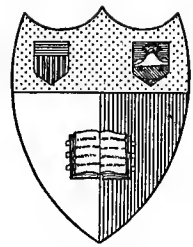
FARMERS' MANUAL OF LAW

HUGH EVANDER WILLIS



FARMERS' MANUAL OF LAW

WILLIS

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Principles of Private Substantive Law

A MANUAL OF LAW ADAPTED FOR THE USE OF FARMERS AND STUDENTS IN AGRICULTURAL COLLEGES

By

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To

Judge A. C. Hickman

PREFACE

The author has long felt that the farmer ought to have prepared for him a law book which would especially meet his needs. The farmer is not situated so that he can attend evening law classes or other schools where instruction in law is given, yet almost no one else is liable to encounter a greater variety of legal problems, and he has sufficient leisure time during the year to acquire a practical knowledge of the law if it were in such form as to be available in his own home and by his own fireside. The author has been engaged in the preparation of other law books and articles up to this time, but at last he has found time to take up the preparation of a manual of the law for the use of farmers in their homes and in agricultural colleges (as soon as the latter awake to the necessity of teaching law).

The whole of private substantive law is treated in this book. This includes all the rights of men for which the state will provide remedies, as well as the rights to such remedies, the methods by which the state aids and protects such rights alone being omitted. The farmer is liable to have arise a question involving any branch of private substantive law, and therefore he should know something about all of it. He need not fear that there may possibly be a great domain of law outside of this book which might greatly affect his case if he could only know about it. However, the farmer is more likely to have questions involving certain branches of the law than others. The branches of the law he is least likely to need receive the shortest treatment, and the branches he is most likely to need, the longest treatment. Public substantive law is not treated in this book, for it concerns society as a whole rather than the individual farmer. The methods by which his antecedent and remedial rights are aided and protected, or adjective law, is also not treated herein. If the farmer finds that he must have a lawsuit, he had probably better engage a reputable attorney. He could appear for himself, but the law of pleading, practice, and evidence is so technical (perhaps unnecessarily so), that it would probably be advisable to allow an attorney to handle his case in those respects. This book tells the farmer what

his legal rights are. It tells him what he can require from his neighbors, both in the matter of forbearing to do things and in the matter of positive acts. It also tells him what his neighbors can require from him. If he follows its principles he will not violate the rights of his fellowmen and he ought to be able to keep his fellowmen from violating his own rights. Even if he should be guilty of a legal wrong to his fellowmen, or they to him, if he will follow the principles of this book, he will know how to restore or redress the same. If he never commits a legal wrong and is never wronged legally, or if when either occurs he is able to adjust the same with the other party, he will not need to consult a lawyer. If he can't do this he ought to employ some one to help him.

Teachers, in using this book in agricultural colleges, would do well to ask their students to read some of the cases cited. These can be found in either public or private law libraries, or in special collections of cases which have been published. If there is manifested a demand sufficient to warrant such publication, the author will select and publish a special collection of adjudicated cases to accompany this volume.

In the back part of this book will be found legal forms, examination and review questions (or problems), a glossary, and an index. The legal forms will be found helpful, not only as illustrations, but as actual models by which desired instruments may be drawn up. The concrete questions will give the student of this book a chance to test the accuracy of his reading, as well as interesting topics for discussion. The glossary will afford a ready explanation of any terms which may not be understood. Some of these terms are more fully explained in the text. The index is not so long as to be cumbersome, but yet is long enough to furnish a complete guide to the subject-matter of the text.

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§ 1. SUBSTANTIVE LAW.

Substantive law is the term used to denote the sum total of the rules regarding the legal rights of men, both antecedent and remedial.

"Law is that part of the established thought and habit, which has been accorded general acceptance, and which is backed and sanctioned by the force and authority of the regularly constituted government of the body politic."

Law, in its broadest sense, has been made to refer to the divine order which pervades both the inanimate universe and the actions of rational beings, and when the reference has been to human action the term has been made to refer to both those rules of society not enforced by state authority and to those thus enforced; but rules enforced by state political authority are alone properly called laws. The general term which embraces these laws is positive law. Law, in its true sense, is a rule of human conduct. It runs like a boundary line between every man's life and the lives of his fellowmen. It tells every man what his fellowmen must or must not do for him, and what he must or must not do for his fellowmen. Whatever conduct he may require from his fellowmen is called a legal right. Whatever conduct he owes his fellowmen is called a legal duty if the same is negative in character, and a legal obligation if positive in character. Positive law is divided into substantive law and adjective law. Substantive law is the law which defines antecedent legal rights and provides remedial rights for

their enforcement. Adjective law is the law which specifies the ways in which remedial rights will be enforced. By a process of elimination we have at length arrived at substantive law. Substantive law includes both public and private legal rights. By a further process of elimination we shall exclude public rights. Then we shall have private substantive law, which is the subject-matter of this handbook, and which includes all the law affecting the legal rights of men as individuals.

§ 2. LEGAL RIGHTS.

A legal right is the conduct (as respects either the person or external things) to which one person is entitled from another, or others, by state political authority.

The subject-matter of substantive law is legal rights. Substantive law includes nothing but legal rights, and all legal rights are included in substantive law. To know legal rights, therefore, is the one way to know substantive law. A right becomes a legal right only when the political authority of the state can be invoked to see that it is respected. The business of the courts organized by the state for the administration of justice is to maintain the equilibrium of legal rights. If no one ever violated another's legal right there would be no business for the courts, but the moment anyone does thus violate another's legal right; that is, the moment he fails to do or to refrain from doing anything to which his fellowman is entitled, the strong arm of the law reaches out and compels him to do what he can to redress his legal wrong. This compelling power of the state acts in two ways, before any legal wrong as a restraining force, because anyone thinking of wrongdoing knows that such power stands ready to protect the legal right he plans to violate, and after the legal wrong as a coercing force by the actual process of the law. Every legal right has at least three, and some have four, elements: The conduct, (the object to which the conduct relates), the

person entitled to such conduct, the person from whom such conduct is due.

Such rules of social conduct as the rules of fashion, of etiquette, and of honor are enforced by public opinion only. They are outside of substantive law. The political authority of the state does not stand back of them. A violation of the right to have a woman or man dress according to fashion, or to have a man take off his hat when addressing a lady, or to observe certain table manners, may be punished by public opinion, and thus the right is more likely to be respected, but the violator cannot be sued at law for such violation. So there are rights of members of the family, of schools, of literary, political, religious, and other clubs, leagues and associations which are enforced by public opinion and various sanctions other than legal. But the political power of the state does not stand ready to redress any violations of the same, and consequently they are not legal rights. The violator runs no risk of a judgment in a law-suit; the injured party has no right to sue at law. We are concerned only with legal rights.

How have rights become legal? Some rights which men in the past have generally claimed for themselves have been recognized by the state, as the agent of the majority of the people in the state, and made legal by the state's providing some remedy for their enforcement either by means of its law courts or by means of legislative enactment. The majority of the people in the state have created other rights by declaring the same in legislative enactments and providing remedies for their enforcement. The rules, or principles, of law which state the legal rights recognized by the courts have been worked out by the courts as actual cases have been presented to them for adjudication, and such rules are known as the common law. The enactments of the legislatures are called the statute law. The common law rests primarily upon custom, for in the first case involving a new legal right the judges seek to give expression to the prevailing customs of the people in their dealings and relations with each other, but after such legal right, in both its antecedent and remedial aspects, has been recognized it becomes a precedent for subsequent cases, so that in the

decision of the latter the judges go back to the precedent instead of to the custom. In this way precedents have been established on most of the questions which arise between men, the courts either recognizing or refusing to recognize claims which men assert to be or ought to be legal rights. These rules are found in the printed reports of the decisions of the courts. Statute law may either change some rule announced by the courts or it may add a new rule by creating a new legal right or by giving a new remedy for an old.

§ 3. ANTECEDENT AND REMEDIAL.

Legal rights are antecedent and remedial. Antecedent rights are the rights to conduct for its own sake; that is, before any wrongdoing. Remedial rights are the rights to the prevention or redress by state authority of violations of antecedent rights.

Antecedent rights are legal rights when, if they are violated, the injured party has remedial rights of some kind to restore such antecedent rights or to compensate for their loss. Certain antecedent rights are also enforced by preventive remedial rights. Antecedent legal rights, then, are such rights as are recognized or created by the state and for whose violations the state promises remedial rights. Remedial rights are the rights to such prevention and redress of violations of antecedent legal rights as are permitted by state authority.

§ 4. IN REM AND IN PERSONAM.

Legal rights are in rem and in personam. Rights in rem are rights against all persons. Rights in personam are rights against some particular person.

These are clumsy terms, but as they have a well-defined meaning and mark a distinction not conveyed by any other terms, it will be expedient to refer to them. Legal rights *in rem* are all antecedent. They are the rights to conduct,

for its own sake, not from any particular person, but from all persons. The conduct under such circumstances must necessarily be forbearance. The person, or persons, having the right have a right to have all their fellowmen refrain from doing certain things. Some antecedent legal rights are *in personam*, and remedial rights are *in personam*. A legal right *in personam* is a right against some particular person, and ordinarily entitles the owner thereof to some positive act from such person. Legal rights *in rem* are legal duties as to the persons bound to refrain; legal rights *in personam* are legal obligations as to the persons bound to act.

§ 5. PUBLIC AND PRIVATE.

Legal rights are public and private. Public rights are rights which the state asserts to itself. Private rights are rights which reside in natural and artificial persons in their private capacity.

Antecedent rights and remedial rights, rights *in rem* and rights *in personam* are all both public and private. Public rights are those of the state, and violations thereof are crimes punishable by actions in the name of the state. Private rights are those of persons in their private capacity: violations of private rights *in rem* are called torts, and are redressed by civil actions *ex delicto;* violations of private rights *in personam* are called breaches of contracts, etc., and are redressed by civil actions *ex contractu*. In private law the state is indeed present, but it is present only as the arbiter of the rights, duties, and obligations which exist between one of its subjects and another. In public law the state is not only the arbiter, but it is present as one of the parties interested. Public law includes criminal law, constitutional law, administrative law, the law of the state as a juristic person, and international law. These are branches of the law with which the ordinary citizen is not vitally concerned. Of course, he should not be guilty of a crime by violating any of the public rights of the state, and for this reason he should be familiar with such rights, but if a man learns how to refrain from torts he will escape most

crimes, and so far as there are crimes which are not torts he can examine the statutes of his own state, as for example the game laws. Consequently public law will not receive further treatment from us. Private substantive law embraces all the rules, or principles, of law which relate to private antecedent legal rights *in rem* and *in personam* and to private remedial legal rights; that is, where both of the persons concerned are private individuals.

§ 6. PRIVATE LEGAL RIGHTS.

Private legal rights may be classified as (1) personal safety, (2) liberty, (3) society and control of family and dependents, (4) reputation, (5) immunity from fraud, (6) advantages open to the community generally, and (7) property.

Property rights are of two kinds, real and personal. Some of the rights of personal property are *in rem* (rights to forbearances); others are *in personam* (rights to acts), and include the large and important classes of rights known as contracts and *quasi* contracts, and remedial rights. All the other private legal rights named above are *in rem*. Correlative with private legal rights *in rem* are private legal duties, and with private legal rights *in personam*, private legal obligations. A violation of any of these rights, duties, or obligations is a private legal wrong. The terms used in the above black-letter classification are popular words and are readily understood and for these reasons the analysis of this book is built upon them. The seven different classes of rights enumerated include all the legal rights of men as individuals. They include all the rights that men as individuals have acquired up to the present time, both by legislative enactments and by judicial decisions. The first six rights enumerated are alike in that they do not have tangible external things for their object, but generally relate to inner rights of the individuals. They do not ramify as the seventh right named does. All the rights of property are supposed to have external objects to which they relate, although some of such objects are incorporeal and intangible. Property differs from all the other rights in that it ramifies in many

directions and includes many different kinds of rights. Property is of such paramount importance that it can almost be said that if there were no such institution there would be no wrongs for the state to redress or punish and no need of legal study. Property, not only includes real property and personal property, but real property is of many kinds and personal property is of many kinds. Personal property includes not only rights to forbearances, as the other legal rights do, but it also includes all the innumerable rights to acts created by contract and *quasi* contract, as well as by remedial obligations.

It will be noticed that life has not been named as one of the legal rights of man. An antecedent right cannot be said to exist unless its violation gives rise to a remedial right. A man has a legal right not to sustain personal injury, for the state provides a remedial right for its violation; but if a man is killed he does not have any right to redress. The right is said to die with the person. For this reason it is sometimes said that a wrongdoer incurs less risk in killing a man than in injuring him without killing. The right to life is not a private legal right. The state, or community as a whole, has a public right not to have any of its members killed, but such public right is outside of this discussion. The legislatures have by statute created a property right in life for the benefit of the surviving spouse and next of kin, so that they may sue for the injury caused them by the wrongful death of their relative, but this right is properly treated under the topic of property.

A uniform method of treatment will be followed throughout this manual, so far as possible, for the sake of convenience and harmony. The legal rights of men will be classified as personal safety, liberty, society and control of family and dependents, reputation, immunity from fraud, advantages open to the community generally, and property, and each will receive separate treatment in the order given, irrespective of whether they are antecedent or remedial, *in rem* or *in personam*. The popular reader will find these terms more intelligible than the more technical, but the technical terms will be introduced by way of explanation so far as necessary to elucidate the full meaning of the more common terms. Remedial rights are forms of personal property and will, therefore, receive treatment under the topic of personal property. Consequently, the remedies for the violations of the various rights will not be considered

in connection with each right, but all the remedies will be treated together as a special topic under personal property. Each right will first be classified, then its elements will be discussed, after which the manner of its creation will be treated, after which the legal wrongs occasioned by violations thereof will receive consideration, and lastly the methods by which they are lost or terminated will be explained. Under the heading of the elements of each of the rights, in most of the rights except property, there will be three elements for consideration, whereas in property there will be four elements, the new element being the objects to which the right relates. Under the heading of how the rights are acquired the discussions will be short and simple, except in the case of property, for all the other rights are acquired in a simple and in much the same way; but the discussion of how property rights are acquired will have to be very full and ample, especially in the case of personal property, for the ways of acquiring property rights are many and intricate. Contract is the most important way of acquiring title to property, for it may not only create property rights *in rem* (both real and personal), but it is itself a personal property right *in personam*. For this reason contracts will receive extended treatment, and will occupy our attention in chapters eleven to nineteen inclusive. Other branches of personal property are so important they they must take considerable space, and as a consequence the topic of personal property will engage our attention throughout the whole of chapters nine to twenty-four inclusive. The violations of each right, as well as the manner in which it may be lost or terminated, will be considered in connection with each general right.

CHAPTER II.

PERSONAL SAFETY.

§ 1. Definition and Classification.

The right of personal safety is the right of a man to be exempt from injury and danger of injury to his person from another's conduct. It is an antecedent legal right in rem.

The right of personal safety is one of those rights which a man may have inside of himself; that is, without any outside object to which the right refers. It is an antecedent right because it exists for its own sake, and before and independently of any violation thereof. It is a right *in rem* because it is a right against the whole world. It is a legal right because the state stands back of the individual, asks all the world to respect the individual's right, and compels anyone who does violate it to redress the wrong that he has done. Every man owes a duty to every other man not to cause him personal injury. It is impossible to imagine a society where such right and duty would not exist. It would exist though the state did not recognize it and thus make it a legal right and duty. If the state did not undertake to see that the right was not violated men would resort to other means to vindicate the same. They would fight for it. One would think that when every man claims the right of personal safety for himself that he would see to it that he would not endanger the personal safety of any of his

fellowmen, for the only way for every man to be safe personally is for every man to never injure another personally, and then the state would never need to be called upon to act as the arbiter between men. But unfortunately such is not the case, and will not be until Christianity is a fact and not a theory, and not being the case it is necessary for the peace of society that the state should take over the matter of enforcing on men the discharge of their duty not to violate the right of their fellowmen to personal safety.

§ 2. ELEMENTS.

The right of personal safety is composed of three elements: (1) conduct, (2) the person entitled to the conduct, (3) the person owing the conduct.

(1) The conduct is forbearance from attempting to do hurt to a person within reach; forbearance from hitting or touching a person intentionally, recklessly, as in rudeness, or in the commission of a crime; forbearance from wounding or disabling a person by negligence; forbearance from injuring a person by any dangerous substance or animal kept, or by the negligent condition of premises.

(2) Every one is entitled to the above conduct from all his fellowmen.

(3) All men owe the above conduct to all their fellowmen.

A man has the right not even to be menaced by gestures by a person within reach. He has a right not to have a man within such distance shake his fist at him, or brandish a stick at him, or present a pistol to him. In such cases the bodily harm stops short of actual execution, but everyone has a legal right not to be thus menaced by anyone. Of course, everyone has a right not to have the unpermitted application of force to his person by anyone, either directly or through means for which he is responsible. When a man owes another conduct it means he owes it for himself and for his agents and servants acting within the scope of their employment. No one has the right not to be gently jostled in a crowd, or not to have his neighbor touch him in a friendly way. So everyone must suffer the

consequences which come to him from another's doing a thing which is rightful when the consequences could not be prevented by prudence on the part of the doer. For example: If a horse on which A is lawfully riding in a highway is frightened by an automobile, or by a steam engine, and runs away with A and runs against and injures B, in spite of all A's efforts to restrain the horse, B has suffered no legal wrong. Again, a boy who consents to play a game of football does not have a right not to be touched by his team mates or opponents in the manner permitted by the rules of the game. A child does not have a right not to be chastised by his parent, or a student by his schoolmaster (unless prohibited by statute). A person who is striking the person of another does not have a right to have the person thus assaulted refrain from self-defense (with the exceptions above named), and a person not only has the right to defend his own person, but he may defend the possession of his own property, or the members of his own family or a servant when attacked. If a trespasser, for instance a thief, comes into a man's house the owner should request him to leave (unless the thief is at the time exercising violence), and if he will not, he has a right to use necessary force to eject him, and he may also use any violence necessary to protect his own person. The same would be true if the thief were stealing a horse from the owner's stable, or corn from his corn-crib, or berries from his vines. But aside from such cases as the foregoing everyone has a right to be free from personal injury by the conduct of others.[1]

§ 3. How Acquired.

The right to personal safety is innate, and is acquired at the moment of birth.

Before there was a state to recognize and enforce the right of personal safety, such right, if it existed at all, was not a legal right, but a moral right. As soon as a state recognized the right at all it became a universal legal right. Every human being in that state acquired the right on the moment, and no

[1]Vincent *v.* Stinehour, 7 Vt. 62; Sheehan *v.* Sturges, 53 Conn. 481; Scribner *v.* Beach, 4 Denio 448.

child could thereafter be born without acquiring it. The right can be acquired in no other way. It cannot be given by one person to another, nor sold, and hence it is not a property right. It is simply one of the great natural rights which men have individually recognized from times immemorial, and for whose protection the law courts of the state had to be organized because men would not do unto their fellowmen as they would have their fellowmen do unto them.[1]

§ 4. VIOLATIONS OF THE RIGHT.

Anyone who fails to give another the forbearances to which he is entitled under his right of personal safety is guilty of a legal wrong, called a tort. The tort is called assault if the injury to the person is only attempted, and battery if it is actually inflicted, and negligence if it results from failure to exercise the diligence due, and escape of dangerous thing if caused by dangerous instrumentality.

The right of personal safety entitles the possessor to a number of different kinds of conduct, although all are in the nature of forbearances, and as a failure to give any of these kinds of conduct violates the right and is a legal wrong, we have a number of different torts for our consideration. Some examples will make clear what will amount to violations of the right of personal safety. A in an angry manner points an unloaded gun at B, and snaps it with the apparent purpose of shooting. The gun, as a matter of fact, is not loaded, but B does not know of this fact, although A does. A is guilty of an assault.[2] A battery would be caused if a boy should fire off a cannon in the highway in violation of law, and the cannon should explode and hit a passer-by, or if one person should kick a horse on which another is riding (as the kick causes the rider a concussion), or if a person should throw a stone and hit another.[3] Negligence to the person is the tort which results when a person, " seeing or knowing, or being in a position to see or know, that

[1]Holland's Jurisprudence, 110.
[2]Beach *v.* Hancock, 27 N. H. 223.
[3]Clark *v.* Downing, 55 Vt. 259.

acts or omissions of his, in failing to exercise ordinary care, skill, or diligence towards another, in a particular place or juncture, will be apt to do him harm," yet is guilty of such acts or omissions to the other's injury. For example: A physician is called to attend a sick person and because of the physician's failure to exercise a reasonable and proper degree of care and skill (as found by jury) such person sustains an injury. The physician is guilty of actionable negligence.[1] A has in his possession and is owner of a stallion, or bull, or dog, which he knows is vicious, and the animal escapes and injures B without his fault. A is guilty of violating B's right to personal safety.[2] A digs a pit on his farm adjoining and close to the highway and fails to fence the same, and B, walking along the highway in the dark, accidentally steps aside and falls into the pit and receives injuries. A is guilty of violating B's right to personal safety.[3] A servant or an agent is not liable for injuries occasioned another by his acts or omissions while acting for his employer, but the employer (master or principal) is liable therefor; but if the servant or agent is not acting for his employer at the time (that is, if his act or omission is not in the course and within the scope of his employment) he and not his employer is liable.

§ 5. How the Right is Lost.

The right of personal safety terminates with death, and it may be partially waived, or temporarily forfeited during life.

A person cannot in modern times renounce his right to personal safety by a self-sale into slavery, or by a self-dedication to monkish seclusion, or in any other way completely give up the same; but, as already learned, he may lose part of his right either by waiving the same, as in a boxing match, or as in a consideration for a contract, or by forfeiting the same, as where he provokes violence by his own wrongful conduct.[4]

[1]Hibbard *v.* Thompson, 109 Mass. 296.
[2]May *v.* Burdett, 9 Q. B. 101.
[3]Barnes *v.* Ward, 9 C. B. 392.
[4]Holland's Jurisprudence, 110.

CHAPTER III.

LIBERTY.

§ 1. Definition and Classification.

The right of liberty is the right of a man to be allowed to go where he pleases so long as he does not interfere with the co-ordinate rights of his fellowmen. It is an antecedent legal right in rem.

The right of liberty is the right to freedom from all restraint except when a man begins to infringe on the rights of others. The law of liberty is the law made up of the rules which tell a man how far he has a right to go without interfering with the rights of his fellowmen and how far his fellowmen may rightly go without interfering with his right, and the rules which tell what remedies a man has if another goes beyond his own right and infringes the right of such man. Legal liberty, then, is freedom to obey law. Legal liberty is freedom to do the legally right thing. Liberty is not an unlimited right, for each man's right is limited by the right of every other man. Hence the right we have under consideration is the limited right of men to have others forbear from interfering with their going where they please so long as they please not to interfere with the co-ordinate rights of the others. The right of liberty is like the right of personal safety in being without any external object, antecedent, *in rem,* and legal.

§ 2. ELEMENTS.

The right of liberty has three elements: (1) conduct, (2) the person who has a right to such conduct, (3) the persons under duty to give such conduct.

(1) The conduct is forbearance from imposing total restraint upon a man's freedom of locomotion except in making a lawful arrest.

(2) Every man has a right to the above conduct from all his fellowmen.

(3) All men are under duty to render the above conduct to all their fellowmen.

Every one has the right not to be placed within prison walls and not to be totally restrained anywhere else, whether in his own house, or office, or on the highway, or in an open field, whether by an officer or by a private person, unless such restraint is pursuant to lawful arrest for some legal wrong. No one has the right not to be arrested by an officer or private person under a lawful warrant of a court of justice for a legal wrong committed, either public or private, or not to be arrested by an officer without a warrant if the officer has probable cause for believing that he is guilty of a felony, or not to be arrested by an officer or a private citizen without a warrant if he is engaged in a breach of the peace (either a crime or a misdemeanor).[1]

The right of liberty of children and insane persons is not so great as the right of adults and persons of sound mind. Parents and guardians in such case have certain powers in the matter of confinement, and may exercise their discretion in regard to many matters of discipline without resorting to the courts.

§ 3. HOW ACQUIRED.

The right of liberty is an innate right and is acquired at the moment of birth.

The right of liberty is like the right of personal safety in the manner by which it is acquired. No one has to buy the right,

[1] Bigelow on Torts, 339-363.

or have it given to him; it comes to him without any effort on his part, because society as a whole has decided that liberty is something that every man should have. It may be called a God-given right. Men had this right before there were any rules of law saying so, and men ought to forbear from interfering with this right even if there were no law saying to them that they must pay for such violations if they cause them; but unfortunately men will not do this by themselves, and as a consequence society has announced its rules to regulate the conduct of men and protect their legal rights.

§ 4. VIOLATIONS OF THE RIGHT.

The violation of a right of liberty is a tort. The tort is called false imprisonment.

In order to amount to a violation of the right of liberty the restraint must be circumscribing so as to cut off all ways of escape, but actual contact with the person is not necessary. For example: P is constantly guarded by D's detectives and all P's movements are under D's control, and P is treated in such a manner as to show that he is regarded as a criminal and that if necessary force will be used to detain him. This constitutes false imprisonment.[1] False imprisonment may result either in arrest under a warrant or in arrest without a warrant. An officer may be guilty of false imprisonment where he executes his writ upon the wrong person without the latter's fault; or a clerk where he issues a precept which he had no right to issue, though regular in form and within the jurisdiction of the court; or a judge where he orders the issuance of the warrant where the act was improper, though he had jurisdiction over the cause; or all three may be liable where the cause is without the jurisdiction of the judge as the writ is void on its face. Briefly, an officer or a private person will be guilty of the tort of false imprisonment whenever he totally restrains the freedom of locomotion of another, unless under such circumstances as would amount to justification, as explained in our discussion of the elements of the right of liberty. What has been said above

[1]Fotheringham *v.* Adams Express Co., 36 Fed. 252.

applies not only to a person's own conduct, but to that of his servants and agents acting within the scope of their employment.

§ 5. How the Right is Lost.

The right of liberty terminates with death; it may be temporarily or permanently forfeited by wrongdoing, and it may be partially waived by contract.

A person cannot in modern times renounce his right to liberty any more than he can his right to personal safety; but he may forfeit it by wrongdoing, as by committing a crime, and he may give up or promise to give up some part of his liberty as a consideration for another's promise in a contract.

CHAPTER IV.

SOCIETY AND CONTROL OF FAMILY AND DEPENDENTS.

§ 1. Definition and Classification.

Family rights are marital, parental, tutelary, and dominical. Marital rights are those incident to the status of marriage, which husband and wife have against each other and against the world. Parental rights are those incident to the relation of parent and child, which each has against the other and against the world. Tutelary rights are those incident to the relation of guardian and ward, which each has against the other and the world. Dominical rights are the rights of the head of the family to the services of wife, child, ward, and servants against them and the world; they are personal property rights. All the family rights are antecedent legal rights, and all are both in rem and in personam.

The rights under consideration are separate rights, but they are grouped together because of their similarity. They are like the rights of personal safety and liberty in that they are legal, antecedent, and *in rem*. They are unlike such rights in that they are also *in personam*. That is, they are rights which entitle the persons who have the same to negative conduct from all the world and to positive conduct from certain particular persons. This applies to marital, parental and tutelary rights

as well as to dominical, but dominical rights are proprietary; the owner has a right to the services of servant, or child, or ward, or wife, and their consideration will be postponed to the topic of personal property. Family rights *in rem,* or against the world, are also unlike the rights of personal safety and liberty in that they have external objects to which the right relates —the other members of the family.

§ 2. ELEMENTS.

The family rights have three elements: (1) conduct, (2) the person entitled to such conduct, (3) the persons under duty or obligation to give such conduct; and rights against the world, (4) the person who is the object of such conduct.

(1) The conduct is as follows: Forbearance from depriving a husband or wife of the society of the other and from being criminally intimate with a wife, and in some states with a husband; and forbearance from interfering with the custody and control of children and wards (and forbearance from depriving the head of the family of the services of the other members); the act of husband and wife associating with each other (consortium); the act of the wife's keeping herself from levity and adultery; the act of the husband supporting the wife (and in some states the act of parent supporting child, and child parent); and the act of rendering service.

(2) Each member of the family has a right to his specific part of the above conduct from the other members of the family and his fellowmen.

(3) All men are under duty to render the above forbearances to the parties entitled to the same; and each member of the family is under obligation to render his specific part of the above conduct to the other members of the family.

In order to violate the husband's right to the society of his wife it is not necessary that there be any separation or pecuniary injury; it is enough if the husband is robbed of the wife's

affections. The tendency of modern law is to give the wife the same rights as the husband. The husband's right includes the right not to have any one harbor his wife, who has abandoned him, after receiving notice not to do so. The right of custody and control of children, etc., includes the right not to be deprived of their services, but such right is property. It is doubtful whether the right of custody and control entitles the parent not to have another merely entice away or harbor his children, but of course the parent can regain custody and control unless he has forfeited his right by misconduct. Some states give a child or a parent a right to support as against the other, and some states do not. The husband and father, as head of the family, has the general right to regulate and control the household, and he has the right to fix or change the domicile of the family, so long as he acts reasonably and in good faith. Presumptively the father has the right to the custody and control of children, but the welfare of the children is the controlling consideration, and if that demands it the children may be taken away from the father and given to the mother, or other fit person.[1]

§ 3. How the Rights Are Acquired.

The family rights are natural rights and are acquired as follows: Marital, on marriage; parental, on the birth or adoption of a child; tutelary, on appointment.

Marriage in primitive races consisted in the forcible capture of a woman by a man. Later the capture became a symbolical ceremony followed by a sale or gift of the woman to the man by her relatives. In its modern form marriage is a mutual conveyance or dedication of the one to the other by the man and woman, but it is generally associated with religious observance, and there are certain legal restrictions on marriage, as for example, that there must not be a prior marriage undissolved; that the parties must attain the age of seven (to be voidable); age of consent (to be valid), or age of majority (unless the consent of parents or guardians is obtained); that the parties

[1]Long's Domestic Relations, 119-136, 321.

must be outside certain degrees of relationship; that the parties shall not be mentally incapable of giving consent, or physically impotent; and that a license shall be obtained, although the latter is not necessary to the validity of the marriage. The marriage does not create the marital rights, but such rights date from the marriage; its personal incidents are attached to it by uniform rules of law which state what society regards as the legal rights connected with such status independently of any agreement of the parties. The right of a guardian is an artificial extension of the parental power, because society recognizes the right of having someone take care of those who are unable to take care of themselves. Of course, the right dates, not from birth, but from appointment, generally by the probate court, either by itself or by ratifying an appointment in a last will or in a deed.

§ 4. VIOLATION OF THE RIGHTS.

Violations of family rights by outsiders are torts. Such violations of marital rights are the torts of alienation of affections and criminal conversation; of parental and tutelary rights, seduction.

Owing to the position of the head of the family in past times the most important right in connection with the family was the right of such person to the services of all the other members of the family, and the loss of services is the gist of almost all violations of family rights, a matter which will be considered in due course. The husband or wife has a cause of action for the alienation of the other's affections, and the husband for criminal conversation with the wife irrespective of the loss of services; and harboring the wife, except out of humanity, is a violation of the right of the husband. While loss of services is the gist of the wrong of seduction, the other elements of injury caused by such wrong generally exceed the loss of services. A child is not entitled to sue for her own seduction, apart from statute, because of her consent to the act. Seduction is the act of a man in inducing a woman to have unlawful sexual intercourse with him. Seductive acts are not essential to the tort, but such means are necessary in order to have the

crime of seduction. Criminal conversation is the term applied to unlawful sexual intercourse with a married woman, in the aspect of a tort; while adultery is the term applied, in the aspect of a crime. Violations of family rights by the members of the family do not constitute torts. There is no legal remedial right to damages for such wrong. Legalized self-help generally takes the place of state action. If a child has the right of support by his parent and it is not furnished he may buy on his parent's credit. A parent has a right to restrain or moderately chastise his child to control his actions during tender years. If the wife violates the conjugal rights of the husband by leaving him, he may petition the courts for a restitution of conjugal rights. Adultery is ground for divorce. In the early history of the common law the husband had a right to chastise the wife for levity, but the advance of civilization has wiped this right out of the way. The wife may enforce her right to support by buying on her husband's credit. Dominical rights extend to the services of slaves, servants, children, wards, and wives, and such rights are violated by any conduct which deprives the owner of the services by killing, injuring, or enticing away the person to perform the services. A person may violate the family rights of another not only personally, but by means of servants and agents acting within the scope of their employment.

§ 5. How the Rights Are Lost.

Marital rights terminate with the death of either of the parties and by their divorce; they are inalienable and incapable of waiver.

Parental rights are terminated by the death of either of the parties, by the child's emancipation, attainment of full age, or marriage, and by judicial sentence; they are alienable to another who adopts the child, or to a schoolmaster.

Tutelary rights are terminated by the death of either of the parties, by the resignation or removal of the guardian, and by the ward's marriage or attaining full age.

These propositions state the law about as fully as it can be stated in an elementary treatise. A divorce is either the dissolution or the partial suspension of the marriage relation by law. In some states divorces may be either absolute or limited; others permit only absolute divorces. The general grounds for divorce are adultery, cruelty, and desertion. A child attains full age on the earliest moment of the day preceding the twenty-first anniversary of his birth, or eighteenth anniversary in case of women.

CHAPTER V.

REPUTATION.

§ 1. Definition and Classification.

The right of reputation is the right of a man not to have diminished his good name in the community, or the well-founded respect which others feel for him. It is an antecedent legal right in rem.

The right of reputation is like the right of personal safety and the right of liberty in being antecedent, *in rem,* and legal; that is, it is a right which exists before and irrespective of wrongdoing, is against all the world, and is recognized and protected by law. Character is what a man is; reputation is what he is supposed to be. Character is injured by the individual's own wrongdoing, or sin; reputation is injured by the wrongdoing of others, or legal wrongs. The right of reputation is like the rights of personal safety and liberty in another respect: it is an inner right of man that has no external object to which it relates other than the opinion of the people in the community. It differs from such rights in having even this external object. "A good name is rather to be chosen than great riches; and loving favor than silver and gold."

§ 2. ELEMENTS OF THE RIGHT.

The right of reputation has four elements: (1) conduct, (2) the person who has a right to such conduct, (3) the persons under duty to give such conduct, (4) and the thing which is the object of such conduct.

(1) The conduct is forbearance from publishing defamation (*a*) which is actionable *per se,* (*b*) which is not actionable *per se,* but causes special damage.

(2) Every man has a right to the above conduct.

(3) All men are under duty to render the above conduct.

(4) The respect of others is the object of the right

Defamation is the speaking or writing false words of a person so as to injure his good name in the community. It is published when it is made to or in the presence of another or comes to the notice of another, but if it is made to come to the notice of another by one without authority it is published only by such person. Defamation is actionable *per se;* whether spoken or written, (1) if it imputes an indictable offense, (2) if it imputes a contagious or infectious disease of a disgraceful kind, (3) if it imputes something derogatory of a person's office, business, or occupation; and when written (4) if it exposes a person to hatred, contempt, or ridicule. Defamation is not actionable *per se* if it orally exposes a person to hatred, contempt, or ridicule, and such defamation must cause special damage (temporal loss) in order to violate the right of reputation. The law considers that everyone has a right not to have anyone injure his good name in respect to obedience to criminal law (public rights), in respect to contagious diseases of a disgraceful kind, and in respect to his business, or occupation, either by written or spoken words; but so far as refraining from exposing one to hatred, contempt, or ridicule the right requires either written words, or special damage from oral words. There is no right not to have another by spoken words expose one to hatred, contempt, or ridicule without special damage. Such are imputations or insinuations of dishonesty, lying, bad credit, unfaithfulness, unchastity, loose behavior in women, or anything else which would bring discredit on one's good name if not spoken of one in reference to his office, business, or occupation, etc. No one, in general, has a right

not to have another speak or write the truth of him, no matter what he says or writes. A person has no right to a false reputation. Yet, so far as the statements relate to physical peculiarities, the truth is no defense, for a man is not responsible for such peculiarities and ought to have a right not to have them paraded before the public. Again no one has a right not to have certain privileged communications made about him. The state, in its legislative, executive and judicial departments, is absolutely privileged whatever the statements and whatever the reasons for their being made, so long as they are made in the course of legislative, executive and judicial proceedings. Many other communications are privileged if they are made honestly and without malice, as, for example, in proceedings before church or other body, or in the publication of matters in which the public has an interest, or in publishing a thing in which the party communicating has an interest or legal or moral duty to perform, if made to a person having a corresponding interest or duty. Example: A master who has discharged his servant for supposed misconduct, hearing he is about to be engaged by a neighbor, writes the neighbor informing him that he has discharged the servant for dishonesty. The charge of dishonesty is false, but believed to be true. The master is not guilty of legal wrong.[1]

The thing to which the right of reputation relates as an object, so far as it has an object, is public respect. Hence no one has a right to control the spoken or written language of another to himself; it must be addressed to a third person or in his presence. The words must be published. Suppose that A tells B, a farmer: "You have committed adultery with X," and as a consequence B becomes sick, is unable to attend to his work, his crops suffer, and he has to hire extra labor to carry on his farm. A has not violated B's right of reputation.[2]

§ 3. How the Right Is Acquired.

The right of reputation is an innate right, and is acquired at the moment of birth.

The right of reputation is acquired in exactly the same way as the rights of personal safety and liberty. At the present

[1] Pattison *v.* Jones, 8 B. & C. 578.

[2] Sheffill *et al. v.* Van Deusen *et al.*, 13 Gray 304.

time, in every state where the right is a legal right, such right is vested in every infant at the moment of birth. Before the time when any child's state began to recognize such right, of course the right was not a legal right, but even then unorganized public opinion recognized the right, and back of public opinion the individual recognized the right; so that it was inevitable that the right should become a legal right so long as transgressions thereof continued to occur.

§ 4. VIOLATIONS OF THE RIGHT.

A violation of the right of reputation is a tort. The tort is called slander if the publication of the defamation is oral; libel, if in writing, print, or figure.

Every violation of a legal right is a legal wrong. The right of reputation is a right against all the world, and as a consequence anyone of the world who violates such right is guilty of a tort. Special damage is not essential to the tort of libel; all that is necessary is the publication of the defamation. The same is true of slander in charging a person with an indictable offense, or a loathsome disease, or calculated to injure him in his office, business, or occupation; but in order to have a false statement exposing a person to hatred, contempt, or ridicule amount to slander it must cause special damage. A young lady is charged with being a prostitute by another in the presence of a third person. As a consequence she becomes dejected in mind, her health is affected, and she is hindered from transacting her necessary business. This is sufficient special damage to make the words slanderous.[1] If the words had been written they would have constituted libel without special damage. D charges P to a third person with pulling the boots off from a dead man and appropriating them himself. This is an indictable offense, as the property vested in the dead man's administrator.[2] Therefore, the words are a slander. If they had been written they would be libel. A person may violate the right of reputation by the conduct of a servant or

[1]Bradt *v.* Townsley, 13 Wend. 253.
[2]Wonson *v.* Sayward, 13 Pick. 402.

agent acting within the scope of his employment as well as by his own conduct.

§ 5. How the Right Is Lost.

The right of reputation terminates with death. It can be forfeited during life only by loss of character.

The right of reputation is a natural right. It comes to a man without his effort, and it will remain with him until his death, save only when by his own life he has destroyed all of the respect of the community for him.

CHAPTER VI.

IMMUNITY FROM FRAUD.

§ 1. Definition and Classification.

The right to immunity from fraud is the right of a man not to be induced by intentional false representations to assent to a transaction which causes him damage. It is an antecedent legal right in rem.

The right to immunity from fraud can only be barely distinguished as a separate right. For the most part its identity is merged in the right of property, which we are shortly going to consider. Fraud, or deceit, is a legal wrong, but it is generally a legal wrong violating the right of property. For this reason the right to immunity from fraud will receive very brief treatment in this chapter, and the reader is referred to the later chapters on property, and especially those concerning contract, for a fuller treatment of the legal wrong of deceit. When we observe the right to immunity from fraud as an independent right, it is a legal right, for the law has provided a remedy for its redress; it is a right against all the world, and it exists prior to any wrongdoing. There are some analogous rights which are not generally classified as legal rights because their violation does not result in torts for which the law will provide redress, but they are legal rights in a minor sense, for the law has

provided a remedy of another sort for their violation. The rights referred to are the rights to immunity from undue influence, the right to immunity from duress, and the right to immunity from misrepresentation might also be added had it not been absorbed by fraud. The remedy which the law has provided for the violations of the latter rights in lieu of compensation is redress by reformation or rescission. There is no independent cause of action for such wrongs. As a consequence they will not receive independent treatment, but will be considered in connection with the subjects of contracts, and wills, etc.

§ 2. ELEMENTS.

The right to immunity from fraud has the elements of (1) conduct, (2) the person who has a right to such conduct, (3) the persons under duty to give such conduct, and generally (4) an object (of ownership) to which the right relates.

(1) The conduct is forbearance from making a false representation in regard to a material fact, with knowledge of its falsity, and with intent that it shall be acted upon, to one who is ignorant of its falsity and believes it to be true, and who does reasonably act upon it to his damage.

(2) Every one has a right to such conduct.

(3) All men are under duty to render the above conduct.

(4) The object of the right is property when it has an object.

A representation is a statement or an act, including an active concealment, which creates a clear impression of fact on another sufficient to influence the conduct of a man of ordinary intelligence; it must relate to a past event, or an existing fact, or must be an affirmation of a matter in the future as a fact. So far as language is concerned there is no difference between a representation and a warranty, but a representation is an inducement to a contract, while a warranty is a contract, collateral to another principal contract. A misrepresentation which is a legal wrong is a tort; a false warranty is a breach of contract. Statements of opinion, expectations, predictions, or motives, or misrepresentations of law by laymen do not

amount to misrepresentations in the legal sense. A misrepresentation is made with knowledge of its falsity if a person knows of its falsity, or makes it of his own knowledge not knowing whether it is true or false, or if he makes it under circumstances in which he is so related to the facts that it is his duty to know whether it is true or not. The intention that the misrepresentation should be acted upon must always exist, but it is of importance only with reference to negotiations with third persons, as it may be taken for granted where the person making the same brings the person to whom he makes it into business relations with himself. Thus: If A sells a horse to B, representing that the animal is sound when he knows it is not, no other evidence of intention is necessary. If a person knows a misrepresentation made to him is false, or if he does not believe it, he cannot insist that another has violated any legal right belonging to him. He should not rely on such statement, and if he does not he will not sustain damage. In any event a person has no right to unreasonably rely and act on a false statement, as where the same is made to another particular individual. The damage may consist in the violation of any of the other legal rights. Where persons are dealing on a footing of equality the general rule is *caveat emptor* (let the buyer beware). Dealers are allowed to indulge in traders' talk, and passive silence is not actionable in such case. But when the parties do not stand upon an equal footing, because of a confidential relation, the rule of *caveat emptor* no longer applies.

The object of the right to immunity from fraud is generally some form of property, but this is not necessarily the case. For example: We have a case of fraud where a man, who has a wife living, pretends that he is single and thus induces another woman to marry him.[1]

§ 3. How the Right Is Acquired.

The right of immunity from fraud is an innate right and is acquired at birth.

The right to immunity from fraud is in general like the other rights we have already considered; it differs from them

[1]Holland's Jurisprudence, 158-160.

principally in respect to the method by which it is violated. Other rights are infringed by acts done against the will of the person of inherence, but in the case of fraud the person of inherence (to whom the right belongs) is consenting to his own loss.

§ 4. VIOLATIONS OF THE RIGHT.

A violation of the right to immunity from fraud is the tort of fraud, or deceit.

In order to have the legal wrong of fraud the wrongdoer's conduct or that of his servant or agent within the scope of his employment must violate all the elements of the right to immunity from fraud; if anyone of the elements is missing there is no fraud. A in offering for sale to B a horse which is a cribber, by artful devices hitches the animal in such a way as not to disclose that fact, and when asked why he so hitches it gives an evasive answer. This, though a concealment, is so active as to amount to a false statement. Of course, A knows of the falsity of his representation, and he makes it with intent that it shall be acted on. B is ignorant of its falsity and because of it believes the animal sound, and because thereof reasonably relies thereon and is induced to buy the horse to his damage. This is fraud.[1] A is negotiating for the purchase of some land from B and they go over the same to examine it. While doing so B expresses the opinion that the land will produce a certain quantity of hay and that there is a certain quantity of wood upon it, and that he thinks there are a certain number of acres in the tract. These are mere expressions of opinion and do not amount to false statements, and in addition A would have no right to rely thereon, for he has an equal opportunity with B to ascertain the facts.[2] But a statement by a cattle dealer, selling cattle to another, that he is of the opinion that the cattle will weigh 900 lbs. and upwards per head is a statement of fact, though the word opinion is used, and if false, made with intent to induce the other party to buy,

[1]Croyle *v.* Moses, 90 Pa. 250.

[2]Mooney *v.* Miller, 102 Mass. 217.

with knowledge of its falsity, and the other party reasonably relies and acts thereon to his damage, fraud would be the result.[1]

§ 5. How the Right Is Lost.

The right to immunity from fraud terminates with death.

[1]Birdsey *v.* Butterfield, 34 Wis. 52.

CHAPTER VII.

ADVANTAGES OPEN TO THE COMMUNITY GENERALLY.

§ 1. Definition and Classification.

The rights to the advantages open to the community generally include all the rights of man to perform without molestation all lawful acts and to enjoy all the privileges which attach to him as a citizen of the country in which he lives. They may be classified as the rights to livelihood, highways, freedom from abuse of legal process, and contract.

The right of livelihood means the unmolested pursuit of the occupation by which a man gains his living; the right of highways means the free and unobstructed use of the public highways and of navigable rivers; the right of freedom from abuse by legal process means the right not to have the machinery of the law, established for man's protection, maliciously set in motion for his detriment; and the right of contract means the right of one not to have a second interfere with a third's contracting or continuing to contract with him to his damage. They are antecedent legal rights *in rem*.

The group of rights now under discussion summarize all the legal rights of man left for consideration, with the exception of the great right of property. Before taking up the

subject of property with its many ramifications it seemed best to gather together into one chapter all the rights not yet considered. They are separate rights, but they are similar in nature, and lend themselves to common treatment. They are all legal rights, although it has taken a struggle of social forces to make them such. They are all antecedent, or existing before legal wrong. They are all *in rem*, or lie against all the world.

§ 2. ELEMENTS.

The rights to the advantages open to the community generally have the elements of (1) conduct, (2) persons who have the right to it, (3) persons under duty to give it, (4) and the objects of it.

(1) The conduct is forbearances, (a) from interfering with the pursuit by which a man gains his livelihood to his damage, (b) from obstructing the public highways and navigable rivers to his damage, (c) from instituting a prosecution with malice and without reasonable and probable cause for an offense falsely charged to have been committed, (d) from procuring the refusal of a third person to contract with another to his damage.

(2) Everyone has a right to such conduct.

(3) Everyone owes a duty to give such conduct.

(4) The objects of the right are (a) occupation, (b) public highways and rivers, (c) machinery of the law, (d) relation between two men.

The above rights do not in general entitle a man to conduct merely from another or his agent, but to conduct that shall not cause damage. This is true of the rights to livelihood, highways, and contract, and of malicious prosecution not defamatory, but if the charge in malicious prosecution would be actionable slander special damage is not necessary. For example: A has a right not to be indicted for stealing a cow, falsely, without probable cause, and of malice, though it does not cause him special damage.

The right of contract closely resembles the right of livelihood, and one explanation will be enough for both. The right

not to have another procure refusal to contract requires that the person who is charged with violating the right should have notice of the relation between the party making the charge and the third person, that the party charged should interfere with that relation, and that actual damage should be caused. The interference, or hindrance, most frequently occurs through combinations of men, as in strikes and boycotts, but combinations are not necessary. The party charged with wrongdoing may justify his act on the ground of freedom of contract, or competition, and this has been a frequent defense in the past, but the modern tendency is to limit the freedom of competition, since competition leads to monopoly and many other evils; the idea of co-operation is beginning to take the place of competition.

The right not to be maliciously prosecuted requires that the prosecution complained of must have terminated before the action for the redress of the wrong caused by it is begun, that such suit must have been instituted without probable cause, and maliciously, and that it must have caused actual damage where it is not defamatory. In America the malicious prosecution may be either a criminal or a civil suit.

As to what will amount to damage in this connection is a question of some difficulty. In the case of procuring refusal to contract, it is enough if the party injured can show some actual pecuniary loss from the acts. In the case of malicious prosecution it must be shown that the party injured has suffered, not merely the restraint of an arrest or attachment of his property, but some recognized legal detriment over and beyond that, as a breach of a contract. In the case of a violation of the right to highways it appears that the party injured must have begun a particular user and such user must be interrupted.

§ 3. How the Rights Are Acquired.

The rights to the advantages open to the community generally are innate and are acquired at the moment of birth.

The social forces at work have won these rights for men and have made them legal rights by securing special legal remedies for their enforcement. Before this happened, of

course, these advantages were not legal rights at all, but after it happened they have always been legal rights, and each individual as he is born, is born into this inheritance. The right not to have others procure refusal to contract, for instance, is the result of the struggle between capital and labor on the one hand, and such forces and the public on the other.

§ 4. VIOLATIONS OF THE RIGHTS.

Violations of the rights to the advantages open to the community generally are torts. The violation of the right to contract is procuring refusal to contract; of the right not to have the abuse of legal process, malicious prosecution; of the right of public highways, nuisance.

With what has already been said about the rights under consideration, a few illustrations will give the average person all the information he will need about them. An insurance company insures X against loss by reason of injuries done to the men working for him in their work. A is one of the men working for X. A disputed case of liability under the policy arises touching A, and the insurance company, with malice, requests X to discharge A and indicates that if this is not done the policy will be canceled (as it could by its terms). X discharges A by reason of this threat, when A would otherwise have continued in his employment, although A's engagement is terminable at will. The insurance company has violated the right of A by procuring the refusal of X to contract with A.[1] D prefers against P before a justice of the peace the charge of arson (maliciously burning of a house). The justice only has authority to bind over or discharge the prisoner. After full hearing the complainant withdraws his prosecution and the justice orders P to be discharged. This is a sufficient termination of the prosecution, and if it was instituted maliciously and without probable cause, constitutes the tort of malicious prosecution.[2] A person acts without probable cause when there are no facts known to him which would induce a man of

[1]London G. Co. *v.* Horn, 206 Ill. 493.

[2]Sayles *v.* Briggs, 4 Met. 421.

ordinary intelligence and caution to believe the charge true; for example, when D charges P with robbery when the facts show that P was a fellow-workman with the robber, had been heard to say before the robbery that the robber had absconded, and when the robber had been seen after the robbery in a public entry near P's house.[1] A person will be protected if he acts *bona fide* on the advice of legal counsel. D obstructs a public highway so as to render it impassable. This highway furnishes the only means of reaching a part of P's land in the use of his farm, and he consequently suffers special damage. D is guilty of creating a private nuisance as to P by what is also a public nuisance.[2]

§ 5. How the Rights Are Lost.

Rights to the advantages open to the community generally terminate with death of the individual, and they may be waived by contract during life so far as not against public policy.

The giving up or the promise to give up one of these rights is sufficient consideration for a contract. A person could thus relinquish his right to a highway so long as he did not attempt to interfere with the rights of his fellowmen to that highway. He could give up his right to an occupation so far as necessary to protect the purchaser of the business to which it is an incident, but anything further than this would be against public policy, for it would deprive the state unnecessarily of the services of the man. Unless the rights are thus relinquished they will continue until death.

[1]Busst *v.* Gibbons, 30 L. J. Ex. 75.
[2]Venard *v.* Cross, 8 Kan. 248.

CHAPTER VIII.

REAL PROPERTY.

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§ 1. DEFINITIONS AND CLASSIFICATION.

Real property is the right of a man to be allowed by his fellowmen to possess, use, and dispose of (freehold) estates in land (corporeal hereditaments) and easements, etc. (incorporeal hereditaments). Real property may be absolute or qualified. It is absolute when a man has the exclusive and unqualified right to possess, use, and dispose of such objects of ownership as against all the world except the state (accompanied by the actual or constructive possession thereof). It is qualified when a man has any of the above elements of absolute property less than all. Real property is an antecedent legal right in rem.

The right of property differs from the rights heretofore considered in that the latter have related to no tangible external objects capable of ownership, while property is an extension of the power of man over the physical world. Most things in the material world are capable of such subjection. The essence of property, however, is not the material thing, but the conduct to which a man is entitled from another with respect to the thing. Kant says, "If a man were alone in the world he would call nothing 'mine.'" The right of property lies not so much in the enjoyment of the thing as in excluding others from interfering with such enjoyment. Property is divided into two classes, real and personal, according to the objects to which the right relates. Real property includes the rights to any conduct which relates to freehold estates in land, etc., and personal property the rights to the conduct which relates to all other external things capable of ownership. The natural division between the objects of personal and real property ownership would be between movables and immovables, when real property would relate to estates in land less than freeholds, as well as freeholds, and this is the way the topic

is generally treated, but the feudal system relegated estates less than freehold to the realm of personal property and necessitated such arbitrary classification.

§ 2. FREEHOLD ESTATES.

The right of real property in general relates to land, but a man is never said to own land; he has only an estate in land. A freehold estate is an estate in land either of inheritance or for life. Estates of inheritance are either fee-simples or determinable fees (fee-tails, estates upon condition, limitation, conditional limitation). An estate in fee-simple is a freehold estate of inheritance without condition or limitation and of indefinite duration. A person has an absolute real property when he has an estate in fee-simple. In the case of all other estates he can have only a qualified property. The estates which approach the closest to fee-simples are determinable fees, for they possess all the incidents of fee-simples except the assurance of indefinite duration. The grantee taking such an estate has the exclusive right to use, possess, and even to dispose of the same (that is, of his interest); but the estate is qualified by being liable to terminate upon the happening or not happening of a future named but uncertain contingency. The determinable fees are the fee-tail, fee upon condition, and fee upon limitation. An estate in fee-tail is a freehold estate of inheritance which descends, not to the heirs generally, but to the heirs of the body of the donee, or to some particular class of such heirs, and through them to his grandchildren in a direct line indefinitely; but such an estate is qualified in that it will end with the death of the first tenant who is without issue capable of inheriting, unless barred by a common recovery (or conveyance). At common law the tenant could alienate the estate so as to give a fee-simple only by suffering a common recovery, and until the rule in Shelley's case it was not decided that the first grantee could even do this. An estate upon condition is a freehold estate of inheritance which depends upon a condition precedent or condition subsequent. An estate to A and his heirs, if A will abstain from the use of intoxicating liquors for five years, is an estate upon a condition precedent. An estate to A and his heirs provided that the

land shall not be used for a slaughterhouse is an estate upon a condition subsequent. If it depends upon a condition precedent it will never vest until the happening of the condition. If it is subsequent it will be terminated upon the happening of the condition and entry by the grantor, his heirs, or legal representatives. An estate upon limitation is a freehold estate of inheritance upon such a condition subsequent that it terminates *ipso facto* upon the happening of the event without any entry, as when an estate is granted to D during widowhood. If an estate in fee upon condition, or in fee upon limitation, is followed by a limitation over to a third person, this last estate is called a conditional limitation, and in either event vests *ipso facto* in the third party upon the happening or not happening of the limiting contingency. An estate upon condition precedent and a conditional limitation are qualified because of the uncertainty as to their beginning; an estate upon limitation and estates upon other conditions subsequent are qualified because of the uncertainty as to their duration. A life estate in land is a freehold estate not of inheritance, which is to continue for the life or lives of some particular person or persons. Curtesy is the life estate in land which the husband acquires at the death of his wife in the estates of inheritance of which she was seized during their coverture when there has been birth of issue alive; and dower is the life estate in land which the wife acquires upon the death of the husband in the one-third part of the estates of inheritance of which he was seized during their coverture. Life estates are qualified because the tenant has the right to possession only for a limited time, the right to use the land only in such a way as not to commit waste, and the right to dispose of no greater estate than the life estate which he has.

§ 3. ESTATES LESS THAN FREEHOLDS.

The estates less than freehold in corporeal and incorporeal hereditaments, though classed as chattels real, and thus as objects of personal property ownership, are in truth the objects of real property ownership. They, in general, resemble other estates in land. They are like them except for the period of their duration. Yet as a consequence of being classed as the

objects of personal property they have acquired various peculiarities not possessed by freeholds. Rights to them will pass under a bequest of personal property. Rights to them pass to the personal representatives instead of the heir. Estates less than freehold are divided into estates for years, estates from year to year, estates at will, and estates at sufferance. An estate for years is an estate less than freehold which is to continue for a fixed and definite period both as to its beginning and its end, called a term. An estate from year to year is an estate less than freehold, with a definite beginning but no definite ending, which consists of an indefinite number of periods unless terminated by one of the parties at the end of one of these periods by notice prior to the end of such period. An estate at will is an estate less than freehold, rent free, which is to continue during the joint wills of the lessor and the one in possession. An estate at sufferance is an estate less than freehold in which a tenant has the naked possession of land, rent free, by holding over wrongfully after the termination of another estate. All of the estates less than freehold are qualified. In an estate at sufferance practically all that the occupant has is the right not to be sued as a trespasser. In an estate at will the tenant at will, in addition to possession, has the right to emblements (growing crops planted by him) and estovers (wood); but he has no further right to use or enjoyment, and he has no right of disposal, as an assignment of his interest would terminate his leasehold. In the estates for years and from year to year the lessee may possess, use so long as waste is not committed, and dispose of such interest as he has. All of the estates are qualified as to their duration.

§ 4. REMAINDERS, REVERSIONS, LICENSES, ETC.

All of the above estates, except those from year to year, at will, and at sufferance, both estates less than freeholds and freeholds, may be either in possession, where the tenant is in actual possession or in receipt of the rents, or in expectancy, where the right to the possession of the land is postponed to a future period, either without any precedent estate or with a precedent estate. Where there is such precedent estate it is an estate in possession of the person to whom given and is called

a particular estate, and the future estate which is to follow it is an estate in expectancy and is called a remainder (vested or contingent). Suppose A, who has an estate in fee-simple, grants the same to B for B's life, then to C for ten years, then to D and his heirs forever. B has a life estate in possession. C has an estate for years in expectancy. D has a fee simple estate in expectancy. If C is alive his estate is a vested remainder, and if D is alive his estate is a vested remainder.

A person may grant the whole of his estate, or only a part of it. In the latter event there is left in him, or his heirs, an estate in expectancy, called a reversion; but one who grants a determinable fee out of an estate in fee-simple has left in him, or his heirs, only a possibility of reverter, instead of an estate in reversion, for there is a possibility that the grantor and his heirs may never get the estate again. A, who has an estate in fee-simple, grants an estate to B for life out of the same. As soon as B's life estate is ended, A's estate in reversion will commence.

A license is a right not amounting to an estate in land (like a possibility of reverter), and is an authority to do an act or series of acts on one's land, as to hunt, fish, cut down trees, etc. A trust is a right of property, real or personal, held by one party (trustee) who is the legal owner, for the benefit of another party (beneficiary) who is the equitable owner.

Absolute property is the greatest property that anyone can have, either in real property or personal property. Qualified property includes any rights of property less than absolute property. These terms apply alike to real property and personal property, and in each they relate to the conduct of his fellowmen to which the owner of the right is entitled. Hence, they will be more fully discussed in connection with the elements of the right of real property and the elements of the right of personal property.

§ 5. ELEMENTS OF THE RIGHTS.

The elements of the right of real property are (1) the conduct which it requires, (2) the objects to which it relates, (3) the person entitled to such conduct, (4) the persons whose duty it is to give such conduct.

(1) The conduct is forbearance from interfering with the

possession, use, or disposal of the objects of real property, either for a limited or an indefinite time.

(2) The objects are corporeal hereditaments (land), including the soil of the earth, and things attached by nature or art and extending indefinitely upward and downward, and incorporeal hereditaments, including easements, etc.

(3) Anyone, by legally acquiring the same, may have a right to a part or all of the above conduct, either severally, or as a tenant in common, or as a joint tenant.

(4) Everyone is under duty to give the above conduct to anyone who has acquired a right to it.

Real property is not conduct alone unrelated to any external object, nor an external object alone, nor a person under duty, nor a person with a right; but it is a right made up of all four elements. It is a greater or less right according as the conduct, and the objects, and the persons vary.

§ 6. CONDUCT REQUIRED BY RIGHT.

Conduct is the most important element of real property if any one element can be said to be most important. In the case of real property the conduct is always forbearance. Persons are under duty to forbear from doing certain things, but they are not under obligation to do any specific acts. Such forbearances embrace forbearance from interfering with possession, or use, or disposal, or all three. The time when such forbearances may be owed may be an hour or a day, or forever. If a person has a right to forbearance forever as regards possession, use, and disposal, as in a fee-simple, he has an absolute property; if his right lacks any one of these essentials he has only a qualified property. It is the conduct to which a person is entitled and not the objects to which it relates which determines whether his property is absolute or qualified. It is not the fact that the right relates to one acre of land or a thousand acres of land, nor the fact that it relates to a corporeal thing or an incorporeal thing, which makes the property absolute, but the forbearance with respect to any of such things to which a person is entitled. The forbearances referred to as the conduct to which the owner of real property is entitled

mean forbearances of men as private individuals. A person may have an absolute property, though the state may have the right at any time to interfere with the possession, use, or disposal thereof. All private property is held subject to the paramount right of the state to take it under eminent domain, police power, taxation, public necessity, and in settlement for legal wrongs, with certain exemptions. This topic will be considered again in connection with personal property.

§ 7. OBJECTS TO WHICH RIGHT RELATES.

The objects of real property, or the things to which the right relates, are corporeal and incorporeal hereditaments. These are not the most fortunate terms, but it is necessary to use them, as unfortunately there is no term to take the place of incorporeal hereditament. The popular word land may be substituted for corporeal hereditaments. Land is the soil of the earth and every tangible thing permanently connected therewith, either by nature or art, and extends from the surface indefinitely upward and downward. Hence, when a person has a right which relates, for instance, to a field within certain boundaries, he has a right which relates to everything beneath the same to the center of the earth and upward above the same to the sky, unless otherwise stipulated.

§ 8. LAND.

It is as obvious that land includes the soil of the earth as that night follows day. Soil includes rocks, stones, minerals, oils, salt, and gases in or upon the soil. Does soil include the water flowing over it, or under it, or along its border? This question cannot be answered by yes or no. Surface water belongs to the owner of the soil upon which it lies to the same extent that the soil does, the term including all waters of a casual and vagrant character which ooze from the soil or diffuse themselves over the surface, following no defined channel. Percolating waters also belong to the owner of the soil, the term including water beneath the surface of the earth, not flowing in a clearly defined stream but combined with the soil or passing through it by percolation and filtration. Water in a water-

course, or a stream of water usually flowing in a definite channel having a bed and banks and discharging into another body of water, cannot be the absolute property of anyone. Every riparian owner; that is, every owner of soil bordering upon such watercourse or over which it flows, is entitled only to make reasonable use of the water for domestic, agricultural, or manufacturing purposes as it passes along. He may consume the water for his domestic needs, but after using it for manufacturing needs he must allow it to pass on. Where irrigation prevails in the western states water in watercourses may be appropriated for agricultural purposes by the first person who claims it; but elsewhere the doctrine of reasonable use prevails. The rules as to watercourses also apply to subterranean waters which run in regular and well-defined streams. The owner of soil over which a stream of water flows or upon which a pond of water rests is the owner of the ice which is formed upon such water; but if the bed of such stream or pond belongs to the state the ice belongs to the state. All of the above things which are included in the term soil are therefore land, or corporeal hereditaments.[1]

Land also includes things attached to the soil by nature, both animate things and inanimate. In the first class are grouped all the primary growths of nature, such as forest trees and all other perennial plants. Annual crops (*fructus industriales*), which owe their growth as much to the labor of man as to nature, are classed as land or as chattels according as they are grown by the owner of the soil or not. If planted by a tenant they are not regarded as land. If planted by the owner of the soil they will pass with a deed of such soil, but they should be mortgaged by a chattel mortgage, not a real estate mortgage.[2] In the second class are placed those things which are cast upon the earth by the forces of nature, such as aerolites, manure made upon a farm in the usual course of agriculture, and soil carried from one point to another and deposited by the gradual action of water, but not if deposited by an avulsion.[3] All of the above things are land, so that the person who is the owner of the soil is also the owner of them.

[1]Ocean Grove, Etc., Ass'n. *v.* Asbury Park, 40 N. J. Eq. 447.
[2]Tripp *v.* Hasceig, 20 Mich. 254.
[3]Goddard *v.* Winchell, 86 Ia. 71; Daniels *v.* Pond, 21 Pick. 367.

Land also includes things which have been attached to the soil by the art of man. It is a maxim of the law that whatever is attached to the soil becomes a part of it, and this maxim is applied most frequently to things which though in nature chattels are attached to the soil in such a way as to become a part of it. Fixtures is the name given to such annexations. In this connection we are considering articles which are on the border line between realty and personalty. If they lie on the side of realty they are called fixtures; if on the side of personalty, chattels (trade, agricultural, or domestic). In determining whether a thing is a fixture or not the intention of the parties is controlling, but if such intention is not expressed it is inferred from the relation of the party making the annexation to the freehold, together with the mode and degree of annexation, or the adaptability of the thing annexed to that portion of the realty to which annexed. The relation of the annexer and mode and degree of annexation are the tests employed when the annexation is by a tenant. In such case the relation is such that a permanent improvement is not presumed, and hence the chattel will not become a fixture unless it is so annexed that its removal would either injure the chattel or the realty. Anything which an owner of the realty annexes thereto is presumed to be intended to be a permanent improvement, and hence if the thing is either annexed or adapted to the use of the realty, it will be regarded as a fixture. Fixtures are land.[1]

A concrete illustration will help to make clearer when a chattel will become land, or a fixture. A is the owner of a sawmill, and in that connection uses a mill-chain for drawing logs up to the mill. The chain is prepared for being hooked and unhooked at pleasure. A executes to B a deed in which he conveys to B all his title and interest in such saw-mill with the privileges and appurtenances. Thereafter A goes to the saw-mill, disconnects the mill-chain, and carries it away. B may now sue A in conversion for exercising acts of dominion over his property. As between A and B the mill-chain is a fixture, and title thereto passes to B along with the title to the saw-mill. The chain was annexed to the saw-mill by the owner, A, who must then have intended a permanent improvement,

[1]Teaff *v.* Hewitt, 1 Oh. St. 511; Parsons *v.* Copeland, 38 Me. 537.

and it was adapted to that part of the realty with which it was connected, even though it would injure neither the chattel nor the land to remove the same. Had A been a tenant in possession of the saw-mill at the time of his making the annexation a temporary improvement would be presumed, and since the chattel can be removed without injury to itself or the land, it would then be regarded not as a fixture, but as a chattel still, and A would have a right to carry the same away.[1]

§ 9. EASEMENTS.

Incorporeal hereditaments include all those inheritable objects of property which are intangible. At the present time such objects are easements, franchises, and rents, but easements are the important incorporeal hereditaments. An easement is the right of the owner of one piece of land, by reason of such ownership, to use the land of another for a specific purpose, not inconsistent with the general property of the owner. The land to which this right is attached is called the dominant estate, and the land over which it is exercised the servient estate. An easement is affirmative where the owner of the dominant estate makes some active use of the right enjoyed, as in case of a right of way. An easement is negative where the owner of the dominant estate restricts the owner of the servient in the use of the same, as in case of lateral support. Ways are either private or public. The right of lateral support is a right appurtenant to every parcel of land not to have the owner of an adjoining parcel excavate upon his own land so near to the line as to cause the first land in its natural state to cave in, or in its artificial condition if a right of that sort is acquired by grant. The right to subjacent support is like the right to lateral support. The right of riparian owners to water is an easement. An easement cannot be acquired in modern law in light and air. The right to fish is an easement, but it is a personal privilege instead of being appurtenant to another estate.[2]

[1] Farrar *v.* Stackpole, 6 Me. 154.
[2] Pierce *v.* Keator, 70 N. Y. 419.

§ 10. PERSONS WHO HAVE THE RIGHT.

"The right of property is an offspring of the social state and not an incident of the state of nature," to use the words of Justice Marshall. Hence all men do not have the right of property. The right must be acquired before anyone is entitled to the same. But, in general, anyone may acquire the right of property if he desires to do so. The amount of land to which an alien or corporation may acquire a right is sometimes restricted, but other persons are generally without restriction. A person may have a right to land by himself or in connection with others. If a person holds land or an easement in his own right alone, without any other person being joined or connected with him in point of interest during his estate therein, he has an estate in severalty. This kind of ownership is necessary to absolute property. If two or more persons have a right to land or an easement by unity of possession but by separate and distinct titles, they are tenants in common. An estate in partnership is one kind of tenancy in common, where partners purchase land with partnership funds. If two or more persons have a right as respects land or incorporeal hereditaments by one and the same interest, accruing by the same conveyance, commencing at the same time, and held by an undivided possession, they are joint tenants. Only a qualified property may be had where there is a tenancy in common or joint tenancy. An estate in severalty, in common, or joint tenancy may be held in a fee, in an estate for life, for years, at will, etc. The principal incident of joint tenancy is the right of survivorship.

§ 11. PERSONS UNDER DUTY.

After anyone has acquired a right as respects any object of real property ownership it is a right which is good against all the world. Everybody for themselves and their agents owe him the duty to refrain from interfering with such interest as he has acquired. If he has acquired a right to possession only, all men must refrain merely from interfering with such possession; if he has acquired a right to possession for only ten years, the world must refrain from violating such possession for only ten years, and so on. Everyone is under some

duty to him, and anyone who fails to discharge his duty violates the right of the person who owns the property and is a wrong-doer.

§ 12. How the Rights Are Acquired.

The right of real property is an outward right and it is acquired by secondary acquisition, either (1) by operation of law on the death of an ancestor; or (2) (a) by operation of law before the death of the former owner when there has been adverse possession, estoppel, accretion or reliction, marriage, or judicial sale; or (b) by act of parties, either by public grant, or by private conveyance, or will, all made during life, but a will to take effect after death.

Original acquisition is a way of acquiring title to a thing which has never had nor does not now have an owner; secondary acquisition is a way of acquiring title to a thing from another or others. All the objects of real property ownership have now been appropriated either by the state or by man. Hence secondary acquisition is the only means of acquiring title to real property with which we have to deal. Real property may be acquired by secondary acquisition in two ways, by descent and by purchase. Title by descent is that acquired by operation of law on the death of an ancestor; title by purchase includes all other modes of acquiring title to real property than by descent whether by operation of law or by act of the parties. Whenever one person loses his right of real property another person or body acquires it, so that in general when we learn how real property is acquired we also learn how it is lost; but there are some ways of losing real property which we shall treat under that topic which we shall not give consideration here. Here we are especially concerned with private rights. A person may lose his real property to the state in a number of different ways, and the state thereby acquires the same. We shall not consider such topics in this place.

The right of property also differs from all the other rights heretofore considered in the manner by which it may be acquired. Property is called an acquired right, other rights are

called natural rights; property is not acquired at birth, other rights are acquired at birth; property exists because of the social state, other rights because men are members of civilized society.

§ 13. DESCENT.

The law of descent applies only to estates of inheritance; that is, fee-simples, fee-tails where they still exist, estates on condition, on limitation, and conditional limitations, both in possession and in expectancy. If a person dies without having disposed of such estates of inheritance by will the law immediately transfers his right to certain persons designated as his heirs, subject to the rights of the surviving husband or wife and the claims of creditors. Under the English common law doctrine of primogeniture the eldest son was always the heir to the exclusion of other children; and under such law parents and grandparents could never be heirs. The doctrine of primogeniture does not obtain in the United States, and in the United States the lineal heirs in the ascending series also take in preference to collateral heirs. The matter of descent is generally regulated by statute in the different states; but usual provisions are that real property shall descend in the following order: (1) to the children equally, and to the children of a deceased child by right of representation; that is, taking among them the share the parent would have taken had he lived; (2) if there be no lineal descendant, to the surviving spouse; (3) if neither issue nor spouse, to the father and mother, or their survivor; (4) if neither children, spouse, nor father or mother, to brothers and sisters and the lawful issue of any deceased brother or sister by right of representation; (5) if none of the above, to the next of kin in equal degree; (6) if there are neither spouse nor kindred, to the state by escheat. Some states do not permit the husband and wife to take as heirs, but only give them curtesy and dower; but many give them a one-third in fee in lieu of curtesy and dower and make them heirs to the other two-thirds if there are no children. An estate for one's own life terminates with his life, and therefore cannot descend to anyone. All other estates, instead of descending to the heirs at once, go to the administrator with

the personalty for the payment of debts and for the widow's allowance and thereafter are distributed by law in much the same way as freehold estates of inheritance are inherited.

§ 14. By Purchase—(1) By Operation of Law.

Title by escheat, confiscation, eminent domain and taxation will be considered under the heading of how real property may be lost; but there are a number of other ways of acquiring title to real property by purchase by operation of law which we shall now consider. Adverse possession is one such means of one man's acquiring title from another. In order to amount to adverse possession the possession must be (1) hostile and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; (5) and continuous and uninterrupted for the full period of the statute of limitations, which is sometimes twenty years and sometimes fifteen years. A right may be acquired by adverse possession, both as respects land and as respects easements, and the elements are the same in both cases, except that in the case of easements there must be acquiescence on the part of the owner of the servient estate. A tenant cannot acquire title against his landlord, as he is estopped from denying his landlord's title. Title to incorporeal hereditaments may be acquired by abandonment, but title to land cannot be acquired in this way, as the statute of frauds requires a writing. For the same reason one cannot divest his title and give it to another by surrender, except where the principle of estoppel would apply, as where the deed belonging to the party surrendering has not been recorded and the party to whom surrendered transfers the same to an innocent third person. A person may acquire title to any of the estates in land or incorporeal hereditaments by estoppel from one who makes a false representation in regard to a material fact, knowingly or negligently, with intent that it should be acted upon by him, if he does reasonably rely upon it to his damage. For example: The owner of land silently permits another to buy his land and expend money upon it without himself disclosing his title.[1]

[1]Hatch *v.* Kimball, 16 Me. 146.

A person may acquire title to land by accretion, where gradually and imperceptibly by the agency of water soil from other land is deposited on his own. A person may also acquire title to land by reliction, where there is a recession of water from land previously covered by it and the water was either on his land or bordering it. Marriage is another way of acquiring title to a life estate or more in estates of inheritance. At common law the husband acquired a life estate by curtesy in all the estates of inheritance of the wife of which she was seized during coverture after issue was born capable of inheriting and the wife's death, and the wife acquired a life estate in one-third of all the legal estates of inheritance of the husband of which he was seized during coverture after the death of the husband, unless her dower was barred by marriage settlement, or jointure. Statutes frequently give each spouse a one-third interest in fee in lieu of common law curtesy and dower. Many statutes also give a homestead right to the surviving husband or wife, or a life estate in the homestead. Title to any estates in land or incorporeal hereditaments may also be acquired by judicial process, as in execution sales, foreclosure sales, sales by executors, administrators and guardians, and other judicial sales, and the equitable title to a trust may be created by operation of law. The above are all the methods of acquiring title by purchase (not by descent) by operation of law.

§ 15. PUBLIC GRANT.

A public grant is the mode of conveying to an individual title to lands belonging to the United States or to one of the states. The instrument by which such title is transferred is called a patent. As soon as the title to land passes from the United States the land becomes a part of the property of individuals within the state, and it is thereafter subject to state legislation, in the matter of descent, devise, transfer, etc.

§ 16. PRIVATE GRANT.

The transfer of any interest in land by a private party except an estate for one year (sometimes three years), is required

by the statute of frauds to be in writing. The modern instrument for effecting such transfer is called a deed if it relates to the transfer of title to freehold estates, and a lease if it relates to the transfer of title to an estate less than freehold. Both leases and deeds are executed contracts. It is often customary for parties to enter into an executory preliminary contract for the sale of estates in land, and then to carry the same out by executing the subsequent conveyance, either deed or lease. For a full discussion of executed and executory contracts the reader is referred to the chapters on contracts. The general essentials will be considered there. We shall consider here only those matters peculiar to the subject of real property. General forms will be found in the back of the book. Title to real property may also be transferred by will.

§ 17. CONVEYANCE (DEED)

There are two kinds of modern deeds, the quit-claim and the warranty, the quit-claim being similar to the common law release and the warranty to the common law bargain and sale. The quit-claim deed conveys whatever title the grantor may have, without any covenants whatever. If the grantor has the title it is as good a conveyance as any. A warranty deed conveys the title of the grantor and he also covenants or warrants (1) that he is seized of such an estate as he undertakes to convey; (2) that he has a good right to convey the same; (3) that the same is free from all incumbrances (unless otherwise stated); (4) that the grantee shall quietly possess and enjoy the same; that is, shall not be evicted by superior title; (5) that he will execute any further instrument necessary to perfect title; (6) (covenant of general warranty) that he will warrant and defend the peaceable possession (or the title) against all lawful claims of all persons whomsoever.

A deed should be dated, either at the beginning or the end thereof. After the date, if at the beginning, the names of the parties should be given, grantor and grantee. If no grantee is named, there is no deed. If a married woman is grantor her husband should be joined with her. If the homestead is being sold both should join. Fictitious names may be used, however, without invalidating the instrument. Following the

names of the parties the consideration is stated, although this may be merely nominal. No consideration is necessary as between the parties, but a voluntary conveyance is not good as against existing creditors. If the true consideration is not stated it may be inquired into. Then should follow the operative words of conveyance, as "bargain and sell," "release," "confirm," "assign," "convey," "grant," "transfer," "set over." After that the land should be described with reasonable certainty. If a wrong description is used oral contemporaneous evidence is not admissible to vary the contract; it can only be admitted to explain ambiguities. But if a map or survey is referred to it becomes a part of the deed. Any conditions, precedent or subsequent, should be stated. Then the instrument must be signed, or in some states subscribed. If a person cannot write his own name he may make his mark, but his name should be written near the mark by some one. A seal is also necessary unless dispensed with by statute. It is not necessary as between the parties to have the deed attested or acknowledged, but in order to entitle the deed to be recorded it must be signed by two witnesses and acknowledged before a notary public or other officer competent to take acknowledgments. A deed does not become effective as a deed until delivery, actual or constructive. A delivery in escrow is a delivery to a third person to take effect after some condition has been fulfilled. Patents of the United States differ from private conveyance in this respect, for the former do not have to be delivered to become effective. Lastly, the deed should be recorded, to prevent an innocent third person acquiring rights by a subsequent sale or mortgage to him by the first grantor. Record is not necessary to pass title.

§ 18. LEASE.

The word lease is used to denote that species of contract by which the possession and profits of land are transferred for a specified term of years. Estates for years are created by a lease. An estate from year to year or at will may be created by lease. An estate at will generally arises by implication, as by entry under a contract to purchase. An estate from year to year is a creation of judicial decisions, and arises where a

person occupies land by permission of the owner, without any term fixed, but with such a reservation of rent that an annual, or quarterly, or monthly holding is implied.

The person granting the lease is known as the lessor, or landlord, and the one to whom it is given as the lessee, or tenant, and the compensation for the enjoyment of the land as rent.

The statute of frauds in some states requires any contract for the leasing of lands for a longer period than one year to be in writing; in other states leases for three years and less are exempted from the operation of the statute.

The usual lease contains a number of covenants, part of which are implied and part of which may be expressed, both on the part of the lessor and on the part of the lessee. A covenant is only that in an instrument under seal which would be called a promise in oral undertakings. The covenants on the part of the lessor, which are implied in every lease and need not be expressed, are: for quiet enjoyment, against incumbrances, for further assurance, and to pay taxes and assessments. The implied covenants of the lessee are to pay rent, not to commit waste, and to make tenantable repairs. Express covenants of the lessor are such as to repair (in case of fire, etc.), and to renew. Express covenants of the lessee which may be inserted are such as to pay taxes, to insure, not to assign or sub-let, to reside on the premises, to build after a certain pattern, and to carry on agricultural land after a certain mode. Some of these covenants are said to run with the land; that is, bind the heirs of the lessor and the assignee of the lessee. Such are the covenants of the lessor for quiet enjoyment, for further assurance, to repair, and to renew, and the covenants of the lessee for rent, to repair, to pay taxes and assessments, to reside on the premises, and to cultivate in a certain manner.

In the absence of a covenant against assignment estates in land may be assigned. An assignment by the landlord must be by deed, as he has an estate of freehold, but the tenant may assign by any appropriate writing. An assignment carries the whole interest of the lessee, but he remains liable for the rent unless the lessor consents to the assignment. Unless restrained by the lease the tenant may also sub-let a part of the premises for the whole term or all the premises for a part of his term, but in such case the sub-lessee is tenant of the first lessee and

not of the landlord, as there is no privity of estate between the landlord and sub-lessee. In the case of an assignment the landlord may also sue the assignee. There is dispute as to whether a grant of part of premises for the whole unexpired term is an assignment or a sub-lease.

Rent reserved in a lease, before due, is an incorporeal hereditament, like an easement, but after it becomes due it is an incorporeal chattel, the first being an object of real property; the second, of personal property.

The estate in the lessee is not created until he enters under the lease. Thereafter he has a qualified property right *in rem* against all the world, including the lessor. Before that time and so far as any covenants and other executory features of the lease are concerned the lessee, as well as the lessor, has only a right *in personam,* like any other contract right.

§ 19. WILL.

Real property may be disposed of by will, as well as personal property. So far as a will relates to real property it is called a devise. A will takes effect only after death. It is revocable during the life of the maker. It may be revoked by a new will and by the destruction of the old will. If a donee named dies before the donor the devise will lapse, and unless other provision is made for that event the real property will go to the testator's heirs. The marriage of a woman will in most states revoke her will, and the marriage of a man followed by the birth of a child will revoke his will. Most states require a person to be twenty-one years of age to make a valid will of real property. A person must be of sound mind and free from undue influence to make a valid will. The formal requisites of a will, together with the property that may be disposed of thereby, are generally regulated by statute, and reference should be made to them. In general a will should be in writing, published and acknowledged in the presence of witnesses (not a beneficiary), signed at the end by the testator, witnessed by at least two witnesses who subscribe their names in his presence and in the presence of each other, and the will is sometimes required to be sealed and dated.

§ 20. VIOLATIONS OF THE RIGHTS.

Violations of the rights of real property are torts. If the wrong violates the right of possession it is called a trespass. If the right of use of a riparian owner is violated it is violation of water rights. If the right of disposal is disparaged by false and malicious representations it is slander of title. If the right to use or disposal is violated by false representations reasonably relied upon and causing damage, it is deceit; if by failure to exercise diligence in a situation where one should see that harm would be likely to result, and it does so result, negligence; if by flooding the land of another other than in the natural way by water collected on his own land or by changing the course of currents, nuisance; if by causing one's land to cave in by excavations close to the boundary or underneath the same, removal of lateral or subjacent support; if by a wrongful and lasting injury to inheritance by the owner of the particular estate, waste.

