. Y. 357.

(*b*) If also the employer exercise control over the workmen who obey his orders,

The employer must not be under a legal duty to perform the act in a particular way. Such a duty may arise in a number of ways.

It may be imposed by statute, — as, for example, upon a village or city, to properly care for its streets. The corporation under such circumstances cannot shift off its legal obligation by employing a contractor to do the work in its stead.[1] It may be regarded as a settled rule that if a duty be imposed by statute as to the use and enjoyment of property, the owner cannot escape from the duty by employing a contractor in his stead.[2]

The duty may be imposed by a general rule of law. An example is found in the obligation of an owner of land not to cast out, by blasting or otherwise, rubbish or stone upon his neighbor's land to his injury. The duty is summed up in a settled legal maxim that "every one must so use his own as not to injure another's."[3] There is a difference of opinion upon the point whether the owner can escape responsibility in such a case by employing a contractor. It has been held by a divided court in New York that he can, though the decision was opposed to the earlier authorities.[4]

The distinction between a statutory duty and a common law duty taken in these cases appears to be over subtle and without solid foundation in principle. It makes an obligation turn upon an immaterial point, — viz., how it originates, — rather than upon the intrinsic nature of the duty or obligation itself. Every legal duty, no matter how it originates, is personal, and cannot be shifted off upon others.[5]

In another class of cases the duty is derived from the character of the act to be done. It may have in it an element of danger to third persons. Now, if A. employs B. to do such an act, he must see that it is so performed as to cause no injury to a third person, not himself in fault. But the injurious act must be closely connected with the injury itself. If, therefore, the contractor, acting negligently, should injure a third person by means of a *collateral act*, — that is, one not directly embraced in the original employment,

[1] Storrs *v.* City of Utica, 17 N. Y. 104; Conrad *v.* Ithaca, 16 Id. 158; Detroit *v.* Corey, 9 Mich. 165; Requa *v.* City of Rochester, 45 N. Y. 129.

[2] Dorrity *v.* Rapp, 72 N. Y. 307. It seems impossible to reconcile this case with Herrington *v.* Village of Lansingburgh, 110 N. Y. 145.

[3] Hay *v.* Cohoes Co., 2 N. Y. 159; Tremain *v.* Cohoes Co., Id. 163.

[4] McCafferty *v.* S. D. & P. M. R. R. Co., 61 N. Y. 178, followed without discussion in Ferguson *v.* Hubbell, 97 N. Y. 507, 510.

[5] In Bower *v.* Peate, L. R. 1 Q. B. Div. 321, it is said that it can make no difference in such a case whether the obligation was imposed by statute or existed at law, p. 328.

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and over the mode of doing the work, he will be responsible for their negligent acts Reynolds *v.* Braithwaite, 131 Pa. St. 416; Mumby *v.* Bowden, 25 Fla. 454; Railroad Company *v.* Hanning, 15 Wall. 649.

— the employer would not be liable. This view is adopted in a number of cases both in England and in this country.[1] (*a*)

Mr. Pollock, in his work on Torts, in speaking of the duties imposed by law on the occupiers of buildings, etc., says that the duty "goes beyond the common doctrine of responsibility for servants; for the occupier cannot discharge himself by employing an independent contractor, however careful he may be in the choice of that contractor."[2]

The result is that in all cases where one is under a duty, whether originating in statute or some rule of law, or even by contract, he must see that the duty is properly discharged, and he cannot absolve himself from it by delegating the performance of the duty to another, be he contractor or not. A. may assign his *rights* under a contract, but how can he assign his *duties* and escape liability? It is plain that he cannot. Neither can he delegate the discharge of them to others and escape liability. *A fortiori* he can neither transfer nor delegate duties imposed upon him by a general rule of law or by statute.

(2) The employment of the servant must have been voluntary. The question as to the liability of an alleged master sometimes arises where, for example, a local law requires a ship owner or master to take a licensed pilot, and he performs his duties so negligently as to injure another ship. The English law holds, as this is a compulsory service, the owner is not liable.[3]

The Supreme Court of the United States, sitting as an Admiralty Court, has held the owner liable, not by a rule under the law of master and servant, but under a great principle of general application that "every man should so use his own as not to injure another's."[4] The English court departs from its rule in case of pilotage through the Suez Canal, holding that the pilotage rules there are not in a legal sense compulsory, and that the case then falls under the law of master and servant.[5]

(3) In order to make a master liable for the act of his servant, it must be embraced within the scope of the employment. The great inquiry in this connection is not what authority the servant

[1] Pickard *v.* Smith, 10 C. B. N. S. 470, 480; Bower *v.* Peate, L. R. 1 Q. B. Div. 321; Tarry *v.* Ashton, Id. 314; Francis *v.* Cockrell, L. R 5 Q. B. 501, 515, 516; Dalton *v.* Angus, L. R. 6 App. Cases, 740; Hughes *v.* Percival, L. R 8 App. Casea, 443, Gorham *v.* Gross, 125 Mass. 232, 240.

[2] Pollock on Torts, p. 414.

[3] The Royal Charter, L. R. 2 Adm. 362.

[4] The China, 7 Wall. 53.

[5] The Guy Mannering, L. R. 7 P. D. 132.

(*a*) See Railroad Company *v.* Morey, 47 Ohio St. 207; Atlanta Ry Co. *v.* Kimberly, 87 Ga. 161; Curtis *v.* Kiley, 153 Mass. 123; Woodman *v.* Met. Ry. Co., 149 Mass. 335.

assumes, but what power the master has conferred upon him. This is the meaning of the expression the "scope of the employment." This authority may be conferred by express words, or derived by implication from words or acts. The servant will have such incidental powers as are usual and reasonable to carry into effect the substantive power granted. Thus, if the rules of an employer require the servant to remove from his premises one who is intoxicated, the servant has the incidental power to determine whether a person supposed to come under the rule is in fact intoxicated. If he commits an error of judgment in deciding the point, the master will be responsible to a person thereby injured. It would be quite different if he knew he was sober, for in that case the servant would be plainly acting beyond the scope of his employment.

There was at one time an attempt made by the courts to establish a distinction between wilful and negligent acts. This distinction involved a fallacy, and has been abandoned. The prevailing view now is that it is quite immaterial whether the act be negligent or wilful, the true test of liability in all cases being "the scope of the employment." The acts done will be in some instances of such a nature that they will be *evidence* of acting within the scope of employment to be submitted as a question of fact to a jury.

The instances to which these rules have been applied are very numerous, and some of them may be cited as illustrations. It has been decided that a master is civilly responsible for the fraud of a servant acting in the course of his employment,[1] even though the act is of so gross a nature as to be a felonious crime.[2] He is also liable for such torts as false imprisonment[3] (*a*) or malicious prosecution (even though the employer be a corporation),[4] or an assault and battery,[5] or arrest and taking into custody on a charge turning out to be unfounded;[6] also for the unlawful conversion of property.[7] Likewise he is responsible for the negligence of his servants. This embraces the most common class of cases, and very frequently occurs in the use of machinery or the

[1] Coleman *v.* Riches, 16 C. B. 104.

[2] Osborn *v.* Gillett, L. R. 8 Exch. 88.

[3] Goff *v.* Great Northern R'way Co., 3 El. & El. 672.

[4] Edwards *v.* Midland R'way Co., L. R. 6 Q. B. D. 287.

[5] Walker *v.* South Eastern R. R. Co., L. R. 5 C. P. 640.

[6] Moore *v.* Metropolitan R'y Co., L. R. 8 Q. B. 36; Eastern Co. R'y Co. *v.* Broom, 6 Exch. 314.

[7] Giles *v.* Taff Vale R'y Co., 2 E. & B. 822.

(*a*) If the act of the servant is not in furtherance of his master's interests, but for the supposed benefit of the community (*e. g.*, procuring an arrest), the master is not liable. Mulligan *v.* N. Y. & Rockaway Beach Ry. Co., 129 N. Y. 506; Abrahams *v.* Deakin [1891], 1 Q. B. 516.

driving and management of carriages and other vehicles, etc. In all such cases, the leading inquiry will be whether the act was done within the scope of the servant's employment.[1]

A few illustrations will suffice. If the servant of a coal merchant, in delivering coal, should take up a plate on the sidewalk in a highway into which to shovel the coal, without warning a passer-by, and the latter, while exercising due care, should fall in and be injured, the master would be liable, as the act was done within the scope of the servant's employment, though done negligently.[2] So the act of a driver of an omnibus in striking a passenger with his whip is presumptively an act of negligence for which the master is responsible.[3] So the employment of a tipsy man, who commits an act of negligence, is negligence by the master, for which he is responsible.[4] Under this principle the master might be responsible for an *illegal* act, done apparently within the scope of the servant's authority.[5]

If, however, the act done be without the scope of the employment, the master is not liable. The action in that case will only lie against the servant. Some illustrations are subjoined.

A master having a private lavatory directed his clerks not to use it. In his absence, one of them violated this direction, and left the water flowing through the faucet so that an adjoining owner was injured. The master was not liable.[6] (*a*) Again, a servant driving a carriage along a highway, wilfully drove against another carriage. The master was not liable.[7] Where also an injury was caused to a third person by a servant *using due care*, — as, for example, where horses under his charge ran away without his fault, — the master was not liable.[8]

Reference should now be made to a class of cases where a servant, though in the general employment of a master, leaves the service temporarily to subserve some purpose of his own; or, it may be, for the time being is relieved from actual service by the master. In cases such as these, the acts of the servant cannot be said to be done within the scope of his employment. Although, in

[1] Moebus *v.* Herrmann, 108 N. Y. 349.

[2] Whiteley *v.* Pepper, L. R. 2 Q. B. D. 276.

[3] Ward *v.* General Omnibus Co., 42 L. J. N. S. (C. P.) 265.

[4] Wanstall *v.* Pooley, 6 Cl. & F. 910 *n.*

[5] Att'y-Gen'l *v.* Siddon, 1 C. & J. 220.

[6] Stevens *v.* Woodward, L. R. 6 Q. B. D. 318.

[7] M'Manus *v.* Crickett, 1 East, 106.

[8] Holmes *v.* Mather, L. R. 10 Exch. 261; Crofts *v.* Waterhouse, 3 Bing. 319.

(*a*) The master would be liable if the lavatory were for the use of the clerks in the course of their employment. Ruddiman *v.* Smith, 60 L. T. N. S. 708.

one sense, he may be in his master's service, the act in question is not performed in his service, but is his own act as truly as if he were not a servant at all. Accordingly, a master is not liable, even though the servant was without authority making use of his master's property, — as, for example, driving his vehicles. Thus, where a wine merchant sent his servant to deliver wine and bring back empty bottles, and on his return he drove off in a different direction on a journey of his own, the master was adjudged not to be liable for his acts.[1]

If the facts of the case show that the relation between two parties is rather that of bailor and bailee than of master and servant, there will be no liability for negligence on the part of the proprietor. Accordingly, if one owns a cab which he lets to a driver for a weekly payment, the horse, harness, and whip being provided by the driver, the owner of the cab having nothing to do with the business except to receive the weekly payment, he will not be the master of the driver.[2] It might be a case of master and servant if the owner of the cab had supplied the horse as well.[3]

(4) The master must owe a duty to the person injured by the servant, in order that such person may have an action against the master on account of the servant's negligence. This point is well illustrated by a case where a person got into a cart driven by a servant, but without the permission of the owner, and was driven so carelessly that he was thrown out and injured. The master was held not to be liable.[4] The same conclusion was reached where one, by the consent of a conductor of a freight train on a railway, rode on a car without payment of fares, passengers being forbidden by the regulations of the company from riding on such a train.[5]

It is a settled principle of the common law of England that if trustees are appointed by statute to do certain acts of a public nature, — *e. g.*, to lay out and repair highways, — and they employ servants, the trustees are not responsible, nor are the funds which they administer chargeable, for injuries caused by the negligence of the servants. The great rule of the law of master and ser-

[1] Storey *v.* Ashton, L. R. 4 Q. B. 476; Rayner *v.* Mitchell, L. R. 2 C. P. D. 357; Mitchell *v.* Crassweller, 13 C. B. 237. Sleath *v.* Wilson, 9 C. & P. 607, to the contrary, is not followed.

[2] King *v.* Spurr, L. R. 8 Q. B. D. 104.

[3] This was so ruled in Powles *v.* Hider, 6 E. & B. 207, and Venables *v.* Smith, L. R. 2 Q. B. D. 279. In these cases the owner was held liable as a master for the driver's negligence. Some remarks therein as to the effect of certain Acts of Parliament on this question have been latterly disapproved and need not be stated.

[4] Lygo *v.* Newbold, 9 Exch. 302.

[5] Eaton *v.* D. L. & W. R. R. Co., 57 N. Y. 382; Morris *v.* Brown, 111 N. Y. 318, 330.

vant — *respondeat superior* — is not applicable.[1] The trustees are only liable for personal negligence or omission of duty.[2](*a*)

The knowledge of the servant may in certain cases be imputed to the master so as to make him liable for negligence, even though there were no actual neglect on his part. There are, for example, frequently cases in law where it is essential to an action for negligence to prove that knowledge of a certain state of facts existed, and that, after this knowledge, due care and caution was not exercised. To make out this knowledge, it may be sought to show that the servant had it, and that he was under the circumstances so identified with the master that his knowledge was legally that of the master. An instance is an action against the master for keeping a vicious dog, whereby the plaintiff was injured. If it be proved that the servant *having charge of the dog* had knowledge of its vicious disposition, the master will be held to have the knowledge, and therefore to be liable.[3] The servant must, however, have the animal in charge. It will not be sufficient to bring home the knowledge of vicious propensities to other servants,[4] unless to one who had such *general management or control* as to include the charge of the animal.

SECTION IV. *Rights of the Master against Third Persons.* — These may be summed up as a right to be indemnified for loss of service occasioned by their wrongful acts. The leading acts of this kind are torts committed upon the servant, such as assault and battery and false imprisonment, also enticement from service, and seduction of a female servant.

(1) *Torts committed against the servant.* There may be two rights invaded in such a case: one, that of the servant himself, who may sue for the personal wrong; the other, that of the master for the loss of service sustained by him. Thus, if the servant were wrongfully *imprisoned*, be it but for an hour, the mas-

[1] Harris *v.* Baker, 4 M. & S. 27; Humphreys *v.* Mears, 1 M. & R. 187; Hall *v.* Smith, 2 Bing. 156; British Cast Plate M'f'rs *v.* Meredith, 4 Term R. 794; Duncan *v.* Findlater, 6 Cl. & F. 894.

[2] Hall *v.* Smith, *supra;* Hannon *v.* Agnew, 96 N. Y. 439; Walsh *v.* Trustees of N. Y. & B. Bridge, Id. 427, 439.

[3] Baldwin *v.* Casella, L. R. 7 Exch. 325.

[4] Stiles *v.* Cardiff Steam Nav. Co., 33 L. J. N. S. (Q. B.) 310. But see Applebee *v.* Percy, L. R. 9 C. P. 647, for a more relaxed rule.

(*a*) A public charity has been held not subject to the law of *respondeat superior* where due care is exercised in the selection of its servants. McDonald *v.* Mass. General Hospital, 120 Mass. 432; Fire Ins. Patrol *v.* Boyd, 120 Pa. St. 624; Van Tassell *v.* Manhattan, etc. Hospital, 39 N. Y. St. Rep. 781; Harris *v.* Woman's Hospital, 27 Abb. N. C. 37. *Contra,* Glavin *v.* Rhode Island Hospital, 12 R. I. 411.

ter would have a cause of action.[1] No action will lie for injuries causing the servant's immediate death.[2]

If the servant were injured by a culpable failure on the part of a carrier to carry him safely, the master would in general have no cause of action, because he is not a party to the contract of transportation.[3] If, however, the injury had been occasioned by the cars of another company negligently colliding with those on which the servant was travelling, the cause of action would not be on contract, and the master could sue.[4]

(2) *Seduction of a female servant.* This subject has already been considered in its application as between father and daughter. Only a few words are necessary in reference to an action by a master, not a father and not standing *in loco parentis.* A master may maintain this action for loss of service, though not related by blood.[5] The measure of damages in this class of cases will in general be confined to the loss actually sustained, though it has been decided in the case of an adopted daughter who was also a servant that damages beyond the mere loss of service might be awarded.[6]

(3) *Enticement of a servant.* A master has an action against one who, knowing of the relation between him and his servant, entices the latter to leave him. If the enticer did not know the relation at the time, he will be liable if he continue to employ the servant after knowledge.[7] (*a*) In such cases the contract between master and servant must be a valid one,[8] and may be either express or implied.[9]

The cause of action for enticement consists in wrongfully and maliciously breaking off *the relation between* the master *and the servant*, to the injury of the former. It has been supposed by some jurists that the action was derived from the provisions of a statute passed in the reign of Edward III.,[10] called the "Statute of Laborers," and that it must be confined to servants of an inferior grade, referred to in that statute.[11] It is now settled in the English courts that it will include persons in general who have entered into a contract to render exclusive personal service, even of a high grade, such as that required of a singer of operatic music. The

[1] Woodward *v.* Washburn, 3 Den. 369.
[2] Osborn *v.* Gillett, L. R. 8 Exch. 88.
[3] Alton *v.* Midland Railway Co., 19 C. B. N. S. 213.
[4] Berringer *v.* Great Eastern Railway Co., L. R. 4 C. P. D. 163.
[5] Fores *v.* Wilson, Peake, 55.
[6] Irwin *v.* Dearman, 11 East, 23.
[7] Blake *v.* Lanyon, 6 Term R. 221.
[8] Sykes *v.* Dixon, 9 A. & E. 693.
[9] Evans *v.* Walton, L. R. 2 C. P. 615.
[10] 25 Edw. III. Stat. I.
[11] See the learned opinion of COLERIDGE, J., in Lumley *v.* Gye, 2 Ell. & B. 216, at pp. 254–269.

(*a*) De Francesco *v.* Barnum, 63 L. T. N. S. 514.

theory of the action is, that persuading a person to break off a valid contract is actionable, even though there is a remedy against the contracting party himself. Another form of statement of a more general nature is, that whenever a man does an act which in law and fact is a wrongful act, and such an act may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action will lie.[1] This principle is none the less applicable because the wrongful act has as a natural consequence led to the wrongful act of another, such as a breach of duty or contract. It will be immaterial that a person induced to break a contract, etc., is himself a free agent, and need not have listened to the enticement, and that he is himself liable. The ground of action against the enticer is that his own act is wrongful, and has been followed as a consequence by the wrongful breach of contract or of duty on the part of the person enticed. This principle has from time immemorial been applied to one who is successfully enticed to commit a *breach of duty* involving loss of service, such as harboring or seducing a wife, or seducing a daughter or *servant*. It is but extending the principle to an analogous case when applied to a breach of contract.[2] There are cases which confine the remedy, where a contract is broken by the wrongful act of another, to an action against the person contracting. These cases must be deemed to be overruled.[3] Both servant and enticer may be sued together in a single action.[4]

SECTION V. *The Relation of the Servant to Third Persons.*—I. *His rights.*—A servant has no cause of action against one who injures his master, resembling the right of a master to sue for loss of service. No decisions have been had upon the point whether he could sue a third person who wrongfully induced the master to discharge him. The principles already stated in the case where the master sues an enticer for the loss of service of his servant, would seem to be broad enough to cover this case.[5] The servant may defend the master when unwarrantably attacked, and may

[1] Ashby *v.* White, Ld. Raymond, 938; 1 Smith's Leading Cases, 105. This was an action by one who offered to vote at an election for members of Parliament, against the inspector, who refused his vote. He was successful. The decision met with great opposition, and aroused so much feeling that some parliamentary debates upon it were published in a separate volume (A. D. 1705), with hostile resolutions by the House. The case is now accepted law.

[2] Lumley *v.* Gye, 2 Ell. & B. 216; Bowen *v.* Hall, L. R. 6 Q. B. D. 333 (Court of Appeal). In this last case the rule was applied to one who agreed to make brick for another exclusively for five years.

[3] Such a case is Vicars *v.* Wilcocks, 8 East, 1. That case is overruled, so far as it conflicts with the principle stated in the text, in L. R. 6 Q. B. D. 338, 339.

[4] Bowen *v.* Hall, *supra*.

[5] See the cases cited under Section IV., *supra*.

justify an assault and battery committed by him so far as may be necessary for that purpose.

II. *His liability.* — (1) In cases where the servant has done a wrongful act, whether wilful or negligent, in the course of his employment or otherwise, he is liable to the injured party for the loss sustained, as being the principal author of the wrong. If his wrongful act be such as to make the master liable, the injured party may sue either the master or servant, or may sue both in a single action. (*a*) So, if a servant, by his negligence, injure a fellow-servant in such a way that no action can be brought against the master, the one servant may, nevertheless, be sued by the other.[1] (*b*) The struggle usually is to maintain an action against the master, if possible, on account of the greater probability in that case that a judgment for damages will be collected.

(2) A servant will not be excused for the commission of a wrongful or illegal act on the ground that it was directed by the master. If the act be a fraud, he will be liable in damages, though his participation in the act were unknown to the party injured.[2] The same rule is applied where he converts the property of another to the master's use and benefit.[3] So if he aid his master in the commission of an act prohibited under a statutory penalty, though the latter may be charged as principal, the servant may be convicted of aiding and abetting him.[4]

Acts of service done abroad, brought in question here. — This subject is affected by the law of nations. Where a citizen of this country is prohibited by law from making a contract to serve a foreign state, and notwithstanding this goes abroad and enters into the service of the foreign state, and there does an act as servant which is perfectly lawful in the state where it is performed, he cannot be made liable on his return to this country to any person claiming to be injured by his act, on the ground that his entering into the foreign service was unlawful, and that therefore he was such a wrongdoer as to be responsible in damages.[5]

[1] Osborne *v.* Morgan, 130 Mass. 102; overruling Albro *v.* Jaquith, 4 Gray, 99. See also Swainson *v.* N. E. Railway Co., L. R. 3 Exch. D. 341, 343; Hinds *v.* Harbon, 58 Ind. 121; Griffiths *v.* Wolfram, 22 Minn. 185.

[2] Cullen *v.* Thomson's Trustees, 4 Macq. H. L. Cas. 424 at p. 441.

[3] Stephens *v.* Elwall, 4 M. & S. 259; Cranch *v.* White, 1 Bing. N. C. 414.

[4] Wilson *v.* Stewart, 3 B. & S. 913.

[5] Dobree *v.* Napier, 2 Bing. N. C. 781. The defendant, an English subject, entered into the service of the Queen of Portugal, contrary to the "Foreign Enlistment Act," and, as her servant, did the act complained of.

(*a*) For a distinction, as to a servant's liability, between misfeasance and nonfeasance, see Murray *v.* Usher, 117 N. Y. 542.

(*b*) Hare *v.* McIntire, 82 Me. 240.

Gratuitous service. — It is a general rule of law, that a person rendering service with the knowledge or consent of an employer is entitled to compensation. If the rate is not stipulated, a reasonable compensation will be implied. This, as a general rule, admits of a number of important exceptions.

A person rendering service may stipulate that payment shall depend on a contingency. If the contingent event does not happen, nothing can be collected. An example is the case where several persons compete as architects for employment, and present plans, each agreeing that no payment is to be made to him unless his plan is adopted.

The nature of the work done may be of such a kind that compensation is not usually expected, such as the friendly act of a neighbor in saving property endangered by fire or other risk. Still, this would be but a presumption, and it might be shown that when the service was entered upon, compensation was mutually expected to be paid and received, in which case it could be enforced.

The person rendering the service may be under a *legal duty* to furnish it, such as that of a fireman employed by a city to save property or lives endangered by fire. In such a case an express promise to pay for the services, though made in advance and as an inducement to undertake the service, would be inoperative and void, as being without consideration.[1]

A relation may exist between the parties which usually precludes compensation, such as that of a child living in a father's family receiving board, clothing, etc., and at the same time rendering acts of service. This relation may exist after majority, but is more usual in the case of a daughter than a son; and it will more readily be inferred in the case of the former than the latter that no compensation is to be paid. This is a matter of presumption, and the presumption may be rebutted by evidence that compensation was expected to be received and paid. The presumption of gratuitous service is not confined to children, but will be extended to cases of other persons received into a family in the same general way, such as nephews, nieces, adopted children, step-children, parents, etc.[2] Some courts hold that the

[1] Day *v.* Putnam Ins. Co., 16 Minn. 408; Russell *v.* Stewart, 44 Vt. 170.

[2] The general rule is sustained in Updike *v.* Titus, 13 N. J. Eq. 151; State *v.* Connoway, 2 Houst. (Del.) 206; Hartman's Appeal, 3 Grant's Cases (Pa.), 271. Cases where a child has continued, after majority, to live with a *parent:* Adams *v.* Adams' Adm., 23 Ind. 50; Miller *v.* Miller, 16 Ill. 296; Munger *v.* Munger, 33 N. H. 581; Putnam *v.* Town, 34 Vt. 429; Perry *v.* Perry, 2 Duvall (Ky.), 312; Conger *v.* Van Aernum, 43 Barb. 602; Leidig *v.* Coover's Ex'r, 47 Pa. St. 534; Cooper *v.* Cooper, 12 Ill. App. 478. The case of *granddaughter and grandfather:* Butler *v.*

presumption against compensation can only be rebutted by proof of an express agreement, while others maintain that an inference in favor of compensation can be drawn from circumstances and from the fact that compensation is expected by each party to be paid. Reference is made to authorities in the note. It should be added that, according to some authorities, a minor who resides without paying board in a family to which he is not related cannot recover for services without proof of an express promise to pay.[1]

There is a class of cases where it appears that parties holding the apparent relation of master and servant, were mutually mistaken as to the existence of the relation, the supposed servant being falsely assumed to be under a duty to render service without compensation. In such a case, should the error be discovered, an action would not lie for past services. Illustrations in the law books are the falsely assumed relation of master and slave,[2] or of master and apprentice,[3] or of husband and wife.[4] If, however, the person who had the assumed right to unremunerated service

Slam, 50 Pa. St. 456; Davis *v.* Goodenow, 27 Vt. 715. But see Hauser *v.* Sain, 74 N. C. 552. That of *son-in-law:* Lovet *v.* Price, Wright (Ohio), 89; Sprague *v.* Waldo, 38 Vt. 139. But see Amey's Appeal, 49 Pa. St. 126; Schoch *v.* Garrett, 69 Pa. St. 144. That of *brother and brother:* Bowen *v.* Bowen, 2 Bradf. 336. That of *stepfather and stepchild:* Gerdes *v.* Weiser, 54 Ia. 591; Smith *v.* Rogers, 24 Kan. 140; Lantz *v.* Frey, 14 Pa. St. 201; s. c. 19 Id. 366. There is no distinction between adopted and other children. Lunay *v.* Vantyne, 40 Vt. 501. The case of *first cousins:* Neal *v.* Gilmore, 79 Pa. St. 421. That of *mistress claiming compensation for services from her lover:* Walraven *v.* Jones, 1 Houst. (Del.) 355; Swires *v.* Parsons, 5 Watts & S. 357.

That the presumption against compensation may be rebutted by evidence that both parties expected that it would be made, see Partlow *v.* Cooke, 2 R. I. 451; Guenther *v.* Birkicht, 22 Mo. 439; Green *v.* Roberts, 47 Barb. 521; Friermuth *v.* Friermuth, 46 Cal. 42. Some courts require very clear and exact proof. Less strict proof seems to be required in New York. Van Schoyck *v.* Backus, 9 Hun, 68; Markey *v.* Brewster, 10 Hun, 16; Moore *v.* Moore, 3 Abb. App. Dec. 303. See also Briggs *v.* Briggs, 46 Vt. 571; Smith *v.* Denman, 48 Ind. 65. It is said that the claim of a son for services rendered by him after he attains majority is not regarded with favor by the Pennsylvania court. Walker's Estate, 3 Rawle, 243. There should be clear and unequivocal proof that the relation was not that of parent and child but of master and servant. Candor's Appeal, 5 Watts & S. 513; Steel *v.* Steel, 12 Pa. St. 64. Pellage *v.* Pellage, 32 Wis. 136, requires an express agreement. See also Wells *v.* Perkins, 43 Id. 160. Neel's Adm. *v.* Neel, 59 Pa. St. 347, applies the same rule to all classes of relatives, though the relationship be even more remote than that of uncle and nephew. See also Scully *v.* Scully, 28 Ia. 548; Harris *v.* Currier, 44 Vt. 468; Shirley *v.* Bennett, 6 Lans. 512. The presumption is not so strong against compensation in the case of remote relatives. Thornton *v.* Grange, 66 Barb. 507. The presumption does not apply as to cousins related by affinity. Gallagher *v.* Vought, 8 Hun, 87.

[1] Windland *v.* Deeds, 44 Ia. 98; Smith *v.* Johnson, 45 Id. 308; Thorp *v.* Bateman, 37 Mich. 68.

[2] Livingston *v.* Ackeston, 5 Cow. 531.

[3] Matthy *v.* Harwood, 12 Barb. 473.

[4] Cropsey *v.* Sweeny, 27 Barb. 310.

knew when it was being rendered that the relation supposed to require the service did not exist, he should be held liable, as there would be nothing adverse to the principal rule governing this subject, that one who knowingly receives the services of another of a nature beneficial to himself, impliedly promises to pay for them.

A word may be added as to a "volunteer servant." This expression includes one who, perhaps observing that the servants of a master find a difficulty in the performance of an assigned task, volunteers to aid them in the absence of the master. In such a case no claim can be made for compensation.

There is, however, a distinction between a *mere volunteer* who takes upon himself all the risks of the employment, and one who assists with the master's consent for the purpose of expediting the delivery of his own goods, or the like. In this case the transaction is of common benefit to both parties, and prevents him from being regarded as a volunteer. He is not a *co-servant*, and would have an action against the master if he were injured by the negligence of those whom he aided, or if the premises on which he was invited to go in order to render the service were in an insecure condition through the neglect of the person who gave the invitation.[1]

[1] Wright *v.* London & N. W. R. R. Co., L. R. 1 Q. B. Div. 252; s. c. L. R. 10 Q. B. 298; Holmes *v.* N. E. R. R. Co., L. R. 4 Exch. 254. Compare these cases with Degg *v.* Midland R. R. Co., 1 H. & N. 773; Potter *v.* Faulkner, 1 B. & S. 800. In the two last cited cases, the party was a mere *volunteer* and without remedy.

CHAPTER XI.

CORPORATIONS.

DIVISION I. — *General Rules Applicable to all Corporations.*

SECTION I. *Classification of Corporations.* — A corporation is an artificial person, created by law, having a continuity of existence, either definite or indefinite, and capacity to do authorized acts, and capable, however numerous the persons that compose it may be, of acting as a single individual.

The leading points in this definition are (1) that a corporation is an artificial *person;* (2) that it is *created by law*, and not by contract; (3) that it has a *continuity of existence.* This does not necessarily mean that it has a *perpetual* existence. It may be created to continue for thirty or fifty or other number of years. All that is meant is that, *while it lasts*, its existence is continuous, and made so by a mode of succession of members established by law. (4) It has capacity to act as a single person. Nothing is so characteristic of a corporation as the fact that it is made by law an artificial person. It has a standing in court as a person. The word "person" in a statute will ordinarily include a corporation.[1] Nothing of this kind can be attributed to other assemblages of natural persons. The members of a partnership cannot by contract make themselves a person. Should they adopt a conventional name they could not make contracts or do other acts in that name. They could not sue in that name, while corporations not only may, but in general must, sue and be sued by a name given to them by law. The ordinary consequences of personality follow. The agent of a corporation is not the agent of its members.[2] The individual members do not own the property.[3] They cannot transfer it to third persons. The corporation, as a legal person, manages, owns, and can alone transfer the property. Such an expression as a "living person" may also include a corporation.[4]

[1] People *v.* Trinity Church, 22 N. Y. 44, 57.

[2] Moffat *v.* Winslow, 7 Paige, 124.

[3] Wilde *v.* Jenkins, 4 Paige, 481; Mickles *v.* Rochester City Bank, 11 Paige, 118.

[4] La Farge *v.* Exchange Fire Ins. Co., 22 N. Y. 352; Boyd *v.* Croydon R'way Co., 4 Bing. N. C. 669.

A stock corporation should be distinguished from an ordinary partnership and that form of the latter which is termed a "joint stock company." The leading differences between a stock corporation and a partnership are these: (1) the corporation is created by law; the partnership by contract. (2) The corporation is a "person"[1] and can make contracts and sue and be sued by its corporate name; a partnership is not a "person," but a collection of individuals, and can only sue, etc., in the names of all its members who are known, and cannot legally act by an assumed name. (3) A judgment against the corporation only binds the corporate property; a judgment against the members of a partnership binds, not only the firm property, but their individual assets. The members are said to be liable *in solido*, or absolutely.

A "joint stock company," not incorporated, is but a special form of partnership, having its capital divided into shares. The characteristic distinctions between it and a corporation are essentially the same as between an ordinary partnership and a corporation.

Corporations may be classified from different points of view. (1) When considered in reference to the *number* of members, they are aggregate or sole. A "sole" corporation consists of a single individual, having an artificial or legal personality distinguished from his natural character. A king in a monarchical country is an example. A corporation consisting of two or more members is aggregate. (2) When a corporation is regarded from the point of view of its being *an instrument of government*, it is called public. "Municipal" is the equivalent of "public." Cities, towns, and villages are public corporations; all other corporations are private. (3) A further division, depending on the *nature of the purposes* for which the corporation is organized, is into ecclesiastical and lay. This last mode of classification is of no practical value in the United States, since there are no ecclesiastical corporations here. All corporations, including churches, are lay. A distinction in lay corporations is drawn between civil and eleemosynary, the latter being established, not for profit, but for charitable purposes. The word "charitable" is more commonly used in modern law than "eleemosynary." These distinctions run into each other, so that a corporation may be sole and public, or aggregate and public. It may also be both public and charitable. Thus, a city, though in one aspect a public corporation, may, from another point of view, be a charitable one.

The term "stock corporation" is much in use. This is de-

[1] A private corporation is a "person" under the Fourteenth Amendment to the United States Constitution. Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181.

scriptive of a private corporation whose stock is divided into *shares*, such as a railroad or a bank.

The phrase "*quasi* corporation" means an organization having some of the powers of a corporation, but yet not completely incorporated. It is for the most part of a public or semi-public nature. It is a question of local policy whether to give such an organization full corporate powers, or only to a qualified extent. Thus, towns in the State of Massachusetts are fully incorporated; in New York they are, for the most part, mere political divisions, and have very slender corporate powers.[1] Other instances of *quasi* corporations are trustees of school districts and counties. Similar theories prevail in England, where there are instances both of aggregate and sole *quasi* corporations, such as church wardens, overseers of the poor, the Lord Chancellor, etc.[2]

The distinction between public and private corporations is important in this country for a special reason. This is owing to a clause in the United States Constitution that "no State shall pass any law impairing the obligation of contracts." A private corporation is deemed to originate in contract, while a public corporation is not, being rather an instrument of government. A charter of a private corporation, being a contract, cannot be changed without the consent of the corporation.[3] The effect of this rule has been to a large degree nullified by the insertion of clauses in the charter, or in some law applicable to the case, that the legislature may at any time alter or repeal the incorporating act. Such a law is held to be a part of the contract created by the charter, and leaves the legislature free to make amendments so far as the constitutional inhibition is concerned.

Corporations may also be considered from the point of view of being either "domestic" or "foreign." This is not a distinction as to the *nature* of the corporation, but simply turns upon its *status*, or legal condition. If it act or sue or be sued in the State or country where it is created, it is regarded as a domestic corporation. On the other hand, if legal inquiries concerning its conduct come up in a different State or country, it is in such aspects termed "foreign." In the absence of restrictions, a corporation chartered in a State may make contracts and do other acts elsewhere, provided that they are embraced within the terms of its charter.[4] It may, however, be restricted by foreign law.

[1] Lorrillard *v.* Town of Monroe, 11 N. Y. 392.

[2] The English authorities are collected in Brice on *Ultra Vires* (Lond. ed. 1874), pp. 17, 18; (2d ed.) pp. 26–28.

[3] Dartmouth College *v.* Woodward, 4 Wheat. 518.

[4] Bank of Augusta *v.* Earle, 13 Pet. 519, 588; La Fayette Ins. Co. *v.* French, 18 How. U. S. 404.

This distinction becomes important as between the States of the Union. There is nothing in the United States Constitution to prevent a State from excluding a foreign corporation created by another State from doing business within its borders.[1] Thus, it may prohibit foreign insurance companies from insuring property within its limits. That article of the Constitution which provides that the citizens of each State shall be entitled to "all privileges and immunities of citizens in the several States," is not infringed, since that refers to individual citizenship, and not to a mere creation of local law, such as a corporation is. Its recognition, as well as the enforcement of its contracts in another State, is purely a matter of comity or courtesy.[2] Accordingly, if a State has the power to exclude a foreign corporation from doing business therein, it may impose conditions upon its permission, such as the payment of a tax considered as a license fee.[3]

A State, however, cannot, in giving its assent to the transaction of the corporate business therein, lawfully impose as a condition the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States. An example is, a stipulation exacted that the corporation will not remove a suit against it in a State court into a Federal court, which, by the laws of the United States it would have the right to do.[4] A State statute cannot make an agreement by the corporation to such an effect valid, since the statute itself would be unconstitutional and void.[5] A State might as well pass a statute to deprive an individual citizen of another State of his right to remove such suits.[6]

Notwithstanding what has just been said as to a corporation not being a citizen for certain purposes, the question still remains whether it is not a "citizen" within that clause of the Constitution which confers judicial power upon the Federal courts.[7] This clause allows a *citizen* of one State to be sued by a *citizen* of another State in the Federal court. The result of prolonged judicial discussion upon this point is, that while a corporation is not strictly a citizen, yet its members will be conclusively presumed for the purposes of this section to be citizens of the State creating the corporation. It was on this ground that the court

[1] Paul *v.* Virginia, 8 Wall. 168.

[2] Id.

[3] Phila. Fire Assoc. . New York, 119 U. S. 110.

[4] Barron *v.* Burnside, 121 U. S. 186.

[5] Insurance Co. *v.* Morse, 20 Wall. 445; Doyle *v.* Continental Ins. Co., 94 U. S. 535. In the two last cases the corporation had entered into the agreement required by the State statute, while in the case of Barron *v.* Burnside, it had not. The distinction between the two classes of cases was declared to be immaterial.

[6] Barron *v.* Burnside, *supra*, p. 200.

[7] Art. III. § 2, cl. 1.

was able to reach the conclusion in the case of Barron *v.* Burnside, already cited, that the stipulation of the corporation not to sue in the Federal courts was void.

SECTION II. *The Creation of Corporations.* — Corporations may be created in a number of ways, — by prescription, by charter granted by the king, or by act of Parliament, or, in this country, by the legislature.

A corporation is said to be created by prescription when it has assumed to act as a corporate body without legal question for a prescribed number of years. The consent of the State is presumed after, say, twenty years. There is a legal fiction resorted to that there has been a charter but that it has been lost.[1] This theory may be resorted to when a charter or act of incorporation has in form been granted, but it has been so defectively drawn that it does not actually incorporate the parties named, though they have acted under its provisions.

Formerly, a large part of the corporations in England were created by the king. While the king could create an artificial person, he could not confer upon it the full powers which could be given by the legislature. For example, he could not give the authority, now so frequently needed by railroad companies and the like, to take land from owners by compulsory measures for their use. Such a power can only be derived from the legislature. For this and other reasons, most of the corporations now created in England are created by Act of Parliament. Such charters as the king granted in this country before the Revolution still remain in force.[2] The king may exercise his power by delegation to another as well as by a direct act of creation.

The only *direct* mode of creating a corporation in this country is by an act of the State legislature or of Congress. The power of Congress was at one time much disputed, but without success. Though there are no express words in the Constitution on the subject, the power may be exercised under the general principle that wherever a power is granted, there is bestowed by implication a power to make use of all such means as are necessary and requisite to carry into effect the power granted.[3] Congress has under this doctrine created great railroad corporations as well as chartered national banks and other instrumentalities of government.

The main power to create corporations is vested in the State

[1] See on the general subject, Queen *v.* Durham, 10 Mod. 146; Jenkina *v.* Harvey, 2 C. M. & R. 393; Angell & Ames on Corporations, §§ 69–71.

[2] Dartmouth College *v.* Woodward, 4 Wheat. 518.

[3] McCulloch *v.* State of Maryland, 4 Wheat. 316, 421.

legislatures. There is little or no restriction upon this power, except some regulations in some of the State constitutions, not designed to limit the power, but to mark out the true mode of its exercise, — such as provisions that corporations shall be created under general laws where that mode of proceeding is feasible.

A corporation is said to be created under a general law, when a legislature prescribes a corporate formula by statute, pointing out various acts which must be done by persons desiring to be incorporated for some specified purpose, in order that they may become a corporation. This course results in an indefinite number of corporations, since the theory is, that there is no element of exclusiveness, but that all who desire to be incorporated may become so by a compliance with the prescribed formula. This formula is not the same in all respects in the various States, nor even for all corporations in the same State. A general outline of it is, that a paper is drawn up, setting forth the names and number of the corporators, with mention of future associates, the proposed name of the corporation, the capital (if any), the directors or trustees for the first year, the period during which the corporation is to continue in existence, etc.[1] This document is signed by the proposed corporators, and the signatures are acknowledged before some prescribed officer, and, when complete, it is filed in a prescribed public office, whereupon the parties become a corporation. If the formula is not complied with, there will be no corporation.[2]

It will be convenient in the course of the discussion of this subject henceforward, to use a single term to express the mode of creating a corporation. The word "charter" is a well-known popular word, and though strictly only applicable to corporations created by the king, it will be used for the present purpose as a generic word expressing any and all modes whereby corporations are brought into existence. There are several leading rules governing the creation of corporations which will be briefly referred to.

(1) It is not necessary that the corporation should be created in so many words, though that course is usual. If powers be granted to a body of men which cannot be exercised without corporate authority, corporate existence may be implied. This is termed creation by implication.[3]

(2) The proposed corporators should accept the charter. This rule is to be inferred from the fact that a charter constitutes a contract. The rule, however, does not apply to a public corpora-

[1] The statutes must be consulted for details and carefully followed.

[2] DeWitt *v.* Hastings, 69 N. Y. 518.

[3] Conservators of the River Tone *v.* Ash, 10 B. & C. 349.

tion. Acceptance may be either express or implied from action under the charter which is technically termed "user."[1] It may be added that persons who have contracted with it as a corporation may be by their action precluded from denying its existence, or, in legal phrase, estopped.

(3) A corporation should have a name by which it may sue and be sued, or perform other legal acts. The name is either conferred by the legislature or assumed by the corporation itself when organized, under a general law. A corporation has no inherent power to change its name.[2] The name may be changed either by special act of the legislature or by acting under some provision of a general law applicable to the case.

A party who has contracted with a corporation under a false name may insist that the corporation is estopped to deny that the name used by it is its true name, much in the same way as a natural person would be estopped under like circumstances.

SECTION III. *The Powers of Corporations.* — I. *The doctrine of ultra vires.* — By the expression "*ultra vires*" is meant an act on the part of the corporation transgressive of its powers. For a correct view of this subject it should be considered that a corporation does not as a rule have free power to act and contract such as that which a natural person possesses. It is organized for some declared purpose, such as for banking, building or operating a railroad, insuring against fire or marine disaster, and the like. Its contracts must, accordingly, be brought within the limitations prescribed by the charter, which must be regarded as its organizing and fundamental law. If these be transgressed, there is a case of *ultra vires*. The question then arises as to the effect of the contract made or act done in violation of its organizing law. Is it utterly void so that the corporation can set up its invalidity, although it may have received the benefit of it, or does some other rule prevail? These points will be briefly considered.

In the outset, it must be stated that the expression "*ultra vires*" is used in two quite different senses, particularly in reference to stock corporations, in which the capital is subscribed or owned by stockholders, while the management is by a board of trustees or directors. One signification implies that the *directors* have exceeded their powers, and thus violated their duty to the stockholders; and the other, and more appropriate, embraces the case where the *corporation itself*, be it a stock corporation or any other, goes beyond the authority which the State has conferred upon it. This last is a true usurpation of authority, and is, so far as the State is con-

[1] M. E. Union Church *v.* Pickett, 19 N. Y. 482.

[2] The Queen *v.* Registrar of Joint Stock Companies, 10 Ad. & Ell. N. S. 839, 844.

cerned, violative of duty to it and a cause of forfeiture of corporate rights. In the first case, there is presented the instance of an agent overstepping the bounds of authority. This is a breach of duty towards the stockholders, and may be waived by their consent, with full knowledge of the facts; but where there is no waiver, the action of the directors will be a breach of trust. The opinion in a recent English case[1] refers to this sense of *ultra vires* when it says that, as between a corporation and its stockholders, it is a great and cardinal principle of law that the funds are not to be used by the governing body for any purpose different from that for which they were contributed. Such a use would be an instance of *ultra vires*. With this distinction in view, the discussion will be confined to the case where either the directors or the corporation exceeds the powers conferred upon it by its charter.

It may be urged that if the directors do such an act without the consent of the corporation, it is a matter between the managers and the company with which the public at large have no especial concern; on the other hand, it is plain that there is an element of public policy in the case, which makes the transgressive act illegal and void in all respects, even as to the corporation itself. If this view be correct, no sanction by the shareholders will make the transaction valid.

The correct opinion seems to be that an act *ultra vires* in this sense is, when considered as a contract binding on the company, without force, and void. It is in fact a case of *want of capacity*, such as the incapacity of a married woman at common law to make a contract. The party contracting with the corporation is bound to know the law, and usually has means of knowledge of the want of power on the part of the corporation by recourse to the statute books. In this view it makes no difference whether the contract is wholly executory or partly performed, or wholly performed. No action will lie *on the contract*, — that is, no action based on the theory that there is a subsisting contract between the corporation and the plaintiff.

It is quite a different question, whether the opposite party may not have remedies growing out of the *non-existence* of the intended contract, — such as, for example, to recover an amount equal to the advantage which the corporation has received from the unauthorized act of dealing, — or whether money advanced cannot be recovered as upon failure of consideration. There are cases in which a recovery has been had on this ground, applicable to natural persons as well. These cases rest on the principle that it is inequitable and unjust to retain money paid upon a supposed con-

[1] Pickering *v.* Stephenson, L. R. 14 Eq. 322.

sideration which does not in fact exist.[1] Still, it is understood to be the rule in the English courts that even this ground is only maintainable under special circumstances.[2]

Most of the cases, as to which there is a diversity of opinion, do not turn upon the principle of law applicable, but upon the question whether the *facts* show a case of *ultra vires*. This is frequently a matter of the utmost difficulty as involving the construction of obscurely written statutes, and of determining how far the disputed power may be implied from the language used. A notable case of this kind is referred to in a note.[3]

The leading case in New York developed a serious difference of opinion among the judges as to the effect of acts *ultra vires*, it being held in the opinion of one eminent judge that it did not make a contract void, while in that of another, no less able and eminent, it was considered that the contract was utterly void.[4] It is believed that the latter view will ultimately prevail as a question of capacity.

The view, however, is taken that even if the contract be void, yet if the corporation enter upon the undertaking and act negligently, so as to injure the party with whom it assumed to contract, he will have an action for negligence.[5] It is further held that the presumption is in favor of the view that the corporation has not acted in excess of its powers, and that the burden of proof is upon one who attacks a transaction on this ground, to show that it was *ultra vires*. Every presumption is to the contrary.[6] In the cases already referred to, in which the act done by the

[1] Parish *v.* Wheeler, 22 N. Y. 494, 508, 509 ; Castle *v.* Lewis, 78 Id. 131, 135 ; Woodruff *v.* Erie R'way Co., 93 Id. 609, 618, 619 ; Manville *v.* Belden Mining Co., 17 Fed. R. 425. These cases do not refer to instances where the contract is in itself illegal or immoral.

[2] Brice on *Ultra Vires*, 521, 522 ; (2d ed.) pp. 764–765.

[3] The case referred to in the text is Taylor *v.* Chichester & M. R'way Co., L. R. 4 H. L. 628. In the lower court of first instance the contract was held not to be *ultra vires*, 4 H. & C. 409. The judgment was reversed in the Exchequer Chamber (L. R. 2 Exch. 356) by four judges against two, on the ground that it was *ultra vires*. This last judgment was reversed in the House of Lords on the ground that the corporation had not exceeded its powers. In the course of the discussion there was a vast number of cases cited, and the arguments of the eminent counsel are a storehouse of information.

[4] Bissell *v.* Mich. So. & N. I. R. R. Co's., 22 N. Y. 258 ; Madison Ave. Bap. Ch. *v.* Oliver St. Bap. Ch., 73 N. Y. 82, 90.

[5] Buffett *v.* Troy & Boston R. R. Co., 40 N. Y. 168. The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong. Whitney Arms Co. *v.* Barlow, 63 N. Y. 62, 69 ; Boston & Prov. R. R. Co. *v.* N. Y. & N. E. R. R. Co., 13 R. I. 260 ; Rider Life Raft Co. *v.* Roach, 97 N. Y. 378.

[6] Shrewsbury & Birmingham R'way Co. *v.* N. W. R'way Co., 6 H. L. Cases, 113, 135, 136.

directors of a corporation is of such a nature that though in excess of power it only affects the interest of the stockholders, a ratification by them would make the act valid. (*a*) This seems to be no more than ratification by a principal of an agent's unauthorized act.[1] The stockholders, having confirmed the act, would be estopped to deny its validity in favor of one who had acted in good faith. If stockholders do not ratify, there is a remedy by injunction.[2]

There is in practice a marked distinction made by some authorities between executory and executed contracts. While executed contracts in excess of power are, as has been seen, in some instances so far upheld as to preclude the corporation from setting up the excess in defence, this doctrine cannot be applied to executory contracts, which are utterly void.[3] (*b*)

A mere stranger, such as a competitor for business, cannot raise the question of *ultra vires*.[4] The reports abound in cases where the question of *ultra vires* has been raised, either successfully or unsuccessfully.[5] They depend largely upon the construction of particular charters, and require so much detail for their elucidation that they lie beyond the compass of this work. Reference may usefully be made to the excellent work of Brice on Ultra Vires.[6]

[1] Kent *v.* Quicksilver Mining Co., 78 N. Y. 159, 186; Rider Life Raft Co. *v.* Roach, 97 N. Y. 378.

[2] Elkins *v.* Camden & A. R. R. Co., 36 N. J. Eq. 5.

[3] Nassau Bank *v.* Jones, 95 N. Y. 115, 123.

[4] Railroad Co. *v.* Ellerman, 105 U. S. 166.

[5] It has even been contested whether the employment of a policeman by a railway company to protect its property was not *ultra vires*. It was decided that it was not. Edwards *v.* Midland R'way Co., L. R. 6 Q. B. Div. 287.

[6] The doctrine of *ultra vires*, with some of its applications, was greatly considered in a series of cases growing out of a loan made by Lord Wenlock to the River Dee Company. An important question was

(*a*) Martin *v.* Niagara Falls, etc. Co., 122 N. Y. 165.

(*b*) That the defence of *ultra vires* cannot be interposed where the contract is executed, see Linkauf *v.* Lombard, 137 N. Y. 417, 423; Jennison *v.* Citizens' Savings Bank, 122 N. Y. 135; Cunningham *v.* Massena Springs, etc. Co., 63 Hun, 439; Dewey *v.* Toledo, etc. Ry. Co., 91 Mich. 351; Railway *v.* Gentry, 69 Tex. 625; Wright *v.* Hughes, Assignee, 119 Ind 324. To the contrary are, Chewacla Lime Works *v.* Dismukes, 87 Ala. 344; Central Transp. Co. *v.* Pullman's Car Co., 139 U. S. 24. In this case the view of the Supreme Court of the United States is said by Mr. Justice GRAY to be as follows: "A contract of a corporation, which is *ultra vires* in the proper sense, — that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, — is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. . . . No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." p. 59.

II. *Powers as to succession of members, including amotion and disfranchisement.* — The capacity of causing a succession of members, on the death or resignation of corporators, is one of the leading advantages that a corporation possesses. If there be several co-owners of property, who are not incorporated, on the death of each the share is transmitted to heirs or executors, as the case may be, and the design of the joint ownership may be entirely frustrated; but, in a corporation, the artificial person continues, though the entire membership may be changed, and that, too, even many times.

The mode of succession varies with the nature of the case. In some instances it is derived from election; in others, as in the case of municipal corporations, it may be derived from inhabitancy of the city or town; in others still, as in a trading corporation, from the ownership of shares or stock. The rules of succession necessarily vary to adapt themselves to the particular case, and will be treated separately.

(1) The first case to be considered is where the membership is definite and fixed in number. This is true in general of charitable corporations, such as colleges, hospitals, dispensaries, and a great variety of others, not organized for profit.

Where an election of a member or members is desired, a majority of the members named in the charter of such a corporation *meet* at an appointed place and time. It will not be sufficient to ascertain their will by consulting them separately. They must

involved as to whether the right to borrow money by a corporation was regularly implied by law, and whether this implication, if it existed, could be overcome without express restrictive words. The executors of the lender sought to enforce the loan, while the corporation, notwithstanding it had received and expended the proceeds for its own use, set up the doctrine of *ultra vires* as a defence. The court held that by a reasonable construction of the statute, the power to borrow beyond a sum specified therein did not exist, and that the defence was good. Baroness Wenlock *v.* River Dee Company, L. R. 10 App. Cas. 354, referring to Ashbury R'way Carriage & Iron Co. *v.* Riche, L. R. 7 H. L. 653. In a second case, growing out of the same transaction, it was further held by a divisional court (KEKEWICH, J.), that where a corporation is empowered by Act of Parliament to borrow a certain sum of money, there is an implied restriction as to borrowing more, and the assent of every individual member will not make the loan valid. Baroness Wenlock *v.* River Dee Co., L. R. 36 Ch. D. 674. In a third case it appeared that the company had used the borrowed money to pay its debts, whereupon the court held that a lender on a loan *ultra vires* may be subrogated to the position of a creditor whose debt has been paid out of the money thus lent. This rule will be applied even to debts *subsequently* incurred but paid out of the proceeds of the *ultra vires* loan. The counsel for the defendant urged that this last proposition was full of danger, but the court thought not, since this rule of substitution would not be relied upon by money lenders, as it had rarely done more for any one than to "snatch a few brands from the burning." Baroness Wenlock *v.* River Dee Co., L. R. 19 Q. B. D. 155, 166, following Blackburn Bldg. Society *v.* Cunliffe, L. R. 22 Ch. D. 61.

be assembled as a corporation (*collegialiter*).[1] For example, a college corporation consists of twenty-four members. A valid meeting may be held by thirteen. When the number is reduced by death, resignation, or otherwise, below thirteen, there can be no legal meeting unless the charter specially provides to the contrary. The active existence of the corporation is suspended, though it may be revived by the legislature. Assuming that there is a valid meeting, a new member may be elected by a majority of the votes *actually* cast. Notice of a meeting must be given. Notice of a regular meeting is presumed. This is also true of an *adjourned* meeting, at least for the purpose of taking up business unfinished at the regular meeting.[2] This doctrine cannot be applied to a *special* meeting. Corporators absent from a general meeting cannot be presumed to know that a special meeting will be called. Accordingly, notice of such special meeting must be given.[3] When a meeting is regularly convened, members abstaining from voting are not regarded. The officers in such a corporation are not in general the managers of the corporation, but are presiding officers, recording officers, treasurers, or agents.

Closely connected with the introduction of new members is the power of removing existing members. This is in some sense an incident to the power to perpetuate. A distinction must be taken between the power to remove a member and to remove an officer. The first is called *disfranchisement;* the other, *amotion.*

Disfranchisement (without referring to stock corporations) may take place for good cause. Two general grounds for removal may be suggested: one, where an infamous crime has been committed by a corporator, even though it have no special reference to corporate duty; the other, where there is a breach of corporate duty, though the act in itself may be perfectly innocent. If the act charged be a crime unconnected with corporate acts, the corporation cannot try the question of innocence or guilt. That must be disposed of by the courts of justice. If convicted of crime, "disfranchisement" may follow. In cases of mere breach of corporate obligations, the corporation may dispose of the whole question, giving the member complained of due notice and opportunity to be heard.[4] Common instances are failure to

[1] The case of the Dean, &c. of Fernes, Davies, R. 116, 130–132.

[2] Lorant *v.* Scadding, 13 Ad. & El. N. S. 706, affirmed in the House of Lords, 3 H. L. Cases, 418. An *adjourned* meeting is there said to be a continuation of the original meeting. This view was expressed by the entire bench of common-law judges, as well as by the House of Lords. See also King *v.* Harris, 1 B. & Ad. 936.

[3] People *v.* Batchelor, 22 N. Y. 128; Smyth *v.* Darley, 2 H. L. Cases, 789.

[4] Rex *v.* Richardson, 1 Burr. 517, 540.

attend the meetings or non-residence, where attendance and residence are required. This subject is to some extent in particular cases regulated by a by-law, and then additional questions will arise as to the reasonableness and validity of the by-law, which will be considered hereafter.

Amotion is a rule of broader extent than *disfranchisement*, applying to all corporations, and accordingly to stock corporations, to which disfranchisement has no common-law application. By this term is meant the removal of officers or managers. An officer amoved does not cease to be a member, but only an officer. A power of this sort is necessary for the proper management and even continuance of the corporate institutions.[1] If the office be one of profit and emolument, the proceeding to remove must be a *quo warranto*, which is a writ on the part of the State, or less formal proceeding called an information, to ascertain by what warrant the alleged officer holds his office.[2] The question has been greatly discussed whether, if an officer obtained the office by a species of fraud practised before his appointment, he could be removed by the corporation without notice. It was plausibly argued that it might be considered that he was never an officer, and that the usual proceedings against officers validly elected for subsequent misconduct need not be resorted to. The point, however, seems to be still undecided.[3]

Where membership depends upon inhabitancy, so that the number is fluctuating, as in the case of a municipal corporation, no particular number of members in attendance at a meeting is necessary. (*a*)

(2) The succession of membership in stock corporations, and the election and removal of officers differ materially from the rules just discussed.

A stock corporation is in general organized for banking, insurance, trading, manufacturing, or transportation purposes. It has a capital, say $1,000,000, divisible into shares of a convenient amount, say $100 each. There being in the case supposed 10,000 shares, it is conceivable that each share should be owned

[1] Bagg's Case, 11 Coke's Rep. 93 *b*. The King *v.* Lyme Regis, 1 Doug. 79, 85, and *per* BLACKBURN, J., in Queen *v.* Saddlers' Co., 10 H. L. Cases, 404, 419–420. As to the officer's right to a hearing, see Willcocks on Corporations, Part 1, paragraphs 691–702.

[2] *Per* LORD WENSLEYDALE, 10 H. L. Cases, p. 464. "If the office had been full, he could not be removed without a *quo warranto*. That is perfectly clear."

[3] See very extensive discussions of this matter in Queen *v.* Saddlers' Co., 10 H. L. Cas. 404.

(*a*) The power of amotion exists as against officers of municipal corporations. Richards *v.* Clarksburg, 30 W. Va. 491.

by a distinct person. Membership depends upon ownership, or the apparent ownership, of shares. There would in the case supposed be 10,000 members. The other extreme would be where all the shares are owned by a few persons, or perhaps by one, making, in that case, for the time being, but one member. Membership may lie anywhere between these extremes. As the number of members is constantly fluctuating by sale or other transfer, it would be impracticable to have a rule requiring a majority to attend a meeting. The regular course is to allow the stock represented, no matter how small the number of shares may be, to control an election. Absent stockholders may be represented by a delegation of their voting power to some person or persons who attend. This is a species of agency, — a form of power of attorney, — and is called voting by "proxy." The power to take votes by proxy cannot be assumed by the corporation, but must be granted by the legislature. (*a*) As a usual rule, each share has a vote, so that if a single person owns or controls 5,001 shares out of 10,000, he controls the corporation, and may select his own board of directors.

It is apparent that the stockholders cannot, as such, properly manage the corporate business. This power is delegated by law to a governing body, variously styled trustees, managers, or directors. The stockholders elect the directors at a meeting of their number. These hold their places for a time specified by law, when a new election is regularly held. A general outline of the mode of proceeding is for the stockholders to select inspectors of election, who count the votes as presented. The inspectors determine the right to vote by an examination of the list of shareholders kept on the books of the corporation. Frequently, the books for transfer of stock are closed for a number of days prior to an election. If a sale of shares should in the interim take place, the voting power would remain in the former owner, unless there were some statutory restraint upon him, since he has the apparent ownership. In the same way, if executors or trustees are registered as owners, they have the voting power.[1] (*b*) The inspectors do not look beyond the transfer book. By the common law, one

[1] Matter of Barker, 6 Wend. 509; Matter of Long Island R. R. Co., 19 Wend. 37.

(*a*) The right to vote by proxy may, according to many authorities, be conferred by a by-law where the statute is silent on the subject. Commonwealth *v.* Detwiller, 131 Pa. St. 614; Morawetz on Corporations, § 486. In New York, voting by proxy in many corporations is regulated by a general statute. See Laws of 1892, ch. 687, §§ 20, 21.

(*b*) This is also true of a foreign executor, *In re* Cape May, etc. Nav. Co., 51 N. J. Law R. 78. If the stock is held jointly by several executors, all must agree upon the vote. Tunis *v.* Hestonville, &c. Ry. Co., 149 Pa. St. 70.

holding stock that has been pledged, or "hypothecated," to another, still has the right to vote, since he is owner, notwithstanding the pledge.[1] (*a*) The time, place, and manner of voting may be regulated by statute, or, in the absence of statutory provision, by by-law.[2]

If a person be placed in office by means of an election wrongly conducted, the regular common law remedy is a *quo warranto* proceeding. This can only be resorted to when the party against whom it is instituted is in office, or, in legal expression, when "the office is full." If the office had not been filled, a *mandamus* could be used to place a person rightfully elected in office. In New York, by statute, there is a summary way of vacating the election by motion. (*b*)

In cases such as these, the court can either confirm the election or order a new one. The mere fact that illegal votes were cast will not be decisive. There must have been enough of that kind of votes to change the result.[3] The person having the greatest number of legal votes will be declared elected.[4] If votes have been improperly rejected which would if received have changed the result, the only remedy is to order a new election.[5]

As to the effect of failing to hold elections at the designated day, there has been much diversity of opinion. On the one hand it has been claimed that a direction in the statute as to the time of holding the election is vital, so that it cannot be held at a later day. The better view seems to be that the words of the charter should not be regarded as *mandatory*, but rather as a direction (or "directory"), which, if not followed, may be carried out at a later day. The time prescribed, in that view, is not of the essence of the direction. (*c*) At all events, if the corporation proceeds to elect officers at a later day, and they enter upon their duties, they become *de facto* officers, and the corporation will be bound by their acts.[6]

[1] *Ex parte* Willcocks, 7 Cow. 402.

[2] Rex *v.* Spencer, 3 Burr. 1827; Newling *v.* Francis, 3 Term R. 189.

[3] *Ex parte* Murphy, 7 Cow. 153; Matter of Chenango Co. Mutual Ins. Co., 19 Wend. 635.

[4] *Ex parte* Desdoity, 1 Wend. 98.

[5] Matter of Long Island R. R. Co., 19 Wend. 37.

[6] Ebaugh *v.* German Reformed Church, 3 E. D. Smith, 60; Lovett *v.* German Reformed Church, 12 Barb. 67; Partridge *v.* Badger, 25 Id. 146.

(*a*) In New York it is now provided by statute that the pledgor may vote the stock if it stands in his name on the books of the corporation, Laws of 1892, ch. 687, § 20.

If the corporation itself owns a portion of the shares, the right to vote upon them is suspended until they are transferred. Vail *v.* Hamilton, 85 N. Y. 453; Am. Ry. Frog Co. *v.* Haven, 101 Mass. 398.

It is a general rule that in taking action which as a body they are authorized to take, the stockholders can only act at a corporate meeting. Duke *v.* Markham, 105 N. C. 131; Cook on Stock and Stockholders and Corporation Law, §§ 625–27.

(*b*) Laws of 1892, ch. 687, § 27.

(*c*) Beardsley *v.* Johnson, 121 N. Y. 224.

The doctrine of disfranchisement of members has a very limited application to stock corporations. To disfranchise would be to forfeit property frequently of high value. This power is but rarely conceded to such a corporation, except so far as it is used as a remedy for non-payment of shares subscribed for or, it may be, for non-payment of assessments. The corporation is not obliged to resort to this proceeding, but may sue in the ordinary way to collect the amount of the subscription. The remedy is cumulative. It is also to a certain extent *alternative*, so that if the stock is forfeited, no action will subsequently lie to recover on the contract. The courts are averse to forfeitures, and make it a rule that there shall be no forfeiture of stock, unless the power to forfeit is *expressly* conferred by the legislature.[1]

The doctrine of amotion as distinguished from disfranchisement is applied to directors and trustees of stock corporations as well as of other corporations, there being no forfeiture of stock involved. There are in State legislation restraining laws to prevent these officers from using their positions to the injury of the corporations, and from abusing their trust. They act in a fiduciary character, while the corporation itself holds its property in trust for the stockholders.

III. *Power to make by-laws.* — A "by-law" is a regulation made by the corporation for the purpose of more perfectly carrying on its business, or performing the powers granted in the charter. The power to make by-laws may be expressly conferred, or implied from the general authority granted by the legislature. When made by a municipal corporation, they are commonly termed "ordinances." They must be reasonable, and not conflict with the general law, nor with the general scope of the charter.[2]

Among other restrictions, they are not allowed to impose a forfeiture,[3] though they may inflict a penalty for the purpose of enforcement; nor can they by by-law grant a director a remuneration for attending a directors' meeting, as the directors cannot be properly regarded as servants.[4] The power is sometimes delegated by statute to a select body to make the by-laws. This will deprive the corporation at large of the power, except as to such matters as are not named in the statute.[5] A by-law in general

[1] Matter of Long Island Railroad Co., 19 Wend. 37.

[2] Hoblyn *v.* The King, 2 Bro. P. C. 329.

[3] Kirk *v.* Nowill, 1 Term R. 118.

[4] Dunston *v.* Imp. Gas Company, 3 B. & Ad. 125.

[5] The King *v.* Westwood, 2 Dow & C. 21.

restraint of trade is void. (*a*) This remark does not apply to a mere *regulation* of trade, such as that no person shall slaughter animals within the walls of a city.[1] (*b*) This rule is modified in England by the effect given to a custom, particularly in cities, *e. g.*, in London, whereby trade may be validly restrained.

The court construes with strictness the power to make by-laws, particularly where they are enforced by a penalty. The rule of construction may be illustrated by examples. A power to make by-laws to remove "dust, ashes, rubbish, soil," &c., from a street, does not include a by-law directing the removal of snow.[2] (*c*) The same general principle is adopted in construing the by-law itself. Thus, a by-law declaring one who made a *temporary* obstruction in the streets of a village punishable by fine, was determined not to be violated by one who erected a *substantial* addition to his house, which encroached upon the footway.[3] On a similar principle, where a railway company had power to make a by-law enforceable by a "penalty or forfeiture," it was decided that a by-law which required a passenger to obtain a ticket in advance, and to *exhibit* his *ticket*, and *deliver* it when required by the company, or else pay the fare from the place where he originally started, was void, because this double payment could not be regarded as a "penalty or forfeiture."[4] A by-law may be partly valid though partly void, if the void part is distinct and separable from that which, standing by itself, is valid.[5]

A by-law is in its nature legislative rather than administrative. This proposition is illustrated by a city ordinance. If a city make a by-law prohibiting an act, and still the act be done by a stranger, and a person is injured, he will have no action against the city. This rule has even been carried so far as to relieve the city from responsibility for the misfeasance of its own officers or agents in carrying out the ordinance. It is assumed to be exercising a kind of *quasi* sovereignty in such a case.[6] (*d*) This rule has been

[1] Pierce *v.* Bartrum, Cowper, 269.

[2] The Queen *v.* Wood, 5 E. & B. 49. See also Jennings *v.* Great Northern Ry. Co., L. R. 1 Q. B. 7; Dearden *v.* Townsend, Id. 10.

[3] Queen *v.* Dickenson, 7 E. & B. 831.

[4] Chilton *v.* London & C. Ry. Co., 16 M. & W. 212.

[5] Reg. *v.* Lundie, 8 Jur. N. S. 640.

[6] Ogg *v.* City of Lansing, 35 Ia. 495.

(*a*) So also an ordinance which tends to create a monopoly is invalid, unless the municipality has received an express grant of power from the legislature to confer such a privilege. City of Chicago *v.* Rumpff, 45 Ill. 90; Gale *v.* Village of Kalamazoo, 23 Mich. 344; City of Brenham *v.* Brenham Water Co., 67 Tex. 542.

(*b*) Cronin *v.* People of the State of N.Y., 82 N. Y. 318; cf. Chaddock *v.* Day, 75 Mich. 527.

(*c*) Cf. Village of Carthage *v.* Frederick, 122 N. Y. 268.

(*d*) Kies *v.* Erie City, 135 Pa. St. 144; Wright *v.* City Council of Augusta, 78 Ga. 241. See also Maximilian *v.* Mayor,

applied to officers executing sanitary regulations,[1] and to the acts of a fire department, etc.[2] The principle cannot be properly extended to cases where a city or other municipality is under a *duty* to do an act for the protection of individuals, such as to keep the streets in repair, in which case it will be liable as well for the negligence of contractors as of servants.[3] (*a*)

IV. *Power to make contracts.* — A corporation has power to make such contracts as are either expressly allowed in its charter or fairly to be implied from the language used. Unless there be some statutory provision to the contrary, the directors or trustees make the contract, without being bound to ask the consent of the stockholders.[4] Where an inquiry arises as to any authority, a preliminary question, as already shown, may be considered, as to its being *ultra vires*.

Leaving this out of view, the most important point will be as to the matter of *implied* powers. It is a general rule that any implied authority will be conceded which is reasonably necessary and proper for the exercise of the powers expressly granted. Thus, a corporation having power to do a particular business may without any express authority borrow money and give its note.[5]

A serious difficulty existed in the common law as interpreted in England as to the use of a seal. The conclusion of the courts was that a seal was absolutely necessary, with some slight and unimportant exceptions. The cases are very numerous in which the distinctions were drawn, and the rules highly inconvenient in practice. The American courts have reached more rational conclusions. The necessity of a seal here has been made to depend on *the nature of the contract*, and not upon the person who makes it, so that where an individual must use a seal, a corporation must, but need not otherwise.[6] Thus, where a natural person makes a deed, he must use a seal; so must a corporation. Where, on the other hand, an individual makes a promissory note, a seal is omitted; so it may be in the case of a corporation. A seal on a corporate obligation, where it is unnecessary, does no harm. The law, by this theory, is greatly simplified, and the complexity of

[1] Ogg *v.* City of Lansing, *supra*.

[2] Heller *v.* Mayor, &c. of Sedalia, 53 Mo. 159; Hayes *v.* Oshkosh, 33 Wis. 314.

[3] Storrs *v.* City of Utica, 17 N. Y. 104; Allentown *v.* Kramer, 73 Pa. St. 406.

[4] Beveridge *v.* New York Elevated R. R. Co., 112 N. Y. 1.

[5] Curtis *v.* Leavitt, 15 N. Y. 9.

[6] This rule has been adopted by statute in England as to trading companies. See 8 & 9 Vict. c. 16, § 97, continued in 30 & 31 Vict. c. 131, § 37. As to gas companies, see 23 & 24 Vict. c. 125, § 20.

62 N. Y. 160; Jolly's Adm'x *v.* City of Hawesville, 89 Ky. 279; Dillon on Municipal Corporations, (4th ed.) § 974, *et seq.*

(*a*) Pettengill *v.* City of Yonkers, 116 N. Y. 558.

having one rule for natural persons and another for corporations as to the same subject-matter is avoided. (*a*)

As a corporation has no physical, but merely an ideal existence, it must necessarily make contracts through agents. The general principles of the law of agency become applicable to it. A letter written by a cashier of a bank upon its business is deemed to be a letter from the bank itself.[1]

A difficulty has arisen in the case of directors of a corporation, as to whether notice to one of the board not at the time attending a meeting is a notice to the corporation itself. It is not doubted that notice to the board while in session is notice to the corporation; but notice to an individual member is not notice to the corporation, unless he was in fact an agent for the corporation, such as the cashier of a bank.[2]

Qualified power to make contracts may be conferred by the charter, — as, for example, to execute a mortgage upon land with the assent of a specified number of the members. In such a case the restrictions of the statute must be observed, otherwise the act will be *ultra vires*, and void.

V. *Capacity to commit a tort.* — It is, after much controversy, a settled rule of law that a corporation may commit a wrong for which it may be made to respond in damages in the same manner as an individual may be. Any different rule would work manifest injustice, as persons carrying on business might become incorporated to evade responsibility for wrongful and injurious acts. No sufficient reason could possibly be given why partners conducting a newspaper should be responsible for a malicious libel, while a corporation conducting the same business should not be. Accordingly, a corporation may be held liable for an assault,[3] nuisance, trespass, libel,[4] fraud,[5] false imprisonment,[6] and conversion of property.[7]

There has been more difficulty in the judicial mind with the case of malicious prosecution than with the other cases. Those who

[1] New Hope Bridge Co. *v.* Phœnix Bank, 3 N. Y. 156.

[2] The Fulton Bank *v.* The New York & Sharon Canal Co., 4 Paige, 127; National Bank *v.* Norton, 1 Hill, 572; Bank of U. S. *v.* Davis, 2 Id. 451.

[3] Eastern Co.'s Railway Co. *v.* Broom, 6 Exch. 314.

[4] Whitfield *v.* So. East. R'way Co., E. B. & E. 15.

[5] Ranger *v.* Great Western R'way Co., 5 H. L. Cases, 72.

[6] Moore *v.* Metropolitan R'way Co., L. R. 8 Q. B. 36.

[7] Giles *v.* Taff Vale R'way Co., 2 E. & B. 822.

(*a*) A late statute in New York provides that an instrument duly executed in the corporate name of a corporation, which shall not have adopted a corporate seal, by the proper officers of the corporation under their private seals, shall be deemed to have been executed under the corporate seal. Laws of 1892, ch. 677, § 13.

have doubted the capacity of a corporation to commit such an act, have argued that a corporation aggregate is incapable of malice or motive. The correct course, however, seems to be to pay attention to *the nature of the act done*, which, if without excuse, is deemed to be malicious. Thus, in the case of an individual, if there be no probable cause for the prosecution, an action for malicious prosecution may be brought against the prosecutor, the malice being inferred. The same principle may fairly be applied to a corporation acting without any probable cause. (*a*) Malice is a mere legal fiction in such a case. There would be much more difficulty in a case where *actual malicious intent* was a necessary ingredient.[1]

VI. *Capacity to acquire lands and other property and to dispose of the same.* — Assuming that there are no restraining words in the constituting law (or charter), a corporation may, for all purposes incident to its business, acquire by its own act personal property as freely as an individual. It may also take personal property by will.[2] There are statutes in a number of the States of a restraining nature as to bequests. Those in New York, being applicable to real estate, are considered below.[3] The particular charter or law under which the corporation is organized should also be examined.

The power of a corporation to acquire and dispose of real property will be considered under the following heads: (1) The power of a corporation to take land by conveyance or to acquire it in any other manner except by will; (2) the power of acquisition by will or devise; (3) the right of disposal.

(1) A corporation may, at the common law, in the absence of any statutory restriction, acquire land, as it may personal property, so far as it may be necessary to carry into effect the powers conceded to it. The capacity to acquire land, in other words, may be treated as incidental to the powers expressly granted.[4]

[1] This question was considered in the House of Lords by Lord Bramwell in Abrath *v.* North Eastern R'way Co., L. R. 11 App. Cases, 247. His reasoning was opposed to the view that an action of malicious prosecution would lie against a corporation, since proof of *actual* ill will was a necessary ingredient in the case. What he said in very distinct words was not taken up by the other judges, as the decision of the question was not necessary to the disposition of the case, though they treated it as a *grave* question.

[2] Sherwood *v.* Am. Bible Society, 1 Keyes, 561; s. c. 4 Abb. App. Dec. 227.

[3] Laws of 1848, ch. 319; Laws of 1860, ch. 360.

[4] M'Cartee *v.* Orphans Asylum Soc., 9 Cow. 437.

(*a*) Reed *v.* Home Savings Bank, 130 Mass. 443; Jordan *v.* Ala. Great Southern Ry. Co., 74 Ala. 85; Boogher *v.* The Life Association of America, 75 Mo. 319; Springfield Engine & Threshing Co. *v.* Green, 25 Ill. App. 106; Carter *v.* Howe Machine Co., 51 Md. 290; Williams *v.* Planters' Insurance Co., 57 Miss. 759.

There were enacted at an early day in England restraining statutes, termed statutes of "mortmain," which restrained the acquisition of land *in any* case, unless by special license from the king. The object of these statutes was to more effectually work out a rule of the feudal system. By feudal law, if an owner of land died, the heir could not take possession of the land without paying a sum of money to the king, called a "relief." This became an acknowledged source of royal revenue. It could not be applied to corporations, as they were then, in the eye of the law, immortal. As a practical equivalent, corporations were required by this legislation to obtain a royal license before they could safely acquire land, and the king on granting it could exact a sum of money equivalent, in his view, to the "relief" which would have been likely to accrue to him in case the land had been owned by a natural person. It is a mistake to suppose that the mortmain acts were exclusively grounded in a jealousy of the Christian church, or even primarily. They were aimed at *all corporations*, whether religious or secular, for the special reason already stated.

The mortmain acts have not been generally re-enacted in the States of this country. The special reason which led to them in England does not, as a matter of course, exist here. As far as there are restrictions upon the acquisition of land, they rest upon a different ground, perhaps upon a well-grounded apprehension that they may become formidable to the State. There is, however, general restrictive legislation in the State of Pennsylvania. The more usual practice is to allow the acquisition of land, but to limit the amount in value or, it may be, in extent. If the amount in value be exceeded, the conveyance is not *void*, so that the grantor can reclaim the land. The question of transgression of the law can only be raised by the State in an appropriate proceeding.[1] The value referred to in the constituting law is that existing at the time of the acquisition of the land. If the value increases even enormously, there is no violation of the statute.[2]

Foreign as well as domestic corporations, if not restrained, may acquire land. A corporation, being a person, may act beyond the limits of the State creating it.

A corporation may acquire land *incidentally*, as where, being authorized to loan money, and the loan being secured by mortgage upon land, the mortgage is foreclosed. The corporation

[1] In New York it is an action by the Attorney-General. If he does not cause the land to be forfeited the title remains in the corporation.

[2] Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633.

may then become proprietor through the foreclosure. It is sometimes required by law that the land be sold by the corporation within a fixed time after its acquisition. On this point the charter or constituting statute should be consulted.

Again, the corporation may acquire land by aggressive acts of wrong, acquiesced in by owners for the time prescribed by law. Such an act is technically termed "disseisin." In the same manner a right to make use of another's land, such as a right of way, may be acquired by prescription.

(2) The right to take land by will, or, stated in another form, the right to "devise" land, did not exist in the common law, except in certain localities by custom. To remedy this defect in the law, a statute was passed in the reign of Henry VIII., known as the Statute of Wills,[1] giving the general power to devise land, but omitting corporations from the class of "devisees," or persons who could take land by will. It thus is a rule that, as a general principle, a corporation cannot take land by will. The rule, however, must be stated with some qualifications and exceptions.

The first qualification to the rule is, that while a corporation cannot take *directly* by will, it may, in some cases, where there is no *prohibitory* legislation, become a beneficiary *under a trust.* It was a rule of law long before the Statute of Wills, that a person might take a trust interest in land by will, though he could not take a *legal estate* in the land itself by that means. For example, an owner of land might, by common law, convey it to another to hold in trust for himself, and then, being no longer strict owner of the land, but rather being owner of a trust estate, he could devise that, and the devisee would be an assignee of such trust estate. The only point of difficulty is whether this rule could be applied to a corporation. There is no *prohibition* in the English Statute of Wills, (34 & 35 Henry VIII., c. 5,) acting upon corporations. At most, there is but an *exception*, which may fairly be claimed not to change the common law. The point then is, under what circumstances can a corporation take a *trust* estate by will?

The answer to this inquiry is found in the law of *charitable trusts.* The Court of Chancery, from an early day, has enforced charitable trusts in land created by will, whether the land was held for corporations, or by individual trustees for specified purposes. It is not proposed to develop the law of charitable trusts in this place, but only to point out how a corporation may become a devisee. The law of charities is a branch of equity

[1] 32 Hen. VIII., c. 1; and 34 & 35 Id. c. 5, to be construed together.

jurisprudence, and is found in equity reports and treatises. Other corporations (not charitable) cannot be devisees, and a devise in general to such a corporation is void. If the corporation is made a trustee by a will, it may be that while the devise is void, the trust will be valid. In such a case, the court will appoint a trustee in place of the disabled corporation.[1]

The following provisions in the New York statutes relating to devises to corporations may be referred to: —

1. The general words of the statute law are: "*No devise* to a corporation *shall be valid* unless such corporation be expressly authorized by its charter, or by statute, to take by devise."[2] This, it will be seen, is a *prohibitory* clause, and quite different in its effect from the mere exception in the English Statute of Wills. There seems to be no room for a charitable corporation to take land, except by express provisions of law.

2. Certain charitable corporations are expressly authorized by law to take land by will in trust. These are trusts to literary incorporated institutions, including incorporated colleges, for the following purposes: to establish and maintain an observatory or observatories, to found and maintain professorships and scholarships, to provide and keep in repair a place for the burial of the dead, or for any other specific purposes comprehended in their respective charters. Cities and villages are also allowed to take property in trust for specified purposes, and also the trustees of common schools. Such trusts may be created by grant or will in both real and personal estate.[3]

3. There are several important general statutes prescribing formulæ for the organization of classes of charitable corporations, enabling corporations so organized to take land by will under specified terms. A leading one of this class is the "Act for the incorporation of benevolent, charitable, scientific, and missionary societies."[4] The same general principle is found in the act for founding rural cemetery associations,[5] and in the act for establishing private and family cemeteries.[6] In this last case, trustees are selected by the testator, and become incorporated in a mode prescribed by the act. "Library companies" have power to take in the same way,[7] also clubs for social and recreative purposes;[8]

[1] Sonley *v.* Clockmakers' Co., 1 Bro. C. C. 81.

[2] 2 R. S. 57, § 3.

[3] Laws of 1840, ch. 318, also Laws of 1841, ch. 261.

[4] Laws of 1848, ch. 319, and amendatory acts. See Rev. Stats. vol. iv. p. 1922, *et seq.* (8th ed.).

[5] Laws of 1847, ch. 133.

[6] Laws of 1854, ch. 112; amended by Laws of 1871, ch. 68.

[7] Laws of 1853, ch. 395.

[8] Laws of 1865, ch. 368; Laws of 1875, ch. 267.

societies for the prevention of cruelty to children,[1] also religious societies.[2] This is but a partial enumeration. (*a*)

4. There is also inserted in various special acts of incorporation of particular societies the right to take by devise. These are very numerous, and cannot, with profit, be particularized. In most of these cases there is a limitation upon the amount or value of the land to be taken, or perhaps a requirement that the land be sold within a brief period after acquisition.

A practical suggestion of value may here be made. It is frequently the case that a will must be drawn without an opportunity to examine the specific provisions of the laws constituting the corporation. It is for this reason wise, under such circumstances, whenever there is doubt, to insert a clause in the will directing the real estate to be treated as personal property. In this case, in the view of the law, it becomes personal estate under the doctrine of equitable conversion, and the provision may sometimes be valid in that aspect, when it would be void as applicable to real estate. Where the circumstances of the case admit of it, the charter should always be consulted.

5. The rule laid down in the New York statutes that a corporation cannot take land by devise without express authority, applies to foreign as well as domestic corporations, if the land be situated in New York. Still, if the foreign law permits such a corporation to take land by devise, this is a sufficient compliance with the New York statute. Again, if the foreign law does not permit the corporation to take land by will, but does permit it to take personal property in that way, a direction in the will to sell the land and convert it into money will be carried into effect by the New York courts.

6. Reference must here be made to certain restrictions upon the power to devise land to corporations, of which there are two forms: one, of a broad and general nature, made with the view that the just and reasonable expectations of near relatives shall not be overlooked in devising or bequeathing property to charitable institutions, and including personal as well as real estate; the other, more precise and narrow, confined to particular corporations, and prescribing an interval of time between the execution of the will and the testator's death.

[1] Laws of 1875, ch. 130.

[2] Laws of 1813, ch. 60.

(*a*) These statutes have been changed and added to by later enactments, which, however, it is impracticable to refer to in detail. In addition to amendments relating to the particular laws mentioned in the text, the General Corporation Law (Ch. 563 of the Laws of 1890, as amended by ch. 687, of the Laws of 1892) should be consulted. An important act also is ch. 701 of the Laws of 1893, respecting gifts for charitable purposes. See *post*, p. 636.

The leading statute of the first class is ch. 360 of the Laws of 1860: "No person having a husband, wife, child, or parent shall by his or her last will and testament devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate after the payment of his or her debts (and such devise or bequest shall be valid to the extent of one half, and no more)."

In determining the amount of one half, the widow's dower and the debts are to be first deducted. If the testator divides his estate among several corporations, etc., they cannot in the aggregate take more than one half.[1] This law does not repeal other restrictions upon the capacity to take by devise, but is in its nature cumulative.

The other case of inability to take by devise is created by a statute of 1848 (ch. 319, § 6), which is applicable to "benevolent, charitable, scientific, and missionary societies." This law provides that no person leaving a wife or child or parent shall leave to an institution organized under that act more than *one fourth* of his or her estate, and that no such devise or bequest shall be valid in any will which shall not have been made and executed *at least two months before the testator's death.*

It will be observed that a strong distinction is made in this law between wills so far as they contain provisions in favor of specified charitable, etc., societies, and those that do not. In the one case, the will, so far as it contains the charitable provisions, must have been executed at least two months before death, while in other respects the will may be made at any time before death. This provision is apparently conceived in a spirit of apprehension that undue influence may be exercised upon testators towards the close of life to induce them to make testamentary provisions in favor of charitable institutions. It is taken in substance from an English statute, enacted in the reign of George II.[2]

In a large number of instances since the statute of 1848, special charters have been granted to charitable institutions by the legislature "subject to all the provisions of law relating to devises and bequests by last will and testament." It has been held that this clause subjects the charter to the rules of the law of 1848, and that such a society can take nothing by a will which is not executed

[1] Chamberlain *v.* Chamberlain, 43 N. Y. 424.

[2] 9 Geo. II. c. 36. This statute principally affects real estate. Its spirit is condemned in most vigorous terms in 2 Palgrave's History of Normandy and England, 263.

at least two months before the testator's death.[1] (*a*) The restriction applies, even though the testator leave no wife, child, or parent.[2] Foreign corporations are not affected by this provision, it being in fact not applicable to all domestic corporations, but only to a certain specified class.[3]

When a corporation has no capacity to take land by devise, the gift to it will be void. The same rule applies in New York, if its capacity is exceeded. The case does not resemble that arising under the statutes of mortmain in a conveyance where the corporation is owner, except as against the State proceeding judicially for a forfeiture.[4] This doctrine assumed great importance in the case of a large bequest and devise to Cornell University. The contestants of the will having shown that the property of the University already equalled the limit provided in the charter, the gift was declared to be void.[5]

(3) As a general rule, a corporation has power to convey such property as it may own. Such a power is an incident to ownership. It will have the power to convey, though it be chartered only for a term of years, at the end of which its capacity to hold land will cease. A conveyance of the entire interest in the land will be valid, if made during its existence. It is said to have the perfect ownership of the land for the purpose of a conveyance, though it has a defeasible interest for the purpose of enjoyment.[6]

It is in special instances restricted from conveying on two general grounds: one by a rule of the law of trusts, the other by the terms of some statute. A corporation as well as a private person holding land for a *specific purpose* of a charitable nature is as a rule disabled from conveying the land free from the trust,

[1] Kerr *v.* Dougherty, 79 N. Y. 327; Lefevre *v.* Lefevre, 59 N. Y. 434; Stephenson *v.* Short, 92 N. Y. 433.

[2] Stephenson *v.* Short, *supra.* The case of Jones *v.* Habersham, 107 U. S. 174, 177, is not opposed to this view, the language of the statute in that case not being the same.

[3] Hollis *v.* Drew Theol. Sem'y, 95 N. Y. 166.

[4] Chamberlain *v.* Chamberlain, 43 N. Y. 424, 439.

[5] Matter of McGraw, 111 N. Y. 66. There is in the opinion of PECKHAM, J., in the Court of Appeals, an elaborate discussion of the point whether the provisions of acts in this country resembling mortmain acts in England have the same effect here as in the common law, in allowing the corporation to *take* the property and hold it *by a defeasible* title until proceedings are instituted by the sovereign power for a forfeiture. His remarks are adverse to that view; still, nothing was really *decided*, except that, under the legislation regarding *wills*, if the amount of property bestowed exceed the limitations of law, the excess is void, so that any one who would have been interested in the property, had there been no will, can raise the point of invalidity.

[6] Nicoll *v.* N. Y. & Erie R. R. Co., 12 N. Y. 121.

(*a*) In the matter of Kavanagh, 125 N. Y. 418.

except to one who purchased for a valuable consideration and without notice of the trust. It is a general rule of law that trustees of charities should never alienate the trust estate without the sanction of the court.[1] Application may be made to the court by the attorney-general who is assumed to represent the public interest in the case.[2] There are decisions holding that this doctrine does not in principle apply where the property is not given *on a specific trust.* It is then held for the general purposes of the corporation, and may be conveyed, or its form be changed. In other words, the property is held in a fiduciary character, though the specific form of ownership, whether personal or real, may from time to time be changed, as long as there is nothing in the charter to forbid it.[3]

Instances of *statutes* forbidding alienation of land by religious corporations are certain acts passed in the reign of Queen Elizabeth. These are cited in the commentaries of Blackstone.[4] It is assumed by the New York courts that these statutes were adopted by the colonists of New York as a part of their common law, and have become a part of the existing common law of the State, so far as they have not been changed by legislation since the organization of the State.[5] Under this theory religious corporations must now apply to the legislature for the requisite authority to sell their land in any case where the purchase money does not inure to the benefit of the corporation. In the case where the corporation is to receive the benefit, a change in the general law permits the land to be sold under direction of the Supreme Court of the district or the County Court of the county where the land is situated. (*a*)

VII. *The right and capacity of a corporation to sue and to be sued.* — It is a reasonable deduction from the capacity of a corporation to acquire rights under contracts and otherwise, that it should have the power to present its rights in court for enforce-

[1] Hill on Trustees, 462, 463.

[2] A statute in England, known as Sir Samuel Romilly's Act, allows a petition to be resorted to. 52 Geo. III. c. 101 ; *Re* Parke's Charity, 12 Sim. 329.

[3] This seems to be the effect of Wetmore *v.* Parker, 52 N. Y. 450, though the property there was personal.

[4] 2 Bl. Com. 320, 321. The statutes are 13 Eliz. c. 10 ; 14 Id. c. 11 & 14 ; 18 Id. c. 11 ; 43 Id. c. 9. These extend the provisions of 1 Eliz c. 19, which referred to grants made by bishops and archbishops to other ecclesiastical and eleemosynary corporations.

[5] De Ruyter *v.* The Trustees of St. Peter's Church, 3 Barb. Ch. 119 ; on appeal, 3 N. Y. 238 ; M. A. Baptist Church *v.* Baptist Church in Oliver St., 46 N. Y. 131, 142, 143.

(*a*) For the procedure in such casea, see Code of Civ. Pro. §§ 3390-3397. Matter of Church of the Messiah, 25 Abb. N. C. 354. In the same manner the corporation may apply for leave to mortgage its real property. Laws of 1890, ch. 424, amending ch. 60 Laws of 1813. Matter of Church of the Messiah, *supra.*

ment. No technical obstacle is in its way, for it is a person, and may appear in court in its corporate name, however numerous its membership may be. It is immaterial whether it be a foreign or a domestic corporation, though a foreign corporation may, if a State see fit, be placed under some restrictions, not applicable to domestic corporations, such as being required to give security for costs chargeable to it in case its suit is unsuccessful. The rule includes municipal as well as private corporations. So a State of the Union, a foreign State, or a monarch may sue in a corporate capacity. If a foreign nation sue in our courts, it must submit itself to the usual rules applicable to plaintiffs in actions.[1]

Under these rules a foreign sovereign might sue in a court of equity as well as of law.[2] For example, he might bring an action here to protect from invasion his right of issuing coin or paper money.[3] No distinction is made in the English courts in this respect between a monarchy and a republic.[4] The minister of a foreign nation does not so represent the nation itself that he can bring an action in his own name to recover national property.[5] A State of the United States may sue in the Federal or State courts in a proper case.[6]

The right of a corporation chartered in one State to sue a citizen or corporation of another State in the *Federal courts* is guaranteed by the United States Constitution;[7] and a corporation created by the laws of one State may maintain an action in the Federal courts of another State.[8] It is a presumption which the courts will not allow to be rebutted, that if a corporation has a legal existence in a State, its corporators are citizens of that State for the purpose of availing itself of this principle.[9] It has been further decided that a corporation chartered in a foreign country may be treated as an alien,[10] and for the same purpose, it would seem, its members might be presumed to be aliens.

[1] Republic of Peru *v.* Weguelin, L. R. 20 Eq. 140.

[2] King of Spain *v.* Hullett, 1 Cl. & F. 333.

[3] Emperor of Austria *v.* Day and Kossuth, 2 Giff. 628; s. c. 3 De G. F. & J., 217.

[4] United States *v.* Prioleau, 2 H. & M. 559; United States *v.* McRae, L. R. 8 Eq. 69; United States *v.* Wagner, L. R. 2 Ch. App. 582.

[5] Baron Penedo *v.* Johnson, 29 L. T. N. S. 452.

[6] As to the right of a State of the Union to sue in the courts of a sister State, see State of Illinois *v.* Delafield, 8 Paige, 527; s. c. under name of Delafield *v.* State of Illinois, 26 Wend. 192 (Senator VERPLANCK's opinion), and 2 Hill, 159 (BRONSON's, J., opinion).

[7] Art. III. § 2.

[8] Insurance Co. *v.* "The C. D. Jr.," 1 Woods, 72; Nat. Park Bank *v.* Nichols, 4 Bis. 315; Williams *v.* Missouri K. & T. R. R. Co., 3 Dill. 267.

[9] This point at one time was a matter of great uncertainty, but is now settled as stated in the text. Ohio & M. R. R. Co. *v.* Wheeler, 1 Black, 286; Ins. Co. *v.* Francis, 11 Wall. 210; Railroad Co. *v.* Harris, 12 Id. 65; Railway Co. *v.* Whitton, 13 Id. 270.

[10] Society, &c. *v.* New Haven, 8 Wheat. 464.

The liability of a corporation *to be sued* is not governed in all respects by the same principles as the right to sue. The case of domestic corporations, foreign corporations, and foreign states will be considered separately.

A domestic corporation may be sued in the courts of the State where it is chartered, or in the Federal courts, embracing the State of its origin, in the cases allowed by the United States Constitution. The proceedings in this case are not substantially different in an ordinary action from those which prevail in the case of a natural person. A successful party may obtain judgment, issue an execution, and sell the property of a corporate debtor, as in the case of an individual debtor. The creditor cannot sell the corporate franchise in this manner. This can only be reached by a proceeding in a court of equity.

Corporations are in modern times largely treated as holding their property in trust, so that the most important litigations to which they are subject are in courts of equity. Courts of that class have the power to deal with the intricate questions involved through the medium of receivers and other officers, and by means of such orders and directions as are flexible and calculated to secure the rights of creditors with a due regard to the interests of shareholders and others interested in the corporate property. The details of this subject must be sought in local State statutes and in treatises and reports in equity.

A foreign corporation could not, at common law, be sued in the courts of another State in regular form, since it could not be found there. It was considered to be always a *non-resident* defendant if sued in another State, incapable of leaving the State of its origin.[1] This general rule has been modified in many States by statutes authorizing the corporation's property to be seized and appropriated to the payment of its debts. Such a proceeding has for its object the appropriation of property within the State rather than the rendering of a judgment enforceable in another State.[2] (*a*)

[1] Lathrop *v.* Union Pacific Ry. Co., 1 MacArthur, 234; Matter of M'Queen *v.* Middletown Mfg. Co., 16 Johns. 5.

[2] Pennoyer *v.* Neff, 95 U. S. 714.

(*a*) The doctrine that a foreign corporation is without the jurisdiction of every State except the State wherein it is organized has been modified by statutes in many States to the extent of allowing service of process upon representatives of such a corporation doing business within the State. St. Clair *v.* Cox, 106 U. S. 350.

In not a few States, also, foreign corporations are admitted to do business only upon the condition that they shall designate some agent or perhaps some public officer to receive service in their behalf. If an action is begun in this manner, the court acquires jurisdiction, and may render a judgment valid and capable of being enforced upon any property within the jurisdiction. Gibbs *v.* Queen Ins. Co., 63 N. Y. 114; *Ex parte* Schollen-

The statutes of New York upon this subject are to be found in the Code of Civil Procedure.[1]

The question of the liability of a foreign sovereign or government to be sued has not to any extent been presented in this country, though it has frequently been passed upon in the English courts. In a number of cases this has been due to the temporary presence of a foreign king in England. It is there declared to be a general rule that no action is maintainable in an English court against a foreign sovereign for anything done, or omitted to be done, in his public capacity as representative of the nation of which he is the head.[2] This rule is applied even though the sovereign is also a British subject.[3] The Khedive of Egypt is not a sovereign prince within this rule.[4]

An important qualification of this rule has been made when a foreign government places funds in the hands of an agent in England to pay a contractor the amount due under a contract. Such a transaction, if unequivocal, might be regarded as an assignment (in equity) to the contractor, or a *species of trust* in his favor which a court of equity would administer.[5] This exception will

[1] See §§ 432, 707, & 1780.

[2] Matter of De Haber and Queen of Portugal; Wadsworth and Queen of Spain, 17 Q. B. 171.

[3] Brunswick *v.* King of Hanover, 2 H. L. Cases, 1.

[4] The Charkieh, 28 L. T. N. S. 513.

[5] Larivière *v.* Morgan, L. R. 7 Ch. App. 550; on appeal, L. R. 7 H. L. 423. This last decision reverses the lower court.

