STUDIES

IN

AMERICAN ELEMENTARY LAW

BY

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TO

HON. R. S. GOULD

THE CHRISTIAN GENTLEMAN
THE GOOD CITIZEN
THE ABLE LAWYER, THE JUST JUDGE
AND THE FAITHFUL TEACHER
THIS BOOK IS AFFECTIONATELY INSCRIBED

PREFACE TO THE FIRST EDITION.

For a number of years I have been considering the matter of Elementary Law, trying to solve three problems concerning it:

First. Whether there is any such thing.

Second. If so, what is it?

Third. If there is, and it can be identified, how can it be taught?

On the first point, I am thoroughly convinced. I no longer doubt that there is matter which may properly be called Elementary Law, and that it is not an ideality only, but is of the most intense interest and of the highest practical value. Indeed, so interesting and far-reaching is it, that, in my judgment, nothing else in the study or practice of the law is to be compared to it.

On the second point, I have changed my mind materially since I began to give the matter thoughtful consideration.

On this question there are three lines of thought. The first does not regard Elementary Law as a subject or matter distinct in itself, but simply as a method of presenting to the student the ordinary rules of law in nontechnical language, a process of simplifying each rule by changing the terms in which it is usually expressed, and thus, without systematizing or co-ordinating the body of rules in any way, to make each more easy of apprehension by the student.

An adequate book prepared on this conception would comprise a complete enumeration of all the authoritative rules of conduct prescribed in the government whose laws it sought to represent, stated simply, but arbitrarily, without showing any relations between them, or any of the reasons on which they are based.

The second line of thought gives more recognition to the idea of the separateness of Elementary Law, yet does not admit this fully; and it also deals with it more as a method of presenting the established rules of law than as a distinct substantive matter. The method employed is a much more thoughtful and helpful one than that in the first school.

This view, put into practice in the preparation of a book, results in a scientific treatment of the whole body of established rules of conduct, and an arrangement of its several parts with reference to each other, and to the whole, thus presenting the co-ordination of these rules.

This is extremely useful. Many of the books thus made are of great merit, and should be in every law library. They are very helpful to the advanced student of the law. There is, however, at least one serious objection to them as text-books, to be used at the beginning of the course; they necessarily presuppose, and an intelligent appreciation of them requires, considerable knowledge of the rules which they seek to co-ordinate, of which the beginner is absolutely ignorant. When placed at the first of the course, they tend to mystify and discourage, rather than to enlighten and stimulate.

The third line of thought deals with the foundation principles of law as independent, substantive truths, susceptible of appreciation and expression, and which exist distinct from the rules of conduct prescribed in any particular government; and regards these latter rules, not as arbitrary commands emanating from the caprice of power, but as earnest and approximately successful efforts at the embodiment and expression of the fundamental principles; impelling the law-making power in their establishment.

In this view, there exist absolute principles of right and wrong, which are universal, eternal, immutable, and inexorable; which constitute the standards by which all human conduct is ultimately to be judged; which principles, with the patience attainable only by the absolute, are gradually, yet constantly, revealing themselves to men and incorporating themselves in human thought and activity. This view looks upon the actual system of law, maintained at any time among any people as but an approximation to that people's conception and appreciation of these absolute principles.

From this point of view, Elementary Law—or, perhaps, more accurately, Elemental Law—consists of these absolute principles, and their influence upon, and manifestation in, the actual rules of conduct prescribed by the particular government whose law is being studied.

I am fully persuaded of the correctness of the view last presented.

As to the third query: How can Elementary Law be taught? Since I believe in the existence of absolute principles, and that the law of any people is but a tentative expression of that people's common judgment and conscience, as to what is required in conduct by these absolute principles, I am forced to believe that the effective and logical way to teach the law is to begin with these basic ideas and as thoroughly as possible familiarize the student with them, and then to advance him gradually in their orderly and systematic manifestation in the formulated rules of law. I think it is better to teach the reason for the rule, and follow this with the rule resulting therefrom, than it is to teach the rule and then go back to the reason from which it resulted. The last taxes the memory to retain an unappreciated formula and dulls interest and hinders intelligent reasoning by a sense of arbitrariness; while the first takes the student through a process similar to that by which the rule was originally evolved, and by showing the reason and necessity for it stimulates his mind to suggest it, or at least to grasp it with avidity when presented as a solution of conditions which he already understands.

From this point of view, an adequate treatment of Elementary Law involves an enumeration and accurate statement of these underlying principles, and a systematic and exhaustive, though gradual, demonstration of their influence and application in each of the actual rules of conduct, which exist in the legal system under investigation.

This is a task which, in its fullness, is beyond human attainment. Its inherent difficulty, perhaps, explains the paucity of acknowledged effort in this field of endeavor. All that can ever be accomplished will be but an approximation. Under conditions as they now exist, very remote approximation is all that can reasonably be expected.

Holding these views, I have acted upon them to the extent of my ability and have endeavored to exemplify them in the following pages. I have striven earnestly, and have given much time and thought to the matter contained in them. From circumstances beyond my control, the preparation of the text for publication has been unduly hurried.

The work has all been done by me, except a few quotations, duly noted; the only extensive ones being from the decisions of the Supreme Court of the United States, two of which constitute

Chapter III, Part Two; and also except Chapter IX, Part Three, on Contracts, which was written by Mr. E. W. Townes, and is published by his permission.

I have not, in a single particular, realized my ideal. I do not think that I have failed in the purpose of the book. I do not claim that I have succeeded. If it shall prove suggestive and stimulate thought and effort in the proper study and teaching of the law, I shall be content. Invoking the sympathy of those who have striven, and are striving, for the unattainable, I submit the result to the candid judgment of those who think.

JNO. C. TOWNES.

University of Texas, November 14, 1903.

PREFACE TO THE SECOND EDITION

In the preface to the First Edition published in 1903 I set out briefly my ideas as to Elementary Law and the proper method of teaching it. These ideas were then largely experimental. The book was prepared to enable me to test their soundness and practicability in my own classes. Hence no attempt was then made to extend its use.