The great wrong which violates the right of real property is trespass. This wrong is only a violation of possession, but as some one always has a right to possession, and as most wrongs against real property violate the right of possession, it is easy to see how extensive the tort is. A tenant has the right to possession. Hence his wrongful act against the landlord, or reversioner, is not called trespass, but waste. The right of real property is seldom violated by deceit, or fraud, as the owner is supposed to know more about his own property than anyone else and not to rely on the representations of others. Slander of title is generally considered to violate the right of disposal. Violation of water rights only violates the right to use, as no one can have a greater right therein. All the other wrongs may violate either the right of use or disposal, or both. A few illustrations will make clearer the nature of the various wrongs enumerated. A is in possession of land in one corner of which is a wood lot. The boundary line between this wood lot and an adjoining lot is not clearly indicated. B by mistake crosses this boundary line and cuts wood in the above wood lot. B is guilty of trespass.[1] D, an upper

[1]Chandler *v.* Walker, 21 N. H. 282.

riparian owner in an eastern state, diverts the water by canals from the stream onto his land for the purpose of irrigating the same, and thus sensibly diminishes the stream. B is a lower proprietor. B's water rights have been violated, though he cannot show any special injury.[1] A has made a contract to sell land to B, and C falsely tells B that A's title will be contested sooner or later, but he makes the statement in good faith. B, as a consequence, refuses to buy. C is not guilty of slander of title, as actual malice is essential.[2] D knows that there is a valuable mine on E's land and offers him what the land would be reasonably worth without the mine, knowing that E knows nothing of the mine and saying nothing about it. E accepts D's offer. D is not guilty of fraud, although if he had made a willful misstatement in regard to the fact of there being a mine on the place he might be.[3] A case of negligence may be shown by proving that a fire, which destroys buildings, or crops, started from combustible materials left on its right of way by a railway.[4] D collects the surface waters on his land into a ditch in the course of reclaiming his land, the ditch not being a natural drain, and discharges the accumulated water onto P's land. D is guilty of a nuisance.[5] X digs a gravel pit on his land close to the line of Y's land, so that Y's soil caves into the pit. X has violated Y's right to lateral support. X must leave sufficient support to keep Y's land in its natural condition, but he is not obliged to support any buildings thereon.[6] D rents P's barn for the storage of hay for a year, and during such time, without leave, stores grain and other heavy substances on the floors and passageways in addition to hay, by reason of which the floors give way. D is guilty of waste.[7]

§ 21. How the Rights Are Lost.

All the estates (rights of real property), may be lost by private grant, judicial sale, taxation, eminent domain,

[1]Embrey *v.* Owen, 6 Ex. 353.
[2]Pitt *v.* Donovan, 1 M. & S. 639.
[3]Harris *v.* Tyson, 24 Pa. St. 347.
[4]Sibilrud *v.* Minneapolis, Etc., Ry., 29 Minn. 58.
[5]Livingston *v.* McDonald, 21 Ia. 160.
[6]Thurston *v.* Hancock, 12 Mass. 220.
[7]Chalmers *v.* Smith, 152 Mass. 561.

destruction under police power, confiscation, accretion, estoppel, and adverse possession. Estates of inheritance may also be lost by escheat; and an easement by abandonment.

If not thus terminated a fee-simple estate will last forever; a fee-tail estate, until the death of the first owner who is without issue capable of inheriting; an estate upon condition subsequent, until breach of condition and entry therefor; an estate upon limitation upon the breach of condition; a life estate, until the death of the person for whose life it is granted (or divorce in case of curtesy and dower); an estate for years, until the expiration of the term; estates from year to year and at will, until notice to vacate; an estate at sufferance, until dispossession; and a license, until revocation.

Every man loses his own right of real property with his own death. All the legal rights of a man terminate with his death. But estates of inheritance which a man may own do not perish with his death. If he has not alienated them prior to his death they will pass to his heirs by descent or to his devisees if he has left a will. So a life estate of one man for the life of another who survives him will continue until the death of the life on which limited. So also the other estates in lands and incorporeal hereditaments may continue in a man's heirs or personal representatives even though he has lost his own right by death.

One man's loss is another man's gain, so far as the rights of real property are concerned. Whenever one man, or set of men, acquires a right of real property, great or small, it means that another man, or set of men, has to that extent lost a right of real property. The above statement also applies to the state. Hence, it follows that most of what has been said under the heading of the acquirement of rights of real property would also apply to the loss thereof.

An estate upon condition precedent will never vest until the happening of the condition; so that, if the condition never happens, or is fulfilled, there will never be any right of real property in the grantee, but the real property will never leave the grantor. A condition subsequent may be void, or it may be waived, in either of which events the estate, if a fee, will never

terminate by its own terms. An estate upon limitation terminates *ipso facto* upon the happening of the condition, and does not need an entry by the grantor to terminate it as other conditions subsequent do.

An individual may lose his right of real property by having the state take it by escheat, confiscation, eminent domain, or taxation. The doctrine of escheat applies only to estates of inheritance. Under it the title to the objects of real property ownership vests in the state when a person dies with no inheritable blood or is an alien. Confiscation is the appropriation by the government in time of war of the property of aliens. Under eminent domain the state may take private property for a public use upon the payment of just compensation. Under the power of taxation the state may compel private persons to pay their just share of the expense of maintaining the government, even though as a consequence the entire value of particular property is destroyed. Under the exercise of the police power the state may destroy private property without paying compensation if the public good demands it.

All the other methods of losing title to real property have already been sufficiently considered under how the rights are acquired, and will not be again discussed in this place.

CHAPTER IX.

ELEMENTS OF PERSONAL PROPERTY.

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§ 1. DEFINITION AND CLASSIFICATION.

Personal property is the right of a man, either to the acts or to the forbearances of his fellowmen, as respects any of the external things capable of ownership, except such as are the objects of real property.

Personal property may be absolute or qualified. It is absolute when a man has the exclusive and unqualified right to possess, use, and dispose of such objects of ownership as against all the world except the state (accompanied by the actual or constructive possession thereof). It is qualified when a man has any of the above elements of absolute property less than all.

Personal property is an antecedent legal right in rem when it entitles its owner to forbearance by all the world; and an antecedent or remedial legal right in personam when it entitles its owner to an act by some particular person.

Personal property may also be defined as the right of a man to be allowed by his fellowmen to possess, use, and dispose of chattels. Personal property, as may be seen from the above definitions, is a legal right which is resolvable into four elements. We shall treat these elements in order, and then we shall consider the various methods by which the various rights of personal property may be acquired, after which we shall consider the violations of such rights and the methods of losing the same. We shall consider only the elements of the right in this chapter.

Personal property differs from real property, not only in the nature of the objects to which it relates, but in the nature

of the conduct to which it entitles the owner. Real property relates to land, easements, etc.; personal property relates to chattels. However, there are some borderline objects to which reference will have to be made. Real property requires forbearances; personal property may require forbearances in the case of some chattels and positive acts with respect to others. Real property is always an antecedent right; personal property embraces both antecedent rights and remedial.

Personal property and real property are alike in that they may both be either absolute or qualified, in possession or in expectancy, and that they may be owned in severalty, in common, or joint ownership. These topics have already been considered in connection with our discussion of real property, and only a brief reference to the same will be necessary here. Absolute property is the greatest right which anyone may have in any object of ownership. It is composed of three main elements: the possession, the use or enjoyment, and the disposal. No one can require more than forbearance from interfering with these three things, and even such forbearance cannot be required of the state, but only of private individuals. No one can acquire a legal right to have the majority of his fellowmen protect what he claims to be one of his rights when to do so would interfere with the paramount rights of those very fellowmen. Hence the state, as the agent of his fellowmen, may take or destroy his right through the police power, taxation, eminent domain, for the claims of creditors and those who have been injured, and by confiscation. Absolute personal property may exist over chattels personal of a corporeal nature, both inanimate and animate, not wild animals, and in such incorporeal chattels as contracts, *quasi* contracts and many remedial obligations. A qualified property may exist because the object of the right is not one in which the law will permit absolute ownership, as wild animals alive, and the elements of light, air, fire, and water, or because the right is not exclusive, or because the right is of limited duration, or because the right does not embrace all of the elements of possession, use, and disposal (or is not accompanied by actual possession). Only a qualified property can exist as respects wild animals alive, obligations to pay damages for personal injuries, and bailments. A qualified property may be either general or special. If a person who has the absolute property in

some object of ownership splits up his property and lets another have the temporary possession, or possession and right to use the same, the former is said to have a general property and the latter a special property.

The term property, personal as well as real, is sometimes inaccurately applied to the objects of ownership themselves; but this only leads to confusion. Property in its primary and true meaning is a legal right. It should no more be limited to the objects of the right than to the conduct to which it entitles a person. It will be used in its true sense throughout this book.[1] For example: A, a farmer, is the owner of cattle, horses, sheep, swine, poultry, machinery, harnesses, vehicles, furniture, and many other corporeal things, besides insurance, promissory notes, perhaps some railway stock, or stock in a creamery, debts against parties who have bought hay, butter, animals, and other farm produce from him, and other incorporeal things either without any physical evidence thereof (as in the case of the right to the services of his hired men), or with such evidence (as in the case of the promissory notes). The chances are that the farmer would say that all of these things are his personal property, and roughly speaking there is no objection to his statement; but in the legal and true sense these are only the objects of his personal property. His rights, known as personal property, not only relate to those corporeal and incorporeal objects, but they also include the power, backed up by the state, to compel some particular fellowmen to do some particular acts with respect to such things, or to compel all of his fellowmen to refrain from doing certain things with respect to such things, and it is the conduct that he can require that is the principal element of value in his right of personal property, and it is the failure to give the conduct to which he is entitled which constitutes a violation of his right of personal property and gives him a right to sue at law.

§ 2. ELEMENTS OF THE RIGHT.

The elements of the right of personal property are: (1) the conduct which it requires, (2) the objects to which it

[1] Campbell *v.* Holt, 115 U. S. 620; Wynehamer *v.* The People, 13 N. Y. 378; Rigney *v.* The City of Chicago, 102 Ill. 64.

relates, (3) the person entitled to such conduct, (4) the person whose duty or obligation it is to give such conduct.

(1) The conduct, in the case of personal property rights *in rem* (against all men), is forbearance from interfering with the possession, use, or disposal of the objects of such personal property, either for a limited or for an indefinite time; in the case of personal property rights *in personam* (against a particular man), to do a specific act which is the object of such right.

(2) The objects are chattels real (leaseholds, etc.), and chattels personal, which include corporeal chattels both animate and inanimate, and incorporeal chattels both debts and other claims for money and other contracts, good will, etc.

(3) Anyone, by legally acquiring the same, may have a right to a part or all of the above conduct (acts or forbearances), either severally, or as a tenant in common, or as a joint tenant.

(4) Everyone is under duty to give the above forbearances to anyone who has acquired a right to them; and the particular person brought into legal relation with him is under obligation to give the above acts to anyone who has acquired a right to them.

Personal property is not the particular objects, with respect to which the right may be asserted, although such objects are necessary to such property; but personal property is the conduct which one may exact from his fellowmen with respect to such objects.

§ 3. CONDUCT REQUIRED BY THE RIGHT.

The conduct required by the right of personal property may be negative, to refrain from interfering with certain acts which the owner of the right may desire to perform with respect to objects of personal property ownership, as to possess, use, or dispose thereof, so long as the owner does not interfere with the co-ordinate rights of his fellowmen in respect to the exercise of their legal rights of property, safety, reputation, etc.

The amount of conduct that a property owner can claim depends upon the right which he has acquired. Until he has acquired the right he can claim no conduct, and he may acquire a right to little or much conduct, when his property will vary from qualified property to absolute property. The more conduct a person can claim the more property he has. If he has the right to have all the world give him the possession, use, and disposal of any object, he has a greater property than if he can merely insist upon being given the possession. If he has such right only for a stated number of years he has less property than he would have if he had the right in perpetuity. If a person does not have the right to dispose of his interest in a chattel to another he has much less property than he would have if he could also dispose of the same.

The conduct required by the right of personal property may be positive, to do some act for the owner of the right. The objects of ownership in such case, except in the case of bailments, are incorporeal, if indeed incorporeal things can be called objects. There are no visible tangible objects. Yet the conduct that can be required gives just as great a property as though it related to corporeal things. The right of a promisee to the performance of a contract is of this class. Frequently the promisee has the right to the payment of money, when his property is called a debt, secured or unsecured; and it may be in the form of an oral promise, or in a bill, or note, bond, insurance, policy, legacy, etc. But the promisee in a contract may have a right to many other things than the payment of money. He may have a right to labor from a servant, or bailee, or agent, or he may have a right to a conveyance, or to a sale, and so on. In all of such cases he is the owner of personal property. He may not always be able to sell his right. If it is one created by a bilateral contract (promise by each party), and he has not performed his promise, he may not sell or assign his right, because a promisor cannot assign his obligation to a stranger, and the right is inseparably connected with the obligation. His property, therefore, is not so great, yet it is property. The remedial rights to restoration or to compensation by way of redress for the violation of antecedent rights (that is, the rights heretofore considered), which arise upon the violation of such rights by torts and breaches of contract, are also personal property, for the owner thereof has a

right to the affirmative conduct of another. Some of these rights cannot be assigned. Some of them do not survive the death of the owner. But most of them may both be assigned and do survive the death of the owner under modern law. All of them are personal property. The obligations created by pure implication of law, and known as *quasi* contracts, also give the one for whose benefit they are created a personal property. The right is generally the right to have the payment of a sum of money, and it is assignable. All rights to positive acts are *in personam,* or rights to the conduct of some particular individual; while all rights to negative forbearances are *in rem,* or rights to the conduct of everyone.

§ 4. OBJECTS TO WHICH THE RIGHT RELATES.

The objects to which the right of personal property relates embrace all those external things which man has subjected to his dominion during the progress of the centuries, and which the majority of the people of the state through law have declared that he shall own, with the exception of those objects which are classified with real property.

What are the objects of real property? At the common law, as we have already seen, the right to land and to incorporeal hereditaments for one's life, or for the life of another, or forever, etc.; that is, an estate for life or for inheritance, was called a freehold estate, and was classed as real property. Thus, it appears that all rights to land, except estates less than freehold, are excluded from the realm of personal property; and had it not been for the accident of the feudal system estates in land less than freehold would also have been classed as real property, as they should have been. The natural division between real property and personal property is between the rights to immovables and the rights to movables; this was the division of the Roman law: but the common law, because of the influence of the feudal system, decreed that only an estate for life or greater was worthy of a freeman and to be classed as real property. The common law, by the same perversity with which it refused to classify estates less than freehold as real property, classified the right to certain movables as real property. We might almost say that it swapped leaseholds

for heirlooms. Heirlooms are such personal chattels as descend to the heir along with the inheritance, contrary to the usual rule, instead of passing to the executor or administrator of the last owner. These things are classified as realty by construction of law, not because of any inherent characteristic which likened them to immovable property, but merely because local custom favored the heir rather than the executor in this respect. Some of the things which have been held to be heirlooms are the ancient jewels of the British crown, the coat armor of ancestors hung in church, ancient portraits and family pictures (though not fastened to the wall, as it is not a question whether they are fixtures), and title deeds. Some authors have also classed as heirlooms deer in a park and doves in a dove-cot, because they pass with the inheritance; but they pass with the inheritance, not because they are heirlooms, but because the deceased had no transmissible personal property right in them. Heirlooms, then, are also excluded from the realm of personal property.[1] Fixtures are also excluded from the realm of personal property. A fixture is a chattel annexed to the freehold in such a way as to become part of it, so that no right of removal can be claimed by the person making the annexation. Fixtures are the objects of property, but of real, not personal, property. This does not seem anomalous, for though fixtures were once chattels they have so changed their identity as to become land. If chattels are in some way annexed to the land, but not sufficiently to become a part thereof and fixtures, they are designated by such terms as domestic chattels, trade chattels, and agricultural chattels, although the term "fixtures" is sometimes incorrectly employed in this sense. Intention is the great criterion for determining whether a chattel has become a fixture or not. If the intention is expressed it controls. If it is not expressed resort must be had to further tests for determining the intention. The tests which have been recognized for this purpose are (1) the object of the annexation (that is, whether a permanent or temporary improvement is meant), as inferred from the relation to the land of the annexer of the chattel, together (2) with the mode and degree of annexation (that is, whether removal would injure either the chattel or the land), or (3) the

[1] Cowen's Case, 12 Coke 105.

adaptability and essentiality of the chattel to the use or purpose of that part of the realty with which connected. If the annexer is the owner of the land either of the last two tests may be used, but if the annexer is a tenant the mode and degree of annexation, and not the adaptability to the use of the realty, is decisive. In the case of a tenant the presumption is that any improvements that he may make are not to be fixtures, and hence he may remove the same before the expiration of his term, unless such removal would injure either the chattel or the freehold.[1]

§ 5. CHATTELS (REAL AND PERSONAL).

Chattels are the objects to which the right of personal property relates. Chattels should include only movables, but, as already explained, certain immovables (that is, estates less than freeholds), have been arbitrarily classed as chattels. This necessitates a division of chattels into chattels real and chattels personal. Chattels real include leaseholds and emblements. They are classed as chattels, but they pertain to the realty and have the general characteristics of realty. Chattels personal are divided into corporeal and incorporeal. Corporeal chattels are such as have a corpus, things of which the owner may take bodily possession. They are divided into two classes, animate and inanimate. Incorporeal chattels are not material objects, although they may be evidenced by some material thing. They are invisible. They cannot be manually delivered by one person to another, but can only be delivered symbolically. As a consequence in early times they were not regarded as the objects of property. But the law in this respect underwent a change. Now a person may not only possess and enjoy such objects of ownership, but he may assign and transfer his rights to them as freely as he can assign and transfer his rights to corporeal chattels. They are the objects of ownership, though the owner thereof is not the owner of objects. They include such things as the obligation of a promisor to perform his promise, the obligation of a wrongdoer to pay

[1]Wolford *v.* Baxter *et al.*, 33 Minn. 12; Parsons *v.* Copeland *et al.*, 38 Me. 537.

damages for torts and breaches of contracts, and the obligations imposed by law called *quasi* contracts, all of which are the objects of rights *in personam;* and such things as trademarks, copyrights, services, etc., which are the objects of rights *in rem.* Many of these incorporeal chattels are known by specific names, as stock, bonds, bills, notes, insurance, good will, etc. These are all objects of ownership. The owner thereof has a right to positive conduct from some one with reference thereto, or to negative conduct from the world, as the case may be.

There are two other expressions which are sometimes used instead of corporeal and incorporeal chattels, to wit: Choses in possession and choses in action. When used, chose in possession is synonymous with corporeal chattel, and chose in action with incorporeal chattel. The terms chose in possession and chose in action are not so accurate as the other terms, and sometimes are even confusing. Suppose a thief steals a coat and recovery be sought of the thief. Is not this a chose in action? No. It is a chose in possession. Again, if one owns bank stock, is it not a chose in possession if he has the certificate thereof? No. This is a chose in action. If the terms corporeal and incorporeal are employed there is no such confusion.

We shall now proceed to consider the various kinds of chattels, one by one, taking up chattels real first, and then proceeding to chattels personal, both corporeal and incorporeal.

§ 6. LEASEHOLDS.

The leasehold is the most important chattel real. It is the right to the possession and profits of land for a specified term, either for years, or from year to year. (Estates at will and at sufferance are not considered, as rent is not due from the tenant.) It is created by an instrument called a lease, to which reference will be made under the head of contracts. Though classified as a chattel, it possesses many of the incidents of real property, and for this reason the reader is referred to the chapter on real property for a fuller discussion thereof. The time for which the lease is to run is known as the term, so-called because leases for years are for a certain

determined period of time. This term, if the lease satisfies the statute of frauds, may begin any time in the future, as livery of seizen (symbolical delivery) is not required of mere chattels. The compensation for the enjoyment of land held under a lease is known as rent. The person granting the lease is known as the lessor or landlord, and the one to whom given, as the lessee or tenant. There are some covenants which are implied in every lease and need not be expressed. The implied covenants on the part of the lessor are for quiet enjoyment, against incumbrances, for further assurance, and to pay taxes and assessments; those on the part of the lessee are to pay rent, not to commit waste, and to make tenantable repairs. It is common to add other express covenants. A lessee may assign or sub-lease, but in the latter case there is no privity of estate between the original lessor and the under-lessee, but the former must look to his own lessee. A tenancy may be terminated by lapse of time, by merger, by surrender, by forfeiture, and by notice to quit.

§ 7. EMBLEMENTS.

The produce of the soil is divided into two main classes: *fructus naturales,* embracing not only the spontaneous and natural growths of the earth, but also those growths which, although planted in the first instance, do not require annual labor for their cultivation, and *fructus industriales,* such as crops and vegetables, produced by the annual or periodical labor of man. For the most part the former are regarded as the objects of real property, and the latter as the objects of personal property. Yet, when severed from the soil, *fructus naturales* become personal chattels; and on a sale of land, if the crops are not severed, the crops will pass to the vendee, unless expressly reserved. A chattel mortgage of growing, or planted crops, or even of a crop to be planted by one in possession of land, is valid, in so far that it creates a lien superior to subsequent attachment or execution at once and title will pass as soon as the crops grow. Thus the law, by legal construction, bestows upon the objects of real property the character and incidents of chattels, by in effect applying a severance which would have taken effect, but for some unforeseen

contingency. An important illustration of this principle is the doctrine of emblements, according to which a tenant, or his personal representative, is entitled to *fructus industriales* planted by him, and to the right of ingress and egress for cultivating and removing the same, if the end of his tenancy is uncertain (for life, or at will), and his tenancy is determined before harvest without his fault. The encouragement of husbandry is the reason for the allowance of emblements, and two things are essential to the right, the expending of labor on the crop, and the unexpected termination of the estate without the fault of the tenant. A tenant should not be entitled to emblements if he knows the exact time of the termination of his estate, for he should not then plant crops that will not ripen before such time; nor should a tenant be entitled to emblements when the crops are not the result of his labor. Hops, and likewise nursery trees, may be the objects of emblements, for though they have permanent roots, they require a vast amount of yearly culture.[1] Emblements are another chattel real.

§ 8. ANIMALS (DOMESTIC AND WILD).

Animals are corporeal chattels personal, and they include all living moving beings, not human. Animals are either domestic or wild. Domestic animals are those which have become so subject to man's dominion that as a class they have been deprived of their natural liberty. Wild animals are those which are either found in their natural liberty, or are found as individuals temporarily deprived of their natural liberty and in man's physical or intellectual power. Absolute property is possible as respects domestic animals; but only a qualified property as respects wild animals alive, for they are liable at any time to escape and to revert to their natural state.

§ 9. MONEY.

Money is an inanimate corporeal chattel personal. Money is any circulating medium of exchange; and among civilized

[1]Evans *et al. v.* Iglehart *et al.*, 6 Gill & J. (Md.) 171; Henderson *v.* Cardwell, 9 Baxt. (Tenn.) 389.

nations at the present time is confined to metallic coins, except so far as paper currency is brought within the definition by circulating in the community for like purposes of exchange. In the world's history numerous and dissimilar things have served the purposes of exchange. The Carthaginians used leather; some Asiatic countries, mulberry-tree bark; unlettered tribes, shell and bone, and the American Indians, wampum (shells); Romans, copper; Britons, brass, tin, and iron. But gold and silver early attained pre-eminence. Yet it was a long time before these precious metals were subjected to the process of coinage—some Asiatic country introducing the system. At first money was weighed, not counted; the English word "pound" is a relic of this custom. The power to coin money has been exercised by bishops and other individuals, but it has usually been exercised by government; and in the United States the Federal Constitution takes the power away from the several states and vests it in the Congress of the United States. Our Constitution provides that Congress shall have power "to coin money, regulate the value thereof, and of foreign coin;" and that no state shall coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. Hence it was argued that gold and silver coin only constituted the lawful money of the United States, and the term was generally so understood until the era of our Civil War. With the first touch of war gold and silver melted away like snow in springtime. Local banks suspended specie payment, and their bills floated about in a depreciated condition. Gold and silver, supplanted by the less valuable dollar, went into hiding or fled the country. Postage stamps and private checks came into use. In this emergency Congress issued the legal tender currency (greenbacks), and made it a legal tender for all debts public and private (i. e. contractual) within the United States and receivable by the United States, except for duties on imports and interest. By the so-called legal-tender decisions it was decided that these legal-tender notes, or greenbacks, are money, at first as a war measure, but finally in time of peace as well as war.[1] Therefore the lawful money of the United States may now be said to be gold, silver dollars,

[1]Legal Tender Cases, 12 Wall 457; Juilliard *v.* Greenman, 110 U. S. 421. (See also, Hepburn *v.* Griswold, 8 Wall. 603, overruled.)

lesser silver coins up to ten dollars worth, one, three, and five cent pieces to the amount of twenty-five cents, and legal tender notes. Parties may expressly stipulate by contract that payment shall be in specie, or gold, etc., and such stipulation is valid. While contracts in aid of rebellion against the United States are utterly void, yet the currency issued by the Confederate government while it held sway was imposed on the community under Confederate control, so that payment therein, having been made and accepted in good faith between individuals of an insurgent state, discharged the debt. In the same way a contract, not for the purpose of aiding the rebellion, but in the usual course of business payable in Confederate dollars, is binding in lawful money of the United States to the actual value of the Confederate dollars at the time and place of contract.[1] To supply the government with money and give the country a uniform currency, the Bank of the United States was established soon after the adoption of the Constitution, but it was unpopular then to have a corporation wield so vast a power and its charter was not renewed. After the difficulties of the war of 1812 the United States Bank was put into operation again in 1816, but President Jackson gave this bank its death blow. The sub-treasury system, which has stood ever since, though losing some of its distinctiveness, carried the nation through the critical period of the Mexican War. When the crisis of the Rebellion came, and numerous state banks suspended specie payments, the experiment with the legal tenders opened the way for a renewed effort to give the whole country a stable, permanent, and uniform currency (United States Bank, shorn of corporate powers) and this was done in the National Banking Acts of 1863. This system is built on the national debt. The bills of national banks are popularly considered money, for though redeemable they are paid and taken as though gold and silver; but strictly speaking bank notes are not money, and in the true sense are not legal tender. Gold and silver certificates are like bank notes in this respect. However, by mutual understanding, if a creditor elects to receive a bank note, or a check, or foreign money, it may become a good tender, and will sustain a money count in pleading; and such things will pass under a bequest of money

[1]Thorington *v.* Smith, 75 U. S. 1.

in a will. Herein lies a convenient test for determining what is money and what simply passes as though it were money; the first is a corporeal chattel, while the second is an incorporeal chattel. When notes become legal tender they become money, or that which extinguishes a debt instead of a debt or the evidence of a debt, and therefore, are to be considered as corporeal chattels in transactions between individuals.

§ 10. SHIPS AND VESSELS.

Ships are another kind of inanimate corporeal chattels personal. They are movables, although made to plow the waters instead of to be carried from place to place on land. They include ships of war, merchant ships, steamships, and sailing vessels. They are a peculiar kind of chattels. They cannot literally attend the person of the owner, as chattels are supposed to do. Peculiar solemnities attend their transfer under the registry laws, insomuch that some have inclined to believe that they are not chattels at all, but such is their status. The person intrusted with the care and management of a ship on its usual employment is a master. Some countries require an examination to test his nautical skill, but in England and the United States the owners may select at their discretion. Usage gives the master a certain percentage on the freight known as primage, and some privilege in carrying goods for himself. In the home port he is not presumed to have authority to make a charter-party, order repairs, nor raise money on bottomry; but all these things he may do abroad; and though he is generally considered master of the ship and not of the cargo, in an emergency, if he has exhausted all other means, he may deal with the cargo either to raise funds on it or to save the ship and cargo. Seamen, or those who attend to the details of navigation, owing to their proverbial improvidence, have become the subjects of the solicitude of the courts and legislatures. They cannot be shipped unless the master procures their signatures to the shipping articles fairly, and such articles must declare the length of voyage they are to be shipped and the voyage. Provisions must be furnished and the ship must be seaworthy. A merchant ship may be employed in two ways for the purpose of venture and profit. One

is where the owners send the ship on some particular voyage, and in addition to carrying their own freight carry other freight or passengers, when the ship thus employed is called a general ship. The other is where the whole ship, or a part of it, is let for a determined voyage by an instrument known as a charter-party.[1]

§ 11. DEAD BODIES.

The property which one may have in a dead body is very qualified indeed. There is no property in the ordinary sense of the word. A dead body cannot be sold, nor seized for debt. A man has no right to dispose of his body by will. To steal a corpse was not larceny at the common law. Yet decent burial is regarded as the individual right of everyone and as a necessary for a minor, and there is a *quasi* property in dead bodies for purposes of burial which belongs to the surviving relatives. The husband, or wife, and in the case of another person the next of kin, has a right to select the place of interment and also to erect a monument.[2]

§ 12. MISCELLANEOUS.

Vegetables, and trees when severed from the ground, and fruit when severed from the trees, minerals and metals after dug out, soil excavated to be used elsewhere, ice cut away, and oil and gas which have escaped from the earth, are changed from land into inanimate corporeal chattels personal; and fruit, vegetables, trees, and other products may sometimes become corporeal chattels by a constructive severance. There are many other chattels personal of an inanimate corporeal character, among which may be enumerated household furniture, implements, utensils, garments, plate, jewelry, wares, merchandise, carriages, rolling-stock of railways (but not the

[1] Cuddy, etc. *v.* Horn *et al.*, 46 Mich. 596; Ford *et al. v.* Cotesworth *et al.*, L. R. 5 Q. B. 544.

[2] Chapple *v.* Cooper, 13 M. & W. 252; Meager *v.* Driscoll, 99 Mass. 281.

road-bed), and whatever other personal chattels there are that can be seen and touched but are not alive.[1]

§ 13. DEBTS AND OTHER CLAIMS FOR MONEY.

Debts are incorporeal chattels personal. The objects of ownership in such case are invisible, although they may be evidenced by writing, or other visible representatives. They are movables as much as corporeal chattels are. They accompany the creditor wherever he goes. The right here is to some positive act on the part of the debtor with respect to some contract or other obligation as the incorporeal chattel. Technically a debt is a fixed and specific amount of money due by virtue of some agreement, but popularly the word is used to denote any claim for money. Many debts and claims for money are also created by pure implication of law, when they are known as *quasi* contracts. Torts and breaches of contracts also give rise to remedial rights to damages, and they will be treated in this connection. Consequently we have the following classes of claims for money: (1) debts of record, (2) specialty debts, (3) simple contract debts, (4) *quasi* contracts, (5) remedial obligations to pay damages. A person may have only a qualified property in some of these, as we shall learn later. The debts may be secured or unsecured. But if the security be only accessory to the debts they remain movables, although the indebtedness be secured by land or other immovable property. The name usually applied to secured debts is the name of the security alone, but the object of the property in fact consists of that incorporeal thing called a debt. There are three kinds of security: the first, a simple lien; the second, a pledge; and the third, a mortgage passing the property out and out.[2]

§ 14. DEBTS OF RECORD.

Debts of record are generally classed as *quasi* contracts, but they rank higher than other *quasi* contracts and the proper

[1] Yale *v.* Seeley, 15 Vt. 221; Hart *v.* Benton-Bellefontaine & Co., 7 Mo. App. 446.

[2] Cable *et al. v.* McCune *et al.*, 26 Mo. 371; Halliday *v.* Holgate, L. R. 3 Ex. 299.

action to institute thereon is debt, whereas the proper action on other *quasi* contracts is generally some form of general assumpsit, where the common law procedure still prevails. A debt of record is one due and evidenced by a judgment of a court of record, which is a judicial, organized tribunal, having attributes and exercising functions independently of the magistrate designated generally to hold it. Judgments may be interlocutory, where the amount of the damages is not ascertained, or final where it is ascertained. A decree in equity is treated like a judgment debt at law if it is for the payment of money. The judgments of other courts, not courts of record, do not have the priority of debts of record but of course they are incorporeal chattels personal. Debts of record are also constituted by recognizances, or obligations entered into before courts of record or magistrates authorized. Debts of record, in the absence of statute, take priority of all other debts.[1]

§ 15. SPECIALTIES.

Specialty debts are debts evidenced by contracts under seal, as bonds, covenants, etc. They are another kind of incorporeal chattels personal. They are not corporeal chattels, for the visible evidence is not the real object of ownership. There is no true object of ownership. The right to the positive conduct of another is without physical object. So this mere right is seized hold of by the law and designated as an incorporeal chattel. A specialty may be in the form of a deed containing a covenant, or in the form of a bond, which is a sealed obligation to pay money, either absolutely or conditionally, and it includes individual bonds, railway bonds, and city, state and United States bonds. Arrears of rent, between landlord and tenant are entitled to the rank of specialties. Debts by mortgage are usually ranked as specialties by reason of the covenant therein. Specialties rank next after debts of record.[2]

§ 16. SIMPLE CONTRACT DEBTS.

All debts not under seal, whether verbal or written, are called simple contract debts. They include not only informal oral

[1] *Ex parte* Gladhill, 8 Met. (Mass.) 168, 170.

[2] Craig *et al. v.* State of Missouri, 4 Pet. 410.

and written promises to pay money, but bills, notes, checks, insurance policies and annuities.[1] They stand lowest on the list of priority, although irrespective of the nature of the debt our government has priority over private citizens. These are all incorporeal chattels, for though the paper on which the obligation is written is corporeal, the paper is not the object of the right, but there is no object other than the contract itself. A bank deposit is a simple debt if the ordinary general deposit; but if a special deposit, the identical package to be returned, there is no debt, but there is a right to positive acts with reference to corporeal chattels.

§ 17. QUASI CONTRACTS.

A *quasi* contract is a legal obligation created by pure implication of law, and enforced by an action *ex contractu*. In such case the one for whose benefit the law creates the obligation has the right to a positive act, the payment of money, with reference to this obligation. This obligation is an object of ownership. It is an incorporeal chattel personal, like a contract, because there is no corporeal chattel even to evidence the incorporeal; there is no object other than the obligation itself. There are many *quasi* contracts. We have already considered debts of record. In addition there are customary obligations, including contribution among sureties and general average as applied to maritime losses, statutory obligations, and equitable obligations, which latter include all the obligations to pay for benefits received which in equity and good conscience belong to another, as where obtained by fraud, or appropriation, or compulsion, or mistaken reliance of some sort.[2]

§ 18. REMEDIAL OBLIGATIONS.

Every legal wrong which violates any of the forms of property heretofore considered; that is, any breach of legal duty of forbearance with respect to corporeal chattels, or any breach of obligation of performance with respect to incorporeal chat-

[1] See chapters on Contracts.

[2] See chapter on *Quasi* Contracts.

tels, creates a new kind of property, a remedial legal right. A remedial legal right is a right *in personam* to have by state authority the prevention or redress of an injury caused by a violation of an antecedent legal right. In some of these remedial legal rights one may have an absolute property right, so that he may not only possess and enjoy the same, but may dispose thereof; in others he may only have a qualified property, because of the lack of the right of disposal. In the early common law only a qualified property right could exist therein, because the rights could not be sold nor transferred for fear that such transfer would breed litigation; but inch by inch this property right has grown, until to-day an absolute property may be had in most of the objects of ownership that fall under the above category. This is true of breaches of contracts, torts affecting the estate of a person, wrongs to the person resulting in the death of that person (Lord Campbell's Act), and in other personal torts after judgment; but before judgment a person can have only a qualified property against a wrongdoer as respects a tort not affecting the estate but the person and not causing death.[1] Only a qualified property can be had in preventive and restorative remedies. The objects of ownership in the case of remedial legal rights vary with the legal wrongs. The act to which the owner is entitled is generally the same, payment of money, but the object to which it relates may be breach of principal contract affecting person, or property, or accessory contract, or *quasi* contract, or the torts of trespass, conversion, death, detention of property, escape of dangerous things, fraud, infringement of patent, etc., removal of lateral support, mutilation of dead body, negligence, nuisance, procuring refusal or breach of contract, or other tort affecting property, or torts affecting the personal rights, like assault, and battery, negligence, false imprisonment, malicious prosecution, slander and libel, etc. But, whatever the object, it is an incorporeal chattel personal.

§ 19. BEQUESTS.

Bequests and distributive shares belong to the same class of incorporeal chattels personal as other claims for money. A

[1] Hammons *v.* G. N. R. R. Co., 53 Minn. 249.

bequest is a gift of personal property by will. A distributive share is that portion of the residue of another's personal estate to which a person is entitled after all debts and charges are paid. The objects of personal property ownership of the deceased may have been corporeal chattels or incorporeal, but the objects of ownership so far as the rights of the legatee and distributee are concerned are incorporeal.

§ 20. STOCK.

The capital stock of a corporation is the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business of the corporation, and for the benefit of the corporate creditors. A share of stock is a proportional part of such capital stock. It invests its owner with the right to participate in the management of the corporation, to share proportionally in the surplus profits and in the assets of the corporation upon dissolution after all debts and expenses have been paid. It is an intangible thing. The certificate of stock is the tangible representative of this incorporeal chattel.

§ 21. WARRANTY, ETC.

The accessory contracts of indemnity, warranty and suretyship are other incorporeal chattels personal, which are in the nature of claims for money.

§ 22. LIENS.

A lien is that hold or claim which one person has upon the property of another as security for some debt or demand due him. It may relate to corporeal chattels in that the lien claimant may keep the same in his possession; but in such case the objects of ownership are not such chattels, but the incorporeal chattels which are the objects of ownership in the debt for which the lien is but accessory.

§ 23. PLEDGES.

A pledge is a bailment of property as security for some debt or engagement. From debts secured by lien we have now advanced a step. Either corporeal chattels or incorporeal chattels evidenced by writing may be pledged, but the pledge itself, like the lien, is an incorporeal chattel because it is merely accessory to a debt.

§ 24. MORTGAGES.

A mortgage is a conditional transfer of property as security for some debt or engagement. Here we take still another step in advance of lien and pledge security. In modern law a chattel mortgage generally passes the general property and a real estate mortgage generally creates only a lien, but irrespective of this and irrespective of the fact that a chattel mortgage generally attaches to corporeal chattels and a real estate mortgage to land, each is only security for a debt, and therefore is classified as an incorporeal chattel.

§ 25. OTHER CONTRACTS.

We have discussed contracts creating debts and other obligations to pay money. Executed contracts are not the objects of property, although they may create rights to corporeal chattels, matters already considered. There remain those executory contracts whose obligation is something other than to pay money. There are many such; contracts containing a promise to convey land, a promise to lease a chattel real, a promise to sell chattels, a promise to make a bailment, a promise to insure, a promise to make a loan, a promise to marry, a promise to perform services as a servant, or as a bailee, or as a professional man, or as an agent, or as a partner; and they are all the objects of personal property. They are incorporeal chattels personal. The promisee in each one of them, as we have learned, has at least a qualified property right, and if his right is dissociated from a promise, or obligation, on his own part he may have an absolute property right therein.[1]

[1]See chapters on Contracts.

§ 26. GOOD WILL.

The good will of a business is another incorporeal chattel personal. It is not corporeal in any way, and yet it is an important object of ownership, especially when the right thereto is purchased and it becomes the object of a right *in personam.* The good will of a business consists in the probability that old customers will continue to deal with the old firm or establishment and all the other advantages of the firm other than its capital and stock. A man's name may be a part of the good will.[1]

§ 27. TRADEMARK.

A trademark is another species of incorporeal chattel personal. A trademark is a name, symbol, emblem, or mark used by a person to indicate, either by itself or by association, that the article to which it is affixed is manufactured or sold by him, or that he carries on business at a particular place. It may consist of the name of a person or firm, when it indicates with exactness the origin or ownership of the goods to which applied. Every man has the absolute right to use his own name in his business, even though it may interfere with the business of another, if he does so honestly and fairly. It may consist of a device, as a drum on a label, or a fanciful word, as "Eureka," when in a secondary sense, i. e., by association and repute, although not *proprio vigore,* it indicates origin and ownership. An arbitrary combination of numbers and letters may indicate origin by association. But words descriptive of the quality, character, composition, or kind of article to which it is applied, as "gold medal," or "cough remedy," or geographical names (except as to people outside the place), or color, or form, or a patent name are not the subject of trademark, for such words are open to all the world. The right to have the world refrain from interfering with one exercising the attributes of property over this incorporeal chattel is not absolute, for a person has no right to dispose of the same apart from the business with which it is connected.[2]

[1] Menendez *v.* Holt, 128 U. S. 514.

[2] Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94.

§ 28. COPYRIGHT.

An author or painter has an absolute property in his unpublished manuscript, lectures, letters, and paintings; and such persons, or their assigns, etc., may have a qualified property in their works after publication by conforming to the requirements of the laws of Congress with reference to copyright. During the period of the copyright the owner may exercise all the prerogatives of property. The right to not have others publish unpublished works and the right to not have others interfere with publication after copyright is secured are both rights which relate to incorporeal chattels personal. According to our present laws of Congress the following things are the subject of copyright: "Any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statute, statuary, and of models or designs intended to be perfected as works of the fine arts." A single page may be copyrighted, or blank forms, but not the opinions of judges. Copyrights are granted for the term of twenty-eight years from the time of recording the title, with the right of renewal for another period of twenty-eight years. The person who may take out a copyright is the author, inventor, designer, or proprietor, or assigns, etc., or a foreigner domiciled here at the time, or a citizen of a foreign state when his state gives the same rights to our citizens.[1]

§ 29. PATENT.

A patent is still another incorporeal chattel personal. A patent is understood to refer to the instrument securing to inventors, for a limited time, the exclusive right to their own inventions. In the United States the whole matter is governed by laws of Congress. The time for which a patent may last is seventeen years. One can only have a qualified property therein. Any person is entitled to the privileges of the patent laws. In order to be patentable the thing for which the patent is sought must be both new and useful to society. It

[1]Compiled Statutes of U. S., 1901, § 4952; 35 Stat. L. 1080.

may be an "art," where the essentials are the use of the apparatus or materials in new processes, methods, or relations; or a "machine," a function or mode of operation embodied in mechanism; or "manufacture," anything apart from machinery made by man's industry and art; or "composition of matter," medicines, etc.; or any new and useful improvements thereof. It must not be known or used by others in this country, nor patented nor described in this or any foreign country before the invention or discovery, or more than two years prior to application, nor in public use or on sale in this country for more than two years prior to application, unless abandoned. So long as the right lasts, like copyright, the owner may possess, use and dispose of his right for the term of the patent.[1]

§ 30. Services of Servants, Children, Etc.

There was one family right which was only alluded to in the chapter on family rights, and that was the right of the head of the family to the services of the other members thereof. This right was not treated in the chapter on family rights, but was left for this place because it is a property right. The services of servants, children, etc., are the objects of personal property, and are to be classed as incorporeal chattels personal. The head of the family has in such services a right *in personam* as regards the other members of the family from whom the conduct is due, but a right *in rem* as against all the rest of the world. In the days of slavery, slaves were themselves the objects of property; the other members of the family are not the objects of the property of anyone; it is only their services which are the objects of such property. We shall know more of these objects of ownership after we have considered the methods of acquiring title thereto and violations thereof.

§ 31. Persons in Whom the Right Resides.

This is the third element of a legal right of personal property. The persons who may have such rights of property may be

[1]U. S. Comp. Stat. 1901, §§ 4886-4887.

natural or artificial; they may be one or many; they may be the original owners or acquire the ownership from others. In the case of incorporeal chattels, they are generally known as promisees, or assignees, as such chattels are generally created by contracts. Promisees may be either joint, or several. In the case of corporeal chattels, they are generally known as owners. Owners may be joint, or in common, or in severalty. Joint promisees are those jointly entitled to the performance of a legal obligation. They must sue jointly and a release of one operates as to all, and if one dies the other may sue alone. Several promisees are those who are individually entitled to the performance of a legal obligation. They may sue separately, and if one dies his personal representative may enforce his obligation. Joint ownership is where two or more persons are joined together, having the unities of time, title, interest and possession. There may be joint owners of incorporeal chattels, as in a patent right, in a legacy, and in stock. The doctrine of survivorship generally applies. Ownership in common is where two or more persons own property with only the unity of possession. The doctrine of survivorship does not apply to ownership in common. Ownership in severalty is where a person owns property in his sole right. The right of personal property is not innate, and consequently a person must acquire the same in some legal way before he has the right, and until he has so acquired the right he is not entitled to any conduct on the part of his fellowmen with respect to any external objects of personal property ownership.

§ 32. PERSONS UNDER DUTY AND OBLIGATION.

The fourth element of the legal right of personal property is the person, or persons, against whom the same is available. What has been said about the persons in whom the right resides also generally applies here. In the case of all rights *in personam*, whether of contract, *quasi* contract, or remedial, the person, or persons, against whom the right is available are said to be under obligation; in the case of all rights *in rem*, they are said to be under duty. The nature of their duties and obligations, of course, measure the extent of the other persons' right, and this topic has already been considered. Rights *in*

personam are available against only those particular persons who have come into some particular relation to the parties claiming the rights, either by contract or by operation of law; rights *in rem* are available generally against all the world. Rights *in personam* require positive acts; rights *in rem* require refraining from acts. Anyone who (himself or his agent) does not refrain from doing any of the things to which rights *in rem* entitle another is guilty of a legal wrong, called a tort; but in the case of rights *in personam* the only person who can be guilty of a legal wrong is that person whose obligation it is to act, and in the case of contract, if he does not perform his obligation, the legal wrong is called breach of contract. In the case of contracts the persons owing the obligations are known as promisors. There are no special names for other persons owing obligations and duties.

CHAPTER X.

TITLE BY OCCUPANCY, ACCESSION AND CONFUSION, AND INTELLECTUAL LABOR.

III. How the Rights of Personal Property Are Acquired, § 1.
  A. By original acquisition, § 1.
    (I) By occupancy, § 2.
    (II) By accession and confusion, § 3.
    (III) By intellectual labor, § 4.
    (IV) By contract (see chapters XI to XIX inclusive).
    (V) By *quasi* contract (see chapter XX).
    (VI) By remedial obligations (see chapter XXI).
  B. By secondary acquisition (see chapter XXII), § 1.

§ 1. How the Rights Are Acquired.

The right of personal property is an outward right, and it is acquired either by original acquisition through occupancy, accession, confusion, intellectual labor, contract, quasi contract, and remedial obligations; or by secondary acquisition through the act of law in confiscation, succession, judgment, intestacy, insolvency, marriage, and adverse possession, and through the act of parties in gift, will, bailment, assignment, indorsement, and sale.

Having discussed each of the four elements composing the legal rights of personal property, we will now consider how such rights may be created. There are two main ways of acquiring personal property, (1) by original acquisition and (2) by derivative, or secondary, acquisition. The first includes the ways of acquiring legal rights which relate to things which have never been the objects of ownership before, or having been for a time the objects of ownership have returned to the common stock of unowned things. The following are all means of acquiring personal property by original acquisition: Occupancy, accession, intellectual labor, contract, *quasi* con-

tract, and remedial obligations. The second, or derivative acquisition, includes the ways of acquiring legal rights to things which are now the objects of ownership by some person. The following are means of acquiring personal property by derivative acquisition: Forfeiture, succession, judgment, intestacy, insolvency, marriage, adverse possession (all forms of transfer by some act of the law), gift, will, indorsement, assignment, bailment, sale (all forms of transfer by some act of the parties). Personal property, or title, by original acquisition, may begin either at the original beginning of the chain of ownership, or after some break therein at which ownership lost its hold. Personal property, or title, by secondary acquisition, can begin only with ownership in some other person. The ownership in such case is lifted out of that person and handed to another.

§ 2. OCCUPANCY.

Occupancy denotes the acquiring of personal property by taking the possession of objects which belong to nobody, either because they never have had an owner or because they do not now have an owner, with the intention of acquiring them.

Possession is the foundation of personal property, and the best method of proving it in modern times no matter how acquired. A qualified property in wild animals may be acquired by occupancy. It may arise in three ways: *per industriam,* by capturing the animals and keeping them in one's actual custody, by inducing in them the *animus revertendi* by artificial means; *ratione soli,* by reason of the fact that they are on one's land; *ratione impotentiæ,* where the young of animals cannot escape because of their weakness. That is, a person may acquire a qualified property in wild animals by getting them in his power (literal meaning of possession), whether physical or mental, and depriving them of their natural liberty; and such property will continue only so long as the animals are kept within one's power out of their natural liberty. P is fox hunting with his hounds and starts a fox

and is in pursuit of the same, when D intercepts the animal, kills it, and carries it away. P has not wounded the fox, but claims he has acquired a property right in the animal by reason of his pursuit thereof. P is mistaken. He has acquired no property right in the fox. The fox is a wild animal, and therefore the first person who deprives it of its natural liberty may acquire a qualified property therein, but P has not deprived the fox of its natural liberty. D has done this, and the fox belongs to him, and since he has killed the fox he has an absolute property in its carcass. A qualified property in goods lost and an absolute property in goods abandoned may be acquired by occupancy. Goods abandoned return to the common stock of unowned things, ready to become the object of ownership of him who first occupies them. A chattel lost has not completely returned to the common stock of unowned things so far as the true owner is concerned, for if he turns up he is entitled to claim it; but as to everyone else it is an object of ownership for the one who first occupies it. Such person is a bailee as to the true owner. P finds a roll of bank bills in a public place in a hotel, where they have been lost by someone, but it is not known whether by a guest, boarder, or a caller. The hotel-keeper claims he is entitled to the possession of the same, and P insists that he has the right to possession. P has a valid claim against all the world except the true owner. The finder acquires a qualified property in lost chattels as to the true owner, and the absolute property as to everyone else. If a chattel is left in a certain place such act makes the owner of the place a bailee, and no one else has a right to make himself a bailee for the true owner by finding the same. A finder of lost articles has no lien for recompense unless a specific reward has been offered, nor does he have any remedial right to recompense of any sort unless where he has made necessary repairs and incurred expense in preserving the same. Under the English common law the title to waifs, estrays, treasure trove and wrecks, instead of vesting in the finder, vested in the king, who held for a time as bailee for the true owner, and then if not claimed owned the same absolutely. In the beginning of the law of property occupancy was the most common method of acquiring property rights, for then none of the possible objects of ownership had been appropriated, but now this is an uncommon method of acquir-

ing property, as most things are already appropriated by some one.[1]

§ 3. ACCESSION AND CONFUSION.

Accession in its narrow sense is the acquirement of personal property in some object of ownership by its being added to another object already owned. Title is acquired in this way to the offspring of animals, to the repairs on a damaged article, to the joint product of materials united by the labor of a willful wrongdoer or by an innocent wrongdoer if his materials are the lesser part.

Specification (accession in its wider sense) is the acquirement of personal property by innocently transforming chattels into another species, or so increasing them in value that the original materials are mere accessories.

Confusion is the acquirement of personal property to the goods of a willful wrongdoer who intermingles his own with another's goods of unequal value so that they are indistinguishable; if goods are intermingled by accident, mistake, or consent, the owners become tenants in common pro rata.

A second way in which title by original acquisition may be acquired is by accession. Accession is grounded upon occupancy. A person acquires title, not from some former owner, but he is the first owner. The underlying principle of accession is that one acquires title to some object of ownership because it is added to an object of ownership which he already owns. This would include chattels produced by his own chattels, as crops on a leasehold, or the increase of animals, chattels united to or incorporated with his chattels, and chattels transformed into another species or so increased in value that the original chattels are mere accessories. The last is known as specification, but it is a form of accession, for a person ac-

[1]Pierson *v.* Post, 3 Caines 175; Manning *v.* Mitcherson, 69 Ga. 447; Goff *v.* Kilts, 15 Wend. (N. Y.) 550; Hamaker *v.* Blanchard, 90 Pa. St. 377; McAvoy *v.* Medina, 11 Allen 548; Haslem *v.* Lockwood, 37 Com. 500.

quires the personal property in the chattels of another because they are added to a greater object of ownership which is the result of his labor. The property in things growing on the land belongs to the owner of the land ordinarily; but a person who has a leasehold estate in land, though it is classified as a chattel, is entitled to the *fructus industriales* growing thereon, and the right to emblements is only an extension thereof; this is on the principle of accession.[1] The title to the brood of animals belongs to the owner of the female for the same reason, and this applies to the increase of mortgaged animals, so that the mortgagee holding the legal title to animals acquires a right to their offspring.[2] If the materials of one person are innocently united to the materials of another by labor so as to form a joint product, the one who has the legal right to the principal materials will acquire the legal right to the whole by accession, in the absence of agreement. So, where an article is to be manufactured for another, the personal property with respect to the same, while making and after finished but before appropriated to the contract, is in the person who furnishes the whole or the principal part of the materials. But where the owner of a damaged or worn-out article delivers it to another for repairs, the repairer furnishing materials, the owner of the damaged article continues to be the owner no matter what the value of the materials used in making the repairs.[3] Again, one who expends labor upon the chattels of another by mistake and in good faith, thinking they are his own, may acquire title thereto if he produces a new article, either by changing the same into another species, or so increasing it in value that the original materials may be considered but mere accessories.[4] But where one willfully and wrongfully adds materials of his own to those of another, or performs labor upon the chattels of another, he acquires no property right in the other's chattels, no matter what proportion of the materials he may furnish, or no matter how greatly he may increase the chattels in value, or no matter though he changes them into another species; and in addition he forfeits all right

[1]Reilly *v.* Ringland *et al.*, 39 Ia. 106.
[2]Kellogg *v.* Lovely, 46 Mich. 131.
[3]Pulcifer *v.* Page, 32 Me. 404; Gregory *v.* Stryker, 2 Donio 628.
[4]Wetherbee *v.* Green *et al.*, 22 Mich. 311.

to his own labor and to his own materials. W, relying upon a permission which he supposes proceeds from parties having the lawful right to give it, but who do not, innocently trespasses upon the land of G, and cuts some standing timber thereon worth twenty-five dollars standing. This timber W makes up into hoops worth seven hundred dollars. After the hoops are made G discovers that they are the product of timber cut on his land, and claims that he has a right to take the same away from W in a suit of replevin, while W claims, that, conceding that he did not purchase the timber, yet that he has acquired title to the hoops by accession (specification) because of the fact that he was an innocent trespasser at the time of the cutting, and because of the great increase in value which he has given to the timber, and that he is liable to pay only for the value of the timber standing. W's contention is the right one. But if W had knowingly and willfully trespassed upon G's land and cut the above timber, G could replevin the hoops without having to account to W for the enhanced value given the same.[1] Confusion of goods, or such a mixture of the goods of two or more persons that they cannot be distinguished, is a way of acquiring property as respects chattels which is analogous to accession. Where the mixture is by consent of the parties, or is occasioned by accident or by innocent mistake, the respective owners become tenants in common, and still retain their rights to proportionate parts of the mixture.[2] But where a person fraudulently, willfully, or wrongfully, intermingles his own with another's goods, he loses title to his own goods and the innocent party acquires title to the whole mass, unless the goods are such as to be readily distinguishable, or are of equal grade, when the foundation for the principle of acquiring property by confusion being wanting, it is not applied.[3]

§ 4. INTELLECTUAL LABOR.

Personal property by intellectual labor may be acquired in a trademark by a person's merely appropriating his own

[1]Silsbury *v.* McCoon, 3 N. Y. 379; Wetherbee *v.* Green, 22 Mich. 311; I. R. Min. Co. *v.* Hertin, 37 Mich. 332.

[2]Dole *et al. v.* Olmstead *et al.*, 36 Ill. 150.

[3]Beach *et al. v.* Schmultz, 20 Ill. 186.

name or some arbitrary mark to indicate the origin or ownership of articles manufactured or sold by him; in literary compositions by having them copyrighted according to law; and in inventions by having them patented according to law.

Another manner of acquiring personal property is by intellectual labor. This is the way to acquire title as respects trademarks, inventions and literary compositions. The rights created are *in rem*, but they respect incorporeal chattels. The right of property in a trademark existed at common law independently of statutory provisions. It is acquired by the occupancy, or appropriation, of his name or other mark by someone to designate his particular articles manufactured or sold, and no definite period is necessary in order to make the right good. Congress has passed laws authorizing the registration of trademarks and providing regulations for the transfer thereof, etc., but such laws apply, and can only apply, to trademarks used in commerce with foreign nations, with the Indian tribes and among the several states. Some of the states have passed laws either supplementing or superseding the common law upon the subject of trademarks.[1]

A right to unpublished lectures, letters, and pictures is acquired in the same manner as a trademark right, by occupancy; but the methods of acquiring property in published literary works and to inventions are purely statutory, and there is no way of acquiring any property right as respects the same except by proceeding according to the requirements of statutes enacted by Congress. The right to print and publish literary or artistic productions is called a copyright. The instrument securing to inventors the exclusive right to their own inventions for a limited time is called a patent. In order to secure a copyright according to the present laws of Congress, a printed copy of the title of a book, etc., or description of a painting, etc., must be delivered at the office of the Librarian of Congress, or deposited in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, on or before the day of publication in this or any foreign country, and two copies of the book, etc., and photo-

[1] Mfg. Co. *v.* Trainer, 101 U. S. 51.

graphs of painting, etc., must be promptly deposited in the same way. The Librarian of Congress upon receiving payment of the fee of fifty cents shall forthwith record the name of such copyright book or article in a book kept for that purpose, and shall give a copy of the same under seal whenever required by proprietor. Notice of the copyright should be inserted in the several copies of every edition; if a book, on the title page or page immediately following; or if other article, on some visible portion, in the words, "Entered according to Act of Congress, in the year ——— by ———, in the office of the Librarian of Congress, at Washington," or "Copyright, 19—, by ———."[1]

In order to secure a patent for an invention or discovery, application should be made therefor, in writing, to the Commissioner of Patents, and there should be filed in the Patent Office a written description of the same and of the manner and process of making, constructing, compounding, and using it; in case of a machine the principle thereof should be explained, and when the nature of the thing admits of drawings one copy should be furnished signed by the inventor, or his attorney in fact, and attested by two witnesses (a copy of which, furnished by the Patent Office, is attached to the patent as a part of the specification); in case of a composition of matter the Commissioner may require specimens to be furnished; and in all cases which admit of representation by model the Commissioner may require a model of convenient size to be furnished. The applicant must make oath that he believes himself to be the first inventor or discoverer, and that he does not know and believe that the same was ever before used or known. He must state of what country he is a citizen. He must pay the fee of $15 for filing of application, except in design cases, and $10 for filing of a caveat. (For issuing the original patent the fee is $20, etc.). Thereupon the Commissioner of Patents must cause an examination to be made, and if it appears that the applicant is entitled to a patent he must issue the same. All applications for patents must be completed and ready for examination within one year after filing application, or they will be deemed abandoned. The patentee, or his assigns, should give notice to the public, either by affixing on the thing

[1]Wheaton *et al. v.* Peters *et al.*, 8 Pet. 591.

patented the word "patented" with day and year, or by affixing thereon a label with like notice. A citizen of the United States who desires further time to perfect his invention or discovery may file a caveat in the Patent Office, and when so filed this is operative for one year from the date of filing. An alien also has this privilege after he has resided in this country one year. If a claim for a patent is rejected the Commissioner notifies the applicant, giving briefly the reasons. After a claim has been twice rejected the applicant, or if some one else claims priority and makes an interference, such party, may appeal from the primary examiner to the board of examiners in chief, then to the Commissioner in person, then on notice to the Court of Appeals of the District of Columbia, which court returns a certificate of its proceedings and decision to the Commissioner. Even then the applicant still has a remedy by a bill in equity in the court having cognizance.[1]

[1]Shaw *v.* Cooper, 7 Pet. 292.

CHAPTER XI.

TITLE BY CONTRACTS: GENERALLY.

§ 1. Ancient Essentials of Contracts.

In early English law the essentials to the enforcibility of an agreement were either benefits bestowed or formalities in expression. The idea of agreement formed by offer and acceptance was unknown. A promise operated, not by way of obligation, but by way of grant.

Lastly, personal property by original acquisition may be acquired by contract and by implication of law in *quasi* contracts and in remedial rights. Executed contracts, if they transfer property rights, are forms of secondary acquisition; but executory contracts, *quasi* contracts, and remedial obligations are means of creating personal property by original acquisition, for thereby one acquires a legal right with respect to something that never had an owner before, the right to the payment of a sum of money or to the performance of some other obligation. The rights to leaseholds and most incorporeal chattels are created in this way. These methods of acquiring property will now be treated in order in this book.

If the law of contracts is that which enforces a promise, there was none in the early common law. Actions were brought not to enforce promises but to get something conceived as already belonging to the plaintiff. In this state of contract law there was little to distinguish it from the

modern law of *quasi* contracts, and from the analogy between them it is reasonable to infer that the two obligations have a common source in the notion of readjustment of proprietary rights.

§ 2. DEBT.

If one person had the possession of a certain sum of money or of goods belonging to another, in early law, the actions of debt and detinue could be brought therefor.

Contract law doubtless started with the exchange of objects of ownership, under which circumstances proprietary rights were completely transferred. The next step in the growth of the law was probably where one party to the exchange parted with his property, but the other, taking this, also kept what he should have given back. Here he had received benefits, or a *quid pro quo,* for which he ought to pay; and the other person was allowed to recover the same in an action of debt, if he had witnesses (jury) to swear that the property belonged to him. Thus, at first, these debts were not conceived of as raised by a promise, but as rights springing from the ownership of property, but the actions of debt came to lie for any liquidated sum on a consideration executed.

§ 3. COVENANT.

On an instrument in writing, sealed and delivered, an action of covenant could be maintained.

This action, too, began with the idea of a change in proprietary rights, but the courts in enforcing it looked only at the form. As in the action of debt, the witnesses, so here, the formalities, furnished the evidence required; but the covenant, or promise under seal, from a promise well proven, came to be a distinct form of action and just as it was said that there must be a *quid pro quo* in order to sustain an action of debt, because there always had been a *quid pro quo,* so a man who had signed, sealed and delivered an instrument, instead of being bound because he had consented to be, and there was

a writing to prove it, was bound because the seal implied a consideration, or *quid pro quo*.

§ 4. ASSUMPSIT.

At length the action of assumpit came to be allowed for the nonperformance of executory agreements, express or inferred, both on a consideration executed and on a consideration executory.

Failure to perform one's agreement did not create a debt, but it was a wrong for which there should be a remedy, and, from the fact that the failure to perform one's agreements bore a relation to deceit, one of the tort remedies was finally extended to cover this sort of wrong. This remedy was the action of special assumpsit, developed by the court of chancery after it was authorized to issue writs similar in principle to the writs of trespass. At first this action did not partake of the nature of a contract action, for it was only allowed when a man undertook to do something and then was negligent in doing it, and then the question of form or consideration did not arise. But, finally, it was allowed when a man expressly promised to do something, and then failed altogether to do it, the detriment to the promisee being alone a sufficient ground for relief. Having taker this step, the courts found that they would have to take another, and class assumpsit as a contract action, but in doing so they adopted the old idea that a consideration was necessary for a contract, as the idea had grown up out of the action of debt and had been incorporated into the action of covenant. This necessity they found to be satisfied in the detriment to the promisee which, as the new remedy grew and expanded to embrace both unilateral and bilateral agreements, became either a detriment to the promisee in the unilateral, or a promise to do that which would be a detriment to the promisee in the bilateral. At last the modern consensual contract had taken complete possession of the field. For a time assumpsit kept in its own peculiar field, leaving the contracts under seal to covenant, and the contracts transferring property rights to debt, but the remedy of assumpsit is so simple and complete that it has gradually supplanted all other

contract actions. The extension of assumpsit was accomplished, not by the action of special assumpsit, but by a new action of assumpsit, called general assumpsit, which was an action on the case like special assumpsit, but in the nature of debt instead of deceit. Debt has disappeared and covenant survives only to a limited extent. With the disappearance of debt, has disappeared also the necessity of a benefit to the party sued as a consideration for the contract. It is of importance now only in those suits in *quasi* contract which partake of the nature of debts, but even in *quasi* contracts the action is general assumpsit. The old doctrine of *quid pro quo* survives in the doctrine that a consideration is necessary to the enforcibility of any agreement. The old formal contract perpetuates itself in the requirement of a seal or writing, or other formalities, in certain agreements. New requirements in regard to assent have grown up as necessary incidents to consensual contracts.

§ 5. MODERN ESSENTIALS OF CONTRACTS.

An executory contract is a legal obligation, created by agreement, and enforced by an action ex contractu.

It is an agreement which creates legal rights *in personam*. This is the usual sense in which the term "contract" is used, and that in which it will, hereafter, be employed in this book, executed contracts not being included. It may also be correctly and concisely defined as an agreement enforcible at law, or as an obligatory agreement. The legal right created is to have done what the law requires because of the agreement. For a failure to have done what one is entitled thus to require, there arises a remedial right to an action for damages, or, in case of a contract to convey land or to sell a chattel of peculiar and nonmarketable value, a suit for specific performance. The essential elements of the definition are agreement and obligation.[1]

[1] Holland on Jurisprudence, 173, 174; Pollock on Contracts, 3.

§ 6. AGREEMENT.

An agreement is the meeting of at least two minds in one and the same intention, by means either of a promise for a promise or of a promise for an act.

Another way in which this idea may be stated is that there must be assent at the same time, to the same thing, in the same sense. This is accomplished by some sort of offer and acceptance. In the case of mutual promises, the contract is called bilateral; in the case of a promise for an act, unilateral.[1]

§ 7. OBLIGATION.

The obligation of a contract is found in the fact that the law binds the parties to the performance of their agreement.

In order to create an agreement to the performance of which the law will bind the parties; that is, in order to create a legal obligation, the agreement, first, must be definite and certain; second, must contemplate a legal obligation; third, must be free from mistake, misrepresentation, fraud, duress and undue influence; fourth, must be made by competent parties; fifth, must rest upon a sufficient consideration; sixth, must have a lawful object; and seventh, must be in the form required by the law of evidence.

A valid contract is an agreement, definite and certain in terms, contemplating a legal obligation, free from mistake, fraud, duress and undue influence, made by competent parties in the form required by law, based on a sufficient consideration and with a lawful object. A voidable contract is an agreement which one of the parties at his option may treat as though it had never been binding. A void agreement is one that from the beginning has no legal effect.

In its contractual sense, a legal obligation is the constraining power or authoritative character given to an agreement by virtue of the fact that it is enforcible at law. Thus it is seen that a contract is a species of agreement, but that there are

[1]Pollock on Contracts, 3, 7; Anson on Contracts, 3.

many agreements which are not contracts. Any agreements which are not enforcible at law, which are not obligatory, which do not create legal rights, are outside of the pale of contracts. They may create moral rights and obligations, but they will have to be taken inside the pale before they can create legal rights and obligations.

In order to be enforcible at law there must be a perfect agreement; that is, the offer and acceptance by which the agreement is consummated must meet in one and the same intention, which must be definite and certain, relate to legal relations and be procured without duress, undue influence or fraud. But, as the law will not permit one to take advantage of his own wrong, when an agreement has been secured by duress or undue influence or fraud, it is enforcible against the person practicing the same and to that extent the agreement is obligatory. In order to be enforcible at law, the agreement must be made by competent parties. Generally, all human beings are in law considered competent to enter into valid agreements, but there are a few whom the law disqualifies in whole or in part; and artificial beings or corporations, being but the creatures of the law, possess only such powers in this regard as are given to them by the law. Agreements made by persons lacking capacity cannot be enforced against them, and in that aspect are not contracts; but if the other party to the agreement is competent, he is bound, and to that extent the agreement, like agreements procured by duress, etc., is obligatory. Sometimes the law will not recognize a promise unless it is in a particular form; as, for example, unless it conforms to the requirements of the statute of frauds, and not being in that form it is not enforcible at law. In order to be enforcible at law, the subject-matter of the agreement must be such as the law recognizes and allows. Any and every agreement must have what is known as a sufficient consideration. This means that in a bilateral contract each party, and in a unilateral, the party doing the act, must have a legal right to hold the other to a promise. There are many acts and promises which the law will not recognize, and which therefore can never be sufficient consideration to support a contract. The thing to be done must possess, or be reducible to, a pecuniary value, or be a thing of which the law will compel specific performance. Again the promise must be to do something which the law will allow.

If it is forbidden by statute, or constitutes an indictable offense, or is a tort, or is contrary to public policy; in other words, is illegal by statute or common law, the authority of the courts cannot be obtained to enforce it and it remains an agreement without legal obligation. If an agreement complies with all of these requirements, legal obligation attaches to it at once. It creates legal rights. It becomes enforcible at law. It is a contract.[1]

[1]Holland on Jurisprudence, 162; Pollock on Contracts, 8.

CHAPTER XII.

AGREEMENT.

I. AGREEMENT, §§ 1-20.
  A. Offer, §§ 2-11.
    (I) Proposal to give or do something, §§ 2-12.
      (A) Promise or act, § 3.
      (B) Communication, § 4.
        1. Time, § 4.
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          b. Manner, § 7.
        2. Lapse, § 8.
          a. Prescribed time, § 8.
          b. Reasonable time, § 10.
          c. Death, § 10.
          d. Rejection, § 11.
  B. Acceptance, §§ 12-19.
    (I) Absolute and unconditional accession to proposal, §§ 12-18.
      (A) Promise or act, § 13.
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      (C) Revocation, § 18.
    (II) Effect, § 19.
II. TERMS DEFINITE AND CERTAIN, § 20.
III. INTENTION TO CREATE LEGAL RELATIONS, § 21.

§ 1. AGREEMENT.

Agreement is the meeting of the minds of two or more parties in one and the same intention, and originates only in an offer on one side and an acceptance on the other.

Some illustrations will make clear what is meant by agreement. D offers to sell a mare to B for $165. B thinks D says

$65 and says he will take her at that price. Is this a true agreement? No. There is no meeting of the minds, on account of the mutual mistake. There is not even an apparent agreement.[1] A offers to sell B ten carloads of apples, at $2 per barrel, to be delivered on specified dates, at specified places, from stock inspected by B's agent, and to be loaded in refrigerator cars. B accepts this offer, on condition that the times of delivery will be changed. A accepts the modification and says "If satisfactory, answer and I will forward the contract." B replies, "All right, send contract." When the contract is received, B returns it, with other modifications, not referred to above. Does the above correspondence constitute a valid agreement? Yes. The minds of the parties have met on all of the terms, and the fact that they intend to sign another paper does not warrant the inference that they intend to make another and different agreement.[2] A offers, on the 24th of November, to sell 800 tons of iron to B for 69 s., and asks an answer by return. On the 27th, B asks for the price on 400 tons more. On the 28th A gives the same price on the 400 tons as he has given on the 800 tons, and asks that the answer be sent by return post. On this same date, there crosses this letter a letter of B saying he will take 800 tons at 69 s., the letter expressing the hope that A will let him have 400 tons at 68 s. The course of post between the parties is one day. Is there a complete agreement concerning the 800 tons? No. The offer of the twenty-fourth expires by expiration of time on the twenty-fifth, and the two letters of the twenty-eighth are, therefore, two offers and not an offer and acceptance. Two offers will not make an agreement.[3]

§ 2. OFFER.

An offer is a proposal by one party to give or do something for another.

If the proposal is accepted, it then becomes a promise, but it is not yet enforcible at law and, consequently, is not yet a

[1] Rupley *v.* Daggett, 74 Ill. 351.
[2] Sanders *v.* Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 39 N. E. 75.
[3] Tinn *v.* Hoffmann, 29 Law T. (N. S.) 271.

contract. It is only when the law attaches binding force to the promise that it is invested with the character of a legal obligation. There are other essentials necessary to enforcibility, but the agreement is the first great essential and, before considering the other essentials, we shall study what is meant by offer and acceptance. Offers must be distinguished from invitations to others to make proposals, and expressions of willingness to consider offers. These are not offers, and an attempted acceptance of them does not create an agreement, for there can be no meeting of the minds in a common intention when one person still withholds his intention. For example: A sends out a circular announcing that a stock of goods is to be sold at a discount and asks tenders, but does not promise to sell to the highest bidder. B tenders his bid, and it is the highest, but it is not accepted. Is the circular an offer? No. It is not an offer, but a proclamation that A is ready to chaffer for a sale. Had the circular said, "We undertake to sell to highest bidder," it would have amounted to an offer.[1] K writes M, "We are authorized to offer Michigan fine salt, etc., at 85c per barrel. At this price it is a bargain." M replies, "You may ship me 2,000 barrels Michigan fine salt, as offered in your letter." Is K's communication an offer which M is at liberty to accept? No. It is merely an advertisement, or business circular, to attract attention to bargains in salt and not intended as a proposal open to acceptance by another.[2]

§ 3. PROMISE OR ACT (OFFER).

An offer may be made either by a promise or by an act; that is, by words or by conduct, or partly by one and partly by the other. If it is by words, it is called express; if by conduct, tacit or inferred.

A party may offer a promise for an act, or an act for a promise, or promise to make a promise, in either of which cases, if the offer is accepted, the agreement is called a unilateral agreement; but if he offers a promise for a promise, an acceptance

[1] Spencer *v.* Harding, L. R. 5 C. P. 561.
[2] Moulton *v.* Kershaw, 59 Wis. 316, 18 N. W. 172.

makes a bilateral agreement. The offer made by conduct, and which is said to be inferred, is to be carefully distinguished from the *quasi* contractual obligations where it is sometimes said that an offer is implied. In the first case, there is true assent, as much as though the offer were express; but in the second case there is no assent. P says, "I will give $5,000 to any person who will bring my wife's body out of that burning building, dead or alive." This is a promise for an act and the offer is express.[1] A undertakes and completes the building of a wall with the expectation that B will pay him therefor, and B knows that A is acting with such expectation. This is an offer of an act for a promise and is inferred.[2] A promises to pay B a certain sum of money at some future day for B's promise to perform certain services for A before that day. This is an offer of a promise for a promise.[3]

§ 4. COMMUNICATION OF OFFER.

An offer becomes such only when it is communicated to the addressee. If addressed to the public at large, the addressee is the person who first accepts it. To be communicated, the offer must at least be brought to the knowledge of the addressee.

Until communicated the offer might as well never have been made. A state of mind not communicated cannot be regarded in dealings between man and man. An agreement means assent, but a person cannot assent to that of which he has never heard. On October 14th A offers a reward of $200 to anyone who will give him information that will lead to the apprehension and conviction of the murderer of X. October 15th, one F is apprehended on information given by B, without notice of the offer of reward. After learning of the reward and with a view thereto, B furnishes information which leads to conviction of the party apprehended. Is there a complete agreement here? No. There is only one side of an agreement. An

[1] Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473.
[2] Day *v.* Caton, 119 Mass. 513.
[3] Funk *v.* Hough, 29 Ill. 145.

offer uncommunicated is the same thing as no offer.[1] On the 25th a railroad offers a reward of $5,000 for the arrest and conviction of the murderers of B. On the 24th, W gives information which assists in the arrest and conviction of the murderers. Has W accepted the offer of reward? No. First, he does not "arrest and convict" and, therefore, does not bring himself within the terms of the offer; second, there is no assent because he does not know of the offer.[2]

§ 5. DURATION OF OFFER.

An offer when once made continues every instant of time until it is revoked, lapses, or is accepted.

A, by mail, offers to sell B wool at a certain price, "Receiving your answer in course of post," but A misdirects his letter so that it is three days late. B accepts at once, but the day before receiving the acceptance, not having received an answer in what would have been the usual course of post if the letter had not been misdirected, A sells the wool to another. Is this a valid acceptance? Yes. A makes the same identical offer, during all the time the letter is traveling, and the assent is completed by acceptance. The acceptance here is in course of post, as the delay is the fault of A.[3] A verbally offers to buy B's shares, the offer to remain open three months. Within the three months B accepts, the offer not having been withdrawn. Is there a valid agreement? Yes. The offer continues until it is terminated in some way. There is no distinction between offers by mail and oral offers, as to duration.[4]

§ 6. REVOCATION OF OFFER: TIME.

An offer may be revoked at any time before acceptance (but never afterwards), even though the offerer pro-

[1]Fitch *v.* Snedaker, 38 N. Y. 248.

[2]Williams *v.* West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456; *Contra,* Williams *v.* Carwardine, 4 Barn. & Adol. 621.

[3]Adams *v.* Lindsell, 1 Barn. & Ald. 681.

[4]Nyulasy *v.* Rowan, 17 Vict. Law R. 663.

poses to keep the offer open a prescribed length of time, unless the offer is under seal, or supported by a valuable consideration.

The fact of naming a definite time in the proposal is for the proposer's benefit and simply operates as a warning that the offer will lapse at the time named anyway. An offer may be revoked at any time before it is accepted, and accepted at any time before it is revoked. A bids $7,000 for certain property at a sheriff's sale, but, learning that it is subject to a mortgage of $6,000, he retracts his bid before it is accepted, contrary to a rule of the sheriff announced before the sale. Is the offer withdrawn? Yes.[1] A guarantees to B the payment of all bills of exchange of C, discounted by B within twelve months, to the extent of 600 pounds. Later, A withdraws his guaranty before B acts on it. Is this guaranty revocable? Yes. It is revocable until accepted by being acted on, as it is only an offer.[2] On the 12th of September, W writes offering C $140 for a horse and saying, "You can draw on us for $140." This is received on the 16th, on which day C signifies his acceptance by drawing on W for this amount; but, on the same day, W writes a letter withdrawing his offer, but this is not received until after the draft is sent. Is the offer accepted? Yes. Drawing according to the offer completes the assent and, when the offer is once accepted, the party making it cannot thereafter withdraw it.[3] A, an auctioneer, offers a tub for sale and B bids forty pounds, but, before A brings down his hammer, withdraws his bid. The next day the tub is sold to B for thirty pounds. Is B liable on his first bid? No. Mutual assent is necessary to a valid contract. B's bid is an offer, which is not binding until assented to, and may be withdrawn until accepted.[4]

§ 7. REVOCATION OF OFFER: MANNER.

A revocation takes effect from the time it is communicated, which is when it is brought to the knowledge of the

[1]Fisher *v.* Seltzer, 23 Pa. 308.
[2]Offord *v.* Davies, 12 C. B. (N. S.) 748.
[3]Wheat *v.* Cross, 31 Md. 99.
[4]Payne *v.* Cave, 3 Term R. 148.

addressee. If the offer is a general one not made to any particular person, revocation takes effect when made in the same way that the offer is made. Notice of withdrawal must be as extensive as the notice of the offer.

A buys a ticket of the B railroad and presents himself for passage, at the time advertised in the newspapers, but the train has been postponed two hours and the only notice thereof is some hand bills, which A has not seen. Is the offer to carry at the hour advertised withdrawn? No. The notice of withdrawal must be as extensive as the notice of the offer.[1] A, in writing, agrees to sell B some property for 800 pounds and to leave his offer open until Friday at nine o'clock A. M. Thursday, B hears that A is attempting to sell, or has sold, the same property to a third person, and then tenders an acceptance of the offer to him before nine A. M. Friday. Is the offer still open? Knowledge is equivalent to an express withdrawal, so that there can be no meeting of the minds thereafter.[2] The United States offers, in the newspapers, a reward of $25,000 for the apprehension of John H. Surratt and a large reward for information that shall conduce to his arrest. This offer is withdrawn through the same channel that it is made; but, in ignorance of the withdrawal, A gives information that leads to the arrest of S. Is he entitled to the $25,000? No. First, he has not accepted that offer; second, the offer is withdrawn. An offer is revocable at any time before acceptance, and can be revoked in the same manner that it is made.[3]

§ 8. LAPSE OF OFFER: PRESCRIBED TIME.

If the offerer has fixed a time within which the offer is to remain open it will lapse at the expiration of that time without any further act on his part.

A offers to sell B 266 hogsheads of tobacco at a certain price and promises to give B until four o'clock to consider his offer. Before four o'clock, B notifies A of his acceptance. Is this

[1]Sears *v.* Eastern R. Co., 96 Mass. (14 Allen) 433.
[2]Dickinson *v.* Dodds, 2 Ch. Div. 463 (only case on tacit revocation).
[3]Shuey *v.* U. S., 92 U. S. 73.

offer accepted? Yes. But if B had waited until after four o'clock the offer would have lapsed by expiration of the prescribed time.[1] A offers, on the 24th of November, to sell a certain quantity of iron to B for a certain price, and asks an answer by return mail. On the 28th, B writes a letter, saying he accepts A's offer. The course of post between the parties is one day. Is the offer accepted? No. The offer of the 24th expires, by expiration of time, on the 25th.[2]

§ 9. LAPSE OF OFFER: REASONABLE TIME.

If no time is fixed, the offer will lapse at the expiration of a reasonable time.

What is a reasonable time is a question of fact for the jury, but the court will sometimes decide the point where it is so plain that the court knows that a different verdict would be set aside. Questions of fact, by being often decided, in the course of time, become questions of law.

Boston, by its mayor, because of frequent incendiary attempts, offers a reward of $1,000, by advertisement in 1837, for the apprehension and conviction of any person who shall set fire to buildings within the city. The advertisement runs about one week. In 1841, L, with the intent of gaining the reward, apprehends and secures the conviction of a person who sets fire to a building in the city. Does the offer still stand? No. It has lapsed by the expiration of a reasonable length of time.[3] On the 29th of February, by a letter to H, an inquiry, by A, is made for his selling price on ten to fifteen tons of band iron. March 2d H gives prices. March 14th A writes H on other business without alluding to this matter. March 16th H answers and asks if A accepts the proposal on the band iron. This letter is received on the 18th, but H does not send a letter of answer until the 20th. The price is fluctuating. Is this a good acceptance? No. The offer has lapsed by the expiration of a reasonable length of time, as A has had the proposal in his possession since the 4th of March.[4]

[1]Cooke *v.* Oxley, 3 Term R. 653 (*Contra*).
[2]Tinn *v.* Hoffmann, 29 Law T. (N. S.) 271.
[3]Loring *v.* City of Boston, 48 Mass. (7 Metc.) 409.
[4]Averill *v.* Hedge, 12 Conn. 424.

§ 10. LAPSE OF OFFER: DEATH.

The death or known insanity of either party ipso facto causes an offer to lapse.

A offers to guarantee the payment by B of all goods sold him by C, but, before C sells B any goods, A dies. Is this offer terminated? Yes. One must ascertain whether a person on whose credit he is selling is alive.[1] A gives B authority to purchase goods for him from C. Subsequently A becomes insane, but C does not know of this. Is B's authority terminated? Yes, as between A and B, but C must have knowledge of it before he is bound by the termination.[2]

§ 11. LAPSE OF OFFER: REJECTION.

An offer lapses by rejection or a counter proposal, but not by a mere inquiry.

A offers to sell his farm for 1,000 pounds. B offers to buy for 950 pounds. A refuses this offer. Thereupon, B writes accepting the offer to sell for 1,000 pounds. Is this offer still open? No. It is terminated by the counter offer.[3] M, by letter, offers to sell S wire for 40 s. net, offer to remain open until Monday. Monday morning, S wires, "Will you accept 40 s. for delivery over two months?" Just as this message is received, M sells to another and telegraphs that fact to S, but before its arrival S sends a telegram of acceptance of the original offer. Is this offer still standing? Yes. The inquiry of Monday is not a rejection and, therefore, the offer continues until the time for accepting or rejecting has expired.[4]

§ 12. ACCEPTANCE.

An acceptance is an absolute and unconditional accession to the identical terms of the proposal.