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berger, 96 U. S. 369; Van Dresser *v.* Oregon Ry. & Nav. Co., 48 Fed. R. 202. Such a judgment would also be entitled to full faith and credit in another State. Lafayette Ins. Co. *v.* French, 18 How. U. S. 404; Pringle *v.* Woolworth, 90 N. Y. 502. If the corporation failed to comply with the statute, it would not, it is believed, be permitted to assert its noncompliance in order to avoid the jurisdiction of the courts, and service made on an agent or the prescribed public officer would be held sufficient. Ehrman *v.* Teutonia Ins. Co., 1 McCrary, 123; Hagerman *v.* Empire Slate Co., 97 Pa. St. 534.

It is stated positively by many authorities that in order to be valid elsewhere, a judgment against a foreign corporation must show on its face that the corporation is doing business in the State where the judgment was rendered. Black on Judgments, § 910; Freeman on Judgments, § 120 *b*; St. Clair *v.* Cox, *supra*; Henning *v.* Planters Ins. Co., 28 Fed. R. 440; Hazeltine *v.* Mississippi. Val. Fire Ins. Co., 55 Fed. R. 743; Moulin *v.* Ins. Co., 24 N. J. Law R. 242. Nevertheless, it has been held in New York under the statutes of that State, that the court acquired jurisdiction over a foreign corporation having no office or property, and doing no business within the State, by the service of a summons upon an officer temporarily in the State for purposes of his own. It was further stated that a judgment obtained upon such service would be valid for every purpose within the State, though its effect elsewhere was not discussed. Pope *v.* Terre Haute Car Manuf. Co., 87 N. Y. 137. See also Hiller *v.* Burlington, &c. Ry. Co., 70 N. Y. 223; Tuchband *v.* Chicago & Alton Ry. Co., 115 N. Y. 437. A contrary rule to that laid down in Pope *v.* Terre Haute Car Manuf. Co., *supra*, is maintained in Phillips *v.* Library Co., 141 Pa. St. 462. See also Moulin *v.* Insurance Co., *supra*; Newell *v.* The Great Western Ry. Co., 19 Mich. 336; State *v.* Dist. Court for Ramsey Co., 26 Minn. 233.

not be applied in favor of the holder of the bonds of a foreign government, though there be money in England in the hands of an agent which the foreign government has bound itself to direct him to apply to the payment of interest. In this last case there is no *fiduciary* relation between the agent and the bond-holders.[1] To appropriate the fund would be an indirect mode of holding the foreign government responsible for the payment of its bonds in an English court. In these last two cases the foreign government did not appear in the action. It would seem that it might appear, if it saw fit, and submit to the jurisdiction of the court in appropriating the funds.

It is a general rule that a State cannot be sued in its own courts without its consent. It may, however, upon grounds of justice and expediency, allow itself to be sued in certain cases, as has long been the rule in England, by means of a proceeding termed "a petition of right."[2] By a similar course, claims against the United States are decided by the Court of Claims. Something resembling this is found in some of our States.

There was a provision of great breadth in the United States Constitution, as at first adopted, permitting an action or suit to be brought by individual plaintiffs in the United States courts against a State.[3] This provision was construed by the Supreme Court of the United States to permit an individual citizen of one State to bring an action against a State of which he was not a citizen in the Federal Court.[4] This decision led to the Eleventh Amendment of the Constitution, as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state." The plain effect of this clause is to prevent a direct action or suit against the State by a citizen either of this country or of a foreign country. A controversy of great moment has arisen as to the point whether this clause prevents proceedings against the agents of the State who, in obedience to a law of the State, assume to violate the obligation of a contract claimed to have been made between the State and individuals. The Supreme Court of the United States, by a narrow majority, has decided that an action might be brought against the agents of the

[1] Twycross *v.* Dreyfus, L. R. 5 Ch. Div. 605.

[2] See *ante*, p. 3.

[3] Art. III. § 2. The words are that the judicial power of the United States shall extend "to controversies between two or more States; between a State and citizens of another State, . . . and between a State or the citizens thereof and foreign States, citizens, or subjects."

[4] Chisholm *v.* Georgia, 2 Dall. 419.

State in such a case, notwithstanding the constitutional provision, as that would not be an action *against the State*. If a tax collector or other State officer takes the property of a private person under an unconstitutional law, he cannot shield himself from liability, since such a pretended law is in truth not a law; so that the action is really against him as if he had not been an officer.[1] This principle will not permit a suit to be brought nominally against a State officer, which is in reality a suit against the State; as if the object be, for example, to determine the obligations of the State on certain State scrip.[2]

A suit to compel State officers to do that which a State statute requires them to do is not a suit against the State in the sense of the Constitution.[3]

VIII. *Special questions as to the powers of corporations.* — (1) *The question of status.* — Under this topic will be considered two principal points: first, the domicile of a corporation; second, the capacity of a corporation to act beyond the limits of the State creating it.

It is a rule of American law that a corporation is domiciled in the State where it is created.[4] It cannot, if a trading corporation, hold a meeting of stockholders beyond the State limits.[5] (*a*)

The rule in English law is different, as it allows the domicile of a trading corporation to be determined by the place where the principal business is carried on, "where it has the centre of its affairs" (*der Mittelpunkt der Geschäfte*), even though beyond the territory of the State where the corporation is created. In a recent case the English court inquired on this basis whether an English corporation was domiciled in Italy, and, in the same connection, whether a corporation was domiciled in Calcutta.[6]

Leaving this question out of view, the general rule would be

[1] Poindexter *v.* Greenhow, 114 U. S. 270; White *v.* Greenhow, Id. 307; and other cases (called the Virginia Coupon Cases).

[2] Hagood *v.* Southern, 117 U. S. 52. *In re* Ayers, 123 U. S. 443.

[3] Rolston *v.* Missouri Fund Com'rs, 120 U. S. 390.

[4] Bank of Augusta *v.* Earle, 13 Pet. 519; Ohio & M. R. R. Co. *v.* Wheeler, 1 Black, 286; B. & O. R. R. Co. *v.* Glenn, 28 Md. 287; Blackstone Manuf. Co. *v.* Inhab. of Blackstone, 13 Gray, 488.

[5] Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623.

[6] Cesena Sulphur Co. *v.* Nicholson, L. R. 1 Exch. Div. 428; Calcutta Jute Mills Co. *v.* Nicholson, Id. See also Attorney-General *v.* Alexander, L. R. 10 Exch. 20.

(*a*) A corporation chartered by several States with the same capacities and powers has been held to have a domicile in each State. County of Allegheny *v.* Cleveland, etc. Ry. Co. 51 Pa. St. 228. In the absence of statutory provision, such a corporation could hold meetings of its stockholders in any one State, so as to bind the corporation in respect to its property everywhere. Graham *v.* Boston, etc. Ry. Co., 118 U. S. 161.

as to the local place of residence of a trading corporation within the state of its domicile, that the principal place of administration must be regarded.[1] Where the inquiry is as to other corporations, such as churches or charitable corporations, the general rule is that they reside where their functions are to be discharged. So that a church organized for work in the city of New York has its residence there.[2]

The existence of a foreign corporation is recognized in the courts of other States. The capacity to enter into legal transactions in such a case must be determined by an examination of the law constituting the corporation, as well as of the country where the transactions take place.

A State may prevent a foreign corporation from entering into a contract which it might allow in the case of a domestic corporation. This principle applies as between the States of the Union. A corporation chartered in Ohio is in New York a foreign corporation. A State of the Union may impose conditions upon a corporation chartered elsewhere as to business transacted within its limits. These must be observed, and a contract made without observance of them will be void.[3](*a*) Thus, if the provision were that a foreign corporation, before doing any business in the State, must duly execute a power of attorney appointing an agent, upon whom all legal process may be served in suits against the corporation, a contract made without such an appointment would be illegal and void.[4] A statute requiring an act to be done after commencing business, such as filing a specified instrument within thirty days after that time, would not prohibit the corporation from continuing business after the time had expired, even though it had failed to comply with the statute.[5]

A law passed by a State legislature prohibiting a foreign corporation when sued in its courts from removing the case under the provisions of the Act of Congress applicable to the subject into the United States courts, is unconstitutional and void, and the

[1] Keynsham Blue Lias Co. *v.* Baker, 2 H. & C. 729; Taylor *v.* The Crowland Gas & Coke Co., 11 Exch. 1; Adams *v.* Gt. W. R. R. Co., 6 H. & N. 404.

[2] Dicey on Domicil, 111, 112.

[3] Lamb *v.* Lamb, 13 Bankr. Reg. 17.

[4] *In re* Comstock, 3 Sawy. C. Ct. 218; Semple *v.* Bank of British Columbia, 5 Sawy. 88.

[5] Northwestern Mut. Life Ins. Co. *v.* Overholt, 6 Cent. L. J. 188.

(*a*) Union Cent. Life Ins. Co *v.* Thomas, 46 Ind. 44; Dudley *v.* Collier, 87 Ala. 431. A distinction is made by some authorities between executed and executory contracts. Farrior *v.* New Eng. Mort. Co., 88 Ala. 275. The contract will not be declared void unless it is plain the legislature so intended. Toledo Tie, etc. Co. *v.* Thomas, 33 W. Va. 566; Sherwood *v.* Alvis, 83 Ala. 115; Morawetz, Private Corporations, § 665.

removal may be made regardless of the law. Still, if a law should be framed so as to revoke the license of a foreign corporation to do business within the State if it made such a removal, the law would be valid, and the corporation would have to elect between withdrawing from the State and complying with the law. This rule rests upon the proposition that as the State has the right to exclude foreign corporations, the Federal courts will not inquire into the reasons for the State's action, or into the means of enforcing it.[1]

(2) *Corporations as trustees.* — It was formerly a mooted question whether a corporation could be a trustee. It is now well settled that it can be. Any other view is based on a mere technicality. If a trading corporation, it is a trustee as between itself and its shareholders. It may also hold property in express trust, as has been shown in the case of charitable corporations. Moreover, in modern times corporations are expressly created for the purpose of acting as trustees for third persons. Of these there are many examples in the State of New York, having large capital and transacting a great amount of fiduciary business. These corporations, called Trust Companies, act as guardians for wards, so far as administering estates are concerned, as trustees to pay over income to beneficiaries, as trustees of railroad mortgages in behalf of bondholders, and in other analogous transactions. Companies of this class are placed under the control of the superintendent of the banking department, and are required to make periodical reports to him, and to submit to an examination by competent experts, and to deposit with him as a guarantee fund ten per cent. of their paid up capital stock. (*a*) Companies of this class have proved highly useful to the community, and, with few exceptions, have been managed with fidelity and success.

(3) *Construction of corporate charters.* — It is a general rule of law that a corporation possesses no powers except those which are specifically granted, or which are incidental to specific grants. This general rule is declared by statute also in some States; *e. g.*, in New York. Whenever privileges are granted to a corporation, they are to be strictly construed; nothing passes but what is granted in clear and explicit terms.[2] The principal difficulty is in determining what powers are incidental to specific grants. A few instances may be mentioned.

Thus, a corporation has an implied power to accept a bill of

[1] Doyle *v.* Continental Ins. Co., 94 U. S. 535.

[2] People *v.* Newton, 112 N. Y. 396.

(*a*) See Laws of 1892, ch. 689, § 14.

exchange or make a promissory note based upon a debt contracted by it in the course of its business.[1] This rule could not be applied to a note given outside of its legitimate business. It must affirmatively appear that it was made in the course of its business.[2] This rule is applied to a municipal corporation as well as to one of a private nature.[3]

A corporation has an implied power to borrow money to use in its legitimate business, and to give its note or draft on that account.[4] It may, of course, pay its lawful debts, and may to that end make a general assignment in trust for its creditors, unless prohibited by statute.[5] (*a*) A trading corporation may, as a trustee for its stockholders, bring an action in their behalf to cancel spurious certificates of stock.[6] It cannot, however, as a rule, use its funds to sustain another corporation. (*b*) A corporation having power to insure lives has an incidental power to invest its property (held as a protection for the insured) in approved securities, such as suitable bonds and mortgages.[7]

If, however, a corporation be restricted by statute to a particular mode of doing business, it must follow that method. If it have authority to loan only upon bond and mortgage, any other investment will be void.[8] This is true both of the security and the loan itself.[9]

Though some of these cases seem severe and harsh in their operation, they would appear to be sound, as long as the view prevails that a corporation is a creature of limited powers.

SECTION IV. *The Visitation of Charitable Corporations.* — The word "visit," as here used, means the right of one or more persons known as visitors, to examine into the condition of the corporation, to search for abuses and irregularities, and to correct them if found to exist. In some instances their action is invoked by persons interested in the corporate affairs. If the corporate

[1] Moss *v.* Oakley, 2 Hill, 265; Partridge *v.* Badger, 25 Barb. 146.

[2] McCullough *v.* Moss, 5 Den. 567.

[3] Halstead *v.* Mayor, &c. of N. Y., 3 N. Y. 430.

[4] Curtis *v.* Leavitt, 15 N. Y. 9.

[5] Hurlbut *v.* Carter, 21 Barb. 221.

[6] N. Y. & N. H. R. R. Co. *v.* Schuyler 17 N. Y. 592.

[7] Farmers' Loan & Trust Co. *v.* Clowes, 3 N. Y. 470.

[8] New York Firemen Ins. Co. *v.* Ely, 2 Cow. 678.

[9] Life & Fire Ins. Co. *v.* Mechanic Fire Ins. Co., 7 Wend. 31.

(*a*) Such assignments are frequently prohibited, when the corporation is insolvent. In New York, see The Stock Corporation Law, § 48. In the absence of express words, a foreign corporation is not regarded as within the terms of this prohibition, and, an assignment by it would be upheld, if valid by the laws of its domicile, even though executed in New York. Vanderpoel *v.* Gorman, 140 N. Y. 563.

(*b*) Cf. Holmes *v.* Willard, 125 N. Y. 75.

body has become inactive or dormant, it should be stimulated to action. If it is acting extravagantly and without due warrant, it should be restrained.

Visitation, in its strict sense, is applicable to charitable and ecclesiastical corporations. It is not necessary to consider the case of ecclesiastical corporations, there being none in this country.

The "visitation" of charitable corporations is derived from the doctrine of foundations and "founders." The word "founder" is used in two senses in English corporation law. One meaning refers to the person who in the outset supplies the property to carry on the corporate business; the other refers to the king or other authority that gives legal existence to the corporation. No particular words are necessary to create a visitor. An authority to one to inspect the foundation and correct what he may find amiss, makes him a visitor. The necessity of a visitor arises from the fact that charitable institutions are in their nature perpetual, and in the lapse of time abuses may arise. "Visiting" is not confined to corporations, but may extend to unincorporated trustees. The more common case found in the law books is the visitation of corporations. There may be a series of foundations made by different persons, so that one may have an original design upon which later foundations are grafted. In such a case the one who first supplied the funds would be deemed the founder, unless there may be special circumstances varying the rule. The king, in England, has in many instances established a charitable foundation. The Lord Chancellor, in such a case, becomes a visitor, as representing the king. He does not in such a case hold the Court of Chancery, but has an authority resembling that of a visitor on a private foundation or an endowment.

In other cases, the visitatorial power vests in the founder, and on his death passes to his heirs; but if he leave no heirs, it devolves upon the king. The authority may be delegated to others by the founder. The fundamental principle is, that the owner of the property has the right to oversee within certain limits the disposition that may be made of it.

It is common for the founder to lay down rules for the management of the institution. These are commonly called statutes. It is a part of the business of the visitor to see that these "statutes" are observed. These statutes are frequently in England of long standing, often whimsical in their nature, and poorly suited to modern conditions of life. Unless contrary to public policy, or illegal in their nature, they will be enforced, the will of the founder, though long since dead, being still followed. Some

remarkable instances of this rule are found collected in a work called "The Dead Hand." [1]

A distinction in the law of visitation of corporate charities is to be taken between the case where the funds belong to the corporation for its general purposes, and where they are vested in it for special purposes, or, in other words, held on special trusts. The distinction is so important that illustrative examples will be useful.

Let it be supposed that a testator simply bequeaths to a college ten thousand dollars. No restriction is placed by him upon the use of the money. The corporation may use it for any legitimate purpose. It holds the property in a fiduciary character, but not on any special trust. On the other hand, let a testator give a fund to be invested, of which the income shall be used to found a particular professorship, or establish a scholarship to be filled only from time to time by beneficiaries bearing his own name. There is now a special trust. These two cases will now be treated separately.

(1) *Charitable funds held for general purposes.* — A preliminary remark may properly be made as to the meaning of the word "charitable," as applied to corporations, and also applicable to trusts under the care of trustees, not incorporated. The word

[1] This book was written by Sir Arthur Hobhouse, now Lord Hobhouse, a lawyer of great distinction, an English judge, and a member of the judicial committee of the Privy Council. (London, 1880.) He refers to the case of Bishop Pursglove, who founded a school in Hull in the year 1560. His scholars were to range from those who had not yet learned to speak plainly to those who could read Horace and Cicero, and write Latin verses. The school is divided into four forms, and the studies of each form were prescribed by the bishop in minute detail. The whole teaching, substantially, is to be done by the master in person, beginning with teaching the children to pronounce and sound their letters, and ending with the highest work. He must be teaching ten hours per day in the summer and eight in the winter, with only five weeks' vacation. The scheme of the bishop still prevails, leading to a deadly feud from time to time between the master and the governors of the charity, who threaten to dismiss him if he does not follow literally the plan of instruction and discipline laid down three hundred years ago. Other cases still more peculiar might have been cited. Sometimes the statutes encourage wild acts on the part of the students, as in Sir John Deane's charity in Wilton, County of Chester, A. D. 1557, where the scholars were directed by the founder to "bar out the schoolmaster" a week before Easter and Christmas.

It has been suggested by leading writers on this topic, that the rules of law should be more flexible than at present, and that while the views of "founders" or donors should be observed when their plans are reasonable or practicable, yet that the proper court should have power to modify them where there is clear reason to justify such action. See "The Dead Hand," p. 229. Any scheme of this kind should be adopted with much caution, as it might result in diminishing or perhaps extinguishing charitable gifts or bequests. In this country, reference would have to be made in altering the charter of a charitable corporation to the prohibitions of the United States Constitution as to the impairment of the obligation of contracts.

"charitable" has long been in use to designate trusts for public as distinguished from private purposes. There is in a charity some assumed element of public utility. Although in existence from the earliest period (derived in all probability from the Roman law), they assumed special prominence towards the close of the reign of Queen Elizabeth, owing to a statute passed at that time making an enumeration of them, and providing a special judicial mode of redressing abuses in their management.[1] This special tribunal was auxiliary to the Court of Chancery. After a time it became obsolete, and the entire jurisdiction was exercised by the Court of Chancery. The enumeration of existing charitable institutions was very imperfect, so that the court has established new ones from time to time as occasion required, having in them the essential element of public utility. One highly important distinction between a private trust and a charitable trust is, that while the former can only be made for a limited period, varying in the different States, charitable trusts may be made perpetual; so that a fund may be established to produce a perpetual income to be devoted from time to time to the purposes of the charity.

Assuming now that property is given to a charitable corporation for its *general purposes*, the visitatorial power which may be vested in the corporation will include both the internal management of its affairs and the disposition of its property. In other words, it is visitor both over the beneficiaries and over the property, though as its relation to the property is a fiduciary one, the court in a plain case of diversion of the property to illegitimate uses, would interfere.

(2) *Special trusts.* — In this case the powers of the visitors are greatly circumscribed. A general statement is, that while the corporation may control internal management, — as, for example, pass resolutions, hold examinations, confer degrees, etc., — yet when any question of a breach of trust arises, the Court of Chancery may give redress, without reference to any opposing action of the visitor. The court does not proceed by way of appeal, but has an inherent power to redress the breach of trust. The great case on this subject, Green *v.* Rutherforth,[2] was disposed of by Lord Hardwicke, and has ever since been followed. The visitor may be the founder, or his heirs, a special individual appointed, or a corporation, and either a public, ecclesiastical, or lay corporation. In every case, the inquiry is the same; namely, Is there a special trust? If so, has it been violated? If the public at large is interested, the attorney-general will present the matter

[1] 43 Eliz. c. 4 (A. D. 1601). [2] 1 Ves. Sr. 462.

to the court. If an individual is injured, as if a professor appointed during good behavior, and having a fixed stipend from a special fund, is removed improperly by the visitor, the court will interfere on his own application, and restore him to his rights.[1]

The jurisdiction of the visitor, limited as already stated, is in general absolute and without appeal upon the principle that in those societies error of judgment or even the chance of partiality or injustice is a less evil than the duration of contention.[2] The visitor proceeds in a summary and informal manner; still the great principle must be followed that a person is not to be condemned without an opportunity to be heard.

In some of the States there are statutes permitting an appeal from the sentences of visitors. In general, however, the subject remains substantially as at common law. A well-known example of an appeal is found in Massachusetts in the instance of the Andover Theological Seminary.[3] The cases cited in the note involved the question whether the visitors proceeded according to law in the removal of Professor Murdock, one of the professors in the institution.

The subject of visitation is frequently applied to the management of colleges and other institutions of education. Only its general principles can be adopted in this country, owing to the difference between the organization of such institutions in England and in the United States. In the English colleges the corporation consists of the teaching and governing body itself. There no board of trustees exists as is usually the case here. The visitor is called in occasionally to hear an appeal or to quiet dissension. He is frequently but a single person. He does not act directly in the management of the institution, but rather controls the acts of others, and keeps them within the requirements of the statutes. He is not the corporation, but is set over it. On the other hand, the management of colleges here is as a rule confided to persons who are not the teachers or actual governors, but are called trustees. These form the corporation. The officers have no self-perpetuating power, and as a rule hold office at the

[1] The cases in England upon this point are now very numerous and uniform. In addition to Green *v.* Rutherforth, already cited, there may be examined Att'y-Gen'l *v.* Corporation of Bedford, 2 Ves. Sr. 505; Att'y-Gen'l *v.* Middleton, Id. 327; Att'y-Gen'l *v.* Lubbock, 1 C. P. Coop. 15; Att'y-Gen'l *v.* Browne's Hospital, 17 Sim. 137; Att'y-Gen'l *v.* Dixie, 13 Ves. 519; Att'y-Gen'l *v.* Magdalen Coll., 10 Beav. 402; Att'y-Gen'l *v.* St. Cross Hospital, 17 Beav. 435. For cases in which a claimant presented his own claim without the intervention of the Att'y-Gen'l see Thomson *v.* University of London, 10 Jur. N. S. 669; Dangars *v.* Rivaz, 28 Beav. 233.

[2] St. John's College *v.* Todington, 1 Burr. 159, *per* LORD MANSFIELD, p. 199.

[3] Murdock, Appellant, 7 Pick. 303; also Murdock *v.* Phillips Academy, 12 Pick. 244, construing stat. of 1823, ch. 50, passed January 17, 1824.

pleasure of the trustees. Under such circumstances, the power of visitation, being vested in the trustees, consists principally in supervising the conduct of their own officers or employees, in laying down rules for their action, in accordance with any statutes of the founder. As visitors, their action would be final in the same way as in England. The funds are administered by the trustees subject to the supervisory power of the court. Where a new professorship or scholarship is founded, it is the duty of the trustees to apply the funds as pointed out by the founder, in conformity with the original foundation. If there be no such regulations prescribed by him, a general gift may be devoted to the general purposes of the institution.[1]

SECTION V. *Judicial Control of Corporations.* — Although "visitation" in its technical sense has no application to business corporations, still they are liable to judicial control in case of abuse of power. In this class of cases there are specific remedies, such as a *quo warranto*, an information in the nature of a *quo warranto*, or a writ of *scire facias*. When a corporation refuses to act, a *mandamus* may be resorted to. For abuse of trust, the courts of equity may give redress. Remedies of the first class are obtained in a court of law, and are sometimes termed "prerogative writs," as being set in motion by the sovereign power in the State.

Scire facias is a term derived from the words used at the commencement of the old writ in Latin. It may be resorted to either where there is an original defect in the charter, as where it was obtained by fraud, or where a legal corporation, in full possession of powers, abuses them; a *quo warranto* is properly resorted to where the corporation is imperfectly organized, but nevertheless continues to act as a corporation.[2] This writ is quite technical in its form, and in modern times the practice is to resort to an "information in the nature of a *quo warranto*," which is much simpler.[3] The main object of the proceeding is to try the right of the corporation to exercise the powers which it claims;

[1] The foundation of Girard College in Philadelphia is an instance where detailed rules are prescribed by the founder. These are in part set forth in the report of the case in the Supreme Court of the United States, where various questions concerning the foundation were litigated. The City of Philadelphia was made trustee and visitor. Vidal *v.* Girard's Executors, 2 How. U. S. 127, 129–136.

[2] Grant on Corporations, 296.

[3] An information is an accusation exhibited against a person for a criminal offence. It differs from an indictment which is found by a grand jury in that it is only the allegation of the party who files it, *e. g.*, the attorney-general. It is allowable in this class of cases on the ground that the usurpation of power is in the nature of a criminal offence. Leave of the court to file it must in general be obtained.

and if it appear to have no right, then to declare the result, which may be the forfeiture of the charter.

In many of the States these proceedings are regulated by codes of procedure. The substance of the remedies referred to is retained, but the methods are simplified.[1] There are other remedies to enforce a claim against a corporation, which may result in its dissolution. These will be considered hereafter.

Remedies also exist against the *officers* of a corporation for malfeasance in office for abuse of trust as well as for misleading third persons who may be induced to trust the corporation or perhaps to purchase its stock or other property by reason of fraudulent representations. This topic is of especial importance in the case of stock corporations. A large part of the business of such corporations is managed by boards of managers, directors, or trustees. To them great pecuniary interests are frequently confided, which are not infrequently abused. Independent of statute, the remedies to be sought by the owners of the funds will be those applied by general rules of law to defaulting trustees. Creditors may also have a standing in court to consider the funds as held *in trust* for the payment of their claims, in which case the directors, etc., may be held personally accountable to them. It is a general principle of law that, if the directors exercise their functions for the purpose of injuring the corporate interests, they are personally liable for any loss sustained.[2]

In the discussion of this subject it is necessary to consider the relation of corporate trustees or directors towards the corporation, their position towards third persons, the rights of third persons against the corporation for the misconduct of its trustees or directors, and finally the remedies existing in favor of the corporation against its trustees or directors for their negligent or wilful misconduct.

(1) *The relation of corporate trustees to the corporation.*— There are two aspects in which the relation of directors and trustees to the corporation may be regarded: one is, that of agents, and the other that of strict trustees. Their duties in the character of agents would closely resemble those of other agents, and would be governed by the general rules of the law of agency. It is a settled rule, that if they exercise their functions for the purpose of injuring the corporate interests, they are personally liable.[3]

[1] See New York Code of Civil Procedure, §§ 1797–1803. These sections do not apply to an incorporated library society, nor to a religious corporation, nor to a select school or academy incorporated by the regents of the university or by act of the legislature, nor to a municipal or other political corporation. § 1804.

[2] Att'y-Gen'l *v.* Wilson, 1 Cr. & Ph. 1.

[3] Id.

In order to be regarded as strict trustees, they must have the title to the property. In such a case, their liability could only be enforced in equity at the suit of the corporation or others representing it, *e.g.*, a receiver. Special and summary remedies are sometimes provided by statute, as where an officer will not surrender documents or pay over moneys to the corporation. Such remedies are usually deemed to be cumulative, and do not displace the ordinary right of action for breach of official duty.[1]

Referring now more particularly to trading corporations, it has been held to be a great and broad principle of justice, applicable to all systems of law, unless there be evidence to the contrary, that the governing body of a corporation cannot use its funds for any purpose other than those for which they were contributed. Any powers given to the governors, whether by statute or otherwise, are to be construed with reference to this principle.[2]

If the directors use the funds for unauthorized transactions, they cannot retain the benefit of them to their own use, unless with the consent of the shareholders, after the particulars of the transaction have been fully explained to them.[3] A director holds fiduciary relations to the company, and in any transaction between him and the company, is bound to communicate all that knowledge of its affairs which he could have acquired in the due discharge of his duties. If he buy its obligations at a discount without having observed this rule, he cannot enforce them in full, but can only claim what he paid for them with interest.[4] (*a*) Directors are liable for losses occasioned by gross neglect.[5] (*b*) This rule cannot be extended to cases where the misfeasance was committed in the director's absence and without his knowledge.[6] (*c*) Presence at a meeting of the directors where a breach of trust is committed without dissent by a particular director is deemed to be an active participation by him in such breach of trust.[7]

[1] Mayor, &c. of Lichfield *v.* Simpson, 8 Q. B. 65.

[2] Pickering *v.* Stephenson, L. R. 14 Eq. 322.

[3] General Exch. Bk. *v.* Homer, L. R. 9 Eq. 480.

[4] *Ex parte* Larking, L. R. 4 Ch. D. 566.

[5] Overend & Gurney Co. *v.* Gibb, L. R. 5 H. L. Cas. 480.

[6] Land Credit Co., &c. *v.* Fermoy, L. R. 5 Ch. App. 763.

[7] Power *v.* O'Connor, 19 W. R. 923.

(*a*) Bulkley *v.* Whitcomb, 121 N. Y. 107.

(*b*) Hun *v.* Cary, 82 N. Y. 65; Wallace *v.* Lincoln Savings Bank, 89 Tenn. 630; Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Marshall *v.* F. & M. Savings Bank of Alexandria, 85 Va. 676. An action by a corporation against its officers to recover damages caused by mere error of judgment is not maintainable. Holmes *v.* Willard, 125 N. Y. 75.

(*c*) Movius *v.* Lee, 30 Fed. R. 298. Cf. Williams *v.* McKay, 46 N. J. Eq. 25.

(2) *The position of the trustees or directors towards third persons.* — Directors may make themselves liable to third persons by any words or acts on their part which constitute a contract by them. For example, they may sign notes which in legal view purport to bind themselves instead of the corporation.[1] So they may warrant to third persons that a particular person has authority to act as agent for the company, when he has no such authority.[2] A representation to that effect which turns out to be untrue would be construed to be such a warranty. This principle cannot be extended to a statement as to a rule of law. A person cannot be supposed to warrant what the rule of law is concerning a particular transaction. It follows that a letter signed by directors and addressed to a bank, requesting it to honor checks when drawn in a particular manner, is not a representation that the directors had any authority to overdraw the account of the company, nor does it import any undertaking that the directors would be personally liable, if the bank did not pay the checks.[3] The directors may be liable to a third person for the publication of false reports whereby the latter, relying upon them, sustains injury, — as if, for example, he had become a stockholder in reliance upon the statements.[4] Where the directors make an erroneous statement of profits, but without bad intent, they will not in general be liable.[5]

Questions of this kind frequently arise in connection with the publication of a prospectus stating the organization and prospects of some new adventure. The general rule is, that no material mis-statement or even concealment is proper. The public should have the same opportunity of judging of everything material which the projectors of the undertaking themselves possess.[6] (*a*) The great object of a prospectus is to invite *original* shareholders to unite themselves with the proposed undertaking. If such a shareholder is misled to his injury by the fraudulent statements of the directors, he has his right of action. This doctrine cannot be extended to one who purchases shares from the original subscriber, there being *no direct connection* between such a person and the

[1] Dutton *v.* Marsh, L. R. 6 Q. B. 361.

[2] Cherry *v.* Colonial Bk. of Australasia, 38 L. J. (P. C.) 49.

[3] Beattie *v.* Lord Ebury, L. R. 7 Ch. App. 777; on appeal, L. R. 7 H. L. Cas. 102.

[4] Clarke *v.* Dickson, 6 C. B. N. S. 453; Cullen *v.* Thomson's Trustees, 4 Macq. H. L. Cas. 424, 440. See also Davidson *v.* Tulloch, 3 Id. 783.

[5] Jackson *v.* Turquand, L. R. 4 H. L. Cas. 305.

[6] Cent. Ry. Co. of Venezuela *v.* Kisch, L. R. 2 H. L. Cas. 99.

(*a*) Cf. Brewster *v.* Hatch, 122 N. Y. 349; Morgan *v.* Skiddy, 62 N. Y. 319; Arnison *v.* Smith, L. R. 41 Ch. D. 348; Knox *v.* Hayman, 67 L. T. N. S. 137.

signers of the fraudulent prospectus.[1] If the directors, in making the statements in question, act in good faith, they will not be liable. The cause of action is grounded upon *deceit*. It is a personal action, and if the director die without having been charged, his executors are not liable, unless the estate of the deceased had been benefited by the deceit.[2]

Instead of positive false statements the directors may fraudulently conceal facts which, if they had been known, would have influenced a subscriber to the stock in making a subscription. It is very doubtful whether an action will lie in that case. There are but few cases in which concealment will be construed to be fraudulent. It is certainly so in some special contracts, such as insurance or suretyship; but in ordinary cases, one party may lawfully refrain from disclosure.[3] (*a*) The principles to be followed in disposing of a case of this kind are those which are applicable to an ordinary action for damages for deceit.[4] Where the statement is capable of two senses, one of which is true and the other untrue, it will lie with the plaintiff to show that he took it and acted upon it in the sense in which it was untrue.[5] It will not be necessary to show that he acted *solely* on the untrue statement. It will be sufficient if that were material and influenced his conduct.[6] The statement must be known by the defendant to be false, or he must have had no reasonable ground for believing it to be true.[7] (*b*) The case of Peek *v.* Derry cited in the note contains a thorough exposition of this subject, particularly as to the point whether a statement made by a person who has no reasonable ground to believe it to be true is a fraud.[8] (*c*)

[1] Peek *v.* Gurney, L. R. 13 Eq. 79; on appeal, L. R. 6 H. L. Cas. 377. The point is decided in the appellate court, pp. 396–400, *per* Lord Chelmsford, and pp. 410–413, *per* Lord Cairns. The cases of Bagshaw *v.* Seymour, 18 C. B. 903, and Bedford *v.* Bagshaw, 4 H. & N. 538, allowing the assignee of shares to sue, were overruled.

[2] Peek *v.* Gurney, L. R. 6 H. L. Cas. 377.

[3] The rule is stated in this way by Lord Cairns. Mere non-disclosure of facts, unless such non-disclosure have the effect of making the disclosed facts absolutely false, will not suffice. L. R. 6 H. L. Cas. 403. The English statute of 1867, 30 & 31 Vict. c. 131, § 38, requires disclosure in certain specified cases. This statute was intended for the protection of shareholders, not for bondholders, etc. Cornell *v.* Hay, L. R. 8 C. P. 328.

[4] Arkwright *v.* Newbold, L. R. 17 Ch. D. 301.

[5] Smith *v.* Chadwick, L. R. 9 App. Cas. 187.

[6] Edgington *v.* Fitzmaurice, L. R. 29 Ch. D. 459.

[7] Peek *v.* Derry, 37 Id. 541.

[8] Peek *v.* Derry, *supra*. See opinion of Cotton, L. J., pp. 567, 568. Also of Hannen, J., p. 578, and of Lopes, L. J., 585.

(*a*) Crowell *v.* Jackson, 53 N. J. Law, 656.

(*b*) See Cole *v.* Cassidy, 138 Mass. 437; Hubbard *v.* Weare, 79 Ia. 678; Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403.

(*c*) This case was reversed on appeal (Derry *v.* Peek, L. R. 14 App. Cas. 337), and the view taken that a false statement made carelessly and without reasonable grounds for belief in its truth did not, if

Care must be taken in applying these rules not to confound an expression of opinion with a statement of facts. (*a*) There is a vast difference between words expressing the strongest confidence that a specified enterprise will be successful, and an assertion that profits in a commercial sense had actually been made. It should also be considered whether a person is likely through inexperience to be misled by the prospectus.[1] Where the language of the prospectus has a plain and clear meaning, it must be construed by the judge, and not by the jury.[2]

(3) *The rights of third persons against the corporation for the misconduct of its trustees or directors.* — The party injured may, in certain cases, look to the corporation instead of the directors. As they may be agents for the company, their acts of a wrongful or injurious nature may bind the corporation, on accepted rules of the law of agency.[3] If the corporation had profited by the fraudulent acts of the directors, this participation in the results of the wrong might amount to a confirmation of their acts. (*b*)

In the case now in hand of fraudulent prospectuses, the injured party, instead of proceeding against the directors, may prefer to rescind the contract. This is an accepted remedy by one who has been fraudulently induced to subscribe to original shares. The action would be brought against the company instead of the directors. (*c*) The contract to purchase in such a case is void-

[1] Bellairs *v.* Tucker, L. R. 13 Q. B. D. 562, 577, and cases on the last-named page.

[2] Moore *v.* The Explosives Co., 56 L. J. (Q. B.) 235.

[3] Barwick *v.* English Joint-Stock Bank, L. R. 2 Exch. 259, is a leading case, and frequently cited in later cases. See opinion of WILLES, J.

believed in good faith to be true, amount to fraud, though it might be evidence of it. This decision is followed in Glasier *v.* Rolls, L. R. 42 Ch. D. 436, and Angus *v.* Clifford [1891], 2 Ch. 449, and seems to have led to the passage of the statute known as the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), establishing the liability of directors and promoters for untrue statements made in prospectuses, etc., unless such statements, not purporting to be made on the authority of an expert or of a public official document or statement, are made under the belief that they are true, for which belief there must have been reasonable grounds. The doctrine maintained in Derry *v.* Peek is criticised by Sir Frederick Pollock in 5 Law Quarterly Review, p. 410 (Oct. 1889). Cf. Wakeman *v.* Dalley, 51 N. Y. 27, where it is said that an action of deceit cannot be maintained unless the representations were known to be false, or unless there were reasons for believing them to be so, or unless the impression was intentionally conveyed by the person making the representation that he had actual knowledge of their truth, though conscious he had none. See also Robertson *v.* Parks, 76 Md. 118.

(*a*) Robertson *v.* Parks, *supra*.

(*b*) See Bosley *v.* National Machine Co., 123 N. Y. 550.

(*c*) Bosley *v.* National Machine Co., *supra*; Vail *v.* Reynolds, 118 N. Y. 297; Scott *v.* Snyder Dynamite Projectile Company, Limited, 67 L. T. N. S. 104; Karberg's Case [1892], 3 Ch. D. 1. It has been held that several subscribers, induced by the same fraudulent representations, have such a common interest that they may join in an action as co-complainants to set aside their subscriptions. Bosher *v.* R. & H. Land Co., 89 Va. 455. Cook on Stock and Stockholders and Corporation Law, § 156.

able, and not void.[1] The injured party should, within a reasonable time, strive to ascertain the facts, and after ascertaining them, proceed without delay.[2]

In the English cases there is a feature of great importance, not usually found here, and which makes the decisions to some extent inapplicable. This is the principle of *unlimited liability* on the part of the shareholders of many corporations for the debts of the company. The legal effect of this rule is, that a shareholder is deemed to be a *partner* with the other shareholders. Accordingly, he cannot sue the company for damages for fraud, that remedy not being available as between partners.[3] This point received thorough consideration in the great case of the failure of the City of Glasgow Bank in 1878. In American law, the shareholder, in general, is not liable beyond the capital contributed by him, though he may be in special cases. Where he is not so liable, he may, for the purposes of an action against the company, be regarded as a stranger. Under the English theory, "such an action (deceit) is *really not against the corporation as an aggregate body*, but is against all the members but one," viz., the plaintiff, to throw upon them the plaintiff's share of the corporate liabilities.[4] One defrauded in subscription to stock by the company is accordingly restricted to an action to rescind the subscription. This proceeds upon the ground that the fraud so vitiated the contract that the subscriber is entitled to claim, if he will, that there was no subscription. But the right to rescind may be lost if the rights of innocent third parties have intervened.[5] The defrauded subscriber may thus be bereft of all remedy.

In some of the States, if a bank become insolvent, the shareholder may not only lose his share, but be liable in addition to an amount equal to the share. This rule is applied to national banks. The same question might apparently then arise as was presented in Houldsworth *v.* City of Glasgow Bank; that is, whether one who had been induced by fraud to subscribe would have an action against the company, or whether he could resist, by means of rescission, his contribution to the fund to pay creditors. There is no reason to doubt that while the corporation is carrying on business ("a going concern") and apparently solvent, the shareholder may sell his share and so escape further liability.[6]

[1] Oakes *v.* Turquand, L. R. 2 H. L. Cas. 325.

[2] Wilkinson's Case, L. R. 2 Ch. App. 536.

[3] Houldsworth *v.* City of Glasgow Bank, L. R. 5 App. Cas. 317.

[4] *Per* Lord Selborne, in Houldsworth *v.* City of Glasgow Bank, *supra*, p. 329.

[5] Tennent *v.* City of Glasgow Bank, L. R. 4 App. Cas. 615.

[6] Tennent *v.* City of Glasgow Bank, *supra*, p. 622.

(4) *Remedies which the corporation may have against its directors for their negligent or wilful misconduct.* — The corporation, having been made liable by the fraud and other acts of misconduct of the directors, may have a remedy against them. The stockholders of a corporation may, at least in some cases, ratify the act of a director though guilty of a breach of duty, and such a director may vote a ratification in his character of stockholder, even though he owns a majority of the shares, and thus confirm his own voidable act as director, where he does not act oppressively, and the charter permits him to acquire the stock.[1]

A director is not a *trustee*, in the technical sense of that word, unless he *has the title* to property. He is as between himself and the company an agent or servant.[2] He is in a fiduciary position, however, and cannot profit at the expense of the corporation.[3]

The wrongful act of one director, committed by him without the knowledge or consent of his associates, is not to be imputed to them, but is personal.[4] If a director be excluded from acting as such by his associates, he is entitled to an injunction.[5] The court, having jurisdiction over the acts of trustees and directors, considered as a matter of fiduciary obligation is the Court of Chancery.[6]

In New York the whole subject is reduced to statutory form. The court may compel the directors to account for their official conduct, and to pay over to the corporation itself or to its creditors, as the circumstances of the case may require, any property which they have wrongfully applied to their own use, or have wasted in any manner. At the same time, the director may be suspended from office for abuse of trust, or he may be removed. The court may direct the proper board to supply the vacancy, or if there be no such body in existence, direct the removal to be reported to the governor, who may, with the consent of the Senate, fill the vacancy.[7] The court also has a statutory power to set aside unlawful transfers of the corporate property, except as against purchasers in good faith, as well as to restrain such

[1] Northwest Transportation Co. *v.* Beatty, L. R. 12 App. Cas. 589. The court said: "Great confusion would be introduced into the affairs of joint-stock companies if the circumstances of shareholders voting in that character at general meetings were to be examined, and their votes practically nullified if they also stood in some fiduciary relation to the company." p. 600.

[2] *Per* JAMES, L. J., in Smith *v.* Anderson, L. R. 15 Ch. D. 247.

[3] McKay's Case, L. R. 2 Ch. D. 1; Pearson's Case, 5 Id. 336.

[4] Cargill *v.* Bower, 47 L. J. (Ch. D.) 649; Land Credit Co. of Ireland *v.* Lord Fermoy, L. R. 5 Ch. App. 763.

[5] Pulbrook *v.* Richmond Con. Mining Co., L. R. 9 Ch. D. 610.

[6] Needham *v.* Rivers Pro. & Man. Co., L. R. 1 Ch. D. 253.

[7] Code of Civ. Pro., § 1781.

as are apprehended. An action for the last-named purposes may be brought not only by the attorney-general, but as well by a creditor or some officer of the corporation.[1] (*a*)

A joint-stock company, whose directors are appointed for a definite period, has no inherent power to remove them before the expiration of that period.[2]

There are other restrictions upon directors. An important one is, that they shall not pay dividends upon the stock of the company except from profits. All who participate in such an act are made liable to the corporation or its creditors for the amount unlawfully diverted in this manner. Independent of statute, and on general principles of law, it is contrary to the duty of directors to pay dividends out of capital. Such an act is *ultra vires*, as it diminishes the funds on which creditors have a right to rely.[3] The courts hold a very strict hand over directors in thus making them jointly and severally liable for the amounts paid.[4] (*b*)

In some of these cases, stress was laid on the fact that in the constituting instruments, division of profits only was allowed. But there is a broader view. Persons intrusted with capital with a view of using it to make profit, violate their trust when they return the capital to shareholders in the guise of profits, and

[1] Code of Civ. Pro., §§ 1781–1782. These rules are subject to some exceptions in the case of religious or charitable corporations, § 1804.

[2] Imperial Hyd. Hot. Co. *v.* Hampson, L. R. 23 Ch. D. 1.

[3] Macdongall *v.* Jersey Imp. Hotel Co., 2 Hem. & M. 528.

[4] *In re* Oxford Ben. Building Society, L. R. 35 Ch. D. 502; Leeds Estate, &c. Co. *v.* Shepherd, L. R. 36 Ch. D. 787; Salisbury *v.* Metropolitan R'way Co., 22 L. T. N. S. 839; Rance's Case, L. R. 6 Ch. App. 104; Flitcroft's Case, L. R. 21 Ch. D. 519; Evans *v.* Coventry, 8 De G. M. & G. 835; *In re* Nat. Funds Ass. Co., L. R. 10 Ch. D. 118.

(*a*) Under these sections the attorney-general may bring suit, without a relator, and whenever in his opinion the public interest demands it, to remove trustees from office, and to compel them to account for property transferred in violation of their duty. People *v.* Ballard, 134 N. Y. 269.

(*b*) It is a general rule that stockholders cannot in the first instance sue the directors for a past or threatened breach of duty to the corporation. The corporation is the proper party plaintiff, for in contemplation of law it alone receives the injury. In case the corporation has been dissolved, or is being wound up, the receiver or official liquidator should sue.

If, however, a proper demand that suit be brought has been made by the stockholder, and refused by the governing body of the corporation, or if it is apparent that such a demand would be useless, owing to the relation of the guilty officers to those in control, the stockholder may then bring suit in his own behalf and that of all other stockholders similarly situated. Greaves *v.* Gouge, 69 N. Y. 154; Brinckerhoff *v.* Bostwick, 88 N. Y. 52; City of Chicago *v.* Cameron, 120 Ill. 447; Nathan *v.* Tompkins, 82 Ala. 437; Davis *v.* Gemmell, 70 Md. 356; Eschweiler *v.* Stowell, 78 Wis. 316; Pomeroy Eq. Jur. §§ 1091, *et seq.*

thus subvert the purposes of the trust. Such an act manifestly requires the assent of the shareholders. It is not necessary that the directors should intend to commit a fraud. It is enough that they intend to do an act which is in its nature substantially a fraud.[1] Moreover, creditors who have naturally looked to the capital as a source from which their claims should be paid, have a right to insist that it should not be dissipated by a direct act of abdication of the trust on which the capital is held. (*a*)

SECTION VI. *Dissolution.* — A corporation, like a natural person, may cease to exist. Its existence may be terminated by the death of its members without filling vacancies. It may also be dissolved by act of the legislature, or by a surrender of corporate rights, or by judicial decree. These various modes will now be considered separately.

I. *By death or removal of all its members.* — This is a dissolution because the corporation has ceased to have the power of holding corporate meetings for the purpose of filling vacancies and so continuing its existence.[2] A new charter may, however, be granted, which will operate as a revival of the former corporation, so that the new corporation will become the owner of all the former franchises and property.[3] A similar effect, suspending the existence of the corporation, might be produced if so many of the members should die or be removed from office that there would not be a sufficient number to hold a legal meeting. This obstacle could be removed by an act of the legislature authorizing a lesser number to form a quorum and fill the vacancies.

II. *By act of the legislature.* — This mode of dissolution has a wide scope in England, as an act of Parliament is said to be boundless in its operations, although in general it would be deemed unjust and impolitic there to dissolve a corporation without good reason. In the United States a constitutional question is involved, owing to the provision in the United States Constitution that no State shall pass any law impairing the obligation of contracts.[4]

In applying this rule to cases as they arise, a distinction must be taken between a public or municipal and a private corporation. A municipal corporation is in its essence a mere instrument of local government. Its charter may accordingly be altered at the

[1] Rance's Case, opinions of JAMES and MELLISH, L. JJ., L. R. 6 Ch. App. 113–124. Also Remarks of the Master of the Rolls, in L. R. 10 Ch. D. 118, 128; approved in 35 Id. 502, 512.

[2] Rex *v.* Morris, 3 East, 213.

[3] Mayor, &c. of Colchester *v.* Brooke, 7 Q. B. 339.

[4] Art. I., § 10, cl. 1.

(*a*) See *post*, pp. 405, 411, 412.

pleasure of the supreme authority in the State, though it might be that its property should continue to be appropriated to public uses.

The case is very different with private corporations. The acts of incorporation and acceptance constitute a contract between the State and the corporators. This cannot be destroyed nor altered by the legislature, unless there be a special power to that effect reserved by the State, — a case to be hereafter considered. It is not material that no money is paid by the corporators for the charter, nor that the trustees receive no pecuniary benefits. It is enough that the persons whom the trustees represent may derive a benefit from it.

These principles are fully set forth in the celebrated "Dartmouth College Case."[1] The college had been chartered by the King of England during the colonial period. It was placed by him under the control of a board of trustees having self-perpetuating power. After the Revolution, the State of New Hampshire attempted to subvert the old organization by a statute which the college did not accept. This act was declared by the court to be unconstitutional and void. This decision met with much opposition, it being maintained by some of the State tribunals that an act of incorporation ought to be deemed a *law*, and so in its nature repealable, rather than a contract and for that reason irrepealable. The answer to this view made by Mr. Mason in his argument for the college seems very strong. If this be a *law*, where is the necessity or propriety of acceptance of it by the corporators? Must a law, after it is duly enacted, be accepted or assented to by an individual in order to make it binding on him?[2]

After the decision of the Dartmouth College Case a practice grew up to the following effect: Either to insert in the charter of incorporation a clause giving the legislature full power of amendment or repeal, or to enact a general law of the State applicable to all future incorporations, or, for still greater caution, to insert a similar clause in the State constitution.[3] Such a clause forms a part of the contract between the legislature and the corporation, and subjects the charter to amendment or repeal at the will of the legislature.[4] Even with this reservation of such power, an arbitrary repeal of a charter, *interfering with*

[1] Dartmouth College *v.* Woodward, 4 Wheat. 518.

[2] Dartmouth College Case, as separately printed, p. 68.

[3] See, for an illustration, Constitution of N. Y., Art. VIII., sect. 1 (last clause).

[4] Peik *v.* Chicago & N. W. R. R. Co., 94 U. S. 164; C. B. & Q. R. R. Co. *v.* Iowa, Id. 155; Schenectady, &c. Plank Road Co. *v.* Thatcher, 11 N. Y. 102, 108, 109.

rights of property, would be unreasonable and unjust and contrary to the constitutional safeguards for the protection of such rights.

III. *Surrender of corporate rights.* — A corporation may be dissolved by surrender, assuming that the surrender is *accepted by the State*. If a charter is to be treated as a contract, the corporation has duties as well as rights. It cannot by its own fiat dissolve the contract. So a corporation may surrender its charter by implication, as, for example, where a new charter is accepted *inconsistent* with its then existing incorporation.[1]

IV. *By adverse judicial decree.* — (1) *Under the common law.* The proceeding for this purpose is a writ of *scire facias* or an information in the nature of a *quo warranto*, already explained. Sufficient cause for the proceeding is either the usurpation of a right or power, — *e. g.*, when a literary college at Geneva, N. Y., assumed, without legal ground, to establish a medical college in the city of New York;[2] suffering an act to be done which defeats the end for which the corporation was instituted;[3] acts of neglect causing injury, such as that of a turnpike company permitting its road to fall into such a state of decay as to be dangerous or inconvenient to travellers;[4] non-compliance with the requirements of the charter by neglect or design, even though there be no bad or corrupt motives.[5] In these cases, it will be no answer to the proceeding that any person injured will have a remedy by action.

It is important to remark that a violation of corporate duty or a breach of the charter does not of itself dissolve the corporation. There must be a judicial proceeding. None but the "people," through their proper officer, can claim that the charter is forfeited. An individual cannot set up the forfeiture as a defence to an action brought against him by the corporation to enforce a legal liability. This rule applies even though the charter provide that on the performance or non-performance of an act the corporation shall be *ipso facto* dissolved. These words are construed to mean dissolution at the election of the State through a judicial proceeding. (*a*)

[1] This mode of dissolution is called in the statute-book in New York "voluntary dissolution," meaning that it is at the will of the corporation, but still under the sanction of the State; Code of Civ. Pro. §§ 2419–2431. Certain corporations are excepted. See §§ 2420, 2431. See also 2 R. S. 467, §§ 66–89.

[2] The People *v.* The Trustees of Geneva College, 5 Wend. 211; and see People *v.* Utica Ins. Co., 15 Johns. 358, 383.

[3] People *v.* Bank of Hudson, 6 Cow. 217.

[4] People *v.* Bristol, &c. Turnpike Co., 23 Wend. 222.

[5] People *v.* Kingston & M. Turnpike Road Co., 23 Wend. 193.

(*a*) See Application of Brooklyn El. Ry. Co., 125 N. Y. 434, and compare Brooklyn Steam Transit Co. *v.* City of Brooklyn, 78 N. Y. 524; Matter of Brooklyn, Winfield, & Newtown Ry. Co., 72 N. Y. 245.

Courts of equity may in their administration of the law of trusts appropriate the property of insolvent corporations to the payment of their debts. This is readily done through the medium of a receiver, who under the direction of the court will bring actions or submit to be sued, collect the assets, and devote them to the use of the creditor. This may result practically in the dissolution of the corporation.

(2) *Dissolution as a statutory remedy.* In the great multiplication of corporations in modern times, and the ease with which they are formed under general laws, it will readily happen that many will turn out to be formed for impracticable and visionary purposes, or, after having had a temporary business success, will fail, and become insolvent. The attention of legislatures is naturally turned to methods whereby they can be summarily dissolved or "wound up," and their affairs finally settled.

A marked instance of this mode of proceeding is "The Companies Winding up Acts" of the English Parliament.[1]

[1] 25 & 26 Vict., c. 89, called "The Companies Act of 1862," with amendatory acts. The powers and liabilities of companies under this act depend both upon the articles of association among the members and the provisions of the Act of Parliament incorporating them. *Re* Cambrian Peat, Fuel, & Charcoal Company, Limited, 31 L. T. 773. The company is required to be registered under a name in a prescribed way, whereupon it obtains a certificate from the registrar, which is conclusive, so that its incorporation cannot be successfully impugned. Oakes *v.* Turquand, L. R. 2 H. L. Cas. 325; Peel's Case, L. R. 2 Ch. App. 674.

Companies under this act may be incorporated for any lawful purpose. § 6. The liability of members may be limited at the pleasure of the members, so that there shall be no liability beyond the shares subscribed. This is called a company with liability "limited by shares." It must be publicly registered in a prescribed registration office with the word "limited" as the last word in its name. The liability of members may be "limited" in another way, which is to fix in the articles of association an *amount in addition* to their shares for which they undertake to be liable. This is called a company "limited by guarantee." § 9. The word "limited" in this case must also be the last word in the company's name, and there must be a registration as prescribed by law. Finally, the members may, if they will, be organized on the principle of unlimited personal liability. § 10.

It is plain that, under these provisions, "the winding up" of the various corporations in case of dissolution will have quite a different meaning. In the strictly limited corporations, the shareholders will only contribute in case they have not paid up their original subscriptions, and then only to the extent of sums not yet paid. In the other cases, the shareholders will be required to contribute in addition whatever their articles of association may provide for. Accordingly, those are "contributories" to the payment of the debts of the company who have in some way bound themselves by *contract* either directly to the creditor or with the corporation that has contracted with the creditor. Bright *v.* Hutton, 3 H. L. Cas. 341. The list of contributories includes all who have agreed to become members, and not entitled to rescind the contract on the ground of fraud. *In re* Scottish Petroleum Co., L. R. 23 Ch. D. 413. The subscriber is bound to take the shares he subscribed for and to pay money or money's worth. Forbes & Judd's Case, L. R. 5 Ch. App. 270. Persons holding shares as trustees may be liable, although

There is also important legislation on the same general subject in the State of New York, resembling in some of its methods the English Winding up Act of 1862, and amendatory statutes. There are three principal cases under the New York statutes: —

1. A majority of the directors may petition for a dissolution of the corporation on the ground that its property is not sufficient to pay the just demands against it, or for other reasons beneficial to the stockholders.[1] In certain specified cases there may be a petition by those in favor of dissolution, though the directors are equally divided in opinion.[2] The contents of the petition and the mode of proceeding under it are specifically marked out. The question is heard before the court or a referee. If the facts warrant it, an order is entered dissolving the corporation. The assets are administered by a receiver. All sales or transfers after the filing of the petition, or judgments confessed, whether to pay or secure debts, or for other considerations, are void as against the receiver or creditors.[3]

their names are entered on the share register as trustees. Bell'a Case, L. R. 4 App. Cas. 547; also other City of Glasgow Bank Cases. Past shareholders are also liable under specified circumstances. Helbert *v.* Banner, L. R. 5 H. L. Cas. 28. The corporation having been "wound up," the court may sanction a scheme for reconstruction and the transfer of remaining assets to a newly-formed company. *In re* Imperial Mercantile Association, L. R. 12 Eq. 504.

Other companies besides those formed under the act itself, such as one incorporated by special Act of Parliament, may be "wound up" under this statute, but not a company wholly unincorporated. *In re* Bradford Nav. Co., L. R. 10 Eq. 331; *Re* Imperial Anglo-German B'k, 26 L. T. 229. "Never having come into existence, it cannot be wound up." The general grounds for "winding up" are that the business was not commenced promptly or that the object of the organization is impracticable or impossible, or that it is insolvent. There may also be a voluntary application by shareholders. A creditor who cannot get his claim paid is in general entitled to a winding up order, though in special cases, where this proceeding would not on the whole be beneficial, or for other reasons, the order may be refused. *In re* Herne Bay Waterworks Co., L. R. 10 Ch. Div. 42. Public interests may also intervene to prevent it. If the order is granted, "liquidators" are appointed to take possession of the assets, and protect them. The liquidator is in substance a statutory receiver, who brings actions, carries on the business, sells property; and the order may be so drawn that he will not be required to apply to the court for directions.

The details of the law are very numerous, and the decisions extensive. The whole scheme appears to be in the nature of a special act of bankruptcy embracing corporations and appropriating their assets of every sort to the payment of their debts, with the additional remedy of calling on the shareholders in certain cases for contribution to pay the company's debts. (*a*)

[1] Code of Civ. Pro., § 2419.

[2] Id. § 2420.

[3] Id. § 2421–2431, both inclusive. As to the receiver, see § 1810. See also 2 R. S. 467, §§ 66–89, which are still probably applicable to a receiver in case of voluntary dissolution.

(*a*) The Companies Act, 1862, was amended and supplemented by the "Companies (Winding up) Act, 1890," 53 & 54 Vict. c. 63. This act and the Companies Acts, 1862 to 1886, are cited together as the "Companies Acts, 1862 to 1890."

2. There are several cases in which a dissolution may be had by creditors seeking to enforce corporate obligations, as where the corporation has remained insolvent for one year, or neglected or refused for a year to pay its notes or other evidences of debt, or suspended its ordinary and lawful business for one year. In case the corporation has banking powers or power to make loans on pledges or deposits, or to make insurances, there may be an application of this kind, not only when it becomes insolvent, but when it has violated any provision of law binding upon it. In this class of cases the attorney-general proceeds, in the first instance, though if he omit to do so a creditor or stockholder may take proceedings which will enable him, with the leave of the court, to proceed for a dissolution. Stockholders and directors, so far as they may be made personally liable, may thereupon be joined by the plaintiff in the same action, or may be proceeded against separately. The dissolution is brought about substantially in the same way as in the case of voluntary dissolution.[1]

3. Special provisions applicable to the dissolution of particular kinds of corporations, so far as they may exist, are not interfered with by the general methods already described. The details must be sought in the respective statutes.

The word *amalgamation* has been sometimes used in connection with the dissolution of corporations, and should be explained. "Amalgamation" is not a legal word. In a recent case the court said: "It is difficult to say what the word 'amalgamate' means. I confess at this moment I have not the least conception of what the full legal effect of the word is. We do not find it in any law dictionary, or expounded by any competent authority."[2] It may, however, be assumed to mean the dissolution of one or more corporations, and the transfer of property and franchises to another. The term appears to have grown up from a practice prevailing in unincorporated joint-stock companies created by deed executed by the members, whereby one company would coalesce with the other. It is established law, that unless the deed provides for amalgamation it cannot take place without the consent of all the members.[3] The language of the deed must be clear. Even the word "amalgamate" will not be sufficient to impose upon a subscriber to the original company the duty to take stock in the new organization.[4] If amalgamation take place without

[1] Code of Civ. Pro., 1785–1796.

[2] *Per* Wood, V. C., in *In re* Empire Assurance Corp., L. R. 4 Eq. 341, at p. 347.

[3] *In re* Era Assurance Society, 30 L. J. Ch. 137.

[4] *In re* Empire Assurance Corporation, L. R. 4 Eq. 341; Dougan's Case, L. R. 8 Ch. App. 540.

authorizing words, it will be *ultra vires*, and a dissenting shareholder will not be bound, though the others assent.[1] Leaving out of view now mere societies, it would seem that corporations could not amalgamate without legislative power. If legislative authority existed when the corporations were chartered, a subsequent amalgamation would bind dissentient shareholders, as they might be assumed to have assented to it when they made their subscriptions.[2] (*a*)

V. *Effect of dissolution.* — This must be regarded in two aspects: (1) In a court of common law. (2) In a court of equity as aided by statutes.

(1) *In a court of common law.* In the early common law, a corporation was regarded from the point of view that its rights and liabilities depended upon the continuance of its technical existence as an artificial *person.* If a natural person died, his existence was, to a certain extent, prolonged by the presence of heirs or executors or administrators to represent in court his various rights and liabilities. Should he die without heirs, his lands escheated to the State as "ultimate heir" (*ultimus hæres*). On the other hand, in the case of a corporation, the fee simple was supposed to vest in the corporators in their politic or corporate capacity created by the "policy of man," and to such vesting the law annexed an *implied condition* that if the body politic were dissolved, the grantor might re-enter upon the land and repossess himself of his former estate.[3] The personal property belonged to the king, as succeeding to all goods without an owner. So on technical grounds, no action could be brought by a creditor to recover a debt, as there was no "person" that he could sue, and for a like reason debts due to the corporation were extinguished. Strictly speaking, if an action were pending when a corporation was dissolved, it would instantly terminate. Rules such as these are to the last degree technical and subversive of substantial justice.

(2) *In courts of equity and by statute.* — The old common law doctrine is practically obsolete. In most cases, the corporation would be regarded as holding its property *in trust* for those

[1] Clinch *v.* Financial Corp., L. R. 4 Ch. App. 117.

[2] Earl of Lindsey *v.* Great Northern R'way Co., 10 Hare, 664. See also 25 & 26 Vict. c. 89, § 161, where powers resembling amalgamation are granted under certain circumstances to an official liquidator or receiver.

[3] 1 Co. Litt. 13 b.

(*a*) The term "consolidation" is employed in the United States in much the same sense as amalgamation is in England.

whom it represented. In the case of a commercial corporation, it would be a trustee for shareholders and creditors. (*a*) In the case of a charitable corporation, it would be a trustee for those whom the founders had designated. It is a settled rule in equity that no trust shall fail for want of a trustee. Accordingly, on the dissolution of a corporation, the court, if the trust be a permanent one, may designate a new trustee, or if that be the better course, may close up the affairs and distribute the property among the proper beneficiaries. Statutes are enacted in the various States in aid of this theory, and facilitating the exercise of this jurisdiction.[1]

An analogous inquiry has been raised, when land is acquired by a corporation in full ownership, by eminent domain for a particular purpose, and that purpose is no longer practicable, whether it can be devoted to some other purpose. It is decided that in such a case there is no reversionary interest in the grantor.[2]

Notwithstanding dissolution, the legislature may revive or renovate the corporation, or may substitute a new one in its place. There is a distinction between the two cases. The revival restores the corporation with its former rights and duties. A strictly new corporation would not represent the old one. When a controversy arises as to which result has taken place, it must be decided as a matter of interpretation, regard being had to the intent of the legislature as well as of the corporators.[3]

DIVISION II. — *Special Rules applicable to Stock Corporations.*

The phrase "stock corporations" is here used to embrace all corporations having a capital consisting of shares susceptible of separate ownership. These have largely taken the place of partnerships in business transactions, as the capital of small owners may thus be readily aggregated, and at the same time, in case of disaster, they will be able to escape unlimited personal liability.

[1] Angell & Ames on Corporations (11th ed.), §§ 779 and 779 *a*.

[2] Heyward *v.* Mayor of New York, 7 N. Y. 314.

[3] Bellows *v.* Hallowell & Augusta Bank, 2 Mason, 31, 43, 44.

(*a*) Cole *v.* Millerton Iron Co., 133 N. Y. 164. While admitting that corporate assets should be devoted to the payment of corporate debts to the exclusion of the claims of stockholders, some authorities refuse to place the principle upon the theory of a trust, contending that corporate capital belongs to the corporation to control and dispose of as a natural person may, if done in good faith. Hospes *v.* Northwestern Car M'f'g Co., 48 Minn. 174; Wabash, etc. Ry. Co. *v.* Ham, 114 U. S. 587; Fogg *v.* Blair, 133 Id. 534; Clark *v.* Bever, 139 Id. 96; Gould *v.* Little Rock M. R. & T. Ry. Co., 52 Fed. R. 680.

The shares also have this advantage, that an assignment of them has no effect upon the continuance of the organization, while in an ordinary partnership, an assignment would work its dissolution.

SECTION I. *Subscriptions for Stock and Assessments.* — There are two instances under this head, — one, where the company is already organized, and the other, where it is projected.

In the first instance, if a subscriber on the one hand agrees to take and pay for stock, and the company to supply it, the transaction has all the usual elements of a contract.[1]

The second instance presents greater difficulties. The corporation not yet being formed, there is no true contract when the subscription is made. It must be regarded as an offer to contract, which is accepted by the corporation on its organization. Still, it is the prevailing view that even while the transaction is imperfect or inchoate, it cannot be withdrawn.[2] (*a*) The advantage to be derived from membership in the company is a sufficient consideration for the subscription. A promise to "take" a specified number of shares will be sufficient, as there is implied in the use of the word "take" a promise to pay for them.[3] The subscription paper may refer to the charter, in which case it would in contemplation of law become incorporated into it. When the corporation is organized, an action will lie on the subscription.[4] It is not material that no cash payment was made when the subscription was received, unless that was made necessary to its validity by statute, nor is it necessary to give any notice that an action will be brought.[5] In fact, the ordinary rules of the law of contract prevail. The subscriber becomes a stockholder when the shares are apportioned to him, though no certificate of stock has been issued to him. The certificate is only *evidence* of title.[6]

It is frequently the case that the corporation has by law the

[1] Angell & Ames on Corporations (11th ed.) § 517.

[2] Lake Ontario & C. R. R. Co. *v.* Mason, 16 N. Y. 451; Schenectady, &c. Plank Road Co. *v.* Thatcher, 11 Id. 102.

[3] Spear *v.* Crawford, 14 Wend. 20.

[4] Buffalo & N. Y. City R. R. Co. *v.* Dudley, 14 N. Y. 336.

[5] Lake Ontario, &c. R. R. Co. *v.* Mason, 16 N. Y. 451.

[6] Burr *v.* Wilcox, 22 N. Y. 551; Buffalo & N. Y. City R. R. Co. *v.* Dudley, 14 N. Y. 336, 347.

(*a*) See Minneapolis Threshing Machine Co. *v.* Davis, 40 Minn. 110. The contrary is maintained by several authorities. See Athol Music Hall Co. *v.* Carey, 116 Mass. 471; Hudson Real Estate Co. *v.* Tower, 156 Mass. 82; Auburn Bolt Works *v.* Shultz, 143 Pa. St. 256. The theory on which these decisions are based is that there is no promisee capable of enforcing the inchoate contract, even though there is no want of consideration. If the agreement is a mere promise to subscribe, and not an actual subscription, it is not an offer which the corporation when formed can accept. Lake Ontario Shore Ry. Co. *v.* Curtiss, 80 N. Y. 219; Morawetz on Corporations, § 49.

right to forfeit the stock in case the subscription money is not paid. This is but a cumulative remedy, the corporation not being bound to resort to it. It cannot, however, bring an action to recover the subscription after having forfeited the stock, since there would be an inconsistency between the two remedies. This rule will prevail, although the forfeiture was but for the non-payment of a fractional part of the subscription. No action will lie for the residue.[1] A forfeiture once made is absolute and complete; and the subscriber has no equitable claim upon the company for any assumed excess of value of the stock above the amount due the company.[2]

A subscriber cannot escape liability on his subscription by a colorable transfer of his shares. While he may transfer his *rights*, he cannot by any such course divest himself of his liabilities. It was said in one case where the sale occurred after calls were made, but before they were payable, that the transferor ought still to be held liable, though the transaction was in good faith and the transferee a person pecuniarily responsible.[3] Much more would this be true were he without means, for a contrary doctrine might result in the impairment of the corporate capital.[4] (*a*)

It may happen in the case of a corporation organized under a general law that all the stock contemplated by the articles of association is not subscribed for. This is not material if there be sufficient subscriptions to organize the corporation.[5]

It may be urged as a defence to an action on the subscription that the company has without the subscriber's consent materially changed the articles of the association since the subscription was made. One party to a contract cannot modify it without the other's consent.[6] If, on the other hand, the legislature alter the constituting act under a reserved power to do so, the reservation is deemed to enter into the original act and to become a part of it, so that the subscriber is still liable.[7] When new stock is issued,

[1] Small *v.* Herkimer Mfg, &c. Co., 2 N. Y. 330, 339; see *ante*, p. 365.

[2] Id. and Story on Equity (13th ed.) § 1325, and cases cited.

[3] See remarks of JOHNSON, J. in Schenectady Plank Road Co. *v.* Thatcher, 11 N. Y. 102.

[4] Nathan *v.* Whitlock, 9 Paige, 152; Aff'g. 3 Edw. Ch. 215.

[5] Schenectady, &c. Plank Road Co. *v.* Thatcher, 11 N. Y. 102, 107.

[6] B. C. & N. Y. R. R. Co. *v.* Pottle, 23 Barb. 21.

[7] Schenectady, &c. Plank Road Co. *v.* Thatcher, 11 N. Y. 102; Buffalo & N. Y. City R. R. Co. *v.* Dudley, 14 Id. 336, 354, 355.

(*a*) If the sale be made in good faith to a solvent purchaser, many authorities exonerate the transferor from liability for calls made subsequent to the transfer. Billings *v.* Robinson, 94 N. Y. 415; Tucker *v.* Gilman, 121 N. Y. 189; Cowles *v.* Cromwell, 25 Barb. 413; Cole *v.* Ryan, 52 Barb. 168; Isham *v.* Buckingham, 49 N. Y. 216; Morawetz on Private Corporations, § 159. In several States there are statutes upon the subject.

existing shareholders are entitled to subscribe for it rather than strangers.[1]

The rules above stated are not to be extended to *assessments* made upon stockholders, after the stock has been fully paid for. The corporation has no incidental or implied power to make such an assessment and sue a subscriber upon it. There must be an agreement to pay it or a statute justifying it.[2] If a remedy by forfeiture is given, no other can be resorted to, unless the stockholder expressly agree to pay the assessment, in which case the remedy is cumulative.[3] The reason is that when a statute creates a new power and gives the means of executing it, it can be executed in no other way.[4]

SECTION II. *The Nature of Stock.* — Stock is an interest appertaining to a shareholder in the franchises and property of the corporation.[5] While the corporation owns the land and other property, the stockholder has an interest in the nature of a thing in action. It is not negotiable, like a promissory note, but simply assignable.[6] It is, however, personal property, even though the corporation own principally real estate. The leading rights which a stockholder possesses are to receive the dividends, to participate in the election of managers or directors, to hold the corporation to the performance of the trust, and on dissolution to receive a proportional share of the corporate property, which would, in that event, on final adjustment belong to the stockholders free from all trust of the corporation. The ownership of stock is commonly evidenced by a certificate. This is a statement by the corporation that the holder is entitled to a specified number of shares. It is commonly stated in the certificate that the shares are transferable to another on the return of the certificate properly indorsed. The certificate may be transferred in an informal manner by merely writing the name of the owner on the back of it and delivering it in that condition to a purchaser. This confers on the latter by implication an authority to write over the indorsement a power of attorney authorizing a transfer of the stock to whomsoever he will. In that way, the old certificate being surrendered to the corporation, a new one may be taken out in the name of the transferee. If the corporation improperly refuse, it can be required to make the transfer on its books by an action in equity. If the owner of the indorsed certificate does not have the transfer made,

[1] Gray *v.* Portland Bank, 3 Mass. 364.

[2] Angell & Ames on Corporations (11th ed.) § 544.

[3] Id. § 548.

[4] Andover Turnpike Corp. *v.* Gould, 6 Mass. 40. 44.

[5] Germain *v.* Lake Shore & Mich. So. Ry. Co., 91 N. Y. 483.

[6] Mechanics' Bank *v.* N. Y. & N. H. R. R. Co., 13 N. Y. 599.

the former owner remains the apparent or technical owner, but would hold the stock in trust for the person beneficially entitled to it. The apparent owner alone could vote at an election for directors. The dividends would be declared in his name, though he would be required to account for them to the beneficial owner.

Special rules sometimes exist as to transfer, such as that it cannot be made until all indebtedness to the corporation is paid. Such a rule may be prescribed by statute, or by an authorized by-law.[1] In the latter case, the purchaser of the stock must at the time of the purchase have had either actual or constructive notice of the by-law.[2] (*a*)

SECTION III. *The Power of the Corporation over its Stock.* — Where the amount of stock is *fixed* in the charter, the corporation cannot increase it. A general agent, who assumes to increase it, could not do so, even though he issued it to a purchaser acting in good faith.[3] Certificates of this kind, having no real but yet an apparent existence, would be cancelled on proper application by a court of equity.[4] This remark is consistent with the proposition that the company might be liable in *some other form* for the act of its agent, *e. g.*, for damages.[5]

Where, however, there is no *restriction* upon the issue of stock, the corporation may increase the number of shares. Such an act, if the capital be not increased, is, so to speak, a dilution of the property. If the capital originally consist of 10,000 shares of $100 each, representing $1,000,000, and the corporation acquire $500,000 more capital, an increase of 5,000 shares leaves the capital the same as before, and if understood by persons interested, harms no one. Accordingly, the company may properly, in such a case, make dividends in stock.[6] So if not prohibited, a corporation may buy its own stock, or receive it in payment of a debt, and hold it as being still in existence, and reissue it.[7]

Stock is sometimes of different grades, such as *common* stock, and *preferred* stock. The effect of this distinction is to cause

[1] McCready *v.* Rumsey, 6 Duer, 574.

[2] Morawetz on Private Corporations, § 203.

[3] Mechanics' Bank *v.* N. Y. & N. H. R. R. Co., 13 N. Y. 599.

[4] N. Y. & N. H. R. R. Co. *v.* Schuyler, 17 N. Y. 592.

[5] N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30.

[6] Williams *v.* Western Union Tel. Co., 93 N. Y. 162.

[7] City Bank of Columbus *v.* Bruce, 17 N. Y. 507 ; Taylor *v.* Miami Co., 6 Ohio, 176.

(*a*) Driscoll *v.* West Bradley & C. M. Co., 59 N. Y. 96. Also see Hammond *v.* Hastings, 134 U. S. 401 ; Farmers' & Traders' Bank of Bonaparte *v.* Haney, 54 N. W. R. (Ia.) 61 ; Bank of Africa *v.* Salisbury Gold Mining Co. [1892] A. C. 281 ; Bishop *v.* Globe Company, 135 Mass. 132.

dividends to be paid to the latter in preference to, or if necessary, to the exclusion of the former. A power to create preferred stock is not necessarily implied from a power to issue capital stock.[1] A corporation may, probably, at the outset divide its stock into two classes on this basis, giving sufficient publicity to its action, so that no one may be misled.[2] It is quite otherwise, when ordinary shares have been issued on the usual basis of equality among shareholders. It is then beyond the power of the corporation to establish a preferred class, except by the assent of the shareholders. This assent may be shown either by express words, or by such acts on the part of the stockholders as lead to an inference of assent, — such as unreasonable delay in objecting to the issue, where strangers have relied on the validity of the corporate acts.[3] Were it not for the case cited, it might be claimed with much show of plausibility that preference shares are merely a mode of paying interest exclusively from profits, payable before dividends to regular stockholders.[4] There is no implied power in a corporation to *reduce* the capital stock. This it can only do when authorized by statute.[5]

SECTION IV. *The Rights of Stockholders.* — (1) *To vote for directors.* — This topic has already been sufficiently considered in another part of this chapter.[6]

(2) *To receive dividends.* — These are properly payable from the profits. It has already been stated that it is beyond the power of the company to reduce its capital by paying dividends from it, even though the stockholders consent. There are also statutory prohibitions to be noted.

When a dividend is declared, it is deemed to be detached from the shares, and when payable it becomes a debt due from the corporation to the stockholder. They belong to those who are stockholders at the time when they are *declared.*[7] Prior to the *declaration* of dividends, the profits are a part of the property of the corporation, and they cannot be considered separately from the stock. Accordingly, a sale of shares carries with it by impli-

[1] Hutton *v.* Scarborough Hotel Co., 11 Jur. N. S. 551.

[2] This seems to be the effect of Harrison *v.* Mexican Railway Co., L. R. 19 Eq. 358.

[3] This subject is discussed with much fulness and ability in Kent *v.* Quicksilver Mining Co., 78 N. Y. 159. A number of cases are collected and distinguished on page 181 of the report.

[4] Henry *v.* Great Northern Railway Co., 27 L. J. Ch. 1.

[5] Strong *v.* Brooklyn Cross Town R. R. Co., 93 N. Y. 426. This rule would lead to the conclusion that independently of any prohibitory statute, a corporation would have no power to make dividends out of capital, as that would be a reduction of capital. Flitcroft's Case, L. R. 21 Ch. D. 519.

[6] *Ante*, pp. 362-364.

[7] Jones *v.* Terre Haute R. R. Co., 57 N. Y. 196; Hyatt *v.* Allen, 56 N. Y. 553.

cation dividends subsequently declared, but not those previously declared, the declaration having separated them from the general property of the company.

Holders of preferred shares are entitled to be paid their guaranteed dividends and all arrears, before the holders of common or non-preferred stock are entitled to anything. There is nothing in law to prevent the creation by the legislature, or by the company at the time of its organization, of a series of preferred stock, such as first preferred, second preferred, etc. Each of these might have dividends in their proper order, either of the same or of varying amounts, the first having always in payment a preference over the second, etc. Dividends of a prescribed amount are sometimes guaranteed by another corporation, as in the lease of a railroad, where the lessee guarantees dividends to the stockholders of the lessor company. If the corporation, being under a duty to pay preferred dividends, divert the funds from the preferred to the common stock, interest must be paid on the arrears.[1]

(3) *The right of a stockholder to call the directors and corporation to account for mismanagement, etc.* — The stockholder is to be regarded as having an interest distinct from that of the corporation. He may, under certain circumstances, claim the interposition of the court to prevent the corporation from dealing in an unauthorized way, and from diverting the capital from its appropriate uses.[2] This doctrine is founded upon the notion that the corporate property is held *in trust* by the corporation, and thus a court of equity may control it as a trustee. It is a very common thing when a trustee will not preserve trust property, and, for example, will not bring or defend an action after reasonable request, for the *cestui que trust* to bring the action and to make the trustee defendant.[3] This principle was applied in the case of Dodge *v.* Woolsey.[4] The facts were that an illegal tax was imposed upon a bank. The corporation would not resist its collection. A suit was brought to prevent the collection of the tax against the bank itself, the directors, and the tax collector, and it was maintained.[5]

The directors will also be liable to a stockholder in some instances in their individual capacity, either for wasting the

[1] See the case of Boardman *v.* L. S. & M. S. R. R. Co., 84 N. Y. 157.

[2] A leading case upon this point is Dodge *v.* Woolsey, 18 How. U. S. 331.

[3] Bate *v.* Graham, 11 N. Y. 237; Hagan *v.* Walker, 14 How. U. S. 29.

[4] 18 How. U. S. 331.

[5] See also March *v.* Eastern R. R. Co., 40 N. H. 548; Pratt *v.* Pratt, Read, & Co., 33 Conn. 446.

funds or depreciating the value of the stock by improper means,[1] or by a fraudulent breach of trust.[2] While they are liable for losses, even though not wilful, if they occur through their gross neglect and inattention, they are not responsible if they have exercised ordinary care.[3] Additional remedies are given by statute. Thus, in New York, if dividends in a monied corporation are made from capital instead of income, the directors are personally liable. (*a*) The fact that the stockholder received such a dividend will not bar the action, if he did not know that the diversion of capital was taking place.[4]

(4) *Rights of stockholders in case of the dissolution of the corporation.* — If the corporation be dissolved, the debts being first paid, the remaining assets belong to the stockholders. The directors thereupon become trustees for the management of the property with a view to its ultimate division among the stockholders.[5] In making distribution, any debt due from a stockholder is treated as assets of the corporation, and deducted from his share. The object is to equalize the distributive shares of all the stockholders in the fund after payment of all debts due by them to the corporation.[6] The stockholder may in such a case assign his interest, and his assignee will have the same rights against the corporation as he himself would have had, had he remained owner. This matter is usually regulated in the various States by statute, in accordance with the principles already stated.

SECTION V. *Liability of the Corporation, Stockholders, and Directors to Creditors.* — But little additional need be said as to the liability of the corporation. As has already been stated, it is liable (where the doctrine of *ultra vires* does not prevent) much in the same way that a natural person would be. It can be sued upon its contracts and its torts, and judgment obtained in the same general way. In addition to this, when it becomes insolvent, the remedies allowed in the law of trusts will be applicable, the property being a trust fund for the payment of its debts. The principles of equity jurisprudence will be applied to the case. Statutory remedies must also be considered in the respective States.

As a general rule, stockholders will not be liable to the creditors

[1] Robinson *v.* Smith, 3 Paige, 222.

[2] Cunningham *v.* Pell, 5 Id. 607.

[3] Scott *v.* Depeyster, 1 Edw. Ch. 513; *ante*, p. 391.

[4] Gaffney *v.* Colvill, 6 Hill, 567.

[5] Angell & Ames on Corporations (11th ed.) § 779 *a*, and cases cited; Curran *v.* State of Arkansas, 15 How. U. S. 312.

[6] James *v.* Woodruff, 10 Paige, 541, aff'd in 2 Den. 574.

(*a*) See Stock Corporation Law, Laws of 1892, ch. 688, § 23.

of the corporation from their private estate. Statutes may, however, impose either a partial or unlimited personal liability. Thus the National Banking Act provides for a partial personal liability. In some instances unlimited personal liability is imposed for the payment of certain debts, as, for example, for the wages of employees (*a*). Trustees or directors may become liable to creditors for personal wrongful acts or negligence causing injury. There is sometimes a statutory liability, as, for instance, for not filing a prescribed report. (*b*)

(*a*) See Stock Corporation Law of New York, § 54.

(*b*) The New York statute is found in the Stock Corporation Law, §§ 30 and 31.

The policy of the legislation concerning the creation of corporations has been quite different in New York from that of the English Companies Act, 1862. *Ante*, p. 401. By that and amendatory statutes a single scheme has been adopted in England applicable to all business corporations formed for lawful purposes. In New York, on the contrary, there have been in the past many distinct methods of incorporation provided for in separate statutes, which were enacted to meet the diverse ends which the incorporators might have in view. Many corporations were formed under the act of 1848 and amendatory acts (ch. 40, Laws of 1848), known as the "Manufacturing Corporation Act." In 1875 a general scheme known as the "Business Corporation Act" (ch. 611, Laws of 1875), was enacted, but this did not repeal the law of 1848, nor the other numerous acts for the creation of stock corporations, such as the laws relating to monied corporations and to railroad and other transportation companies.

Besides laws for the incorporation of stock corporations, there were separate statutes for the creation of religious, social, charitable, and benevolent organizations, and distinct rules provided for their administration, their power to acquire land, their visitation, and dissolution.

In 1890, and again in 1892, by the recommendation of the Commissioners of Statutory Revision, it was endeavored to simplify, and to a certain extent codify, the various general corporation acts then in force. This legislation resulted in several acts of a wide scope and application. By the General Corporation Law (ch. 563 of the Laws of 1890, as amended by ch. 687 of the Laws of 1892) all corporations are divided into four classes: Municipal corporations, stock corporations, non-stock corporations, and mixed corporations. Stock corporations are in turn divided into monied, transportation, and business corporations, while non-stock corporations are divided into religious and membership corporations. Mixed corporations, which may or may not have capital stock, are either cemetery, library, co-operative, board of trade, or agricultural and horticultural corporations. The General Corporation Law is applicable to all domestic corporations, and provides in a general way for their administration and internal government, leaving the details of organization to be prescribed by other laws.

Another act of especial importance is the Stock Corporation Law (ch. 564, of the Laws of 1890, as amended by chs. 2, 337, and 688 of the Laws of 1892). This act applies to all corporations having capital stock divided into shares, except that the first article does not apply to monied corporations. Its provisions are confined for the most part to the general powers of such corporations, to subscriptions for stock, its issuance and transfer, and to the rights, duties, and liabilities of stockholders and directors. The provisions relating to the organization of stock corporations are found in special acts passed at the same time. These are the Banking Law, the Insurance Law, the Railroad Law, the Transportation Corporations Law, and the Business Corporations Law. The classes of corporations to which the first four of the above named acts apply, appear from the respective titles of these acts.

The Business Corporations Law (ch. 691 of the Laws of 1892) was designed to take the place of the Manufacturing Cor-

poration Act of 1848 and the Business Corporation Act of 1875, both of which were repealed by the amendments to the General Corporation Law in 1892. Under this comprehensive statute, all business or other industrial corporations may be organized, except that no corporation can be formed under it for the purpose of carrying on any business which might be carried on by a corporation formed under any other general law of the State authorizing the formation of corporations for the purpose of carrying on such business.

Notwithstanding these numerous changes, the various statutes for the organization of religious, charitable, and benevolent corporations, and also those for the creation of what are now known as mixed corporations, still remain as they were, except in so far as the provisions of the General Corporation Law or of the Stock Corporation Law may be applicable. It may be stated, generally, that these provisions apply only when not conflicting with other corporate laws.

BOOK II.

THE LAW OF PERSONAL PROPERTY.

PART I.

PROPERTY IN GENERAL AND THE LIMITATIONS TO ITS OWNERSHIP.

CHAPTER I.

THE NATURE OF PROPERTY.

THE origin of the right of property is to some extent speculative, and is differently regarded by writers on jurisprudence. Some have considered it from the point of view that property originated with mere occupancy or possession by an individual man, who maintained his right by persistency of occupation, losing his entire right when his possession ceased. Others, more philosophically, have endeavored to trace the right historically, and to show as a *matter of fact* what were the earlier forms of ownership, seeking for them among the older features of Roman law, and in India and among the tribes of Germany. Research and inquiry have thus been carried to a great extent, and have led to solid and satisfactory conclusions.

The right of property must be regarded as primarily founded in the family relation, and in particular in that relation in the patriarchal state. This presupposes social relations and some amount of law or public opinion to uphold its existence and to prevent its subversion. As between the members of one and the same family of whom a patriarch may be supposed to be the head, the natural respect and reverence due from the various members to such a head may have sufficed. In reference to strangers, as, for example, to other heads of like families, there must have been in the early days something resembling our modern notions of international law, whether by compact or tacit understanding,

leading to mutual respect of personal and property rights. As after a while these separate interests merged into a larger community, ideas were expanded to meet the new circumstances, and rights of property began to assume the form which is recognized to-day.

There are still in the East communities of archaic origin which continue their ancient institutions, and show that property was not held at first individually, but *in common*, and that common ownership by a village community is much older than individual ownership. The village community is to be regarded as a larger community, of which the patriarchal family is the unit.[1] Mr. Maine finds much support for this theory in the Hindoo village community. These remarks are especially applicable to land, for movable property appears to have been at an early day the subject of individual ownership, and perhaps to some extent led the way to individual ownership in land.

Very close attention has of late been given to the study of the village community in Germany by writers of the school of Von Maurer. A compendium of results may be found in an essay by Morier, contained in a series entitled "Systems of Land Tenure in Various Countries," published by the Cobden Club.[2] A number of associated families in Germany held land divided into three divisions termed a "mark." There were the mark of the village, the "common mark," and the "arable mark," or cultivated section. The families dwelt in the village, and held the "common mark" in a species of undivided ownership, while the "arable mark" was cultivated separately by the respective families. There would thus appear to be *separate* ownership there side by side with undivided ownership. It is difficult to say which is the earlier, undivided or separate ownership. The *undivided* ownership is not to be confounded with *communistic* ownership. This last involves ownership by the village as a corporation, so that no one *individual* has any separate or exclusive interest; while an *undivided* interest is capable of separation and exclusive enjoyment. The weight of evidence is strong to the effect that among the Teutonic races communistic ownership did not prevail, although the common mark was owned without division.[3]

[1] This subject is fully developed by Sir Henry Sumner Maine in his various works, also by G. L. Von Maurer, in Germany.

[2] Chap. V. (p. 279), on "The Agrarian Legislation of Prussia during the Present Century," by Sir Robert B. D. Morier.

[3] This point is clearly brought out by Mr. Denman W. Ross in his very scholarly and valuable work entitled "Early History of Land-Holding among the Germans," Boston, 1883. The theory which he supports is fortified by the citation of a great mass of authorities, not merely from text-writers, but from original sources of information.

It seems possible to take this view: as to all that property which could only be made available by tillage, or regularly recurring human labor, *separate* ownership existed from the earliest assignable period; while from the land which was set apart as yielding spontaneous products, — such as pasture-ground or forest, — the property was held without division. This division would follow the natural law, that steady and persistent labor is not undertaken without a reasonably sure prospect of reward. Man being substantially the same being in all ages, the labor required to till arable land could only, if free, be obtained by securing to the workman the exclusive enjoyment of the products of his labor. This separate ownership did not preclude regulations of *the mode of cultivation*, tending to produce uniformity. Nor is it altogether inconsistent with a method of new assignments of land from time to time among the proprietors, which is said to have prevailed at an early date, and which could be made in such a way as to secure an equivalent for the products of past labor. The great law at all events is recognized that no crop will be planted and tilled unless at least between the time of planting and maturity separate and exclusive possession is recognized, and separate and exclusive enjoyment of the product of labor is secured. It is much that the progress of the Teutonic races for more than a thousand years has been away from communism, and even from undivided interests towards separate and exclusive ownerships.[1]

The modern inquiries upon the origin of property have this surpassing advantage over those that formerly prevailed, in that they account both for the notion of individual property and the growth of social regulations tending to foster and protect it. As far as we can wrest from antiquity its secrets, separate ownership is at least coeval with undivided ownership. Separate ownership is from the outset also the mistress of the future, and tends to undermine and overthrow undivided ownership, and practically succeeds everywhere, except in the sluggish East, where archaic systems still linger, though apparently doomed to swift decay.[2]

[1] The distinctions and the resemblances between the Hindoo village as still subsisting, and the Teutonic village of early days, as well as that which existed in England, are fully discussed by Sir Henry Sumner Maine, in his work on "Village-Communities," Lectures 3d, 4th, and 5th. It would seem that more light might be shed on the subject in hand from a still more close and minute examination of the early institutions of England and Germany. A great debt of gratitude is due to Mr. Maine for bringing this class of subjects to the attention of scholars both in England and America.

[2] Village-Communities, p. 24: "India is gradually losing everything which is characteristic of it." The only chance of retaining even a knowledge of Sanskrit is in the reactive influence of Germany and England.

The word "property" has two quite distinct meanings in law, leading to much confusion in the minds of students. In one sense, it means the subjects of ownership, — the lands and houses, or the ships and other movable articles capable of ownership. In another and more technical sense, it means ownership itself, — the interest a specified person may have in the houses and goods in question. In the one sense, it is objective and refers to outward and physical things; in the other, it is abstract and has no reference to particular objects. A single instance of each meaning may be cited; when a distinction is taken between *real* property and *personal* property, the *subjects* of ownership are referred to, that is, as to their nature, whether movable or immovable; when on the other hand, "property" is said to be absolute or qualified, ownership is plainly regarded. In this book, the word "ownership" will be for the most part employed, instead of "property" when the second of the two significations is intended.

CHAPTER II.

THE DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY.

THE object of this chapter is only to point out in a general way the difference between the two kinds of property, reserving the more minute consideration of personal property to later chapters. The importance of the distinction is largely due to the fact that the two kinds of property are governed by different systems of law. Real property is largely developed out of the feudal system, which has no relation to personal property. The latter grew up to a considerable extent from the customs of merchants (*lex mercatoria*). It is largely influenced by the Roman law, and by usages not merely in England but in other parts of Europe. Much of it has been worked out by decisions of the courts within a comparatively few years. The law of real property is in its theory antiquated, though modified by the necessities of modern times. It is local in its nature, and must be studied, where minute knowledge is required, in rules locally prevailing in the State where the land is situated. It is accordingly a leading rule that a conveyance or will of real property, wherever made, must comply with the forms prevailing in the place where the land is situated; while a sale of personal property is in general governed by the law of the place where the sale is made, and a will of the same kind of property by the law of the place where the testator is domiciled at the time of his death.

Even the Roman law, though largely assimilating the rules governing real and personal property, distinguished for some purposes between movables and immovables. This is a distinction based on the inherent difference between the two kinds of things. Some branches of law are thus peculiar to immovables, such as the law of "servitudes" or rights which an owner of land or an individual may have in the immovable property of another. The general idea of real property is that it is immovable, — a portion of the earth, or something connected with it or attached to it. Still, there are exceptional things, which in fact are movable, but for legal reasons are deemed to be real, such as title deeds of an estate,

doves in a dove-house, fish in a fish-pond, etc. Personal property on the other hand, is in general movable. There are, however, certain interests in land classed among chattels and deemed to be personal, — the principal instance being a lease for a definite number of years. The reason for this is historical and technical. Such interests originate in *contract*, and a contract is personal. Although a lease at present is an estate in land, yet its origin in contract is not lost sight of, and in this way it is for many purposes personal property.

Reference must also be made to a rule of equity jurisprudence, that an owner may so impress his intent or purpose upon property as by a mere direction, to convert it from one species of property to the other, without any actual change of ownership. Thus a testator may by his will direct his land to be sold and converted into money. It will then for many purposes be deemed to be money at the moment of his death. So if he directed in the same manner his money to be laid out in land, it would for many purposes be regarded as land, although it remained in the form of money. This is known as the doctrine of "equitable conversion." In some cases, a rule of law restores the property to its original character. This is termed "reconversion." The details of this subject may be found in works on equity jurisprudence.

Frequently a question arises whether the attachment or annexation of an item of personal property to land gives it the characteristics or qualities of real property. This question properly belongs to the law of real property where it is treated under the title of "Fixtures."

CHAPTER III.

THINGS NOT THE SUBJECT OF PRIVATE OWNERSHIP.

It is the general rule of law that things are capable of ownership. Such a theory is highly desirable since it tends to prevent rival and hostile claims and public disorder, as well as to promote efficiency in the production of wealth; still, there are certain items of much intrinsic importance that are not regarded as the subject of private ownership.

It is proper for the sake of clearness to distinguish between those things which are not usually the subject of private ownership, but which may become so by appropriation or occupancy, and those which cannot be acquired by a private person, at least by his own act. Of the former class are wild animals, precious stones or other articles found on the seashore, soil washed upon the shore of land already under private ownership (alluvion), and the like. The other class of things, and these are referred to in the present chapter, are the air, running water, the sea, and the seashore below a prescribed line and also property permanently devoted to public or religious uses and declared by law to be inalienable. Of these, some are incapable of appropriation from the necessity of the case or by the common consent of mankind; others by the local law of the country where the things in question may be.

This subject is a branch of the Roman law, and is treated in the Institutes of Justinian.[1] As to instances of the first class, he says: "The following things are by natural law common to all,— the air, running water, the sea, and consequently the seashore, . . . all rivers and harbors are public, so that all persons have a right to fish therein. The seashore extends to the limit of the highest tide in time of storm or winter. Again, the public use of the banks of a river, as of the river itself, is part of the law of nations; consequently every one is entitled to bring his vessel to the bank and fasten cables to the trees growing there and may use it as a resting place for the cargo as freely as he may navigate the river itself. But the ownership of the bank is in the owner of the adjoining

[1] Book II., Tit I.

land, and consequently so too is the ownership of the trees which grow upon it. Again, the public use of the seashore, as of the sea itself, is part of the law of nations; consequently every one is free to build a cottage upon it for purposes of retreat as well as to dry his nets and haul them up from the sea. But they cannot be said to belong to any one as private property, but rather as subject to the same law as the sea itself with the soil or sand which lies beneath it."[1] Much of this passage is a summary of the common law, though it is not true in that system that all rivers are public, nor that a navigator upon public waters can fasten cables to trees, etc., belonging to riparian owners. While bays and harbors and the beds of navigable rivers may be public, yet the legislature frequently appropriates them to the use of private owners, as by authorizing the construction of wharves, etc., or grants, perhaps, a right to plant and cultivate oysters on the bed of navigable waters within its jurisdiction. It may also be remarked that water itself from a running stream may sometimes become the subject of private appropriation, as for example, in the form of ice cut and stored in ice-houses. Such ice has all the qualities of property. It may even be the subject of larceny.[2] In the case cited, the ice was not private property while in the river from which it was taken.

It was also a rule of the Roman law that property devoted to sacred or religious purposes was not the subject of individual ownership. This principle was carried very far. If property was once regularly consecrated it became inalienable, except that if movable it could be sold for the redemption of captives, the support of the poor in time of famine, and the payment of church debts. Finally, land could be made, as it were, *quasi* sacred by its full owner burying a dead body in it, or by being buried in it himself. It was not fully "sacred" in this case, for it remained private property, but could not be diverted from the purpose to which it had been put.[3]

There is no such doctrine in the common law. Private property cannot be withdrawn from commerce in this manner, except in accordance with the law of "charitable trusts," to be hereafter noticed.

[1] Moyle's Translation, Oxford: Clarendon Press, 1883, vol. 2, p. 36.

[2] Ward *v.* The People, 6 Hill, 144.

[3] 1 Moyle's Institutes, note 8, p. 185. The underlying thought here seems to have been that these purposes were public and closely resembling religious purposes. Justinian says in another place that "there is very little difference between public and sacred things." (7th Novel of Justinian.)

CHAPTER IV.

THE QUALIFICATIONS OF OWNERSHIP.

THESE are derived from theories concerning the welfare or the interest of the State, or in other words, from the view that, under the circumstances, private ownership should not exist, or if it does exist, that it should be subverted in the particular instance. In this way ownership may be abridged or destroyed on the occurrence of some act or event, without any fault of the owner, but on public grounds. In such cases there is a limit to the generally absolute character of ownership. Still, ownership continues in full force until the decisive event happens.