I have used the book in my classes each year since its publication. The aggregate membership of these classes is fully one thousand pupils, most of them men of good ability, eager to acquire legal information and legal habits of thought. I have carefully noted the effort made by these students to master the subject and the practical results of these efforts, taking observations both during the study of this subject and of the later topics in the curriculum. I am now thoroughly convinced of the practicability and value of the study of Elementary Principles as the introductory topic in the study of the law. Complete mastery of the fundamentals of the law has been acquired by very few, if any, even of the world's greatest jurists; but the student of average ability and training can get such an acquaintance with these basic principles in the beginning of his legal studies as to be exceedingly helpful to him in his subsequent courses. This acquaintance gives an approach to after work which we had sought in vain in other methods of teaching. It enables the student to realize that the law is a connected and co-ordinated system, not a semi-accidental collection of arbitrary rules, and that the differing rules which he finds in the respective topics are the outgrowth and manifestation of the same unchanging principles applied to the differing matters with which the several topics deal.

This training of the student in power of legal thought and judgment, makes the work of both teacher and pupil in each succeeding subject easier and more interesting, and by tracing these fundamentals through each topic, each later subject becomes essentially a review of each of those which have preceded it.

Being thus assured of the value of the subject and the practicability of the manner of presenting it, I have carefully revised the whole book, enlarging some portions and cutting down others so as to give better proportion and greater symmetry, and have rewritten almost the entire text. In fundamenal conceptions, the changes are few and inconsequential; in details they are numerous and important.

As stated, the First Edition was written with a view only to experimental use in my own classes. This edition is prepared in the hope of larger use and greater usefulness. The extent to which these hopes are to be realized is "in the womb of the future."

JNO. C. TOWNES.

Austin, Texas, March 31, 1911.

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STUDIES

IN

AMERICAN ELEMENTARY LAW

CHAPTER I.

INTRODUCTORY.

Our subject is Elementary Law in the United States. These terms embrace the fundamental principles which are embodied in and operate through our American governmental institutions, the foundations on which the whole fabric of American jurisprudence, government and law rests, and their influence and manifestation in and through this fabric. Thus understood, few subjects equal it in importance and interest, and none can more worthily or profitably engage the time and effort of the student of Law.

These principles are few, but their application to the almost infinite variety and complexity of facts and conditions which go to make up the sum of American life, public and private, is most varied and exceedingly difficult. The attempt at this application by the numerous States, legislatures, courts, and law writers at widely different times, and under widely different circumstances, has led to an almost infinite number of legal rules or formulæ. The body or aggregate of these rules, in the main consistent and just, yet occasionally inconsistent and unjust, we are taught to look upon as the law, and much of the time devoted to legal education is given to classifying and assimilating these formulæ and fixing

them in the mind of the student as the rules which are to control in his future professional career.

This study of the formulated rules is good, but it is not the best; for, valuable as is the rule deduced from the principle, and authoritative as is the expression of the rule in statute, or decision, or recognized text, still neither student nor lawyer nor judge will ever see in the rule its highest merit or obtain from it the safest guidance until he is familiar with the great principles which secured its approval and led to its establishment. Let us, then, give ungrudgingly our time and patience and energy and mind in searching for these basic principles and tracing out their influence and application. I ask your aid in this search; for, sad to say, notwithstanding the interest and importance of the undertaking, I have been unable to find any one who has diligently and successfully pursued it.

There are many books on Elementary Law, some good, some bad, some indifferent. Some are fine treatises on jurisprudence; some are apparently efforts to state legal rules in simple and non-technical language; some are fine analyses of our institutions and quite scientific presentations of legal rules, but I have found in none of them an attempted statement of the underlying principles on which our institutions and rules of law are founded, nor an effort to ascertain and point them out or show their influence in the development of our American system. I appreciate the difficulty of the task and acknowledge in advance my incapacity to discharge it; but if it is never attempted it will never be achieved, and if it be attempted, there is at least the possibility of approximate success; and even decided failure might still prompt to further and more successful endeavor by others more capable.

This, then, will be the order of our work: to ascertain and state as clearly as possible as many of the fundamental principles upon which our government and law are founded as we may be able, and then to develop their practical application and influence—

First—In the action of sovereignty in the organization and maintenance of our governments;

Second—In the operation and working of these governments;

Third—In the general rules regulating and governing the conduct of individuals;

Fourth—In the law of procedure, and

Fifth—In a general but more specific manner in the three great divisions of Criminal Law, Tort Law and Contract Law.

Many of the principles thus dealt with are applicable in all five of these connections, and some in more than one but less than all, and some in only one. It would consequently involve considerable repetition and loss of time to take each up separately and show or attempt to show its effect throughout the whole body of the law. To avoid this and to reduce the labor and liability to confusion, the subject will be presented under the five general subdivisions indicated above, and matters common to more than one will be treated at some length in the most appropriate connection and be dealt with more briefly in others, with reference to the fuller treatment.

SOME GENERAL PRINCIPLES OF LAW.

Sovereignty.

1. Political power embraces the rightful authority to organize and operate a localized government, based upon physical force and capable of maintaining itself against both external and internal foes, and of exercising control over all persons and things within its territorial limits.

2. The sum of these powers is sovereignty. The person or collection of persons in whom these powers exist is sovereign. All the persons subject to the same sovereign are a people.

3. "A State is a body of persons, living within a specified territory, permanently organized for the purposes of government."

4. In our American institutions, all of these political powers are not vested in any one collection of persons. They are divided; those which are usually denominated National are vested in a designated portion of the people of the United States as a whole, while those which are local or domestic are vested respectively in designated portions of the people of the several States.