The meeting of the minds required by an offer and acceptance is an expressed, and not a secret meeting. A man must

[1]Jordan *v.* Dobbins, 122 Mass. 168.

[2]Drew *v.* Nunn, 4 Q. B. Div. 661; Beach *v.* First M. E. Church, 96 Ill. 177.

[3]Hyde *v.* Wrench, 3 Beav. 334.

[4]Stevenson *v.* McLean, 5 Q. B. Div. 346.

stand by terms which he has actually expressed. A common intention means that both parties must have an intention, and that the same one; therefore, there can be no contract if the offer is unknown or if there is no accession to the offer. The absolute identity of offer and acceptance is necessary because, otherwise, the intention expressed by one party would either be doubtful or different from that expressed by the other. A offers to supply B with any quantity of iron he may order during a certain period at specified prices. B accepts the tender. Several orders are given by B and supplied. Then A refuses to supply any more. Is the offer accepted? So long as the tender stands, every order amounts to an acceptance, but the mere acceptance of the tender amounts to nothing, because of the lack of mutuality.[1] A commission firm advertises that it will pay ten and one-half cents for eggs, shipped to arrive by February 22d, acceptance, stating the number of the cases, to be sent by February 20th. A rival firm, on February 20th, accepts this offer for 450 cases, but adds the condition that the offerer can pay a certain price for the cases themselves, or return them. The eggs are pushed on cars from one house to the other before the 22d. Is this offer accepted, and is it a perfect agreement? No. Acceptance differs from the offer.[2] B offers, in a newspaper, to pay $5,000 for the delivery to the sheriff, with evidence to convict, the person who administered poison to X. O arrests Y, but the latter is discharged on a committing trial. The offer is then withdrawn, but B tells A to go on and he will pay him what his services are worth. Is he entitled to the $5,000? No. That offer is withdrawn. He must sue in *quantum meruit*.[3] A offers a reward of $25,000 for the arrest and conviction of the party breaking into a school house. Through fear of arrest, and without expectation of receiving the reward, but with notice of it, B gives the information for which the reward is offered. Is this an acceptance? No. It must be given with a view to obtaining the reward, or there is no assent.[4]

[1]Great Northern R. Co. *v.* Witham, L. R. 9 C. P. 16.

[2]Seymour *v.* Armstrong, 62 Kan. 720, 64 Pac. 612.

[3]Biggers *v.* Owen, 79 Ga. 658, 5 S. E. 193.

[4]Vitty *v.* Eley, 51 App. Div. 44, 64 N. Y. Supp. 397; Hewitt *v.* Anderson, 56 Cal. 476. *Contra*, Williams *v.* Carwardine, 4 Barn. & Adol. 621.

§ 13. PROMISE OR ACT (ACCEPTANCE).

An acceptance may be made by a promise or by an act, according to which is asked for by the offer.

A asks B to assist C to get some money, and offers to see that it is paid. B signs a note with C, as surety, and seasonably sends notice of it to A by mail (though this is never received). B has to pay the note. Can he compel payment by A? Yes. This is an offer of a guaranty which can be accepted by an act and only seasonable notice of acceptance need be given. The offer is by mail and, therefore, contemplates an answer by mail.[1]

§ 14. COMMUNICATION OF ACCEPTANCE.

The acceptance must be communicated.

There can no more be an acceptance of an offer, without notifying the offerer of the intent to accept, than there can be an offer uncommunicated. An insurance company which has been carrying fire insurance for P writes him that it will reinsure his property for another year unless notified to the contrary. Relying on this promise, P gives the company no notice to insure or not to insure. Is the offer accepted? No. Some communication of acceptance is necessary. If P does not want insurance, the company could not impose a liability in this way, so he cannot hold the company. Both parties must be bound or neither is bound.[2] A writes B, "Upon an agreement to furnish my offices within two weeks, you can begin work at once." B makes no reply to this note, but commences work at once. Is this an acceptance? No. The terms of the offer indicate that this is an offer of a promise for a promise and such an offer cannot be accepted without making the acceptance known to the other party. A proposition alone cannot make an agreement. Where a bilateral agreement is offered it cannot by acceptance be turned into a unilateral agreement. But even if a unilateral agreement had been offered, acceptance would not be complete until the work should be finished, so

[1] Bishop *v.* Eaton, 161 Mass. 496, 37 N. E. 665.
[2] Prescott *v.* Jones, 69 N. H. 305, 41 Atl. 352.

that B's case would be hopeless on either ground.[1] B asks R to bind, for a few days, certain insurance policies about to expire, but R says nothing in answer. B thinks R has assented. R does not bind the policies. Is this a complete agreement? No. Silence, when it is not a man's duty to speak, is no evidence of an acceptance. If anything, it is evidence of non-acceptance.[2]

§ 15. MANNER OF ACCEPTANCE NOT PRESCRIBED.

If the acceptance consists of a promise it may be communicated by being put in process of transmission to the offerer; if it consists of an act, the performance of the proposed act is in itself sufficient, if it appears from the offer that other communication is dispensed with; but silent consent, or performance of an act in ignorance of an offer, never amounts to an acceptance.

A, by letter, offers to insure B's house to the amount of $8,000 for a premium of $56, and says "should you desire to perfect the insurance, send me your check." The day after receiving the offer, B replies inclosing his check for the amount of the premium. Is this a sufficient acceptance? Yes. When one makes an offer by mail he impliedly makes the mail service his agent to bring back the acceptance to him. This is really a unilateral agreement, because the acceptance asked for is an act—sending the check, and not a promise.[3] A offers to give $5,000 to anyone who will bring his wife's body, dead or alive, out of a burning building. B, having received notice of this offer, and relying on it, brings the body of A's wife out of the building. Is this an acceptance? Yes. This is a promise for an act, and the only thing necessary to consummate the acceptance is the performance of the act.[4] A undertakes and completes the building of a wall, with the expectation that B will pay him for his work, and B knows that A is so acting, and allows him to work without objection. Is there an acceptance

[1] White *v.* Corlies, 46 N. Y. 467.
[2] Royal Ins. Co. *v.* Beatty, 119 Pa. 6, 12 Atl. 607.
[3] Tayloe *v.* Merchants' Fire Ins. Co., 50 U. S. (9 How.) 390.
[4] Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473.

of A's offer? Yes. This is an offer of an act for a promise. The promise is inferred as a matter of fact from B's conduct and his conduct is a sufficient transmission thereof.[1] A has shoes in B's possession and writes B that he can have them for a given price cash, but if he cannot pay cash by return mail to return the shoes. B does nothing for a few days, and then returns the shoes. Is the offer accepted? Yes. The neglect of duty to return imposes an acceptance of the alternative offer.[2]

§ 16. MANNER OF ACCEPTANCE PRESCRIBED.

If the offer designates a time, place or means of acceptance, the acceptance must be in accordance therewith or it amounts to nothing.

A offers by mail on the 8th to lease a building to B, but makes his offer dependent upon the receipt of a telegram of acceptance by him before the 20th. B telegraphs acceptance on the 17th, but the telegram is never delivered. Is this an acceptance? No. The offerer has made the actual receipt of the acceptance by him necessary to complete the assent. Had he simply said, "Telegraph answer," there would have been a good contract.[3] E offers to buy 300 barrels of flour from H, at $9.50, sending his offer by H's wagoner from Harpers Ferry and requesting an answer by return of the wagon, which indicates the time and place of acceptance but not necessarily the means. H accepts by letter addressed to Georgetown, and received a week later than "by return wagon." Is this a complete acceptance? No. Acceptance at a time or place different from that pointed out does not complete the agreement.[4]

§ 17. TIME OF ACCEPTANCE.

The acceptance takes effect from the moment it is properly dispatched out of the sender's control; that is, when de-

[1] Day *v.* Caton, 119 Mass. 513.
[2] Wheeler *v.* Klaholt, 178 Mass. 141, 59 N. E. 756.
[3] Lewis *v.* Browning, 130 Mass. 173.
[4] Eliason *v.* Henshaw, 17 U. S. (4 Wheat.) 225.

livered to the agent, express or implied, of the offerer, unless the offerer makes acceptance depend upon his actual receipt of it.

When the addressee accepts, in the manner expressly or impliedly authorized by the offerer, it is the same thing as though he had put his acceptance into the hands of the agent of the offerer. Accordingly, if the postoffice is authorized by the offerer, the acceptance takes effect when it is posted. Sending an offer, under circumstances indicating that it must be within the contemplation of the parties that, according to the ordinary usages of mankind, a certain means may be used in communicating the acceptance, makes that means the agent of the offerer. G hands to H's agent an application for 100 shares of stock. This is allowed by H, and a letter of allotment is posted to G, but this G never receives. It is found that G authorizes H to notify him by mail. Is there a sufficient acceptance? Yes. The minds of the parties meet on the posting of the acceptance.[1]

On the 24th of December, F offers by letter to sell brandy to M. On the 17th of January, M answers that he will decide to take it in case of war. By letters of the 7th and 28th of March, F shows that he intends to keep the offer of the 24th of December open, though these letters are not received until after M's death. March 31st, M writes and mails an unconditional acceptance. M dies on the 10th of April, before F receives the letter of acceptance of the 31st. Is the offer accepted before revoked by death? Yes. The letter of the 31st completes the agreement. The offer continues up to the time of revocation, and acceptance dates from the moment of despatch, not from the moment of knowledge. The case is decided according to the rules governing bilateral agreements, but the fact that M has the brandy in his possession makes it difficult to conceive of it from this standpoint.[2]

A, by handing him his offer, offers in writing to give B the refusal of certain property for fourteen days, at 1,750 pounds. The following day A sells the property to another and mails notice to B that he withdraws his offer. Before receiving the withdrawal, B accepts the offer by mail, and not orally as he

[1]Household Fire & Carriage Acc. Ins. Co. *v.* Grant, 4 Exch. Div. 216.
[2]Mactier's Adm'rs *v.* Frith, 6 Wend. (N. Y.) 103.

lives at a town some distance away and takes the offer home with him. Does this acceptance take effect from the time it is posted? Yes. It is within the contemplation of the parties that the acceptance shall be posted.[1]

§ 18. REVOCATION OF ACCEPTANCE.

An acceptance once unconditionally made cannot be revoked.

The agreement is concluded, and it is now too late for further dickering. Other communications that may reach the offerer before acceptance will be of no avail, and it makes no difference if the acceptance never arrives at all. On the first of January A, by mail, proposes to B to sell him 1,000 bushels of wheat at a certain price. On the third of January B mails a letter accepting this offer, and this acceptance is received by A the morning of the fourth. Immediately after despatching his letter of acceptance, B sends a telegram rejecting the offer, and this is received by A on the evening of the third. Is this acceptance revoked? No.[2]

§ 19. EFFECT OF ACCEPTANCE.

The effect of an acceptance is to complete the agreement, which dates from the moment of acceptance and not from that of the offer, and henceforth an offer can neither be revoked nor lapse in any way. Revocation of an offer, after acceptance, is too late.

While the offerer impliedly authorizes the use of the same means by the addressee as the offerer uses in making his offer, the addressee does not authorize the offerer to use any means in revoking his offer. In the case of communication of offer and acceptance by means of telegraph, each party also makes the telegraph company his agent for the transmission of his own message, but it is only to the extent of sending the message

[1]Henthorn *v.* Fraser [1892] 2 Ch. 27.
[2]Mactier's Adm'rs *v.* Frith, 6 Wend. (N. Y.) 103.

as written, and if it is altered by the company in transmission the sender is not bound thereby.

A offers to give $9.50 per ton for hay, and B answers, "You can take the hay at your offer, but after you have hauled it, if the hay proves good enough so that you can pay $10 per ton, I should like to have it." The hay burns and A denies liability. Is this a complete agreement? Yes. There is an absolute acceptance of the offer and, thereafter, the offer cannot be withdrawn. The clause in regard to the payment of $10 may be disregarded.[1] A receives from B, on the 30th of December, an offer to sell pig iron when the usual course of trade demands an answer by the next mail. This is on the 30th. A answers on the 30th, but misdates his letter the 31st, and by fault of the mail service the letter is delayed one day. Is this acceptance binding? Yes. The acceptance takes effect from the time posted and it is the offerer's loss thereafter. The mistake in date is open to explanation.[2] On the 1st, by letter, A makes an offer to do something for B. On the 4th B mails an acceptance of this offer. On the 3rd A mails a letter withdrawing his proposal, but B does not receive this until after he has mailed his acceptance. Is the offer withdrawn? No.[3]

§ 20. TERMS DEFINITE AND CERTAIN.

In order that the agreement may be enforcible the minds of the parties must not only meet in a common intention, but that intention must be definite and certain or capable of being made so.

A agrees to pay B, if he does certain work, such remuneration as shall be deemed right. B does the work. Is this an enforcible agreement? No. A has the option to pay or not to pay as he thinks right, which is too indefinite.[4] A promises to sell B the middle one-third of a certain quarter section of land for a specified price and B accepts this offer by agreeing to pay the price. Is this agreement enforcible? No. There

[1] Phillips *v.* Moor, 71 Me. 78.
[2] Dunlop *v.* Higgins, 1 H. L. Cas. 381.
[3] Wheat *v.* Cross, 31 Md. 99.
[4] Taylor *v.* Brewer, 1 Maule & S. 290.

is no way of determining what one-third of the quarter section is meant by the agreement.[1] W offers to furnish three steamers belonging to A, with pea coal for the year 1888, for $3.05 a ton. A replies, "I accept your offer." Though this agreement is indefinite at the time, it is determinable by its terms, and that is definite which can be made definite. Here, also, is a sufficient consideration for the agreement because there is a mutuality of promises, it being necessarily inferred that A promises to buy of W the coal needed for his steamers.[2]

A father loans to his son money, taking the son's promissory note. The son complains that he has not had an equal share with the other children, and the father says, "If you will stop complaining I will not sue you on the note," and the son promises to leave off complaining. Is there a consideration for the father's promise? The answer to this question depends upon whether the promise is given for the son's promise to stop annoying his father generally by complaining, or to stop annoying his father by complaints in regard to not getting an equal share, for in the latter case, as the son has no legal right to complain he can show no consideration for his promise. But outside the question of consideration, the promise of the son is so indefinite and uncertain as to be incapable of enforcement.[3]

§ 21. INTENTION TO CREATE LEGAL RELATIONS.

In order to be enforcible the agreement must be intended to create legal relations.

A young man and a young woman go through a marriage ceremony, all with the understanding that it is in jest. Is this agreement enforcible? No. Because it is not made with an intention to create legal obligations. Offers made in jest do not form the basis for a valid contract. Another illustration of this rule is that of a mutual mistake as to the existence of the subject-matter of a contract.[4]

[1]Sherman *v.* Kitsmiller, 17 Serg. & R. (Pa.) 45.
[2]Wells *v.* Alexandre, 130 N. Y. 642, 29 N. E. 142.
[3]White *v.* Bluett, 23 Law J. Exch. 36.
[4]McClurg *v.* Terry, 21 N. J. Eq. (6 C. E. Green) 225.

CHAPTER XIII.

REALITY OF AGREEMENT.

§ 1. REALITY OF AGREEMENT.

Though the minds of the parties apparently meet in a common intention, if this is accomplished under such cir-

cumstances as to make it no real expression of intention, the agreement lacks one of the elements necessary to enforcibility.

The first great essential of enforcibility in modern law is an agreement in fact as well as in form. If this does not exist, the first and greatest element of a contract is lacking, and there is nothing upon which to build more than a voidable contract. The circumstances which affect the reality of assent are ignorance and lack of freedom of action. Ignorance that affects assent, if not caused by the act of the other party, is referable to mistake; but, if caused by the act of the other party, to misrepresentation or fraud. The lack of freedom of action that vitiates assent, if caused by the act of the other party, is called duress; if due to the relationship which he sustains, undue influence.

§ 2. MISTAKE.

If the offer and acceptance meet in a common intention, so as to form an agreement, such agreement is not vitiated by a mistake of one or both of the parties; but there are a few special cases where, on the face of the transaction, an agreement has been concluded, but where there is no real agreement, because the parties, through a mistake, do not arrive at a common intention, and such agreements are vitiated by the mistake.

The law will not permit one who has entered into an agreement to avoid its operation on the ground that he does not attend to the terms used by himself or the other party, or that he is misinformed as to its contents, or is mistaken as to its legal effect; yet, where there are circumstances of mistake, or mistake and fraud, an apparent agreement may be avoided. The doctrine, however, does not include cases where, because of mistake, the offer and acceptance never agree in terms, for then there is not even an apparent agreement. This question has already been considered under the head of offer and acceptance. The doctrine does not include cases of real agreement, but failure to express it. There the parties may have the agreement, as expressed, corrected to conform to their

real intention. This subject will be alluded to again under the head of remedies. The doctrine does not include cases where the agreement is procured by misrepresentation. In such cases the agreement may be affected, not by mistake, but by another circumstance which will be presently considered. The doctrine does not include cases of mistake as to the existence of the subject-matter of the agreement, or as to the party's power to perform it, for each of them relates to the performance of contracts and will be treated under the topics "Failure of Consideration" and "Conditions."

§ 3. MISTAKE AS TO NATURE OF TRANSACTION.

The execution of one instrument when a person intends to execute a different kind of an instrument, if caused by the act of a third party or the fraud of the other party, renders the agreement void, but the person accepting may be estopped by his negligence from showing his mistake.

There is no real common intention, but only the appearance of one, in a case of this sort. This is a mistake as to the nature of the transaction. If it is in writing, the acceptor never really signs the agreement to which his name is appended. It is just as though he had written his name on a sheet of paper in idle pastime or to practice his signature. M signs a bill of exchange as an indorser. The paper is presented to him for his signature by C, who informs him that it is a guaranty. Admitting that M is not negligent, is this a valid agreement? No. This is such a mistake as to prevent any meeting of the minds in a common intention.[1] A man, C, unable to read the English language, signs a promissory note, when he is told and believes he is signing a contract making him an agent to sell a patent right. This note is sold to B, a third party. Is C liable? No. This agreement is void, and being void there is nothing for the third party to be a *bona fide* holder of.[2]

[1]Foster *v.* Mackinnon, L. R. 4 C. P. 704.

[2]Walker *v.* Ebert, 29 Wis. 194; Alexander *v.* Brogley, 63 N. J. Law, 307, 43 Atl. 888.

§ 4. MISTAKE AS TO IDENTITY OF PARTY.

An acceptance by one man of an offer, which is plainly meant for another, or which is made to him because of his falsely representing himself to be another, renders the agreement void.

To come within this rule, the offerer must have in mind some definite person with whom he intends to contract. Under the circumstances of the proposition, there is no more real assent than though the offer were never accepted. This is a mistake as to the identity of the party with whom the agreement is made. In the first supposition a party takes advantage of a mistake; and in the second, he creates it. P sends an order for ice to the C ice company. This company has sold out its business to the B ice company, which delivers ice to P, who believes that C is delivering the ice, and takes it in that belief. Is there an agreement? No. A person cannot enter into an agreement with a person whom he does not know to be a party to the agreement. As to whether there is any *quasi* contractual obligation, see chapter on *quasi* contracts.[1] In a communication by mail, one Blenkarn, by his artifices, makes L think he is Blenkiron, and gets an offer on handkerchiefs from L, and accepts it by ordering the goods. Is this an agreement? No. If there is any agreement, it is between L and Blenkiron, but there can be none between them, because Blenkiron knows nothing of the agreement.[2]

§ 5. MISTAKE AS TO IDENTITY OF OBJECT.

When two things have the same name, an offer referring solely to one of the two things and an acceptance referring solely to the other, renders the agreement void.

Under such circumstances there is only the shadow of a common intention; for, because of the mistake as to the identity of the subject, the minds of the parties never really agree. A agrees to sell to B, and B to buy, cotton to arrive from Bom-

[1]Boston Ice Co. *v.* Potter, 123 Mass. 28.
[2]Cundy *v.* Lindsay, 3 App. Cas. 459.

bay by a ship called "Peerless." It seems there are two ships by this name, and B has in mind one to sail in October, while A has in mind one to sail in December. Is this offer accepted? No. There is no real meeting of the minds.[1] A offers to sell to B four lots of land in Waltham on Prospect Street for a certain price, and B accepts the offer, but thinks the offer refers to lots on another Prospect Street in Waltham. Is this agreement void for mistake? Yes. While apparently the parties assent to the same thing, really, one is negotiating for one thing and the other is selling a different thing.[2]

§ 6. MISTAKE AS TO INTENTION KNOWN.

If one party accepts an offer thinking that the offer refers to a certain thing and that such thing is what is offered, and the other party knows this, but intends to offer a different thing, the agreement is void.

The vitiating circumstance here is the fact that the offerer knows that the other party thinks he is offering the certain thing and allows the mistake to continue. One person is not bound to enlighten another with whom he is dealing or prevent him from deceiving himself, but he must do nothing to deceive him. The fraud, coupled with the mistake, renders the agreement not merely voidable but void. A offers to buy of the X railroad a ticket for $21.25, when the fare should be $36.75. A knows this is a mistake, but X does not, and A knows that X does not. Is this agreement void? Yes. Because of the mistake on one side and the fraud on the other.[3]

§ 7. EFFECT OF MISTAKE.

The effect of mistakes such as those above enumerated, being to make the apparent agreement void, neither the parties thereto nor innocent third parties can acquire any rights thereunder.

The apparent agreement being void, there is no contract and, consequently, there is nothing for even an innocent third

[1] Raffles *v.* Wichelhaus, 2 Hurl. & C. 906.
[2] Kyle *v.* Kavanaugh, 103 Mass. 356.
[3] Shelton *v.* Ellis, 70 Ga. 297.

party to base any rights upon, and this is so though the pretended agreement is in the form of a promissory note. The inquiry goes back of the question of negotiability; it challenges the origin and existence of the agreement or proposition itself. Until a thing has an existence it is absurd to talk about negotiating it.

§ 8. MISREPRESENTATION.

As a general rule a non-disclosure or even an innocent misstatement, not a term of the contract, is immaterial.

Representations are of three kinds: Those made innocently, those made fraudulently and those made terms of the contract itself, which are either conditions or warranties. Innocent misrepresentation differs from fraud in that it lacks the element of fraudulent intent, and the test is, does the representation give rise to an action *ex delicto?* A representation made to induce a contract differs from a condition and a warranty in that the latter are promises, the condition being the basis of the contract and the warranty being a subsidiary undertaking. The subject of fraud will be treated next in order, and conditions and warranties will receive treatment under the head of performance. It is the policy of the law to overlook any representations which do not amount to fraud or which are not made terms of the agreement. If men could go into all the discussions and statements made by way of inducement to contract, there would be no end to trials. A certain latitude must be allowed a man who wants to gain a purchaser. *Caveat emptor* is the rule. Accordingly, in order to bring an innocent misrepresentation into the light of the condemnation of the law, it is necessary to show, between the parties, either some relation of superabounding confidence, or that, for other reasons, they are not dealing on terms of equality. The particular consideration of the various elements of misrepresentation will be postponed until considered in fraud, as fraud is misrepresentation with the element of knowledge added. A, by charter party, agrees with B that his ship, then in the port of Amsterdam, shall proceed to Newport and load coal. At the time, the ship is not in the port of Amsterdam and she does

not arrive for four days. Does this fact give B the right to repudiate his contract? If a representation, no; if a condition, yes, as the representation is not fraudulent.[1] A offers to sell to B for $3,000 certain land owned by him, honestly representing that the description in his deed corresponds with certain physical boundaries, which would include a fine residence site. This representation is false. B is living on the land at the time, accepts the offer and pays the purchase price. Is this contract voidable for misrepresentation? No. There is nothing but an innocent misstatement, under circumstances where the parties are dealing on an equality, and *caveat emptor* applies.[2]

§ 9. EQUITABLE RELIEF.

Equity will not enforce specific performance of a contract for one who by innocent misrepresentation induces another to contract.

§ 10. CONTRACTS INVOLVING SUPERABOUNDING CONFIDENCE.

Contracts are uberrimae fidei either because of the nature of their subject-matter, or because of the relations of the parties, or because trust and confidence are especially reposed by one in another; but in either case a misrepresentation either by affirmation or concealment will be sufficient ground for avoidance of the contract.

Contracts *uberrimae fidei,* because of the nature of the subject-matter, are such as contracts of insurance, of suretyship and of guaranty. Those *uberrimae fidei,* because trust and confidence are especially reposed, are most frequently contracts for the purchase of land or stock or chattels. Those *uberrimae fidei,* because of the relations of the parties are such as those between parent and child, guardian and ward, trustee and beneficiary, principal and agent, attorney and client, physician and patient, and spiritual advisers and those advised. An applicant for insurance is asked to state whether there are

[1]Behn *v.* Burness, 3 Best & S. 751; Davison *v.* Von Lingen, 113 U. S. 40.

[2]Brooks *v.* Hamilton, 15 Minn. 26 (Gil. 10).

any buildings within ten rods of the one to be insured, and he answers that there are five. As a matter of fact, there are not only five but also several others. The insurance company issues the policy on the application. Is the contract voidable because of the misrepresentation? Yes. Intentional fraud is not necessary in order to vitiate this contract, as it is one *uberrimae fidei,* because of the nature of the subject-matter.[1] A seller of a piece of land states that it includes about five acres more than the description includes, but in making the statement he is merely misled by the survey and is innocent of intentional wrong. Reasonably relying on this statement, the buyer takes the land and gives his notes for the purchase price. In a suit on the note, is the defendant entitled to a recoupment because of this misrepresentation? Yes. This is a contract *uberrimae fidei,* because of trust and confidence reposed.[2] W takes out insurance with L, the reason for his doing so being his fear that his house will be burned, which fear is aroused by an attempt to set another building on fire, but he does not disclose this fact to L. Can L avoid the policy? Yes. This is a case where every fact affecting the risk must be disclosed.[3] One year after becoming of age, A sells some land to her former guardian. She is told by her guardian that there is $700 of indebtedness against the land and that it is liable to be sold therefor, and he offers to pay her $600, and to pay off this claim, and because of her reliance upon this statement she conveys the land. There is only about the sum of forty dollars due upon the land. Is this deed voidable for misrepresentation? Yes. The relationship between the parties is still such that a misrepresentation will render voidable a contract induced thereby; but in order to avoid the deed, A will have to return what she has received.[4] One N is a tenant in common with S in certain coal lands, but holds the legal title and is, therefore, a trustee for S. After S's death, N procures a conveyance of her interest from S's wife without informing her that there are coal mines being worked on the land, and that the same is becoming valuable, and that she has a clear right to the property and its great value. She is eighty-

[1]Burritt *v.* Saratoga County Mut. Fire Ins. Co., 5 Hill (N. Y.) 188.
[2]Mulvey *v.* King, 39 Ohio St. 491.
[3]Walden *v.* Louisiana Ins. Co., 12 La. 134.
[4]Wickiser *v.* Cook, 85 Ill. 68.

six years old and her mind is somewhat impaired. Is the conveyance voidable for misrepresentation? Yes. The relationship of trustee and beneficiary demands a disclosure of any fact affecting the subject of the contract. The burden of proof is on the trustee to show fairness and equity, and this he has failed to do.[1] A vendee in New York goes to New Orleans to purchase some tobacco, knowing that a treaty of peace, just signed by the United States and Europe, will greatly enhance the price of tobacco, but he does not disclose this fact in any way. Is this contract voidable for non-disclosure? No. As there is no confidential relationship between the parties, the buyer is not bound to disclose extrinsic facts, affecting the value of the commodity.[2] A purchases land of B, knowing at the time that there is a valuable mine on the land, but without disclosing this fact. Is the contract voidable? No. Nondisclosure of an extrinsic fact by the purchaser will not affect even a contract in regard to the sale of land. A vendee is not under the same obligations as the vendor in the matter of making disclosures.[3]

§ 11. EFFECT OF MISREPRESENTATION.

When it has any effect on a contract, an innocent misrepresentation makes it voidable.

As the effect on a contract of an innocent misrepresentation, when it has any, is to make the contract voidable, the injured party may disaffirm the contract except as against innocent third parties, within a reasonable time after discovering the falsity of the representation, by returning what he has received, or he may ratify it by positive acts or acquiescence for an unreasonable length of time. If a contract is voidable for innocent misrepresentation, the after consequences are the same as in the case of a contract voidable for fraud. W accepts from I a deed to lots, in settlement of a debt, on I's representations that the lots are of particular situations and values. The lots are not worth one-fifth of the value they are represented

[1]Spencer & Newbold's Appeal, 80 Pa. 317.
[2]Laidlaw *v.* Organ, 15 U. S. (2 Wheat.) 178.
[3]Harris *v.* Tyson, 24 Pa. 347.

to be, though I does not knowingly deceive W. On what conditions can W disaffirm? Upon acting without unreasonable delay and reconveying the lots.[1]

§ 12. FRAUD.

A false statement or an active concealment of a material fact made with knowledge of its falsity to induce another to enter into a contract, if the other reasonably relies and acts upon it to his injury, renders the contract voidable by the one defrauded.

At the early common law, the rule was quite absolute that in order to have any effect on a contract a misrepresentation had to be made with knowledge of its falsity, unless a term of the contract. Equity, however, established a more liberal doctrine, generally refusing specific performance or granting affirmative relief when there was a material misrepresentation, though made without knowledge of its falsity. But, in the changes of the law through the centuries, the common law doctrine and the equitable doctrine have gradually approached each other, until at last they have practically merged into an indistinguishable whole. The doctrine of knowledge has been extended by the rules of the *scienter* so as to include misrepresentations made recklessly, misrepresentations in regard to something peculiarly within one's own knowledge and active concealment; and the contracts *uberrimae fidei* have been extended so as to include cases where trust and confidence are expressly reposed, until every case of voidability for misrepresentation is included under one as much as the other. Hence, in classifying the statements which will render a contract voidable, it is immaterial whether they be called misrepresentations or frauds. If they are all classed as misrepresentations they will include those made *uberrimae fidei* and those not; if classed as frauds, they will be divided into actual and constructive. It is no longer necessary nor perhaps expedient to distinguish between innocent misrepresentation and fraud so far as the law of contracts is concerned. If the false statement is suffi-

[1]Wilcox *v.* Iowa Wesleyan University, 32 Iowa, 367.

cient to avoid the contract, it makes no difference whether it is called innocent misrepresentation or fraud. But, from the viewpoint of torts, it is still necessary to preserve the essential of making a false statement knowingly. Fraud is a misrepresentation made with knowledge of its falsity and an active attempt to deceive. Nondisclosure may amount to misrepresentation and be a ground for the avoidance of a contract involving superabounding confidence, but it will not constitute anything more than constructive fraud, unless it is industrious.

§ 13. REPRESENTATION.

In order to amount to a representation, the statement or nondisclosure must relate to a past event or an existing fact, or must be an affirmation of a matter in the future as a fact.

Statements of opinion, expectations, predictions, motives, or of law, do not amount to representations in this sense, but a representation may be made by artful devices and contrivances whereby defects are concealed, just as well as by positive misstatements. A is negotiating for the purchase of land from B and they go upon the land to look it over. While there B expresses the opinion that the land will produce a certain quantity of hay and that there is a certain quantity of wood upon it, and that he thinks there are a certain number of acres in the tract, and that some buildings on an adjoining lot can be bought cheaply. Do these statements amount to representations in the legal sense? No. They are mere expressions of opinions and not positive assertions, and, in addition to this, A has equal opportunity with B to ascertain the facts.[1] Certain creditors who are about to bring a creditors' bill against other parties apply to a sheriff to know whether a certain writ has been returned in due form of law and the sheriff informs them that it has been returned in due form of law, when, as a matter of fact, it is not according to the requirements of law. Is this a misrepresentation? No. It is a statement in regard to a point of law, an affirmation concerning an instrument, com-

[1]Mooney *v.* Miller, 102 Mass. 217.

pletely within the reach of the questioners.[1] A, in offering a horse for sale to B, by artful devices, hitches the animal in such a way as not to disclose that it is a cribber, and, when asked why he so hitches it, gives an evasive answer. B, relying upon the soundness of the horse, buys the animal. Is the contract voidable for fraud? Yes. This is an active concealment which is equivalent to a false statement. Artful devices by which one conceals a material fact and prevents the other from discovering it constitute fraud.[2]

§ 14. FALSITY.

A representation is false if it creates an impression that is false.

Half the truth may be a lie.

§ 15. MATERIAL FACT.

A representation is in regard to a material fact if it tends to induce the party to whom it is made to enter into the contract.

A states that he has purchased a quantity of rails at a certain price, and that he will sell them to B at the same price, if B will make a contract with C to build a certain railway. B makes said contract with C. A has not purchased the rails and B is obliged to buy them at a higher price from other parties. Is this a statement in regard to a material fact? No. It is only a statement in regard to a collateral matter, and does not constitute an essential element of the contract. It is not even a representation, but a promissory statement in regard to something in the future, and if there is any action it is for breach of contract.[3]

[1] Starr *v.* Bennett, 5 Hill (N. Y.) 303.
[2] Croyle *v.* Moses, 90 Pa. 250.
[3] Dawe *v.* Morris, 149 Mass. 188, 21 N. E. 313.

§ 16. KNOWLEDGE OF FALSITY.

A person is considered to know of the falsity of a representation, if he knows it is false, or makes it of his own knowledge, not knowing whether it is true or false, or if it is regarding something peculiarly within his own knowledge.

These are called the rules of the *scienter,* and from the standpoint of torts it is important to know them, for a person can only be held liable for deceit when he has knowledge of the falsity of his statement; but, from the standpoint of contracts, it is immaterial whether these statements are said to be made with knowledge or simply are called misrepresentations under these particular circumstances. In a sale of land by A to B, A represents to B that the land is good prairie land, high and rolling, and contains 160 acres, with walnut and pecan trees and other valuable timber thereon. These representations are false, but A makes them without actually knowing of their falsity and because the same statements have been made to him by a former owner who has seen it. Are these misrepresentations made with knowledge of their falsity? No. In an action for deceit A should not be held liable; but perhaps he has made misrepresentations, when trust and confidence are placed in him, so that the contract is voidable.[1] D agrees to hire S, as teacher, if she succeeds in getting a certificate in a certain examination to be given at an institute then in session. B, assuming to know, assures D that there is to be no examination and applies for the job, and it is given him because of his representation. This is false and D breaks the contract with B. Can B recover damages? No. The contract is voidable because B made a misrepresentation of fact as of his own knowledge.[2]

§ 17. INTENT TO DECEIVE.

A representation is made with the intent that it shall be

[1]Merwin *v.* Arbuckle, 81 Ill. 501.

[2]School Directors of Union Dist. No. 2 *v.* Boomhour, 83 Ill. 17.

acted upon when it is made to be communicated to the injured person, though not made directly to him.

A states to Dun & Bradstreet's Commercial Agencies that he is proprietor of a business carried on under the name of "New York Pie Company." B questions Dun and Bradstreet, and, relying on this statement of A, sells goods to the New York Pie Company. Is A estopped from denying liability? Yes. When he makes the representation to the agency, he must intend that it shall be communicated to their patrons and acted on by them.[1] In order to be allowed to do business in Massachusetts, a corporation files a certificate with the Commissioner of Corporations. This contains a false statement as to its capital stock. A is induced thereby to take notes of the corporation. Is the corporation liable to A for the fraudulent statement? No. It is intended only for the state officials and not for the public or any class of which A may be a member.[2]

§ 18. DECEPTION.

The representation is reasonably relied and acted on, though not the sole inducement to the making of the contract, provided it is a material inducement. Where it is a material inducement the party to whom it is made is not required to make further investigation.

Deceit which does not affect conduct cannot affect contract. A buys some mining stock of B, the latter making certain representations in regard to the same, but A admits that he considered what B said was wind, and that he saw other men to see whether they would corroborate B's statements. Are these representations reasonably relied and acted upon? No. A makes his purchase upon his own information and not upon that given him by B.[3] In the sale of carpets J represents that the amount is 900 yards, when it is only 595, and L, in buying, relies upon this representation without measuring the car-

[1] Stevens *v.* Ludlum, 46 Minn. 160, 48 N. W. 771.
[2] Hunnewell *v.* Duxbury, 154 Mass. 286, 28 N. E. 267.
[3] Humphrey *v.* Merriam, 32 Minn. 197, 20 N. W. 138.

pets for himself. Is this reasonable reliance? Yes. But, if it had been a sale of land where the boundaries were pointed out, he would have had no right to rely on the statement as to quantity.[1]

§ 19. INJURY.

Injury means the violation of a legal right, actual damage not being essential.

§ 20. EFFECT OF FRAUD.

Fraud renders a contract voidable at the option of the party misled. Therefore, he may repudiate it or affirm it within a reasonable time after learning of the fraud, except as against innocent third parties; but in order to do so he must place the other parties in statu quo.

R is induced by the B railroad to enter into a contract in which, for the privileges of membership in a relief and hospital association without further charge, he gives up any claim for damages against the railroad company for injuries sustained. R is injured by the negligence of the railroad and receives medicine and attendance from the hospital and relief association. Can he recover damages from the railway? No. He cannot retain the fruits received under the contract, ratifying the same to this extent, and at the same time repudiate his own obligations thereunder.[2]

§ 21. DURESS OF IMPRISONMENT.

Physical restraint either in or out of prison, or with or without legal process, renders a contract voidable at the election of the person thereby coerced to make the same.

This is duress of imprisonment and the vitiating circumstance therein is the fact that freedom of assent is destroyed

[1] Lewis *v.* Jewel, 151 Mass. 345, 24 N. E. 52.
[2] Petty *v.* Brunswick & W. R. Co., 109 Ga. 666, 35 S. E. 82.

by the physical restraint. A accuses B of stealing some of his cattle, telling him he has a warrant for his arrest and keeps guard over him so as to keep him under his control until B, in order to be released from this restraint, enters into a contract. Is this contract voidable? Yes. Because of the duress of imprisonment.[1] A, who is detected defrauding B, is taken to prison, and his imprisonment is prolonged in order to get him to give a note in settlement of what he cheated B out of. This note is finally executed. Is it voidable for duress? Yes. The assent to the contract is not free.[2] A has B arrested and lodged in jail under a void process, and, in order to get his release, B signs a contract not to sue A for damages. Is this contract voidable for duress? Yes.[3] A, in order to get settled a disputed claim between him and B, has B arrested without probable cause, and in order to get out from under arrest, B assents to a contract releasing a part of a just claim. Is this release voidable for duress? Yes.[4]

§ 22. DURESS PER MINAS.

Threats of imprisonment with or without warrant issued, or threats of bodily harm to a person himself or a near blood relative, or threats of criminal prosecution, render a contract voidable at the election of the person thereby coerced to make the same.

This is duress *per minas,* and freedom of assent is precluded by the fear generated, so that the assent is not really his own but that of others. At the common law, fear of imprisonment or fear of loss of life or fear of loss of limb or fear of mayhem was essential, but in modern law a fear of battery is included as well as a fear of criminal prosecution. At the common law, also, the threats were required to be such as to overcome a mind of ordinary firmness; but, generally, in modern law the criterion is whether the threats overcome the mind

[1]Foshay *v.* Ferguson, 5 Hill (N. Y.) 154.
[2]Schommer *v.* Farwell, 56 Ill. 542.
[3]Guilleaume *v.* Rowe, 94 N. Y. 268.
[4]Watkins *v.* Baird, 6 Mass. 506.

of the particular person, taking into consideration the quality of his mind and all the circumstances. The threat of imprisonment does not need to be of unlawful imprisonment; it is enough if the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract. By threats to take B's life, P induces B to execute a deed conveying to him the title to land owned by B. Is this deed voidable for duress? Yes. A contract procured through fear of loss of life, produced by the threats of the other party, lacks an essential element of consent and may be avoided for duress.[1] L is arrested and brought before a justice of the peace, who, thinking that he cannot lawfully take a bond for L's appearance at court, notifies him that unless he executes another bond for the maintenance of an alleged illegitimate child he will be sent to prison. Is the second bond voidable for duress? Yes. A bond executed through fear of unlawful imprisonment may be avoided.[2] M tells Mrs. B that her husband has committed a state's prison offense and unless she will sign a mortgage he will send her husband to state's prison, and, from fear of this threat, she signs the mortgage but does not sign the note. The note signed by the husband and the mortgage signed by the husband and wife are assigned to an innocent third party. Is the mortgage voidable for duress? Yes. A threat to imprison the husband is sufficient to amount to duress on the wife. The innocent third party is not protected, because the wife did not sign the note and the mortgage is only a chattel.[3] H signs a note because of a threat against G, but no threat is made to H. Is the contract voidable as to H? No. His assent is free.[4] C signs a note and mortgage because of a threat that unless he does so his son will be sent to state's prison for the crime of forgery. Is this contract voidable? Yes. The assent procured by a threat to put a child or a member of the family in prison is not free but given under duress.[5]

[1]Brown *v.* Pierce, 74 U. S. (7 Wall.) 205.
[2]Inhabitants of Whitefield *v.* Longfellow, 13 Me. 146.
[3]First Nat. Bank *v.* Bryan, 62 Iowa, 42, 17 N. W. 165.
[4]Robinson *v.* Gould, 65 Mass. (11 Cush.) 55.
[5]Harris *v.* Carmody, 131 Mass. 51.

§ 23. DURESS OF GOODS.

A threat to detain or destroy property when no ready or adequate remedy lies open in case the property is destroyed, renders a contract voidable at the election of the person thereby coerced to make the same.

This is called duress of goods and is a further extension of the common-law doctrine of duress *per minas*. A is a dealer in oysters and is owing a debt of $1,000 to B, and, in order to injure A, B claims that A owes him $3,000 and has assigned his property to defraud his creditors, and B levies a writ upon $5,000 worth of A's oysters. In order to prevent the oysters from spoiling, A pays the extra $2,000 and executes a release to B for all damages caused by such attachment. Is this release voidable for duress? Yes.[1]

§ 24. EFFECT OF DURESS.

Duress in execution (compulsion) makes the agreement void, but duress in inducement makes the contract voidable only. In the latter case the one coerced may avoid the contract within a reasonable time, by placing the other party in statu quo, or he may ratify it. Innocent third parties are protected in the case of conveyances of land and commercial paper.

The reason why the agreement is void where there is duress in execution is because there is no assent whatever. It is the same thing as though the party practicing the duress should forge the other person's signature in his absence. As in the case of fraud, third parties are protected in the case of commercial paper because of the doctrine of negotiability, and in the case of conveyances of land because of the sanctity given to the registry system, but they are not protected in the case of ordinary contracts, because the person upon whom the duress is practiced is not at fault to the same extent as the person upon whom fraud is practiced. In order to compel D to execute to him a deed to large quantities of land S imprisons

[1]Spaids *v.* Barrett, 57 Ill. 289.

him, chains him to the floor, manacles him, hangs him, whips him with a rawhide and threatens him with death unless he will execute the deed, and in order to save his life D signs the deed. S records this instrument and then sells the land to W, an innocent third party. Can D avoid the deed for duress? No. The deed is only voidable and cannot be avoided after the rights of innocent third parties have intervened.[1] A, by imprisonment of P, gets him to sign a promissory note for $2,500. This A sells to C, an innocent third party. Is the note voidable for duress as to C? No. He is an innocent third party. The contract is only voidable and, of two innocent parties, the one should suffer who makes the loss possible by allowing the note to get into circulation with his name attached.[2]

§ 25. UNDUE INFLUENCE.

If a person is constrained to enter into a contract by an influence in the nature of compulsion which destroys his free agency and determines his will to the advantage of another, the influence is undue and the contract is voidable at the election of the one upon whom it is practiced.

Fair argument and persuasion, solicitation and importunity, suggestion and advice, appeal to the emotions and the affections, while they are all forms of influence, have no effect on the validity of a contract. In order to avoid a contract, the influence must be undue. In order to be undue, the influence must overcome the will of another. This is accomplished by unconscientious use of power arising out of those circumstances and conditions which raise a presumption of fraud. Weakness of mind, though it may not be such as to make a person incapable of entering into a contract, or taking advantage of one's necessitous condition, or a misstatement that does not amount to fraud, or a nondisclosure, or circumstances of oppression not amounting to duress, or inadequacy of consideration which, in itself, does not affect a contract,

[1] Deputy *v.* Stapleford, 19 Cal. 302.
[2] Clark *v.* Pease, 41 N. H. 414.

any one of these may be an important element in establishing undue influence. If a person is of full capacity, within reach of good advice, and in no such immedate want as to put him at the mercy of unscrupulous speculators, undue influence will not be presumed, and it will have to be proven, but there are conditions where the presumption of undue influence arises.

§ 26. WITH CONFIDENTIAL RELATIONSHIP.

Where there is a confidential relation existing between the parties, there is a presumption of undue influence, and this continues after the actual termination of the relation until there is a complete emancipation. Among such relationships are those of parent and child, husband and wife, guardian and ward, attorney and client, trustee and beneficiary, physician and patient, spiritual advisers and those advised.

A, a resident of St. Paul, who has a large amount of property, has two daughters, B and C, residing in California. B returns to St. Paul and lives with A until his death. Up to the time of B's return, A has thought as much of one daughter as of the other, but soon thereafter he is affected with a strong prejudice against C. B secures A's entire confidence and prevails upon him to deed his entire property to her child, without any consideration. A is a man addicted to drink, old and somewhat infirm. Are these deeds voidable for undue influence? Yes. All of these facts taken together raise a strong presumption of undue influence, and it has not been overcome. Facts, even though circumstantial, which show that one person overpowers and subjects the will of another to his own will, make a case of undue influence.[1] E gives a deed of her land to her father. After her death, her heirs claim that this deed is voidable for undue influence because of the relationship between the parties, but show nothing else to establish undue influence. Is the deed voidable? No. The relationship of parent and child alone is not sufficient to avoid the deed. If undue influence is relied upon it must be proven.[2] A is guardian of B, but his guardianship terminates in 1871. In 1872, he

[1]Graham *v.* Burch, 44 Minn. 33, 46 N. W. 148.
[2]Jenkins *v.* Pye, 37 U. S. (12 Pet.) 241.

procures a deed from his former ward without disclosing the real value of the land conveyed. Does the presumption of undue influence arise in this transaction? Yes. The relationship is still such that the former guardian must take no undue advantage.[1]

§ 27. WITHOUT CONFIDENTIAL RELATIONSHIP.

Where there is no confidential relationship between the parties, the presumption is that undue influence has not been used and the burden of proof is on the one asserting the contrary.

A, being pressed for money, appeals to B for a loan to pay some $2,600 of indebtedness. B agrees to make a loan of $10,000 upon condition that A will buy of him a tract of land on which he places an exorbitant price. A assents to these terms. Is the contract of purchase voidable? Yes. There is no confidential relationship here, but A has proven that undue influence is actually the cause of his entering into this contract by showing that B has taken an unconscionable advantage of his financial embarrassment.[2]

§ 28. PRESUMPTIONS AS TO UNDUE INFLUENCE.

Questions of undue influence are rarely settled by presumption alone. Undue influence must be found as a fact, but the more circumstances of confidence, weakness of mind, inadequacy of consideration, misstatement, nondisclosure and oppression that can be shown to exist, the stronger grows the presumption, until at length it becomes well nigh incontrovertible.

A is an old woman, seventy-two years of age, feeble in health, illiterate and excitable. P is, and has been for a long period her trusted friend and adviser and has had charge of her

[1]Wickiser *v.* Cook, 85 Ill. 68.

[2]Hough's Adm'rs *v.* Hunt, 2 Ohio, 495.

property. A is threatened with a suit of slander and, fearing she may lose her property, applies to P for advice. As a result of her conference, A, without valuable consideration, deeds her property to P's minor son, P going with A to the lawyer who draws up the papers. Is this deed voidable? Yes. Here there is a confidential relationship, weakness of mind, and inadequacy of consideration, and possibly nondisclosure of the legal effect of the deed, all of which are enough to establish such a presumption of undue influence without any express showing that only the strongest evidence of good faith will overcome it.[1] A, a boy, who has been working for his grandfather, B, during his minority, is entitled to $500 as wages, and is persuaded by B's executor, who is A's uncle, to accept forty acres of rocks worth not more than $200 in settlement. The boy is simple and uneducated. The uncle has been a justice of the peace for years. Is this settlement voidable? Yes. The fact of confidential relationship, due to both blood and business relations, the difference in their mental ability, and the inadequacy of consideration taken together, made out a case of undue influence.[2]

§ 29. EFFECT OF UNDUE INFLUENCE.

Undue influence renders the contract voidable at the election of the party unduly influenced. He may either ratify it or, except as to innocent third parties, disaffirm it, within a reasonable time after the dominating influence ceases to affect him; but, to avoid his contract, he must return what he has received.

P, an old, eccentric and illiterate woman conveys her land to C, her spiritual adviser in the Roman Catholic Church, for $1,000, when he is her sole adviser about the transaction, and when she does not understand the legal effect of her act, and he does not apprise her of it. In order to avoid the conveyance, must P return the $1,000? Yes.[3]

[1]Ryan *v.* Price, 106 Ala. 584, 17 So. 734.
[2]Hall *v.* Perkins, 3 Wend. (N. Y.) 626.
[3]Corrigan *v.* Pironi, 48 N. J. Eq. 607, 23 Atl. 355.

CHAPTER XIV.

PARTIES TO CONTRACTS.

§ 1. PARTIES.

An agreement implies at least two parties. In order that it may be enforcible at law, the parties must be definite and ascertained, must be competent to contract and must join in the agreement.

Parties are either natural (human beings) or artificial (corporations). Natural persons have the general power of making all agreements; and artificial persons have the special power of making such agreements as are allowed by their charters; but there are several ways in which natural persons may become incapable, in whole or in part, of making agreements that are obligatory. Privity of contract is another essential and, except as extended by the doctrines of agency and assignment, no one can either make himself, or be made, a party to a contract, unless he joins in the agreement. However, it should be noted that in many transactions where no contractual obligation exists because of lack of capacity or lack of privity, *quasi* contractual obligations may exist, and recovery may be permitted on this other ground. These questions have been considered in the chapter on *quasi* contracts.

§ 2. CERTAINTY OF PARTIES.

The parties must be definite and ascertained.

It is the essence of obligation that it be imposed on definite parties. A man cannot be bound by a floating obligation to an unascertained person any more than he can be under obligation to himself. He cannot be under obligation to the entire community nor can the whole community be under obligation

to him. Obligations correspond to rights *in personam,* not to rights *in rem.* An administrator is indebted to his estate and, for the purpose of securing the debt, executes a note and mortgage, payable to himself as administrator. Are these valid? No. There must be the concurrence of two minds. A person cannot by his promise confer a right against himself. The estate in this case is not a second party, because the administrator is the only one who has assented. The estate and representative are not ascertained.[1]

§ 3. COMPETENCY OF SOVEREIGN STATES.

A sovereign state may enter into an agreement which it can enforce, but no one can enforce an agreement against such a state without its consent, either general or given in the particular case; this consent has been generally given by states to their citizens.

Under this proposition foreign sovereigns and their representatives are held not to be subject to the jurisdiction of courts in this country unless they submit to it. They can sue to enforce agreements but cannot be sued unless they so choose. A remedy against the United States has been given by the establishment of a court of claims.[2]

§ 4. COMPETENCY OF CORPORATIONS.

A corporation can make agreements that are enforcible only when expressly or impliedly authorized by the charter of its incorporation, it having implied authority to make such contracts as are reasonably necessary to the exercise of a power expressly conferred or to carry out the legitimate purposes and advance the objects of its creation. Within the scope of its powers, unless restricted, it may contract as a natural person.

A corporation is a legal entity, created by law, and consequently possesses only those powers conferred upon it by the act of its incorporation. An act outside the scope of its

[1] Gorham's Adm'r *v.* Meacham's Adm'r, 63 Vt. 231, 22 Atl. 572.
[2] Hans *v.* Louisiana, 134 U. S. 1.

powers is called *ultra vires,* but if a corporation or one dealing with a corporation receives a benefit under an agreement that is simply *ultra vires* but not against public policy or actually prohibited, though the agreement may not be enforcible, the value of the benefits may be recovered, as was learned in the consideration of *quasi* contracts.[1]

§ 5. INFANTS.

An infant is a person under the age of twenty-one years except where the age of majority for women has been changed by statute to eighteen.

An infant attains his majority the earliest moment of the day preceding the twenty-first, or eighteenth, anniversary of birth (according to the age of majority).

This period of immaturity is fixed arbitrarily by law so far as any one person is concerned, though it is the period which seems generally to correspond with the facts. The reason for the rule as to the time when an infant attains his majority is just as technical, and is that the law disregards fractions of a day. The right to determine the period of minority is a legislative right, and, therefore, the legislature can change the time, so that when the legislature makes an infant's marriage or enlistment above a certain age valid it really makes him of age for those purposes, after the time set. A, a boy, is born on the first day of January, 1879. When will he become of age? He will become of age the 31st day of December, 1900.[2]

§ 6. INFANTS' AGREEMENTS.

An infant's marriage and his agreements made under authority of statute or to discharge other legal obligations resting on him are valid. In some jurisdictions,

[1]Bank of Augusta *v.* Earle, 38 U. S. (13 Pet.) 519; Louisiana *v.* Wood, 102 U. S. 294; Davis *v.* Old Colony R. Co., 131 Mass. 258.

[2]Bardwell *v.* Purrington, 107 Mass. 425; *In re* Morrissey, 137 U. S. 157.

his power of attorney and, in all, his agreements made while under guardianship, are void. All other contracts of an infant are voidable by him but binding on the other party.

The disability and exemptions imposed on and granted to an infant are for his benefit and for the reason that the law recognizes the actual condition of man. Up to a certain age a person is incapable of acting with discretion and that he may not prejudice himself or suffer imposition it protects him by allowing him to avoid his contract, in spite of the fact that all other essentials to enforcibility may be present, and this is so even though he falsely represents himself to be of age. His marriage contract, above the age of consent, is held valid on grounds of public policy, for marriage is not only a contract, it is also a status. An infant's obligation to pay for necessaries is sometimes called a valid contract, but it is rather a *quasi* contractual obligation. The doctrine which imposes the *quasi* contractual obligation for necessaries is not in conflict with the general policy of the law to protect the infant, but rather for the same purpose. Most courts hold that an infant's power of attorney is void, so that it binds neither the infant nor the adult, but a few courts claim that there is no distinction between this agreement and any other, and that an infant ought to be able to do through an adult of capacity as much as he can do through his own incapacity. A, a female, between fifteen and sixteen, without the consent of her parents, marries B, an adult. Is the marriage valid? Yes. At the common law, infants may contract valid marriages, males at the age of fourteen and females at the age of twelve, though this age has generally been raised by statute to eighteen for males and fifteen for females.[1] W, an infant, signs an instrument making his father, R, his agent, for the purpose of making the agreement, and the father agrees in writing under seal to sell N after W becomes of age, a certain tract of land. Can W ratify this agreement after becoming of age? No. There is no agreement to ratify as the appointment of the agent is void.[2] B, while an infant, executes to W a deed of trust to certain land. The debt secured, not being paid, W deeds the

[1]Bennett *v.* Smith, 21 Barb. (N. Y.) 439.

[2]Trueblood *v.* Trueblood, 8 Ind. 195.

land to F. After becoming of age, B deeds the same land to M. Is M entitled to hold the land? Yes. B's deed to W is voidable.[1]

§ 7. DISAFFIRMANCE BY INFANTS.

Unless previously ratified by him, an infant may disaffirm all of his voidable contracts; if executory so far as he is concerned, at any time either before or after his majority; if executed so far as he is concerned, those relating to personalty at any time during his minority or within a reasonable time after reaching his majority; and those relating to realty, within a reasonable time after reaching his majority.

An infant may disaffirm his voidable contracts by any word or act clearly evincing to the other party that he renounces the same.

If an infant is sued on a voidable contract, he can always interpose his infancy as a defense. Personal property is perishable, and for his protection it is necessary to allow him to disaffirm his contracts in regard thereto, even though yet a minor. A contract executed by an infant is ratified by nonaction unless disaffirmed before the expiration of a reasonable length of time after majority. What this time is depends on the circumstances of each case. B, a minor, executes a conveyance of realty to W. Can he bring an action of ejectment and thus disaffirm his conveyance before reaching majority? No. An infant's conveyance of realty cannot be disaffirmed by him until after reaching majority. Had the minor, in this case, only promised to execute the conveyance, he could have set up his infancy as a defense to a suit for specific performance by the other party.[2] A, a minor, sells B, a minor, certain goods. Thereafter, but before reaching majority, A gives a bill of sale of the same goods to C. Is C entitled to the goods as against B? Yes. This act evincing his intention to renounce the first sale disaffirms his contract and, if the minor ratifies the bill of sale after becoming of age, C has a perfect title.[3]

[1] Tucker's Lessee *v.* Moreland, 35 U. S. (10 Pet.) 58.

[2] Welch *v.* Bunce, 83 Ind. 382.

[3] Chapin *v.* Shafer, 49 N. Y. 407; Shipman *v.* Horton, 17 Conn. 481.

§ 8. RETURN OF BENEFITS BY INFANTS.

It is not necessary for the infant to return or offer to return what he has received under a contract as a condition precedent to its disaffirmance; but, if he avoids his contract, he will be required to make restitution of that which remains in specie at the time of disaffirmance.

The question of the return of consideration does not arise where the contract is executory on both sides, or even so far as the adult is concerned, but only when executed by the adult. Some courts hold that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits received are such that he cannot return them, and the contract is fair and reasonable and free from any fraud or overreaching, he cannot disaffirm it. In any case, where an infant asks for equitable relief, if he would have equity, he must do equity, which may include returning the consideration. M, a minor, borrows of S seventy dollars by giving a mortgage on a pony and a yoke of oxen. On default, S takes the pony and oxen, sells them at auction, and bids them in himself. After becoming of age, M gives notice of his disaffirmance, and on S's refusal to surrender the stock, M sues him for conversion, without offering to return the money borrowed. Can he maintain his action? Yes. If an infant were not allowed to prevail, his contracts would have to be held valid.[1]

§ 9. RATIFICATION BY INFANTS.

No voidable contracts of an infant may be ratified before majority, but unless previously disaffirmed all may be ratified after majority, executory, either by express ratification or by any act or declaration by him to the other party, recognizing his former contract as binding; executed, by mere acquiescence for an unreasonable length of time.

[1]Miller *v.* Smith, 26 Minn. 248, 2 N. W. 942. But see MacGreal *v.* Taylor, 167 U. S. 688, and Johnson *v.* Northwestern Mut. Life Ins. Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992.

It requires the same capacity to make a voidable contract valid as to make a valid contract in the first instance. Contracts executed by the infant are ratified by nonaction unless disaffirmed within a reasonable length of time after majority, but contracts executory as to him may be disaffirmed at any time before ratification. They cannot be enforced without a ratification. R, a minor, gives a note for $600 to H, an adult, for a deed to certain land and, after becoming of age, sells a portion of the land covered by the deed to another party. Is this contract ratified? Yes. The sale of the land is an act which recognizes his former promise as binding. After ratification it is no longer possible for the former infant to disaffirm his contract.[1] A, a minor, conveys land to B and, after arriving at majority waits seventeen years without excuse before attempting to disaffirm. Is the contract ratified? Yes. Silence and nonaction for an unreasonable length of time will amount to ratification of a contract executed as to the infant.[2] A, an infant, executes a promissory note to B. After reaching majority he tells a stranger that he ratifies the note. Is this a sufficient ratification? No. The ratification must be made to a party in interest and not to a stranger.[3]

§ 10. SPECIFIC PERFORMANCE BY INFANTS.

The remedy of specific performance is not allowed, either at the suit of an infant or against an infant, during his infancy.

As no obligation can be forced on him without his consent, if the contract is still executory as to him, the infant can always refuse to go on further with it; but the converse of this statement is also true and, if his contract is executory, the infant cannot during infancy compel specific performance of it. If he should be allowed to carry out his contract it would either have to be declared valid or he would still have the right to disaffirm it after becoming of age, and thus make of no effect

[1]Henry *v.* Root, 33 N. Y. 526.
[2]Coursolle *v.* Weyerhauser, 69 Minn. 328, 72 N. W. 697.
[3]Goodsell *v.* Myers, 3 Wend. (N. Y.) 479.

the decree of the court, rather than permit which a court of equity asks him to wait until his act will be valid.[1]

§ 11. Effect of Ratification.

Disaffirmance annuls the contract on both sides ab initio, and thereafter the rights of the parties are just what they were before the contract; the contract cannot subsequently be ratified, and innocent third parties are not protected.

Ratification makes the contract valid and constitutes a waiver of the right to avoid.

As the contract is completely annulled, and the parties stand as though no contract had been made, the infant or former infant can sue to recover the value of any services rendered or goods delivered under the contract, but these are other examples of *quasi* contracts. Third persons, even *bona-fide* purchasers of commercial paper, are bound to know whether or not the makers have capacity to contract.[2]

§ 12. Ratification: Personal Privilege.

The right to elect, whether to ratify or disaffirm his voidable contracts, is the personal privilege of the infant or, in case of his death, of his personal representative.

§ 13. Persons Non Compos Mentis.

A person is said to be of unsound mind (non compos mentis) when his mental faculties are in such condition that he is unable to understand the nature and effect of a contemplated act.

Temporary or recurrent derangement makes one non compos mentis only while not in the possession of his facul-

[1]Flight *v.* Bolland, 4 Russ. 298; Richards *v.* Green, 23 N. J. Eq. (8 C. E. Green) 536.

[2]Downing *v.* Stone, 47 Mo. App. 144.

ties; and partial derangement makes one non compos mentis only on the subject of the derangement.

Mere weakness of mind, or deafness, or drunkenness, or blindness, or senility, does not in itself make one *non compos mentis,* but unsoundness of mind may result from drunkenness, imbecility, or lunacy. An imbecile is one who from birth is without reason. A lunatic is one who has possessed reason, but who has lost it in whole or in part.[1]

§ 14. AGREEMENTS AND CONTRACTS OF PERSONS NON COMPOS MENTIS.

A marriage and a power of attorney of a person non compos mentis are void.

After he has been adjudged incompetent, all the attempted contracts of a person non compos mentis are void.

The contracts of a person non compos mentis are valid if fair and beneficial to him and so far executed that the parties cannot be placed in statu quo, and the person non compos mentis is not under a conservator, is apparently of sound mind, and the other party does not know of his infirmity.

Contracts made by a person non compos mentis during a lucid interval, or by a monomaniac on a subject not affected by his mania, are valid.

All other contracts of a person non compos mentis are voidable as to him but binding on the other party.

In determining contractual capacity, the law does not measure the different degrees of mental capacity that men acquire from breeding, education and pursuits, nor does it recognize as incompetency, ignorance, improvidence, visionariness, partial derangement, or mere drunkenness, in itself. It requires a deficiency of mind such as to make one, at the time of the contract, incapable of understanding the nature and effect of the transaction. Like infants, persons *non compos mentis* may incur *quasi* contractual obligations. O, an insane person, executes and delivers a conveyance of land before any finding of

[1]Stone *v.* Wilbern, 83 Ill. 105.

lunacy and receives the purchase money. The purchaser has no knowledge of the lunacy and the contract is fair and reasonable, but O does not offer to return the purchase price. Can he disaffirm? No.[1] A and B exchange lands, and B agrees to pay A $1,000, in addition to his land, for that of A. If B is, at the time so intoxicated that he does not understand the nature of the act, can he avoid the contract? Yes. It makes no difference whether the intoxication is procured by A or is voluntary, so far as civil matters are concerned.[2]

§ 15. DISAFFIRMANCE BY NON COMPOS MENTIS.

The person non compos mentis may disaffirm or ratify his voidable contract, within a reasonable time after being restored to soundness of mind, by any word or act which clearly evinces to the other party either that he recognizes his former contract as binding or that he renounces it (as the case may be).

A, an insane person, deeds land to I. Subsequently, during a lucid interval, A accepts part of the purchase price for the land. Is this a ratification? Yes.[3]

§ 16. RETURN OF BENEFITS BY NON COMPOS MENTIS.

In order to rescind his voidable contract, if the other party is ignorant of his incapacity, the person non compos mentis must place him in statu quo.

A, while insane, sells certain land for a sum of money paid him. The sane party acts in good faith. Can A disaffirm his deed without offering to return what he received therefor? No.[4]

[1]Gribben *v.* Maxwell, 34 Kan. 8, 7 Pac. 584; Molton *v.* Camroux, 4 Exch. 17; Lancaster County Nat. Bank *v.* Moore, 78 Pa. 407.

[2]Barrett *v.* Buxton, 2 Aiken (Vt.) 167.

[3]Arnold *v.* Richmond Iron Works, 67 Mass. (1 Gray) 434.

[4]Boyer *v.* Berryman, 123 Ind. 451, 24 N. E. 249; Joest *v.* Williams, 42 Ind. 565.

§ 17. EFFECT OF DISAFFIRMANCE.

The effect of disaffirmance is to leave the parties as though no contract had ever been made. The contract cannot thereafter be ratified, and innocent third parties are not protected except as against drunkards.

Innocent third parties are protected against drunkards on contracts made while intoxicated, because the case is analogous to fraud.[1]

§ 18. DISAFFIRMANCE AND RATIFICATION: PERSONAL PRIVILEGE.

The right to avoid or ratify his voidable contract is the personal privilege of the person non compos mentis or of his subsequently appointed guardian, or of his heirs and personal representatives, after his death.

§ 19. COMPETENCY OF MARRIED WOMEN.

At the present time, a married woman, generally, has full contractual capacity; but, at the common law, she was absolutely incapacitated except when her husband was civilly dead or had wholly abandoned her, renouncing the marriage relation, or was a non-resident alien.

At the common law, on marriage, the husband and wife legally became one person, and that one the husband. Therefore, as it takes two people to contract, not only could the husband and wife not contract with each other, but the wife could not contract at all. As a result of the common law rule, the husband also became owner of all the wife's chattels and was entitled to all of her earnings. The removal of these common law disabilities has generally been accomplished by statute, although in equity a married woman has always had power to contract with reference to her separate estate. W executes

[1] Tucker's Lessee *v.* Moreland, 35 U. S. (10 Pet.) 58; Youn *v.* Lamont, 56 Minn. 216, 57 N. W. 478.

and delivers to his wife, C, a trust deed on certain land situated in the state of Colorado. Is this deed valid? Yes. Under the statutes of Colorado the theoretical unity of husband and wife is severed, so far as the power to contract is concerned, and each may contract with the other, or alone with third parties, in regard to all matters.[1]

§ 20. COMPETENCY OF ALIENS.

Alien friends, ordinarily, have the same contractual power as the subjects of a state; but alien enemies cannot enter into any contracts with subjects that are inconsistent with a state of war, nor enforce in time of war any contracts made in time of peace.

An alien is a subject of a foreign state, and is called friend or enemy according as his country is at peace or war with the United States. Generally a contract made by an alien in time of peace is annulled by war, but if it is one capable of surviving, it is merely suspended during the time of hostilities. At the time the war of the Rebellion breaks out, E, of Georgia, is indebted to G, of New York, and while the war is in progress, through the medium of a third person, G offers to take and E promises to give, certain cotton in settlement. This cotton is later captured by Federal forces and reported as G's cotton and sold. Has G a claim against the United States? No. This act of commercial intercourse is unlawful and, therefore, G never became the owner of the cotton and, not being the owner of it, he has no claim against the United States.[2]

§ 21. OTHERS INCOMPETENT TO CONTRACT.

At the common law, various other persons, including outlaws, convicts, ex-communicants, slaves, barristers and physicians, were incapacitated to a greater or less ex-

[1]Wells *v.* Caywood, 3 Colo. 487. See Tracy *v.* Keith, 93 Mass. (11 Allen) 214.

[2]United States *v.* Grossmayer, 76 U. S. (9 Wall.) 72. See Cohen *v.* New York Mut. Life Ins. Co., 50 N. Y. 610; Taylor *v.* Carpenter, 3 Story, 458, Fed. Cas. No. 13, 784.

tent; but the common law disabilities attaching to these persons have been removed in modern times.

§ 22. PRIVITY.

A person who is not a party to an agreement cannot be a party to the obligation which that agreement creates; but one may become a party to both the agreement and the obligation through the medium of an agent or by stepping into the place of one who is already a party.

The parties to an agreement can impose an obligation on a third person neither for their own benefit nor for his benefit. No one can have a contractual obligation thrust upon him without his consent. Yet a third person who is not a party to an agreement, but for whose sole benefit it is made or to whom the promisee is under existing legal obligation, is permitted to sue on the contract. This, however, is not on the theory that the parties have created an obligation for him, but that the law operating on the acts of the parties establishes the privity and creates the obligation. This obligation, then, being *quasi* contractual in nature, has been more appropriately considered in the chapter on *quasi* contracts. So, likewise, the law sometimes imposes a duty *in rem* on all persons not to interfere with a contractual obligation created. But this duty lies in the realm of torts, and, therefore, does not belong to this discussion. Where a third person takes the place of a debtor, by consent of the debtor, creditor and person substituted, then the transaction is known as novation and the ordinary rules for the formation of a contract apply, and this subject also does not need consideration here.

§ 23. AGENCY.

One may enter into a contract through the instrumentality of another authorized to act for him and called his agent.

It is not necessary that the parties, themselves, shall communicate their consent to each other. There are various medi-

ums through which it may be communicated, and one of them is that of agency. Agency is a legal relation, founded upon the contract of the parties or created by law, by virtue of which one party, the agent, is employed and authorized to represent and act for the other, the principal, in business dealings with third persons. Anyone may be an agent, but to be a principal one must be *sui juris* and *compos mentis*. Agency, except to execute a deed, may be created by word or conduct, or ratification, or estoppel. It may be terminated by the act of the parties in revoking or renouncing the agency, or by operation of law, as in the case of death or insanity. If an agent is authorized to represent his principal in all matters of a particular class, he is a general agent; if only on one occasion, or in one transaction, a special agent. A principal can be bound on a contract made by an agent only by force of previous authority given to the agent, or by subsequent ratification of his act, but if the principal either authorizes or ratifies the contract he is bound because the contract is then his own.

The difference between an agent and a servant is, that an agent is employed to make contracts for his principal, while a servant is not; but both are subordinate to and dependent upon the will of their employer. The liability of the principal for the torts of his agent is the same as that of the master for his servant. The principal is liable for the agent's torts when the agent is acting for him, not when the agent is acting for himself.

§ 24. AUTHORIZED KNOWN AGENCY.

When a contract is made by an authorized agent known to be an agent, whether the principal is named at the time or not, the principal is a party to the contract unless it is a deed purporting to be the deed of the agent. If the principal is named, the agent cannot also be a contracting party unless he contracts in his own name without qualification. If the principal is not named, the agent is also a party unless he eliminates himself by express stipulation.

A is authorized by B to buy a horse for him. A informing C that he is acting for B, enters into a contract of purchase

with C. Here A drops out, for C looks only to B, and B and C alone come into contractual relations. The only question under such circumstances is as to the existence of the agent's authority, unless, for example, he should sign a written contract promising in his own name to buy the horse.[1] If A, in the above illustration, though authorized by B, should not inform C that he is acting for B, but simply that he is an agent, either A or B is a party to the contract. C looks to A, because no definite principal is named, and yet, because the existence of a principal is disclosed, he cannot object to the principal becoming a party to the contract.[2]

§ 25. AUTHORIZED UNKNOWN AGENCY.

When a contract is made by an authorized agent not known to be an agent, the undisclosed principal as well as the agent is a party unless the agent contracts as the real and only principal, or the nature of the contract is inconsistent with an unknown principal becoming a party; but the principal must take the contract subject to all equities.

A, B and C are partners, C being a dormant partner. A and B, without disclosing C, enter into a contract agreeing to hire D for eight years on his agreement to work for that period. D may treat C as a party.[3] A, being W's agent to sell a pair of oxen, conceals his agency in the negotiation of a sale to H, and when asked whether W owns them declares that W does not, but that he owns them himself. H does not wish to buy from W, but, after this statement, buys from A. W is not a party. There is no contract with him.[4]

[1]Nash *v.* Towne, 72 U. S. (5 Wall.) 689; Badger Silver Min. Co. *v.* Drake (C. C. A.) 88 Fed. 48.

[2]Wilder *v.* Cowles, 100 Mass. 487; Carr *v.* Jackson, 7 Exch. 382.

[3]Beckham *v.* Drake, 9 Mees. & W. 91.

[4]Winchester *v.* Howard, 97 Mass. 303; Ferrand v. Bischoffsheim, 4 C. B. (N. S.) 710. See Miller *v.* Lea, 35 Md. 396.

§ 26. UNAUTHORIZED AGENCY: PRINCIPAL NAMED.

When a contract is made by one who professes to act as agent but who is not authorized, if he names a principal who is ascertained and existing and might in fact be a principal, the agent can in no way be a party to the contract (though he may be liable on implied warranty or for deceit), but the alleged principal may make himself a party by ratification. If the professed agent names a principal not capable of authorizing the contract, the agent only is a party.

A, claiming to act for B, a man living and known, but having no authority from B, makes a contract with C to lease B's farm. A is not a party; but, by ratifying the act, B can make himself a party. To hold A a party would be to make a contract not to construe one, but when B ratifies the act, there is a true agreement between C and B.[1] But if, in the foregoing illustration, B is a fictitious party, there can be no contract between B and C, for there is no B, and A can be treated as a party.[2]

§ 27. UNAUTHORIZED AGENCY: NO PRINCIPAL NAMED.

When a contract is made by one who professes to act as agent but who is not authorized, if he does not name a principal he himself is the principal.

A, claiming that he is acting for another, but not stating whom, contracts with C. A is really acting for himself. Is he a party with C? So far as C is concerned the contract is with A, and A may show on his part that he is the real principal.[3]

§ 28. ASSIGNMENT: BY PROMISOR.

A promisor cannot assign his liabilities under a contract so as to substitute another party for himself.

[1]Fox *v.* Tabel, 66 Conn. 397, 34 Atl. 101; Lewis *v.* Nicholson, 18 Q. B. 503; Collen *v.* Wright, 7 El. & Bl. 301.

[2]Kelner *v.* Baxter, L. R. 2 C. P. 174.

[3]Schmaltz *v.* Avery, 16 Q. B. 655; Carr *v.* Jackson, 7 Exch. 382.

A promisee cannot be compelled to accept performance from anyone but the one who has promised, for the promisee has a right to the benefit he expects from the character, credit and substance of the promisor; yet, if the contract does not call for personal confidence and skill, without dropping out as a party, the promisor may get the work done for him by equally competent persons.

P, a corporation, rents 100 railroad wagons to L, L agreeing to pay an annual rent, and P agreeing to keep the wagons in repair. P passes a resolution to voluntarily wind up its business and then assigns to B its contract with L. Is this transaction valid? Yes. So long as P continues to exist it can be considered as performing its obligations through B. In rough work like this, it is not necessary that P shall do it in person.[1] B enters into a contract with E to supply him with lead ore in certain quantities and for certain prices, title to pass on delivery and the price to be paid after the ore is assayed by either or both of the parties. Can E assign this contract to another? No. It involves transferring personal liabilities and B cannot be compelled to accept some one whose liability he may not be willing to accept. In this sort of a case both parties to the contract are promisors.[2]

§ 29. ASSIGNMENT BY PROMISEE: AT COMMON LAW.

At common law, except by negotiation of commercial paper and by marriage and death, etc., a promisee cannot assign his rights under a contract so as to completely substitute another party for himself. The most he can do is to give the assignee a right to sue in the name of his assignor (the promisee), free from his control.

According to the law merchant the promisee, in negotiable instruments, can negotiate the same so as to give a right free from defenses to one who acquires title for value, before maturity, without notice of defects, though no notice is given to the promisor. There is an essential difference between nego-

[1] British Waggon Co. *v.* Lea, 5 Q. B. Div. 149.

[2] Arkansas Valley Smelting Co. *v.* Belden Min. Co., 127 U. S. 379.

tiability and assignability. An assignee of a contract can, at most, only step into the shoes of his assignor; an assignee of negotiable paper may have greater rights than his assignor. The promisee, by negotiating the paper, drops out except as to subsequent parties as to whom he may enter into a new and technical contract known as the contract of indorsement. In the case of an assignment of an interest in a leasehold or a freehold, covenants that concern the land and are not merely personal pass to the assignee whether of the lessee or lessor or of the vendee or vendor. Marriage at the common law effected a substitution of the husband for the wife as a party to her contracts; but this rule is changed by statute to-day. Death substitutes, for a party to a contract, his personal representatives if the contract is one that the party himself could have assigned; but in such a case new parties are not really substituted for the old, for the assignment is merely a means of continuing, for certain purposes, the legal existence of the deceased. Aside from these exceptions, among the living the common law is very reluctant to permit an assignee to succeed to the position of the original promisee. An obligation is the legal chain which binds together two parties, in the case of a contractual obligation the parties to the agreement, and it is hard to conceive of unfastening one end of this chain from one man and fastening it to another again, except by a new agreement. For this reason, at the common law, the assignee has to sue in the name of his assignor, and a partial assignment is absolutely invalid, as the debtor cannot be considered to have contracted to have an obligation split up into fractions. A assigns to S the balance due him on an account with X. He then becomes a bankrupt and his commissioners assign over his effects to his assignee. At law is S entitled to the amount of the balance? Yes. By having A sue for him, S can get this amount. The debt is due in form to A, but in substance to S, and, therefore, it does not pass under the commission to the assignee. At the earliest common law the assignee acquired no right whatever. Later, as here, he could acquire a right which was enforcible by having the assignor sue for him, and the last step in the development of the common law doctrine is where the assignee can sue in the name of the assignor.[1] W as-

[1]Winch *v.* Keeley, 1 Term R. 619. See Peuson *v.* Higbed, 4 Leon. 99.

signs to P a debt due him from M and J. Suit is brought by P in the name of W against M and J. Can W and M and J dismiss this suit without P's consent? No. The assignor will not thus be allowed to interfere with the rights of his assignee. Otherwise, the protection of the form would defeat the whole purpose of the law.[1] A policy is issued to F in 1870. F's interest in this policy is assigned to W in 1875, but in 1878 W reassigns all but $2,000 to F, both of these assignments being on slips of paper attached to the policy, when the policy itself requires the assignments to be indorsed thereon. In 1880 F assigns the policy to H, who pays valuable consideration therefor, and is without notice of the other assignments. F dies: Is W protected? No. H is entitled to the amount of the policy. W is in fault for giving the opportunity for fraud.[2] C sues S. C has agreed with his attorney, B, to pay him out of the proceeds of the judgment in this suit, and B notifies S of this. Can C and S stipulate to dismiss the suit? Yes. B's claim amounts only to a partial assignment and is, therefore, invalid.[3]

§ 30. ASSIGNMENT BY PROMISEE: IN EQUITY.

In equity a promisee may assign his rights under a contract relating to money or specific property, and the assignee may enforce the contract in his own name if he has given a consideration for the assignment; but the assignment does not bind the original promisor until he has notice of it, and then only so far as he has not, up to that time, acquired equities against the original promisee.

Rights, but not liabilities, may be assigned. Wherever a contract is coupled with liabilities or involves personal confidence and skill, it cannot be assigned. If this relates only to one party, the other party may assign his rights. If it relates to both parties, no assignment is possible. But a right to the payment of money or relating to land or chattels specified involves no such personal confidence. In equity parts of a debt

[1] Welch *v.* Mandeville, 14 U. S. (1 Wheat.) 233.

[2] Bridge v. Connecticut Mut. Life Ins. Co., 152 Mass. 343, 25 N. E. 612.

[3] Chapman *v.* Shattuck, 8 Ill. (3 Gilm.) 49.

may be assigned to different persons, and the entire controversy may be settled in one suit to which all are made parties. An assignor can give no better title than he himself has. An assignee is bound to take notice of the rights of a debtor, and, in order to protect his rights, he must notify the promisor of the assignment. It is only fair to the promisor or debtor that he should know to whom he is under liability, and that he should not suffer for any change in his relations that he may make before notice of the assignment. P, a factor, sells goods for A, but, A, being indebted to P, assigns to P the debts due him for goods sold by P. P, in turn, assigns these to his creditors. Can P's creditors hold the debts against the creditors of A? Yes. In equity the title to the debts becomes P's.[1] For a loan of $100 H assigns to C his wages to be earned on a sea voyage. H dies on the voyage. His wife becomes his administratrix, and insists that there should first be paid a bond of H, given her on her marriage, to pay her $400 if she should outlive him. C is entitled to the wages. Advancing the $100 is equivalent to paying the wages beforehand, and neither the seaman nor his wife can have the wages twice.[2] F and C loan money to G, who gives them an order on S to pay them the amount out of a particular fund; and F and C notify S. Is this a good assignment? Yes, in equity.[3] S builds a schoolhouse for N, and N reserves $600 as guaranty for the performance of the building contract. S assigns this $600 to J. Is the assignment to J good? Yes, if he will sue in equity, and make all those interested parties to the suit.[4]

§ 31. ASSIGNMENT BY PROMISEE: STATUTES.

By statute the equitable rules have been generalized and the equitable remedies largely made legal.

H is entitled to a certain legacy from the estate of G and receives from the executors a statement of the amount due him. On this he writes an order to the executors to pay the amount

[1]Fashion *v.* Atwood, 2 Cas. Ch. 36.

[2]Crouch v. Martin, 2 Vern. 595.

[3]Row v. Dawson, 1 Ves. Sr. 331. See Cator v. Burke, 1 Brown Ch. 434.

[4]James *v.* City of Newton, 142 Mass. 366, 8 N. E. 122.

to L. Is this a valid assignment, so that L can sue in her own name? Yes. By virtue of the judicature act of 1873, in England.[1] G deposits with K $2,316, receiving a slip of paper with dates and various sums in a column, footing up to the above amount, but with nothing else on it. G delivers this paper to C, with the intention of giving him the money. Is this a valid assignment? No. The slip is too incomplete. After its delivery there is nothing to prevent G from recovering the deposit from K.[2] In April B assigns all the wages to be earned by him as school teacher the next calendar year. At the time he has a contract to teach until the following June. The next September he makes a new contract to teach another year. Does the assignment cover wages earned after September? No. The money to be earned under an engagement not yet made is not assignable.[3] P assigns and delivers to N an "I. O. U." for $250. N keeps this in his possession until he makes an assignment to B for benefit of his creditors. Three years later he delivers the "I. O. U." to E for a valuable consideration. Does E have a right to the money from P? No. E has only the rights of his assignor and, therefore, has none, as N's rights pass to B by the assignment for creditors.[4] D, for a valuable consideration, assigns to M a note of X. Later D gets the note into his possession for a temporary purpose. H has it attached by an execution on a judgment in his favor against D. No notice of the assignment is given H. Is M entitled to the note? Yes. Notice is required only to protect the debtor (as X) or the purchaser (as Y, if D should resell to Y), but all that can be seized on the execution is the right remaining in the assignor which in this case is nothing.[5]

§ 32. NUMBER OF PARTIES.

A contract may have one promisor and one promisee, or more than one promisor or more than one promisee, or more than one party on both sides.

[1]Harding *v.* Harding, 17 Q. B. Div. 442.
[2]Cook *v.* Lum, 55 N. J. Law, 373, 26 Atl. 803.
[3]Herbert *v.* Bronson, 125 Mass. 475.
[4]Emley *v.* Perrine, 58 N. J. Law, 472, 33 Atl. 951.
[5]Pellman *v.* Hart, 1 Pa. 263.