The instances that may be grouped together under this general statement are these: (1) Theft, or other wrong-doing whereby ownership is subverted; (2) taxation; (3) eminent domain; (4) public necessity; (5) the police power. These will be treated under separate sections.

SECTION I. *Theft or other Wrong-doing.* — It is a settled rule that in general an owner cannot lose his ownership without his consent.[1] The prominent exception to this rule is the transfer of money, or its equivalents, including bank bills, bills of exchange, promissory notes, and checks payable to order and endorsed in blank by the payee, or similar instruments payable to bearer. These last three must be transferred before they are due, and all must be taken by a person paying value and acting in good faith. This statement does not include bills of lading of goods, nor certificates of stock in incorporated companies. It must be confined to instruments containing *promises to pay money.*

There is a distinction to be taken between a case of theft or other purely wrongful act, and that of fraud. By the term "fraud," is now meant the case where the owner intends to transfer the ownership, but is induced to do so by fraudulent representations. In this case there is the element of *consent* on his part, and until the transaction is repudiated the title is vested in the defrauder. Should he accordingly transfer to an innocent pur-

[1] Saltus *v.* Everett, 20 Wend. 267.

chaser, the title would pass to the latter, and the sole remedy of the former owner would be to proceed against the defrauder. This rule would not be changed though the statutes of a State made the fraud a felony.

There is a class of cases where, upon a purchase and sale of goods, it is mutually agreed that the title shall not pass until the goods are paid for.[1] The agreement may provide for the payment by instalments. Assuming that such partial payments are made, still the apparent purchaser will have no title until full payment is made. (*a*) The question may then arise, whether before full payment he can transfer to another the ownership of the chattel itself. The better opinion is that he cannot, and that the most that he can do is to put the purchaser in his own position, even though the latter act in good faith and pay full value. (*b*) It would be perfectly lawful for a State to provide by law that the "seller," under such circumstances, should take certain steps to insure publicity, such as to file the certificate of sale in a specified public office, under the penalty, if he fail to do so, of losing the ownership in favor of a derivative purchaser acting in good faith (*c*).

The general principles above stated will not prevent an owner from abandoning goods by a decisive act, and thus losing ownership.

SECTION II. *Taxation.* — In American law, there is a general power of taxation vested in each State in analogy to a like power in English law, as well as a specific power lodged by the terms of the United States Constitution in the general government. The one power is implied; the other is express. In general, there is no restriction found in the State constitutions upon the power to tax. It can properly be exercised only for some public purpose. It

[1] Ballard *v.* Burgett, 40 N. Y. 314; Bigelow *v.* Huntley, 8 Vt. 151; Sargent *v.* Metcalf, 5 Gray, 306.

(*a*) Benner *v.* Puffer, 114 Mass. 376; Nichols *v.* Ashton, 155 Mass. 205; Thorpe Brothers & Co. *v.* Fowler, 57 Ia. 541; Mack *v.* Story, 57 Conn. 407; Cole *v.* Mann, 62 N. Y. 1; Bean *v.* Edge, 84 N. Y. 510.

(*b*) Some authorities draw a distinction between a conditional *sale* and a conditional *delivery*, holding in the latter case that if the delivery is made the condition is waived, and the title vests absolutely in the vendee. Comer *v.* Cunningham, 77 N. Y. 391; Parker *v.* Baxter, 86 N. Y. 586. This distinction has, however, been criticised as leading to confusion. Benjamin on Sales (Corbin, 4th Am. ed.) §§ 358–360. A rule contrary to that stated in the text is found in the following cases. McCormick *v.* Hadden, 37 Ill. 370; Van Duzor *v.* Allen, 90 Ill. 499; Vaughn *v.* Hopson, 10 Bush, 337; Forrest *v.* Nelson, 108 Pa. St. 481; Lincoln *v.* Quynn, 68 Md. 299.

(*c*) See in New York, Laws of 1884, ch. 315; Rev. Stats. p. 2522, as amended by ch. 632 of the Laws of 1892, and ch. 684 of the Laws of 1893.

would be in the highest degree unjust to tax the community for the benefit of a particular individual. If, however, the purpose be public, the power, in the absence of special restriction, is unlimited, since the occasions that may require the exercise of the taxing power cannot be foreseen. A single locality, such as a city or town, may be taxed without extending the taxation elsewhere. There are reasons requiring taxation in some instances to be limited in its area, as where the object is to further some local improvement; and such taxation is constitutional.[1]

There is a single restriction upon State power to tax found in the United States Constitution to the effect that no State shall without the consent of Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.[2] In regard to taxation by the United States government, there are special rules and some restrictions found in the 8th and 9th Sections of Article I. of the Constitution.

If these restrictions are violated, the law is void. Where the taxing power is lawfully exercised, the person taxed may be deprived of his property without any violation of principle, since taxation is necessary to political existence. The individual taxed is assumed to receive an equivalent for the property of which he is deprived in the benefits to be derived from good government and the due administration of law. The distinction between the power of taxation and the right of eminent domain is stated in the next section.

Section III. *Eminent Domain.* — The meaning of this expression is the right of a State or of the United States, as the case may be, to take property for public purposes. This, again, is a power inherent in a State. It may be necessary to exercise it for protection and defence in time of war, or for the welfare of the people in time of peace. A similar power was exercised under the Roman law.[3]

The law of "eminent domain" is in no respect founded upon feudal principles. It applies both to real and personal property. It has its foundation in the theory that in the presence of imperative public interests private rights of property must give way. Still, this rule is not to be pressed so far as to lead to confiscation. The individual owner should be compensated for his loss, so that "eminent domain" in actual practice is but little more than a compulsory transfer for value.

[1] People *v.* Mayor of Brooklyn, 4 N. Y. 419; Town of Guilford *v.* Supervisors of Chenango County, 13 Id. 143.

[2] Art. I. § 10, cl. 2.

[3] The 7th Novel of Justinian. Provision is made in this case for taking property of the Church for the use of the State, and an indemnity is provided for.

The obligation to provide compensation is secured by clauses both in the United States and State Constitutions. The language used is, "nor shall private property be taken for public use without just compensation."[1] This clause, as found in the United States Constitution, is only intended as a restraint upon the action of *Congress*, and not upon that of the *States*.[2] It is on this account that a like clause is found in various State Constitutions, in order to bind State legislatures.

The distinction between the right of eminent domain and the power of taxation is to be carefully noted. Taxation is based upon contribution between the members of the community or of a class of persons; eminent domain is founded upon the idea that the State takes from an individual more than his share of the public burdens. Taxation falling upon a class of persons is apportioned among them according to some rule of apportionment. On the other hand, "eminent domain" operates upon an individual without reference to any amount imposed upon any other individual.[3]

Eminent domain can only be exercised by or under sovereign authority, *i. e.*, by a State or by the United States. Its exercise is partly a legislative and partly a judicial matter. In other words, there are always two possible inquiries in this class of cases: one is, whether the proposed use for which the property is to be taken is in its nature public or private; the other, whether an exigency has arisen in which the right should be exercised. The determination by the legislature of the first inquiry in favor of the use being public may be reviewed by the courts;[4] that of the latter, is final and conclusive.[5] (*a*) This principle was applied to a statute allowing rural cemetery associations to take land compulsorily. It was held to be void, as the use was deemed by the court to be private, and not public.[6]

It is not, however, necessary that the use should benefit the entire people of a State or of the nation, as the case may be. It is enough if it promotes, for example, the industrial power or resources of a considerable number of the inhabitants, or in any

[1] Art. V. of Amendments.

[2] Withers *v.* Buckley, 20 How. U. S. 84.

[3] People *v.* Mayor of Brooklyn, 4 N. Y. 419, 424; Howell *v.* City of Buffalo, 37 N. Y. 267.

[4] Talbot *v.* Hudson, 82 Mass. 417; Matter of Deansville Cemetery Association, 66 N. Y. 569.

[5] Matter of Fowler, 53 N. Y. 60.

[6] Matter of Deansville Cemetery Association, 66 N. Y. 569.

(*a*) Matter of Application of Union Ferry Co., 98 N. Y. 139, 153; Pocantico Water Works Co. *v.* Bird, 130 N. Y. 249.

way indirectly adds to public convenience or even pleasure or recreation. But it will not be enough to justify a claim of eminent domain if the property to be taken is to remain under private ownership and control, and no right to the use or to direct the management of it is conferred upon the public.[1] (*a*) However, the State may delegate the power to a local municipality, or even to a private corporation, such as a railroad or canal company, where the circumstances show that the use will be public in its nature.

The mode of exercising this power should next be considered. A common form of expression is to call it a case of "condemnation." The property is said to be "condemned." This term will be used as occasion may require in the further course of this discussion.

Proceedings to condemn property are regulated by law, and in some instances, as in New York, to some extent by constitutional provision. The New York constitution requires that the amount of compensation should be assessed by a jury or by three commissioners appointed by a court of record.[2] Details will not be stated here, but must be sought in the particular act or class of acts applicable to the subject. Thus, in taking land, the statute sometimes only allows a mode of use or easement to be taken; in other instances, the entire ownership may be taken. It might happen in the last case that it would finally turn out that a portion of the land was not needed for the public purpose, although it had been fully acquired and paid for. As the ownership has vested in the body (*e. g.*, a city) acquiring it, it may be sold or disposed of in the same manner as other acquisitions.

The principle on which compensation is awarded in condemnation proceedings is to make up to the former owner the loss sustained by him. It will accordingly be necessary to take into account the extent of the owner's interest which is to be "condemned." If it be an easement, such as a right of way, as the entire interest of the proprietor is not taken, compensation will be made accordingly. Then if a second exercise of the power of condemnation were made over the same property, additional compensation must be made.[3]

It is a fundamental prerequisite to a claim for compensation under our law, that some *property* should be *taken*. The language of the constitutional provision is, "nor shall private

[1] Matter of the E. B. W. & M. Co., 96 N. Y. 42.

[2] Art. I. § 7.

[3] Williams *v.* N. Y. Central R. R. Co., 16 N. Y. 97; State *v.* Laverack, 34 N. J. Law, 201.

(*a*) Matter of the Split Rock Cable-Road Co., 128 N. Y. 408; Pocantico Water Works Co. *v.* Bird, 130 N. Y. 249.

property be taken for public use without just compensation." Accordingly, no claim for consequential damages can be made for the erection of public works in the vicinity of the property of the claimant, unless his property itself be taken. Thus, if a railroad company under public authority should lay its track in the bed of a navigable river, thus cutting off the approach of a riparian proprietor by boats to the river, he would have no claim for compensation from the company, as his *property* would not be taken.[1] (*a*) While the principle stated in Gould *v.* Hudson Riv. R. R. Company, just cited, is correct, there is room for doubt whether it was correctly applied. In a similar case in England, it was decidcd that the construction of an embankment along the river Thames in front of the land of a riparian proprietor, and preventing his approach to the river, deprived him of a right of property for which compensation was due. Such an accessory right to the use and enjoyment of land was deemed itself to be land.[2] A cognate question became of great importance in the construction of elevated railways in the city of New York. It was decided that, even conceding that the city owned the fee of the street, yet as it had, on opening a particular street, agreed that it should be forever kept open as a street for the benefit of the abutting property, the owners had an easement appertaining to their land which constituted "property," and which could not be taken or materially impaired in value by the railroad company without compensation.[3] (*b*)

[1] Gould *v.* Hudson Riv. R. R. Co., 6 N. Y. 522.

[2] Duke of Buccleuch *v.* Metropolitan Bd. of Works, L. R. 5 H. L. Cas. 418; McCarthy *v.* Metropolitan Bd. of Works, L. R. 7 C. P. 508.

[3] Story *v.* New York Elevated R. R. Co., 90 N. Y. 122; Arnold *v.* Hudson Riv. R. R. Co., 55 Id. 661.

(*a*) This case has been often questioned, and may properly be considered as overruled. Kane *v.* New York Elevated Ry. Co., 125 N. Y. 164; Rumsey *v.* New York & New Eng. Ry. Co., 133 N. Y. 79; s. c. 136 N. Y. 543.

(*b*) See also Lahr *v.* Met. El. Ry. Co., 104 N. Y. 269; Abendroth *v.* Manhattan Ry. Co., 122 N. Y. 1; Kane *v.* New York El. Ry. Co., 125 N. Y. 164. In these cases the principle of the Story case was affirmed and its application extended.

It is a general rule, as stated in the text, that purely consequential damages, such as those incidental to the occupation of the land of another, are not recoverable. If, however, some property is taken, the owner is entitled to receive not only the value of the part taken, but also compensation for the depreciation in value caused to the remainder. Henderson *v.* N. Y. Central R. R. Co., 78 N. Y. 423; Bohm *v.* The Met. El. Ry. Co., 129 N. Y. 576; Cummins *v.* Des Moines & St. Louis Ry. Co., 63 Ia. 397. What constitutes a "taking" has been much discussed and variously decided. The tendency of the later authorities is to regard any invasion of a property right as a "taking," whether property is actually converted and the title thereto actually divested, or not. Eaton *v.* The B. C. & M. R. R., 51 N. H. 505; Pumpelly *v.* Green Bay Co., 13 Wall. 166; Rigney *v.* The City of Chicago, 102 Ill. 64; Sedgwick on Damages, §§ 1114–1124; Lewis on Eminent Domain, §§ 56–59. In

Under these rules, it is well settled that no title to the property taken passes until compensation is actually made. It is not, however, necessary that the *payment* of compensation should precede the public occupation. Payment should be made within a reasonable time. It is enough if an actual and certain remedy is provided whereby the owner may compel payment of his damages before he is required to part with his property.[1]

No distinction in the foregoing statements is made between proceedings for condemnation in behalf of a State and of the United States. The power of the United States to proceed directly in such a case has been sustained by the Supreme Court of the United States.[2] It may also be a petitioner in a State court in the same general way as a private foreign corporation.[3] This principle does not go so far as to compel a State to pay for land for the use of the United States,[4] nor to justify proceedings under a State law insufficiently framed.[5]

It is assumed that a State cannot exercise the right of eminent domain so as to interfere with the paramount power of the United States. Still, there would seem to be nothing to prevent the taking from the United States, as a mere landed proprietor, of a portion of its domain within State limits.[6]

The State has no power under this rule to take one man's property and give it to another, even though it make full compensation.[7] This principle was applied to the case of a private road.

[1] Matter of the Petition of United States, 96 N. Y. 227.

[2] Kohl *v.* United States, 91 U. S. 367.

[3] Matter of the Petition of United States, *supra*.

[4] Trombley *v.* Humphrey, 23 Mich. 471.

[5] Darlington *v.* United States, 82 Pa. St. 382.

[6] United States *v.* R. R. Bridge Co., 6 McLean, 517.

[7] Taylor *v.* Porter, 4 Hill, 140; Hoye *v.* Swan, 5 Md. 237.

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several States, moreover, constitutions have been adopted or statutes passed giving compensation where property is "injured or damaged."

In the development of the law of eminent domain, the word "property" has acquired a broader meaning than it at first received. Thus, in the elevated railroad suits in New York, referred to in the text, it has been adjudged that the right of an owner of land abutting on a street, to light, air, and access is an easement, and is *property*, and that any impairment thereof is a *taking* within the constitutional provision. As these easements are not considered as possessing value separately and apart from the land, it follows that the real and only injury to the owner is the effect produced upon the land by the impairment of the easement. Such an injury is therefore wholly consequential. Bohm *v.* The Met. El. Ry. Co., *supra*. In ascertaining the extent of this consequential injury, the benefits, if any, to the land, caused by the presence and operation of the elevated road, must be taken into account. Newman *v.* M. E. Ry. Co., 118 N. Y. 618; Bohm *v.* M. E. Ry. Co., *supra*; Sutro *v.* M. Ry. Co., 137 N. Y. 592; Bischoff *v.* N. Y. E. Ry. Co., 138 N. Y. 257.

Further consequential injuries, such as those due to noise, vibration, etc., are not invasions of a property right to be compensated for under the rules of eminent domain. American Bank Note Co. *v.* N. Y. E. Ry. Co., 129 N. Y. 252, 271.

The decision in Taylor *v.* Porter led to a provision in the New York constitution, providing a mode of laying out private roads.[1]

When property has been obtained through the law of eminent domain for one public purpose, there is nothing to prevent its being again condemned for a paramount public purpose.[2]

SECTION IV. *Public Necessity.* — By this expression is meant the sacrifice of private property for the public welfare, under such circumstances of overruling necessity that no compensation is required. This subject is frequently alluded to in the old law-books. Thus, KINGSMIL, J., in the Year Books of Henry VII.[3] says that, as to a thing which concerns the commonwealth, one can justify a trespass in order to take goods out of the house, when the safety of the goods is concerned, or to even break down a house for the same purpose. And so in time of war one can justify an entry into another's land to make a bulwark in defence of the king and the realm, and these things are justifiable and lawful for the maintenance of the commonwealth. Some years later, it is said by SHELLY, J., that the "commonwealth" is to be preferred before "private wealth," since for the commonwealth one may suffer damage, so that, for example, a house shall be "plucked down" if the next house be on fire, and suburbs of cities shall be plucked down in time of war, for this is for the commonwealth, and a thing that is for the commonwealth any one can do without being liable to an action.[4] These principles were followed in a famous case known as the Saltpetre Case.[5]

This general doctrine, so far as it may justify the destruction of property to prevent the spread of a conflagration, has been carefully considered in a number of cases, particularly in some growing out of the great fire in New York in 1835.[6] It has been specifically decided that the destruction by public authority of private property to arrest a fire is not "taking property for public use," within the meaning of the Constitution.[7] There is, however, a statute upon this matter applicable to the city of New York, providing that if the city magistracy order a building to be destroyed to stop a conflagration, the owner of the building must be indemnified in a prescribed manner, unless it would, without such act, have been inevitably destroyed.[8] This statute has been

[1] Art. I., § 7.

[2] Crosby *v.* Hanover, 36 N. H. 404; Central Bridge Corp. *v.* Lowell, 4 Gray, 474.

[3] 21 Hen. VII. 27.

[4] Year Book, 13 Hen. VIII. fol. 15.

[5] Part 12, Coke's Rep. 12.

[6] American Print Works *v.* Lawrence, 3 Zab. (N. J.) 9; Hale *v.* Lawrence, Id. 590. See also Beach *v.* Trudgain, 2 Grat. (Va.) 219.

[7] McDonald *v.* Red Wing, 13 Minn. 38.

[8] 2 Rev. Laws, 368, 369; also, Laws of 1882, ch. 410 (Consolidation Act), § 450.

construed in several cases. It is decided that it only applies to the owner of the *building*, or some one having an interest therein, and accordingly would not extend so far as to protect the owner of *goods* stored in a building belonging to another person. Such a person would be left to the rules of the common law.

In the course of the discussions growing out of these cases, it became important to consider the distinction between the cases where property was taken for "public use," so as to make compensation necessary, and where it was taken from *necessity*, so that the rule of compensation could not be invoked. Reference to these discussions will be found in a note. The true theory is, that most of the so-called cases of "necessity" are really a branch of the "police power" in a State, and may properly be placed under that head. No rational distinction can be drawn between the case where property is necessarily destroyed to prevent a conflagration, and where a destruction is made to prevent the spread of a disease or a pestilence. Each depends upon the principle that the "safety of the people is the supreme law." [1]

An instance of the same kind is found in the case of persons travelling upon a public highway which is suddenly out of repair, going upon adjacent fields without permission of the owner. This is confined to the case where the obstruction is *sudden* and *recent*, *e. g.*, a fresh fall of snow.[2] This is held to be the exercise by an individual of a public right, finding its justification in necessity. If the obstruction is neither sudden nor recent, its existence is really imputable to the neglect of the public authorities, and so not necessary.

SECTION V. *Regulation or Destruction of private Property under the so-called "Police Power."* — By the police power is meant that authority in the State which regulates private affairs, including the control and management of property, so as to make them

[1] The old cases do not distinguish accurately between the two classes of cases. Thus, the "Saltpetre Case" treats without distinction the erection of bulwarks upon private land in time of war, and the destruction of property to prevent the spread of a fire. The former instance would now clearly be regarded as a case under the rule of eminent domain. Mouse's Case, Part 12, Coke's Rep. 63, is an instance of destruction under the doctrine of necessity. That was a case where, for the safety of passengers, heavy merchandise was thrown overboard from a barge in a storm. The distinction between the two classes of cases is clearly shown in the opinion of Senator VERPLANCK, in Stone *v.* Mayor of New York, 25 Wend. 157, 173, and also in the opinions of BRONSON, J., and of Senators SHERMAN and PORTER, in Russell *v.* Mayor of New York, 2 Den. 461. A note of the reporter to the last-cited case on page 491 shows that the court in another cause, involving the same question (Lawrence *v.* The Mayor), adopted the opinion of BRONSON, J., above referred to, as a sound exposition of the law, and thus sanctioned the proposition that this was not a case of taking private property for public use within the meaning of the Constitution.

[2] Campbell *v.* Race, 7 Cush. 408.

consist with the public welfare. Sometimes it is exercised by the State itself, and again by municipalities, or by public officers, such as commissioners of highways. When properly exercised, private rights must yield to it.

The general nature of the police power has been defined by the Supreme Court of the United States.[1] While it is conceded to be difficult to render a precise definition of it, it is said to be clear that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot divest itself of the power to provide for these objects. They belong emphatically to that class of subjects which demand the application of the maxim, *salus populi suprema lex.*[2]

I. *The relation of the exercise of this power to constitutional provisions.* — The attempted exercise of the police power in particular cases may be obnoxious on two constitutional grounds: one, that it is an invasion of a right of property, and another that the legal proceedings resorted to are not "due process of law." These will be considered separately.

(1) There are opposing views as to the point whether the police power can properly so be exercised as to destroy vested rights of property. The question has been sharply presented as to prohibitory liquor laws acting upon liquor then in existence so as practically to destroy its value. In a New York case such legislation was held to be unconstitutional and void, as an unauthorized invasion of the right of property.[3] On the other hand, the Supreme Court of the United States has decided that a State may forbid the manufacture and sale of intoxicating liquors as a beverage, within its territory, in the exercise of the police power, and further, may declare a brewery a common nuisance because it produces an intoxicating liquor prohibited by law to be manufactured and sold.[4] (*a*)

(2) In the practical exercise of the police power, such methods of proceeding must be resorted to as are usual in judicial inquiries. Property is not to be taken arbitrarily, or without due notice to the owners and a reasonable opportunity to be heard. Under this head, it has been decided that in a seizure of property under a police regulation, the law must provide for legal

[1] Beer Co. *v.* Massachusetts, 97 U. S. 25, 33.

[2] Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191.

[3] Wynehamer *v.* The People, 13 N. Y. 378.

[4] Mugler *v.* Kansas; Kansas *v.* Ziebold, 123 U. S. 623.

(*a*) Kidd *v.* Pearson, 128 U. S. 1; Eilenbecker *v.* Plymouth County, 134 U. S. 31.

notice to the owner of the nature and cause of the accusation, as well as of the trial of the question whether there has been a violation of law.[1] If the law should forbid the maintaining of an action by the property owner, it would be unconstitutional.[2] So if the owner's remedy be unreasonably clogged or hampered.[3]

II. *Instances of the valid exercise of the police power.* — These are very numerous; some of them will be specified in this connection.

(1) The licensing and prohibition of the sale of intoxicating liquors. This class of laws prevails in most, if not all, of the States. There is no doubt as to the power to regulate and license. The power to regulate, however, seems to imply the power to prohibit,[4] and there is no reasonable doubt of the constitutionality of prohibitory liquor laws acting *in futuro.* Sometimes the law assumes the form of prohibition under special circumstances, — as, for example, where a religious meeting is in progress.[5] The more general form of license or prohibition is equally valid.[6] (*a*)

(2) The prohibition of the manufacture and sale of substitutes for butter.[7] (*b*) These have been termed "oleomargarine cases."

(3) Requirements that physicians and midwives report births and deaths.[8]

(4) Regulations respecting the drainage of land as related to public welfare.[9]

[1] Greene *v.* James, 2 Curtis C. Ct. 187.

[2] Preston *v.* Drew, 33 Me. 558.

[3] Saco *v.* Woodsum, 39 Me. 258. To the same general effect are Fisher *v.* McGirr, 1 Gray, 1; State *v.* Snow, 3 R. I. 64.

[4] Cronin *v.* The People, 82 N. Y. 318.

[5] Com. *v.* Bearse, 132 Mass. 542; State *v.* Read, 12 R. I. 137. Cf. Dorman *v.* State, 34 Ala. 216.

[6] Thurlow *v.* Massachusetts, 5 How. U. S. 504; Fletcher *v.* Rhode Island, Id. 540; Pierce *v.* New Hampshire, Id. 554; State *v.* Wheeler, 25 Conn. 290; Jones *v.* People, 14 Ill. 196; Austin *v.* State, 10 Mo. 591; State *v.* Gurney, 37 Me. 156; Met. Board of Excise *v.* Barrie, 34 N. Y. 657.

[7] State *v.* Addington, 12 Mo. App. 214; Powell *v.* Pennsylvania, 127 U. S. 678.

[8] Robinson *v.* Hamilton, 60 Ia. 134.

[9] Donnelly *v.* Decker, 58 Wis. 461.

(*a*) A State statute prohibiting the sale in original packages of liquor manufactured in and brought from another State was declared by the United States Supreme Court to be an invalid exercise of the police power because repugnant to the clause in the Constitution giving Congress power over interstate commerce. See Leisy *v.* Hardin, 135 U. S. 100, overruling Pierce *v.* New Hampshire, 5 How. U. S. 504. See also Bowman *v.* Chicago, &c. Railway Co., 125 U. S. 465. These decisions led to the passage of a law by Congress to the effect that liquors imported into a State or Territory should upon their arrival be subject to the police regulation of such State or Territory, whether in original packages or otherwise. 26 Stat. L. 313, ch. 728 (August 8, 1890). This statute was declared constitutional in *In re* Rahrer, 140 U. S. 545.

(*b*) Commonwealth *v.* Huntley, 156 Mass. 236; People *v.* Arensberg, 105 N. Y. 123; Waterbury *v.* Newton, 50 N. J. Law Rep. 534.

(5) Provisions in city ordinances requiring fire escapes.[1]

(6) Regulations concerning the speed of railroad trains through cities.[2]

(7) Prohibition of the pollution of reservoirs and the streams supplying them.[3]

(8) Restrictions on the sale of pistols other than army and navy pistols.[4]

(9) Regulations as to the keeping of pool-tables for hire.[5]

(10) Prohibition of the disinterment of the remains of the dead.[6]

(11) Prohibition of the sale of opium except by medical men.[7]

(12) Prohibition of the erection of wooden buildings in a city within specified fire limits.[8]

(13) Prohibition of the sale of coal-oil not bearing a specified fire test.[9]

(14) Prohibition of the slaughtering of animals within prescribed limits. In this connection the "Slaughter House" cases in the Supreme Court of the United States should be referred to. The facts in substance were that the legislature of Louisiana, in a large district of 1154 square miles (including New Orleans, and containing a population of more than two hundred thousand people), granted to a corporation the exclusive right of having slaughter-houses, and required all cattle slaughtered in the district to be slaughtered there. It also prescribed pecuniary fees to be paid for each animal slaughtered, and allowed the company to retain certain parts of the animal itself. It was held that this was an exercise of the police power in itself perfectly lawful and in no way forbidden by the Thirteenth and Fourteenth Amendments to the United States Constitution.[10]

On similar ground, the legislature may provide that specified persons shall have exclusive power to remove dead animals from the streets of a city.[11] Moreover, it is lawful to confer exclusive privileges in other cases where public policy is involved,

[1] Fire Dept. of N. Y. *v.* Chapman, 10 Daly, 377.

[2] Knobloch *v* C. M. & St. P. R. R. Co., 31 Minn. 402.

[3] State *v.* Wheeler, 44 N. J. Law, 88.

[4] Dabbs *v.* State, 39 Ark. 353; State *v.* Burgoyne, 7 Lea, (Tenn.) 173.

[5] Com. *v.* Kinsley, 138 Mass. 578.

[6] *In re* Wong Yung Quy, 6 Sawy. C. Ct. 442.

[7] State *v.* Ah Chew, 16 Nev. 50.

[8] McKibbin *v.* Fort Smith, 35 Ark. 352; Aronheimer *v.* Stokley, 11 Phila. (Pa.) 283.

[9] Wright *v.* C. & N. W. R. R. Co., 7 Ill. App. 433

[10] Slaughter House Cases, 16 Wall. 36. Three of the judges dissented, each writing an opinion; namely, FIELD, BRADLEY, and SWAYNE, JJ. They denied that this was a police regulation, but said that it was in the nature of a monopoly, and in contravention of the Constitution.

[11] River Rendering Co. *v.* Behr, 7 Mo. App. 345.

as where text-books are to be used in the common schools of the State.[1]

(15) The State may on similar principles regulate modes of travel, as by requiring that locomotive engines shall sound whistles,[2] or that flagmen shall be stationed at crossings,[3] or that trains shall stop at way stations,[4] and it may regulate the issue and taking up of tickets by common carriers.[5] The power to regulate may be exercised to the inconvenience of adjoining owners.[6]

(16) "Police power" is largely exercised in the various States through the medium of licenses to follow a trade, pursuit, or avocation, such as a license to keep a pool-table;[7] to lawyers to practise;[8] to keepers of private markets;[9] to peddlers of sewing-machines;[10] to brokers in real estate;[11] and to hotel-keepers.[12] Similar principles are extended to market regulations;[13] also to auctioneers;[14] and to the regulation of packing-houses engaged in the packing of provisions.[15] (*a*)

In some cases State interference has been rested on special grounds, as, for example, because the interests affected by it have received property under the rules of eminent domain, *e. g.*, railways or highways, or because an exclusive privilege has been granted by the State, as in the case of public ferries. State regulation, however, is not limited by such facts as these. The police power may be relied upon in its broad form as stated at the outset of this discussion.

As we have seen, one mode of exercising the police power is through the medium of a license. It is highly important to distinguish between such a license and one required for revenue pur-

[1] Bancroft *v.* Thayer, 5 Sawy. C. Ct. 502.

[2] Pittsburgh, &c. R. R. Co. *v.* Brown, 67 Ind. 45.

[3] D. L. & W. R. R. Co. *v.* East Orange, 41 N. J. Law, 127.

[4] Davidson *v.* State, 4 Tex. App. 545.

[5] Fry *v.* State, 63 Ind. 552.

[6] Textor *v.* B. & O. R. R. Co., 59 Md. 63.

[7] Com. *v.* Kinsley, 133 Mass. 578.

[8] Wilmington *v.* Macks, 86 N. C. 88.

[9] New Orleans *v.* Dubarry, 33 La. Ann. 481.

[10] Machine Co. *v.* Gage, 100 U. S. 676.

[11] City of Little Rock *v.* Barton, 33 Ark. 436.

[12] City of St. Louis *v.* Bircher, 7 Mo. App. 169.

[13] City of Bowling Green *v.* Carson, 10 Bush (Ky.), 64; State *v.* Gisch, 31 La. Ann. 544.

[14] Goshen *v.* Kern, 63 Ind. 468.

[15] Chicago Packing, &c. Co. *v.* Chicago, 88 Ill. 221.

(*a*) A statute fixing the maximum charge for elevating grain is a legitimate exercise of the police power over a business affected with a public interest, and so is constitutional. People *v.* Budd, 117 N. Y. 1; on appeal, Budd *v.* New York, 143 U. S. 517.

poses. The latter is a mere revenue measure, and has in it no element of police regulation. It is but an exercise of the power to tax in a particular manner. But a license considered as a police measure cannot properly be treated as a mode of taxation. Only a reasonable amount should be exacted for the purpose of properly carrying out the provisions of the license law. This distinction is of great consequence in determining the power of a city by ordinance to regulate trades and occupations by means of licenses. It may be that when the object is to regulate exhibitions and places of amusement, a greater sum may properly be exacted under the police power than in the case of ordinary trades and occupations.[1]

A license, thus regarded, is not a contract. It may be revoked at pleasure.[2] (*a*) Accordingly, if one under a license purchases property to sell again, for example, pistols, he can be lawfully prohibited by a police regulation from selling after his license has expired, particularly if sufficient time was accorded to him to sell before the license expired.[3] The true theory of such a license is that it is but a permission to do an act which without the permission could not be done.[4]

There have been statutes in some of the States making discrimination, in licensing trades or occupations, between their own citizens and those of *other* States. These may be void as trenching upon the provisions of the United States Constitution concerning the regulation of commerce.[5] (*b*)

The mere license to sell is not of itself a "regulation of commerce," but a regulation of the privilege of selling.[6] If, however, any discrimination be made in favor of the products of the State as against those of other States, the law will be void.[7] (*c*) Still, a mere license law operating upon citizens of *other* States solely may violate that other clause of the Constitution[8] which

[1] This distinction is well stated, with citation of authorities, in No. Hudson County R. R. Co. *v.* Hoboken, 41 N. J. Law, 71. A tax on an avocation is said to be a true tax, in People *v.* Equitable Trust Co., 96 N. Y. 387, 396. It is added that unless they are imposed to restrain or regulate some obnoxious trade or business, such taxes must receive the condemnation of enlightened statesmanship.

[2] Com. *v.* Kinsley, 133 Mass. 578.

[3] State *v.* Burgoyne, 7 Lea (Tenn.), 173.

[4] Carrier *v.* Brannan, 3 Cal. 328; Metropolitan Board of Excise *v.* Barrie, 34 N. Y. 657.

[5] City of Marshalltown *v.* Blum, 58 Ia. 184; *In re* Watson, 15 Fed. R. 511.

[6] Corson *v.* State, 57 Md. 251; Howe Machine Co. *v.* Cage, 9 Baxter (Tenn.), 518.

[7] State *v.* Furbush, 72 Me. 493; *In re* Rudolph, 6 Sawy. C. Ct., 295.

[8] Art. IV., § 2, cl. 1.

(*a*) Sprayberry *v.* City of Atlanta, 87 Ga. 120.

(*b*) Crutcher *v.* Kentucky, 141 U. S. 47.

(*c*) See Minnesota *v.* Barber, 136 U. S. 313.

secures to citizens of each State all privileges and immunities of citizens in the several States.[1] (*a*)

Under the police power, a law may require that no citizen of the State shall be excluded from the equal enjoyment of the facilities supplied by the owners or lessees of theatres or other places of amusement by reason of race, color, or previous condition of servitude.[2] (*b*)

There are, of course, many miscellaneous regulations which may be justified under the police power. It would seem that it would be lawful, for example, reasonably to regulate in cities the height to which apartment or tenement houses should be constructed upon streets.[3]

The State in the practical exercise of the police power frequently vests it in a city or other municipal corporation. Many judicial questions are presented from that point of view. There can be no doubt as to the general propriety of such a delegation in matters of local importance. The inquiries will be in the main the same as where the State itself directly exercises it, with additional questions as to the meaning and limitations of the vesting statutes. In other words, there will be two general inquiries: *first*, What power did the legislature intend to vest in the municipality? This is a question of statutory interpretation or construction. *Secondly*, Is the power conferred lawful in its nature as a branch of the police power? This last point will be determined by general rules governing police power, no matter by what authority it may be exercised.[4]

III. *Instances of the unwarranted exercise of the police power.*— A State cannot, under a pretended exercise of the police power, impose a restriction upon the individual citizen which does not in fact connect itself with police regulation.[5] Every citizen has a general right to pursue a trade or business. If this be perfectly lawful and in no way injurious to the health or welfare of others, it would appear that it should not be prohibited, though it may be liable to just taxation. The act of a State legislature violating this doctrine may be *ultra vires* and void.

[1] McGuire *v.* Parker, 32 La. Ann. 832.

[2] Penal Code of N. Y. § 383; People *v.* King, 110 N. Y. 418.

[3] *Dictum* in People *v.* D'Oench, 111 N. Y. 359, 361.

[4] See, for details, 1 Dillon on Municipal Corporations, chapter 12 (4th ed.). This is a work of very high merit and warmly commended to students.

[5] Matter of Jacobs, 98 N. Y. 98.

(*a*) The granting of licenses to sell liquor may be restricted in the discretion of the legislature to a certain class, *e. g.*, to citizens of the United States of temperate habits and good moral character, without violating the Fourteenth Amendment. Trageser *v.* Gray, 73 Md. 250; Welah *v.* The State, 126 Ind. 71.

(*b*) See ch. 692, Laws of 1893, amending § 383 of the Penal Code.

It is quite plain that a legislature cannot by its own mere *fiat* make a particular matter a branch of the police power. The subject to be regulated must be within the police power *before the law is passed* which regulates or suppresses it. Whether a particular law is justified by the police power is purely a judicial question for the courts. It is a preliminary matter, and must exist as a basis for the law to control it. If that be so adjudicated, then the *expediency* of the exercise of the power in any particular instance is wholly a matter of legislative discretion. The sole question for the courts is, does the "police power" embrace the legislation in question.

Under this rule the legislature has no power to prohibit the manufacture of cigars by tenants of tenement houses in their rooms.[1] A city ordinance conferred unlimited power on certain officials to grant or refuse leave to carry on public laundries in a city or municipality. In the exercise of this power, a discrimination was made wholly against Chinamen. This was declared to be unlawful.[2]

It is not within the police power to prohibit the manufacture or sale for food of any substitute for butter or cheese produced from pure, unadulterated cream or milk;[3] though it would be lawful to prohibit the use of ingredients not necessary or essential to the manufactured article itself, with the view of giving it the semblance of butter. This would be a device to mislead or deceive which the legislature has the power to restrain.[4]

Without citing additional instances, the general result is that while legislative power is broad and ample to regulate the acts of individuals, so as to promote the public welfare, and, in case of a conflict with individual interests and the public good, to cause the former to give way, yet the mere arbitrary exercise of restraint or regulation of individual acts is not to be tolerated, where such acts are innocent, and no public good is to be achieved by their restraint or prohibition. The "police power," though indispensable in a civilized country, is a dangerous one, being capable of great abuse, and no invasion of the liberty or property of a citizen should be allowed, unless public ends require it or would be apparently promoted by it.[5]

[1] Matter of Jacobs, 98 N. Y. 98.
[2] Yick Wo *v.* Hopkins, 118 U. S. 356.
[3] People *v.* Marx, 99 N. Y. 377.
[4] People *v.* Arensberg, 103 N. Y. 388. See also Powell *v.* Pennsylvania, 127 U. S. 678, upholding similar legislation; also *ante*, p. 433.
[5] Reference may be made, upon this aspect of the subject, to People *v.* Gillson, 109 N. Y. 389.

PART II.

DISTINCTIONS PECULIAR TO PERSONAL PROPERTY.

CHAPTER I.

ATTRIBUTES OF OWNERSHIP, INCLUDING THE POWER TO USE, SELL, EXCHANGE, ETC.

VARIOUS terms are used to indicate personal property. Among these may be mentioned goods, chattels, wares, merchandise, and things (either in possession or "in action"). These words, for the most part, may be used indiscriminately. In the matter of the construction of written instruments in which they are found, — such as wills or statutes, — differences in their meaning may become important. The word "chattel" has a very broad and comprehensive meaning, including movable property in every variety of form. The phrase "thing in action" is used of rights from the point of view of their being enforceable in a court of justice, including both contracts and causes of action springing from a tort or wrong.

SECTION I. *The Power to sell or exchange.* — It is a well-settled rule that the right of property in chattels includes the free and unfettered right on the part of the owner to make use of them and dispose of them as he may see fit, in the way of enjoyment or profit, unless his act be inconsistent with the public welfare. This clear right is secured by constitutional provisions. These have already been noticed while discussing the police power.

The right to convey land did not exist under the feudal system. Under the relation of feudal lord and vassal, the land, though apparently transferred in full ownership or "in fee," was assumed to have been granted in confidence in such a way as to create a personal relation, so that the lord could not sell his interest, perhaps for a money rent or services, without the consent of the vassal, or the latter without the consent of the lord. This rule led to a practice, which was recognized in law, that the lord might lawfully exact from the vassal (grantor) a sum of money for allowing him to alienate or convey the property. This was termed a "fine

for alienation." A statute of great importance was enacted in the eighteenth year of Edward I. (Statute of Westminster III.),[1] which permitted a sale so that a purchaser would hold the land bought by him of the "chief lord," and not of the vendor. The consequence was that on a second sale no "fine for alienation" could be exacted. The land was freely alienable. This statute does not prevent restrictions upon the assignment of a limited or partial interest, *e. g.*, a lease. It has generally been re-enacted in this country. It has been decided in New York, where the statute prevails, that a clause in a conveyance reserving to a grantor a right to exact a sum of money on a sale by his vendee, is repugnant to the nature of the estate, and void.[2] Such clauses frequently exacted as much as a quarter of the purchase-money on a second sale, and were known as "quarter sales."

No such general rule ever prevailed as to personal property. Without freedom of sale or exchange, ownership is not complete. Many movable articles are produced in great excess of the wants of the producer. To deny the right of sale would be to make the article comparatively valueless, and to check and embarrass production. In case of sale, the unrestricted right to make a succeeding sale passes to a purchaser. If one should attempt to restrict a subsequent transfer, the restriction would be inoperative and void.

The validity of this rule, as applicable to personal property, is shown in the decisions upon the laws prohibiting the sale of ardent spirits. To test the question, let it be assumed that ardent spirits have been and are at this moment "property," and so recognized by the laws. A law is then passed that ardent spirits shall not be sold except, perhaps, for medicinal purposes. The existing owners are thus deprived of the general power of sale. The question, then, is, has there been a violation of a right of property?

This question was discussed, as a constitutional question, with great care in a case in New York.[3] It was there decided that such a law substantially destroyed the ownership in intoxicating liquors at the time vested in persons within the State, and so violated the constitutional provision that a person shall not be deprived of life, liberty, or property without due process of law. Such a law might be enacted if it were prospective in its operation.[4]

[1] 18 Edw. I. c. 1, known as the statute of *Quia Emptores*.

[2] De Peyster *v.* Michael, 6 N. Y. 467.

[3] Wynehamer *v.* The People, 13 N. Y. 378.

[4] This decision must, however, be compared with Mugler *v.* Kansas, 123 U. S. 623, to the effect that such a law, though an invasion of the right of property, is justifiable under the "police power." *Ante*, p. 432.

Similar rules would apply to the right of an owner to create temporary or limited interests in his property, *e. g.*, to pledge it. Rules of public policy may, however, in some instances, intervene to prevent transfers. These are unobjectionable, particularly when not retrospective. Prominent among such rules are those which forbid the assignment of mere rights of action, perhaps to prevent litigation, or with a view to secure an income without anticipation, or on public grounds, as, for instance, salaries of public officers not yet due, or seamen's wages, or a life insurance held by a married woman upon her husband's life. Rules of this kind for the most part originate in statute, and are to be treated as exceptions to a general rule, justified by the special circumstances of the case.

SECTION II. *The Right to abandon.* — Ownership of personal property appears also to include not only the power to give it away to another, but also the right to abandon or destroy it, having due regard to the rights of others.

The right to abandon is not, however, very well settled in the decisions. It has been presented to the courts as a question of liability on the part of an owner, as where a ship has been sunk by an unavoidable accident in a public navigable river. It has been held, in such a case, that in some instances on abandonment of the possession and control of the ship all liability ceases.[1] It has, however, been decided in this country that an abandonment at sea does not divest the owner of his property.[2] In the State of Louisiana, abandonment may take place by force of the Revised Civil Code, § 3448. Decisions of the courts will be found in a note.[3]

SECTION III. *The Power to dispose of Property by Will.* — It may be doubted whether the power to dispose of property by will is fairly to be implied from ownership. The power of disposing of *personal* property by will appears to be coeval with the common law. The general power to devise *real estate* did not exist until the year 1540, except in certain localities, by custom. In the year just named, general power to devise land was conferred by statute.[4]

A distinguished writer is of opinion that a true power of devising or bequeathing property originally existed in no society except the Roman. He accordingly turns to Roman jurispru-

[1] White *v.* Crisp, 10 Exch. 312. See also Brown *v.* Mallett, 5 C. B. 599.

[2] Whitwell *v.* Wells, 24 Pick. 25.

[3] Hereford *v.* Police Jury, 4 La. Ann. 172; Creevy *v.* Breedlove, 12 Id. 745; McGregor *v.* Ball, 4 Id. 289, on an Arkansas statute.

[4] 32 Hen. VIII. c. 1, as supplemented by 34 Id. c. 5.

dence for the source of all our modern ideas respecting wills. The whole subject is from this point of view to be considered historically, by tracing the origin and progress of the idea of testation in the Roman law, and its adoption in modern Europe down to our own time.

The original theory of a will was that it was an act of *legislation*, occurring at Rome in the peaceable assemblies of the people, or while they were engaged in a military campaign.[1] (*a*) This method was used by the patricians alone, as the plebeians had no standing in the assembly referred to. The wills thus made were entirely oral. The general right to make a will is recognized in the Twelve Tables.[2] It would appear that the clause to this effect was framed to allow the plebeians to make a will. There thus came into use the will by a fictitious sale or conveyance, called "*per aes et libram*," or "by copper and scales." This was made in the presence of five witnesses and a balance-holder, together with the fictitious purchaser, or, as then called, "heir."

This form of will was thus a *conveyance inter vivos*, by which, through certain prescribed forms, the testator passed over his estate to his "heir," or, as we would say, devisee or legatee. No writing was then necessary. The peculiarity of it was that it was irrevocable; so that the testator was henceforward at the mercy of the fictitious purchaser. Wills were, therefore, as a rule probably made only when the testator supposed himself to be near his end. By-and-by, in the course of judicial decision, the *prætor* (or Roman judge) introduced a less formal method, whereby the real intent of the *conveyance* could be disclosed in a writing, in the presence of seven witnesses, who affixed their seals to the outside as *fastenings*, so that it could not be broken open. At first, the devisee (purchaser) was necessarily informed of his rights, so that wills became immediately public; when the prætor's method took its place, the conveyance (*per aes et libram*) became a mere form. The accompanying writing disclosed the testator's intentions, which might be secret, and hence revocable. The next step was

[1] In the former case it was said to be made in the *Comitia Calata*, and in the latter, *in procinctu*.

[2] Maine's Ancient Law (11th Ed.), 202. *Pater familias uti de pecunid tutelâve rei suae legâssit, ita jus esto.*

(*a*) The theory that the making of wills in the *Comitia Calata* was a legislative act is combated by Sir Henry Maine. Ancient Law (11th ed.), p. 199. But see Hunter's Roman Law, p. 766, and Moyle's Institutes of Justinian, vol. 1, p. 235, note, where the doctrine of the text is adopted. Almost nothing is known of the nature of the will *in procinctu*. Moyle states that it also was an act of legislation of the whole *populus* engaged in a campaign in the field.

taken after the empire was established, and signing by the witnesses became necessary.

There were thus, in the time of Justinian, three historical sources of a Roman will, and in general controlling its validity and execution: the witnesses and the requirement of their continuous presence together, in order to publish the will, from the old law (*jus civile*); the seals, and the number of the witnesses, from the prætor's edict; and the subscribing by the testator and the witnesses, from the imperial constitutions.[1] But even down to this time the oral will, in the presence of seven witnesses, could be adopted.[2]

The progress in this law through the prætor's edict resembled to some extent the development of the principles of equity jurisprudence. The formal conveyance by the testator conferred the legal title to the property upon the transferee, while the equitable title was created by the writing, which the prætor or judge would cause the holder of the formal title to respect. After a short period of possession, the equitable owner was clothed by a legal rule with the absolute title as against all claimants.

The law, having reached this stage, was, after the destruction of the Roman empire, brought down to modern times through the medium of the church or ecclesiastical courts, which, from an early period, had the cognizance of wills of personal property; though wills of real estate could not be regularly made, as has been seen, until a statute was enacted in the reign of Henry VIII.

The right to make a will has been declared in this country to be a creature of positive law, and not a natural right.[3]

Section IV. *Succession to the Property of an Owner dying intestate.* — A similar question may be raised as to this point. Is succession derived from the law of nature, or is it a mere positive regulation? Is it an *incident* of property?

As a matter of philosophy, it is difficult to see how the rights of property in a particular owner can be prolonged to his kindred after his death. Succession is, no doubt, an older conception than that of testamentary disposition. If it be conceded, as is now claimed by many leading jurists, that the idea of property is closely connected in its origin with that of the family, and that under the patriarchal system the family was represented by its head, then the step is a natural one to the proposition that on the death of the head some one should stand in his place and represent him, not

[1] Justinian's Institutes, Book II., Tit. 10, § 3.

[2] Id. § 14.

[3] Patton *v.* Patton, 39 Ohio St. 590, 597.

merely to the members of the family group, but to other families and strangers. Succession by inheritance is thus a natural offshoot from patriarchal families. It closely resembles the law of corporations sole, where the corporate power is continued from predecessor to successor. It is not necessary, however, to conceive of one person only as successor. There may be several co-successors, or co-heirs, taken together, representing their predecessor.

The oldest idea of succession, viewed historically, seems to be that of the legal continuation of the existence of the former proprietor in his successor. The latter not only took all the decedent's rights, but assumed all his liabilities. He was a so-called universal heir. The former owner, though in fact dead, lived on in law. This idea has been modified in modern times so as to relieve the heir or other successor from legal responsibility, except to the extent of assets received from the former proprietor, his predecessor.

Succession as growing out of family ties must from an early period have depended upon kinship. A leading use of a will at the outset was to provide for testamentary succession where there was a default of kindred. There is, even in modern days, a condition of unstable equilibrium in the law in respect to the conflicting claims of the kindred to the succession, and of the right of the testator to dispose of his property freely by his will. In the Roman law, there were strong restraints upon the disinheriting of children. There was a special remedy given to complaining children against the will of a father who had thwarted their just and proper claims, and reciprocally to parents against an undutiful will made by children. If nothing was left in either case, there was a *theory* of mental unsoundness, which did not mean true insanity, but such a disregard of duty as to show a want of that affection to which a party so closely related is entitled. In any event, a child was held to be entitled to one fourth of a parent's estate. In England, there has been a strong tendency in favor of the utmost liberty of testation, except in the case of lands given to charitable purposes. In France, the Roman theory has prevailed in modern days, and the code to a large extent denies the power of making a will in case the owner of property leaves children. The development of thought in some of the American States closely resembles that recognizable in England, even to the disparagement of bestowments upon charitable institutions.

A word should be added as to primogeniture, or succession of the oldest son to the land of his ancestor. The older systems of law do not draw this distinction between the oldest son and the

other children, but admit equal inheritance and co-heirship. This is true as a matter of property simply; but when *political authority* is involved, it is almost an essential idea that the headship of a family should be vested in a single person. This was the plain requirement of the middle ages. Kingly power being feeble, the feudal lord closely resembled a patriarchal chieftain, and was the recognized head of all to whom he was bound by family and social ties. True, as representing the *property* of an ancestor, he would naturally be under responsibilities to the other members of the family, to permit them to participate in the benefits he received. At this time law had come to treat the power over property as equivalent to ownership. His rights were magnified at the expense of his duties, and so he was soon treated as absolute owner. Couple with this the power of his ancestor to make a will of property so far as it belonged to him as owner, and the present law of England is reached, which briefly stated is, *primogeniture prevails in the inheritance of land, unless there is a will to the contrary.*

As to the succession to personal property, the result of the authorities, after great conflict of opinion among the most distinguished jurists, is that if an owner died without leaving husband, widow, or kindred, the goods went to the king, as being without an owner and so *bona vacantia.* It is not the correct view that the church had any interest in the property, as some maintain. It had merely the right or duty of jurisdiction or administration, and the right of possession for these purposes.[1] The main duties imposed by the law upon the bishops (or so-called ordinaries) was to pay the debts of the intestate, and to apply the residue, if any, for the benefit of his soul, by providing for the chanting of masses. Ordinaries appear to have neglected these duties in a flagrant manner, so that an Act of Parliament was passed in 1357 (31 Edward III. stat. 1. c. 11) directing the ordinaries to depute the next and most lawful friends to administer the intestate's goods, to collect his rights of action, to pay his debts, and to "administer and dispend for the soul of the dead." These administrators were also declared to be accountable to the ordinaries in the same manner as executors.

The duty to "dispend for the soul of the dead" continued until the time of the Reformation, when that was deemed to be a "superstitious use," opposed to public policy, and prohibited. The administrator, accordingly, after payment of debts, was not accountable for the residue. The same principle would apply to executors after payment of debts and legacies. This very unsatisfactory state of the law continued until the Statute of Distribu-

[1] Dyke *v.* Walford, 5 Moore P. C. Cas. 434, 488–496 (A. D. 1846).

tions was passed in the reign of Charles II. (22 & 23 Car. II. c. 10, as explained by 29 Id. c. 3, § 25), which required all administrators (except a husband) to distribute the surplus in a prescribed manner among the next of kin. The husband was allowed to hold the property of his wife as at common law, without any disturbance by the statute. It may be said that the Statute of Distributions was largely derived from the 118th Novel of Justinian, though not a transcript of it.[1]

It is only proposed to notice in this connection the *theory* on which the right of succession is to be rested. The details of the law of succession will be found in a succeeding chapter on title by will and in case of intestacy.[2]

[1] This Novel was adopted to correct inequalities in distribution at that time existing. It consists of six chapters and an epilogue. Four of the chapters concern the division of estates. The last chapter (6th) is noticeable from the fact that it declares that the new rule does not affect existing claims, and that it shall go into effect at a future specified day, thus anticipating two of the most beneficent checks recognized in modern times upon arbitrary legislation.

[2] *Post*, p. 638.

CHAPTER II.

THE DISTINCTION BETWEEN CORPOREAL AND INCORPOREAL PERSONAL PROPERTY.

PERSONAL property is either corporeal or incorporeal. Corporeal property is the object of the senses, and may be seen or touched. This is the ordinary kind of property, within the observation of all men. Incorporeal property exists in contemplation of law, and has only an ideal existence. Instances are the rights of an author, either at common law or by copyright; of an inventor; the right to a trade-mark, or to the "good-will" of a business. So a seat in the Stock Exchange is a species of incorporeal property, and like other property may be taken by legal process for the owner's debts.[1] Rights of action, termed "things in action," are also "incorporeal."[2]

By a "thing in action" is meant a right to proceed in a court of justice to obtain redress, be it money or other form of relief. The most generic division is, things in action springing from contract, and those derived from tort. Thus, one may have a cause of action for a libel or slander; for trespass, or by reason of an act of negligence. All of these are things in action, and are the subjects of ownership.

Accordingly, if one owns a document evidencing a cause of action, *e. g.*, a promissory note or a bond, and he is unlawfully deprived of it by a wrong-doer, he may bring an action for its conversion and recover its value. In this case he would proceed against the wrong-doer. He might, however, elect to regard the title as still in himself, and sue his debtor upon the contract as though he had not been deprived of the possession of the instrument.

Chattels real are also a species of incorporeal property. Such property exists where one has an interest in land for a definite period, as, for example, a specified number of years, while the ultimate ownership, termed a reversion, is in another. This so-called "term for years" is in law a chattel, no matter how long

[1] Powell *v.* Waldron, 89 N. Y. 328; Grocers' Bank *v.* Murphy, 60 How. Pr. 426. But see Barclay *v.* Smith, 107 Ill. 349.

[2] An unlocated land certificate is a chattel incorporeal. Porter *v.* Burnett, 60 Tex. 220.

the term may last. As it however partakes of the nature of land, it is not a strict chattel, but possesses some of the qualities of real property; one important feature considered as personal property is that on the death of an owner it passes to his executors or administrators, and not to his heirs. A widow cannot have dower in it, nor a husband curtesy.

The explanation of this anomaly in the law is a historical one. An interest in a "term for years" was originally treated as a contract. This is of course a "thing in action" and personal property. In process of time the contract ripened into an estate. The estate still retains traces of its origin, and to this extent is personal property.

The details of this subject are more conveniently treated in works on *Real Estate*.

CHAPTER III.

VARIOUS DISTINCTIONS OF OWNERSHIP.

OWNERSHIP may be either absolute or qualified, absolute or conditional, complete or partial, legal or equitable, separate or joint. These distinctions will be considered in separate sections.

SECTION I. *Absolute and qualified Ownership.* — The *nature of the property itself* may be such as not to be susceptible of indefeasible ownership. Reference is here made to the right of property in animals. These, for the treatment of this subject, must be classified into the ordinary domestic animals, and those by nature wild. Wild animals, again, are divisible into those which are partially tame and those which are wholly wild.

As to domestic animals, there is no question. One may have an indefeasible property in them, which is as complete as if he owned an inanimate chattel.[1] The young of such animals in general belong to the owner of the dam, except in the case of young swans (cygnets), which belong equally to the owner of the sire and dam, assuming that these are owned by different persons.[2] The general rule rests upon the fact that the dam has more care over the young than the sire, while it is departed from in the case of swans, because the male bird shares the care with the female.[3] In some cases the ownership is divided between a tem-

[1] This rule applies to a particular animal once wild but now domesticated, *e. g.*, a buffalo. Ulery *v.* Jones, 81 Ill. 403.

[2] Queen *v.* Lady Young, The Case of Swans, Part 7 Coke's Rep. 15 b.

[3] Lord Coke, in reporting this case, states the principle in quaint and interesting terms. He refers to the Case of Lord Strange and Sir John Charlton, in the Year Book of 2 Richard III. 15 b and 16 a, where it appeared that Lord Strange had certain swans which were cocks, and Sir John Charlton owned swans which were hens, and they had cygnets between them, and it was decided that the cygnets belonged equally to the owners of the cocks and hens. Lord Coke then proceeds. "And the law thereof is founded on a reason in nature; for the cock swan is an emblem or a representation of an affectionate and true husband to his wife above all other fowls; for the cock swan holdeth himself to one female only, and for this cause nature hath conferred on him a gift beyond all others; that is, to die so joyfully that he sings sweetly when he dies; upon which the poet saith:

'*Dulcia defecta modulatur carmina lingua,*
Cantator, cygnus, funeris ipse sui,' *&c.*

And therefore this case of the swan doth differ from the case of kine or other brute beasts."

Swans were royal birds, and when wild belonged to the king by virtue of his prerogative. But a private person might have

porary owner, such as a bailee for hire, and an ultimate owner, when the young are born. In this case they belong to the hirer.[1]

In the case of wild animals (*ferœ naturæ*) partially reclaimed, there is a true ownership, as in the case of a cat. Under special circumstances, an owner may recover special damages against one who has killed his cat.[2] The same remark may be made as to a dog. An action for conversion will lie against one who wrongfully detains the dog of another.[3] Finally, as to animals wild and not reclaimed, the right of property is lost with the possession, unless immediate pursuit is made, as in the case of a swarm of bees leaving the owner. Owing to these distinctions, it is important to inquire whether an animal leaving its owner has the disposition to return, *animum revertendi*. If that continues, property is not lost during the recurring intervals of absence. On the other hand, if it has departed, having lost the intention to return, the ownership is at an end. The want of the intention to return will be shown by the circumstances of the case.

It is now a settled rule of English law that wild animals started up on the land of a proprietor belong to him, and not to one who pursues and takes them thereon.[4] On this principle, a grant by the king of crown lands in a colony grants by implication the wild animals thereon.[5]

The rule is stated as follows, in substance, in the case last cited. By the common law of England, a grant of a fee simple in land confers upon the grantee the exclusive right of killing and taking all game beasts of chase and animals which are properly *ferœ naturæ* which may at any time be upon his land, so long as such animals may be and remain upon the land so granted.[6]

It follows from this statement that when the wild animals have left the owner's land he has no further right over them. The same view has been adopted in this country, and a trespasser upon land has been denied all title to wild animals found there by him, as

a "swan mark," either by grant from the king or obtained by prescription. He then could grant it to another. Lord Coke saw a conveyance of this kind, where a father conveyed his "swan mark" to his eldest son, and his heirs rendering a periodical rent. The mark was a "little knotted staff." The swan marked with such a mark belonged to the owner of it, even though swimming in open and public rivers.

[1] Wood *v.* Ash, Owens. Rep. 139.

[2] Whittingham *v.* Ideson, 8 Upper Canada L. J. 14.

[3] Binstead *v.* Buck, 2 W. Bl. 1117. So as to a canary-bird. Manning *v.* Mitcherson, 69 Ga. 447. The right of property in a dog does not appear to have been settled until the 12th year of Henry VIII. (A. D. 1520). See Filow's Case, Year Book, Trin. Term, p. 3, case 3. All the judges gave opinions *seriatim*. ELLIOT, J., denied the right of property.

[4] Blades *v.* Higgs, 12 C. B. N. S. 501; affirmed in Exch. Cham. 32 L. J. (C. P.) 182; in the House of Lords, 34 L. J. (C. P.) 286.

[5] Falkland Islands Co. *v.* Queen, 2 Moore, P. C. Cas. N. S. 266, 274.

[6] Id.

between him and the owner of the land.[1] The rule was recently applied in Rhode Island in a case where the trespasser B. had placed an empty box upon the land of another for bees to hive in. The bees having hived there, one C. took them away. It was decided that the trespasser B. had no title to the bees, even though C. had no interest in the land.[2]

There are important statutes in several of the States regulating the taking of wild animals, including fish, requiring that they be caught in a specified way, or only at certain seasons of the year. The question has been raised whether such statutes are constitutional, the objection being that they invade a right of property. They are, however, deemed valid as being in the nature of police regulations.(*a*) The rules thus far stated are not fully applicable in criminal law. This fact is well shown in the crime of larceny or theft. The common law makes two divisions of larceny, — grand and petty. The distinction turns upon the value of the property stolen. If the value were under twelve pence, it was "petty;" if above twelve pence, "grand" larceny. The punishment for grand larceny was death. In applying these distinctions to this crime, it was determined that larceny could not be affirmed of stealing wild animals having no *intrinsic* value, but valued only on account of the whim or caprice of the owner. It thus might happen that an animal could be property as the subject of a civil action and not be so in a court of criminal justice. Instances are dogs, cats, apes, parrots, singing-birds, and the like.[3]

It has, however, been decided that under the New York statutes dogs are the subject of larceny.[4] An opposite conclusion was arrived at under the Pennsylvania statute,[5] and in Ohio[6] and North Carolina.[7]

The ownership of an animal may, in some instances, be defeasible by some special rule of law, for example as being a "nuisance." Thus, it has been frequently decided that a ferocious dog suffered to run at large, unmuzzled, is a common nuisance, and

[1] Gillet *v.* Mason, 7 Johns. 16; Goff *v.* Kilts, 15 Wend. 550; Ferguson *v.* Miller, 1 Cow. 243; Adams *v.* Burton, 43 Vt. 36.

[2] Rexroth *v.* Coon, 15 R. I. 35.

[3] The sense and humanity of the early jurists revolted against the frightful punishment prescribed for petty thefts. Bracton is very emphatic in this respect: "For petty larceny or a petty article let no Christian be put to death." Vol. 2, 517, of Twiss' translation. A strict construction of law would thus be naturally adopted by courts.

[4] Mullaly *v.* The People, 86 N. Y. 365; People *v.* Malony, 1 Park. Cr. C. 593; People *v.* Campbell, 4 Id. 386.

[5] Findlay *v.* Bear, 8 Serg. & R. 571.

[6] State *v.* Lymus, 26 Ohio St. 400.

[7] State *v.* Holder, 81 N. C. 527.

(*a*) See Lawton *v.* Steele, 119 N. Y. 226.

that any one may kill it, without any statutory provisions.[1] The same is true if one's dog be found upon the premises of another, biting persons or killing domestic animals.[2] This rule does not, however, extend to mere canine trespasses, even though accompanied with slight annoyance. The remedy, if any, in such a case, is an action against the owner.[3] A dog may, however, be killed in self-defence.[4]

Statutes frequently confer the right to kill dogs, as, for example, when they kill sheep,[5] (*a*) or when some police regulation is violated, as "being without a collar."[6] Such legislation is valid on the same general principle as that of the destruction of animals infected with a dangerous disease.

Closely connected with the ownership of animals is the liability of an owner for their acts injurious to others. There are two general classes of cases on this subject: one where the animal is naturally inclined to do mischief, and the other where it is not.

(1) If the animal be of the first class, the owner will be liable for injuries done by it without any proof that he had knowledge of its vicious propensities. Knowledge in such a case will be conclusively presumed.[7] (2) In the case of other animals, it will in general be necessary to a recovery to allege and prove knowledge by the owner, technically called *scienter*, of the animal's mischievous propensities. This will usually be a question of fact for a jury. Knowledge by a servant employed to have charge of the animal, *e. g.*, a dog, will be deemed to be the knowledge of the master,[8] but this will not be the case if the servant had nothing to do with this branch of the employer's business.[9] The basis of the action is the neglect of the owner in taking proper care of the animal after knowledge of its mischievous propensities. (*b*)

[1] Putnam *v.* Payne, 13 Johns. 312; Maxwell *v.* Palmerton, 21 Wend. 407; Brown *v.* Carpenter, 26 Vt. 638.

[2] Leonard *v.* Wilkins, 9 Johns. 233; King *v.* Kline, 6 Pa. St. 318.

[3] Hinckley *v.* Emerson, 4 Cow. 351.

[4] Reynolds *v.* Phillips, 13 Ill. App. 557.

[5] Milman *v.* Shockley, 1 Houst. (Del.) 444.

[6] Tower *v.* Tower, 18 Pick. 262; Cummings *v.* Perham, 1 Met. 555. See Morewood *v.* Wakefield, 133 Mass. 240. In this case it was urged by the plaintiff that "doga are now a valuable species of property; that their education and training is now carried so far that they are no longer to be regarded in the same light as formerly; that they often are not only of much pecuniary value, but are objects of special affection, and that, in short, they should now be entitled to the same protection as horses and other valuable domestic animals." The court said: "We are not insensible to the force of these considerations" (page 242). The plaintiff was not, however, allowed to recover.

[7] Besozzi *v.* Harris, 1 F. & F. 92.

[8] Baldwin *v.* Casella, L. R. 7 Exch. 325.

[9] Stiles *v.* Cardiff Steam Nav. Co., 10 Jur. N. S. 1199; S. C. 33 L. J. (Q. B.) 310.

(*a*) See in New York, ch. 686, Laws of 1892, art. vi.

(*b*) Moynahan *v.* Wheeler, 117 N. Y. 285; Quilty *v.* Battie, 135 N. Y. 201.

Other cases of negligence might be noted, as where cattle known to have a contagious disease are put with other animals so as to communicate the disease to them.[1] Such cases are frequently within the terms of some prohibitory statute. In such a case the rule is laid down by some authorities that if there be a violation of a prohibitory statute, an action will lie by a party injured against the violator.

A recent case occasioned great diversity of judicial opinion, where a statute[2] prohibited the sale, knowingly, of infected animals in open market. Notwithstanding this prohibition, an owner sold pigs known to be diseased, expressly stating that they were sold "*with all their faults.*" The buyer, not knowing of the disease, mingled them with sound pigs, who took the disease and died. It was held that he had no cause of action. He was obliged to sue upon a warranty or a false representation, and he could not make this out by reason of the express words of the contract negativing all warranty.[3]

The humane spirit of modern times has taken much more note of animals than formerly. There has been much beneficent legislation resorted to with a view of preventing cruelty to them.[4] There are similar statutes in some of the States of this country. There are also stringent statutes by Congress of a commercial nature for neglecting to provide food and water for cattle on railroad cars.[5]

Another instance of property not absolute is the *quasi* ownership of a dead body. By the common law of England, as interpreted by Lord Coke and others, there is no property in the remains of the dead, though there may be in the shroud or coffin in which they are placed. There is, however, a tendency in the United States to reject this view, as being repugnant to the sentiments of our time. The better opinion seems to be, that for the purpose of protecting the remains of the dead, or determining the

[1] Earp *v.* Faulkner, 34 L. T. 284.

[2] 32 & 33 Vict. c. 70.

[3] Ward *v.* Hobbs, L. R. 4 App. Cas. 13. This case is a remarkable instance of the diversity of judicial opinion, even among the ablest judges. It was held by the Queen's Bench Division, that the seller was liable. Ward *v.* Hobbs, L. R. 2 Q. B. D. 331. In the Court of Appeal, L. R. 3 Q. B. D. 150, a different conclusion was arrived at "with doubt" or "with reluctance," each of the judges reading a separate opinion. In the House of Lords there are several separate opinions, Lord O'Hagan concurring "with difficulty," and Lord Selborne "with reluctance."

[4] 3 Geo. IV. c. 71; 5 & 6 Wm. IV. c. 59; 7 Wm. IV. & 1 Vict. c. 66. See also 12 & 13 Vict. c. 92. The last is known as the "Prevention of Cruelty to Animals Act." Under this legislation it is cruelty to perform an operation upon an animal which causes pain, unless the act is justified by some lawful purpose. Murphy *v.* Manning, L. R. 2 Exch. Div. 307. See New York Penal Code, §§ 655–669.

[5] U. S. Rev. St., §§ 4386–4390.

place of interment, and the like, there is a species of property, or perhaps more accurately, a right of control, in the relatives, which a court of equity, on proper application, will enforce, as being in the nature of a trust. It would seem quite clear that a dead body is not property in the ordinary sense.

A leading discussion of this question is found in the report of Samuel B. Ruggles, as referee, to the Supreme Court of New York. This was favorable to the right of property, and was confirmed by the court.[1] This decision has been followed in the courts of other States.[2] (*a*)

Accordingly, the right to select a burial-place must be determined upon equitable grounds. In Massachusetts, the right of the husband to select the burial-place of the wife's remains appears to be made paramount.[3] In New York, the claim of a son, under somewhat special circumstances, was preferred to that of the widow.[4] (*b*) In Pennsylvania, it has been held, that where all but one of several children had interred their mother's remains in a particular place (following a dying request made by her), the dissenting child could not remove the remains to another place of burial.[5] It has, however, been held by the court of South Carolina, that an *administrator* had no such property in the body of his intestate that he could bring an action for its mutilation by the negligence of a railroad company.[6] The court remarked that the cases as yet had gone no further than to hold that there was a property in the *next of kin*.[7] (*c*)

Some of the cases above cited seem to rest the right of property upon a common-law obligation on the part of the relatives to bury the deceased. They may, therefore, protect the body in order to bury it. This seems to be an inadequate theory, since after burial there would be no further right.

It has been decided in England that a person cannot by his

[1] Appendix 4 Bradf., 503, 532.

[2] In Pennsylvania, Wynkoop *v.* Wynkoop, 42 Pa. St. 293. In Indiana, Bogert *v.* City of Indianapolis, 13 Ind. 134. In Massachusetts, Weld *v.* Walker, 130 Mass. 422. In Rhode Island, Pierce *v.* Swan Point Cemetery, 10 R. I. 227. In Ohio, 6 Am. Law. Rev. 182.

[3] Weld *v.* Walker, *supra.*

[4] Snyder *v.* Snyder, 60 How. Pr. 368.

[5] Lowrie *v.* Plitt, 11 Phila. (Pa.) 303.

[6] Griffith *v.* Railroad, 24 Am. Law Reg. N. S. 586.

[7] Id. p. 590 See also a learned note to this case by Mr. L. V. Bright. In Missouri, the view is, that there is no property in a corpse, but only a right of interment. Guthrie *v.* Weaver, 1 Mo. App. 136.

(*a*) See also Larson *v.* Chase, 47 Minn. 307; Renihan *v.* Wright, 125 Ind. 536.

(*b*) Cf. Secord *v.* Secor, 18 Abb. N. C. 78; *In re* Donn, 14 N. Y. Supp. 189; Peters *v.* Peters, 43 N. J. Eq. 140.

(*c*) The right of property in the next of kin is recognized in Larson *v.* Chase, *supra;* Renihan *v.* Wright, *supra.*

will make a bequest of his body, taking effect after death.[1] This subject bears upon the right of cremation. It was decided in England by a criminal court, STEPHEN, J., presiding, that it was not a misdemeanor for one having lawful possession of a dead body to burn it rather than to bury it.[2] This decision scarcely seems to accord with a class of cases which hold that there is a common-law duty to bury a dead body, imposed upon the next of kin in certain instances. It would be necessary, in order to permit cremation, to enlarge the former rule, and to hold that the duty simply is *either* to bury *or* otherwise to dispose of it as may comport with public health and decency, and that cremation is such a mode. Nothing was decided by Queen *v.* Price except that cremation was not necessarily a common-law crime. It clearly might become so by attendant circumstances, such as would make the act a common nuisance. If the right of cremation exist, it clearly ought to be regulated by law, as it might easily be resorted to with a view of destroying evidence of crime.[3] It would be a clear misdemeanor to burn the body with such a view;[4] but if cremation were regularly allowed to any one having lawful possession of a dead body, its destruction for the purpose of concealment of crime would be less easily detected than at present.[5]

There are other forms of qualified or limited ownership. One is the case where the ownership is liable to be defeated by a prescribed event. This would be in law a condition subsequent. On the happening of the prescribed event, assuming it to be a lawful one, the ownership would cease.

Another instance occurs in the law of bailment. By this contract, an owner may confer upon another a limited interest in a chattel, reserving the ultimate interest in himself. In this case, the bailee becomes a temporary or "special" owner, while the bailor is the "general" owner. All bailments do not lead to this result. A sufficient test is to inquire whether the bailee has a right which is available against the general owner. This would be true of a hirer, of a pledgee, of a carrier having an unpaid claim for freight, of a sheriff holding the goods of a debtor on account of the debt; but it would not be true of an ordinary finder or of a borrower. Under this rule, the general owner

[1] Williams *v.* Williams, L. R. 20 Ch. D. 659.

[2] Queen *v.* Price, L. R. 12 Q. B. D. 247 (1884).

[3] Queen *v.* Stephenson, L.R. 13 Q. B. D. 331.

[4] Id.

[5] GROVE, J., said in the case cited, "If it is a crime to bury" for such a purpose, "*a fortiori* it is one to burn a body, because if you bury, exhumation is possible, but if you burn, the body is destroyed, and examination is no longer possible." Queen *v.* Stephenson, *supra*, p. 337.

might be guilty of theft in taking the goods from the special owner, in the same way as if he had taken the goods of a stranger. This rule has been stated in the paradoxical form, that "he steals his own goods." This, however, is not a correct statement, for what he takes is the interest that another has in his goods.[1]

SECTION II. *Equitable and legal Ownership.* — The meaning of this distinction is, that ownership is in some cases recognized in a court of law, while in other cases it is solely considered in a court of equity. The more ordinary form of ownership is legal; on the other hand, a trust may exist. In the case of a technical trust, the title to the property is exclusively vested in the trustee. If, for example, he hold a fund, he alone will collect the interest and perform what acts are necessary for the protection of it. He will be owner as to third persons. As between him and the beneficiary, called the *cestui que trust* (or, if more than one, *cestuis que trustent*), the latter is owner in the view of a court of equity. The ownership is thus divided into formal and substantial, or, in technical phrase, legal and equitable. There are other fiduciary relations sometimes called trusts, which are not true trusts, — such as, for example, a bailment. The bailee does not ordinarily have the legal title, but at most a special property. If he had the formal title in any instance, — as, for example, he does frequently have in the case of bank and other stocks standing on the books of the corporation *in his name*, — he will be a *technical* trustee. The same remark may be applied to cases where agency is the leading reason for delivering goods of the principal. If the goods are simply delivered to the agent, a simple *fiduciary* relation will be created; if the title is conferred, *e. g.*, by a bill of lading, a technical trust may exist.

There are frequently trusts in which there is no active duty to be performed, and accordingly called passive trusts, or "dry" trusts. A trust may also be implied from the relation of the parties or the circumstances of the case.

Trusts emphatically rest upon confidence. The relation created by an express trust is in a high degree confidential. One of the leading risks run by the beneficiary is, that the trustee may in violation of his duty transfer the estate to one who pays him full value without notice of the trust; such a person, holding the legal title, is discharged in law from the performance of the trust towards the beneficiary. Still, if the property can be traced, a trust may be fastened upon the proceeds; if not, the whole trans-

[1] Adams *v.* State, 45 N. J. Law, 448, and many other cases. The proposition is elementary.

action may resolve itself into a claim for damages against the defaulting trustee. But, where no such special element involving the rights of purchasers enters into the case, the trust will, as a rule, attach itself to the property, or, in case of change of form, to its proceeds, so long as these can be traced. When this can no longer be done, the whole transaction may resolve itself substantially into a debt, and the beneficiary may only have a claim for money against the defaulting trustee, as far as his creditors are concerned.[1]

Thus, in an accounting against a defaulting trustee in bankruptcy or insolvency, a trust creditor is not entitled to preference over the general creditors of the insolvent merely on the ground of the nature of his claim. There must be some equitable principle entitling the *cestui que trust* to preferential payment, such as that the estate of the insolvent includes proceeds of the trust estate, and then only to the extent of such proceeds.[2] (*a*)

As between the beneficiary and the trustee mingling trust funds with his own, the former may insist upon a return to him of the funds themselves or their proceeds,[3] or if such return is impracticable, as, for example, by the failure of a bank in which a deposit of them is made, may cast the loss upon the trustee.

The general rules governing trusts will be found in books upon equity jurisprudence, or more specifically, in treatises on the law of trusts.[4]

[1] Hart *v.* Ten Eyck, 2 Johns. Ch. 62. The trust funds might be separated even as against a creditor if he knew or had reasonable means of knowing that the agent or trustee was mingling them with his own funds. National Bank *v.* Insurance Co., 104 U. S. 54, where the subject is elaborately considered.

[2] Matter of Cavin *v.* Gleason, 105 N. Y. 256. The case of People *v.* City Bank of Rochester, 96 N. Y. 32, supposed by some to hold a contrary view, is explained in Cavin *v.* Gleason; Philadelphia Nat. Bank *v.* Dowd, 38 Fed. R. 172 (1889); Circuit Court E. Dist. of N. C. This is an elaborate and well-considered case, and many American and English authorities are collated. Compare Knatchbull *v.* Hallett, L. R. 13 Ch. D. 696, and Taylor *v.* Plumer, 3 M. & S. 562, 573, — opinion by Lord Ellenborough.

[3] Van Alen *v.* Am. Nat. Bank, 52 N. Y. 1; Cragie *v.* Hadley, 99 N. Y. 131; Cook *v.* Tullis, 18 Wall. 332.

[4] Story's Equity Jurisprudence, Pomeroy on the same subject, Lewin on Trusts, Perry on Trusts, and Hill on Trustees.

(*a*) Frank *v.* Bingham, 58 Hun, 580; Atkinson *v.* Rochester Printing Co., 114 N. Y. 168; Merchants' & Farmers' Bank *v.* Austin, 48 Fed. R. 25; Phillips *v.* Overfield, 100 Mo. 466; Bank *v.* Weems, 69 Tex. 489; *In re* Ulster Building Co., 25 L. R. Ir. 24. Cf. Holmes *v.* Gilman, 138 N. Y. 369.

According to some recent authorities it is not necessary to trace the trust property directly into the fund sought to be charged. It is by these authorities sufficient to prove that the estate of the insolvent was increased or benefited by the amount claimed. This done, a lien is given upon the whole estate for the full amount of the property received in trust, irrespective of the actual amount of such property or its proceeds on hand at the time of the failure. McLeod *v.* Evans, 66 Wis. 401; The Ind. Dist. of Boyer *v.* King, 80 Ia. 497; First Nat'l Bank *v.* Hummel, 14 Col. 259; Carley *v.* Graves, 85 Mich. 483; Smith *v.* Combs, 49 N. J. Eq. 420.

SECTION III. *Separate and Co-ownership.* — Any subject-matter susceptible of ownership may be owned by one person separately and exclusively, or by two or more. This co-ownership is either joint tenancy or tenancy in common. Partnership will be treated separately.

(1) *Joint tenancy.* By joint tenancy is meant an ownership of a complex kind, in which two or more persons are supposed each to own the *whole* chattel. It is not an ownership in undivided shares, but of the whole. One of the results of this theory is survivorship. As the owners from time to time die, the chattel belongs to the survivors until the last survivor becomes complete owner, free from the rights of his former associates. This subject also prevails in the law of real property. It is commonly said that there are four *unities* in this case: title, time, interest, and possession.

In creating a joint interest, it is a rule of construction that a grant of a chattel to two or more makes them joint tenants, rather than tenants in common. This rule is modified by the principles of equity jurisprudence, where each of the parties advances a part of the consideration to purchase the chattel. In this case, there is a tenancy in common. It is a rule of commercial law that survivorship does not prevail among merchants (*jus accrescendi inter mercatores locum non habet*). When, however, a chattel is acquired by gift or by will by two or more, equity does not interfere, as there is no consideration on which to base the theory of a trust, and survivorship takes effect. An example is a legacy of one hundred dollars to A. and B.

In tenancy in common, there is no theory that each owns *the whole.* Each owns an undivided share. There is only one unity, that of possession. This is much more usual than joint tenancy. On the death of one, his share belongs to his executors or administrators.

In the law of contracts, a combination of the two principles prevails. Joint tenancy can be readily destroyed by either of the owners so far, at least, as his own share is concerned. He can sell to a stranger his interest, in which case his share is in theory severed from that of the others. Thus if there were ten joint tenants, any one of them could convey; and while the remaining nine would be joint tenants as between themselves, the purchaser would be a tenant in common with the others instead of a joint tenant. He would be a tenant *in common* rather than a *joint tenant*, since the *four* necessary unities do not exist; he would be a tenant in common rather than an owner by himself, since his share is still undivided.

Moreover, the joint tenants can by agreement divide the property

so that each shall own separate interests, or if the chattel be indivisible, can unite in a sale and divide the proceeds. The subject matter owned may also be divided by a legal proceeding. As this remark is also applicable to interests held in common, the consideration of the topic will be deferred.

(2) *Tenancy in common.* In this form of ownership there is no theory that each owner owns the whole. It is simply a case of separate interests, though undivided. Each owns his own share. He may freely sell or dispose of it, and on his death, if still owner, it passes not to the survivor, but to his own representatives, who occupy his position and become in like manner tenants in common. Instead of there being four unities, as in joint tenancy, there is but one, unity of possession. This form of ownership is far more usual in modern life than joint tenancy. It is *implied* in one highly important instance. This is where one of several partners sells his interest in the stock in trade to a purchaser, or it is sold by a creditor on an execution. The purchaser does not in such a case become a partner, but a tenant in common, subject, it may be, to have the property diverted from his use to the payment of partnership debts.

There is an important aspect of this case in the law of contracts. Let a contract be made with two or more persons, in which they have rights to be enforced in court. The *formal* right is of an indivisible nature, and must be presented for enforcement in the names of both. Should one die, this right of *enforcement* would vest *exclusively* in the *survivor*. Should he receive payment, the beneficial interest would not belong to him exclusively, but he would be deemed to be a trustee for the representatives of the deceased to the extent of their share. In brief, the right to sue vests in the survivor, but not the beneficial interest. A parallel principle is adopted in enforcing a *joint liability*, though this, of course, is not a case of joint ownership. It may properly enough be stated here for the sake of giving a general view of the whole subject. Thus, if two or more incur a joint liability on contract, and one die, the duty to discharge it is imposed upon the survivor, who, in doing so, exacts from the representatives of the deceased their proper share, called contribution. In other words, as between the creditor and the survivor, the latter must pay the whole; as, between the survivor and the representatives of the deceased, there is a duty to equalize the burden of the liability.

A liability may by express words of promise be created by two or more persons in such a way as to be enforced against all collectively or each separately. This is termed "joint and several." In this case, the creditor will have an option to sue one or all. In

whichever way he proceeds, the duty to contribute will attach as in the case of joint liability.

By *partition* is meant the right of one or more of several joint owners, whether in joint tenancy or in tenancy in common, to proceed in law to have his or their interest ascertained and set apart. This is declared to be a right inherent in ownership. The right to the partition of real estate is very ancient, both in the courts of common law by writ, and in a court of equity. Writs of partition at common law are given in full in Bracton,[1] to meet a variety of cases as between *co-heirs*. While some things were not the subject of partition (such as a castle for the defence of the realm[2]), yet most joint interests were, and provisions are found for producing equality between the heirs, and for equalizing division when some of the items were in their nature indivisible. Courts of equity had their attention attracted to this subject at a very early day, on account of the fact that in many cases there was no adequate or complete remedy at common law.[3]

Personal property falls plainly within the jurisdiction of equity, since the common-law courts could grant no relief in this class of cases. All the needed power was at hand in the courts of equity, since they could take an accounting, ascertain all the facts, have a reference to a master, provide for an equality of division, protect the rights of infants and married women, order a sale if necessary for division, and direct the parties to make all requisite assignments and transfers.[4]

However, the interests of owners of property may be so controlled by a trustee that the right to sell and divide may be vested in him, and partition be not available to them, except by unanimous consent on the part of the *cestuis que trustent*, being of full age.[5]

SECTION IV. "*Future Estates*" *in Personal Property.* — The doctrine of "estates in land" is of far-reaching importance in real property. In fact, real estate law is based upon it. One is not supposed strictly to own land, but an *estate* in land. These estates are classified according to archaic rules derived from the

[1] Bracton, Twiss' translation, vol. 1, pp. 569–615 (1878).

[2] Id. pp. 605, 607.

[3] This point is discussed in a satisfactory manner in 1 Story on Eq. Jur. (13th ed.), § 646; 3 Pomeroy Eq. Jur. § 1391.

[4] See Tripp *v.* Riley, 15 Barb. 333; Fobes *v.* Shattuck, 22 Id. 568; Tinney *v.* Stebbins, 28 Id. 290; Wetmore *v.* Zabriskie, 29 N. J. Eq. 62; Crapster *v.* Griffith, 2 Bland (Md.), 5; Smith *v.* Smith, 4 Rand. (Va.) 95, 102; Marshall *v.* Crow's Adm., 29 Ala. 278; Corbitt *v.* Corbitt, 1 Jones (N. C.), Eq. 114.

[5] Biggs *v.* Peacock, L. R. 22 Ch. D. 284.

feudal system. The grand division is into freehold and less than freehold. The characteristic of a freehold is that it must at least continue for the life of some specified person or persons, or beyond that, be capable of descent to heirs, in which last case it is termed a freehold of inheritance. All other "estates" are less than freehold.

Out of these arbitrary distinctions grow complex legal rules not necessary now to be stated, except so far as they bear a close relation to the subject in hand. One leading topic proper now to be considered is the law of "remainders." By a "remainder" in real estate law is meant the residue of an estate, where some prior interest of a limited nature, called a "particular estate," is created by the same instrument. A simple illustration is found in a will, where a testator gives a house and lot to A. for his life, and the residue of his interest to B. The amount given to B. is termed a "remainder." This subject is fruitful in subtle distinctions, which in some of the States have been much disturbed by statute. Without going into detail, the important remark is that this branch of law is not applicable to personal property. The law of freehold and non-freehold estates is confined to landed interests. So also is the technical law of remainders.

It must not be understood that there are no future interests possible in personal property. There certainly may be. For example, there may be trusts to take effect at a future day, or other executory interests in the nature of the "executory devises" of real estate law, in which the intention of the testator is more fully regarded than in the case of remainders.

There is a practical difficulty in bestowing upon one person the temporary ownership of personal property, and upon another the residuary interest in the same property, owing to the fugitive and perishable nature of the property itself. A distinction must be taken between that which can only be used or enjoyed by consuming it, and that which can be used by one, and still remain for the use and enjoyment of another. In the first class of cases, the gift of the use of the chattel for a term is an absolute gift, since the gift would otherwise be of no value. This result might be avoided if an owner should direct the chattel to be sold, and the proceeds to be invested, and the income paid to A., say for life, and afterwards the fund conveyed to B. In this case, it is plain that the interest of the fund can be distinguished and separated in ownership from the fund itself. So if one should give his law library to be used by A. for his life, and the books themselves, after A.'s right had terminated, to B., there would be, without any sale, a possible division of ownership. A. in such a

case is temporary owner; B. is the ultimate owner. Each has rights which a court ought, when its aid is properly invoked, to protect. An injunction might be resorted to if A. threatened to injure the property, or he might in a proper case be required to give security. As long as there is no wrong or threat of wrong, there would in general be no more exacted than that a list of the books should be supplied to B., so that he might have the means of knowing what should be forthcoming at A.'s death. It would, however, be a general rule that money would not be paid over, by order of the court, to A. under such circumstances, unless he gave adequate security for its payment to B., when the time prescribed by the will or other instrument arrived.

Questions of this kind may arise in marriage settlements or wills. They do not, from the nature of the case, usually arise in mere business transactions. They may occur as to all forms of personal property, such as government securities, railroad and other stocks, bonds, mortgages, etc.

Powers. — This subject is important as affecting both real and personal property. It is more fully developed in the case of real property, but it has its appropriate place here. Powers of the class now to be considered appear for the most part in marriage settlements and wills.

In the outset, a distinction should be taken between an ordinary power of attorney in business affairs, and those now under consideration. A "power of attorney" is merely a formal mode of constituting an agent. It implies a principal, and the legal theory is, when any act is done by the agent, that it is really performed by the principal through the medium of the agent. The questions governing such a power are to be solved by general rules derived from agency. The powers now in question have nothing to do with agency. They are in their origin a *branch of the law of trusts.*

A single illustration will suffice to show how these powers arose. Let it be supposed that A. made over a fund amounting to $25,000 to B. to hold in trust for A. himself. B., having the formal title, thereupon became a trustee for A., who was then a *cestui que trust* or beneficiary of a trust. His rights, henceforth, are to be administered by a court of equity, having exclusive jurisdiction of the subject, and following rules of its own, varying from those adopted in the common-law courts. Among other rules, was the right of A. to designate some other person to be the beneficiary, and to reserve the right to revoke a designation once made, and to substitute another beneficiary. The control which A. thus had over the subject-matter was

termed a power to "appoint," and after appointment to "revoke," and to make a new appointment, etc. All the while the trust might continue, and so the matter resolved itself into the designation of a *cestui que trust*, and the recalling of the designation, and the substitution of another *cestui que trust* in his place. This was not the only mode of proceeding. A. might, in the beginning, instead of reserving the power to himself, have conferred it upon another, termed a "donee" of the power, who might proceed to "appoint" and "revoke" as before. It is plain that under such circumstances the donee's authority is limited and circumscribed by the power. He acts not as owner, but under a delegated authority. Though not an agent, he is an *instrument* of another person, and must follow the line chalked out for him. If authorized to appoint by *deed*, he could not do so by *will*, or *vice versa*.

Out of this class of authorizations springs a set of highly complicated and refined rules, some of which are too subtle for practical use. The subject has been codified in New York, and a statutory set of rules introduced applicable to both real and personal property, which, though an improvement on the common law, still require careful study in their application, and present various questions not free from difficulty. The idea of a trust which pervaded the old law has been removed, and the power has been made to attach to property whether held in trust or not.[1]

[1] The principal writers upon "Powers" are Sugden (afterwards Lord St. Leonards), Chance, and Farwell. Sugden's treatise is the great storehouse of learning upon this subject, and his own views carry with them great influence. He is a writer of authority. Farwell's work is much more compendious, but it contains the recent cases, and possesses much practical utility.

The New York regulations are found in the Revised Statutes, Part II., Chap. I., Tit. II., Art. 3. Powers are there classified into such as are general or special, or are beneficial and in trust. A power is declared to be general where it authorizes an alienation of property in fee to any alienee whatever. In other words, it must authorize the transfer of the entire interest without restriction as to persons. In opposition to this broad authority there may be a limited or circumscribed power called a *special* power. It may be limited in two respects: one, where, if a transfer of a fee is authorized, the person or class of persons to receive the estate is designated; and the other, where an interest less than a fee is dealt with. Each kind of power may be *beneficial*, when no person other than the donee has by the terms of its creation any interest in its execution. In other words, such a grantee may exercise the power for *his own* benefit. Either a general or special power may be *in trust* when the donee is not to exercise it for his own benefit, but a duty is imposed upon him to make use of it for others. If the duty be to dispose of *proceeds* after the power is exercised, as for example, if there be a general authority to sell to any one, but to divide the proceeds between A., B., C., and D., then there would be a *general* power to sell *in trust* to divide the proceeds. On the other hand, if the power were to convey to *specified* persons, there would be a "special power in trust;" and there would also be a

Suspension of the ownership of personal property. — The rules on this subject apply to clauses in an agreement or a will whereby the ownership of property does not for the time being become absolute, but is made to depend on a contingency only upon the happening of which the ownership is to become absolute. It is readily to be perceived that this might be a very remote event, so that during all the intervening period there would be no determinate owner.

The postponement of absolute ownership to a remote period is opposed to the policy of the law. A rule mainly applied by decision to real estate is also applicable to personal property. Ownership at common law could not be postponed beyond a life or lives in being at the time of the creation of the estate or interest, with the further possible period required for the gestation of a child and an additional suspension of a period of twenty-one years as an absolute term.

This rule is the slow product of generations of judges as applied to the particular state of things existing in England. It has long been the practice, in case of a marriage, to settle land upon the husband for his life, with a succeeding estate upon the wife for her life, with the remainder to the children of the marriage, usually by entailment, with some differences of form. A common form is on the sons successively; in case of death without issue, and if there be no sons, then upon daughters; and if the parties

special power in trust, when any person other than the grantee is designated as entitled to *any* benefit from the disposition or charge authorized by the power. This would include a benefit derived from a lease of the property, or a mortgage of it, where that was authorized by the power, and was according to law.

The *whole* system of powers *in trust* thus embraces: (a) cases where one is authorized to sell or convey property without restriction, but at the same time is required to *divide the proceeds* in a prescribed manner; (b) where one is required to convey an entire interest to *specified persons*, the restriction being upon the *power to convey* instead of upon the *disposition of the proceeds;* (c) cases where *inferior* interests or estates (such as *leases, mortgages*, etc.), or others less than the whole are created, and some persons other than the grantee of the power is declared to be entitled to them.

The common-law classification is different from this, and made to turn upon the point whether the donee of the power has some interest in the property over which the power is exercised, and also whether the exercise of it in some way acts upon the interest which he possesses. Powers from this point of view are either (a) appendant, (b) in gross, or (c) collateral. Thus if the donee has a temporary interest in the property, as for life, and the power acts upon that, it is *appendant;* if the power does not affect the life interest, but only the succeeding interest, it is *in gross;* if the donee has no interest whatever, but is, in other words, a stranger, the power is *collateral*. These are very technical distinctions.

As a power is a mode of creating an estate, it should be exercised in such a way as not to offend against rules of public policy. The rules governing the general subject should be sought in the treatises referred to, and in the reported cases. Careful attention must be given in New York to the statutes.

to the marriage die childless, to others, perhaps the grantor himself. Each of these uncertain events must happen during the life of the parents. If an infant child should survive his parents, he would be able at twenty-one to dispose of the property. So, if the parents were surviving when a child entitled under the settlement became of age, they could unite in a conveyance, and dispose of the estate. The *power to sell* would not be in *abeyance* or suspended for a period longer than their two lives, and the minority of a child, and a possible period of nine months in case of a posthumous child.

It was from this class of cases that the rule in question was first worked out, and the facts could be formulated so as to state that the ownership of property could be suspended for lives in being, and during the period of infancy (twenty-one years), and nine months in case of the birth of a posthumous child. After a time there came cases in which the suspension was for more lives than two. The principle was deemed to be the same, since no matter how many lives might be named, the suspension was in reality but for one life, that of the longest survivor.

The most difficult question that arose was, whether the twenty-one years could be taken as a fixed and absolute period, without reference to infancy. For example, a testator provides that his estate shall pass to a non-existent charitable corporation having powers which he prescribes, should it be chartered within the period of twenty-one years after his death. Such a provision has no reference to the ordinary elements in suspension, namely, duration of life, infancy, or gestation. Is this lawful? The answer would seem to be, that as public policy underlies this whole subject, there can be under the authorities no public policy opposed to a *moderate* suspension, but only to a *lengthened* one, and that twenty-one years is a moderate period *in analogy* to what had already been established as to infancy, and is accordingly valid.[1]

The case of Cadell *v.* Palmer is an instance of a desire on the part of a testator to go nearly to the extreme verge of the law. He suspended ownership during the continuance of twenty-eight lives, and the survivor of them, and a fixed period of twenty years besides. The will was declared to be valid, as the twenty years suspension was lawful (with or without the lives), as being less than twenty-one years, which was the extreme limit. The

[1] Cadell *v.* Palmer, 10 Bing. 140; on appeal, 1 Cl. & F. 372. The discussions in the House of Lords turned upon the question whether prior decisions had not really disposed of the question. 1 Cl. & F. pp. 399–410. The judges in advising the Lords enter into the matter of *reasonableness*, pp. 412, 417.

court was of opinion that the nine or ten months allowed in the case of a posthumous child could not be allowed as an absolute term.[1]

The time is to be reckoned in all cases from the "creation" of the estate. This in a conveyance is from the delivery of the deed; in the case of a will, from the testator's death, since the will does not take effect until that time.

This subject is treated in the law books under different names. When the writer has in view the effect of suspension, he may call it a "*perpetuity*," or suspension of ownership. When regard is had to the nature of the provision, it may be called "*remoteness*." When attention is directed wholly to the inability to sell, it is called suspension of the power of alienation. These terms may be applied either to the case of real property or personal property, including therein chattels real.

Cases may arise, particularly under modern statutes, where there is no strict suspension of ownership. The ownership is determined and fixed, but the *power of sale* is withdrawn. There is a marked instance of this kind in New York, where a trust is created to pay the income for life to a beneficiary for his use. The law declares that the beneficiary shall not sell or assign such an income, but simply receive it as it accrues. This prohibition suspends the power of sale or alienation, and the trust must be kept within the limits of the rule against perpetuities.[2]

Most of the American States adhere to the common-law rule fixing the limit of the time during which suspension of ownership can be allowed. Others, of which New York is a conspicuous example, have abridged the period by legislation. The number of lives has been cut down to two, and the twenty-one years have been lopped off, except in a single instance, applicable solely to real estate, which is where a future estate is made to take effect in case a prior estate be terminated by some event, — for example, death occurring during the minority of the holders of the estate.[3]

There is a single but important exception to the rule against perpetuities. This is the case of charitable trusts. It is a settled rule in equity jurisprudence that property, whether real or personal, may be so disposed of by an owner that its income shall be perpetually devoted to a designated charitable purpose. The word "charitable" is not here used in its popular sense, but in the technical meaning of "advantageous or useful to the public."

[1] Cadell *v.* Palmer, 1 Cl. & F. 372, 421, 422.

[2] Hawley *v.* James, 5 Paige, 318; reversed, 16 Wend. 61. The rule here laid down has been followed in many subsequent cases.

[3] 1 R. S. 723, § 16; Manice *v.* Manice, 43 N. Y. 303.

It includes a great variety of dispositions having in them the element of public utility, such as the repair of highways, the support of the poor, the foundation of schools, colleges, and hospitals, the erection and sustentation of churches, etc. As the law of perpetuities is the outgrowth of rules of public policy, it is manifest that there can be no public policy opposed to the devotion of property to the public advantage in the best possible manner. Experience has shown that permanent endowments are essential to the highest development of great public institutions of the kind already referred to.