5. This division of political power results in two bases of governmental authority, the first National or Federal, and the second local or State. Of the first there is but one, the "people" of the whole United States, whose jurisdiction extends over the whole territory of the United States. Of the second there are many, consisting severally of the "people" of each State, each distinct from every other and having jurisdiction only in the territory of the

particular State. Each of these is supreme within the sphere of its political activity.

6. Whether or not this division of subject matter over which political power has ultimate jurisdiction destroys the sovereign nature of the power as to the matters within its control is an academic question with which we have no concern further than to guard ourselves against the erroneous doctrine that political power can not thus be limited as to subject matter without waiving the supreme control over the matters to which it properly pertains. In our American Institutions the people of each state and the people of the whole United States are each supreme in their respective fields of political activity. In the academic sense of unlimited political power, neither is sovereign. In the practical and legal sense, each is sovereign within its own sphere of action.

7. The first duty of sovereignty is to perpetuate itself.

8. The second duty of sovereignty is to protect the whole people subject to its jurisdiction in their collective or public capacity.

9. The third duty of sovereignty is to protect all the people subject to its jurisdiction in their just rights individually.

10. Sovereignty can not abdicate its functions nor grant them irrevocably to its governmental agents.

11. Sovereignty may delegate the exercise of its powers to public agents for public purposes.

12. A sovereign will not employ its agencies against itself, nor give aid to persons engaged in the violation of its laws.

13. Political power has three phases or aspects: First, Determinative; second, Applicatory, and third, Executive.

Government.

14. The system of agencies created and maintained by a sovereign through which to perpetuate itself and discharge its functions, is a government.

In America governments are created and perpetuated by written instruments called constitutions.

15. These constitutions necessarily have parts of four different natures, viz; creative, perpetuative, functional, and restrictive.

16. The creative parts are those providing for the institution and organization of government.

17. The perpetuative are those providing for the renewal or continuation of the government.

18. The functional are those which distribute power and duty among the several agencies, and provide for the exercise of the one and the discharge of the other.

19. The restrictive parts are those which reserve to the sovereign creating the government, to the people collectively or individually, rights and privileges which the goverment can not interfere with or take away; or limit the exercise of power conferred upon the governmental agencies. These restrictions are frequently, though not always, set out in a Bill of Rights.

20. In all American constitutions, the distinctions between determinative, applicatory, and executive powers are recognized, and a different department of government is provided to exercise each, called, respectively, the Legislative, Judicial, and Executive Departments.

21. The division of the subject matter as to which the people of the several states, and the people of the whole United States, respectively are sovereign, results in the establishment of two governments, each supreme within the sphere of political activity and each without power as to matters exclusively within the jurisdiction of the other, and each having some power over those matters which are concurrently within the spheres of both.

22. The line of separation between these powers is drawn by the Constitution of the United States, all powers conferred by that instrument upon the Federal Government, pertaining to it, and all powers not so conferred, remaining with the people and with the states.

23. The United States Constitution should be construed fairly according to the natural meaning and import of its language, allowing to the Federal Government all those powers which pass to it by such construction, and denying to it all powers which do not so pass to it.

24. The powers delegated to governmental agencies are trusts for the benefit of the sovereign and the people organizing the government, and are not for the benefit of those agencies, or persons acting for them. Such agencies have only the authority conferred upon them by the sovereign.

25. A person who is directly interested in the exercise or the results of the exercise of governmental power can not act for the sovereign in its exercise.

26. In the administration of government, the safety of the people is the chief end.

27. The government should interfere with the individual only so far as the public good requires.

28. The public good is best subserved by equality of right and duty among all the individuals subject to the government.

This is correct in theory, but its practical application is rendered impossible by the manifest inequality in merit and capacity in individuals and the classes into which they are divided.

So that the actual present rule is equality in protection and as near approach to equality in right and duty, privileges and burden as the difference in individuals and their conditions will permit consistently with the public good.

Law.

29. Law is an authoritative rule of being or conduct. A municipal law is a rule of being or conduct established by political power capable of enforcing it. The law of any State or Nation is the aggregate of such rules established and enforced by it.

30. The subject matter with which municipal law deals is persons, things and conduct.

Persons.

31. A person is any being capable of sustaining legal relations, that is, of having legal rights and owing legal duties.

32. Persons are natural and artificial. The first embraces all human beings. The second, all legal entities created by sovereign power for designated purposes, having such powers and rights, and subject to such duties and obligations, as the creating power prescribes.

33. A normal person is one who sustains the political status of citizen or subject to the sovereign who is acting regarding him, and whom the law regards as capable of determining his own conduct.

An abnormal person is one not a citizen or subject, or who is, in reality, or by legal implication, regarded as incapable of self-determination. The general rules of law are made for normal persons. They are changed for the benefit of abnormal persons as justice may require, and appropriate rules are provided as to them.

34. The principal abnormal conditions recognized by law are

alienage, mental unsoundness, drunkenness, duress, infancy and coverture, each of which is given such effect in dealing with persons subject thereto as justice and public policy require.

Marriage.

35. The law recognizes the necessity of marriage and the desirability of protecting the respective spouses in the rights incident to the married state.

The common law regards the husband and wife as one person, the husband having the right of control. This is much modified by statute in many States.

Family.

36. A family is a legal institution consisting of a number of persons between and among whom there exists the duty to maintain and support on part of one of them and the right to be maintained and supported on part of the others, which rights and duties result from status and not from contract.

Things.

37. A thing is any existence not a person. Corporeal things are those discernible by the natural senses. Incorporeal things are those not discernible by the natural senses.

Conduct.

38. Conduct is every manifestitation a person makes of himself. The legal standard or unit by which conduct is measured is the average man.

39. Conduct is affirmative, including all forms of human activity, or negative, including all forms of failure or omission to act when action is a duty. The same conduct may be affirmative from one point of view and negative from another.

40. All affirmative conduct violative of the legal rights of another, and all negative conduct in neglect or breach of legal duty resting upon the person failing, is unlawful.

41. The law takes no cognizance of mental conditions or designs not manifested in conduct either affirmative or negative.