A joint contract is one where the promisors are either jointly bound or the promisees are jointly entitled to the performance of an obligation. A several contract is one where each promisor is individually liable or each promisee is individually entitled to the performance of an obligation. A joint and several contract is one where the promisees may elect to hold the promisors either jointly or severally bound to perform an obligation. When two or more persons undertake an obligation, the presumption is that they undertake jointly, and words of severalty are necessary to overcome this presumption. In written instruments the question whether the obligation is joint or several is to be determined by looking at the words of the instrument. An instrument contains the following: "The lessee and his sureties, J. C. and S. R., covenant with the lessors to pay the rent." This is a joint obligation. There are no words of severalty in the covenant. The sureties and the lessee undertake to pay rent as one man, and the sureties cannot be sued alone.[1]

§ 33. JOINT PARTIES.

Joint promisors must be sued jointly, and a release of one releases all. If one dies, the rest are exclusively liable. Joint promisees must sue jointly, and a release by one operates as to all. If one dies the others may sue alone.

A performs work upon a ship under the joint directions of B and C. C dies. Is B liable for the entire value of the work? Yes. After the death of the other party a joint debt may be treated as if it were originally the separate debt of the survivor, so that he can be charged in his own right, although it is better to sue him as survivor. After the death of the other joint obligors, a plea in abatement can no longer be interposed.[2] J sues D for goods sold to him by J. & Son. The son dies before the suit is brought. Can J sue in his own name? No. He should allege the fact of his being a survivor. Joint sellers must join in an action.[3] K and L sell and deliver goods

[1]City of Philadelphia *v.* Reeves, 48 Pa. 472.
[2]Richards *v.* Heather, 1 Barn. & Ald. 29.
[3]Jell *v.* Douglas, 4 Barn. & Ald. 374

to H and S jointly. K and L sue and recover judgment therefor against S, who does not plead in abatement that the obligation is joint. Can K and L now sue and recover from H? No. The judgment against S is a bar. The debt, being a joint debt, is merged in the record by suit against one who does not plead in abatement just as much as though both had been joined in the suit.[1] K lends money to W and N, acting for themselves and H, although H is undisclosed. K sues W and N and gets judgment. Can he now sue H? No. H's liability is a joint liability with W and N, and a suit against them is a bar to a separate suit against him. W, N and H are undisclosed principals of W and N.[2] C sues G and F on joint liability. G dies, pending suit, and C discontinues as to him, and prosecutes the suit against F to judgment which is in favor of F. Can C now sue G's administrator under a statute giving him a remedy against either the administrator of deceased or the survivor? No. The original liability is joint, and that there is no joint liability has been decided in the suit against F.[3] H sues six parties who have agreed to pay him six-sevenths of any loss he may sustain, by an indorsement of a certain note. H gives one obligor a paper under seal, "In full satisfaction for his liability." This imposes a release and discharge of him, and, therefore, it releases all.[4] D sues B and M on a joint obligation. B is discharged in bankruptcy. M dies. Is M's executor liable? No. The joint obligor is discharged by death, the survivor only being liable.[5] O, N and J jointly sell iron rails to the M railway for $600. N and J settle with the railway for money and stock, giving a receipt in full. Can O, joining the others with him, recover his proportion of the $600 from the railway company? No. Each of the three has an interest, not only in a third, but in the other two-thirds. O cannot bring suit for his third, because the others own that as much as he, but each having an interest in the entire claim can settle for the whole.[6]

[1]King *v.* Hoare, 13 Mees. & W. 494.
[2]Kendall *v.* Hamilton, 4 App. Cas. 504.
[3]Cowley *v.* Patch, 120 Mass. 137.
[4]Hale *v.* Spaulding, 145 Mass. 482, 14 N. E. 534.
[5]Martin *v.* Crump, 2 Salk. 444.
[6]Osborn *v.* Martha's Vineyard R. Co., 140 Mass. 549, 5 N. E. 486.

§ 34. SEVERAL PARTIES.

Several promisors must be sued separately. If one dies, the obligation may be enforced against his estate.
Several promisees may each sue separately. If one dies, his personal representative may enforce his obligation.

K sells land to D, and D sells the same land to W and S. D, not paying K the purchase money, W and S "covenant with K," etc., "and as a separate covenant" with D, to pay K, or D, in case K shall have been paid his price by D, the amount of the purchase price and interest. Can K sue without joining D? Yes. This covenant is several. For where the covenant is ambiguous, it will be joint if the interest is joint, and several if the interest is several.[1]

§ 35. JOINT AND SEVERAL PARTIES.

Joint and several promisors may be sued altogether or separately, but a release of one discharges all, and the death of one does not cast the liability on the survivors.
A promise cannot be joint and several as to the promisees.

A promissory note in the words, "I promise to pay," etc., is signed "R. B.," "T. W." This is a joint and several obligation, because of the fact that the promise begins in the singular number. The holder of the note can sue either B or W, or both.[2] P sues the executor of H, who, as surety, has signed a joint and several obligation with B. Without the consent of the sureties, P has executed a covenant not to sue B, qualified by a reservation of remedies against the sureties. Is the executor liable? Yes. This is not a release, and operates only so far as the rights of the sureties are not affected. Had it been a release, the release of B would have released H.[3]

[1] Keightley *v.* Watson, 3 Exch. 716.
[2] March *v.* Ward, Peake, 130.
[3] Price *v.* Barker, 4 El. & Bl. 760.

CHAPTER XV.

CONSIDERATION.

§ 1. Consideration: Defined.

In order to be enforcible the agreement must relate to the mutual transfer of legal rights; that is, it must be supported by a sufficient consideration.

Consideration is a legal right given or promised in exchange for a promise of a legal right.

Consideration is the thing given or done, or to be given or done, by one person in exchange for a promise by another person to give or do something. It does not mean that one party must receive a benefit (although this was true in the early contract of debt), but that the other abandons, or promises to

abandon, a legal right, either as an inducement for, or because induced by, the first's promise of a legal right. The legal right may be a right *in rem*, or a right *in personam*, antecedent or remedial; it may be a right which arises without a contract, or one that arises by virtue of a *quasi* contract, or another contract; it may be a right of property, or a right of liberty; but, whatever it may be, if it is of sufficient worth to be protected by the law from violation by torts, it is of sufficient worth to be recognized and protected by the law from violation by breach of contracts. A promise by one person to give up a legal right without a reciprocal promise by another will not be enforced, because one man's rights ought not to be taken away from him and given to another unless he receives something in return. A man ought not to be made poor that another may be rich. So, though a man may make a gift of any of his rights, by his own act, the law will not compel him to carry out a promise to make a gift. His promise of a legal right must be bought by a legal right, or the promise thereof, by another. But there are other, as fatal, objections to enforcing gratuitous undertakings. The consequences of enforcing them would be mischievous to society. Promises, unthinkingly uttered, as well as those never made, would be enforced. Voluntary undertakings would be preferred to just debts. The faithful discharge of their duties, by executors, would be well nigh impossible. So that the common law has wisely insisted, in the case of assumpsits as well as in the case of covenants and debts, upon some better evidence than a bare promise and, as a result, we have the modern doctrine of consideration, the righteous union of the old *quid pro quo* of debt and the detriment, or damage, of assumpsit.

An anomalous form of consideration is that of natural love and affection between those related by blood or marriage. If love and affection and that of the promisor could be a consideration, it would be a marked exception to the general doctrine of consideration, for the other party would neither give, nor promise to give, a legal right for the first party's promise. It is enough to say that today the doctrine is obsolete. It is of interest only as an instance of the early common law doctrine of uses. At the common law it was sufficient to sustain a covenant to stand seized.

While the doctrines of assumpsit now occupy almost all

the field of contracts, there is a small corner still left in the possession of covenant. This necessitates a division of contracts into simple and specialty, the former always requiring a consideration, and the latter, instead, requiring a seal. But the doctrine of consideration is so useful and overshadowing that it continues to encroach upon the doctrine of the seal, so that now the seal is coming to have little significance, and what little it has rests, not upon the original ground of evidence, but that it implies a consideration.

The doctrine of consideration is sometimes made to include legality, definiteness, intent to create legal relations and everything necessary to enforcibility, except parties and assent. Consideration consists of a legal right. If the thing given or done, or to be given or done, is illegal or unenforcible, for other reason, in a sense it is not a legal right and, therefore, cannot amount to a sufficient consideration; but there is another reason why such agreements are not enforcible, and it conduces to clearness, not to extend consideration to include these matters.

The modern doctrines of consideration do not extend to *quasi* contracts.

§ 2. SUFFICIENCY OF CONSIDERATION.

A moral obligation, or a good consideration, or a gratuitous undertaking, or a past consideration, or doing what one is already under obligation to do, is not sufficient; but forbearances to sue for a definite time, compromises of doubtful claims, compositions of creditors, subscriptions, accords and satisfactions and, in general, the giving, or promise to give, any legal rights of liberty or property, etc., are sufficient.

A thing given or done in the past, even though on request or in performance of a legal duty, though under such circumstances as to lay the foundation for a *quasi* contract, is not sufficient consideration for a subsequent promise, for the act is not induced by the promise; but if various parties sign a subscription list, a subsequent act in reliance thereupon by those for whose benefit the subscriptions are given is induced by the promises, for they continue down to the time of the act. The

doing of what one is already legally obliged to do, whether a duty imposed by law or an obligation of contract, cannot amount to a consideration for a new promise, for no legal right is given up. The legal right tendered for a consideration has already been sold, and cannot be used again though still in the promisee's possession. Thus, payment of a part of a debt due for a promise to forego the balance, or to extend time, or the completing of a contract for a promise of extra compensation, or apprehending a criminal to secure a reward when it is one's duty to do that act, does not constitute any consideration for a promise. It is the same thing as though no act had been done. There can be no detriment to one in paying half the sum he at any time may be compelled to pay. A promise to pay a debt barred by the statute of limitations, or by a discharge in bankruptcy, or a ratification of a voidable contract, or a waiver of demand and notice, is not an exception to this rule, for there is no legal right given up for the promise in any of these cases and the question of consideration is not involved. The promises merely amount to a waiver of a bar or impediment created by law for the benefit of individuals. No new obligation is created. But deeds, bills of sale, delivery of any corporeal chattel, or the evidences of incorporeal chattels, marriage, work and services, the relinquishment of any personal right, compromises of valid claims, or claims honestly or reasonably believed to be valid, forbearance to sue for a definite time, or the giving up of any other legal right, is a sufficient consideration for a promise.

§ 3. ADEQUACY OF CONSIDERATION.

Except in promises to exchange sums of money, the law does not require the consideration to be adequate.

So long as there is a legal right given or promised for a promise of a legal right, the law does not attempt to determine whether value is being given for value; i. e., *quid pro quo*. The adequacy of the consideration is not inquired into. It is better to allow freedom of contract to individuals, and permit their appetites to measure the price that shall be given for legal rights desired. Hence, though the thing to be done by one be never so small, as the mere surrender of the possession of a

chattel, or the taking a trip abroad, for another's promise to improve the chattel, or to pay all the expenses of the trip, as there is the relinquishment of a legal right, the consideration is sufficient.

The case of exchange of sums of money may, at first, seem an exception to this rule, but looked at more closely it is seen to be in direct harmony with it; for, in the nature of the case, there is no opportunity for the parties to measure the value of legal tender. Let A promise to pay B $1,000 for B's promise to pay A $2,000. A pays B $1,000 and B pays A $1,000. Then A sues B to recover the rest of the $2,000. What legal right has he given or promised to give for it? So, a promise of an act that a person may or may not perform stands in no better light.

§ 4. CONSIDERATION IN UNILATERAL AGREEMENTS.

In a unilateral agreement, the consideration must be a legal right given by one for a promise of a legal right by another.

In a unilateral agreement, the consideration is always executed. The thing given or done constitutes, at the same time, both the acceptance of an offer and the consideration for the promise. The promisee sustains an injury or detriment because of his giving up a legal right, and as this is induced by the promise of the other party, he is entitled to the fulfillment of that promise.

Owing to the importance of this topic we shall give a great variety of illustrations of various things which have been held to be and not to be sufficient consideration for unilateral agreements. In consideration of N's promise to pay one cent, and the love and affection S bore his deceased wife, and the fact that she had expressed it as her desire in an inoperative will, S agrees to pay N $500. Is there sufficient consideration for his promise? No. First, one cent is not sufficient consideration, for it is a case of exchange of sums of money. Second, all the other things are past, and natural love and affection would be no legal right even if not in the past.[1] D sells a horse

[1] Schnell *v.* Nell, 17 Ind. 29.

to P for thirty pounds. Afterwards D expressly warrants the horse sound, etc. There is no consideration for the warranty. The promise must be coextensive with the consideration. A past consideration will support no promise. The warranty is gratuitous.[1] P buys land, agreeing to pay off a certain mortgage on the premises, to D. P, as a clairvoyant, gives test sittings to D, and subsequently D agrees to give the amount of the mortgage to P, providing he dies within the time prophesied by P. Is there a sufficient consideration? No. So far as appears, there is no debt to P, prior to the making of the promise. A mere favor cannot be turned into a consideration.[2] W renders medical service for a pauper at the request of her son who is caring for her, under an agreement with T, an overseer of the parish. After the cure, T promises to pay this bill. Is there sufficient consideration for T's promise? If the son can be regarded as the agent of T there is, for then T has ratified the act of his agent, and the son's promise is his promise; otherwise, the only liability is in *quasi* contract, for the act is not induced by the promise.[3] L, twenty-five years of age, on returning from a sea voyage, is taken sick and is boarded and nursed by N. After all the expenses are incurred, W, L's father, promises to pay N therefor. Is there sufficient consideration? The act is not given for the promise. This case is to be distinguished from a case where there is a legal obligation which cannot be enforced because of impediments created by law, but which a party may waive. Of course there is a *quasi* contract against the son.[4] C signs a subscription paper wherein in consideration of one dollar (not paid), and the agreement of the others, he promises to pay $5,500 to P, on condition that $45,000 be subscribed, which is done. P neither acts on this promise, in raising the $45,000, nor does anything since in reliance on the promise. C has paid $2,000, but this is applied on an old debt. There is no consideration for P's promise unless it can be shown that it is induced by the other subscriptions. If the promise is to the church, there is no legal right given for it. Even if one subscription is for another, England, Massachusetts, New York and some other courts, hold that P

[1] Roscorla *v.* Thomas, 3 Q. B. 234.

[2] Moore *v.* Elmer, 180 Mass. 15, 61 N. E. 259.

[3] Watson *v.* Turner, Bull. N. P. 129. See Atkins *v.* Hill, Cowp. 284

[4] Mills *v.* Wyman, 20 Mass. (3 Pick.) 207.

cannot sue on the contract, because of lack of privity.[1] A owes B $209. B tells A that if he will pay $25 thereon B will wait a month and, if necessary, longer, for the balance. A pays the $25. There is no consideration for B's promise, as A has sustained no detriment, given up no legal right. The payment of the $25 is a legal right which already belongs to B.[2] K contracts to do grading for D, but in the course of the work encounters frozen ground and other obstacles and refuses to go on with his contract. Thereupon D promises to pay up to the full extent of the cost of the work if K will go on and prosecute it and complete his contract. K promises to do this and does so. If K encounters, in the work, some new and unforeseen difficulty not in the contemplation of the parties when the contract was made, it might discharge the first contract and the parties could then make another. So, if the other party causes work outside of the contract to be done, there would be a new act and, therefore, some consideration for the new promise. But where the promise is simply a repetition of subsisting promises there is no consideration.[3] A offers a reward of fifty pounds to anyone who will give information which shall lead to the conviction of a burglar. A constable of the district gives the information. Is he entitled to the reward? Not if the act is within his duty, for then it is without consideration and against public policy, but, if the officer does something outside of his duty, he gives up a legal right and this amounts to a sufficient consideration.[4] A is the guardian of B, but, when about twelve years old, B runs away and lives with an uncle, until A promises him that, if he will return, A will not charge him anything for board and will send him to school without charge. Is there sufficient consideration for the guardian's promise? No. The ward is legally bound to stay with his guardian, so that his act of returning is no detriment, and A can sue to recover the value of board and schooling.[5] A is surety for an infant, B, to another, for money borrowed by B, and A pays the debt. After B becomes of age he promises again to pay

[1] Presbyterian Church of Albany *v.* Cooper, 112 N. Y. 517, 20 N. E. 352.

[2] Warren *v.* Hodge, 121 Mass. 106.

[3] King *v.* Duluth, M. & N. R. Co., 61 Minn. 482, 63 N. W. 1105.

[4] England *v.* Davidson, 11 Adol. & E. 856.

[5] Keith *v.* Miles, 39 Miss. (10 George) 442.

it to A. Is there a consideration for his promise? It is not a case of consideration but of obligation implied by law. The promise after infancy has ceased amounts merely to a waiver of the defense of infancy. At the present time this case is settled by the doctrines of *quasi* contract.[1] A owes B a certain amount on a promissory note. A goes through bankruptcy but, after his discharge, again promises to pay the note. The original note is still a legal obligation and may be declared on as soon as there is a waiver of the bar created by the discharge. There is no consideration for the new promise, but none is necessary, as it amounts to a waiver.[2] An indorser of a promissory note is not given notice of non-payment and no demand is made on the note, but after the note is due he writes on the note, "Waive demand and notice." Is he liable? Yes. This is like the case of debts of infants and debts barred by statute of limitations and bankruptcy. It is a valid legal obligation which can be sued on, since the defense of no demand and notice is waived.[3] A, at the time of entering into a contract, agrees, in writing, to waive the statute of limitations. Is the agreement binding? Yes. Where no principle of public policy is violated, parties are at liberty to forego the protection of the law. The statute of limitations is for the benefit of individuals and not to accomplish general objects of policy and, therefore, may be waived.[4] S buys of H a mare at sheriff's sale, but leaves the animal temporarily with H. H sells the same to F. S demands the animal of F, who gives her up on S's promise to return her if H is not convicted of larceny in selling her to F. F is keeping the animal wrongfully, so he gives up no legal right, and the conviction or acquittal of F has no legal effect and, hence, there is no consideration for S's promise. In addition, the contract never takes effect because of failure of the condition precedent that H's title would be determined by the prosecution.[5] A gives B a letter, which he has in his possession,

[1]See Edmond's Case, 3 Leon. 164.

[2]Dusenbury *v.* Hoyt, 53 N. Y. 521. See, also, Way *v.* Sperry, 60 Mass. (6 Cush.) 238.

[3]Rindge *v.* Kimball, 124 Mass. 209.

[4]State Trust Co. *v.* Sheldon, 68 Vt. 259, 35 Atl. 177. See, also, Ilsley *v.* Jewett, 44 Mass. (3 Metc.) 439; Armstrong *v.* Levan, 109 Pa. 177, 1 Atl. 204.

[5]Fink *v.* Smith, 170 Pa. 124, 32 Atl. 566.

and which shows that a certain ancestor of B is an alien, on B's promise to pay him $1,000. Is this act sufficient consideration? Yes. This is a case of an act for a promise, a gift on mutual consideration.[1] A lets B have two boilers to weigh for B's promise to return them in good condition. Is A's act sufficient consideration? Yes. Giving up the boilers is a detriment to A. If the suit had been in debt, in order to have a consideration A would have to show a benefit conferred on B, but in assumpsit a detriment to A is sufficient.[2] A surrenders to B a promise of guaranty, by C to A, of certain bills of L, on B's promise to see certain bills of L paid. Is this consideration sufficient? Yes. The surrender of the paper is the giving up of a legal right and, therefore, sufficient, although if the former guaranty is valid it makes the consideration more valuable.[3] A claims that B owes him a debt. B denies this, but promises to pay it if A will make oath to it. A makes oath. Is this a consideration? Yes. The promise is to pay in return for the oath, making which is a detriment to A. It would be different if B simply said, "You don't dare swear to it." Perjury would be a detriment, but would make the contract illegal, so that the perjurer could not enforce it.[4] C tells his nephew, D, that if he will take a trip to Europe he will repay him his expenses. D takes the trip. Is this a consideration for C's promise? Yes. It is a detriment to D. This case is different from one where a promise is made to make a present. That the trip is a benefit is nothing to the purpose, as D has a legal right to spend his money in some other way.[5] Two men are bound for a debt of a third person, so that both are liable to pay it. A says to B, "Pay all the debt and I will pay you my share." B pays all the debt. Is there a consideration for A's promise? Yes. B sustains a detriment which he is not bound to sustain because of the obligation of contribution.[6] A promises to pay B $5,000 when B is twenty-one years old, if he will refrain from drinking liquor and using tobacco until that time. B refrains. Is this a sufficient consideration? Yes. B has a legal right to drink

[1]Wilkinson *v.* Oliveira, 1 Bing. N. C. 490.
[2]Bainbridge *v.* Firmstone, 8 Adol. & E. 743.
[3]Haigh *v.* Brooks, 10 Adol. & E. 309, 323.
[4]Brooks *v.* Ball, 18 Johns. (N. Y.) 337.
[5]Devecmon *v.* Shaw, 69 Md. 199, 14 Atl. 464.
[6]Bagge *v.* Slade, 3 Bulst. 162.

liquor and use tobacco. This he gives up for A's promise, and that is sufficient. It is sufficient that he restricts his lawful freedom of action for the other's promise.[1] A and B are divorced. A, the husband, promises to pay B, the wife, six pounds per month, so long as she conducts herself with sobriety and in a respectful, orderly and virtuous manner. If the wife either refrains from these things or promises to refrain, is there consideration for A's promise? Yes. She has a legal right to get drunk or consort with people of bad character, and a promise to surrender this liberty and to conduct herself in the manner desired by A is sufficient consideration.[2] A works for B, having advanced A's railway fare from his home to the woods. There is a dispute as to who is to pay this, and A, finally, gives a receipt in full for the money due him for work after deducting transportation charges. Is there a consideration for the receipt? Yes. There is a dispute, therefore B gives up a legal right.[3] D's ship runs into and damages L's ship, and L detains D's ship and sues for the amount of the damage. D promises that if L will release the ship and discontinue the suit he will pay the damages not to exceed 180 pounds. L releases the ship and discontinues the suit. Whether L has a legal right to recover is an uncertain question. This being so, D gives up a legal right, for the compromise of a doubtful claim is such.[4] A imprisons two joint debtors, W and V. Of his own act, he releases W, and B then promises to pay the joint debt if A will release V. A release of one joint debtor is a release of all. Therefore, he has no legal right to detain V, after the discharge of W, and there is no consideration for B's promise.[5] A, claiming that money is due him from the Government of Honduras and others, is about to take legal proceedings when B promises to deliver certain securities if he will forbear. A forbears. Forbearance to sue is a sufficient consideration for a promise to compromise a disputed claim, as a legal right is given up when one is justified in believing he has a chance of success.[6]

[1]Hamer *v.* Sidway, 124 N. Y. 538, 27 N. E. 256.
[2]Dunton *v.* Dunton, 18 Vict. Law R. 114.
[3]Tanner *v.* Merrill, 108 Mich. 58, 65 N. W. 664.
[4]Longridge *v.* Dorville, 5 Barn. & Ald. 117.
[5]Herring *v.* Dorell, 8 Dowl. 604.
[6]Callisher v. Bischoffsheim, L. R. 5 Q. B. 449.

§ 5. CONSIDERATION IN BILATERAL AGREEMENTS.

In a bilateral agreement the consideration must be a promise of a legal right given by one for a promise of a legal right by another.

The consideration in both unilateral and bilateral agreements must really be of the same nature. The only difference is that in a unilateral it is executed, while in a bilateral it is executory. In a bilateral agreement the consideration is not a legal right actually given up, not a detriment sustained, not a thing given or done, but only the promise thereof. But where a promise of one legal right is obtained by a promise of another legal right, the party who is ready to carry out his promise is as much entitled to the fulfillment of the other promise as though he had actually given up a legal right. In a bilateral contract either party may sue, while in a unilateral only the promisee can sue, but the party suing must always furnish a consideration. A offers to supply B with any quantity of iron he may order, during a certain period, at specified prices. B accepts the tender. Several orders are given by B and supplied. Then A refuses to supply any more. Is the acceptance of the tender a sufficient consideration for A's offer? The mere acceptance of the tender amounts to nothing, because B does not promise to give up any legal right. It is an illusory promise. The agreement is void for lack of mutuality.[1] A man promises to marry a woman, in exchange for her promise to marry him, but she refuses to marry him. The man's promise is a sufficient consideration for the woman's. Each has promised to give up a legal right, the right to a single life, and this is sufficient.[2] A and B mutually agree to marry each other. A is an infant of fifteen. Is there consideration for B's promise? Yes. If the contract was void because of the infancy of one of the parties, there would be no consideration; but, as it is only voidable, the consideration is sufficient.[3] H owes B a note and P is surety on the note. H asks for an extension for one year, agreeing to pay interest, and B grants the extension. Is there

[1]Great Northern R. Co. *v.* Witham, L. R. 9 C. P. 16. See, also, Chicago, & G. E. R. Co. *v.* Dane, 43 N. Y. 240.

[2]Harrison *v.* Cage, 5 Mod. 411.

[3]Holt *v.* Ward Clarencieux, 2 Strange, 937.

consideration for B's promise? Yes. Each party has promised to give up a legal right, one to sue, the other to pay at once (which means he must pay interest another year) and, therefore, as the obligation of the surety is changed without his consent, he is discharged.[1] A owes B an amount on a promissory note. When it is due A asks an extension for a week, and agrees to pay it within a week if extended, and B grants the extension. There is no consideration for B's promise, as it is a promise to extend a note for nothing. A does not promise to give up any legal right. This case is to be distinguished from the preceding case.[2] M sells to S, by metes and bounds, a tract of land containing 521 acres, for $8,000. Later, the parties differing as to the quantity of the land, agree to have it surveyed, and M agrees to pay sixteen dollars and fifty cents for every acre under 521, for S's promise to pay the same amount for every acre over 521. This agreement is bilateral and, like a wager, each party promises to give up a legal right to money on the happening or not happening of an ulterior event, but it is not against public policy because not a mere bet.[3] A has B arrested for a debt and, on B's promise to pay the debt and costs, A promises to release her. Is there sufficient consideration? Yes, if the arrest is legal, as A has a legal right to keep B in jail till the debt is paid.[4] At the time of his death B is indebted to J for fifty-eight pounds for goods bought. After his death his wife, N, on J's promise to forbear suing for the amount, promises to pay the debt within a reasonable time. Is there sufficient consideration? Yes, if J really has someone in mind to sue, as a personal representative, his promise to forbear is a sufficient consideration; otherwise there is no consideration. He must change his conduct because of the promise.[5] G, being a promoter of a company which purchases property in New Zealand from him on certain representations made by him, is charged with misrepresentations at a shareholders' meeting, and fearing that proceedings may be taken against him, executes a guaranty of a certain dividend to the

[1]Benson *v.* Phipps, 87 Tex. 578, 29 S. W. 1061.

[2]Austin Real Estate & Abstract Co. *v.* Bahn, 87 Tex. 582, 29 S. W. 646, 30 S. W. 430.

[3]Seward *v.* Mitchell, 41 Tenn. (1 Cold.) 87.

[4]Atkinson *v.* Settree, Willes, 482.

[5]Jones *v.* Ashburnham, 4 East. 455.

shareholders for ninety years. No proceedings are taken against him. Is there a consideration? No. If the contract is bilateral, there is no promise to forbear a disputed claim believed to be valid; if unilateral, no forbearance because of the guaranty. It is merely a sop to the angry shareholders. It is not right to turn an expectation into a contract.[1] A owes B a debt and, on B's promise to forbear suit for such time as he shall elect, C, A's wife, indorses a note, which A signs as maker, as surety for the debt. The note is payable on demand. B forbears suing for two years. Is there a sufficient consideration? No. This is a bilateral agreement, and B has promised to give up no right and, therefore, there is no consideration for the note. If C had made a promise to become liable as surety on B's forbearance to sue, and B had forborne there would be consideration, or, if B had promised to forbear for a fixed or reasonable time, there would be a consideration.[2] C owes R and T a sum of money. In consideration of the promise of R and T to accept a composition of fourteen shillings on the pound, C promises to pay the same. The early cases held that this is merely an accord and, therefore, not a consideration; that, to be a consideration, accord must be executed by satisfaction; but the true ground is whether in an accord or in a satisfaction some new legal right is given up or promised. If C actually pays the amount of the composition by giving R and T some new right, he does something he is not legally obliged to do, and that is sufficient consideration for the promise on the other side. So, if the accord is the promise of a new legal right, there is no reason why it should not be binding.[3]

[1] Miles *v.* New Zealand Alford Estate Co., 32 Ch. Div. 266.
[2] Strong *v.* Sheffield, 144 N. Y. 392, 39 N. E. 330.
[3] Lynn *v.* Bruce, 2 H. Bl. 317.

CHAPTER XVI.

LEGALITY OF SUBJECT-MATTER.

§ 1. Legality of Subject-matter.

In order to be enforcible the subject-matter of the agreement must be lawful. The subject-matter may be unlawful, either because prohibited by law or because contrary to the policy of the law.

A lawful part of a divisible agreement is enforcible if it constitutes a complete agreement and can be separated from all illegality.

An agreement is unlawful if its immediate subject-matter is unlawful, or if the ulterior design of both parties is

unlawful, though the immediate subject-matter is lawful.

The privilege of making contracts is a right which should be invaded only when the rights of society as a whole become paramount to the right of the individual, when the individual right should give way for the public good.

The subject-matter of an agreement may be unlawful because expressly forbidden or because contrary to the policy of the law, but where there is an express prohibition it is useless to discuss the policy of the law. If any part of an entire or indivisible agreement is illegal, the whole agreement should be void, but if the agreement is divisible so that all the elements of a contract exist in a part, though another part may be illegal, the legal should be enforced, for, if it is not contrary to law to enforce an agreement standing alone, it is no more against the law when standing beside another.

If the immediate subject-matter of an agreement is unlawful, neither party should be allowed to sue on it, nor should there be any recovery in *quasi* contract for benefits conferred pursuant thereto.

If the immediate subject-matter of the agreement is not unlawful, then the intention of the parties becomes of consequence, and if the intention of both parties in making it is unlawful, neither party should have any remedial rights; but if the intention of only one party is unlawful, though the other party may have the bare knowledge of this fact, if he in no way participates in the unlawful design, the latter should be allowed to treat it as a voidable contract and either sue for breach or avoid it and sue in *quasi* contract. In an agreement for illicit cohabitation, the immediate subject-matter is unlawful and it is against the policy of the law to have anything to do with it. In an agreement for marriage the immediate subject-matter is lawful, but if both parties are already married, or one is married and the other knows that fact, the unlawful intention of the parties makes the agreement unlawful. Now, if only one party is married, and the other does not know this fact, but supposes they are both single, the subject-matter is unlawful as to only party, and the innocent party is entitled to redress. The rule which protects an innocent party where the immediate subject-matter is not unlawful also rightly pro-

tects an innocent agent of a party whose intention is unlawful.

If a party is induced to enter an illegal contract by fraud or coercion, or, in any event, if the contract is unperformed, he is allowed to rescind the contract on the original ground of fraud or coercion, or on the ground that he is allowed a chance to repent, for under such conditions the reason for non-enforcement of agreements whose object is illegal does not apply.

If a statute is only directory, it does not make the doing of a thing unlawful. The agreement is enforcible, but some penalty may have to be paid.

§ 2. CRIMES.

Any agreement, the subject-matter of which is the commission of a crime, is unlawful.

The reason why such agreement is unlawful is because it is prohibited by law. It makes no difference whether the crime is forbidden by common law or statute. Any agreement whose object is the commission of a crime is illegal. What cannot be done directly cannot be done indirectly. If, however, the purpose of a statute is not to prohibit certain conduct, but to make it expensive to parties (as where the penalties are recurrent), an agreement relating to that matter may not be forbidden or unenforcible. The law of crimes is now mostly a statutory matter, the common law of crimes having been embodied in statutory enactments. Agreements are seldom made to commit heinous crimes. H sells and delivers tea to J for a certain price, knowing that J intends to smuggle tea into England, but H has nothing to do with the smuggling scheme. Can H recover the price? Yes. This contract is not about anything prohibited by law, but is a mere sale of tea. Had the bargain been that H was to be paid if J succeeded in landing the goods, or if H had undertaken to run goods into England, it would have been an agreement to commit an offense against the laws of England, and illegal, and H could not then recover the price, not because the law would protect J, but because it will not lend its aid to such a plaintiff.[1] G, of Massachusetts, sells in Massachusetts, to J, a Maine hotel keeper,

[1] Holman *v.* Johnson, Cowp. 341.

intoxicating liquors for a certain price, G expecting and desiring that J will sell the same unlawfully in Maine and intending to facilitate his doing so. Is the agreement enforcible? No. As G intends a breach of the law of Maine the sale is illegal. The overt act of selling, otherwise too remote, is connected with the result, by the intent of the seller, but if G merely sells liquor to J, with an indifference as to where J sells it, the sale is not made illegal by the fact that G knows that J intends to sell it unlawfully.[1] O is arrested for a felony, and to get him released on bail, N signs his bond, and in exchange for N's promise to indemnify him against all liability, M also signs the bond. Is the contract of indemnity enforcible? Yes. The obligation assumed by sureties on a bail bond is not personal security, and, therefore, the contract relieving from liability is not illegal.[2]

§ 3. TORTS.

Any agreement, the subject-matter of which is the commission of a tort, is unlawful.

The reason why this agreement is unlawful is because it is prohibited by law. This prohibition extends not only to the more overt civil wrongs like assault and battery, trespass, conversion, slander and libel, malicious prosecution, false imprisonment and nuisance, but to negligence, conspiracy and frauds of every kind. Frauds on creditors and the general public are frequent instances. If a contract is procured by a tort it is voidable, but if an agreement is made to commit a tort it is void. In the first the tort affects the reality of consent, in the second the legality of the object. A and B, who together own a majority of the stock in the "I" Company, promise to make C treasurer of the company at a fixed salary, in exchange for C's promise to buy part of their stock at par. Is the contract illegal? Yes. It is a fraud on the other shareholders. The defense of illegality is not allowed to protect A and B, but for the public good.[3] K is induced to sign a composition deed,

[1] Graves *v.* Johnson, 156 Mass. 211, 30 N. E. 818.
[2] Maloney *v.* Nelson, 12 App. Div. 545, 42 N. Y. Supp. 418.
[3] Guernsey *v.* Cook, 120 Mass. 501.

by promises of other creditors who have secretly been paid in full, by relatives of the debtor, G, with G's knowledge. Is the composition deed enforcible? No. The fact that the excess is not paid by the debtor does not divest the transaction of its fraudulent character, as the agreement is between the creditors themselves as much as between the creditor and debtor.[1] G promises not to bid, at an auction, for the labor of the inmates of a house of correction, in exchange for S's promise to pay G $800 if he gets the contract. Is the agreement enforcible? No. This agreement is made for the purpose of preventing competition and is contrary to public policy and is fraudulent.[2] In exchange for B's promise to defend, at his cost, any suits for statements contained in his book, J promises to publish the same. The parties do not intend to publish libelous matter, but make the above agreement in case suits for libel are brought. Is this agreement enforcible? Yes. In order to be illegal the author and publisher must intend to publish a libel.[3] P buys of N certain bonds, being induced to purchase by the fraud of N's agent. The sale of the bonds is illegal because forbidden by law. Can P rescind for fraud and recover the money paid? Yes. The right to be restored to his former position because of the tort is not taken away, because thereby a forbidden deed will be undone. This answer might be different, if P should know he was doing something forbidden.[4]

§ 4. PRACTICING PROFESSIONS AND BUSINESSES WITHOUT LICENSE.

Any agreement, the subject-matter of which is practicing certain professions or businesses without a license, or contrary to regulation, is unlawful.

Lawyers, physicians, teachers, peddlers and foreign corporations, are generally required to procure a license of some

[1]Kullman *v.* Greenebaum, 92 Cal. 403, 28 Pac. 674. *Contra,* Hanover Nat. Bank *v.* Blake, 142 N. Y. 404, 37 N. E. 519.

[2]Gibbs *v.* Smith, 115 Mass. 592.

[3]Jewett Pub. Co. *v.* Butler, 159 Mass. 517, 34 N. E. 1087.

[4]National Bank & Loan Co., *v.* Petrie, 189 U. S. 423.

sort before pursuing their occupation or business. Sales of intoxicating liquors and sales by weights and measures are frequently prohibited excepting as licensed. A domestic corporation cannot make valid agreements in regard to matters in excess of its powers (*ultra vires*). If the purpose of the statute is to protect the public, it is prohibitory, and an agreement in violation of the statute is void; but, if the statute is merely directory, it does not invalidate the contract. A performs work for B, as a broker, when he is not licensed as such. The language of the statute indicates that the legislature intends to protect the public rather than to raise a revenue. Can A recover for his work? No. If this statute has the intent indicated it is meant to prohibit the contract. A contract prohibited by statute is void.[1] A sells goods to B, by weight and measure, when his measure, scales and weights are not sealed as required by statute. The statute makes such sale a misdemeanor and imposes a penalty and the intent is to prohibit the sales altogether. Can A recover? No. The contract is unenforcible, for the statute aims to prevent fraud and to protect the public.[2] R agrees to act as agent for the U. S. Co., in writing insurance, and the company appoints him as its agent for Massachusetts for five years, for a percentage of commissions. R agrees not to engage in a like business for three years after quitting the company. The company has no certificate authorizing it to transact business in Massachusetts, it being thought that the business is not insurance, and, therefore, the certificate not necessary. The company breaks its contract because of insolvency. Is it liable? Yes. It is the business of the company to procure the certificate and it cannot set up that fact to defeat B's recovery.[3] B, an officer of N, borrows money of it, pledging, as security, bonds which he holds as trustee. A statute provides that no official shall borrow money of a corporation for which he is acting. Is the contract enforcible by N? Yes. The statute is directory. Its purpose is to protect the corporation. The official is the one who is affected by the statute. As the bonds are in the hands of a *bona fide* purchaser, it is protected, though B has no right

[1] Cope *v.* Rowlands, 2 Mees. & W. 149.

[2] Bisbee *v.* McAllen, 39 Minn. 143, 39 N. W. 299.

[3] Rosenbaum *v.* United States Credit System Co., 65 N. J. Law, 255, 48 Atl. 237.

to pledge them.[1] P promises to lay two drains for D, for a private sewer, for D's promise of compensation, the details of the contract being left to P. P uses some pipes not authorized by statute, and also works without a permit as required by the state. Can P recover anything for services? Yes. The illegal acts do not enter into the promise or consideration. A contract is not necessarily illegal because carried out in an illegal way.[2]

§ 5. WORK AND LABOR ON SUNDAY.

In most jurisdictions any agreement, the subject-matter of which is the doing of work and business on Sunday, except work of necessity and charity, is unlawful.

When this agreement is prohibited it is by virtue of statute. In England and in some of the states of the Union, at one time, it was unlawful to make any agreement that was blasphemous in character. If a statute forbids only servile labor on Sunday, a valid contract may be agreed upon on Sunday, and if a statute forbids the making of contracts on Sunday, in order to fall within the prohibition the contract must be completely closed on Sunday. Works of charity include acts of humanity, or benevolence, to relieve the distress of man or beast, or acts done in connection with religious worship. Works of necessity include acts done for the preservation of life, health, or property, when the acts cannot as well be done on another day. A hires, and B lets, a hall to A for a weekday ball and two Sunday lectures against the Bible and Christ. Is the agreement enforcible by A? Not in England, as to the Sundays, for its object is unlawful by the Statutes of Victoria.[3] D hires of P on Sunday, a horse and carriage and, through his negligence, injures both. He gives a note in settlement. It is illegal by statute to do anything on Sunday except works of necessity and charity. Is the note enforcible? No. The hiring is illegal, as it is not for necessity or charity and, therefore, the note given to settle an agreement that cannot be enforced

[1] Bowditch *v.* New England Ins. Co., 141 Mass. 292, 4 N. E. 798.
[2] Fox *v.* Rogers, 171 Mass. 546, 50 N. E. 1041.
[3] Cowan *v.* Milbourn, L. R. 2 Exch. 230.

is without consideration.[1] If a party renders services on Sunday, contrary to statute, can he recover in *quasi* contract? No. It is not like the case of benefits conferred on a contract, unenforcible because not satisfying the statute of frauds. There, it is merely unenforcible; here, it is illegal.[2]

§ 6. WAGERS.

Any agreement, the subject-matter of which is a wager or an agreement to pay something on the happening or not happening of a specified but uncertain event, is now generally unlawful, except in the case of insurance.

In the absence of statute, there is a difference of opinion as to whether wagers are unlawful. Some courts hold them unlawful, on common-law grounds, because against public policy; others hold them unlawful where against public policy. The English courts enforced all wagers until they repented too late, and set to work to discourage them by evolving rules of public policy. But, whatever view is taken of wagers in general, those for commercial objects are upheld if there is some other reason for the agreement than a mere bet. Insurance is a form of wager contract, but it is justified by the requirement of what is called an insurable interest in the life or thing covered by insurance. Option agreements are not inherently vicious, but where such agreements do not contemplate an actual delivery of property but the payment of the difference between the contract price and the market price on the day set for performance, they are a mere wager on the rise and fall of the price, and condemned. Competition entered into for the purpose of obtaining a prize or premium offered by a third person to a winner is not a wager.

Recovery of money deposited with a stakeholder can be maintained in *quasi* contract if he is notified by the depositor not to pay over the money deposited. The reasons for allowing such recovery is that the stakeholder is not in part *delicto* and, in England, by statute, and, generally, by common law,

[1] Tillock *v.* Webb, 56 Me. 100.

[2] Stewart *v.* Thayer, 170 Mass. 560, 49 N. E. 1020.

wagers are non-enforcible and not illegal; that is, the immediate object is not unlawful. H wagers 500 pounds against 500 pounds wagered by W that the earth is convex, proof of convexity of a canal or lake to be considered proof of convexity of the earth. The money is deposited with A; the referee finally decides that W wins, but before A pays the money over to W, H demands the return of the money deposited by him. Whether the wager is illegal or legal, a party can recover his own money from the stakeholder before it is paid over, because the stakeholder is only agent for the depositor. If the wager is legal, his authority may be revoked. If the wager is illegal, he is not affected with the illegality. A statute which says no suit shall be brought to recover any sum of money deposited means a suit by the winner to recover the loser's money. This is really a proposition in *quasi* contract, rather than an illustration of a contract.[1] L and M buy stock for O, on credit, but as a real purchase until O owes them $2,000. Can they collect? Yes. Purchase of stock, on credit, is not necessarily a gambling transaction. It may be bought on credit as well as sugar or flour.[2] Brokers in Chicago buy stock for brokers in Boston, on contracts for future delivery, but with no intent to have any actual delivery, but, by a series of off-setting contracts of sale, simply to make a payment of the difference in price. Can the Chicago brokers recover commission and losses incurred for the Boston brokers? No. There is no contractual or *quasi* contractual obligation, as the transactions are held, in Massachusetts, and the United States, to be illegal as well as void, and, therefore, not only the original contracts, but collateral contracts, are tainted. To make a wagering contract, it is enough that both parties intend that one party shall not be bound to deliver or the other to accept. Delivery is not necessary if a party will stand ready to deliver.[3] W, through H, sells to B 5,000 bushels of wheat at $1.12, seller to have until the last of July to make delivery. Wheat goes up and H for W buys back the wheat from B for $1.26, and H gives B his note for the difference in the price. B intends to buy the wheat, but H claims the transaction is a gamble. Is the

[1] Hampden *v.* Walsh, 1 Q. B. Div. 189.

[2] Hopkins *v.* O'Kane, 169 Pa. 478, 32 Atl. 421. But see Thacker *v.* Hardy, 4 Q. B. Div. 685.

[3] Harvey *v.* Merrill, 150 Mass. 1, 22 N. E. 49.

transaction illegal? No. If either of the parties contracts in good faith, he is entitled to the benefit of the contract.[1] N and F are captains of two hunting teams which arrange to hunt squirrels, the side that gets beat to pay for the suppers of both sides, each man paying for two suppers. W furnishes twenty-four suppers at the price of $18 on the order of N and F, who are to be responsible to him. W knows how the suppers are to be paid for. Can W recover from N and F? Yes. A wager is void only and not illegal and, therefore, W is not *particeps criminis*. His rights do not depend on the wager.[2] C promises, in writing, to pay F $902 if cotton shall rise to eight cents on or before the first of November, and, if not, $500. This instrument is given in part payment for a tract of land, the enhanced price to be paid if the value of the land is increased by its products. Is this a wager? No. The parties have an interest in the contingency.[3]

§ 7. LOTTERIES.

Any agreement, the subject-matter of which is a lottery or a scheme for the distribution of property by chance among those who pay or agree to pay a valuable consideration for the chance of getting greater value, is unlawful.

A lottery is closely allied to a wager. It involves the element of procuring, through lot or chance, by the investment of one amount of money or its equivalent, a greater amount of money or value. If there is no consideration for the promise to distribute property by chance, it is a promise to make a gift and unenforcible on that ground; if there is a consideration for it, it is unenforcible because against public policy. The good morals of society require that no encouragement should be afforded to the acquisition of property other than by honest industry. C purchases a farm and cuts it up into lots, and issues for each lot a ticket, which he sells for $330. The

[1] Pixley *v.* Boynton, 79 Ill. 351.
[2] Winchester *v.* Nutter, 52 N. H. 507.
[3] Ferguson *v.* Coleman, 3 Rich. Law (S. C.) 99.

lots vary in value from $100 to $1,100, and each person who buys a ticket is to receive one lot. Is this a lottery? Yes. This case is to be distinguished from a case of partition by lot by tenants in common, for here the vitiating element is the chance of getting a very valuable lot for nothing.[1]

§ 8. USURY.

Any agreement, the subject-matter of which is usury, or knowingly taking or reserving, or promising to take or reserve, a greater sum for the use of money than lawful interest, is unlawful.

O borrows $100 of H and gives him, therefor, his note, secured by a bill of sale on certain cattle. The note draws six per cent interest per month and is, therefore, usurious. When the note falls due, O turns the cattle over to T, as security, for ten days, at the end of which time H takes them from T. Can O sue H for the conversion of the cattle? Yes. The original transaction is void for usury, and turning the cattle over to T is an extension of the original usurious security and not a payment; hence this transaction is void, and the cattle still belong to O.[2]

§ 9. DEALINGS AFFECTING THE STATE: IN ITS EXTERNAL RELATIONS.

Any agreement, the subject-matter of which is to enter into dealings with alien enemies, or which is promotive of hostile action against a friendly state, is unlawful.

An agreement of this sort is unlawful because it is contrary to the policy of the law. Unless the hostile governments have waived their rights upon the breaking out of hostilities, a contract is either suspended during the time of hostilities or, if its

[1] Seidenbender *v.* Charles' Adm'rs, 4 Serg. & R. (Pa.) 151.

[2] Ormund *v.* Hobart, 36 Minn. 306, 31 N. W. 213. See Barnes *v.* Hedley, 2 Taunt. 184.

object is inconsistent with suspension, dissolved. The individual right must yield to the greater rights of society as a whole.[1]

§ 11. DEALINGS AFFECTING PUBLIC SERVICE.

Any agreement, the subject-matter of which is to promote dereliction of public duty, or to traffic in public offices, the emoluments of office, pensions, or public contracts, or to corrupt public officials, is unlawful.

A promise by a citizen to pay an official for doing what the duties of his office require him to do is unenforcible for two reasons. It is without consideration, and it is illegal. The public has an interest in the proper performance of their duties by public officials, and anything that would tend to make them less efficient is against public policy. The foundation of a republic is the virtue of its citizens. When that is undermined, the republic itself is endangered and liable to fall. The duties of public officers and the duties of the citizens are correlative, the one to be animated by a desire for the public good, the other by a desire for the integrity of every department of the government. C promises to take charge of a claim of T against the United States, and to prosecute it before Congress, as a lobbyist, for him, on T's promise to allow C twenty-five per cent of whatever Congress may allow him. Is this agreement illegal? Yes. An agreement for purely professional services is valid, but when it includes personal solicitation it is pernicious and the law puts the seal of its disapproval upon it, and where the two are blended in one agreement the bad destroys the good. T, therefore, not only has no lien on the money granted by Congress, but he cannot even recover the agreed amount in a suit.[2] In exchange for M's promise to procure C's appointment as special counsel for the United States in defense of the "Farragut Prize Cases," and to assist in the defense, C promises to pay M one-half of all the fees which he shall receive as such special counsel. Is this agreement valid? No. It is contrary to public policy. Corruption

[1]Esposito *v.* Bowden, 7 El. & Bl. 793; De Wutz *v.* Hendricks, 2 Bing. 316; Hanauer *v.* Woodruff, 82 U. S. (15 Wall.) 439.

[2]Trist *v.* Child, 88 U. S. (21 Wall.) 441.

in the public service is always the forerunner of despotism.[1] R, a railway construction company, has contracted with the G Railway to build for it a road by the nearest and most suitable route through Alabama, but deflects it to the town of Anniston, in consideration of W's promise to donate land and $30,000 in money. Is W's promise enforcible? No. Even if the contract involved only private parties, it would be contrary to law in binding an employee to rob his employer, but it is also contrary to public policy in that it attempts to induce a corporation, affected with a public interest, to disregard the interests of the public.[2] A is running for office and promises to give B a claim, which he holds against him, if B will work and use his influence for A's election. This B does. Is the promise enforcible? No. It is against public policy because it tends to the injury of the public service. A may sue and collect the claim.[3]

§ 12. DEALINGS AFFECTING PUBLIC JUSTICE.

Any agreement, the subject-matter of which is to compound a crime, or to oust the courts of jurisdiction, or, at the common law but not generally to-day, to encourage law suits, or to maintain a suit in consideration of a share of the proceeds, is unlawful.

The last two doctrines are known as champerty and maintenance. Champerty is maintenance, aggravated by an agreement to share in the proceeds of a suit. At the common law they were barred, or condemned, on the ground that they tend to degrade the remedies of the law, lead to corrupt practices and disturb the peace of society. No encouragement should be given to litigation by parties, introduced to enforce rights which the parties, in whom they are vested, are not disposed to enforce. Close social relations or charity may justify one in maintaining another's suit, but public policy forbids that one should maintain another's suit as a speculation. A *bona*

[1]Meguire *v.* Corwine, 101 U. S. 108.

[2]Woodstock Iron Co. *v.* Richmond & Danville Extension Co., 129 U. S. 643.

[3]Nichols *v.* Mudgett, 32 Vt. 546.

fide purchase of a chose in action does not come within the condemnation of the rules against maintenance. An agreement to refer to arbitration incidental and subsidiary matters in dispute, as a condition precedent to a right of action accruing, is valid, but if it goes so far as to completely oust the courts of jurisdiction and substitute a forum of the parties' own making, it is void, because tending to endanger the tribunal established for the community as a whole. For the same reason a private person is not allowed, by compounding a crime or stifling a criminal prosecution, to get redress for his own rights at the expense of the rights of the state. An agreement may be voidable because of duress if made to gain release from the restraint of unlawful imprisonment, or from fear of imprisonment or prosecution, but an agreement to gain release from lawful imprisonment or to stifle criminal prosecution is void because of illegality.

The above proposition will be further explained by some illustrations. D, an attorney, is employed by P to sue an insurance company to collect insurance for P under an agreement to retain one-half of the amount received after payment of the costs. Is this champerty? Yes. Where the English law is followed, P can sue D in *quasi* contract for money had and received and recover the amount received by D from the insurance company.[1] A, an attorney, agrees to take charge of his case for B, without charge, if the suit is unsuccessful, on B's promise to pay a large and liberal fee in the event of success. Is this agreement bad for champerty or maintenance? No. It is not champerty for there is no sharing in the fruits of litigation. It is not maintenance for a lawyer to give his services.[2] A agrees to institute proceedings for B, pay all the necessary expenses and receive one-half of what he shall realize. This agreement is champertous and A cannot sue to recover compensation. To allow champerty would be to permit temptation to the avaricious and unscrupulous in the profession.[3] C claims to be owner of land, under a will, and employs F to conduct some litigation in regard thereto for him. In consideration of C's deeding one-half of the land to him, F promises not only to rely upon the success of the suit for compensation but to

[1]Ackert *v.* Barker, 131 Mass. 436.

[2]Blaisdell *v.* Ahern, 144 Mass. 393, 11 N. E. 681.

[3]Thompson *v.* Reynolds, 73 Ill. 11.

pay the costs and expenses. Is this agreement valid? Yes, where the old rules of champerty do not prevail. In New York, for example, except so far as preserved by statute, they are abolished. This sort of a contract stirs up no strife and induces no litigation.[1] H and G enter into an arrangement by which H is to seek out claims against the G. N. Railway arising from its failure to fence its track, and to procure the parties to institute suits, which G is to conduct. H gets seventy-one of these claims and contracts authorizing G to sue. G institutes the suits, but the parties settle with the railway company contrary to the agreement. The case arises in modern times. Can G recover for services performed? While the old common-law rules of champerty and maintenance are modified so that an attorney may take a contingent fee or carry on a suit for his share, the essential principle on which they rested still exists and agreements are void which stir up strife and contention, disturb the peace of society, lead to corrupt practices and prevent the remedial process of the law.[2] A sues the C railway to recover damages for destruction of property by fire, and C sets up the defense that A has agreed, with his attorney, to have him carry on the suit at his own expense and to receive one-sixth of the amount recovered, if successful. Can this defense be set up by a third party? No. If A has a good cause of action against C, there is no reason why he should be defeated in it because of a void contract between him and his attorney. The question of champerty should be determined between A and his attorney.[3] B's son forges his name to various notes aggregating over 7,000 pounds. The son has these discounted by W. After discovering this forgery, in order to prevent prosecution of his son, and in consideration of the bills and notes given up by W, B promises to pay the amount of the notes, and secures the same by mortgage. This agreement is void as an agreement to stifle criminal prosecution, and it makes no difference whether W forces it out of B or B proposes it himself.[4] M is employed by F to collect rent, and fails to account for a large sum. F threatens to prosecute him for embezzlement and M indorses to F, not because of the threat

[1] Fowler *v.* Callan, 102 N. Y. 395, 7 N. E. 169.
[2] Gammons *v.* Johnson, 76 Minn. 76, 78 N. W. 1035.
[3] Small *v.* Chicago, R. I. & P. R. Co., 55 Iowa, 582, 8 N. W. 437.
[4] Williams *v.* Bayley, L. R. 1 H. L. 200.

but as a free act, bills accepted by S. Is this illegal? No. It is not a case of stifling prosecution, but of a creditor obtaining payment of a debt due him. It does not appear that the bills are given to stop prosecution or because of fear, so that the payment of the bills is neither illegal nor procured by duress.[1] S takes out insurance, with A, on a ship, under a mutual agreement that in case of loss the amount of the recovery shall be what certain persons designated shall say. This agreement is valid and there can be no suit, until the referee's action. Parties cannot oust the court of jurisdiction, but they may agree that no right to sue shall arise until a reference is made to arbitrators.[2] W, when about to enter the employ of the M railway as conductor, deposits $65 to be retained by M as security for the proper discharge of W's duty, and for failure to discharge his duty the M railway to retain all or a part as legal damages, M's president being sole judge and his certificate to be a final adjudication. This is an attempt to oust the courts of their jurisdiction and is invalid, and W may sue in a law court and recover.[3] A is arrested for a felony and to get him released on bail, N signs his bond, and in exchange for N's promise to indemnify M against all liabilities, M also signs the bond. Is the contract of indemnity enforcible? Yes. The obligation assumed by sureties on a bail bond is not personal security and, therefore, a contract relieving one from liability is not illegal.[4]

§ 13. DEALINGS AFFECTING MORALS.

Any agreement, the subject-matter of which is illicit cohabitation, is unlawful.

The reason such agreement is unlawful is that it is contrary to the policy of the law. A promise to provide for a woman because of past illicit cohabitation under certain circumstances could be supported on moral grounds, but it would be unen-

[1]Flower *v.* Sadler, 10 Q. B. Div. 572.

[2]Scott *v.* Avery, 5 H. L. Cas. 811.

[3]White *v.* Middlesex R. Co., 135 Mass. 216; Miles *v.* Schmidt, 168 Mass. 339, 47 N. E. 115.

[4]Maloney *v.* Nelson, 12 App. Div. 545, 42 N. Y. Supp. 418.

forcible because a gratuity, and a promise for future illicit cohabitation is unenforcible because of illegality. Society has a right to have no conduct of this sort. The institution of marriage is the first act of civilization, and the protection of the married state is a part of the policy of every people possessed of morals and laws. P agrees, on certain conditions as to price, to let B, a prostitute, have a brougham for the purpose of assisting her in carrying on her immoral vocation. Is the agreement enforcible by P? No. Anyone who knowingly contributes to the performance of an act contrary to the law cannot recover the price of goods supplied thereby.[1] An unmarried woman, ignorant of the man's marriage, promises to marry a married man, in exchange for his promise to marry her. If it was not for the illegality this agreement would be perfectly valid, as it has all the other elements of a contract, including consideration, and as the woman is not tainted with illegality, she can recover for breach of contract.[2]

§ 14. DEALINGS AFFECTING THE MARRIAGE RELATION.

Any agreement, the subject-matter of which is to restrain marriage, procure marriage for a reward, or discover private family matters, or which contemplates future separation of husband and wife, is unlawful.

These matters relate to the rights of individuals, yet their performance is of public importance either because tending to depopulate the commonwealth, or to promote licentiousness. The marriage contract, of all others, should be the result of full and free consent, and not only the parties, but society at large, is concerned in the observance of the duties incident to the marriage relation. While an intention to restrain marriage is illegal, a contract, or a condition in a will, imposing an obligation not to marry some particular person or class, or postponing marriage for good reason, is not contrary to public policy. Agreements providing for immediate separation are

[1] Pearce *v.* Brooks, L. R. 1 Exch. 213.

[2] Millward *v.* Littlewood, 5 Exch. 775. See, also, Hanks *v.* Naglee, 54 Cal. 51.

valid, because the state of things has become inevitable, but those providing for the future are illegal because they induce the parties not to perform the duties in which society has an interest. B, a married man, living apart from his wife, and expecting to get a divorce, promises to marry N, within a reasonable time after such divorce. Is this promise illegal? Yes. The illegality of a promise is determined at the time it is made, and a promise, thus aimed at the institution of marriage, is contrary to the policy of the law.[1] A promises to give B $5,000 if she will return and live with him as his wife until his death and will not institute proceedings for divorce, and she does both. Is the promise illegal? A majority of the Supreme Court of Massachusetts decided that this promise is illegal, on the ground that conjugal consortium is without the range of pecuniary consideration, but Holmes and others dissented on the ground that it is not unlawful to make a lawful act. Marriage is a consideration for a promise to pay money, and, if it is not illegal to make such a promise for the assumption of conjugal relations, it is not, for the resumption of conjugal relations.[2] A promises to pay $1,000 to B if he will forbear marrying for the space of six months. B refrains from marriage for six months. Is this agreement illegal? Yes. There being no reason for B's refraining from marriage, this agreement is against public policy.[3] J promises to give H $5,000 if he will help him to get a wife. This H does. Can H enforce J's promise? No. It is contrary to public policy, because the agreement is a marriage brokerage agreement.[4] A promises B, first, to live with him and to take care of him while he lives, and, second, to refrain from marrying while he lives, in exchange for B's promise to provide for her amply and sufficiently to make her well off. Can A recover for her services? Yes. She makes one valid promise and one void promise for his promise, but the void promise is not illegal, because one has a right to omit to marry if he or she chooses, and, therefore, A is not in *pari delicto*. If B had promised to give $5,000 for A's two promises it would be impossible to tell how much of the $5,000 was for services and how much for refraining from

[1] Noice v. Brown, 38 N. J. Law, 228.
[2] Merrill *v.* Peaslee, 146 Mass. 460, 16 N. E. 271.
[3] Sterling *v.* Sinnickson, 5 N. J. Law (2 South.) 871.
[4] Johnson's Adm'r *v.* Hunt, 81 Ky. 321.

marrying, and, as it could not be divided, suit could not be brought on the express promise, but in this case there is no rule against recovery.[1]

§ 15. NEGLIGENCE OF COMMON CARRIERS.

An agreement relieving a common carrier from responsibility for negligence to a passenger or goods is unlawful.

This is again because of the interest which the community as a whole has in the life of its citizens and in the preservation of the wealth of the state.[2]

§ 16. MONOPOLIES.

Any agreement, the subject-matter of which is a monopoly, where one or more persons procure the advantage of selling alone all of a particular kind of commodity, is unlawful.

It has been a common-law doctrine, though there are some indications that it will not always be, that in direct proportion as a monopoly benefits the individual, it is a detriment to the public. In the United States neither trades unions nor employers' unions are illegal *per se;* it is only as they contemplate an unlawful object that they become objectionable. Monopoly generally results from combination. Individuals may ordinarily combine their capital and energy to effect any object any one of them might pursue, but, if the end of their agreement is to destroy competition, it is held to be against public policy. A and B, with others, are members of a Chicago Law Stenographic Association whose constitution (contract between the members) declares that it has for its object the control of the price to be charged, by restraining competition between members of the association, but it is not connected with the sale of

[1] King *v.* King, 63 Ohio St. 363, 59 N. E. 111.
[2] New York Cent. R. Co. *v.* Lockwood, 84 U. S. (17 Wall.) 357.

any business. Is there any right of action for violation of any rules of this association? No. It is contrary to public policy, as it tends to create a monopoly against which public interests have no protection.[1] The candle manufacturers of the eastern part of the United States combine in an incorporated company to last six years, with the object of increasing the prices and decreasing the manufacture of candles in the territory covered. The members pay in a certain per cent of the price of candles disposed of on their own account and each receives his proportion of the pool. No member is obliged to operate his factory, as his proportion is determined by the business done in previous years. Is this compact illegal? Yes. It is contrary to public policy, and if one member drops out, he cannot sue to compel payment of money due.[2]

§ 17. RESTRAINT OF TRADE.

Any agreement, the subject-matter of which is a restraint of trade, not necessary for its protection, is unlawful.

If a restraint of trade goes beyond reasonable protection it tends to injure the public, if not for other reasons in that it deprives the state of the services of its citizens in their chosen field of activity, and it oppresses one party without benefiting another; but, if the restriction by being limited as to time or place, does not go beyond what is reasonably necessary for the protection of a trade or business, the public is helped rather than injured, for the public is interested in the parties on both sides. Contracts in partial restraint of trade help rather than harm both public interest and private welfare. They are necessary to trade itself. They protect all established business by safeguarding its secrets and making it salable. In the early days, when one who could not work at his trade could hardly find work, it was said that contracting not to follow one's trade was the same thing as contracting to be idle or to expatriate himself, but in the light of modern ease of change of pursuits this statement would be absurd. The rule now, as extended, seems to be that if it is necessary in order to give

[1] More *v.* Bennett, 140 Ill. 69, 29 N. E. 888.

[2] Emery *v.* Ohio Candle Co., 47 Ohio St. 320, 24 N. E. 660.

fair protection to business, the restriction may be unlimited, unless the agreement is one that will injuriously affect the public interests. Restraints upon trade, as any other agreements, to be enforcible, must, of course, have a sufficient consideration. Restraints may not only be placed on trade by the voluntary act of the parties where it is necessary to determine whether they are against public policy; but it may be necessary for society because of public policy, as announced by the majority in the state, to place involuntary restraints upon trade, by grant, as in case of patents on inventions; or by custom, as in the case of particular trades; or enactment, as in the case of the protective tariff and positive regulations, topics already considered. D assigns to P a lease, for five years, of a bakery in a certain parish, giving a bond, conditioned in the amount of fifty pounds, not to engage in the trade of a baker during that time anywhere in the parish. This bond, in voluntary restraint of trade, is not against public policy because it is necessary to protect P, and it is not so unlimited as to deprive D of means of sustenance or society of a useful member.[1] C, director of a school of languages in Providence, employs R to teach French under an agreement that for one year after the end of his service he will not teach French or German, or be connected with a school that teaches them, in the state of Rhode Island. Is the agreement enforcible? No. It is not necessary to be so extensive to protect the business of C, for no protection is needed outside of Providence.[2] Three men, as business managers of electric companies, agree to form one new company to which they sell the business of all three, and as a part of the good will of the business sold, each officer agrees not to enter into business to compete or interfere with the business of the new company for a period of five years. This stipulation goes no farther than is reasonably necessary to protect the good will of the business sold.[3] In consideration of a deduction from the retail price, A promises not to sell caffein for less than a stipulated price, in default of which he will pay $21 as liquidated damages. He sells below the agreed price. Is he liable to pay the $21? Yes.[4]

[1]Mitchel *v.* Reynolds, 1 P. Wms. 181.
[2]Herreshoff *v.* Boutineau, 17 R. I. 3, 19 Atl. 712.
[3]Anchor Elec. Co. *v.* Hawkes, 171 Mass. 101, 50 N. E. 509.
[4]Garst *v.* Harris, 177 Mass. 72, 58 N. E. 174.

§ 18. DEALINGS AFFECTING PUBLIC HEALTH AND SAFETY.

Any agreement, the subject-matter of which is to injure the public health or safety, is unlawful.

Government is instituted and maintained and law is administered for the protection of the rights of the people, of which the right to personal safety is not one of the least important, and where the subject-matter of a contract is designed to injure the public health or safety, it is contrary to the policy of the law, and a remedy will be withheld from the party attempting the wrong, though it does not amount to a crime or a tort, C agrees to sell, and P to buy, such quantities of menhaden as P's business requires, not to exceed C's catch, P to receive the barrels of menhaden from C, but to brand them with misleading marks such as "Alaska mackerel," etc. Can P recover on this agreement? No. It is not enforcible because of fraud upon the public.[1]

[1]Church *v.* Proctor (C. C. A.), 66 Fed. 240.

CHAPTER XVII.

FORMALITIES.

§ 1. Formal Agreements

In order to be enforcible, agreements relating to certain subjects must be under seal, and agreements relating to certain other subjects must be in writing or in some other way satisfy the requirements of the statute of frauds.

The early doctrines of the law crop out here for the requirement of a seal is a doctrine that got a foundation in the law

before the modern consensual contract was discovered. Before that time the only way that an executory agreement could be made binding was by the contract under seal. This necessitates the classification of contracts into formal, or those under seal and those in writing, and the formless or oral.

§ 2. REQUIREMENT OF SEAL (DEEDS).

Conveyances of real estate are sometimes required to be under seal, and the parties may put their other agreements under seal as a matter of choice. If that form of expression is used, the contract is called a deed or specialty, and derives its validity from its form alone.

A promise under seal, at the common law, possessed validity, not because of the agreement of the parties nor of consideration, but from the formality itself. Therefore, a gratuitous promise under seal was binding, and an offer under seal could not be withdrawn. But today the doctrine of the seal has little application and in many states private seals have been abolished. Yet the rights arising out of a sealed contract may be greater than those arising from a simple contract. A right of action lasts longer before being barred by the statute of limitations. Estoppel sometimes applies, as it would not otherwise. A debt under seal is entitled to priority over simple contract debts, and the latter are merged in the former where the same engagement is covered by both. At the common law, a corporation could not contract except under seal, but this rule does not obtain today. The contract under seal is a formal contract.

Contracts of record, including judgments and recognizances, have been classed as formal contracts, but they are properly classed as *quasi* contracts, having been relegated to that limbo by the action of assumpsit, which removed the law of contracts from its old foundation of debt (and covenant) and placed it upon its own new foundation of promise. This *quasi* contractual obligation ranks above specialties so far as priority is concerned.

A deed or specialty, is a contract under seal, and land is generally conveyed by deed, but it does not follow that they are synonymous. Deeds may not refer to land, and certain forms of conveyances require more than a seal. The deed of

bargain and sale must be based on a valuable consideration, and a covenant to stand seized must be based upon a good consideration.[1]

§ 3. WRITING REQUIRED FOR DEEDS.

A deed must be in writing or printed on paper or parchment.

Formerly a deed executed by one party had smooth edges and was, therefore, called a deed poll; while a deed executed by two or more was copied for each on the same parchment, and then cut apart by indented edges and was, therefore, called an indenture.

§ 4. SEAL REQUIRED FOR DEEDS.

A deed must be under seal (and signed).

At the common law a seal was wax, or other tenacious matter, with an impression on it, and that it was which constituted the primary distinction between writings sealed and writings not sealed; but, in recent times, the seal has become a mere form, and a flourish of the pen, the word "Seal" or "L. S.," or other mark, with pen or print, is sufficient. At the common law a deed need not be signed, the seal alone being sufficient, but where the seal has become a mere form the signature is a material part of the deed. The seal rendered a promise obligatory, not because it identified the party who affixed it, but because of the ceremony and solemnity necessary in affixing it. The next of kin sues the administrator for an account, and the administrator pleads a release sealed and delivered, but not signed. Is this a good plea? Yes. The release does not need to be signed in order to be effectual.[2] A paper signed in Virginia has a scrawl on it for a seal, but no wax, but the instrument is made payable in New York. Is this a seal? According to the strict rules of the common law it is not, and as this instrument is to be tested and governed by the laws of New York, where the common-law rules prevail, it is not a sealed

[1]Anonymous, Bel. 111; Sharington *v.* Strotton, 1 Plowd. 298, 308a; Krell *v.* Codman, 154 Mass. 454, 28 N. E. 578.

[2]Taunton *v.* Pepler, 6 Madd. 166.

instrument.[1] N signs a promissory note, on which the word "Seal" appears immediately after his name. Is this contract under seal? Yes. The necessity for an actual seal in its original sense has long gone by. This is a specialty and an action thereon is not barred by a statute of limitation which applies to simple contracts.[2] A attaches his seal to an obligation, but does not state "Sealed with my seal," nor "In witness whereof." Is this obligation good? Yes. The seal is sufficient according to the early common law.[3] In an action of covenant, A produces a writing which concludes "As witness my hand this 22d day of February, 1791, W.," with a written scroll annexed to the signature of W. Should this be admitted as evidence? In some jurisdictions it is held that as a covenant is a deed, and the seal is one of the essentials of a deed, the clause "In testimony whereof" ought to recite that the maker hath thereunto put his seal, otherwise a supposititious seal may be affixed. As in this case he has not done this, but has said, "As witness my hand," this is not a good covenant.[4] E, one of the members of the firm of E, B and G, signs the firm name and affixes brackets for a seal on a promissory note. Will assumpsit lie against E, B and G? In any event, this is a sealed instrument as to one of the makers, and where the old rule prevails only covenant can be maintained thereon.[5] C makes a covenant with G, for the benefit of G's widow, who is H. Can H enforce this covenant? No. Only those who are parties to contracts under seal can sue on them, and in Massachusetts, H could not sue, though this were a simple contract, because of lack of privity.[6]

§ 5. DELIVERY REQUIRED BY DEEDS.

A deed must be delivered. The maker must part with the right of control over it, and the grantee unconditionally accept it.

[1]Warren *v.* Lynch, 5 Johns. (N. Y.) 239.
[2]Lorah *v.* Nissley, 156 Pa. 329, 27 Atl. 242.
[3]Anonymous 1 Dyer, 19 A.
[4]Austin's Adm'x *v.* Whitlock's Ex's, 1 Munf. (Va.) 487.
[5]Eames *v.* Preston, 20 Ill. 389.
[6]Saunders *v.* Saunders, 154 Mass. 337, 28 N. E. 270.

All that is necessary to constitute a delivery is an intention that the deed shall become operative. It may be handed to the other party to it, or to a third party, or even retained in the possession of the party executing it. A delivery may also be upon condition, when it is called a delivery in escrow. A sues on an obligation of March 20th, dated October 10th, but delivered March 20th. Is March 20th the true date of the obligation? Yes, and, therefore, a declaration to this effect is not demurrable.[1] R, on December 14th, makes a proposal to take from S, insurance against burglary. A protection note is issued on December 18th. On December 27th, S executes a policy and attaches a seal to it, but does not deliver the policy. On December 26th a burglary occurs. Can R sue on the policy? Yes. This is not a conditional execution, and as there was an intent that the policy should become operative, the fact that it remains in S's hands is immaterial.[2] H signs a deed and places it on a table where a scrivener is sitting, but the latter does not represent the grantee and goes away leaving the deed on the table. Is this a sufficient delivery? No. In order to be a complete delivery there must be an acceptance by the grantee or his representative.[3]

§ 6. REQUIREMENT OF WRITING.

Many agreements must be in writing in order to be enforcible.

Unlike the seal, writing does not, even at common law, dispense with the other essentials of a contract, but, where an agreement is required to be in writing, that is merely an additional prerequisite to enforcibility. Parties, assent, consideration, definiteness, intention to create legal relations, freedom from vitiating circumstances and illegality, all of these things are required as well as writing.

[1]Stone *v.* Bale, 3 Lev. 348.

[2]Roberts *v.* Security Co. [1897] 1 Q. B. 111. See, also, Butler *v.* Baker, 3 Coke, 25 a, 26 b.

[3]Meigs *v.* Dexter, 172 Mass. 217, 52 N. E. 75.

§ 7. COMMERCIAL PAPER.

Bills of exchange and promissory notes must be in writing.

The necessity of the case makes this imperative The object of commercial paper is to facilitate business by giving to the commercial world something that can readily pass from hand to hand like money, free from equitable defenses, and this could not be accomplished without some tangible writing.

§ 8. STATUTE OF FRAUDS.

The statute of frauds (29 Car. II., C. 3, as adopted by statutes in the various states) requires that certain agreements, or a note or memorandum thereof, shall be in writing and signed (or subscribed) by the party (or parties) to be charged therewith, or some person thereunto by him lawfully authorized, before an action may be brought thereon.

One reason why the original statute of frauds was passed was because the plaintiff and defendant were not then competent witnesses in their own behalf, but, though they may now testify the real object to be accomplished by the statute—prevention of fraud and perjury—makes it as necessary to have written evidence in certain cases as when the statute was first enacted.

If a subject comes within the statute, the statute can be satisfied, except in the case of sales of chattels, only by a written agreement or a note or memorandum of an agreement, which means that the memorandum must show all the essential elements of the contract, though details may be omitted and no particular form need be followed; and, where the contract is required by the statute to be in writing, it cannot be modified by an oral agreement; for, *pro tanto,* that would be violating the provisions of the statute, which, to prevent fraud and perjury and to secure better evidence than the slippery testimony of men's memories, eliminates oral and requires written evidence in regard to those subjects. Where a statute requires the agreement or memorandum to be "subscribed" it must be signed at the end, but, if the language is merely

"signed," the signature may come anywhere. The signature may be made by an authorized agent who, if authorized to sign, may sign his principal's name, and if authorized to sell only, may sign his own name. Authority to execute a deed must be by deed, for the power must be of as high dignity as the act. Both parties do not need to sign, in order to give the memorandum validity, but no one can be sued (charged) unless he has signed. The memorandum must not only show who are the contracting parties, but, which is promisor and which promisee. The memorandum may consist of several papers, but they must appear on their face to be connected parts of one transaction, or when connected make a contract without further explanation.

Failure to comply with the statute, except in some jurisdictions in the case of sales, does not render the transactions void, but merely unenforcible; the statute affects the remedy only. Hence the statute of frauds that will apply is that of the place where the agreement is sought to be enforced. Where there is part performance of an oral contract in regard to the sale of land, equity will sometimes compel specific performance. The party to be charged may expressly waive the defense of the statute. Though the agreement relates to some subject which falls within the statute, if it is executed on both sides, it is valid; and if it is executed wholly or in part only on one side, recovery may be had in *quasi* contract for benefits conferred, if the other party is in default. The statute does not apply to specialties.

The fourth and seventeenth sections of the original statute will constitute the basis for our discussion. They are as follows:

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

be charged therewith, or some other person thereunto by him lawfully authorized." (Sec. 4)

"No contract for the sale of any goods, wares and merchandise, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." (Sec. 17)

§ 9. PROMISE OF EXECUTOR OR ADMINISTRATOR.

The statute applies to an action "to charge any executor or administrator, upon any special promise, to answer damages out of his own estate."

The statute does not apply to promises of a personal representative to pay money out of his own estate, to subserve some end of his own, nor to pay a debt of his decedent out of the decedent's estate, but only to answer out of his own estate claims against the estate, for which he is liable only as representative of the decedent.

§ 10. PROMISE TO ANSWER FOR ANOTHER'S DEBT.

The statute applies to an action "to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person."

Statutes sometimes read: "Every special promise to answer for the debt, default, or doings of another." If the promise is not supported by consideration or is otherwise unenforcible, it is not necessary to consider whether it comes within the statute; but, if the contract possesses all the other elements of enforcibility, it is then necessary to decide whether it is a guaranty. The action referred to in the statute includes liabilities present or future arising out of tort as well as out of contract.

The term "another person" means someone other than the immediate parties to the agreement. Three parties are thus involved. There must be a promise by one person to pay a second person a third person's debt.

The promise must be collateral; it must be a guaranty. Therefore, there must be an original debt to which an auxiliary promise can be collateral. If the promisor is alone charged, or if the original debt is extinguished, or if the promisor is really subserving some interest of his own, or if the promise is to be answered for out of the third person's property, the promise is not a guaranty, and is not within the statute. D, orally, promises P that if he will loan one E his gelding to ride to a certain place, E will safely return the animal. For this promise, P loans the gelding to E. Is the promise enforcible? No. This is a collateral undertaking, as P may sue E in detinue, and it is, therefore, within the statute.[1] C owes P a debt, secured by a mortage deed. D promises P to pledge as security certain bonds which he agrees to redeem at par within one year if P will redeed the land to C. On this inducement P deeds back the land to C. Is D's promise within the statute of frauds? No. P relinquishes his claim to the land and D enters into an independent obligation.[2] B obtains a judgment against P. W requests N to become bail for a stay of execution on this judgment, and orally promises him to pay the judgment if P does not. N gives bail and has to pay the judgment. Can he enforce W's promise? No. It is a promise to answer for the debt of P. The act of giving bail is sufficient consideration for W's promise, but N should have secured a promise in writing.[3] S owes W a debt, and W orally promises R that if he will sign notes as surety for S, W will procure a chattel mortgage from S to secure payment of the notes. Is W's promise within the statute? No. S is the "another" in this case, but W does not promise to pay his debt, for the only liability of S to R is a possible *quasi* contract to arise in the future, and even if that is treated as a "debt," W's obligation is not collateral but original, a promise to pay not S's debt but R's; that is, to save him harmless by getting a mortgage. In order to bring

[1]Bourkmire *v.* Darnell, 3 Salk. 15.
[2]Booth *v.* Eighmie, 60 N. Y. 238.
[3]Nugent *v.* Wolfe, 111 Pa. 471, 4 Atl. 15.

the case within the statute, S would have to promise to give the chattel mortgage and W promise to get it if S should not.[1] In settlement of a suit against him, M gives H $1,062 in commercial paper in exchange for H's promise to take them in satisfaction of his claim of $750 and to pay a debt of $500 due from M to a third person. Is this promise of H within the statute? No. There is no promise to pay another's debt. After this transaction, the debt is H's. He has been paid to pay it.[2]

§ 11. AGREEMENTS MADE UPON CONSIDERATION OF MARRIAGE.

The statute applies to an action "to charge any person upon any agreement made upon consideration of marriage."

Statutes sometimes modify this so as to read, "Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry." However, this is but a restatement of the common-law interpretation of the statute. Mutual promises to marry do not come within this section; yet, if the agreement cannot by its terms be performed within one year from the making thereof, it will come within the next section of the statute. Part performance does not apply to a unilateral agreement within the statute, for the same act of performance which brings the contract within the sweep of the statute cannot be relied upon to exclude it therefrom. In such cases the marriage is the acceptance of the proposal; it adds nothing to the circumstance, which makes a writing essential. W enters into an oral antenuptial agreement with L wherein he promises her that if she will marry him he will give her, at once, $5,000 and, later, other property. L marries him. Is this promise within the statute? Yes. This is the exact case meant by the statute. The doctrine of part performance does not apply, for equity cannot repeal a statute.[3]

[1]Resseter *v.* Waterman, 151 Ill. 169, 37 N. E. 875.
[2]Meyer *v.* Hartman, 72 Ill. 442.
[3]Hunt *v.* Hunt, 171 N. Y. 396, 64 N. E. 159.

§ 12. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

The statute applies to an action "upon any agreement that is not to be performed within the space of one year from the making thereof."

Statutes sometimes insert a phrase so that the provision reads "upon any agreement that by its terms is not to be performed within the space of one year from the making thereof." This section applies to all contracts whether they also come within other provisions of the statute or not, except where the statute permits oral leases for a term of three years. The statute does not apply to a contract that by its terms may be performed within one year from the time it is made, but to such only as by their express terms cannot be carried into full execution until after the expiration of a year; and, if it can be performed within one year at the time it is made, a subsequent modification which extends performance beyond a year (if not itself longer than one year) does not bring it within the statute. But if the parties intend the agreement to last beyond a year, it should be held within the statute, even though there is a possibility of performance within that time. Some courts hold that this clause means not to be performed on either side, so that if one party can perform his side of the agreement within a year, the fact that the other cannot does not make it within the statute. But, in any event, a party who confers benefits can recover in *quasi* contract. In consideration of another promise by P, D promises to give P a certain amount of money, on the date of his marriage. This is not within the statute, as it does not appear from the agreement that it is to be performed after a year. If the contingency may happen within a year, the promise is not within the statute.[1] By an agreement between W and T, it is agreed that, if W will grant the ground for a switch and put down the ties at a certain point, T will put down the rails and maintain the switch for W's benefit, as long as he needs it. Is the agreement within the statute? No. There is no stipulation which in terms, or by reasonable inference, requires the contract to continue more than one year. Within a year, W might die or abandon his whole business, or

[1]Peter *v.* Compton, Skin. 353.

for other reasons cease to need the switch.[1] D sells out his grocery business to P, and orally promises him, in that connection, not to go into business in the same town for five years. Is this agreement within the statute? No. If the death of the promisor within the year will merely prevent full performance of the agreement, it is within the statute; but, if his death will leave the agreement fully performed and its purpose carried out, it is not. Therefore, this promise is not within the statute.[2] In a deed, C assigns certain letters patent to H and N, who agree to pay therefor by installments extending over several years. H does not sign but affixes his seal. Is H's covenant within the statute, so that it must be signed by him? No. The statute of frauds does not apply to contracts under seal.[3] D lets H have twenty ewe sheep, under an agreement to return forty at the end of four years. Is this within the statute? Yes. It cannot be performed within a year, but as D has performed, though he cannot sue on the express contract, he may sue in *quasi* contract or tort, and H cannot plead the statute as a bar.[4] B agrees on the 31st of March, to work for C for one year, to commence April first, for a stipulated price, promised by C. Is this agreement within the statute? Yes. If the term of service is to commence at any time subsequent to the day of the contract, and is for a full year, it cannot by its term be performed within one year from the making.[5] D and P make mutual promises to marry each other, at the end of a period of about five years. This agreement comes within the very teeth of the statute.[6] H's agent draws up a memorandum of an agreement, in which he places H's name at the top, and below writes a promise of E to work for H for three years for 130 pounds per annum, and E signs this, at the bottom. Is this a sufficient memorandum to bind H? Yes. It states all the elements of the contract and H's name as party to be charged is signed by his authorized agent. There is H's name, inserted by his agent, in a con-

[1] Warner *v.* Texas & P. R. Co., 164 U. S. 418.