The fundamental thought underlying the doctrine of perpetuities is, that they are injurious to the public welfare, in allowing an individual owner to withdraw his estate indefinitely from exchange and from the requirements of trade, by imposing obligations on his successors to comply with his views as to the methods of promoting family aggrandizement in the distant future. He is thus vainly attempting to introduce an element of stability into the administration of his estate by remote heirs, while natural laws decree instability and change. Accordingly, he can no more bind the *proceeds* of his estate, if sold, than the estate itself in the form that he left it. The law means that after a limited time the dead man shall relinquish his grasp, and cease his useless contest with the laws of nature. The old chancellors argue that those proprietors who strive to create perpetuities fight against God.[1] In the great case of the Duke of Norfolk, Lord Chancellor NOTTINGHAM, after describing "perpetuities," said, "such do fight against God, for they pretend to such a stability in human affairs as the nature of them admits not of, and they are against the reason and policy of the law, and therefore not to be endured."[2] The persistency of language by the courts shows how deep an impression was made while this doctrine was germinating of the unwholesomeness of the fruit that it was likely to bear.

[1] Cary's Reports, 11 (41 Eliz.) *per* LORD EDGERTON, Chancellor.

[2] Select cases in Chancery, p. 31; also Choice Cases in Chancery, Stevens & Haynes reprint, 1870, p. 49.

PART III.

TITLE TO PERSONAL PROPERTY.

THUS far it has been the object to consider the ownership of personal property, the various interests that may be acquired in it, and the qualifications imposed upon ownership by general rules of law. It still remains to consider how property may be acquired. This inquiry involves the *title* to property.

There are various modes of acquiring title to personal property. Some writers treat these simply by way of enumeration.[1] Others, for example Chancellor KENT, arrange them under principal divisions, with subordinate titles. His method leads to three principal divisions, — title by original acquisition, by act of the law, and by act of the parties. A similar arrangement will be adopted here. One class embraces things which are obtained by the claimant himself through his own act. The title is not derivative from others, but originates with him. The plainest case of this kind is mental origination. This embraces the authorship of a literary work, or the production of a picture or statue. Other instances are the finding of property on land or sea, capturing it in time of war. So property already owned may receive additions to its value which, by being incorporated with it, become in law a part of it. From this fact springs a form of title termed title by "accession." So goods belonging to different owners may be commingled in such a way that one gains the title to the whole. This leads to a special form of title, that is, by "confusion." Finally, one may take materials belonging to mankind in common, and so appropriate them to his own use as to become owner, particularly where he has added labor to them. This may be termed title by "production." These various modes of acquiring title will now be considered.

[1] 2 Bl. Com. c. 26.

CHAPTER I.

TITLE BY ORIGINAL ACQUISITION.

DIVISION I. — *Title by Capture.*

THERE are two modes of acquiring property in this way, one upon land, and the other upon water. The first is called *booty*, and the second, *prize*.

SECTION I. *Booty.* — There is a practical distinction of much consequence between booty and prize. As to the latter, a court of admiralty has, by the regular course of law, jurisdiction to determine its *status*, that is, whether it is lawful prize or not. This is not so with booty.[1] The right to that does not depend upon a legal adjudication, but upon undisturbed possession by the captor for a reasonable time. This defect in law is remedied in England by statute, conferring upon the admiralty court jurisdiction in this class of cases.[2]

The right to take possession and hold captured property is based upon the *right of conquest*.[3] Booty vests in the crown in England; here, in the national government. It has long been the practice in England to award the booty to the captor, the crown surrendering its right, derived from its prerogative. Various claimants have had their conflicting claims disposed of, being settled by the Lords of the Treasury, upon some assumed principle. A decision did not form a precedent, because it was not rendered by a court. The Banda & Kirwee Booty Case was the first judicial decision in England, and was rendered by Dr. Lushington in the Court of Admiralty. It was a case of great importance, involving about £750,000. The money was divided between the commander-in-chief, being "in the field," with all his staff, also in the field, on the one hand, and the division that made the capture on the other. The scale on which the distribution was to be made among the several ranks was not under the

[1] Booty is sometimes called "Army Prize" in distinction from captures at sea, which are called "Naval Prize."

[2] 3 & 4 Vict. c. 65, § 22. See Banda & Kirwee Booty Case, L. R. 1 Adm. & Ecc. 109 (1866).

[3] Gilmer *v.* United States, 14 Ct. of Claims, 184.

order of submission to the admiralty judge properly before him.[1] The question of the participation of other divisions in the fund, on the ground that by their "community of enterprise" they were constructive captors, was extensively discussed, and the claim was disallowed under the circumstances. It was decided that co-operation entitling to a share must *directly* tend to produce the capture, and that it must be strictly limited to encouragement to the friend and intimidation to the enemy.[2]

Questions arose in this country during the conflict with the Confederate States as to the capture of property by the Union armies. This was particularly in connection with the capture of cotton. It was decided by the Supreme Court of the United States that cotton found within the Confederate territory was a legitimate subject of capture by the forces of the United States, even though it belonged to a foreigner never coming to this country, and that the title vested in the United States as soon as the cotton was reduced to firm possession.[3] "There is no necessity for judicial condemnation. In this respect, captures on land differ from those at sea."[4] In these proceedings, the owner must be

[1] Banda & Kirwee Booty Case, *supra*, p. 268.

[2] The distinctions between the law governing booty and prize are pointed out in the case. It was argued for twenty-six days by many of the ablest counsel in England. There was an action in the Court of Chancery to distribute the fund on the theory of a "trust," which under the terms of the grant was disallowed, no technical trust being intended. Kinlock *v.* Secretary, L. R. 15 Ch. D. 1. Reference may also be made to an English Blue Book published in 1864, entitled "Report of the Commissioners appointed to inquire into the Realization and Distribution of Army Prize."

[3] Young *v.* United States, 97 U. S. 39. The same principle was decided in Mrs. Alexander's Cotton, 2 Wall. 404; United States *v.* Padelford, 9 Id. 531; Sprott *v.* United States, 20 Id. 459; Haycraft *v.* United States, 22 Id. 81; Lamar *v.* Browne, 92 U. S. 187.

[4] Young *v.* United States, *supra*, p. 60. Cotton was peculiarly the subject of confiscation from its character. It was potentially an auxiliary of the enemy, and constitituted a leading means by which they expected to perpetuate their power. It might have been destroyed. Congress passed the so-called "Abandoned and captured property act" (12 U. S. Stat. at Large, 820) both to avail itself of its just rights as a belligerent, and to recognize its duties under the enlightened principles of modern warfare. It was provided that property when captured should be sold, and the proceeds paid into the United States Treasury. Any claimant might within two years after the close of the rebellion bring suit in the Court of Claims for the proceeds, and on establishing his ownership and that he had never given "aid or comfort" to the rebellion, receive the residue of the proceeds after deducting lawful charges. This act applied to all owners, whether foreigners or natives. United States *v.* O'Keefe, 11 Wall. 178. (*a*) The words "aid and comfort" in the statute mean such assistance to the enemy as would constitute treason if rendered by one owing allegiance to the United States. The Proclamation of Pardon issued by the President Dec. 25, 1868 (15 U. S. Stat. at Large, Appendix No. 15) relieved all who owed allegiance to the United States from showing as a basis for prosecuting

(*a*) See generally as to this act, Briggs *v.* United States, 143 U. S. 346.

properly notified.[1] The *property* is treated as the offending thing. It is not confiscated as punishment, but for the purpose of weakening the enemy. This principle underlies the act of Aug. 6, 1861, chap. 60.[2] The act of July 17, 1862, chap. 195, proceeds on a different principle, which was to confiscate the property of *traitors* by way of *punishment*. This was confined to the natural life of the offending *owner*.

In case of confiscation of a debt, notice should be given to the debtor, in order to obtain *jurisdiction*.[3] Confiscation proceedings under the laws of the Confederate States had no effect upon the property of a citizen of a loyal State.[4]

SECTION II. *Prize.* — This term is applied to such property as is taken at sea by the right of conquest in time of war, whether from an opposing belligerent, or from a neutral violating the law of nations in respect to war. In this class of cases, it is the general rule that the property should be brought for condemnation into a port belonging to the captor. Still, under *peculiar circumstances*, condemnation may take place, though the captured property is in a neutral port, and it may be sold there.[5] Such a case must be treated as an exception, and cannot be cited as a precedent.[6]

It is, perhaps, a correct distinction that undisturbed possession by a captor of a captured ship gives him a title *de facto*, while the condemnation by a prize court gives the title *de jure*.[7]

The elements usual in prize cases are that the property is taken possession of at sea, and that it belonged to an enemy, or a neutral violating the laws of war. No force is necessary. Cotton abandoned at sea and picked up by the enemy is prize rather than "derelict" property.[8] Prize accrues to the government or State to which the captor belongs. Individuals derive their title from the State, and their rights are limited by the grant to them.

As a rule, as has been seen, the captor must bring the prize into some port of his own country, and proceed against it in a court having jurisdiction, called "a prize court." This in Eng-

their claims that they had not given "aid and comfort" to the enemy, but did not help one who owed no allegiance, such as a foreigner not being within the United States, but having property captured there. Congress must intervene in favor of such a person. He can otherwise receive no assistance from the amnesty, nor from the courts.

[1] Chapman *v.* Phœnix Nat. Bank, 85 N. Y. 437. For a case where the owner recovered the proceeds as not falling within the statute, see United States *v.* Quigley, 103 U. S. 595.

[2] Phœnix Bank *v.* Risley, 111 U. S. 125, affirming Risley *v.* Phenix Bank, 83 N. Y. 318.

[3] Id.

[4] Stevens *v.* Griffith, 111 U. S. 48.

[5] The Polka, 1 Spinks Ecc. & Adm. R. 447 (1854).

[6] The Polka, *supra*, also The Henrick & Maria, 4 Rob. 43, and 6 Id. 138, n.

[7] See remarks of court in The Gauntlet, L. R. 4 P. C. 184, 192.

[8] Seventy-eight Bales of Cotton, 1 Lowell, 11; The Wando, Id. 18.

land is a court of admiralty. Here it is a United States court; at present, a District Court having by act of Congress the requisite jurisdiction. The proceeding is *in rem*, or against the property itself. The decision of a prize court having jurisdiction so far fixes the *status* of the property that the title passes to the captor. This is recognized in courts of other countries, including those of the country where the captured property originally belonged. Redress, if the decision be erroneous, can only be obtained by diplomacy; and if that fail, by war. The ground of this rule is that the legal proceeding is against the *thing* captured. Its object is to establish the *status* or ownership of the thing, and the judgment of the court fixes or establishes such ownership. It is not intended to develop the details of prize law, but only to point out the relation of the topic to the title to personal property.

The origin of the jurisdiction was first clearly stated in Lindo *v.* Rodney,[1] a great case decided by Lord MANSFIELD, where it was shown that a prize court entertained a special jurisdiction in time of war only, conferred upon it by statute, and was a different tribunal from the ordinary or "instance" court of admiralty, sitting to transact maritime legal business in time of peace. In the United States the district court has authority over both classes of cases, though the prize jurisdiction is, for the most part, dormant in time of peace. For further information, the admiralty decisions in England and in the courts of the United States, particularly those of the Supreme Court of the United States, as well as the treatises of standard text-writers, should be consulted.[2]

DIVISION II. — *Title by Finding.*

This topic will be considered under two sections: I. Finding on Land. II. Finding at Sea.

SECTION I. *Finding on Land.* — Finding takes place when one who is not the owner of a chattel takes possession of it on the

[1] Reported in a note to Le Caux *v.* Eden, 2 Doug. pp. 612, 613.

[2] Reference may be made to the standing interrogatories in 2 Wheat. Appendix, p. 81, and 1 Ch. Rob. 381, and to the U. S. Revised Statutes, §§ 4613–4652, to the rules in admiralty of the Supreme Court, and to notes in the Appendix to 1 and 2 Wheat. Important blockade cases are The Franciska, 2 Spinks Ecc. & Adm. R. 113. The Prize Cases, 2 Black, 635, and Blatchford's Prize Cases. Many authorities are collected by Mr. David Roberts, in his Treatise on Admiralty and Prize (Part II.). There is in this book a useful collection of the names of the judges of the United States Supreme Court, and the date of their appointment, together with a list of admiralty reports, both in England and in this country, down to the year 1868, pp. 641–644. The treatises on International Law should also be consulted.

ground that it has been lost[1] by its owner, not knowing at the time who is owner, nor having reasonable grounds to believe that he can be found. The line between finding and stealing is narrow, and the test in a close or doubtful case is, whether the so-called finder knows at the time who the owner is, or has reasonable grounds to believe who he is.[2] If so, and he appropriates the chattel to his own use, he is a thief. If not, he does not become a thief by a subsequent wrongful appropriation to his own use. The capital fact in larceny or stealing is the act of felonious *taking*.

On the other hand, if the owner is not known at the time of taking, or there are no reasonable grounds for believing that he can be ascertained, there is no larceny, though the finder conceals the goods, or converts them to his own use, after ascertaining who the real owner is.[3] (*a*) This rule has been held not to be applicable to cattle at large in the highway.[4] The principle has been stated in the following forms in the cases: —

If one claiming to be a finder takes goods into his possession with a felonious intent to deprive the owner of them, and then has reasonable means of ascertaining who is the owner, it is a case of larceny.[5] The place of finding may be material as tending to show whether the goods were really lost or mislaid, or left by the owner under circumstances which would lead him to return for them.[6] One who, when he finds a pocket-book containing money, appropriates it with intent to take entire dominion over it, and at the same time reasonably believes that the owner can be found, is guilty of larceny.[7] Where one, at the time of finding, has reasonable ground to believe, from the nature of the property or the circumstances under which it is found, that if he does not conceal, but deals honestly with it, the owner will be ascertained, he will be guilty of larceny if, at the time of taking the property into his possession, he intends to steal it.[8] The finder of lost goods which have no marks by which the owner can be identified, and who does not know to whom they belong, is not guilty of larceny, even if he does not exercise diligence to discover who the owner of the goods may be.[9] The rule that the finder of property so marked

[1] There must be a *loss*. Reg. *v.* West, 6 Cox C. C. 415.

[2] People *v.* Swan, 1 Park. C. C. 9; State *v.* Weston, 9 Conn. 527; State *v.* McCann, 19 Mo. 249.

[3] Lane *v.* The People, 10 Ill. 305; State *v.* Taylor, 25 Ia. 273; State *v.* Conway, 18 Mo. 321; People *v.* Anderson, 14 Johns. 294; People *v.* Cogdell, I Hill, 94; Porter *v.* State, Mart. & Yerg. (Tenn.) 226.

[4] People *v.* Kaatz, 3 Park. C. C. 129.

[5] Com. *v.* Titus, 116 Mass. 42.

[6] Griggs *v.* State, 58 Ala. 425; Rountree *v.* State, Id. 381.

[7] Reed *v.* State, 8 Tex. App. 40.

[8] Brooks *v.* State, 35 Ohio St. 46.

[9] State *v.* Dean, 49 Ia. 73.

(*a*) Allen *v.* State, 91 Ala. 19.

that the owner can be ascertained is guilty of larceny if he converts it to his own use, has been applied in the case of a bar of bullion lost from a stage-coach.[1]

The rule as laid down in the English courts is, that if a man finds goods that have been *actually lost*, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, there is no larceny. If he reasonably believes that the owner can be found under the same circumstances, it is a case of larceny.[2] The "reasonable belief" referred to in the last sentence means such belief as might be derived from the finder's previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it.[3] Reasonable belief at the time of finding that the owner can be found, is insisted upon by many decisions.[4] Accordingly, if the original intention be innocent, no subsequent change of intent will constitute larceny.[5] It is not a case of finding, in the legal sense, where a passenger accidentally leaves goods in a railway-car, and a servant of the road appropriates them.[6] Nor where a purse was accidentally left on the prisoner's stall and appropriated by her. In this last case there was plainly no loss of goods.[7] The court said: "The distinction is quite clear between property mislaid — that is, put down and left in a place to which the owner would be likely to return for it — and property lost." (*a*)

Dropping the distinction between finding and stealing, the next point to be considered is the act that constitutes "finding." There may be competing claims between the owner of property, such as land or a building upon which the goods are claimed to be found, and one who may casually pick them up or lay hold of them. The correct view in such a case is, that if the goods were lost as distinguished from being deposited, the casual finder, having first obtained possession, would have the better right. A leading illustration is found in the case where a commercial traveller picked up a parcel (which proved to contain bank notes) on the floor of a shop at which he had called on business. It was decided that

[1] State *v.* Clifford, 14 Nev. 72.

[2] Reg. *v.* Thurborn (or Reg. *v.* Wood), 3 Cox C. C. 453; s. c. 1 Den. C. C. 387. In this case there is an elaborate opinion by PARKE, B. Reg. *v.* Glyde, L. R. 1 C. C. R. 139.

[3] Reg. *v.* Thurborn, 1 Den. C. C. 387, 396.

[4] Reg. *v.* Deaves, 11 Cox C. C. 227; Reg. *v.* Knight, 12 Id. 102; Reg. *v.* Matthews, 28 L. T. N. S. 645.

[5] Reg. *v.* Preston, 5 Cox C. C. 390.

[6] Reg *v.* Pierce, 6 Cox C. C. 117.

[7] Reg. *v.* West, 6 Cox C. C. 415.

(*a*) Livermore *v.* White, 74 Me. 452.

he was the finder, rather than the owner of the shop.[1] This principle has been extended to the case of a domestic servant picking up a roll of bank bills in the public parlor of a hotel, there being no presumption in such a case that the money belongs to a guest of the hotel.[2] So, as between one who had bought a safe and another who, having permission to use it, found a roll of bank bills between the outer casing and the lining, it was held that the latter was the true finder.[3]

If, however, the goods had been in the lawful custody of the owner of the hotel or other property referred to in the various cases cited above, the latter would have been the real finder.[4] The effect of finding is, that the finder is owner as to all persons except the true owner.[5] As if one should find a jewel, and he should be deprived of it by another against his consent, he could recover its full value. He would hold the proceeds in trust for the true owner, if discovered, in the same way as he held the jewel itself. As between him and the rightful owner, the title is in the latter. He has no lien upon the chattel for the act of finding, nor is he entitled to any reward.[6] If, however, a reward be offered, a lien is created to the extent of the reward.[7] The offer of a reward is in the nature of a proposal to contract, which is deemed to be accepted by the finder on complying with the proposal.

The remedy against the finder by the owner for a wrongful refusal to return the goods is an action for the specific thing (replevin), or at his election an action for conversion to obtain its value.

Reference should be made here to the special cases of *treasure trove*, *estray*, and *wreck*.

Treasure trove (treasure found), says Bracton[8] (following the Roman law), "is an ancient deposit of money or some other metal, respecting which memory exists not, so that it has no owner, and so, of natural right, it becomes the property of him who has found it, so that it shall not belong to another. Otherwise, if any one shall have hidden anything under the ground for the sake of gain or of fear or of custody." Accordingly, a "treasure" must be found by accident. If A. found a "treasure" on B.'s land otherwise than by accident, it belonged in the old law

[1] Bridges *v.* Hawkesworth, 21 L. J. N. S. (Q. B.) 75; S. C. 15 Jur. 1079.

[2] Hamaker *v.* Blanchard, 90 Pa. St. 377. See also Matthews *v.* Harsell, 1 E. D. Smith, 393.

[3] Durfee *v.* Jones, 11 R. I. 588; Bowen Sullivan, 62 Ind. 281. In this case, a servant, while sorting a bale of old papers purchased by her employer, found genuine bank bills in an envelope.

[4] McAvoy *v.* Medina, 11 Allen, 548.

[5] Armory *v.* Delamirie, 1 Strange, 505.

[6] Wood *v.* Pierson, 45 Mich. 313.

[7] Wentworth *v.* Day, 3 Met. 352; Cummings *v.* Gaun, 52 Pa. St. 454.

[8] 2 Bracton (Twiss' ed.), 271.

altogether to B. In Justinian's legislation, it belonged one-half to the owner of the land where found, and one-half to the finder, though if the finder found it wholly on his own land, it belonged to him. In Bracton's time, in England, it belonged wholly to the king; and the same view is stated by Lord Coke in his Institutes.[1] Bracton takes the distinction that by "*natural right*" treasure trove belongs to the finder, while by "the law of nations" (meaning apparently positive law) it belongs to the king. The reason why it belonged to the king, apparently, is that it is a case of goods without an owner (*bona vacantia*), as in the case of one dying intestate without next of kin. Such property passes either to the church or to the king,[2] and the better opinion is, to the latter. The king might grant it to a private person. Mines of metal belong to the owner of the soil, except gold and silver, which also by common law belong to the king. The charge of treasure trove belongs to the coroner acting for the king. In this country, the State would succeed to the rights attributed in this section to the king.

It has been said that if a man find in the sea precious stones of which no man *was ever proprietor*, these do not belong to the king, but to the finder.[3] But it seems that this rule will not be applied to Spanish dollars found in the sands of the seashore, as they will be presumed to have come there by the loss of some wrecked vessel.[4] On the general subject reference may be made to the authorities cited in the note.[5]

Estrays or strays are names applied to domestic animals, being at large and without the possession of their owner. The general rules of finding are applicable when the owner is not known. If, however, the owner is ascertained, the finder will at most only have a claim for the necessary expenses of keeping the property.[6] Straying animals may, however, be regarded from the point of view of the public inconvenience of their being at large in the highway, or as trespassers upon the property of others. From these points of view, the matter of their detention by placing them in an enclosure or "pound" becomes important, and the consequent right of a pound-keeper to hold or detain them until charges and damages are paid. This subject is largely regulated by statute in the respective States. It has of late years lost much of its importance, owing to the increased efficiency of laws ex-

[1] 3 Coke's Inst. 132.

[2] The legal maxim was, "*Quod non capit Christus, capit fiscus.*" See Atty-Gen'l *v.* Köhler, 9 H. L. Cas. 654.

[3] Laws of Oleron, Art. 34; 2 Black Book of the Admiralty, pp. 470, 471.

[4] Talbot *v.* Lewis, 6 C. & P. 603.

[5] 3 Coke's Inst. 132, 133, cap. 58; 2 Id. 168; 20 Viner's Abr. 414, 415.

[6] Amory *v.* Flyn, 10 Johns. 102.

cluding cattle from running in the highways. The recent cases are mainly based upon the correct construction of the local statutes, and are for the most part not of general interest. A case may, however, be referred to where the question was raised whether a statute authorizing cities to restrain animals from running at large, and to sell them in a prescribed way for the recovery of a penalty and costs, was a violation of the constitutional rule that one is not to be deprived of his property without due process of law. It was decided that under the circumstances it was not.[1] (*a*)

Wreck is the legal term applied to property lost or shipwrecked at sea and *cast up on the shore*. Bracton treats of this subject, and states that the proper application of the word "wreck" is to the case where the ship is broken up, from which no living thing has escaped, and principally if the owner of the article has been drowned. Whatever comes *to land* therefrom shall be the property of the king, nor shall any one else claim or have anything thereof from the king, although he may have land near the shore of the sea, unless he enjoy a special privilege concerning wreck. This rule seems to be based on the supposition that the owner is not known (*bona vacantia*), so that it is only a question between the finder and the king. Bracton proceeds to say, "unless it be that the *true owner* coming from elsewhere may show by certain marks and signs that the things are his property, as if a live dog has been found, and it can be proved that he is the owner of the dog, it is thereupon *presumed* that he is the owner of the dog and of the things. And in the same way, if *certain signs* have been affixed to the merchandise and other things."[2] This is written of the common law, and is in substance, that if the owner cannot be found, the wreck vests in the king; but if he can be shown by certain signs or marks, the property shall belong to him. The Statute of Westminster (3 Edw. I. c. 4) states that it is agreed that where a man, a dog, or a cat escape "quick" (meaning alive) out of the ship, that such ship, &c., is not to be adjudged a wreck, but the goods shall be kept for the owner and restored to him, if he make claim within a year and a day, and if not, they shall remain to the king. The correct view seems to be that the animals named are put as instances, and that the question of ownership is merely matter of evidence.[3]

[1] Fort Smith *v.* Dodson, 46 Ark. 296. Strays in New York are regulated by 2 R. S. 517–522. Code of Civ. Proc. §§ 3082–3115. (*b*)

[2] 2 Bracton (Twiss' ed.) 273.

[3] Hamilton *v.* Davis, 5 Burr. 2732; Bailiffs, &c. of Dunwick *v.* Sterry, 1 B. & Ad. 831, 844.

(*a*) Burdett *v.* Allen, 35 W. Va. 347; Coyle *v.* McNabb, 18 S. W. Rep. (Tex.) 198.

(*b*) See also Art. VI. ch. 569, Laws of 1890, as amended by ch. 254, Laws of 1891, and chs. 61, 92, and 252, Laws of 1892.

The matter of wreck is in general a question of jurisdiction between the courts of admiralty and common-law courts. The admiralty jurisdiction subsists so long as the shore is covered with water; rights enforceable in the common-law courts exist only when the land is left dry.[1] A ship cannot be considered a "wreck" (or *wreccum maris*) unless at the time of taking possession she is either on the shore or left high and dry on land. Accordingly, a log of wood found floating in the sea near the shore, and drawn up on a rock by a person wading into the water, is not "wreck," but an incident to admiralty jurisdiction,—a *droit* of the admiralty. The same rule would be applied to a log cast upon the beach but carried back to sea by the next tide and taken while floating.[2] Grants of "wreck" are made at times in England within a specified territory, in which case the grantee has a special property so as to prevent a wrongdoer from taking wrecked property away, though as between him and the owner the latter may have the title.[3] A wreck may become an obstruction on the seashore, and the public welfare may demand its removal. This is provided for in England, and the public authorities have power to destroy and remove sunk, stranded, and abandoned vessels in any fairway or on the seashore under specified circumstances. The statute applies to the cargo, stores, etc., as well as to the vessel itself.[4]

There is, in New York, a statute regulating wrecks and proceedings with reference to them in much detail. The statute includes goods cast by the sea or any inland lake or river upon the land, and provides modes for ascertaining title to the wrecked property, for salvage claims, sale, etc. (*b*)

SECTION II. *Finding at Sea.* — The common-law meaning of the term "sea" is that part of the ocean or tributary rivers where the tide ebbs and flows. In the United States an enlarged meaning has been given by the courts to the jurisdiction of courts of admiralty, and waters *in fact* navigable have been included in the term "sea," though above tide water.

"Derelict property," in the admiralty branch of the common law, means property at sea abandoned by its owner. On the other hand, if the property, though abandoned, be cast up high and dry

[1] The Pauline, 2 Rob. Adm. 358.

[2] Staepoole *v.* The Queen, 9 Ir. R. Eq. 619 (Ch. App.); Palmer *v.* Rouse, 3 H. & N. 505.

[3] Bailiffs, &c. of Dunwick *v.* Sterry, 1 B. & Ad. 831.

[4] 40 & 41 Vict. c. 16. (*a*)

(*a*) Amended by 52 & 53 Vict. c. 5 (1889).

(*b*) Ch. 569, Laws of 1890, as amended by ch. 254, Laws of 1891; and chs. 61, 92, and 252, Laws of 1892, §§ 137–150.

on the shore, it is "wreck," and not derelict.[1] It would accordingly seem that the law of "derelict" in this country would accompany the expanded meaning of admiralty jurisdiction.

The case of saving derelict property is quite different from that of "finding" on land. The rules of the admiralty or maritime law prevail. No contract is necessary to entitle the salvor to compensation. The maritime law regards the *nature and value* of the services rendered by the salvor to the property saved, rather than the question whether he rendered the services through the medium of a contract with the owner. Still, even in the maritime law, if the property be not derelict, a contract is necessary as a basis for compensation.

The important fact to constitute "derelict" is *abandonment.* Abandonment depends largely on intention. The master and crew must leave the ship with intention not to return. This point is highly important, for if the ship be utterly abandoned, the salvors have an exclusive right to possession; if not, the salvors are bound, on the master's return, to give up the charge to him, whereupon he may refuse to continue to employ them, and may employ others.[2]

Abandonment is accordingly largely a question of fact, and all the circumstances must be considered in determining the intention. Some authorities are referred to in a note.[3] (*a*) Derelict applies to all property abandoned at sea, though not having been on a ship, as the term is ordinarily understood. Thus, the obelisk known as "Cleopatra's Needle," having been abandoned in a vessel constructed entirely for the purpose of conveying the obelisk from Alexandria to England, was declared derelict. The court fixed the value of the obelisk at £25,000 sterling.[4]

The amount awarded to salvors in the case of "derelict" is usually large, and is frequently about one half of the value of the

[1] The Pauline, 2 Rob. Adm. 358; Stacpoole *v.* The Queen, 9 Ir. R. Eq. 619. *Ante*, p. 477.

[2] The Champion, Brown. & Lush. 69.

[3] A laden barge accidentally breaking loose from her moorings in a navigable river, and drifting about with no one on board, is not derelict. The Zeta, L. R. 4 Adm. & Ecc. 460. There is no intent to abandon in this case. For a similar reason, if, on an alarm attending a collision, the crew of one vessel jump on board the other, the abandonment is not so complete as to constitute a case of derelict. The Fenix, Swabey, 13. But where it appeared that a vessel was picked up with four to five feet of water in the hold, her compasses and the seamen's clothes having been taken off, the court declared her "derelict." The Gertrude, 30 L. J. N. S. Adm. 130.

[4] The Cleopatra, L. R. 3 P. D. 145.

(*a*) See also The Ann L. Lockwood, 37 Fed. R. 233; The Eleanor, 48 Id. 843; The Fairfield, 30 Id. 700; A Lot of Whalebone, 51 Id. 916; The Lepanto [1892], P. 122; The Capella [1892], P. 70.

property saved. The amount depends upon the meritorious character of the services. Some instances are cited in the note.[1] There is, however, no fixed rule; but the nature of the service, the risk run, and losses voluntarily incurred by salvors may be taken into account where the value of the property saved is ample.[2] In some cases even more than half may be awarded.[3] The residue belongs to the owner, if he can be ascertained; if not, it becomes public property, and is termed a "*droit* of the admiralty."

DIVISION III. — *Title by mere Occupancy.*

There is a number of cases which may be grouped together in this connection, involving the appropriation by an individual to his own use of things which, without such appropriation, would be without an owner. The law permits items to be separated in this way from the mass of unappropriated things, and to become by appropriation private property. Instances of some importance are gains obtained by hunting and fishing, appropriation of ice formed in navigable streams, etc.

Legal questions may arise as to the point whether occupancy has become so complete as to confer ownership.

The principle, as stated in the Roman law, is, that "wild animals, birds, and fish, — that is to say, all the creatures which the land, the sea, and the sky produce, — as soon as they are caught by any one become at once the property of their captor."[4] This rule may be modified by game laws, but the Romans had no game laws. The principle may also be qualified in our law, as has been shown before, by the fact that the captor was at the time a trespasser upon the land of another, and took the animals there.[5]

The act of capture may be complete or inchoate. In the latter case the title does not pass unless the animal is brought within the power of the captor, — as, for example, by being killed, or so wounded or entangled in nets, etc., that he cannot escape. It will not be sufficient to wound an animal and to send the hunter's dog in pursuit, even though the animal be captured by the dog. It must have come into the possession of the hunter.[6]

[1] Property worth £5,100, salvage awarded £2,300, The Craigs, L. R. 5 P. D. 186; property worth £750, salvage £360, The Hebe, L. R. 4 P. D. 217; property valued at about £2,800, salvage £900, The Andrina, L. R. 3 Adm. & Ecc. 286; one half the value awarded, The Livietta, L. R. 8 P. D. 24.

[2] Bird *v.* Gibb, L. R. 8 App. Cas. 559; The City of Chester, L. R. 9 P. D. 182.

[3] The Rasche, L. R. 4 Adm. & Ecc. 127 (1873).

[4] Institutes of Justinian, Book II. Title I. § 12 (Moyle's ed. Vol. 2).

[5] Pierson *v.* Post, 3 Caines, Term R. (N. Y.) 175. *Ante*, p. 450.

[6] Buster *v.* Newkirk, 20 Johns. 75.

Legislation for the protection of wild animals is resorted to both in England and in this country. In England the laws forbid unnecessary slaughter of wild animals, including birds and fish, and thus aim to prevent their extinction. There is also beneficent legislation to promote increased production of various species. Reference is made to a leading statute in England where the legislation has been carried so far as to forbid the killing of wild birds in the breeding season. The act extends to all offences of this kind within the jurisdiction of the admiralty, as well as to offences committed on land. There is a useful enumeration in a schedule appended of the various wild birds found in Great Britain.[1] Certain American statutes are also referred to in a note.[2]

DIVISION IV. — *Title by Accession.*

By this expression is meant the case where some addition is so made to an existing chattel that by a rule of law it belongs with the chattel to the proprietor of the latter. Examples are where the addition is attached to, incorporated with, or derived from a chattel. This statement will include the young of domestic animals, the expenditure by one person of labor and skill upon the chattel of another, or even the addition of materials. Accession is found as a title in the law of real estate, and gives rise to the doctrine of "fixtures." Some more specific statements as to this subject in reference to personal property will be useful.

SECTION I. *The Ownership of the Young of domestic Animals.* — The general rule is, that the young belong to him who owns the mother, — *partus sequitur ventrem.* The rule is deemed to rest upon the general consent of mankind, and to be founded upon principles of natural justice.[3] (*b*) Where, however, the animal is leased for hire, and young are brought forth during the hiring,

[1] 43 & 44 Vict. c. 35, as amended by 44 & 45 Vict. c. 51.

[2] U. S. Rev. Stats. as to food fish, §§ 4395–4398, as amended by 25 Stat. L. 1 (1888); as to seals and other fur-bearing animals within the Territory of Alaska, Id. §§ 1956–1968, as amended by 25 Stat. L. 1009 (1889). See also N. Y. Penal Code as to the act by a non-resident of taking oysters, § 441, also by other persons, § 640, cl. 8; or using dredges for taking oysters or other fish. (*a*)

[3] See Bracton, Book II. ch. II. par. 1; Institutes of Justinian, Book II. Tit. I. § 19. It was stated from the English bench by RICKHILL, J., in 1406 (Year Book, 7 Hen. IV. fol. 9, pl. 13). See Tyson *v.* Simpson, 2 Hayw. (N. C.) 147.

(*a*) See also Arkansas Cattle Co. *v.* Mann, 130 U. S. 69; Meyer Brothers *v.* Cook, 85 Ala. 417.

(*b*) See also The Game Law (ch. 488, Laws of 1892). For the principal amendments to this act, see chs. 321 and 573, Laws of 1893.

they belong to the hirer.[1] The rule does not extend to a mere gratuitous borrower.

SECTION II. *Addition by Labor or by the Use of new Materials.* — This is called in the Roman law "*specificatio*," meaning the converting of another's material into a new form (*species*). In that system the line of inquiry was, under what circumstances does such an act give the title to the new product to him who has made the addition? In the common law, the point of view rather is, under what circumstances does the owner of the materials have a right of property in the whole subject-matter, including the additions?

The older Roman jurists looked at the subject from two opposite points of view. One class thought that the change of form had substantially destroyed the original substance. Consequently, he who had labored upon it took the new product by a species of "occupation," as though he were a finder. Another class contested this view, by claiming that the case was one merely of addition, and that the new product belonged to the original owner of the materials. Justinian, following certain jurists, took a middle view, and ordained that when the manufactured article could be reduced or brought back to its original materials, the title was not changed; otherwise, it passed to the manufacturer. He says, by way of illustration, that a vessel of metal can be melted down, — reduced to the bronze, silver, or gold of which it is made. Accordingly, the ownership remains. On the other hand, it is impossible to reconvert wine into grapes, or oil into olives, and accordingly the title is changed. He is, however, inconsistent in his illustrations, for while he states that if an author write in letters of gold a poem, history, or speech on the parchment of another, the ownership of the parchment attracts to itself the poem, etc., yet if a painter paint a picture on the board of another, the title to the picture and board vests in the artist. The sole reason given for this last statement is that it would be absurd were it otherwise.[2]

[1] Wood *v.* Ash, Owen's R. 139. The court went on the ground that if this rule did not prevail, the lessor would have the rent, and the lessee would have no profit. See also Putnam *v.* Wyley, 8 Johns. 337; Concklin *v.* Havens, 12 Id. 314; Stewart *v.* Ball, 33 Mo. 154; Elmore *v.* Fitzpatrick, 56 Ala. 400. This principle is found in the Roman law. "The term 'fruits,' when used of animals, comprises their young, as well as milk, hair, and wool; thus lambs, kids, calves, and foals belong at once, by the natural law of ownership, to the fructuary (lessee), . . . [who] ought to replace any of the animals which die from the young of the rest; . . . for it is his duty to cultivate properly and use them like a careful head of a family." Institutes of Justinian, (Moyle's ed.) Book II. Tit. I. §§ 37–39.

[2] Several leading jurists considered this distinction as unreasonable. Gaius II. 78. In Dig. 6, 1, 23, 3, exactly the opposite rule is stated. It had, however, the majority of voices in its favor, and is supported by Bracton, quoting not only from the Institutes, but also from an abstract of it well known in the Middle Ages, called the "Summa of Azo." Vol. I. (Twiss' ed.) 77.

In many cases the value added becomes thoroughly incorporated with the original article, so as to form a part of it, so that the independent existence of the one is lost in the other. Illustrations are paint put upon a carriage, thread used in making a garment, and the like. The carriage and garment would attract the paint, the dye, or the thread to itself. This last case is used both in the Institutes and in Bracton as an instance of accession. "Purple" is suggested, on account of its great value at that time. The Roman law, with its pervading spirit of equity, required that wherever the ownership might rest, he who lost his title should be paid by the other for the value of his property. The party in possession could resist an action by the other unless that was done, under the rule that "no one can have his wealth increased to the detriment of another."

One of the earliest cases of accession in the English law books occurred in the reign of Henry VII.[1] It appeared that A. owned several "dickers"[2] of leather which came through the act of another into the possession of B., who made up the leather into slippers, shoes, and boots, and that A. brought his action to obtain the slippers. It was claimed by the defendant's counsel that the incorporation of the thread of the shoemaker with the leather changed the title.[3] Bracton was cited to the court, and appears to have been the only authority mentioned. It is directly to the contrary. The court discarded this view, and substantially adopted the rule of the Roman law, that the shoes, etc., belonged to the owner of the leather. In the course of the decision the general distinctions of the Roman law were recognized. This is a highly interesting case, as showing how the rules of the Roman law influenced the courts of common law through the medium of Bracton.[4]

Cases of accession may be regarded under two further aspects: one, where the addition is made with the consent or under the employment of an owner; and the other, where there is no such consent or employment.

In the first class of cases there is no legal doubt. While, philosophically, the case is one of accession, it would be an affront to common sense to maintain that the title to the accessions was not

[1] Year Book, 5 Henry VII. fola. 15, 16, pl. 6.

[2] A "dicker" was a package of ten hides.

[3] The theory seemed to be that the thread attracted to itself the leather, instead of the leather the thread.

[4] The court, however, used one illustration apparently inconsistent with the Roman law, — that of bullion made into money, or money into "plate." Perhaps the thought here was, that *money* had qualities entirely different from plate, — such as legal tender, — and accordingly that money, when reduced to plate, could in no proper sense be regarded any longer as money, while leather in the form of shoes was still leather.

in the employer, no matter how large their value might be. The manufacturer or mechanic would have a lien or right to detain the goods until payment was made, unless credit was given. This lien would be lost by an unconditional delivery of the goods to the employer, whereupon he would simply become a debtor to the amount of the mechanic's bill.[1] Still, there may be cases in which the mechanic furnishes the principal part of the materials, in which case the thing when completed will belong to him, though the employer may furnish a subordinate part of the materials.[2]

The next class of cases embraces those where the work is done without the owner's consent, including the acts of wilful wrongdoers. No element of contract is found here, and the rule is that by the doctrines of accession the materials, with all the additions, belong to the owner of the principal chattel. Unlike the rule of the Roman law, no compensation need be paid, since in our law the claim for compensation must rest upon *contract*. It is a general rule, that where property has been wrongfully converted into another species of property, if its identity can be traced in its new form, it will belong to the original owner.[3] (*a*) Thus, where wood has been converted and made into coal, the coal belongs to the owner of the wood, who may sue for its value.[4] So, if a trespasser cut trees and convert them into railroad ties, the owner of the trees owns the ties.[5]

The general rule of the Roman law, that if there be an entire change in the chattel of one by the labor of others, the ownership of the chattel is changed, generally prevails in this country. An important exception has been grafted upon this rule by some courts, to the effect that if the change be made by a *wilful wrongdoer*, the title is not affected. Thus, if corn be taken by a wilful trespasser from an owner and converted into whiskey, the latter product belongs to the former owner, and could, of course, be claimed by him

[1] Gregory *v.* Stryker, 2 Den. 628, is a good illustration. A wagon worth $11.50 was so repaired as to be worth $90. It was decided that the wagon as repaired belonged to the employer, the mechanic having his lien. Worth *v.* Northam, 4 Ired. (Law), 102.

[2] Story on Bailments, § 423. Another way of regarding the subject is to inquire whether the transaction is a *sale* by the mechanic or a *bailment* to him.

[3] Williams *v.* McClanahan, 3 Metc. (Ky.) 420.

[4] Riddle *v.* Driver, 12 Ala. 590; Betts *v.* Lee, 5 Johns. 348; Chandler *v.* Edson, 9 Id. 362.

[5] Strubbee *v.* Railway, 78 Ky. 481.

(*a*) Guckenheimer *v.* Angevine, 81 N. Y. 394; Eaton *v.* Munroe, 52 Me. 63. Some courts have refused to apply this rule where the change was wrought in good faith and produced a great increase in the value of the property. Wetherbae *v.* Green, 22 Mich. 311; Baker *v.* Meisch, 29 Neb. 227. See also Isle Royale Mining Co. *v.* Hertin, 37 Mich. 332; Railway Company *v.* Hutchins, 32 Ohio St. 571; Lewis *v.* Courtright, 77 Ia. 190. Forsyth *v.* Wells, 41 Pa. St. 291.

as against a purchaser in good faith.[1] This decision was put upon an assumed rule to the same effect in the Roman law.[2] There is, however, no such *settled* rule in the Roman law, it being in that system a matter of great dispute. The New York court cites a passage from the *Digest* of Justinian (not the *Institutes*) to sustain its views. This, however, will be found to be but the opinion of a single jurist, while he is contradicted by other opinions of different jurists, cited in the same book, as is frequently the case in the Digests.[3] The question thus being really open, it would well deserve consideration whether the exception made by the New York court is not wholly inconsistent with the general rule on which that court proceeded, for the test of ownership is, by the authoritative Roman law, whether the property can be restored to its *original materials*. Thus, Justinian says, "If the new species can be reduced to the *materials* of which it was made, it belongs to the owner of the materials; if not, it belongs to the person who made it. For instance, a vessel can be melted down, and so reduced to the rude material — bronze or silver or gold — of which it is made; but it is impossible to reconvert wine into grapes, oil into olives, or corn into sheaves, or even mead into the wine and honey of which it was compounded."[4] If this be the rule, good faith in making the change is an extraneous fact, and wholly immaterial. At all events, the rule concerning the requirement of good faith is not to be extended to an involuntary wrongdoer.[5]

The subject of accession assumes great importance in the case of a wrongful despoiling of the United States government by cutting timber from its lands. There is to some extent an element of public policy in the case, as the government has no adequate defence against the spoliator. Should the government sue for the value of the timber thus removed, it would be entitled to recover from a wilful wrongdoer the full value of the property at the time and place of making its demand or bringing the action, with no deduc-

[1] Silsbury *v.* McCoon, 3 N. Y. 379, reversing the same case in 4 Den. 332.

[2] Id. p. 387.

[3] Digests 10, 4, 12, 3, by Paulus. See Moyle's Institutes, Vol. I. At the top of page 193 he says, "It has been much disputed whether *bona fides* (good faith) is essential to acquisition by *specificatio* (accession). The passages bearing upon this point are Digests 13, 1, 13; ib. 14, 3; 10, 4, 12, 3 (the only one cited by the New York Court of Appeals), 41, 20; 47, 2, 52, 14." It is stated in Mackeldey's Roman Law (Dropsie's ed.) that in the case in question it is immaterial whether the change was made *bona fide* or *mala fide*, § 271. Nearly all the passages from the Digests show that the former owner has an action against the wrongdoer for the *value* of the goods taken, — a so-called action of "condition." This is not on the ground of ownership, but by force of the rule in that system of law that no one "can increase his wealth by despoiling another."

[4] Institutes (Moyle's ed.), Vol. 2, Book II. Tit. I. § 25.

[5] Hyde *v.* Cookson, 21 Barb. 92.

tion for his labor or expenses. So if one should purchase innocently from such a wrongdoer, he would be liable for the value at the time of the purchase. On the other hand, if the trespass were mistaken or unintentional, the value at the time of the conversion would be taken, with suitable deductions for any increment of value made by the involuntary wrongdoer.[1]

DIVISION V. — *Title by Confusion.*

This subject is derived from the Roman law, and embraces both the intermingling of solids and fluids; the former is called *commixtio;* the latter, *confusio.* In that system it is very closely allied to accession, for when a new product is made by the pouring together of fluids it is called by the same name (*specificatio*). The effect of confusion upon ownership is quite different in that system from that which prevails in the English law, since in the Roman law the title of the whole passes to the confuser, while in the English law the opposite result is reached. Confusion, as understood in English and American law, is the wilful and fraudulent intermixture of the chattels of one person with the chattels of another, without the consent of the latter, in such a way that they cannot be separated and distinguished.

Under this definition (1) the confusion must be wilful or intentional. If by accident, or by the unauthorized act of a third person, goods of A. and B. become intermingled so that they cannot be separated, the rights of the parties will be equitably adjusted, by treating them as tenants in common, having rights proportionate to their respective interests, as they originally stood.

(2) The intermingling must be against the consent of the owner.[2] If made by mutual consent, the rule of joint ownership will in general be applicable. An instance is the case where grain belonging to different owners is stored by a warehouseman and intermingled in one common mass without objection by the owners.[3]

(3) The act of mixture must be in its nature *fraudulent;* that is, there must be a bad intent, and some harm ensuing to the innocent party. (*a*) If A. should intentionally mix his goods with those of B. in such a manner that they could not be separated, yet if the amount belonging to each owner was known, and the

[1] Wooden Ware Co. *v.* United States, 106 U. S. 432, and cases cited.

[2] Nowlen *v.* Colt, 6 Hill, 461.

[3] Dole *v.* Olmstead, 36 Ill. 150. To the same effect is Chandler *v.* De Graff, 25 Minn. 88.

(*a*) Claflin *v.* Continental Works, 85 Ga. 27.

quality was the same, there would be no legal fraud, and each owner might share in common. If, on the other hand, A.'s goods were of an inferior quality, or if the amount belonging to him was not known, the law might, for want of sufficient proof, give the whole compound subject-matter to the innocent party.[1]

(4) The goods must be incapable of separation so as to identify the original ownership. Thus, if A. should place his furniture in the same room with similar goods belonging to B., there would be no confusion if A. could identify his articles.[2] (*a*)

Where, however, the various elements of the definition combine, a case of confusion arises, and the wrongdoer suffers the loss of his goods, while the innocent party is under no obligation to render compensation. The wrongdoer, having caused the difficulty, must remove it by satisfactory evidence. The court cannot undertake to do it for him without such aid.

The rule that one mixing his goods with those of another so that a separation is impossible, loses his ownership, is a doctrine that is adopted to prevent fraud. It is never resorted to except in favor of an innocent party as against a wrongdoer.[3] It would seem that the strict law of confusion ought not to be applied where goods are intermingled by the negligence of one of the owners, without fraudulent intent.[4] A number of authorities bearing upon this subject are collected in a note.[5]

[1] Smith *v.* Sanborn, 6 Gray, 134; Davis *v.* Krum, 12 Mo. App. 279; Ryder *v.* Hathaway, 21 Pick. 298.

[2] Goff *v.* Brainerd, 58 Vt. 468; Smith *v.* Sanborn, *supra*.

[3] Wooley *v.* Campbell, 8 Vroom, 163.

[4] Pratt *v.* Bryant, 20 Vt. 333.

[5] See Lupton *v.* White, 15 Ves. 432; Hart *v.* Ten Eyck, 2 Johns. Ch. 62, 108; Beach *v.* Schmultz, 20 Ill. 185; Seavy *v.* Dearborn, 19 N. H. 351; Robinson *v.* Holt, 39 N. H. 557; Wilson *v.* Nason, 4 Bosw. 155. The rule is applied to logs in a stream marked in the same way as another's logs, with which they are intermingled. Dillingham *v.* Smith, 30 Me. 370; Stephenson *v.* Little, 10 Mich. 433; Jenkins *v.* Steanka, 19 Wis. 139. On the general subject, see Stearns *v.* Herrick, 132 Mass. 114; Lehman *v.* Kelly, 68 Ala. 192. The rule applies to matters of account. Diversby *v.* Johnson, 93 Ill. 547; Jewett *v.* Dringer, 30 N. J. Eq. 291. This last case is highly illustrative. A junk dealer, by fraudulent collusion with the employees of a railroad corporation, obtained a quantity of old iron, etc., at much less than its actual weight and value. On delivery to him it was thrown indiscriminately on other heaps of old iron belonging to him, so as to be indistinguishable. It was held on appeal that the whole mass must be forfeited to the railroad company, as it was an instance of confusion. The "Idaho," 93 U. S. 575, 586, and cases cited.

(*a*) Queen *v.* Wernwag, 97 N. C. 383.

DIVISION VI. — *Title to incorporeal Things by mental Action, including the Appropriation of Trademarks.*

Under this general head may be ranked the following topics: SECTION I. Title to literary property, including letters, and, by analogy, pictures, statues, oral lectures, etc. SECTION II. Title to the products of invention or discovery. SECTION III. Title to trademarks by appropriation. These different modes of acquisition will each be separately considered; first, with reference to the rules at common law, and secondly, with reference to those created by statute.

SECTION I. *Title to Literary Property.* — I. *At common law.* — (1) *Literary compositions in general.* — *Plays.* — The right of an author to his literary works may fairly be rested upon intellectual labor. In that point of view it is as complete as that of a mechanic who, by reason of skill, has constructed a watch, or some implement by muscular labor. If an author's work be published by another, without his consent, express or implied, the publication is an encroachment upon his exclusive ownership. To protect his right from invasion, he is entitled to the usual remedies in the case of a violation of a right of property, — *e. g.*, an injunction.[1] There is no reason why damages should not be recovered in an action at law.

Remedies may be sought in the United States courts as well as in a State court.[2] So an unpublished play cannot be acted on the stage without the owner's consent. It should be added that while literary property is in this state or condition it may be sold. A distinction would thus arise between an author and a mere proprietor. An alien may own the property and sell as well as a citizen. If the former should sell to a citizen, while the latter would be a proprietor, he would, under the existing United States laws, have no right to a copyright, as he would be in no better position than the alien author. Still, either of them, as long as the production remained unpublished, would have an ownership which would be protected by the courts.[3] (*a*)

The case of an unpublished play demands special attention as

[1] Little *v.* Hall, 18 How. U. S. 165; Bartlette *v.* Crittenden, 4 McLean, 300; Bartlette *v.* Crittenden, 5 Id. 32.

[2] U. S. Rev. St. §§ 4967–4970.

[3] Keene *v.* Wheatley, 9 Am. Law Reg. 33.

(*a*) See ch. 565, Laws of 1891; 26 U. S. Stat. L. 1106, amendatory of former provisions, and abolishing the distinction between citizens and aliens in certain cases, *post*, p. 495.

it has often been before the courts. It was well settled that the right of authors, exclusive of copyright, existed at common law, and that the State courts have jurisdiction to protect them, as in the case of other common-law rights or property interests.[1] Property in a literary product is not distinguishable from other personal property. It may be sold, and may pass by succession. It must at common law be as fully protected by the courts in the case of an alien as in that of a citizen.

There is but one general way in which this right may be lost. This is by the *dedication* of the work by the author to the public. If it has been so dedicated, the work has become public property, and henceforward any one may use freely that which has thus been cast away. In this view, there must be an act of relinquishment by the owner analogous to an abandonment of his right of property in the case of ordinary chattels.

In the special case of a play, a question may arise whether there has been "a dedication" by the act of placing it upon the stage, and causing it to be acted. The correct view is that the right publicly to represent a dramatic composition for profit, and the right to print and publish the same composition to the exclusion of others, are entirely distinct, and one may exist without the other. Dedication does not take place until the author does some unequivocal act, indicating an intent to make his work over to the public. An unqualified publication by printing and offering for sale is a complete dedication. The permission by the author to others to act the play at a public theatre is not a dedication. The manuscript and the right of the author are still within the protection of the law, in the same manner as if they had never been communicated to the public in any form.[2]

There has been much difference of opinion upon a single point. This is, whether a spectator attending a representation could lawfully reproduce a copy of the play from memory, and then publicly act it for his own benefit, without the consent of the owner. It is held by some authorities that he could, since the permission to attend the representation gave him the full right to memorize the play, together with the right to all the advantages that could be derived from remembrance. The better and later opinion is, that no right to represent the play can be obtained in this manner by a spectator.[3]

[1] Palmer *v.* De Witt, 47 N. Y. 532.

[2] Palmer *v.* De Witt, 47 N. Y. 532, 542; Parton *v.* Prang, 3 Cliff. U. S. 537; Boucicault *v.* Hart, 13 Blatch. 47; Rees *v.* Peltzer, 75 Ill. 475; Macklin *v.* Richardson, Ambler, 694; Keene *v.* Kimball, 16 Gray, 545; Boucicault *v.* Fox, 5 Blatch. 87, 98.

[3] Keene *v.* Kimball, 16 Gray, 545, to the contrary, is overruled by the later case of Tompkins *v.* Halleck, 133 Mass. 32. See also French *v.* Maguire, 55 How. Pr. 471.

If the owners of an unpublished opera should sanction the publication of the libretto and vocal score with a piano accompaniment, and retain the orchestration in manuscript, another person who had independently arranged a new orchestration could make use of the published matter in connection with his orchestration.[1] The acts of the owners would amount, in this case, to a dedication. Still, the publication of the songs and vocal score would not make the name public property.[2]

A State court has jurisdiction of an action to determine the rights of parties to an agreement to have and perform a play.[3] It is immaterial in the matter of rights that a play is a joint production.[4]

(2) *Letters.* These are protected, both on the ground that they are literary property, and also, in some cases, on the independent basis of the trust and confidence existing between the writer and the person addressed. A distinction may thus exist between the ownership of the paper vested in the receiver of the letter, and the title to the incorporeal subject-matter still remaining with the author. Each of these may pass by succession to the representatives of the respective parties.

The rights of the parties are to some extent conflicting. The receiver of the letter is deemed to be the owner, and can bring an action against the writer to recover it back from him in case he gets it into his possession.[5] Still, after a time, adverse possession might ripen into a title by force of the Statute of Limitations.[6] As a rule, whatever value the letters may have as autographs, belongs to the receiver. On the other hand, the author, or his representatives, may have an injunction against the receiver, or his representatives, to prevent the publication of the letters.[7] There is an exception in the case where publication is necessary to the vindication of character,[8] provided that the letter is still in the receiver's possession.[9] If, however, a solicitor writes a letter, apparently on behalf of his client, he has no such property as to entitle him to prevent its publication.[10]

The question has been much mooted whether the letters, to obtain protection, must be of a *literary character*. The view has been

[1] Carte *v.* Ford, 15 Fed. R. 439; Carte *v.* Duff, 23 Blatch. 347.

[2] Aronson *v.* Fleckenstein, 28 Fed. R. 75. See Carte *v.* Evans, 27 Fed. R. 861.

[3] Widmer *v.* Greene, 56 How. Pr. 91.

[4] French *v.* Maguire, 55 How. Pr. 471.

[5] Oliver *v.* Oliver, 11 C. B. N. S. 139; Hopkinson *v.* Burghley, L. R. 2 Ch. App. 447.

[6] First Troop Phila. Cavalry *v.* Morris, 10 Am. Law. Reg. N. S. 272.

[7] Thompson *v.* Stanhope, Ambler, 737.

[8] Perceval *v.* Phipps, 2 Ves. & B. 19. See Rice *v.* Williams, 32 Fed. R. 437.

[9] Gee *v.* Pritchard, 2 Swanst. 402.

[10] Howard *v.* Gunn, 32 Beav. 462.

reached in some cases that they must be, otherwise no injunction will be granted.[1] Such a rule imposes upon a court the duty of determining whether letters, are in fact, literary, — a duty which an ordinary judge is scarcely capable of discharging. The better opinion is, that there is no such rule, and that the writer of any letter has a property in it, which the proper court has jurisdiction to protect.[2]

(3) *Pictures and statues.* Similar principles must be applied to pictures and statues. Whatever is original, and capable of legal protection, will be protected, — such as the design or grouping of figures. The right will not be lost by exhibiting a picture with a view to obtain subscribers for an engraving. This rule was applied to a case where a frequent visitor to an exhibition of paintings had so impressed upon his memory the arrangement of the figures that he could, and did, reproduce some of them from memory, so as to make a copy with the aid of a stereoscope.[3] A like rule was applied to etchings made by Queen Victoria and Prince Albert for their own amusement, and exhibited to acquaintances or friends. The act of exhibition did not destroy their title, nor prevent a court of equity from granting an injunction to prevent publication.[4] This case decided that the right of property of an author enabled him to withhold his work altogether from the knowledge of others.

(4) *Miscellaneous cases.* There are many cases which have been recognized as matters of literary property, although not strictly cases of authorship.

A translator has a title to *his particular translation* of a work, not itself protected therefrom by copyright, though he cannot prevent others from making translations.[5] *Annotations upon the works of other writers*,[6] including additions, improvements, or corrections, are protected;[7] but the annotator does not, by means of his notes, obtain any ownership in the work to which the annotations are made.[8]

Other instances are catalogues;[9] monumental designs;[10] marginal head notes of law cases, prepared by a law reporter for a law magazine;[11] musical compositions;[12] and maps made from

[1] Hoyt *v.* Mackenzie, 3 Barb. Ch. 320.

[2] Woolsey *v.* Judd, 4 Duer, 379; Pope *v.* Curl, 2 Atk. 341.

[3] Turner *v.* Robinson, 10 Ir. Ch. R. 121; on appeal, Id. 510. This was the well known picture of The Dying Hours of Chatterton.

[4] Prince Albert *v.* Strange, 1 MacNaghten & G. 25.

[5] Wyatt *v.* Barnard, 3 Ves. & B. 77.

[6] Black *v.* Murray, 9 Scotch Sess. Cas. (3d series), 341.

[7] Cary *v.* Longman, 1 East, 358.

[8] Cary *v.* Faden, 5 Ves. 24; Barfield *v.* Nicholson, 2 Sim. & S. 1.

[9] Hotten *v.* Arthur, 1 H. & M. 603.

[10] Grace *v.* Newman, L. R. 19 Eq. 623.

[11] Sweet *v.* Benning, 16 C. B. 459.

[12] Bach *v.* Longman, Cowp. 623; Platt *v.* Button, 19 Ves. 447.

original sources. Accordingly, no property can be obtained in a copy of an existing map made by another, though it has been said that such latter map may be used as a means of correcting the new work.[1]

(5) It remains to notice specially the case of *breach of trust* or *confidence*, etc. This case is illustrated by the delivery of oral lectures by a professor to his class, or by confidential letters, the intrusting of medical recipes to a clerk, etc. There is, in each of these, an element of confidence which justifies a court of equity in protecting by an injunction the rights of the party reposing the confidence.

The right to protect *oral lectures* is illustrated by the case of the lectures of Dr. Abernethy.[2] It was held that as these were delivered to a class of persons, even though they were taken down by the hearers, there was no authority to publish them. This view rested both on the ground of an implied contract or trust, and on the further proposition that no one who attended could transfer to a third person the right to publish; for the latter would also be bound by the implied contract not to print, etc. It was further said by the court that there was nothing in the relation which Dr. Abernethy held as lecturer in St. Bartholomew Hospital (where the lectures were delivered) which would preclude the plaintiff from having a property in the lectures, without some evidence to show that he ought not, under all the circumstances of the case, to be regarded as owner.

This question was not fully settled by the decisions in favor of Dr. Abernethy, and was only finally disposed of in the English courts in 1887. The rule was then laid down that a professor in a university who delivers orally in his class-room lectures which are his own literary composition does not communicate such lectures to the whole world, so as to entitle any one to republish them without the permission of the author. The principle was applied to the case of a professor in a Scottish university, delivering lectures as a part of his ordinary course to students who were admitted on payment of the prescribed fees.[3]

On similar grounds it has been decided in this country that where one permitted pupils to take copies of his manuscripts for the purpose of instructing themselves and others, he did not thereby abandon the manuscripts to the public.[4] Another instance of trust and confidence is that of confidential letters. The publication will be enjoined on the special ground of breach

[1] Kelly *v.* Morris, L. R. 1 Eq. 697.

[2] Abernethy *v.* Hutchinson, 3 L. J. (Ch.) 209 ; s. c. 1 Hall & Twells, 28.

[3] Caird *v.* Sime, L. R. 12 App. Cas. H. of L. Sc. 326 (1887).

[4] Bartlette *v.* Crittenden, 4 McLean, 300.

of trust.[1] A similar rule was applied to medical recipes intrusted by one who compounded them as proprietor to a clerk.[2] (*a*) The laws of Congress carry out the general principles considered in this section by giving an action to the proprietor of *any manuscript* printed without his consent, provided he be a citizen of the United States or a resident therein.[3] (*b*)

The title to literary property, as has been seen, may be lost by abandonment or dedication. This takes place where the work is published without compliance with the copyright laws. Under such circumstances the publication of the work so abandoned is freely open to all.

It may be added that no legal protection will be given to works of a libellous or immoral tendency. There can be no property in such a work, whether copyrighted or not;[4] nor will a work based

[1] Earl of Granard *v.* Dunkin, 1 Ball & B. 207.

[2] Yovatt *v.* Winyard, 1 J. & W. 394; Green *v.* Folgham, 1 Sim. & S. 398.

[3] Laws of 1870, ch. 230, § 102; U. S. Rev. St. § 4967.

[4] Stockdale *v.* Onwhyn, 5 B. & C. 173; Southey *v.* Sherwood, 2 Mer. 435. There is not a great deal of adjudication upon the point whether immorality in a literary work takes away all *right of property*. There are two modes in which the question has been presented: one, in an action or suit for an injunction in equity; the other, in an action at law for damages. The latter proceeding would most distinctly test the *matter of ownership*. The first judicial remark upon this subject appears to have been made by EYRE, C. J., in a case where the celebrated Dr. Priestley brought an action against "the hundred" (a political district) for riotous proceedings of a mob in which a part of the property alleged to have been destroyed consisted of *unpublished* manuscripts. It was urged by the defence that Dr. Priestley was in the habit of publishings work injurious to the government. The Chief Justice said that evidence of this kind was fit to be offered to defeat a recovery. Though this remark was but a *dictum*, it subsequently ripened into decision. (See argument of Lord BROUGHAM in Stockdale *v.* Onwhyn, *supra*, pp. 173, 174, and of Sir SAMUEL ROMILLY, in Southey *v.* Sherwood, *supra*, p. 437.) In Stockdale *v.* Onwhyn the point was directly decided in a common-law action that there could be *no property* in an immoral work professing to be an account of the amours of a courtesan. In this case the book had been copyrighted, and the action was brought for damages for publishing a pirated edition. This view is confirmed by Poplett *v.* Stockdale, Ry. & M. 337; Wright *v.* Tallis, *infra*, — a case of fraudulent representation, — went upon the same ground. The equity view is found in the case of Southey *v.* Sherwood. In this case the poet Southey had lent the manuscript of "Wat Tyler" (as yet unpublished), but had made no assignment of it. The defendant published, without his consent. An injunction was refused. The court intimated an opinion that an immoral book could not be protected by an injunction, referring to the prior case of Walcot *v.* Walker, 7 Ves. 1.

(*a*) A photographer may be restrained from selling or exhibiting photographs of his customers without their consent. Pollard *v.* Photographic Company, L. R. 40 Ch. D. 345; cf. Corliss *v.* E. W. Walker Co., 57 Fed. R. 434; Schuyler *v.* Curtis, 64 Hun, 594.

(*b*) See § 9 of ch. 565 of the Laws of 1891 (26 U. S. Stat. L. 1106), abolishing the requirement that the author or proprietor must be a citizen or resident of the United States, and giving to aliens the same protection as to our own citizens under certain conditions, as to which see § 13.

upon fraud (*crimen falsi*) be the subject of legal ownership.[1] This last proposition does not extend to cases where, though a work may be written under a fictitious name, there is no serious design to deceive, or to make gain and profit by a false representation.[2] One may fail to obtain a right of property in a literary work produced by himself, on the ground that its production was a part of his duty in an employment by the public or State. Thus, where a voyage of discovery had been made, and a narrative of it prepared under the orders of the British government, it was held that the author of the narrative had no property in it.[3] This would especially be the case if there were an understanding between him and the government that the sketches were to be public property.[4]

The *remedies* when the right of property in an unpublished book is violated are three-fold: first, an action at common law; secondly, a suit in equity for an injunction founded on the *common-law right;* thirdly, a suit in equity, where the piracy has been accompanied by circumstances of fraud or breach of trust, confidence, or contract, express or implied.[5]

II. *Literary property as protected by statute, or copyright.* — The term "copyright" strictly means such statutory protection as is given to authors, etc., in general securing them the right to the exclusive sale of their productions after publication, though in the case of plays, granting the exclusive right to represent them on the stage as well. It is sometimes used as meaning the right of ownership prior to publication. It is used in the present discussion in the former sense.

(1) *Theory and nature of copyright.* — While it is now conceded that an author has a common-law right of property in his work while unpublished, yet it is held by the court that publication is, in its own nature, a dedication of the work to the public. The thoughts and forms of expression are now the common property of all mankind, like air and sunlight. Accordingly, it needs the intervention of statute law to repel this presumption of dedication, and to give the author an exclusive right to multiply copies and to sell them.

Statutes of this kind give the author an exclusive right to multiply and sell copies for a prescribed time, whereupon the work becomes common property. This rule, in the great mass of cases, furnishes adequate protection, as the time designated in the statute is usually sufficiently long to have introduced the work, if

[1] Wright *v.* Tallis, 1 C. B. 893.
[2] *Per* TINDAL, C. J., 1 C. B. 906.
[3] Nicol *v.* Stockdale, 3 Swanst. 687; Com. *v.* Desilver, 3 Phil. (Pa.) 31.
Heine *v.* Appleton, 4 Blatch. 125.
[5] Turner *v.* Robinson, 10 Irish Chan. R. 121, 131, 132.

intrinsically valuable, into general use, and to embrace a large part of the sales.

In the case of plays, the copyright law goes further, and protects the exclusive right of public representation upon the stage.[1] A similar right exists under the terms of English statutes.[2] Before these statutes, it was held that a proprietor of a copyright could maintain no action against one who acted his play on the stage.[3] By a statute cited in the note[4] an exclusive right to the performance of published musical compositions is given in England.[5] This last-named right is even more extensive than that attached to dramatic compositions.[6]

A copyright is incorporeal property. It cannot be sold on an execution.[7] Accordingly, if a map were engraved on a copperplate, and the latter were sold on an execution, the purchaser would acquire no right to multiply copies of the map. The copyright can only be reached by a creditor through the medium of a court of equity making a proper order under all the circumstances of the case.

(2) *Who may take a copyright under the United States laws.* — An applicant for a copyright must be a citizen of the United States or resident therein. Non-resident foreigners are excluded. The language of the statute is, "Any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book," etc. The executors, administrators, or assigns of any such person are also included.[8] (*a*)

[1] U. S. Rev. Stats. §§ 4952 and 4966. The owner of the copyright may recover as damages for the violation of his right not less than $100 for the first performance, and not less than $50 for every subsequent performance.

[2] 3 & 4 Wm. IV. c. 15, and 5 & 6 Vict. c. 45, § 20.

[3] Murray *v.* Elliston, 5 B. & Ald. 657.

[4] 5 & 6 Vict. c. 45, § 20. See also 45 & 46 Vict. c. 40, and 51 & 52 Vict. c. 17.

[5] See *ex parte* Hutchins, L. R. 4 Q. B. D. 483.

[6] Russell *v.* Smith, 15 Sim. 181.

[7] Stephens *v.* Cady, 14 How. U. S. 528; see also Stevens *v.* Gladding, 17 Id. 447.

[8] U. S. Rev. Stats. § 4952.

(*a*) See ch. 565, Laws of 1891, U. S. Stat. L. § 1106, amending 4952, 4954, 4956, 4958, 4959, 4963, 4964, 4965, and 4967, and repealing § 4971 of the Revised Statutes of the United States. By this enactment the privileges of copyright are extended to citizens and subjects of any foreign state or nation when such foreign state or nation permits to citizens of the United States the benefit of copyright on substantially the same basis as its own citizens, or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright to which, by the terms thereof, the United States may at its pleasure become a party.

The existence of either condition is to be determined by the President of the United States by proclamation made from time to time.

The act also provides that in the case of a book, photograph, chromo, or lithograph the two copies required by law to be delivered or deposited shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States,

(3) *The subject of a copyright, and the laws under which it is granted.* — Under the United States Constitution, Congress has the power to grant copyrights and patents.[1] The language is, "Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." There is no doubt but that the whole power over this subject is vested in Congress exclusive of the States, both from the terms employed and the nature of the grant, and it has been so decided. In other words, there is an implied prohibition of action by the States in respect to a subject which would otherwise be vested in them.

The subject of copyrights had been before the English courts before the United States Constitution was adopted. The constitutional provision was, no doubt, adopted in view of the legislation then existing in England. It will be pertinent to cite the English decisions upon the subject of copyrights, as illustrative of the cases embraced under American law.

The subjects embraced in the United States copyright law are, any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or any painting, drawing, chromo, statue, statuary, and models or designs intended to be perfected as works of the fine arts.[2]

The protection given by law is intended for a work already composed and not yet published. There can, accordingly, be no copyright in a prospective and uncomposed series of numbers of a newspaper, though the right may attach on each successive publication.[3]

The word "book" in the statute is of great consequence, and admits of much decision as to its true interpretation. Under the terms of the law there must be both *authorship* and a *book*. The word "book" has a wide meaning in English decisions. It is much broader in its signification than in ordinary cases, and embraces an article in a magazine, a portion of a serial story, as well as the whole;[4] an article in an encyclopædia; corrections

[1] Art. I. § 8, cl. 8.
[2] U. S. Rev. Stats. § 4952.
[3] Platt *v.* Walter, 17 L. T. N. S. 157.
[4] Low *v.* Ward, L. R. 6 Eq. 415.

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or from transfers made therefrom. During the existence of such copyright the importation into the United States of any book, chromo, lithograph, or photograph so copyrighted, or any edition or editions thereof, or any plates of the same not made from type set, negatives, or drawings on stone made within the limits of the United States, is prohibited, except in certain specified cases.

For English legislation upon the subject of "International copyright," see 7 & 8 Vict. c. 12; 15 & 16 Vict. c. 12; 38 & 39 Vict. c. 12; and 49 & 50 Vict. c. 33.

and additions to the work of another ;[1] an East India calendar or directory ;[2] a translation ;[3] an illustrated catalogue ;[4] and has even been extended to an advertising catalogue.[5] (*a*)

Similar results have been reached in this country. It is held that a "book" is not necessarily a volume made up of many sheets bound together; it may be printed only on one sheet. The test is not the size, form, or shape, but the subject-matter.[6] Under this rule there may be a copyright of an "abstract of title" to land ;[7] also of the plan of a book as connected with the arrangement and combination of the materials, though the materials may be common to other writers.[8] There may be a copyright in the head-notes prepared by a law reporter,[9] (*b*) but not where the judges themselves prepare them.[10] (*c*) A copyright may be taken for additions to a work already copyrighted, without giving notice of the existing copyright.[11] There may be a copyright in a compilation from original sources ; and if two or more persons make distinct compilations in this manner, each may have a copyright ;[12] it may also be had for a fair abridgment.[13]

There can, however, be no copyright in a "general subject," — as, for example, in a chart or map as a general subject; but only in a particular person's mode of treating the subject. Any other person may make a map from the original sources.[14] No copyright can be acquired in a label for merchandise,[15] (*d*) nor in a mere adaptation of a musical composition copyrighted by another, even though a new name be given to it ;[16] (*e*) nor in a mere newspaper

[1] Cary *v.* Longman, 1 East, 358.

[2] Mathewson *v.* Stockdale, 12 Ves. 270.

[3] Wyatt *v.* Barnard, 3 V. & B. 77.

[4] Maple & Co. *v.* Junior A. & N. Stores, L. R. 21 Ch. D. 369. This case overruled an earlier case holding that there is no copyright in a descriptive catalogue. Cobbett *v.* Woodward, L. R. 14 Eq. 407.

[5] Grace *v.* Newman, L. R. 19 Eq. 623.

[6] Clayton *v.* Stone, 2 Paine, Cir. Ct. 382 ; Drury *v.* Ewing, 1 Bond. 540, — case of diagrams on one sheet.

[7] Banker *v.* Caldwell, 3 Minn. 94.

[8] Greene *v.* Biship, 1 Cliff. 186 ; Gray *v.* Russell, 1 Story, 11 ; Emerson *v.* Davies, 3 Id. 768.

[9] Myers *v.* Callaghan, 10 Biss. 139 ; s. c. 20 Fed. R. 441.

[10] Chase *v.* Sanborn, 4 Cliff. 306.

[11] Lawrence *v.* Dana, 4 Cliff. 1.

[12] Bullinger *v.* Mackey, 15 Blatch. 550.

[13] Folsom *v.* Marsh, 2 Story, 100.

[14] Blunt *v.* Patten, 2 Paine, 397.

[15] Coffeen *v.* Brunton, 4 McLean, 516.

[16] Jollie *v.* Jaques, 1 Blatch. 618.

(*a*) The headings in a trades directory are the subject of copyright under 5 & 6 Vict. c. 45, though the body of the work consist of advertisements. Lamb *v.* Evans [1892], 3 Ch. 462.

(*b*) Callaghan *v.* Myers, 128 U. S. 617.

(*c*) Banks *v.* Manchester, 128 U. S. 244.

(*d*) Higgins *v.* Keuffel, 140 U. S. 428.

(*e*) A written play consisting of directions for its representation in pantomime is a "dramatic composition," Daly *v.* Palmer, 6 Blatch. 256 ; Daly *v.* Webster, 56 Fed. R. 483. A stage dance, consisting of a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, but which tells no story, represents no particular thought or emotion, and portrays no character, is not a "dramatic composition" within the meaning of the copyright act. Fuller *v.* Bemis, 50 Fed. R. 926.

or price-current.[1] Nor is the method of advertising the subject of copyright;[2] nor a title to a book.[3] At all events, there is no copyright in a title which seeks to appropriate the virtues, such as "Charity," "Faith," and the like.[4]

The correct view seems to be that the ground on which a title to a book can be protected by the courts is, that it may aid the owner in making sales and consequent profits, so that the right is analogous to that of a trade-mark. It is settled in the English courts that if the owner of a publication claims an injunction to restrain the issue of another publication of a similar name, he must show not only that the assumption of the name by the defendant is calculated to deceive the public, but also that there is a probability of the plaintiff being injured by such deception.[5] Another form of statement is, that the claim to the title of the paper depends upon user and reputation. On this principle an injunction was refused where the plaintiff's paper had only been published for three days, with a very small sale.[6]

Another inquiry now to be taken up is the meaning of the word "author." It is the *author* or proprietor that is to have the copyright. Some light is shed upon the meaning of this word by the observation that the word is found in the Constitution as well as in the laws of Congress. In the Constitution it is coupled with

[1] Clayton *v.* Stone, 2 Paine, C. Ct. 382.

[2] Ehret *v.* Pierce, 18 Blatch. 302.

[3] Osgood *v.* Allen, 1 Holmes, 185.

[4] Isaacs *v.* Daly, 39 N. Y. Super. Ct. 511. The question whether there can be a copyright in the "title" of a book, is a vexed one. It is held in Shook *v.* Wood, 10 Phil. (Pa.) 373, that a party will, in case of an intention to deceive, be enjoined from using the title of a dramatic composition which has been copyrighted, even though the body of the play intended to be presented under that title may be entirely different from the copyrighted play. In England the question is not settled. In Dicks *v.* Yates, L. R. 18 Ch. D. 76 (1881), it was said by JAMES, L. J., and JESSEL, M. R., that there cannot, in general, be any copyright in the title or name of a book. The case did not, however, call for a decision of the point. It was said in the same case that some decisions, apparently holding that there could be a copyright in a title, were really cases of common-law fraud, such as Metzler *v.* Wood, L. R. 8 Ch. D. 606, and Weldon *v.* Dicks, L. R. 10 Ch. D. 247. It appears to be settled by these decisions that if one has published a book and copyrighted it under a name, and another publishes another work under the same name, *selling it as though it were the book first* copyrighted, a fraud is committed by the false representation, without reference to copyright. Mack *v.* Petter, L. R. 14 Eq. 431, seems to rest on this principle, as well as Kelly *v.* Byles, L. R. 13 Ch. D. 682, 692.

There is as yet no authoritative decision that a title considered in and by itself, and without any fraud, can be copyrighted. Certainly a hackneyed phrase like "Splendid Misery" cannot be. Dicks *v.* Yates, L. R. 18 Ch. D. 76. On the whole, it would seem that those judges who appear to suppose that the title of a book is in and by itself a subject of copyright, have been led away by the false analogy of a "trade-mark," to which a copyright bears no real resemblance.

[5] Borthwick *v.* Evening Post, L. R. 37 Ch. D. 449.

[6] Licensed Victuallers Newspaper Co. *v.* Bingham, L. R. 38 Ch. D. 139.

a reason for the grant of power to Congress. The object of giving an exclusive right to authors and inventors is to "promote the progress of science and useful arts." It is not every one who composes that is an author in the sense of the Constitution. His recognition as such must tend to "promote the progress of science and useful arts." A monopoly is granted, and there must be good reason for it. There must be in the right protected some element of public utility, and the party claiming it must be an *author*.

In order to be an author there must, in general, be originality. Originality, not skill or merit, is the test whether a work is the subject of a copyright.[1] Thus, a person cannot, in general, obtain a copyright for a method of communicating information by question and answer, that method being of unknown antiquity. This is particularly the case where the questions are in the simplest possible forms.[2] There is a certain class of useful books, — *e. g.*, dictionaries, — in which absolute originality is excluded from the nature of the case, which are still, by way of exception, the subject of copyright.[3]

It would seem that a mere work of industry, with a plan readily occurring to a person of ordinary intelligence, could not properly be regarded as a case of authorship under the United States Constitution.[4] There should be some intellectual skill. Still, the cases go very far in England and in this country. The question, however, is not the same there as here, as there is no constitutional direction or intimation in English law that the object of copyright is to promote "the progress of science and useful arts."

There is as yet no authoritative exposition of this subject by the Supreme Court of the United States, and the inquiry is fairly relevant whether the full scope of the Constitution has been sufficiently attended to in the decisions in the inferior courts.

(4) *The mode of acquiring a copyright.* — As a copyright is the creature of statute, it is necessary for the claimant to comply with the statutory provisions made in his behalf; otherwise, he will have no right. He will, by an assumed abandonment, have lost his property in his work existing before publication, and have acquired nothing under the statute.

This rule is strictly enforced in England under the statute requiring "registration."[5] While compliance with that law may not be necessary to the legal existence of the copyright, it is requisite to perfect the right to sue.[6] It is accordingly necessary

[1] *Per* LINDLEY, L. J., L. R. 21 Ch. D. 380.

[2] Jarrold *v.* Houlston, 3 Kay & J. 708.

[3] Spiers *v.* Brown, 6 W. R. 352.

[4] See Clayton *v.* Stone, 2 Paine, C. Ct. 382.

[5] 5 & 6 Vict. c. 45.

[6] Goubaud *v.* Wallace, 36 L. T. N. S. 704.

to enter accurately the very day of first publication,[1] the name and place of abode of the publisher,[2] and other details prescribed in the statute. There is no copyright unless the book has been actually published at the date of registration.[3] A system prevails also by which false entries may be expunged by order of one of the Superior Courts on the application of a person aggrieved.[4] The acts to be done in this country are prescribed in the Revised Statutes of the United States.[5]

The primary step to be taken is *before* publication to deliver at the office of the Librarian of Congress, or deposit in the mail properly addressed to him, a printed copy of the title of the book or other article to be copyrighted, or a description of the painting, drawing, statue, etc., or a model or design for a work of the fine arts, and within ten days *after* publication to deliver or deposit in the mail as before, two copies of the book or other article, or a photograph of the painting, drawing, statue, model, etc.[6] The copies of the books are to be complete printed copies of the best edition. There must also be a copy of every subsequent edition wherein any substantial changes shall be made.[7] There is a penalty of $25 for failure to deliver or deposit copies or photographs as prescribed in the statute.

It is also incumbent upon the owner of the copyright to insert on the title-page or next succeeding page of each book published, notice of the copyright, — *e. g.*, "Copyright, 18—, by A. B.," [8](*a*) and in the case of maps, drawings, statues, etc., to inscribe on the front or face thereof like words. Unless this provision is complied with, no action can be brought for infringement.[9]

In carrying out these directions, it has been held to be enough to print the surname and only the initial of the given name of the proprietor.[10] The delivery or deposit of copies required by § 4959 may be made after printing and *before formal* publication.[11] The rules should receive a liberal construction.[12] A substantial failure

[1] Mathieson *v.* Harrod, L. R. 7 Eq. 270.

[2] Low *v.* Routledge, 10 Jur. N. S. 922.

[3] Henderson *v.* Maxwell, L. R. 5 Ch. D. 892.

[4] *Ex parte* Davidson, 2 E. & B. 577; see also 18 C. B. 297; Graves' Case, L. R. 4 Q. B. 715.

[5] §§ 4956, 4959, and 4962.

[6] § 4956.

[7] § 4959.

[8] Act of June 18, 1874, 18 St. L. 78. See also U. S. Rev. Stats. § 4962.

[9] § 4962.

[10] Burrow, &c. Lith. Co. *v.* Sarony, 111 U. S. 53, — case of photographs.

[11] Chapman *v.* Ferry, 18 Fed. R. 539.

[12] Myers *v.* Callaghan, 10 Biss. 139. See Donnelley *v.* Ivers, 20 Blatch. 381.

(*a*) It would seem to be sufficient if this statute were substantially complied with. Callaghan *v.* Myers, 128 U. S. 617; Falk *v.* Schumacher, 48 Fed. R. 222; Hefel *v.* Whitely Land Co., 54 Fed. R. 179.

to comply with the statute is fatal — *e. g.*, a failure to deliver the two copies within ten days after publication.[1]

(5) *Term of copyright, and renewal.* — The author or proprietor, on complying with the law, is entitled to a copyright for the term of twenty-eight years. The copyright may, under special circumstances, be renewed for the further term of fourteen years. If, at the expiration of the first named period, the author be living, the copyright belongs to him; if he be dead, it belongs to his widow or children.[2] The language of this section does not extend to a proprietor as distinguished from an author. The title of the work must be recorded a second time, and the other requirements applicable to the original right, complied with. This must be done within six months before the expiration of the first term. Within two months from the date of the renewal, a copy of the "record" must be published for four weeks in one or more newspapers printed in the United States.

(6) *Assignment.* — This may be considered under two aspects: 1. Assignment before copyright of the author's proprietary interest. 2. Assignment of the copyright itself.

1. A manuscript, unpublished, being an item of property, is in its own nature susceptible of transfer or assignment. Such a transfer may be total or partial, or may create a lien in the assignee's favor. So it may be to two or more persons to hold jointly or in common. This proprietary right is a sufficient basis for a copyright. So one may hold it in trust for another who is a beneficiary under him.

Contracts between authors and others, particularly publishers, assume a great variety of forms, and many questions arise under them. An agreement with a publisher to publish an edition and to pay a royalty on copies sold, does not imply that he is to have the publication of a later edition.[3] There is a distinction between an assignment of the author's right and a license to publish. In the latter case no title passes to the licensee.[4] An author may by apt words so bind himself as to a particular edition that he can print no more on his own account until that edition is exhausted. This would amount to a partial assignment.[5] Agreements between authors, on the one hand, to prepare a work, and to make additions and corrections for later editions; and of publishers, on the other hand, to print, reprint, and publish, and to divide the profits,

[1] Merrell *v.* Tice, 104 U. S. 557; Parkinson *v.* Laselle, 3 Sawy. 330. Consult also Wheaton *v.* Peters, 8 Pet. 591; Ewer *v.* Coxe, 4 Wash. 487; Jollie *v.* Jaques, 1 Blatch. 618; Baker *v.* Taylor, 2 Id. 82.

[2] U. S. Rev. Stats. § 4954.

[3] Warne *v.* Routledge, L. R. 18 Eq. 497.

[4] Reade *v.* Bentley, 3 Kay & J. 271.

[5] Sweet *v.* Cater, 11 Sim. 572.

— are contracts of a personal nature, and not assignable by either party without the other's consent.[1] Similar rules are applied where the contracting firm of publishers has been succeeded in its business by others.[2]

An out and out purchase of a manuscript by a publisher has been thought in one case to give the purchaser a right to alter or deal with it as he may think proper.[3]

2. An assignment of a copyright, under English and American statutes, must be in writing.[4] It is also said that there cannot be a *partial* assignment of a copyright.[5] (*a*) There may be an agreement to assign which will not be a *legal* assignment, but will be recognized in a court of equity.[6] Such an agreement will not so operate as necessarily to make a subsequent assignment by the author inoperative.[7]

Under the laws of the United States an assignment may be made by any instrument in writing, and recorded in the office of the Librarian of Congress within sixty days after its execution; if not recorded, it will be void as against a subsequent purchaser or mortgagee for a valuable consideration, without notice.[8]

(7) *Infringement.* — The first question that may arise as to an infringement is as to the *title.* It has already been stated that there is much doubt whether a copyright extends to the title.[9] Still, if the title is embraced within the protection of the law, there must be, in order to constitute an infringement, a similarity, or colorable imitation of the title. Accordingly, where the title of the copyright was "Why and Because," and the title complained of was "The Reason Why," it was held that there was no infringement.[10] On the other hand, the title "The Birthday Scripture Text-Book," was thought to be infringed upon by the expression, "The Children's Birthday Text-Book."[11] Moreover, if the title contained expressions in common use, — *e. g.*, "post office," — these could not be copyrighted.[12] It may be added that

[1] Stevens *v.* Benning, 6 De G. M. & G. 223; s. c. 1 Kay & J. 168.

[2] Hole *v.* Bradbury, L. R. 12 Ch. D. 886.

[3] Cox *v.* Cox, 11 Hare, 118.

[4] Leyland *v.* Stewart, L. R. 4 Ch. D. 419; U. S. Rev. Stats. § 4955.

[5] Jefferys *v.* Boosey, 4 H. L. Cas. 815.

[6] Sims *v.* Marryatt, 17 Q. B. 281.

[7] Leader *v.* Purday, 7 C. B. 4.

[8] U. S. Rev. Stats. § 4955.

[9] Weldon *v.* Dicks, L. R. 10 Ch. D. 247; Dicks *v.* Yates, L. R. 18 Ch. D. 76.

[10] Jarrold *v.* Houlston, 3 Jur. N. S. 1051.

[11] Mack *v.* Petter, L. R. 14 Eq. 431. See also Metzler *v.* Wood, L. R. 8 Ch. D. 606.

[12] Kelly *v.* Byles, L. R. 13 Ch. D. 682. The title in this case was "Post Office Directory." The defendants were not restrained from using these words as part of their directory.

(*a*) An undivided interest in a copyright has been held to be assignable. Black *v.* Henry G. Allen Co., 42 Fed. R. 618; s. c. 56 Id. 764.

the same general defects would defeat a copyright in the *title* as in the case of the book itself, such as fraud in statement.[1] There is nothing analogous to copyright in the name of a newspaper; still, it may be protected on other grounds, — *e. g.*, trade-mark, good-will, etc.[2]

Infringement as to subject-matter is the more important question. Generally speaking, to constitute an "infringement" there must be a transcript of the copyrighted work, or a republication of it with only colorable variations, with no independent literary labor. Infringement may exist without complete reproduction of the copyrighted work; partial imitation may be actionable. Accordingly, it may consist in quotation. It is plain that a "quotation" may be so extensive as to constitute an infringement. The *result* of the publication of the quotation is to be regarded, and the inquiry is to be made whether its effect is to injure or supersede the sale of the original work.[3] It will not aid the infringer to state that the matter complained of is quoted. Such a statement might relieve the writer from dishonest plagiarism, but not from legal liability.[4] Fraud is not an essential element in an infringement case. The real question is, has a right of property been invaded in some material respect.[5]

Some special rules may be stated as to those writers who derive their information from special sources, such as authors of encyclopædias and the like. Any other person may go to the original sources, though he must not take his material from the copyrighted work itself.[6] It has even been held that the latter may be resorted to for the purpose of obtaining *references* to the original sources of information.[7]

Copies of a copyrighted book cannot be multiplied by an unauthorized person, even though not printed, and distributed gratuitously.[8] It is immaterial that the copyrighted book was primarily intended as an advertisement, there being nothing in the matter of copyrighting which makes it turn upon the purpose to which the book is to be chiefly applied.[9] However, it has been held that

[1] Wright *v.* Tallis, 1 C. B. 893.

[2] Kelly *v.* Hutton, L. R. 3 Ch. App. 703.

[3] Bramwell *v.* Halcomb, 3 M. & C. 737; Scott *v.* Stanford, L. R. 3 Eq. 718.

[4] Bohn *v.* Bogue, 10 Jur. 420.

[5] Clement *v.* Maddick, 1 Giff. 98; Perris *v.* Hexamer, 99 U. S. 674. It is not material that the author wrote gratuitously, for the benefit of others. Lawrence *v.* Dana, 4 Cliff. 1.

[6] Pike *v.* Nicholas, L. R. 5 Ch. App. 251.

[7] Jarrold *v.* Houlston, 3 Kay & J. 708; Morris *v.* Wright, L. R. 5 Ch. App. 279.

[8] Novello *v.* Ludlow, 12 C. B. 177.

[9] Maple & Co. *v.* Junior A. & N. Stores, L. R. 21 Ch. D. 369. Compare Hotten *v.* Arthur, 1 H. & M. 603; Cobbett *v.* Woodward, L. R. 14 Eq. 407, 414, opposed to a copyright in an advertisement, is overruled by Maple & Co. *v.* Junior A. & N. Stores, *supra*, p. 379.

an advertising card, devised for the purpose of displaying paints of various colors, is not the subject of copyright under the laws of the United States.[1] It will be convenient to state at this point some qualifications to the doctrine of infringement.

1. Some use of prior works is tolerated in such books as dictionaries, gazetteers, grammars, encyclopædias, guide-books, etc., if the main design and execution are *novel* and *improved*, since the materials of such works, to a considerable extent, must be the same.[2]

2. A fair abridgment of a work is declared by the courts not to be an infringement. To constitute a fair abridgment there must be real, substantial condensation of the materials, and not merely a collection of extracts, constituting the chief value of the original work. The abridgment must have originality, or it cannot, according to principle, be itself the subject of copyright, though, without originality, it might impair the value of the book to which it is applied.[3]

3. A translation is not an infringement. The case now referred to is that of the translation of a copyrighted book put on sale in the same country in which the copyright exists. This rule was applied to the sale in the United States of an unauthorized translation of Mrs. Stowe's novel, "Uncle Tom's Cabin." The theory of this rule is, that it is not the same work as the original, the language being different.[4] At the present time, the effect of this rule may be avoided under our statutes by reserving the right of translation.[5] Any one may translate a book written in a foreign language, — *e. g.*, Latin or Greek, — and obtain a copyright in his translation, though another person might translate the same work and have a copyright in his translation.[6]

4. Dramatization of a work — for example, a novel — is not of itself an infringement.[7] (*a*) This rule is not of much importance here, as the right to dramatize may be reserved by an author.[8]

The remedies for an infringement are either a suit in equity for an injunction, or an action for penalties.

[1] Ehret *v.* Pierce, 18 Blatch. 302.

[2] Webb *v.* Powers, 2 Woodb. & M. 497, 512.

[3] That an abridgment is not in principle an infringement seems doubtful, since the rule permits the abridger to make use of the plan and arrangement of the principal work. The cases are, Folsom *v.* Marsh, 2 Story, 100; Story *v.* Holcombe, 4 McLean, 306. This subject needs revision by the courts.

[4] Stowe *v.* Thomas, 2 Wall. Jr. 547.

[5] U. S. Rev. Stats. § 4952.

[6] Wyatt *v.* Barnard, 3 Ves. & B. 77.

[7] Reade *v.* Conquest, 30 L. J. (C. P.) 209. See 11 C. B. N. S. 479; Toole *v.* Young, L. R. 9 Q. B. 523.

[8] U. S. Rev. Stats. § 4952.

(*a*) Schlesinger *v.* Bedford, 63 L. T. N. S. 762.

Injunctions in equity are referred to in the Revised Statutes.[1] The jurisdiction is vested in the circuit courts, and district courts having the jurisdiction of circuit courts, according to the course and principles of courts of equity. It has been held that an injunction may, in some instances, be granted without proof of actual damage.[2] Damages, as distinguished from profits, cannot be recovered in suits in equity for the infringement of copyright. In this respect the law of copyright differs from that of patents.[3]

Penalties and forfeitures are not enforceable in equity, in the absence of legislative authority. They must be proceeded for as penalties; and the rules applicable to actions for penalties must be followed.[4] In each of these cases the claimant must show that the rules governing copyright have been substantially complied with.[5] Penalties under the copyright statute are quite severe. The statutes should be consulted.[6]

SECTION II. *Title to the Products of Invention and Discovery.* — The origin of the American law of patents must be sought in English law. The Crown of England as a branch of the royal prerogative, has had from time immemorial the power to grant to individuals exclusive rights in the nature of monopolies, under a general rule that the king may exercise a control over the trade of the country. Such grants, as well as grants of land, etc., were made by instruments termed "letters patent." They were usually addressed to all the king's subjects, and were under the great seal. They were public or "open" letters, and were thus distinguished from grants addressed to particular persons, which were sealed on the outside, and called "close letters."

The Crown exercised this power to a very prejudicial extent in creating monopolies. In the great case of Monopolies[7] such an exercise was judicially declared to be illegal, though it was not denied that the Crown had power to grant, as a recompense for a new invention, the exclusive right to trade on it for a reasonable period. The exact time that would be regarded as reasonable was not fixed by the decision. It led to the enactment of the statute of the twenty-first year of King James I. (1623) c. 3, declaring

[1] § 4970.

[2] Reed *v.* Holliday, 19 Fed. R. 325.

[3] Chapman *v.* Ferry, 8 Sawy. C. Ct. 191.

[4] Id.

[5] Chicago Music Co. *v.* J. W. Butler Co., 19 Fed. R. 758.

[6] U. S. Rev. Stats. §§ 4964–4966.

[7] In the 44th year of Elizabeth, 11 Coke's Rep. 846; Noy's R. 173, under name of Darcy *v.* Allin. In Noy's Report, the argument of counsel against the monopoly is given at much length. Though quaint, it is manly and sound. The particular case was that of an exclusive grant to import, manufacture, and sell playing-cards. See Caldwell *v.* Van Vlissengen, 9 Hare, 415, 427.

monopolies in general to be void; but at the same time excepting "letters patent and grants of privilege for the term of fourteen years, or under, hereafter to be made of the sale, working, or making of any manner of new manufactures within this realm, to the *true and first* inventor and inventors of such manufactures which others at the time of making such letters patent and grants shall not use," etc. (§ 6.) It is further declared "that the same shall be of such force as they should be if this act had never been made, and of none other."

It is well settled that this statute did not create, but controlled the power of the Crown in the granting of patents.[1] It has been distinctly held that patentees have always derived, and still derive, their rights, not from the statute, but from the grant of the Crown.[2]

In this country the power to grant patents is vested by the United States Constitution exclusively in Congress. The right is accordingly statutory as contrasted with that in England, which originates with the common law, but limited and confined by statutory restraints. The principles of law governing the general subject in the two countries are substantially the same.

A patent may be defined to be an exclusive temporary privilege, obtained from governmental authority granted to an inventor or discoverer, or proprietor of an invention or discovery, for the manufacture, sale, and use of the article or thing to which the patent refers.

The thing patented may be either a machine or a process. It is not easy to draw the line between the two. A leading distinction is, that in a *machine*, use is made of the mechanical powers;

[1] Coke's Third Institute, Case 85, p. 181.

[2] Caldwell *v.* Van Vlissengen, 9 Hare, 415, 427.

There is strong reason to believe that the English courts would not, even before this statute, have upheld any grant of a patent for an invention which had already gone into public use. In other words, this cardinal rule of patent law was not derived from the Statute of James, but from judicial decision, since this would be a monopoly of the class justly termed "odious." The counsel in Darcy *v.* Allin, Noy's Reports, pp. 182, 183, cites three cases (one in the 9th of Queen Elizabeth, and all before the Statute of James), where the patent was judicially declared void, because the invention had already gone into public use before the issuing of the patent. One of his cases is worth transcribing. "A monopoly patent was granted to Mr. Matthey, a cutler, at Fleetbridge, in the beginning of this queen's [Elizabeth] time, *which I have here in court to show*, by which patent was granted unto him the sole making of knives with bone hafts and plates of lattin, because, as the patent suggested, he brought the first use thereof from beyond seas, yet nevertheless when the wardens of the company of cutlers did show before some of the counsel and some learned in the law that they did use to make knives before, though not with such hafts, that such a light difference of invention should be no cause to RESTRAIN them, whereupon he could never have benefit of this patent, although he labored very greatly therein." It would seem, from the use of the word "restrain" in this passage, that an injunction was resorted to at that early day.

in a *process*, resort is had to chemical action. Important rules grow out of this distinction, which will be noticed more fully hereafter.

A patent is in the nature of a monopoly, and in that aspect antagonistic to the interest of the public. It is to be tolerated only on the ground that it is legal, and the legislation authorizing it is only sound when under the circumstances the evils of a monopoly are as a rule overborne by the advantages to be derived from it. "An illegal monopoly is a public grievance," and it is for the interest of trade that the court should, on due application, so declare it.[1]

The subject of patents will be considered according to the following arrangement of topics. I. To whom the patent should be granted. II. The subject-matter of a patent. III. Proceedings in the Patent Office, to obtain a patent, to correct defects, to secure a reissue, and to determine questions of interference. IV. Substantive rights acquired under a patent: (1) The patent itself; (2) Derivative, or subordinate substantive rights, including renewal or extension, assignments, licenses, sale of single machines, etc.; (3) Infringement. V. Remedies: (1) When the patent is attacked: 1. By the United States; 2. By an individual; (2) Remedies by the patentee: 1. At law; 2. In equity.