42. The standard by which to determine the sanity of a person as to any particular conduct is, Did the person at the time have sufficient mental capacity to understand the legal nature of the conduct and its probable results and consequences.

Motive is that which induces action.

Intending is the process through which the mind and will pass in yielding to or rejecting motive.

Intent is the state of mind resulting from the process of intending.

Purpose is the end to be attained.

43. The effect of design and motive upon conduct differs in different branches of the law. In criminal law, mental capacity, motive prompting conduct and intent are almost always taken into account and are usually controlling in determining legal liability; in tort law, mental capacity, motive and intent are usually unimportant as regards liability for actual damages, though in heinous cases they are taken into account in allowing punitive or exemplary damages; in contract law, mental capacity is essential to the assumption of obligation, but mental capacity and motive are of no consequence in determining the consequences of breach of contract obligation once validly assumed.

Accident.

44. An accident is "the happening of an event without human agency," or if through human agency, without the concurrence of the will of him through whose agency it occurs.

45. An inevitable accident is one which occurs without any legal wrong by any person. An inevitable accident never results in legal liability except in cases of insurance. Accidents not inevitable, which result in hurt to him against whom the legal wrong is committed always render the wrongdoer responsible.

Legal Rights and Duties.

46. Rightness, propriety, is conformity to authoritative standard.

47. Right and duty are correlative.

48. The sanction of law is necessary to the practical enjoyment of legal right.

49. A legal right is a power, claim, interest, or advantage which one or more persons enjoy under the protection of the law, secured to him or them by the sovereign by giving to him or them capacity to control by law the conduct of others with reference thereto.

50. Legal duty is subjection to a correlative legal right; that is, the necessity laid on the person or persons owing the duty to respect and leave inviolate the correlative legal right existing in the person or persons to whom the legal duty is due.

51. Legal obligation results from the sovereign's recognition of a legal right and its undertaking to protect the same by enforcing the correlative legal duty.

52. The sovereign, as such, has rights and owes duties of a public nature. These rights are protected by criminal law. The sovereign may also have rights of a private nature, as rights of property, rights under contract, etc. These are governed by the principles of civil law, limited in their enforcement by the immunity of the sovereign from suit except by its own consent.

53. Every man has legal rights in his own personality. Most of these are inalienable. Some of them may be alienated. Many are protected by constitutional provisions and bills of rights and are beyond the power of government. These rights extend to and include capacities, advantages and privileges, secured by the protection of one's body fully, of one's reputation from all unlawful interference, of one's mind partially, and of one's moral or spiritual nature in a still more limited degree.

54. Every person may have and enjoy legal rights in things. These are, in almost all instances, alienable, though the methods by which this may be done are under governmental control. Some of these rights are protected by constitutional provisions and are, hence, beyond the power of the government to modify or interfere with, except in the manner and to the extent permitted in the constitution.

55. This right in things is called ownership or estate. In its completeness, it consists of five elements, the right to possess, to use, to derive benefit from, to modify or destroy and to transfer.

When all these combine, the estate is called general ownership. When some of them less than all or all of them to a limited extent exist, it is called special ownership.

56. Persons may have and enjoy legal rights in other persons. Such rights are limited by the constitutional provisions against slavery; and, it is sometimes claimed, are still further restricted by the spirit and genius of our government. These rights are not called ownership, but are in many respects analogous to it. They consist in the right of one person to control, use or profit by an-

other in limited ways and for limited purposes. Such is the right a parent has to control a child or to receive his wages, or the right of a master to direct and appropriate benefits from the services of his servant.

57. Every person may have legal rights against other persons. These are limited by constitutional provisions forbidding imprisonment for debt and exempting designated property from execution. These are specific claims one person has against another designated person or persons. In a majority of instances they are based upon contract.

58. In every government there must be some person or persons who enjoy political rights or privileges. These are not inherent in any particular individual as such, but are conferred by sovereignty upon such individuals and under such limitations as it sees fit. In our American institutions some of these are protected by constitutional provisions.

59. For the violation of every substantive right, the law provides a remedy. This right to remedy is called a remedial right.

The Creation, Modification and Termination of Legal Rights and Duties.

60. The respective legal rights and duties of persons, as involved in criminal and tort law, are fixed by the sovereign, irrespective of the consent of the persons immediately concerned; that is, in these two branches of the law, certain legal rights and duties are prescribed as incident to certain conditions or relations, and all persons who come within these conditions or relations are subject to the prescribed rules as to such rights and duties, without reference to their assent to or disagreement from same.

61. The sovereign recognizes the right of persons in many regards to modify existing rights and duties and to create new ones by agreement.

62. Agreement is the meeting of two or more minds. There must be a common understanding of the facts and the same will concerning them.

63. In order for unperformed agreements to create, change, or destroy legal rights, they must be genuine, between legally competent parties, for lawful purpose, based upon valuable consideration, and evidenced in proper form.

64. Agreements possessing the foregoing requisites are called contracts, and the rules governing them constitute contract law.

65. Agreements non-enforcible in themselves, because they lack some one or more of the elements of contract, but which have been fully performed by both parties as originally contemplated, will be recognized and upheld as sufficient basis for change of legal rights always as between the parties to the agreement and usually as against all persons.

66. Agreements not forbidden by good morals or law, but which are defective simply by reason of want of capacity in one or more of the parties thereto, will not be made the means of working injustice, and if they have been partially performed by either party, the other will be compelled either to perform his part or restore the performing party to his former condition. The statement with reference to restitution must be qualified in case of infants. If an infant has made an agreement and received advantage under it and consumed that advantage during his minority, his right to set aside the agreement can not be defeated by his failure to restore.

67. Agreements for the conveyance of real property having all the other elements of contract, but defective in form, and which have been fully performed by the purchaser and performed by the seller to the extent of placing the purchaser in possession, will be enforced against the seller if the purchaser has improved the property.