[2] Doyle *v.* Dixon, 97 Mass. 208.

[3] Cherry *v.* Heming, 4 Exch. 631.

[4] Dietrich *v.* Hoefelmeir, 128 Mich. 145, 87 N. W. 111.

[5] Billington *v.* Cahill, 51 Hun, 132, 4 N. Y. Supp. 660; Odell *v.* Webendorfer, 50 App. Div. 579, 64 N. Y. Supp. 451.

[6] Derby *v.* Phelps, 2 N. H. 515.

tract intended to be binding on E, and that it is in the form of an address is immaterial.[1] T and others agree, in writing to herd cattle for B for a term of about two years, each to receive for his labor one-sixth of the price the cattle sell for above a certain price. B does not sign this agreement, but, in subsequent letters, refers to "the agreement" again and again. Therefore, this is a sufficient memorandum to bind him, in a suit by T. It is not necessary that the writings should, on their face, demonstrate their reference, and unless B by oral proof can show that he meant some other agreement, he is estopped from denying that the agreement referred to in his letters is the one signed by T.[2]

§ 13. CONVEYANCES OF REAL PROPERTY.

The statute applies to an action upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them.

The original statute excepted leases for three years or less, and modern statutes generally except from the operation of the statute "leases for a term not exceeding one year" and "contracts for the leasing for no longer period than one year." Whether sales of the products of the soil come within the statute or not, depends upon whether the products are personalty or realty. *Fructus industriales* (or crops produced by annual cultivation), *fructus naturales* (or natural growths) after severance, and minerals after severance, are personalty, and a contract regarding them or which contemplates the passing of title only after removal is not regarding land. An easement, but not a mere license, true fixtures, *fructus naturales* and minerals before severance, are interests in land. The statute does not apply to judicial sales, and equity will decree specific performance of an oral contract where the party asking for relief has performed such acts on the faith of it, that otherwise he would suffer an injury amounting to fraud (as where possession has been taken and purchase money paid, or permanent improvements made).

[1]Evans *v.* Hoare [1892] 1 Q. B. 593.
[2]Beckwith *v.* Talbot, 95 U. S. 289.

The statute of frauds does not apply to partnership agreements for the purchase and sale of land. There is no conveyance nor contract to convey land, or any interest therein. If later, pursuant to their agreement, the partners buy or sell land, the transfers, or agreements to transfer title will have to be in writing, but the partners do not convey, or contract to convey, any land from one to the other. The statute does not apply to oral partitions of land by tenants in common by marking a division line, for there is no acquisition of land nor transfer of title, but only the setting apart in severalty of the interests held in common.

Some concrete illustrations will bring out the application of this section of the statute of frauds. A orally agrees to sell B, and B agrees to buy, certain growing timber. Can B sue A for breach of contract if he refuses to perform? No. This is a sale of something which is a part of the realty and the contract must be in writing.[1] A tenant puts certain chattels into D's mill, but does not remove them during his term. Thereafter, the tenant sells them to P, who orally sells them to D, on his oral promise to pay a certain price for them. Is this within the statute? Yes. As the chattels are not removed before the end of the term they become fixtures, in the true sense (land), and a writing is essential. P cannot recover on the express contract.[2] D sells to P, at auction, building materials composing a certain building, for a certain price, the building to be torn down within a certain time. P pays down 100 pounds. Later D returns this and P sues for specific performance, etc. Is this a sale of land or of chattels? It is either a sale of land, as being a sale of the house standing, or at least the right to possession of the land or house for the purpose of pulling down the house, and this is an interest in land. If the owner should agree to sell the materials in the house after he should pull it down, it would be a sale of chattels.[3] W orally agrees to sell L, for $175, his dwelling house, W to deliver it to L, standing upon blocks, within a certain time, and L agrees to accept and pay the price. W delivers it. Is this a sale of land? No. As the severance is to be

[1]Hirth *v.* Graham, 50 Ohio St. 57, 33 N. E. 90.
[2]Lee *v.* Gaskell, 1 Q. B. Div. 700.
[3]Lavery *v.* Pursell, 39 Ch. Div. 508.

made before sale, it is a sale of chattels.[1] I is orally authorized to sell certain land for D, and signs a contract for a sale of the land with D's name by I "as agent." Does this satisfy the statute? Yes. Authority to convey must be in writing under seal, but an authority to make a contract for a conveyance need not be.[2] P and D enter into an oral agreement wherein they are to pay off the incumbrances on certain real estate, sell and dispose of the same and share the profits and losses. In a suit for an accounting, is this oral agreement competent evidence? Yes. A partnership agreement for buying and selling land does not need to be in writing. It does not transfer any title to land, nor create any interest in land.[3] D orally agrees with R to acquire the title to an undivided two-thirds of certain land in his own name, and to convey to R an undivided one-third, for R's promise to pay one-third of the purchase money and one-half of the expenses. Is this agreement within the statute? Yes. The circumstance that at the time of the agreement D does not own the land brings the case more clearly within the statute. Here, there is no right of *quasi* contract, for D has not given R any of the benefits.[4] P and D make an oral agreement that D shall bid off and buy a certain estate, upon the joint account of both, in equal shares. Is the agreement within the statute? Yes. Hence P cannot enforce a trust in the land, in his favor, after it is conveyed to D.[5] By an agreement in writing D agrees to convey to P certain land, and P thereupon enters into possession. P then agrees, verbally, to sell and surrender an undivided one-half back to D, for his oral promise to pay $3,500. D goes into possession and sells the land to a third party. Can P recover the $3,500 orally promised him? No. Either the written agreement which gives P an equitable interest in the land will have to be rescinded, or P's conveyance will have to be in writing. There is no evidence of rescission and there is no written conveyance. The mere surrender of possession is not

[1]Long *v.* White, 42 Ohio St. 59.
[2]Johnson *v.* Dodge, 17 Ill. 433.
[3]Bates *v.* Babcock, 95 Cal. 479, 30 Pac. 605.
[4]Dunphy *v.* Ryan, 116 U. S. 491.
[5]Parsons *v.* Phelan, 134 Mass. 109.

sufficient part performance.[1] W and R are tenants in common of a certain tract of land. They orally partition same by marking the division line. Is this partition within the statute of frauds? No. It is not a sale or transfer of land, or any interest therein.[2] P and D have a dispute as to a boundary and then they get a surveyor to re-survey, and place a fence on the line, and acquiesce therein for six years. Is this valid? Yes. Where the owners of contiguous lots by oral agreement mutually establish a dividing line not then established, and, thereafter, use and occupy their respective tracts for a time, the agreement is not within the statute of frauds. After this long acquiescence P is estopped from denying the agreement.[3] P takes from D a letterhead on which D's name appears and writes an offer to buy certain land, which he supposes D owns, and signs his own name thereto. D is not the owner and refuses to convey. P sues D. Is this memorandum signed by the party to be charged? No. The address at the head is no part of the document. In order to bind a party, a name thus placed must be recognized as his own name by the party whose name it is, as by writing it for the purpose of a memorandum or by sending it.[4] J signs a memorandum of a sale of land which on its face is complete, but the testimony shows that the consideration stated is not the true consideration. Must the memorandum state the consideration? By statute it is sometimes expressly enacted that the consideration need not be expressed; otherwise, it must be. If it were open to the vendee to prove by oral testimony the price to be paid, he might prove any other terms of the contract, and the statute would no longer prevent frauds and perjuries. In a unilateral contract, the consideration is the act of acceptance; in a bilateral it is a promise; and if either element of the agreement is shown it is almost inevitable that the consideration will be shown.[5] G is agent for H, but, without authority in writing referring to the specific property, sells an "estate on Congress Street," to D, for $1,100, executing a memorandum to that effect. H owns several estates on Congress Street. The agent has a

[1]Dougherty *v.* Catlett, 129 Ill. 431, 21 N. E. 932.
[2]McKnight *v.* Bell, 135 Pa. 358, 19 Atl. 1036.
[3]Cavanaugh *v.* Jackson, 91 Cal. 580, 27 Pac. 931.
[4]Hucklesby *v.* Hook, 82 Law T. (N. S.) 117.
[5]Hayes *v.* Jackson, 159 Mass. 451, 34 N. E. 683.

letter which identifies the property, but there is no reference thereto in the memorandum. Is the memorandum sufficient? No. It shows on its face that it may apply to more than one estate. So far as the memorandum goes the agent's authority might as well be oral.[1]

§ 14. SALES OF PERSONAL PROPERTY.

The statute of frauds applies to a "Contract for the sale of any goods, wares and merchandise, for the price of ten pounds sterling or upwards." In order that such contract shall be allowed to be good, the statute requires either a note or memorandum of the bargain signed by the party to be charged or by his agent, or a receipt and acceptance of part of the goods, or something in earnest to bind the bargain or in part payment.

Modern statutes sometimes declare that oral contracts of the above sort are void unless one of the three requirements named is met. Under this provision of the statute of frauds are included both actual sales, which presently pass the title to chattels, and contracts to sell, which contemplate the passing of title at some future time. It should be noted that this section of the statute differs radically from the section heretofore considered. While the section heretofore considered has one uniform requirement of writing, the section now under consideration gives an option between three requirements, only one of which is writing.

§ 15. VALUE OVER A CERTAIN AMOUNT.

The statute does not apply to contracts for sales unless the value of the goods, etc., reaches ten pounds sterling, or upwards.

The original statute has been generally changed to read value instead of price, and fifty dollars instead of ten pounds.

[1]Doherty *v.* Hill 144 Mass. 465, 11 N. E. 581.

If the contract embraces more than one article, the aggregate value is the value intended. The proposed American act to make uniform the law of sales suggests $500 as the value when the statute shall begin to apply. P goes to B's shop and bargains for various articles, a separate price being agreed upon for each and no one article being worth ten pounds, but all together amounting to seventy pounds, and an account for the whole is made out. Is this sale within the statute? Yes. It is the intent of the parties to make one entire contract, so that, though P assists in measuring, cutting and marking the goods, the sale is not valid, for so long as the seller retains possession and his lien is not lost, there is no such receipt and acceptance as is contemplated by the statute.[1]

§ 16. SALE AND NOT CONTRACT FOR WORK, LABOR AND MATERIALS.

The statute does not apply to a contract for work, labor and materials, but only to a contract for the sale of goods, etc. A contract is for the sale of goods, by the English test, if when ultimately carried out it will result in the sale of a chattel; by the New York test, if the chattels are in existence (in solido) at the time of the contract; by the Massachusetts test, if the contract when ultimately carried out will result in the sale of a chattel, except goods manufactured especially for the vendee and on his special order and neither intended nor adapted for the general market.

The English and Massachusetts rules look to the time of performance, the New York rule to the time of the formation of the contract. In England, sales of choses in action do not come under the statute, but in America they generally do, either by virtue of being expressly included or by judicial interpretation. In general, all personal property is included. The statute applies to barter as well as sale. At the order of F, P, a dentist, in England, makes two sets of false teeth for the price of twenty-one pounds, but these are never received and

[1]Baldey *v.* Parker, 2 Barn. & C. 37.

accepted. There is no part payment, and there is no memorandum, other than a letter in regard to an appointment but not disclosing any bargain. Is this a sale of goods? In England the test is whether the contract when carried out will result in the sale of a chattel. If so, it is a sale of goods; if not, it is a contract for work. This contract results in the sale of chattels; and, as the statute is not satisfied, the dentist has no cause of action.[1] G and B, in Massachusetts, enter into an agreement, by which G is to make a buggy for B according to special directions given by B, for the price of $675. After G completes the buggy, he sends to B a bill, which B keeps. G retains the buggy in his possession until, nearly a month later, it is destroyed by fire. Is this contract within the statute? No. The Massachusetts rule is like the English rule, except that a contract to make chattels for the purchaser on his special order and not for the general market, as in this case, is constructively a contract for labor and not a sale of goods.[2] In New York, D orally agrees to manufacture ten tons of paper for P, as soon as certain other work is finished, for which P agrees to pay fifteen cents per pound. Is the agreement within the statute? No. In New York, it is a contract for work, as in that state whether the contract is for a sale or not depends upon whether the goods are in existence at the time of the contract. Consequently, though oral, P can sue for breach of contract. Yet, of course, in New York, aside from the question of the statute of frauds, this is a contract to sell chattels, and title will pass on the appropriation of the goods to the contract.[3] G, orally, promises to assign to L a real estate mortgage, for L's promise to pay $3,000 therefor. Is this within the statute of frauds? Yes. The statute includes all the objects of personal property. This is an incorporeal chattel, so that the only delivery possible is symbolic, and that cannot be in part, but this fact does not take the case out of the statute. Part delivery arises only where the nature of the chattels permits of it.[4]

[1] Lee *v.* Griffin, 1 Best & S. 272.
[2] Goddard *v.* Binney, 115 Mass. 450.
[3] Parsons *v.* Loucks, 48 N. Y. 17.
[4] Greenwood *v.* Law, 55 N. J. Law, 168, 26 Atl. 134.

§ 17. RECEIPT AND ACCEPTANCE.

In a contract for the sale of goods the statute of frauds is satisfied if "the buyer shall accept part of the goods so sold, and actually receive the same."

The receipt of goods is the physical act and involves a change of possession, actual or constructive; the acceptance is the mental act, and must amount to a recognition of the contract; both must exist, but it makes no difference as to which happens first. R orally buys from C 156 firkins of butter, which he inspects and which constitute one lot and he gives C a card with his name and address, ordering him to deliver the goods to his agent. This C does. R refuses to keep the butter, on account of its condition. Is the statute satisfied? Yes. The goods are accepted at the time of the sale, and received at the time of delivery. The acceptance does not need to follow receipt[1]

§ 18. PART PAYMENT.

In a contract for the sale of goods the statute of frauds is satisfied if the buyer "gives something in earnest to bind the bargain, or in part payment."

Earnest signifies any money or valuable article accepted by the seller as a token of good faith. Earnest is a form of part payment, yet differs from it in that there is a forfeiture if the buyer refuses to carry out his bargain. Modern statutes frequently require the part payment to be made at the time of the contract, but if the subsequent payment is made for the express purpose of satisfying the statute, or if the parties then restate and affirm their agreement, it is sufficient to satisfy the statute, as the time is then the time of payment. P owes D about four pounds for goods bought and sells about twenty pounds worth of leather to D, it being verbally agreed that the claim of four pounds shall go in part payment of the twenty pounds. Is the statute satisfied? No. Had the debt of four pounds actually been extinguished it might have

[1]Cusack *v.* Robinson, 1 Best & S. 299.

amounted to part payment, without further ceremony of payment, but this agreement is that the leather shall be delivered by way of satisfying the debt of four pounds, and D to pay the difference. There must be an actual payment; an agreement in an agreement is not enough.[1]

§ 19. NOTE OR MEMORANDUM.

In a contract for the sale of goods the statute of frauds is satisfied if "some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

Sometimes the expression is "subscribed by the parties." In the case of sales of goods or contracts to sell goods, the statute may be satisfied in either of three ways, and the memorandum is the third. Other agreements, within the statute, can be satisfied only by writing, and where a sale within the statute is in writing, the rules governing the memorandum are those heretofore considered. M, as agent for S, sells certain goods to G and they both sign, with their initials, the following memorandum:

"Sept. 19, W. W. Goddard,

	12 mos.
300 bales S. F. drills	7¼
100 cases blue, do	8¾

Credit to commerce when ship sails; not after December 1—delivered free of charge for truckage.

The blues, if color satisfactory to purchasers.

R. M. M.
W. W. G."

A bill of parcels is also made out under date of September 30th, stating purchase by G and footing up the price and the terms of payment, but it is not signed. Is this a sufficient memorandum? The original memorandum is sufficient ex-

[1]Walker *v.* Nussey, 16 Mees. & W. 302.

cept as showing which party is buyer and which is seller, as oral evidence is admissible to show that M is acting as agent and to explain the meaning of 7¼ and 8¾; and, when the bill of parcels is connected, it makes a contract without further explanation, and therefore, is sufficient.[1] W sells clover seed to D, and writes D's name at the top of a memorandum while D is looking over his shoulder. Is this sufficient to hold D as the party to be charged? No.[2] B sells hops to J, taking his order in an order book, and having J sign this. B's name appears only on the leather cover of the book into which the paper book is slipped. Is this a sufficient memorandum? Yes. When the memorandum is made, the book and cover are one.[3] S, orally, purchases of B goods of a value more than fifty pounds. These are sent to S, but arrive so badly damaged that S refuses to accept them. Then, by letter, he reiterates all the substantial parts of the contract, but concludes with a repudiation of his liability. This is sufficient as a memorandum. The statute applies to the action and the memorandum may be made at any time. S admits the contract, but denies liability on other grounds. Therefore, the statute is not involved.[4] H authorizes R to buy a horse for him of G, which he does. Nothing occurs to take the case out of the statute of frauds except a letter setting forth the sale which passes between H and R. Is this sufficient memorandum? Yes. A note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves, or between one of them and his own agent.[5] L orally buys coal from W, through his agent, B. L signs a memorandum of the contract and delivers it to B. B, at the same time, signs a memorandum, but in it the name of the purchaser does not appear. When construed together, they show who is buyer and who is seller, and they afford intrinsic evidence that they refer to the same transaction. Therefore, this is a sufficient memorandum and W is liable for breach of contract.[6] D buys goods of P on a written order of August 12th, and another of August 18th. On

[1]Salmon Falls Mfg. Co. *v.* Goddard, 55 U. S. (14 How.) 446.
[2]Wright *v.* Dannah, 2 Camp. 203.
[3]Jones Bros. *v.* Joyner, 82 Law T. (N. S.) 768.
[4]Bailey *v.* Sweeting, 9 C. B. (N. S.) 843.
[5]Gibson *v.* Holland, L. R. 1 C. P. 1.
[6]Lerned *v.* Wannemacher, 91 Mass. (9 Allen) 412.

September 27th, the parties orally agree to rescind the contract of August 12th, and to extend the time of delivery in the contract of August 18th. D refuses to take any goods. What are P's rights? The contract of August 12th is rescinded, but the contract to extend the time of delivery in the contract of August 18th is void, because not in writing, and, therefore, the contract of August 18th stands and P can recover for breach thereof.[1] D buys, of P, certain iron, the memorandum of the contract signed by D stating that the iron shall be delivered at specified times. Later, D verbally requests P not to deliver twenty-five tons for a certain time and P verbally assents. Does the verbal agreement discharge the whole contract and yet give P no cause of action on it? The contract, being one required to be in writing in the first place, cannot be waived by parol, and, therefore, all this agreement amounts to is a voluntary withholding delivery at request, when P might insist at any time upon the original agreement being carried out.[2]

§ 20. MISCELLANEOUS STATUTORY REQUIREMENTS.

Modern statutes, also, sometimes require to be in writing, waivers of the defenses of the statute of limitations of a discharge by bankruptcy proceedings and of infancy, and contracts of insurance, power to bind a person as surety, contracts for interest above a certain rate, promises to dispose of property by will in a particular manner, sales of a vessel enrolled in the United States registry, and assignments of copyrights and patents.

§ 21. FORMLESS AGREEMENTS.

All other agreements do not require any writing, or other formality, as a condition to enforcibility.

[1]Noble *v.* Ward, L. R. 1 Exch. 117, L. R. 2 Exch. 135.

[2]Hickman *v.* Haynes, L. R. 10 C. P. 598; Walter *v.* Victor G. Bloede Co., 94 Md. 80, 50 Atl. 433. *Contra,* Cummings *v.* Arnold, 44 Mass. (3 Metc.) 486.

CHAPTER XVIII.

PARTICULAR KINDS OF CONTRACTS: CLASSIFIED.

I. As to Form, §§ 1-3.
- A. According to nature of agreement, § 1.
  - (I) Unilateral, and bilateral, § 1.
  - (II) Express, and inferred, § 1.
  - (III) *Quasi*, § 1.
- B. According to number of parties, § 2.
  - (I) Joint, § 2.
  - (II) Several, § 2.
  - (III) Joint and several, § 2.
- C. According to formalities, § 3.
  - (I) Specialty, § 3.
  - (II) Written, § 3.
  - (III) Oral, § 3.

II. As to Performance, § 4.
- A. Executed, § 4.
- B. Executory, § 4.
  - (I) Unconditional, § 4.
    - (A) Absolute, § 4.
    - (B) Divisible, § 4.
    - (C) Subsidiary, § 4.
  - (II) Conditional, § 4.
    - (A) Casual, § 4.
      1. Precedent, § 4.
         a. Express, § 4.
         b. Implied, § 4.
      2. Subsequent, § 4.
         a. Express, § 4.
         b. Implied, § 4.
    - (B) Promissory, § 4.
      1. Precedent, § 4.
         a. Express, § 4.
         b. Implied, § 4.
      2. Concurrent, § 4.
         a. Express, § 4.
         b. Implied, § 4.
      3. Subsequent, § 4.
         a. Express, § 4.

III. As to VALIDITY, § 5.
- A. Valid, § 5.
- B. Voidable, § 5.
- C. Void, § 5.
- D. Unenforcible, § 5.

IV. As to SUBJECT-MATTER, §§ 6-30.
- A. Principal, §§ 7-29.
  - (I) Affecting property rights, §§ 8-22.
    - (A) To convey real property, § 8.
    - (B) To lease, § 9.
    - (C) To sell personal property, § 10.
      1. Oral, § 10.
      2. Written, § 10.
    - (D) To make a bailment, §§ 11-17.
      1. Bailments for sole benefit of bailor, § 12.
      2. Bailments for sole benefit of bailee, § 13.
      3. Bailments for mutual benefit of both parties, §§ 14-17.
         - a. Pledge, § 14.
         - b. Hirings, § 15.
         - c. Innkeeping, § 16.
         - d. Common carriage of goods, § 17.
    - (E) To insure, §§ 18-20.
      1. Fire, § 19.
      2. Life, § 20.
    - (F) To loan and to repay, §§ 21-22.
      1. Bills and notes, § 22.
  - (II) Affecting personal rights, §§ 23-29.
    - (A) To marry, § 23.
    - (B) For services, §§ 24-29.
      1. As servant, §§ 24-25.
      2. As bailee, § 24.
      3. As public calling, § 26.
      4. As profession, § 27.
      5. As agent, § 28.
      6. As partnership, § 29.
- B. Accessory, § 30.
  - (I) Suretyship (and guaranty), § 30.
  - (II) Warranty, § 30.
  - (III) Pledge, § 30.
  - (IV) Mortgage, § 30.

§ 1. UNILATERAL, BILATERAL, EXPRESS AND INFERRED CONTRACTS.

A unilateral contract is a half executed, half executory contract, consisting of an express or inferred promise of one legal right and another legal right given in exchange therefor.

A bilateral contract is an executory contract, consisting of an express promise of one legal right, and a counter promise of another legal right given in exchange therefor.

An express contract is a contract all of whose terms are assented to either in speech or writing.

An inferred contract is a contract where either the act of acceptance, or both the act of acceptance and the promise offered, are inferred as a fact from conduct.

A quasi contract is not a contract, but a legal obligation, like a contract, created by implication of law.

In a unilateral contract only the promisor is under legal obligation, as the promisee has a legal right to the things which the promisor has promised to give or do, but the promisor has already received his right. In a bilateral contract the parties incur reciprocal obligations, as each has a right to the things the other has promised to give or do, and each is therefore the owner of personal property. A offers a reward of a certain sum for the return of a lost article, and B acting on the offer returns the lost article. B's act accepts A's offer and creates a unilateral and inferred contract, giving B a right to the reward offered. If A renders services for B, expecting compensation, and B at the time knows that A expects compensation but, without objection, allows A to render the services, A's act accepts the promise offered by B's conduct, and creates another unilateral and inferred contract. If A confers certain benefits upon B, expecting compensation, and B, at the time, knows nothing of the act but subsequently elects to accept the benefits, there is no actual contract of any kind, as the act and promise are not given for each other, but A may sue B in *quasi* contract and recover the value of the benefits. If A offers to perform certain services for B for $100 and B accepts this offer, thereby promising to pay $100 for A's serv-

ices, the latter's promise accepts the former's offer of a promise, and creates a bilateral and express contract, giving B a right to A's services and A a right to the $100 after performance.

§ 2. JOINT, SEVERAL AND JOINT AND SEVERAL CONTRACTS.

A joint contract is one where either the promisors are jointly bound, or the promisees jointly entitled, to the performance of a legal obligation.

A several contract is one where either each promisor is individually liable, or each promisee individually entitled, to the performance of a legal obligation.

A joint and several contract is one where the promisees may elect to hold the promisors either jointly, or severally, bound to perform a legal obligation.

If a promise in the words, "We promise to pay $100 to X and Y," is signed by A and B, the latter are jointly liable, and the former jointly entitled to the payment of $100. If a promise in the words, "I promise to pay $100 to X and Y," is signed by A and B, the former, jointly, may hold the latter either jointly or severally liable to pay $100. If a promise in the words, "We severally promise to pay $100 to X and Y to be equally divided between them," is signed by A and B, the latter are severally liable, and the former severally entitled to the payment of fifty dollars.

§ 3. SPECIALTIES, WRITTEN AND ORAL CONTRACTS.

A specialty is an express contract under seal.

A written contract is an express contract evidenced by writing.

An oral contract is an express contract without other evidence than spoken words.

A and B sign a written agreement, under seal, wherein A agrees to sell B a horse, for $200 and B agrees to pay that amount for the horse. This is a specialty, or deed. Remove the seal, and it is a written contract. Remove the writing, and

it is an oral contract and enforcible, providing B at the time pays a part or all of a purchase price.

§ 4. EXECUTED, EXECUTORY, CONDITIONAL, AND UNCONDITIONAL CONTRACTS.

An executed contract is one where both parties have done all they have agreed to do.

An executory contract is one where one or both of the parties have something yet to do.

An unconditional contract is an executory contract wherein the promises are independent because either absolute, divisible or subsidiary.

A contract upon condition is an executory contract, the performance of one or both of whose promises depends upon a future and uncertain event, precedent, concurrent, or subsequent. If the event merely suspends the obligations of the parties until it takes place or terminates them ipso facto upon its happening, it is a casual condition. If the event is an engagement of one of the parties and an essential term of the contract, so that it not only suspends or terminates the other obligations of the parties but gives a right to damages for breach thereof, it is a promissory condition.

An executed contract has transferred property rights; an executory contract creates existing property rights.

An absolute promise is one the obligation to perform which does not depend on the performance of another promise. Divisible promises are those susceptible of being divided into several distinct and independent contracts. A subsidiary promise or warranty is one which, while a part of the main contract, is collateral to its main object.

A condition precedent is an uncertain event, generally an act, which must occur before the obligation of a promise arises, so that the promise does not have to be performed unless the event happens. A condition precedent may be express or implied, promissory or casual; but, except for an express condition in a covenant, it must be a term in a bilateral contract.

A condition subsequent is an uncertain event, generally impossibility of performance, which must occur after the obligation of a promise arises, so that the promise has to be performed if the event does not happen before the time for performance arrives and thus extinguish the obligation. A condition subsequent may be an express promisory condition or an implied or express casual condition, and may be a term in a unilateral or bilateral contract. A condition concurrent is an uncertain event, always an act, which must occur at the same moment as the obligation of a promise. A condition concurrent may be express or implied, but it is always promissory, and, except for an express condition in a covenant, it must be a term of a bilateral contract.

By express stipulation in a covenant, the performance of some act by the other party may be made a condition precedent or concurrent, though the contract is unilateral; but, with this exception, promissory and casual conditions precedent and concurrent must be connected with bilateral contracts, for there is no simple unilateral contract until the performance of one party has occurred. A bilateral contract ordinarily consists either of two or more covenants, or two or more promises, not a covenant and a promise, for, in the latter case it is possible for both the covenant and the promise to be unilateral, the covenant because of its form and the promise because as to it the covenant may be an act performed. This is illustrated by deeds, bills of sale, and insurance policies, unless they are given by way of performance of a previous bilateral contract. A bilateral contract at the time of its creation is executory on both sides, a unilateral on one; but both become executed as performance proceeds. An express condition arises from the words of the parties, an inferred from the nature of the contract as a whole, while an implied is a creature of the court for the furtherance of justice. An implied promissory condition is added by the law, yet not to alter a promise; but because in a bilateral contract one promise to do a thing is given in exchange for another promise to do, consequently the law presumes that each promise is intended to be payment for the other and each performance to be payment for the other. For this reason promissory conditions are presumed to be concurrent. But, if the contract on one side is to do acts which take time, while on the other side it is to pay money or give

property; or if, by the terms of the contract, one side is to be performed before the other, the former promise in each case is independent and absolute, while the latter is subject to the condition precedent of performance by the opposite party. General dependency is where the performance of one promise must occur first and is independent and the performance of the other dependent upon the performance of the first, in which case the dependency applies to the whole of the two sides of the contract. Mutual dependency is where the performance of both promises must occur at the same time, but the dependency need not refer to the whole of the contract, but may refer simply to two acts. Because the doctrine of implied dependency rests on the presumption that one performance is an equivalent for another, if it appears that the performances are unequal there is no foundation for the doctrine, and it falls. Performances are often unequal in insurance contracts and guaranties, where a contract is partly unilateral and partly bilateral, or partly executed on both sides, unless each performance is exact payment for the other. This may also be true where there are two contracts in the same instrument, and where there are covenants or notes in separate instruments, and where there is a bilateral preliminary contract to make a unilateral final contract, the making of the unilateral being conditioned on performance, but, after made, being unconditional (as in executed policies, leases, and deeds).

Examples of promissory conditions precedent implied by the law are that one who attempts to transfer the general property to a thing has title thereto; that a thing delivered is like the sample or description of the thing sold; that a thing sold shall be fit for the particular purpose bought; where reliance is placed on another's skill and judgment, that the same shall be used; where quantity is an essential term of the contract, that the correct quantity is delivered and that the buyer shall have a reasonable opportunity to inspect. Of promissory concurrent conditions implied, the most common are delivery and payment. Some implied casual conditions subsequent are impossibility of performance arising from death, sickness, change in law, or destruction of the specific thing whose existence is essential to performance, the limitations on the liability of bailees, and insolvency in a sale on credit. A promise to do a thing, involving personal taste or judgment, to the satisfaction

of the promisee makes the satisfaction of the promisee an express casual condition precedent to recovery. The promisee is sole judge, and it is irrelevant that a reasonable man should be satisfied. An option to determine a contract, a sale or return, and the defeasance in a penal bond, or charter party, are examples of express casual conditions subsequent. A agrees to sell B a certain wagon for $40 and B agrees to give A $40 for the wagon. This is a bilateral agreement and executory on both sides, although, so far as the passing of title is concerned, it is an executed sale. If A delivers the wagon he does all that he is required to do, and now it is executory only on B's side; but this is not a unilateral contract: it is a bilateral contract partly executed, for whether the contract is unilateral or bilateral is determined at the time of its creation. If B also pays the $40 agreed, the contract becomes executed, both parties have done all they are bound to do, and there is no further obligation on either, although, as a result of the contract each has acquired new legal rights *in rem*. In the above illustration, delivery and payment are implied concurrent conditions, to be performed by the parties before the contract is executed. If the wagon is not in *esse*, but is to be manufactured according to certain specifications, the making of the wagon is an implied promissory condition precedent, and the manufactured article will have to be appropriated to the contract before the title will pass and the obligations of the buyer will arise, and there is an implied promissory condition, or warranty, that the manufactured article shall be reasonably fit for the purpose for which ordered. If, in the agreement, A gives B the right to return the wagon after a certain time, if not satisfactory to him, this is an express casual condition subsequent, and if B takes advantage of it and returns the wagon, the title will revest in A, and if B has paid therefor, he can recover the price paid.[1]

§ 5. VALID, VOIDABLE, AND VOID CONTRACTS AND AGREEMENTS.

A valid contract is one whose obligation is binding upon both parties to the agreement.

[1]Langdell on Contracts.

A voidable contract is one whose obligation is not binding upon one party to the agreement, at his election.

A void agreement is one which creates no obligation.

An agreement of imperfect obligation is one which is incapable of enforcement, but otherwise valid.

A and B enter into and sign a written agreement whereby A agrees to work for one year from a certain future date, for the sum of $2,000, and B agrees to pay $2,000 for the work. If both parties have complete contractual capacity, this is a valid contract. If A is a minor, insane person, etc., or if the contract is procured by fraud, etc., it is a voidable contract. If the work which A agrees to perform is unlawful, because forbidden by law, or against the policy of the law, the agreement is void. If B does not pay, and A waits more than six years after performance before suing (or if B is discharged by proceedings in bankruptcy, or if the agreement is not in writing, to satisfy the statute of frauds), it is unenforcible.

§ 6. SUBJECT-MATTER OF CONTRACTS.

The subject-matter of a contract is the sum of its obligations, or all the legal rights created by the agreement.

The subject-matter of all the law is all legal rights; the subject-matter of contracts those particular legal rights of property which are created or transferred by agreement. The subject-matter of crimes is public legal rights *in rem,* invaded by wrongs; the subject-matter of torts, in general, private legal rights *in rem,* invaded by wrongs; and the subject-matter of contracts, private legal rights *in personam* created by agreement. The subject-matter of any particular contract is the particular right or rights *in personam* created or rights *in rem* transferred thereby, while the subject-matter of any particular tort or crime is the particular right *in rem* violated by a wrongful act. But contracts are not only distinguishable from torts, crimes and other branches of the law, but they are distinguishable from each other by the nature of their subject-matter. As the legal rights created by agreement vary, so do the contracts

vary, and thus it is possible to classify contracts according to the nature of their subject-matter.[1]

This classification is the most fundamental yet discussed, and many of the different contracts, thus differentiated, are so important that they are generally treated in special text-books. In this connection, no effort will be made to do more than classify them, show their relation to the main subject of contracts, and point out their distinctive peculiarities.

§ 7. PRINCIPAL CONTRACTS.

A principal contract is one whose subject-matter is direct, rather than auxiliary rights.

A principal contract is to be distinguished from an accessory contract, to be referred to later.

§ 8. CONVEYANCES (CONTRACTS FOR).

A contract to convey is a contract whose subject-matter is the right of one person (called vendee) to the transfer from another of the right to use, possess and dispose of a freehold estate in land, and the right of the other person (called vendor) to the price paid or promised therefor.

So far as the principal contract and the grantor are concerned, a conveyance is an executed contract. The grantor has given either an act for a promise in a unilateral contract, or performance of a promise in a bilateral, and thereby rights *in rem* have been created by secondary acquisition. But a contract to convey is executory. It gives the grantee the right to the transfer of the title to the land, and the grantor, or person who has promised to grant, a right to the payment of the purchase price, or whatever else is promised for the promise to convey. Such rights are personal property. A promises B to pay $5,000 for the ownership of a certain lot, and B promises to convey the title to the same to A for that price, and the parties reduce

[1] Jacobson *v.* Miller, 41 Mich. 90, 1 N. W. 1013; Hamlin *v.* Tucker, 72 N. C. 502; Reed *v.* City of Muscatine, 104 Iowa, 183, 73 N. W. 579; 9 Col. Law Rev. 419.

the contract to writing. The subject-matter of this contract is the right of A to a deed, and the right of B to the money. B executes and delivers the deed; that is, the instrument for effecting the conveyance, and A pays the money. Now the contract is executed, and neither party has any further rights except so far as covenants in the deed are still executory. The subject-matter of the deed is the actual transfer to A of the right of title and his right to the things covenanted.

A conveyance is a contract, and hence must have all the essential elements of a contract the same as any other contract. These elements have already received separate treatment, and do not need to be again discussed, and the distinctive peculiarities of conveyances have been pointed out in the chapter on Real Property, where conveyance was treated among the methods of acquiring the right of real property, and they do not need to be repeated. Reference may also be made to the chapter on forms for typical examples of instruments of conveyance.

It should be noted that so far as a contract is a conveyance it is executed; it has spent its force; it has created a right of real property, and is properly considered in connection with real property; but so far as a contract is executory, even the executory part of a contract of conveyance, it creates rights of personal property, by original acquisition, and is properly treated with the other methods of acquiring title to the objects of personal property by original acquisition.

§ 9. LEASES (CONTRACTS FOR).

A lease is a contract whose subject-matter is the transfer from one person to another of the right to use, possess and dispose of an estate less than a freehold in land for some period, called a term, and the right of the lessor to the rent promised therefor.

Like a conveyance, a lease is executed by the lessor so far as the principal contract is concerned, and creates rights *in rem;* while the rights, which it gives him against the lessee are the payment of rent and the fulfillment of other covenants on the lessee's part. A contract to lease is wholly executory and gives the lessor the right to whatever is promised therefor,

unless the contract is unilateral. A lease is, strictly, the name given to the chattel real, known as a leasehold, but it generally has a wider significance. The word "lease" is also used to denote the instrument by which a contract of lease is effected.

The elements of the contract, whether executed or executory, are the same as those of any other contract. A lease differs from other contracts in its subject-matter; that is, in the rights which it creates. An executed lease creates a leasehold, or chattel real, by secondary acquisition, but this so resembles real property that it has been treated in the chapter on real property. A contract to lease is appropriately classed as personal property, for it creates an incorporeal chattel. All the other executory features of such contracts are also objects of personal property created by original acquisition.

§ 10. CONTRACTS TO SELL.

A contract to sell is a contract whose subject-matter is the right of one person (buyer) to have another (seller) transfer the right to use, possess and dispose of a chattel, and the right of the seller to the price therefor.

So far as the passing of title is concerned, a sale is executed and the rights of ownership have been transferred, but the vendor may yet have a right to payment and the owner to delivery. A contract to sell gives the vendee the right to the transfer of the title, and the vendor the right to the purchase price. This may be by oral or written contract. Executory contracts create personal property by original acquisition; but executed contracts, relating to personal property, create personal property by secondary acquisition; that is, transfer it from one person to another. The first relate to incorporeal chattels, the second to corporeal as well as incorporeal. Sales, assignments, indorsements, and bailments are forms of acquiring personal property by secondary acquisition, and their full consideration will be postponed to Chapter XXII. The executory forms of such contracts will receive treatment here.

A contract to sell must have all the essential elements of contracts generally, which have been heretofore considered.

A contract to sell differs from other contracts in its subject-matter. Its subject-matter is the right on the one hand to a price, and the right on the other hand to the transfer of the title to a chattel. The subject-matter of a sale is the actual transfer of the title to a chattel. Hence the only difference between a sale and a contract to sell is that in the one case title passes, and in the other case it does not. In all other respects the contracts may be identical. The tests for deciding, in case of doubt, whether a contract is a sale or a contract to sell will be referred to again when we reach the topic of sale. The question is: Does the title pass? Intention of the parties governs this, and such intention may either be expressed or inferred from the fact that there is some condition to be performed before title can pass, as for the goods to be ascertained, or to determine the price, or to put the goods into a deliverable condition. If there is any condition precedent to the passing of title, whether casual or promissory (express or implied), the contract is only a contract to sell. Examples of casual conditions precedent of this sort would be such as are found in the following contracts: A promise by A to sell to B and B to buy a stack of hay for such price as C shall decide is just, a promise by A to buy a certain colt from B and B to sell the same for $200, provided the animal lives to be three years old, and a promise to buy an animal offered for sale if satisfactory on trial.[1] In the above cases there is only a contract to sell. Each party has a personal property right against the other, but it is dependent upon the happening of the casual condition; and if the person designated to price the hay refuses to act, or the colt dies, or the prospective buyer is not satisfied on trial, the contract falls at that moment and ceases to have any value. Examples of promissory conditions precedent are such as the following: That goods sold by sample shall be like the sample, that goods sold by description shall be like the description, that goods sold for a particular purpose made known by the buyer who relies upon the seller shall be reasonably fit for such purpose, and that a person who sells a thing as his own has title to the same.[2] The above are all examples of implied promissory conditions, sometimes called implied warranties, but the same conditions might be made express by the

[1] Hunt *v.* Wyman, 100 Mass. 198.

[2] Farrell *v.* Manhattan, etc., 198 Mass. 271.

parties. Implied, as well as express promissory conditions, are terms in the contract, and the party under obligation to perform the condition must do so before title will pass, unless the condition is waived, but if he does not perform the condition he is liable for breach of contract; and herein lies the distinction between casual and promissory conditions—failure to perform a promissory condition is a legal wrong, but the failure of a casual is not.

Express warranties are accessory contracts, and not terms in the main contract, and are thus not conditions and have nothing to do with the passing of title. They will be discussed with the other accessory contracts.

Conditions subsequent to the passing of title, whether casual or promissory, do not make a contract a contract to sell instead of a sale. Thus a sale of a horse by A to B for the price of $150, upon condition that B may return the horse any time within six months and get his money back, is a sale and B is the owner of the horse until he takes advantage of the condition subsequent and revests the title in A.[1]

Contracts to sell create personal property by original acquisition, for thereby a person acquires a property right to something to which he never had a right before, the performance of a particular promise—to pay money or to transfer title.

§ 11. Bailment and Contract for Bailment.

A bailment is a contract whose subject-matter is the right of the bailee to the possession of a chattel and in certain bailments to compensation, and the right of the bailor to have diligence exercised by the bailee in keeping the chattel and to have delivery made at the end of that time.

In an actual bailment the holder, or bailee, has the possession and the right to possession and sometimes the right to use and to compensation, if any, and the owner, or bailor, has the right to diligence in caring for the chattel and to its return. A contract to make a bailment gives the parties the reciprocal rights to have possession transferred. A promises to transport a quantity of goods for B, from one place to another, on B's

[1]Dearborn *v.* Turner, 16 Me. 17.

promise to pay therefor the sum of $100 as freight. A has the right to transport the goods, and B the right to have A transport them. B delivers the goods to A. B now has the right to have the safety of the goods insured, or diligence exercised in the course of transportation, according to the nature of the bailment and to have the goods delivered to the consignee at the end of the route; while B, will have the right to the freight if not paid in advance. The ordinary loan differs from a bailment in that it creates a debt, or the right to a certain amount of money, instead of the right to the return of the same chattel, in the same or in an altered form.

Bailments is in general to be regarded as a contract subject, and as a contract must have all the essential elements of all contracts. However, the relation of bailment may arise without contract, as in finding chattels, and those bailees who are engaged in what are called public callings may be compelled to enter into the bailment relation whether or not they desire to do so. In an actual bailment, the possession of chattels has been transferred from one person to another, and to this extent a special qualified property right has been created in the bailee by a form of secondary acquisition. This feature of bailments will be considered in Chapter XXII on secondary acquisition. The rest of the rights created by the bailment and all of the rights created by contracts for a bailment are personal property rights created by original acquisition, and should, therefore, be considered in this place. Though now considered as a contract subject, originally the bailment relations were regarded as created by law, and the law imposed various obligations upon all the different bailees. These obligations are well known, and will now be read into any bailment contract by the law unless the parties otherwise stipulate, and some of such obligations cannot be changed by contract because public policy requires that bailees assume the same.

A public calling is a business which has acquired such a virtual monopoly that the public has acquired an interest in its use, and may regulate it to that extent for the common good. The obligations which have been imposed upon public callings in the way of regulation are: (1) to serve all, (2) with adequate facilities, (3) for reasonable compensation, (4) without discrimination, (5) and under a liability for injury which it cannot reduce by contract to less than liability for its own negli-

gence. Bailees who are engaged in public callings, like innkeepers and common carriers of goods and passengers, have all of the above obligations resting upon them by law. The persons for whose benefit such obligations are created have rights of personal property, but as the rights are not created by contract, but by *quasi* contract, they belong in the following chapter, and we shall now confine ourselves to those rights of bailors and bailees which are created by contract.

Bailments are classified as gratuitous and mutual benefit. Gratuitous bailments are classified as for the benefit of the bailor including deposits and mandates, and for the benefit of the bailee including *commodatums*. Mutual benefit bailments are classified as pledges and hirings, and the hirings are classified as the hiring of the use of a thing, the hiring of work on a thing, the hiring of the custody of a thing, and the hiring of the carriage of a thing. The hiring bailments may also be classified according as the bailees are engaged in private or public callings. Innkeepers as to the baggage of a guest and common carriers of goods are conspicuous examples of the latter.

§ 12. BAILMENTS FOR THE SOLE BENEFIT OF BAILOR.

A deposit is a bailment of goods to be kept by the bailee without reward.

A mandate is a bailment where the bailee undertakes to do some work upon the thing bailed, or to carry the same, without recompense.

Deposit and mandate are the two bailments for the sole benefit of the bailor. The bailee in each case is under obligation to exercise slight diligence, and is liable for gross neglect. The bailee has no right to use the article for his own benefit. He has no right to compensation. He must return the article on the termination of the bailment. If a horse were delivered for gratuitous custody, the bailee would have a right to exercise the animal, or if a cow were thus delivered, he would have a right to milk her, for these things are necessary for their proper care, but he would have no right to use the horse to plow with in his own fields. The obligations of the bailee

arise only after the object of the bailment comes into his possession. He is not guilty of any legal wrong if he refuses to accept a chattel after he has said that he would do so, but if he does accept a chattel he is bound to exercise slight diligence in caring for it and to return it at the end of the bailment; or if it has been lost so that he cannot do so, show that such loss was not due to his gross negligence. The offer to care for or do work upon a chattel gratuitously is not binding because there is no consideration for it, but the promise, express or implied, to exercise slight diligence and to return the article is supported by the legal right to possession which the bailor has given up therefor.[1] The bailor in bailments of this class has practically no obligation, although if he asks the bailee to gratuitously take care of something which he knows is dangerous, and the bailee does not, he should notify the bailee of such danger, as for example that a dog delivered is vicious.

§ 13. BAILMENTS FOR THE SOLE BENEFIT OF BAILEE.

A loan for use, or commodatum, is a bailment of a chattel for a time to be used by the borrower without paying for the use.

The gratuitous loan is the only bailment for the sole benefit of the bailee. A gratuitous loan differs from a deposit and a mandate in that it is for the benefit of the bailee instead of the bailor, but the bailee is not entitled to compensation in a gratuitous loan. The benefit to the bailee arises from the fact that he has a right to use the thing bailed. Examples of bailments of this class are: One person borrows from another a horse to drive to a certain place, or a book, or a watch, or a ring, to be used for a time without compensation. The bailee in a gratuitous loan is bound not to injure, destroy, or lose the things bailed by even slight negligence on his part. He must exercise high diligence in caring for the object of the bailment; that is, in the presence of any danger he ought to prefer the safety of the borrowed article to the safety of his own chattels. This is because the bailment is for his sole benefit. The gratuitous loan is created in the same way as other gratuitous

[1] Tracy *v.* Wood, 3 Mason 132.

bailments, and it is terminated in the same way. If a loan is for a definite time it will terminate at the expiration of that time. If the loan is not for a definite period it will terminate upon demand by the lender. The death or insanity of the borrower, or an unauthorized use by him, will also terminate the bailment. A loans a horse to B, to drive to X. Instead of driving to X, B starts to drive to Y. Such unauthorized use terminates the bailment.

§ 14. PLEDGE.

A pledge is a bailment of chattels as security for some debt or engagement.

A pledge is a mutual benefit bailment. The benefit to the bailee is the security acquired, the benefit to the bailor is the purchased loan, but the consideration for the promise of the bailee is not the benefit to the bailor, but the detriment he sustains in giving up possession and in promising to pay interest on the debt. Delivery is as essential to a pledge as to the gratuitous bailments, but, since it is a bilateral contract, it may create obligations before the actual delivery of the chattels, so that either the bailor or bailee may be liable for refusal to deliver or accept the chattels. Corporeal and incorporeal chattels may be the objects of pledge, but incorporeal chattels can be pledged only by symbolical delivery. Corporate stock, insurance, saving's bank deposits, bills of lading, promissory notes, and bills of exchange may be thus pledged; in which cases mere delivery is sufficient as between bailor and bailee. For his protection against third parties the pledgee should have stock transferred on the books of the corporation, should have the insurance company notified, and should have commercial paper indorsed as though sold. The pledgee is under obligation to exercise slight diligence in caring for the things bailed while they are in his possession. He has a right to repledge the chattel for a debt and time no greater than those for which the same is pledged to him, but he has no right to otherwise use it. The pledgor impliedly warrants that he has title to the thing pledged. He has a right to sell his reversionary interest, and also to redeem the pledge until such right is foreclosed. If the debt is not paid when due, the pledgee has

a right to look to the chattels pledged for his satisfaction by means of a foreclosure. If the time of payment of the debt is not fixed the pledgee should first demand payment. Then he must give the pledgor actual notice of the time and place of sale. The sale must be at public auction, unless the parties have agreed upon a private sale. The pledgee should not purchase at the sale, for if he does the same would be voidable. If the above steps have been followed the sale divests the pledgor of his title and vests it in the purchaser. There is no redemption as in the case of mortgages. A pledgee may foreclose by a bill in equity. Commercial paper should be collected or foreclosed in equity. A pledge is terminated by payment of the debt, by a tender of the debt, by a redelivery of the chattels, by a destruction of the chattels (though if this is due to pledgee's ordinary negligence the value thereof may be deducted from the indebtedness), by an unauthorized use, by merger in a purchase of the general property in the chattel and by a judgment on the debt.[1]

§ 15. BAILMENTS FOR HIRE.

A bailment for hire is a bailment of chattels to be used, or kept, or repaired, or carried, for a reward.

The bailments for hire are mutual benefit bailments. In the bailment where the use of a thing is hired, the bailee gets the benefit of the use of the thing, and the bailor the benefit of the compensation promised, while in the bailments where the carriage, or repair, or custody of a thing is hired, the bailee has the benefit of the compensation promised, and the bailor the benefit of the particular service. These bailments resemble the gratuitous bailments except for the matter of compensation. The hiring bailments arise by contract, generally bilateral contracts, the consideration for each promise being the other promise (not because a benefit to the person to whom made, but because a detriment to the one making the same), and hence there is an obligation which is binding upon the parties before the possession of the chattels is actually delivered. The bailee is bound to exercise ordinary diligence in caring for the chat-

[1] Donald *v.* Suckling, L. R. 1 Q. B. 585; Norton *v.* Baxter, 41 Minn. 146.

tels while they are in his possession in case of all the hiring bailments, and is liable for ordinary negligence, except in the case of the exceptional bailments of innkeepers of goods and common carriers of goods, which have a higher liability. Some important classes of bailees for hire are agisters, livery stable keepers, warehousemen, storage-house keepers, and safe deposit companies. The bailee and not the bailor is liable for any injury to third persons by the chattels while in the bailee's possession, as the bailee is not the agent or servant of the bailor. Third parties are liable to the bailor, however, for any injury they may cause the reversionary interest of the bailor in the chattel bailed, even though the bailee is also liable because a joint tortfeasor.[1] A bailor, who lets a thing for use, impliedly warrants or promises that the thing is reasonably fit for the use for which hired if reliance is placed in him. Thus if a person hires a horse for a particular purpose the bailor promises that it will be reasonably fit for that purpose.[2] A bailee for hire has a lien for repairs made on a chattel, for storage of a chattel, and for carriage of a chattel, and statutes generally give livery-stable keepers and agisters who pasture cattle a lien for the care of animals. Bailments for hire may be terminated by the expiration of time fixed, accomplishment of purpose of hiring, loss or destruction of object, by merger, by breach of contract, by agreement, and where the hiring is for an indefinite time by the death of either of the parties. As soon as the bailment is terminated it is the duty of the bailee to return the thing bailed to the person authorized to receive it.

§ 16. INNKEEPERS.

An inn, or hotel, is a public house for the entertainment for compensation of all transients who choose to visit it as guests.

An innkeeper is one who keeps an inn; a guest one who patronizes an inn as a traveler. The innkeeper is engaged in a public calling and as such has certain obligations imposed upon him, as to serve all without discrimination, which will be con-

[1] N. Y., etc., R. Co. *v.* N. J., etc., R. Co., 60 N. J. L. 338.
[2] Fowler *v.* Lock, L. R. 7 Com. Pl. 272.

sidered in another place; but the contract relation of innkeeper and guest should be treated here. In order to be an innkeeper one must hold himself out as ready to entertain all travelers with at least lodging, and generally both lodging and food are furnished. A guest may be a person from the same town, but he must come to the inn as a traveler, and not as a boarder, or lodger. The innkeeper owes an obligation to the guest to exercise ordinary diligence to protect him from personal injury; and to insure the safety of the guest's goods, except for injury resulting from the act of God (force of nature without intervention of man), or public enemy (nation at war with U. S.), or inevitable accident (accidents from human agency as well as nature, as accidental fire), inherent nature of the chattels, and from the fault of the guest, his servants, or companions. The innkeeper is a bailee as to the guest's goods. He is under the above obligation as to all the goods the guest brings into the inn, although by statute he may generally require the guest to deposit the same in his safe or he will not be liable. The innkeeper has a lien on such goods for his compensation for keeping the guest, but he does not have a lien upon the goods of a person who becomes a boarder in his inn.

§ 17. COMMON CARRIERS OF GOODS.

A common carrier of goods is one who transports the goods of everyone for hire as a public calling.

Carriers are private carriers without hire (or mandataries), private carriers for hire (ordinary mutual benefit bailees), and public, or common carriers. The latter are distinguished from private carriers in two respects: (1) They are engaged in a public calling and must serve all without discrimination for reasonable compensation, matters which are discussed elsewhere, and (2) they are under an exceptional liability for the safety of goods in their possession. The common carrier of goods according to the common law is an insurer of the safety of the goods which he takes into his possession and is bound to deliver them at the termination of his carriage unless he can show that they have been lost by the act of God (force of nature beyond the control of man and to which man has not contributed), by the public enemy (military force making war

upon the country, and pirates), act of the shipper, inherent nature of the goods, or public authority. Destruction by lightning would be an act of God. Decay of fruit would be loss by inherent nature of goods. Seizure by legal process would be public authority.[1] Aside from the safety of the goods the obligations of a common carrier are like those of the ordinary bailee for hire, to exercise ordinary diligence. The latter obligation would embrace the furnishing of facilities, time for completing carriage, and all other matters incident to transportation. By contract, unless prohibited by statute, the common carrier may limit his liability altogether to that of an ordinary bailee. Thus he may exempt himself from liability for loss by fire, or leakage, or dangers of navigation, etc., provided the loss is not due to his negligence.[2] He may also by contract limit the amount recoverable in case of loss, and he may limit the time in which the shipper must present his claim. But whenever the common law obligations are varied by contract the common carrier must give up some additional legal right as a consideration for the promise of the shipper to take less than the common law obligation; otherwise, the common law obligation will attach. This consideration is generally a lower rate. The contract between common carrier and shipper is generally, though not necessarily, found in a bill of lading, which is a receipt of the carrier for the goods, and an agreement to carry them from the place of shipment to the place of destination. So far as a bill of lading is a contract, and not a receipt, it cannot be varied by oral contemporaneous evidence. A common carrier cannot limit its liability by mere notice. When goods are shipped under a common carrier's common law liability as to safety, such liability will end after the goods have reached their destination, notice has been sent the consignee, and a reasonable length of time has expired in the case of railways.[3] After such time the railway becomes a warehouseman. Some states allow the common law liability of insurance to end when the goods are unloaded,[4] and others after a reasonable length of time without

[1] Evans *v.* Fitchburg R. Co., 111 Mass. 142.
[2] Liverpool, etc., Co. *v.* Phenix I. Co., 129 U. S. 397
[3] McMillan *v.* Michigan, etc., 16 Mich. 79.
[4] Norway Plains *v.* Boston & Maine Ry., 67 Mass. 263.

notice.[1] Express companies must make actual delivery or attempt to do so, before their common law liability will end, where their business is sufficient to warrant making deliveries.

§ 18. INSURANCE.

Insurance is a conditional contract whose subject-matter is the right of the insured to the payment of indemnity (fire), or a certain amount of money on the happening of a certain event (life), and the right of the insurer to the payment of stipulated premiums.

In insurance the subject-matter of the contract is not primarily the transfer of any of the rights of ownership to visible objects as is the case in conveyances, sales and even bailments, although, incidentally, title to the money paid as premiums passes to the insurer and in case of the happening of the event the title to the money of the insurer passes to the insured; but the primary subject-matter of the insurance is the personal property right to incorporeal chattels. An annuity resembles insurance in that the subject-matter of an annuity is the right of a person to a certain sum of money, payable yearly, for life, for a term of years, or in perpetuity, by another. Insurance is a method of acquiring personal property by original acquisition; that is, rights are created to things which never had an owner before.

Insurance is another contract, and it must have all the essential elements of contracts, but there are a few peculiarities in connection with the subject-matter of insurance contracts and with the elements of contracts as they appear in insurance to which reference should be made.

The peculiarities of insurance law so far as the elements of the contract are concerned may be briefly disposed of. Agreement, consideration, and parties offer no peculiarities. Insurance is a fiduciary contract because of the nature of the subject-matter, and consequently an innocent misrepresentation which is material may make the contract voidable. Mistake, fraud, etc., affect insurance as any other contract. In-

[1]Moses *v.* Boston & Maine Ry., 32 N. H. 523.

surance is on the borderline of being illegal, for it partakes of the nature of a wager contract and wagers are illegal. The legality of the contract of insurance is secured by the requirement of an insurable interest in the one taking out the insurance. Any contract in which the insured does not have such interest is illegal and void. Insurance does not require any formality except as statutes have provided "Standard Policies." The statute of frauds does not affect it, as the contract is one which may be performed within one year by the happening of the contingency, e. g. death, or fire. The contract may be oral or written, though it is generally written, and in the form of a policy. The term warranty is used in insurance law, not in its true sense of an accessory contract, but as a representation which is made a term, or condition, of the contract itself, so that the contract is avoided if the condition is broken; all that the insurance warranty means is that the representation is warranted material.

The subject-matter of insurance, or the rights created by the contract, are the right of the insurer to the payment of stipulated premiums, and the right of the insured in fire insurance to indemnity for loss from fire, and the right of the insured, or beneficiary, or assignee, in life insurance to the payment of a stipulated amount of money on the happening of a particular event. Insurance is thus distinguished from all other contracts. No other contract creates the same rights as an insurance contract. There are many different kinds of insurance, and they also are to be distinguished from each other by the nature of their subject-matter. In fire insurance the insured has a right to indemnity, while in life insurance his right is not to indemnity but the payment of a definite sum. Many different kinds of insurance are distinguishable from each other only because of the different events upon which the insured becomes entitled to the payment of money. Accident insurance is that in which the insured has a right to the payment of a sum of money on the happening of an accidental personal injury. Marine insurance is that in which the insured has a right to indemnity for losses caused ship or cargo from the perils of the sea. Fidelity insurance is that in which the insured has a right to indemnity for loss caused by the dishonesty of another; burglary, for losses caused by holdup; plate glass, for loss from breakage; employer's, for liability for

injuries to employees; hail, for damage to growing crops; live stock, for loss of horses, mules, and cattle by death of any sort; and so on through fifty more kinds of insurance.

§ 19. FIRE INSURANCE.

Most states have now adopted standard forms of fire insurance policies and require insurance companies to issue no other policy in a state than that prescribed by statute. The leading standard policies are the New York and the Massachusetts, and most other states have copied one or the other. Everyone who takes out fire insurance should read his policy through. If a company issues a policy not in the form required by law it is generally provided that it shall forfeit the right to do business within the state, and it cannot collect premiums, but the insured can collect insurance money from such company. An open policy is one where the amount to be paid in case of loss is to be determined by adjustment after fire. A valued policy is one in which the amount to be paid in case of total loss is agreed upon by the parties in advance.

The contract of fire insurance is personal and does not run with the property. Hence a transfer of the property covered does not carry the insurance, unless assigned with the assent of the insurer. The insured must have an interest in the property insured both at the time of the insurance and at the time of loss. Hence if the insured sells the property, and the insurance is not assigned with the consent of the insurer, the insurance merely lapses. A person has an insurable interest in any property by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss.[1]

The contract of fire insurance runs for a certain term, as for a year, or three years, with a definite beginning and ending. It promises indemnity only to a certain amount, and will cover actual losses up to that amount. In a valued policy such amount is payable in case of total loss without any estimation of loss. The promise of indemnity relates only to specified property; that is, the right of the insured in some particular ob-

[1]Rohrbach *v.* Germania Fire Ins. Co., 62 N. Y. 47.

jects. Certain objects of ownership, such as bills, notes, jewels, etc., are excluded from the promise of indemnity unless specially mentioned. The great risk insured against is fire; that is, fire must be the proximate cause of the loss. Damage by water in extinguishing a fire would be a loss proximately caused by fire. Certain causes of fire are generally excepted; for example, foreign enemies, riots, and explosion (unless fire ensues, and then to include loss caused by fire only). The policies all contain a number of conditions, the breach of any of which will give the insurer the right to avoid the policy and thus escape the payment of indemnity. The most common of such conditions are: Representations made a part of the policy, other insurance without the consent of the company, removal of the property without consent, increase of risk by changing the situation or circumstances of the property without consent, sale of property, or assignment of policy without consent, vacancy of premises for a certain period without consent, manufacturing plant running extra time or ceasing to run without permission, attempt to defraud the company, keeping prohibited articles such as gunpowder, benzine, etc., that insured shall make reasonable exertions to save property, if exposed. Conditions, as well as misrepresentations and fraud, may be waived by the company or its agents acting within the scope of their employment.

Provisions in fire policies as to notice and proof of loss must be substantially complied with before the claim is payable. The insured has no right to sue an insurance company until they have been furnished, unless they are waived. Retention of proof of loss by the insurer without objection waives all objections, and an objection to proof of loss on one ground waives all other objections. A provision that proof of loss must be furnished forthwith means within a reasonable time. Failure to furnish the same within such time will work a forfeiture unless the insured is foresighted enough to get a policy which provides otherwise.

§ 20. LIFE INSURANCE.

Standard life insurance policies are not so common as standard fire, but some states have adopted standard forms for life

insurance. But, whether or not a standard form is prescribed in any particular state, the policies written by the different companies closely resemble each other. Life insurance is written on the old line plan or the assessment plan. Old line insurance is written by either stock or mutual companies, and their policies are either whole life, limited payment life, endowment with various years of maturity, life annuities both immediate and deferred, and term both renewable and convertible.

The payment of the first premium is generally made a condition precedent to the attaching of the risk in life insurance, and the agreement of the insured to pay annual premiums on a day certain is of the essence of the contract. If the insured does not pay his premiums on the day they are due the policy is immediately terminated, unless the company waives the forfeiture. Hence the insured must let nothing prevent the payment of the premiums before the final due day. Some modern policies are beginning to grant a month's grace in the payment of premiums. The failure of the company to give notice does not excuse the payment of premiums.[1]

Insurable interest is required in life insurance only at the time of taking out the policy. Life insurance is not indemnity, so that such interest is not required at the time of death, but there must be such interest at the time of contract to prevent the same from being a mere wager. One has an insurable interest in another when he sustains such a relation to him as to justify a reasonable expectation of advantage or benefit from the continuance of his life. Everyone has such insurable interest in his own life. Parents and children and husbands and wives have such interest in each other because of the ties of blood and marriage. Such parties may estimate the value of the life insured at any sum they please. A creditor has an insurable interest in the life of his debtor to an amount large enough to safely cover his debt. If the insured has such an insurable interest as any of the above and takes out a policy of insurance, he may make the insurance payable to anyone he may choose as beneficiary, or if he makes it payable to his estate he has a property right which he may sell to anyone by assigning the policy, and neither such beneficiary or such

[1]Klein *v.* Insurance Co., 104 U. S. 88.

assignee need have any insurable interest, and all this is true whether the insured takes out the insurance on his own life or on the life of another in which he has an insurable interest. Making a policy payable to a beneficiary gives the beneficiary a vested interest which the insured cannot take away, unless the right to change the beneficiary is reserved in the policy.[1]

§ 21. LOANS (CONTRACTS FOR, AND FOR REPAYMENT).

A contract to loan is one whose subject-matter is the right of the borrower to the payment of a certain sum of money, and the right of the lender to have a like sum of money repaid at some future time, with or without interest on the same during such interval.

A contract to loan is a bilateral contract executory on both sides, and it creates a personal property right for each party by original acquisition to the incorporeal chattel of a debt. If the loan is consummated the borrower's property right to such incorporeal chattel is extinguished and he gets in place thereof a personal property right to the corporeal chattel of money by secondary acquisition. Loan in the sense here used, where the borrower acquires the absolute property in a chattel or a right to the same, is to be distinguished from the term gratuitous loan, or loan for use, employed in bailments, where the bailee acquires only a qualified property in a chattel or a right to the same.

The right of the borrower in a contract to loan or an actual loan does not demand so much of our attention as the right of the lender to the repayment of the amount of such loan. The promise to repay a loan is generally found in the form of a promissory note, and this promise is frequently further secured by a pledge, or a mortgage, or by getting another person to promise to insure or guarantee the note. All of these forms of security for a note are accessory contracts and will be discussed under the head of accessory contracts. The payment of the money which another owes may also be obtained by a draft or check (bills of exchange). In such case the lender or creditor draws upon the borrower or debtor, instead of having the latter execute a promissory note. When money is de-

[1]Mutual Life Ins. Co. *v.* Allen, 138 Mass. 24.

posited with a bank as a general deposit, and the bank thus becomes a borrower, a bill of exchange is the common method of enforcing payment; but the same method may be used against any debtor, and is frequently used against merchants who have purchased goods and against employers. Whenever a bank or other person in the business of loaning money makes a loan he insists upon the borrower's making a promissory note. A promissory note is an unconditional written promise of one person to pay to another's order or bearer a specified sum of money at a specified time. A bill of exchange is an unconditional written order by one person to another directing the latter to pay to a third person's order or to bearer a specified sum at a specified time. Such bills and notes create for the payee, or lawful holder, by original acquisition, a personal property, which he may not only possess and enjoy, but of which he may dispose. But if such owner disposes of the same, which must be by assignment or by indorsement, the person to whom he transfers the ownership acquires the same by secondary and not by original acquisition, and these matters will be referred to later. A promise to repay money may be in the form of a bond, or a promise under seal. Bills and notes are classed as commercial paper. The legal rate of interest is generally six per cent, although it runs from five to eight per cent in different states, and a maximum rate running from six per cent to anything in different states is permitted by contract.

§ 22. BILLS AND NOTES.

We will give a few further explanations of negotiable bills and notes. The promise in notes and the order in bills must be unconditional. A signature to them is essential, though in the absence of statute the position of the signature is immaterial. Every bill must contain an imperative order, and every note a specific promise; otherwise it will not be negotiable. The promise or order must be to pay in money, and the sum to be paid must be fixed and certain. A promise to pay in "currency, exchange, rents as they become due" is not a promise to pay in money, and therefore not negotiable. The payee must be named or definitely indicated. "Good for $100 on demand. G. & H." is not a negotiable note as it names no payee. The time when a bill or note is to be paid must be certain. The

note or bill must be delivered. If a note is stolen from maker, though completely executed, it is the same thing as though the holder had a blank paper. The date and expression of the consideration are nonessentials. A bill of exchange is made complete only by its acceptance by the drawee (person who is ordered to pay). A stranger to the bill cannot accept it, unless the drawee refuses to accept it and the bill is protested, when a third person may accept it for the honor of one or more parties to the bill. In the absence of statute an oral acceptance by the drawee is sufficient. Acceptance admits the genuineness of the drawer's signature. The drawer of a check is not discharged by the laches of the holder in presenting the same, but the drawer of other bills is. A bill or a note which has the above essentials is negotiable; that is, it is transferable on the market free from equitable defenses. The words order or bearer, or equivalent words, are the *indicia* of negotiability. Negotiability, however, is not essential to a bill or note. Nonnegotiable bills and notes are simply subject to equitable defenses.

What is the method of transferring bills and notes? Paper payable to bearer passes by delivery. A note payable to order and indorsed in blank is then regarded as paper payable to bearer and passes by delivery. One who transfers paper payable to bearer impliedly warrants that the same is genuine, that he has title thereto, and that the parties to the instrument were competent to contract, but not the solvency of such parties. Paper payable to order must be indorsed in order to pass complete legal title. The indorser has the same warranties as the transferrer of bearer paper, and in addition enters into a new and independent contract that the bill or note will be paid when due by the prior parties, upon due presentment and demand; or, if not, by himself upon notice of their failure. An indorsement may be either in full, where the indorser makes the instrument payable to a certain person or his order; or in blank, where the indorser merely writes his name on the back of the paper, thus making it bearer paper; or restrictive, as where it is indorsed "for collection"; or "without recourse" when the indorser has the same liability as a transferrer of bearer paper. A person may put his name on a bill or note as an acceptor, drawer, maker, or indorser without any other interest therein than to accommodate a person who desires

to raise money on the same. Such party is an accommodation indorser, and he is liable to an innocent indorsee for value if the latter makes due presentment and gives notice to all persons secondarily liable but fails to recover. A guarantor is one who insures the solvency of the maker in writing for a consideration, upon condition of presentment to the maker and notice of dishonor to him within a reasonable time.

Commercial paper must be presented for payment at maturity in order to fix the liability of drawers and indorsers, who are only secondarily liable. Joint makers and sureties are not entitled to such presentment and notice, as they are in the same situation as the original maker, and a guarantor is entitled to only reasonable notice. Any *bona fide* holder, or his duly authorized agent, may present a note or bill, but foreign bills and indorsed foreign notes require protest instead of notice of dishonor and they must be presented by a notary public. Presentment should be made personally to the acceptor of a bill, or the maker of a note. It should be made at the place indicated on the face of the bill or note, or if none is indicated at the maker's domicile or place of business. If he is not there it may be presented to anyone of discretion found at these places. Presentment should be made on the exact day of maturity, which, when the paper is entitled to grace, is the last day of grace, during business hours at place of business, or banking hours at bank, or during reasonable hours at residence. If the promisor desires it, the paper should be exhibited when presentment is made. If the paper is dishonored notice of dishonor must be sent to drawers and indorsers by some party to the paper or his agent. Notice may be sent on the day of default, and must be sent on the next day; that is, posted in time for the mail. If the parties live in the same town the indorsers and drawers are entitled to personal notice. Checks are not entitled to days of grace, but by the law merchant other commercial paper is entitled to three days of grace. As checks are payable on demand they are not presented for acceptance, but they may be presented for certification. The drawer is not discharged if he presents the check for certification, but he is if the payee presents it. Neglect or delay to present a check for payment will not discharge a drawer not already discharged, unless it results in injury to him.

§ 23. CONTRACTS TO MARRY.

A contract to marry is one whose subject-matter is the right of the woman to have the man become her husband and of the man to have the woman become his wife, if the contract is in the form of mutual promises to marry; and the right of one party to have the other become a spouse and of the other to whatever legal right is promised therefor, if the contract is in the form of a promise to marry for a promise to transfer property or to give up any other legal right.

Marriage is a contract whose subject-matter is the establishment of the status of a man and woman, for discharging to each other and the community the duties legally incumbent on husband and wife. Marriage is another executed contract and the rights created are *in rem*. But a contract to marry is one whose subject-matter, if in the form of mutual promises, is the right of each party to the performance of the other's promise; if in the form of a written promise to marry for a written promise of a sum of money, the rights to the marriage, and the money; if in the form of a written promise of a sum of money for a marriage, the right to the money after marriage. An executed contract of marriage creates at once the marital rights and inchoately the parental and dominical rights which we have already considered in Chapter IV. An executory contract creates a personal property right to the performance of a promise. The rights created by an executed contract of marriage, with the exception of dominical rights, are not property, and therefore have been given separate treatment. Dominical rights are personal property. They give the head of the family the right to the services of the other members, including servants. The right to the services of the latter may spring from a special contract, but the right to the services of the former springs directly or indirectly from marriage.

Mutual promises to marry are not within the statute of frauds, but any other promise (unilateral or bilateral), based upon consideration of marriage is within the statute of frauds and must be in writing.

§ 24. CONTRACTS FOR SERVICES (EMPLOYMENT).

A contract of employment is one whose subject-matter is the right of one person to have certain services performed by another, and the right of the other to receive stipulated compensation.

Contracts of employment are usually bilateral, in which case each party acquires a personal property by original acquisition which he may at once possess and enjoy and for the violation of which he may obtain legal redress, and which he may dispose of by assignment as soon as he performs on his part; but such contracts may be unilateral, in which case the party who has performed on his part has an absolute property at once in the promise of the other party.

There are a number of different kinds of contracts of employment, each of which differs from the other in subject-matter according as the services contracted for are to be rendered by domestic servants, farm hands, day laborers, bailees, those engaged in public callings, professional men, agents, or partners. The obligations and correlative rights in each one of these contracts differ from those in all the others. The difference between the relation of master and servant and of principal and agent is that an agent is engaged to make contracts for his principal, while a servant is not engaged to make contracts for his master. The hiring of the services of a bailee is one kind of employment, but as it is only a special phase of the contract of bailment it needs no further discussion. A contract with a person, not a bailee, engaged in a public calling has some distinctions from other contracts of service, and the same is true of professional services. We have already considered the authority of an agent to bring his principal into contractual relation with third parties in connection with parties to contracts, but we shall need to consider the rights of principal and agent against each other in the matter of the rights to services and compensation. Partnership is a contract which is peculiar in that each partner acquires a right to carry on a business and to share as co-owner in the profits thereof. The tort liabilities of the various parties sustaining the relation of employed and employer have been considered in connection with the violations of the various legal rights of men already

considered, and will be considered further in connection with the violations of the rights of personal property.

§ 25. MASTER AND SERVANT.

After one person engages to work for another as a servant for a compensation which the other agrees to pay, each party acquires at once a right to have the other carry out his promise. Ordinarily the servant must carry out some part of his promise before his right to performance from the master arises, for that is made a condition precedent, but he may be excused from such performance by the wrongful conduct of the master. During the performance of the contract, the master is entitled to have the servant take such care of his interests as a diligent servant would under the same circumstances, and the servant in addition to compensation is entitled to have the master use reasonable diligence to keep the premises on which he works in safe condition, to provide safe machinery with which to work, and to provide competent men to carry on the service with him. The servant assumes the risks incident to the business as respects premises, machinery and fellow-servants (unless statutes otherwise provide); all the master is called upon to do is to exercise reasonable diligence with respect to the particular occupation.

§ 26. PUBLIC CALLINGS.

The obligations imposed by law without any contract upon those engaged in public callings we shall consider in the chapter on *Quasi* Contracts, but the general obligations of the contracts between such parties and those who deal with them should be referred to here. It is impossible to specify all the present public callings, for the test of a public calling seems to indicate that whenever a business becomes a virtual monopoly it becomes a public calling. The bailees engaged in public callings we have already considered. In addition to them others engaged in public callings are public carriers of passengers, telephone and telegraph companies, gas and electric light companies, water supply companies, etc. A public car-

rier of passengers is bound to exercise the utmost skill, so far as human foresight may go, in selecting its servants, in selecting its machinery, and operating the same so as to protect a passenger from injury, and it cannot relieve itself from liability for negligence by special stipulation, for it is against public policy. A passenger is one, not acting as a servant of the company at the time, who is being transported by the carrier from place to place in its vehicle with its consent (express or implied), or who is at the station of the carrier with the intention of entering upon such relation as soon as possible. A carrier of passengers may exempt itself from liability for injury to a person riding on a gratuitous pass, though the injury is caused by its negligence. So long as the contract does not refer to exemption from liability for negligence it may contain practically any stipulations if based upon consideration, and the company has a right to make and enforce reasonable rules and regulations, as for purchase of ticket in advance, procuring stop-over check when stopping off, etc. Telegraph and telephone companies are bound to exercise ordinary diligence in transmitting despatches, and they cannot relieve themselves from liability for negligence. The cases do not all agree as to what is an exemption from liability for negligence. The federal courts generally hold that a requirement that a message must be repeated in order to make the company liable for mistakes does not exempt, but most of the state courts hold that it does. If the contract does not exempt from liability for negligence the parties may make such contract as they desire. Those engaged in public callings can charge only reasonable compensation, and such charge must not be discriminatory.

§ 27. PROFESSIONAL MEN.

One who hires the services of a professional man, as a lawyer or a doctor of medicine, is entitled to have such practitioner exercise a fair average degree of professional skill and knowledge; that is, such skill and knowledge as a prudent practitioner of fair ability would exercise under the same circumstances, and if he does not have them, or having them, neglects to use them, he is liable to the hirer. Generally, in this country, any-

one admitted to the practice of law is entitled to compensation for his professional services, and other professional men likewise. The nature and amount of compensation may be fixed by agreement, but in the absence of agreement it is fixed by law at what the services are reasonably worth. It is more difficult to determine what professional services are reasonably worth than some mechanical and physical services, for much depends upon professional skill and learning. Allowance must be made for the nature of the services rendered, the practitioner's standing in his profession, and the usual charges in the same vicinity for like services.

§ 28. PRINCIPAL AND AGENT.

The relation of principal and agent involves three persons, the principal, the agent, and a third person with whom the agent brings the principal into contractual relations. We are to consider the rights of principal and agent against each other. The competency of parties to be principal and agents was fully discussed in the chapter on Parties. What was there said about infants, insane, married women and corporations applies here. Unincorporated associations are not legal entities, and if they appoint agents the members are individually and collectively liable so far as they authorized the appointment. Each member of a partnership is both principal and agent as to all the other members within the scope of the partnership business.

The relation of principal and agent may arise by appointment, by implication (or estoppel), and by ratification. A contract of agency which is not by its terms to be performed within one year must be in writing, and where a contract between a principal and a third person is required to be under seal the authority of an agent to execute such contract must also be under seal, in which case the appointment is called a "power of attorney." Otherwise the appointment of an agent may be oral. A *del credere* agent, who guarantees his principal against loss from credit given third parties by the agent, is the primary debtor and not guarantor, and his promise need not be in writing. Agency may be established by estoppel where a

person permits himself to be represented by another, for in such case he is not permitted to deny the authority of the representative to act for him. So if he permits an appointed agent to act outside the scope of his authority he will not be permitted to deny his authority. Agency by ratification may be created by an express or implied approval of a previously unauthorized act, if such act is not absolutely void; but to amount to a ratification the person ratifying must have had and still have capacity to do and delegate the act, have knowledge of all the material facts and know that he will not be bound without ratification, and if sealed or written authority is required sealed or written ratification must appear. An agent's act may be ratified by silence. The minor son of P, who resides with P, swaps a horse belonging to P for a horse belonging to D. After the exchange P is seen riding the horse his son got from D and keeps the same two months before offering to return him. This amounts to ratification.[1] Ratification is equivalent to prior authority and makes the contract good from the beginning. Agency may also be created by law without any act of a principal, as in case of the implied authority of the wife to pledge her husband's credit for necessaries and in some other *quasi* contracts. An agent must have authority in some one of the above ways, and he can bind the principal only so far as he has authority, but sometimes the boundary of the agent's authority is so hazy that third parties dealing with him may assume that he has more authority than is really the case. If the agent is a general agent; that is, authorized to act for his principal in all matters connected with a specific transaction, or business, he may charge his principal, within the actual and apparent scope of his authority, and third parties are not bound by secret instructions. Apparent authority may be incidental to actual authority. For example: An agent who has authority to travel at his principal's expense has authority to hire a horse. Apparent authority may be that acquired by custom, as in case of factors, brokers, auctioneers, attorneys at law, and bank cashiers. A principal is not liable beyond the apparent scope of an agent's authority, unless by estoppel or ratification. If the agent is a special agent, or one who has authority to act in one transaction, or on one occasion, he can

[1] Hall *v.* Harper, 17 Ill. 82.

charge his principal only within the actual scope of his authority, and this may be limited by secret instructions. In any event if the authority is conferred in a written instrument, its extent must be determined by the writing itself.

The agency having been created, the parties acquire various rights against each other. The agent acquires the right to the agreed compensation, if any, or a reasonable compensation if none is agreed upon, the right to reimbursement for all expenses necessarily incurred in the discharge of the agency, unless his compensation covers the same, and the right to indemnity for damages he is compelled to pay because of following his principal's instructions. The principal acquires the right to the performance of the agreed act or acts, the right to obedience to his instructions, the right to the exercise of reasonable diligence in the conduct of the business by the agent, the right to good faith on the part of the agent, and the right to an accounting for all the property coming into the agent's possession by virtue of the agency. An agent cannot delegate to another the performance of the act or acts to which the principal is entitled, but he may perform the mechanical duties incident thereto through his own servant.

§ 29. PARTNERSHIP.

If a person does not want to do business in his sole right, but desires to join other men or capital with him, he may do so by forming either a partnership or a corporation. A corporation is a legal entity, or juristic person, which is created by the law's conferring upon one or more individuals a personality with a capacity differing from that of such individuals. The essential attributes of a corporate being are: (1) perpetual succession, (2) capacity to acquire rights and assume obligations, (3) possession of corporate franchises, etc., all under its own adopted name. Members who invest their money in a corporation are not individually liable for its debts except as so made by statute. Corporations are created by legislative grant, either by special statute or under a general statute which permits the forming of a corporation by filing articles of incorporation with a designated public official. A partnership is not a legal entity but acts as individuals. The

death of one terminates the relation. Each partner is agent for the firm. Each partner is individually liable for all the debts of the firm. The parties sue and are sued in their individual names. A partnership is created only by contract, though a person may incur the responsibility of a partner by estoppel. The contract may be oral or written, but it is generally written in articles of partnership. A partnership thus differs from a corporation in every respect.

Partnerships may be divided into ordinary partnerships, limited partnerships, and joint stock companies. A general ordinary partnership is a voluntary association of two or more persons under an agreement to carry on a business in common and to share in common the profits of the enterprise. A limited partnership exists only by virtue of statute, and when it so exists it is one where one or more of the partners but not all are liable only for the amount of capital embarked. A joint-stock company is a partnership in which the capital is divided into shares, which are transferable, and which are divided among the partners according to their interest. The death of a member does not work a dissolution of a joint-stock company and the shareholders elect directors, as in a corporation; but each member is liable for all the debts, and the members sue and are sued separately.

The rights of the partners against each other are: To have the exercise of the highest good faith, to have the use of due diligence in the conduct of the business, to have made no claim for compensation except his share of the profits (unless all the labor is thrown upon him), to have the business conducted according to the terms of the agreement, and to have an accounting of profits. Each partner is agent for all the others, and may bind the partnership by any act within the scope of his authority. A partner in a trading partnership can sell or mortgage personal property belonging to the firm, purchase the kind of goods dealt in by the firm, receive payment of firm debts, indorse commercial paper in the firm name, borrow money on the credit of the firm, and engage agents and servants for the conduct of the business. The powers of a partner in a nontrading partnership are not so extensive, yet even those are extensive enough, so that only those who have complete confidence in each other should form a partnership.

§ 30. ACCESSORY CONTRACTS.

An accessory contract is one whose subject-matter is a right which is ancillary to another right.