I. *To whom the patent should be granted.* — The statute of 21 Jac. I., c. 3, § 6, confines the patent to the "true and first inventor." The law of this country confines the grant to an *inventor* or *discoverer*, the invention or discovery not being known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery.[2]

The leading point of inquiry then is, who is an "inventor or discoverer" within the meaning of the statute. There may be two competing claimants for the patent, and the one who is the true and first inventor must be ascertained. The law protects him who was the first inventor, although he was not the first to adapt his invention to practical use, by permitting him to file a *caveat*. Independent of this caveat, the rule would have been that the person who first adapted his invention to practical use would be entitled to a patent.[3] Until an invention is so perfected and adapted to use, it is not patentable.[4] Accordingly, whoever finally perfects a machine, and renders it capable of useful operation, is entitled to a patent, though others may have had the idea, and made

[1] The Queen *v.* Prosser, 11 Beav. 306, 317. A case of *scire facias* to repeal letters patent.

[2] U. S. Rev. Stats. § 4886.

[3] Phelps *v.* Brown, 4 Blatch. 362.

[4] Reed *v.* Cutter, 1 Story, 590; Lowell *v.* Lewis, 1 Mas. 182, 187.

experiments towards putting it in practice.[1] It will not be enough to take away the claim of first invention to show that suggestions aided the claimant. It must appear that they would furnish all the information necessary to accomplish the result.[2] Nor will it invalidate a patent to show that *every part* of the machine described in it is not the original invention of the patentee; that is only necessary as to the parts claimed as his own invention.[3] But the employment of mechanical skill to construct a machine in accordance with ideas furnished by another, gives no right to the invention.[4] The amount of labor and expense to which a claimant has been put does not properly enter into the question of the right to the patent.[5] A person is not deprived of his right to an invention made while in the service of another, unless his employment embraced the exercise of his inventive faculties.[6] (*a*)

Claim for a patent for improvements upon existing machines.— It is a well-settled rule that there may be a patent for an improvement upon an existing machine, whether the latter be itself patented or not. In such a case, the inventor of the improvement must confine himself to a patent for that.[7]

So, if old materials and old principles be used in a *state of combination*, to produce a new result, there may be a patent. The invention consists in the *combination*, and the combiner is, for the purposes of a patent, the "first" inventor to that extent.[8] A patentee may have a second patent for an improvement on the thing first patented.[9] Under these rules it is not sufficient merely to place old parts in *juxtaposition*. There must be *invention*. This implies a new or peculiar function developed by the combination; all the elements must so enter in that each qualifies the others.[10] Invention must be distinguished from mere mechanical skill.[11] So, it has been held, that a combination of old elements is patentable where a new and useful result is produced by their

[1] Washburn *v.* Gould, 3 Story, 122. See Cahoon *v.* Ring, 1 Cliff. 592. *Ex parte* Henry, L. R. 8 Ch. App. 167.

[2] Pitts *v.* Hall, 2 Blatch. 229. Allen *v.* Rawson, 1 C. B. 551.

[3] Holliday *v.* Rheem, 18 Pa. St. 465.

[4] Yoder *v.* Mills, 25 Fed. R. 821.

[5] Crane *v.* Price, 4 M. & G. 580.

[6] Hapgood *v.* Hewitt, 11 Bias. 184. Aff'd, 119 U. S. 226.

[7] Evans *v.* Eaton, 7 Wheat. 356; Whittemore *v.* Cutter, 1 Gall. 478.

[8] Hailes *v.* Van Wormer, 20 Wall. 353.

[9] Mathews *v.* Flower, 25 Fed. R. 830.

[10] Pickering *v.* McCullough, 104 U. S. 310; *contra*, Stutz *v.* Armstrong, 20 Fed. R. 843.

[11] Scott Mfg. Co. *v.* Sayre, 26 Fed. R. 153; Peard *v.* Johnson, 23 Id. 507; Atlantic Works *v.* Brady, 107 U. S. 192; Beecher Mfg. Co. *v.* Atwater Mfg. Co., 114 U. S. 523.

(*a*) Cf. Solomons *v.* United States, 137 U. S. 342; Dalzell *v.* Dueber Mfg. Co., 149 U. S. 315; Lane & Bodley Co. *v.* Locke, 150 U. S. 193; Jancks *v.* Langdon Mills, 27 Fed. R. 622; Annin *v.* Wren, 44 Hun, 352, *post*, p. 527.

joint action, or an old result in a cheaper or more advantageous manner.[1]

A patent for "improvements," — *e. g.*, by the patentee, — is, to some extent, construed differently from an original patent, since a claimant in his specification may not only refer to the improvement which he now claims, but to former rights as something known, and only necessary to be referred to for the purpose of explaining the claim. This last matter is not to be construed with more strictness and precision than is necessary to enable it to fulfil that purpose of explanation for which it was introduced. Accordingly, where the patentee of the improvements had referred to electric currents transmitted through "metallic circuits," and a subsequent improvement (alleged to be an infringement) used "metallic circuits" in part, and the *earth* in part, it was decided that the expression "metallic circuits" meant metallic circuits "so far as it is material to the *improvements claimed* that they should be so;" and the defendants having used wholly metallic circuits in a respect material to the improvements of the plaintiff, they were held liable.[2]

This general subject will be more fully considered under the head, "The subject-matter of a patent." It is now necessary to notice the qualifications imposed by the statute upon the right to obtain a patent, whereby an application may be defeated notwithstanding patentability.

Invention described in a printed publication, either here or in a foreign country. — A true first inventor or discoverer, so far as his own knowledge is concerned, may fail to obtain a patent, or, if he obtains it, may be defeated because the invention has been described in some printed publication before his own invention or discovery.[3]

If this fact appears, it is a good defence to an action for an infringement.[4] Unless so described or patented, the inventor here is entitled to a patent, if he believed himself to be the first inventor.[5]

The rule is established in England that in order to invalidate a patent by a prior book publication, it is not enough to show that the invention was described in a published book, but it must also appear that it became known to a sufficient part of the "public."[6]

[1] Railway Reg. Mfg. Co. *v.* No. Hudson Co. R. R. Co., 26 Fed. R. 411; Davis *v.* Fredericks, 21 Blatch. 556.

[2] Telegraph Co. *v.* Brett, 10 C. B. 838, 880, 881 (1851).

[3] See U. S. Rev. Stats. § 4886.

[4] Judson *v.* Cope, 1 Fisher Pat. Cas. 615.

[5] O'Reilly *v.* Morse, 15 How. U. S. 62, 110; Hays *v.* Sulsor, 1 Fisher Pat. Cas. 532; Bartholomew *v.* Sawyer, 4 Blatch. 347; Doyle *v.* Spaulding, 19 Fed. R. 744.

[6] Plimpton *v.* Spiller, L. R. 6 Ch. D. 412.

The word "public" here seems to mean persons conversant with the particular subject, or persons who are desirous of taking out patents for new inventions, and therefore desirous of making themselves acquainted with the course of inventions generally.[1] Under this principle it was held not to be sufficient that an American book of illustrations containing a drawing of the invention was on a book-shelf in the Patent Office, but not entered as a donation in the usual catalogue, though it appeared that the librarian saw it before the patent was taken out in England.[2] It is enough, however, if known to the public, though not used.[3]

Invention first patented in a foreign country. — This is a ground for denying to an inventor here a patent, or defeating it if granted. This rule does not apply to the inventor or discoverer who obtained the foreign patent. He is entitled to a patent here under the terms of the Revised Statutes.[4] The language of this section is: "No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented, or caused to be patented, in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application" for the patent here. The time must expire at the same time with that of the foreign patent, and must in no case exceed seventeen years.

Invention known or used by others in this country. — This fact will destroy the right of a claimant, without reference to the point whether the invention or discovery is described in any printed book. The knowledge or use may be proved as a fact.[5]

Invention or discovery suffered to go into public use by inventor or discoverer. — This act is fatal to a patent if the public use be suffered to exist for two years.[6] (*a*) The same principle exists in England, but no definite time is fixed there. It is well settled that there must be no public use by the inventor or others with his consent prior to the grant of the patent.[7]

Some question may arise as to the meaning of the expression "public use" in this connection. It does not mean trials of an

[1] *Per* JAMES, L. J., in Plimpton *v.* Spiller, L. R. 6 Ch. D. 412, 429.

[2] Plimpton *v.* Spiller, *supra.*

[3] Patterson *v.* Gaslight & Coke Co., L. R. 3 App. Cas. 239.

[4] § 4887.

[5] Manning *v.* Cape Ann, &c. Co., 108 U. S. 462.

[6] U. S. Rev. Stats. § 4886.

[7] Household Coal, &c. Co. *v.* Neilson, 9 Cl. & F. 788.

(*a*) The public use or sale contemplated by the Revised Statutes is limited to a use or sale in the United States. Gandy *v.* Maine Belting Co., 143 U. S. 587.

incomplete invention by way of experiment.[1] (*a*) It does, however, include a case where it comes to the knowledge of others than the inventor, though not to the public at large.[2]

A wide interpretation prevails in this country. In a recent case it was decided that where the invention had been communicated to a single individual, and used by that person without any injunction of secrecy for more than two years before the patent was applied for, it had gone into *public* use.[3] This seems to be a very unsatisfactory construction, as it gives no force to the word *public*. It was dissented from by Mr. Justice MILLER.

However, prior use must be proved beyond a reasonable doubt.[4] The effect of prior public use was made severe upon the inventor by an Act of Congress of March 3, 1839. As the law then stood, the inventor lost his right to the patent, though the invention had gone into *public use* without his consent. This rule was very recently applied to the great case of the "driven well" (Green's patent).[5] The same policy is continued under the Revised Statutes incorporating the act of 1839 with a later act of 1870.[6]

If a public use is proved for the required two years prior to application for a patent, the burden of proof will be on the applicant to show by convincing proof that the use was not public in the sense of the statute, but was for the purpose of perfecting an incomplete invention by tests and experiments.[7]

Abandonment. — A patentee may so conduct himself as to lead to the inference that he has abandoned his invention to the public. This view may be taken without reference to the matter of public use. It is a question of fact, as showing intention. A recent illustration is found in the case where, an application having been rejected at the Patent Office, the applicant took no steps for eight years to reinstate it. There was, accordingly, a presumption of abandonment.[8]

The Revised Statutes of the United States provide that any citizen of the United States, or alien resident for one year, who has made oath of his intention to become a citizen, who makes any new invention or discovery, and desires further time to mature it, may file in the patent office a *caveat* setting forth the

[1] *In re* Newall, 4 C. B. N. s. 269.

[2] Carpenter *v.* Smith, 9 M. & W. 300.

[3] Egbert *v.* Lippmann, 104 U. S. 333.

[4] Westherell *v.* Keith, 27 Fed. R. 364.

[5] Andrews *v.* Hovey, 123 U. S. 267, construing statute of March 3, 1839; s. c. on petition for rehearing, 124 U. S. 694.

[6] U. S. Rev. Stats. § 4886.

[7] Smith & Griggs Mfg. Co. *v.* Sprague, 123 U. S. 249.

[8] U. S. Rifle, &c. Co. *v.* Whitney Arms Co., 118 U. S. 22. See *post*, p. 538.

(*a*) Harmon *v.* Struthers, 43 Fed. R. 437; s. c. 57 Id. 637.

design of the invention and its distinguishing characteristics, and praying protection of his right until he shall have matured his invention. The *caveat*, having been filed, is confidential, and is operative for one year, except that if application is made within the year by any other person for a patent with which the *caveat* would interfere, the commissioner of patents gives notice to the caveator by mail. If the caveator wishes to avail himself of his *caveat*, he must file his regular application for a patent within three months, the usual time for transmitting the notice to the caveator through the mail being added.[1]

II. *The subject-matter of a patent.* — The subject will be treated under two heads: (1) What is not patentable; (2) What is patentable.

(1) *What is not patentable.* — Though the instances falling under this head are extremely numerous, they seem to be capable of arrangement under four principal classes. 1. Where the subject is a principle or mere property of matter. 2. Where the application is for a result as distinguished from a mode of producing the result. 3. Where, owing to inventions already existing, whether patented or not, there is no novelty in the invention or discovery. 4. Where *invention* is not exercised, but at most only mechanical skill.

1. There can be no patent for the discovery of a mere property of matter, such as that the inhalation of ether produces insensibility to pain. A new force or principle can only be patented in connection with the means by which it operates.[2] So electricity or steam cannot be exclusively appropriated, except by mechanical inventions or combinations which produce a particular result.[3] A principle is not patentable. It is the device which is patentable.

2. It is a general rule that a patent can only be had for a means of producing a result instead of a result itself.(*a*) This remark is particularly applicable to a *machine* as distinguished from a *process;* for in the latter there may be a patent for the method of producing the result, and also a separate claim and patent for the result itself.[4] The distinction between a machine and a process has already been adverted to. In the former the mechanical powers are used, while in the latter the chemical forces are employed. Of this, a good example is the manner of treating India rubber by

[1] U. S. Rev. Stats. § 4902. See Phelps *v.* Brown, 4 Blatch. 362.

[2] Morton *v.* N. Y. Eye Infirmary, 5 Blatch. 116.

[3] Smith *v.* Ely, 5 McLean, 76; Blanchard *v.* Sprague, 3 Sumner, 535.

[4] Merrill *v.* Yeomans, 1 Holmes, 331.

(*a*) Excelsior Needle Co. *v.* Union Needle Co., 32 Fed. R. 221.

the Goodyear vulcanizing method, which has led to the most useful practical results.

3. An invention may have been made so far as the mind of the claimant of the patent is concerned, but it may have been *anticipated* by another. It is thus destitute of *novelty* in the view of patent law. This want of novelty is fatal. The want of novelty may be presented in some one of the following forms: —

A. Something already known may be adapted to a *new use*, without any difference in the mode of application.[1] (*a*) It will not help the case that the new claim is more economically worked or is more beneficial to the public.

B. In general, there is a want of novelty where an already known mode of accomplishing a result is followed, but the method is not substantially changed.[2] (*b*) A similar rule is adopted in the substitution of steel springs for those made of whalebone, etc.,[3] or metal springs for India rubber, though a superior article is produced by the substitution.[4] This rule is applied in construction for the purpose of ornament.[5]

C. There is a want of patentable novelty in applying an article already known to a purpose *analogous* to that to which it had already been applied. (*c*) An illustration is a case where a double-angle iron, being a well known article, was applied to a particular purpose, instead of two pieces of single-angle iron, riveted to a plate.[6] So the use of a prior invention for a similar purpose and with a similar result, with only a trifling change in the mode of application, is not patentable for want of novelty.[7] It would not be a case of novelty to take existing furniture-springs and japan them.[8]

4. The want of invention or discovery is, after all, the chief objection that can be made to a patent. It is the sole object of the patent laws to grant an exclusive right to *inventors*. If there be no invention there should be no patent. Want of novelty is in a sense want of invention. It is not enough that a thing is new

[1] Western Electric Mfg. Co. *v.* Odell, 18 Fed. R. 321.

[2] Crane *v.* Price, 4 M. & Gr. 580; Ralston *v.* Smith, 11 H. of L. Cas. 223, 253; Miller *v.* Foree, 116 U. S. 22; Drummond *v.* Venable, 26 Fed. R. 243.

[3] Thompson *v.* James, 32 Beav. 570.

[4] Florsheim *v.* Schilling, 26 Fed. R. 256. Aff'd, 137 U. S. 64.

[5] Post *v.* T. C. Richards, &c. Co., 26 Fed. R. 618.

[6] Horton *v.* Mahon, 12 C. B. N. S. 437; s. c. on appeal, 16 Id. 141.

[7] Goodyear *v.* Hartford Spring Axle Co., 23 Fed. R. 36.

[8] Eagleton Mfg. Co. *v.* West, Bradley, &c. Co., 111 U. S. 490.

(*a*) Knapp *v.* Morss, 150 U. S. 221.

(*b*) Ansonia Co. *v.* Electrical Supply Co., 144 U. S. 11. See also Lovell Manufacturing Co. *v.* Cary, 147 U. S. 623; Burt *v.* Evory, 133 U. S. 349.

(*c*) Ansonia Co. *v.* Electrical Supply Co., *supra*.

in the sense that in the shape or form in which it is produced it is not before known, nor that it is useful; there must be an *invention* or *discovery*. The inventive faculties must be exercised.[1] It is not the object of the patent laws to grant a monopoly for every trifling device which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures.[2] The distinction between such a mechanical device and an invention has been stated by the Supreme Court as follows: To justify a patent, the thing for which it is claimed must "spring from that intuitive faculty of the mind put forth in the search for new results or new methods, creating what had not before existed, or bringing to light what lay hidden from vision." It is not enough to display the expected skill of one's calling, or to exercise the "ordinary faculties of reasoning upon the materials supplied by special knowledge and the facility of manipulation which results from its habitual and intelligent practice."[3] It would be tedious to cite the various cases in which these principles have been applied. A few may be referred to for illustration.

There is no invention in adapting an automatic valve (a known device) to a steam fire-engine;[4] nor in filling a vessel from the bottom instead of the top;[5] nor in compressing parcels of plasterer's hair into a bale for convenience of transportation;[6] nor in changing an irregular aperture designed for a key in a lock, to one of the size and shape of the key;[7] nor an improved roof for burial vaults, as that could be done by a skilled workman without the exercise of the inventive faculty.[8] (*a*)

(2) *What is patentable.* — In general terms, nothing is patentable but an *invention* or *discovery*. One of these words refers mainly to mechanical methods, and embraces machines; the other refers to the laws of nature, and includes chemical forces.

There being at the present time a great mass of inventions that have through lapse of time ceased to be protected by a patent, as well as a large number to which protection is still extended, the time and discriminating powers of courts are severely taxed in drawing or refusing to draw distinctions which will uphold a new claimant for patent-law protection.

[1] Thompson *v.* Boisselier, 114 U. S. 1.

[2] Atlantic Works *v.* Brady, 107 U. S. 192, 200.

[3] Hollister *v.* Benedict, &c. Mfg. Co., 113 U. S. 59, 72; Thompson *v.* Boisselier, *supra*, p. 13.

[4] Blake *v.* San Francisco, 113 U. S. 679.

[5] Rosenwasser *v.* Berry, 22 Fed. R. 841.

[6] King *v.* Gallun, 109 U. S. 99.

[7] Yale Lock Mfg. Co. *v.* Greenleaf, 117 U. S. 554.

[8] French *v.* Carter, 25 Fed. R. 41.

(*a*) See also Butler *v.* Steckel, 137 U. S. 21; Fond du Lac County *v.* May, Id. 395; Puetz *v.* Bransford, 31 Fed. R. 458; Leggett *v.* Standard Oil Co., 149 U. S. 287.

A chief rule is, that there must be the exercise of a creative or inventive faculty. A few examples may be cited. A patent had been granted for *separate* celluloid keys (in imitation of ivory) for a musical instrument. A device for covering the whole key-board with a single celluloid sheet, was held to be an invention.[1] So an invention which makes tarred wooden-pipe a practical reality.[2] Nickel-plating is patentable,[3] as well as the application of celluloid to a fabric for collars and cuffs.[4] Success is an important feature, and an arrangement which makes a machine practically useful which is worthless without it, is patentable.[5] This principle was applied to an improvement in the "manufacture of celluloid," the commercial success of that product being largely due to it.[6] So the production of a new and useful result by a new application of an old process has been held to be patentable.[7] This doctrine cannot be applied to a case where the new device carries out the old method more perfectly than before.[8] (*a*) It has been already stated that a patent cannot be had where there is no more than the exercise of mechanical skill. Still, if calculation and experiment were requisite over and above mechanical skill, a patent can be sustained.[9]

In a patent for a combination of old ingredients, the fact that a *new useful result* is produced is of great consequence, and will in general make it patentable.[10] The *combination* is the novelty, in such a case, which is the subject of the patent.[11] The real inquiry seems to be, where old and new elements are combined, or perhaps old combined with old, whether that combination for which the patent is claimed as a whole is new.[12] (*b*) It is a further

[1] Celluloid Mfg. Co. *v.* Comstock, &c. Co., 27 Fed. R. 358.

[2] Hobbie *v.* Smith, 27 Fed. R. 656.

[3] United Nickel Co. *v.* Cal. Electric Works, 25 Fed. R. 475.

[4] Celluloid Mfg. Co. *v.* Chrolithion C. & C. Co., Id. 482.

[5] Enterprise Mfg. Co. *v.* Sargent, 28 Fed. R. 185.

[6] Celluloid Mfg. Co. *v.* Am. Zylonite Co., 23 Blatch. 444; s. c. 26 Fed. R. 692; 27 Id. 750; 28 Id. 195.

[7] Cary *v.* Wolff, 24 Fed. R. 139; Sewing Machine Co. *v.* Frame, Id. 596.

[8] Alden Evap. Fruit Co. *v.* Bowen, 24 Fed R. 787.

[9] Davis *v.* Fredericks, 21 Blatch. 556.

[10] Welling *v.* Crane, 14 Fed. R. 571; Joyce *v.* Chillicothe Foundry, &c. Works, 15 Fed. R. 260; Wood *v.* Packer, 17 Fed. R. 650.

[11] Harrison *v.* Anderston, &c. Co., L. R. 1 App. Cas. 574.

[12] Newton *v.* Grand Junction Railway Co., 5 Exch. 331.

(*a*) Burt *v.* Evory, 133 U. S. 349; Busell Trimmer Co. *v.* Stevens, 137 U. S. 423.

(*b*) Not only must the combination be new, but there must be a new result due to the co-operative action of all the parts. If they act separately, performing the same function as before, the device is a mere aggregation. National Progress Bunching Machine Co. *v.* John R. Williams Co., 44 Fed. R. 190; Adams *v.* Bellaire Stamping Co., 141 U. S. 539; Union Edge Setter Co. *v.* Keith, 139 U. S. 531; Brinkerhoff *v.* Aloe, 37 Fed. R. 92.

requisite that the result for which the patent is applied for should be *useful.* The very slightest utility will answer this requirement. (*a*)

Special rules have been established as to a *process* as distinguished from a machine. A grand element in this class of cases is discovery of a law of nature, or perhaps of a chemical force, and making it useful. If an article were previously known as a chemical curiosity, and one discovered that it could be made useful, his discovery might be the subject of a patent.[1] The same rule would apply to the discovery of a new use. Thus, if it were known that hydrated oxides of iron would absorb sulphuretted hydrogen, but it was subsequently discovered that these oxides could be used to purify *coal gas* from sulphuretted hydrogen, the later discovery would be patentable as being new and useful.[2]

A patent obtained for a process, is not so strictly confined to the specification of the inventor as is a patent for a machine. In other words, the applicant is not restricted in the same way to the particular form of apparatus or other means described in his application.[3]

III. *Proceedings in the Patent Office to obtain a patent, to correct defects, to secure a re-issue, and to determine questions of interference.* — The Patent Office is a branch of the Department of the Interior, and in it are deposited all records and other matters and things relating to patents. Its leading officer is a Commissioner. There is also an Assistant Commissioner, and three Examiners-in-chief, appointed by the President, with confirmation of the Senate. Other officers and employés are nominated by the Commissioner and appointed by the Secretary of the Interior. The Examiners-in-chief are required by law to be persons of competent legal knowledge and scientific ability. They have power to revise adverse decisions of Examiners upon applications for patents or for their re-issue and in interference cases, to be hereafter more fully considered.[4]

In obtaining a patent, several steps may be taken, mainly of a preliminary nature, which are grouped under this general division.

The specification. — By the term "specification" is meant a writ-

[1] Young *v.* Fernie, 4 Giff. 577.

[2] Hills *v.* London Gas Light Co., 5 H. & N. 312.

[3] Am. Bell Telephone Co. *v.* Dolbear, 15 Fed. R. 448; s. c. 17 Id. 604. *Post*, p. 532.

[4] U. S. Rev. Stats. §§ 475–496.

(*a*) That the patented article has gone into general use may be evidence of its utility, see Magowan *v.* New York Belting Co., 141 U. S. 333; McClain *v.* Ortmayer, Id. 419.

ten or printed statement on the part of the applicant describing his invention or discovery. At the close of it, a so-called "claim" is made by him of that for which he deems himself entitled to be protected. The specification and claim are companions, but must be dealt with separately. The object of the specification is to set forth the nature of the invention, and the mode in which it operates. The general principle governing it is, that it should be drawn with such fullness and precision as to enable one skilled in the business to which it relates to construct the thing patented *from the description given in the specification.* To facilitate this result, the law of the United States requires models or drawings to accompany the specification, where these are practicable.

The English authorities refer to a "title" describing the invention. It is, however, said that the title need not give any idea of the invention. It is sufficient if the specification is consistent with it.[1] The patent, however, is void if the title is so generally worded as to be capable of comprising, not only the particular invention, but improvements not contemplated in it.[2] So, if there is a material variance between the specification and the title, the patent may be void.[3]

There is also a distinction taken in England between a provisional and a final specification. A "provisional specification" is in the nature of a *caveat*, its principal object being to protect the inventor until the description of the invention is perfected in the final specification.[4] It is accordingly sufficient in the provisional specification to describe the nature of the invention in general terms, without entering into the minute details usual in the final specification.[5]

Still, under the decisions, great care must be taken in the final specification to make it correspond with that which is provisional. The complete specification must not claim anything different from that which is set forth in the preliminary one, but it need not extend to everything so included.[6] If the former covered more ground than the latter, the patent might be void.[7] So it has been held that a patent was void because the nature of part of the invention described in the final, was not sufficiently set forth in the provisional specification.[8] (*a*) No such

[1] Neilson *v.* Harford, 8 M. & W. 806.
[2] Cook *v.* Pearce, 8 Q. B. 1044.
[3] Croll *v.* Edge, 9 C. B. 479. Compare with Nickels *v.* Haslam, 7 M. & Gr. 378.
[4] Stoner *v.* Todd, L. R. 4 Ch. D. 58.
[5] *In re* Newall, 4 C. B. N. S. 269.
[6] Penn *v.* Bibby, L. R. 2 Ch. App. 127.
[7] Bailey *v.* Roberton, L. R. 3 App. Cas. 1055.
[8] United Telephone *v.* Harrison, L. R. 21 Ch. D. 720.

(*a*) Vickers Sons & Co. *v.* Siddell, L. R. 15 App. Cas. 496; Nuttall *v.* Hargreaves [1892], 1 Ch. 23.

distinction between the provisional and final specification exists in this country.

The final specification in England or the specification in this country is the basis on which the patent rests for its validity. The regular test of its sufficiency, already stated, is, that it must enable a skilled mechanic, exercising the actual knowledge common to the trade, to make the machine from it and by following its terms.[1] When a fresh patent is taken out for improvements, it is sufficient if by reading the two specifications in connection, the mechanic would have no difficulty in ascertaining what is claimed. One object of the general rule is, that when the patent expires, the public may have the full and precise benefit of the invention or discovery.[2]

Before further considering this subject, reference should be made to the rules of construction governing a specification. As it is a written instrument, the general rule of construction is that its meaning is a matter of law for the court and not for the jury. Thus, the question of novelty, when raised by the comparison of two specifications, would in general be a matter of law,[3] and the court on such a comparison may direct a jury to find a verdict.[4] If, however, there be terms of art in the specification and the description of technical processes, questions of fact may be presented for the consideration of the jury.[5]

The general rule of construction followed by the court is, to take the ordinary and proper meaning of the words, — that is, their popular signification, — unless there be something in the context to the contrary. Thus, in a particular specification, the word "parallel" was construed in a popular and not in its pure mathematical sense.[6] This rule must be taken with the qualification, that if there be terms of art, evidence may be necessary to interpret them, even where the expressions are identical in two specifications bearing different dates.[7]

The specification must not be misleading. As a branch of this rule, ambiguity may be fatal.[8] The court looks at the grammatical construction, holding the specification to be fatally defective in case a process is so stated that it would not accomplish the end designed, even though a skilled mechanic would not be misled.[9]

[1] Plimpton *v.* Malcolmson, L. R. 3 Ch. D. 531.

[2] Newbery *v.* James, 2 Mer. 446; Bovill *v.* Pimm, 11 Exch. 718.

[3] Thomas *v.* Foxwell, 5 Jur. N. S. 37; S. C. Exch. Ch. 6 Id. 271; Booth *v.* Kennard, 2 H. & N. 84.

[4] Bush *v.* Fox, 5 H. of L. Cas. 707.

[5] Hill *v.* Evans, 4 De G. F. & J. 288; Betts *v.* Menzies, 10 H. of L. Cas. 117.

[6] Clark *v.* Adie (No. 2), L. R. 2 App. Cas. 423.

[7] Betts *v.* Menzies, *supra*.

[8] Turner *v.* Winter, 1 T. R. 602.

[9] Simpson *v.* Holliday, L. R. 1 H. of L. Cas. 315.

The court declined to read the word "or" as "and," to uphold a patent in the case cited. Again, an omission to mention something necessary for the beneficial enjoyment of the invention, is fatal. Nor will it suffice to use a generic word comprising a variety of species, the majority of which would be unsuitable to accomplish the end designed.[1] A specification will be bad for including two parts, one of which is not new,[2] unless, after eliminating the old part, a residue is left (which is sufficiently stated) of sufficient utility,[3] or unless the old part is to be used in connection with and as subsidiary to the new.[4]

With respect to the statement in the specification of the mode or means of accomplishing the result, it will in practice be necessary to consider each case by itself, to determine whether enough has been stated to enable a skilled mechanic to construct it without resorting to experiments. The following instances illustrate the foregoing principles.

A description of a lamp-burner omitted to state where the hole for the admission of air was. The specification was held insufficient.[5] In a specification for a "process" in combining materials to make stuccoes, plasters, cements, etc., the case was put by the court in the form of a dilemma. Either the party claimed all alkalies and acids, or only those which answered his purpose. In the first aspect the specification was bad, for all would not accomplish the purpose; in the second view it was also bad, for it did not specify such as would answer.[6] In a patent for a new method of drying and preparing malt, it was held that the word "malt" was to be taken in its usual sense, as an article used in the brewing but not in the coloring of beer; and that as the latter was the purpose for which the method was really designed, it should have been so stated.[7] A brush, differing from a common one in no other respect except that the hairs or bristles were of unequal lengths, cannot be properly described as a "tapering" brush.[8] A specification set forth a machine for making paper in single sheets, without seam, from one to twelve feet, and upwards, wide, and from one to forty-five feet and upwards in length. It

[1] Wegmann *v.* Corcoran, L. R. 13 Ch. D. 65. In this case the specification described rollers for crushing meal as made of "iron *coated with china*, and finally turned with diamond tools." It appeared that hard china, only, could be used, and specially tough, such as had scarcely been made in Europe during this century, and that it must be fixed in a peculiar manner to an iron core, or spindle. The specification was, accordingly, deemed insufficient.

[2] Kay *v.* Marshall, 8 C. & F. 245.

[3] Frearson *v.* Loe, L. R. 9 Ch. D. 48.

[4] Plimpton *v.* Spiller, L. R. 6 Ch. D. 412.

[5] Hinks *v.* Safety Lighting Co., L. R. 4 Ch. D. 607.

[6] Stevens *v.* Keating, 2 Exch. 772.

[7] The King *v.* Wheeler, 2 B. & Ald. 345.

[8] Rex *v.* Metcalf, 2 Stark. 249.

was held that the meaning of this statement was, that paper varying between these extremes could be made by the same machine, and that as the patentee, when he obtained the patent, had constructed no such machine, the patent was void.[1]

If drawings be annexed to a specification, and be properly referred to in it, they may be taken to be a part of it.[2] The model may also be resorted to in aid of construction where the words are uncertain.[3] According to the usual rule, the meaning of the words is for the court; the application of the facts to the specification is a matter for the jury.[4] If the meaning cannot be satisfactorily ascertained upon the face of the specification, it is void for ambiguity.[5] In case of the patent of a "design," the specification may refer to a photographic illustration, and state that the design is fully represented by the photograph.[6] As a rule, a specification is sufficiently clear when expressed in terms intelligible to a person skilled in the art to which it relates.[7] The same rule applies in case of a combination of old elements to produce a new result. The test is, whether a person having sufficient skill can make use of the invention without first ascertaining by experiment the exact thing to be done to make the invention of practical use.[8]

There are three great ends to be accomplished in requiring a full and exact specification. One is, that the government may know what they have granted; a second, that licensed persons desiring to practise the invention may know, during the term of the patent, how to make, construct, and use the invention; and the third, that other inventors may know what part of the field of invention remains unoccupied.[9] Any attempt to anticipate and include future inventions would be inoperative; and if words calculated to mislead the public were employed, the patent might be declared void.[10] The general principle is, that whoever discovers that a certain useful result will be produced in any art, machine, or composition of matter by the use of certain means, is entitled to a patent for it, provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means specified, without any addition

[1] Bloxam *v.* Elsee, 6 B. & C. 169.

[2] Earle *v.* Sawyer, 4 Mason, 1; Hogg *v.* Emerson, 11 How. U. S. 587; Parker *v.* Stiles, 5 McLean, 44; Kittle *v.* Merriam, 2 Curt. 475.

[3] Frazer *v.* Gates, &c. Iron Works, 22 Fed. R. 439.

[4] Brooks *v.* Jenkins, 3 McLean, 432, 442.

[5] Emerson *v.* Hogg, 2 Blatch. 1.

[6] Dobson *v.* Dornau, 118 U. S. 10.

[7] Loom Co. *v.* Higgins, 105 U. S. 580; Jenkins *v.* Walker, 1 Holmes, 120.

[8] Jenkins *v.* Walker, *supra.*

[9] Gill *v.* Wells, 22 Wall. 1, 25.

[10] Carlton *v.* Bokee, 17 Wall. 463.

to or subtraction from them, produce precisely the result described. If this cannot be done by the means the applicant describes, the patent is void.[1]

This rule is applicable in general terms to a *process* as well as a machine, though it cannot be applied with the same rigor and definiteness in the latter as in the former.

The applicant must, in connection with his application, make an oath before a person authorized by law to administer oaths that he verily believes himself to be the original and first discoverer of the subject-matter for which a patent is asked, and that he does not believe that the same was ever before made or used. He also must state of what country he is a citizen.[2] The commissioner examines the invention or discovery, and if it appears that the claimant is justly entitled to it by law, and that the invention is sufficiently useful and important, he issues a patent accordingly.[3]

Claim and disclaimer. — At the close of the specification there follows, in brief terms, the "claim" of the inventor. This may be of such a nature as to be too broad in its terms, or it may be impracticable, or have some other defect. A "disclaimer" may then be resorted to for the purpose of correcting the defect. The subject of "disclaimer" is regulated by statute both in England and the United States.[4]

The object of allowing the "disclaimer" is this: where a specification contains a good and sufficient description of a useful invention, and it has something annexed to it which is capable of being separated from it, leaving the original description good and sufficient without the necessity of material addition, then the vicious excess can be removed by a disclaimer.[5]

The relief afforded by a disclaimer does not extend to the case where the patent comprises an impracticable generality, and the aim of the patentee is to alter the specification so as to show a specific process.[6] Such a proceeding would be more pertinently termed a substitution of a new claim.

The laws of the United States permit a disclaimer, where, through inadvertence, accident, or mistake, and without any fraudulent intent, the patentee has claimed more than that of which he was the original or first inventor. The patent is still valid for that which is truly and justly his own, provided that this is a material or substantial part of the thing patented. The disclaimer is

[1] Burr *v.* Cowperthwait, 4 Blatch. 163; O'Reilly *v.* Morse, 15 How. U. S. 62, 119.

[2] U. S. Rev. St. § 4892.

[3] Id. § 4893.

[4] 46 & 47 Vict. c. 57; U. S. Rev. State. § 4917.

[5] Ralston *v.* Smith, 11 H. of L. Cas. 223, 243.

[6] Ralston *v.* Smith, *supra;* Globe Nail Co. *v.* Superior Nail Co., 27 Fed. R. 450.

deemed to be a part of the original specification as to the extent of his interest. It will not affect any action or proceeding at the time of its filing, except so far as to the matter of unreasonable delay in filing it.[1]

The scope of a patent must be limited to the invention covered by the claim.[2] An inventor may, however, amend or enlarge his claim before the issue of his patent, where this is warranted by the specification.[3] The plain meaning of the words is not be extended by construction,[4] nor to matters of doubtful implication.[5] A claim in the case of a machine not confined to the mechanism, but extended to the mode of operation generally, is void.[6]

If the Patent Office imposes upon an inventor disclaimers, etc., and he accepts them, they are said to be binding on him, as they are in the nature of conditions, and are imposed for the protection of third persons.[7] A patent is not to be construed by the court contrary to a disclaimer.[8] Failure to file a disclaimer, where proper before suit, will deprive the plaintiff of costs.[9]

Surrender and reissue. — This topic is closely connected with defects in the specification or claim, and is regulated by the statute.[10] The law provides that whenever a patent is invalid by reason of an insufficient specification or excessive claim, made through inadvertence, accident, or mistake, and without fraud, the commissioner shall, on the surrender of the patent, cause a new one to issue with a corrected specification to the proper parties, the surrender to take effect on the issue of the amended patent. New matter is not to be introduced into the specification; and in case of a machine patent, where there may be models or drawings, each can only be amended by the other; but where there is neither model nor drawing, amendments may be made on satisfactory proof that the new matter or amendment was a part of the original invention.

The court, notwithstanding the re-issue, has power to compare the re-issued patent with the original, and to declare the re-issue void, as being too broad,[11] as well if it embraces inventions not included in the original patent,[12] as where the original was for a

[1] U. S. Rev. St. § 4917.

[2] Yale Lock Mfg. Co. *v.* Greenleaf, 117 U. S. 554.

[3] R'way Reg. Mfg. Co. *v.* No. Hudson Co. R. R. Co., 24 Fed. R. 793.

[4] Becker *v.* Hastings, 22 Fed. R. 827.

[5] Fricke *v.* Hum, Id. 302.

[6] Hatch *v.* Moffitt, 15 Fed. R. 252.

[7] New York Belting, etc. Co. *v.* Sibley, 15 Fed. R. 386.

[8] Atlantic Giant Powder Co. *v.* Hulings, 21 Fed. R. 519.

[9] U. S. Rev. St. § 4922.

[10] Id. § 4916.

[11] Gosling *v.* Roberts, 106 U. S. 39; Hoffheins *v.* Russell, 107 Id. 132; Cochrane *v.* Badische, etc. Fabrik, 111 Id. 293; Mahn *v.* Harwood, 112 Id. 354.

[12] Wing *v.* Anthony, 106 U. S. 142.

mechanism, and the re-issue was for a process, or for a different contrivance.[1] But where there is no expansion of the claims of the original patent, the re-issue is valid.[2] Diligence must be used in applying for a re-issue, unless the delay can be satisfactorily explained. The lapse of two years justifies a demand for such explanation.[3] (*a*) After a disclaimer, a re-issue cannot be properly granted for the part disclaimed; and if the re-issued patent covered the part disclaimed, it would to that extent be invalid.[4]

Interference cases. — Interference cases arise in the following manner. An application having been made for a patent, the commissioner is of opinion that it would interfere with a pending application or with an existing patent. He thereupon gives notice to the applicants and patentee, if any, and directs an assistant, called the Primary Examiner, to proceed to determine the question of the priority of invention. A patent may issue to the one who is thus decided to have the priority, unless an appeal is taken from the Interference Examiner to the board of Examiners-in-chief; and any party dissatisfied with their decision may appeal to the Commissioner in person.[5]

A conclusion reached in this way is, after all, not decisive. There has not been, in the proper sense, any judicial decision having a binding effect. It is still open to any party interested in an alleged interference to file a bill in equity against the interfering patentee and those claiming under his patent, and in the due course of equity practice the court will have power to adjudge either of the patents void, as the circumstances of the case may require. This decision will only be binding on the parties to the suit and their representatives.[6]

Appeal in cases other than interference cases. — If a party in other cases is dissatisfied with the decision of the Commissioner, he may appeal to the Supreme Court of the District of Columbia. (*b*) The case is confined on the appeal to the discussion of "reasons of appeal" set forth by the appellant in writing. The appeal is disposed of in a summary way, and the revision governs the action of the Commissioner. This proceeding is designed to determine

[1] Eachus *v.* Broomall, 115 U. S. 429; Moffitt *v.* Rogers, 106 U. S. 423; s. p. 109 U. S. 641.

[2] Yale Lock Mfg. Co. *v.* Sargent, 117 U. S. 536.

[3] Wollensak *v.* Reiher, 115 U. S. 96.

[4] Cartridge Co. *v.* Cartridge Co., 112 U. S. 624.

[5] U. S. Rev. St. §§ 4909, 4910.

[6] Id. § 4918.

(*a*) Cf. Topliff *v.* Topliff and another, 145 U. S. 156; Electric Gas Lighting Co. *v.* Boston Electric Co., 139 U. S. 481.

(*b*) Appeals from the decision of the Commissioner, both in interference and other cases, are now determined by the Court of Appeals of the District of Columbia, created by the Act of Feb. 9, 1893. See Ch. 74 Laws of 1893, § 9.

whether or not a patent should be granted. It does not prevent a party from contesting in any court the validity of a patent which may be granted under the decision, where such validity is called in question.[1] On the other hand, if the application is refused, the applicant may have his remedy by bill in equity, with proper parties, and his rights may be regularly determined by judicial action.[2]

Special matters concerning the issue of a patent. — 1. *Abandonment after filing application.* All applications shall be completed and prepared for examination within two years after filing the application, otherwise the presumption of abandonment will be raised, unless it be satisfactorily shown that the delay was unavoidable.[3]

2. *Rights of assignee of the inventor.* Reference is *not* made here to the assignee of the *patent*, but to the assignee of the *invention* or *discovery*. Such an assignment should be recorded. The application should be made and the specification should be verified by the inventor or discoverer, and any corrected specification signed by him, if living.[4]

3. *Death of inventor before patent issued.* In this case the patent issues to the executor or administrator of the inventor. If the inventor died intestate, it is held in trust for the *heirs at law;* if he left a will disposing of the invention in trust for the devisee. The representatives in such a case make the requisite oath or affirmation.[5]

IV. *Substantive rights acquired under a patent.* — (1) *The patent itself.* — The patent is issued in the name of the United States, and is signed by the Secretary of the Interior, or, under his direction, by one of the Assistant Secretaries of the Interior, and countersigned by the Commissioner of Patents, and recorded with the specifications in the Patent Office.[6]

It contains a short title or description of the invention or discovery, and a grant to the patentee, his heirs or assigns, of an exclusive right for the term of seventeen years, to make, use, and vend the invention or discovery throughout the United States. The specification and drawings are annexed to the patent, and form a part of it.[7] The date of the patent is not to be later than six months from the time when it was passed and allowed and notice given to the patentee or his agent, and the prescribed fee must be paid within that time.[8] If payment is not so made the

[1] U. S. Rev. St. §§ 4911–4914.
[2] Id. § 4915.
[3] Id. § 4894.
[4] Id. § 4895.
[5] Id. § 4896.
[6] Id. § 4883; 25 Stat. L. 40, Feb. 18, 1888.
[7] Id. § 4884.
[8] Id. § 4885.

patent will be withheld, but a new application (the same as in the case of an original application) may be made within two years. Still, no person will be held responsible in damages for the manufacture or use of the thing for which a patent is ordered to issue under the renewed application, prior to the issue of the patent. If the question of abandonment is presented at the time of the renewed application, it is to be treated as a question of fact.[1]

The rules of construction, as applied to *patents*, should be noted. This topic has been to some extent anticipated in considering the construction of a specification. The general rule is, that they are to be construed in a liberal manner, so as to give effect to the right of the patentee. The cases on this point are numerous. A few are cited in a note.[2] This rule does not affect the general principle that it must be so certain as to be understood by those acquainted with the subject. As before stated, it is to be construed in connection with the specification and drawing.

The right to a patent consists in the exclusive right to make, use, and vend the thing patented. This does not embrace the product of the thing patented. An illustration is, that a patent for tools to make a particular article of furniture would not confer an exclusive right to sell the furniture when made.[3] Nor does a patent securing the exclusive right to manufacture certain medicines include the right to prescribe or administer them in opposition to the law of a State requiring one practising medicine to be a licensed physician.[4]

(2) *Derivative or subordinate substantive rights.* — 1. *Renewal or extension.* It is contrary to the policy of the existing patent laws to grant an extension of a patent, unless it were originally granted prior to March 2, 1861. In that event, the patent may, under certain conditions prescribed by law, be so extended, as if it had been originally granted for twenty-one years.[5] The benefit of the extension or renewal enured to assignees of the patent to the extent of their interest.[6] Similar rules are applied to patentees of designs.[7] It is only necessary to refer briefly to this topic, as the period during which renewals could be applied for has now elapsed.

2. *Assignments, licenses, etc.* One may purchase or otherwise acquire a machine or other patentable article from an inventor or discoverer before any patent is taken out. In this case he may

[1] U. S. Rev. St. § 4897.

[2] Grant *v.* Raymond, 6 Pet. 218; Turrill *v.* Michigan, &c. R. R. Co., 1 Wall. 491.

[3] Boyd *v.* Brown, 3 McLean, 295; *post*, p. 530.

[4] Jordan *v.* Overseers of Dayton, 4 Ohio, 294.

[5] U. S. Rev. St. §§ 4924–4927.

[6] Id. § 4928.

[7] Id. § 4932.

continue to use, or he may sell the specific thing thus acquired, after the patent is obtained.[1] (*a*)

A patent, or any interest therein, is assignable, at law, by an instrument in writing, and the patentee may grant and convey an exclusive right under his patent within the whole or any specified part of the United States.[2] An assignment may, accordingly, be considered *territorially*, and there may be an exclusive right for a State, county, city, town, or other division of the country, without reference to other States, counties, etc. An assignment will be void as against a subsequent mortgagee or purchaser for a valuable consideration, acting in good faith, unless it be recorded in the Patent Office within three months from its date.[3] An unrecorded transfer would, notwithstanding this provision, be valid as between the parties themselves.[4] It is not necessary that an *agreement* to assign should be in writing.[5] When a patent is issued to two or more persons, each may assign his interest.

Where a territorial right is created by assignment, the assignee may lawfully sell within the territory to a purchaser who, he knows, intends to remove the thing purchased elsewhere; and such purchaser may use the article in another territory.[6] (*b*)

There may also be assignees of an undivided interest, — *e. g.*, A. may own an undivided half, and B. and C. each an undivided fourth.

The most complicated question arising in the law of assignment is that of licenses. A licensee is one who has transferred to him, in writing or orally, a less or different interest than the whole interest, or an undivided part of such whole interest, or an exclusive sectional (territorial) interest.[7]

A license may be implied, as well as express. It may be implied from such facts as follows: A person in the manufactory of

[1] U. S. R. S. § 4899.
[2] Id. § 4898.
[3] Id. § 4898.
[4] Horne *v.* Chatham, 64 Tex. 36; Peck *v.* Bacon, 18 Conn. 377; Saxton *v.* Aultman, 15 Ohio St. 471.
[5] Burr *v.* De La Vergne, 102 N. Y. 415.
[6] Hobbie *v.* Jennison, 40 Fed. R. 887. See also Adams *v.* Burke, 17 Wall. 453; McKay *v.* Wooster, 2 Sawy. 373.
[7] Potter *v.* Holland, 4 Blatch. 206; 1 Fisher's Pat. Cas. 327.

(*a*) An invention which has not been patented may be sold and transferred by oral agreement. Jones *v.* Reynolds, 120 N. Y. 213. See also Dalzell *v.* Dueber Manufacturing Co., 149 U. S. 315.

(*b*) Hobbie *v.* Jennison, *supra*, was affirmed on appeal to the Supreme Court. See 149 U. S. 355. The purchaser of patented articles from an assignee has, however, according to the current of decisions in the Circuit Courts, no right to take them to the territory of another assignee, and there sell them in the usual course of trade, without the consent of the latter assignee. California Electrical Works *v.* Finck, 47 Fed. R. 583; Standard Folding Bed Co. *v.* Keeler, 41 Fed. R. 51; Id. 37 Fed. R. 693; Hatch *v.* Adams, 22 Fed. R. 434; Hatch *v.* Hall, Id. 438.

his employer, while receiving wages, makes an invention at his employer's expense, and his wages are increased in consequence of the useful results of his experiments, and he permits his employer to use the invention, without compensation.[1] (*a*) An express license, as the term imports, is one made by express words. A license need not be recorded.[2] A licensee may have an interest in the nature of a trust, while the patentee, being the legal owner, would be the proper plaintiff in an action against a third person for an infringement. In such a case, the patentee would be but a nominal plaintiff, and could not settle the action without the consent of the licensee.[3] (*b*)

Licenses may assume a variety of forms. Thus, they may be general or limited. There may be a license to make a patented machine; again, there may be a mere right to use it. A right to use would not imply a right to make, though there would be an implied right to repair.[4] (*c*) The sale of a machine by a patentee implies the right to use it.[5] In this way, a license may be restricted at the pleasure of the patentee. It may be, for example, to use "at his own establishment." In such a case, it can only be used there.[6] A license to a firm is not necessarily revoked where one of the partners buys out the interest of another.[7] One licensed to use a machine in a particular locality cannot lawfully authorize another person to use it in a different locality.[8] A license need not be recorded, even as against a subsequent purchaser. In fact, record is nugatory.[9]

A licensor may grant, within a specified territory, the right to make and sell for the home trade, and reserve to himself the advantage of competing with sellers in foreign markets.[10] If the owners of a patent admit to a licensee that a third party

[1] McClurg *v.* Kingsland, 1 How. U. S. 202; 17 Pet. 228; Slemmer's Appeal, 58 Pa. St. 155. See Sanford *v.* Messer, 5 Fisher's Pat. Cas. 411.

[2] Brooks *v.* Byam, 2 Story, 525.

[3] Goodyear *v.* Bishop, 4 Blatch. 438.

[4] Bicknell *v.* Todd, 5 McLean, 236.

[5] Wilson *v.* Stolley, 4 McLean, 275.

[6] Rubber Co. *v.* Goodyear, 9 Wall. 788.

[7] Belding *v.* Turner, 8 Blatch. 321.

[8] Steam Cutter Co. *v.* Sheldon, 10 Blatch. 1.

[9] Chambers *v.* Smith, 5 Fisher's Pat. Cas. 12.

[10] Dorsey, &c. Rake Co. *v.* Bradley Mfg. Co., 12 Blatch. 202, 205.

(*a*) Solomons *v.* United States, 137 U. S. 342; Annin *v.* Wren, 44 Hun, 352; Fuller & Johnson Manufacturing Co. *v.* Bartlett, 68 Wis. 73; Jencks *v.* Langdon Mills, 27 Fed. R. 622. See also Dalzell *v.* Dueber Mfg. Co., 149 U. S. 315, and *ante*, p. 508.

(*b*) Waterman *v.* Mackenzie, 138 U. S. 252; Pope Mfg. Co. *v.* Gormully Mfg. Co. (No. 3), 144 U. S. 248; Rice *v.* Boss, 46 Fed. R. 19.

(*c*) An express license to use would, however, confer the right to make for the purposes of the use. Illingworth *v.* Spaulding, 43 Fed. R. 827; The Steam Stone Cutter Co. *v.* Shortsleeves, 16 Blatch. 381; Hamilton *v.* Kingsbury, 15 Id. 64.

has a right to grant the license, and such licensee acts upon their representation, they will be prevented or estopped from showing that such third party had no right to grant the license.[1]

A compensation, either for an assignment or a license, may be paid by a fee proportionate to the number of articles sold or manufactured. This is termed a "royalty." Questions accordingly arise whether such a licensee can set up the invalidity of the patent as a defence to an action to recover the royalties. Such questions are variously answered in the decisions. Some authorities treat the case as analogous to that of a tenant who is not permitted to dispute the title of his landlord as long as his possession is undisturbed. In some cases the matter assumes a technical aspect, proceeding on the basis of the license being under seal, and having the effect of a covenant in a sealed instrument.[2]

In some cases the invalidity of the patent has been allowed as a defence, on the ground of want of consideration.[3] The better opinion, however, seems to be that the invalidity of the patent is not of itself a sufficient defence. The licensee has really obtained what he bargained for, which was the right to use and enjoy the patent for a specified time, without molestation. (*a*) It is an entirely different case from that of a sale, wherein the purchaser does not receive what he bargained for, as there is then a failure of consideration. If, however, the patent is rescinded or revoked, there is a true failure of consideration, and the revocation is a defence.[4]

A patentee may assign his right to recover for infringements occurring before the assignment of the patent.[5] The rules of law applicable to an assignment of a lease apply to an assignment of a right acquired by contract to use a patented machine on payment of a royalty.[6] If an exclusive right to make and sell the invention during the life of the patent be granted to A. for a royalty, an action for an infringement against the grantor may be brought by A., whether he be deemed a licensee or a grantee.[7] The question of what amounts to a fixed license fee or established royalty, was considered in a recent case.[8] The foregoing principles may be embodied in the following rules: —

[1] Gear *v.* Grosvenor, 1 Holmes, 215.

[2] Bowman *v.* Taylor, 2 A. & E. 278; Wilder *v.* Adams, 2 Woodb. & M. Cir. Ct. 329.

[3] Harlow *v.* Putnam, 124 Mass. 553. Cf. Crossley *v.* Dixon, 10 H. of L. Cas. 293; Clark *v.* Adie, L. R. 2 App. Cas. 423.

[4] Marston *v.* Swett, 66 N. Y. 206; s. c. 82 Id. 526; White *v.* Lee, 14 Fed. R. 789, 791, and cases cited.

[5] Hamilton *v.* Rollins, 5 Dillon, 495.

[6] Wilde *v.* Smith, 8 Daly, 196.

[7] Stanley Rule, &c. Co. *v.* Bailey, 14 Blatch. 510.

[8] Black *v.* Munson, 14 Blatch. 265.

(*a*) See Hyatt *v.* Ingalls, 124 N. Y. 93.

Rule 1. A license may be a personal right, and accordingly not assignable. In such a case the license will expire at the death of the licensee. Thus, a license to "construct and use" a patented article is personal.[1] Another instance is a license to use a particular process at the licensee's place of business.[2] On the other hand, a license requiring no royalty, and being granted to the licensee, *his executors*, *administrators*, and *assigns*, is assignable.[3]

Rule 2. The doctrine of estoppel *in pais* is applicable to licenses. Thus, a licensee is estopped from disputing the validity of a patent under which he is manufacturing goods.[4] (*a*) This is true, in general, where he has undisturbed use of the patent.[5] An estoppel, being mutual, may work to the advantage of the licensee or assignee. Thus, if a patent having a potential existence is assigned for a valuable consideration, an assignee will have a corresponding interest in the patent subsequently granted.[6] So, if a patentee warrants his title, and afterwards becomes owner.[7] (*b*) It has further been held that if there be two joint patentees (A. and B.), and one of them, A., without the other, assigns to C., an estoppel is worked in favor of the latter, and B. must look to A. for an accounting of receipts.[8] On similar principles, if a licensee agrees not to contest the validity of a patent, it will stand as between the licensor and licensee, though as between other parties it may be declared void.[9]

Rule 3. A licensor cannot, in general, maintain a bill in equity for an accounting, as he has a plain and adequate remedy in a court of law to recover his royalty.[10] But if the licensee has covenanted to make monthly reports of sales, and refuses to do so, a court of equity has jurisdiction to compel a discovery, etc.[11]

Rule 4. In some instances a license may be presumed from the acts of the parties, — *e. g.*, by the claimant of the license having, with the consent of the patentee, experimented at the

[1] Curran *v.* Craig, 22 Fed. R. 101.

[2] Gibbs *v.* Hoefner, 19 Id. 321; see Oliver *v.* Rumford Chem. Works, 109 U. S. 75; Troy Iron & N. Factory *v.* Corning, 14 How. U. S. 193.

[3] Adams *v.* Howard, 22 Fed. R. 656.

[4] Hyatt *v.* Ingalls, 49 N. Y. Super. Ct. 375; on appeal, 124 N. Y. 93.

[5] Marsh *v.* Harris Mfg. Co., 63 Wis. 276.

[6] Maurice *v.* Devol, 23 W. Va. 247.

[7] Gottfried *v.* Miller, 104 U. S. 521.

[8] Curran *v.* Burdsall, 20 Fed. R. 835.

[9] Pope Mfg. Co. *v.* Owsley, 27 Fed. R. 100.

[10] Crandall *v.* Piano Mfg. Co., 24 Fed. R. 738.

[11] Pope Mfg. Co. *v.* Owsley, *supra*.

(*a*) This rule does not prevent the licensee from questioning the validity of the patent after the license expires, in vindication of acts done since its termination. H. Tibbe & Son Mfg. Co. *v.* Heineken, 37 Fed. R. 686.

(*b*) See Adee *v.* Thomas, 41 Fed. R. 342; Id. 346.

claimant's cost.[1] Where, however, the alleged licensee claims, under a written instrument, he will be limited to a reasonable construction of the words. Thus, it has been held that a certificate that one *owns* a third of a patent does not necessarily constitute an assignment.

Rule 5. A patentee cannot forfeit the license for non-performance by the licensee of his contract, unless he reserves a condition giving him the power to do so. Without that he will be left to his action for the amount of the royalty or rent.[2] Even a provision that a license shall be void if royalties are not paid, does not, of itself, make it void; but an action must be brought to have it annulled. Such a provision is, in general, intended as a security for payment.[3]

Rule 6. A license for the exclusive use of a machine does not continue longer than the life of the patent then in existence.[4] While it continues, it is irrevocable by the licensor, if given for a valuable consideration, unless a right to revoke is reserved.[5]

Rule 7. A distinction must be taken between a right to make and sell a patented article and the right simply to sell. The former necessarily includes a right to use, while the latter does not.[6]

A patent being an incorporeal right, may, as has already been shown, be assigned in whole or in part, or may be leased or licensed for a rent or royalty. So a *single patented machine* may be sold or leased, with the right of the patentee included, so that the lessee or purchaser may use or sell it in turn, free from any claim of the patentee; or may pay a royalty. To use a single machine constructed according to the patent, is an infringement, unless the patentee consent. This topic must be distinguished from the question of property in the product of the machine, for to this the right of the patentee does not, in general, attach. For example, a patentee invents a new and useful method of planing boards. The machine to which the invention applies, may be sold, with the patentee's right included. The planed boards, the product of the machine, are not embraced within the terms of an "exclusive right to make, use, and sell the machines" within a specified territory only, and an assignee of such a right may sell, out of that territory, the plank, boards, etc., the product of the machine.[7] So the purchaser of a patented machine has a right to repair it when

[1] Jencks *v.* Langdon Mills, 27 Fed. R. 622.

[2] Consolidated, &c. Co. *v.* Wolf, 28 Fed. R. 814.

[3] Dare *v.* Boylston, 18 Blatch. 548; Adams *v.* Meyrose, 2 McCrary, 360.

[4] Paper Bag, &c. Co. *v.* Nixon, 105 U. S. 766.

[5] Kelly *v.* Porter, 8 Sawy. 482.

[6] Ingalls *v.* Tice, 14 Fed. R. 297.

[7] Simpson *v.* Wilson, 4 How. U. S. 709; *ante*, p. 525.

necessary, though the repair consists in a replacement of an essential part of the combination patented.[1]

(3) *Infringement.* — This technical expression means the act of violating the rights of the patentee, existing by reason of the patent. Such an act of violation confers upon him a cause of action, for which the appropriate remedies will be considered in a subsequent part of this work. The present purpose is to discuss the *nature of an infringement.*

As an infringement is a violation of a right of property, it may exist independent of motive. One may infringe, though ignorant of the existence of the patent.[2] The purpose of the alleged wrong-doer may, however, be material, — as, for example, where a patented machine was made for philosophical experiments, or to ascertain whether it would produce the effect ascribed to it; under such circumstances, there may be no infringement.[3] Still, in a recent English case, it was decided that where a patented invention was made use of for the purpose of experiment and instruction, the use constituted an infringement.[4]

Where a machine is patented, a sale of the goods manufactured by it is not necessarily an infringement, though it would be if the person selling the article were connected with the use of the machine.[5] To make the very thing patented without the consent of the patentee is, in general, an infringement; though if the maker had no knowledge of its having been patented, only nominal damages would be given.[6]

A rule for determining an infringement is this: if there be an invention which is an improvement in the "principle" of a machine patented, there is no infringement in making and using the improvement; if it be an improvement in the "form," as distinguished from the principle, there is a violation.[7] The word "principle," in the above rule, so far as it refers to a machine, means that which applies, modifies, or combines mechanical powers to produce a certain result.[8] Colorable differences or slight variations do not exempt a person from the charge of infringement.[9] It is often a matter of judgment to the eye whether there is a colorable imitation or not.[10]

[1] Wilson *v.* Simpson, 9 How. U. S. 109.

[2] Parker *v.* Hulme, 1 Fisher's Pat. Cas. 44.

[3] Whittemore *v.* Cutter, 1 Gall. 429; Poppenhuaen *v.* Falke, 2 Fisher's Pat. Cas. 181.

[4] United Telephone Co. *v.* Sharples, L. R. 29 Ch. D. 164.

[5] Boyd *v.* M'Alpin, 3 McLean, 427.

[6] Bryce *v.* Dorr, 3 McLean, 582.

[7] Brooks *v.* Bicknell, 3 McLean, 250.

[8] Smith *v.* Pearce, 2 McLean, 176.

[9] Byam *v.* Eddy, 24 Vt. 666.

[10] Sayles *v.* Chicago, &c. R'way Co., 4 Fisher's Pat. Cas. 584.

To constitute an infringement of a patent for a *design*, it is not necessary that the appearance should be the same to the eye of an expert. The test of a patent for a design is the eye of an ordinary observer, giving such attention as a purchaser usually gives. The true test of identity of design must be sameness of appearance.[1] (*a*)

The question of the infringement of a patent depends largely upon the specification. In a patent for a machine the specification must point out the *mode* of accomplishing the result. If that be so drawn that the same result can be accomplished by some mode substantially different, there will be no infringement. It is plain that great skill will be necessary in complicated cases in drawing the specification; otherwise the inventor may lose the benefit of a patent, to which he is really entitled, by want of skill in presenting his case to the Patent Office.

This nicety is not so essential in a *process*, the effect or result being produced by chemical action. Then the patent may be for the art or method, and the inventor must show how the process may be adapted to practical use. In showing that, the inventor may describe mechanical means for applying peculiarly shaped vessels or other receptacles for containing any of the ingredients used in his process or art. But these constitute no part of his invention.[2] But even in this class of cases, where the chemical action is described to consist of certain combinations of substances, the patent would not cover the same result produced by different combinations. A well known instance is where the specification described a process for the manufacture of steel by the "use of the *carburet* of *manganese* in any process whereby iron is converted into cast-steel," and it was subsequently discovered that if the "oxide of manganese" and coal-tar were put into the melting-pot with the iron, cast-steel would be produced, of equal quality. It was held that the specification did not embrace the new discovery, though experts testified that the two substances became one in the melting-pot.[3]

[1] Gorham Co. *v.* White, 14 Wall. 511; Dreyfus *v.* Schneider, 25 Fed. R. 481.

[2] Piper *v.* Brown, 4 Fisher's Pat. Cas. 175.

[3] There was a great diversity of opinion among the judges as to the theory of this decision. The correct view would seem to be, that as the burden of proof is upon the patentee to establish an infringement, he did not succeed in doing it, since it was impossible to say that oxide of manganese and coal-tar became the "carburet," before combining with the iron. And again, if this could be said, the "specification" of the compound did not embrace the simple substances of which the compound was formed. Unwin *v.* Heath, 5 H. of L. Cas. 505.

(*a*) Smith *v.* Whitman Saddle Co., 148 U. S. 674; Redway *v.* Ohio Stove Co., 38 Fed. R. 582.

In all cases of infringement, the great line of inquiry is whether there is a *material* difference between the patent, as properly construed, and the alleged infringement. Materiality may disclose itself in a variety of ways. Sometimes a material feature is dispensed with;[1] or an element is omitted which has a function of its own;[2] or there is a difference in form, mode of operation, and result;[3] or, it may be, a difference of combinations simply, while the result is the same.[4] In all these cases there is no infringement.

There is no infringement in a patent for a process where the discovery of the patentee is used by another for a wholly different purpose, not involving commercial profit. An example is, the case where hydrate of lime was patented for the purpose of precipitating substances from sewage water for agricultural purposes, and the alleged infringer used the same method for purifying and deodorizing the water.[5]

When a *process* of manufacturing is patented, the *result* of the process is not included, and an infringement cannot be proved by showing that the defendant has produced the same thing. It must further appear that he has produced it by the *same method*.[6] If a patent be obtained for a process by means of the use of a chemical substance artificially prepared, it is not infringed by the use of a natural substance to accomplish the same result, containing among its constituents that which is described in the patent.[7]

As a chemical *product* may be patented, as well as a process, the introduction of it for sale into the country, though made abroad is an infringement.[8] The same rule is applied in England when the foreign article is brought into the country only for transshipment to another country,[9] but the Custom House agents of the importers were not, under the circumstances of the case, treated as infringers.[10] The mere possession of infringing machines is in itself an infringement. It is no answer to this view, that the infringers have taken out the infringing elements, and keep the

[1] Yale Lock Mfg. Co. *v.* Sargent, 117 U. S. 373; Brown *v.* Davis, 116 U. S. 237.

[2] Tobey Furniture Co. *v.* Colby, 26 Fed. R. 100.

[3] Field *v.* De Comeau, 116 U. S. 187.

[4] Buzzell *v.* Andrews, 25 Fed. R. 822; as to materiality, see also 28 Fed. R. 102.

[5] Higgs *v.* Goodwin, Ell. Bl. & Ell. 529; s. c. 27 L. J. Q. B. 421.

[6] Palmer *v.* Wagstaff, 9 Exch. 494.

[7] Hills *v.* Liverpool United Gas-Light Co., 9 Jur. N. S. 140. In this case, the specification, as construed by the court, called for hydrated oxides of iron artificially prepared, while the defendant used "bog-ochre," a natural product containing hydrated oxides.

[8] Von Heyden *v.* Neustadt, L. R. 14 Ch. D. 230,

[9] Nobel's Exp. Co. *v.* Jones, L. R. 17 Ch. D. 721.

[10] Nobel's Exp. Co. *v.* Jones, L. R. 8 App. Cas. 5.

separate parts stored, since, though dismantled to-day, the machines might be re-instated to-morrow.[1]

Looking now at the cases where infringement has been declared, the doctrine of "equivalents" becomes important. It is plain, on a moment's reflection, that it would be very difficult for a patentee to exhaust in his specification all similar modes of producing a particular result. It would lead to needless prolixity, and, in most cases, would be productive of no beneficial result. A recent case is highly illustrative. The patent called for the use of *saw*-dust. The infringer used *auger* borings of the same general character as saw-dust. Though the two substances are not identical, they were declared to be equivalent.[2] It is not easy to frame a definition of mechanical equivalents. Only general terms can be used, and resort must be had to decided cases. A broad statement is, that an "equivalent" produces the result in substantially the same way as that described in the specification. The material used may be different in the two cases, and there still be an equivalent. To hold that a "mechanical equivalent" is used, is practically a mode of stating that the matter in question has no patentable novelty, which is a fatal objection to the validity of a patent.

V. *Remedies.* — As the power to grant patents is solely vested in Congress by the provisions of the United States Constitution, the jurisdiction over them is, for the most part, vested in the Federal Courts, in so far as such jurisdiction is granted by the legislation of Congress. The jurisdiction depends, not upon the residence of the parties, but upon the subject-matter.[3] The statutes of Congress must be consulted in order to determine how much jurisdiction is conferred, and in what particular courts it is vested.

The power as now conferred upon the Circuit Court of the United States, as a court of equity, is a general equity power, and carries with it all the incidents belonging to that species of jurisdiction.[4] Thus, it has jurisdiction for the purpose of settling all conflicting claims to the patent.[5] On the question of infringement, the jurisdiction of the Federal Court is exclusive.[6]

The State courts may entertain cases where there is no *direct*

[1] United Telephone Co. *v.* London, &c. Co., L. R. 26 Ch. D. 766, 776; Bacon, V. C. See also Adair *v.* Young, L. R. 12 Ch. D. 13.

[2] Hobbie *v.* Smith, 27 Fed. R. 656.

[3] Allen *v.* Blunt, 1 Blatch. 480.

[4] Potter *v.* Dixon, 5 Blatch. 160; Kendall *v.* Winsor, 6 R. I. 453.

[5] Gibson *v.* Woodworth, 8 Paige, 132.

[6] Continental Store, &c. Co. *v.* Clark, 100 N. Y. 365; Dudley *v.* Mayhew, 3 N. Y. 9; Smith *v.* McClelland, 11 Bush (Ky.), 523; De Witt *v.* Elmira, &c. Mfg. Co., 66 N. Y. 459.

adjudication sought upon the validity of the patent, but the matter comes up *collaterally*. Instances are as follows: An action for damages, resulting from alleged fraudulent representations upon a sale of a patent, and to inquire whether the patent was really what it was represented to be.[1] So a State court may entertain a bill to compel an assignment of a patent, its validity not being in question.[2] (*a*)

The legal proceedings in patent cases are of two general classes. (1) Cases in which the patent is attacked, and sought to be overthrown. (2) Those in which a remedy is sought by the patentee.

(1) *Cases in which the patent is attacked.* — 1. *Proceedings by the United States.* It is a general principle of the common law that letters patent granted by the king (like the grant of an individual) may, on his application, be set aside in the courts for fraud, mistake, and other causes going to show want of intelligent consent. It has been common from early times to resort to a writ called "scire facias," from its original Latin form, for this purpose. At present, this proceeding is used in the common law courts as distinguished from equity. There is reason to believe that in its origin it could be adopted as an equitable remedy. There is an equitable element in it, since it is a mode of revoking a grant for fraud, mistake, and other like ground which admits that the grant is in its form valid, but was in fact obtained against right and good conscience.[3]

Still, in England *scire facias* is considered to be the correct remedy as instituted in a court of law, not only in the case of grants by the king of land, but also of patents for inventions. Accordingly, if a person obtains, by fraud, priority in a patent for an invention, the true inventor has no remedy, except through a *scire facias*.[4] The Attorney-General has a discretion in this class

[1] Hunt *v.* Hoover, 24 Ia. 231.

[2] Binney *v.* Annan, 107 Mass. 94.

[3] A very early case of a *scire facias* returnable in the Court of Chancery is found in the Year Book of 13 Edw. III. (A. D. 1338–1339). Pike's translation, pp. 96–100. There is also a valuable discussion of the topic of *scire facias* as an early *equitable* remedy in the introduction, pp. 101–111. In the Year Book 10 Henry IV. 5, pl. 17, and 10 Id. 7, pl. 5, *scire facias* in law is contrasted with the same proceeding in equity. The case in the 13 Edw. III. was brought to repeal letters patent granting land claimed to have been forfeited to the king. The object of the proceeding was to compel the king's grantee to show cause why the land should not be seized into the king's hand for the purpose of being restored to the former owner.

[4] *Ex parte* Bailey, L. R. 8 Ch. App. 60, 63.

(*a*) An action to recover royalties is within the jurisdiction of the State courts. Hyatt *v.* Ingalls, 124 N. Y. 93. So an action for an injunction, involving merely the question of the existence or meaning of a license, and not the validity of the patent, is cognizable by a State tribunal. Waterman *v.* Shipman, 130 N. Y. 301; Mayer *v.* Hardy, 127 N. Y. 125.

of cases, and the court will not, in general, control his discretion.[1] It is, however, the duty of the government to protect the public from illegal monopolies.[2]

It has not been distinctly adjudicated by modern decisions in England that a bill in equity will not lie, but rather that *scire facias* in the Queen's Bench is a proper remedy, and that this court may dispose of the whole question, ordering the patent to be cancelled and annulled; and that though the record of the patent must be sent back to the Court of Chancery to be cancelled, yet that the act of cancellation is formal and ministerial, and the Court of Chancery has no power to stay the execution of the judgment.[3]

The general question herein considered was not disposed of in the United States until the year 1888. It was then decided in a case of great importance that a bill in equity issued by the United States was an appropriate method of presenting to the court the question whether a patent should not be revoked because it had been obtained by fraud, accident, or mistake. It was declared that this method is sustained by precedents in the High Court of Chancery in England, as well as in other courts there.[4] The remedy in this country is by proceedings on the part of the United States before the judicial department of the government.[5] The bill in the case cited was declared to be well brought, and the allegations therein sufficient, if sustained, to authorize a decree setting aside the patent as null and void.[6]

2. *Proceedings by an individual to vacate a patent under the Revised Statutes.* Section 4918 of the Revised Statutes provides a remedy whereby one patentee, or other person having an interest, claiming an interference, can proceed against another in a court of equity to have the alleged interfering patent declared void. Under this section either or both patents may be declared void.[7] An adjudication under this section only affects the rights of parties to the suit, and those deriving title under them subsequent to the adjudication.[8]

(2) *Remedies by the patentee.* — These are of two general kinds: 1. Actions in a court of law. 2. Suits in equity.

[1] Queen *v.* Prosser, 11 Beav. 306. Aff'd by Lord Cottenham, Lord Chancellor (p. 318).

[2] Id. 317.

[3] Bynner *v.* The Queen, 9 Q. B. 523; Queen *v.* Eastern Archipelago Co., 4 De G. M. & G. 199. There may now be in England, by statute, a proceeding (based on a petition) to revoke letters patent: 46 & 47 Vict. c. 57, § 26 (1883). See *In re* Haddan's Patent, 54 L. J. (Ch.) 126.

[4] Attorney-General *v.* Vernon, 1 Vern. 277.

[5] United States *v.* Bell Telephone Co., 128 U. S. 315.

[6] Id.

[7] Foster *v.* Lindsay, 3 Dill. 126.

[8] § 4918.

1. *Actions in a court of law.* The regular remedy for an infringement is an action at law for the damages sustained. Where such an action will give complete and adequate relief, it should, on general principles, be resorted to rather than a suit in equity. A large portion of the litigation in patent cases is in equity, the object being to obtain an injunction against the infringer, and an accounting for the profits. Some preliminary observations may here be made applicable to proceedings in either tribunal.

All that class of objections to the suit which go to attack the right of the patentee, are equally available to the defendant, whichever form the case may assume. In a suit for infringement the patent is itself presumptive evidence of the patentee's right as against an infringer. The burden of proof is thus cast upon the defendant to show some ground on which the patentee's claim should be rejected. These grounds may be grouped together. The defences which may be urged to a patent consist of two general classes: *first*, denial (technically called the "general issue"), which asserts that the patent has no legal existence; and, *second*, special defences which, logically considered, admit the existence of the patent, but claim that under the circumstances it ought not to be enforced against the defendant. This last subdivision introduces the subject of special pleading, which requires this class of defences to be stated in the pleading of the defendant.

This technical rule is dispensed with by the Revised Statutes of the United States[1] in certain specified cases. In these cases the defendant may simply deny the right of the plaintiff, at the same time giving him notice in writing, thirty days before the trial, that he will make one of the specified defences. They are these:—

(1) That for the purpose of deceiving the public the specification was made to contain less than the whole truth, or more than was necessary to produce the desired effect.

(2) That the plaintiff had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting it.

(3) That it had been patented or described in some printed publication prior to the plaintiff's supposed invention or discovery.

(4) That the plaintiff was not the original and first inventor or discoverer of any material and substantial part of the thing patented.

(5) That it had been in public use or on sale in this country for more than two years before the application for the patent, or

[1] U. S. Rev. St. § 4920.

had been abandoned to the public. The last, though classed in the statute as one defence, really consists of two, since there may be an abandonment to the public without reference to the lapse of two years. This rule applies to cases both in law and equity. The section of the statute sets forth in detail the necessary contents of the notice.

There may be other special defences not enumerated in § 4920, — such as, that the invention was first patented in a foreign country, and that the time limited in the foreign patent has expired;[1] or that the patentee had not attached to the patented article the word "patented," with the day and year when the patent was granted;[2] or that the plaintiff had failed to pay the prescribed fees, under § 4897; or that the defendant had the right to use and vend the *specific article*, under § 4899, though the patent be otherwise valid as to infringers. So it may be made to appear that the alleged infringement is itself a new and independent invention, and so patentable by the defendant. The doctrine of estoppel may be used as a defence, as where the conduct of the patentee is a representation to the defendant on which he acts, that he (the defendant) is not infringing.[3] Several of these special defences require to be considered more in detail.

Prior public use for two years. — At the present time such a use as this is fatal to the claim of the patentee, even though he be the first inventor, and the prior use took place without his consent, or even knowledge. The only thing material is *the fact* that the invention has been in public use for two years. The burden of proof is on the person sued for infringement, when he alleges prior use, to establish the fact.[4]

[1] U. S. Rev. St. § 4887.

[2] Id. § 4900.

[3] A case in which estoppel was not maintained is Proctor *v.* Bennis, L. R. 36 Ch. D. 740.

[4] Cartrell *v.* Wallick, 117 U. S. 689.

The point whether a prior use of two years is fatal, without reference to the inventor's knowledge or consent, was thoroughly considered by the Supreme Court of the United States under the second clause of the seventh section of the act of March 3, 1839, (5 Stat. L. 354). That clause, in connection with a prior clause, in substance provided that while any person who had purchased or constructed a newly-invented machine, etc., before the application of the inventor, etc., for a patent, should have the right to use and vend the specific machine, etc., so made and purchased, notwithstanding the patent yet that the patent itself should not thereby be invalidated, *unless such purchase, etc., had been for more than two years prior to the application.* The construction given to these last stated words was that the patent was invalid by more than two years' use, whether the inventor knew or consented to the use or not. Andrews *v.* Hovey, 123 U. S. 267 (the driven well case). On a motion for a rehearing, the court reiterated this decision, with an exhaustive examination and discussion of prior decisions. Andrews *v.* Hovey, 124 U. S. 694 (1888). Under the existing law this policy of the act of 1839 appears to be retained, U. S. Rev. St. §§ 4886, 4899, and see remarks of the court at the foot of page 274 in Andrews *v.* Hovey, *supra.* The result is, that a public use, etc., of more than two

Abandonment. — This is a question largely of intention. It partakes of the nature of prior use, but is not identical with it. In the present state of the law, prior public use is an arbitrary defence, depending upon a statutory period of two years. Abandonment assumes an intention to relinquish the right to the invention. It is treated as a matter of fact, and in a common-law action must be submitted to a jury.

An abandonment may be established, even though two years have not expired. This inference does not necessarily follow from the invention being in public use or on sale for less than two years, but after the lapse of two years such public use is, by force of the statute, conclusive evidence of abandonment, and the patent is void.[1]

Want of novelty. — This means that the patentee has been anticipated by another. Such a defence should be clearly established.[2] If it be claimed that the patentee derived his conception from another, it should be made by the claimant to appear that the prior alleged inventor had a conception of the invention. The burden of proof is on him.[3] A large part of all the litigation concerning patents turns upon the question of novelty.

It is not proposed in the further discussion of this subject to treat of remedies in detail.

2. *Suits in equity.* An action in equity is a leading remedy, in order that the patentee may obtain an injunction against the infringer, and at the same time an accounting for past profits realized by him. An injunction must be applied for during the life of the patent. Still, it can be obtained though only a few days remain.[4] In one of the cases cited, only three weeks remained. The fact that the patent expires during the suit does not take away the jurisdiction of the court.[5] The court, however, will not entertain the suit simply for an accounting of the profits, as the remedy at law would be sufficient, — viz., damages. In general, a patentee would have an election to sue at law for his "royalty" or patent fee charged by him to one using his invention without right, or to sue in equity for past profits and an injunction against future use.[6] The special rules governing the question whether a preliminary injunction should be

years of an invention or discovery prior to the application for a patent is a perfect defence to an action for infringement, though such public use, etc., took place without the inventor's or discoverer's knowledge or consent. *Ante*, pp. 510, 511.

[1] Elizabeth *v.* Pavement Co., 97 U. S. 126, 134.

[2] Yale Lock Mfg. Co. *v.* Berkshire Nat. Bank, 26 Fed. R. 104.

[3] Duffy *v.* Reynolds, 24 Fed. R. 855.

[4] Dick *v.* Struthers, 25 Fed. R. 103; Adams *v.* Bridgewater Iron Co., 26 Id. 324.

[5] Brooks *v.* Miller, 28 Fed. R. 615.

[6] Bragg *v.* City of Stockton, 27 Fed. R. 509.

granted will be found in the books upon equity procedure and practice.

The question of damages is of high importance, for in many instances the whole value of the patent to the patentee consists in the damages recovered. The true measure of damages is thus of prime consequence. If the patentee receives a fixed fee from others for the use of the invention, this will in general be the true measure of damages against an infringer;[1] but if he issues no licenses, special circumstances may then control. He may be deprived of profits by the infringer's acts so as to be compelled to lower his prices. This deprivation may be the true measure of damages.[2] Sometimes he will only recover nominal damages, as where it is not clear that the injury is attributable to the particular patent in question,[3] or where damages should be apportioned and he has not shown the true basis for apportionment.[4] The burden of proof is, in other words, on the patentee to establish the damages, and if he fails to do this, the amount recovered will be nominal.[5] It is not any objection to recovery in a suit in equity, of full profits, that the defendant did not realize that amount by his wrongful act.[6]

A question has been raised whether if an infringement has taken place in a foreign country, and the infringing machine is brought temporarily into this country, an injunction can be obtained while the machine is here. It is held in England in the affirmative, so that an infringing wheel on a foreign steamboat could be prevented from revolving while the boat was in British waters.[7] This doctrine has not been followed here.

Section III. *Title to Trade-marks by Appropriation. — Preliminary.* — This, in its development, is a subject of modern origin. Still, the germ of it is found in the early law. The act of counterfeiting a trade-mark attracted attention, both as an injury to an individual who had originated it, and as a fraud upon the unwary, who might be deceived, and be led to the purchase of goods which otherwise they would not have purchased. The act of counterfeiting was thus treated both civilly and criminally.

The earliest decision where relief was granted in a civil action

[1] Graham *v.* Geneva, &c. Mfg. Co., 24 Fed. R. 642.

[2] Yale Lock Mfg. Co. *v.* Sargent, 117 U. S. 536.

[3] Moffitt *v.* Cavanagh, 27 Fed. R. 511.

[4] Willimantic Thread Co. *v.* Clark Thread Co., 27 Fed. R. 865.

[5] Tuttle *v.* Gaylord, 28 Fed. R. 97; Dobson *v.* Hartford Carpet Co., 114 U. S. 439.

[6] Simpson *v.* Davis, 22 Blatch. 113.

[7] Caldwell *v.* Van Vlissengen, 9 Hare, 415. It is said that this decision was offensive to the Dutch government, to which the ship belonged, and this feeling led to the enactment of 15 & 16 Vict. c. 83, § 26, changing the rule.

is one cited by Doderidge, J., in Southern *v.* How.[1] The judge (Doderidge) said that in "22 Eliz. an action upon the case was brought in the Common Pleas by a clothier, that whereas he had gained great reputation for his making of his cloth, by reason whereof he had great utterance to his great benefit and profit, and that he used to set his mark to his cloth, whereby it should be known to be his cloth. And another clothier, perceiving it, used the same mark to his ill-made cloth, on purpose to deceive him; and it was resolved that the action did well lie."

This case does not give us the breadth of the present law, for the right of action does not now depend on the fact that the counterfeiter attaches his mark to inferior goods, as will be shown hereafter. It is valuable simply as containing the germ of the existing law.

A leading case before the Star Chamber, Oct. 12, 1632, established the criminality of counterfeiting trade-marks. The proceeding was against Thomas Jupp a clothmaker of the city of London.[2] Jupp had affixed certain iron stamps to an inferior article of baize, counterfeiting the marks of the famous baize of Colchester, and had sealed his goods with the seals of that town. The inferior baize was made at the town of Bocking. An expert could distinguish the baize made at these towns, but an ordinary purchaser discerned the quality of the baize by its seal, and bought it without further inquiry than the view of the seal.

These seals had a griffin or a dragon on the one side, and on the other side three crowns, and the words, D. W. S., Colchester Bay, 1571. These "depictures" were graven in iron, and Jupp was detected with the stamps for counterfeiting them in his possession. Another peculiarity in the case was, that imperfect pieces of baize, made at Colchester itself, were regularly marked by cutting off a piece and fixing the seal at the "angle." Jupp tampered with this class of goods by so cutting the baize as to make it appear to be sealed regularly. He swore that he had done this "above a hundred and a hundred times for merchants." Jupp was sentenced to heavy punishment, to mark "the detestation of the court of this form of fraud."[3]

[1] Popham's R., 143, 144 (16 Jac. I.).

[2] Appendix to Vol. 3, Rushworth's Historical Collections, p. 102.

[3] As this is the first known decree on this branch of the subject, it may not be out of place to quote it at some length. The proceeding had been instituted by the Attorney-General. "His Majesty's Attorney-General humbly prayed their Lordships that some exemplary punishment might be inflicted upon the said Tho. Jupp; whereupon their Lordships, taking into consideration the many laws that have been provided for the true draping of the wool of this realm, by ordaining the searching, measuring, marking [and] affixing seals of divers places where they are draped, and the public seals of the

I. *The nature of a trade-mark, and the ownership of it.* — A trade-mark may be defined to be some word, sign, or symbol, either invented or appropriated, and, if a word, having an arbitrary meaning, used to designate the ownership or origin of a product or other thing connected with trade or manufacture, and to distinguish it from other products or things of the same general nature.

The question whether one who makes use of a trade-mark has a property in it, has only been finally determined within a few years. It is now settled that there is a property in a trade-mark, and that the jurisdiction of a court of equity to protect it by injunction rests upon that ground.[1] The earlier cases, holding that there is no property in a trade-mark, must be deemed in this respect to be overruled.[2]

The relation of "good-will" to a trade-mark should be noticed. "Good-will," as applied to business, is a broad term. It includes every advantage which a proprietor has acquired by carrying on his business, whether it be connected with the premises on which the business is conducted or with the name under which it is managed, etc.[3] When it assumes the form of a name, it very closely resembles a trade mark. It, like a trade-mark, is a species

Alnager ('official measurer') unto the cloths, that the people of this town of Colchester . . . receive a great part of their sustenance by making of baize; that for many years past, by occasion of the careful search there made, they have been truly and not deceitfully made, and of a known goodness; that such of them as are fully wrought are sealed with a seal attesting their goodness; if, upon search, any prove not so good, they are marked for such, so as the buyers, both within the realm and abroad, may be ascertained of the goodness of the merchandise by view of the seal whereon (the law requiring it) such great care hath been had from time to time that upon the credit of the seal alone they were plentifully and readily vended in all places. And albeit there had not been hitherto any discovery made of delinquents in this kind, yet their Lordships, taking into their serious consideration that the offence of the said Thomas is a false cosenage, by which the *buyers, being deceived*, will not be so ready to buy any other cloths upon the credit or attestation of the seals, so as the good and true workers of cloth will not receive encouragement to make true workmanship as they were wont, but be enforced for vent to make their cloths like unto those whereunto such counterfeit seals shall be affixed, and in time produce a disaffiance to the attestations of the seals, whereof will ensue many inconveniences; and they can foresee that if this new falsity shall be unpunished, it will grow further abroad."

The court made Jupp's term of imprisonment depend upon his discovering and making known the names of the merchants for whom he had practised his deceit.

It is plain that many of the salutary rules underlying at the present day the condemnation of counterfeiters of trade-marks, were then fully recognized. The underlying element of public policy is strongly presented in this decree.

[1] Hall *v.* Barrows, 9 Jur. N. S. 483; S. C. 4 De G. J. & S. 150; Leather Cloth Co. *v.* Am. Leather Cloth Co., 4 De G. J. & S. 137; Partridge *v.* Mends, How. App. Cas. 559.

[2] The overruled cases are: Perry *v.* Truefitt, 6 Beav. 66; Blanchard *v.* Hill, 2 Atk. 484.

[3] Churton *v.* Douglas, Johns. Rep. (Eng.) 174, 188.

of property. Questions concerning it frequently arise in connection with the assets of a partnership, and are more appropriately considered in a treatise upon contracts.

An important consequence of regarding a trade-mark as property, and thus a subject of ownership, is, that it may be claimed, and the right to it enforced in our courts, by aliens as well as by citizens. Accordingly, if an Englishman places upon spools of thread sold by him here, a valid trade-mark, he can prevent, by injunction, sales of the commodity bearing an imitation mark in this country.

II. *Trade-marks at common law or by statute.* — (1) *At common law.* — The selection of any particular trade-mark depends on the volition of the party inventing or appropriating it. The property in it depends upon the act of appropriation, or, in other words, upon "occupancy." The person first using the mark for a particular purpose, excludes others from using it for an interfering purpose.[1] It has been held accordingly that the property in a trade-mark consists in the right to the exclusive use of some mark, name, or symbol in connection with a particular manufacture or vendible commodity.[2] It is an element in the right that the article with the mark attached is "in the market" when it is imitated.[3] Accordingly, it is no violation of the right to use the very mark for some wholly distinct purpose, — as if the word "Congress" had been arbitrarily attached to the bottled water of a mineral spring, it would be perfectly lawful for a manufacturer to call his shoes "Congress" shoes.

(2) *By statute.* — There is legislation upon this subject, both in England and the United States.

In England Parliament has established a system of *registration.* The act of registration is now of great importance, as being vital to the legal existence of the trade-mark. There are clauses in the statutes providing for a preliminary examination by a commission of the trader's claim, and a review in proper cases by the Court of Chancery of the decisions of the commissioners. The statutory methods are not to be resorted to so as to violate some other right or to offend against the law.[4] The present statutes are referred to in the note.[5] There has been a great number of legal decisions under these acts, and an examination of them will often be highly useful for the purpose of settling general ques-

[1] Wotherspoon *v.* Currie, L. R. 5 H. of L. Cas. 508.

[2] Leather Cloth Co. *v.* Am. Leather Cloth Co., 11 H. of L. Cas. 523.

[3] McAndrew *v.* Bassett, 4 De G. J. & S. 380.

[4] See Hendricks *v.* Montagu, L. R. 17 Ch. D. 638 (C. A.).

[5] 46 & 47 Vict. c. 57; 48 & 49 Id. c. 63, 49 & 50 Id. c. 37; 51 & 52 Id. c. 50.

tions arising under this branch of law, since the right to "register" frequently turns upon principles of general application.

In the United States Congress has no power to pass laws of general application upon this class of subjects. Whatever power it possesses is derived from its authority to "regulate commerce." This is confined by the United States Constitution to "commerce with foreign nations, and among the several States, and with the Indian tribes." Any regulation as to trade-marks affecting commerce wholly within a particular State or States is unconstitutional and void.[1]

The courts of the United States have the power under the judiciary legislation of the United States to give relief to persons claiming a trade-mark, whether aliens or citizens, when the action is brought between citizens of different States, or between a citizen of a State and an alien. Finally, any State may legislate upon trade-marks so far as domestic commerce is concerned, and without interfering with the regulative power of Congress already referred to.

III. *What constitutes a valid trade-mark.* — It is essential to the existence of a trade-mark that it should designate the origin or ownership of a thing, and not merely its kind or quality. Under this rule, many questions have arisen as to the right of appropriation of ordinary words of the language, such as "balm," "medicated balm," "soothing-syrup," "yellow ointment," and the like. It is well settled that there can be no exclusive appropriation of such words to express the idea or thing that such words naturally convey. Any manufacturer or owner has a perfect right, of which he cannot be deprived, to designate an article which he produces or sells by a word or phrase commonly used for that purpose. To deny this, would be to give a particular person an undeserved advantage over others. If a person uses two words in combination, one of which serves to designate ownership or origin, and the other character, kind, or quality, he obtains no right to the exclusive use of the latter word. An illustration is that the use of the expression "Newcastle Chronicle" as the title of a newspaper, would not prevent another person from using the phrase "Sporting Chronicle."[2] Accordingly, one cannot acquire, by mere use, an exclusive right to a term which is simply descriptive of the kind of business he carries on.[3] (*a*)

[1] United States *v.* Steffens, 100 U. S. 82; *post*, p. 553.

[2] Cowen *v.* Hulton, 46 L. T. N. S. 897.

[3] Colonial Life Ass. Co. *v.* Home & Colonial Ass. Co., 33 Beav. 548.

(*a*) Employers' Ass. Corp. *v.* Employers' Ins. Co., 61 Hun, 552; Koehler *v.* Sanders, 122 N. Y. 65.

The object in the case cited was, to obtain the exclusive use of the word "colonial" as descriptive of colonial business. So if one company calls itself "The Law Life Company," it cannot prevent another from using the expression "The Equity and Law Life Company."[1] Again, an adjective merely describing the quality of a manufactured article, will not be protected by the court as a trade-mark.[2] An instance is the expression, "Nourishing London Stout."

The following instances of a valid trade-mark may be cited.

(1) *The name of the manufacturer or seller.* Examples: — *Singer* Sewing Machine;[3] *Thorley's* Food for Cattle;[4] *Estcourt's* Hop Supplement;[5] *Hemy*, etc., Tutor for the Piano Forte.[6]

The use of a name in such a case does not give such an *exclusive* right of property as to prevent another person of the same name, acting in good faith, from designating articles of the same kind made by him in the same way.[7] (*a*) This principle is not to be used as a cover for fraud. Thus, while a person may legally assume a name, which is the patronymic of a family (or, at least, is not liable to an action for assuming such a name), yet it would seem that he must not do this for the purpose of invading the rights of another in respect to a trade-mark.[8] The name of a manufacturer (particularly of the first maker) may, in course of time, become a mere sign of the *quality* of the article, in which case it will cease to have the characteristics of a trade-mark.[9]

It is not necessarily a defence to an infringer that he has stated the truth. The real wrong is in the intent to deceive. Accordingly, where one Hemy had been employed to compose a work marked with his name, and was subsequently employed by other publishers to prepare a work on the same subject, also marked with Hemy's name with some variations in the title, the right of the first publisher was deemed to be infringed.[10]

[1] Colonial Life Ass. Co. *v.* Home & Colonial Ass. Co., *supra*, *per* Master of the Rolls, p. 550.

[2] Raggett *v.* Findlater, L. R. 17 Eq. 29.

[3] Singer, &c. Manufacturers *v.* Wilson, L. R. 3 App. Cas. 376.

[4] Massam *v.* Thorley's Cattle Food Co., L. R. 14 Ch. D. 748.

[5] Estcourt *v.* Estcourt Hop Essence Co., L. R. 10 Ch. App. 276.

[6] Metzler *v.* Wood, L. R. 8 Ch. D. 606.

[7] Meneely *v.* Meneely, 62 N. Y. 427.

[8] Du Boulay *v.* Du Boulay, L. R. 2 P. C. 430; s. c. 6 Moore P. C. C. (N. S.) 31. In this case, the point for which it is cited was not involved, so that it is but a *dictum*.

[9] Hall *v.* Barrows, 4 De G. J. & S. 150.

[10] Metzler *v.* Wood, L. R. 8 Ch. D. 606.

(*a*) Brown Chemical Co. *v.* Meyer, 139 U. S. 540; Caswell *v.* Hazard, 121 N. Y. 484.

(2) *The name of the place of origin.* This may become a trade-mark.[1]

(3) *Use of the word "patent" as a trade-mark, where the subject is not patented.* There is some authority for holding that the word "patent" cannot be used as a trade-mark by reason of the misrepresentation necessarily involved. The more modern view is, that there is not necessarily a misrepresentation in such a case, — as, for example, where from the usage of many years the goods have acquired the designation in the trade generally of patent.[2] (*a*)

(4) *Arbitrary expressions.* These are necessarily unlimited. A manufacturer or vendor may, at pleasure, invent new terms, or give new adaptations to old ones. As long as they describe origin or ownership they will be protected as property. A few instances sanctioned by the courts will suffice: "Radstock" Collieries,[3] "Angostura" Bitters.[4] So an arbitrary word may be used in connection with the name of the manufacturer. An example is Ford's *Eureka* Shirts.[5] Similar words may be used to designate natural products, the subject of sale, such as the waters of springs, — *e. g.*, *Apollinaris* Water,[6] or *Congress Spring* Water.[7] So also an arbitrary number, as *No. 10*, not corresponding with a street number.[8] So-called "fancy names" are protected. Examples are *Pride*, as applied to cigars;[9] *Royal*, to designate a flavoring extract.[10] But under this rule the expression *Gold Medal* is not a good trade-mark.[11] (*b*)

(5) *Title of a book.* There may be a trade-mark in the title of a book.[12]

(6) *Device or label.* There may be a trade-mark in a device,

[1] Radde *v.* Norman, L. R. 14 Eq. 348; McAndrew *v.* Bassett, 4 De G. J. & S. 380; Newman *v.* Alvord, 51 N. Y. 189.

[2] Marshall *v.* Ross, L. R. 8 Eq. 651; Ford *v.* Foster, L. R. 7 Ch. App. 611. But see Cheavin *v.* Walker, L. R. 5 Ch. D. 850.

[3] Braham *v.* Beachim, L. R. 7 Ch. D. 848.

[4] Siegert *v.* Findlater, L. R. 7 Ch. D. 801.

[5] Ford *v.* Foster, L. R. 7 Ch. App. 611.

[6] Apollinaris Co. *v.* Norrish, 33 L. T. 242.

[7] Congress, &c. Spring Co. *v.* High Rock, &c. Spring Co., 45 N. Y. 291.

[8] G. & H. Mfg. Co. *v.* Hall, 61 N. Y. 226.

[9] Hier *v.* Abrahams, 82 N. Y. 519.

[10] Royal Baking Powder Co. *v.* Sherrill, 59 How. Pr. 17.

[11] Taylor *v.* Gillies, 59 N. Y. 331.

[12] Dicks *v.* Yates, L. R. 18 Ch. D. 76; Potter *v.* McPherson, 21 Hun, 559.

(*a*) Cf. New York Card Co. *v.* Union Card Co., 39 Hun, 611.