68. Legal rights and duties may also be created, modified or lost by conduct not constituting contract. Such conduct may be either affirmative or negative. Before conduct can have such effect, this effect must have been antecedently prescribed by some positive rule of law, or the conduct must be such as to render it manifestly unjust not to follow it with such consequences.

69. When one person has by conduct, affirmative or negative, created in the mind of another a reasonable belief that a certain fact or facts are true, and has thus induced the person deceived to act on such belief in such way that it would work injury to him to permit the other to deny his former representations or statements, the latter is estopped from so doing and the rights of the parties, as to this matter, must be determined as if the representations were true.

70. When a person having a right shall fail, for the length of

time prescribed by law, to assert the same against another who is unlawfully depriving him of its benefits, his right to enforce it against the party so holding adversely is lost.

71. If one person gives to another permission to do an act or a series of acts otherwise invasive of the rights of the former, but not contrary to law or good morals, such permission may be revoked at any time, but will still be good as a defense for conduct committed under it.

72. Fraud is deception resulting in unfair disadvantage to the deceived.

73. Fraud vitiates all transactions into which it enters, so far as the defrauded party is concerned. The party guilty of the fraud can not avail himself of it.

74. From a violation of the law no cause of action arises in behalf of the wrongdoer.

75. From every violation of law resulting directly in injury to the legal rights of another a cause of action arises in behalf of the injured person against the wrongdoer. This is a remedial right.

76. Ignorance of the law excuses no one for its violation.

77. Misrepresentation of law, made with intent to deceive, will be considered in behalf of the person deceived so far as the rights of the deceiver are concerned, if the deceived had the right to look to the deceiver for information.

78. In criminal law, ignorance of fact not due to negligence excuses if the act under investigation be such that it would have been lawful had the fact been as it was assumed to be.

79. Mutual mistake of fact as to a material matter inducing agreement will avoid the agreement. Unilaterial mistake of fact will not of itself ordinarily prevent or avoid contract.

80. Mistake of fact will not usually excuse in tort law, but in some instances it will. The line of separation is not clearly drawn

81. The law permits a transfer or assignment of rights which do not grow out of or pertain to special or confidential relations. Such assignments are effective without the consent of the persor owing the correlative duty. If the right grow out of or involve special or confidential relation, it can not be assigned without the consent of the person with whom such relation is sustained. If the right involve public interest directly and appreciably, it can not be assigned without the consent of the sovereign, obtained through its proper representative.

82. The law permits a person to substitute another for himself in the exercise of powers and rights not dependent on or growing immediately out of special or confidential relations and which do not materially affect public interests. In cases of confidential relations, the consent of the person with whom the relation is sustained must first be obtained, and in the case of public interest, if substitution be permitted at all, the consent of the proper representative of the public must first be obtained.

Legal Duties, and Consequence of Failure to Discharge.

83. The law does not permit the assignment of legal duties without the consent of the person having the correlative right.

84. Where one person owes a duty to another and substitutes a third person for himself in its discharge, the performance by the substitute discharges the duty; failure to perform by the substitute leaves the duty undischarged and binding upon him who owed it.

85. We may sum up the last two statements by saying, legal duties can not be assigned by the person obliged, but performance may be delegated by him.

86. When a legal duty due to a third person rests on two or more persons and one undertakes to discharge such duty and fails and injury to the person having the correlative right directly results, both are responsible for such injury to the third person. As between themselves, the one undertaking the duty is responsible.

87. When two or more persons owe an unconditional legal duty to another, but one is bound primarily and the other secondarily, failure to discharge the duty renders both liable to the person having the correlative right. The one primarily bound, if he discharge the duty, has no right of compensation from the one secondarily bound; but if the one secondarily bound be compelled to discharge the duty, he can compel compensation from the one primarily bound.

88. *Primary Range of conduct.*—Every person is entitled to the benefits arising to him from his own lawful conduct in his own behalf. Every normal person is responsible to the public and to individuals injured for injuries resulting directly from his own unlawful conduct. These benefits and responsibilities in the aggregate constitute the primary range of right and liability.

89. *Secondary Range of conduct.*—The secondary range of con-

duct embraces all acts and omissions by one person, to the benefits of which another person is entitled, or the liabilities for which attach to another person.

There are six doctrines in law, from which such rights and liabilities may arise, viz. Legal identity, Substitution, Co-operation, Non-assignability of duty, Express Agreement, and in rare cases Statutory Enactments, declaring such liability.

90. *Identity.*—Upon marriage at common law, the husband and wife become one person in law, and the husband is legally responsible in large measure for the conduct of the wife. The ancient law on this subject is much modified by later statutes.

91. *Substitution.*—Where one person lawfully substitutes another for himself in the exercise of any legal power or right, the conduct of the substitute, within the limits of the substitution, is, legally speaking, the conduct of the constituent, or one appointing the substitute.

92. *Co-operation.*—Whenever persons act together in carrying on a common lawful enterprise, their rights and duties as between or among themselves are to be adjusted, in the absence of agreement to the contrary, on the basis of equality. If a different rule is to control, it must be shown to have been in contemplation of the parties, or the circumstances must be such that justice strongly requires a different settlement.

93. Whenever persons act together in carrying on a common lawful enterprise as against third persons, each is primarily entitled to demand and receive all the advantages and each is primarily responsible for all the injuries arising therefrom. These settlements between each and third persons may be readjusted between the parties themselves according to the real intent of the persons or, in the absence of such intent, the rules of justice and right.

94. If persons act together in an unlawful manner, knowing it to be such, each being equally guilty, no cause of action can arise therefrom to either, either against his co-actor or against any other person.

95. If persons act together in any matter not violative of the criminal law or immoral in itself, but violative of the legal rights of some other person, such actors honestly believing they have the right to do as they are doing, each is responsible to the party whose legal right has been violated for the full amount

of the injury directly resulting to him; subject, in rare cases, to be offset by benefits actually received by him from such action. In such cases, as between themselves, the parties are entitled to and subject to account and settlement as in lawful transactions.