This species of contract embraces suretyship and guaranty, warranty, pledge, and mortgage. A contract of suretyship is one whose subject-matter is the right of the person to whom the promise is made to the payment of a debt if the debtor will not pay; a contract of guaranty, if he is not able to pay. A warranty is a collateral contract whose subject-matter is the right of a purchaser to damages if the title or quality of a thing bought is not as represented. The warranty referred to is the true express warranty, which is not a condition in the principal contract but accessory to it, so that it has no effect on such main contract by way either of suspension or termination. The so-called implied warranty is an implied promissory condition, and it will be found discussed in this chapter under the heading of conditions. A pledge is a bailment contract whose subject-matter is the right of the pledgee to hold a chattel as security for a debt or engagement (with power of foreclosure). This contract has already been referred to under the heading of bailments. A mortgage is a contract whose subject-matter is the conditional transfer of title to real property or personal property as security for a debt or engagement. If it relates to real property, it is called a real estate mortgage; if to personal property, a chattel mortgage. In most of the northwest and western and some of the southern states a real estate mortgage creates only a lien by way of pledge, and in a few northwestern states a chattel mortgage has no greater effect. Forms in the back of this book will give any further explanation of mortgages that may be desired. All of these accessory contracts may be supported by the consideration in the main contract if entered into at the same time, but they must have a new consideration if entered into subsequently. They generally take the form of unilateral contracts. The promisee has a right to the performance of the obligation according to the agreement, but the promisor has no right to any performance, and can only insist upon the fulfillment of the conditions upon which his promise is made.

CHAPTER XIX.

INTERPRETATION.

§ 1. Rules of Evidence.

What are all the facts in regard to the words and circumstances making the various elements of a contract is for the jury. When they are found, whether they amount to a contract, and, if so, its effect, are questions for the court to decide according to the principles hereinbefore set forth.

If the contract is wholly oral, no special discussion of the proof of the same is necessary here, but full discussion thereof will be found in works on evidence. If the contract is wholly

written its terms are not in dispute, and its legal effect is a question of law within the exclusive province of the court. But, though there may, apparently, be a written contract, there may exist, to be submitted to the jury, certain questions as to the execution of the contract, or as to the existence of all the elements of the contract, or as to usages, supplementary terms and ambiguities; and it will be necessary to consider the rules upon some of these questions.

§ 2. PROOF OF DOCUMENT.

A contract under seal is proved by evidence of sealing and delivery (and where attestation is necessary, testimony of attesting witnesses). A simple written contract is proved by oral evidence that the party sued is the party bound, and, if the contract is in several documents, that these are connected.

If a written contract is lost or inaccessible, oral evidence thereof is admissible according to special rules of evidence. If the contract is within the statute of frauds, in order to orally connect several documents they must contain a reference or, when connected, make a contract without further explanation. Written contracts are generally admitted on the pleadings or upon notice given. In a suit for conversion, by the mortgagee of property, he attempts to show his title by producing a mortgage and having the mortgagor testify to his execution of it, without calling a subscribing witness. Is this sufficient proof? Not by the strict common-law rule.[1] An auctioneer makes out and signs a memorandum of the sale of a house, in which there is not sufficient reference to the conditions of payment. This fact is contained in handbills and newspaper notices signed by the seller. Is oral evidence admissible to connect these to the memorandum? No. There is no reference to them in the memorandum and when connected they do not make a contract without further explanation.[2]

[1] Story *v.* Lovett, 1 E. D. Smith (N. Y.) 153.

[2] O'Donnell *v.* Leeman, 43 Me. 158; Colby *v.* Dearborn, 59 N. H. 326.

§ 3. EVIDENCE THAT DOCUMENT IS NOT A CONTRACT.

Oral evidence is admissible to show that a document is not a contract at all because lacking in some one of the essential elements or because of a condition.

By a contract in writing, P agrees to buy, and D to sell, a quantity of lumber. There is a contemporaneous oral agreement that the obligation of the contract shall not be complete until certain commercial agencies report favorably on P's pecuniary responsibility. Can this parol agreement be shown? Yes. This is an exception to the general rule excluding oral contemporaneous evidence. This does not vary its terms but shows that there is no contract.[1]

§ 4. EVIDENCE AS TO TERMS OF CONTRACT.

Oral contemporaneous evidence is inadmissible to vary the terms of a written contract. Such evidence is admissible to complete the contract, by showing a supplementary agreement, or unexpressed terms; or to annex a term of special meaning by reason of a usage of trade or locality; or to explain the terms of the contract itself, by identifying the parties or subject-matter.

To admit oral evidence to vary the terms of a written contract would controvert the very object of the parties in reducing their agreement to writing. W furnishes lumber to T, who uses it in erecting a house for M. While his contract is still executory he releases or assigns it to M, by an instrument under seal, in which the consideration named is $25. By way of further consideration, M orally offers to pay T's debt to W for lumber. Is the oral testimony admissible? Yes. This is a supplementary agreement.[2] K sues S for 4,000 shingles. He delivers eight packs, but they contain only 2,500 shingles. Can K show that, by a usage of the lumber trade, two packs are regarded as 1,000 shingles, without reference to the number? Yes, if the custom is so general and well established that

[1]Reynolds *v.* Robinson, 110 N. Y. 654, 18 N. E. 127.
[2]Wood *v.* Moriarty, 15 R. I. 518, 9 Atl. 427.

those buying and selling may be presumed to deal in reference to it.[1] By written contract, M buys of G a reaper warranted to do certain work "with a good team." Is oral evidence admissible that at the time of the sale G says "one span of horses"? Yes. The word "team" is of doubtful significance; it has meaning, but it admits of several interpretations. Evidence to explain the meaning of the term is admissible, and declarations of the parties made at the time are competent for that purpose.[2]

§ 5. RULES OF CONSTRUCTION.

The primary rule of construction is that, if not inconsistent with other rules of the law, the intention of the parties shall be discovered and effectuated.

There are many rules of construction, some in apparent conflict, more interdependent, and most of them of equal authority, so that to reach the right construction all should be read together; but if any rule is predominant it is that the intention of the parties must prevail. Sometimes, the intention of the parties being apparent, it may be carried out, though the literal words of the contract do not express it, or the general intent may be carried out, though by reason of some impediment the particular intent may fail. The courts will not make a contract for the parties, but they will undertake to find out what that contract really is, by ascertaining the intention of the parties. The language used by one party is to be construed in the sense in which it may be reasonably understood by the other.

§ 6. WHOLE OF CONTRACT CONSIDERED.

In discovering and effectuating the intention of the parties, the whole of the contract is to be considered, and each part so construed with the others as to give all of them

[1] Soutier *v.* Kellerman, 18 Mo. 509.
[2] Ganson *v.* Madigan, 15 Wis. 158.

some effect, if possible; if impossible, words inconsistent with the main intention are to be rejected.

It is presumed that each part is inserted for some purpose and it should be given effect, but it should not be allowed to defeat a clear intention gathered from the whole agreement. Grammatical correctness, or punctuation, or obvious clerical errors, will not be allowed to defeat the obvious intention of the parties. If clauses are repugnant, the one which expresses the chief object must prevail. A clause in wider terms, following specific enumeration, will generally be restricted to things of a like sort. On a promissory note, signed by D, appears, written at the bottom, the memorandum, "One-half payable in twelve months, the balance in twenty-four months." This memorandum is written on the note, after signing but before delivery. Is this memorandum a part of the note? Yes. Oral evidence is admissible, not to vary the contract, but to show the circumstances under which the memorandum is affixed, when every word and clause should be taken into consideration and if possible given an effect; but, having ascertained what the written words are, the contract must be construed according to them.[1]

§ 7. PLAIN LITERAL SIGNIFICATION.

In discovering and effectuating the intention of the parties, the words of a contract are to be understood in their plain and literal signification. If the words have an ordinary and popular meaning, or a peculiar meaning attached to them by usage, and it comports with the intention of the parties as otherwise expressed, or if they are technical words which have a special sense given to them by the profession or business to which they relate, and they are formally employed, such meaning or sense will be given to them.

Words are ordinarily to be understood in their plain and literal signification, but when any question as to the same arises, the popular and ordinary sense is the one which is most

[1]Heywood *v.* Perrin, 27 Mass (10 Pick.) 228.

likely to express the intention of the parties, except in the case of local usage or technical words, when the intention is most likely to follow the meaning given by usage, or by those employing technical words. On the back of a note is the indorsement "Interest paid on the within note to July 26." In order to determine whether sureties are discharged or not, it becomes important to know whether this means up to July 26th or through July 26th, which would be an extension of the note. In its plain, ordinary, popular sense this means only up to, or before, the 26th. Accordingly, there is no extension of the note and the sureties are not discharged.[1]

§ 8. WRITTEN WORDS CONTROL PRINTED, ETC.

In discovering and effectuating the intention of the parties, in case of inconsistency, written words will control printed words, and words will control figures.

As the written words placed in a printed blank are selected by the parties for that special occasion, they are more likely to express the intention of the parties than printed words for general occasions. This rule is only to help arrive at the actual intention, and, if the intention is found to be otherwise, the written will give way to the printed.

§ 9. SUBJECT-MATTER, ETC.

In discovering and effectuating the intention of the parties, the words of a contract are to be construed with reference to its subject-matter, the time and circumstances under which it is made and the object contemplated.

An insurance company insured A, on his ship, Minnehaha, "The risk to be suspended while vessel is at Baker's Island loading." Does this clause mean "for the purpose of loading," or while "actually loading"? A strict literal construction would favor the latter, but, looking at the circumstances under which it is made, the meaning which the parties intended is found

[1]Stearns *v.* Sweet, 78 Ill. 446.

to be the former "while the vessel is at Baker's Island for the purpose of loading," as it was the risk of the place and unfavorable moorage that the company desired to avoid. Therefore, as no violence is done to the language used, the sense in the minds of the parties should be given effect.[1]

§ 10. CONSTRUCTION GIVEN BY PARTIES.

In discovering and effectuating the intention of the parties, in case of doubt, a construction which the parties themselves have placed upon the contract, in acting under it, will be followed if not contrary to other rules of law.

For example, if a deed gives the grantee the privilege of cutting timber on adjacent land for the purpose of "building" on the premises passed by the deed, the meaning of the word "building" may be learned from the fact that the grantee with knowledge of the grantor, thereafter, cuts timber not only to build buildings but to build fences.[2]

§ 11. SEVERAL INSTRUMENTS TAKEN TOGETHER.

Several instruments relating to the same subject-matter and by the same parties, if substantially one transaction, are to be taken together and construed as one instrument.

The reason for the rule is that it is presumed this will carry out the intention of the parties. Illustrations of this rule are found in a deed of conveyance and a written agreement for reconveyance; a deed of conveyance and a written agreement to support the grantor; a note and a mortgage securing the same.

§ 12. FAVORABLE CONSTRUCTION.

If the terms of a contract are susceptible of two constructions one of which will effectuate the contract and the

[1]Reed *v.* Merchants' Mut. Ins. Co., 95 U. S. 23; Mathews *v.* Phelps, 61 Mich. 327, 28 N. W. 108.

[2]Livingston *v.* Ten Broeck, 16 Johns. (N. Y.) 14.

other will not, the one which will effectuate it will be chosen.

It is to be presumed that the parties intend the legal and not the illegal, the possible rather than the impossible. Yet this rule will yield to the true intention if it appears elsewhere to be otherwise.

§ 13. CONSTRUED AGAINST USER.

The language of a contract, in case of doubt not otherwise removed, is to be taken most strongly against the party using it, unless such construction will cause a penalty or forfeiture.

Conditions, exceptions, reservations and provisions, are strictly construed against the person in whose favor they are introduced. A condition is void which is so repugnant to a grant as to utterly defeat it. Unless time is of the essence of a contract because of stipulation or because of the nature of the contract, failure to perform a contract as conditioned does not amount to a breach and discharge. If a contract is such that damages for violation thereof are of uncertain value and it is agreed that a fixed sum shall be paid for its breach, this sum may be recovered as liquidated damages; but if the damages are of certain value and, on breach, a sum is to be paid in excess of that value, or if a contract contains a number of provisions, damages on some of which are certain and on others uncertain, and a fixed sum is to be paid for breach of any, this is a penalty.[1] M executes to G a deed, by which, in the granting clause, he conveys all his title to all of certain property described, and in the *habendum* clause says "The interest and title intended to be conveyed" is only that acquired by M from one E, which is an undivided one-half. Which clause shall control? The first. A deed is always construed most strongly against the grantor. If the instrument is free from ambiguity, the intention must be ascertained from the language of the

[1]Thurston *v.* Arnold, 43 Iowa, 43; Streeper *v.* Williams, 48 Pa. 450; Trower *v.* Elder, 77 Ill. 452.

instrument. These clauses are in absolute conflict, and, therefore, cannot be explained, and the first must prevail.[1]

§ 14. CONFLICT OF LAWS.

The legality of a contract is ordinarily to be determined by the law of the place where it is made (lex loci contractus). If it relates to land or corporeal chattels, its validity is governed by the law of the place where the land or chattels are located (lex situs). If it is to be performed in another jurisdiction, the validity of acts of performance depends upon the law of the place of performance (lex loci solutionis).

Questions of obligation should be settled by the law which creates the obligation, whether contract or *quasi* contract. Such questions are, acceptance, delivery of deed, consideration, and passing of title. Questions of performance should be settled by the law of the place of performance.

These rules are not followed in deference to right, but as a matter of comity between states and nations.

Among the exceptions to the rules are those that no state will permit its laws to be evaded, nor give effect to agreements plainly repugnant to the principles of law and morality common to civilized nations, or contrary to the public interests of the state in which suit is brought.

Matters of adjective law are governed by the law of the place where the action is brought (*lex fori*).[2]

[1]Green Bay & M. Canal Co. *v.* Hewitt, 55 Wis. 96, 12 N. W. 382.
[2]Hyde *v.* Goodnow, 3 N. Y. (3 Comst.) 266.

CHAPTER XX.

QUASI CONTRACTS.

I. Obligations Equitable, §§ 1-31.

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9. Mistake as to subject, etc., § 18.

(B) On other legal relations, §§ 19-20.

1. Ownership of chattels or land, § 19.

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C. Conferrer not entitled to benefit because, §§ 21-31.

(I) Benefit conferred by voluntary act, § 21.

(II) Illegal conduct of party conferring benefit, § 22.

(III) Change of position of party receiving benefit, § 23

(IV) *Bona fide* third parties, § 24.

(V) Only net benefit recoverable, § 25.

(VI) Effect of valid express contract, § 26.

(VII) Waiver of tort action, § 27.

(VIII) Family relationship, § 28.

(IX) Infant's, etc., liability, §§ 29-31.

§ 1. QUASI CONTRACT: DEFINED.

A quasi contract is a legal obligation, created by pure implication of law, and enforced by an action ex contractu.

In a legal obligation created by implication of law, the law or natural equity alone produces the obligation by rendering obligatory the facts from which it results, and it is for this reason that these facts are called *quasi* contracts, because, without being contracts, they produce obligations of the same sort as actual contracts. The legal rights created are rights to have done what the law requires without agreement, but they are such as would have arisen had the parties made a valid agreement. They are rights *in personam*, but in many ways they resemble rights *in rem*. They lie in the territory between torts and contracts. They are constructive contracts. The contract is a mere fiction, a form imposed in order to adapt a case to a given remedy. But they are enforced by actions *ex contractu*. Rights created by contract are the result of agreement and obligation. Rights created by *quasi* contract are the result of obligation without agreement. In the one, the intention is ascertained and enforced; in the other, it is disregarded. The latter are implied solely by law, because equity and good conscience or positive rules of law demand it. They are called implied contracts; not because they are actual contracts; that is, not because there is an actual meeting of the minds of the parties or a mutual understanding to be inferred by a jury from language, acts and circumstances, for there is no actual meeting of the minds or mutual understanding, but they are called implied contracts because of a legal fiction invented and used for the sake of the remedy. They are not contracts but legal obligations created without contracts.

These obligations are created by law when any person has re-

ceived benefits which in equity and good conscience belong to another, when positive duties are laid on one person for the benefit of another by statute or common law, or when a judgment has been rendered against a wrongdoer by a court of competent jurisdiction.[1]

The common law actions of contract for the recovery of money due by *quasi* contract are the money counts of *indebitatus* assumpsit, to wit: Money paid for defendant's use, money had and received by defendant to plaintiff's use, money lent and advanced, interest and account stated, and the counts of *quantum meruit* and *quantum valebat*. The *quantum meruit* and *quantum valebat* counts are also proper for breach of inferred contracts. The code action available in *quasi* contracts is the ordinary civil action. The common counts for goods sold and delivered, etc., have also been extended into the realm of *quasi* contracts.

§ 2. OBLIGATIONS EQUITABLE.

Whenever a benefit has been received by one person which in equity and good conscience (ex aequo et bono) belongs to another person, the law implies an obligation on the part of the former to refund the same and permits the latter to recover its value in an action ex contractu.

This is the most general principle of *quasi* contracts and covers a multitude of cases. Otherwise stated, "No one should be allowed to enrich himself unjustly at the expense of another." It is an equitable principle growing out of the abhorrence of equity at seeing one man take another man's property without compensating him for it. In order to render it applicable it must appear: first, that a benefit has been conferred by one upon another; and second, that in equity and good con-

[1]Keener on *Quasi* Contracts, 15; 10 Harvard Law Review, 217; Sceva *v.* True, 53 N. H. 627; Street, Foundations of Legal Liability, 208, 235; Jones *v.* Pope, 1 Wms. Saund. 37; Woods *v.* Ayres, 39 Mich. 345. But see Gordon *v.* Bruner, 49 Mo. 570; First Nat. Bank of Nashua *v.* Van Vooris, 6 S. D. 548, 62 N. W. 378; Head *v.* Porter, 70 Fed. 498.

science this benefit belongs not to the one receiving it but to the one conferring it. The mere fact that one person confers a benefit upon another is not enough, alone, to create any legal obligation. Every man is, ordinarily, permitted to regulate his own affairs in his own way, and he is protected from officious intermeddlers. A loans money to B on C's becoming a surety, both B and C signing a bond as security. By A's neglect this bond becomes of no use. Can A recover from C for money had to A's use? No. C has received no benefit, and A alone is in fault. In order to recover in this action one must show to the court that the other party receives a benefit and that he has equity and good conscience on his side.[1] A being indebted to B makes an assignment for B's benefit of all A's property on the X farm. The debt not being paid he allows B to take possession and sell not only this property but also the stock, crops, etc., on the Y farm, thinking they are covered by the assignment. Can he or his assignee recover the effects sold from the Y farm? No. B is entitled to keep this property though A did not intend to let him have it, and, therefore, A cannot recover it in a suit in *quasi* contract.[2] A, by mistake in drawing up and signing a note to B, leaves out the interest, but by another mistake in paying the note, pays interest on the same. Can he recover the interest thus paid in an action for money had and received? No. *Ex aequo et bono* the money belongs to B.[3] A orally agrees to buy land from B and pays $65. He then decides not to go on with the agreement, although B is ready to do so. Can A recover the money paid? No. It does not in equity and good conscience belong to him, so long as the other party does not take advantage of the statute of frauds.[4]

§ 3. BENEFIT.

The benefit received may be labor or services, money or goods (anything which has a pecuniary value), but, in

[1] Straton *v.* Rastall, 2 Term R. 366.
[2] Platt *v.* Bromage, 24 Law J. Exch. 63.
[3] Buel *v.* Boughton, 2 Denio (N. Y.) 91.
[4] Collier *v.* Coates, 17 Barb. (N. Y.) 471.

order to amount to a benefit, positive enrichment is required; a mere saving to one party or a loss to another will not suffice.

This limitation is for the purpose of preventing inequity which would be likely to result if the rules were extended Herein also lies a distinction between *quasi* contracts and torts only such torts can be waived and suits in *quasi* contract instituted as result in a benefit to the estate of a person, which is capable of being measured pecuniarily. Property rights whether corporeal or incorporeal, are included, but where no such benefits are received, but there is merely a naked wrong the liability is only in tort for the wrong. Where goods converted have been sold by the wrongdoer, the count for money had and received is proper. A infringes B's patent rights and B sues in equity for an injunction and account of profits. Pending the suit, A dies. Does the suit survive? Yes, as this is a benefit which is capable of being measured pecuniarily.[1] A removes B's wheat stack, while a fire is raging, in order to save the stack from burning, but without any request from B. Can A recover for work and labor? No. He is an officious intermeddler and there is no positive enrichment.[2] A places timber on the bank of a stream from which place it is accidentally loosened and carried by the tide. B finds it and voluntarily carries it to a place of safety. Is B entitled to anything for services? No, as no benefit has been conferred. At least he has no lien.[3] A orally agrees to make a monument and to pay $200 cash for a lot of B. He makes the monument and has it in his possession when B repudiates the agreement. Can A recover the value of his services? No. The agreement is within the statute of frauds, as it is an agreement to sell the lot and not a contract for labor and material. Therefore, if he can recover at all it will have to be in *quasi* contract; but the

§ 4. ACCEPTANCE, ETC.

A benefit belongs, in equity and good conscience, to another, if conferred because of a request though without any agreement as to remuneration, or if, though there is no request, the party benefited is free to elect whether he will or will not accept, and elects to accept.

The best illustration of this *quasi* contract is payment of another's debt, or doing for another any other thing which he is bound to do for himself coupled with subsequent acceptance by such party. A requests B, an attorney, to render certain legal services for him, there being no express or inferred agreement as to remuneration. Is B entitled to recover for the value of his services? Yes, since there is a request for the services, the law implies an obligation to pay therefor. Under such circumstances, it is generally possible to infer a true contract.[1] A sends goods to B's house without any request from B, and B accepts and uses the goods. Is he liable in *quasi* contract to pay what the goods are worth? Yes. Most cases of this sort arise in connection with mistakes.[2] A undertakes to carry goods for B and deliver them to C. By mistake, A delivers them to D, who appropriates and sells them. C pays B and A pays C. Can A recover from D on a count for money had and received? Yes, as this is not a case of one officiously paying money for another.[3] A ships a horse over the X railroad to station Y. After its arrival, A calls for the horse, but for trumpery reasons leaves without taking the horse. The X railroad then hires the animal cared for at a livery, and later has to pay this livery bill, when the X railroad sends the horse to A, who keeps it. Can the railroad collect the amount paid for the livery? Yes. Humanity demands the care of the horse, and A's conduct justifies the railroad in providing it. Therefore, the law raises an obligation on the part of A to reimburse the X railroad.[4] A pays the necessary funeral expenses of a deceased person. Is he entitled to recover for the same in *quasi* contract? Yes. It is the duty of the executor to provide

[1] Rose *v.* Spies, 44 Mo. 20.
[2] Hobbs *v.* Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495.
[3] Brown *v.* Hodgson, 4 Taunt. 189.
[4] Dawson *v.* Linton, 5 Barn. & Ald. 521.

for a decent burial and the law implies an obligation to recompense one who, in the absence or neglect of the executor, not officiously, but from the necessity of the case, incurs reasonable expense. In the case of necessaries a request is implied by law.[1]

§ 5. FRAUD OR APPROPRIATION

A benefit belongs, in equity and good conscience, to another if conferred because of a tortious act of the party benefited.

A is a slave of B up to 1865, and from that time is kept by B in absolute ignorance of her emancipation, and works for him as his slave to 1889. After the death of her master, she learns she has been a free woman. Can she recover the value of her services? Yes, because they were obtained by fraud. Whether she expected reward is, therefore, immaterial.[2] A who is already married represents to B that he is a single man, and solicits her to marry him. She, relying on his representation, does marry him, and for many years lives with him, supposing herself to be his wife. Later she learns of the fact that A has another wife. Can she recover the reasonable value of her services? Yes, because of the fraud while performing the services, although she in fact expects no compensation.[3] A's machinery is tortiously taken, and after various sales is finally bought by B. The statute of limitations of three years has run against the tort, so that title by adverse possession may possibly have been acquired. Can A sue in *quasi* contract and recover the value of the machinery? Yes, because of the option to waive damages for the tort. But if B is innocent demand is necessary.[4] A entices B's apprentice away from B's shop. B sues in *indebitatus* assumpsit. Will this form of action lie? Yes. He may waive damages for the tort and recover the equivalent for the labor.[5]

[1]Patterson *v.* Patterson, 59 N. Y. 574.
[2]Hickam *v.* Hickam, 46 Mo. App. 496.
[3]Asher *v.* Wallis, 11 Mod. 146; Higgins *v.* Breen, 9 Mo. 497.
[4]Kirkham *v.* Philips' Heirs, 54 Tenn. (7 Heisk.) 222.
[5]Lightly *v.* Clouston, 1 Taunt. 112.

§ 6. MISREPRESENTATION IN CONFIDENTIAL RELATION.

A benefit belongs, in equity and good conscience, to another, if conferred because of misrepresentation in regard to a material fact (by one standing in confidential relations), reasonably relied and acted upon to his damage by the other.

A is the guardian of B and pursuades B to sell him certain premises for $600 by representing to her that there is an indebtedness against the premises of $700, which he promises to assume. As a matter of fact the indebtedness amounts to only forty dollars. Is B entitled to recover the money paid the guardian? Yes.[1]

§ 7. UNDUE INFLUENCE.

A benefit belongs, in equity and good conscience, to another if conferred because of compulsion, exerted by means of a judicial or official position, or a relation of confidence (undue influence).

A common carrier agrees to carry boots and shoes for a certain amount of freight, but at the terminus of the route refuses to deliver them unless paid about $1,000 more freight than it agrees to carry for. The shipper pays this amount and gets the goods. Can he recover freight paid? Yes. It is not a voluntary payment.[2] A who sustains a fiduciary relation to B, procures from her a conveyance of land without informing her of the true condition of the property. Coal is being mined on the land and the land is becoming valuable, but he withholds this information. Is B entitled to an accounting? Yes.[3] A pays the amount of an execution on a judgment which is subsequently reversed. Will *indebitatus* assumpsit lie? Yes. The money belongs to the person from whom collected and there is no other reasonable way to regain it.[4]

[1]Wickiser *v.* Cook, 85 Ill. 68.
[2]Tutt *v.* Ide, 3 Blatchf. 249, Fed. Cas. No. 14, 275 b.
[3]Spencer & Newbold's Appeal, 80 Pa. 317.
[4]Clark *v.* Pinney, 6 Cow. (N. Y.) 297.

§ 8. DURESS OF IMPRISONMENT.

A benefit belongs, in equity and good conscience, to another if conferred because of compulsion, exerted by imprisonment with or without legal process (duress of imprisonment).

J is incarcerated on a decree recovered against him, and is forced to give a new bond to one F, as assignee, to free himself from prison, there being no court where he can secure any remedy. Is he liable on the bond or can he get it overruled? He is not liable on this bond because of the duress of imprisonment.[1] A is arrested on a charge of burning B's house and barn, the evidence showing he simply burned some refuse parts of the building; but the justice orders him to recognize in the amount of $500, and by reason of B's representations that A will have to go to state's prison, A is unable to get sureties, and thereupon B offers to drop the matter for $125. A then turns over to B goods of the value of $60. Can their value be recovered? Yes, if the jury finds duress; that is, that A is arrested without cause, or for improper purpose, or without lawful authority.[2]

§ 9. DURESS PER MINAS.

A benefit belongs, in equity and good conscience, to another if conferred because of compulsion, exerted by threats inducing fear of injury to person or property (duress per minas).

A is a dealer in ice, and in the night when he has his wagons loaded with ice ready to be hauled to Boston, B attaches the same in a suit on a promissory note on which A claims he owes nothing, and B tells A not to move the wagons until he pays $300. To release his property, A pays the $300. Can he recover the same in a suit for money had and received? Yes. If B fraudulently and knowing he has no just claim seizes the goods of A for the purpose of extorting the money, this is

[1] Jack *v.* Fiddes, Mor. Dict. 2923.
[2] Richardson *v.* Duncan, 3 N. H. 508.

duress of goods.[1] A owns a building which has just been erected and he wants to place a mortgage upon it but cannot without paying off a lien for an unfounded claim which B causes to be filed, and he pays the amount of this lien under protest. Can he recover the same? Yes. This is duress of circumstances. The payment is involuntary.[2] A threatens to take B's life unless he will pay him $1,000, and because of the fear exerted by the threat B pays A the money. Can he recover it in an action *ex contractu?* Yes. The duress makes this payment involuntary and it belongs in equity and good conscience to B.[3]

§ 10. CONTRACT MODIFIED BY CONSENT.

A benefit belongs, in equity and good conscience, to another if conferred because of reliance on a contract which is deviated from by consent.

A enters into an agreement with B to dig a tail race for a mill for B according to certain specifications. A does work, some according to the contract, and some not in accordance with the contract. It is not shown whether the contract is modified by mutual consent. Can A recover in *quantum meruit?* Only, first, if B prevents execution; second, if the whole or part of the contract is modified and substituted parts are performed.[4]

§ 11. SUBSTANTIAL COMPLIANCE.

A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract which is not strictly complied with, though substantially performed.

A agrees to sell B 250 bushels of grain, to be delivered within six weeks. A delivers 130 bushels and the time for completion of the contract expires without B returning the 130 bushels.

[1]Chandler *v.* Sanger, 114 Mass. 364.
[2]Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217.
[3]Brown *v.* Pierce, 74 U. S. (7 Wall.) 205.
[4]Helm *v.* Wilson, 4 Mo. 41; Wheeden *v.* Fiske, 50 N. H. 125.

Can A recover the value thereof? Yes, but B has an action for damages for breach of contract. Recovery should be allowed only for the excess of benefit over the damage occasioned.[1] A agrees to build a church for B, and in building it he inadvertently builds the sills lower and the windows smaller than the plans and specifications ordered. It is reasonably adapted to the use for which it is built and B is in beneficial use of it. Can A recover for the work and materials? Yes, because the contract, though unenforcible because of this breach, is yet substantially complied with, and B cannot here deduct the amount it would take to build the church according to the contract, as it would cost all A's labor is worth.[2]

§ 12. CONTRACT TERMINATED BY CONDITION.

A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract which has lapsed because of the happening or not happening of a condition express or implied.

A pays B $1,500 freight on a cargo of shell and wood lost at sea by the wreck of the ship carrying it. Is A entitled to recover the freight paid? Yes. The freight is paid for the carriage of the goods to their destination, and the delivery there is a condition precedent to recovery. The policy of the rule is to take away the temptation to misconduct and carelessness.[3] A buys and pays for a chaise and horse on condition that they can be returned if his wife does not approve. His wife does not approve of the transaction and he returns them. Can he recover money paid? Yes. The contract is ended by the happening of the condition and now the prospective seller holds money which it is against conscience for him to keep.[4] A buys bonds from B and sells them again to C, but they turn out worthless because not stamped. A refunds to C. Can he

[1]Oxendale *v.* Wetherell, 7 Law J. K. B. (O. S.) 264.

[2]Pinches *v.* Swedish Evangelical Lutheran Church, 55 Conn. 183, 10 Atl. 264.

[3]Reina *v.* Cross, 6 Cal. 29.

[4]Towers *v.* Barrett, 1 Term R. 133.

recover what he pays B? Yes. There is an implied condition that the thing is what it is sold for. Consideration has failed.[1] A orally agrees to buy a house and estate for $3,700 from B and pays the latter more than the purchase price and carries furniture into the house. The house is consumed by fire. Can he recover the money paid? Yes. On account of the statute of frauds title has not passed, and it is a condition of the contract that the subject of the sale shall continue to exist, and, it having been destroyed, A is entitled to recover. The contract cannot be enforced against A and the destruction of the property excuses his default.[2]

§ 13. PERFORMANCE PREVENTED BY DEFAULT.

A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract whose performance is prevented because of default by the other party.

A pays money to B for stock which B refuses to deliver according to his contract. Can A sue in *quasi* contract for the money? Yes. B is estopped to set up the express contract.[3] A bids off at auction and pays $17 for a cow and 400 pounds of hay. He takes the cow at the time, but when he demands the hay it is refused, on the ground that it has already been used. Can A recover the value of the hay in suit for money had and received? No. Before he can recover in this sort of a suit he must rescind the express contract, and the latter being an entire contract must be rescinded in toto, if at all. A should sue in conversion or for breach of the express contract or, if he desires to sue in *quasi* contract, he should disregard the express contract, return the cow, and sue for $17.[4] A is employed by B to manage a hotel for a year and works over eight months, when he is discharged. He sues for breach of contract and also in *quantum meruit* for the value of his services. Can he recover on either count? He may recover on

[1] Young *v.* Cole, 3 Bing. N. C. 724.
[2] Thompson *v.* Gould, 37 Mass. (20 Pick.) 134.
[3] Anonymous, 1 Strange, 407.
[4] Miner *v.* Bradley, 39 Mass. (22 Pick.) 457.

either count, but not upon both; by electing to drop the count for breach of contract, he may recover in *quantum meruit*.[1]

§ 14. PERFORMANCE PREVENTED BY ACT OF GOD.

A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract whose performance is prevented by act of God, inevitable accident or public authority.

A and his wife agree to live in B's house and to care for her during her life for the rent of the house and eight dollars per month and the promise to give them the house at her death. After a few years A's wife dies, and B terminates the contract for that reason. Can A recover in *quantum meruit* the value of his services? Yes. B should not retain benefits and make no return when the contract is terminated by the act of God.[2] A has contracted to dig a canal and hires B to do part of the work. During the progress of the work it is stopped and the contract annulled by state authority. Ten per cent of the price to be paid B is reserved until final estimation. Is B now entitled to this ten per cent reserved on the work done? Yes. He is entitled to recover in *quasi* contract, but the contract price gives the measure of damages.[3] H has contracted with B to make and put up certain pews in a church which is being built by B. When they are all made and in the building, but only part of them put up, the church and pews are burned by accidental fire. Can H recover their value? Yes. This is not an undertaking to build something new but to add something to the property of B and there is an implied obligation on him to keep up the building.[4] A agrees to work for B for one year. At the end of six months, he is disabled. Can he recover for the work already done? Yes. He may recover the value of his services during the six months. There is no action on the contract, and if B pays nothing for the services he is unjustly enriched.[5]

[1]Brown *v.* Woodbury, 183 Mass. 279, 67 N. E. 327.
[2]Parker *v.* Macomber, 17 R. I. 674, 24 Atl. 464.
[3]Jones *v.* Judd, 4 N. Y. (4 Comst.) 411.
[4]Haynes *v.* Second Baptist Church, 12 Mo. App. 536.
[5]Wolfe *v.* Howes, 20 N. Y. 197; Green *v.* Gilbert, 21 Wis. 395.

§ 15. LACK OF AUTHORITY TO CONTRACT.

A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract unenforcible because of lack of authority in the party making the contract.

A buys a quantity of cotton from B and pays 509 pounds too much, by a mistake in adding up the figures. Both parties are acting for undisclosed principals and B credits the amount received to his principal. Can A recover the 509 pounds from B? Yes, as he acted as principal. It is not a case of an agent acting for a principal and turning the money over to him.[1] A contracts to construct a dam across a river for B, who is acting as agent for C. C has given no authority to B to make such a contract, but the work is performed by A and is used by C. Can A recover the value of the benefit received? Yes.[2] A lends money to a town on notes made by the town treasurer on behalf of the town, without authority from the town. If the money is applied to the legitimate uses of the town, as for the payment of claims against it, can A recover the amount of the loan? Yes.[3]

§ 16. INCAPACITY OF PARTY TO CONTRACT.

A benefit belongs, in equity and good conscience, to another if it is conferred by him under a contract which is subsequently avoided because of the incapacity of a party thereto.

A hires B, a minor, to work for him for three years, grinding bibs at nine cents apiece. After working a short time, B quits the service, ignoring his express contract. Can he bring action in *quantum meruit* and recover for the work already done? Yes, the law gives him the right to avoid this express contract and, having avoided it, he is entitled to pay for the services rendered the other party.[4] A hires V, a minor, for a

[1] Newall *v.* Tomlinson, L. R. 6 C. P. 405.
[2] Van Deusen *v.* Blum, 35 Mass. (18 Pick.) 229.
[3] Billings *v.* Inhabitants of Monmouth, 72 Me. 174.
[4] Gaffney *v.* Hayden, 110 Mass. 137.

whole sea voyage. After two years of the voyage V deserts the ship without any sort of a reason. Can V recover the value of his services in an action of *quantum meruit?* Yes. An infant's disaffirmance of a voidable contract takes effect *ab initio* and, therefore, the parties stand just as though they had never made a contract, but A has the benefit of V's services and in equity and good conscience should pay therefor.[1] A sells chattels to B, a corporation, when the corporation, under its charter, does not have authority to make the purchase, but it accepts and uses the chattels. Can A recover the value of the chattels, in a suit in *quasi* contract? Yes, the contract is invalid because of the incapacity of the corporation making it, but it would be inequitable to allow it to keep the benefits without compensating A for them.[2] Insane persons are liable for benefits received, and some courts now hold infants to the same obligation, if they would avoid their contracts.[3]

§ 17. STATUTE OF FRAUDS NOT COMPLIED WITH.

A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract unenforcible because not in conformity to the requirements of the statute of frauds.

A agrees orally to sell B four acres of land for forty dollars, to be paid for in work. After the agreement is made B takes possession and erects a house and develops the land. A then conveys the land to C for $100. Can B recover the value of his work and materials furnished? Yes, B may treat the agreement as a nullity, except as to giving him permission to work.[4] In consideration of B's promise to give A the right, from then forward, to feed live stock carried on its railroad, A conveys land to B for yards. B allows A to feed for one year in which he clears $6,000, or more than the value of the land, and then

[1]Vent *v.* Osgood, 36 Mass. (19 Pick.) 572.

[2]Parish *v.* Wheeler, 22 N. Y. 494; Bissell *v.* Michigan Southern and Northern Indiana R. Cos., 22 N. Y. 258; Slater Woollen Co. *v.* Lamb, 143 Mass. 420, 9 N. E. 823.

[3]Johnson *v.* N. W. Mut. Life Ins. Co., 56 Minn. 365; 59 N. W. 991.

[4]King *v.* Brown, 2 Hill (N. Y.) 485.

B refuses to go on with the agreement. Can A recover the value of the land? No. The contract, being void under the statute of frauds cannot be enforced, but B having received the land, A could recover the value of the same; but he must allow credit for money received by himself. As this is more than the value of the land, he cannot, therefore, recover in his action.[1]

§ 18. ELEMENT OF CONTRACT LACKING: MISTAKE.

A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract unenforcible because an essential element of the contract is lacking.

A buys land of B, but there is no land of the description contained in the deed. Can the money paid B be recovered? Yes. Evidence of mistake, imposition or deception, is sufficient to maintain assumpsit for money had and received.[2] A is a cotton dealer. He writes B "I will sell you 100 bales of cotton at fifty cents a bale." B replies, "Send me fifty bales immediately." A ships B the fifty bales, which the latter accepts and uses. The market price of cotton at the time is fifty-five cents per bale. How much should A recover from B? Fifty-five cents per bale. By qualifying A's offer, B does not accept it, so that there is no express contract; but he is under obligation to pay the reasonable value of the cotton, because it is sent to him at his request.[3]

§ 19. MISTAKE AS TO OWNERSHIP.

A benefit belongs, in equity and good conscience, to another if conferred because of mistaken reliance on the ownership of chattels or land.

A purchases an estate, which comes to him by intermediate conveyances, from an administration sale which is defective,

[1] Day *v.* New York Cent. R. Co., 51 N. Y. 583.
[2] D'Utricht *v.* Melchor, 1 Dall. (Pa.) 428.
[3] Rommel *v.* Wingate, 103 Mass. 327.

but A thinks he has a perfect title and makes permanent improvements. B gets the land from A. Can A recover for improvements from B? Yes. In the United States this right is generally established by statutes known as "Betterment Acts." It is also an equitable right. At law prior to adoption of the equitable rule, it has been generally held that there is no obligation because the person receiving the benefit has no chance to elect whether or not he will take the same.[1] A buys a share of stock from an insolvent trustee and spends large sums of money in realizing on it. Later it develops that he gets no title and the original owner, B, recovers the proceeds of the share. Can A recover the value of his services and expenses? Yes. First, because as trustees in law for the true owner, he does only his legal duty; second, because these are improvements made by a *bona fide* occupier.[2] A, by mistake, but under color of title, cuts timber on B's land, and by his labor increases it in value almost twofold. D takes the timber in its improved condition. Can A recover the value of his labor? Yes. D has received a benefit for which in equity and good conscience he ought to pay.[3]

§ 20. MISTAKE AS TO DUTY.

A benefit belongs, in equity and good conscience, to another if conferred because of mistake as to duty.

A, being one of the Colemeters of London, pays rent, by mistake, to the mayor instead of the chamberlain of the city, the common council of London having changed the method. A afterwards pay the chamberlain. Can he recover what he pays to the mayor? Yes.[4] A bank of Ohio pays D money on a time draft, illegal by the statutes of New York. Can the bank re-

[1]Bright *v.* Boyd, 1 Story, 478, Fed. Cas. No. 1, 875; Griswold *v.* Bragg, 48 Fed. 519; Goodnow *v.* Moulton *et al.*, 51 Ia. 555; Union Hall Ass'n *v.* Morrison, 39 Md. 281; But see, Mitchell *v.* Bridgman, 71 Minn. 360.

[2]Williams *v.* Gibbes, 61 U. S. (20 How.) 535.

[3]State *v.* Shevlin-Carpenter Co., 62 Minn. 99, 64 N. W. 81. See, also, Isle Royale Min. Co. *v.* Hertin, 37 Mich. 332.

[4]Bonnel *v.* Foulke, 2 Sid. 4.

cover the money paid in an action for money had and received? Yes. This is a mistake of foreign law and is a mistake of fact.[1] A is the owner of Lot 28, on which there is an assessment for paving the street. He receives notice of the assessment on Lot 27 and, thinking it refers to his own lot, pays it. Can he recover the sum so paid? Yes, this is a mistake of fact, and the party receiving the money has not changed his position, so that it will be inequitable to allow a recovery.[2]

§ 21. BENEFITS CONFERRED VOLUNTARILY.

But benefits received by one person do not belong, in equity and good conscience, to another if conferred without expectation of reward, or with expectation of reward but without request or subsequent acceptance, or on a demand of right, or under a misapprehension of legal rights, or upon a demand unjustly made with knowledge of all of the facts.

In the foregoing sections have been explained the grounds which make benefits received by one person belong in equity and good conscience to the person conferring them. It remains to consider the grounds which make it inequitable and against conscience for the party conferring benefits to recover for them, and first of benefits conferred voluntarily. If a man gives away, or takes his chances as to whether he is giving away, his goods, instead of being equitable, it would be most palpably inequitable to permit a recovery for their value. So, where a man has an option to litigate a question when a demand is made, it would be a mistake and unjust to allow him to acquiesce for the time being, but be at liberty to change his mind and open up the matter any time within the statute of limitations. A, a young man, makes valuable presents to a young lady whom he is addressing with a view to marriage. He does this in order to gain her favor. Can he recover the value of the presents? No. Like all other adventurers, he must run

[1] Bank of Chillicothe *v.* Dodge, 8 Barb. (N. Y.) 233.
[2] Mayer *v.* City of New York, 63 N. Y. 455.

his risk.[1] A makes a contract with B to furnish him ice, but B sells out to C, and C supplies ice to A, who uses it, thinking it is furnished by B. Can C recover for the ice from A? No. A has received a benefit, but C is an officious intermeddler, and as A has no opportunity to accept after discovering who furnishes the ice, there is no reason in equity and good conscience for permitting a recovery.[2] A performs certain work for B, as a friend, expecting to be remembered in B's will, but nothing is given him by the will. Can A now recover in *quasi* contract for work and labor? No.[3] A, under the impression that he is bound to do so, pays a water company a rate in excess of what the House of Lords holds legally due. Can he recover the excess? No. This is a mistake of law. The reversal of a decision otherwise might give rise to hundreds of actions. It is thought by some that the doctrine of mistake of law should have been confined to crimes.[4] A is suing B for dower in realty, warranted by C. A has already executed a release which she has forgotten, but which C thinks exists. The suit is compromised by C paying A $1,000. The release is then found. Can C recover the $1,000 from A? No. This is a voluntary payment, and is neither a mistake of law nor of fact.[5] A buys from B a lot and part of another lying between Water Street and Sand Creek, the distance on the plat being given as 80 feet, though the actual distance is 110 feet. B later claims that the lots only extend back 80 feet, and A pays him for a quitclaim deed for the 30-foot strip. Legally the original deed covers all of the 110 feet. Can A recover the money paid for the second deed? No. This is a mistake of law.[6] A suffers judgment to be entered against him for goods sold and delivered, although he has a receipt acknowledging satisfaction in full, but he has mislaid this receipt. Later he finds the receipt and sues in *quasi* contract to recover the money. He is not entitled to recover, as the proper course for him is to prevent the entry of the first judgment.[7]

[1]Robinson *v.* Cumming, 2 Atk. 409.
[2]Boston Ice Co. *v.* Potter, 123 Mass. 28.
[3]Osborn *v.* Governors of Guy's Hospital, 2 Strange, 728.
[4]Henderson *v.* Folkestone Waterworks Co., 1 Times Law R. 329.
[5]Mowatt *v.* Wright, 1 Wend. (N. Y.) 355.
[6]Erkens *v.* Nicolin, 39 Minn. 461, 40 N. W. 567.
[7]James *v.* Cavit's Adm'r, 2 Brev. (S. C.) 174.

§ 22. ILLEGAL CONDUCT OF PARTY CONFERRING BENEFIT.

Whenever the transaction, by which one person confers a benefit upon another, is illegal, because against morality or public policy (malum in se), the parties are in pari delicto, and the law will create an obligation in favor of neither; but where the act is prohibited by statute for the purpose of protecting a set of men (malum prohibitum), if the parties are not in pari delicto because equal in guilt, or if the contract is executory, the law will afford relief to the more innocent party.

There is no ground for allowing one wrongdoer to recover from another the value of the benefits conferred by his own wrongful act. A guilty party should not be allowed to appeal to the law for indemnity, for he has placed himself without its pale by contemning it; but, if he is innocent of illegal purpose, or has acted under circumstances of imposition, hardship, or undue influence, there is sufficient reason for allowing a recovery. A's son is arrested and charged with passing counterfeit money to B, and A pays B thirty dollars to settle the criminal prosecution, and B lets the prisoner go. Can A recover the thirty dollars? No. Because of his own moral turpitude.[1] Eight hundred and forty pounds are recovered from one of two joint tort feasors. Will contribution lie? No. There is no contribution between joint wrongdoers.[2] A and B are owners of a stage; B is driving the same. Through B's negligence C is injured, and C recovers $1,300 damages from A. Can A compel contribution from B? Yes. A is guilty of no personal wrongdoing.[3] A deposits money with the F Bank, which promises to pay it on a day certain, contrary to statute. Can A recover the money? Yes. The express contract is void, but A can recover on an obligation implied by law as, first, the transaction is simply *malum prohibitum* and does not involve moral turpitude, and A is not, therefore, *in pari delicto*, and, second, the contract is executory. So, in all cases where the express contracts are not illegal but are void because con-

[1] Daimouth *v.* Bennett, 15 Barb. (N. Y.) 541.
[2] Merryweather *v.* Nixan, 8 Term R. 186.
[3] Bailey *v.* Bussing, 28 Conn. 455.

trary to the policy of the law or prohibited.[1] A pays a matrimonial agency fifty dollars to procure a husband for her. Can she recover the money? Yes. She is not *in pari delicto,* as the matrimonial agency may be regarded as exercising a species of imposition or undue influence. The necessity of supporting public interests really demands this holding.[2] A, as agent for B, receives money from various parties, which money B could not have collected because of illegality. Can B recover it from A? Yes. On payment it becomes B's money and the law implies an obligation to pay it over. There is no illegality in this *quasi* contract. Likewise, a stakeholder is bound to pay over to his depositor money deposited with him, if notified to do so before paying it to winner, and a broker may recover his commission if innocent of intent to gamble.[3]

§ 23. CHANGE OF POSITION OF PARTY BENEFITED.

The fact that the party receiving the benefit has changed his position, or that the benefit has been conferred because of the negligence of the other party, is no bar to a recovery, unless the party benefited has changed his position without knowledge or reason to know of the real fact, so that to allow a recovery would be inequitable.

One ought not to throw on another a loss occurring without the other's fault; but, if the loss can be traced to a fault or negligence of the other party, it should be forced on him. J pays a note, on which his name has been forged, to the C bank, which negotiates it. After discovering the forgery, can J recover from the bank? No. The maker of the note is supposed to know his own signature. Therefore, he is negligent and it would now be inequitable on the bank to allow recovery, as the indorsers are discharged.[4] A pays to B a bill, drawn on him by a forger and indorsed to B, a *bona fide* purchaser. Can A recover the money paid B? No. B is entitled to the protec-

[1]White *v.* Franklin Bank, 39 Mass. (22 Pick.) 181.

[2]Duval *v.* Wellman, 124 N. Y. 156, 26 N. E. 343.

[3]Baldwin Bros. v. Potter, 46 Vt. 402; Hampden v. Walsh, 1 Q. B. Div. 189.

[4]Johnston *v.* Commercial Bank, 27 W. Va. 343.

tion of the court as much as A, as their equities are equal.[1] A pays money to B, as agent for C, upon a policy of insurance, and B gives C credit on an old account. The loss is not fair. Can A recover the amount paid from B? Yes. B has not changed his position.[2] An insurance company, through a mistake of its directors, who forgot that the policy has lapsed, pays the amount of a life insurance policy. Can the money be recovered? Yes. The company may recover after allowing a deduction for the amount to which the insured is equitably entitled. The negligence of one party will not prevent his recovery unless the other party is placed in such a position that to allow a recovery would be inequitable.[3]

§ 24. BONA FIDE THIRD PARTIES.

Innocent third parties are protected against suits in quasi contract where the benefits which have come into their possession under voidable contracts consist of money or commercial paper, or conveyances of record; and they are always protected where the benefits are obtained in the first instance by means of fraud or undue influence, except as against infants or insane persons.

The law considers that it is better that money or negotiable security should carry on its face its own credentials. The reason for protecting the holder of conveyances of land lies in the sanctity given to the registry system. The party who allows himself to be defrauded is at fault to such an extent that he ought to suffer rather than the innocent party who is not at all at fault. Innocent third parties are not protected against infants because of the arbitrary rule of law to protect infants in all cases. Before an insane person, however, can recover from a third party, he must place him in *statu quo*. An insurance company pays the amount of a loss, under a fire policy, to an assignee, to whom the insured assigns the policy. The assignee takes the money in payment of a debt due from the insured.

[1] Price *v.* Neal, 3 Burrow, 1354.
[2] Buller *v.* Harrison, Cowp. 565.
[3] Kelly *v.* Solari, 9 Mees. & W. 54.

The property is burned by the insured and the proofs are false and fraudulent. Can the company recover from the assignee? No. The insured alone is liable. The assignee holds no money that he is not entitled to keep. It is the same thing as though the company should pay the insured, and the insured should pay the assignee his debt.[1] A pays to B bills drawn on him by a forger and indorsed to B, who is a *bona fide* purchaser. Can A recover from B the money paid him? No. B is entitled to the protection of the court as much as A, as their equities are equal.[2] A, by fraud, gets B to sell him a team of horses for half of their value and then sells them to C, an innocent third party. Can B recover from C? No. It is the policy of the law to protect innocent third parties. The one who allows himself to be defrauded in the transaction is at fault to such an extent that he ought to stand the loss rather than one not at all at fault. B must seek redress from A.[3] A, an infant, buys land of B, giving in payment twenty head of cattle. B sells the cattle to C, an innocent third party. After becoming of age, can A avoid his contract and recover the cattle, or their value, of C? Yes. It is the policy of the law to protect infants, and this will be done in preference to innocent third parties.[4]

§ 25. ONLY NET BENEFIT RECOVERABLE.

The amount refunded in a suit in quasi contract is always the value of the net benefit received by the other party. The benefit is determined by the reasonable value of the advantage conferred, the net benefit by deducting therefrom any counterclaim existing in favor of the party benefited.

The one conferring the benefit, or sustaining the loss, should recover only that to which, in conscience and equity, he is entitled, which can be no more than what remains, after deducting all just allowances which the party benefited has a right

[1] Merchants Ins. Co. *v.* Abbott, 131 Mass. 397.
[2] Price *v.* Neal, 3 Burrow, 1354.
[3] Paige *v.* O'Neal, 12 Cal. 483.
[4] Hill *v.* Anderson, 13 Miss. (5 Smedes & M.) 216.

to retain from the money or chattels received or the equivalent thereof. As the party suing in *quasi* contract must place his right to recover upon equitable grounds, if he would have equity, he must do equity. An insurance company pays a loss on a policy of fire insurance. Then the company discovers that the proofs of the loss are fraudulent and sues to recover the entire amount paid. If the insured is honestly entitled to anything, the company can recover only the difference between that amount and the entire amount paid.[1] A works for B as watchman, being employed by B's agent. A thinks he is working for three dollars for twenty-four hours and B thinks he is working for one dollar and a half. What can A recover? Reasonable compensation, for it would not be right to allow him to recover the three dollars, or the one dollar and a half, but he is entitled to something. The law disregards the understanding of both parties, and determines the amount which A ought to receive.[2] A collects money for B, as his agent, and retains forty pounds for his services. Then B sues for money had and received. Can A show that this is a reasonable allowance without pleading it as a set-off? Yes, for in this suit a party can recover only that to which he is in conscience entitled.[3]

§ 26. EFFECT OF VALID EXPRESS CONTRACT.

Where there is a valid express contract, the law will not imply an obligation ex contractu; and where there is an entire contract, and a party performs a part of it, and then, without legal excuse and against the consent of the other party, refuses to perform the remainder, no obligation to pay for the part performed is created by law.

A *quasi* contractual obligation will not be created where there is a valid express contract, but it may arise where the contract is voidable because of incapacity of parties, or because of fraud, or duress, or undue influence; or where the express contract is broken by default of the other party, or where the express con-

[1] Western Assur. Co. *v.* Towle, 65 Wis. 247, 26 N. W. 104.
[2] Turner *v.* Webster, 24 Kan. 38.
[3] Dale *v.* Sollet, 4 Burrow, 2133.

tract is unenforcible under the statute of frauds, or where the party suing has a legal excuse for his own breach of contract. It is a principle of the common law to encourage private contracts, and when the parties have entered into contractual relations, the law will not disturb them, in the absence of some vitiating circumstance. Until the express contract is avoided or rescinded, the injured party has no right to a suit for its breach. The law will not make a better obligation for the parties than they have made for themselves, but, when no contract has been made or, for reasons of justice, a contract made should be brushed aside, a great many situations arise where obligations ought to exist and these are supplied by force of law alone. The object of allowing a recovery in *quasi* contract, when there is some form of contract subsisting, is not to better the condition of the one suing but to prevent the other party from enriching himself by his own wrongful act. A is keeping a mare for B, until B calls for her, and raises a colt from her and hires C to keep and train the colt. Is B liable to C for board and shoeing of the colt? No. C must look to A with whom he has a valid express contract.[1] C agrees to work for M for one year for $300, payable monthly. He works six months, at the end of which time he is discharged without excuse. M has paid C $25 per month. Can C recover in *quantum meruit* for the work done? Yes. When M rescinds his contract, he puts it out of his power to enforce it against C, and when M refuses to execute a part of the contract, C has a right to rescind the whole. Allowance should be made for money paid by M.[2] A agrees to work for B ten and one-half months for three cents for each run of yarn spun for him. After working eleven weeks he leaves. Can A recover the value of his services? No. This is an entire contract and performance is a condition precedent. The services would have been of more value in the last part of the period.[3] A hires out to work for B for one year, and during the year is discharged for misconduct. Can he recover *pro rata* the value of his services? No. Because his discharge is occasioned by

[1]Cahill *v.* Hall, 161 Mass. 512, 37 N. E. 573.

[2]Clark v. Manchester, 51 N. H. 594.

[3]McMillan *v.* Vanderlip, 12 Johns. (N. Y.) 165; Johnson *et al., v.* Fehsefeldt, 106 Minn. 202.

his own violation of duty. Some courts would allow A to recover in *quantum meruit,* and give B a counterclaim for any damages he has sustained by breach of the express contract; but, on principle, this is wrong.[1]

§ 27. WAIVER OF TORT ACTION.

The doctrine which permits a recovery in quasi contract, when a benefit has been acquired by a tortious act, is known as election of remedies; for the party injured may sue either in contract, or in tort, but having elected to sue in one, he cannot sue in the other.

If the tort remedy is elected, a judgment satisfied passes title, so that the former owner cannot sue again in contract to recover the value of the benefits. If the contract remedy is elected, the former owner treats the transaction as though it were a contract, and he should not afterwards be permitted to gainsay this by calling it a tort. Originally the only remedy of one who had suffered from the tortious act of another was an action of tort, the doctrine being that what was a tort in its inception could not be made the foundation of an implied assumpsit; but, through the application of the doctrine of estoppel, where the wrongdoer has by his act acquired a benefit, as by the appropriation of the services of an apprentice, or money, or goods, the one conferring the benefit is now allowed to waive damages for the tort and sue for the value of the benefit in an action *ex contractu.* What amounts to an election is a question of some difficulty. In order to make the election binding the suits in tort and contract must involve the same subject-matter, the best criterion of which is whether the same evidence will maintain both. If they involve the same subject-matter, the institution of proceedings *ex contractu* or *ex delicto,* as the case may be, will be an election, according to whether the particular court will thereafter permit the amendment of pleadings so as to change the cause of action, or will permit the discontinuance of one cause of action and the beginning of another. But a judgment in either suit, rendered on the

[1]Turner *v.* Robinson, 5 Barn. & Adol. 789; Stark *v.* Parker, 19 Mass. (2 Pick.) 267. *Contra,* Britton *v.* Turner, 6 N. H. 481.

merits, is a bar to all other suits, for it is a maxim of the law that one shall not be twice vexed for the same debt. The peace and quiet of the state require that the court shall be acquainted with everything that it is necessary for it to know in order to pronounce a judgment answering the claims of justice and, when a judgment has been finally rendered, that should end the dispute. A's testator and B are tenants in common of a lot, and B cuts and sells some of the wood thereon, receiving payment partly in cash and partly in real estate. Will assumpsit lie for money had and received? Yes. For one-half of the amount for which the wood is sold, as A has a right to waive the action of trespass. It is the same thing as though B had sold all the wood for cash and reinvested the money.[1] C obtains judgment against A for 2,000 pounds money lent. Execution issues and the sheriff levies on and sells goods of A to D for over 2,000 pounds. A becomes a bankrupt and H is appointed assignee, and sues the sheriff and C in trover for taking the goods of A. Judgment is entered for the sheriff and C. Can H now sue C for money had and received? No. The first action determines that the goods did not belong to the assignee. He cannot now try whether the money produced by those goods is his.[2] A sues B in trespass, but on demurrer the declaration is adjudged bad. Can A sue B again for the same cause of action? Yes. A judgment to be a bar to another suit must be rendered on the merits. The case as stated in the second suit is not tried in the first.[3]

§ 28. BENEFITS CONFERRED BY MEMBERS OF FAMILY.

Where benefits are conferred on each other by the members of a family living as one household, the presumption is that they are intended to be gratuitous, and a legal obligation will arise only when the contrary is conclusively established.

The household is presumed to abound in reciprocal acts of kindness and good will. A works for B for many years, they

[1]Miller *v.* Miller, 24 Mass. (7 Pick.) 133.

[2]Kitchin *v.* Campbell, 2 Wm. Bl. 827; Marsh *v.* Pier, 4 Rawle (Pa.) 273; Huffman *v.* Hughlett, 79 Tenn. (11 Lea) 549.

[3]Wilbur *v.* Gilmore, 38 Mass. (21 Pick.) 250.

either being married or living in a state of concubinage, and after B's death A attempts to recover compensation. Should recovery be allowed? No. The relation which they bore is inconsistent with any understanding for compensation.[1] A, upon the marriage of her mother with B, goes to live in her stepfather's family, as one of his own children, but while there is made to work very hard by her stepfather. After becoming of age, can she recover the value of her services? No. The stepfather stood in *loco parentis,* and the child cannot demand wages from a parent, as neither contemplates remuneration.[2]

§ 29. INFANTS, ETC., LIABILITY.

Infants (and sometimes persons non compos mentis) are not under obligation to pay for benefits received, unless they are what are classed as necessaries.

These persons are incapacitated by law from entering into valid contracts and, hence, cannot be held liable on their agreements. If they are to be bound at all, it must be in *quasi* contract, for it is just as though they had never entered into any agreement; but the law does not consider that they ought to be held liable for anything not necessaries. The exception in the case of necessaries is for the protection of the incapacitated person, and it does not apply if he has a parent or guardian ready to supply them. The contracts of the above persons of incapacity are not absolutely void, but are voidable, and hence may be ratified when the parties attain capacity, when of course, they are bound as any competent parties. It is generally held that insane persons, and it is sometimes held that infants, cannot avoid their voidable contracts without returning benefits they have received. In such jurisdictions there is no distinction between the *quasi* contractual obligations of persons of incapacity and persons of perfect contractual capacity. C sells goods to L, an infant, on the latter's representation that he is of age. The goods are not necessaries. Is the infant bound to pay the purchase price for them? No. An infant

[1] Swires *v.* Parsons, 5 Watts & S. (Pa.) 357.

[2] Lantz *v.* Frey, 14 Pa. 201; Donahue *v.* Donahue, 53 Minn. 460, 55 N. W. 602.

is not under obligation to pay for benefits received unless the benefits are necessaries, and he is not estopped from setting up his infancy because of his misrepresentation as to his age. It is the policy of the law to protect infants. C may recover possession of any of the goods remaining in specie.[1] A stepfather furnishes necessaries to his stepson, a minor, at the latter's request, but without any express promise on his part to pay for them. Is the stepson liable in *quasi* contract? Yes.[2] A furnishes necessaries to B, an insane person, when such person is not otherwise provided for. Can A recover the value of the things furnished in an action *ex contractu?* Yes. An insane person, like an infant, is under obligation to pay for necessaries.[3] A minor has a guardian ready and willing to supply his wants, but agrees with B to be his apprentice in a tailor shop, for B's promise to supply him with necessaries. Can B recover from the minor the value of the supplies furnished? No. A minor cannot bind himself for necessaries when he has a guardian willing to supply them.[4]

§ 30. NECESSARIES: DEFINED.

Necessaries are things for the personal advantage of a person of incapacity, which are not supplied him by his parent or guardian, and without which he cannot reasonably exist as a physical and intellectual being.

A, a minor, away from home attending college, agrees to lease a room from B for forty weeks at the rate of ten dollars per week, and enters into possession and occupies the room for ten weeks, when he gives up possession and ceases to occupy the same. Is he liable for all or any part of the agreed rent? He is bound to pay the reasonable value of the use of the room for the ten weeks he occupies it, as lodging is something without which a person cannot reasonably exist, and must be classed as a necessary, but he is only obliged to pay for the reasonable value of a room suitable and proper for a person of his station in life. He is not under legal obligation to pay

[1]Conrad *v.* Lane, 26 Minn. 389, 4 N. W. 695.
[2]Gay *v.* Ballou, 4 Wend. (N. Y.) 403.
[3]Trainer *v.* Trumbull, 141 Mass. 527, 6 N. E. 761.
[4]Guthrie *v.* Murphy, 4 Watts (Pa.) 80.

for the room during the time he does not occupy it, as a minor cannot make a binding executory agreement to purchase necessaries. The law alone raises the obligation after the benefits have been received.[1] An undertaker furnishes funeral supplies for a deceased husband of A. Is this a necessary? Yes. It is a necessary. It is something without which a person cannot reasonably exist and it is a personal advantage to A because of the principle that husband and wife are one?[2]

§ 31. FUNCTIONS OF COURT AND JURY.

Whether a specific thing belongs to the class of necessaries is a question of law for the court, but whether a thing belonging to the class of necessaries is a necessary for a particular person in a particular case is a question of fact for the jury, and is to be determined by having regard to the person's condition, estate and circumstances in life.

A furnishes B, a minor, with an antique chased goblet, which B intends to give to a friend, and some diamond solitaires, to be used as a fastening for the wrist bands of his shirt. Who should determine whether these are necessaries? The court should determine whether they can ever be necessaries for any infant and, accordingly, should decide that the goblet can never be a necessary, but that the solitaires may be. The jury should decide whether the diamond solitaires are a necessary for this particular infant, taking into consideration his station.[3] A furnishes money to B, a minor, to pay his traveling expenses to California. B has a guardian ready to provide everything suitable to his age and station in life. Is it a question of law or of fact as to whether A can recover from B? Law. The court should decide that this is not a necessary.[4] A furnishes a horse, saddle, bridle and traveling expenses to B, a minor, 180 miles from home, to enable him to make his journey homeward.

[1]Gregory *v.* Lee, 64 Conn. 407, 30 Atl. 53.
[2]Chapple *v.* Cooper, 13 Mees. & W. 252.
[3]Ryder *v.* Wombwell, L. R. 4 Exch. 32.
[4]Henderson *v.* Fox, 5 Ind. 489,

What are the respective functions of the court and jury in deciding whether the minor is liable to pay for these chattels? The court should decide whether the articles belong to those classes for which any infant is bound to pay, and if they fall within those classes, then, whether they are necessary and suitable considering the estate of this particular infant, and what is a reasonable price therefore should be left to the jury.[1]

§ 32. OBLIGATIONS NOT IMPOSED BY EQUITY.

Whenever, without any agreement of the parties, an obligation is imposed by law on one person to do certain positive acts for another, the law implies an obligation on the former to compensate the latter for any damage he may sustain by misperformance, or nonperformance, of the obligation, and the damages may be recovered in an action ex contractu.

The *quasi* contractual obligations heretofore considered have rested on the doctrine that one man's gain should not be another man's loss, but there are some *quasi* contractual obligations which do not rest upon this doctrine but are positive obligations of the law. The latter include cases where a person is bound to do particular acts other than to pay for benefits received.

§ 33. OBLIGATIONS STATUTORY.

Statutes sometimes impose obligations on one person to do certain positive acts for another.

A is a pilot, licensed to pilot vessels into the port of New York, A statute of New York provides that any pilot bringing his vessel in from sea shall be entitled to pilot her out to sea again, when she leaves. B employs A to pilot his vessel into New York, but goes to sea again without a pilot. Is A entitled to recover damages for the loss sustained? Yes. An obligation to employ and pay him is created by statute.[2]

[1]Beeler *v.* Young, 4 Ky. (1 Bibb) 519.

[2]The Francisco Garguilo, 14 Fed. 495; Milford *v.* Com., 144 Mass. 64, 10 N. E. 516.

§ 34. PROMISE FOR SOLE BENEFIT THIRD PARTY.

American law generally imposes an obligation on a promisor to do an act promised for a third person, in a contract made upon a valid consideration, where either the contract is made for the sole benefit of the third person or the promisee is at the time under an existing legal obligation to the third person.

This obligation is difficult of explanation. While a valid contract exists between the promisee and promisor none exists between either of these parties and the beneficiary or the creditor of the promisee. The difficulty arises in finding a remedy for the latter on the contract between the former. No property rights are transferred. No relation of agency exists. There is no novation. A trust is not created. The best solution is either, simply that the third party is entitled to equitable relief, or that this relief is a *quasi* contract. *Quasi* contract is a rational explanation, for the law, operating upon the act of the parties, creates the debt, establishes the privity and implies the promise and obligation. Before the third person accepts the performance, the promisee may release the promisor at any time, but after the third person has expressly or impliedly accepted it there can be no release. A's son and heir offers to pay a daughter 1,000 pounds if his father will not cut down a certain wood, and the father forbears from cutting the wood. Can the daughter sue the son and recover the 1,000 pounds? Yes. This promise is made for the sole benefit of the daughter, but she could not sue if the law did not imply an obligation, as she is not a party to the contract.[1] A father-in-law, in consideration of the promise of a father to give his son, X, 100 pounds, promises to give X 200 pounds. Can the son, X, sue the father-in-law, or father, on the contract and recover the amount promised him? Not according to the later law of England, which holds that a stranger to the consideration cannot sue on the contract, though for his benefit; but generally in America, an obligation to pay the third person is created

[1] Dutton *v.* Poole, 2 Lev. 210; Williston's Wald's Pollock on Contracts, 237-278.

by law.[1] A deeds land to B, on his covenant to pay all incumbrances on the premises, by mortgage or otherwise. The deed declares that A's wife reserves the right of dower. The mortgage is foreclosed, and the wife loses her inchoate right of dower. Can the wife recover on B's covenant? No. It is not enough that the performance of a covenant may benefit a third person; it must be entered into for his benefit and the grantor must be a debtor of the third person.[2] A owes B $2,000 and sells out his business to C, on the latter's promise to pay B. C claims the sale is fraudulent, but does not try to avoid it on that ground. Can B recover from C? Yes.[3] A takes out a policy of life insurance with the B Insurance Co., and names as beneficiary C, who has no insurable interest in A's life. A dies. Can C recover the amount of the policy from the insurance company? Yes. The promisee, or his estate, though entitled to sue on the promise on the ordinary principles of contract, having suffered no pecuniary damage by the failure of the promisor to perform his agreement, cannot recover substantial damages. C must be allowed to recover or no one can recover. This is sometimes placed on the ground of a trust.[4]

There is still another way in which a third person may acquire legal rights, and that is by means of a trust. A trust is not a contract, although it has much in common with contracts. A trust is not a *quasi* contract, although there is a personal obligation between the trustee and the beneficiary, or *cestui que* trust. The creator of a trust and the trustee, by agreement, bring rights into existence which a third party, the *cestui que* trust, may enforce. The agreement which creates the trust, however, creates much more than obligations, and the obligation which exists between the trustee and *cestui que* trust is not created by the agreement at all, but by pure operation of law. Hence a trust is a further way of creating a property right, either real or personal, by operation of law.

[1]Tweddle *v.* Atkinson, 1 Best & S. 393; Second Nat. Bank *v.* Grand Lodge of F. & A. A. M., 98 U. S. 123; Wood *v.* Moriarty, 15 R. I. 518, 9 Atl. 427. But see Kramer *v.* Gardner, 104 Minn. 370.

[2]Durnherr *v.* Rau, 135 N. Y. 219, 32 N. E. 49.

[3]Arnold *v.* Nichols, 64 N. Y. 117.

[4]Provident Life Ins. & Inv. Co. *v.* Baum, 29 Ind. 236; Ashburner, Principles of Equity, 113.

Trusts are divided as to the method of their creation into express, or those created by express terms in a deed or will, and implied, or those deducible from the nature of the transaction or superinduced upon the transaction by operation of law. Trusts, as to the matter of performance by the trustee, are active and passive. In an active trust the trustee has some duty to perform, but in a passive trust none, the legal title merely resting in him.

§ 35. CONTRIBUTION AND GENERAL AVERAGE.

An obligation is imposed by law on several parties who are liable, in company with others, to pay their proportionate part of the whole liability, or loss, to the party or parties so liable, upon whom the whole loss has fallen or who have been compelled to discharge the whole liability.

A, B and C each enters into a separate bond for $4,000 for the conduct of D. D defaults, and A is sued, on his bond, for $3,884, and judgment obtained. Then A demands contribution from B and C. Will contribution lie between sureties on distinct obligations? Yes. The bottom of contribution is not contract but a fixed principle of justice. They all are bound to the same person and in equal right. The fact that they join in different instruments simply fixes the proportion of their liability[1] A and B are sureties for E for the performance of a trust as guardian of C. E becomes insolvent and C requires A to pay the total amount due from the guardian. Can A compel contribution from B? Yes. And if B is dead, he can recover from B's executor.[2] A and B are owners of a stage. B is driver thereof. Through B's neglect, C is injured, and C recovers $1,300 damages from A. Can A compel contribution from B? Yes, as A is guilty of no personal wrongdoing.[3] A owns a ship and is carrying, in the same, a cargo of wheat for B. On the voyage, in order to save the vessel and cargo, it is necessary to sacrifice some of the ship's tackle, etc. Can A re-

[1]Deering *v.* Winchelsea, 2 Bos. & P. 270.
[2]Bachelder *v.* Fiske, 17 Mass. 464.
[3]Bailey *v.* Bussing, 28 Conn. 455.

cover a proportion of the amount of loss from B? Yes. On the principle of general average, the ship and cargo being considered as embarked in a common peril, except as to ordinary losses.[1]

§ 36. PUBLIC CALLINGS.

An obligation is imposed by law on public callings to serve all alike with adequate facilities for reasonable compensation, without discrimination, and to be under liability for injury which it cannot reduce by contract to less than liability for its own negligence.

As observed in the preceding chapter a public calling is a business which has acquired such a virtual monopoly that the public has acquired an interest in its use and may regulate it to that extent for the common good. The above obligations are those which the law allows and will itself impose, if asked, upon public callings to accomplish such regulation. A asks B, a common carrier, to transport certain goods for him, and tenders the freight, but B refuses to carry it, though he has conveyance. Does A have any cause of action? Yes. In *quasi* contract, sometimes said to be in tort, for here is an obligation to carry, imposed by customary law.[2]

§ 37. CARE AND DILIGENCE.

In every situation where a person undertakes to act, the law imposes an obligation on him to act with reasonable care so as not to injure the person or property of others by any force set in operation by himself or his agent.

This is properly a contractual obligation because the person under liability does not owe this duty to all the world, but to some person with whom he has come into privity. A is the owner of a dry dock, used for the painting and repairing of

[1] Birkley *v.* Presgrave, 1 East, 220.
[2] Jackson *v.* Rogers, 2 Show. 327.

vessels and supplies and puts up the staging necessary to enable this work to be done, but the work, thereafter, no longer remains under his control. D, a painter in the employ of C, who has a contract with the owner of a vessel to paint the same, while engaged in painting the vessel, is injured by the breaking of a rope put up by A. Can B recover from A? Yes. The law implies an obligation on him to take reasonable care to supply staging and ropes fit to be used with safety.[1] A and B are soldiers engaged in actual service. A asks B, as a favor, to care for his pocketbook containing a large amount of money. B takes the book, but through his gross negligence loses the same. Can A recover from B the value of the book and its contents? Yes. The law implies an obligation on B to exercise slight diligence in caring for this property.[2]

§ 38. OBLIGATIONS OF RECORD.

Where a court of competent jurisdiction adjudges a certain sum of money to be due from one person to another, a legal obligation to pay that sum is created by law, and an action of debt, may be brought thereupon whether the judgment be one rendered by a court of record or not.

There is some difficulty in classifying judgments or debts of record. Originally, they seem to have been considered contracts, as they gave rise to the action of debt; but they lack the essential elements of modern contracts, and in the progress of the law have gradually been relegated to the realm of *quasi* contract. However, a judgment based on a contract is so far treated as a contract as to come within the inhibition of the clause of the Federal Constitution in regard to impairing the obligation of contracts.[3]

[1]Heaven *v.* Pender, 11 Q. B. Div. 503.

[2]Spooner *v.* Mattoon, 40 Vt. 300.

[3]Grant *v.* Easton, 13 Q. B. Div. 302; Williams *v.* Jones, 13 Mees. & W. 628; Peerce *v.* Kitzmiller, 19 W. Va. 564.

CHAPTER XXI.

REMEDIAL OBLIGATIONS.

I. PREVENTIVE, § 2.
   A. Injunction, § 2.
   B. Exemplary damages, § 2, § 3.

II. REDRESSIVE, § 2.
   A. Restorative, § 2.
      (I) Reformation, § 2
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   B. Compensatory, § 3.
      (I) Damages, § 3.
         (A) Legal injury caused by violation of legal right, §§ 4-6.
            1. What does not amount to legal injury [Moral wrongs—Lawful acts—Act of God and inevitable accident—*De minimis non curat lex*—*Volenti non fit injuria*—Loss uncertain, remote, or not proximate result—Profits—Counsel fees—Avoidable consequences—Act of government—Benefits conferred by wrongdoer—No special loss when it is gist of legal right—Slander *non per se*—Nuisance—Fraud—Negligence—Lateral support—Procuring refusal to contract or breach of contract—Slander of title—Malicious prosecution not defamatory], § 5.
            2. What amounts to legal injury, § 6.
               a. Breaches of contract and *quasi* contract, § 6.
               b. Torts with special damage laid and proved when gist of the action, § 6.
               c. All other torts whether or not causing special damage, § 6.

§ 1. REMEDIAL LEGAL RIGHT: DEFINED.

A remedial legal right is a right in personam to have, by state authority, the prevention or redress of an injury caused by a violation of an antecedent legal right.

Antecedent legal rights are those rights, such as safety, liberty, reputation, family and property, which are recognized by the state and for whose violation the state promises remedial rights. Antecedent rights are called such because they precede any wrongdoing. Remedial rights are called such because their object is the re-establishment of the equilibrium of antecedent rights after it has been disturbed by someone's wrongdoing. Antecedent rights may be *in rem;* that is, against all the world, as a right to safety, liberty, or reputation; or *in personam;* that is, against some particular individual, as a right to the performance of a promise; but, except as certain modes of their execution may be *in rem,* remedial rights are invariably *in personam,* or against some specified person, who, by his wrongful act, at once also becomes the person of incidence of the remedial right.

In early times most remedies consisted in some form of self-help, but at the present time the state has provided adequate remedies for practically all legal wrongs, and the rights thereto are, therefore, called legal remedial rights. Such rights are personal property whose objects are incorporeal chattels. Like *quasi* contracts they are created solely by law. These rights may be either public or private, both of which, in turn, may be either preventive or redressive, according as they take effect before or after the commission of a wrong. If the remedial rights are for the purpose of redress, they may be either restorative, to compel the doing of the act whose omission constitutes the wrong or to compel the returning of that which one

has gained by his wrong; or they may be compensatory, to substitute something for that of which one has been deprived or to pay him for his injury. Most remedial rights are redressive in nature, compensation being the usual form of redress, but the law will sometimes interfere for the prevention of an anticipated violation of an antecedent right.

§ 2. PREVENTIVE AND REDRESSIVE.

Remedies for the violations of public rights are preventive, in so far as, by police restraints, education, moral dissuasion, and the example of punishment, the state applies methods which tend to prevent the perpetration of wrongs; compensatory, in so far as the state exacts from the wrongdoer such reparation as is the equivalent of that observance of public rights which is due. But, from the nature of things, compensation is not so much the desire of the state as the vindication of public rights and such a manifestation of public authority as to prevent future violations. Private remedial rights are also classified into those for the purpose of prevention and those for the purpose of redress of violations of private antecedent legal rights. The great preventive remedy for private wrongs is the injunction, a prohibitory writ to restrain the doing of an act, which would infringe a legal right, where the injuries threatened would be irremediable, but the allowance of exemplary damages also indirectly accomplishes the same end. After rights have been violated, the only remedies of the law that are available are necessarily for the purpose of redressing the wrong, either by compelling a restoration of the rights or compensation therefor, both of which remedies are pecuniary in character. In the case of money or other property having a fixed value, such remedies are perfect; but when the remedies of compensation are extended to the violation of the rights of life, liberty, reputation and family, their appropriateness is not so apparent, but thus far the law has not been able to discover any other standard by which to measure the enormity of any legal wrong, and the remedy of money or its equivalent has to suffice. Restoration is obtained by specific performance of a contract to convey land, or to sell chattels of peculiar but nonmarketable value; by ejectment, to regain

the possession of land wrongfully detained; and by replevin, to regain the possession of chattels wrongfully detained; and also, under certain circumstances, by mandamus, to compel the doing of some act; by reformation, to correct a written contract which the parties have failed to correctly reduce to writing because of mutual mistake, or mistake on one side and fraud on the other; and by cancellation, to annul contracts. But these cases of redress are comparatively few and exceptional. Most redress for private wrongs is compensatory, and here we come to the doctrine of damages.

§ 3. DAMAGES.

Damages are the compensation recoverable at law for the injury caused by the violation of a private, antecedent, legal right.

Preventive remedies are, of course, the most complete remedies, but for most wrongs they are impracticable. Restorative remedies are complete where they can be applied, but it is impossible to restore some legal rights after their violation. Damages are always applicable, but sometimes with much more perfect success than at other times. The two most general elements of the definition are: (1) legal injury caused by a wrong; (2) compensation recoverable therefor. One element occupies one side of the balance, and the other the other side. Other terms synonymous with injury are loss and damage. Compensation must be commensurate with the injury. Accordingly, the subject of damages divides itself into two parts: First, whether there is legal injury; that is, when damages are recoverable, the question which lies in the substantive law of antecedent rights and only slightly projects into remedial law; and, second, if damages are recoverable, what the amount of the damages shall be.

§ 4. LEGAL INJURY.

In order to have a remedial right to damages, there must

be a violation by one person of an antecedent legal right of another person.

If there is no violation of an antecedent right there is no remedial right to damages; if there is a violation of an antecedent legal right, there is a remedial right to damages. Actual damage, without a violation of a legal right, gives no right to damages, but a violation of a legal right, without actual damage, gives a right to damages. There must be a wrong before there can be a remedy for that wrong, but when there is a legal wrong it is the proud boast of the law that it has a remedy therefor, *ubi jus, ibi remedium.*

§ 5. WHAT IS NOT LEGAL INJURY.

No legal injury is caused by (a) breaches of moral rights; or (b) by lawful acts; or (c) by act of God or inevitable accident; or (d) by injuries too small for judicial cognizance; or (e) by injuries received by consent; or (f) by injuries that are uncertain, remote, or not the proximate result of a wrongful act—including the loss of profits, consequences which the injured party could prevent or avoid by due and reasonable diligence after notice of the wrong, and counsel fees when such fees are not the subject-matter of a contract or paid by an innocent party called upon to defend a suit founded upon the wrong of another against whom there is a remedy over and who has been notified but fails to defend; or (g) by act of government; or (h) by injuries sustained by a wrongdoer through conferring benefits; or (i) when there is no special damage if special damage is an element of the legal injury, as in slander not per se, nuisance, fraud, negligence, violation of lateral support, procuring refusal or breach of contract, slander of title, malicious prosecution not defamatory.