(*b*) One cannot acquire a right to the exclusive use of the word "Columbia" as a trademark. Columbia Mill Co. *v.* Alcorn, 150 U. S. 460.

sign, or symbol, as well as in words, or there may be a combination of signs, symbols, or words.[1] (*a*)

There is a tendency in the English cases to hold that even where there is not, strictly speaking, a trade-mark, there will be an injunction granted to prevent a trader from so conducting himself as to mislead persons who intend to purchase of another dealer, and so induce them to buy of himself. This doctrine proceeds on the broad ground that a fraud must not be committed, and is independent of the theory that a trade-mark is property.[2] It has been held that a trade-mark cannot exist "in gross," but only as an incident to a thing used, manufactured, or sold.[3]

It may be said as to trade-marks in general that the mere intent to use a particular name will not be sufficient to give a claim as against one who, though aware of such intent, acts by anticipation, and first makes use of the name.[4]

IV. *Assignment of a trade-mark.* — Though a trade-mark is for most purposes to be regarded as property, the question of its assignability depends greatly upon the nature of the mark and the mode in which it has been used.[5] The assignment must not result in a false assertion, — as, for example, that goods not manufactured by A., the assignor, are in fact made by him.[6] Still, treating a trade-mark as property, it may in general be sold, and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been commonly affixed, and may be lawfully used by the purchaser. The difficulty mainly arises when the trade-mark consists of the name of the manufacturer, and the probability is that the public will be misled by the supposition that they are buying goods made by the original manufacturer.[7] (*b*) A court of equity could under such circumstances give no protection to an assignee, since he

[1] Cook *v.* Starkweather, 13 Abb. Pr. N. S. 392; Godillot *v.* Harris, 81 N. Y. 263; Read *v.* Richardson, 45 L. T. N. S. 54. The device in this last case was a bull dog's head on a black ground, surrounded by a circular band, on which were the names of the proprietors.

[2] Lee *v.* Haley, L. R. 5 Ch. App. 155; Boulnois *v.* Peake, L. R. 13 Ch. D. 513, n.; Hookham *v.* Pottage, L. R. 8 Ch. App. 91.

[3] Cotton *v.* Gillard, 44 L. J. Ch. 90.

[4] Civil Service Supply Association *v.* Dean, L. R. 13 Ch. D. 512; Maxwell *v.* Hogg, L. R. 2 Ch. App. 307.

[5] *Per* TURNER, L. J., in Bury *v.* Bedford, 4 De G. J. & S. 352.

[6] Leather Cloth Co. *v.* Am. Leather Cloth Co., 4 De G. J. & S. 137, 144.

[7] Leather Cloth Co. *v.* Am. Leather Cloth Co., 11 H. of L. Cas. 523.

(*a*) The adoption of packages of a peculiar form and color in which to enclose merchandise for sale, without any distinguishing symbol, letter, sign, or seal, is not in general sufficient to constitute a trade-mark. Fischer *v.* Blank, 138 N. Y. 244.

(*b*) See Symonds *v.* Jones, 82 Me. 302; Brown Chemical Co. *v.* Meyer, 139 U. S. 540.

would violate the maxim that he who comes into equity must do so with clean hands.

The principles which govern the use of a name which has already acquired the character of a trade-mark by another person, whether of the same name or not, are well stated in the case of Massam *v.* Thorley's Cattle Food Company.[1] Bearing in mind that a person by the common law may assume a name, it is easy to see that any inflexible rule that a person having the same name as the first appropriator may use the trade-mark with impunity, is not only promotive but provocative of fraud. The qualification is accordingly necessary, that a person of the same name cannot use a prior trade-mark belonging to another, with intent to deceive, nor continue to use it if such continued use be calculated to deceive. It was at one time thought that the case of Burgess *v.* Burgess[2] left the right to use a name open, without qualification. The effect of the opinion of Lord Justice KNIGHT BRUCE in that case has since been much limited.[3] This class of cases must be distinguished from those where the article has acquired the name of an individual as *an article of commerce* as distinguished from that of a *manufacturer;* an example is that of "Liebig's Extract of Beef." Such a name cannot properly be treated as a trade-mark.

The same rule would govern an assignment, a ruling element in this whole subject being that there must be no deception. No assignment of a trade-mark should be upheld by the courts which has a misleading effect.

The Thorley Case, being decided in the Court of Appeal, must be regarded as practically overruling a view taken by the Master of the Rolls in an earlier decision,[4] to the effect that a person who has by fair means gained the knowledge of a trade-secret may, after the death of the original inventor, make and sell the article under his name. This case apparently went upon the ground that a trade-mark, on the death of the inventor, ceases to be property, and is open to all, *publici juris*. The correct view is that the trade-mark passes to the representatives of the inventor or appropriator at his death.[5]

A mortgagee will not necessarily stand in the exact position of an assignee. He may have taken a mortgage on the stock in trade with the trade-marks simply as a security for his claim, without using the trade-marks, or having an intent to use them. Accordingly, in such a case he cannot restrain persons claiming

[1] L. R. 14 Ch. D. 748.
[2] 3 De G. M. & G. 896.
[3] Massam *v.* Thorley's Cattle Food Co., L. R. 14 Ch. D. 748, 752.
[4] James *v.* James, L. R. 13 Eq. 421.
[5] Massam *v.* Thorley's Cattle Food Co., *supra*, p. 754.

under the mortgagor from using the trade-marks.[1] The principle asserted was, that a trade-mark will not be protected by an injunction in favor of one who has never used it, is not at the time using it, and who does not allege that he intends to use it.

V. *Trade-marks, as affected by the sale of the business, including transfers on the dissolution of a partnership.* — This question is not affected by the point whether the sale is by the trader himself, or by his assignee in bankruptcy. On a sale, the former owner has no right, on setting up a new business of the same kind, to use the trade-marks of his old business, or in any other way to represent himself as carrying on the *identical* business which was sold, although as a general rule he has a right to set up a new business of the same kind, even next door to the old business.[2] (*a*) The point is, that he must do nothing to mislead customers. The only way to bind him not to set up the new business is to obtain a specific agreement from him to that effect. It was at one time decided that the court would restrain the party setting up the new business from sending special solicitations to the customers of the old house inviting them to deal with him at the new place of business. This proposition must now be regarded as overruled.[3]

On the dissolution of a partnership, special questions arise. Some of these will be stated.

(1) The first case is one where stock-in-trade is purchased, but there is no assignment of the good-will of the business. The outgoing partner is then entitled to an injunction to restrain the use of his name in the style of the firm.[4]

(2) A brand which has become a trade-mark may be valued and sold with the works.[5]

(3) A trader having been a manager or partner in a firm may, on setting up an independent business, state to the public that he has been with the firm, but must do so in a way not calculated to lead the public to believe that he is carrying on the business of the firm which he has left, or is in any way connected with it.[6] (*b*)

[1] Beazley *v.* Soares, L. R. 22 Ch. D. 660.

[2] Hudson *v.* Osborne, 39 L. J. Ch. 79.

[3] Lahouchere *v.* Dawson, L. R. 13 Eq. 322. The decision in this case elicited much difference of opinion among English judges. The principal objection to it seemed to be that it established an implied promise or obligation in restraint of trade. The case was distinctly disapproved of in Pearson *v.* Pearson in the Court of Appeal (L. R. 27 Ch. D. 145), and was overruled in Collier *v.* Chadwick (Court of Appeal), referred to in Vernon *v.* Hallam (L. R. 34 Ch. D. 748, at pp. 751 and 752), which follows Pearson *v.* Pearson, *supra.*

[4] Scott *v.* Rowland, 26 L. T. N. S. 391.

[5] Hall *v.* Barrows, 4 De G. J. & S. 150.

[6] Hookham *v.* Pottage, L. R. 8 Ch.

(*a*) Marcus Ward & Co. *v.* Ward, 40 N. Y. St. R. 792.

(*b*) Van Wyck *v.* Horowitz, 39 Hun, 237.

(4) If the trade-mark contain the name of one of the partners, such as "Condy's Fluid," either party, on dissolution, may use the name as long as there is no fraud by the party whose name is not used in misleading the public in the supposition that the article is manufactured by him whose name is used.[1] Where no provision is made by the partners as to the trade-mark in such a case, it is really an undivided asset belonging to the former partners in common, and one cannot prevent the other from using it.[2] (*a*)

More recently, it has been held by the Court of Appeal[3] that as one may assume any name that he pleases, there is nothing to prevent a trader from using the name, even of a living person, as a trade-mark, so long as he does not interfere with some other existing trade-mark. The sole right on which a court of equity acts is that a trader must not use a description, whether true or not, which is intended to represent, or calculated to represent, to the public that another man's business is his business, and so by a fraudulent statement deprive another of the business which would otherwise come to him. The court interferes *solely* for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the outside world from being misled.[4]

VI. *Infringement.* — The remedy for infringement is twofold. It is either by an action for damages or an injunction in equity. The injunction is by far the most common, as it is the most effective remedy.

Some of the cases in which an action at law for damages has has been brought are cited in a note.[5] In such an action it is an essential ingredient that the imitation must be calculated to deceive. It is really founded in fraud; and the point whether the imitation was calculated to deceive, and whether the defendant used the mark with intent to supplant the plaintiff in his business, will be submitted to the jury.[6]

App. 91. In this case the advertisement was "P. from H. & P." It was held not to be proper, as not being sufficiently clear.

[1] Condy *v.* Mitchell, 37 L. T. 766 (C. A.).

[2] Banks *v.* Gibson, 34 Beav. 566.

[3] JESSEL, M. R.; JAMES and BRAMWELL, L. JJ.

[4] Levy *v.* Walker, 10 Ch. D. 436, 447, 448; New Haven Patent Rolling Spring Bed Co. *v.* Farren, 51 Conn. 324.

[5] Blofield *v.* Payne, 4 B. & Ad. 410; Sykes *v.* Sykes, 3 B. & C. 541; Rodgers *v.* Nowill, 5 C. B. 109; Morison *v.* Salmon, 2 M. & Gr. 385; Crawshay *v.* Thompson, 4 Id. 357.

[6] See cases *supra*.

(*a*) Caswell *v.* Hazard, 121 N. Y. 484. Where, upon the dissolution of a firm, one of the partners retires, and the remaining members succeed to and continue the business, the right to use the trade-marks of the old firm passes to the new, although no express mention is made in the deed of assignment. Merry *v.* Hooper, 111 N. Y. 415. See also Menendez *v.* Holt, 128 U. S. 514; Laughman's Appeal, 128 Pa. St. 1.

In actions for an injunction in equity there are said to be four elements: That the plaintiff has properly acquired the trade-mark; that there is no false representation by him calculated to mislead; that the article is used in some way in trade; that the defendant has imitated the mark for the purpose of making profit or use of other articles of a similar description.[1] The court proceeds upon the right of property, and accordingly the injunction can be had, even though the infringer used the trade-mark innocently.[2] It is a further rule that the owner can have an account taken of the profits realized by the infringer. But compensation of this kind will only be given for use of the trade-mark after the infringer has been informed of the ownership by another.[3]

Some of the rules governing the right to an injunction are these: —

(1) The plaintiff must seek his remedy "with clean hands." (*a*) The meaning of this expression is, that he must not be engaged in any attempt to mislead the public, — as, for instance, palming off a worthless article as valuable and useful. It is no answer to this proposition to say that a person is not answerable for a falsehood in his trade-mark because it may be so gross and palpable that no one is likely to be deceived by it.[4] This is not a question so much between the plaintiff and the infringer as it is between the plaintiff and the public. The objection goes to the foundation of the plaintiff's right, and asserts that a cause of action bottomed on a fraud against the public cannot be recognized in a court of justice.

(2) The plaintiff's trade-mark must have been imitated. Still, it is not necessary that the imitation should be so close as to deceive persons seeing the two marks side by side. It is enough that the degree of resemblance is such that ordinary purchasers, proceeding with ordinary caution, are likely to be misled.[5] It is not absolutely necessary to show, in order to maintain an action, that the public has been actually deceived. It is sufficient that the imitation is calculated to deceive (*b*) (and this may be determined from inspection[6]), or that there is an intention to deceive.[7]

[1] See McAndrew *v.* Bassett, 4 De G. J. & S. 380.

[2] Millington *v.* Fox, 3 M. & C. 338; Edelsten *v.* Edelsten, 1 De G. J. & S. 185; Dixon *v.* Fawcus, 3 Ell. & Ell. 537.

[3] Edelsten *v.* Edelsten, *supra*.

[4] Leather Cloth Co. *v.* Am. Leather Cloth Co., 4 De G. J. & S. 137, 148, *per* Lord Chancellor.

[5] Seixo *v.* Provezende, L. R. 1 Ch. App. 192.

[6] Hookham *v.* Pottage, L. R. 8 Ch. App. 91; Alexander *v.* Morse, 14 R. I. 153.

[7] Cope *v.* Evans, L. R. 18 Eq. 138.

(*a*) See Prince Mfg. Co. *v.* Prince Metallic Paint Co., 135 N. Y. 24.

(*b*) Heinz *v.* Lutz, 146 Pa. St. 592; Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq. 164.

(3) Delay by the plaintiff may cause the court to refuse relief. An owner may proceed at once, before any one has been actually misled, for the life of a trade-mark may depend upon the promptitude with which the right of property is vindicated.[1] Yet an injunction will not necessarily be refused because considerable time has elapsed since infringement first took place. The court will, however, in such cases require clearer proof of fraudulent intent, and that the plaintiff has been actually injured by the infringement.[2] The court will not regard delay for the purpose of obtaining sufficient proof of the injury sustained as evidence of laches or neglect.[3]

(4) It has been held that in deciding the question of the piracy of a trade-mark, the color of the mark cannot be taken into account.[4]

(5) The injunction in a proper case may extend to third persons, such as carriers of goods having forged brands.[5] They may also be compelled to disclose the names of the persons from whom the goods were received.[6] A purchaser of the goods may be enjoined from selling them, even though innocent of the forgery at the time of his purchases.[7] So *printers* of forged labels may be liable, as aiding in the violation of the rights of the owner.[8]

VII. *Registration of trade-marks.* — A system of registration of trade-marks is now established in England by the Act 46 & 47 Vict. (1883) c. 57.[9] This is a substitute for the prior registration act of 1875, and repeals it. The act is drawn with some detail. It is confined to marks for particular goods or classes of goods. Opposition may be made to an application for registration in a prescribed manner, and if the application is persisted in, the question is determined by the officer designated by the act, whose decision is subject to appeal to the Board of Trade. This body may in turn refer the appeal to the court. Registration is presumptive evidence of a right to exclusive use. If the trade-mark is one of the class that can be registered under the act, there can be no proceeding for an injunction or for damages, unless registration has been had either under this or former acts, or has been refused by the proper office. A certificate of refusal may be ob-

[1] Johnston *v.* Orr Ewing, L. R. 7 App. Cas. 219.

[2] Rodgers *v.* Rodgers, 31 L. T. 285.

[3] Lee *v.* Haley, L. R. 5 Ch. App. 155.

[4] Nuthall *v.* Vining, 28 W. R. 330. *Contra*, New York Cab Co. *v.* Mooney, 15 Abb. N. C. 152.

[5] Upmann *v.* Elkan, L. R. 7 Ch. App. 130.

[6] Orr *v.* Diaper, L. R. 4 Ch. D. 92.

[7] Upmann *v.* Forester, L. R. 24 Ch. D. 231.

[8] De Kuyper *v.* Witteman, 23 Fed. R. 871.

[9] See also amendatory acts 48 & 49 Vict. c. 63; 49 & 50 Id. c. 37; 51 & 52 Id. c. 50.

tained from the office. All registrations are to be entered in a book to be kept for this purpose.[1] The act in respect to cutlery trade-marks (called "Sheffield marks") is modified by provisions concerning the cutlers' company in Yorkshire.[2] A large number of decisions have already been made by the court in carrying this and prior acts into effect.

No truly effective system of registration of trade-marks exists in the United States. It is not open to Congress to establish a general and uniform system, owing to a want of constitutional power. A trade-mark is not an invention, discovery, or writing within the meaning of the eighth clause of the eighth section of the first article conferring upon Congress the power to secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries. A regulation of a trade-mark is, at most, a regulation of commerce, which must be limited to "Commerce with foreign nations, among the States, and with the Indian tribes." Commerce commencing and terminating within the limits of a State is beyond the jurisdiction of Congress. It was on these grounds that it was decided that the trade-mark legislation of Congress of the years 1870[3] and 1876[4] was unconstitutional, as neither in its terms nor essence a regulation properly limited, but was intended to embrace all commerce, including that between citizens of the same State.[5] This decision led to a statute which confined the right to registration to owners of trade-marks used in commerce with foreign nations or with the Indian tribes, provided that such owners were either domiciled in the United States or located in any foreign country or tribes, which by treaty, convention, or law afforded similar privileges to citizens of the United States.[6]

Under this act, the court has no jurisdiction over a suit between citizens of the same State respecting a trade-mark, unless the goods were intended to be transported to a foreign country, or to be used in lawful commercial intercourse with an Indian tribe.[7]

A later statute provides that nothing contained in the act of 1881 shall prevent the registry of any lawful trade-mark rightfully used by the applicant in foreign commerce or with Indian tribes at the time of the passage of that act.[8] Under this provision, the word "trade-mark" for the purpose of registration

[1] 46 & 47 Vict. c. 57, §§ 62–80.
[2] Id. § 81. See also 51 & 52 Vict. c. 50.
[3] 16 U. S. Stat. L. 198.
[4] 19 U. S. Stat. L. 141.
[5] United States *v.* Steffens, 100 U. S. 82. See Baldwin *v.* Franks, 120 U. S. 678, 687. *Ante*, p. 544.
[6] Laws of 1881, ch. 138 (21 U. S. Stat. L. 502).
[7] Luyties *v.* Hollendeer, 30 Fed. R. 632; Ryder *v.* Holt, 128 U. S. 525.
[8] 22 U. S. Stat. L. 298.

must have the signification given to it by the general rules of the common law.[1] Registration is no more than *prima facie* evidence of ownership.[2] For further details, the act should be consulted.

Criminal legislation for the protection of trade-marks is common in the various States of the United States. In New York, violation of the trade-marks provisions is made a misdemeanor.[3] In England, offences against the trade-marks registration law are treated summarily, and with the imposition of a fine upon a convicted offender. (*a*)

[1] Moorman *v.* Hoge, 2 Sawy. 78, 85. This case construes the law of 1870.

[2] Glen Cove Mfg. Co. *v.* Ludeling, 22 Fed. R. 823.

[3] See Penal Code, §§ 364–371.

(*a*) See Merchandise Marks Acts, 1887–1891, 50 & 51 Vict. c. 28, and 54 Vict. c. 15.

CHAPTER II.

TITLE BY ACT OF THE LAW.

THE meaning of this expression is, that the title to property may be gained by a mere legal rule. An owner may thus be deprived of his ownership, and it may be vested in another. This will, in most cases, be the result of some legal proceeding. The various modes which will be considered are, I. Forfeiture; II. Escheat; III. Taxation; IV. Eminent Domain; V. Judgment; VI. By Proceedings in the case of a failing debtor; VII. By succession in case of the death of a former owner (including testament and administration). Each of these instances will be treated separately.

DIVISION I. — *Forfeiture.*

This is a species of title of great antiquity, and applicable both to real and personal property. One principal ground of it was the commission of crime, and it was applied to a large number of offences. Usually a *verdict* of a jury was necessary, so that there was no forfeiture until conviction. In the meantime, the alleged criminal might be sustained from the goods, or might sell them to persons acting in good faith. The doctrine of *relation*, however, applied to the case, so that in some instances the forfeiture after the conviction was referred back to the time when the wrongful act on which the forfeiture was based was committed. The effect of this rule was to overturn intermediate transfers, — as, for example, where they were of a fraudulent character, calculated to deprive the king or other claimant of the benefit of the forfeiture. The cases occurring in the early reports are those of personal actions against an offender, with the forfeiture of property inflicted as a penalty for his crime. In modern law, proceedings against a chattel considered *as itself an offender*, without reference to its ownership, are of much importance, and will be noticed hereafter.

Where the right of the wrongdoer is qualified, as where he owns property subject to a pledge, the interest of the creditor is

not affected.[1] It extended, however, to all kinds of personal property, whether in possession or in action.[2] The principle of forfeiture for crime did not extend to trials in the court of admiralty for crimes committed on the high seas, as that court followed the Roman and not the common law.

Forfeiture may be claimed under a contract providing for it. This case is simply a branch of the law of contracts, and is an instance of the law of contracts.

There are comparatively few instances in the United States of forfeiture for crime. There is in the United States Constitution a clause prohibiting Congress from causing an attainder of treason to work a forfeiture beyond the life of the person attainted.[3] There are, however, some cases of forfeiture for crime under the legislation of Congress. These are, in the main, for violation of the laws concerning customs or the internal revenue, the navigation laws, regulations of vessels engaged in commerce, and the laws prohibiting the slave-trade.[4] Regular methods of trial are established for ascertaining the violation of law, and for enforcing forfeiture.

Things subject to forfeiture may be regarded as of three distinct classes, (1) Those to which some crime or guilt is attributed. (2) Those which are considered as having a hostile character. (3) Those which are treated as liable for a debt. In the first class of cases there is a species of legal fiction that the chattel is itself an offender; it is "guilty," and yet the sole object of the fiction is to justify a legal proceeding against it, and to change its ownership, — for example, to take it from the existing owner and transfer it to the United States. A forfeiture may thus happen for a prohibited act though the owner is himself personally innocent.[5]

In proceedings under the laws of the United States, the doctrine of "relation" assumes great prominence. The condemnation will relate back, not merely to the seizure, but to the wrongful act which was the ground of the seizure. The title of a purchaser in good faith will, accordingly, be subverted.[6] This rule met with

[1] 13 Vin. Abr. 443, Tit. *Forfeiture.*

[2] Hawk., P. C. 638, Cap. 49, § 9 (6th Lond. Ed.).

[3] Art. III. § 3.

[4] Forfeiture for breach of customs laws is provided for in Title XXXIV. of the Revised Statutes. There will be no forfeiture for errors happening by mistake or accident and not from any intention to defraud the revenue § 3051. The punishment for violation of internal revenue laws is found in the Revised Statutes, Title XXXV, *Internal Revenue*, and amendatory acts. The distillery itself may be destroyed in certain cases, so as to prevent the use of it for the purpose of distilling, § 3332. The statutes should be examined for further details.

[5] United States *v.* Brig Maleck Adhel, 2 How. U. S. 210, 234.

[6] United States *v.* Bags of Coffee, 8 Cranch, 398; United States *v.* The Brig-

vigorous opposition from Judge Story in the cases cited, who would date the forfeiture from the time of conviction. The title obtained by the forfeiture is a new one, and not merely a continuation of the old one.

Forfeiture applies to admiralty law, both in prize cases and in the enforcement of maritime liens, as for collision, and the like. The discussion of these, so far as they have special features, will be considered hereafter. The legal proceeding to cause a forfeiture is called an action *in rem*, or against the thing, as distinguished from an action against the person, or *in personam*. This proceeding will be considered more fully hereafter, under the topic of judgments.

DIVISION II. — *State Succession or Escheat.*

This subject is analogous to title by escheat in the case of real property. It is a well settled rule of the common law, in the case of real property, that if an owner dies without heirs, the land escheats to the State, as being property without an owner. In the case of personal property, goods without an owner (*bona vacantia*) in some instances belonged to the finder, and in others, to the sovereign. Instances of the latter were treasure-trove, shipwrecks, and estrays.

Much controversy has arisen in respect to succession to personal property, where an owner dies intestate and without successors, such as husband, wife, or next of kin. It was the view of Lord COKE that such property inured to the king, as a branch of the royal prerogative.[1] This view is stoutly resisted by the great antiquarian, JOHN SELDEN, who insists that Lord COKE wrongly interpreted the authority that he cited.[2]

It has, however, in modern times, been decided by the Privy Council in England, that the right to goods belonging to persons dying intestate, and without leaving husband or widow, and without kindred, as *bona vacantia*, has from the earliest times been vested in the king, in right of his crown, and that the Church never had, at any time, by law, any beneficial interest in the property of intestates, but only the right of jurisdiction and

autine Mars, Id. 417. The majority of the court were of the opinion that they were bound by express words in the statute. Justice Story held that the words of the statute must be interpreted according to the rules of the common law, which did not divest the title of a purchaser in good faith.

[1] Hensloe's Case, Coke's Rep., Part 9, 36 *b*, at p. 38 *b*, citing "Close Rolls," 7 Hen. III. m. 16.

[2] Selden's Works, Vol. 6, p. 1681.

administration.[1] In this country the matter is governed by statutes in the respective States.

In the State of New York there is, in two of the counties (New York and Kings), an officer called a public administrator, whose duty it is, among other things, to take charge of vacant estates. They proceed substantially as other administrators, and pay any surplus, after discharge of fees and expenses, into the city treasury.(*a*) In the other counties a similar service is performed by the county treasurer. Surplus moneys in this case are paid into the State treasury. (*b*)

DIVISION III. — *Taxation.*

This mode of obtaining title applies both to real and personal property. It is a matter of statute regulation, which branches out into much detail. Taxation as affecting personal property only is considered here.

The tax may be levied on real property, and yet be collected from the taxpayer's personal estate. There is first an assessment of the amount to be paid according to a fixed and equitable proportion, by public officers termed assessors. They proceed judicially upon due inquiry. They are not personally liable for errors of judgment, though they are for wilful misconduct.[2] If the tax is not paid within the prescribed time, a warrant is issued to a collector, who proceeds to seize upon or "distrain" the property of the taxpayer, whether it be money or goods. In the case of goods, there would be a public sale, the tax would be paid from the proceeds, and the overplus returned to the owner.[3]

The collection of taxes to be paid to the United States under internal revenue laws is regulated by the Revised Statutes.[4] Cer-

[1] Dyke *v.* Walford, 5 Moore, P. C. C. 434 (1846).

[2] Queen *v.* Buck, 6 Mod. 306. This is an old case, where the collectors and assessors omitted some from their books whom they nevertheless assessed, and put the money in their own pockets. They were adjudged guilty of a misdemeanor, and sentenced to the pillory in the county where the offence was committed. The court said the offence deserved exemplary punishment.

[3] East India Company *v.* Skinner, Comberbach's Rep. 342.

[4] Tit. XXXV. See especially, § 3187.

(*a*) The law in New York relative to the disposition of vacant estates, as stated in the text, was formerly found in the Revised Statutes, Part II., Ch. VI., Tit. VI. These provisions were, however, repealed by ch. 686, Laws of 1893. This act re-enacted much of the old law, in the form of amendments to the Code of Civil Procedure, §§ 2665–2669. Provisions relating to the office of public administrator in the city and county of New York may be found in the Consolidation Act, §§ 216–247. In the county of Kings surplus moneys are paid into the State treasury.

(*b*) Code of Civ. Pro. §§ 2668, 2747.

tain specified articles are exempt from distraint. In case of sale, the collector gives a certificate of sale, which is made conclusive evidence of the regularity of his proceedings in making the sale.[1] The subject in New York and other States is fully regulated by statute.[2]

DIVISION IV. — *Eminent Domain.*

The right of a State or of the United States to take the property of an individual owner on this ground, includes both real and personal property. The right is inseparably attached to national empire and sovereignty.[3] All kinds of property are subject to the right.[4] The occasion for taking personal property in this manner is, however, rare. One of the very early cases in which the right was asserted is the famous Saltpetre Case, in which the court vindicated the right of the "Commonwealth" to take property in time of war.[5]

Personal property, as well as real estate, is protected by the constitutional provision that private property is not to be taken for public use without just compensation.[6] This kind of property may be destroyed without compensation in cases of inevitable necessity, as to arrest the spread of a conflagration.[7] A provision requiring a particular county to issue bonds for an improvement in which the State, as a whole, is interested, is not a case of eminent domain, but rather of taxation.[8]

In the exercise of the right of eminent domain, there is nothing in the nature of a contract between the owner and the State. It is only necessary that compensation be made, and then the owner's property can be taken without his assent.[9] If the property be taken by "due process of law," — that is, by judicial inquiry and condemnation, with due notice to the owner, — the title of the original owner will be divested, and the State or its appointee will be substituted as owner.

[1] U. S. Rev. St. § 3194.

[2] For the law of New York, see the Revised Statutes of that State (8th ed.), pp. 1116, *et seq.* The collector proceeds under a tax list and warrant, distrains, sells, and pays any surplus to the owner, pp. 1116, 1117. There are special rules for the assessment of taxes on incorporated companies, pp. 1149–1159.

[3] Jones *v.* Walker, 2 Paine, C. Ct. 688.

[4] New York, &c. R. R. Co. *v.* Boston, &c. R. R. Co., 36 Conn. 196.

[5] Coke's Rep., Part 12, p. 12.

[6] People *v.* Mayor, &c. of Brooklyn, 9 Barb. 535.

[7] American Print Works *v.* Lawrence, 3 Zab. 9; Hale *v.* Lawrence, Id. 590; 1 Id. 714. *Ante*, pp. 430, 431.

[8] County of Mobile *v.* Kimball, 102 U. S. 691.

[9] Garrison *v.* City of New York, 21 Wall. 196.

DIVISION V. — *Title by Judgment.*

The word "judgment" is used in this connection in a broad sense, and is intended to include all judicial determinations of legal proceedings whereby the title to property may pass. Judgments are commonly divided into two principal classes, *in personam* and *in rem*.

(1) *Judgments in personam.* These are the results of actions or other proceedings against persons who are expressly or tacitly included in the litigation. The word "judgment" is more properly applied to an action in a court of law, the result of a suit in equity being regularly called a "decree." It is, however, common in this country to call each a "judgment."

A judgment *in personam* is in its nature a judicial declaration that a certain thing is to be done by a party to an action, — as, for example, to pay a sum of money. This declaration does not work out its own result. It remains a declaration and nothing more, unless it is carried into effect by the executive branch of the government, through a writ called an "execution," addressed in the name of the people to the sheriff or other officer of the county, requiring him to carry the judgment into effect, either by selling the property of the debtor, or taking him personally into custody, or delivering specific property to the successful party, as the case may be. An execution is thus vitally connected with such a judgment. Lord COKE says an execution is the life of the law, and the fruit and life of every suit. In an equity case, instead of an execution there will be a requirement by the court that the prescribed act be done, — *e. g.*, that a deed be executed, or that the party refrain from doing a forbidden act. If this direction be disregarded, the party will be deemed guilty of a contempt of court, and treated accordingly.

It has been strongly claimed that there is one instance in which a judgment *in personam* changes the title to property. This is where personal property has been wrongfully converted to the use of another, and the owner brings an action and recovers its value. The argument is, that the property vests at once in the wrongdoer, and the former owner has only the judgment. The more correct view is, that the title does not pass by the mere force of the judgment, but only when that has been paid.[1]

[1] The difficulty in this case grows out of the election of remedies. When an owner's property is thus converted to the use of another, he has a choice of remedies; he may either sue for the value, or disregard the act of conversion, and claim his property. Having elected to sue for the value, and obtained judgment, he is estopped from bringing an independent action to recover the property itself.

There appears to be no exception to the rule that a judgment for a mere sum of money is but an incorporeal right, vesting no title to property other than the ownership of the judgment itself. Where the judgment, though against a person, is for the delivery of a specific thing, such as for specific coin in a box or a particular chattel, it vests a title, while the office of the execution in that case is to put the owner into possession of the thing to which he is already entitled by force of the judgment.

(2) *Judgments in rem.* Such a judgment is the result of an action against a particular thing. A chattel is, as it were, personified, and becomes a defendant in the action. This theory is resorted to, not only in cases of forfeiture, already referred to, but in case of ships and other property, as hostile or contraband in time of war, or in the enforcement of liens in civil cases in courts of admiralty, as for salvage, seamen's wages, collision, etc. A mode is provided whereby an owner, though not sued, is notified of the pendency of the action, with a corresponding liberty to make his defence. Notice is of the essence of the proceeding.

Still, it does not follow from this reasoning that the *ownership* passes. The most that can be said is, that *no other action* can be brought against the same party, or those in privity with him (Hatch *v.* Coddington, 32 Minn. 92), while the judgment remains outstanding. The title, accordingly, is unchanged. This would appear to be well shown by the exercise of the right of *recaption*, which would apparently still exist in favor of the owner, though he could not resort to a new proceeding *in court*. (As to "recaption" by the act of an owner without legal proceedings, see Blackstone's Com. Book III. chap. I. par. ii.) Drake *v.* Mitchell, 3 East, 251, 258. Brinsmead *v.* Harrison, L. R. 6 C. P. 584, is an important and well-reasoned case, maintaining that no title passes until *satisfaction* of the damages has been made (p. 587). The argument is, that the proceeding is not *in rem*, and that it has no specific effect upon the goods (p. 588). At most, there is but an assessment of their value. A case in Jenkins' Centuries (4th Cent., Case 88), is approved, as well as Cooper *v.* Shepherd, 3 C. B. 266, while a *dictum* of JERVIS, C. J., in Buckland *v.* Johnson, 15 C. B. 145, 157, is disapproved. This point has sometimes been considered in connection with the queation whether, if there be two or more persons jointly liable for a trespass to property or a conversion of it, and an action be brought against one and judgment obtained without satisfaction, it is a bar to an action against the others. There is, however, no necessary connection between the two questiona: one is a matter of the transfer of property valid as *to all persons*, strangers as well as parties to the action; the other is a question between the parties and those in privity with them. See remarks in Brinsmead *v.* Harrison (in Exch. Cham.), L. R. 7 C. P. 547.

On the last point the authorities are in a hopeless state of confusion. Cases taking the view that the former judgment, without satisfaction is a bar to the action against the joint wrongdoer are King *v.* Hoare, 13 M. & W. 494; Brinsmead *v.* Harrison, *supra*, both in C. P. and Exch. Cham.; Hunt *v.* Bates, 7 R. I. 217; Kenyon *v.* Woodruff, 33 Mich. 310. The opposite view is maintained in Lovejoy *v.* Murray, 3 Wall. 1; Livingston *v.* Bishop, 1 Johns. 290; Sheldon *v.* Kibbe, 3 Conn. 214; Elliott *v.* Hayden, 104 Mass. 180. It is, however, admitted in all the cases that on *satisfaction* of the judgment the title passes, on the principle that the payment of the amount awarded is equivalent to the payment of the price on a purchase. So a payment by one joint wrongdoer is available to another. Knapp *v.* Roche, 94 N. Y. 329, 334, and cases cited. Luce *v.* Dexter, 135 Mass. 23.

This may take place, on the one hand, by the seizure of the goods, and on the other, by posted placard or by advertisement. The seizure is in general supposed to be sufficient for the owner; and the advertisement, for others. The officer who makes the seizure should make return to the court of the fact, and of any required notice. Sometimes the mode of giving notice is regulated by rule of court, — as, for example, by the ninth rule in admiralty.[1]

Assuming that everything is regularly done, a judgment against the thing changes the *status*, condition, or ownership of the thing by its own force. It needs no execution to accomplish the result. This is a true case of *title* by judgment, and is said to bind all the world. There is now a new title, without reference to the former one, which is extinguished.[2]

DIVISION VI. — *Title from a Failing Debtor.*

The cases upon this subject may be arranged under two general heads, — one, where the debtor by his own act provides how his property shall be used in payment of his debts, or enters into an arrangement with one or more creditors for a compromise or composition; the other, where the matter is adjusted by a court or tribunal having jurisdiction over the subject.

SECTION I. *Voluntary Assignments and Composition Deeds.*

I. *Voluntary assignments.* — These may be divided into two kinds, — preferential and non-preferential.

Preferential assignments. — It is a rule of the common law that a debtor having several creditors may lawfully pay directly one or more to the exclusion of the others. The creditors passed over cannot complain, as there is no fraud or wrong in discharging a debt. This rule may be affected by insolvency or bankruptcy. In the absence of contravening legislation, it exists.

In a preferential assignment the debtor does not make direct payment to favorite creditors, but acts through the medium of a trustee, commonly called an assignee. The substance of such an assignment is, that the debtor conveys his estate to the assignee, directing him to convert it into money, and to pay the creditors according to a classification which he points out, paying the first class in full before the second class is reached, and so on from class to class until the fund is exhausted.

There will be two general points to be considered: (1) The validity of the assignment; (2) Its nature and effect.

[1] Waples on Proceedings *in Rem*, Book I. chap. 7.

[2] Williams *v.* Armroyd, 7 Cr. 423; Gelston *v.* Hoyt, 3 Wheat. 246, 318; Waples on Proceedings *in Rem*, Book I. chap. 15.

(1) There may be a valid objection to the assignment, on the ground that it is so drawn as to hinder, delay, and defraud creditors. Of course, such an objection would only be taken by such creditors as deemed their interests to be prejudiced by the assignment or its preferences. Modern judicial opinion does not favor such an assignment; at most, it only tolerates it. Accordingly, it is kept within strict and confined limits.

Such an assignment will be void as a mere matter of law for the following presumably fraudulent provisions: for allowing an assignee to sell on credit, or reserving the power to the debtor to interfere in the future with the distribution of his estate among creditors;[1] or by authorizing the assignee to compromise with the assignor's creditors;[2] or by requiring full releases from creditors paid in part.[3] An assignment void on such grounds affords no protection to the assignee against a sheriff who seeks to enforce by execution a judgment against the debtor. The debtor must devote his property absolutely and unconditionally to the payment of his debts.

Again, the assignment may be void for "extrinsic" reasons, — that is, not appearing on the face of the instrument. This will raise the question of the intent of the assignor, and requires evidence, and is a matter of fact rather than of law. If the assignment be free from fraud, it will not be void because it incidentally and inevitably hinders and delays creditors.[4]

In a number of the States these transactions are not upheld, on account of their assumed repugnance to a rule of fair and proportional distribution of the assets of an insolvent debtor among his creditors. It should be added that when a bankrupt law of the United States is in force, voluntary assignments under State laws must give way.[5]

In the State of New York the mode of making such an assignment is regulated by statute.[6]

[1] Kerchiea *v.* Schlosa, 49 How. Pr. 284.

[2] McConnell *v.* Sherwood, 84 N. Y. 522.

[3] Wakeman *v.* Grover, 4 Paige, 23; (on appeal) Grover *v.* Wakeman, 11 Wend. 187.

[4] Hanselt *v.* Vilmar, 76 N. Y. 630.

[5] U. S. Rev. St. § 5128, made void all such preferential assignments made within four months before the filing of a petition in bankruptcy by or against an insolvent. This law having been repealed, the right to make assignments revived.

[6] Thia legialation regulates a *general* assignment, and does not include a mere assignment of a fund or of particular specified asseta. Tiemeyer *v.* Turnquist, 85 N. Y. 516. Nor does it extend to assignments made by non-residents according to the law of their domicile, even though there may be assets in New York. The details are to be found in the laws of 1877, ch. 466, amended by the Laws of 1878, ch. 318; 1884, ch. 328; 1885, ch. 380 and 464; 1886, ch. 283; 1888, ch. 294.

An important law, pasaed in 1887, limits the right to make preferential general assignments (other than for wages or salaries of employees) to the amount of one third

An assignment under State laws is subject to the laws of the United States, giving a preference or priority to that government in respect to debts due to it.[1] In such a case, an assignment not providing for the payment of Federal debts would be subverted

in value of the assigned estate. If one third is insufficient to pay the preferred creditors, that amount must be divided among them *pro rata*. Laws of 1887, ch. 503, referring to ch. 328, Laws of 1884, and ch. 283, Laws of 1886. (*a*)

For the provisions of the law of New York relating to conveyances made with intent to defraud creditors, see Rev. Stats. Part II. Ch. VII. Tit. I. and III. The right of an executor, assignee, or other trustee, to attack a conveyance, as being in fraud of the estate he represents, is regulated by ch. 487, Laws of 1889, amending ch. 314, Laws of 1858. (*b*)

[1] Laws of 1797, ch. 20; 1799, ch. 22; U. S. Rev. St. § 3466.

(*a*) The general assignment act of New York does not apply to a specific assignment for the benefit of one or a portion of the debtor's creditors. Royer Wheel Co. *v.* Fielding, 101 N. Y. 504. The debtor may, also, notwithstanding the statute of 1887, give a preference by a confession or offer of judgment. Such preferences, if made without fraud, and not a part of a scheme for a general assignment, are upheld to any extent, since the statute only applies to general assignments. Central Natl. Bank *v.* Seligman, 138 N. Y. 435.

If in contemplation of an assignment, and as a part of the same transaction, a special transfer is made, or a judgment is confessed, which results in a preference forbidden by the statute of 1887, the transfer or judgment may be set aside, and the preferred creditor be compelled to account for the unauthorized excess. Berger *v.* Varrelmann, 127 N. Y. 281.

The assignment, in the absence of fraud, is allowed to stand, the statute merely operating to reduce the amount secured to the preferred creditor to the limit allowed. Central Natl. Bank *v.* Seligman, *supra*. The preference will, however, not be disturbed if the creditor, when accepting the security, had no knowledge that the debtor intended to make an assignment. Manning *v.* Beck, 129 N. Y. 1.

Many other States have passed laws regulating or prohibiting preferences in general assignments. In construing these statutes, the rule has become well established that it is not necessary that the preference be found in the deed of assignment itself in order to offend the statute. It may be secured by a separate instrument or by a confession of judgment, and still be held void as being in reality a part of the assignment.

There are, accordingly, many decisions to the effect that where the debtor, in contemplation of making an assignment, and for the purpose of giving a preference not allowed by statute, transfers separately a portion of his estate and then assigns the residue, the preference will be void. Berry *v.* Cutts, 42 Me. 445; Van Patten *v.* Burr, 52 Ia. 518; Holt *v.* Bancroft, 30 Ala. 193; Hardware Co. *v.* Implement Co., 47 Kan. 423; Watkins National Bank *v.* Sands, Id. 591; Backhaus *v.* Sleeper, 66 Wis. 68; Preston *v.* Spaulding, 120 Ill. 208; Home National Bank *v.* Sanchez, 131 Ill. 330. Other authorities regard the intent of the debtor as immaterial, and uphold preferences made outside of and separate from the assignment, if, when they were made, the debtor still had dominion over his property, even though a contemplated assignment immediately follow. Lake Shore Banking Co. *v.* Fuller, 110 Pa. St. 156; Carnahan *v.* Schwab, 127 Ind. 507; The John Shillito Co. *v.* McConnell, 130 Ind. 41; Cross *v.* Carstens, 49 Ohio St. 548. The tendency of the later decisions is to give a strict construction to statutes forbidding preferences, and where fraud does not exist, to uphold preferences. The rule asserted in White *v.* Cotzhausen, 129 U. S. 329, that statutes against preferences should be liberally construed, with a view to securing equality of rights among all the creditors, has not met with favor. Farwell *v.* Nillson, 133 Ill. 45; Moore *v.* Meyer, 47 Fed. R. 99.

(*b*) Spelman *v.* Freedman, 130 N. Y. 421.

to the extent necessary to provide for the payment in full of debts due the United States.

(2) The *effect* of a voluntary assignment of this kind is to create a trust. The assignee is a trustee, and the creditors are beneficiaries or *cestuis que trustent*. Like other trustees, the assignee is held liable to an accounting in a court of equity. He must use due diligence, and is liable for the absence of that care which prudent men use in their own affairs. He is not permitted to secure any benefit to himself from the management of the estate. The details may be pursued in works upon equity jurisprudence. There are also statutory rules which should be consulted.[1]

Non-preferential assignments. — Such an assignment may be made with a view of dividing the debtor's estate among creditors ratably. The general rules of the law of trusts would be applicable also to this case. Such an assignment is in accordance with the general principles of insolvent and bankrupt laws, and would be likely to be upheld in States opposed to the methods of preferential assignments.

II. *Composition deeds.* — This is an instrument (commonly under seal) signed by creditors, whereby they mutually agree to accept from a debtor less than their just demands, — as, for example, to take a percentage on their claims.[2]

It is necessary to distinguish between such a concession by a single creditor, simply, and one by two or more. If the concession be by one, there must be some consideration as between the debtor or creditor, or the promise of the latter will not be binding. It is quite plain that if a creditor should simply promise a debtor that he would forego his entire claim, there would be a mere naked promise, which would not be legally binding. A small consideration would suffice. The same rule is applicable to a reduction of the amount of the claim. The consideration may be payment before the debt is due, or any engagement by a third person, or an item of property, no matter how small in value.[3] It must, however, be something which the debtor is not already bound to pay. There is no consideration by reason of his partial performance of an existing obligation at the time due for a promise to relieve him from the performance of the residue.[4]

[1] See Laws of New York already referred to, *ante*, pp. 563, 564.

[2] It seems that an oral composition may be made, though it would be injudicious. Fellows *v.* Stevens, 24 Wend. 294, 297, 298, and cases cited; Chemical Natl. Bank of New York *v.* Kohner, 85 N. Y. 189.

[3] Sir GEORGE JESSEL, in one case, suggested a "tomtit." Couldery *v.* Bartrum, L. R. 19 Ch. D. 394.

[4] This point was very thoroughly considered in Foakes *v.* Beer, L. R. 9 App. Cas. 605; affirming Beer *v.* Foakes, L. R. 11 Q. B. D. 221. This last case reversed the decision in 52 L. J. (Q. B. D.) 426.

There is a way to avoid the difficulty. This is to release the debtor by an instrument under seal, since, by a technical rule of the common law, a seal is conclusive evidence of consideration.

Recurring to the case of two or more creditors, who mutually agree to remit a portion of their respective claims, and to accept a percentage, it may be maintained that their mutual promises form an agreement of which the debtor may avail himself. A question frequently arises as to the case where one of the creditors, appearing to accept a specified percentage, has a secret agreement with the debtor for the payment of an additional sum. This is deemed to be a fraud on the other creditors.[1] A note given for such a sum is void.[2] It is a further rule that if the debtor has paid such sum as a condition of obtaining his creditor's signature, he is under a species of duress, and may recover back the money paid.[3] (*a*)

In general, the creditors may impose such conditions upon the debtor in giving their assent as they see fit. If the conditions are not complied with by the debtor, the original cause of action revives.[4] This rule applies where the stipulated *percentage* is not paid.[5] (*b*) If the composition is properly made and faithfully executed, the court, in carrying it into effect, will give it a fair and liberal construction. (*c*)

The decision of the House of Lords in L. R. 9 App. Cas. is particularly instructive. The earliest case is Pinnel's Case, 5 Rep. 117, and followed by Cumber *v.* Wane, 1 Sm. Lead. Cases (8th ed.), *357. These decisions are fully approved in this country. Thus, it is held in New York that a debt cannot be discharged by payment of a part only without a release. Van Valkenburgh *v.* Lenox Fire Ins. Co., 51 N. Y. 465. The rule perhaps applies to a note of the debtor given for a part of the debt. Jagger Iron Co. *v.* Walker, 76 N. Y. 521. This case holds that such a note is simply evidence of the debt, and its operation is only to extend the time of payment. The present English rule is that a negotiable note of the debtor for a part of the debt is a sufficient consideration for a promise to discharge the whole claim. Sibree *v.* Tripp, 15 M. & W. 23; Goddard *v.* O'Brien, L. R. 9 Q. B. D. 37.

[1] Van Bokkelen *v.* Taylor, 62 N. Y. 105.

[2] Hagaman *v.* Burr, 41 N. Y. Super. Ct. 423.

[3] *In re* Lenzberg's Policy, L. R. 7 Ch. D. 650; Atkinson *v.* Denby, 6 H. & N. 778; s. c. 7 Id. 934. This last case is questioned by the Court of Appeals of New York in Solinger *v.* Earle, 82 N. Y. 393, as being unsound in principle.

[4] Durgin *v.* Ireland, 14 N. Y. 322.

[5] Penniman *v.* Elliott, 27 Barb. 315.

(*a*) Solinger *v.* Earle, cited in the note, is followed, and the right of the debtor to recover the amount paid, denied in Smith *v.* Zeigler, 44 N. Y. St. R. 51.

(*b*) Zoebisch *v.* Von Minden, 120 N. Y. 406.

(*c*) A debtor may also in New York procure a discharge from his debts by proceeding under a statute called the "Two Thirds Act." Creditors holding claims which amount to not less than two-thirds of all the debts owing by the debtor to creditors residing in the United States must consent to the discharge. Code of Civ. Pro., §§ 2149–2187.

SECTION II. *Bankruptcy and Insolvency Proceedings.* — The term "bankrupt" first appears in the law in the reign of Henry VIII. (A. D. 1542–1543).[1] It then appeared only in the title to the statute, — "An Act against such persons as do make bankrupts." The preamble to this act is very broad and comprehensive. It is plainly directed against fraudulent debtors in general, who, "craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience." This language points to a general abuse of the credit system by unscrupulous debtors. The remedy adopted was, on complaint in writing to the Lord Chancellor and other high officers named in the act, to have the property of the debtor sold, and the creditors paid ratably. Other sections provide for an examination of third persons indebted to them or having their estates in possession, and against fictitious claims, and for fines and imprisonment of wrongdoers. The proceedings do not result in a discharge of the debtor, but the creditor may still collect what may remain due after obtaining his percentage under the act.

A few years later (1570) a different policy was adopted.[2] The persons now to be declared bankrupt are *any merchant* or other person using or exercising the trade of merchandise by buying and selling, etc. The acts of a fraudulent nature are now specified, five in number, among them, departing from the country, or keeping his house with intent to defraud his creditors. Commissioners in bankruptcy are to be appointed to take charge of the property, and to provide for its application to the claims of creditors.

This act appears to be the germ of modern bankrupt laws. It was extended, and its scope enlarged, by enactments in the reign of James I.[3] By the last of these statutes, the wife of the bankrupt was allowed to be examined by the commissioners. There was much further legislation upon this topic down to 1732, not long before the American Revolution, when a comprehensive and improved statute was adopted,[4] from which Sir WILLIAM BLACKSTONE draws much of the material used in his chapter on this subject.[5]

[1] Stat. 34 & 35 Hen. VIII. c. 4.
[2] 13 Eliz. c. 7.
[3] 1 Jac. I. c. 15; 21 Id. c. 19 (1623).
[4] 5 Geo. II. c. 30.
[5] 2 Bl. Com., Tit. Bankruptcy, Book II. Ch. 31.

In all this legislation, bankruptcy was treated as an involuntary proceeding against debtors who were guilty of fraud or injustice toward creditors. Again, not all fraudulent debtors were subject to it. A debtor must hold in substance the character of trader, in order to be within the act. This rule continued in England until the year 1861. Other persons in debt could only obtain relief under the "Insolvent Debtors Acts," commencing in the reign of William and Mary.[1] Such a law as this did not discharge a debtor from his debts, but, on the surrender of his estate to assignees, relieved him from imprisonment.[2]

It is plain from this general course of legislation, that down to the time of the formation of the Federal Constitution, "bankruptcy" and "insolvency" were distinguished from each other. Bankruptcy was applied to a particular class of debtors, and was involuntary. Insolvency was applied to all other failing debtors, and was a voluntary act on the debtor's part.

These facts shed light on the clause in the United States Constitution conferring upon Congress power to pass uniform laws on the subject of bankruptcy.[3] The word "bankruptcy" fairly means, as here used, *all modes* of dealing with an insolvent debtor's estate, so as to appropriate it to the payment of his debts, and cannot be confined to its imperfect or fluctuating exercise by the English Parliament. It may, accordingly, include voluntary as well as involuntary proceedings.[4]

The power vested in Congress does not prevent the enactment of insolvent laws by the respective States. The only question of difficulty is, the effect of a conflict between Federal and State legislation. As the power of Congress over the subject is both plenary and uniform, the State insolvent laws must give way in such a case; their operation will be suspended.[5] On the repeal of a United States bankrupt law, however, a State law revives.

There have been three bankrupt laws passed by Congress since the origin of the government. They were enacted respectively in 1800, 1841, and 1867.[6] The statute of 1800 was repealed Dec.

[1] 5 & 6 Wm. & M. c. 8 (1694).

[2] 2 Geo. II. c. 20; 2 Id. c. 22; 10 Id. c. 26; 21 Id. c. 31, 33. An extended act, with carefully drawn provisions, is 28 Geo. II. c. 13 (1755). A "poor debtor's oath" is sanctioned in this act. See also 5 Geo. III. c. 41; 12 Id. c. 23; 18 Id. c. 52. In this last act there is legislation concerning bankrupts who have not received their certificates of discharge.

[3] Art. I. § 8, cl. 4.

[4] Silverman's Case, 2 Abb. U. S. 243, s. c. 1 Sawy. 410.

[5] *In re* Reynolds, 9 Nat. Bankr. Reg. 50; Sturges *v.* Crowninshield, 4 Wheat. 122, 196; *Ex parte* Eames, 2 Story, 322; Kunzler *v.* Kohaus, 5 Hill, 317; Sackett *v.* Andross, Id. 327; Shears *v.* Solhinger, 10 Abb. Pr. N. S. 287.

[6] Law of April 4, 1800; 2 U. S. Stat. L. 19; Law of Aug. 19, 1841; 5 Id. 440; Law of March 2, 1867; 14 Id. 517; (U. S. Rev. St. (1878) Tit. 61).

19, 1803, and that of 1841 on March 3, 1843. The law of 1867 was enacted on March 2, 1867; amended in important respects June 22, 1874, and in its turn repealed, except as to pending cases, June 7, 1878.[1]

Notwithstanding its repeal, a brief discussion of the last-named statute is thought necessary. This is especially so on account of its influence on the law of the time. Moreover, the decisions made under it will doubtless be resorted to in giving effect to any future bankrupt law passed by Congress.

(1) *The court having direct jurisdiction, and its officers.* — The tribunal before which bankruptcy proceedings were directly brought was the District Court. The United States is divided into convenient districts, in each of which a distinct court is established, held by a single judge. His decisions upon contested questions may be reviewed on appeal to the Circuit Court. Much of the bankrupt business of a non-contested nature was transacted by a "register," one such officer being appointed in each Congressional district. His duties were prescribed by the statute.[2]

The Circuit Court had concurrent jurisdiction over controversies arising between assignees in bankruptcy and other persons claiming an interest adverse to the bankrupt,[3] as well as a general superintendence over all cases and questions arising in the District Court, when sitting as a court of bankruptcy. An appeal did not lie to the Supreme Court, unless the matter in dispute exceeded $2,000.[4]

(2) *Kinds of Bankruptcy.* — *Voluntary Bankruptcy.* — This, in substance, was a proceeding originating with a debtor seeking a discharge from his debts. It was necessary that he should reside within the jurisdiction of the United States, and owe debts exceeding in amount $300. It was instituted by a petition addressed to the judge of the district where the petitioner had resided or carried on business for six months next preceding his application, setting forth certain facts specified in the statute. The act of filing such a petition was deemed an act of bankruptcy, and the statute provided that thereupon the petitioner should be adjudged a bankrupt.[5]

The judge or register thereupon issued a warrant in bankruptcy to the marshal of the district, directing him, as messenger of the court, to publish notices in newspapers stated in the warrant, and to serve written or printed notices on the creditors named in the schedule annexed to the petition or otherwise ascertained.[6]

[1] 20 U. S. Stat. L. 99.
[2] U. S. Rev. St. § 4998.
[3] Id. § 4979.
[4] Id. § 4989.
[5] Id. §§ 5014–5017.
[6] Id. § 5019.

The court obtained full jurisdiction over the subject by the petition, adjudication, and warrant.[1] The proceeding was substantially an action commencing with the petition and terminating with the judgment. The subsequent proceedings to ascertain and distribute the assets were mere consequents upon the action.[2] It was really a *case at law*, not reviewable until final judgment,[3] and, after judgment, beyond the power of Congress to set aside. Where, however, the want of jurisdiction appeared on the face of the petition, no consent of the parties could confer it.[4]

Involuntary bankruptcy. — This form of bankruptcy was, for the most part, based upon wrongful acts by the debtor, and resembled the bankruptcy of the early English statutes. There were several acts which were styled acts of bankruptcy. In substance they were as follows: Departing or remaining absent from the State of the debtor's residence with intent to defraud creditors, or remaining concealed with like purpose, or concealing or removing his property, or making an assignment or transfer of his estate, or making a preferential assignment to one or more of his creditors, or acts of a similar nature.[5] There was a single class of cases involving no wrongful element. This was where a banker, or other merchant or trader, had suspended payment of his commercial paper, and had not resumed it within fourteen days.

The proceedings were commenced in this case by petition of creditors owning claims aggregating $250. The debtor then had an opportunity to show cause why he should not be declared a bankrupt. At the appointed time the question of bankruptcy could, upon the debtor's demand, be passed upon by a jury. If the charges were not proved, the case was dismissed, but if established, he was adjudicated a bankrupt, and a warrant forthwith issued to take possession of his estate. In the event that the debtor failed to appear, judgment went against him to the same effect.[6] Time was given him to prepare a schedule and inventory in the form and verified as in the case of a petitioning debtor. Further proceedings were substantially the same, both in voluntary and involuntary bankruptcy.[7]

(3) *Proceeding to realize the estate. — Duties of the assignee. — The adjustment of claims and the distribution of assets among the creditors.* — By the common law, any creditor had the power, by the exercise of superior diligence, to collect his claim without

[1] *Re* Archenbrown, 11 Nat. Bankr. Reg. 149.

[2] *In re* Oregon Bulletin Printing, &c. Co., 3 Sawy. 529.

[3] Id., and *In re* Comstock, Id. 128

[4] *In re* Hopkins *v.* Carpenter, 18 Nat. Bankr. Reg., 339.

[5] U. S. Rev. St. § 5021.

[6] Id. §§ 5023–5028.

[7] Id. § 5029.

reference to the debtor's obligations to other creditors. By the bankrupt law, another principle is introduced, derived from a theory of equity jurisprudence, — the race for an advantage is not allowed, and the creditors (excepting those having liens) are placed upon a par, and paid ratably. This rule appears in the very earliest bankrupt law,[1] and has been continued down to our time. A few exceptions are grafted upon this rule, based upon grounds of public policy.

To accomplish the end in view, a trustee or "assignee" is resorted to, whose duty it is to receive the property, convert it into money, proceed with prudence and fidelity in the management of his trust; make partial payments (called "dividends") as sums of money are realized, to the creditors, and in the end account to the bankruptcy court for his acts as trustee.

Bankruptcy acts like a forfeiture, and vests the property of the debtor in the court as the instrument of the State. Different modes have been adopted from time to time to vest it in the assignee. Under the last bankrupt law, the register was authorized to convey it by deed to the assignee. This conveyance by a fiction of law relates back to the commencement of the proceedings, and dissolves any attachments made within four months preceding that time.[2] This conveyance is made subject to certain specified exemptions to be hereafter considered.[3] The items of property that passed to the assignee are set forth in § 5046 of the Revised Statutes. Briefly, they include corporeal and incorporeal property, and rights of action upon contract or for injuries to property or estate, but not mere claims for personal wrongs, such as assault and battery or false imprisonment.

The language of § 5044 indicates that the conveyance carries with it all *such* property as the debtor had at the *commencement* of the proceeding. Accordingly, it has no effect upon property subsequently acquired, *i. e.*, between the commencement of the proceedings and the discharge. This would belong to the debtor.

The duties of the assignee may for the most part be ascertained by resort to general rules of law governing the action of trustees, the general principle being that he must use the same care and diligence that prudent men use in the management of their own affairs, modified by any special rules found in the statute.[4]

In settling claims, the assignee was obliged to confine himself to such as existed *at the commencement of the proceedings*. No others could be allowed, nor would the debtor be discharged from

[1] 34 & 35 Hen. VIII. c. 4.
[2] U. S. Rev. St. § 5044.
[3] Id. 5045.
[4] See Id. §§ 5047–5066.

any arising thereafter. Of those then existing the statute enumerated five classes.[1] Beyond those none could be proved.[2]

Claims against the bankrupt as trustee and for mere personal rights of action were not within the purview of the statute. They remained, therefore, unaffected by the proceedings, though in the latter case, if the claim had been reduced to a judgment, it might be treated as a debt. Claims sounding in fraud were not barred, even though reduced to judgment.[3]

There was no part of the late bankrupt law which was of more doubtful policy than that which related to exemptions. The Constitution requires Congress to pass *uniform* laws on the subject of bankruptcy. As a matter of fact, it was found that there was at the time a great difference in existing State legislation as to exempting property from seizure by legal process for the payment of debts. Some of the States inclined in favor of the creditor, and allowed few and meagre exemptions. Others were liberal to the debtor, and allowed large and perhaps unreasonable exemptions. It was insisted on behalf of creditors, that the law was not "uniform" unless it established throughout the country one rule for all creditors. Still, the bankrupt law adapted itself to the existing condition of things in the States, and not only provided for a uniform exemption, say to an amount not exceeding five hundred dollars, but in addition, such exemption as existed by State laws in the year 1871, in the State where the bankrupt was domiciled at the commencement of the proceeding.[4] There has been considerable difference of opinion in the courts as to the constitutionality of this branch of the law. It has been held that, in view of the doubts on the subject, the court would not be justified in disregarding it.[5]

Debts having been proved and exemptions allowed, the residue of the property was to be distributed on the principle of proportion, with the exception of certain preferred claims, which must first be paid in full. These were: (1) Fees and expenses of suits and of the proceedings in bankruptcy. (2) Debts due the United States, including taxes and assessments. (3) Debts due the State in which the proceedings were pending, including taxes and assessments made under its laws. (4) Wages earned within six months before publication of proceedings, of operatives and servants, to an amount not exceeding $50. (5) Debts due to any

[1] See U. S. Rev. St. §§ 5067–5071.

[2] § 5072.

[3] § 5117; Young *v.* Grau, 14 R. I. 340. The nature of the fraud or trust intended is considered in Hennequin *v.* Clews, 111 U. S. 676, and Palmer *v.* Hussey, 119 U. S. 96.

[4] § 5045.

[5] Darling *v.* Berry, 4 McCrary, C. Ct. 470.

persons who by the laws of the United States were entitled to priority.[1] There were detailed provisions for proving debts, contesting them, ascertaining the debtor's property, for holding meetings of the creditors, and making dividends.[2]

When a creditor and the bankrupt had mutual and provable claims, one was set off against the other, dollar for dollar, and the balance only regarded.[3] The debtor must have acquired his claim before the filing of his petition.

The bankrupt might be a sole trader and also a member of a firm. He also might be a member of two or more firms, having in each case a distinct business, and distinct estates to be wound up in bankruptcy. In such a case the proof against each estate was required to be made distinctly and separately, without reference to the fact that the firms were composed in whole or in part of the same individuals. Each estate was thus treated as a matter by itself, with separate ownership and separate liabilities.[4]

It was the object of the law to protect pledges and mortgages, and at the same time to recognize the claims of the creditor for any difference, in case of deficiency, between the value of the property and the amount of the debt. The value might be ascertained by agreement or by sale, under the direction of the court. If the value exceeded the mortgage, the assignee was entitled to the excess. The creditor was not allowed to prove his claim for a deficiency unless he complied with the rules of law as to the mode of ascertaining the value of the property.[5]

If three fourths in value of the creditors resolved at a proper meeting that it was for the interest of the general body of the creditors that the estate should be settled by trustees under the direction of a committee of the creditors, that course might be sanctioned by the court, and the trustees substituted for the assignee. The proceedings were substantially the same as if the assignee had continued to act, and the discharge of the bankrupt was equally binding.[6]

(4) *Proceedings peculiar to partnerships and corporations.* — Independent of any bankrupt law, there is a special rule prevailing in equity, in case of the insolvency of a partnership, that if there be both partnership assets and separate property of the individual partners, the partnership estate is to be first applied to the discharge of the partnership liabilities. This grew out of the theory of a trust, and that each of the partners had an equitable lien upon the assets for the sake of bringing about an equality of

[1] U. S. Rev. St. § 5101.
[2] §§ 5076–5100.
[3] § 5073.
[4] § 5074.
[5] § 5075.
[6] § 5103.

burdens. There was a later graft upon this rule, with the same general desire for equality, that the separate creditors should have a preferential claim upon the separate assets. This general doctrine was followed in the bankrupt law.[1] Where there are no partnership assets, no such distinction is made. It should be added, that, after these preferences have been made, any surplus from either fund is to be appropriated to the payment of the non-preferred class of creditors.

The provisions of the bankrupt law were made applicable to corporations of a moneyed or business character, with such modifications as their peculiar circumstances made necessary. Such a corporation could go into voluntary bankruptcy by a vote of a majority of its corporators at a legal meeting called for the purpose.[2] A law passed in 1873 and embodied in the Revised Statutes[3] provided for the validity of orders made for winding up corporations of this kind under State laws, notwithstanding bankruptcy proceedings may have been commenced.

(5) *The discharge.* — One of the main objects of a bankrupt law was to relieve honest debtors, who had been unfortunate, from their debts. This, beyond doubt, has been one of the principal motives for enacting bankrupt laws as they have existed in this country. In this there is assumed to be an element of public policy, as the debtor class of this sort frequently includes many of the most enterprising and energetic business men of the country.

The discharge only operated upon claims that were provable under the law. If capable of being proved, they were discharged, whether proved or not, even if omitted from the schedule, unless the omission was fraudulent. The proper form of discharge is prescribed in the act.[4]

The assets in the later administration of the law must have been equal to fifty per cent. of the claims, before a discharge could be had, unless the assent in writing of a majority of the creditors, both in number and value, was filed with the court.[5] The discharge does not wholly obliterate the claim, as though it had never existed. The debtor still remains under a species of "moral obligation." This is a technical expression, and refers to a class of instances of which a discharge in bankruptcy is one, where there once has been, or would have been according to general rules, a legal obligation had there not been a legal maxim or a statutory provision of an *exceptional nature*. Such a "moral

[1] U. S. Rev. St. § 5121.
[2] § 5122.
[3] § 5123.
[4] § 5115. The subject of discharge is found in §§ 5104–5120.
[5] § 5112. This rule was applied to proceedings commenced after Jan. 1, 1869.

obligation" is a good basis for an express promise. If the promise be absolute, the bankrupt is clearly liable; if it be conditional, such as to pay when he is able, the creditor must prove that the condition has been fulfilled. This subject more properly belongs to the law of contracts, and it is deemed sufficient here merely to state the rule.

If a debtor is sued upon a claim from which he has been discharged in bankruptcy, he should set forth his discharge in his defence. Otherwise, the case might go against him. It is analogous to the case of payment or a release, which must be set up by a debtor in avoidance of the debt.[1]

(6) *Fraud as an element in bankruptcy proceedings.* — This was the basis of the early bankrupt law, and even of the modern bankrupt law. Fraud may appear in a variety of forms, — either in contracting the debt, or in concealing or transferring property, or in setting forth fictitious claims, and in other like ways. It may also appear in the course of the proceedings, and be practically a fraud on the court. Such fraud might lead to a variety of evil consequences. It might be construed to be an act of bankruptcy; again, it might vitiate the act done; or it might be a ground for vacating or amending the discharge, or subject the wrongdoer to imprisonment as a criminal. Specific sections of the bankrupt law provided for these various classes of cases.

(7) *The mutual relation of the State and Federal courts in cases of bankruptcy.* — A bankrupt law is, by force of the United States Constitution, binding upon both the State and national tribunals. It is the supreme law of the land. Action of the State courts in administering the State collection laws must be in subordination to the policy of the bankrupt law. At the same time, the State collection laws are in full force and vigor for most purposes. Those who are not bankrupt are subjected to their rules. Even persons who may become bankrupt will be amenable to these laws, except so far as the bankrupt laws may affect them. It is a case of the necessary modification of State law, and not of subversion.[2]

With these propositions in mind, the relations of the courts may be stated in the form of rules.

Rule 1. The District Court has exclusive jurisdiction (subject to appeal to a higher Federal court) over the direct administration of the bankrupt's estate. It is the only court that can take the accounts of the estate, order its distribution among creditors, and grant the bankrupt his discharge.

Rule 2. Strangers to the proceeding may have rights to the

[1] Dimock *v.* Revere Copper Co., 117 U. S. 559, 565.

[2] Eyster *v.* Gaff, 91 U S. 521.

estate which they can enforce in the ordinary tribunals. If such a court has jurisdiction of a suit, it will not necessarily be deprived of it by mere force of an adjudication in bankruptcy, though the bankruptcy court might arrest or control it for the purposes of justice.[1]

Rule 3. A sheriff of a State court must obey an injunction of the District Court. At the same time, property in his possession by virtue of an execution before the commencement of bankruptcy proceedings, should not be taken away in a summary proceeding. The judgment in the State court should be first set aside.[2]

Rule 4. The court will protect its assignee from having property taken away by a State court in a proceeding to which he is not a party.

Rule 5. The bankruptcy court may control a proceeding by a creditor to foreclose a mortgage against the bankrupt's estate. Leave to foreclose should be obtained from the District Court, setting forth the facts. Still, prosecution of a foreclosure suit in a State court is not of itself a contempt of the bankruptcy court, and is valid.[3] The object of this rule is to protect the interest of the assignee, and he should not be permitted to stay a foreclosure without good reason.

Rule 6. The District Court has power in a variety of cases to restrain by injunction proceedings in State courts. Instances are: to prevent a creditor from liquidating and enforcing a lien; or to prevent the sale of property by virtue of an execution issuing out of a State court; or, in a proper case, to prevent an attaching creditor from proceeding against the goods attached; or to restrain the prosecution by a depositor against an insolvent bank; or to restrain persons from collecting rents of real estate in which the bankrupt has an interest.

Rule 7. A distinction must be carefully taken between cases where jurisdiction has been exercised before the bankrupt proceedings were initiated, and those where the bankrupt proceedings preceded State action. Thus, a bankrupt court cannot correct or annul judgments rendered in a State court,[4] nor affect alimony in a divorce suit,[5] nor prevent the prosecution of an action already commenced,[6] nor, as we have seen, take property from a sheriff holding it under State execution.[7]

[1] *In re* Davis, 1 Sawy. 260.
[2] *Infra*, Rule 7.
[3] *In re* Moller, 14 Blatch. 207.
[4] *In re* Dunn, 11 Nat. Bankr. Reg. 270.
[5] *In re* Garrett, 11 Nat. Bankr. Reg. 493.
[6] Hewett *v.* Norton, 13 Nat. Bankr. Reg. 276.
[7] Townsend *v.* Leonard, 3 Dill. 370.

The action of the bankruptcy court does not disturb liens created by contract prior to the act of bankruptcy and in good faith. It only affects the mode of enforcing them. The lien is to be recognized.[1] While the mortgagor is still under a relation of trust to the mortgagee, the bankruptcy court has a broad and extensive authority to work out the trust in accordance with the intention of the law.[2] If a receiver appointed by a State court under regular proceedings be in possession, the proceedings in bankruptcy will not be a ground for dispossessing him.[3] And if he be in possession in a foreclosure case, the only recourse for the assignee is to redeem the mortgage.[4] Where a corporation is dissolved under a State law, and afterwards becomes bankrupt, the proceeds up to that time in the State court are saved.[5]

Insolvency under State laws. — The original distinction between bankruptcy and insolvency, as it existed in England, has practically disappeared in the United States. A State may pass what in substance is a bankrupt law; that is, a law discharging a debtor from the payment of his debts, as well as one relieving him simply from imprisonment. There are, however, practical limitations to the power of the States growing out of restrictions in the United States Constitution. The full statement of these properly belongs to a treatise on constitutional law. They will be noticed here in a brief and summary manner.

(1) A State is restricted in this respect by the clause in the United States Constitution to the effect that "no State shall pass any law impairing the obligation of contracts."[6] This prohibition prevents a State from making any material change in the effect of a contract by a subsequent law, and, of course, from discharging an obligation on any grounds that did not exist when the contract was made. This rule does not hinder a prior State law from affecting a subsequent contract, since in that case the law is assumed to enter into the contract.

(2) Again, even though the law comply with the rule as above stated, yet it cannot affect contracts made between a citizen or a resident of the State, and a citizen or resident of another State, unless the foreign creditor chooses to submit to the jurisdiction of the court and allow his claim to be adjudicated upon.[7] It has been strongly urged by the Massachusetts court[8] that the rule would be

[1] *In re* Burt and Towne, 12 Blatch. 252.
[2] Lockett *v.* Hill, 1 Woods, 552.
[3] Bradley *v.* Healey, 1 Holmes, 451.
[4] Davis *v.* Railroad Co., 1 Woods, 661.
[5] *In re* Nat. Life Ins. Co., 6 Biss. 35.
[6] Art. 1., § 10, cl. 1.
[7] Baldwin *v.* Hale, 1 Wall. 223; Ogden *v.* Saunders, 12 Wheat. 213, 358; Boyle *v.* Zacharie, 6 Pet. 348.
[8] Scribner *v.* Fisher, 2 Gray, 43; but see Kelley *v.* Drury, 9 Allen, 27, where the doctrine of Baldwin *v.* Hale is adopted by the Mass. court.

different if the contract were by stipulation of the parties *to be performed* in the State where the insolvent proceedings were pending. This view has not met with general recognition, and is discarded in other States,[1] and has been repudiated by the Supreme Court of the United States.[2] (*a*) The rule may be stated in a more general form. No State laws can discharge the obligations of any contracts made in the State, except those made between citizens of that State.[3]

Where an insolvent law simply acts on the remedies to be used in enforcing the contract, it may be retroactive, but this principle must not be pressed so far as to deprive the creditor of all efficient remedy. An instance is that of abolishing imprisonment for debt. If there be still remaining the ordinary remedies for collecting debts, the abolition will be upheld.[4] The distinction between a right and a remedy assumes much importance in this branch of constitutional law.

The rights of foreign assignees in bankruptcy or insolvency. — When an assignee is appointed by a court of bankruptcy or insolvency in England, or perhaps in another State of the Union than the State where the assets are, the question arises how far will the courts of the latter State permit the foreign assignee to have control of these assets for the purposes of the bankruptcy. This is really a question of the so-called "comity of nations." There is no positive obligation, which can be enforced, imposed upon a nation to recognize the decrees or judgments of courts rendered elsewhere. There is, however, a practice or course of proceeding of that kind which prevails, unless there are countervailing reasons to the contrary, or some prohibitory statute.

In applying this general principle to the particular instance now in hand, there has been great vacillation of judicial opinion. Some courts have reached the conclusion that the assignment under the bankrupt law of a particular State should pass a title to the property everywhere. Others have adopted the view that, while the foreign assignment should, as a rule, pass the title elsewhere, yet that this doctrine should be subordinate to the rights of domestic creditors. Others take a more limited view still, and deem the foreign assignment to have no extra-territorial effect. It is a local, domestic matter, and nothing more.

[1] Donnelly *v.* Corbett, 7 N. Y. 500; Poe *v.* Duck, 5 Md. 1; Pugh *v.* Bussel, 2 Blackf. (Ind.) 394.

[2] Baldwin *v.* Bank of Newbury, 1 Wall. 234; Gilman *v.* Lockwood, 4 Id. 409.

[3] Baldwin *v.* Hale, 1 Wall. 223.

[4] Bronson *v.* Kinzie, 1 How. U. S. 311.

(*a*) The doctrine of the United States Supreme Court in Baldwin *v.* Hale has been reiterated recently in Massachusetts. Phœnix Nat. Bank *v.* Batcheller, 151 Mass. 589; Guernsey *v.* Wood, 130 Mass. 503.

A distinction must be taken between movables and immovables, — a distinction recognized in all the theories. As to the title to immovables, the law of the country where the property is situated is followed. The question as to the effect of a bankrupt or insolvent law upon this kind of property may, accordingly, be withdrawn from the discussion. The test as to whether a particular thing is an immovable or not, is the rule prevailing in the country where the thing in question happens to be.

The first theory prevailing in England will be called the "English theory." The doctrines there prevailing may be briefly summed up as follows. There are two cases: *First*, where the bankrupt is domiciled in England or in the British dominions. *Second*, where he is not. The first is much the more common case.

The fundamental principle underlying the whole subject is, that the movable property, including rights of action, by a fiction of law follows the person of the owner, and is, accordingly, with him where he may be domiciled. A transfer there must, necessarily, on this theory, dispose of the property wherever it may be situated. Accordingly, the English courts admit the title of foreign assignees appointed by the court of the debtor's domicile, when the property is situated in England.[1] The rule is not to be extended so far as to pass to the assignee property in the foreign country which would not have passed to him had it been situated in the State or country where the bankruptcy proceedings took place. It follows from the general rule that the title of the foreign assignee would prevail over a gift made by the debtor, as well as over an attachment by a creditor in the State where the assets were.[2]

The English courts in enforcing these rules are met by the difficulty that they do not prevail universally elsewhere. They can only enforce them in cases where the assets, though situated out of England, are at some place within the British dominions. If beyond their jurisdiction, they may be affected by some foreign proceedings, and yet subsequently come within British control. In such a case the question will arise, how far will the English court recognize the foreign proceeding. The rule there appears to be, that while it will not recognize a *voluntary* payment by a debtor, it will uphold one collected by legal process. This last statement is an inference from a general rule that a title obtained by a foreign judgment from a court having jurisdiction, and there

[1] Sill *v.* Worswick, 1 H. Bl. 665; Jollet *v.* Deponthieu, Id. 132 (n). It will be seen hereafter that this is not the prevailing rule in this country.

[2] Solomons *v.* Ross, 1 H. Bl. 131 (n).

being no element of fraud, will be valid.[1] It ought further to be stated that if a creditor, having received some portion of his claim abroad, asks for any part of the funds in the English court, he must bring into the common fund the portion so acquired abroad. This rule rests on principles of natural justice, enforcing an equality of rights, upon which the bankruptcy law itself depends.[2]

Where the bankrupt is not domiciled in the country in which the proceeding is pending, the rules cannot be definitely stated. It would seem that its effect is local, and does not, accordingly, in general, pass to the assignee the title to goods abroad. But there are few direct adjudications upon this question.

The theory generally prevailing in the United States is, that while the statutes of foreign States (including those on the subject of bankruptcy) can in no case have any force in this country by their own authority, and that a foreign assignee in bankruptcy can have no recognition here by force of the foreign law, yet that comity, which is really a part of the common law, allows a certain effect to the title derived under the foreign statute, when this can be done without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here. Accordingly, foreign assignees can, subject to these conditions, appear in our courts and maintain suits against debtors of the bankrupt, and others who may have possession of, and are liable on general principles of law to account for, his property.[3] (*a*)

It may be laid down still more generally, that any sale or transfer in one State or country, even though the seller be domiciled there, of property situated in another country, having regulations conflicting with the sale or its modes, must give way if the rules in the country of the *situs* be not complied with. This is but a restriction, for local reasons, of the general doctrines of comity as between nations.[4]

If, however, the property sold be at the time *at sea*, and subsequently come into the port of another State, the fact that it was at sea will be considered as making it a part of the territory of

[1] Castrique *v.* Imrie, L. R. 4 H. of L. Cas. 414.

[2] *Ex parte* Wilson, L. R. 7 Ch. App. 490, 493; Selkrig *v.* Davis, 2 Rose Bankr. Cas. 291.

[3] Matter of Waite, 99 N. Y. 433. This is an elaborate and satisfactory decision, discussing previous decisions, and disapproving cases opposed to its principles, such as Abraham *v.* Plestoro, 3 Wend. 538, and Mosselman *v.* Caen, 34 Barb. 66.

[4] Green *v.* Van Buskirk, 7 Wall. 139, 150; Hervey *v.* R. I. Locomotive Works, 93 U. S. 664; Pierce *v.* O'Brien, 129 Mass. 314; Clark *v.* Tarbell, 58 N. H. 88.

(*a*) See Hiberuia National Bank *v.* Lacombe, 84 N. Y. 367; Barth *v.* Backus, 140 N. Y. 230.

the State where the transfer was made, and the law of the State where the ship was arrested will have no effect.[1]

Special questions arise as to a foreign corporation.[2] A corporation, being a creature of the government which charters it, has such power to contract liabilities and to cause them to be varied or discharged, as its government may confer. Foreign creditors holding its obligations are presumed to take them subject to this rule. Accordingly, where the Parliament of Canada had created a railway corporation which had issued negotiable bonds secured by mortgage, to creditors residing in this country, and had provided that new securities might be substituted in the place of the older ones, with the consent of the majority of the bond-holders, which should be binding on the minority, it was held that the Parliament had authority to take this course, and that the statute was binding on American bond-holders, in the courts of the United States. This act was a species of bankrupt law, but depends for its validity here on the special principles of corporation law.[3]

There is still another theory as to the effect of a foreign bankruptcy on the title to movables elsewhere. This is, that it has no effect in this country, and passes no title. This doctrine is sustained by few authorities, and is unsound in principle. It probably grew out of a misapprehension of the true scope of some of the earlier decisions.

DIVISION VII. — *Title by Succession.*

The term "succession," as used in the Roman law, is a convenient expression to indicate all modes whereby title to property passes from a predecessor to a successor.[4] In this connection it will be confined to one who enters into the rights of property of a deceased person. Under our law this may happen in two general modes, one by will, and the other by intestacy.

SECTION I. *Title by Will.* — This subject will be discussed only as to wills of personal property. Wills of real estate could not be made at common law, except in special localities, where there was a custom to that effect. They, accordingly, depend wholly upon statute.

This topic will be treated under the following heads: I. The

[1] Crapo *v.* Kelly, 16 Wall. 610, reversing Kelly *v.* Crapo, 45 N. Y. 86.

[2] Canada Southern R. R. Co. *v.* Gebhard, 109 U. S. 527.

[3] Id.

[4] Mackeldey's Rom. Law, § 649.

origin of the power to make wills of personal property; II. Capacity to make a will; III. The nature and requisites of a will or testament; IV. Revocation; V. Revival and republication; VI. Probate; VII. The construction, operation, and effect of a will; VIII. Legacies.

I. *The origin of the power to make wills of personal property.* — The power to make a will of personal property dates from a very remote period in English law. The early rule was to divide a man's property into certain parts, some of which he could bequeath and some of which he could not. Thus, if he left a wife and child, he might bequeath one third; if he left a wife or child, but not both, one half; and if he left neither wife nor child, the whole. The share allotted under this rule to a wife or child was called a "reasonable part." The law in the reign of Henry III. (about 1256–57) is well stated by Bracton. At that early day the power to make a testament was conceded to one "of sound mind and of good memory, although weak of body and confined by sickness and set in his death-bed." [1] He was bound to remember his lord with the best thing he had, and the Church with the next best thing. No one was bound to give anything to the Church for burial; "nevertheless, where that laudable custom exists, the Lord the Pope does not wish to break through it." After these privileged claims, the testator might pay regard to his parents, and other persons, according as he is pleased. A woman might make a will, like any other person; but if married, she could not make it without her husband's consent, except by special custom.[2]

In determining what property an owner may effectually bequeath, Bracton holds that the debts due the king must be first paid, and that only the residue of the chattels comes to the executors. Then follows a singular statement, that if any debt is due to the Jews, it shall not draw interest until the heir is of full age. Other debts and funeral expenses are to be deducted. "The whole which remains over shall be divided into three parts, — of which let one part be left to the male children of the deceased, if he has male children; the second to the wife, if she survive; and of the third part the testator may have the free disposal. But if he have no children, then the one half shall be reserved to the deceased, and the other half to the wife. But if he has died without a wife, there being children, then the half shall be at the disposal of the deceased, and the half shall go to the children. But if he die without wife or children, then the whole shall be at the disposal of the deceased." [3] It is difficult to say when this rule

[1] Twiss' Translation, vol. i. 115.
[2] Id. 479.
[3] Twiss' Translation, vol. i. 483.

ceased to be a part of the common law. It gradually became obsolete. A feeling against it existed even in the time of Bracton; for he states that some say that the wife or children should not claim anything except of grace; "for there would be scarcely found any citizen who would make in his lifetime great acquisitions, if he were compellable at his death, against his will, to leave his goods to ignorant and lazy sons, or to wives who ill deserved them; and therefore it is very necessary that he should be allowed free liberty in this part. For through this means he will abolish misconduct, animate to virtue, and give to his wife and to his children an occasion for doing good, which would not be done if they knew without a doubt that they would obtain a certain portion, even without the consent of the testator."[1] In fact, the rule appears to have been an exotic. It was borrowed in substance from the Roman law,[2] was alien to English feeling, and slowly disappeared. Before the time of the American Revolution it had disappeared, even from localities where it had existed by special custom. The general rule in this country is, that with certain statutory exceptions an owner can make his will disposing of goods and chattels to whomsoever he pleases.

II. *Capacity to make a will.* — As it is a general rule that capacity exists, it is only necessary to consider the exceptions. Incapacity to dispose of property by will may arise from want of age, or mental unsoundness, or from restraint either in fact, or imposed by some rule of law.

Want of age. — In order to make a valid will a male must have reached the age of fourteen years, and a female, twelve. This rule appears to have been borrowed from the Roman law. Resort to the Roman law was natural, as the jurisdiction over wills of personal property was vested in the ecclesiastical court, and ecclesiastics were familiar with that law. In that system minors, after reaching the age of puberty, could make a will.[3] This rule has been to some extent changed by statute.[4] The rule as to a will of land is twenty-one years for both sexes.

Mental unsoundness. — The expression "mental unsoundness" is here used generally to include all cases in which mental capacity is impaired or destroyed, whether by natural or congenital weakness, active insanity, old age, etc.

It is generally conceded that the test of capacity to make a will

[1] Twiss' Trans., vol. i. 485–487.

[2] The Roman law varies from time to time on this subject. The later rule is found in Justinian, Novel 115, c. 3–5. As between parents and children, there could be a total exclusion only for causes authorized by law, and specified in the will. Mackeldey, § 713.

[3] Mackeldey, 687.

[4] In New York the age is 18 in the case of males, and 16 in the case of females. N. Y. Rev. St. (8th ed.) p. 2547.

is not the same as that of making a contract. In a contract one mind is opposed to another, and a man of strong intellect may in the struggle so overcome one of weak powers as to obtain a contract which the other party had not, under the circumstances, the capacity to make. There has been much fluctuation of opinion as to the correct rule in the case of a will where no "undue influence" is exercised. Reserving that topic for later consideration, the prevailing opinion is that the general test of capacity to make a will is substantially as follows: The testator must have "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 obvious relations to each other, and be able to form some rational judgment in relation to them."[1] It is a further principle that the burden of proof rests upon those who propound the will for probate to establish the capacity of the testator.[2]

The rule as above stated involves two propositions, — one that the testator is left to himself, and to reach his own conclusions; the other, that his conclusions are rational. It is assumed that a rational will cannot emanate from an irrational mind, acting by its own volition. So it is fair to reason that the reasonableness of the will tends to show that the mind is sound, — where, for example, an attack is made on its sanity.[3]

Undue influence. — This form of restraint exists, where, though there is sufficient mental capacity if the testator be left to himself, yet disturbing influences are brought to bear upon him sufficient to deprive the instrument of the character of a voluntary act.

As a branch of this subject, it is necessary to consider certain legal rules relating to the effect of *confidential relations* between the testator and the objects of his bounty. There is a large number of such relations recognized in law. Prominent among them are attorney and client, physician and patient, clergyman and parishioner, parent and child, husband and wife, trustee and beneficiary, guardian and ward, etc. When one of the parties stands in one of these relations to the other, and, through the influence exercised by him on the testator, obtains a legacy, and particularly a legacy disproportionate to that of others having equal claims, the court will insist on being satisfied that the transaction was fair

[1] Converse *v.* Converse, 21 Vt. 168, 170; Harwood *v.* Baker, 3 Moore, P. C. C. 282; Den *v.* Johnson, 2 Southard (N. J), 454; Delafield *v.* Parish, 1 Redf. 1, Opinion in Ct. of Appeals, pp. 137–139; s. c. 25 N. Y. 9. The case of Stewart *v.* Lispenard, 26 Wend. 255, and the cases that followed it, adopting a different rule, must be regarded as overruled.

[2] Crowninshield *v.* Crowninshield, 2 Gray, 524; Delafield *v.* Parish, *supra*, 146, 147.

[3] Greenwood *v.* Greenwood, 3 Carter's Ecc. Rep. Appendix, p. ii.

and just. The burden of proof will be on the claimant to make this clear. (*a*)

There was a maxim of the Roman law which is recognized in our own, — *qui sese scripsit hæredem*, — referring to the case where a will was in the handwriting of a party benefited. This fact is not a fatal objection to a legacy, but makes it necessary for the legatee to show that the real intention of the testator was expressed. It raises a presumption against the will, which needs to be rebutted.

Where the testator's capacity is impaired by disease, old age, etc., the considerations above stated increase in importance. If one standing in a confidential relation, as a child or trustee, deals with a parent or beneficiary of weak intellect, the presumption of undue influence is greatly strengthened.

In all cases, the real questions are, was the testator capable of making the will, if left to himself? If so, was he under such influences or restraint as to prevent the instrument from being the true expression of his will? (*b*) The circumstances attending the execution of the instrument are in the nature of evidence to shed light on these principal questions.

Coverture. — By the common law, a married woman could not make a will of personal property without her husband's consent; with that consent she could. There have been, in some instances, restraints upon her testamentary capacity. This was at one time the case in New York; but the disability is now removed. The general tendency of the law in this country now is, to allow a married woman to dispose of her property by will as freely as if she were single.

III. *The nature and requisites of a will or testament.* — A testament may be defined to be the expression, in legal form, of one's purpose as to the disposition after his death of property which is his own, or over which he has control. The words "over which he has control" are inserted in the definition, for the reason that a testator may sometimes make a will of the property of another by means of a "power" granted to him. An important point in this definition is, that the will must be made *in legal form*. Though the intention be plain, yet if the prescribed forms be not followed, the will is void.

In disposing of his property, an owner is confined to a will only in cases where the disposition is to have no effect until after his death, and is revocable. If the dispositions operate at once (*in*

(*a*) Marx *v.* McGlynn, 88 N. Y. 357; Matter of Will of Smith, 95 N. Y. 516; Matter of Mondorf, 110 N. Y. 451.

(*b*) Marx *v.* McGlynn, *supra*; Rollwagen *v.* Rollwagen, 63 N. Y. 504; Matter of Will of Snelling, 136 N. Y. 515.

præsenti), they may be valid as *contracts*, although they are not to be carried into execution until after the death of the party making them, or are contingent upon the survivorship of another.[1]

A will of personal property was, in England, until within a few years, a matter for the ecclesiastical courts, and was governed by rules peculiar to those tribunals. By the ecclesiastical law, a will might be either oral or in writing. This was also the rule in the Roman law. In that system there were important and complicated formalities in order to guard against fraud or error.[2] These formalities were not observed in the English ecclesiastical law. There was, in fact, no protection against the most barefaced fraud and perjury. It might be made in the handwriting of the testator without his name, seal, or witnesses, or even in another's handwriting, if proved to be according to his instructions, and approved by him. This rule did not apply to wills of land after the 29th year of Charles II. (1676), when an execution by prescribed formalities was introduced.[3] It continued to be the rule in England as to personal property until January 1, 1838, when the same ceremonies were made necessary as in devises of real estate.[4]

Nuncupative, or oral wills, were formerly allowable when the testator was *in extremis*. His intention could be taken down afterwards in writing, if proved by a sufficient number of witnesses. The Statute of Frauds placed these transactions under a number of restrictions, unless when made by mariners at sea or soldiers

[1] Matter of Diez, 50 N. Y. 88, 93; Gilman *v.* McArdle, 99 N. Y. 451.

[2] By the Roman law there was a difference between the forms in oral and written wills. In making an oral, or nuncupative will, the testator must declare, in the presence of seven witnesses, his last will, and the names of his heirs, with clearness, and in language understood by the witnesses. If the will were written, it might be either in the testator's own handwriting or not. If the former, it was termed "holographic," and it must state that the testator wrote it all himself. The testator need not subscribe it. If written by another, it must be acknowledged in the presence of seven witnesses, and the testator must subscribe his name. If he could not write, for any reason, an eighth person must sign his name, and state that he did so at the testator's request.

The next step in each of the cases above named was to place the will before the witnesses, with the declaration that it was the testator's testament; whereupon each subscribed, and sealed it.

If the testator desired to have the contents of the will kept secret, he placed it in an envelope, with a declaration that the envelope contained his last will and testament. He then signed the envelope, and the witnesses placed their signatures and seals on the envelope.

Special rules prevailed when the testator was mute or blind, and there was a dispensation with the rules when the testament was made by a soldier on the field, and a relaxation of them when made in the country, or during the prevalence of a contagious disease. The methods varied when an ascendant made a descendant his heir. Mackeldey's Rom. Law, §§ 692–700.

[3] Statute of Frauds, 29 Car. II. c. 3.

[4] Statute of Wills, 7 Wm. IV. and 1 Vict. c. 26, §§ 9, 11, and 12. This act is modified as to the mode of the testator's making his signature by 15 & 16 Vict. c. 24, § 1 (1852).

in actual service. The subject is now governed in England by statutes entering into much detail as to special cases.[1]

There is an important distinction between real estate and personal property, to the following effect. The solemnities necessary to the validity of a will of real estate are those required by the law of the place where the real estate is situated, while those affecting personal property are such as are required by the law of the testator's domicile at the time of his death.[2] This rule is inconvenient in practice, since if one make his will in due form by the law of his domicile, and then change his domicile to a State where other forms prevail, his will is revoked, — it may be without his being actually aware of it.[3] The rule has been modified in England, so as to make the will of a British subject valid, if it conform either to the law (1) of the place where made, or (2) of the testator's domicile at the time of execution, or (3) of his domicile of origin within the British dominions.[4] There is similar legislation in New York.[5]

The forms of execution of wills in this country (with the exception of Louisiana), in general, closely resemble those prevailing in England. There are, however, important differences in some of the States. As each State legislates separately on the subject, there is only a general conformity. Several leading rules may, however, be stated.

(1) In general, the will must be subscribed by the testator. In other words, his signature must be found at the end of the will. The words "at the end" have elicited much discussion,— so much so, in England, that an explanatory statute has been adopted.[6] A literal interpretation is enforced in New York, as where, in a similar requirement as to the signature of witnesses, an important clause was written after their names. This fact was sufficient to make the whole will void.[7] (*a*) A better principle is found in the English statute, which only makes void what is written after the name. The will, accordingly, down to the signature, is admitted to probate.[8]

Cases occur where there is in the body of the will a reference to some extraneous paper, — as, for example, a schedule, etc., —

[1] 7 Wm. IV. and 1 Vict. c. 26, § 11; 28 & 29 Vict. c. 72.

[2] Whicker *v.* Hume, 7 H. of L. Cas. 124. In the Goods of Raffenel, 3 Sw. & T. 49; Doglioni *v.* Crispin, L. R. 1 H. of L. Cas. 301; Moultrie *v.* Hunt, 23 N. Y. 394.

[3] See Moultrie *v.* Hunt, *supra*.

[4] 24 & 25 Vict. c. 114.

[5] Code of Civ. Pro. § 2611.

[6] 15 & 16 Vict. c. 24.

[7] Will of Hewitt, 91 N. Y. 261. See also In the Matter of the Will of O'Neil, Id. 516.

[8] 15 & 16 Vict. c. 24, § 1.

(*a*) Matter of Conway, 124 N. Y. 455.

and this is attached to the will at its end. The question then is, whether the signature, being followed by the schedule, is "at the end" of the will. The answer is in the affirmative, since the paper referred to is deemed to be incorporated into the will at the point where the reference is made.[1] (*a*)

The rules governing such references are these: 1. The paper referred to must be at the time in existence. A testator cannot direct that the provisions contained in a future codicil shall be carried out, unless that codicil itself be properly executed, nor validly refer to any memoranda or papers to be thereafter executed.[2] The court must be able to identify the document as existing when the will was made.[3] This doctrine will be applied, although the non-existing paper was executed subsequently on the same day.[4] There is this qualification to the rule, that if the will refers to a non-existing paper which comes into existence between the execution of a will and that of a codicil, the reference may be upheld by sufficiently clear words in the codicil.[5] 2. The reference in all cases must be such as to leave no doubt as to the identity of the paper.[6] 3 It is a question of construction to decide whether a document of this kind is sufficiently incorporated by the reference.[7] 4. The reference may be to a foreign will, or other instrument, or even to some other document, though of great length. The court has a discretion to admit the will to probate without incorporating on the records the paper referred to.[8] Still, a reference to a will executed abroad, as a matter of law, makes it a part of the will in which the reference is made.[9]

It is common to provide in the statutes that the will may be either signed or subscribed by the testator himself, or by some other person in his behalf. In the latter case, the signature must be authenticated by the testator in some prescribed manner; for example, it must be acknowledged by the testator as his signature, or be made in his presence and under his direction by the

[1] Tonnele *v.* Hall, 4 N. Y. 140.

[2] *In re* Norris, 14 W. R. 348.

[3] Straubenzee *v.* Monck, 8 Jur. N. S. 1159.

[4] Goods of Sims, 16 W. R. 407.

[5] In the Goods of Reid, 38 L. J. (Prob.) 1.

[6] Dickinson *v.* Stidolph, 11 C. B. N. S. 341; Allen *v.* Maddock, 11 Moore, P. C. C. 427. In the Goods of Brewis, 10 Jur. N. S. 593; Phelps *v.* Robbins, 40 Conn. 250.

[7] Watson *v.* Arundell, 11 Ir. R. Eq. 53.

[8] In the Goods of Cole, 20 L. T. N. S. 758. In the Goods of Peabody, 21 L. T. N. S. 730.

[9] In the Goods of Howden, 43 L. J. (Prob.) 26.

(*a*) If the paper is testamentary in character and not merely descriptive of the thing given, it is, in some States, not taken as a part of the will, even though properly referred to, unless authenticated as a will. Booth *v.* Baptist Church, 126 N. Y. 215; In the Matter of the Will of O'Neil, 91 N. Y. 516; Phelps *v.* Robbins, 40 Conn. 250.

signer. It has been held that the word "acknowledgment" in the statute implies that the witnesses to whom the acknowledgment is made must either know what the instrument is,[1] or else the witnesses, being in the testator's presence, must be able to see that there is a signature upon the instrument when they attest it.[2] It will add to the weight of the evidence if there is a full "attestation clause." It is not enough, in such a case, *merely* to ask the witnesses to sign the instrument as a paper.[3] A testator may sign by means of a mark.[4] A testator who is so blind as scarcely to distinguish night from day is capable of acknowledging his signature.[5] This ruling makes the word "acknowledge" practically equivalent to "adopt."

(2) The testator must, in some of our States, including New York, declare to the witnesses that the instrument that they are called on to attest is his last will and testament.

The word "declare" does not mean that the testator should personally make any statement on the subject. The idea intended to be conveyed is, that he makes known to the witnesses in some way, — as, for example, by the statements of others, to which he assents, — that the instrument is his last will, etc. (*a*). It will not be enough to state that it is his will and *deed*. That is not sufficiently explicit. This requirement seems wise. The object of having the witnesses present is, that they may observe the capacity of the testator, and his freedom from restraint. Due scrutiny would not be likely to be made if they supposed they were called in to witness an ordinary paper, such as a deed, mortgage, or release.

(3) The next point to be considered is the signature of witnesses. Upon this subject there is much variety in the statutes of the various States. Some require that the witnesses should attest in the testator's presence; others omit that requirement. Again, there is in some instances a provision that the witnesses sign in each other's presence. In others, this is not necessary. The wise course for a State is, not to make this branch of the subject of execution complicated, as the plain intent of the testator may be subverted by an unintelligent act on the part of the witnesses. The framers of the New York statute acted wisely in not requiring that the witnesses should attest in the testa-

[1] Ilott *v.* Genge, 4 Moore, P. C. C. 265.