96. When persons participate in an unlawful act or enterprise, one knowing the illegality and the other not having such information, as to injured third parties, both are responsible. As between themselves, the one having the guilty knowledge is responsible to the other if he were the cause of the latter's action.

97. *Non-assignability of Duty.*—As duties are non-assignable, if a person who owes a duty delegates to another the performance of the duty, this does not discharge the obligation. To effect such discharge the substitute must perform the duty.

98. *Express Agreement.*—If one person expressly agrees to be responsible for the conduct of another in proper way and for valuable consideration, the agreement is binding.

99. In a few instances, statutes declaring that one person shall be responsible for what another does, or fails to do, have been sustained, on grounds of public policy.

Legal Causation.

100. For an act or omission to be regarded in law as the cause of a result, such result must either have been intended or must be direct. A result is direct when a reasonably prudent person in the situation of him whose conduct is being judged would have contemplated such result as natural and probable. Consequences neither intended nor direct are regarded as remote. For remote consequences no legal liability attaches.

101. Where an independent responsible agency intervenes between the wrongful conduct of one person and the injury of another, he who is guilty of the wrongful conduct is not responsible for the damage unless he foresaw the intervention of such agency, or should have foreseen such intervention by the exercise of ordinary care and prudence.

Remedy.

102. Every member of a political community, by reason of his membership therein, loses much of his right of self-help. The right of reasonable protection of himself and others, and in some cases, of his property, from unlawful violence is retained.

The right of redress by individual action for wrongs already inflicted is practically lost.

103. The individual being thus deprived of so great a share of his right of self-help, it is incumbent on sovereignty to afford him adequate remedy through its governmental agencies for all violation of his just rights.

104. In recognition of this obligation sovereignty organizes and maintains a system of tribunals to investigate conduct and award remedies. These tribunals are known as courts.

105. The final adjudication of legal rights and alleged violations of them and the denial or award of remedy is conclusive and permanently binding on all, the parties to the litigation, and those holding under them. This is the rule of *res adjudicata.*

Fixedness.

106. It is essential to the good order and well being of the community that the rules of conduct which are to be observed within the community, and upon which legal rights and duties depend, should be known and reasonably permanent. Frequent and unnecessary change is hurtful, hence a statute once passed should not be lightly set aside by subsequent legislation, and a rule, once announced by the courts as a part of the Common Law, should be firmly adhered to and followed until changed by the Legislature or until it is demonstrable that it is in conflict with the present development of the community. This latter rule is known as the doctrine of *stare decisis.*

Growth.

107. Law is the authoritative expression of public opinion and conscience. As the people progress, public opinion and conscience change. This progress most frequently finds expression through legislative enactments. It also expresses itself through the courts by setting aside judicial precedents which are no longer applicable to existing conditions. "The reason of the rule having failed, the rule itself fails."

Certitude.

108. The forces that make for fixedness and those which make for progress are in perpetual conflict, which must continue until the established rules of conduct shall be absolutely based upon truth, and law and justice shall become convertible terms.

Presumptions.

109. A presumption is an assumption of the truth of a fact or facts which obviates the necessity of proof to sustain it. The law makes many such assumptions. A few of these not only obviate the necessity of proving the proposition assumed, but are pressed to the extent that no controverting testimony can be received. These are called conclusive presumptions and are binding on all whether the fact assumed be in reality true or not.

Other presumptions simply relieve from the necessity of proving the assumed fact and deal with it as true until it is shown by evidence to be erroneous. These are called rebuttable presumptions.

Legal Fictions.

110. A legal fiction is a conclusive presumption by the law that a fact is true when it is known to be false.

Legal fictions are indulged in principally in matters of procedure to offset the injustice or extreme inconvenience which would result in particular cases from some arbitrary rule established by law because conducive to justice in the great majority of instances coming within its application.

PART I.

POLITICAL POWER AND ORGANIZATION OF GOVERNMENTS.

CHAPTER I.

POLITICAL POWER.

Political power in its truest sense consists of the combination of moral right and physical capacity to exercise general control over the conduct of others by force.

The complete conception embraces both the moral right and the physical capacity. Moral right without the physical capacity to enforce itself would lack the mandatory element necessary in power. Physical power without moral right would lack the element of propriety which has come to be a part of the conception of political power and would be but brute force. In the earlier stages of the world's development, the moral element was little regarded and the element of force had undue emphasis. The result was organization for the purpose of carrying out the will of the tyrant or despot rather than for proper political purposes according to present standards of government and governmental authority.

Whatever differences of opinion there may be regarding the foregoing statements as to the ethical element in political power, it is conceded on all hands that this power embraces the rightful authority to organize and operate a government having a fixed locality, based upon physical force, capable of maintaining itself against both external and internal foes and of exercising control over all persons and things within its territories.

SOVEREIGNTY.

A certain amount of political power constitutes sovereignty. In the technical use of the term it embraces all, or the aggregate, of such powers, and it is customary to define sovereignty as supreme political power. This aggregate of powers certainly is

sovereignty; but the question remains, may not some combination of such powers less than all also be entitled to this designation? Must the word supreme be stressed to mean the highest and ultimate power in all departments of political activity, or may it be limited to the highest and ultimate authority confined to certain political activities? To ask the question differently, May not political power be supreme within its sphere of operation although it is limited as to the matters within its rightful control?

All are familiar with territorial limits to sovereign power. No government has ever extended over the whole world. This territorial limitation in no wise interferes with our notions of sovereignty. Why is limitation as to the subject matter over which power may be exercised any more inconsistent with the idea of sovereignty than limitations as to territory?