Since the law recognizes and enforces only certain rights, which by being recognized and enforced have become known as legal rights, no matter what injury or loss one person may sustain by the act of another, if the act does not amount to a violation of a legal right, there is no remedial right to dam-

ages. Thus, there is no legal compensation for violations of moral rights. There is no legal compensation provided for injuries occasioned by lawful acts, as the destruction of property because of public necessity, or under the exercise of the police power, or in the improvement of one's own property, pursuant to the maxim *sic utere tuo ut alienum non laedas,* or by inevitable accident or act of God, because all legal rights are subject to these limitations. If there is a loss without a legal wrong or injury, it is *damnum absque injuria.* Sometimes the loss or damage is so insignificant that the law will not remedy it, *de minimis non curat lex,* and hence there is no legal injury. So, there can be no violation of a private legal right when the owner of the right gives permission for the doing of the act, *volenti non fit injuria,* a principle which also applies to legal limitation of liability by contract. Again, though one has sustained some damage, if this is so uncertain that it is impossible to say what or how much of it is traceable to any wrong, compensation cannot be recovered therefor, for compensation must always be commensurate with legal injury, and how can there be any right to compensation when it is uncertain whether there is any legal injury, or, if there is, what it is? All that it is ever possible to recover under such circumstances is some nominal sum to vindicate the legal right. Likewise, if the loss is so remote that the human mind cannot trace the operation of any given cause therefor, or if it is not the proximate result of the wrong complained of, no recovery can be had, because it is impossible to show that it is the result of any violation of a legal right. In the same way, nothing is recoverable for losses which the plaintiff, as a prudent man, should prevent, or which he causes after notice not to do so, for they are due, not to any wrong of the defendant, but to his own act or negligence, and the one who causes the loss by his wrong should suffer, or compensate, for it. In a suit for money detained, any damages beyond principal and interest are speculative and uncertain. The expenses of litigation are not the proximate result of a violation of an antecedent legal right unless they are the subject-matter of contract, or caused by having to defend a suit founded upon another's wrong. However, in the common law a system of costs, not including counsel fees, has been established and legal taxed costs are awarded the successful litigant. Profits are ordinarily so uncertain that

they cannot be traced to any wrongful act, but this is a general truth rather than a general principle, and when they are not speculative they are recoverable. If a jury awards a person damages so far beyond or below true compensation for the violation of a legal right as to indicate that its verdict is the result of passion and prejudice, the damages are called excessive, and will be set aside, for they are either not caused by the wrongful act or all the damages caused have not been assessed. Ordinarily no damages are allowed for mental suffering, for there is no legal right not to have such suffering caused by another's act, but, if a person has a cause of action for another's violation of a legal right affecting his person, or which naturally gives rise to grief and distress, as long as there is a right to other damages, if there is, in addition, actual damage sustained by mental suffering because of the same wrong, something is allowed to be assessed for the same, and the amount is left to the sound discretion of the jury. In certain other cases special damage is an element in the legal right, and before one can recover for a wrong he must show special damage, for there is no wrong until then. This is the case in slander not *per se,* in nuisance, in fraud, in negligence, in violation of lateral support, in procuring refusal to contract or breach of contract, in slander of title, and sometimes in malicious prosecution. A wrongdoer is not entitled to recover for benefits conferred, for there is no violation of his legal rights by another. Lastly, though a person have a right to damages for some violation of a legal right, positive law has established certain rules of procedure which must be followed before damages can be obtained. These are the rules of practice, pleading and evidence, among which are the rules limiting recovery to a single suit for damage incident to a single cause of action, and to the interest of the party suing.

§ 6. WHAT IS LEGAL INJURY.

Legal injury results from breaches of the obligations of contracts and quasi contracts, from those torts requiring special damage when special damage is occasioned and from all other torts, regardless of special damage.

Damages are compensation for legal injury. Hence, before

there can be any question of compensation, there must be legal injury. Legal injury is the one essential to the right to compensation. If a complainant has sustained no legal injury, he is not entitled to compensation. Legal injury results only from the violation of an antecedent legal right, and what are not such violations has been shown. Hereafter in this book we shall consider what amount to such violations. The only private antecedent legal rights thus far recognized by the law are the rights *in rem* to personal security (or life), personal liberty, reputation, family, advantages open to the community, immunity from fraud and certain property rights, and other property rights *in personam* to the performance of legal obligations. Violations of the latter are called breaches of contracts and *quasi* contracts, and violations of the former are called torts. Generally the nature of a right is such that it is not necessary to have special damage occasioned in order to have a legal injury, but some of the antecedent rights *in rem* require special damage before there is any violation thereof, and in such cases there is no legal injury without special damage. Damage is said to be the gist of the action. These unusual torts have already been considered in connection with the discussion of what does not amount to legal injury, and mere reference to them in this place will be enough; they are slander not *per se*, nuisance, fraud, negligence, removal of lateral support, procuring refusal to contract, or breach of contract, slander of title and malicious prosecution not defamatory. Aside from these cases special damage does not have to be shown.

§ 7. COMPENSATION.

Compensation is the pecuniary recompense awarded for the legal injury caused by the violation of a legal right.

On the one hand we have wrongful conduct by one person which has caused another person legal injury. This is the beginning of the law of damages. If there were no legal injuries there would be no law of damages. But these legal injuries are found everywhere. Every day men are failing to live legally correct lives. Every day torts are being committed and solemn obligations undertaken are not performed.

Every day rights *in rem* and *in personam* are being violated. Every day men whose rights are thus violated lose property, bargain, time, earning capacity, profits, reputation, services and society of spouse or children, are compelled to incur expenses, and suffer physical pain and mental suffering. On the other hand we have the law, standing with the power of compensation in her hands, watching these injuries and ready to obtain for the injured man just compensation for his injuries. But how is the law to determine what the compensation shall be? To deal justly with the men, both the wronged and the wrongdoer, she should be able to estimate both how much the injury is and how much it will take to redress it. She should place the men in the same position as though no wrong had been done, as though the tort had not been committed, or as though the contract had been performed. Through the course of the centuries she has tried one method after another, until at last she has adopted, as the best way to measure the damages that shall be given for legal injuries, the measure of value for all pecuniary injuries and the sound discretion of the jury for all nonpecuniary injuries. But for the purpose of determining value and to aid the jury in the exercise of its sound discretion it has been necessary to adopt numerous other subsidiary measures, or rules, of damages. These include, not only those designating the elements of injury sustainable, but the distance to which any injury shall be traced and compensated, to what extent compensation shall be allowed in advance of the occurrence of future consequences expected to continue to flow from a wrong, how different people holding different interests which have been injured shall be compensated, and whether circumstances of aggravation and mitigation shall be considered in the determination of the award. Sometimes it is permitted to parties in advance to determine what shall be the compensation in case any legal injury thereafter occurs, but ordinarily the determination of this question must be left to the courts and juries, whose separate functions must be maintained.

Any and all of the wrongs caused by torts and breaches of contracts and *quasi* contracts constitute violations of private antecedent legal rights and, therefore, some legal injury is presumed at all events. Not only can no legal right be violated with impunity, but any violation is conclusively presumed to

cause some injury, for which the injured person is entitled to redress. What damages shall be recovered is determined by the rules, or measures, of damages which constitute the real subject-matter of the law of damages. Whether the legal right violated is one of contract, property, person, reputation, or family, or the right not to have negligence, deceit, nuisance, or slander not *per se,* causing damage, the person injured is entitled to recover something. It may be exemplary, or substantial, or only nominal damages, but something he must recover. If there is no substantial injury, but merely a violation of a legal right, or if the injury is substantial but the evidence is not such that the extent can be ascertained, nominal damages, or a trifling sum in recognition of the right, are always recoverable. If the injury is substantial and proven substantial damages are recoverable. In both breaches of contracts and torts substantial damages include direct damages for those injuries which result immediately, and consequential damages for those resulting naturally, but not immediately, from the wrongful act. In contracts, consequential damages can include only such injuries as are in the contemplation of the parties at the time of contracting as the probable result of its breach; in torts, only those which arise as the natural and probable result of the wrong. If, in addition to compensation, damages are allowed by way of punishment, or to make the wrongdoer an example to others, they are called exemplary or vindictive. They are allowed for torts and breach of promise of marriage if the wrongdoer acts with violence, oppression, reckless negligence, malice or fraud. General and special damages are so called as a matter of pleading. General damages are such as are awarded for injuries that necessarily result, because the usual and ordinary consequences; special, such as are awarded for injuries that do not necessarily result, but have occurred in the particular case, and therefore must be specially pleaded to prevent surprise on the other party to the suit on the trial. If the amount of the damages is determined by anticipatory agreement between the parties, they are called liquidated damages. Parties may stipulate for such compensation in lieu of ordinary damages where the injury from breach of contract will be uncertain and incapable of estimation by any definite standard, or if the stipulated sum does not differ greatly from the general rule. Present damages

are awarded for an injury which has already accrued; prospective, for an injury which will accrue in the future from a wrongful act already committed. The rules which decide when these various kinds of damages are recoverable and the measure thereof constitute the topics for treatises on damages.[1] We can only state the briefest rules thereon in this chapter.

§ 8. MEASURE OF DAMAGES.

The amount of substantial damages recoverable for the injuries caused by breach of contract, if liquidated, is the sum agreed upon.

The amount of substantial damages recoverable for all pecuniary injuries resulting from torts, quasi contracts, and breaches of contracts, if not liquidated, is the value of such injuries.

The amount of the substantial damages for all nonpecuniary injuries resulting from torts and breaches of promise of marriage and from wrongful death contrary to statute, as well as the amount of exemplary damages for malicious conduct in connection with such wrongs, is such sum as the jury in its sound discretion may award (subject only to review by the court).

The amount, or *quantum*, of substantial damages may be estimated, or measured by the parties in advance, or by fixed rules of law, or by the jury. The above rules state the amount recoverable in each of such cases. The injuries which may be caused by the violations of the legal rights of men may be divided into pecuniary and nonpecuniary. Pecuniary injuries embrace the loss of property of all kinds (including loss of bargain and loss of profits), loss of reputation, loss of time, loss of society, custody, support, and services, loss of means of livelihood, use of highways, etc., and nonpecuniary injuries embrace physical pain and mental suffering. The nature of the injuries suggests the legal rights which must be violated to cause the same. Where the damages are liquidated the amount recoverable is easily determined, and as the damages for nonpecuniary injuries lies in the sound discretion of the jury not much can be said of them, but the amount recoverable for

[1] See Willis on Damages.

pecuniary injuries, when not liquidated, is a matter of law for the court and is a matter of some complexity. Value is the measure of damages for all such injuries. Value is determined by the true market value for all lawful available uses, as drawn from all sources of information at the time and place of the destruction, taking, demand for, or delivery of the object, as the case may be. If there is no market value at this place, then that at the nearest market governs; if there is no market value anywhere, the value is the actual value to the owner, taking into account the cost, practicability and expense of replacing the thing, and such other considerations as affect its value to the owner. A few illustrations will help to make these statements clear. P sues D for damages for failure to deliver a crop of wool sold. Can P recover the highest price between the date of purchase and demand, when the agreement is to deliver within a reasonable time? No. He can recover what at the time of demand and refusal would enable him to purchase other property of like kind and equal value at the same place.[1] D, a common carrier, which has undertaken to transport the same, through its negligence, loses P's portmanteau and contents, including clothing made to fit P and partly worn, so that it would sell for but little if put on the market as secondhand clothing. What is P entitled to recover? The value of the clothing for the use of P at the point of destination.[2] Interest at the legal rate is recoverable, whatever the cause of action, if there exists a claim for damages for the loss of a right of pecuniary value, as of a definite time. B negligently destroys the property of F. Should interest be added to the sum which is found to represent F's loss on the day it takes place? Yes. Otherwise he would not be compensated for the loss of the use of the money from the time it should have been paid to date.[3]

§ 9. ACTIONS AVAILABLE FOR RECOVERY FOR VIOLATIONS OF LEGAL RIGHTS.

As we have just seen, a person is entitled to the preventive remedy of injunction, a prohibitive writ to restrain the doing

[1] Chadwick *v.* Butler, 28 Mich. 349.
[2] Fairfax *v.* New York Cent. R. C., 73 N. Y. 167.
[3] Fraser *v.* Bigelow Carpet Co., 141 Mass. 126.

of an act which would be a legal wrong, where the injuries threatened would be irremediable. The action for procuring such relief in common law is a bill in equity. A person is entitled to the redressive remedy of specific performance in case of a breach of contract to convey land or to sell chattels of peculiar but nonmarketable value. The proper action for securing such relief at common law is another bill in equity, which is also the proper action to obtain a reformation, or rescission or cancellation. But the great remedy to which a person is entitled after his legal rights of personal property (as any other legal rights) have been violated, is the redressive remedy of compensation called damages. The rules of damages have just been considered. The proper action for securing such relief in the so-called code states is a formless action, known as a civil action; but under the common law procedure there are a number of available actions, which may be divided into two classes, contract and tort. The contract actions are covenant, debt, detinue, special assumpsit and general assumpsit. Covenant will lie for damages for breach of contract under seal, where it is not for a specific sum of money. Debt will lie for the recovery of a sum certain, whether due by simple contract, specialty, record, or statutory and customary obligations, where a *quid pro quo* has passed to the debtor or the contract is under seal. Detinue is a form of debt which will lie for the recovery of specific chattels to which the plaintiff already has title, though in the event they cannot be returned their money value is obtained. Special assumpsit is an action which will lie for the recovery of damages for the breach of a contract created by express agreement. General assumpsit is an action which will lie for the recovery of damages for breach of *quasi* contracts and inferred contracts; it is divided into *indebitatus* assumpsit with its various counts and into *quantum meruit* and *quantum valebat*. The tort actions available to redress legal wrongs violating personal property are trover (or conversion) replevin, trespass, trespass on the case, and perhaps case as distinguished from trespass on the case. Trover is a specialized form of case devised for the purpose of the recovery of damages for the conversion of chattels in which the plaintiff has a personal property right *in rem*, absolute or qualified. Replevin is an action designed to protect the right *in rem* of possession merely, and lies for the

recovery of the possession of any chattels taken from the plaintiff unlawfully. By statute the actions of replevin and detinue have generally been merged in modern times into an action sometimes called replevin and sometimes claim and delivery, and such action lies either for the unlawful taking or the unlawful detention of chattels. Ejectment is an action which lies for the recovery of the possession of land. Trespass is an action which lies for the recovery of damages for any injury done to personal property rights *in rem* (or real property or to the person) by the direct and wrongful application of force by one not in the lawful possession thereof. Anciently trespass lay only for a wrongful invasion of possession, so far as it concerned property rights, and the wrongful act had to be done by one not in the lawful possession, and the ancient doctrine still obtains except as the latter part of it has had small changes. Trespass on the case is an action in the nature of trespass, where, so far as personal property is concerned, a person is sued for the recovery of damages for injury to rights *in rem* caused by independent agents of harm, as servants, animals, and inanimate dangerous things like fire, explosives, or accumulations of water. There are a number of actions on the case, or as they are sometimes called, trespass on the case. They are all formless actions based on legal duty and bearing some similarity to older actions. Special assumpsit is an action on the case in the nature of deceit; general assumpsit is an action on the case in the nature of debt; trover is an action on the case in the nature of detinue; trespass on the case is an action on the case in the nature of trespass, and includes recovery for negligent omissions. Case is a sort of residuary action in the realm of torts, as *indebitatus* assumpsit is in contracts. Another action of case for the recovery of damages for injury to the rights *in rem* which are personal property is an action on the case for nuisance. Waste is an action on the case for the violation of a real property right, and slander and libel for violations of personal rights, but the action on the case for waste is itself a personal property right and the actions on the case for slander and libel become personal property after judgment. The proper action of co-owners of either joint or common property in non-severable chattels is a bill in equity for an accounting, but if one co-owner should destroy the property, trover or conversion would lie,

and if he should sell the same and receive money therefor either trover or general assumpsit in the form of an action for money had and received would lie, as the tort action may be waived. Trover and replevin, as well as general assumpsit, are actions available for co-owners of property in severable chattels.

CHAPTER XXII.

SALES, GIFTS, BAILMENTS, WILLS, JUDGMENT, INTESTACY, ADVERSE POSSESSION, ETC.

III. How the Rights of Personal Property Are Acquired,
- A. By original acquisition (See Chapters X to XXI inclusive).
- B. By secondary acquisition, §§ 1-8.
  - (I) By act of law, § 1.
    - (Confiscation, succession, judgment, intestacy, insolvency, marriage, adverse possession), § 1.
  - (II) By act of parties, §§ 2-7.
    - (A) Gifts, § 3.
      1. *Inter vivos*, § 3.
      2. *Causa mortis*, § 3.
    - (B) Wills, § 4.
    - (C) Bailments, § 5.
    - (D) Assignments and indorsements, § 6.
    - (E) Sales, § 7.
      1. Chattels specified, § 8.
      2. Contract unconditional, § 8.

§ 1. Secondary Acquisition by Some Act of Law.

One method of secondary acquisition, where property which one person already owns is transferred to another, is by act of law, which embraces title by confiscation, succession, intestacy, marriage, judgment, insolvency, and adverse possession. By confiscation the state takes the goods of an alien enemy found in a state in time of war. By succession the members of a corporation aggregate acquire the rights of another set which preceded them. By intestacy the rights of property of one dying without disposing of his property by will are transferred to specified parties by law. By marriage each spouse acquires certain rights by law in the property owned and that which is subsequently acquired by the other. At common law this was especially true of the husband who at once became the owner of all the wife's corporeal chattels, and could make himself the owner of her incorporeal chattels by reduc-

ing them to possession. By a judgment which is satisfied a person acquires the personal property in chattels which were formerly owned by another, and after he has satisfied the judgment the title of the person thus paying it dates back by relation to the time of his own wrongful act. By insolvency proceedings creditors acquire by law property rights formerly owned by their debtor. By adverse possession, or the keeping of chattels in one's possession under a claim of right, hostilely, openly, exclusively, and continuously, for the period of the statute of limitations, one acquires by law the title to chattels formerly owned by another.[1]

§ 2. SECONDARY ACQUISITION BY SOME ACT OF THE PARTIES.

The most common method of transferring personal property is by a transfer of rights already owned by some act of the parties. Contract is the great medium for such transfer, as it is the great medium for the creation of rights by original acquisition. If the right transferred is the right to the incorporeal thing of a contract itself, the transfer is accomplished by an assignment, or indorsement, etc., of such contract. If the right transferred is a right to a corporeal thing the transfer is accomplished by a sale. But there are other methods of transferring personal property by secondary acquisition by some act of the parties, including gifts, wills, and bailments. Absolute property may always be transferred by the parties, for the right to transfer is an incident, or element, of the property, and qualified property may be transferred if the property is not qualified in the particular respect of lacking the right to dispose thereof.

§ 3. GIFTS.

A gift is a voluntary and immediate transfer of property without consideration by the owner to some other person.

In order to make a valid gift of personal property, the act

[1]Mrs. Alexander's Cotton, 2 Wall. (U. S.) 404; Smith *v.* Smith, 51 N. H. 571; Campbell *et al. v.* Holt, 115 U. S. 620.

designated must take place between living persons, the donee must be enriched by what the donor loses, the donor must intend such enrichment, the donee must accept the same, and there must be an actual or constructive transfer of the object to which the gift relates. A promise to give is invalid, as it creates no obligation; a gift is valid as it transfers the property because of the importance that the law attaches to possession. If acceptance would be to the advantage of a donee there is a presumption of acceptance by law. Constructive possession is such as occurs where a key to a repository in which chattels are kept is delivered. A gift has the one element of agreement in common with contract, but in one case the agreement is directed to the creation of an obligation and in the other it is not. Delivery is perhaps the chief requisite of a gift. There are two kinds of gifts: gifts *inter vivos* and gifts *causa mortis*. The first class includes the ordinary gifts made by one person to another, not made in anticipation of impending death. The second class includes gifts in expectation of death then imminent. The distinction between the two classes of gifts lies in the fact that gifts *inter vivos* must be unconditional, while gifts *causa mortis* are conditional. The personal property acquired by a gift *causa mortis* is defeasible upon the happening of any one of four conditions subsequent implied by the law (or they may be expressed): (1) actual revocation by the donor before death, (2) the donor's recovery from the illness with which he is threatened, (3) the donee's death before that of the donor, (4) a deficiency of assets to pay the donor's debts. Otherwise the two kinds of gifts are alike and must have the same requisites. Both must be made between living persons, in spite of the fact that the term *"inter vivos"* has been appropriated to specially designate one class; in both the donee must be enriched by what the donor loses; in both the donor must intend such enrichment; in both the donee must accept the gift; and in both there must be an actual or constructive delivery of the possession of the object to which the gift relates; and in both the transfer of property must be gratuitous, voluntary and immediate. Gifts *causa mortis* differ from legacies in that they are no part of the estate of the deceased, in that the gifts may be made without written evidence, but legacies must be set forth in wills drawn in conformity to law, and in that the gift must be made in expecta-

tion of death imminent, while a will may be drawn at any time during life. In the case of a proposed gift *causa mortis* (or *inter vivos*), if the donor seeks to postpone the passing of title until the time of his own death, the title in such event neither passes under a gift, for the title passes to his estate at the moment of the donor's death and the dead man cannot thereafter make a gift of the same, nor does it pass under a will, because there is none for lack of conformity to the law of wills, and the property in the chattels must therefore pass by operation of law. A gift of either kind must be gratuitous, and this is another reason why it must be executed, for if anyone should attempt to enforce a promise to give, in order to maintain his action he must show a sufficient consideration, and if he can do so he has a contract, not a gift. A gift of either kind must be voluntary. A person must have sufficient mental capacity to understand the character of his act, and the act must not be procured by undue influence on the part of the donee. In the case of gifts between those standing in confidential relations to each other, the majority of the courts now hold that there is a presumption of undue influence, so that the burden is on the donee to affirmatively show that he did not exercise undue influence in procuring the gift.[1] A father gives a piano to his daughter, who is a minor and living with him, and makes such delivery as is possible under the circumstances. Later he gives a mortgage on the same piano to a third person, and such mortgagee contends that the giving of the subsequent mortgage revokes the gift to the daughter. The gift to the daughter is irrevocable, and the mortgagee has no right against the piano. A person could not make an oral gift of a one-fourth interest in a horse, for he could not make any delivery. But a complete gift of an account in a savings bank could be made by delivering the savings bank book, for the possession of the book would give the holder the right to the money. A, who thinks he is about to die from an illness which he has, indorses on a certificate of deposit "Pay to B, but not until my death," and delivers the certificate to B. This is not a good gift *causa mortis,* for it cannot take effect until after death, so that if it is available at all it must be as a testamentary disposition. Had A indorsed the certificate so that title would pass at once, it

[1]Kellogg *v.* Adams, 51 Wis. 138; Basket *v.* Hassell, 107 U. S. 602.

would have been a valid gift *causa mortis* on delivery, but would have been revoked by A's recovery from the illness with which he was threatened, or by actual revocation, or by the donee's death before the donor's.

§ 4. WILLS.

A will is an instrument by which a person makes a disposition of his property to take effect after death, and which is revocable during his life. It is called a devise so far as it relates to real property, and a bequest so far as it relates to personal property, and a legacy as applied to both.

The property which may be disposed of by will, as well as the formal requisites of a will, are prescribed by the statutes of the several states, and reference should be made to them. In general they permit anyone to make a will of personal property who is of full age, sound and disposing memory, and under no constraint of will; and they generally require the will to be in writing, published and acknowledged in the presence of the witnesses, signed at the end by the testator, and witnessed by at least two witnesses, who subscribe their names in his presence and in the presence of each other. A will must be made *animo testandi*. Sealing and dating are sometimes, but not generally, required.

§ 5. BAILMENTS.

A bailment is, in general, a delivery of chattels by one person to another, to be held according to the purpose of the delivery, and to be returned or delivered over when that purpose is accomplished.

A bailment transfers the possession and right of possession from the general owner (bailor) to a person (bailee) who then has a special property in the object of ownership. It also creates various obligations on the bailee for the benefit of the bailor. The bailee may also have the right to compensation for his services. The right to compensation and the right to the performance of his obligations by the bailee are objects of

ownership by original acquisition, acquired either by contract or *quasi* contract, and are merely further illustrations of a topic which has been already treated. The transfer of the right of possession of chattels is a method of acquiring title by secondary acquisition. In such case only a qualified property is transferred, ordinarily only the right of possession, but sometimes also the right of use and sometimes also a qualified right of disposal, as in the right to repledge. The qualified property thus carved out of the greater absolute property may relate either to corporeal chattels or to incorporeal, but in the latter case the delivery is symbolical. Bailments are classified as those for the sole benefit of the bailor, including deposits and mandates, those for the sole benefit of the bailee, or gratuitous loans, and those for the mutual benefit of both parties, including pledges, and the hiring of a thing for use, hiring of work and labor on a thing, hiring of care and custody of a thing, and hiring of the carriage of a thing from place to place. In all of them the bailee has at least the right to the possession of the thing bailed as against all the world, including the bailor, so long as the bailment continues.[1]

§ 6. Assignment and Indorsement.

Personal property relating to incorporeal chattels which a person acquires by some form of original acquisition, if transferrable at all, may be transferred by assignment, or by indorsement. Claims for damages for mere personal torts are not assignable; but other remedial rights, *quasi* contracts, contracts where the right of the promisee is not coupled with his obligation, patents, copyrights and trade-marks and good will in connection with the business sold, all are the subject of assignment, and commercial paper is transferrable by indorsement. The indorsee of commercial paper may get a better title than his indorser had if he is a *bona fide* purchaser; that is, if he purchases the same in good faith, before maturity, for a valuable consideration, and in due course of business, but an assignee of any other incorporeal chattels only steps into the shoes of his assignor. He succeeds to just what rights such

[1]Coggs *v.* Bernard, 2 Ld. Raym. 909.

assignor had, and any defenses available against the assignor are available against him. The assignment of a property right in an incorporeal chattel carries with it the accruing interest or income of the principal thing. The assignment of a debt carries with it the collateral security, unless expressly reserved. The assignee should give notice of the assignment to the debtor, if he would protect himself against any future claims of the debtor against the assignor. If, for example, the debtor should pay the claim to the original assignor before receiving notice he would be discharged from further liability. In equity and under modern statutes the assignee may enforce his right by a suit in his own name. A parol assignment is good in equity, but under most statutes the assignment must be in writing in order to enable the assignee to sue in his own name. In case the incorporeal chattel is evidenced by writing the right to the same may be assigned by an indorsement thereon; otherwise a new instrument should be executed. An order for the whole of a debt or specific fund amounts to an equitable assignment thereof, entitling the assignee after notice to the third person to sue in his own name for the same whether or not the order is accepted, unless the order is in the form of a check or bill of exchange, when acceptance is necessary. An assignment of a part of a fund by an order is good if the debtor assents to the same. A fire insurance policy is not assignable ordinarily, as fire insurance is a personal contract of indemnity. Public officers cannot assign salaries not yet earned but which they expect to earn in the future, because it would be against public policy to permit such assignments.[1]

The following examples will more fully illustrate the doctrines of assignment and indorsement. A slanders B by telling a third person that B is a thief. B now has a cause of action in damages against A; that is, he has a remedial right against A and A is under a remedial obligation to compensate B for the injuries he has caused him by his tort; but B cannot assign this claim to anyone else, as it stands. He must sue on the claim and recover judgment. Then he may assign the judgment to anyone he may desire, or he may collect the judgment himself. A hires B to work for him as a clerk for the period of six months for the salary of $60 a month, payable

[1]Schlieman *v.* Bowlin *et al.*, 36 Minn. 198.

at the end of each month. B cannot assign his obligation to perform the services which he has promised to perform, nor can A assign his obligation to pay therefor to anyone else; but after B has performed his obligation he may assign the salary that is then due to anyone he may desire by writing an order to A to pay the amount to such person. A pays B $100 by mistake, thinking that he owes B that sum when he does not owe him anything. The law creates a *quasi* contract against B to repay the money to A. A may assign this claim to anyone he may desire. Again, A owes B a certain sum of money and he signs a promissory note in which he agrees to pay such sum to B or his order at some future time, and he executes a chattel mortgage on some of his cattle as security for the note. B indorses on the back of the note "Pay to the order of C" and writes his name beneath and hands the note to C, who pays value and buys in good faith. C not only has a right to the chattel mortgage, but A cannot set up any defenses available against B.

§ 7. SALES.

A sale is a contract whose subject-matter is the transfer from one person to another of the general property (that is, the right to use, possess, and dispose, though the right may be otherwise qualified) in corporeal chattels, for a price paid or to be paid therefor.

Whether the term sale should be applied to the transfer of property to incorporeal chattels is a matter of dispute. Such property may be transferred. Hence the only dispute is over the name to be applied to such transfer, and this is of importance only so far as the statute of frauds is concerned. One section of the statute of frauds applies to sales. Hence, in such connection, it becomes important to know whether incorporeal chattels are included. The English courts generally take the view that they are not, and the American courts, the view that they are. It conduces to clearness to adopt the definition given above for a sale, and to make the use of the term in the statute of frauds an exception to the general rule, and to adopt the term assignment for the transfer of property to incorporeal chattels. An actual sale must be compared with

two other contracts which it closely resembles, a mere contract to sell and a sale of things having a potential existence. A contract to sell relates to and creates an incorporeal chattel and is a form of acquiring personal property by original acquisition; but it contemplates the transfer of the general property in corporeal chattels in the future, and if the contract is not broken, but carried out, it ripens into a sale at such time and transfers the general property in corporeal chattels owned by another, being then a form of secondary acquisition. A sale of things having a potential existence, or things which are the natural product or expected increase of things already owned and in existence, is a hybrid, partaking of the characteristics of both the contract to sell and the sale.[1] It differs from a contract to sell in that the general property passes as soon as the objects of the contract come into existence instead of when the same are appropriated to the contract by the parties. It differs from a sale in that the general property does not pass at the time of the making of the contract. The property in the objects of the sale or contract to sell may have been acquired by the seller by occupancy, or accession, by secondary acquisition by act of law, by gift, or by another sale (or, if the term sale is made to include incorporeal chattels, by contract, *quasi* contract, remedial obligation, indorsement or assignment). It makes no difference how he acquired his property right; if he has a disposal property right he may make a sale thereof. A sale, as a contract to sale, must possess all the essential elements of all other contracts—agreement, competent parties, consideration, definiteness, intention to create legal obligation, freedom from vitiating circumstances, legality, and such formalities as are required by the law of evidence, but this is not the place for a discussion of them. The one thing which distinguishes a sale from all other contracts is the transfer of the general property, or the passing of the title. If the contract transfers the title to corporeal chattels it is a sale; if it does not it is not a sale. If it contemplates the passing of title to corporeal chattels in the future it is a contract to sell; if it passes the title to incorporeal chattels it is an assignment; and if it has a different subject-matter than any of these it is a contract of some other class, as for example a principal con-

[1]Hull *v.* Hull, 48 Conn. 250.

tract of bailment, or of employment, or of insurance, etc., or an accessory contract of warranty, etc.

§ 8. CHATTELS MUST BE SPECIFIED AND CONTRACT UNCONDITIONAL.

An executed sale is a contract, but it does not need to be an executed contract. An executed contract is one all of whose terms have been performed; but, though an executed sale necessitates the passing of the general property, many other terms of the contract may be still unperformed. Sales are distinguished from contracts to sell by the passing of title, but it is sometimes a difficult matter to determine when the title will pass under a contract. The great test for determining when the title will pass is the intention of the parties, so that if it is the intention of the parties that the title shall pass at the time the contract is made there is a sale, but if that is not their intention, there can be only a contract to sell. But sometimes it is as difficult to ascertain the intention of the parties as it is to decide whether the title has passed. If the parties clearly express their intention, that is decisive; but if they do not express the same, the intention must be ascertained from the language of the parties, the subject-matter of the agreement, and the various facts and circumstances attending the transaction.[1] All of these matters may be grouped into two classes, which may be called tests of intention, and subtests as to the passing of title: (1) are the chattels specified? (2) is the obligation to transfer the title conditional? Both tests must be used together. If the chattels are specified and the obligation is unconditional, and there is no other expression of intention, there is a sale. These tests are enough to indicate that it was the intention of the parties that title should pass at the time of contract. But, if either the chattels are not specified, or the obligation to transfer title is conditional, the title does not pass at the time of contract and the contract can be only a contract to sell. These conditions are precedent, or concurrent, and may be express or implied. They generally relate either to putting the chattels into a deliverable state, or to ascertaining

[1] Hatch *v.* (Standard) Oil Co., 100 U. S. 124.

the price, which conditions may be performed by the vendor, or vendee, or a third party, but the condition may be some external event. In the case of conditions in a contract to sell chattels, the title will ordinarily pass upon the happening or performance of the condition; but where there is a contract to sell unascertained or future goods by description (chattels not specified), the title to such goods does not pass until goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller by the assent of the buyer, or by the buyer with the assent of the seller. Such assent may be express or implied, and may be given either before or after the appropriation is made, and the seller is given implied authority to appropriate for the buyer whenever the latter asks the former to do anything with respect to the goods for him (as ship), which can only be done on the theory that the title has passed.[1]

[1]Andrews *et al. v.* Durant *et al.*, 11 N. Y. 35; Nofsinger *et al. v.* Ring, 71 Mo. 149; Goddard *v.* Binney, 115 Mass. 450.

CHAPTER XXIII.

VIOLATIONS OF PERSONAL PROPERTY.

I. Violations of Rights In Personam—Breaches of Contracts, §§ 1-4.
   (Before performance is due, after part performance, by promisor, and by promisee), § 1.
   A. By repudiation, § 2.
   B. By prevention, § 3.
   C. By failure of performance, § 4.
      (I) Of independent promises, § 4.
         (Absolute, divisible, or subsidiary), § 4.
      (II) Of dependent promises, § 4.
         (A) Promissory conditions precedent (express, implied).
         (B) Promissory conditions concurrent (express, implied).
         (C) Promissory conditions subsequent (express), § 4.

II. Violations of Rights In Rem—Torts, § 5.
   A. Conversion, § 5.
   B. Deceit, § 5.
   C. Infringement of trademark, etc., § 5.
   D. Procuring refusal to contract, or breach of contract, § 5.
   E. Negligence, § 5.
   F. Nuisance, § 5.
   G. Trespass, § 5.

§ 1. Breaches of Contracts.

A contract is broken if the promisor in a valid unilateral contract, or either party in a valid bilateral contract, or the party bound in a voidable contract, or quasi contract, refuses, prevents, or fails in performance of the obligation which the contract or quasi contract imposes on him.

A breach of contract or *quasi* contract is a wrong as much as a tort is. A right *in personam* can no more be rightly vio-

lated than a right *in rem*. *Quasi* torts are disregarded in this statement, but the statement is true as to them. Breaches of *quasi* contract need no further discussion, but breaches of contract do. The nature of a promise is such that it gives the promisee a right to the thing promised, and the promisor the corresponding duty to give or do the thing promised—not the duty to perform his contract, or pay damages, as he may elect. In case of breach of contract the law steps in and compels either specific performance in certain cases or, if not specific performance, payment of damages, for the double purpose of placing the particular person injured in the same situation as though performance had been rendered, and to deter people generally from breaking their contracts. Conditions, whether express or implied, cannot be modified or dispensed with by a court, but a breach must go to the essence of the contract. In the case of express conditions every breach, whether before performance is due or after part performance, goes to the essence of the contract because the parties have made all the conditions essential; but in the case of implied conditions, while, except in equity, an anticipatory breach, or breach *in limine*, goes to the essence of the contract, a breach after part performance will not in law or equity go to the essence of the contract if it relates simply to the time of performance. What is said about breach of contracts applies to all contracts, e. g., conveyance, lease, sale, bailment, loan, insurance, employment, etc.

§ 2. BY REPUDIATION.

A contract not upon a condition precedent is broken if either party to a contract absolutely and unequivocally renounces entire performance, so far as he is concerned, either before performance is due or in the course of performance and the other party acts on the renunciation.

The repudiation of a contract may be withdrawn, at any time before the other party acts on it, but not afterward. In order to constitute a breach the repudiation must be absolute and unequivocal and refer to the entire performance, to which

the contract still binds the promisor. Actual failure to perform the contract is not necessary. If he so desires, the promisee may refuse to accept the repudiation and thus keep the contract alive, so long as he does not increase the liability of the promisor. D agrees with P to purchase one-third of a cargo of tea that P is to bring from China, subject to its arrival in Belfast and other contingencies, which make the delivery of the tea a condition precedent. While the tea is en route D notifies P that he refuses to fulfill the contract, and this refusal continues down to and includes the time when D is bound to receive. Is D guilty of breach? Yes. He may retract at any time before performance if P has not acted on his refusal, but if P has acted on it, and, at all events, after time for performance has arrived, D is estopped from setting up a withdrawal of his refusal.[1] P and D enter into a contract under seal, by which P covenants to furnish D 3,900 tons of iron chairs, to be made and to be delivered according to certain stipulations, and to be paid for one month after each delivery, on the production of a certificate of D's engineer. P furnishes 1,787 tons and obtains a certificate from the engineer. Thereupon D notifies P that he will not take any more and P stops making them. Must P show that he has the chairs ready to deliver before he can maintain an action for breach of contract? No. The renunciation of the contract by D, acted on by P, amounts to a breach, even though D should later ask P to go on with the contract, and it excuses P from performance on his part. P would be ready to complete the contract if it had not been renounced.[2] In consideration of P's promise to enter D's employment as a courier, for three months, to begin June 1st, D promises to employ and pay him a certain wage. On May eleventh, D writes P that he declines his services and, on May twenty-second, P sues D for breach. Is P entitled to commence an action for breach before the day of performance? Yes. Anticipatory breach. These are concurrent conditions. and each party must hold himself in readiness to perform, and, if one renounces his performance, it would be unreasonable to hold the other to readiness to perform. The injured party

[1]Ripley *v.* McClure, 4 Exch. 345.

[2]Cort *v.* Ambergate, N. & B. & E. J. R. Co., 17 Q. B. 127; Rayburn *v.* Comstock, 80 Mich. 448, 45 N. W. 378.

may either sue immediately or wait until the day of performance.[1] D promises to marry P, on the death of D's father, but while his father is still living, D announces to P his intention of not fulfilling his promise on his father's death. Can P sue at once without waiting for the father's death? Yes. The fact that before the father's death D himself may die, or change his mind, is immaterial. By anticipation the contract is taken to be broken to all its incidents, if the promisee so desires. The termination of the betrothal is an immediate breach. If the promisee chooses to treat the notice as inoperative the contract is kept alive for the benefit of both parties. From the standpoint of logic it is easier to maintain that there can be no breach until the time for performance arrives.[2] P and D are ice dealers, and, in consideration for P's promise to furnish D 3,245 tons of ice in 1879, D promises to return the same quantity of ice to P in the shipping season in 1880. Ice is worth fifty cents a ton in 1879. In July, 1880, when ice is worth $5 a ton, P demands from D the ice promised and D refuses to return it immediately, but offers to pay fifty cents, or return the ice when the market reaches that point. Can P sue D at once for breach? No. This is only a qualified refusal, and there will be no breach by failure to perform until after the shipping season is over.[3] On the 11th of November, P and D enter into a contract, by which P agrees to deliver to D certain coke from and after December 1st. November 19th, P notifies D that he will not deliver the coke, but instead of acting on this, on December 4th, D still insists upon compliance with the contract. Does D have a cause of action for damages? No. The contract is still alive.[4]

§ 3. BY PREVENTION.

A contract is broken if, before its performance has commenced or during performance, the fulfillment of the

[1] Hochester *v.* De La Tour, 2 El. & Bl. 678.

[2] Frost *v.* Knight, L. R. 7 Exch. 111; Johnstone *v.* Milling, 16 Q. B. Div. 460. *Contra,* Daniels *v.* Newton, 114 Mass. 530.

[3] Dingley *v.* Oler, 117 U. S. 490.

[4] Zuck *v.* McClure, 98 Pa. 541.

promise is rendered impossible, either by the promisor's own act or by the act of the promisee.

Whether the prevention comes from the promisor or promisee makes no difference so far as breach of the contract is concerned; it affects simply the remedial rights of the parties. M leases land to S for twenty-one years and covenants that at any time during S's life, upon surrender of his lease, M will make a new lease during the residue of the years. By accepting a fine M grants the land to another and disables himself from taking a surrender or making a new lease. Can S sue M for breach of obligation, without first surrendering his old lease? Yes. Breach on the part of M excuses S from performance of the condition precedent.[1]

§ 4. FAILURE TO PERFORM.

A contract is broken if a party thereto fails to perform either an independent promise, absolute, divisible, or subsidiary, or a promissory condition, precedent, concurrent, or subsequent, resting on him. If his promise is subject to a condition precedent, the condition precedent must be performed before he can be guilty of breach in not performing his own promise, and, if the promises are concurrent conditions, all he has to show is readiness to perform.

The conditions referred to here are those called vital, or promissory. With mere casual conditions we here have no concern. The questions involved in connection with the latter relate more especially to discharge of contract, and will be considered fully in the succeeding chapter. Failure to perform an independent promise amounts to a breach. Why? Because, if the independent promise is an absolute promise, the obligation to perform the same does not depend upon any other performance; if the independent promise is one of divisible promises, a breach thereof by one party does not preclude a recovery upon the other promises against the other party; if the independent promise is a subsidiary promise or warranty, it is collateral to the main contract, so that the per-

[1] Sir Anthony Main's Case, 5 Coke, 20 b.

formance or nonperformance of the warranty does not discharge or constitute a breach of the main contract. If the promisor, acting in good faith and attempting to perform the contract, does substantially do so, but from inadvertence and mistake leaves some trivial defects, while this is a technical breach so that he cannot sue on the contract, yet it will not prevent recovery in *quasi* contract for the benefits. P leases premises from D, P covenanting to pay rent and to make repairs, and D covenanting for quiet enjoyment. P fails to perform his covenant to pay rent and D then breaks his covenant of quiet enjoyment by threatening P's subtenants with legal proceedings if they do not pay D. Are these covenants dependent? No. A breach of either gives a cause of action.[1] P conveys to O the equity of redemption of a plantation in the West Indies, together with a stock of negroes, and covenants that he has a good title, and that O shall quietly enjoy the same, in consideration of O's payment of 500 pounds and promise to pay an annuity of 160 pounds for P's life. O refuses to pay the annuity, for the reason that P does not have title to some of the negroes. Is he guilty of breach? Yes. The covenant of title to these negroes is not dependent, as P has performed in part. Breach of the covenant by P gives O a cause of action for damages but it does not excuse him from all liability.[2] P and D enter into a contract by which P promises to sell to D for a named price as much gas coal, in quality like a former cargo, as D's ship can fetch in nine months from a distant point. P ships coal of a quality inferior to the former cargo, but D accepts it, and P detains D's ship in loading, and D refuses to send his ship for any more coal, though P is ready to supply it. Is D guilty of breach? Yes. D, by accepting the coal, waives the implied promissory condition precedent that it shall be like the sample, and the other promises being concurrent conditions, readiness to perform on P's part is sufficient.[3] P agrees to sell O, at a certain price, 10,000 boxes of glass, to be of approved standard qualities, to be delivered during the four succeeding months and paid for on delivery. P delivers and O pays, for about 5,000 boxes which are not of the approved standard qualities, and then O refuses

[1] Edge *v.* Boileau, 16 Q. B. Div. 117.

[2] Boone *v.* Eyre, 1 H. Bl. 273, note.

[3] Jonassohn *v.* Young, 4 Best & S. 296.

to receive any more. Is P guilty of a breach which excuses O from further performance? Perhaps he is guilty of breach; but, so far as the discharge of the contract is concerned, O has waived this condition and is now relegated to damages for the breach, and, as he has refused to continue performance, he is guilty of breach on his own part.[1] In a lease of a hotel and farm by D to P, D covenants to put fences and buildings in good condition and maintain them thus, and reserves the right of entry to view and make improvements. D fails to keep premises in repair, but P never gives him notice of condition of premises. Is D guilty of breach? Yes. Notice is not a condition implied here, as D might know or make himself acquainted with the need of repairs, on account of his reservation.[2] D guarantees the payment of 300 pounds toward the payment of certain goods, in consideration of P's guaranty that two bills of exchange of 162 pounds shall be paid when due. The goods are not paid for and D refuses to pay his guaranty until P pays his. Are these promises dependent? No. The promises are in exchange for each other, but the performances are not, as neither expects to do anything. There is no basis for implied conditions.[3] In a lease, among other stipulations, the lessor, D, agrees with P to make necessary repairs on the outside of buildings. A carriage house falls and injures P's carriage, and D refuses to rebuild. P refuses to pay rent. These covenants are independent. P can be ejected for breach of covenant to pay rent and D is liable in damages for breach of covenant to repair the outside of the building from the time of fall to ejection, for this covenant includes the whole of the building. D is not liable for injury to the carriage, as the fall of the building is not covenanted against.[4] In consideration of fees promised, D undertakes to conduct a law suit for P to collect a debt, but is so negligent in delaying to sue out execution that the debt is lost. D is guilty of violating the obligation which he impliedly assumed to faithfully and carefully transact the business intrusted to him.[5] A husband, without any special

[1]Cahen *v.* Platt, 69 N. Y. 348.
[2]Hayden *v.* Bradley (6 Gray) 425.
[3]Christie *v.* Borelly, 29 Law J. C. P. 153.
[4]Leavitt *v.* Fletcher, 92 Mass. (10 Allen) 119.
[5]Stimpson *v.* Sprague, 6 Me. 470.

contract, manages his wife's estate. He is entitled to reasonable compensation for his services within the agency, and if she refuses to pay she is guilty of breach.[1]

§ 5. TORTS.

We do not speak of violations of the personal property one has in remedial obligations, for such property is the result of one legal wrong already. The violations of the other personal property rights *in personam* acquired by original acquisition are known as breaches of contracts and *quasi* contracts if caused by the party under obligation. Violations of such rights are torts if caused by outsiders, for as to them they are rights *in rem*. The violations of the personal property rights *in rem*, both those acquired by original acquisition in occupancy, accession, and intellectual labor, and those acquired by secondary acquisition in some act of law, in gifts, wills, bailments, leases, assignments, indorsements, and sales, are known as torts, many having specific names. Such rights *in rem* may be either absolute or qualified; a violation of either is a tort of some kind. One who violates the qualified property right another has in a dead body, even by mutilation of the dead body, or disturbing the grave, or defacing the monument, is guilty of trespass. A person who violates the qualified property of a bailee as respects chattels in his possession is guilty of conversion if he exercises acts of dominion over the same, or of trespass for simple injury by force, or of negligence if there is an act or omission in failing to exercise ordinary care and it causes injury. The bailee may recover either for the injury to his own property, or for the total injury, and hold the excess for the bailor. A person who violates the qualified property of another in wild animals is guilty of the same torts as above. A person is guilty of the tort of conversion whenever he exercises dominion over the personal property of another, whether it is absolute or qualified, general or special, or it relates to corporeal chattels or incorporeal chattels evidenced by corporeal. A person is guilty of the tort of deceit, or fraud, whenever he misleads another to his damage by false and

[1] Patten *v.* Patten, 75 Ill. 446.

fraudulent representations. A person is guilty of the tort of infringing a trademark when he dresses up his own goods so as to induce ordinary purchasers to believe that they are the goods trademarked by another; of infringement of patent when he makes, uses or vends, without the owner's permission, a thing substantially identical with a thing patented; of infringement of a copyright when he prints, publishes, imports, or knowingly exposes for sale any such printings, etc., of any book, etc., which has been copyrighted, or such a part thereof as to sensibly diminish the value of the same. A person is guilty of the tort of negligence to personal property when, being in a situation to know that acts or omissions of his in failing to exercise ordinary care toward such property will be apt to do injury, yet is guilty of such acts or omissions and causes injury. A person is guilty of a nuisance affecting personal property when he causes or suffers the existence upon his own premises, or in public ways or waters, anything not naturally there which while there causes damage to another's personal property. A person is guilty of the tort of procuring refusal to contract when he interferes with another's enjoyment of the fruits and advantages of his enterprise, industry, skill, and credit by interfering with a known relation which he has to a third person to his actual damage. A person is guilty of the tort of procuring a breach of contract when, knowing of the existence of a contract between a second and a third person, he procures such third person to break his contract to the damage of such second person. A person is guilty of the tort of trespass to personal property when he takes or interferes with the possession of another's chattels without permission, unless in either case he has a better right than such other person to the possession of the objects of such property.

The following are illustrations of torts which violate the rights of personal property: A street-car motorman carelessly and negligently runs his car at a very high rate of speed in the business part of the city and across cross streets, and in so doing runs into and demolishes a vehicle belonging to P and in which P is riding across the street-car track, P not being guilty of contributory negligence. The street-car company is liable for the tort of negligence. A's horse strays away. B sees the animal, catches it, puts it into his stables, and refuses to give it up when A discovers it there and de-

mands it. B is guilty of conversion. A shoots and kills some hens and turkeys owned by B on B's land without having permission to do so, but he does not appropriate the articles to his own use. He is guilty of the tort of trespass. The same would be true in case one shoots wild game on another's land.

D, a lawyer, is employed by P to take statutory proceedings against his apprentices for misconduct. D proceeds upon a section of the statute relating to servants and not to apprentices. D is guilty of the tort of negligence. This wrong may also be treated as a violation of the contract rights resulting from the relation of employer and employee.[1] D bought an ox of P, paying $25 therefor, and was directed to go and take the animal from an inclosure. D, by mistake, took the wrong ox. He is guilty of conversion.[2] D, with the knowledge of the existence of a valid contract between P and X, an innkeeper, by which contract P has the exclusive right to secure and send guests to X's hotel throughout certain territory, induces X to break his contract with P and to employ D for the same purpose in the same territory. This is the tort of procuring breach of contract, and D is liable for the damage caused P.[3] D sells P three horses for $400, which is paid. The horses are afflicted with glanders, but D falsely represents that they are sound, and P reasonably relies upon the representation. The horses have to be killed because of their disease and other property has to be burned to stop the contagion. D is guilty of the tort of deceit.[4] If any tort affecting personal property (as any other tort) is committed by a servant or agent the master or principal is liable if the same is within the scope of the servant or agent's authority; otherwise such servant or agent alone is liable. A servant or agent is not personally liable for a wrongful act done within the scope of his employment if he does not purposely participate in the wrongdoing.

[1]Hart *v.* Frame, 6 Clark & F. 193.
[2]Hobart *v.* Hagget, 12 Me. 67.
[3]Beekman *v.* Marsters, 194 Mass.
[4]Merquire *v.* O'Donnell, 103 Cal. 50.

CHAPTER XXIV.

HOW PERSONAL PROPERTY IS LOST, DISCHARGE OF CONTRACTS, ETC.

I. By Original Acquisition of Rights In Rem; by Occupancy, Accession and Confusion, § 1.

II. By Secondary Acquisition of Rights In Rem and In Personam, § 1.

III. By Taxation, Eminent Domain, Police Power, § 1.

IV. By Discharge of Rights In Personam, §§ 1-20.

A. Of the antecedent rights of contracts, §§ 2-12.

(I) By operation of the original contract, § 3, § 4.

(A) Casual conditions precedent, § 3.

1. Express, § 3.

2. Implied, § 3.

(B) Casual conditions subsequent, § 3.

1. Express, § 3.

2. Implied, § 3.

(II) By performance, §§ 4-7.

(A) Independent promises, § 4.

(B) Promissory conditions, § 5.

1. Precedent, § 5.

a. Express, § 5.

b. Implied, § 5.

2. Concurrent, § 6.

a. Express, § 6.

b. Implied, § 6.

(1) Payment, § 6.

(2) Tender, § 6.

(3) Alternative promises, § 6.

3. Subsequent, § 7.

a. Express, § 7.

(III) By a new contract, §§ 8-9.

(A) Rescission, § 8.

(B) Substitution, § 9.

1. Same subject-matter, § 9.

a. Merger, § 9.

(C) Partly old, partly new subject-matter, § 9.

(D) New parties, § 9.

(IV) By cancellation and surrender, § 10.
(V) By alteration, § 11.
(VI) By breach, § 12.
A. Repudiation, prevention or failure to perform, § 12.
1. Promissory conditions concurrent, not absolute promises, § 12.
2. Promissory conditions subsequent, not divisible promises, § 12.
3. Promissory conditions precedent, not subsidiary promises, § 12.
B. Of remedial rights, §§ 13-20.
(I) By the act of the parties, §§ 14-16.
(A) Release, § 14.
(B) Accord and satisfaction, § 15.
(C) Arbitration and award, § 16.
(II) By act of law, §§ 17-20.
(A) Judgment, § 17.
(B) Bankruptcy, § 18.
(C) Statute of limitations, § 19.
(D) Change in law, § 20.

§ 1. How the Rights of Personal Property Are Lost.

All the rights of personal property may be lost by confiscation, succession, judgment, intestacy, insolvency, marriage, adverse possession, gift, will, bailment, assignment and indorsement or sale, and also by taxation, eminent domain, and the exercise of the police power; personal property rights in rem may also be lost by occupancy, accession and confusion; and personal property rights in personam may also be lost by discharge.

In general it may be said that all the ways of acquiring personal property are also ways of losing it, for as one man acquires the same another loses it. The only exceptions to this rule are those where the chattels to which personal property is acquired by original acquisition do not at the time have an owner, as in acquiring personal property by intellectual labor. As a person may acquire personal property by occupancy in something which is a part of the common stock of unowned

things, so he may lose his personal property in a thing owned by abandoning it to the common stock of unowned things. As a person may acquire personal property by contract, *quasi* contract, and remedial obligations, so he may lose the same by discharge. Discharge and abandonment destroy one man's personal property without transferring it to another; but all the means of acquiring title by secondary acquisition destroy one man's personal property by transferring it to another, and this is likewise true of accession and confusion. Personal property may also be lost by the state's taking the same under the power of taxation, or the power of eminent domain, or in the exercise of the police power. Taxation, eminent domain, and the police power have already been sufficiently treated in the chapter on real property, and all the methods of losing personal property by original acquisition and secondary acquisition have been sufficiently treated in the chapters on personal property, so that we shall confine our attention in the rest of this chapter to a consideration of the matter of the discharge of personal property rights *in personam.*

Personal property rights *in rem,* if created by contract, like rights *in personam,* may be lost by the happening of conditions and by the termination of the interest which a person has in any objects of such ownership. A might exchange a horse with B for a wagon upon the condition subsequent that if at the end of six months B is not satisfied with the horse he may return the same. During the six months A is the owner of the wagon, but if at the end of the six months B should not be satisfied and should return the horse A would lose his property in the wagon. A person who hires the use of a thing for a specified time will lose his property right therein at the expiration of such time. If personal property is given to A for life with remainder to B, A's interest will terminate with his life.

Thus it is seen that there are a great many ways of a man's losing his personal property during his life, and if he does not lose it during life he will lose it at death; but in such case it goes to the personal representatives of the former owner to finally go as he may have directed by will, or if he has not left a will, as provided by law, so that there is the same sort of continuity of interest in personal property as in the case of real property.

§ 2. DISCHARGE OF THE ANTECEDENT RIGHTS OF CONTRACTS.

The antecedent rights of contracts may be discharged by operation of the terms of the original obligation as expressed by the parties or implied by law, by performance, by means of a new contract, and by breach, alteration or cancellation of the old contract.

§ 3. DISCHARGE BY CASUAL CONDITIONS.

A contract lapses or is discharged from the time of nonperformance or nonfulfillment of a casual condition precedent or subsequent, express or implied, depending either upon one of the parties or a third person's doing a specific thing, or upon the happening of an uncertain event. When a party prevents a third person agreed on from performing the condition, his act also amounts to a breach.

A vital or promissory condition precedent is a promise by one party, whose performance discharges the person making the same but whose nonperformance, at a fixed time, or if no time is fixed within a reasonable time from the making of the contract, *ipso facto*, discharges the other party, and also gives a cause of action for breach. These are more appropriately treated under "breach" and "discharge by breach and performance." A suspensory or casual condition precedent merely suspends the operation of the promise until the condition is fulfilled, and it is the condition appropriately treated here. The discharge here referred to includes antecedent rights only. Certain remedial rights survive. Their discharge will be referred to hereafter. Casual conditions may be waived and then they have no more effect than as though they had never existed; but, unless waived, express and inferred conditions must be fulfilled to the letter; otherwise the court would be making a new contract for the parties. Yet this rule is often relaxed enough to allow a recovery in *quasi* contract, as when the contract has been substantially complied with, and where an engineer, whose certificate is a condition precedent to recovery, withholds the same through fraud or bad faith, or collusion, or mistake. An insurance company, for the promise of L and B to pay stipulated premiums, promises to

pay them 7,000 pounds, in case of loss by fire, upon condition that L and B procure from the minister and churchwardens of the parish a certificate that they believe the loss is occasioned without fraud. Loss occurs, but the minister and churchwardens refuse to certify, though other householders are willing to do so. Can L and B recover the amount of loss? No. This is a valid casual express condition precedent and its nonperformance discharges the contract. One party cannot substitute a new condition for one which both parties have originally made.[1] H, in consideration of S's promise to dispatch his vessel and receive a certain cargo at certain places, on his part, promises to provide the cargo at those places, provided the ship arrives and is ready by the 25th of June. The ship does not arrive until the 3rd of July. Is H discharged? Yes. This is a casual condition precedent, and as it is impossible for it now ever to happen S can never sue. So far as appears S does not promise to have the vessel at the designated points by the 25th of June. If he had, he would be liable for breach of a promissory condition.[2] P agrees to build a building for D, who agrees to pay a certain price therefor, in installments, as the work progresses upon receiving a certificate by the architect to that effect, the price of additions, or alterations, to be added to the sum contracted for upon condition that the price is first settled by the architect of D, who is sole arbitrator. P performs extra work and renders an account, which the architect checks, but the architect has given no certificate. Can P recover from D? No. The production of the certificate is a condition precedent and must be done before liability, other than *quasi* contractual, arises.[3] A agrees to do certain work for B, in consideration for B's promise to pay what a certain architect estimates it is worth, payment to be made upon the production of his certificate. A does the work, but the architect, in collusion with B and by his procurement, refuses to give A a certificate. Can A recover? Yes. This is in the nature of a *quasi* contract. The law will not allow B to take advantage of his own wrong.[4] N agrees to do the mason work on two buildings for W, in consideration of W's promise to pay there-

[1] Worsley *v.* Wood, 6 Term R. 710.
[2] Shadforth *v.* Higgin, 3 Camp. 385.
[3] Morgan *v.* Birnie, 9 Bing. 672.
[4] Batterbury *v.* Vyse, 2 Hurl. & C. 42.

for $11,700, in installments, upon the certificate of one M that the work is satisfactory. N substantially, but not strictly, performs the contract, but M refuses the certificate. Can N recover? Yes, in *quasi* contract, because of benefits received. The contract is a valid contract upon an express condition precedent, and if N did not have a good excuse for nonperformance so that W cannot set up the express contract, there could be no recovery until performance of the condition.[1] P and his tenant D enter into a contract by which P agrees to sell, and D to buy, certain goods at a valuation to be fixed by N, appointed by P, and M, appointed by D. M refuses to value the goods. D refuses to take the goods. Can P recover therefor? No. Not on the express contract, for there is an express condition precedent unperformed; not on *quasi* contract, for the goods have not been accepted.[2] C demises certain land to W for twelve years, and in the indenture is, among others, the covenant that W will dig and raise from the land an aggregate amount of not less than 1,000 tons nor more than 2,000 tons of potter's clay in each year of the tenure. There is not 1,000 tons of clay in the land. Is W discharged from liability? Yes. His particular covenant fails because of the condition subsequent implied that if there is no clay the covenant is discharged.[3] In March P and D enter into a written contract, whereby P agrees to purchase for a certain price, and D agrees to sell, 200 tons of Regent potatoes, grown on land belonging to D, to be delivered in September and October. D plants sufficient ground to ordinarily produce that crop, but a disease attacks the potatoes and ruins nearly the whole crop. Is D discharged? Yes. As he agrees to sell potatoes, grown on his land, there is a condition subsequent implied that if there is no crop he is discharged. But if the promise had been general, to sell 200 tons of Regent potatoes, no condition would be implied.[4] P and D enter into a contract by which D promises to furnish the Wachtel Opera Troupe to sing on specified dates. Wachtel himself, because of his fame, is the chief attraction. Without him the troupe is worthless and no one else can fill

[1] Nolan *v.* Whitney, 88 N. Y. 648.

[2] Thurnell *v.* Balbirnie, 2 Mees. & W. 786.

[3] Clifford *v.* Watts, L. R. 5 C. P. 577.

[4] Howell *v.* Coupland, 1 Q. B. Div. 258; Anderson *v.* May, 50 Minn. 280, 52 N. W. 530.

his place. He is sick and unable to sing those nights, and D does not furnish the troupe. Is D discharged? Yes. A contract for personal services is subject to the implied condition that the person to perform them shall be able to do so, and if he dies or becomes disabled, the obligation is extinguished.[1] P contracts to work for D during a sawing season, but owing to a cholera scare leaves D's employ, without his consent, before the expiration of the term. This is sufficient excuse to discharge P from liability, but any recovery on his part will have to be *quasi* contractual.[2] Illness will also excuse an agent from performance and will thus discharge the contract of agency. Death of an agent or a partner will discharge such contracts. A partnership is also terminated by withdrawal of a partner, alienation of a partner's interest, bankruptcy, etc.

§ 4. Discharge by Performance.

A unilateral contract is discharged by the promisor's performance of his promise; a bilateral contract, by both parties' performance of their promises. When one party performs on his part the contract is discharged as to him.

If one party to a bilateral contract has discharged his part of the obligation, he is discharged from further liability, but the contract is still in existence. Performance may relate to independent or dependent promises. Hence, conditions precedent and concurrent have to be considered again in this connection. But performance relates only to promissory conditions express or implied, not to casual. Promissory conditions may be waived so far as the question of the discharge of the contract is concerned, but a cause of action for the breach still survives. For this reason they are sometimes called warranties, but they are not collateral undertakings, and, therefore, are not true warranties. If promissory conditions are performed the contract is discharged, and no cause of action for breach arises.

[1]Spalding *v.* Rosa, 71 N. Y. 40; Lacy *v.* Getman, 199 N. Y. 109, 23 N. E. 452.

[2]Lakeman *v.* Pollard, 43 Me. 463; cf. Dewey *v.* Alpena School Dist. 43 Mich. 480, 5 N. W. 646.

§ 5. PERFORMANCE OF PROMISSORY CONDITIONS PRECEDENT.

Performance of a promissory condition precedent, according to a reasonable construction of its meaning, operates as a discharge as to the person under obligation to perform it.

P covenants that his ship shall go on an intended voyage, for D's covenant that, if the ship goes and returns, he will pay P a certain sum. The ship makes the voyage and returns. P's promise is an express promissory condition precedent, but performance of it discharges P.[1] An insurance company promises, in its policy, to indemnify K against loss by fire to a certain amount, provided he will keep a complete set of books showing purchases and sales, and a complete record of business, together with an inventory, and keep the same in a fireproof safe at night and when the store is not open for business, or in some secure place. Loss occurs from a conflagration, before which, except for his inventory, K removes to his residence all of his books, consisting of ledger, cash book, day book and inventory. The inventory is either lost or destroyed in the safe. Can he recover from the company? Yes. These are promissory conditions, but they must have a reasonable construction, giving them which, K is not bound to keep such books as the most expert bookkeeper might, or in a safe that is absolutely fireproof, and, with such construction; K has fulfilled the conditions.[2] A life insurance company issues a policy of insurance to W, upon her life, it being a condition precedent that the statements in the application of W are true, as they are warranted (i. e. made material representations) and made a part of the policy. In the application W says she has no brothers dead, when, as a fact, one brother in London, unknown to her, has died four years prior. This is another promissory condition, but it must have a reasonable construction, and, in the absence of more express stipulation, this condition will be interpreted to mean that so far as she knows she has no brothers dead, not that brothers are not dead, and thus interpreted she has performed her condition.[3]

[1]Constable *v.* Cloberie, Palm. 397.
[2]Liverpool & L. & G. Ins. Co. *v.* Kearney, 180 U. S. 132.
[3]Globe Mut. Life Ins. Ass'n *v.* Wagner, 188 Ill. 133, 58 N. E. 970.

§ 6. PERFORMANCE OF PROMISSORY CONDITIONS CONCURRENT.

Performance or a promissory condition concurrent operates as a discharge as to the person under obligation to perform it, and mere readiness to perform is all that is required of him to put the other party in default.

In order to discharge the obligation of paying a sum or money due, the obligor, or debtor, must pay the exact amount due, in genuine money, at the time and place agreed, or pay something accepted by the creditor as a substitute. In the absence of agreement the presumption is that negotiable paper of the debtor is taken only as a conditional discharge, and if it is not paid the original debt may be enforced. If a creditor accepts payment from a volunteer, in some jurisdictions, the debtor may take advantage of it. If an instrument taken is that of a third person, it is presumed payment. In case of a number of debts owed to the same creditor, if a partial payment is made, with no directions from the debtor as to how it shall be applied, the creditor may generally apply it as he sees fit.

As applied to money demands, a tender or attempted performance of payment by the debtor, or some one authorized by him, to the creditor, or some one authorized by him, according to the time, place and mode of payment prescribed in the contract, if unconditional and kept good by readiness at all times to pay on demand, while it does not discharge the debt, yet it suspends the running of interest, precludes damages for nonpayment and gives the debtor a right to costs in case of suit.

In an alternative promise, where one promises to do one of several things, the right, within the time set by the contract, to elect which shall be done, rests with the promisor, unless the contract expressly or impliedly vests the right in the promisee, in which case he must give timely notice of his election, and an election of one alternative discharges the others.

The following are illustrations of performance of promissory conditions concurrent: By an indenture P covenants to convey to W certain land, pay $1,500 and give a note for $3,000 within forty-five days, in consideration of W's covenant to convey other land to P within forty-five days. Before the expiration of the forty-five days W dies, but no administrator

is appointed, until some time later. Within a reasonable time after the administrator is appointed P tenders performance. Is this sufficient? Yes. In implied concurrent conditions readiness to perform is all that is required and impossibility to do this before discharges P from any breach.[1] T and S enter into a written contract, by which S agrees to engage and employ T, as its servant and representative salesman, for four years and to remunerate him by a stipulated salary, and T agrees to devote the whole of his time to S, etc. After the expiration of a little over half of the time, S notifies T that he will not be allowed to perform any more duties but will be paid his wages, as usual, in the future. Is this a breach or performance? Performance. S is not under obligation to find work for T, and so long as he is willing to pay wages there is no breach. If T were working on commission the case would be different.[2] By a written contract, B agrees to sell to F a cargo of maize as per bill of lading dated between the 15th of May and 30th of June, payments to be made in cash in London in exchange for shipping documents. B offers to F a cargo of one vessel but without shipping documents, so that F is not obliged to accept it. Later, but within the time of performance, B offers the cargo of another vessel, which F refuses to accept, on the ground that he is not bound to accept it as a substitute for the first cargo. Is tender of shipping documents waived? Yes. As the first ship is not a proper one B is entitled to withdraw the tender and make another.[3] In a written contract, P promises to sell certain real estate, of which he is not the owner and to which he does not have the ability to compel the owner to convey the title. P gets the owner to offer the place to D on different terms, but D does not accept these, and D also refuses to complete the contract with P. Does P have a cause of action? No. There is a concurrent condition which he must perform, and which he cannot. This discharges D, unless he has waived performance; but P cannot take advantage of any waiver, for he has no claim on which damages can be predicted.[4]

[1]Pead *v.* Trull, 173 Mass. 450, 53 N. E. 901.

[2]Turner *v.* Sawdon [1901] 2 K. B. 653; Turner *v.* Goldsmith [1891] 1 Q. B. 544.

[3]Borrowman *v.* Free, 4 Q. B. Div. 500.

[4]Gray *v.* Smith, 76 Fed. 525; Id. (C. C. A.) 83 Fed. 824,

§ 7. PERFORMANCE OF PROMISSORY CONDITIONS: SUBSEQUENT.

What has been said in regard to discharge by performance of promissory conditions precedent is equally applicable to discharge by performance of promissory conditions subsequent. It should be noted that such conditions must be expressed.

§ 8. DISCHARGE BY NEW CONTRACT RESCINDING.

Any contract, not under seal, may be discharged by another contract rescinding it, though oral.

If the first contract is bilateral, and still executory, mutual abandonment of their rights under it will be a sufficient consideration for the contract of rescission; but, if the contract is unilateral, or bilateral executed on one side, a new consideration will have to be found by one party. This rule does not apply to a rescission under seal where the seal is effective; and where there is a document of title, by a surrender of it, an executed gift may be made. Hence, it is seen, whether or not the result is happy, that the doctrine of consideration, not only applies to the formation of a valid contract but also to its discharge by act of the parties; but it has no application to the party who has the election to avoid the obligation of a voidable contract. Except in the case of contracts relating to land, the statute of frauds does not apply to contracts of rescission. Rescission by act of the court has been treated under "Remedies." [1]

§ 9. DISCHARGE BY NEW CONTRACT, SUBSTITUTED.

A contract may be discharged by substituting for it a new contract, either having none of the terms of the old contract or having some of the old terms and some new, or having a new party in place of one of the parties to the old contract.

The first is a complete substitution; the second, a modification; the third, novation. An assignment does not discharge a contract, for the same contract continues; but in novation

[1] Coniers *v.* Holland, 2 Leon. 214; Flower's Case, Noy, 67; Langden *v.* Stokes, Cro. Car. 383; Edwards *v.* Weeks, 2 Mod. 259.

there is a new contract which takes the place of the old, and the party supplanted is discharged from all liability. If the subject-matter is within the statute of frauds, the new as well as the old contract will have to conform to its requirements. If a contract is wholly executed it cannot be rescinded or have another substituted for it. The parties may place themselves in their original position, but it will not only take a new contract to do so, but the fact that the contract accidentally deals with the same subject-matter does not make it a rescission. If a higher security is accepted for a lower, between the same parties and upon the same debt, as a specialty for a simple contract, the lower is presumed to be merged and extinguished in the higher. D offers to guarantee the payment of goods P may sell to K, up to 200 pounds, and P sells H goods of the value of 190 pounds. Before any breach, a new contract is entered into extending the time of credit for a promise of a joint note. This is a substituted contract, and discharges the old contract.[1] P, by a contract under seal, leases land to D, and one of the covenants in the lease is that D will yield up the premises at the end of the term, together with all improvements erected thereon. D assigns the lease to H and P agrees with H that if H will erect a greenhouse he may pull it down and remove it at the expiration of the term. As the contract under seal can be discharged only by an instrument of the same nature, the second agreement is of no effect and will be no defense to a suit for breach of covenant.[2] By a bill of sale, in the form of an indenture, P assigns to D a stock of goods, fixtures, etc., subject to a redemption in case P pays forty-two pounds by twenty-five consecutive weekly payments. On the day when the fourteenth payment becomes due, P asks D for a week's time and D says he may have it. Is this a discharge of his old obligation? No. There is no consideration for the new promise. Therefore, D may proceed on the old contract, to seize the goods.[3] W secures a judgment for $1,154 against E and A, co-partners. Thereafter, in consideration of $100 paid by E, W releases E from all liability and indorses this on the execution. A contends that this is a discharge of E, and, therefore, discharges A as the other joint debtor. Is this a

[1] Taylor *v.* Hilary, 1 Cromp. M. & R. 741.
[2] West *v.* Blakeway, 2 Man. & G. 729.
[3] Williams *v.* Stern, 5 Q. B. Div. 409.

valid discharge? No. It is without consideration.[1] B owes A $200. In exchange for A's promise to discharge B, C promises to pay B's debt to A. This is a discharge of the first contract between B and A by the new contract between C and A.[2]

§ 10. DISCHARGE BY CANCELLATION AND SURRENDER.

Contracts under seal, bills and notes, insurance policies and any other purely formal obligations, may be discharged by cancellation and surrender.

This is so because the document is not merely evidence of the obligation but is regarded as the obligation, and when the physical document is destroyed the obligation ceases. So, though a voluntary cancellation of any writing may not amount to rescission, yet, if it is the party's only legal evidence, it may prevent any suit. Z signs a bond, agreeing to pay A the interest on $1,500 during the latter's lifetime. A dies and his executor and heir sues on the bond. A indorses on the bond that after his decease it shall be of no effect. Does this release it? No. There must be either a complete contract to rescind or a delivery. A, in his lifetime, delivers the bond to H, with directions to burn it, but H neglects to do this. Is the bond cancelled? Yes.[3] M holds a promissory note against P, but transfers the possession of it to him, without condition, intending it as a gift *inter vivos*. P subsequently returns it to M, but without an intent to revest the title. Is the note canceled? Yes. A gift of a note *inter vivos* or *causa mortis* may also be accomplished by destruction of the note *animus donandi*.[4]

[1] Weber *v.* Couch, 134 Mass. 26.

[2] Roe *v.* Haugh, 12 Mod. 133; Trudeau *v.* Poutre, 165 Mass. 81, 42 N. E. 508.

[3] Albert's Ex'rs *v.* Ziegler's Ex'rs, 29 Pa. 50. See Cross *v.* Powel, Cro. Eliz. 483.

[4] Marston *v.* Marston, 64 N. H. 146, 5 Atl. 713; Darland *v.* Taylor, 52 Iowa, 503, 3 N. W. 516.

§ 11. DISCHARGE BY ALTERATION.

A contract embodied in a document is discharged by an intentional, material alteration, by addition or erasure by a party to the instrument or his agent, without the consent of the other party.

Of course, this rule applies only to executory contracts, for, if the obligation is already terminated by performance or any other discharge, there is nothing left to discharge by alteration. Aside from commercial paper, the loss of a written instrument only affects the rights of the parties, as it may occasion difficulty of proof, but if commercial paper indorsed in blank is lost before maturity, the owner loses his rights unless he offers indemnity to the party primarily liable. A signs a note and delivers it to B, who adds the words "with interest," or changes the amount payable, or inserts a name. Is the note discharged? Yes.[1] D signs a written guaranty which, while it is in P's hands, without D's consent is altered by P by the addition of two seals, one after D's name and one after another party's. Is the obligation discharged? Yes. It is the duty of P to preserve the instrument in its original state. The addition of the seals gives a different legal character to the writing.[2]

§ 12. DISCHARGE BY BREACH.

A contract is discharged, and thereby one party is excused from further performance, by breach on the part of the other party, either by repudiation, prevention, or failure of performance of a promissory condition, precedent, concurrent, or subsequent. A breach of independent promises, absolute, divisible, or subsidiary, does not discharge the contract.

By this wrongful act the contractual tie is loosed, and the parties are wholly freed from the antecedent rights under the contract, and henceforth all that remain are the remedial rights to exoneration and to damages for breach and for benefits, to which the party injured becomes at once entitled. So far as

[1] Pigot's Case, 11 Coke, 26 b; Meyer *v.* Huneke, 55 N. Y. 412.
[2] Davidson *v.* Cooper, 13 Mees. & W. 343.

the discharge for breach of an implied condition is concerned, there is to be noted a distinction between breaches *in limine,* or before any part of the condition is performed, and breaches after part performance. The former discharge the contract if material, while the latter discharge it only when they go to the essence of the contract. Discharge of contracts by the happening, or the not happening, of casual conditions precedent and subsequent, as well as the remedial rights for the breach of promissory conditions, have already been discussed, and the circumstance that the discharge is brought about by the wrongful act of a party adds no new element, so far as the discharge of the contract is concerned. Independent promises may be absolute where the performance of one promise is not made to depend on the other; divisible, where a contract in one instrument is severable into distinct and independent contracts; subsidiary, where one undertaking of a party in a contract is not vital to the existence of the contract; but a breach of none of these independent promises will discharge the other party from his promise. D agrees to sell and deliver, in one month, a quantity of corn, and P agrees to pay therefor a certain price. Can P sue D for breach in not delivering the corn without showing readiness to pay? No. Where two concurrent acts are to be done the party who sues the other for nonperformance must aver that he has performed, or is ready to perform, his part.[1] D and S enter into an agreement, according to which D agrees to convey to S title to a certain farm on a certain day in the future, and S agrees to pay therefor in cash and a conveyance of the title to another farm, the timber on the respective places to be valued by appraisers. D cuts the timber on his place, and S then refuses to go on with the contract. Is S guilty of breach? No. It is a condition subsequent implied that S shall not cut off the timber growing on the estate to be conveyed and thus change its character. S is discharged from further liability. The only breach is D's own. If loss is caused by accident it falls on the buyer or mortgagor, rather than seller or mortgagee.[2] In writing, C agrees to sell H a tract of land, and H agrees to pay therefor $700 in three certain installments, the deed to be executed at

[1] Morton *v.* Lamb, 7 Term R. 125.
[2] St. Albans *v.* Shore, 1 H. Bl. 270.

the completing of the last payment. H pays the first two installments. C does not tender any conveyance of the land. Is there a breach by H? No. The promises to pay the first two installments are independent and absolute, but the promise to pay the last is dependent upon the execution of a deed, and a tender is necessary.[1] P promises to manufacture for D certain portions of a patented machine upon bills for parts delivered being settled promptly, in order to prevent too large an amount of money being tied up in the work. A bill for $90 is not paid promptly, when about $700 is already due, and P refuses to do any more work. Is this failure by D a breach of contract? Yes. Under the circumstances of this case it is apparent that failure in prompt payment of a small item is a breach which goes to the whole of the contract, and it therefore discharges P from further performance and also gives him a cause of action against D. This is a promissory condition subsequent.[2] P promises to ship D 667 tons of a certain kind of iron, in June, July, August and September, about one-fourth each month. In June, instead of shipping about 100 tons, P ships only about twenty tons and is not ready to deliver the quantity specified to be delivered in June. D refuses to accept the twenty tons. Is D guilty of breach? No. P is guilty of a breach in not performing his promise according to its terms and that discharges D. P begins with a breach. Possibly, if in this case D should agree to furnish the ship and fail to do so during the first month, it would not amount to a breach of the whole contract, but P would be obliged to supply the other installments, as it would not go to the essence of the contract.[3] W agrees to buy of N, and N agrees to sell 5,000 tons of T iron rails, at forty-five dollars a ton, to be shipped from a European port at the rate of 1,000 tons a month, beginning in February, the whole contract to be shipped before August. N ships 400 tons in February and W pays therefor, in ignorance that no more has been shipped. In March, N ships 885 tons, and W refuses to go on with the contract. Is N guilty of breach? Yes, and this breach discharges W from

[1]Kane *v.* Hood, 30 Mass. (13 Pick.) 281.

[2]National Mach. & Tool Co. *v.* Standard Shoe Mach. Co., 181 Mass. 275, 63 N. E. 900.

[3]Hoare *v.* Rennie, 5 Hurl. & N. 19. But see Simpson, *v.* Crippin, L. R. 8 Q. B. 14.

further obligation. A condition that shipment shall be at the rate of 1,000 tons a month is not performed by shipping 400 or 885. There is no waiver of this condition by keeping of 400, as W does not know the condition is broken.[1] R, of Illinois, agrees to sell M, of Pennsylvania, six carloads of corn at a certain price per bushel, to be delivered at a town in Pennsylvania, payments to be made when deliveries are made. One car arrives and also two drafts. M pays for the first draft. Another car arrives and M refuses to pay until the remaining cars arrive. R then notifies M that he rescinds the contract. Is either M or R guilty of breach? If M refuses to pay without sufficient reason and none appears, he is guilty of breach, and that authorizes R to rescind.[2] By a sealed contract, D agrees to erect a three-story business house, according to plans and specifications, by January 1st, 1869, P to pay therefor in installments as the work progresses. In 1868 D has the building completed, when it falls, and in 1869 he has it almost completed again, when it falls, on account of the improper drainage of the subsoil, and then D refuses to go on with his contract. Is he liable for breach? Yes. The act is in itself possible and D must perform; but, if the performance is made impossible by the act or fault of the other party, that will excuse the promisor.[3] T apprentices his son to E, by an agreement in which the son undertakes to serve E for five years in his trades of auctioneer, appraiser and corn factor, to learn his art, and E agrees to teach him. E stops being a corn factor. The son leaves his work. Is T discharged from his promise by E's failure to continue the business of corn factor? Yes. That E shall follow his trade is a condition precedent to T's obligation that the apprentice shall serve.[4] P agrees to sell D, and D agrees to buy, at a specified price, a certain quantity of wool, to be shipped from Odessa to either Liverpool, Hull, or London, the name of the vessels to be declared as soon as the wools are shipped. The parties contract with the knowledge that D intends to resell, but P does not notify D of the names

[1] Norrington *v.* Wright, 115 U. S. 188.

[2] Rugg *v.* Moore, 110 Pa. 236, 1 Atl. 320.

[3] Stees *v.* Leonard, 20 Minn. 494 (Gil. 448); Butterfield *v.* Byron, 153 Mass. 517, 27 N. E. 667.

[4] Ellen *v.* Topp, 6 Exch. 424.

of the vessels as soon as the wool is shipped. Is this a condition precedent, the breach of which by P discharges D? Yes. It is a condition inferred from the words used and the conduct of parties.[1]

§ 13. DISCHARGE OF REMEDIAL RIGHTS OF CONTRACTS AND QUASI CONTRACTS.

The remedial rights of contract or quasi contract may be discharged by consent of the parties or by operation of law.

§ 14. DISCHARGE BY RELEASE.

A contractual remedy may be waived by a release under seal, executed by the injured party.

D is indebted to P and T and is unable to satisfy his debts, but it seems best to the creditors to allow D to carry on his business under the direction of T for five years, and the parties enter into a contract, under seal, to this effect, and P and T covenant not to molest or interfere with D during that time, and provide that if they do D shall be released from all demands. In spite of the contract P sues D, within the five years. Is the contract a release which bars the action? Yes. This covenant inures as a release.[2]

§ 15. DISCHARGE BY ACCORD AND SATISFACTION.

An existing contractual remedial right is discharged upon the satisfaction of an accord, or at once upon making the contract, if it is the intention of the parties to take the accord in satisfaction. An accord is a bilateral agreement where one party proposes to give and the

[1] Graves *v.* Legg, 9 Exch. 709.
[2] Gibbons *v.* Vouillon, 8 C. B. 483.

other promises to accept a satisfaction in lieu of an existing remedial right.

This is the doctrine of accord and satisfaction. The reason why it is ordinarily said that accord (though in the form of a complete contract), without satisfaction, does not discharge the right of action is that the expression arose in connection with the discharge of tort actions before the origin of the bilateral contract, and it has persisted down to the present time. But a part payment, with nothing more, cannot be a good accord and satisfaction because there is no consideration for the promise of the creditor to forego. An accord may be defined as a bilateral contract by which a proposed satisfaction is offered and accepted. P sues D on two promissory notes, one for 140 pounds, the other for 200 pounds, and D pleads that after the notes become due it is agreed between P and D and B that B shall pay P 200 pounds by quarterly payments of six pounds, the causes of action of P to be suspended so long as B shall continue to make his payments. In spite of this P sues D, though B does not fail in making the quarterly payments. Is this a good accord and satisfaction? No. Construing the agreement according to the general intent of the parties, as learned therefrom, it means that P shall forbear suing until the quarterly payments cease. This does not suspend the right of action, in the meantime, but simply subjects P to an action for damages for breach of his agreement.[1] B covenants to repair a house for E, and is guilty of breach of covenant. E sues B and the latter pleads accord and satisfaction. Is this a good plea? Yes. It is not a discharge of the specialty but of the remedy for the breach of the specialty, and is therefore good even at the common law.[2] Creditors, pursuant to statutory authority, resolve that a certain composition shall be taken in satisfaction of debts due them from their debtor. Can a creditor thereafter sue the debtor for the whole debt before default is made in payment of the composition? No. If a promise by the debtor is accepted as satisfaction by the creditors, it is a discharge, but, if they agree to accept a composi-

[1] Ford *v.* Beach, 11 Q. B. 852; Hunt *v.* Brown, 146 Mass. 253, 15 N. E. 587.