[2] Inglesant *v.* Inglesant, L. R. 3 P. & D. 172. In the Goods of Janaway, 44 L. J. (Prob.) 6.

[3] Fischer *v.* Popham, L. R. 3 P. & D. 246.

[4] Jackson *v.* Jackson, 39 N. Y. 153.

[5] King *v.* Berry, 5 Ir. R. Eq. 309.

(*a*) Elkinton *v.* Brick, 44 N. J. Eq. 154. Matter of Hunt, 110 N. Y. 278.

tor's presence, nor in the presence of each other. All that remains is, that the testator should request that the witnesses should attest the execution. The words of request may proceed from another if the testator assent.[1] They should also sign before his death. By means of this simplicity of direction, the revisers avoided the extreme refinements of the doctrines of "constructive presence" which had grown up in the English law. The meaning of "constructive presence" was that the testator, by a fiction, was deemed to be present, when, for all practical purposes, he was really absent.[2] (*a*)

The subscribing witnesses attest in New York by signing their *names* at the end of the will.[3] The present English law provides that they shall attest and subscribe the will, no mention being made of their *names*. Still, the decisions are that there must be either a signature of the name or some mark intended to represent it.[4] The hand of the witness, in writing, may be guided by the testator,[5] or by another witness.[6] It is held, however, that a mark will answer, even if the witness is able to write, it being made with intent to attest.[7] The absence of intent to attest will be fatal, as where the witness, having written his name before complete execution, and having omitted to cross the initial of his first name, which was F., and which appeared as T., afterwards, at the time of execution, crossed it. It was held that the act of crossing could not be construed as a mark, and that the will was void.[8] Under the New York statute it is conceived that the mark of a witness duly attached to the instrument will suffice, if he regard it as his name for the time being, and the formalities attending execution by mark be complied with. The testator should sign before the witnesses.[9] If the witness should happen to sign first,

[1] Gilbert *v.* Knox, 52 N. Y. 125.

[2] Constructive presence was established by such cases as Casson *v.* Dade, 1 Bro. C. C. 99; In the Goods of Trimnell, 11 Jur. N. S. 248. Cases in which the testator was held *not* to be constructively present are Clerk *v.* Ward, 4 Bro. P. C. 70; Doe *v.* Manifold, 1 M. & S. 294, and Jenner *v.* Ffinch, L. R. 5 P. D. 106. Most of the cases arise where the witnesses retire, for the purpose of signing, to a room adjoining that where the testator is. If the door were open, and the testator *could* see the witnesses, and were aware that they were signing, the execution is valid; otherwise not. "Constructive presence" is thus made to depend on the testator's mental state.

[3] 2 R. S. 63, § 40, cl. 4 (8th ed. p. 2547).

[4] Hindmarsh *v.* Charlton, 8 H. of L. Cas. 160.

[5] Lewis *v.* Lewis, 2 Sw. & T. 153.

[6] In the Goods of Frith, 4 Jur. N. S. 288.

[7] In the Goods of Eynon, L. R. 3 P. & D. 92.

[8] Hindmarsh *v.* Charlton, *supra*.

[9] Rugg *v.* Rugg, 21 Hun, 383; aff'd 83 N. Y. 592.

(*a*) Cf. Walker *v.* Walker, 67 Miss. 529; Maynard *v.* Vinton, 59 Mich. 139; Cook *v.* Winchester, 81 Mich. 581; Riggs *v.* Riggs, 135 Mass. 238.

the case would seem to be governed by the decision in the House of Lords already referred to,[1] and it would seem, he would be obliged to sign again. It is not necessary that a will should be *sealed*, unless the statute expressly prescribes it.[2]

Attestation clause. — This is a clause at the end of the will, long in use, setting forth that the acts required by law have been in fact performed. No particular form is necessary. It may run in this way: "Subscribed, sealed" (if sealed), "published, and declared by the testator, as his last will and testament, in the presence of us, who, at his request (in his presence and in the presence of each other) have signed (or subscribed) our names as witnesses." The expressions in parentheses may be omitted in some of the States. They can be used, if desired, since where they are unnecessary they are harmless.

An attestation clause is not necessary either in England[3] or in New York.[4] It is very useful, however, as a memorandum of what transpired at the execution of the will, and may, when the witnesses are dead or forgetful, be *presumptive* evidence that all the acts therein recited actually occurred.[5] In a strong case recently, in England, the attestation clause was written by the testator himself to a codicil, adapting it to the case from a like clause in a will previously executed by himself. Of the two witnesses, one, a governess, deposed that she purposely abstained from looking at any of the writing on the paper, while the other, a nurse, at the time of execution was very nervous. Neither of them could say as to what writing was on the paper, nor whether the testator's signature was there when they signed, and both swore that they did not see him sign. Still, the will was upheld, on the presumption in its favor derived from the attestation clause, the opposing evidence not being sufficient to overcome it.[6] In fact, the legal presumption that a will with a perfect attestation clause was properly executed, is such that it requires the strongest evidence to overcome it.[7]

It should be added that the attestation by the witnesses is but a prescribed formality. They are not the only witnesses that can be produced before the court, when the question comes up on a contested will, whether it was properly executed or not. Other witnesses of the facts may be called to disprove or sustain their version of the occurrences.[8]

[1] Hindmarsh *v.* Charlton, 8 H. of L. Cas. 160.

[2] Matter of Diez, 50 N. Y. 88.

[3] See Wills Act (1 Vict. c. 26), § 9. In the Goods of Atkinson, L. R. 8 P. D. 165.

[4] Jackson *v.* Jackson, 39 N. Y. 153.

[5] Jackson *v.* Jackson, *supra*.

[6] Wright *v.* Sanderson, L. R. 9 P. D. 149 (Court of Appeal).

[7] O'Meagher *v.* O'Meagher, L. R. (Ire.) 11 Ch. 117; Matter of Kellum, 52 N. Y. 517; Brown *v.* Clark, 77 N. Y. 369.

[8] Lowe *v.* Jolliffe, 1 W. Bl. 365.

IV. *Revocation.* — As a will does not take effect until after the testator's death, it is, as a general rule, revocable by him at his pleasure, or it is, in legal phrase, "ambulatory." There are, however, cases in which an instrument in the form of a will cannot be revoked. It may have assumed in substance the form of a contract. The general subject may thus be discussed under two heads, — revocable and non-revocable wills.

Revocable wills. — A will may be revoked either partially or wholly. The revocation may be either express or implied. A revocation may be implied from future testamentary acts, either absolutely or partly *inconsistent* with a prior one. These various cases will be considered separately.

(1) *Express revocation.* A will may be expressly revoked either by words or by acts. An express revocation by words is where there is a so-called "revoking clause" in a later will or codicil. Appropriate words for a sweeping revocation are: "I hereby revoke any and all former wills and codicils by me made." More special words must be used to revoke particular instruments or clauses in a will or codicil. In such a special case it is judicious to use words confirming the will or codicil in all other respects than those to which the revocation applies. As a general rule, at the present time, a revoking instrument should be executed with the same formalities as a will or codicil itself.[1]

Revocation by act done, and without written words complying with the statutes, takes place where there is a partial or total destruction of an instrument by the testator, or under his direction; such acts as cancelling, tearing, erasing, or obliterating, with the intent either wholly or partially to destroy the will, may be referred to. In all such cases, regard must be had both to the *act* done and to the *intention* of the testator. The act without a revoking intent is of no significance.[2] Accordingly, destruction of the will in the heat of passion, where there appears but a momentary intent, or by accident, would have no effect.[3] The contents of the will could be proved by oral evidence.

Revocation by the common law was broader than that which prevails under modern statutes. By common law, any act of the testator evincing his intention, without words, would suffice.[4] A slight tearing of the will, and throwing it on the fire, with any portion of it burnt, would suffice, though it was in substance saved by some person without the testator's knowledge.[5] The present English statute mentions burning, tearing, or otherwise destroy-

[1] See, in England, 7 Wm. IV. & 1 Vict. c 26, § 20, in New York, 2 R. S. 64, § 42 (8th ed. p. 2548).

[2] Burtenshaw *v.* Gilbert, Cowp. 49, 52.

[3] Doe *v.* Perkes, 3 B. & Ald. 489.

[4] Doe *v.* Harris, 8 A. & E. 1.

[5] Bibb *v.* Thomas, 2 W. Bl. 1043; Doe *v.* Harris, *supra.*

ing the will.[1] Under this statute it has been held that tearing off a substantial part of the will is sufficient, — *e.g.*, the seal and part of a word,[2] or the names of the subscribing witnesses.[3] It is not sufficient to run a pen through the lines of various parts of the will, to write on the back of it the words "this is revoked," and to throw it among a heap of waste papers. There must, under the statute (§ 20), be a *positive act of destruction.*[4]

The language of the New York statute closely resembles the English. The *will* must be "burnt, torn, cancelled, obliterated, or destroyed."[5] The word "obliterated," as used in this section, refers to the *whole* will, and not to a particular provision, and, accordingly, under this statute, part of a will cannot be revoked by obliteration.[6] Under the existing English law there is a rule opposed to obliteration of a part of the will, unless affirmed in the margin or otherwise by the signature of the testator and the attestation of witnesses.[7] If the erasures are so complete that the words cannot be read or proved, probate is granted, with the erased words in blank.[8] This practice is more convenient than that prevailing in New York.

Important questions arise as to presumptions. It is a general principle of law that alterations and erasures appearing on the face of the will are presumed to have been made after execution. The effect of this principle is, that an alteration has no effect in the way of substitution, unless there is satisfactory evidence that it was made before execution.[9]

Intent is a vital element in revocation. It may be absolute or qualified. The testator, in an act of revocation, may be laboring under a mistake of facts. For example, he may falsely suppose a beneficiary under his will to be dead, and revoke on that supposition; or he may strike out a name with a view of substituting another, and the substitution may fail by reason of non-compliance with the rules of law. In such cases, there is no true intent to revoke, and the will stands unrevoked. Another instance is where he revoked because he falsely supposed that his will was invalid;[10] so if he destroyed his will in a fit of delirium tremens.[11]

[1] 7 Wm. IV. & 1 Vict. c. 26, § 20.

[2] Price *v.* Powell, 3 H. & N. 341.

[3] In the Goods of Dallow, 31 L. J. (Prob.) 128. Other instances are: In the Goods of Marshall, 17 W. R. 687; Williams *v.* Tyley, 5 Jur. N. S. 35; In the Goods of Harris, 10 Jur. N. S. 684.

[4] Cheese *v.* Lovejoy, L. R. 2 P. D. 251.

[5] 2 R. S. 64, § 42 (8th ed. p. 2548.)

[6] Lovell *v.* Quitman, 25 Hun, 537; aff'd 88 N. Y. 377.

[7] Greville *v.* Tylee, 7 Moore, P. C. C. 320.

[8] In the Goods of James, 1 Sw. & T. 238.

[9] Greville *v.* Tylee, 7 Moore, P. C. C. 320; Doe *v.* Palmer, 16 Q. B. 747; Cooper *v.* Bockett, 4 Moore, P. C. C. 419; Wetmore *v.* Carryl, 5 Redf. 544; Dyer *v.* Erving, 2 Dem. 160.

[10] Giles *v.* Warren, L. R. 2 P. & D. 401; Clarkson *v.* Clarkson, 2 Sw. & T. 497.

[11] Brunt *v.* Brunt, L. R. 3 P. & D. 37.

Out of these principles grows the doctrine of "dependent relative revocation." The meaning of this expression is, that there is a conditional revocation, depending on the successful substitution of a new clause in the place of an existing one. Accordingly, if the substitution be not accomplished, there is no true intent to revoke, and the original clause remains. The following case is a good illustration. The testator had given to his wife *three* hundred pounds; to his son James, *three* hundred pounds. Over the word "three" to his wife, he had, after execution, written "one," over "three" to his son, he had, in like manner, written "five." As these later written words had no effect by way of substitution, the will was probated as it originally stood.[1]

The doctrine of dependent relative revocation came into the law after the enactment of the Statute of Frauds in England, requiring ceremonies to be observed in the execution of wills of real estate.[2] Some of the leading cases are cited in the note.[3] (*a*) That statute is, in substance, the law of the American States. When its principles were extended to wills of personal property, the law of conditional revocation followed the extension, and is logically applicable to every case of an attempted revocation by way of substitution, where the substituted provision fails to take effect.

(2) *Implied revocation.* There are three principal classes of cases of implied revocation. 1. Inconsistent later wills or codicils. 2. Subsequent marriage of the testator, or marriage and birth of issue. 3. Statutory provisions working a revocation.

1. It is a well-settled rule that if a subsequent will or codicil is inconsistent with a prior will, and there be no revoking clause, there is an implied revocation so far as the two instruments are inconsistent, but no further.[4] Under such circumstances, both papers constitute the testator's will.[5] The intention, however, is to be regarded, and if it appear that this was to dispose of the property in a different manner from the intention pervading a former will, the latter will be revoked as a whole, even though in some particulars the subject-matter of the earlier will is not completely covered.[6] This doctrine can only be applied where the disposi-

[1] In the Goods of Nelson, 6 Ir. R. Eq. 569; Brooke *v.* Kent, 3 Moore, P. C. C. 334; Clarkson *v.* Clarkson, 2 Sw. & T. 497. See *Ex parte* Earl of Ilchester, 7 Ves. 348, where the doctrine is explained. The case of Brooke *v.* Kent, above cited, is a leading authority. In this case all the alterations were by way of *reduction* of amounts stated in the will.

[2] 29 Car. II., c. 3.

[3] Onions *v.* Tyrer, 1 P. Wms. 343; Bibb *v.* Thomas, 2 W. Bl. 1043; Burtenshaw *v.* Gilbert, Cowp. 49, 52.

[4] Lemage *v.* Goodban, L. R. 1 P. & D. 57.

[5] Geaves *v.* Price, 32 L. J. N. S. 113.

[6] Dempsay *v.* Lawson, L. R. 2 P. D. 98.

(*a*) See Jarman on Wills (6th Am. ed.), 154.

tions in the two instruments are so inconsistent that both cannot stand together.[1]

2. It has long been a rule of law that if an unmarried man, without children by a former marriage, makes his will, devising all his estate, and making no provision for prospective issue, and subsequently marries, and has issue by the marriage, the will is tacitly revoked.[2] The rule as to issue includes a posthumous child,[3] but does not extend at the common law to the case where a man, married when he makes his will, has a child subsequently born.[4] The ground of the rule is, that there has been such a change in the circumstances of the testator as to presumably lead to a change of intention on his part. The rule was somewhat different when a single woman made a will and then married. Then a revocation took place without the birth of issue. She had come under the power of her husband, had lost her capacity by her own act to make a will or to revoke one already made, and the law, in aid of her incapacity, caused a revocation, which it was presumed that she would have made after marriage if she had had the power. Under the present law of England, a will made before marriage, whether by man or woman, is revoked by marriage.[5] The rule in New York is not the same in the case of the wills of women as of men. The will of a woman is revoked by her subsequent marriage.[6] In the case of a man, however, in order that there may be an implied revocation, the will must dispose of the whole estate of the testator; there must be subsequent marriage and birth of issue, and either the wife or the issue must be living at the testator's death; there must also be no provision for issue in any settlement, or in the will, or else no such mention of them as to show an intention not to make a provision for them. When all these circumstances concur, there is a conclusive presumption of an intention to revoke, and no evidence beyond that which is above indicated can be offered to rebut the presumption.[7] The limit thus placed upon the evidence that can be used to rebut the presumption of revocation is salutary, and prevents litigation. It is an improvement upon the common law.

3. A partial revocation of a will may occur under a statute providing that in case a child be born to a testator then married, after making his will, without any provision of the kind already detailed having been made for such child, the child shall succeed to such portion of the parent's estate as he would have succeeded to

[1] O'Leary *v.* Douglass, L. R. (Ire.) 1 Ch. Div. 45.
[2] Marston *v.* Fox, 8 A. & E. 14.
[3] Doe *v.* Lancashire, 5 T. R. 49.
[4] Doe *v.* Barford, 4 M. & S. 10.
[5] 7 Wm. IV. & 1 Vict. c. 26, § 18.
[6] 2 R. S. 64, § 44 (8th ed. p. 2548).
[7] 2 R. S. 64, § 43 (8th ed. p. 2548).

in case the parent had died intestate.[1] This section did not at one time include a mother, though it does now.[2]

A special form of revocation exists where a testator bequeaths a particular item of property, and later changes his relations to it, — perhaps mortgages it, or contracts to sell it, etc. This was held at common law, by a subtle form of reasoning, to be a revocation. The doctrine was for the most part applied to devises of real estate, though it could be extended to bequests of specific personal property. The effect of such incumbrances or incomplete transfers is now in general regulated by statute. The English statute prevents such revocation so far as any interest still belongs to the testator. The same general remark applies to New York legislation.[3] The substance of the legislation is, that the devisee or legatee shall take the property devised or bequeathed, subject to all contracts and charges made by the testator during his life, though if there be an absolute inconsistency between the provisions of the will and the testator's subsequent acts, there will be a revocation.

Non-revocable wills. — One may make a valid promise for a consideration to bequeath a sum of money or a chattel to another. Should he fail to fulfil the promise, his representatives are liable.[4] (*a*) So, if the party has made his will in accordance with his agreement, it will not be lawful for him to revoke it. If he does, he will at least be liable in damages to the other party to the contract. It is well settled that a *covenant* not to revoke is a valid one, subject to general rules governing the validity of contracts.[5]

There is a single authority to the effect that if a will be actually made in accordance with a written promise, it cannot be revoked.[6] It will be different with an oral promise, by reason of the Statute of Frauds, if the contract related to a will of *land*. Accordingly, where a woman had served an intestate as a housekeeper without wages, for many years, and had been induced to give up other prospects of establishment in life by reason of an oral promise that she should have a life estate in the intestate's land, and the latter had executed an instrument in the nature of a will in her favor, which failed for want of proper attestation, it was decided

[1] See in New York, 2 R. S. 65, § 49 (8th ed. p. 2549).

[2] Cotheal *v.* Cotheal, 40 N. Y. 405, 408.

[3] 2 R. S. 64–65, §§ 45–48 (8th ed., pp. 2548–2549).

[4] Ridley *v.* Ridley, 11 Jur. N. S. 475.

[5] 2 Sheppard's Touchstone (Preston's ed.), 401; Sugden on Powers (8th ed.) 214; Robinson *v.* Ommanney, L. R. 21 Ch. D. 780; (aff'd in Court of Appeal) 23 Id. 285; Sherman *v.* Scott, 27 Hun, 331.

[6] Loffus *v.* Maw, 8 Jur. N. S. 607.

(*a*) Collier *v.* Rutledge, 136 N. Y. 621; Emery *v.* Darling, 33 N. E. R. (Ohio), 715.

that the promise could not be enforced. The decision of Justice STEPHEN to the contrary was reversed.[1] No case but Loffus *v.* Maw precisely holds that the will is absolutely irrevocable, and the subject requires further adjudication. There appears to be no serious objection to the view in that case, the will having been regularly executed and the Statute of Frauds having no application.

The topic of "mutual wills" demands attention in this connection. There are but few cases on this subject. In the outset, a distinction should be taken between a *joint* will, executed by two or more persons, and *mutual* wills.[2] In a joint will, two or more persons simply unite, without any element of promise or reciprocity of obligation. In *mutual* wills there is, as the words import, mutuality of obligations or of benefits. While both live, the will of each may be revoked at pleasure. After the death of one, whose property has devolved in a way understood between the testator and the survivor, the survivor may have lost the power to revoke.[3] In the case of Dufour *v.* Pereira,[4] Lord CAMDEN held that a husband and wife having made a mutual will, and the wife, after her husband's death, having possessed his estate and enjoyed it during her life, by that act bound her assets to make good all her bequests in the mutual will, and that this was irrevocable.[5] Cases in which mutual wills are considered in this country will be found in the note.[6] (*a*)

V. *Revival and republication.* — Before entering upon the discussion of this topic, reference should be made to "codicils." The word "codicil" is derived from the Roman law, and included every disposition of a testamentary nature which was not a strict and technical testament, which regularly contained the institution of at least one direct heir. A codicil was informal, and might at first be either oral or written. In the later law it must be made in accordance with prescribed forms.

[1] Alderson *v.* Maddison, L. R. 7 Q. B. D. 174 (Court of Appeal). See also De Moss *v.* Robinson, 46 Mich. 62.

[2] In the Goods of Stracey, Deane, 6. A will executed by two, of the property of one, is really a separate and not a joint will. Kunnen *v.* Zurline, 2 Cin. (Ohio) 440; Rogers' Case, 11 Me. 303.

[3] Dufour *v.* Pereira, 1 Dick. 419; Lord Walpole *v.* Lord Orford, 3 Ves. 402; Hobson *v.* Blackburn, 1 Add. 274; Schumaker *v.* Schmidt, 44 Ala. 454. The principles governing mutual wills under the Roman-Dutch law are considered in Denyssen *v.* Mostert, L. R. 4 P. C. 236.

[4] 1 Dick. 419.

[5] To this effect is Taylor *v.* Mitchell, 87 Pa. St. 518.

[6] Wood *v.* Roane, 35 La. Ann. 865; Betts *v.* Harper, 39 Ohio St. 639; Allen *v.* Allen, 28 Kan. 18; Hershey *v.* Clark, 35 Ark. 17; *Re* Diez, 50 N. Y. 88; Evans *v.* Smith, 28 Ga. 98; Clayton *v.* Liverman, 2 Dev. & B. Law (N. C.) 558; Walker *v.* Walker, 14 Ohio St. 157.

(*a*) See also Cawley's Estate, 136 Pa. St. 628; Hill *v.* Harding, 13 Ky. Law R. 380.

In English and American law, a codicil is an addition to, and presupposes the existence of, a will. It may either change the provisions of a will or dispose of subjects not embraced therein. There is no limit to the number of codicils. Earlier codicils, so far as they are inconsistent with later ones in force, give way.

Everything that can be accomplished by a codicil can be done by a later will as well. There is somewhat less formality in drawing a codicil, and it is frequently resorted to, particularly where changes or additions of a minor nature are to be made.

By the term "republication" is meant the due execution of a later testamentary instrument acting upon an earlier one, confirming or establishing it, either in whole or in part. The earlier instrument is thus made to speak from the date of the republication. It may be either express or implied. An express republication, as the words import, means a sufficient reference to the earlier instrument in the later one. The republication will be complete, though the reference was a mistaken one.[1] If there be a mistake in a codicil in referring to a previous will as still subsisting, when in fact it is not, the codicil is not on that ground void.[2] A republication may be implied from the fact that a memorandum, duly executed as a codicil, is written on the same paper as an earlier will.[3] This principle will not, it seems, by extended to the case of a mere physical annexation of the two papers, — *e. g.*, by a piece of tape. The intention to revive must appear in the instrument itself.[4] Implied revivals have been carried very far by the courts. It is the policy of the present English law to do away at least with the more extreme forms of implied revivals of wills. One of the most objectionable of the common-law rules is, that if a testamentary instrument be revoked by a later one, and then the revoking instrument be in turn revoked, the first instrument is revived by republication.

This rule has given way in modern law.[5] It is provided by the New York statute that the destruction, cancelling, or revocation of a second will shall not revive the first, unless it appear by the terms of the revocation that it was the intention of the testator to revive the first will; or unless, after such destruction, etc., the testator shall republish his first will.[6] Some of the decisions in

[1] In the Goods of Lewis, 7 Jur. N. S. 220.

[2] In the Goods of Law, 21 L. T. N. S. 399.

[3] In the Goods of Terrible, 1 S. & T. 140; Ncate *v.* Pickard, 2 N. Cas. 406.

[4] Marsh *v.* Marsh, 1 Sw. & T. 528. See remarks of CRESSWELL, J., p. 533.

[5] The English statute, 7 Wm. IV. & 1 Vict. c. 26, § 22, provides that no will or part of a will which shall have been revoked, shall be revived except by re-execution, or by a codicil showing an intention to revive.

[6] 2 R. S. 67, § 53 (8th ed., p. 2550).

England upon the statute there, as it closely resembles our own, may properly be referred to.

The intention to revive must appear on the face of the instrument, or by a disposition of property inconsistent with any other intention.[1] Thus, a second codicil which refers to a will of a particular date, but not to a subsequent codicil prior to itself, does not revive the latter.[2] The principle is, that a reference in a second codicil to a will, will not set up an intermediate first codicil, which is in itself *invalid*. At the same time, the failure to refer to a *valid* intermediate codicil does not by implication revoke it.[3] The following is an instance of revival since the statute. A testator made a will, March 13, 1876, revoked it by a second will, April 29, 1876, and, on June 9, 1880, made a codicil commencing, "I make and publish this codicil to my will dated 13 March, 1876." He also cancelled a gift in that will as having been paid by him. The codicil revived the first will, and the three documents were admitted to probate.[4]

VI. *Probate.* — From the earliest period there has been this peculiarity in the law of testaments (wills of personal property), that their validity should be passed upon by a court having probate powers. Without this judicial inquiry and sanction, no action could be brought to enforce claims due to the estate of the deceased, nor could any liabilities be enforced against it. This probative power resided in the ecclesiastical court.

The methods of the ecclesiastical court were borrowed from the Roman law, as well as the principles applied to the construction and interpretation of the instrument itself. The jurisdiction of the ecclesiastical courts was displaced in England by 20 & 21 Vict. c. 77, taking effect on January 1, 1858, and was vested thenceforward in a court of probate. Up to that time decisions of cases must be sought in ecclesiastical reports.

Owing to the severance of all political connection between Church and State in this country at the time of our Revolution, there could be no ecclesiastical courts in the strict sense here. Various methods were adopted in the States for the probate of wills, and probate courts were established. In a number of the States there was a close adoption of English methods. In New York, a court was established in each county, called a surrogate's court, with the right of appeal to the court of general jurisdiction.

[1] In the Goods of Steele, L. R 1 P. & D. 575.

[2] Burton *v.* Newbery, L. R. 1 Ch. D. 234; In the Goods of Reynolds, L. R. 3 P. & D. 35.

[3] Green *v.* Tribe, L. R. 9 Ch. D. 231.

[4] In the Goods of Edge, L. R. (Ire.) 9 Ch. D. 516.

It was a rule of English testamentary law that a will disposing of real property alone could not be proved in the testamentary court. There must be personal property to give the court jurisdiction,[1] or at least there must be an executor.[2] A similar rule applies to the probate court there.[3] The jurisdiction in the States of this country depends on the local statutes.

It is a further rule that a will disposing solely of personal property situated in a foreign country will not be probated. There must be assets within the jurisdiction.[4] The general rule that the courts of the domicile of the testator have the power of administering the personal estate must be qualified by the statement that the *situs* of property will of itself confer jurisdiction.[5] The Court of Chancery has no original jurisdiction to determine the validity of a will of *personal* estate. The power to do that is exclusively vested in the probate court. It may, however, interfere for the purpose of protecting the property while litigation is pending.[6] There is a *dictum* in the Court of Appeal that the probate court has exclusive jurisdiction to revoke a will.[7]

It is not intended in this work to consider details of procedure in the probate court, but only to present a general outline. The course of practice is for the persons named as executors, or other parties interested, to present a petition to the court that the will may be proved. A citation is accordingly issued summoning the next of kin and others interested in the estate (as the local rules may provide) to appear at a fixed day, and to attend the proceedings. This citation is served in a prescribed manner upon the parties cited. At the day fixed, or at an adjourned day, those who seek to sustain the will are heard. The regular course is, to produce the subscribing witnesses, if they can be had, and to ascertain from them whether the formalities required by law were observed, and whether any fraud, duress, or undue influence was exercised.

Although the subscribing witnesses are not experts, they may give their opinion as to the mental capacity of the testator. If their testimony sustains the will, and there is none opposing it, the will, as a matter of course, is admitted to probate. This is the stage of proceedings at which any of the parties entitled to contest the will may do so. It may be shown by proper evidence, including

[1] In the Goods of Barden, L. R. 1 P. & D. 325.

[2] In the Goods of Jordan, L. R. 1 P. & D. 555.

[3] Campbell *v.* Lucy, L. R. 2 P. & D. 209.

[4] In the Goods of Coode, L. R. 1 P. & D. 449.

[5] Compare Enohin *v.* Wylie, 10 H. of L. Cas. 1, with Ewing *v.* Orr Ewing, L. R. 9 App. Cas. 34.

[6] Rynes *v.* Wellington, 9 Beav. 579; Allen *v.* M'Pherson, 1 H. of L. Cas. 191.

[7] Priestman *v.* Thomas, L. R. 9 P. D. 210.

the testimony of witnesses, that the professed will was never duly executed as a matter of form, or that the testator had not capacity to make it, or that it was obtained by fraud, duress, abuse of confidential relations, or undue influence. These various objections may be presented either singly or in combination. Their force will be increased by the fact that the capacity of the testator was impaired, even though he had sufficient ability to make the will had he been left uninfluenced. The subject of "undue influence" is largely a matter of equity jurisprudence, and its details will be found in treatises on equity, and in the reported decisions.

The whole matter is thus one of evidence. A probate court, as organized at common law, has no jury. The judge, in such a case, in determining the validity of the execution of the instrument before him, may follow the testimony of one subscribing witness when adverse to that of the other, or sustain the will though all of the witnesses testify that the requisite formalities were not complied with. The decision of the judge is not final, but is subject to review in an appellate court, according to local procedure.

By the rules of the common law, the testamentary court has no power to determine the validity of a will of land. This is a matter for a court of general jurisdiction, at law or in equity, according to the nature of the question involved. This rule still prevails in New York. A decision by the surrogate, that the will is valid, considered as a will of personal property, will not be binding upon the same questions arising upon it, considered as a will of real estate, and the subject may be litigated anew in the proper court, without reference to the surrogate's decision, except so far as statute law may provide otherwise.[1] This is strikingly shown by the case of Clarke *v.* Sawyer. The will in that case had been declared valid as a will of *personal* estate, by the surrogate, and, then, on an appeal to the Chancellor, the decision was reversed, and the will was declared void.[2] An independent suit was brought in equity, on the same testimony as had been used before the surrogate, to have the will declared void as to *real estate*. Coming before the assistant Vice Chancellor in the first instance, it was held to be valid, and the suit was dismissed.[3] An appeal being taken to the same Chancellor, as in the previous case, this judgment was in its turn reversed,[4] and the reversal was sustained by the Court of Appeals.[5] (*a*) This anomaly in the law could be removed

[1] Clarke *v.* Sawyer, 2 N. Y. 498.
[2] Clark *v.* Fisher, 1 Paige, 171.
[3] Clarke *v.* Sawyer, 3 Sandf. Ch. 351.
[4] Clarke *v.* Sawyer, 2 Barb. Ch. 411.
[5] 2 N. Y. 498, *supra*.

(*a*) There is room for argument, that the rule stated in the text respecting the effect of the decrees of surrogates in New York where a will of real estate is sought to be

by establishing a probate court, with a jury, authorized to try issues, both as to real and personal estate, as was done upon the establishment of the probate court in England.[1]

In the early law, wills could be proved in two ways; either in the so-called "common form," or in "solemn form." In the first case, there was a merely formal proceeding. The will was uncontested, or parties interested were not cited. In such cases, notwithstanding a considerable lapse of time (in some instances nine years or more), the next of kin might call upon the executor to prove it (in solemn form) by witnesses, whose testimony they might contest. This distinction appears to have prevailed in New York until the Revised Statutes.[2] These provide a substitute whereby, even after a will has been regularly admitted to probate, the next of kin of the testator may at any time within one year thereafter file allegations against the validity of the will or the competency of the proof. This clause goes much further than the common law, for it allows a rehearing after a contested will has been admitted to probate, without giving any reason. The contestant has the right to try over again, upon the same or upon additional evidence, the very questions which were litigated on the first application for probate. The *allegations* must be filed before the year expires, and if so filed, the citations may be issued afterward.[3]

[1] 20 & 21 Vict. c. 77, §§ 36, 37, 61 & 62. Probate causes are now determined by the Probate, Divorce, & Admiralty Division of the High Court of Justice, which was created by the "Supreme Court of Judicature Act," 1873 (36 & 37 Vict. c. 66). See, also, 38 & 39 Vict. c. 77, and other amendatory acts.

[2] See 2 R. S. 60, § 30 (6th ed. Vol. 3, p. 61), repealed by Laws of 1880, ch. 245.

[3] See Code of Civ. Pro. §§ 2647–2653, for the existing law; Will of Gourand, 95 N. Y. 256, 260.

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probated, should not be applied in cases where probate has been refused by the surrogate, as the statute, giving the decree presumptive force merely, refers only to cases where the will has been admitted. Code of Civ. Pro. § 2627.

Since a surrogate's court has now, in a proper case, jurisdiction over the probate of wills of real as well as personal property, it would seem that its determination should be conclusive, when the matter is properly before the court, as to both classes of wills, except where made otherwise by statute. Moreover, the exception prescribed in § 2627, applying as it does only when a will is admitted, might be explained as the result of the regard of the law for the rights of the heir, as opposed to the claims of the devisee. The right of trial by jury could be said to be waived, by those claiming under the will, in presenting it for probate, in the first instance, to the surrogate's court.

The contrary doctrine would seem to render the decision of the surrogate, in rejecting a will of real property, of no effect whatsoever, as the statute does not make such a decree even *prima facie* evidence of the matters passed upon. See, generally, Jarman on Wills, 3d ed. Vol. I. p. 35, n. Anderson *v.* Anderson, 112 N. Y. 104; Bolton *v.* Schriever, 135 N. Y. 65; Matter of Bortholick, 141 N. Y. 166.

VII. *The construction, operation, and effect of a will.* — Assuming that a will of personalty has been properly proved, the next inquiry is as to its meaning and effect. An important distinction must now be noticed between devises of real estate and bequests of personal property. The former do not necessarily involve a *trust*. Whether there is a trust or not will depend upon the character and nature of the devise. In the case of personal property the title vests in the executor, who acts as a trustee for the legatees or next of kin, and creditors. The distinction may be shown by an illustration. If a testator should give his house and lot directly to A., the latter would be the legal owner, and could at once exercise acts of ownership, such as enter into possession, or, if resisted, bring an appropriate action to obtain possession. On the other hand, had the same testator bequeathed a specific article of personal property to a legatee, the ownership, as a matter of law, would remain in the executor, who would be a trustee for the legatee, and the executor alone could bring a possessory action for the recovery of the article. It is thus true that the law of executors has no application to real estate. Whatever control an executor may have depends upon the special language of the will, in which case, if it be sufficient to create a trust, he acts as trustee, and *not* as executor. If some power, not amounting to a trust, be conferred upon him, his authority will depend on the law of powers.

For the purpose of ascertaining the meaning of the language used by testators in the disposition of their estates, it is highly expedient that there should be a court of general jurisdiction, having power to interpret wills, or, in technical language, "a court of construction." The advantages of such a system are that rules of a general nature can be formulated and applied to the various cases as they arise. This court, as to all cases having the element of trust, is a court of equity. Still, the great point to be regarded in construing a will is the ascertainment of the testator's intention, and that is often expressed in inartificial language, while the circumstances of the case are frequently special, and not likely often to recur. Accordingly, only rules of a general nature can be laid down; and decisions on special facts commonly have but little value as precedents.

It is a convenient and well settled rule that executors and legatees may commence a proceeding before a court of equity simply to obtain a construction of the will. This rule could not be applied to a will containing devises of real estate solely, unaffected by a trust.[1] It is the presence of a trust which gives the

[1] Post *v.* Hover, 33 N. Y. 593, 602; Bowers *v.* Smith, 10 Paige, 193.

court jurisdiction. The executor or other trustee asks for the direction of the court in the management of the trust. On similar grounds a legatee, or other beneficiary, may institute a like proceeding to have his right or interest ascertained, so that he may obtain such portions of the estate as he is entitled to.[1] The court, having thus obtained jurisdiction, may dispose of the whole controversy, even though the element of trust does not extend through all the provisions of the will.[2] A devisee who claims a mere legal estate cannot maintain an action for the construction of a will, but must resort to strictly *legal* remedies.[3] It has been held that such an action cannot be maintained if the will is clear. There must be some doubt as between the executor and some person interested in the provisions of the will.[4]

Jurisdiction to construe the will to a certain extent is conferred by statute in New York upon the surrogate. It is, however, confined to personal property.[5] Another statute, in New York,[6] provides that the *validity*, construction, or effect of a testamentary disposition of real property, situated within the State, may be determined in an action brought for that purpose, etc. This statute was recently applied to the inquiry whether a power created in one will had been duly executed by the donee in his will.[7] (*a*)

Some general rules of construction should now be considered. It is a general principle that the construction of a will of personal property depends upon rules prevailing in the law of the testator's domicile at the time of his death. This is but a rule of interpretation, designed to ascertain the testator's meaning, and may give way when there are sufficient grounds for believing that his intention was to use the words in a different sense from that prevailing in his domicile. Accordingly, if he use technical words, having a definite meaning in the law of his domicile, it will be presumed that he used them in that sense. A similar view would be taken of words of weight, measure, etc. This principle would give way in case he

[1] Wager *v.* Wager, 89 N. Y. 161. The law on this point is clearly and ably stated in the opinion in this case. See also Greyston *v.* Clark, 41 Hun, 125.

[2] Wager *v.* Wager, *supra*, p. 168.

[3] Weed *v.* Weed, 94 N. Y. 243.

[4] Weed *v.* Cantwell, 36 Hun, 528; aff'd, *sub nom.* Horton *v.* Cantwell, 108 N. Y. 255.

[5] Code of Civ. Pro. § 2624. The limits of this jurisdiction were considered in Jones *v.* Hamersley, 4 Dem. 427.

[6] Code of Civ. Pro. § 1866, taken from Laws of 1853, ch. 238.

[7] Drake *v.* Drake, 41 Hun, 366.

(*a*) The question of the validity of a power of sale in a will does not affect the "testamentary disposition" made by the testator of his lands, so as to authorize an action for the construction of the will. Mellen *v.* Mellen, 139 N. Y. 210. This statute does not refer to the validity of the will making the disposition, but simply to the validity of the disposition so made. Anderson *v.* Anderson, 112 N. Y. 104.

used foreign legal terms prevailing in the country where he lived, or where the will was made, or was to be carried into effect, though not the country of his domicile. The presumption that he intended to adopt the sense prevailing in his domicile might then be rebutted. The fact that he used a foreign language would not be controlling. Thus, a native of Norway, domiciled in an American State, might write his will in the Norwegian language, without any thought of following Norwegian law; or an inhabitant of Lower Canada might use the English language without any intent to follow the English law.[1] But if a testator, domiciled in one country, make a will expressed in the technical terms of the law of a foreign country, *so as to manifest an intention* that it should operate according to that law, effect must be given, even in the courts of the domicile, to the meaning as found in the foreign law.[2]

In English and American law the great point is to ascertain the intention of the testator. This must be gathered from the instrument itself. In construing it, certain subordinate rules must be followed.

Rule 1. The courts resort to established rules, under which particular words standing by themselves have acquired a definite meaning, or, in other words, a legal signification, which the draughtsman of the will is presumed to know. This meaning has been for the most part ascertained by decision. Unless this meaning were followed, the meaning of the testator would be a matter of conjecture. The "intention" of the testator for which the court is seeking, is in general presumed to be found in prior legal decisions interpreting the words used. There will be room for uncertainty where the meaning of the words has not yet been fixed by decision, or where the decisions, instead of being uniform, are conflicting.

Rule 2. The intention of the testator being the point to be regarded, the rule of construction must be the same in law as in equity.

Rule 3. Technical words are not necessary. Popular words may be adopted. It is, however, highly expedient to use words whose meaning has been settled by authoritative decisions. When technical words are used, they are presumed to be employed in their legal sense, unless the context indicates the contrary.[3]

[1] McGibbon *v.* Abbott, L. R. 10 App. Cas. 653; explaining Martin *v.* Lee, 14 Moore, P. C. C. 142.

[2] Bradford *v.* Young, L. R. 26 Ch. D. 656, discussing Studd *v.* Cook, L. R. 8 App. Cas. 577. See Dicey on Domicil, pp. 306, 307, 308.

[3] Lord Chancellor SELBORNE, in a recent case, declares the qualification of this rule as to the "context showing the contrary" to be a perilous and hazardous argument in most cases where it is used, — an argument which seeks to escape from the necessity of grappling with the meaning of

Rule 4. Wills of personal property for most purposes speak, not from the execution of the will, but from the death of the testator. This rule does not apply to words *descriptive* of persons or things existing when the will was made. The expression "my son *now* living," or "stock now standing, inscribed in my name," would be confined to a son living or to stock owned when the will was executed.[1] This rule affects specific legacies, to be hereafter considered.

Rule 5. All the parts of the will are to be construed together, so as, if possible, to form a consistent whole. If there are irreconcilable expressions, the later ones usually prevail.

Rule 6. Words are in general to be taken in their ordinary and grammatical sense, unless there can be ascertained a clear signification to the contrary. If the same words are used more than once as applicable to the same subject, they will be presumed to be used in the same sense, unless there be something in the context to show the contrary.

Rule 7. Where the language is plain, the inconvenience or absurdity of the provision supplies no ground for varying the construction. On the other hand, where the language is obscure, such considerations will be taken into account.

There is a considerable number of subordinate rules designed to rectify mistakes and errors to a limited extent, to explain ambiguities, to reconcile contradictions, to remedy defects of arrangement, and the like, so far as to aid the intention of the testator, but never to subvert or overthrow it. These may be classified as sub-rules.

Sub-rule 1. Extrinsic (sometimes called parol) evidence is admissible to remove an ambiguity, or, in other words, to show, where the words are capable of two or more applications, which of them was intended. At one time this rule was confined to *latent* ambiguities, — that is, to such as did not appear on the will, but were disclosed by external evidence. This distinction is now discarded, and any ambiguity, whether latent or appearing on the face of the will, can be removed by extrinsic evidence. For example, should the testator give a legacy to "George Gord," it would be equally explainable, whether the will itself disclosed that there were two persons of that name, or it was shown by extrinsic evidence.[2]

Sub-rule 2. Extrinsic evidence cannot be used to remove an

particular words upon grammatical principles, and endeavors to get into a region of speculation as to the probable intent of the testator. Giles *v.* Melsom, L. R. 6 Eng. & Ir., App. Cas. 24, 31.

[1] Jarman on Wills, Ch. 10.

[2] Doe *v.* Needs, 2 M. & W. 129. The subject is considered most satisfactorily in this case.

uncertainty as distinguished from an ambiguity. For example, it cannot be used to fill a blank space with the name of a legatee nor with the property assumed to be intended. Nor could it be shown what individual member of a class of persons was intended, where the testator, in referring to the class, had not sufficiently identified the individual. Thus, a legacy to the "most worthy inhabitant" of a specified village, would present a case of incurable uncertainty.

Sub-rule 3. An error in description does not necessarily vitiate a legacy. There is a well-known maxim, —*falsa demonstratio non nocet*. This means that where there is a *sufficient* description of the person or thing intended, an erroneous addition will not vitiate it.[1]

As applied to a will, this means that, if a description be false in part, yet if there be existing circumstances *absolutely identifying* the subject intended, the clause is valid. The test of the maxim is, that the description so far as it is false, applies to no subject, and so far as it is true, it applies to one only. This doctrine cannot be pressed so far as to allow by oral evidence a *different* legacy to be *substituted* in the place of one which, through mistake, could not take effect, but only to *correct the mistake*, and then, after correction, carry the will into effect, if enough remains to indicate the testator's intention.[2]

Sub-rule 4. Words and clauses may be transposed, supplied, or rejected, where transposition or rejection is warranted by the context or general scheme of the will. This rule is not to be pressed to the extent of supplying by conjecture a sense which is in opposition to the plain and obvious meaning of the language used, no matter how reasonable that sense may be. The great object of interpretation is to find out the meaning of the testator, even though that may turn out to be unreasonable or silly; and when his meaning is plain, it must be followed at whatever cost to the will. So, too, words obviously miswritten may be corrected, as "with" for "without," and "or" for "and," or *vice versa*.

[1] Doe *v.* Hubbard, 15 Q. B. 227, 241.

[2] The correct principle is shown in the case of Selwood *v.* Mildmay, 3 Ves. 306. In that case a testator bequeathed the proceeds of £1,250, "part of his stock in the four per cent. annuities of the Bank of England." He had no annuities of thia class when the will was made, though he had formerly owned some, which had, however, been sold, and the proceeds converted into "long annuities." Evidence of these facts was received, *not* to show that he intended to give the "long annuities," but to show how the mistake arose, and thus give the legatee £1,250 out of the testator's general estate. This case, from misapprehension of its real scope, has sometimes received adverse criticism, as in Miller *v.* Travers, 8 Bing. 244, and Doe *v.* Hiscocks, 5 M. & W. 363. The theory of the decision was carefully and correctly stated by Lord LANGDALE, M. R., in Lindgren *v.* Lindgren, 9 Beav. 358, and followed by him in a case presenting similar facts.

Sub-rule 5. The court will regard the circumstances under which the will was made, — such as the state of the testator's property, or of his family, or, if material, of his friendships or acquaintanceships, with the view of placing itself as nearly as possible in the situation of the testator. This is not with the view of altering the will, but to place itself in the right position to understand his meaning. With all the light thus obtained, the testator's intention must be gathered from the will, and from that alone.

Sub-rule 6. A testator must be presumed to have calculated on his will taking effect rather than the contrary, and to have intended to dispose of his whole estate. The burden of proof is accordingly upon one who alleges the contrary.

Sub-rule 7. If the intention cannot operate to its full extent, it should operate as nearly as possible. This leads to the doctrine of *cy pres*,[1] — meaning the rule of *approximating* the intent, or getting as near to it as the rules of law will permit. It is peculiarly applicable to wills of real estate. Still, as wills of land and personal property are brought nearer together than formerly, there appears to be no good reason for excluding it, wherever it can reasonably be applied. It is resorted to frequently in the case of gifts to charitable uses.

Further and more detailed rules of interpretation will be found in treatises upon wills and upon construction and interpretation.

VIII. *Legacies.* — The general name given to a disposition of personal property in a will is a legacy.

(1) *Kinds of legacies.* — Legacies may be generally classified as specific, demonstrative, and general.

1. *Specific legacies.* There has been much difference of opinion as to the true definition of a specific legacy. The correct view seems to be that it includes items, or a class of items, belonging to the testator, *so described* in the will as to be distinguished from all other items of property. It is not enough that the testator owns an article which answers the designation. Thus, a legacy of a gold watch would not be specific, even though the testator owned one, nor of ten shares in a designated bank, though he owned precisely ten shares. But if the words, the "gold watch I now wear," or "ten shares of stock now registered in my name," were used, the description would be so closely drawn as to exclude all others, and so make the gift specific. In other words, the test of a specific legacy is the *language of the testator*, and not the extrinsic fact that he owned, when the will was executed, a chattel which in its nature corresponded to the thing bequeathed.

[1] The words *cy pres* mean "as near." It is accordingly an elliptical expression.

Lord Chancellor SELBORNE, acting as a judge in the House of Lords, has framed two definitions of a specific legacy. One is as follows. It is a bequest by a description which identifies a particular subject then existing as intended to pass to the donee *in specie*.[1] In a later case his definition is, something "which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed or taken *in the state and condition* indicated by that description, separates in favor of a particular legatee from the general mass of his personal estate."[2] This definition was approved by Lords BLACKBURN and FITZGERALD.[3] Yet it seems doubtful whether the words, "to be enjoyed in the state and condition indicated," etc., are really a proper term in the definition. Suppose that the testator should bequeath one hundred shares of stock specifically described, and add the words, "if sold before my death, then the proceeds," would the last words deprive the bequest of its specific character? It would seem not.[4] The great feature of a specific bequest is, that a particular thing then owned by the testator is sufficiently described or identified as the subject of his gift. A good illustration is such words as "all *my* stock in the Midland Railway Company,"[5] or, "*my* books and paintings."[6] (*a*)

The case of Tifft *v.* Porter is important.[7] The testator owned 360 shares of the stock of a bank. He bequeathed simply 240 shares of stock in the bank to A., and 120 shares to B., without any description showing that they were the shares then belonging to him. The legacy was held to be general and not specific.

A mere exemption by way of legacy of particular items from the general mass of the testator's estate does not make the bequest of *the rest* of his property to another person specific. Thus, if he should bequeath to A. *all the personal estate* of which he should die possessed *not consisting of money* or securities for money, and give to B. what he had not bequeathed to A., the legacy to the latter would not be specific.[8] Specific words following general expressions will sometimes be regarded as simply

[1] Giles *v.* Melsom, L. R. 6 Eng. & Ir. App. Cas. 24, 29 (1873).

[2] Robertson *v.* Broadbent, L. R. 8 App. Cas. 812, 815 (1883).

[3] Id. 820, 821.

[4] See Palin *v.* Brookes, 26 W. R. 877.

[5] Bothamley *v.* Sherson, L. R. 20 Eq. 304.

[6] Langdale *v.* Esmonde, 4 Ir. R. Eq. 576.

[7] 8 N. Y. 516. To the same effect, see Bronsdon *v.* Winter, Ambler, 57; Wilson *v.* Brownsmith, 9 Ves. 180; Johnson *v.* Goss, 128 Mass. 433. Compare with Metcalf *v.* Framingham Parish, Id. 370.

[8] Broadbent *v.* Barrow, L. R. 20 Ch. D. 676 (C. A.).

(*a*) Hood *v.* Haden, 82 Va. 588; Hayes *v.* Hayes, 45 N. J. Eq. 461; Maybury *v.* Grady, 67 Ala. 147; Tomlinson *v.* Bury, 145 Mass. 346; Harvard Unitarian Society *v.* Tufts, 151 Mass. 76.

explanatory or confirmatory of the general words, and in such a case the legacy will not be specific.[1] A specific legacy is defined by high authority to be "a bequest of a specified part of the testator's personal estate which is so distinguished."[2] This definition was followed by one of the judges in Broadbent *v.* Barrow, cited in the note, though declared not to be exhaustive.[3]

2. *Demonstrative legacies.* By the term "demonstrative" is meant a designation of a particular fund from which the legacy is directed to be paid in such a way that if the fund should fail or be insufficient the legacy would still be payable, either in whole or in part, from the testator's general estate.

A testatrix directed a number of legacies to be paid from a fund of £6,000 which she assumed to belong to her. It turned out that she had only a life interest in the fund. The legacy was declared to be *demonstrative*.[4] In other words, the testatrix had *pointed out* a fund from which the legacy was to be paid, but did not limit the legatee to that fund.[5] The legacy must accordingly be paid from the general estate of the testatrix. (*a*)

Accordingly, a pecuniary legacy given with a *particular* security is demonstrative.[6] And wherever there is a fixed, independent, separate, and distinct intent to give the legacy, it will stand, though the fund out of which it is directed to be paid does not exist.[7] Thus, where a testator bequeathed certain annuities, and directed that they should be paid out of the rents of his real estate, and the latter proved to be insufficient, it was held that the gift was demonstrative, and the deficiency must be paid out of the capital of the residuary personal estate.[8] If, however, the words are positive that the legacy *must* be taken from a designated fund, then the legacy is not "demonstrative," but must be confined to the fund so designated.[9]

Some of the leading practical distinctions between specific and demonstrative legacies should be noted. A specific legacy is not liable to "abate" in respect to other classes of legacies, a demonstrative one is. A specific legacy is liable to "ademption," a

[1] Fairer *v.* Park, L. R. 3 Ch. D. 309.
[2] Williams on Executors (8th Eng. ed.), 1163.
[3] *Per* LINDLEY, L. J., p. 684.
[4] Cunliffe *v.* Cunliffe, 23 W. R. 724.
[5] Fowler *v.* Willoughby, 4 L. J. (Ch.) 72, s. c. 2 Sim. & S. 354.
[6] See Willox *v.* Rhodes, 2 Russ. 452; Colville *v.* Middleton, 3 Beav. 570; Campbell *v.* Graham, 1 Russ. & M. 453.
[7] Mann *v.* Copland, 2 Madd. 223.
[8] Paget *v.* Hurst, 9 Jur. N. S. 906; Williams *v.* Hughes, 24 Beav. 474.
[9] Coard *v.* Holderness, 22 Beav. 391.

(*a*) See generally as to demonstrative legacies, Giddings *v.* Seward, 16 N. Y. 365; Pierrepont *v.* Edwards, 25 N. Y. 128; Delaney *v.* Van Aulen, 84 N. Y. 16; Armstrong's Appeal, 63 Pa. St. 312; Ives *v.* Canby, 48 Fed. R. 718; Additon *v.* Smith, 83 Me. 551; Hutchinson *v.* Fuller, 75 Ga. 88.

demonstrative one is not. A specific legacy vests immediately on the death of the testator, a demonstrative one does not.[1] The topics of "abatement" and "ademption" will be hereafter considered.[2]

3. *General legacies.* This expression includes all legacies given in money simply, without any direction as to the fund from which payment is to be made, or in goods without definite description. Thus, a legacy of a gold watch is a general legacy, as well as one of a thousand dollars. A legacy of stock (government bonds) will accordingly be specific or general according to the circumstance whether the testator intended to confine it to stock that he then had.[3] Accordingly, a legacy of all the stock that the testator may be possessed of at the time of his decease is not specific but general.[4] In an English case a testator bequeathed as follows: "£1,500 of *my* Egyptian 9 per cent. bonds to A.," and, again, "£500 Egyptian 9 per cent. bonds to B." The bequest to A. was declared to be specific, and that to B., general,[5] and this even though the testator had such last-mentioned bonds at the time.[6]

One further distinction must now be noticed. This concerns a "residuary legacy." It is not uncommon for a testator, after naming certain legacies of a specific, demonstrative, or general nature, to add a clause to the effect that all the rest and residue of his personal property, or, it may be, both real and personal, shall go to specified persons. As to the personal property, the beneficiary is termed a "residuary legatee," and as to the real property, "a residuary devisee." A provision in a will for a residuary *legacy*, in its broadest meaning, is a species of omnibus clause, designed to sweep in everything that has not been otherwhere effectually disposed of.[7]

There may, however, be a "residue" of a portion of an estate, as well as a general residue covering the entire estate. Again, a clause framed in residuary terms may be a specific legacy. Such words as the following, "all my personal estate in Jamaica to be remitted to England,"[8] "all my personal estate at W.,"[9] or, "all other of my personal estate and effects which I can by law bequeath to such an institution,"[10] are examples. So where in a residuary clause specific property is named, the bequest may be

[1] Mullins *v.* Smith, 1 Dr. & Sm. 204; Kirby *v.* Potter, 4 Ves. 748.

[2] See *post*, pp. 619–623.

[3] Avelyn *v.* Ward, 1 Ves. Sr. 419, 425.

[4] Parrott *v.* Worsfold, 1 Jac. & W. 594. But see Stephenson *v.* Dowson, 3 Beav. 342, where the contrary is held.

[5] Macdonald *v.* Irvine, L. R. 8 Ch. D. 101 (C.A.).

[6] See Tifft *v.* Porter, 8 N. Y. 516; Johnson *v.* Goss, 128 Mass. 433.

[7] Taylor *v.* Taylor, 6 Sim. 246.

[8] Nisbett *v.* Murray, 5 Ves. 149.

[9] Sayer *v.* Sayer, 2 Vern. 688.

[10] Shepheard *v.* Beetham, L. R. 6 Ch. D. 597.

specific as to that particular property, and general as to the rest.[1] It is, however, a rule that where a testator uses general words, such as "all my property," or "all that I have power over," and then proceeds to mention particular things, this enumeration does not change the effect of the general words, nor make the enumerated gifts specific.[2] A partial residue carved out of a general one is not necessarily specific.[3]

A distinction must here be mentioned, applicable to legacies in general, between such as are cumulative and such as are substitutionary. It sometimes happens that legacies of the same amount are given to the same person, either in the same instrument, or different instruments. The question then arises, whether the legatee is to have both, or only one. If he is entitled to both, the legacies are called *cumulative.* If only one, it may be because it is treated as a case of inadvertent repetition. In this case, the later legacy is called *repetitious.* It may be that the testator intended to put the later legacy in place of the former. It is then called *substitutionary.*

The following rules prevail in determining whether legacies are cumulative.

Rule 1. When two legacies are given in the same instrument, of the same amount, to the same person, the presumption is that only one was intended.[4] It is, however, a matter of intention, and the presumption may be rebutted by evidence to the contrary.

Rule 2. When the legacies are found in different instruments (excluding the case of two codicils), without any qualification or statement of motive, the legacies are, in general, cumulative, and the legatee is entitled to both.[5] It is not material whether the amounts be the same, or different.[6]

Rule 3. The construction adopted in Rule 2 may be repelled by internal evidence to the contrary, as where the same sum is given for the same cause.[7] Simple repetition, if exact, may be enough to repel the presumption.[8] The circumstances of the whole case must be regarded.[9]

Rule 4. In determining whether legacies are cumulative or substitutionary, the object will be to ascertain the testator's intention, which in many cases can only be done by a close and critical examination of the different instruments.[10]

[1] Mills *v.* Brown, 21 Beav. 1.
[2] King *v.* George, L. R. 5 Ch. D. 627 (C. A.).
[3] Robertson *v.* Broadbsnt, L. R. 8 App. Cas. 812.
[4] Garth *v.* Meyrick, 1 Bro. C. C. 30.
[5] Baillie *v.* Butterfield, 1 Cox Eq. 392.
[6] Hurst *v.* Beach, 5 Madd. 351,58.
[7] Osborne *v.* Duke of Leeds, 5 Ves. 369, 382; Benyon *v.* Benyon, 17 Ves. 34.
[8] Moggridge *v.* Thackwell, 1 Ves. 464.
[9] Lyon *v.* Colville, 1 Colly. 449.
[10] Guy *v.* Sharp, 1 M. & K. 589; Hemming *v.* Gurrey, 1 Dow & Cl. 35.

Rule 5. Where there are several gifts to a stranger, by different instruments, the presumption is that the gifts are cumulative. The presumption will be strengthened by a difference of motive in the two cases, or weakened or overcome by the statement by the testator of the same motive.[1] The question is thus made to depend upon circumstances.[2]

Rule 6. As between a first and second codicil, the court is not inclined to regard them as separate instruments for the purpose of making the legacies cumulative.[3]

Rule 7. A special question has arisen in separate legacies to servants. This is whether the word "servant" expresses a motive, or is simply descriptive, and used to identify the person. In the former aspect it will be regarded as repetitious; in the latter, as cumulative.[4]

(2) *Ownership or right of the legatee.* — From this point of view, legacies are either vested or contingent, and absolute or conditional. Again, ownership may be qualified or general.

Vested and contingent legacies. — A legacy is said to be "vested" when the ownership is fixed in a particular person. A distinction must be taken between ownership and possession. A legatee may own a chattel, and yet not be entitled to immediate possession. His interest would still be deemed to be vested. An important class of cases is that where money is *to be paid* to a legatee on attaining a specified age, — *e. g.*, twenty-one. Should he die before twenty-one, the legacy would in general belong to him, and so be transmitted by succession to his representatives. (*a*) If the words indicate that the money is to belong to him if he attains twenty-one, the legacy is contingent, and if he dies before that age, nothing vests, the money simply remaining a part of the testator's estate. If the income is directed to be applied to the support of the legatee until he attains twenty-one, and then the principal is to be paid over to him, and, in case he dies under that age, to another, the legacy is deemed to be vested at the moment of the testator's death, though liable to be divested by the death of the beneficiary before the prescribed time. He would thus own the *entire income* during his life, though he died under the specified age.[5]

[1] Suisse *v.* Lowther, 2 Hare, 424.

[2] Russell *v.* Dickson, 4 H. of L. Cas. 293; Tuckey *v.* Henderson, 33 Beav. 174.

[3] Tatham *v.* Drummond, 10 Jur. N. S. 557.

[4] Roch *v.* Callen, 6 Hare, 531; Wilson *v.* O'Leary, L. R. 7 Ch. App. 448.

[5] *In re* Peek's Trusts, L. R. 16 Eq. 221; Bolding *v.* Strugnell, 45 L. J. (Ch.) 208.

(*a*) Warner *v.* Durant, 76 N. Y. 133; Smith *v.* Edwards, 88 Id. 92; Bushnell *v.* Carpenter, 92 Id. 270; Matter of Accounts of Mahan, 98 Id. 372; Goebel *v.* Wolf, 113 Id. 405.

A different rule is applied where the legacy is made a charge upon the testator's land. In that case, if the money is *to be paid* on the attainment of a specified age, and the beneficiary dies before that age, the legacy fails. It is said to *lapse*. The reason of the distinction is, that the charge is prejudicial to the testator's heirs, and the rules of law favor those who claim the real estate by succession. The word "vested," when used in respect to ownership, may mean either the vesting of a defeasible interest, or of one that is absolute and indefeasible. The context may be resorted to in order to show what is intended.[1] Only general rules can be stated in this connection. A great number of decisions turn upon the special words used by the testator, and are to be found collected in the digests, and in the treatises on wills.

The doctrine of *lapse* is to be noticed. The meaning of "lapse" is the effect of the death of a legatee before the testator, or after the testator, but before the time fixed for the vesting of the legacy. The expression is more usually applied to the first case.

It is a general rule that if there be a legacy to A. of a chattel simply, and without qualifying words, and he die before the testator, the legacy "lapses," — that is, has no effect. The testator's property is to pass by succession as though there had been no such legacy. This rule is now modified by statute in England, and a number of our States. The New York statute provides that if the legatee (or devisee) be a child or other descendant of the testator, and die before the latter, leaving a child or other descendant, the legacy does not lapse, but belongs to the child or other descendant of the devisee or legatee.[2]

It is common, in a will, to find a provision that if a particular legatee die, his share shall go to others. The regular construction is, that the testator meant die in his (the testator's) own life-time. Accordingly, in a case where the testator and legatee died at the same instant, the clause did not apply, and the substituted persons took nothing.[3] (*a*) The point in the case is, that the legacy

[1] Armytage *v.* Wilkinson, L. R. 3 App. Cas. 355. It is a settled rule that courts lean towards vesting, and when property is once vested, will not divest it without strong grounds.

[2] 2 R. S. 66, § 52 (8th ed. p. 2549).

[3] Elliott *v.* Smith, L. R. 22 Ch. D. 236. See also Peard *v.* Morton, L. R. 25 Ch. D. 394; Vanderzee *v.* Slingerland, 103 N. Y. 47. The same rule applies where the words "die *without* issue" are used, though in this last case slight circumstances may vary the construction. Id.

(*a*) The rule that the words "die without issue," refer to death during the life-time of the testator, would not apply if the first legatee took a life estate. Fowler *v.* Ingersoll, 127 N. Y. 472; Mullarky *v.* Sullivan, 136 Id. 227. Nor where the language of the will evinces a contrary intent. Mead *v.* Maben, 131 N. Y. 255; Matter of Denton, 137 Id. 428.

does not fail unless it is shown that the legatee dies before the testator.

It is a fatal defect if the vesting of the legacy is to take place at a period so remote as to transgress the "rule against perpetuities." This is a positive rule of the common law, that legacies must vest in ownership within the compass of a specified life, or lives, in being at the testator's death, and an additional period of twenty-one years, and in case of unborn children, the usual period of gestation. The period of twenty-one years may be allowed as an absolute period, without reference to lives. Thus, a person might make a charitable bequest to a corporation to come into existence within twenty-one years after his death.[1]

When this rule is transgressed, the transgressive provision is void as being opposed to public policy; all provisions built upon it and made to take effect if it does not, are void. There is a rule called the doctrine of *acceleration* which may sometimes be invoked when a primary provision is void, to bring up a substituted provision, as it were, to the death of the testator. The practical result is that the will is read as if the primary provision were absent. This rule cannot be applied to the case now under consideration.[2] The case just mentioned must be distinguished from that of alternate limitations, for in this case, if one is too remote and the other is not, and the latter takes effect, it will be valid.[3] An instance is, a bequest to A. for life, and after her death to be divided between her children when, or if, they attain twenty-seven, and in the event of her not bearing any child, to B. If she have no child, the gift to B. will be valid, since the event on which his interest is to vest, is sure to be ascertained within a single life. On the other hand, if A. had borne children, the legacy could not vest in them, as it would be too remote, for it might be requisite to wait for one life and more than twenty-one years in addition, to determine whether the legacy would vest.[4]

The common-law rule is modified in New York and in some other States so as to narrow the power to postpone the vesting. It is confined to *two* lives in being at the testator's death, and the

[1] Cadell *v.* Palmer, 1 Cl. & F. 372.

[2] Beard *v.* Westcott, Turn. & Russ. 25; Palmer *v.* Holford, 4 Russ. 403; *Re* Thatcher's Trusts, 26 Beav. 365; Rose *v.* Rose, 4 Abb. N. Y. App. Dec. 108.

[3] Cambridge *v.* Rous, 25 Beav. 409; Evers *v.* Challis, 7 H. of L. Cas. 531; Schettler *v.* Smith, 41 N. Y. 328.

[4] JESSEL, M. R., puts the following illustration in Miles *v.* Harford, L. R. 12 Ch. D. 691, 703: "On a gift to A. for life, with a gift over in case he shall have no son who shall attain the age of twenty-five years, the gift over is void for remoteness. On a gift to A. for life, with a gift over if he shall have no son who shall take priest's orders in the Church of England, the gift over is void for remoteness; but a gift superadded, 'or if he shall have no son,' is valid, and takes effect if he has no son."

period of twenty-one years is cut off, except in the single case, relating to real estate, of the first taker being an infant and dying during his minority. The general principles are quite the same as in the common law.

Absolute and conditional legacies. — This is a distinction that arises in the case of vested legacies. A legacy is said to be *absolute* when it is without any restriction or qualification whatever. This is the common case. It is illustrated by the gift of a gold watch, a sum of money, and the like. It is said to be *conditional* or *defeasible*, when some act or event may withdraw it from the legatee. In each case the legacy is vested, but in the one it cannot be divested, and in the other it can be.

Conditions in law are of two kinds, — precedent and subsequent. A precedent condition must be performed before any title or right vests; a subsequent condition, if not performed, divests a right or interest which has already vested.

A legacy upon condition precedent resembles a contingent legacy. In considering such a conditional legacy, one's mind is directed to the fact that the *legatee* had something to do to cause it to vest, while in a contingent legacy the uncertainty consists in the happening or not happening of a prescribed event.

A good instance of a conditional legacy of this form is that of one given to an executor *by virtue of his office*, or for his care and trouble. A gift to one who is executor of the testator is not necessarily conditional. It may be made simply on grounds of friendship or affection. The first inquiry, then, will always be, whether the gift is made to him in that character and for representative reasons. If not, the legacy is absolute. What it is, is a matter of intent, depending upon all the circumstances.[1] There may be a presumption that a legacy given to an executor is given to him in that character.[2] It may, however, according to one case, be rebutted by circumstances, — as, for example, where there are two executors, — if there be a great inequality in the respective bequests to them.[3] The same conclusion was arrived at where the property was given to a tenant for life, and after his death the bequest to the executor was payable.[4]

If the legacy is given by virtue of office, it does not vest if the executor does not prove the will, even though by bodily age and mental infirmity he is incapable of proving it,[5] or is prevented by illness.[6] Still, if being at a distance he take steps to

[1] Compton *v.* Bloxham, 2 Colly. 201.
[2] Stackpoole *v.* Howell, 13 Ves. 417.
[3] Jewis *v.* Lawrence, L. R. 8 Eq. 345.
[4] *In re* Reeve's Trusts, L. R. 4 Ch. D. 841.
[5] Hanbury *v.* Spooner, 5 Beav. 630.
[6] *Re* Hawkin's Trusts, 33 Beav. 570.

prove it, manifesting his intent, and die before it is proved, the legacy may be payable.[1]

It has, however, been held that if the executor at first decline to serve, and in the mean time an agent be appointed to take charge of the estate, and subsequently the person named as executor qualify, there should be deducted from his legacy the expenses fairly attributable to the appointment of the agent.[2] In such a case of renunciation and retraction, interest on the legacy only runs from the time of proving the will.[3] A legacy to an executor of this sort is not a contract, but is a true legacy, and subject to the rules governing legacies.[4]

Qualified ownership in legacies. — A testator may give a legatee a qualified instead of a complete ownership, such as a life interest. The legacy may be either of specific articles or a general residue. In the gift of specific articles a distinction must be taken between such articles as cannot be used without consuming them, and those which can be so used. In the former class of cases a gift of a partial interest is, in substance, a gift of the whole, since otherwise the legacy would be practically inoperative. But in such cases, if there were a direction to sell, there might be a life interest given in the proceeds. If there be a residuary gift of perishable articles to persons in succession, there is a presumption that the testator intended that the property should be sold and converted into permanent property. This would mean in England conversion into the consolidated government debt (consols). This is known as the rule in Howe *v.* Earl of Dartmouth.[5] In this country the investment would be made in such securities as were sanctioned by the court in each State. This presumption may be rebutted by evidence that the testator intended that the life tenant should enjoy the goods in their original form (*in specie*).[6] The general rule is that the person having the ultimate interest may have the residue ascertained and converted into the authorized securities within a year.[7] If this is not done, but the estate is realized at some later day, it will be necessary to ascertain retrospectively what was the residue at the end of the

[1] Lewis *v.* Mathews, L. R. 8 Eq. 277.

[2] Morris *v.* Kent, 2. Edw. Ch. 175.

[3] Angermann *v.* Ford, 29 Beav. 349.

[4] Att'y-Gen'l *v.* Robins, 2 P. Wms. 23, 25; Duncan *v.* Watts, 16 Beav. 204; Debuly *v.* Eckett, 4 Jur. N. S. 805.

[5] Howe *v.* Earl of Dartmouth, 7 Ves. 137.

[6] Morgan *v.* Morgan, 14 Beav. 72. The question thus becomes one of construction of the will; slight indications of intent on the testator's part will prevent the application of the rule in Howe *v.* Earl of Dartmouth. See Blann *v.* Bell, 2 De G. M. & G. 775; Vachell *v.* Roberts, 32 Beav. 140. *In re* Sewell's Estate, L. R. 11 Eq. 80; Wilday *v.* Sandys, L. R. 7 Eq. 455; Boys *v.* Boys, 28 Beav. 436.

[7] Wightwick *v.* Lord, 6 H. of L. Cas. 217.

year, attributing a due proportion to capital and a due proportion to interest.[1]

Where the legacy is specific, the life tenant may in general enjoy it in its original form. An example is the gift of a law library to be used for life, while the books themselves, subject to the life interest, are bequeathed to another. In this case the life tenant would regularly give the person in remainder a list or inventory of the chattels bequeathed. If any unnecessary injury were done them, or threatened, a court of equity would intervene, and require security.

Important questions arise as to the right of a life tenant to dividends on stocks bequeathed by the testator. It is a general rule that dividends declared after the testator's death, though the profits were made in his lifetime, form part of the *income* and not of the body or *corpus* of his estate.[2] (*a*) So, if shares be settled on A. for life, and after his death on another, any dividend declared before A.'s death, and payable afterwards, belongs to A. This is on the ground that the declaration of the dividend separates it from the mass of the estate, and it becomes a debt.[3] There is no fixed rule that surplus profits, when divided by means of an extraordinary dividend, shall be treated as capital as between the tenant for life and the succeeding owner. It is for the company, if they have power to increase the capital, to say whether the profits shall be treated as capital or not.[4] Accordingly, new shares of corporate stock representing surplus property, and distributed to stockholders, would not belong to the life tenant. In such a case the surplus is retained by the corporation and used in its business.[5] (*b*) It has been sometimes held that the court will look into the question of the source of the

[1] Wightwick *v.* Lord, H. of L. Cas. 227.

[2] Bates *v.* Mackinley, 8 Jur. N. S. 299.

[3] Wright *v.* Tuckett, 1 Johns. & H. 266.

[4] Sproule *v.* Bouch, L. R. 29, Ch. D. 635 (C. A.).

[5] *Ex parte* Brown, 14 R. I. 371; Minot *v.* Paine, 99 Mass. 101. There are some cases to the contrary (Clarkson *v.* Clarkson, 18 Barb. 646, and Van Doren *v.* Olden, 19 N. J. Eq. 176), but these do not appear to proceed on correct principles. The case of Sproule *v.* Bouch, puts the whole subject on satisfactory grounds, in making the sole test the act of the corporation in determining whether the surplus profits shall be capital or not.

(*a*) Matter of Kernochan, 104 N. Y. 618.

(*b*) See also Daland *v.* Williams, 101 Mass. 571; Rand *v.* Hubbell, 115 Mass. 461; Gifford *v.* Thompson, Id. 478; Davis *v.* Jackson, 153 Mass. 58; Sugden *v.* Alsbury, L. R. 45 Ch. D. 237; *In re* Barton's Trusts, L. R. 5 Eq. 238. Notwithstanding the views of the text, it is believed that the rule more commonly recognized in the United States is "to give all surplus earnings, in whatever form distributed, to the life tenant," Gilkey *v.* Paine, 80 Me. 319. Richardson *v.* Richardson, 75 Id. 570; Riggs *v.* Cragg, 26 Hun, 89; Earp's Appeal, 28 Pa. St. 368; Smith's Estate, 140 Pa. St. 344; Woerner on Administration, § 457.

profits, discriminating between those that are recent and such as are the accumulations of past years. There would appear to be no solid basis for such a distinction. As said recently in a case of high authority, "profits retain their character of income until they are converted into capital." [1] (*a*) There has as yet been no authoritative adjudication on the point in New York.

A further question arises as to apportionment when periodical payments are to be made to the life tenant, and he dies before the day of payment arrives. By the common law, if the payment is of interest, as that accrues from *day* to *day* the life tenant, or his representatives, is entitled to interest to the day of his death. But in the case of annuities or dividends not yet payable at the life tenant's death, there is no apportionment.[2] This rule included dividends paid upon government securities as well as in incorporated companies. The rule has been changed in England by statute.[3] The effect of the statute is that if a company is so constituted that its dividends are declared at fixed periods, as soon as one is declared it is apportionable.[4] It has also been held that the statute applies to occasional dividends.[5]

There is a similar statute in New York and in some other States, — for example, Massachusetts.[6] Both in the English and New York statutes the rule applies to wills made before the enactment of the statute, if the testator die afterwards.

(3) *Incidents to legacies.* — There are several rules of a peculiar nature governing legacies, which may be grouped together under this head. These are: 1. Abatement. 2. Ademption. 3. Satisfaction. Reference will also be made to special rules governing legacies to one's debtor.

1. *Abatement.* This word refers to the rule of priority or equality in payment when the testator's net estate is insufficient to pay all his legacies. Such an insufficiency may exist either at the testator's death, or may occur afterwards. It may be by the

[1] Sproule *v.* Bouch, L. R. 29, Ch. D. 635, 655; Price *v.* Anderson, 15 Sim. 473; *In re* Hopkins' Trusts, L. R. 18 Eq. 696. There is another class of cases where money is invested on interest, and the interest etc., is given to one for life. If on a sale a surplus beyond the original investment is produced, the life tenant has no share in it, whatever may be the rule as to stock in incorporated companies. This is the rule, though securities are selected by all the parties in interest differing from those named by the testator. Matter of Gerry, 103 N. Y. 445.

[2] Warden *v.* Ashburner, 2 De G. & Sm. 366.

[3] 4 & 5 Wm. IV, c. 22, § 2.

[4] *Re* Maxwell's Trusts, 1 Hem. & M. 610.

[5] Carr *v.* Griffith, L. R. 12 Ch. D. 655.

[6] In New York, Laws of 1875, ch. 542; Rev. St. (8th ed.) p. 2563; Massachusetts Pub. St. ch. 136, § 25; Adams *v.* Adams, 139 Mass. 449.

(*a*) See Bouch *v.* Sproule, L. R. 12 App. Cas. 385.

misfortune or by the fault of the executor. Waste of assets through his misconduct is technically termed a *devastavit*. The general rules of priority may be superseded by the words of the will, since the testator has the power to direct that in case of deficiency, certain legacies shall be paid before others. In considering the general rules of priority the different kinds of legacies will be contrasted.

A. Residuary legacies, as contrasted with such as are specially named. It is a general rule that residuary legacies must abate rather than particular ones.[1] This rule would not apply if a fund, assumed to equal a *fixed* amount, was given in the first instance, in part, in specified sums, to A., B., and C., and the "overplus" to D. This would simply be a mode of dividing the fund; and if there was a deficiency, all the legacies would abate equally.[2] This statement does not extend to a case where the fund is uncertain and indefinite.[3]

B. Demonstrative legacies as contrasted with such as are pecuniary. A demonstrative legacy has the preference so far as the designated fund from which it is to be paid is concerned. That being exhausted, there is no preference over other legacies as to the general assets.[4] If the specified fund fail altogether, the legacy is, in fact, a general one.[5]

C. Specific legacies, as contrasted with demonstrative and other legacies. If the subject of a specific legacy be still subsisting, it is to be paid, even though nothing is left for the pecuniary legatees.[6] This rule will be applied to a demonstrative legacy as long as the fund pointed out is not exhausted.

Where there are two or more specific legacies, and the estate is not sufficient to pay them, they must, as between themselves, abate proportionally. If one legatee be insolvent, the amount that should have been paid by him in the discharge of debts, etc. must be made up by the others, the general estate being insufficient.[7] It is a general rule, that where there is a number of legacies belonging to the same class, such as several specific legacies, or several pecuniary, they abate ratably, unless there is clear and conclusive proof that priority was intended.[8] (*a*)

[1] Purse *v.* Snaplin, 1 Atk. 414, 418.
[2] Page *v.* Leapingwell, 18 Ves. 463.
[3] Baker *v.* Farmer, L. R. 3 Ch. App. 537.
[4] Sellon *v.* Watts, 9 W. R. 847; Mullins *v.* Smith, 1 Dr. & Sm. 204.
[5] Roberts *v.* Pocock, 4 Ves. 150.
[6] Drinkwater *v.* Falconer, 2 Ves. Sr. 623.
[7] Connolly *v.* Farrell, 10 Beav. 142.
[8] Miller *v.* Huddlestone, 3 M. & G. 513.

(*a*) There is an exception to this rule where the legacy is given for a valuable consideration, — *e. g.*, in lieu of dower. Borden *v.* Jenks, 140 Mass. 562; Security Co. *v.* Bryant, 52 Conn. 311. Such a legacy, though general, takes precedence of specific as well as general legacies. Borden *v.* Jenks, *supra*.

The final point to be noticed is the effect of payment or appropriation by the executor to pay some of the legacies, where there is a subsequent waste (*devastavit*) by him, causing a deficiency. It has been held that legatees who may have received their amounts, cannot, in such a case, be called on to contribute, there having been no original deficiency in the estate itself.[1] But where there is merely a setting apart, or appropriation, there must have been a *consent* by the legatees to the appropriation, when the fund is uncertain in amount, or indefinite.[2]

2. *Ademption.* A legacy is said to be "adeemed" when, owing to some change in the subject-matter, or to some act of the testator, it is not payable to the legatee. Ademption is for the most part applicable to specific legacies, but it may appertain, under special circumstances, to a general legacy, as where advances are made by the testator to the legatee on account of it, after the execution of the will, and before his death. Ademption is sometimes likened to a revocation. This view is not strictly correct, since it may take place by a mere accidental destruction of the chattel bequeathed, as well as by an intentional disposition of it, — *e. g.*, a sale. The fundamental idea of a strict ademption seems to be that there has ceased to be any subject-matter on which the testamentary words can act.

Recurring to the ademption of specific legacies, if the subject of the bequest does not remain *in specie* at the time of the testator's death, it is adeemed without considering the testator's intent (*animus adimendi*).[3] Accordingly, if the specific goods are lost at sea by shipwreck, there is an ademption. If they were insured, the insurance money would not pass to the legatee.[4] A specific legacy of stock is adeemed by a sale of it.[5] So if the testator bequeathed long annuities, and sold them, purchasing new annuities, differing only in the fact that they terminated a quarter of a year sooner.[6] If the stock (government bonds) be converted by statute, — as, for example, where an option is given the holder to have the bonds paid off or the interest reduced, and he chooses the latter, — there is no change in the identity of the debt, and no ademption.[7] A direction by the testator to an agent to sell stock specifically bequeathed, followed up by a sale *after the testator's death*, is not an ademption.[8]

[1] Knight *v.* Knight, 15 L. J. N. S. Ch. 363.

[2] Baker *v.* Farmer, L. R. 3 Ch. App. 537.

[3] Barker *v.* Rayner, 5 Madd. 208; Hertford *v.* Lowther, 7 Beav. 107.

[4] Durrant *v.* Friend, 5 De G. & Sm. 343.

[5] Ashburner *v.* Macguire, 2 Bro. C. C. 108; Humphreys *v.* Humphreys, 2 Cox Eq. 184.

[6] Pattison *v.* Pattison, 1 M. & K. 12.

[7] Browne *v.* M'Guire, Beatty, 358; Oakes *v.* Oakes, 9 Hare, 666.

[8] Harrison *v.* Asher, 2 De G. & Sm. 436.

If one partner bequeath to another all his share in the profits up to a specified date, and subsequently draws out the profits, there will be an ademption.[1] So a bequest of a debt is adeemed, if paid either voluntarily or by compulsion, to the testator during his lifetime.[2] Some early cases drew a distinction between voluntary and compulsory payments, regarding ademption as a matter of intention. These are not now followed, the true test being whether the subject-matter exists *in specie*. So a release in a will of interest due on a debt due the testator from the legatee, is equivalent to a specific legacy of the interest; and if the debt be paid to the testator in his lifetime, the legacy is adeemed.[3] Other cases upholding ademption by payment of a debt bequeathed will be found in the note.[4] This doctrine is not applicable to a demonstrative legacy, since the particular fund referred to is not of the essence of the legacy. If that fail, it is still, as has been already stated, a general legacy.[5]

A specific legacy described in the will as being in a particular place, is adeemed by removal from that place. Thus, if "furniture in house No. 1" be bequeathed, there will be an ademption if it be removed to Nos. 3 or 5, though not if the removal be temporary, or for a special purpose.[6]

Wherever a sale or other like act regularly causes ademption, the principle will not be extended to a sale, etc., by one having no mental capacity to act, nor by a person having no authority to sell.[7] If, however, the property of an insane testator were sold under order of a court having jurisdiction to make the order, the legacy would be adeemed.[8]

A change of investment might be so complete and radical as to constitute an ademption,[9] but not a mere change in *the form* of investment, such as placing it in the name of a trustee for his use instead of his own name, nor, perhaps, a sale where he had reserved a valid and enforceable option to have the thing sold returned to him.[10] A bequest having been once adeemed, is not restored by a subsequent confirmation of the will.[11]

[1] Aston *v.* Wood, 43 L. J. (Ch.) 715.

[2] Stanley *v.* Potter, 2 Cox Eq. 180. See also Innes *v.* Mitchell, 6 Ves. 461; Barker *v.* Rayner, 2 Russ. 122.

[3] Sidney *v.* Sidney, L. R. 17 Eq. 65.

[4] Sidebotham *v.* Watson, 11 Hare, 170; Phillips *v.* Turner, 17 Beav. 194; Fryer *v.* Morrie, 9 Ves. 360.

[5] Campbell *v.* Graham, 1 Russ. & M. 453; Clark *v.* Browne, 2 Sm. & G. 524.

[6] Heseltine *v.* Heseltine, 3 Madd. 276; Colleton *v.* Garth, 6 Sim. 19; Houlding *v.* Cross, 1 Jur. N. S. 250; Spencer *v.* Spencer, 21 Beav. 548; Blagrove *v.* Coore, 27 Beav. 138.

[7] Jenkins *v.* Jones, L. R. 2 Eq. 323; Taylor *v.* Taylor, 10 Hare, 475. *Re* Kitchen, 31 L. T. 642.

[8] Jones *v.* Green, L. R. 5 Eq. 555; *In re* Freer, L. R. 22 Ch. D. 622.

[9] Gardner *v.* Hatton, 6 Sim. 93.

[10] See Collison *v.* Curling, 9 Cl. & F. 88, aff'g s. c. 4 M. & C. 63. The decision in these cases seems to involve the principle stated in the text.

[11] Cowper *v.* Mantell, 22 Beav. 223.

The remaining case to be noticed, is that of any legacy, whether specific or otherwise, which is advanced or given by the testator before his death, to the legatee. The rule is, that where a testator gives a legacy for a particular purpose, and afterwards accomplishes the purpose himself, the legacy is *satisfied*. The act of providing one's wife with ready money at his decease, so that she could control it without application to the executors, would not come within the rule.[1]

Questions of this kind frequently arise between parent and child, presenting the inquiry as to *double portions* in two aspects, — one where there is first a marriage settlement providing for children of the marriage, and afterwards provisions by will, and the converse case of provisions being first made by will, and afterwards in some other form, — *e. g.*, a marriage settlement. It is the last of these cases which is now under consideration, and which is the simpler of the two. There is a general presumption of law against *double portions*, and the difficulty lies in applying this presumption to particular cases as they arise. The whole subject received discussion and clear elucidation in the case of Lord Chichester *v.* Coventry.[2] The facts of that case presented an instance of a marriage settlement preceding a will, but the whole subject was considered, and the discussion is highly valuable as to the present matter.

There is a distinction in such cases between *ademption* and *satisfaction*. Ademption applies to the case where the legacy precedes the settlement; satisfaction, where the settlement precedes the legacy. In the first case, the legacy is considered to be "taken out" of the will (adeemed) by the subsequent advancement. Satisfaction is the more appropriate name for the second case, as the settlement had already created a *claim*. It has been defined to be the donation of a thing with the *intention* that it is to be taken, either wholly or in part, in *extinguishment* of some prior claim of the donee.[3] The presumption against double portions may be rebutted by evidence to the contrary. (*a*) Intrinsic evidence may be found in the respective instruments. Thus, where the two provisions are of the same nature, or differ but slightly, the presumption is against the intention to create double portions. Otherwise, if the provisions are of a different nature.[4] Ademption may be more easily inferred than satisfaction, since the testator has unlimited power to carry it into effect, while in

[1] Pankhurst *v.* Howell, L. R. 6 Ch. App. 136.

[2] L. R. 2 H. of L. Cas. 71.

[3] 2 Leading Cases in Equity (White & Tudor, 382, 6th ed. note to Chancey's Case).

[4] Weall *v.* Rice, 2 Russ. & M. 251, 267.

(*a*) See Lacon *v.* Lacon [1891], 2 Ch. 482.

satisfaction the consent of the party having the claim must be obtained before something else can be legally substituted in its place.[1]

The case of ademption by payment before the testator's death may be provided for in the will itself. This case is still stronger than those already discussed, since there is positive evidence of an intent to adeem, instead of a mere presumption.[2]

3. *Satisfaction.* This topic has been partly anticipated in pointing out the distinction between it and ademption. The fundamental idea here is, that the legatee has a true claim against the testator, and a presumption is urged that the legacy satisfies the debt. This subject will be further considered under two general divisions: *first*, satisfaction in general, and *second*, as between parent and child, including "double portions."

First. Satisfaction in general. It is a general rule of law, as well as of good sense, that a legacy "imports a bounty." It is apparently intended as a gift, and not as payment of debts. Still, it is equally plain that, if the debtor, in making a provision in his will in favor of a creditor, makes it sufficiently clear that he intends, through the form of a legacy, to discharge a debt, his intent must be carried out. Between these two propositions, there is debatable ground. An inquiry arises as to what shall be the *presumed intent* of the testator in case the will is silent when he gives a legacy to a creditor perhaps equal to or greater than the amount of the claim. The courts have, by force of decision, established a set of rules, to some extent artificial, which will be stated.

Rule 1. A legacy of the *same nature* as a debt, equal or greater in amount, without special qualification, will be presumed to be given in satisfaction of the debt.[3] Under this rule, land is not a satisfaction for money, nor money for land, not being of the same nature. Land should be given for land, and personal estate for personal estate.[4]

Rule 2. Slight circumstances are laid hold of by the courts to overcome the presumption. (*a*) A court of equity leans against satisfaction of debts by legacies.[5] The whole doctrine would

[1] Lord Chichester *v.* Coventry, *supra*, p. 87. The case of Earl of Durham *v.* Wharton, 3 Cl. & F. 146, is a leading instance of ademption; that of Lady Thynne *v.* Earl of Glengall, 2 H. of L. Cas. 131, of satisfaction.

[2] Langdon *v.* Astor's Executors, 16 N. Y. 9, 33–57. In this case (one of ademption of a general legacy), the words "satisfaction" and "ademption" are used somewhat indiscriminately, though DENIO, J., in his opinion, says that "ademption" is the most significant. p. 40.

[3] Bengough *v.* Walker, 15 Ves. 507 512; Chaplin *v.* Chaplin, 3 P. Wms. 245.

[4] Bellasis *v.* Uthwatt, 1 Atk. 426, 428.

[5] Lady Thynne *v.* Earl of Glengall, 2 H. of L. Cas. 131, 153.

(*a*) Sheldon *v.* Sheldon, 133 N. Y. 1.

now be rejected if it were new, and the courts will not extend it beyond its precise limits.[1]

Rule 3. A legacy in satisfaction of a debt must be of a fixed amount, and not uncertain. It must be absolute, and not contingent.[2] A gift of a residue cannot be a satisfaction of a debt, as the amount is in its nature uncertain, and may be less than the debt.[3] So a debt is not even partially satisfied by a legacy of a less amount,[4] nor by one payable on different terms from the debt.[5]

Rule 4. Any special language in the will may introduce a different principle from the presumption which prevails when the will is silent. Under this rule, a legacy of a residue may show the intent of the testator to be a *direction to pay a debt*, and so be carried out *pro tanto*, if the residue be not equal to the debt.[6] So, if the testator should use the words "*after* the payment of my *debts*," and then give legacies, among others, to a creditor, the special words would preclude the presumption that he intended the legacy to be in *satisfaction* of the debt.[7] (*a*)

Again, if a legacy be given in full satisfaction of all *claims* that the legatee may have against the testator, the word "claims" cannot be construed to include a claim belonging to the legatee's wife.[8] If the testator, by mistake, describes the debt as larger than it is in fact, and there is no evidence on the face of the will of an intent to give the larger sum, except as being the amount of the indebtedness, only the amount actually due can be enforced.[9]

Rule 5. Parol or extrinsic evidence is admissible, both to show that the legatee was a creditor, and to fortify the presumption of satisfaction,[10] as well as to rebut it,[11] but not to alter the terms of the bequest. A legacy in satisfaction of all claims of A. could not be shown by such evidence to mean claims which A. held as executrix.[12]

Second. Satisfaction, as between parent and child. This case presents the subject of "double portions," not as in the case of

[1] Richardson *v.* Greese, 3 Atk. 65, 68; Hassell *v.* Hawkins, 4 Drew, 468.

[2] Spinks *v.* Robins, 2 Atk. 491.

[3] Barret *v.* Beckford, 1 Ves. Sr. 519; De Vese *v.* Pontet, 1 Cox, Eq. 188.

[4] Gee *v.* Liddell, 35 Beav. 621.

[5] Haynes *v.* Mico, 1 Bro. C. C. 129; Adams *v.* Lavender, 1 M'Cl. & Y. 41.

[6] Philips *v.* Philips, 3 Hare, 281.

[7] Jefferies *v* Michell, 20 Beav. 15.

[8] Parmiter *v.* Parmiter, 1 Johns. & H. 135; aff'd 3 L. T. N. S. 799.

[9] Wilson *v.* Morley, L. R. 5 Ch. D. 776. This case was distinguished from Whitfield *v.* Clemment, 1 Mer. 402, to the contrary, for the reason that in the last-named case there was evidence of an intent to confer a bounty.

[10] Pole *v.* Lord Somers, 6 Ves. 309, 321.

[11] Wallace *v.* Pomfret, 11 Ves. 542.

[12] Dixon *v.* Samson, 2 Y. & C. 566; Parmiter *v.* Parmiter, *supra.*

(*a*) Bradahaw *v.* Huiah, L. R. 43 Ch. D. 260; Boughton *v.* Flint, 74 N. Y. 476.

"ademption" already considered, but rather under circumstances where the child has a *claim*,—*e. g.*, by marriage settlement,—and the question is whether the parent has satisfied the claim. The court does not lean against the doctrine of satisfaction in this class of cases, as it does in ordinary debts, but rather favors it, owing to its hostility to double portions. A leading modern case is the case of Lady Thynne *v.* The Earl of Glengall,[1] already cited in another connection.[2] In this case there was a marriage settlement by a father upon a daughter, in which he agreed to transfer to trustees certain stock in trust for his daughter for life, and after her death for the children of her *marriage*, as her husband and she should *jointly* appoint. In his will the father gave a moiety of the *residue* of his personal estate in trust for his daughter for life, remainder to her *children* (not confining himself to the children of the *marriage*, as the settlement did), as *she* should appoint (omitting the husband). Notwithstanding these differences, and the fact that the gift was a residue, the will was held a satisfaction of the portion under the settlement as far as it would go. Assuming that a residue was uncertain in amount, it should apply for what it was worth. The court wholly threw out of view the cases as to satisfaction of a debt, holding that they had no application.[3] This case is understood to have settled the law on clear and satisfactory grounds.

There should be mentioned here the subject of a legacy to a testator's debtor. A testator may, if he will, make a legacy to a debtor of the amount of his debt. This must, as a rule, be regarded as a true legacy, and not as a release of the debt. It would not be treated as a release by a court of equity, as there is no consideration.[4] So the words, "I return A. his bond," were held simply to constitute a legacy.[5] It would therefore lapse, like other legacies, in case the legatee should die before the testator.[6] If, however, the testator use plain words of release, the intention may be regarded, and the debt deemed to be discharged.[7] The fact that the testator is a parent of the legatee will be taken into account.[8] There may be a release in the view of a court of equity, though not so regarded in a court of law.[9]

[1] 2 H. of L. Cas. 131 s. c. *sub nom.* Earl of Glengal *v.* Barnard, 1 Keen, 769.

[2] See *ante*, p. 624.

[3] Weall *v.* Rice, 2 Russ. & M. 251, 267; Richman *v.* Morgan, 1 Bro. C. C. 63.

[4] Tufnell *v.* Constable, 8 Sim. 69.

[5] Maitland *v.* Adair, 3 Ves. 231.

[6] Toplis *v.* Baker, 2 Cox, Eq. 118.

[7] South *v.* Williams, 12 Sim. 566; Elliot *v.* Davenport, 1 P. Wms. 83; Sibthorp *v.* Moxom, 3 Atk. 580. In this last case the court laid stress on the word "forgive." See also Synge *v.* Synge, L. R. 9 Ch. App. 128.

[8] Sibthorp *v.* Moxom, *supra;* Musket *v.* Cliffe, 2 De G. & Sm. 243.

[9] Hedges *v.* Aldworth, 13 Ir. Eq. 406, disapproving a *dictum* to the contrary in Cross *v.* Sprigg, 6 Hare, 552.

Sometimes the testator mentions the amount of the debt, which turns out to be erroneous; such a statement in general binds the legatee,[1] though if the error leads to an absurdity, the court will ascertain the true amount of the debt, and, if necessary, direct an accounting.[2]

(4) *Legacies charged upon land.* — This is a special topic, becoming important where the personal estate is not sufficient to pay the legacies, and there is real estate belonging to the testator. The inquiry then is, whether the land is not to be used to make up any deficiency. In general, it cannot be. The heir or devisee, as the case may be, is entitled to the land, and the legacies are only to be paid from the personal estate as far as it will go. There may, however, be evidence of intent, to be gathered either from the express words of the will, or by reasonable implication, that the land is to be resorted to. In this point of view the legacy is said to be *charged* upon the land. A few leading rules will now be stated.

Rule 1. A legacy may be "charged" upon land by implication. There are two principal cases: one, where the question arises between the legatee and the owner of the land, considered by itself; the other, where following the legacy is a residuary gift of real estate and personal property blended together. This is technically called a "mixed residue." An example of a "mixed residue" is such words as "all the rest, residue, and remainder of my real and personal estate, I give," etc.

In the first class of cases stated in this rule, the question is between the legatee and the owner of the land, considered by itself. The sole question is the intent. This will be inferred from such facts as these: he gives his wife land, and then directs her to pay enumerated legacies.[3] No particular form of words is necessary. The case will be strengthened by special words, such as a devise of real estate "subject to a legacy," [4] or a devise of a house to A., he "paying thereout" one hundred dollars to B. at a specified time.[5] So a *direction* to trustees to pay certain legacies has been held to constitute a charge.[6] It is a rule that a testator, by a direction to sell his land for this and other purposes, may cause the proceeds to be treated as personal estate (called the doctrine of "equitable conversion"), and thus provide a fund from which legacies are to be paid.[7]

[1] Robinson *v.* Bransby, 6 Madd. 348.

[2] *In re* Taylor's Estate, L. R. 22 Ch. D. 495, disapproving of *In re* Aird's Estate, L. R. 12 Id. 291.

[3] Johnson *v.* Brady, 11 Ir. Eq. 386.

[4] Freeman *v.* Simpson, 6 Sim. 75.

[5] Seal *v.* Tichener, 2 Dick. 444.

[6] Gallemore *v.* Gill, 2 Jur. N. S. 1178; 2 Sm. & G. 158; Preston *v.* Preston, 2 Jur. N. S. 1040; Rich *v.* Whitfield, 14 W. R. 907.

[7] Field *v.* Peckett, 29 Beav. 568; Bright *v.* Larcher, 3 De G. & J. 148.

In the second class of cases, where there is a *mixed residue*, it is a well-settled rule of the common law, as interpreted by the English courts, that if there are gifts of legacies, and then of the "rest and residue, real and personal," blending the whole into one mass, the legacies are "charged" upon the land.[1] This principle is applicable, although the residuary legatee has power to dispose of the residuary property "in any manner he may think proper." The meaning is, that he shall so dispose of it as not to interfere with the prior burdens to which the property is subject. The principle also applies, although there is a direction that the debts and legacies shall be paid by the executors.[2] The meaning of the word "charge" is not that the legacies are necessarily to be paid from the land, but that the land may be resorted to in case the personal property is insufficient. It is a general rule of law that the personal estate is the primary fund for the payment of debts and legacies, and the rule prevails, even though the land be "charged" with their payment.

The principle governing all these instances is simply this: when a testator treats his entire estate as a compound fund, or, in the language of the cases, as "one mass," and then gives enumerated legacies, and in the end the *residue* or *remainder*, the words "residue" and "remainder" mean the *overplus* after the enumerated legacies are deducted, where the personal estate is insufficient. This does not appear to be a mere technical conclusion, but to be founded on good sense and correct reasoning.[3] The rule is "thoroughly well established, having been acted upon by the Court of Chancery for two hundred years."[4]

The New York decisions do not accept in full the principle adopted by the English courts. The mere fact that "the residue of the estate real and personal" is given to one, while enumerated legacies are given to others, does not, in New York, make the latter a charge upon the land. There must be *further* evidence of the intent, such as that the personal estate is insufficient when the will takes effect, or that there is a direction to executors to pay, or the like. Accordingly, where the personal estate was ample to pay the legacies, there was no charge on the land, though nothing had been set apart with the view of paying the legacies.[5] (*a*)

[1] Greville *v.* Browne, 7 H. of L. Cas. 689.