The student of American institutions must practically familiarize himself with the use of the term in this second meaning and recognize the idea of divided or dual sovereignty. In all National and interstate matters, the highest political power is vested in the people of the United States, and they have final and supreme political jurisdiction over these matters; in all local and domestic matters, the highest political power is vested in the people of the respective States in severalty, and they have original, final, and supreme political jurisdiction over these matters. These are practical and not merely speculative matters. They must be dealt with by the different officers of government and by others interested in them, and convenience demands that some term be applied to them; and the great majority of legal writers employ the words sovereignty and sovereign as indicating final, and ultimate political authority over particular subject matter, either possessed originally or delegated irrevocably. This is but following the ordinary method of giving to one word more than one meaning, both having much in common, yet differing in some essential ideas. We will use the word in both meanings as occasion may require, trusting to the context to indicate the exact sense in each instance.

Investiture of Sovereignty.

In no one thing do political communities differ more than in the investiture of sovereignty. In theory, at least, they vary from the absolute monarchy on the one hand, where all power is con-

centrated without check or limit in one will, to pure democracy on the other, where all persons subject to the government are theoretically supposed to have an equal voice in its organization and maintenance. In practice, it is extremely doubtful whether either of these extreme types has ever existed. The governments actually existing in the civilized world to-day are those in which sovereignty is vested in some number of persons more than one and less than all.

It is said that in our American institutions the governments are of the people, for the people and by the people. This is not technically nor literally true. Sovereign power in democracies is exercised principally in the right of suffrage or of voting. Political power in America in this sense is vested in and exercised by decidedly less than half of the persons subject to its operation, and these alone, in a technical or literal sense, can be called sovereign. In actual practice, however, the protections afforded and rules of conduct prescribed are largely the same as if all persons had a voice in the government. This results from the wide distribution of political power and the indissoluble bonds that bind together those person who possess it and those who do not, their kinship and community of interest and the similarity of their views of life.

Governments.

In political communities in which sovereignty is vested in a large number of persons it is impracticable for them to act directly and personally in the exercise of their political powers. It becomes necessary, therefore, for them to devise and organize some system of agencies through which these powers may be put forth and these functions performed. Such a system of agencies is called a government.

Sovereignty in the institution and perpetuation of government acts directly. But the government having been organized, the ordinary exercise of political power is delegated to and performed by the system of agencies constituting the government.

The two fundamental purposes of sovereignty in organizing and maintaining government are the perpetuation of the sovereign itself and the just and proper protection of the people subject thereto. In order, therefore, for the government to be effective and accomplish the end of its creation the sovereign or-

ganizing it must keep in mind and provide for the permanent continuation of its own existence and the perpetuation of the governmental agencies through which it is to act. We, therefore, find in all the schemes of government worthy of the name there are fixed plans and rules by which the fundamental, sovereign powers shall be exercised directly by the sovereign so far as this is essential to its own existence and well being, and also by which the governmental agencies shall be perpetuated and the bodies or persons through whom their functions are discharged shall be renewed from time to time.

The powers and duties of sovereignty must also be distributed among the different governmental agencies and the manner in which these powers and functions are to be exercised must be outlined.

In those communities in which sovereignty is lodged in the people it is customary for the people, in creating their governments, to prescribe fixed limits upon the powers conferred upon their agents and upon the exercise of such powers in many important respects.

The organization of a popular government, therefore, involves the ordaining of fundamental laws of four different classes:

(1) Creative, or those which call the government into being.

(2) Perpetuative, or those which provide for the perpetual existence of the sovereign and of the governmental agencies created by it.

(3) Functional, or those which prescribe the powers and duties of each and all of the governmental agencies.

(4) Restrictive, or those which limit the powers delegated and the manner of their exercise.

As the function of sovereignty is to exercise political control and the governmental agencies organized are to enable it to discharge these functions, and as control involves the exercise of will by the dominant party and its enunciation in rules of conduct for the subject party, the application of these rules to such conduct or the judging of such conduct by such rules and the enforcement or execution of the dominant will, we find that both in sovereignty and in organized government there are three phases of power.

From the point of view of sovereignty these three phases of power are:

(1) The determinative; that is, the power to will and to declare the result for the control of those subject to the sovereign.

(2) Applicatory; that is, the power to apply the rules thus established to the conduct of those subject thereto and to announce the results.

(3) Executive; that is, the power to carry into effect the will of the sovereign as set out in the announced rules of conduct.

In governments these three phases of power are called respectively:

(1) The legislative power; that is, the power to make and declare laws.

(2) The judicial power; that is, the power to investigate the conduct of individuals and apply the law thereto.

(3) The executive power; that is, the power to carry out and enforce the law.

By the exercise of these powers singly or in combination sovereignty through government maintains itself and discharges all its functions. Among these functions, the fundamental one is self-preservation. Hence governments must be so organized as to enable them to successfully defend themselves against attacks from outside enemies and also to suppress internal disorders.

Each sovereign should also carry on friendly intercourse with other sovereigns. Provision must be made for this in establishing government.

Sovereignty must also be prepared to make laws for the government of those subject to it and to apply and execute these laws, hence, in creating and maintaining the agencies through which it acts, must provide for this also.

If the territory occupied by the sovereign is large it is obvious that the public good and convenience will be promoted by subdividing this territory for certain governmental purposes and localizing the agencies through which sovereignty acts. This must also be provided for. The practical exercise of this power of subdivision results in the creation of counties, cities and towns, and various political districts of different kinds. Such subdivision is not a process of political disintegration by which sovereignty loses control and ultimate power over these several districts. It is only a method by which the sovereign power of the whole political community may be exercised and applied in the

different localities throughout the territory of the sovereign more conveniently, cheaply, and effectively by the use of local agencies.

Raising Revenue.

Governments can not be maintained without expense, and hence in their organization provision must be made for raising revenue. Ordinarily, this is done by taxes of different kinds and by import duties. In times of war, in extreme emergencies, other and more stringent methods are employed. It is a recognized rule of government that taxes should be as nearly uniform as can practically be made, but no perfectly just scheme of taxation has ever been devised. All property within the State government, except such as may constitute directly or indirectly agencies by which the Federal government seeks to maintain itself, is subject to taxation. The right to levy import duties is practically limited to the Federal government.