[2] Blake's Case, 6 Coke, 43 b.

tion, the debtor is not discharged unless he pays.[1] After a suit has been instituted against him by P, D agrees to give, and does execute a note for thirty dollars and agrees to pay certain costs, in settlement, and P gives D a receipt in full. Does this amount to a discharge of the old cause of action? Yes. This is an accord which operates at once as a discharge, as that clearly appears to have been the intention of the parties.[2] P obtains a judgment against D, for $4,334 and agrees to accept, in settlement thereof if paid within one year, $3,000 in cash and an assignment of a patent right, or $1,000 merchandise and the patent right estimated at $1,000. D elects the second alternative and does everything but transfer the patent right, the assignment of which P refuses when tendered. Can P collect the balance of the judgment? Yes. This is merely an accord, and the intention of the parties is not to take it as a satisfaction of the judgment.[3] D owes P a large sum of money and sends him a check for less than the amount due with a receipt that this sum is accepted in full satisfaction, to be signed by P. P refuses to sign the receipt but keeps the check. Is this an accord and satisfaction? This is a question of fact, but the fact seems to be that P has not accepted the check in full satisfaction.[4] P and D are in dispute over a claim, D asserting that he owes eight dollars and forty-eight cents and P that he owes fifty-eight dollars and forty-eight cents. D sends to P a check for eight dollars and forty-eight cents, with these words on the back of it: "Good only if indorsed in full of all demands to date against D." P crosses this out, without D's knowledge, and draws the money. Is this an accord and satisfaction? Yes. Payment of a less sum than is due, on an undisputed claim, does not bar a recovery for the balance; but here there is a disputed claim, and the offer of settlement has been accepted.[5] P, a driver, employed by the Adams Express Co., is injured while transferring goods from a wagon to a freight car, and sues the Pennsylvania Railroad Co. This company

[1]Slater *v.* Jones, L. R. 8 Exch. 186; Good *v.* Cheesman, 2 Barn & Adol. 328; *In re* Hatton, 7 Ch. App. 723.

[2]Babcock *v.* Hawkins, 23 Vt. 561. See Case *v.* Barber, T. Raym. 450; Allen *v.* Harris, 1 Ld. Raym. 122.

[3]Kromer *v.* Heim, 75 N. Y. 574.

[4]Day *v.* McLea, 22 Q. B. Div. 610.

[5]Hull *v.* Johnson, 22 R. I. 66, 46 Atl. 182.

pleads an accord and satisfaction, in that the express company is bound to see it harmless, and in consideration of payment to P of wages, during a period of incapacity, P agrees to accept the same in full satisfaction. Both in England and America the late cases support a satisfaction moving from a third person.[1]

§ 16. Discharge by Arbitration and Award.

A remedy ex contracto is discharged by arbitration and award if a claim is submitted to arbitration by lawful agreement of the parties and the arbitrators make an award, which substitutes a new debt for the original. Whether the award substitutes a new debt or merely fixes the amount due, if the award is performed, all remedial rights are discharged.

P sues D for payment for hops delivered, and D pleads that the matter has been submitted to J for arbitration by a certain day, and that before that day J has made an award that each party, or his executors and administrators, give the other a general release. Does this award bar the original remedy on the contract? No. As the arbitrator has awarded nothing in satisfaction, it creates no new duty.[2] In an action of *indebitatus* assumpsit by P for tolls D pleads that, differences as to the claim having arisen, they mutually submitted them to arbitration and promised to abide by the award, and the umpire awarded that D should pay P thirteen pounds, but does not allege payment of the award. Is the award alone a bar? No. Had the award varied the nature and character of the original demand, it would be, but as the money payable under the award is nothing but the original debt ascertained in amount, it is not; but if properly pleaded, it would be a bar to the recovery of anything over thirteen pounds.[3] P and D submit various claims, over which they are in dispute, to arbitrators. The latter pass on some of the items and announce their determina-

[1] Jackson *v.* Pennsylvania R. Co., 66 N. J. Law, 319, 49 Atl. 730.

[2] Freeman *v.* Bernard, 1 Ld. Raym. 247.

[3] Allen *v.* Milner, 2 Cromp. & J. 47; Commings *v.* Heard, L. R. 4 Q. B. 669; Williams *v.* London Commercial Exch. Co., 10 Exch. 569.

tion to the parties, but before passing on the other items, and before the award is signed, D delivers to the arbitrators a paper revoking their authority to proceed. Is the power created by the submission revoked? Yes. It may be revoked any time before the award. The first announcement is not an award, because it does not decide all of the matters submitted.[1] P and G make a general submission to arbitration of all matters in dispute between them and an award is rendered. A claim which P has against D, for attaching his cow, in a suit by G against P, P does not submit to arbitration. Is the award a bar? No. D is not a party to the award.[2]

§ 17. DISCHARGE BY JUDGMENT.

Contract remedial rights are discharged by a judgment on the merits for or against the party. If in his favor, a quasi contract is created thereby and a remedy in quasi contract arises. If against him the principle res adjudicata applies and there can be maintained no other suit involving the same subject-matter.

When the suit results favorably, the judgment is called a contract of record and is the highest form of security. The old right of action for breach is merged in the judgment. The foundation of the principle *res adjudicata* is the prevention of the vexation of litigants and the giving necessary sanctity to the formal actions of the court.[3]

§ 18. DISCHARGE BY BANKRUPTCY.

A discharge in bankruptcy effects a statutory release from liability on contracts or quasi contracts.

This is a bar to the remedy not to the obligation of a contract and it is established by law for the benefit of the individ-

[1]Boston & L. R. Corp. *v.* Nashua & L. R. Corp., 139 Mass. 463, 31 N. E. 751.

[2]Robinson *v.* Hawkins, 38 Vt. 693.

[3]Higgens' Case, 6 Coke, 44b; Runnamaker v. Cordray, 54 Ill. 303; Bacon *v.* Reich, 121 Mich. 480, 80 N. W. 278.

ual debtor, and it may be waived by him by a new promise to pay his debt. This promise is required by some jurisdictions to be in writing.[1]

§ 19. Discharge by Statute of Limitations.

Statutes generally bar the remedy for breach of contracts, or on quasi contracts, after the lapse of a prescribed period from the time the cause of action accrues.

This bar is also for the benefit of the individual debtor, and may be waived by any act or promise recognizing his former promise as binding as a part payment or acknowledgment, though in some jurisdictions this acknowledgment must be in writing. In like manner a person who has the right to avoid a voidable contract may waive the privilege and thereby give the other party a complete remedial right.[2]

§ 20. Discharge by Change in Law.

The states may not pass any law impairing the obligation of a true contract, express or inferred, but so long as it is as efficacious as before, the remedy may be changed by the legislature unless the parties have specifically contracted for certain existing remedies. This inhibition does not apply to the United States.

Marriage, as a status, may be dissolved by divorce, and *quasi* contracts are not protected at all. Among the changes of remedy permitted are the following: Changing the statute of limitations; giving an additional remedy; repealing the right to a new trial as a matter of course, or providing for notice; and changing the rules of evidence; but not changing the amount of damages, or exemptions from levy and execution, or priority of liens.[3]

[1] Reed *v.* Pierce, 36 Me. 455.

[2] Manchester *v.* Braedner, 107 N. Y. 346, 14 N. E. 405; Allen *v.* Collier, 70 Mo. 138; Jones *v.* Jones, 18 Ala. 248.

[3] Sturges *v.* Crowninshield, 17 U. S. (4 Wheat.) 122; Walker *v.* Whitehead, 83 U. S. (16 Wall.) 314.

FORMS

FORMS

WARRANTY DEED.

THIS INDENTURE, made the _____ day of _____ in the year one thousand nine hundred and _____,

Between _____ of _____ county of _____, and state of _____, of the first part, and _____ of _____ county of _____, and state of _____, of the second part,

WITNESSETH, That the said party of the first part, in consideration of the sum of _____ ($_____), lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the said party of the second part, his heirs and assigns forever,

All that tract or parcel of land, situate in the_____ county of _____ and state of _____, known as _____ _____, and bounded and described as follows, viz.: _____ _____,

Together with the appurtenances, and all the estate and rights of the said party of the first part in and to said premises. To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns forever.

And the said _____, party of the first part, does covenant with the said party of the second part as follows: That he is seized of the said premises in fee simple, and has a good right to convey the same; that the said premises are free from all incumbrances; that the said second party shall quietly enjoy the said premises; that he will execute such further assurance of title as shall be necessary; and that he will forever warrant the title to said premises.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

_____[SEAL]

In Presence of }

State of _____ }
County of _____ } ss.

On this _____ day of _____ in the year one thousand nine hundred and _____ before me, the subscriber, personally appeared _____, to me personally known to be the same person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same as his free act and deed.

(Notary's Seal)

_____

Notary Public for _____ County,

_____

(VIRGINIA FORM OF DEED.)

"This deed made the _____ day of _____, in the year _____, between (here insert names of parties), witnesseth: that in consideration of (here state the consideration), the said _____ doth (or do) grant unto the said _____ all, etc. (Here describe the property, and insert covenants and any other provisions). Witness the following signature and seal (or signatures and seals)."

LEASE.

This lease, made this _____ day of _____, one thousand nine hundred and _____, between _____ of _____ county of _____, and state of _____, of the first part, and _____, of the said _____ and county, of the second part,

WITNESSETH, That in consideration of the rents and covenants hereinafter expressed, the said party of the first part has demised and leased, and does hereby demise and lease to the said party of the second part (his heirs and assigns), all that certain piece, parcel, or tract of land situate, lying, and being in the _____ aforesaid, known as (here give description of farm), containing _____ _____ acres, with the privileges and appurtenances and buildings, for and during the term of _____, from the _____ day of _____, 191__, which term will end on _____ day of _____, 191__. And the said party of the second part covenants that he will pay to the party of the first part for the use of said premises, the (here insert monthly or yearly, etc.) rent of _____ Dollars ($_____); (here may also be inserted such covenants as to pay taxes, to insure, not to assign or sublet, to reside on the prem-

ises, to carry on the farm after a certain mode, etc.), and that at the expiration of such term he will surrender up said premises to the party of the first part in as good condition as now, reasonable wear and damage by the elements excepted.

The party of the first part covenants to (here insert such covenants as to repair in case buildings are destroyed by fire, to renew, etc.), that in case the buildings on the said demised premises are destroyed without any fault or neglect on the part of said second party, or his servants or employees, or become untenantable, then the liability of said second party for rent (here insert, shall cease, or other provision).

Witness the hands and seals of the said parties the day and year first above written.

----------[SEAL]
----------[SEAL]

In Presence of }

REAL ESTATE MORTGAGE.

This indenture, made this _____ day of _____, A. D. 191__, between _____ of _____, of the first part, and _____ of the same place, of the second part, witnesseth:

That, in consideration of the sum of _____ dollars ($_____) paid by the said second party, the said party of the first part, does grant, bargain, sell, and convey unto the said party of the second part and to his heirs and assigns forever, all (here give description of premises), together with the hereditaments and appurtenances thereunto belonging, or in any wise appertaining.

This conveyance is intended as a mortgage, to secure the payment of the sum of _____ dollars, in _____ from the day of the date of these presents, with _____ interest, according to the conditions of a certain bond (or note), bearing even date herewith, executed by the said party of the first part to the said party of the second part; and if such payment be made, then these presents shall be void and the estate hereby granted shall cease.

But in case default shall be made in the payment of the principal (or interest), as above provided, then the party of the second part, his executors, administrators, or assigns, are hereby empowered to sell the premises above described in the manner prescribed by law; to retain said principal and interest, together with the costs of making the sale out of the money arising from such sale; and to pay the overplus, if any, to the party of the first part, his heirs or assigns.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

_____[SEAL]

In Presence of }

State of _____ }
County of _____ } ss.

On this _____ day of _____, A. D. 191__, before me, the subscriber, personally appeared _____, to me personally known to be the same person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same as his free act and deed.

(Notary's Seal.) _____
Notary Public, _____ County,
_____

DISCHARGE OF MORTGAGE.

State of _____ }
County of _____ } ss.

I, _____ of _____ county of _____, and state of _____, do hereby certify that a certain indenture of mortgage bearing date the _____ day of _____ A. D. 191__, executed by _____ to _____, and recorded in the office of _____ _____ of the county of _____ state of _____ in book _____ of mortgages, page _____, on the _____ day of _____, A. D. 191__, at _____ o'clock ____ M. (and in case mortgage has been assigned insert, which said mortgage was duly assigned to me by the said _____, mortgagee above named, by assignment dated _____, and recorded in, etc.) has been paid and is hereby discharged, together with the bond (or note) secured thereby.

Dated the _____ day of _____, 191__.

_____ [SEAL]

(Acknowledgment as in case of mortgage.)

POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS: That I, _____ of _____ county of _____, and state of _____, do hereby

make, constitute, and appoint _____ of _____ my true and lawful attorney, for me and in my name and stead, to (here insert subject-matter of the power as, to grant, bargain and sell such lands as I may be entitled to or interested in, situate in _____ _____, etc.); giving and granting unto my said attorney full power and authority to do and perform all the necessary acts in the execution and prosecution of the aforesaid business, and in as full and ample a manner, as I might do if I were personally present.

In witness whereof I have hereunto set my hand and seal the _____ day of _____, 191__.

_____[SEAL]

In Presence of }

(Acknowledgment as in case of mortgage.)

CHATTEL MORTGAGE.

KNOW ALL MEN BY THESE PRESENTS: That I, _____, of _____ in the county of _____, and state of _____, am justly indebted unto _____ of the same place, in the sum of _____ dollars, on account, to be paid on the _____ day of _____, with interest from this date.

Now therefore, in consideration of _____, and in order to secure the payment of _____, as aforesaid, I do hereby sell, assign, transfer, and set over unto the said _____, his executors, administrators, or assigns, the chattels mentioned in the schedule hereto annexed, and now at _____ in _____ aforesaid.

Provided, however, that if the said debt and interest be paid, as above specified, this sale and transfer shall be void: and this transfer is also subject to the following conditions:

The chattels hereby sold and transferred are to remain in my possession until default be made in the payment of the debt and interest aforesaid, or some part thereof; but in case of a sale or disposal, or an attempt to sell or dispose of the same, or a removal of or attempt to remove the same from said _____ aforesaid, the said _____ may take the said chattels, or any part thereof, into his own possession.

Upon taking said chattels, or any part thereof, into his possession, either in case of default or as otherwise provided above, the said _____ shall sell the same at public (or private) sale; and after satisfying the aforesaid debt and interest thereon, and all neces-

sary and reasonable costs and expenses incurred by him, out of the proceeds of such sale, he shall return the surplus to me or my legal representatives.

In witness whereof I have hereunto set my hand (and seal), this _____ day of _____, 191__.

_____[SEAL]

In Presence of }

(Acknowledgment as in Real Estate Mortgage.)

CONTRACT.

This agreement, made this _____ day of _____, 191__, between _____ of _____, of the first part, and _____ of _____ of the second part, witnesseth: That the said _____ agrees to sell and deliver to the said _____ one thousand head of Lincoln sheep on or before _____ at $5 a head, and in consideration therefor the said _____ agrees to pay the above price on _____, 191__.

Signed at _____, this _____ day of _____, 191__.

_____

_____

BILL OF SALE.

KNOW ALL MEN BY THESE PRESENTS: That, in consideration of _____, the receipt of which is hereby acknowledged (or in consideration of the promise of _____ to pay _____ on _____), I do hereby grant, sell, transfer, and deliver unto _____, his executors, administrators, and assigns, the following chattels, viz.: (here describe chattels). To have and to hold the same forever. And I do covenant with the said _____ that I am the lawful owner of the said chattels; that they are free from all incumbrances; that I have good right to sell the same as aforesaid; and that I will warrant and defend the same against all lawful claims and demands of all persons whomsoever.

In witness whereof I have hereunto set my hand (and seal) the _____ day of _____ in the year 191__.

_____[SEAL]

In Presence of }

PROMISSORY NOTE.

$800.00 Minneapolis, Minn., January 1, 191__.

Four months after date (or on demand, etc.) I promise to pay to the order of _____

Eight Hundred _____ Dollars

at (Note may be drawn payable anywhere) value received.

_____(maker)

No. _____ Due _____

BILL OF EXCHANGE.

$1,100.00 Minneapolis, Minn., January 1st, 191__.

Two months after date pay to the order of _____

Eleven Hundred _____ Dollars

value received and charge the same to the account of

To _____(drawee) _____(drawer)

ARTICLES OF PARTNERSHIP.

This agreement, made this _____ day of _____, 191__, between _____ and _____, both of _____, witnesseth:

The said parties agree to associate themselves as co-partners for _____ from this date, in the business of _____, under the firm name and style of _____.

For the purpose of conducting the above named business, _____ _____ has at this date invested _____ dollars as capital stock, and _____ has paid in the like sum of _____ dollars, both of which amounts are to be expended and used in common, for the mutual advantage of the parties hereto in the management of their business.

(Next insert provisions in regard to keeping book accounts wherein each partner shall enter and record, or cause to be entered and recorded, full mention of all moneys received and expended, etc., if desired.)

It is further agreed that once a year, or oftener should either partner desire, a full, just and accurate exhibit shall be made to each other, or to their legal representatives, of the losses, and profits made by such copartnership. And after such an exhibit is made, the surplus profit, if such there be, resulting from the business, shall be divided between the subscribing partners, share and share alike.

(Next insert provision for final account in case of dissolution in case of death, etc.)

It is also agreed that in case of a misunderstanding arising with the parties hereto which cannot be settled between themselves, such difference of opinion shall be settled by arbitration, upon the following conditions, to wit: Each party shall choose one arbitrator, which two shall select a third, and the three thus chosen shall determine the merits of the case and arrange the basis of settlement, as a condition precedent to an action at law or in equity.

In witness whereof, the undersigned hereto set their hands the day and year first above written.

In Presence of }

NOTICE OF DISSOLUTION.

The partnership heretofore existing under the name of _____ _____ is this _____ day of _____, 191__, dissolved by mutual consent.

WILL.

I, _____, of _____ in the county of _____ and state of _____, being of sound mind and memory and considering the uncertainty of life, do therefore make, ordain, publish, and declare this to be my last will and testament, as follows:

First, I order and direct that my executor hereinafter named, pay off all my just debts and funeral expenses as soon after my decease as conveniently may be.

Second, After the payment of said debts and expenses, I give and devise (here insert provisions in regard to disposition of real estate).

Third, I give and bequeath (here insert provisions in regard to disposition of personal property).

Fourth, (if different bequests, or devises, are made, it may be necessary to designate each separately).

Fifth, (or sixth, or whatever number is next), I give, devise and bequeath all the rest and residue of my estate, both real and personal, to _____ (for example: To my wife so long as she shall remain unmarried, but upon her decease or marriage, the remainder

thereof I give, devise, and bequeath to my said children and their heirs forever, to be divided in equal shares between them).

Lastly, I appoint _____ to be executor of this my last will and testament, hereby revoking all former wills by me made.

In testimony whereof I have hereunto subscribed my name and affixed my seal, the _____ day of _____ in the year of our Lord one thousand nine hundred and _____.

_____[SEAL]

This instrument was, on the day of the date thereof, signed, published, and declared by the said testator _____ to be his last will and testament in our presence, who, at his request, have subscribed our names thereto as witnesses, in his presence and in the presence of each other.

_____ residing at _____
_____ residing at _____

EXAMINATION AND REVIEW QUESTIONS

EXAMINATION AND REVIEW QUESTIONS

1. D's engine sets on fire a hay stack, and sparks are blown by the wind from this hay stack to P's dwelling house, five hundred feet distant; fire is communicated to the house, and in his efforts to extinguish the same, but without negligence on his part, P receives personal injuries. Is D under legal liability to P? If so, what is the tort? Give reason for answer.

2. P and D, being in an altercation, D steps into his office and brings out a gun which he aims at P in a threatening manner at a distance of three or four rods. The gun is not loaded, but P does not know this fact. Is D guilty of any tort? If so, what tort? If not, why not?

3. D watches P through detectives, for two weeks, and P is urged by them to confess that he is guilty of a crime, and he is treated in such a manner as to show that, if necessary, force will be used to detain him. Does this constitute a tort? Why?

4. Will the institution of a civil action ever amount to malicious prosecution? If so, give example. What are the essential elements of malicious prosecution?

5. D charges P with pulling the boots off from a certain dead man, and appropriating them to himself. The charge is made directly to P in his dwelling house, but no other persons are present or overhear the conversation. What, if any, tort is D guilty of? Why? If overheard by another, is there a tort? Give reason for answer.

6. A, who is employed by B as driver for his milk wagon during the week, went to his master's stable on Sunday, and took therefrom the master's horse and carriage. While driving the same, he negligently runs over and injures C. C brings action against B. Can he recover? Why?

7. X permitted his son, Y, to go to a children's party at the house of A at a time when Y had a contagious disease. A's child and ten others were seized with the disease in consequence of this exposure. Can X, or Y, be compelled to respond in damages, and, if so, to whom?

8. A, who was intoxicated, was lying in the highway. X, the driver of an ice-cart, was reading a newspaper as his horses walked along. The wheels of the cart passed over one of A's legs. Can A recover damages of X?

9. X wrote to A an abusive letter, which reflected upon A's character, and to B a letter, which, though reflecting upon his character, was written with the honest purpose of redressing a grievance of the

writer. By mistake, each letter was put into the envelope intended for the other. Actions for libel are brought against X by A and B. Are the actions well founded?

10. A, a railroad station-master and telegraph operator, hearing of the escape of a lunatic, whose name he thinks is X, on a train just departed, wires B, the operator at the next station: "Look out for X, an escaped lunatic, on train No. 15." On the arrival of the train, B causes X to be detained, but X turns out not to be the escaped lunatic. Does X have a cause of action against A or B?

11. A father tells counsel that he negligently permitted his two-year-old child to go out alone in the street, where the child was run over by an electric car and lost an arm, and asks if there is any right of recovery against the street-car company. What answer would you give?

12. Defendant employed Plaintiff as a driver of a team for Defendant. The Defendant let a truck and team to X and directed Plaintiff to drive the team. X built upon the truck a superstructure of seats to be used in a street parade. During the parade this superstructure broke and injured the Plaintiff. (1) Is Defendant liable to Plaintiff? (2) Would X be?

13. A farmer dies seized of 160 acres of land on which he lives. He is survived by a widow, two sons, a daughter, and 3 grandchildren, issue of a deceased daughter. The deceased daughter also left a surviving husband. How does the land descend? Suppose the farmer left a will giving all the land to his wife for life, remainder to one of the sons in fee: the widow renounces the provision for her in the will; how does the land descend?

14. A, the owner of Lot 1, built a house upon it so near the line that the eaves overhung Lot 2 and dripped rainwater upon the latter lot. A was not aware of this fact. It remained in that state 20 years, when B, wishing to build upon Lot 2, requested A to remove the eave, and upon his failure to do so, sawed it off. A sues B for damage. Explain the rights of both parties.

15. A owned a farm on which was 35 acres of marsh. By digging a drain 100 rods long through his own land toward the east he could have drained the water along a natural depression into a swamp on the land of B, the effect of which would be to enlarge the latter swamp and damage 20 acres of B's land. By cutting a ditch 15 rods long through a low hillock toward the west, he could have drained the water into C's field, turning 10 acres of tillable land into a swamp. He chose the latter, and C sues him for damages. Explain rights of both parties.

16. If a lessee under a lease for years assigns his term, and the landlord consents to the assignment and accepts rent from the assignee, what rights if any has the landlord against the assignor in case the assignee becomes insolvent?

17. A died, leaving by will certain lands to his wife for her life, at her death to his two sisters, Mary and Jane, for their lives and the life of the survivor of them; remainder to testator's brother, William. At the death of A's widow, Mary and Jane took possession; Mary died; then William claimed one-half, but Jane claimed it all, for her life. Which is right? Why?

18. The owner of land sold and conveyed it by warranty deed to A for valuable consideration, Jan. 1, 1907. A did not file his deed until Jan. 30. In the meantime the former owner again sold it to B on Jan. 20, and conveyed it to him by a quit-claim deed, which B filed Feb. 1. Both A and B were purchasers for value and without actual notice. Which has the priority? Discuss fully.

19. A, in his deed to B, warrants against all encumbrances. There is at the time a party wall upon the land, and B sues A and recovers damages. B then transfers the property to C with like warranty. C, finding the wall there, sues A for damages. Can he recover? Why?

20. A, the owner of an entire block, conveys a certain lot therein to B, by warranty deed, containing provision that B will not build nor permit to be built upon the lot anything but a dwelling house. A then sells the remaining lots to other persons, the deeds all containing a like provision. Is B's estate one in fee simple? Who can enforce the restriction, and how?

21. A hives some wild bees which he finds in a tree on his land. Later the said bees swarm and fly over onto B's land and take possession of a hollow tree thereon. A watches the bees through a field glass during all of their flight. Thereafter B discovers the bees and contracts to sell the same to C, who takes them into his possession and pays the purchase price. A sues C in replevin. C defends on the ground that A is not the owner and on the ground of *bona fide* purchase. (1) Give the rules of law upon the points involved in the suit, and (2) apply the same to the facts in this case.

22. A has on deposit in the X bank $3,000. He is about to undergo a serious surgical operation. In view of the operation and the probability of death therefrom, he draws a check on the X bank for the entire amount of the deposit in favor of B, and hands the same to C with instructions to deliver it to B in the event of the operation resulting fatally. The operation is performed and results fatally, A never regaining consciousness. C delivers the check to B, but the X bank refuses to honor it. B sues X in contract for damages for the breach of its obligation to pay over the money, setting up the above facts. X demurs. (1) Give the rules of law on the points involved, and (2) apply the same to the facts set forth.

23. Action: trover. Defense: ownership. Facts: plaintiff sold a horse, over which the controversy arises, to one X, X having the alternative to return the same within a year or pay $200 therefor

Within said year X sold the said horse to defendant, and plaintiff institutes the above action. Give decision and reasons therefor.

24. Action:—Special assumpsit for price. Defense:—Condition precedent. Facts:—Plaintiff agreed to sell defendant one carload of No. 1 wheat for $1 per bushel upon the following terms and conditions:—Plaintiff was to ship the same to defendant by rail, wheat to be delivered to defendant on the track at Y, where defendant was to take it, haul it to his mill ten miles distant, and pay for the same less freight as soon as the wheat should be weighed on defendant's scales. The wheat was delivered on the track at Y, but before defendant took the same away it was destroyed and wholly lost because of a flood. Give decision and reasons therefor.

25. Action:—Breach of contract. Defense:—Condition precedent. Facts:—Plaintiff agreed to sell defendant 500 boxes long boneless middles, to average not less than fifty-two pounds each middle, and 500 boxes short boneless middles, to average not less than forty-two pounds each middle, meat to be cured, cut, trimmed and packed according to New York standard for seven cents per pound for both lots, it being mutually agreed that M should inspect the meat before delivery and decide whether the meat offered by plaintiff conformed to the terms of the contract. Plaintiff prepared certain meats and M gave him a certificate that the same were according to contract. The meats did not come up to the requirements of the contract and defendant refused to accept the same. Give decision and reasons therefor.

26. Action:—Breach of oral contract. Defense:—Statute of frauds. Facts:—Plaintiff and defendant entered into an oral contract whereby plaintiff agreed to make two sets of artificial teeth for defendant for the price of $100, and defendant agreed to pay such price therefor. Plaintiff made the teeth according to contract, but defendant refused to take them. Give decision and reasons therefor.

27. Action:—Breach of contract. Defenses:—(1) Breach of warranty, (2) Condition precedent. Plaintiff sold defendant a harvester for $800, warranting the same, in respect of lightness of draught, and agreeing that the defendant might take it on trial and that if it did not fulfill the warranty plaintiff would take it back. Defendant took the machine, tried it, found it did not run as warranted and returned it to the plaintiff. Give decision and reasons therefor.

28. Action:—Breach of warranty implied by law. Defense:—No warranty. Facts:—Plaintiff bought a chicken from defendant under the following circumstances. Plaintiff went to defendant's market, saw a quantity of chickens piled on a counter, selected one, paid for it and took it home. The chicken was not wholesome and fit for food, and plaintiff and the members of her family were poisoned by eating it. Give decision and reasons therefor.

29. Action:—Breach of contract. Defenses:—(1) Implied prom-

issory condition that goods shall be like sample, (2) no appropriation of goods to contract. Facts:—Defendant promised to buy of plaintiff a certain quantity of canned corn of the packing of 1893, plaintiff's agent showing a sample of the corn of 1892, and plaintiff agreed to sell the same, for a price agreed upon. Plaintiff tendered the requisite quantity of corn of the packing of 1893, but it was inferior to the sample of corn of 1892, and defendant refused to take it, although in his original order he had told plaintiff to ship the corn to him. Plaintiff still has the corn in question on hand. Give decision and reasons therefor.

30. Wood of different grades, belonging to A and B, is mixed by a freshet. B gathers it all up and piles it together. A sues B in replevin. B sets up the defense that A is not entitled to possession. (1) Give the rules of law on the questions involved and (2) apply the same to the facts.

31. A promises to sell B the hay in a certain barn for a price to be fixed by S. B is a tenant of A and the hay is not to be moved. In exchange for A's promise B promises to pay the price to be fixed by S. Thereafter B refuses to let S examine the hay and prevents him from fixing a price. A sues B for breach of contract and asks to recover the value of the hay. B pleads that there is no breach of contract because of the nonperformance of the condition precedent. (1) Give the rules of law on the above issue and (2) apply the same to the foregoing facts.

32. A inadvertently trespasses on B's land and cuts 50,000 feet of white pine. The stumpage value of the same is $10 a M. A transports the logs to his mill and works them up into lumber worth $70 a M. The value immediately after severance is $13 a M. The value of the expense and labor A has put on the chattels since severance amounts to $15 a M. B sues A in replevin. A sets up a counterclaim for $60 a M. (1) Give the rules of law on the points involved and (2) apply the same to the facts above given.

33. A offers to sell B 500 bags of linseed meal out of a lot of 800 bags, all of the same grade, for the price of $3 a bag, and B accepts the offer. Then A refuses to let B have the said meal when B tenders the purchase price. B sues A in replevin. A defends on the ground that B does not have the title or right to possession. (1) Give the rules of law upon the issues and (2) apply the same to the facts above given.

34. A orally offers to sell B for fifty cents a bushel all the potatoes he shall raise on a certain five acres of land owned by him during the next season and B orally accepts the offer. A raises 1,000 bushels of potatoes, but instead of delivering the same to B, he sells them to C for the market price of sixty cents a bushel. A sues C in replevin. C sets up the defenses that A does not have title or right to possession

because of a condition precedent to passing of title and the statute of frauds. (1) Give the rules of law upon these issues and (2) apply the same to the facts of the case.

35. A offers to sell B certain land owned by him for $3,000 honestly representing that the descriptions in his deed correspond with certain physical boundaries which would include a fine residence site. This representation is false. B is living on the land at the time and he accepts the offer and pays the purchase price. Is this contract voidable for misrepresentation?

36. A is a guardian of B, but when about twelve years old B runs away and lives with an uncle, until A promises him that if he will return A will not charge him anything for board and will send him to school without charge. B returns. Is there sufficient consideration for the guardian's promise?

37. A and B mutually agree to marry each other. A is an infant of fifteen years. Is there sufficient consideration for B's promise?

38. On the 1st of November, A offers to sell 800 tons of certain coal to B for $8 a ton, and asks an answer by return mail. On the 4th B asks for the price on 400 tons more. On the 5th A gives the same price on the 400 tons as he has given on the 800, and asks that the answer be sent by return post. On this same date there crosses this last letter a letter of B's saying he will take 800 tons at $8, the letter expressing the hope that A will let him have 400 tons at $7.50. The course of post between the parties is one day. A refuses to let B have the 800 tons. B sues A for breach of contract, setting the same up as above. A demurs. (1) Give the rules of law upon the issues, and (2) apply the same to above facts.

39. A, by charter party, agrees with B that his ship, then in the port of Amsterdam, shall proceed to Newport and load coal. At the time the ship is not in the port of Amsterdam and she does not arrive for four days. B repudiates the contract. A sues B for breach. B pleads discharge by casual condition precedent. (1) Give the rules of law upon the issues raised; (2) apply the same to foregoing facts.

40. H is entitled to a certain legacy from the estate of G, and receives from the executors a statement of the amount due him. On this statement he writes an order to the executors to pay the amount to L. The executors refuse to pay L, and L sues them for breach in his own name. The executors plead lack of privity and not a valid assignment. (1) Give the rules of law and (2) apply the same.

41. A promises to open a cartway for a promise of B to pay him $900 therefor, on a penalty of $250 for nonperformance. After starting the work A encounters unforeseen difficulties and refuses to perform his promise. B then promises to pay A a certain price by the day if he will go on and complete the job. A completes the work. B fails to pay therefor. A sues him for breach of second unilateral

contract. B pleads no consideration for his promise and asks for $250 damages for breach of first bilateral contract. (1) Give the rules of law on issues, and (2) apply the same to the facts.

42. I writes M, "We are authorized to offer Michigan fine salt at 85 cents per barrel; at this price it is a bargain." M replies, "You may ship me two thousand barrels Michigan fine salt as offered in your letter." Is I's communication an offer which M is at liberty to accept?

43. A sells to B by metes and bounds a tract of land containing 521 acres, for $8,000. Later, the parties differing as to the quantity of the land agree to have it surveyed, and A agrees to pay $16 an acre for every acre under 521 in exchange for B's promise to pay the same amount for every acre over 521. There are ten acres over 521 according to the survey. B refuses to pay the $160. A sues him for breach. B sets up illegality in that the agreement was a wager and also no consideration. (1) Give rules of law, (2) apply the same.

44. A orally offered to sell B, for a designated price, "Lot 1 Block 3 of Jones's Addition to X," and B, in a letter signed by himself accepted this offer. Thereafter B learned that "Lot 1" was on the opposite side of the street from the lot he supposed was "Lot 1," and refused to carry out his agreement. What are A's rights? Give reasons.

45. By contract in writing P agrees to buy and D to sell a quantity of timber. There is a contemporaneous oral agreement that the obligation of the contract shall not be complete until certain commercial agencies report favorably on P's pecuniary responsibility. The agencies report unfavorably and D refuses to sell. P sues for breach. D pleads discharge by casual condition precedent. Demurrer. (1) Give the rules of law, and (2) apply the same to the facts above.

46. On the 1st of November, 1907, A orally offered to sell to B a certain house and lot in Minneapolis for the sum of $4,000, and promised to keep the offer open for a month. On the 5th of November C offered A $6,000 for the same property and A sold it to him, but gave no notice of any sort to B. On the 20th of November B mailed an acceptance of A's offer to him, and B received the acceptance the same day. Institute some action for B, show what defense, if any, A has, and give the decision which you think correct.

47. In March P and D enter into an oral contract, whereby P agrees to purchase for the price of $20 a ton and D agrees to sell 200 tons of Regent potatoes, grown on land belonging to D, to be delivered in September and October. D plants sufficient ground to ordinarily produce that crop, but a disease attacks the potatoes and ruins all but two tons, which he sells at an advanced price to a third party. P sues D for breach. D pleads discharge by casual condition subsequent and the statute of frauds. (1) Give the rules of law on such issues, and (2) apply the same to the facts set forth.

48. P goes to B's shop and bargains for various articles, a separate price being agreed upon for each and no one article being worth $50.00 but all together amounting to $700.00, and an account for the whole is made out. Is this sale within the statute of frauds?

49. By written contract M buys a reaper of G, warranted to do certain work with a good team. Is oral evidence admissible to show that at the time of sale G says one span of horses?

50. D assigns to M a note of X, for valuable consideration. Later D gets the note into his possession for a temporary purpose. H has it attached by execution on a judgment in his favor against D. No notice of assignment is given H. Is M entitled to the note?

51. An insurance company by its authorized agent agrees to issue a standard insurance policy on your house for $1,000 for one year dating today at noon, for a premium of $8, which you pay at time contract is made. No policy is issued and tonight your house burns down. What are your remedies?

52. A married woman insures the life of her husband and pays the premium herself. She is divorced from him, and thereafter and before another premium is due he dies. In a suit on the policy the insurance company defends on the ground that she has no insurable interest. Is the defense good?

53. A in his application for fire insurance warrants that the building will not contain explosives, and the policy provides that if explosives are kept in the building the policy shall be void. Explosives are kept in the building, and it is partially destroyed by fire. The fire was not caused by the explosives, nor did the fire reach that part of the building in which the explosives were stored. Can there be a recovery?

54. A in procuring a policy of fire insurance represents that the building is 30 by 40 feet in size, whereas it is 32 by 38 feet in size. It is destroyed by fire and the insurance company defends on the ground of false representation. Can the owner recover?

55. A knows that B has threatened to shoot him the first time he sees him, and induced by the fear of death at the hands of B he applies for life insurance, concealing his knowledge of B's threats. He is accepted as a risk and a policy is issued to him and he pays the first premium. B shoots A. Can the beneficiary recover the insurance money?

56. A is agent for two insurance companies and writes a fire policy in each company upon B's building, and in each policy there is a prohibition against other insurance and no permission for other insurance is given by the agent. The building is totally destroyed by fire and each company defends on the ground that other insurance was written on the building. Is the defense of either company good? Which?

57. A policy is written on A's property and thereafter A sells and conveys the property for cash to B. There are no restrictions against

alienation in the policy and there is no assignment of the policy. There is a total destruction of the building insured. A and B bring separate suits against the insurance company. Can either recover? Which?

58. An accident policy excepts from its liability "All intentional injuries inflicted by the insured or by any other person." The insured gets into a fight and his assailant hits him a blow on the face and the insured is knocked down and in falling hits his head on a stone sidewalk and dies in consequence. Can a recovery be had on the policy?

59. A has a house worth $10,000 and insures it for his benefit for $8,000. There is a mortgage of $5,000 on the property running to B and B insures his interest as mortgagee for $5,000. Both policies have prohibitions against other insurance. There is a total destruction of the building. A and B bring separate suits, each on his own policy, for his loss. Can either recover? Which?

60. A vessel sails from New York to Liverpool on May 1st and on May 3rd the owners apply for insurance on ship and cargo for the voyage from New York to Liverpool. The vessel was in fact lost with cargo on May 2d while at sea, but neither owners nor insurer knew that fact when policy was delivered and premium paid. Can the owners recover on the policy?

61. A plate glass insurance company insures against all losses to plate glass, except those "caused by or in consequence of fire." A building catches on fire and in burning explodes some dynamite in the building, which explosion breaks the plate glass in a building covered by a policy containing the above clause. Is the company liable? Why?

62. A owed B $10,000. B, acting on his own behalf, took out a policy upon the life of A, and paid the premiums. A died, having paid the $10,000, and the policy was outstanding. To whom does the amount of policy go? Give reasons.

63. A insures his life for the benefit of B, his old college friend. A subsequently, with B's consent, assigns the policy to C, a stranger, for $1,000. A dies and C claims the amount of the policy from the company. Is the claim good? Why? What would be two defenses for the company to interpose in a suit on the policy by C?

64. An insurance policy provides that if the property insured now or hereafter has a chattel mortgage on it, the policy shall be void. A, the agent of the company, writes a policy of this sort on B's chattels, there being at the time a chattel mortgage thereon, filed in the town clerk's office. The property is subsequently destroyed by fire. B made no concealment and acted in good faith. Is the policy void, because of the mortgage? Why?

65. A takes out a policy of fire insurance in the X Insurance Co. There is a clause in the policy which reads, that if the insured property is incumbered in any way this policy shall be null and void. After the issuance of the policy judgment is rendered against A, as the re-

sult of a decision in a contested suit. The building is subsequently destroyed by fire. A presents his claim to the company, which refuses to pay it. Should he recover? Why?

66. There is an insurance policy upon the life of A, payable to his wife, or if she be dead, to their children. They have two children, X and Y. X dies, leaving a son, then A's wife dies, then A dies. Who is entitled to recover the amount of the policy? Why?

67. A's policy called for the payment of premiums in installments, the policy to be suspended if payment was not made when due. One payment was due January 1st. On that day A was seriously ill and unable to make payment. Loss occurred on January 2d. Would his non-payment be excused? Give reasons.

68. A policy provides that no condition thereof shall be waived, except upon the indorsed consent of the company. An agent, in violation of one of the conditions of the policy, writes insurance upon a vacant house and forwards the premium to the company, which retains the same. Can the insured recover on the policy? Why?

69. A, intending to commit suicide, insures his life in his wife's favor. He commits suicide. Can the company successfully defend an action by the wife? Suppose the wife kills her husband to get the insurance? Give reasons.

70. A takes out a fire insurance policy on his barn. The policy reads that if A has any other insurance on his premises, the policy is void. A has another policy on the premises existing in the same company. His barn burns, and he sues the company. Should he recover? Give reasons.

71. A makes a written application for an insurance policy, and makes certain false oral representations at the same time (1) affirmative and (2) promissory. The policy is issued. When can the insurance company set up these representations to defeat an action on the policy?

72. Are the two following notes respectively promissory notes and why?

(a) "Oct. 11th, 1878. I. O. U. $225, to be paid on the 22d inst. W. Brooks."

(b) "Litchfield, Aug. 30th, 1808. Due John Allen $30.50 on demand. Joseph L. Smith."

73. Give all the arguments tending to show that this is, or is not a negotiable note.

"$1,000. Lynchburg, Va., June 2d, 1890.

Six days after date please pay to Henry C. Wilson one thousand dollars out of any money in your hands belonging to me.

To Baker, Voorhees & Co.,
New York City. John W. Daniel."

74. The payee of a negotiable instrument indorses it "without recourse" to B. B indorses it "without recourse," to C. In an action by the indorsee against the maker, the latter avoids liability by the successful defense of usury. The indorsee sues B for damages for breach of implied warranty. Judgment for whom, with full reasons? State the liabilities of an indorser without recourse.

75. A proposes to sell B a diamond for $500 payable in two months. B accepts the offer and prepares his promissory note accordingly; but before handing it to A, examines the so-called diamond, pronounces it paste, and refuses to hand over the paper. A snatches it from him, leaving the stone in B's hands. A indorses the paper before maturity to C, an innocent purchaser. What are C's rights against A and B, assuming (a) that the stone is genuine and worth $500? (b) That it is paste and worthless?

76. Minneapolis, Minn., March 31, 1905.

Ten days after date, pay to John Jones or order $100.00 and charge to my account.

John Robinson.

To James Williamson & Co.

Across the end of this note was written, "Accepted, payable at the First National Bank" This bill is duly indorsed by John Jones and is in the hands of Samuel Smith who is a *bona fide* holder for value. (1) What is the nature of this acceptance? (2) What is the effect of accepting this acceptance?

77. X, the father of Y, deposits at Y's request $1,000 in the First National Bank, receiving a certificate of deposit for the amount which the bank issues payable to the order of X X dies, never having indorsed the order to Y. The F. N. Bank refuses to honor the certificate of deposit on the ground that Y is not a *bona fide* holder for value. (1) Can Y collect the amount from the bank? (2) What defenses would be available to the bank in case they refuse to pay it?

78. A note is made payable to B alone. It is indorsed by B and C. On the back of it a formal contract of guaranty is written by X. It then passes D's and E's hands to Y, the holder. Y sues X on his contract of guaranty. (a) Is the action maintainable? (b) What defense or defenses can you suggest as possibly available?

79. A owned a patent, B advanced money to build a machine under the patent and stipulated that the money so advanced should be reimbursed to him, and B was to receive one-fourth of the profits from the working or sale of the machine. He also bought one-fourth of the patent right. It was agreed that if the machine was offered for sale, each had the refusal of the other's interest in the patent; neither A nor B could bind each other by contract. A sold a machine and kept the money. B now sues him for advances and conversion. The de-

fense was that a partner could not sue a copartner for fraudulent removal of the firm property. Is the defense good? Or, in other words, does a partnership exist?

80. X borrowed of A $5,000, Y borrowed of B $5,000. They went into business January 1st, 1909. Upon July 1st, 1910, realizing that they were insolvent, with the consent of each, X took one-half of the assets and delivered the same to A, in payment of his individual debt. Y likewise took one-half of the assets and gave them to B in payment of his individual debt. A and B did not know at the time that X and Y were insolvent. Can the creditors of X and Y recover this property in the hands of A and B?

81. By virtue of an execution issued on a judgment against M, a partner in the firm of N and M, the sheriff sold a part of the chattels belonging to the firm, and delivered posssesion of them to the purchaser, A. N then sold the same chattels in the course of the partnership business to X. X takes possession of the chattels in A's absence. The firm was found insolvent. Has A any remedy against X either at law or in equity?

82. (a) Define good will. (b) A. Y. Robinson and R. L. Baker are in partnership doing business under the name of Robinson & Baker. They sell out the entire business, including all assets, to Edwards & Co. A. Y. Robinson then embarks in the same line of business, in the same city, in the same block, with one G. B. Baker, forming the firm with the name of Robinson & Baker. Edwards & Co. seek an injunction restraining Robinson & Baker from doing business under that name. Will the injunction lie? (c) P. T. Barnham & Co. dissolve and sell out their business to Harvey & Co., who continue the business at the old stand as successors to P. T. Barnham & Co. P. T. Barnham establishes a similar business on the other side of the street, directly opposite, under the name of P. T. Barnham. Harvey & Co. bring a suit in equity seeking an injunction. Will the injunction lie?

83. A contributes to the capital $15,000, B contributes $10,000, C contributes $5,000; their debts are $3,000, and they have no firm property at all, their capital being all lost. Wind up this partnership, adjusting the rights between the partners.

84. (a) The firm of X and Y are insolvent, so are X and Y individually. The properties in the hands of the assignee of the firm consist only of book accounts of questionable value, while the assets in the hands of the assignees of the individual partners will pay the creditors of the individual partners about thirty-five cents on a dollar. The assignee of the firm offers the book accounts at public auction. You are an individual creditor of X. Do you see any advantage in bidding up the price for which the book accounts are sold, they being practically valueless?

85. A San Francisco cabman refuses a well-dressed, well-behaved

Chinaman a ride. What facts must the latter establish in order to lay a foundation for damages and what will be the measure thereof?

86. J. P. Morgan returns to this country with several rare paintings among his personal baggage. The baggage is lost. He brings suit for the full value of the paintings, which is proven to be fifty thousand dollars. Discuss his rights.

87. B ships a trainload of cattle by fast freight. The train runs through a stretch of country over which a prairie fire is raging, to the knowledge of the company, and several of the cattle are suffocated. B sues. Can he recover?

88. A has an office in which he wishes a Bell 'phone installed. He tenders the regular monthly rates to the company, which has 'phones in adjoining buildings. Upon their still refusing he brings mandamus proceedings. What, if any, sufficient defense may the company set up?

89. D borrows $1,000 from A and pledges as collateral security for the loan a note for $2,000 and real estate mortgage executed to D by M. On the maturity of D's debt to A he fails to pay the same, and after notice A sells the $2,000 note with its mortgage at public sale, bidding them in himself for $1,000. Thereafter D tenders the amount of his loan to A ($1,000 and interest). On the maturity of M's note and mortgage, if not paid, will A have a legal right to foreclose the mortgage? Give principles of law governing the case.

90. The X Packing Co. controls the purchase and sale of one-fifth of all the live stock marketed and the products thereof in the United States, and it has an agreement with all the other large packing houses in the country as to the prices to pay when purchasing and to ask when selling. The X Packing Co. does not pay A, a seller of cattle, what they are reasonably worth, and it charges B, a retailer of meats, an unreasonable price. Is the X Packing Co. guilty of any legal wrong as to either A or B? Write brief but full argument.

91. A citizen of New York enters into a contract in New York state with a common carrier, which is incorporated in New Jersey, for the transportation of two carloads of live stock. In the contract, in consideration for a reduced rate of freight given by the common carrier, the shipper promises to exempt the common carrier from all liability for injury to the same, even though caused by the carrier's negligence. The animals are all killed by the negligence of the common carrier. Discuss the possibility of recovery for the loss.

92. A ships 100 head of cattle over the X Railway. The cattle are delayed en route for a month by strikers, who are employees of the X Railway and go out on a strike unexpectedly. As a result of the delay 50 of the cattle die. When the other 50 cattle finally arrive at market the market price has fallen a dollar a hundred pounds and the cattle have shrunk in weight. The railway refuses to pay A anything for his losses. Has the railway committed any legal wrong? Discuss.

93. A farmer, living twenty miles from the Minneapolis freight station of the X Railway, buys goods in another town and orders them shipped to him at Minneapolis by the X Railway. The goods arrive in Minneapolis on March 1, and are unloaded into the railway's warehouse on March 6th in the evening. The farmer telephones the company on March 5th, and asks if the goods have arrived, and is informed by a clerk that they have not arrived. No notice of the arrival of the goods is ever sent. The goods are destroyed by accidental fire the night of March 7th. Is the X Railway under obligation to pay therefor? Discuss.

94. A railroad corporation enters upon the publication of a newspaper. Can it be held liable for a tort committed by one of its employes in that enterprise? Why?

95. A legislature passes a law requiring all railroads to build cattle-guards at highway crossings and to pay damages arising from any neglect to do so. The A & B Railroad Company was already in existence, and there was no power reserved by the legislature to amend, alter, or repeal its charter. Does that company, therefore, escape the operation of the law in question? Why?

96. P, in order to go from Minneapolis to Duluth to spend the holidays, buys a ticket over the G railroad, but after boarding the train is unable to find a seat and refuses to surrender his ticket until provided with a seat. What are the rights of P and G?

97. P boards a street car in Minneapolis, pays his fare, asks for a transfer for Washington Ave., but is given a transfer for Fifth Street. He enters a Washington Ave. car, tenders his transfer, but it is refused and he is ejected. What are P's remedial rights?

98. P, who is riding on a free pass, exempting the railway from liability for negligence, sustains injuries caused by the negligence of the X railway. P is a citizen of Minnesota, X of Wisconsin. Can P recover any damages from X?

99. E operates a grain warehouse at S, and fifteen owners of grain, P being one, deposit in his warehouse grain to the amount of four thousand bushels, receiving the usual receipts reserving the right to deliver grain from any other warehouse. E sells to D, without the consent of the receipt holders, the grain in the warehouse at S, until there is left only one thousand bushels. P sues D in conversion. Decide the points of law involved.

100. P and D are co-owners of a vessel, which is on the Atlantic on a voyage to Europe, and at P's request D promises to get the vessel insured, but neglects to do so. The vessel is wrecked. P sues D for damages he sustains by reason of the fact that the vessel is not insured. Should non-suit be granted?

101. For a debt which C owes P, C pledges to P certain horses in South Dakota, which P has shipped to St. Paul, but in order to save

freight has consigned to C. The Minnesota Transfer Co. receives the horses, but while they are in its possession it is garnished in a suit by H against C. P sues the Minnesota Transfer in replevin, and H intervenes, having obtained judgment in his suit against C. The Minnesota Transfer claims the right to hold the animals under its lien. Decide the priority of the rights of the parties.

102. T borrows $700 of D, and pledges as security therefor a note and mortgages on land, with authorization of sale. After default D sells, but buys the property in himself through a third party. T gives another mortgage on the same land to P. Thereafter T tenders to D sufficient money to pay his debt, but D refuses it. Can P now foreclose his mortgage?

103. P rents to G a wagon, which is ruined in a collision with a street car, when both G and the motorman on the street car are guilty of negligence. What are the remedial rights of both G and P against the Street Railway Co.? What are the remedial rights of P against G?

104. P and his wife are living at the X hotel in Minneapolis. P is a traveling man and in soliciting orders in another part of the city finds it will be inconvenient to return home on a certain night, and stops at the Y hotel. That night thieves steal P's watch and purse, from the Y hotel, and some chattels belonging to P's wife, from the X hotel. What is the liability of both hotels?

105. P ships a trainload of cattle by fast freight. The train runs through a stretch of country over which a prairie fire is raging, and as a consequence the train is delayed two days, and several of the cattle are suffocated. What remedial rights does P have?

106. Theresa Boon and Thomas Wilson agreed on the tenth day of May, 1870, to become man and wife and that they should so consider themselves from that time and forever. During the afternoon of the same day Wilson became insane and suddenly disappeared before they had cohabited at all. In 1874 Theresa Boon, having heard nothing about Wilson since his disappearance, married William Draper, she never having adopted the name of Wilson, but was always known as Theresa Boon. In 1876 Mr. and Mrs. Draper quarreled and she deeded him 640 acres of land situated in Goodhue County, Minn., if he would agree never to molest or live with her again. In 1878 she met and married one Fisher, with whom she lived and by whom she had five children. In 1886 she died, leaving $50,000 separate real estate in Minnesota; $5,000 in bank stock; a lease for ten years of a business block in Minneapolis; and moneys due her amounting to $1,000. Thomas Wilson in 1887 learns of the facts, upon his release from the asylum, and he brings suit to recover the property from Fisher and the five children. Can he recover?

107. B, a farmer, rented his farm to C for one year, for a third

of the crop, the written lease providing that B should advance to C money for hired labor not exceeding $200, which should be a lien on C's share of the crop. The lease was not acknowledged, but was filed in the proper town clerk's office. While the crop was growing C gave a mortgage on his share to X for borrowed money, which was duly filed, X then having no actual notice of the terms of C's lease. B had no actual notice of X's mortgage. Before the filing of the mortgage B advanced to C $100, and afterwards $100 more. Explain rights of parties.

108. M mortgaged the tools in his shop to secure a past due debt to R; afterwards he mortgaged them again to S to secure a fresh loan, S having no notice of the mortgage to R. R never filed his mortgage, but on learning of S's mortgage immediately took possession of the tools. S now begins replevin to recover the property. Explain rights of parties.

109. The will of K having been duly executed, he subsequently desired to revoke one of the paragraphs. For that purpose, in the presence of two witnesses he drew several lines across the paragraph with his pen and stated to the witnesses when he did so an order to revoke that part. Was the paragraph duly revoked?

110. On October 12th, 1871, the testator duly executed his will. On July 3d, 1872, he married, whereby the will was revoked. On the same day after his marriage he executed a codicil in which he made a provision for his wife, and the codicil contained a clause to this effect: "In all other respects I revise, justify and confirm my said will." The question is whether the will is operative?

111. Congress passes a law reducing the rates of express charges all over the United States on interstate shipments to rates one-third less than the present charges, but the rates apply uniformly to all lines and are proportioned to the expense of carriage. Is the law valid? Write a brief.

112. The X railway carries a ton of bran for A fifty miles for $2. The Y Railway carries a ton of bran for B one thousand miles for $2, in the same general region and under practically the same conditions of transportation. Has any legal right of A been violated?

113. A, by mistake in drawing up and signing a note to B, leaves out the interest, but by another mistake in paying the note he pays interest on the same. A now sues B in *quasi* contract to recover the value thereof. (1) Give the rule of law, (2) apply the rule to above facts.

114. The defendant deserted his wife. He refused to provide for her. She was without means of support. The plaintiff was a grocer. The wife applied for necessary groceries. The defendant expressly notified the plaintiff not to deliver them and told him he

would not pay for them. The plaintiff furnished the wife needed groceries. Can he recover of the defendant?

115. It is held in Cotnam *v.* Wisdom, 83 Ark. 601, that a physician, called by a bystander upon the happening of a railway accident, and who attended an injured man, who was unconscious at the time and died several days later without regaining consciousness, could recover in *quasi* contract against estate of injured man. (a) What, in such a situation, prevented a recovery upon the theory of a true contract? (b) What was the basis of the right of recovery in *quasi* contract?

116. A was on his way to the city on important business. His horse gave out. He went to a farmhouse nearby—all were absent. He took a horse from the stable and continued his journey. He returned it a day later, and said nothing about it. He took good care of it and returned it uninjured. He did not intend to pay for its use. Its use was worth $2. He made $100 by his trip. If he had not taken the horse he would not have made anything. It is admitted that the owner of the horse could recover of A at least nominal damages in trespass. (a) Can he waive the tort action and sue in assumpsit for the use? (b) If so, how much can he recover?

117. D is driving some sheep along a highway, and ten sheep belonging to P run into the flock. D drives all of the sheep into a yard and throws out five of P's sheep, and then continues along the highway with the flock. What, if any, tort is D guilty of? Why? What kind of action or actions could P maintain and what is the measure of damage?

118. In the relationship of master and servant, what duties does the master owe to his servant? Discuss the doctrine of "fellow-servants," at common law and under the statute and the doctrine of "assumption of risk."

119. J steals a horse from D. D searches for the animal, but is unable to find the same. P then offers D twenty dollars for the horse and agrees to run his risk in finding him. D accepts this proposal and the money is paid. Later D finds the horse in the possession of J, and sells him to J for ninety dollars. Is D guilty of any tort? Why? If so, define the tort.

120. A gives B permission to pass across the former's lot over a narrow path, on either side of which is dangerous machinery, and also over a short foot-bridge, out of repair. Suppose B is injured (1) by the machinery, and (2) by falling through the bridge because of the breaking of a plank. What redress, if any, would B have?

121. The town of New Paynesville is engaged in the manufacture of gas for lighting the city and houses in the same. Through the negligence of the men employed in the gas works, an explosion occurs and A's dwelling near the plant is entirely demolished. Does A have any legal means of redress?

122. A was engaged in the automobile business as agent for the manufacturer, on commission. He sold a car for $2,500 and deposited the money in a bank to his own credit, together with funds of his own, and never accounted to his principal prior to his failure, which occurred soon after, when he had a bank balance of $700. His principal and the trustee in bankruptcy each claim this fund. On what principles are the rights of the parties to be determined?

123. A contracts in writing to convey land to B on Jan. _, 1909, for $1,000. After this contract is made, B makes a second contract to resell the same land to C for $1,500. A refuses to perform. What is the amount of damages recoverable?

124. On June 1, 1908, P has his house insured by D against loss by fire, not to exceed the sum of $1,300. The property is worth more than this amount, and is injured by fire on Sept. 1, 1908, to the amount of $1,300. What is the measure of damages?

125. For $5,000 paid on Feb. 1, 1909, A conveys land to D with a covenant of seizin. B is evicted by C, who is the true owner, after B has made valuable improvements. What is the measure of damages?

126. A and B enter into mutual promises of marriage, but B, who is a man of immense wealth, breaks off the engagement on the day set for the marriage. What is the measure of damages?

127. A packing plant is established in Y in June, 1908, and at once becomes so offensive because of odors and noises that B, who lives in the vicinity, has to abandon his dwelling house and the value of the property very greatly depreciates. What is the measure of damages?

128. Through the gross negligence of D's servants in operating its train P sustains severe personal injuries, so that he is in consequence unable to work for a year, and incurs expenses for doctors' bills, hospital charges and medicine. What is the measure of damages?

129. A ships the body of her deceased child to M by the X railway. Through the gross and reckless negligence of the railway the delivery of the body is delayed half a day, in consequence of which A sustains great mental suffering. What is the measure of damages?

130. A sells B five bushels of seed corn for two dollars a bushel and warrants it to be good seed and that it will germinate. B plants the corn on twenty acres of land, the rental value of which is $100. In preparing the ground and planting the corn B spends $50. For $40 he could have cultivated it during the growing season. The corn fails to germinate. A fair crop of corn in that neighborhood is worth $20 an acre standing in the field. What is the measure of damages?

131. A entered B's land quietly, and B, without warning him, put him off the land with appropriate force. Would A have a right of action?

132. A, in attending a regular church service, was injured by the defective condition of the grounds. Could he recover?

133. A's cow was loosed by B and trespassed upon C's land, with no fault on A's part. Is A liable?

134. A's horse was tied at a public hitching-post. B untied the horse to make room for his own. Is B liable in trespass? Suppose B had acted by mistake, thinking it was his own horse?

135. A negligently tethered his horse on the highway, and B, driving negligently, ran into the horse and injured him. In an action by A, B pleads contributory negligence. Is the plea good?

(Give reasons for all answers.)

GLOSSARY

GLOSSARY.

Abandonment. Relinquishment of property with intent not to reclaim the same.

Absolute property. The sole and exclusive right to use, possess and dispose of objects of ownership, without any limitation.

Abstract. An outline history of the title to land.

Acceptance. Assent of the addressee to the proposal of the offerer. The act by which the drawee of a bill of exchange assents to the request of the drawer to pay it and makes himself liable to pay it.

Acceptor. The one who accepts a bill of exchange.

Acceptor *supra protest*. One who accepts a bill which has been protested, for the honor of the drawer or an indorser.

Accession. The right to that which one's own property produces, and to that which is united to one's own property.

Accessory contract. One made for assuring the performance of a prior contract.

Accommodation paper. A bill or note made or indorsed by one person without consideration for the benefit of another.

Accord. A bilateral contract by which a proposed satisfaction is offered and accepted.

Accretion. Increase of land by gradual deposition of soil.

Acknowledgment. The act of one who has executed a deed in going before some competent officer or court, and declaring it to be his act and deed. The certificate of such officer.

Acquisition. The act by which a person procures the property to a thing. Original acquisition, where the thing is not then the property of any other individual. Derivative acquisition, where the property is procured from others.

Act. Something done. Positive conduct.

Act of God. Inevitable accident beyond human foresight or control.

Action. The proceeding in court for the redress of a legal wrong. Suit.

Adjective law. That which regulates legal procedure.

Administrator. The person appointed by the court to manage and distribute the estate of an intestate. Feminine is administratrix.

Admiralty. Jurisdiction over maritime causes.

Adult. One of full legal age. Generally twenty-one years in the case of males.

Adverse possession. Title by operation of law when possession has been hostile, under claim of right, actual, open, exclusive, and continuous for period of statute of limitations; in the case of land, generally twenty years; and in the case of chattels, six years.

Affidavit. A written declaration under oath.

Affirmance. A confirmation of a voidable act.

Agency. A relation between two (or more) persons, by which one is authorized to make contracts for the other.

Agistment. Pasturage of cattle for a consideration.

Agreement. A meeting of at least two minds in the same intention by means of an offer and an acceptance.

Aleatory. Depending upon an uncertain event.

Alien. One born out of the jurisdiction of the United States and who has not been naturalized.

Alien enemy. One who owes allegiance to the adverse belligerent.

Alienate. To convey; to transfer.

Allonge. A piece of paper attached to a bill or note for indorsements after there is no more room on the instrument itself.

Alteration. A change in the terms of a written instrument.

Ancestor. A person from whom another has descended in a direct line.

Animal. Any animate being not human.

Animus revertendi. The intention (or habit) of returning.
Animus testandi. An intention to make a will.
Annuity. A yearly sum stipulated to be paid a person.
Answer. A formal written statement containing a defense to an action.
Ante. Before.
Antecedent right. A right which exists (or goes before) any wrongful act.
Appointment. The designation of one person by another having authority to discharge the duties of some office or trust.
Appurtenances. Things belonging to another thing. Incidents.
Arbitrator. A private extraordinary judge, to whose decision matters in controversy are referred by consent.
Articles. A contractual document containing the terms of an agreement.
Assent. Agreement; mental concurrence.
Assets. All the available property.
Assignment. The transfer of property by one person to another.
Assumpsit. A form of action for the recovery of damages for breach of a simple contract or of *quasi* contract.
Assured. The other party with an insurance company to an insurance contract. Insured.
Attachment. A process by which property is seized pending suit.
Attorney. One put in the place or stead of another.

Baggage. Whatever chattels a passenger needs on his journey, and to accomplish the object of it for his personal use and convenience.
Bailment. A delivery of chattels by one person to another to be held for some purpose and returned.
Bankrupt. A person who under the bankruptcy laws is liable to have his property seized and distributed among his creditors, or who has been adjudged a bankrupt.
Barter. Exchange of goods for goods.
Base fee. An estate in land which has a qualification annexed to it.
Beneficiary. The person entitled to the income or enjoyment of property the title to which is in another called a trustee; *cestui que* trust. The person to whom a life insurance policy is payable.
Bequeath. To give personal property to another by will.
Bequest. A gift of personal property by will.
Bilateral. Two-sided. A contract where promise is given for promise.
Bill. A formal written statement, account, or declaration. A paper filed in court calling for some specific action. as a bill in equity.
Bill of exchange. A written order from one person to another, directing the latter to pay a third person a certain sum of money.
Bill of lading. An instrument issued by a carrier. consisting of a receipt for goods and an agreement to carry them from the place of shipment to the place of destination.
Bona fide. In good faith.
Bond. A sealed obligation to pay money.
Boycott. A combination to cease dealing with a person; a conspiracy to induce others to cease dealing with a person.
Breach. Violation of an obligation, or right *in personam.*
By-laws. Rules adopted by a corporation for its own government.

Capital. The amount of money invested in a business.
Capital stock. The sum, divided into shares, which is raised by mutual subscription of the members of a corporation.
Cargo. The entire load of a ship or other vessel.
Case. A question contested before a court. An action on the facts of the particular case. A statement of facts agreed on.
Casual. Occurring by chance or accident.
Casual condition. An event which either suspends an obligation until it takes place or terminates the same on its happening.
Causa mortis. In anticipation of death.
Caveat emptor. Let the buyer beware.
Caveat venditor. Let the seller beware
Champerty. An agreement to maintain (carry on) a lawsuit in con-

sideration of a share of the proceeds.

Chancery. Equity.

Charter. A grant of certain rights by the sovereign, as to a corporation. To hire or lease a vessel.

Charter party. A contract by which the owner of a vessel lets the whole or a part of it.

Chattel mortgage. A sale of a chattel on condition subsequent that title shall revest on performance of condition.

Chattel, personal. Goods of every kind.

Chattel, real. A chattel interest in land, as a leasehold.

Chose in action. Right of action for a thing. Incorporeal chattel.

Chose in possession. A thing of which one may have possession. Corporeal chattel.

Civil action. An action to establish a private right, as distinguished from a criminal action.

Civil law. Roman law, as distinguished from English law.

Code. A body of law established by legislative authority.

Collateral. That which is by the side. Not direct. Additional.

Commercial paper. Bills, notes and checks. Negotiable instruments.

Common law. The unwritten law of England; that is. the law developed by the courts instead of by the legislature. with the English statutes passed before the settlement of the United States, together with such additions as the United States courts have made.

Complaint. The name of the first pleading by the plaintiff in an action at law. Sometimes called a declaration.

Composition. An agreement between an insolvent debtor and his creditors whereby the latter agree to take less than the whole of their claims.

Compromise. An agreement to settle a dispute, in regard to uncertain legal rights.

Concurrent. Running together.

Concurrent condition. An uncertain act which must occur at the same moment as the obligation of a promise.

Condition. A future and uncertain event on the happening or nonhappening of which a promise is made to depend.

Confiscation. Appropriation of goods by the state.

Confusion. Intermixture of goods so that they cannot be distinguished.

Consideration. The thing given or done, or to be given or done, by one person in exchange for a promise by another to give or do something.

Contract. A right of personal property created by an agreement to the performance of which the law will bind the parties.

Conversion. The tort of unauthorized exercise of ownership over the chattels of another. A form of action for damages therefor.

Conveyance. An instrument in writing under seal by which any estate in real property is created, aliened, or mortgaged.

Copyright. The exclusive right granted to authors by the government to multiply and sell their literary and artistic products.

Corporeal. Having an objective, material existence.

Costs. Allowance made to a successful party to a suit for expenses.

Covenant. A promise contained in a sealed instrument. An action to recover damages for breach of such promise.

Crime. A violation of a public right. or right of the people as a whole, and punishable by action in the name of the state.

Custom. A usage so well established as to have the force of law.

Damages. The compensation recoverable at law for the injury caused by the violation of a private antecedent legal right, that is, for torts and breaches of contracts and *quasi* contracts.

Debt. A definite sum of money due by simple contract or specialty. A form of action for the recovery of such sum.

Deceit. A fraudulent misrepresentation by which one is reasonably misled to his damage.

Declaration. First pleading of a plaintiff in common law procedure.

Decree. A judgment of a court of equity.

Deed. A contract under seal. A conveyance.

Defendant. The person against whom an action is begun.

Del credere. Applied to transaction where an agent guarantees that purchasers will pay for goods of the principal sold to them.

Dependent promises. Where the performance of one depends upon the prior, or concurrent, performance of the other.

Descent. Title given by force of law upon the death of an owner.

Devise. A gift of real property by will.

Divorce. Dissolution or partial suspension of marriage relation.

Domestic animal. One of a class that has been deprived of its natural liberty by man.

Dominical rights. Rights of the head of the family to the services of the other members of the family and servants.

Duress. Deprivation of freedom of will by restraint, or fear of imprisonment, loss of life, loss of limb, or bodily harm, or criminal prosecution.

Duress of goods. Restraint of goods under circumstances of peculiar hardship.

Duty. The conduct owed to one who has a right *in rem.*

Earnest. A sum of money paid to bind a bargain and forfeited if the buyer refuses to carry out his side of the contract.

Easement. The right of the owner of one piece of land, by reason of such ownership, to use the land of another for a specific purpose, not inconsistent with the general property of such owner.

Ejectment. A form of action to regain the possession of real property, with damages for the unlawful detention.

Emblements. Annual products of the soil raised by labor and industry, removable by tenant whose tenancy is of uncertain duration and unexpectedly terminated.

Eminent domain. Power to take private property for public use on payment of just compensation, by the sovereign or one to whom sovereign has delegated the power.

Equity. System of jurisprudence administered by equity courts. Chancery.

Equity of redemption. Period allowed by equity for a mortgagor to reclaim his property by paying his debt secured by it.

Escrow. A deed delivered to a third person to be held until the happening of some contingency, and then delivered to grantee.

Estate. The interest one has in land, etc.

Estoppel. The preclusion of a man from setting up certain facts because of prior conduct, in the nature of fraud.

Estovers. The right of a tenant to take wood for fuel, fences, and repairs.

Evidence. The means by which any alleged matter of fact is established or disproved. A branch of adjective law, or procedure.

Ex aequo et bono. In equity and good conscience.

Ex contractu. Of contract.

Ex delicto. Of tort.

Executed. Performed.

Executor. The person appointed by the maker of a will (testator) to carry out its provisions. Feminine is executrix.

Executory. To be performed.

Express. Stated; declared; not left to implication.

Family rights. Rights of members of the family against each other and the world.

Fee. An estate of inheritance in lands. Reward for services.

Fee-simple. Absolute, unqualified fee; the largest estate one can have.

Fee-tail. An estate limited to particular classes of heirs.

Fiduciary. A relation of trust or confidence.

Fixture. A chattel which has become land by annexation.

Forbearance. Refraining from doing something. Negative conduct.

Forcible detainer. Keeping possession of land by force.

Forcible entry. Taking possession of land by force.

Foreclosure. Proceeding to extinguish the right of a mortgagor or pledgor to redeem thing pledged.

Forfeiture. Penalty whereby that which belongs to one is lost to him.

Forgery. Fraudulently making or altering a writing which purports to create or modify a legal right.

Franchise. A special privilege con-

ferred by government on an individual or a corporation.
Fraud. Deceit.
Freehold. An estate for life, or a fee.
Fructus industriales. Products of the soil raised by labor.
Fructus naturales. Natural, perennial growths of the soil.
Fungible. Capable of being replaced in kind.

General assumpsit. A contract action for the recovery of damages for breach of inferred contracts and *quasi* contracts. Includes common counts and *quantum* counts.
Gift. Voluntary, gratuitous, and immediate transfer of property by delivery by one person to another.
Goods. Inanimate movables, or chattels.
Good will. Benefit acquired by the establishment of a particular trade or occupation.
Grant. Transfer of real property by deed.
Guaranty. An accessory contract, in which the promisor promises that another will pay his debt.

Heir. The person to whom the law passes the title to real estate on the death of an ancestor.
Hereditaments. Things capable of being inherited.
Highway. Passage, road, or street, which every citizen has a right to use.

Incorporeal. Without body or material substance.
Incumbrance. A claim, lien, or liability attached to property.
Indebitatus assumpsit. "Being indebted he promised." A form of contract action for the recovery of damages for breach of *quasi* contracts and breach of obligations to pay a debt due by express contract.
Indemnity. That which is given to a person to prevent his suffering damage.
Indenture. Any deed by which two or more parties enter into reciprocal obligations. Formerly with serrated edges.
Independent promises. Where the performance of one does not depend on the performance of the other.
Indorsement. A writing on the back of an instrument.
Infant. One under legal age. A minor.
Inherit. To take as heir.
Injunction. A writ issued by a court of equity forbidding and restraining parties from doing something.
Innate. Inborn; original with the individual.
In pari delicto. Equally in fault.
In personam. Against the person. A right *in personam* is a definite right against some particular person.
In rem. In the thing itself. A right *in rem* is an indefinite right which is not exercised against one person more than another.
Insolvency. Inability to pay debts in due course.
In statu quo. In the condition in which one was before.
Insurance. An aleatory contract of indemnity according to the law of averages.
Inter vivos. Between the living.
Intestate. Without a will, or testament.
In transitu. In transit.

Joint contract. One in which the promisors are jointly bound, or the promisees jointly entitled to the performance of an obligation.
Joint and several contract. One in which the promisees may hold the promisors either jointly or severally bound to the performance of their obligation.
Judgment. The decision of a common law court in an action before it.
Jurisdiction. Power to hear, try and determine a case between litigating parties.

L. S. (*locus sigilli*). Place of the seal.

Land. The soil of the earth and things attached thereto by nature or art, extending indefinitely upwards and downward.
Law. The sum total of the rules regarding the legal rights of men which govern the courts in the administration of justice.
Lease. The contract by which a leasehold (estate less than freehold) is created.
Legacy. A gift of personal property or real property by will.

Legal right. Authority, backed by the state, to require another or others to do or refrain from doing something either with respect to the person or with respect to some outside object.

Levy. Seizure of property to satisfy a judgment.

Liberty. The right to go where one pleases so long as he does not interfere with the rights of others.

License. Permit to do an act which would otherwise be illegal,

Lien. A hold or claim which one person has on the property of another as security for a debt or charge. A common law lien is the right to retain possession for such purpose.

Liquidated damages. Compensation agreed upon by the parties in advance for a future breach of contract where the injury to result is uncertain.

Livelihood. Means of subsistence.

Loan. Money lent at interest. A loan for use is a bailment of an article to be used by the borrower without paying for the use.

Majority. Full legal age.

Marital rights. Such as accrue to husband (and wife) by virtue of marriage.

Marriage. Civil status of one man and one woman for discharging to each other and the community the duties incumbent on husband and wife.

Master. One who has one or more persons hired by contract to serve him. One who has control over an apprentice.

Minority. Under legal age. Infancy.

Misrepresentation. Assertion of that which is untrue. To have legal effect it must be fraud or made by one in confidential relation.

Money. Gold and silver coin and greenbacks. Medium of exchange.

Money had and received. Form of action in general assumpsit for certain *quasi* contracts.

Mortgage. Conveyance of property as security for a debt, to be void on payment of it.

Municipal law. The law proper to any single nation or state, as distinguished from international law.

Negligence. Failure to use the care that a reasonably prudent man would under like circumstances. A tort if it causes damage.

Next of kin. Nearest blood relatives.

Nominal damages. Compensatory damages of a trivial amount awarded to establish a legal right.

Notary public. A public officer authorized to certify or attest documents, take acknowledgments of deeds, etc.

Note, promissory. Unconditional written promise to pay a certain sum of money at a future time.

Novation. Substitution of a new contract for an old by putting a new party in place of one of the parties to the old contract.

Nuisance. Anything that by its use or permitted existence works annoyance, harm, inconvenience, or damage to another.

Obligation. The conduct owed to one who has a right *in personam;* a legal bond holding a person to the performance of some act.

Occupancy. Title acquired in a thing which belongs to nobody by taking possession thereof with such design.

Original acquisition. A way of acquiring title when one is the first owner.

Orphans' court. The name given to the probate court in a few states.

Ownership. The right by which a thing belongs to one to the exclusion of others.

Parol. Oral; by word of mouth.

Partnership. The relation subsisting between two or more persons who have contracted to share as co-owners the profits of a business carried on by all or by any of them for all.

Patent. Exclusive right secured to inventors by the U. S. Government to the exclusive use of their own inventions for a limited time. Title deed given by state or nation.

Performance. Fulfillment of an obligation by leaving nothing more to be done.

Per minas. By threats.

Per procuration. By proxy.

Personal property. Right to be allowed to use, possess, and dispose of chattels.

Personal representative. Executor or administrator of a deceased.
Personal safety. The right to be exempt from injury and danger of injury to the person.
Plaintiff. The person who brings an action in court.
Pleadings. Written allegations as to claims and defenses in an action in court.
Pledge. A bailment of chattels as security for a debt.
Police power. General power of the state to preserve public rights at the expense of private rights.
Post. After, e. g., subsequent portion of a book referred to.
Practice. The form, manner, and order of conducting law suits.
Precedent condition. An event which must occur before the obligation of a promise.
Prescription. Title by adverse possession.
Preventive remedy. Restraining the doing of an act which would violate a legal right.
Primogeniture. First born.
Principal. Most important. Chief.
Principal contract. One whose subject-matter is direct; rather than auxiliary rights.
Private grant. Conveyances and leases.
Private law. Law whose subject-matter is the legal rights of private persons, including also civil procedure.
Private substantive law. Law whose subject-matter is the antecedent and remedial legal rights of private persons, excluding procedure.
Privity. Connection. Mutuality of interest.
Probate. To prove, as a will.
Probate court. One in which wills are proved.
Process. Means of compelling a defendant to appear in court.
Promise. An offer or an acceptance which involves the obligation to perform some act.
Promissory condition. An event which is also a promise, so that it not only suspends or terminates the other obligations of a contract but gives a right to damages for breach thereof.
Proof. Establishment of a fact by evidence.
Property. Rights of ownership in land and chattels.
Public calling. A business which is such a virtual monopoly that the public has an interest therein and may regulate it to the extent of such interest.
Public grant. Patent. Conveyance by state.
Public law. Law whose subject-matter is the legal rights of the people as a whole, together with procedure (criminal, etc.).
Pur autre vie. For another's life.
Purchase. Transmission of property by voluntary agreement.

Qualified property. Right of ownership less than absolute.
Quantum meruit. As much as he deserves. An action in general assumpsit on inferred contracts and *quasi* contracts.
Quantum valebat. As much as it is worth. Action in general assumpsit on inferred contracts and *quasi* contracts.
Quasi. As if.
Quasi contract. Legal obligation created by pure implication of law, but enforced by the same action as if a contract.

Ratification. Confirmation of a previous contract or act which is not binding.
Real estate mortgage. A lien upon land as security for the performance of some obligation, to be void on such performance.
Real property. The right to be allowed to use, possess, and dispose of land, and easements, etc.
Receiver. Person appointed by court to take control and possession of property pending litigation and final decree of court.
Recording acts. Statutes providing for the recording of deeds, etc., in some public office, and that the record shall be constructive notice to all subsequent purchasers and incumbrancers.
Redemption. Act by which a mortgagor reclaims the title and possession of things mortgaged.
Redressive remedy. Right to restoration of or compensation for legal right violated.
Release. Giving up a claim by the person entitled, to the person against whom it exists.
Reliction. Increase of land by the rescission of water.
Remainder. An estate in land (or interest in chattels) which is expectant and will begin after an-

other precedent estate has terminated.

Remedial legal right. A right against a particular wrongdoer to have by state authority the prevention or redress of an injury to be caused, or caused, by the violation of an antecedent legal right.

Remedial obligation. The legal bond holding a wrongdoer to redress his wrong. Correlative with remedial legal right.

Replevin. Action to recover the possession of goods.

Representation. Statement of fact.

Reputation. What a person is supposed to be.

Residuary devisee. The person under a will who takes all the lands of the testator not specifically devised.

Reversion. The residue of an estate left in the grantor after particular estates have been granted, and to commence in possession after the ending of such particular estates.

Right. The conduct to which one is entitled from another or others.

SS. (scilicit) "To wit." Used after statement of venue.

Sale. A contract which transfers the title to chattels.

Seized. The technical term describing the possession of a freehold in lands.

Seizin. Possession of land under a claim of a freehold. The formal ceremony by which one obtains possession, as livery of seizin.

Servant. A person employed to labor not as an agent.

Set-off. A counter-claim which defendant sets up against the claim of plaintiff. Counterclaim includes set-off and recoupment. A recoupment must arise from the same transaction as the plaintiff's.

Several. Separate; distinct. Several promisors each binds himself for the whole of the obligation.

Simple. Unconditional. Unsealed.

Special assumpsit. An action of contract for the recovery of damages for breach of express contract.

Specialty. A contract under seal.

Specific performance. An equitable remedy to compel the substantial performance of a promise.

Status. Legal position, or condition.

Statute of frauds. The name given to St. 29 Car. II, c. 3, passed in England, and to the statutes of the various states patterned thereon. They provide for memorandum, etc.

Statute of limitations. Statute fixing time within which actions must be brought, if at all.

Stock. The total capital put into a corporate enterprise, or a proportional part thereof.

Subject-matter. Rights created, or violated.

Subrogation. Substitution of one person to the place of a claimant.

Subscribe. To write under.

Subsequent condition. An uncertain event which must occur after the obligation of a promise.

Subsidiary. Affording assistance. Anciliary. Supplementary.

Substantive law. The law which embraces the rules regarding antecedent and remedial rights, but not adjective law or procedure.

Succession. Mode by which one set of men, members of a corporation aggregate, acquire the rights of another set.

Successor. One who comes into the place of another.

Sufferance. Negative consent. Toleration.

Suit. A proceeding in court.

Supra protest. Over (after) protest.

Surety. One who binds himself for the payment of money, or other performance, for another who is already bound to do the same.

Suretyship. An undertaking to answer for a debt, not like guaranty to pay if the debtor does not.

Surrogate. Judicial officer who presides over a probate court.

Tax. Contribution imposed by government on individuals for the service of the state.

Tenant. Generally, one who holds land; specifically, one who holds land for years of a landlord or lessor.

Testament. That which is witnessed. A will.

Testator. One who makes a will. Feminine, testatrix.

Title. The right to property. The evidence of such right.

Tort. A violation of a private legal right *in rem;* that is, any private or civil wrong other than breaches of obligations.

Trademark. A symbol, or mark, used by a person to indicate that the article to which it is affixed is manufactured or sold by him.

Transcript. Official copy of a court record.

Treasure-trove. Treasure found. Gold, silver, and other riches found hidden in a secret place.

Trespass. To invade another's right of security, or possession of objects of ownership. A form of action for the recovery of damages for such injury.

Trover. Action for the recovery of damages for the conversion of goods. Conversion.

Trustee. A person appointed to execute a trust.

Tutelary. Invested with the guardianship.

Ultra vires. Beyond the power. Applied to acts of corporations in excess of charter powers.

Undue influence. Deprivation of freedom of will by mental constraint.

Unenforcible. Not to be put into execution.

Unilateral. One sided. A contract where promise is given for an act.

Valid. Of binding force.

Vendor. The seller.

Venue. Locality; the heading of legal documents showing state and county.

Verdict. The decision of a jury upon matters submitted to it.

Violation. Infringement. Non-observance.

Vis major. Superior force. Inevitable accident.

Void. That which has no force or effect.

Voidable. Having some force, but which may be avoided.

Waiver. Surrender of some right or privilege which the law gives.

Warranty. An accessory contract in which the seller promises the existence of certain facts as to the thing sold.

Waste. Lasting and wrongful injury by the holder of a particular estate to the detriment of the holder of the reversion or remainder.

Wild animals. Animals in a state of nature, or temporarily deprived of their natural liberty. Animals *ferae naturae.*

Will. A written instrument executed according to statute, in which a man makes a disposition of his property to take effect after death.

Witness. One who gives evidence in court. One who sees a document executed and signs his name thereto as evidence thereof.

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