[2] *In re* Brooke, L. R. 3 Ch. D. 630. See also Wheeler *v.* Howell, 3 Kay & J. 198.

[3] Greville *v.* Browne, *supra*, pp. 697, 700, 705.

[4] *Per* Jessel, M. R., in *In re* Brooke, *supra*.

[5] Bevan *v.* Cooper, 72 N. Y. 317, and cases cited; Wiltsie *v.* Shaw, 100 N. Y. 191.

(*a*) Later cases, sustaining the New York doctrine, are Brill *v.* Wright, 112 N. Y. 129; Briggs *v.* Carroll, 117 Id. 288; Morris *v.* Sickly, 133 Id. 456. The contrary rule is approved in Turner *v.* Gibb, 48 N. J. Eq. 526; Bennett's Estate, 148 Pa. St. 139; Knotts *v.* Bailey, 54 Miss. 235; Cady *v.* Cady, 67 Miss. 425.

In other cases, having special facts, "charges" have been adjudged.[1]

It is likely that the decision in Wiltsie *v.* Shaw will lead to fine-spun distinctions as to the point whether there is sufficient evidence of intent. The English rule, on the other hand, is clear, and liable to but few, if any, exceptions.[2]

Rule 2. An express charge may be made by any appropriate words. The word "charge" is usually adopted by professional draughtsmen. There may be a charge in reference to some legacies, and not as to others. Difficult questions may arise as to whether the words importing a charge will be carried forward to legacies not specifically protected. It may be claimed that the expression as to one is, by implication, an exclusion as to others. Cases involving this point are cited in the note.[3]

The *effect* of a charge is to create a lien or incumbrance upon the land while it remains in the ownership of those to whom it descended or was devised. In case of a sale, a distinction is made as to a charge of debts simply as against an heir, and to a charge of both debts and legacies as against a devisee. In the former case there is an implied power in the executor to sell the land free from the charge.[4] It will be observed that in this case the *title* to the land descends to the heir, and the executors represent the owner of the charge, and sell to settle the estate. In the latter case the title has passed to the devisee, and the money can only be raised through his instrumentality. There is no implied power bestowed upon him to sell *in order to pay the legacies*,[5] though he may of course sell his interest, *subject* to the burden of the legacies. It would seem accordingly to be a good objection to a title derived from a devisee that there were charges subsisting that were not paid off, and it appears to have been so considered in a recent case in New York.[6]

Special questions will arise whether a certain order must not be followed in appropriating lands, such as to take first lands specifically devised to pay debts, and next such as descend to heirs, etc. In this matter the intention of the testator governs. It is, however, held that *general* words creating a charge of *legacies*

[1] Hoyt *v.* Hoyt, 85 N. Y. 142; Harris *v.* Fly, 7 Paige, 421. Extraneous circumstances may be considered, according to these cases, but this can only be done when the words are doubtful. Hensman *v.* Fryer, L. R. 3 Ch. App. 420.

[2] The English rule is adopted in Massachusetts (Wilcox *v.* Wilcox, 13 Allen, 252) and in other States; also in the United States Supreme Ct., in Lewis *v.* Darling, 16 How. U. S. 1.

[3] Boyd *v.* Higginson, 5 Ir. Eq. 97; Hensman *v.* Fryer, L. R. 3 Ch. App. 420.

[4] Shaw *v.* Borrer, 1 Keen, 559; Ball *v.* Harris, 8 Sim. 485; Robinson *v.* Lowater, 5 De G. M. & G. 272.

[5] Newman *v.* Kent, 1 Mer. 240; Wigg *v.* Wigg, 1 Atk. 382.

[6] Wiltsie *v.* Shaw, 100 N. Y. 191.

only, — *e. g.*, "on all my real and personal estate," — do not, unless there is some evidence of intention to the contrary, include land specifically devised to another.[1] The principle governing the case is, that the testator, having given a particular thing, intends that the devisee should take it in its integrity, and without derogation, and cannot be supposed, from mere general words, to intend to withdraw it from a purpose to which he has already apparently devoted it.

A different rule prevails where the charge includes *both* debts and legacies. As the debts clearly bind the specifically devised lands, there is a presumed intention that the legacies mentioned at the same time should also.[2] Where a legacy is *simply* charged upon land by such words as "*subject* to the payment," etc., the devisee is not personally bound to pay it. He takes the land *cum onere*, and that is all.[3] It is otherwise if there be words in the will from which a promise by the devisee to pay can be inferred from his acceptance, — *e. g.*, if he be *directed* to pay.[4]

(5) *Void legacies.* — A void legacy is not the same as a lapsed legacy. A lapsed legacy is in its own nature valid, but fails to take effect owing to an event, such as the death of the legatee before the testator. A *void* legacy is a nullity. This invalidity may happen in a variety of modes, but principally from want of capacity on the part of the testator to give, or from a like incapacity of the legatee to receive. A legacy may also be void by reason of illegality or fraud, or uncertainty in description, etc.

1. *Illegality.* An important instance under this head is that of "remoteness," or bestowal of property to vest at a period of time beyond that allowed by the rules of law. This, at the common law, is beyond the lives of specified persons in being, and a period of twenty-one years in addition. This period in New York and some other States is reduced by statute to two specified lives.[5] A legacy transgressive of this rule is void. A legacy may be given to an unborn child of specified parents, as it would necessarily come into existence, if at all, within the legal period. The same rule applies to a non-existing corporation in other respects qualified to take.[6] In the common law the period of twenty-one years may be selected by a testator, without reference to lives. In other

[1] Campbell *v.* M'Conaghey, 6 Ir. R. Eq. 20; Spong *v.* Spong, 1 Dow. & Cl. 365; s. c. 3 Bligh, N. s. 84; Couron *v.* Couron, 7 H. of L. Cas. 168.

[2] Maskell *v.* Farrington, 3 De G. J. & S. 338.

[3] Jillard . Edgar, 3 De G. & Sm., 502 and cases cited on p. 508.

[4] Brown *v.* Knapp, 79 N. Y. 136, and cases cited on p. 143.

[5] 1 R. S. 773, § 1 (8th ed. p. 2516).

[6] Rose *v.* Rose, 4 Abb. N. Y. App. Dec. 108.

words, it may be taken as an absolute period.[1] Thus, a testator might lawfully bequeath property to a charitable corporation to be chartered within twenty-one years after his death. In New York, only to such a corporation chartered within two lives of persons whom he names, — *e. g.*, two of his executors.[2] (*a*) An instance of a different form of illegality is a bequest for purchasing the discharge of poachers committed to prison for non-payment of fines for violating the game laws.[3]

2. *Fraud.* Some instances of fraud as a cause of invalidity of legacies may be noted. One is where the object of the testator is to dispose of his property so as to hinder, delay, or defraud creditors.[4] Another is the case where a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed to be the motive of the testator's bounty. It was accordingly adjudged that a legacy given by a woman to a man in the character of her husband, whom she supposed and described as husband, who at the time of marriage with her had a wife living, was void.[5]

3. *Uncertainty.* A will may be void on the ground of uncertainty. The meaning of this is, that the will is so drawn that the intent of the testator cannot be ascertained by a resort to the usual rules of judicial construction. This rule is of special force at the present time, when statute law requires wills to be in writing. The intention of the testator must, in general, be found in the will itself, coupled with evidence of surrounding circumstances.

4. *Want of capacity to bequeath.* This defect only exists in special cases. It is not necessary to repeat the statements already made as to the instances of infancy, coverture, and undue influence. Rules of law sometimes preclude a testator who possesses full testamentary capacity from making bequests. An instance is a statutory rule in New York that no person having a husband, wife, child, or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association, or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts (and such devise or bequest

[1] Cadell *v.* Palmer, 1 Cl. & F. 372.

[2] Burrill *v.* Boardman, 43 N. Y. 254; Shipman *v.* Rollins, 98 N. Y. 311; Inglis *v.* Trustees of Sailors'-Snug Harbor, 3 Pet. 99.

[3] Thrupp *v.* Collett, 26 Beav. 125.

[4] Coope *v.* Cresswell, L. R. 2 Eq. 106; on appeal, L. R. 2 Ch. App. 112.

[5] Kennell *v.* Abbott, 4 Ves. 802.

(*a*) See Cruikshank *v.* Home for the Friendless, 113 N. Y. 337; People *v.* Simonson, 126 N. Y. 299, 307; Longheed *v.* The D. B. Church, 129 N. Y. 211.

shall be valid to the extent of one half, and no more).[1] This statute has been the subject of much adjudication, which is referred to in a note.[2]

5. *Incapacity of the legatee to take. Corporations.* There is an important distinction between the general capacity of a corporation, on the one hand, to take real, and on the other, personal, property by will. Wills of real estate, conferring the legal title, could not be made at all under the rules of the common law. They were introduced by the Statute of Wills in the reign of Henry VIII. Corporations were excepted from this statute, and are generally not authorized in the American statutes to take real estate. As, however, the common-law rule did not apply to trust interests, a devisor could create a trust in his own favor, and then make a will of his trust estate. These refinements never applied to wills of personal property. A corporation, like a natural person, was allowed to take that species of property, unless in some way restricted by statute.[3] There is restrictive legislation upon this point in a number of the American States. New York may be referred to as an example. The law of 1860 (ch. 360) has already been mentioned, which limits the testator, as to corporations, etc.

More important still is the earlier legislation of 1848, intended exclusively to limit the capacity of corporations formed under the general law of that year, to take property by devise or bequest, unless the will should have been executed at least two months before the testator's death.[4] The amount which could be devised or bequeathed under this statute was subsequently increased by various acts until, in 1890, it was enacted that charitable corporations, and others not organized for business purposes, could take and hold property not exceeding in value three million dollars, or property yielding a yearly income not exceeding two hundred and fifty thousand dollars. This act does not, however, affect corporations already having power to take and hold a larger amount.[5](*a*)

[1] Laws of 1860, ch. 360 (Rev. St. 8th ed. p. 2550).

[2] In order to determine whether the will exceeds the prescribed amount, the whole estate must be treated as if converted into money at the time of the testator's death, and the money value of the portion given ascertained, and if the one half is not exceeded, the will is valid. Hollis *v.* Drew Theol. Seminary, 95 N. Y. 166. See *ante*, p. 238.

[3] Sherwood *v.* American Bible Society, 4 Abb. N. Y. App. Dec. 227; and cases cited on p. 231.

[4] Laws of 1848, ch. 319.

[5] See Laws of 1848, ch. 319, § 6; Laws of 1881, ch. 641; and Laws of 1889, ch. 191, as amended by Laws of 1890, chs. 497 and 553.

(*a*) Sec also § 12 of the General Corporation Law, as amended by ch. 400 of the Laws of 1894. It is here provided that if any general or special law or any certificate of incorporation shall limit the amount of property a corporation other

An important question arose in connection with the charter of Cornell University, whether the distinction recognized in England between taking and holding property by corporations prevails in New York. The English statutes prohibiting corporations from taking and holding lands without license from the king, called statutes of "mortmain," were so construed by the courts, that an unauthorized acquisition would vest in the corporation by a defeasible title, until proceedings were taken on behalf of the sovereign power to divest the title. This construction is repudiated by the New York Court of Appeals as to acquisition by devise or bequest, so that a gift by will, beyond the authorized amount, is void for the excess, and vests no title whatever in the corporation.[1]

This decision was affirmed in the Supreme Court of the United States, not upon the main ground, which was held not to present a Federal question reviewable by that court, but solely upon the ground also maintained in the New York Court of Appeals, that Cornell University held property exceeding in value $3,000,000, which was the amount authorized by its charter.[2]

Charities. — Special rules prevail as to charitable legacies. They are not subject to the doctrines of "remoteness" as an ordinary legacy is. A perpetual fund may be given to selected trustees (not incorporated), who may have power to fill vacancies in their number, and thus apply the income from time to time to the charitable purpose. A similar gift may be made to a charitable corporation. The whole subject thus becomes a branch of the law of trusts, enforceable in equity. The word "charitable" is not used in the popular sense of a gift for the benefit of the poor, but embraces purposes of general public utility, extending to the rich as well as the poor, including gifts to support highways, institutions of learning and religion, etc. The decisive test is "public utility." Thus, a gift to the Royal Geographical Society, whose object is "the improvement and diffusion of geographical knowledge," is charitable; so also to a society whose objects were to "improve natural knowledge."[3]

[1] Matter of McGraw, 111 N. Y. 66. See also Chamberlain *v.* Chamberlain, 43 N. Y. 424, 439; White *v.* Howard, 46 N. Y. 144. Accordingly, the heirs or next of kin may raise the question, 111 N. Y. 108.

[2] Cornell University *v.* Fiske, 136 U. S. 152, 174, 175.

[3] Beaumont *v.* Oliveira, L. R. 4 Ch. App. 309, 313, 314, and cases cited; Trustees of British Museum *v.* White, 2 Sim. & S. 594.

than a stock corporation may take or hold, such corporation may take and hold property of the value of three million dollars or less, or the yearly income derived from which shall be five hundred thousand dollars or less, notwithstanding any such limitations.

It was at one time supposed by some that this subject was statutory in its origin in England, and accordingly did not exist in an American State, unless under the support of positive legislation. The act commonly referred to is one passed in the latter part of the reign of Queen Elizabeth.[1] This doctrine has been overthrown by later researches, as a large number of decrees of the Court of Chancery made before that date has been collected, forming a body of law upon this subject. This subject is not confined to legacies, or wills of real estate, but includes conveyances of land as well as of personal property. The courts following the Roman law favor charities, adopting the doctrine of *cy pres* to a marked extent, in order to uphold them.

The general law of "charities" has been qualified in England by statute. At the time of the Reformation certain gifts previously regarded as charitable were by statute declared to be "superstitious" and void. This legislation introduced the doctrine of "superstitious uses."[2] This theory has no place in American law. One of the uses declared in England to be superstitious is a foundation for the sustentation of a "chantry priest" to say masses for the souls of the dead.[3] This rule still prevails, notwithstanding the act of 23 & 24 Vict. c. 134.[4] (*a*)

Another important English statute is one passed in the 9th of Geo. II., c. 36. This is sometimes called a statute of "mortmain." (*b*) This is not an accurate expression, since a mortmain act is directed against corporations in general, restricting the right to take land; the statute in question, on the other hand, is directed solely against *charitable uses* in land, or interests in land. This act is purely local in its operation. It does not extend to the English colonies,[5] and never had any operation in this country. The object of the statute was to require charitable gifts of land, or of money to be laid out in land, to be made by deed executed twelve months before the death of the grantor, and enrolled in a prescribed manner. The result was that there could be no

[1] 43 Eliz. c. 4 (A. D. 1601).

[2] 37 Hen. VIII. c. 4; 1 Edw. VI. c. 14.

[3] Atty-Gen'l *v.* Fishmongers Co., 5 M. & C. 11; West *v.* Shuttleworth, 2 M. & K. 684; Heath *v.* Chapman, 2 Drew. 417.

[4] *In re* Blundell's Trusts, 30 Beav. 360. Such a bequest or appropriation of funds to such a purpose is not a superstitious use in Ireland. Read *v.* Hodgens, 7 Ir. Eq. 17; also Id. 34, n.

[5] Atty-Gen'l *v.* Stewart, 2 Mer. 143; Mitford *v.* Reynolds, 1 Ph. 185; Whicker *v.* Hume, 1 De G. M. & G. 506.

(*a*) *In re* Elliott, 39 W. R. 297.

(*b*) This act was for the most part repealed by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42). The purpose of this act is "to consolidate and amend the law relating to Mortmain and to the disposition of land for Charitable Uses." See also 54 & 55 Vict. c. 73, and 55 Vict. c. 11.

charitable devise of land (with some exceptions) after the passing of that act.[1] The words "lands, etc.," used in the act are construed with much strictness, including mortgages, money charged on land, railway bonds secured by mortgage, etc.[2] Mere railway debentures are not included, as they are strict personal property, being nothing more than promises to pay money.[3] Leasehold property, though in one sense personal estate, is, for this purpose, land, and a gift of it falls within the prohibition of the statute.[4] A distinction for the purposes of the act is taken between *pure* and *impure* personalty. The former lies entirely without the statute, except in the case of stock in the public funds, the latter is within the prohibition. The statute cannot be evaded by a direction that the land of a testator be sold and converted into money.[5] In some cases, where there is a mixed fund of "pure and impure" personalty given to a number of objects, some of which can take land and others not, the court will so distribute the items as to give the "impure personalty" to such as are authorized to take and hold land.[6]

The recent New York decisions have made large inroads into the law of charitable gifts as understood in England or in a State like Massachusetts, closely following the common law. It is declared to be the effect of the statute of perpetuities to prohibit the devotion, even of personal property, to charitable uses beyond two lives, and that such devotion can no more be made indirectly than directly, as it is in fraud of the law. Accordingly, a gift of personal property to three persons to devote the income during their lives to a specified charitable purpose, was declared to be void.[7] (*a*) There can thus be no charitable gift in New York to continue beyond two lives, unless made to a corporation having statutory powers to take and hold the property. Again, the New York courts do not, as a rule, enforce trusts against charitable corporations. They are treated as *owners* of the property conveyed or devised to them, rather than as trustees responsible to beneficiaries designated or described by the donor or testator.[8] Finally, the *cy pres* doctrine, figuring so largely in the works on equity

[1] Price *v.* Hathaway, 6 Madd. 304.

[2] Ashton *v.* Lord Langdale, 4 De G. & Sm. 402.

[3] Holdsworth *v.* Davenport, L. R. 3 Ch. D. 185; Mitchell *v.* Moberly, 6 Id. 655; Attree *v.* Hawe, 9 Id. 337.

[4] Johnstone *v.* Hamilton, 5 Giff. 30.

[5] Jones *v.* Williams, Amb. 651; Incorp. Church, etc. Soc. *v.* Coles, 1 Jur. N. S. 761.

[6] Wigg *v.* Nicholl, L. R. 14 Eq. 92.

[7] Will of O'Hara, 95 N. Y. 403. The decisive case is Holland *v.* Alcock, 108 N. Y. 312, in which the English law of private trustees is rejected. See also Cottman *v.* Grace, 112 N. Y. 299.

[8] Wetmore *v.* Parker, 52 N. Y. 450.

(*a*) See also Read *v.* Williams, 125 N. Y. 560.

as a proper element in construction, has been practically abandoned.[1] (*a*)

Individual legatees. — The capacity of an individual legatee to take is almost unlimited. It is immaterial that he is an infant or insane. The law will presume acceptance if the legacy be beneficial. There were some artificial incapacities in the old law which have practically disappeared from modern law. One was, that a monk in a convent could not take property. This rule could not now be applied to a member of a religious brotherhood. In the same way, the disability arising from coverture has practically disappeared. In one or two of the States (*e. g.*, New York) a person sentenced to imprisonment for life is civilly dead.

This rule has raised a question as to his power to take and hold property, either real or personal. As to personal property, the correct view seems to be that he cannot take it at all. As to real estate, the prevailing view is, that while he cannot take it at all, in case he is a professed monk, or banished from the country, or has abjured the realm, he can in other cases, although civilly dead, take

[1] The law of trusts, as applicable to the *administration* of charitable funds held by corporations, appears to have substantially fallen into disuse in New York. The attorney-general's services, as representing the State, are called into requisition in England in such cases as well as in some of our States. Such a proceeding is unheard of, at least in late years, in New York. There is really no active check upon the misappropriation or waste of the funds by corporate action. The decisions of the courts went to extreme length in regard to funds held by religious corporations (Petty *v.* Tooker, 21 N. Y. 267; Gram *v.* The Prussia, &c. Ev. Soc., 36 Id. 161), until a statute was passed in 1875, (Laws of 1875, ch. 79, § 4), fastening a trust upon church property which a court of equity was specifically authorized to enforce. It is safe to predict that similar legislation will ere long be needed to reinstate the old beneficent rules in regard to other charitable corporations.

The subject of charitable uses may be further pursued in the books on Equity Jurisprudence, in Moore's Reading on the Statute concerning Charitable Uses, in Duke on Charitable Uses, Tudor on the same, Boyle on Charities, and Shelford and Highmore on Mortmain. The early decrees, as well as English statutes, are collected in Dwight's Argument in the Rose Will Case, 2 vols., N. Y., 1863, and to some extent in Mr. Horace Binney's argument in the Girard Will Case. Highly valuable decisions are to be found in the Massachusetts reports.

(*a*) Under the decisions cited in the text a certain designated beneficiary or beneficiaries are essential to a valid testamentary trust. See also Tilden *v.* Green, 130 N. Y. 29. This rule was abolished, and in consequence the law in New York relating to trusts materially affected by the passage of a late law, ch. 701, Laws of 1893. This statute provides that "no gift, grant, bequest, or devise to religious, educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this State, or shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same." The legal title to the lands or property given, vests in a trustee if one is named; if not, then in the Supreme Court. The Supreme Court is given control over such gifts in all cases, while the attorney general represents the beneficiaries with the duty of enforcing the trust by proper proceedings.

and hold, by a defeasible title, — that is, until the State proceeds to take the property from him, under the result of "office found."[1]

Another case in which a devisee or legatee cannot take is, where, being already a devisee or legatee named in a will, to prevent revocation, he murders the testator. Under such circumstances the devisee or legatee shall not be permitted to profit by his own fraud, or to take advantage of his own wrong, or to acquire property by his own crime. To uphold the provision in such a case is to violate the fundamental maxims of the common law.[2]

The rule laid down in Riggs *v.* Palmer is analogous to a similar doctrine in the Roman law, though the rules of that system permit other instances of forfeiture which the common law would not follow. Moreover, in the Roman law the forfeited legacy passes to the State treasury (*fiscus*), and this may have been the reason for including many instances of incapacity to hold the legacy.[3]

6. *The effect of a void legacy.* — A void legacy is, for most purposes, to be regarded as though not found in the will. A residuary legatee would, therefore, be entitled to it as a part of the residue of the estate. Still, if land should be directed by a testator to be sold for a particular purpose, such as to pay a legacy which fails, the money, though realized, will be considered as land for the purpose of determining to whom it belongs.[4]

[1] Accordingly, it has been said that an attainted person "can take a grant, and grant to others even the inheritance which on office found would escheat to the crown; and the rights so acquired by third parties may be the subject of actions in Her Majesty's courts." Kynnaird *v.* Leslie, L. R. 1 C. P. 389, *per* WILLES, J. p. 400; Avery *v.* Everett, 110 N. Y. 317. "Office found" is the finding of certain facts by a jury under a proceeding by public authority before a proper officer or court, called an "inquest or inquisition of office." This proceeding originated in the early common law, its main object being to vest escheated lands in the Crown. The distinction made in the text seems narrow and arbitrary. It is believed, however, to rest upon the great rule of *magna charta* that no freeman shall be deprived of his property without trial by jury, and this is obtained by the practice of "office found." In the excepted cases of monkhood and abjuration the ecclesiastical court had jurisdiction, and in that of banishment there was a *record* of it in the action of the highest court in the kingdom, Parliament.

[2] Riggs *v.* Palmer, 115 N. Y. 506. This case overrules Preston *v.* Palmer, 42 Hun, 388, and disapproves the reasoning in Owens *v.* Owens, 100 N. C. 240. The last case upholds the right of dower of a wife who was an accessory to her husband's murder, on the ground that to hold otherwise would be a forfeiture of a right which *the law* gives to a surviving wife, the only cause of forfeiture mentioned in the North Carolina Code being the wife's adultery, accompanied with the fact that she is not living with the husband at his death.

It has been adjudged by the Supreme Court of the United States that a person who had procured a policy of insurance upon the life of another, payable at his death, and had then murdered him to make the policy payable, could not recover on the policy. N. Y. Mut. Life Ins. Co. *v.* Armstrong, 117 U. S. 591.

[3] These instances are collected in Mackeldey's Roman Law, § 738, Dropsie's ed. (1883).

[4] Bective *v.* Hodgson, 10 H. of L. Cas. 656.

It still remains to consider the case of property not reached by the provisions of the will, such as a *residue* after all the debts and legacies are paid, with no residuary or other legatee named. In such a case the early rule was, that the executor was entitled to the surplus. He was practically a general residuary legatee by implication.[1] This was but a presumption of the testator's intent, and could be rebutted by a contrary intent appearing from the instrument, in which case the executor would be held in equity to be a trustee for the next of kin. Thus, if the testator professed to dispose of his whole estate, though he in fact failed to do so, the executor will be a trustee.[2] This view will be strengthened by a request to executors to accept the office.[3] In some cases nice distinctions were taken whereby the executors took the surplus as their own, and free from any trust.[4] This doctrine was in the end unsatisfactory, and the rule was changed in England by statute, requiring that the executor should not claim to his own use unless the intent of the testator that he should do so appeared from the will.[5] The rule as to the presumption was thus reversed, and the executor no longer takes the residue by implication. The whole subject is thus a matter of intention, to be collected from the terms of the will.[6] If there be express words of trust, the case is perfectly clear. The rule has also disappeared from American law, and any surplus is distributable among the testator's next of kin, in accordance with the Statute of Distributions.

SECTION II. *Succession in Case of Intestacy.* — By the common law, the personal property of an intestate vested in the bishop, or ordinary, who was required to devote it to pious uses, or, in other words, to the purchase of masses to be chanted for the repose of the soul of the deceased. This was, in a sense, to appropriate it to the use of the intestate, the prayers being assumed to be available to him in the world where he was supposed to be. The opposing theory, advocated by Lord COKE, in Hensloe's Case,[7] if ever plausible, is no longer so, since the publication by the English government of the ancient authority on which Lord COKE rests his opinion. That in no respect sustains him.[8] This was long ago perceived by JOHN SELDEN, who refuted Lord COKE. The "ordinary," or bishop, had jurisdiction to dispose of the property in the way above described, until the time of the Protestant Reformation, when the saying of

[1] Dawson *v.* Clark, 15 Ves. 409; s. c., 18 Id. 247.
[2] Oldham *v.* Carleton, 2 Cox Eq. 399.
[3] Giraud *v.* Hanbury, 3 Mer. 150.
[4] See Barrs *v.* Fewkes, 2 Hem. & M. 60.
[5] 1 Wm. IV. c. 40.
[6] Williams *v.* Arkle, L. R. 7 H. of L. Cas. 606.
[7] Coke's Reports, Part 9, 36 *b*, 38 *b*.
[8] Rotuli Literarum Clausarum (Close Rolls), 7 Henry III. memb. 16, p. 537.

masses, having been declared by Parliament to be superstitious, was no longer allowed by the courts. The practical result was, that the administrator, appointed by the ordinary under the authority of an early English statute, took the whole estate. This was a point, however, much in controversy between the probate court and the common-law courts. The probate court would require distribution among the next of kin, and require a bond from the administrator to that effect. The common-law court, holding that the administrator was entitled to the estate, would declare the bond void, and, where the circumstances admitted of it, would prohibit the probate court from compelling the administrator to account. To settle this controversy, the Statute of Distributions was enacted, providing for distribution among the widow and next of kin.[1] This statute did not extend to the estate of a wife, so that the husband, if there be no supplementary statute, continues to take her assets as at the common law. The Statute of Distributions was borrowed from the Roman law, as found in the 118th Novel of Justinian.

The substance of Justinian's legislation, modifying prior rules, was as follows: Succession was made to depend on the nature of relationship, whether ascendant or descendant or collateral. The claimants could be arranged into five classes: (1) Descendants, all of whom shared in the estate without reference to degree if no living ancestor intervened. If all the descendants were of the first degree (son or daughter), the estate was divided equally (*per capita*); if not, then the division was made according to "stocks" (*per stirpes*). In other words, the division was made as if all the sons or daughters not living, but leaving descendants, were still living. The shares of any that were dead were subdivided among their descendants. (2) The next class included *ascendants*. In this case the nearest ascendant (father, mother, etc.) excludes the more remote, without reference to sides. Ascendants in equal degree on either side share the succession. The brothers and sisters of the whole blood are members of this class. The sons and daughters of one who is dead represent his share, but the grandchildren do not take. The mode of subdivision among the various members of this class is intricate, and unnecessary for the present purpose to be detailed. (3) There being no members of the first and second classes, brothers and sisters of the half blood succeed. The rule of representation is the same as among the members of the second class. (4) The next class includes all other collateral relatives. No distinction is henceforth made between relatives of the whole blood and of the half blood. They

[1] Edwards *v.* Freeman, 2 P. Wms. 435, 447.

take the succession according to the proximity of relationship. Uncles and aunts, and their descendants, would be the nearest of kin. Special rules govern the relation of husband and wife.

The English Statute of Distributions is not an exact reproduction of Justinian's Novel, but it closely resembles it. They are alike in making the classes of successors depend upon nearness of relationship; in the doctrine of representation, not carried in either case in collaterals beyond brothers' and sisters' children, and in making certain distinctions as to the half blood. So in the American States, the Justinian legislation has had large influence. Great stress was laid by the Roman law upon an equality of advantages among the members of the respective classes. The same rule was applied as to land. From this the common law widely departed in the doctrine of primogeniture. A further rule in the direction of equality, in Roman law, is the doctrine of "*collation* of goods." This came into the common law in the distribution of the personal property of an intestate, being known as the doctrine of "advancement." By "collation" is meant the duty of one of several distributees to bring into the common fund such advances or gifts as were made to him in his lifetime by the intestate, or, what is equivalent, to submit to be charged with such advances as a part of his share in the succession.

Advancements. — (1) *To descendants.* — This word is used in a variety of senses in law. It is only proposed here to consider it in connection with the Statute of Distributions. It is a settled rule that if one of the share-takers under that statute has received from a parent, or from one standing in the place of a parent, something *to establish him in life*, or a so-called "provision," he must "collate" the amount so received before taking his share in the intestate's estate. The English equivalent expression is "hotchpot." Sometimes there is a clause in a will providing for "collation." This is otherwise called a "hotchpot clause."[1]

[1] Section 5 of the Statute of Distributions, (22 & 23 Car. II. c. 10) is as follows: "One-third part of the surplusage (after payment of debts) to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be *advanced* by the intestate in his lifetime, by portion or portions, *equal* to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made; and in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be *advanced* by the said intestate in his lifetime, by portion *not equal* to the share which will be due to the other children by such distribution as aforesaid, then so much of the surplusage of the estate of such intestate, to be distributed

The principle on which the doctrine of advancement rests is, that as the aim of the statute is to make the children's portions equal, any payment made by a father out of the common fund for a particular purpose, at the son's desire, if in considerable amount, must be made up before the latter may participate in the distribution. The payment is the material thing. The court does not look to the application of the money.[1] In a recent case, an advancement was defined to be a sum of money given by a parent to establish a child in life, or to make a provision for a child. In this case some eight particular inquiries were put to the court. The following were held to be advancements: admission fee paid to one of the Inns of Court of a child intended for the Bar; price of a commission of one entering the army; price of the outfit also; price of plant and machinery to start a child in business.

The following were not deemed to be advancements: payment for instruction to a special pleader in the case of one intended for the Bar, — this was regarded rather as preliminary education; passage-money of an officer and his wife going to India to join a regiment; payment of debts incurred by an officer in the army; payment to a clergyman to assist in housekeeping.[2] It would seem that in the third case there would be an advancement if the payment of the debts was necessary to his continuance in the army.[3]

The subject of advancement in cases of intestacy is fully recognized in this country, and is extended to real as well as personal estate, there being no such exception as to the "heir at law" as is found in the English Statute of Distributions. The phraseology of the statutes must be considered, as it is likely to vary to some extent from the English statute. There are two such statutes in New York, which must be construed together.[4] One concerns the case where the intestate leaves *no* real estate, and the other where he does leave it.[5] (*a*) The word "children," as used in the former statute, is equivalent to "descendants." So that the rule of advancements to a child may be invoked by a grandchild entitled to a share in the estate.[6]

to such child or children (as were so advanced, etc.), as shall make the estate of all the said children to be equal as near as can be estimated." Then follows a clause to the effect that the heir at law should not be obliged to bring his land derived from the intestate into hotchpot. This is not applicable to descents in this country.

[1] Boyd *v.* Boyd, L. R. 4 Eq. 305.
[2] Taylor *v.* Taylor, L. R. 20 Eq. 155.
[3] Boyd *v.* Boyd, *supra.*
[4] Beebe *v.* Estabrook, 79 N. Y. 246.
[5] 2 R. S. 97, §§ 76–78; 1 R. S. 754, §§ 23–26.
[6] Beebe *v.* Estabrook, *supra.*

(*a*) See ch. 686, of the Laws of 1893, amending § 2733 of the Code of Civil Procedure, and embodying therein the provisions formerly contained in the Revised Statutes concerning the distribution of an estate consisting wholly of personal property where a child has been advanced by the decedent.

Advancements depend, in principle, upon the intention of the intestate, which may be shown from extraneous sources, such as entries in his books. Where there is no specific evidence of intention, a presumption is raised that the money paid is or is not an advancement according to the principles derived from the English cases already cited.

(2) *To a wife.* — The Statute of Distributions gives a part of the intestate's property (one third) to a wife. This third may be received by way of advancement in such a manner as to disentitle her from claiming her "thirds." This point resembles a rule in the law of dower of real estate. There may be a settlement, for example, so made as to require a wife to choose or "elect" whether she will take the provision in the settlement, or the amount allowed by the rule of law. The discussion is now confined to cases of *intestacy*, though a similar question may arise under a husband's will, as to whether the wife is bound to elect.

The word "thirds," used in a settlement or will, is not confined to real estate, but is a general expression including the interest of a widow in any of her husband's property. It may, accordingly, include the share of personal property coming to the wife in case of intestacy.[1] Whether the settlement deprives the wife of her share, is purely a question of construction. The court will adopt a reasonable construction of the words used. Where the language was, that a jointure was in full bar and satisfaction of any dower or "thirds" which she could or might claim *at common law* in the estates real, *personal*, or freehold of her intended husband, it was held that though she did not claim in the personal estate by "common law" in the technical sense, the fair meaning of that expression was "general law," and that she was barred.[2] It will aid that construction if the settlement was based to some extent upon the husband's personal estate.[3]

Domicile as affecting the distribution of the estate of an intestate. — There are two principal questions to be considered. *First.* By what law is it determined that a person dies intestate. *Second.* By what law, in case of intestacy, is his personal property to be distributed. With respect to the first question, it may be said that the fact of intestacy is governed by the rules prevailing in the law of his domicile at the time of his death. This rule may be modified by statutes. The reason for it is plain. Assume that the validity of any will that he may make is to be determined

[1] Thompson *v.* Watts, 2 Johns. & H. 291.

[2] Gurly *v.* Gurly, 8 Cl. & F. 743 (House of Lords). The case of Colleton *v.* Garth, 6 Sim. 19, was decided the other way, but the word "personal" was not used there, and the phrase "common law" was without qualification.

[3] Thompson *v.* Watts, *supra*; Davila *v.* Davila, 2 Vern. 724.

by the law of his domicile, etc., and it follows as a necessary consequence that the result of testacy or intestacy must depend upon the fact whether the testator left a valid will.[1] (*a*)

Concerning the distribution of the estate, it is a general rule that this must also follow the law of the domicile, unless there be opposing statutes in the State where the property happens to be situated.[2] This rule means the law of the domicile at the time of death, and does not include any change in the law of the domicile after death.[3]

SECTION III. *Executors and Administrators.* — Having considered the two ways of acquiring title by succession, it now remains to speak of the administration and settlement of estates, and also of their distribution, according to the principles of succession heretofore discussed.

The rules of law governing executors and those governing administrators have a general similarity, and will be treated under one title. There are, however, certain important points of difference which must be pointed out. These differences concern especially the appointment and qualification of executors and administrators to office, and these will now be mentioned.

Before entering on the duties of administration, an executor receives from the probate court "letters testamentary," constituting evidence of authority to proceed and settle the estate. These letters do not issue until after the will has been proved.

This evidence is for most purposes conclusive; so that the validity of the probate could not be questioned in an action brought by or against the executor. The only recourse is to appeal from the decree of the court admitting the will to probate. A single illustration will suffice. Should the executor bring an action on a note found among his testator's assets, the debtor would not be allowed to show in defence that the letters testamentary ought not to have been issued.[4] The decree does not, however, conclusively establish the domicile of the testator. A court of equity has in general no power to set aside a probate, unless obtained by fraud.[5] This does not include fraud in the

[1] Moultrie *v.* Hunt, 23 N. Y. 394.

[2] Stanley *v.* Bernes, 3 Hagg. Ecc. 373; Doglioni *v.* Crispin, L. R. 1 H. of L. Cas. 301.

[3] Lynch *v.* Gov't of Paraguay, L. R. 2 P. & D. 268.

[4] Whicker *v.* Hume, 7 H. of L. Cas. 124.

[5] Barnesley *v.* Powell, 1 Ves. Sr. 284, and even in that case with great caution; Ryves *v.* Duke of Wellington, 9 Beav. 579, 599.

(*a*) Cross *v.* United States Trust Co., 131 N. Y. 330; Dammert *v.* Osborn, 140 N. Y. 30. But it has been held that a trust created by will, to be administered by trustees in a foreign country and valid there, will be upheld, even though invalid in the testator's domicile. Hope *v.* Brewer, 136 N. Y. 126. See also Chamberlain *v.* Chamberlain, 43 N. Y. 424; Matter of Huss, 126 Id. 537.

execution of the will.[1] Where parties agree that a will shall not be proved, a court of equity may enforce the agreement, and prevent probate.[2]

The letters testamentary cannot be used to recover property in a foreign country or another State of the Union.[3] (*a*) The executor may assign to another, who may bring the action. As a usual rule, a purchaser from the decedent is not bound to pay the purchase money until the will is proved and letters issued, as, until that time, the executor cannot give complete indemnity.[4]

I. *Distinctions peculiar to executors.* — (1) An executor is not in general bound to give bonds for his fidelity, on the principle that as he was trusted by the testator, he may properly be trusted by the court. In special cases, bonds may be exacted.[5]

(2) The executor's title dates from the testator's death. The administrator's title dates from appointment, though after appointment it will for some purposes, by a legal fiction, relate back to the death.

(3) The executor, where there is no statute to the contrary, may by will bequeath his executorship to his executor. On the other hand, on the death of a sole administrator there must be a new appointment.

(4) *Executor de son tort.* There is a peculiar rule in the common law that if one, without being appointed executor, interferes with the management of a decedent's estate, he may be treated as an executor, and will be precluded from denying that he is such. He may, however, discharge himself by turning over to the rightful executor any property in his hands before action is brought against him.[6] Such a person is subject to all the liabilities, but is entitled to none of the privileges of an ordinary executor.[7] He may, accordingly, be sued by a creditor of the estate.[8] A similar rule is applied to one who, having been appointed executor, does not prove the will.[9] The doctrine of executorship *de son tort* does not apply to goods received in a foreign country.[10] (*b*) This

[1] Melwish *v.* Milton, L. R. 3 Ch. D. 27.
[2] Wilcocks *v.* Carter, L. R. 10 Ch. App. 440.
[3] Scott *v.* Bentley, 1 Kay & J. 281.
[4] Newton *v.* Met. R'way Co., 1 Dr. & Sm. 583.
[5] This matter is regulated by statute.
[6] Hill *v.* Curtis, L. R. 1 Eq. 90.
[7] Carmichael *v.* Carmichael, 2 Ph. 101, 103.
[8] Coote *v.* Whittington, L. R. 16 Eq. 534.
[9] *In re* Lovett, L. R. 3 Ch. D. 198.
[10] Beavan *v.* Lord Hastings, 2 Kay & J. 724.

(*a*) See also Petersen *v.* The Chemical Bank, 32 N. Y. 21; Stone *v.* Scripture, 4 Lans. 186; Schluter *v.* Bowery Savings Bank, 117 N. Y. 125; Wilkins *v.* Ellett, 9 Wall. 740; s. c. 108 U. S. 256; Gilman *v.* Gilman, 54 Me. 453. So, at common law, an executor cannot be sued outside of the State or country where he was appointed. Lyon *v.* Park, 111 N. Y. 350.

(*b*) Cf. Emery *v.* Berry, 28 N. H. 473.

species of executorship has been abolished in some States; and the "wrongful executor" simply made a trespasser, and liable for his conduct in an action of trespass.[1] The old rule was more convenient, as it enabled the owners of the estate to hold him liable on an accounting in equity.[2]

(5) Special rules apply where one appointed an executor is under a disability. In the case of an infant, an administrator is appointed to manage the estate during the minority.[3] A married woman acting as executrix involves her husband in liability if she wastes the estate during their joint lives.[4] The husband also stands in a fiduciary relation to the estate.[5] The liability of the husband must be understood at the present time as subject to the changes produced in the law of any State by the statutes enlarging the legal capacity of married women.

II. *Distinctions applicable to administrators.* — Administrators are appointed by the probate court to settle a decedent's estate, either when there is no will, or, if there be a will, when there is no executor. The appointment is made by the issuance of "letters of administration" to the person entitled thereto, upon his filing a bond prescribed by law.

Administration is of two classes, — general and limited. The first is the ordinary case. Limited administration is granted under a variety of instances. Limited administrators are either (1) with the will annexed (*cum testamento annexo*); (2) *de bonis non;* (3) *durante absentia;* (4) *durante minore ætate;* (5) *pendente lite.*

(1) *Cum testamento annexo.* This case occurs where there is no executor, either by reason of death, renunciation, or other cause. Administration is then committed to some person entitled by law, who must, in settling the estate, follow the directions of the will. Such an administrator has the same general powers as an executor. A point of difficulty, however, is whether he can execute a special trust devolved upon the executor. The better opinion is, that he can, except where the testator has granted discretionary powers to his executor, in which case he cannot.

(2) *De bonis non.* This expression refers to the case where an original administrator has died or became incapaciated without fully settling the affairs of the estate. In this case a supplementary administrator is appointed to finish the business, or to admin-

[1] See in New York 2 R. S. 449, § 17.

[2] Sharland *v.* Mildon, 5 Hare, 469.

[3] Until the enactment of 38 Geo. III. c. 87, an infant could act as executor on arriving at the age of seventeen. Williams on Executors, 7th ed. p. 231.

[4] The executorship is presumed to have been accepted with the husband's consent. Adair *v.* Shaw, 1 Sch. & Lef. 243, 266; Williams on Executors, 7th ed. pp. 1836, 1837. See also Soady *v.* Turnbull, L. R. 1 Ch. App. 494.

[5] *Re* Peperell, 27 W. R. 410.

ister upon the estate so far as it has *not been already administered* (*de bonis non administratis*).

(3) *Durante absentia.* This case refers to an appointment while an executor is abroad. The object is to provide a person who may be a party to a suit in equity, and represent the estate. Should the executor return in the progress of the suit, he is substituted in place of the administrator.[1] This appears to have originated in statute.[2]

(4) *Durante minore ætate.* This applies to the case of a minor. Such an administrator is an ordinary administrator, except that his office terminates when the executor attains majority.[3] The administration then ceases, and a suit begun by the administrator cannot be continued, but must be commenced anew, unless the case has reached judgment.

(5) *Pendente lite.* The object of such an administration is to secure the property while a suit is pending concerning disputed wills or the right to the office of administrator. Such a person resembles a receiver appointed by a court of equity. His duty is to protect the fund rather than to administer upon the estate. Accordingly, if holding in the case of a litigation concerning a will, he ought not to pay legacies.[4] A person of this character is in some States termed a collector. (*a*)

In addition to the foregoing there may be mentioned the case where the person appointed executor, or who is entitled to administration, is of unsound mind, though not so declared by the courts. An administrator *durante animi vitio* may then be appointed.[5]

The classes of persons from whom administrators are to be taken, have long been established by law. The principal change in modern times is, that the membership of the classes has been enlarged, and the duties of the probate court more strictly defined. The statutes of the respective States must be examined for details.

The principles upon which the selection of administration has been made to rest are, *first*, proximity of relationship; *second*, *interest* in the estate, — that is, the relation of debtor and creditor; and *third*, the interest of the State, to be represented by one of its officers. Those of the first and second classes may renounce their rights, whereupon the office may come to the third class.

[1] Rainsford *v.* Taynton, 7 Ves. 460.
[2] 38 Geo. III. c. 87.
[3] *In re* Cope, L. R. 16 Ch. D. 49; Stubbs *v.* Leigh, 1 Cox Eq. 133.
[4] Adair *v.* Shaw, 1 Sch. & Lef. 243, 254.
[5] *Ex parte* Evelyn, 2 M. & K. 3.

(*a*) Such an officer in New York is now called a temporary administrator. See Code of Civ. Pro. §§ 2670–2683.

A grant of letters of administration, even though *ex parte*, is conclusive evidence of the facts necessary to be shown in order to obtain it, — *e. g.*, that the administrator is next of kin. It is a judicial act. An action in equity cannot be brought to rescind the letters on the ground that the necessary facts do not exist. The correct remedy is, to apply in the probate court to have the letters recalled or revoked.[1]

An administrator, like an executor, cannot bring an action in another State or country without taking out letters of administration there, called "ancillary letters."[2] The appointment has only a local effect.[3] This rule does not apply when he has recovered a judgment, for then he need not sue in the foreign country on the judgment *in his character as administrator*, but in his individual capacity.[4] (*a*)

III. *Rules common to both executors and administrators.* — Executors and administrators have, strictly speaking, only to do with personal property, and with this only by way of settlement of the estate. Though they hold in a fiduciary character, their trust is implied. An express trust of personal property may be given to an executor, but in that case he is really a trustee. In the same way, he may have the title to real estate, or authority over it. On the first of these suppositions, he will be deemed a trustee, and in the second, the donee of a power. In discussing this subject, notice will only be taken of the duties of executors and administrators strictly as such, except that their statutory power to dispose of land to pay the testator's or intestate's debts will be briefly noticed.

It should be said, by way of preliminary, that the interest of two or more executors is joint, and cannot be divided into distinct powers.[5] Each, however, has entire control of the personal estate, and may release a debt or transfer a right of action without the others.[6] The same rule seems to be applicable to administrators, though it was at one time thought otherwise. The receipt of one executor is sufficient, though he forges the signature of the co-executor to the receipt, and embezzles the amount paid.[7] So one may settle an account though his associates dissent.[8]

[1] *In re* Ivory, L. R. 10 Ch. D. 372; Barrs *v.* Jackson, 1 Ph. 582.

[2] See *post*, p. 667.

[3] Fernandes' Executors' Case, L. R. 5 Ch. App. 314. See *ante*, p. 644.

[4] Talmage *v.* Chapel, 16 Mass. 71; *In re* Macnichol, L. R. 19 Eq. 81.

[5] Owen *v.* Owen, 1 Atk. 494.

[6] Jacomb *v.* Harwood, 2 Ves. Sr. 265; Charlton *v.* Earl of Durham, L. R. 4 Ch. App. 433.

[7] Charlton *v.* Earl of Durham, *supra*; Barry *v.* Lambert, 98 N. Y. 300.

[8] Smith *v.* Everett, 27 Beav. 446.

(*a*) See Tittman *v.* Thornton, 107 Mo. 500; Barton *v.* Higgins, 41 Md. 539.

The following are among the general duties of executors and administrators.

(1) *To bury the deceased.* The executor is entitled to the possession of the body of the testator. His duty is to bury it, though there be a direction in the will that it be burnt. Such a direction cannot be enforced against the executor.[1]

The general rule is to allow the executor or administrator a sufficient sum for funeral expenses, depending upon the decedent's station in life. A very rigid rule was formerly applied in case of insolvency in favor of the creditors.[2] The more modern doctrine is to follow the rule, even in cases of insolvency.[3] In one instance the court refused to allow £2210 for the burial of an insolvent nobleman.[4]

(2) *The collection of assets and the payment of debts.* The generic name for property belonging to the testator, and applicable to the purposes of the settlement of the estate, is *assets.* Assets are either legal or equitable. Assets are said to be legal when they can be recovered by an executor or administrator *by virtue of his office.* They would thus, for this purpose, be legal, even though recoverable solely in a court of equity. On the other hand, if the property would not have come under the control of the executor at all unless there had been a direction by the testator to that effect, it would have been "equitable assets." An instance is land directed by the testator to be sold for the payment of his debts.[5]

The importance of the distinction between legal and equitable assets is, that the former are used in a prescribed order called the "course of administration," while the latter are applied proportionally and without discrimination, under the cardinal maxim that "equality is equity." The common-law rules as to the administration of *legal* assets are arbitrary and unjust. One of them allows the executor, if he be a creditor, to retain an amount sufficient to pay his own claim, to the exclusion of other creditors. This he may do, though his claim has become barred by the Statute of Limitations during the lifetime of the testator.[6] On the other hand, if the assets be equitable, he has no absolute right of

[1] Williams *v.* Williams, L. R. 20 Ch. D. 659.

[2] Greenside *v.* Benson, 3 Atk. 248, 249; Stag *v.* Punter, Id. 119.

[3] Pitchford *v.* Hulme, 3 L. J. (Ch.) 223.

[4] Bissett *v.* Antrobus, 4 Sim. 512.

[5] Cook *v.* Gregson, 3 Drew. 547; Att'y-Genl. *v.* Brunning, 8 H. of L. Cas. 243. There is much confusion upon this subject in the earlier decisions. This is cleared away by the decision in the Brunning Case, in which separate opinions are delivered by the most eminent judges of England.

[6] Hill *v.* Walker, 4 Kay & J. 166; Stahlschmidt *v.* Lett, 1 Sm. & G. 415.

retainer, but though in possession, can only keep his proportion.[1] There are other rules of priority which it is not necessary to refer to. In this country, statutes often regulate the subject, and introduce the principle of equality, following in the main the doctrine of equitable assets. There are still some priorities established, such as debts due the United States, or the particular State where the estate is being administered.

Administration of the estate of an insolvent decedent will thus be substantially like a bankruptcy proceeding, in which, as has already been seen, certain priorities are held to be consistent with the general distribution of the estate among creditors, on the principle of proportion.[2]

Statutory regulations will be found requiring the executor, etc., to advertise for claims in a specified way, to be presented within a prescribed time. If not presented, the executor will be justified in paying such as are presented. This may, of course, result in an exhaustion of the assets. A failure to comply with the rule does not discharge the debt. The executor must also be satisfied that the claim is valid, and may require it to be verified in a mode prescribed by law. If the claim is disputed, the remedy of the creditor is to proceed by action or arbitration. The details of these matters of procedure should be sought in the local statutes. (*b*)

As to the collection of claims due the estate, the executor for the most part stands in the position of the decedent, and, with

[1] Bain *v.* Sadler, L. R. 12 Eq. 570; Duignan *v.* Croome, 41 L. T. 672.

[2] The law in New York prescribes the following order: —

1. Debts entitled to a preference under the laws of the United States.

2. Taxes assessed upon the property of the deceased previous to his death.

3. Judgments docketed and decrees entered against the deceased, according to the priority thereof respectively.

4. All recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts.

Preference may be given by the surrogate to rents due or accruing, upon leases held by the testator or intestate at the time of his death, over debts of the fourth class, if it appear to his satisfaction that such preference will benefit the estate of the testator or intestate.

No preference can be given to any debt in any one of these classes over another in the same class, except in class 3. A debt due and payable cannot be preferred to one not due. A debt not due may be paid by an executor, etc., after making a rebate of legal interest on the sum paid for the unexpired term of credit without interest. No advantage can be obtained by the commencement of a suit, nor by the recovery of a judgment against the executor or administrator. An executor or administrator cannot satisfy his own debt out of the property of the deceased until it is allowed by the surrogate, and such debt is not entitled to preference over others of the same class. (*a*) This statute establishes a symmetrical system greatly to be preferred on the score of justice to the rules of the common law.

(*a*) Code of Civ. Pro. § 2719.

(*b*) See in New York, Code of Civ. Pro. § 2718.

some exceptions, can collect what he could have collected. The exceptions consist in the main, of causes of action of a *personal* nature. These are said "to die with the person."

The matter presents itself in two aspects, — one where the injured party dies, and the other, where the wrongdoer dies. These personal actions are for the most part causes of action for personal wrongs, among which may be enumerated, libel, slander, assault and battery, false imprisonment, malicious prosecution, etc. There are, however, some instances of personal actions arising out of contract, such as a breach of promise of marriage.[1] When a wrong is committed upon property, a complex question arises. A mere wrong depriving a person of property will not survive against the wrongdoer's personal representatives, such as a cause of action for negligence, deceit,[2] or fraud.[3]

A different question arises where the estate of a wrongdoer has directly benefited by a wrongful act committed upon the property of another, — as, for example, if he has converted chattels to his own use. In this case, suit may be brought for the value or for the chattels themselves, if they still exist. The plaintiff can then, according to the better opinion, recover, particularly in the last instance; for the executor, by refusing to deliver the chattels, makes the wrong his own. The liability of the executor of a wrongdoer for acts done to the real estate of another has been thoroughly considered by the Court of Appeal in England.[4] In the case referred to, there were four principal questions. *First.* The wrongdoer had taken away minerals and appropriated them to his own use, and there was an inquiry as to their value. *Second* and *Third.* He had carried minerals through roads or passages under the farm of the injured party, and the inquiries were as to the quantities that had been carried, and the value of the way appropriated. *Fourth.* It was claimed that he had damaged the farm by the way he worked under it, and the question was as to the damage sustained. While the inquiries were pending, the wrongdoer died. It was held that no recovery could be had against the executor for any claim but the first. In that instance something positive had been *added* to the wrong-doer's estate. In the other cases, the most that could be said was, that the gain, if any, was indirect and negative. In brief, the wrongdoer must be shown to have taken some beneficial property or value capable of being

[1] Wade *v.* Kalbfleisch, 58 N. Y. 282.

[2] Young *v.* Wallingford, 52 L. J. (Ch.) 590.

[3] Walsham *v.* Stainton, 1 Hem. & M. 322.

[4] Phillips *v.* Homfray, L. R. 24 Ch. D. (1883).

measured, followed, and recovered.[1] In New York there is a statute governing the subject found in the note.[2]

When a *legal duty* is cast upon the executor, he can be held upon the theory of an implied contract. This fiction is sometimes carried very far. Thus, where a guest at the house of a friend died of a malignant and contagious fever, and, by advice of his medical attendants, the furniture in the bedroom was destroyed to prevent contagion, and other expenses incurred, it was held that the executors of the guest were liable.[3]

When a contract made by a testator is sought to be enforced, either by or against an executor, etc., his representative character must be observed. The ownership of the claim or the ground of liability must be traced both in the pleadings and proofs to or from the testator. On the other hand, if the executor himself entered into the contract, though he did it for the benefit of the estate, the representative character is not material.

As a general rule, an executor is only liable to the amount of assets received. He may increase his liability by admitting that he possesses assets which he does not in fact have. Such an admission may be made in a variety of ways, such as by paying interest on a legacy,[4] or by giving a note to a legatee on account of the legacy,[5] or by paying in money to the executor's deposit account in a bank, etc.[6] Admissions like these can be rebutted by the executor by showing mistake or other excuse. On the other hand, judgment by default against him as executor has been held to be an admission of assets binding on his own estate as if the debt were his own.[7]

Real estate as assets. — It has already been stated that real estate is not, strictly speaking, assets; still it may become so, by general directions on the part of the testator.

[1] One of the judges, BAGGALLAY, L. J., would have gone further, and held the executor liable, considering that the estate of the wrongdoer *had* been benefited by the wrongful use of the roads. The difference between the judges was in the proper application of a conceded principle. Cases on which the opinion rested were Sherrington's Case, Savile's R. 40; Hambly *v.* Trott, 1 Cowp. 371, and, in equity, Marquis of Lansdowne *v.* Marchioness of Lansdowne, 1 Madd. 116.

[2] The statute is as follows: "For wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executors or administrators, against such wrongdoer, and, after his death, against his executors or administrators, in the same manner, and with the like effect in all respects, as actions founded upon contracts." 2 R. S. 447, § 1 (8th ed. p. 2670). The second section provides an exception in the case of personal actions.

[3] Shallcross *v.* Wright, 12 Beav. 558.

[4] Atty-Gen'l *v.* Higham, 2 Y. & Colly. C. C. 634.

[5] Holland *v.* Clark, Id. 319.

[6] Crossdail *v.* Phillips, 5 L. J. (Ch.) 52.

[7] *Re* Higgins's Trusts, 2 Giff. 562.

The fact that the land is *charged* with debts does not necessarily make it assets. It is under such circumstances simply in aid of the personal estate, which is, as a rule, the primary fund for payment of debts. Accordingly, this must be exhausted before the land can be reached.[1] The testator may, however, by sufficient words, make the land the primary fund, and so exhaust that before reaching the personal property. The reason is plain. The property, in whatever form it may be, is his, and how it shall be used after his death is purely a matter of intention.

The general order in which property should be used in payment of debts is substantially as follows, unless there be evidence of intention to the contrary: (1) personal estate; (2) lands specially devised for the purpose of paying debts;[2] (3) lands descending to an heir; (4) lands devised, but without the purpose of their being used to pay the testator's debts.[3] (*a*)

The distinction must be carefully noted between a mere charge and a direction *as to the mode of paying the debts* from a particular fund. It is this last element which makes the land in question the primary fund.[4] If the testator has gone still further, and shown his intention to exempt his personal estate from his debts, the court will make the land the primary fund,[5] but a mere charge, as has been seen, will not have that effect.[6] (*b*)

But if a testator gives a pecuniary legacy to A., and then allows land to descend to his heir, B., there is more evidence of intention to have the legacy paid than to have the land descend, and the debts should be charged on the latter.[7]

A difficult class of cases arises where there is conflicting evidence of intention, as where the testator gives pecuniary legacies, also specific legacies, and finally gives his land in part to specified persons, and the residue to a residuary devisee. It is assumed that there are no special words in the will "charging" any particular property, but that the case is one under modern law, which in the last resort, and in some form, subjects all the testator's estate, both real and personal, to the payment of his debts.

In the old law a residuary devise was treated as a *specific* devise, since the theory prevailed that nothing passed by a will except

[1] Fingal *v.* Blake, 2 Moll. 50.
[2] Phillips *v.* Parry, 22 Beav. 279.
[3] Manning *v.* Spooner, 3 Ves. 114.
[4] Harmood *v.* Oglander, 8 Ves. 106, 124.
[5] Reeves *v.* Newenham, 2 Ridgeway's Parl. Cas. 11.
[6] Milnes *v.* Slater, 8 Ves. 295.
[7] Herne *v.* Meyrick, 1 P. Wms. 201; Clifton *v.* Burt, Id. 678; 2 Williams on Executors (7th ed.), p. 1696; Id. 1717, and cases cited.

(*a*) Heermans *v.* Robertson, 64 N. Y. 332; Sweeney *v.* Warren, 127 N. Y. 426.
(*b*) Sweeney *v.* Warren, *supra.*

that which a testator owned at the time of its execution. Of course, as every parcel of land has in it the element of *locality*, it could be labelled. And if the owner gave a particular lot to A., and another to B., and the "residue" to C., that which was devised to the last, though in general residuary words, was as specific as the lots which, by special mention, were devised to A. and B. Modern legislation, both in England and in this country, has enabled a testator, by appropriate words, to make a devise include all the land which he owns *at the time of his death.* At once a great judicial controversy arose in England, whether a residuary devise was any longer specific. There are many contradictory decisions; but it is now settled by the appellate court that a residuary devise is still specific.[1] The practical result is, that in case of a deficiency of the general personal estate, specific legacies, specific devises of land, and residuary devises contribute ratably.[2]

In England it is held that the rule of contribution applies as between a pecuniary legatee (not specific) and a residuary devisee, on the general ground that "every will ought to be read as in effect embodying a declaration by the testator, that the payment of his debts shall be, as far as possible, so arranged as not to disappoint any of the gifts made by it, unless the instrument discloses a different intention."[3]

In the absence of statutes, the probate court does not have the power to take the land of a testator for the payment of debts. This is a power vested in courts of equity, as engaged in the administration of trusts. In this country, probate courts have statutory powers to order the sale of land to pay debts. This extension of power to the probate courts does not deprive the equity courts of their jurisdiction, without words in the statute to that effect. Moreover, if sufficient power were given to executors in the will, they might sell the land without resort to a court, and avoid the delay and expense of a proceeding under the statute.

The New York statute is found in the Code of Civil Procedure. The proceedings may be had at any time within three years after letters granted, on the petition of an executor or administrator, or a creditor. The proceedings cannot be resorted to after three years. Other methods must be adopted. Nor are they to be used in case of an express charge of debts upon land, as the jurisdic-

[1] Hensman *v.* Fryer, L. R. 3 Ch. App. 420; Lancefield *v.* Iggulden, L. R. 10 Ch. App. 136.

[2] Id., see also Gervis *v.* Gervis, 14 Sim. 654; Eddels *v.* Johnson, 1 Giff. 22; Opposing cases are Rotheram *v.* Rotheram, 26 Beav. 465; Bethell *v.* Green, 34 Id. 302.

[3] Tombs *v.* Roch, 2 Colly. 490, 502, adopted in Hensman *v.* Fryer, L. R. 3 Ch. App. 420, 426.

tion of courts of equity is ample.[1] (*a*) The result of this legislation is, that the debts of a testator are a statutory lien upon the land for three years; on the expiration of that period the lien ceases. As this is a special statutory proceeding, great care must be taken to observe all the requirements essential to the jurisdiction of the court, as otherwise the proceeding may be a nullity.

The mode of proceeding after three years is an action to make heirs and devisees liable to the extent of estates or interests descended or devised to them. The action is to be brought jointly against all the heirs or devisees.[2] The amount which each is to pay is apportioned amongst the various heirs or devisees, according to the value of the real property descended or devised to them.[3]

(3) *Payment of legacies.* This is a matter that is only applicable to an executor, or to an administrator with the will annexed, although questions of a similar nature may be brought before an administrator in respect to distributive shares in the intestate's estate.

It is a general rule that a legacy is not payable until one year after the testator's death.[4] (*b*) It can, however, be made payable earlier by the direction of the testator, as well as at a period more remote.[5] If a legacy be payable when the legatee shall be twenty-one, and the legacy be with interest before that time, it is payable at once to his executor, upon his death; otherwise, payment must be deferred until the legatee would have attained twenty-one, had he lived.[6] A different rule prevails when the legacy is given to B. in case A. dies before the prescribed time. Upon A.'s death the legacy is at once payable to B.[7] If an *absolute vested bequest* be given to A., payable at twenty-five, the direction to postpone payment is inconsistent with ownership, and will be disregarded.[8]

The currency in which a legacy is payable, where the will is silent, is usually that of the country where the testator resided, though the legatee reside in a foreign country.[9] If payable in produce, — *e. g.*, sugar, — and the executor does not pay, the value must be awarded.[10]

Specific bequests should be delivered in their existing form, and

[1] Code of Civ. Pro. §§ 2749–2801.
[2] Id. §§ 1843–1860.
[3] Id. § 1847.
[4] Hill *v.* Chapman, 1 Ves. 405, 407.
[5] Frost *v.* Capel, 2 Beav. 184.
[6] Crickett *v.* Dolby, 3 Ves. 10, 13.
[7] Laundy *v.* Williams, 2 P. Wms. 478.
[8] Rocke *v.* Rocke, 9 Beav. 66; *In re* Jacob's Will, 29 Id. 402.
[9] Saunders *v.* Drake, 2 Atk. 465. See also Pierson *v.* Garnet, 2 Bro. C. C. 38; Cockerell *v.* Barber, 16 Ves. 461.
[10] Symes *v.* Vernon, 2 Vern. 553.

(*a*) See Matter of Gantert, 136 N. Y. 106; Matter of Hesdra, 2 Connolly, 514.

(*b*) In New York the time is one year from the grant of letters. Code of Civ. Pro. § 2721.

not sold, unless a sale is necessary for the payment of debts.[1] If the thing described is not owned by the testator, the executor should obtain it at the expense of the general estate. The executor should not deliver the things bequeathed to the legatee until debts are paid, for he may be personally answerable to creditors for their value, should there be a deficiency, though he acted in good faith, and the deficiency was occasioned by later events which he had no reason to anticipate.[2] Where several articles from a mass are bequeathed, such as six horses out of twenty, the legatee will have a right of selection;[3] but having once selected, his interest is fixed, and he cannot cancel his choice and choose anew.[4]

In order to avoid some of the questions above referred to, the executor, on paying a legacy, may take security from the legatee to refund, if that should become necessary in order to pay debts.[5] Payment of a legacy, etc., to an infant, is especially provided for in New York, by § 2746 of the Code of Civil Procedure.

Interest on legacies. — This is a subject of much practical importance. As a rule, interest will not begin to run until a year after the testator's death, according to the rules under which interest is regularly allowed, as there is no delay until that time.[6] Interest will, however, be payable in special cases before that time, so that it will only be necessary to consider the special cases. In some instances it is not material that the will is silent on the subject of interest.[7] In these instances, all the circumstances are taken into account, in order to arrive at a just conclusion.[8]

The payment of interest may be *implied* under the following circumstances: (A) When the legacy is charged upon land. Thus it has been held that if a testator give a legacy charged upon land which yields rents and profits, and no time of payment be mentioned, the legacy shall carry interest from the testator's death. A legacy charged on land, though payable by express words at a future day (say the death of X.) may still draw interest before it is due, as being in the nature of a burden or lien upon the land.[9] In some cases the interest, though allowed, will not be raised until the future day arrives, — *e. g.*, the death of a life tenant.[10] (*a*) The

[1] Clarke *v.* Earl of Ormonde, Jacob, 108.

[2] Spode *v.* Smith, 3 Russ. 511.

[3] Jacques *v.* Chambers, 2 Colly. 435.

[4] Littledale *v.* Bickersteth, 24 W. R. 507.

[5] Cases in which security has been required by the court are, Dowley *v.* Winfield, 14 Sim. 277; Moffat *v.* Burnie, 16 Beav. 298; Cuthbert *v.* Purrier, 2 Ph. 199.

[6] Donovan *v.* Needham, 9 Beav. 164.

[7] Purcell *v.* Purcell, 2 Dr. & War. 217.

[8] Askew *v.* Thompson, 4 Kay & J. 620.

[9] Earl of Milltown *v.* Trench, 4 Cl. & F. 276.

[10] Pennefather *v.* Bury, 9 Ir. Eq. 586.

(*a*) *In re* Waters, L. R. 42 Ch. D. 517.

general rule is, that where a vested legacy is charged on land, interest will run from the time the legacy is "raisable" out of the land, unless there is some express provision concerning interest. If the bequest be contingent, interest does not attach until the contingency happens, unless there be express words allowing it.[1]

(B) When given by a parent, or one standing in the place of a parent. A legacy of this sort bears interest from the death of the testator, on the supposition that it is intended for maintenance.[2] (*a*) This rule applies to one who puts himself in the place of a parent.[3] It is not extended to adults.[4] (*b*) It will be applied to infants, even though the legacy be payable at a future day, — *e. g.* at twenty-one, — if there be no provision for maintenance.[5] The same rule is applied to bequests if children or grandchildren, etc., attain twenty-one, with gifts to others in case they die under that age.[6]

On the other hand, if there be an express provision for maintenance, a legacy payable at a future day will not bear interest until the time of payment.[7] The true theory of the whole subject is, that there is a *presumption* that a parent would not leave a child without support, but that this presumption may be rebutted by evidence to the contrary.[8] (*c*)

The rule of maintenance has not been extended in the English cases to illegitimate children, unless the father has apparently assumed an obligation towards them by placing himself *in loco parentis*.[9] In that case, interest for maintenance is allowed.[10] The decisions on this point seem to rest on too narrow a basis, since, as a father of an illegitimate child is under a natural duty

[1] Gillman *v.* Gillman, 16 Ir. Chan. 461. See Spurway *v.* Glynn, 9 Ves. 483.

[2] Becleford *v.* Tobin, 1 Ves. Sr. 308; Crickett *v.* Dolby, 3 Ves. 10.

[3] Wilson *v.* Maddison, 2 Y. & Colly. Ch. C. 372.

[4] Raven *v.* Waite, 1 Swanst. 553; Wall *v.* Wall, 15 Sim. 513.

[5] Heath *v.* Perry, 3 Atk. 101.

[6] *In re* Bowden, 6 L. J. N. S. Ch. 146; Mills *v.* Roharts, 1 Russ. & M. 555; Leslie *v.* Leslie, Lloyd & Goold, 1.

[7] Wynch *v.* Wynch, 1 Cox Eq. 433.

[8] *In re* Ronse's Estate, 9 Hare, 649.

[9] Perry *v.* Whitehead, 6 Ves. 544.

[10] Russell *v.* Dickson, 2 Dr. & War. 133; Rogers *v.* Sontten, 2 Keen, 598. In Russell *v.* Dickson, *supra*, the court laid great atress upon the fact that the testator had, in his will, called the legatee his *natural* daughter *Mary Sheehan*, while in the codicil he called her his *daughter* Mary Dickson. This showed an intent to stand *in loco parentis*, and to elevate her to his own rank in society. This was snfficient to justify interest for maintenance.

(*a*) See Brown *v.* Knapp, 79 N. Y. 136; Lyon *v.* Industrial School Association, 127 N. Y. 402; Stout *v.* Stout, 44 N. J. Eq. 479; Davison *v.* Rake, Id. 508.

(*b*) Thorn *v.* Garner, 118 N. Y. 198.

(*c*) When, by statute, legacies are made payable at a certain time, — *e. g.* one year after the granting of letters testamentary, or of administration, — interest does not begin to run until one year from the granting of letters. Matter of Accounting of McGowan, 124 N. Y. 526; Wheeler *v.* Hatheway, 54 Mich. 547.

to support him, it may fairly be *presumed* that he intends to do so, when he recognizes that duty so far as to give him a legacy.

There is no interest on a sum paid into court, unless the amount paid in yields interest, in which case the legatee will have the interest which is earned.[1] (*a*) Interest on an annuity commences from the testator's death.[2] (*b*) A legacy to a wife (not being given as a jointure) does not bear interest until a year after the testator's death.[3]

Duty on legacies and successions. It has long been the policy in England to impose a duty upon legacies, and in later years a duty or tax on "successions" has also been levied. The statute on this subject also affects the duties on legacies.[4] By another enactment, power is given to representatives in certain cases to commute legacy or succession duties presumptively payable.[5] These statutes have been very fruitful in litigation, and there is a large number of decisions upon the subject. The legislature of New York has recently adopted this policy and established both legacy and succession duties in a single statute. (*c*) Reference to the English decisions will probably be found useful in discussing questions that may come before the courts in construing similar laws elsewhere.[6]

(4) *Distribution of the estate.* — Where there is no will, the distribution of the estate among the next of kin requires but brief mention, as the principles governing the payment of legacies largely apply. Distribution is usually ordered on the final accounting among the parties entitled under the Statute of Distributions, already considered. It is sometimes directed before the time for creditors to present their claims has expired, where the debts of the decedent can be secured by refunding bonds given by the distributees. The details of this procedure must be sought for in local statutes.

In case a distributee is an infant, it is necessary in many States to appoint a special guardian or guardian *ad litem* to represent him on the accounting and distribution. In some States his share is paid to his general guardian, or paid into court until he arrives

[1] Maxwell *v.* Wettenhall, 2 P. Wms. 26.

[2] Gibson *v.* Bott, 7 Ves. 89, 96.

[3] *In re* Whittaker, L. R. 21 Ch. D. 657; *In re* Percy, 24 Id. 616.

[4] 16 & 17 Vict. c. 51, "Succession Duty Act," 1853. See also 44 & 45 Vict. c. 12; 51 & 52 Id. c. 3; 52 & 53 Id. c. 7.

[5] 43 Vict. c. 14, § 11.

[6] See Shelford: Succession, Probate, and Legacy Duties (1861); and Trevor: Taxes on Succession (1881).

(*a*) Johnson *v.* Moon, 82 Ga. 247.

(*b*) See Matter of Stanfield, 135 N. Y. 292.

(*c*) Laws of 1892, ch. 399, repealing the former statutes and constituting the present law upon the subject.

at majority.[1] Where a distributee is unknown, statutes now provide that his share shall be paid into some public repository for his benefit.[2] The accounting and distribution ordinarily occur at the end of one year from the granting of letters of administration. (*a*) Should the distributee die before that time, his interest passes to his personal representative.

(5) *Management of the estate.* The duties of executors and administrators in this respect are, in a single expression, those of a trustee. They have *the legal title* to the personal property, subject to a *trust* imposed upon them by law to hold and manage it for the benefit of the creditors and beneficiaries, including legatees and next of kin. These general duties will now be stated, the object being to group together under this head such acts as making contracts on account of the estate, continuing the business of the decedent, making investments, taking out insurance, general care of the assets, etc.

1. *Contracts of personal representatives.* — It is a general rule of law, that if an executor make a promissory note, though for the benefit of the estate, and though signing his name as executor, he will be personally liable to the holder.[3] The word "executor" added to his signature is a word of "description" merely, and does not change the nature of the contract. In some instances he will be entitled to indemnity from the estate, but not necessarily.[4] Under the provisions of the Statute of Frauds, a promise to pay out of his own estate must be in writing. A promise so made, and based on a *consideration*, will be personally binding. Examples of consideration are such as these: where an attorney delivered up papers belonging to the estate at his request, which the attorney was not obliged to deliver until his bill was paid,[5] or where the creditor consented to wait for the payment of his claim on the promise of the executors to settle it.[6]

2. *Continuing the business of the decedent.* — It is frequently requested by a testator that his executors should for a time carry on the trade in which he was himself engaged, perhaps with the belief that his estate can in this way be settled to greater advantage. There are two principal classes of cases of this kind, — one, where the testator was a sole trader; the other, where he was

[1] New York Code of Civ. Pro., § 2746.
[2] Id. § 2747.
[3] Lucas *v.* Williams, 3 Giff. 150.
[4] Lucas *v.* Williams (No 2), 4 De G. F. & J. 438.
[5] Duchess of Hamilton *v.* Incledon, 4 Bro. P. C. 4.
[6] Bradly *v.* Heath, 3 Sim. 543.

(*a*) In New York, by ch. 421, Laws of 1894, an accounting *may* be had immediately after publication for claims is complete, the creditors being cited.

a member of a firm. Only the first of these classes will now be considered, the other class more properly belonging to the law of partnership.

The regular business of a personal representative is to settle and adjust the affairs of the estate at the earliest practicable moment.[1] It is accordingly an inflexible rule that the business ought not to be carried on without the most distinct and positive authority to that effect in the will itself.[2] Under these circumstances, if the enterprise prove disastrous, only the capital embarked in the business will be liable.[3] A direction by the testator that the business shall continue to be carried on does not authorize the executor to embark in it additional capital.[4] (*a*)

Though the testator's estate be liable in a limited manner, the executor himself will be personally responsible for the debts contracted after the testator's death.[5] It is not material to this liability whether he is or not entitled to be indemnified from the testator's estate.[6] The executor "is liable for every shilling on every contract he enters into."[7] That portion of the estate which the testator set apart for the business becomes a trust estate, and may be treated as separated from the rest of his estate, so that only that will be liable for the debts contracted in the business. (*b*) Accordingly, the creditors may not only sue the executor on his contract, but may be substituted or subrogated to the position of the executor in his claim for indemnity out of the testator's estate. It follows that if the executor has no claim for indemnity, the creditors have no claim for substitution, and cannot proceed against the testator's estate.[8] But it must be repeated that the debt is the executor's debt, and that the creditor cannot proceed against the property of the testator except as above indicated, even though the executor use the property of the estate as though it were his own.[9] The language of a high authority is worthy of careful consideration. "Executors have no authority in law to carry on the trade of their testator; and if they do so, unless

[1] Collinson *v.* Lister, 20 Beav. 356.

[2] Kirkman *v.* Booth, 11 Beav. 273.

[3] *Ex parte* Garland, 10 Ves. 110; *Ex parte* Richardson, 3 Madd. 138.

[4] M'Neillie *v.* Acton, 4 De G. M. & G. 744.

[5] Labouchere *v.* Tupper, 11 Moore P. C. C. 198.

[6] Id.

[7] Owen *v.* Delamere, L. R. 15 Eq. 134, 139.

[8] Shearman *v.* Robinson, L. R. 15 Ch. D. 548.

[9] *In re* Morgan, L. R. 18 Ch. D. 93.

(*a*) See Willis *v.* Sharp, 113 N. Y. 586.

(*b*) A testator may, however, bind his general assets for all of the debts incurred in the business. If such an intent clearly appear from the will, and the executor be insolvent, the general assets will be liable in equity. Willis *v.* Sharp, *supra*. See also Burwell *v.* Mandeville's Executor, 2 How. U. S. 560.

under the protection of the Court of Chancery, they run great risk, even although the will contains a direction that they should continue the business of the deceased." [1]

3. *Care and preservation of the estate.* — The principle governing this class of questions is that the personal representative should use the same care that a man of ordinary prudence uses in the conduct of his own affairs. This rule may be applied to the following cases: —

(*a*) *Duty to insure.* Somewhat singularly, it has been held that an executor is under no general duty to insure.[2] In one of the cases cited, two months had elapsed since the expiration of the insurance, and no insurance taken. A reason given in the cases is, that the insurance money is not an asset, it being a mere contingent claim in case a misfortune destroying the property happens.[3]

(*b*) *Conversion of assets, and investments.* There is sometimes an implied duty to convert the assets into money, even though not needed for the payment of debts,— as, for example, where they are of perishable nature. (*a*) There are often directions in the will as to conversion, which must be observed. The duty to convert in such a case depends upon the legal construction of the words used. Thus, if a testator should direct all his property, except ready money, or money in the "funds," to be converted into "money," the word "funds" would mean *direct* obligations of the government, and would not include the bonds of another country guaranteed by the government.[4]

The rule of law, as interpreted by the English courts, is strict as to investments. The general rule is that the investment must be made in government stocks or in mortgages of real estate having value considerably in excess of the sum loaned.[5] If the investment be properly made, the executor is not in general liable for depreciation in value. (*b*)

[1] Williams on Executors, 7th ed. p. 1791.

[2] Bailey *v.* Gould, 4 Y. & Colly. 221; Fry *v.* Fry, 27 Beav. 144, 146.

[3] Bailey *v.* Gould, *supra.*

[4] Burnie *v.* Getting, 2 Colly. 324.

[5] It was said in Stickney *v.* Sewell, 1 M. & C. 8, that the correct rule was not to advance more than two thirds upon property of permanent value, such as freehold land, not including buildings.

(*a*) In many States this subject is governed by statute. See Woerner on Administration, § 330.

(*b*) While the English rule is not a part of the common law, it is an established principle in several States that investments by executors and administrators must be confined to government and real estate securities. King *v.* Talbot, 40 N. Y 76; Mills *v.* Hoffman, 26 Hun, 594, reversed on other grounds in 92 N. Y. 181; Ormiston *v.* Olcott, 84 N. Y. 339; Lamar *v.* Micou, 112 U. S. 452. In New York, city securities are also now an authorized investment, by statute, Laws of 1889, ch. 65. Investments even in real estate mortgages

On the other hand, if the investment be unauthorized, the executor must sustain the loss occasioned by depreciation, but can receive no advantage if it turn out to be profitable.[1] A power may be conferred in the will to loan upon "personal security," or to a particular person named, in which case the executors would not be liable for following out the power.[2] Such a direction, framed in general terms, would not permit a loan on personal security by one executor to another.[3] The reason of this is, that the testator relied on the "united vigilance" of them both, and his intent would be defeated if one could lend to the other.[4]

It is a further rule that the executor should, within a reasonable time, convert the personal obligations of the testator into money. The fact that the testator was content with personal security is no reason why the executor should continue to hold it. This rule is affected by the broader rule that it will be enough if the executor act with reasonable diligence and in good faith.[5] Still, the general rule remains, that if personal securities are not collected, and there is a loss occasioned by the neglect, the executor is liable.[6] If, however, assuming that active measures had been taken, the security could not have been collected, the executor would not be liable, for nothing has been lost by his delay.[7]

The general rule is, that the executor has one year within which to convert into money the assets which should be sold. The rule is not absolutely rigid. The particular nature of the property must be considered, and the attending circumstances.[8] There is, in some cases, a special reason for selling stocks of banks and other companies, owing to the fact that a personal liability is imposed upon the owner in case of corporate insolvency. If a long time should elapse before sale, and the liability be incurred, the executor will be answerable, unless good reason be given for his delay.[9] So in respect to closing the domestic establishment of the testator and discharging servants, a reasonable time must be allowed.[10]

[1] Knott *v.* Cottee, 16 Beav. 77.
[2] Parker *v.* Bloxam, 20 Id. 295.
[3] ——— *v.* Walker, 5 Russ. 7.
[4] Id.
[5] Buxton *v.* Buxton, 1 M. & C. 80; Marsden *v.* Kent, L. R. 5 Ch. D. 598 (C. A.).
[6] Bullock *v.* Wheatley, 1 Colly. 130; Caney *v.* Bond, 6 Beav. 486.
[7] East *v.* East, 5 Hare, 343, 348.
[8] Hughes *v.* Empson, 22 Beav. 181.
[9] Grayburn *v.* Clarkson, L. R. 3 Ch. App. 605.
[10] Field *v.* Peckett, 29 Beav. 576.

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outside the State will not usually be upheld. Ormiston *v.* Olcott, *supra.*

In other States the rule is less strict; but it is universally considered, as stated in the text, to be the duty of executors and administrators to employ the same care and prudence in making investments as a prudent and cautious man would use in the management of his own property. 40 Am. Dec. 506, *n.*; Lamar *v.* Micou, *supra.*

(*c*) *Liability for waste.* As a rule of law, an executor is liable for "waste" of the assets. This is technically termed a *devastavit.* It may occur by neglect, such as a failure, without good cause, to observe the rules already considered, or it may be caused by wrongful acts of a wilful nature, injurious to, or destructive of, the estate. Such waste may also be charged upon one who is in privity with the executor in the wrongful act. From this point of view, it is the duty of an executor to keep accounts. They should be clear and distinct, and not mingled with his private accounts.[1] A legatee, for example, has a right to an inspection of the accounts,[2] and it is reasonable to maintain that they should be in a condition fit for convenient inspection. An executor should also deposit the money of the estate with a banker, separate from his own. The rule does not mean merely keeping a separate account of the trust money, but having such an account entered on the banker's books in his name *as executor*, or its equivalent. A non-compliance with this rule might subject him to personal liability in case of the banker's failure. (*a*) He might also be liable if he left an unreasonable amount for a considerable time on deposit, even though properly entered. It may be reasonable for an executor to keep an amount of money on hand to meet bills that may be presented. If so, he will be protected. When the amount of the deposit is beyond the requirements of the estate, he may be liable for the failure.[3] He may also be liable for the misfeasance of his agents, such as a clerk,[4] also of a solicitor, in some instances.[5]

An important and difficult question is presented at this stage of the discussion, as to the circumstances under which an executor is liable for the waste or embezzlements of a co-executor, though not a participant in the wrong. Where there are several executors, one or more of them may be active, and others passive. If the active executor waste the assets, the passive one is not liable, unless there be some special circumstances. (*b*)

First. It is quite plain that if he concur in an act of his

[1] Freeman *v.* Fairlie, 3 Mer. 29, 40.

[2] Ottley *v.* Gilby, 8 Beav. 602.

[3] Cases in which the executor was held liable are Moyle *v.* Moyle, 2 Russ. & M. 710; Lowry *v.* Fulton, 9 Sim. 115; Astbury *v.* Beasley, 17 W. R. 638. Cases in which he was declared not to be liable are, Swinfen *v.* Swinfen, 29 Beav. 211; Johnson *v.* Newton, 11 Hare, 160; Wilks *v.* Groom, 3 Drew. 584; Finch *v.* Marcon, 40 L. J. (Ch.) 537.

[4] Kilbee *v.* Sneyd, 2 Moll. 186.

[5] Gilroy *v.* Stephens, 51 L. J. (Ch. D.) 834.

(*a*) Summers *v.* Reynolds, 95 N. C. 404; Williams *v.* Williams, 55 Wis. 300.

(*b*) Nanz *v.* Oakley, 120 N. Y. 84; Cocks *v.* Haviland, 124 Id. 426; De Haven *v.* Williams, 80 Pa. St. 480; English *v.* Newell, 42 N. J. Eq. 76.

associate, simply because his concurrence is made *indispensable* by law, he is not liable.[1]

Second. If one executor take possession of the assets, and then intrust them to another to be managed, the former is liable.[2] (*a*)

Third. Any wilful neglect or default on the part of the passive executor will make him responsible,[3] (*b*) — such as allowing a part of the estate to remain outstanding in an improper state of investment.[4] The passive executor, when called upon to do an act which is claimed to be indispensable, should make due inquiry.[5]

Fourth. If a passive executor does an act (not being necessary) which enables a co-executor to obtain control of the assets, he will be liable for misapplication.[6] This rule could not be applied to a case where one executor had securities in a box, of which he supposed himself to have exclusive control, while his co-executor also had a key, and, by means of it, without the knowledge of the former, withdrew securities, and misapplied them.[7]

Fifth. The act of joining in a receipt with the defaulting executor is evidence of joint control, and tends to show that the other surrendered possession of assets. It is not, however, conclusive evidence. (*c*) The real inquiry is, whether the passive executor had control, and so surrendered it. If so, he is liable, but not otherwise.[8]

There is sometimes found in the will a clause to the effect that each executor shall only be liable for his own default, and not for concurring in an act to enable his associate to receive funds, etc., for the purposes of the will. This is called an "indemnity clause," and will furnish protection, unless there be gross neglect or personal misconduct.[9]

The present judicial mode of stating the executor's liability is, that it is equivalent to that of a gratuitous bailee, and that he cannot be made liable, except for *wilful default.*[10] When the courts expound the phrase "wilful default," it is said that it does not mean deliberate or intentional default alone, but includes

[1] Terrell *v.* Matthews, 5 Jur. 1074.

[2] Townsend *v.* Barber, 1 Dick. 356; Langford *v.* Gascoyne 11 Ves. 333: Cf. Cowell *v.* Gatcombe, 27 Beav. 568.

[3] Styles *v.* Guy, 1 Mac. & G. 422.

[4] Lincoln *v.* Wright, 4 Beav. 427.

[5] Harrington *v.* Harrington, 1 L. J. (Ch.) 41.

[6] Candler *v.* Tillett, 22 Beav. 257.

[7] Id.

[8] Doyle *v.* Blake, 2 Sch. & Lef. 230, 242.

[9] Wilkins *v.* Hogg, 3 Giff. 116; Pass *v.* Dundas, 29 W. R. 332.

[10] Job *v.* Job, L. R. 6 Ch. D. 562.

(*a*) Bruen *v.* Gillet, 115 N. Y. 10.

(*b*) Wilmerding *v.* McKesson, 103 N. Y. 329; Matter of Niles, 113 Id. 547; M'Cormick's Executors *v.* Wright's Executors, 79 Va. 524; Hinson *v.* Williamson, 74 Ala. 180.

(*c*) Wilson's Appeal, 115 Pa. St. 95.

imprudence or negligence, if unexcused.[1] Under existing statute law in England (Conveyancing Act of 1881), it would seem that an executor is only liable for delay in collecting his testator's debt when he does not act in good faith.[2]

One mode in which the neglect of an executor is corrected is by charging him interest on money under his control. This principle is particularly applicable to cases where an unreasonable amount lies idle and uninvested at a bank. Simple interest is commonly charged, where no profit has been made by misconduct.[3] (*a*) An executor may, in general, avoid responsibility by depositing temporary balances in a trust company, authorized by law to receive them.

In some instances compound interest will be charged, as where an executor has used the money of the estate for his own benefit, or where he has been directed to invest, and he has failed to fulfil the direction, — as where he had been directed to accumulate a fund for infants.[4] (*b*) Where the executor has used the money in his own business, he is presumed to have made the profits usual in the business, and is made to pay compound interest. A charge of compound interest is only made by the court in extraordinary cases.[5]

IV. *Judicial proceedings.* — (1) *Administration suits.* A proceeding for this purpose may take place either in a court of equity, or, to some extent, before a court of probate. The former tribunal has the more full and complete power over the subject, as it is a court of general jurisdiction, while that of the probate court is limited, though at the present time generally much enlarged by statute.

It is not the object of this work to consider questions of procedure in detail. The general object of the suit in equity is to discover assets, and in connection with that to obtain a decree to pay debts and legacies. The regular course for a creditor is to

[1] Connolly *v.* Connolly, 17 Ir. Ch. R. 208; Elliott *v.* Turner, 13 Sim. 477; Rowley *v.* Adams, 2 H. of L. Cas. 725. In this case it was decided that there was no wilful default.

[2] *Re* Owens, 47 L. T. 61.

[3] Atty-Gen'l *v.* Alford, 4 De G. M. & G. 843; Johnson *v.* Prendergast, 28 Beav. 480; Burdick *v.* Garrick, L. R. 5 Ch. App. 233. The ground of the decision is, that he *ought* to have received interest, and is therefore conclusively presumed to have received it.

[4] Raphael *v.* Bœhm, 13 Ves. 407.

[5] Burdick *v.* Garrick, L. R. 5 Ch. App. 233; Jones *v.* Foxall, 15 Beav. 388.

(*a*) Pickens *v.* Miller, 83 N. C. 543; Frost *v.* Denman, 41 N. J. Eq. 47; Lent *v.* Howard, 89 N. Y. 169; Remington *v.* Walker, 99 N. Y. 626; White *v.* Ditson, 140 Mass. 351.

(*b*) Eliott *v.* Sparrell, 114 Mass. 404; Jennison *v.* Hapgood, 10 Pick. 77; Matter of Kernochan, 104 N. Y. 618; Hannahs *v.* Hannahs, 68 Id. 610; Cruce *v.* Cruce, 81 Mo. 676.

proceed against the executor for an accounting, and not directly against a debtor simply; but he may, in the case of collusion between the debtor and the executor, proceed against both.[1] The question whether collusion exists depends on all the circumstances. The *general* rule that the debtor cannot be made a party defendant with the executor is established by many decisions.[2] The underlying principle is that the personal representatives are the proper persons to sue, and persons interested in the estate should not be allowed to sue, unless there be danger that there will be some loss to the estate.[3] Special circumstances must be shown.[4] A creditor desiring to affect real estate should sue in behalf of himself and all other creditors,[5] unless the testator had conferred a power of sale upon executors,[6] though this remark does not apply to personal estate in the English courts since the statute cited in the note.[7]

After the court has decreed that the executor shall account, the account will be taken before the proper officer of the court, in some States called a "master" and in others a referee. Creditors will, on proper proceedings, be restrained by an injunction from bringing independent actions.[8] The effect of this course of proceedings is that the creditors will bring in their claims before such master or referee, and all the questions will be disposed of in one action. The injunction may now be obtained on motion.[9] An injunction will not be granted to prevent a creditor from proceeding against the executors personally.[10] The ground on which an injunction is granted is that relief can be obtained by any creditor in the general creditor's suit; if that is not true, no injunction will be granted.[11] The same principle will be applied to prevent a creditor from suing in a foreign court.[12] The general principles governing the granting of an injunction are stated in the case of Pennell *v.* Roy.[13] The court has the power to appoint a receiver (an officer of the court) to take charge of the property pending the litigation.[14] In some instances concurrent suits have

[1] Doran *v.* Simpson, 4 Ves. 651; Alsager *v.* Rowley, 6 Id. 748.

[2] Elmslie *v.* M'Aulay, 3 Bro. C. C. 624.

[3] Stainton *v.* The Carron Co., 18 Beav. 146.

[4] Yeatman *v.* Yeatman, L. R. 7 Ch. D. 210.

[5] Ponsford *v.* Hartley, 2 Johns. & H. 736.

[6] Worraker *v.* Pryer, L. R. 2 Ch. D. 109.

[7] 38 & 39 Vict. c. 77, Ap. A, Part 2, § 1; Cooper *v.* Blissert, L. R. 1 Ch. D. 691.

[8] Goate *v.* Fryer, 2 Cox Eq. 201.

[9] Paxton *v.* Douglas, 8 Ves. 520.

[10] Kent *v.* Pickering, 5 Sim. 569; Burles *v.* Popplewell, 10 Id. 383.

[11] Costerton *v.* Costerton, 2 Keen, 774; Whitaker *v.* Wright, 2 Hare, 310.

[12] Graham *v.* Maxwell, 1 Mac. & G. 71; Hope *v.* Carnegie, L. R. 1 Ch. App. 320. Not applied to a foreign creditor resident abroad. *Re* Boyse, L. R. 15 Ch. D. 591.

[13] 3 De G. M. & G. 126.

[14] Rendall *v.* Rendall, 1 Hare, 152.

been brought, each of which is so framed as to be for the benefit of all the creditors. The court may give the preference to the one which is so framed as to give the most broad and comprehensive relief, even though commenced later in point of time, and stay proceedings in others.[1]

A foreign executor may be held to account in the courts of equity of any State in which he may happen to be found, on the general rule of equity that its jurisdiction follows the person of the defendant.

After the preliminary decree to account, the creditors and other persons interested appear before the master or referee and present their claims, and have power to investigate the executor's accounts. When the examination is completed, a "report" is made to the court. Any interested party not satisfied with the report may, under the rules of the court, make exceptions to it. The whole matter is then heard by the court upon the exceptions, whereupon the report will be confirmed or disallowed, either in whole or in part, as may be deemed just. Reference to authorities upon the practice is made in a note.[2]

(2) *Administration in the probate courts.* The present practice in the various States of this country is, for the most part, to deal with the subject in the probate courts, whose jurisdiction, as it formerly existed, has been greatly enlarged. Such an enlargement does not of itself abrogate the former power of the courts of equity, but for the most part makes a resort to them unnecessary. (*a*) This statutory system is not uniform. The practical result is, that the statutes of each State must be consulted as to a case arising there. The statutes regulating the practice in the surrogate's courts of New York are to be found in the Code of Civil Procedure.[3]

The conduct of an executor, etc., is to such a degree a matter of trust that in case of certain acts of misconduct he may be removed from office, his letters revoked, and, if necessary, an administrator appointed in his place. In New York, the grounds of revocation of letters are enumerated in a statute.[4]

[1] Hawkes *v.* Barrett, 5 Madd. 17.

[2] See 2 Smith's Chancery Practice, chapters 29–37; 1 Story's Eq. Jur. chapters 9 & 10. A full collection of English authorities will be found in 3 Chitty's Equity Index (4th ed.), Tit. Executors, etc., pp. 2428–2525

[3] Code of Civ Pro. §§ 2706–2748.

[4] Id. §§ 2685–2693.

(*a*) See in New York Chipman *v.* Montgomery, 63 N. Y. 221; Wager *v* Wager, 89 N. Y. 161; Hard *v.* Ashley, 117 N.Y. 606. An action in equity against an executor for an accounting will not be entertained unless complete relief cannot be had in the surrogate's court. Blake *v.* Barnes, 28 Abb. N. C. 401; Sanders *v.* Soutter, 126 N. Y. 193. Where jurisdiction is obtained for a special purpose, equity may retain the case, and decree a complete settlement and distribution. Sanders *v.* Soutter, *supra.*

V. *Ancillary administration.* — The expression "ancillary," as here used, means "subordinate," and implies a principal administration otherwise granted. It grows out of the fact that letters testamentary or of administration granted in any particular State or country have only a local effect. A local executor cannot bring actions or enforce claims in other States or countries.

It is a rule dictated by the so-called "comity of States or nations" to recognize the substantive rights created in decedent's estates by the law of the domicile. The actual administration of the assets found in any particular State is vested in the courts of the State where such assets are situated. Such administration is "ancillary." After the administration of these assets is completed, any surplus remaining is remitted to the courts of the decedent's domicile, under the direction of the probate court or the courts of chancery of the State where the assets are administered.[1] The principle is stated in the case cited in the following terms: "By the law of England [common law] the person to whom administration is granted by the ecclesiastical court is by statute bound to administer the estate, and to pay the debts of the deceased. The letters of administration, under which he acts, direct him so to do, and he takes an oath that he will well and truly administer all and every the goods of the deceased, and pay his debts so far as the goods will extend, and exhibit a full and true account of his administration. That such are the duties of an executor . . . . is certain, although the testator or intestate may have been domiciled elsewhere. The domicile regulates *the right* of *succession*, but the *administration* must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased."[2]

In the case of Enohin *v.* Wylie,[3] there are remarks by Lord WESTBURY, which are apparently in conflict with the views above stated, and which deny to the courts of the state or jurisdiction where the assets are situated, the power to administer the local assets in an administration suit. These remarks were really *dicta*, and were not concurred in by the other judges. The *dicta* of the Lord Chancellor have been disapproved in later cases.[4] If the same persons who have the principal administration are also appointed ancillary administrators, and are present in the country where the assets are situated, and are served there with process in an administration suit in equity, and they take no steps to set it aside, the court has jurisdiction to determine the whole sub-

[1] Preston *v.* Melville, 8 Cl. & F. 1, 12–14.

[2] Preston *v.* Melville, *supra*, pp. 12, 13.

[3] 10 H. of L. Cas. 1.

[4] See *In re* Orr Ewing, L. R. 82 Ch. D. 456, 468, *per* COTTON, L. J.; (on appeal), L. R. 9 App. Cas. 34.

ject of administering the assets wherever situated. This is on the general ground that the jurisdiction of a court of equity follows the person. The rule was applied to the administration in England of the entire assets of a testator domiciled in Scotland, but having a small portion of his personal estate situated in England.[1]

This subject is regulated in New York by statute. In substance it is a digest of the principles already stated.[2] Under the statute, the duty of the court in granting ancillary administration is made imperative, when certain specified steps have been taken. The local court takes an account as nearly accurate as possible of debts due residents of this State, and the applicant for letters may, in the discretion of the surrogate, be required to give a bond which will effectually secure the payment of the debts. The surrogate may order them to be paid out of the assets, or a proper percentage on them, if the estate is insufficient to make payment in full. Any surplus must be remitted to the State or country where the principal letters were granted.[3]

Under the head of *title by contract* would belong gifts, as well as contracts ordinarily so termed. One form of gift, *donatio causa mortis*, in some respects resembles a legacy. Still, it is radically distinguished from a legacy in the fact that it does not pass to an executor, and is made to take effect in the testator's lifetime. It will on this account not be considered in this connection.

The topic of "title by contract" is at once so vast and varied that, in carrying out the scope of this work, which is more properly an introduction to the law of contracts, it will not be expedient to consider it. It is enough to mention it here for the sake of completeness.

[1] Ewing *v.* Orr Ewing, L. R. 9 App. Cas. 34, 45, 46. Scotland was treated as a foreign jurisdiction.

[2] Code of Civ. Pro. §§ 2694–2702.

[3] Id. §§ 2700, 2701.

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