Eminent Domain.

As the needs and safety of the public are paramount to those of any member or members of it, sovereignty always reserves the right to reclaim and apply to public use such property belonging to individuals as it, the sovereign, shall deem necessary to use for the public safety or welfare, limiting the exercise of such power by its governmental agencies by such safeguards as, in its judgment, are proper. This power of reclaiming private property and applying it to public use is called the power of eminent domain.

Police Power.

The sovereign is also charged with the duty of caring for the public safety, health and morals, and always reserves to itself the right so to control and regulate the conduct and affairs of individuals as shall be necessary or expedient to prevent any serious injury to the public in either of these regards. This authority is called the police power.

It is necessarily vague and difficult of definition or even of description. It can not be parted with even by agreement made by the people themselves, as in a constitutional provision, or through their agents, as by some public officer; but the power remains in the sovereign and may always be exercised when the

public good requires. It is in the exercise of this power that we find the best index of the advance in public intelligence and morals. Practices which, at one time, may be deemed proper, by reason of advance in the thought and conscience of the people, may subsequently be recognized as improper and subversive of the public good. In such instances antecedent permission of the unrecognized evil or even actual participation in it will not prevent or estop the sovereign from its suppression when the advanced public opinion and conscience shall so demand.

This is most forcibly illustrated in the Mississippi lottery case. For a consideration paid, the lottery company had procured a charter to maintain its lottery within the State of Mississippi for an unlimited period of time, the permission being given by statute passed in pursuance to a constitutional provision expressly authorizing it. The company organized and conducted its business strictly within the terms of the agreement and paid to the State all that it promised to pay. Subsequently, the Legislature repealed the law authorizing the company, and declared the business unlawful. The company resisted its disorganization, on the ground that the previous constitutional action and statute constituting its charter were contracts within the protection of the Constitution of the United States. The case went to the Supreme Court of the United States, and it was there held that, although these several acts possessed every essential of contract so far as form, parties, meeting of the minds and consideration went, still the agreement was not a contract, because its subject matter was immoral and that it was beyond the power of the people of the State or the Legislature of the State to bind themselves to submit to immoral practices and the perpetration of immoral schemes. The company was disorganized and compelled to quit business.

CHAPTER II.

ORGANIZATION OF GOVERNMENTS IN THE TERRITORY OF THE UNITED STATES.

Political Organizations Considered Theoretically.

As preliminary to the discussion of this subject practically it is essential that we get in mind at least three kinds of political organizations:

(1) Unitary States.
(2) Confederations.
(3) Federal States.

Unitary States.

These are States in which all sovereign power is vested in one body of people and exercised through one government. In them there is no division of sovereign power or of the matters or subjects over which political power is exercised. There is one sovereign, and one government through which the one sovereign exercises all of its functions. In it the same jurisdiction applies to national and domestic affairs. The same power that in time of peace sustains and carries on diplomatic relations with other nations, and which when occasion arises, wages war, extends to and controls the most minute and least important of all the domestic affairs of the community and the private rights of individuals. The sovereign power in such a State is necessarily undelegated and the government is necessarily single.

If in such a State sovereignty be vested in the people, the government thus organized is the simplest form of representative government. There could be no opportunity for conflict between different sovereignties as to which had jurisdiction over any matter. The one sovereign would reign supreme through the whole sphere of political activity.

Perhaps the Republic of Texas was the most complete and most nearly perfect example of such a State and such a government that ever existed within the territory now covered by the United States. In 1836 the people of Texas asserted their pri-

mary right of sovereignty and declared Texas a free and independent nation, absolved from allegiance to any other political power. They made this declaration good on the battlefield and shortly thereafter adopted a written constitution creating the government known as the Republic of Texas. This constitution provided for and organized a government fully equipped to deal with all political and legal questions from the least to the greatest. A careful study of this constitution will give a thorough and satisfactory idea of a Unitary State in all its various aspects.

Confederations.

Confederations are leagues for specified purposes entered into by then existing sovereigns and governments. They are in sharp contrast with Unitary States. They have no inherent or primary power. They do not result from the action of any one sovereign nor exist by reason of any single sovereign will. They are created by the mutual agreement of a number of sovereigns, each coming into the compact of its own will and each having the power to withdraw therefrom at pleasure. The compact in which the confederation originates is, to all intents and purposes a treaty among sovereign contracting powers. Morally it may be binding, but as each member to it is sovereign there is no common arbiter who can enforce its terms or compel the observance of its obligations.

If the plan of confederation contemplates a tribunal for the exercise of so-called legislative powers such an assembly would be a conclave of ambassadors from separate sovereignties whose action must ultimately be referred to and accepted by such sovereigns, rather than a body of legislators coming from and representing the people of different portions of one sovereignty whose action would be directly binding throughout the whole territory.

A confederation does not deal directly with the individual citizens of the several States composing it. It has no direct power over them. Its authority and action are limited to the States entering into the league. It deals directly with them and its action affects the individual only indirectly through the State to which he owes allegiance.

Federal States.

A Federal State resembles each of the foregoing in some respects and differs from each in other respects. Unlike a uni-

tary State, its power is not primary and inherent, but is delegated by and received from pre-existing unitary States. In this it resembles a confederation.

It differs sharply from the confederation in the nature and extent of the giving over of the sovereign powers delegated to it. In a Federal State this delegation of power is absolute and irrevocable. In a Confederation each member of the league has the power to withdraw at will and in this way to rehabilitate itself in the exercise of all of its powers of sovereignty. In a Federal State this is not true. The delegation once made, the State making the delegation is permanently divested of the sovereign powers delegated by it and cannot thereafter reclaim them. The distinction is this: In forming a Confederation, the several Unitary States entering into the compact delegate to the Confederation, not their sovereign powers or any of them, but simply the right to exercise certain of these powers for specified purposes, while in creating a Federal State, the several Unitary States give over to the Federal State specified prerogatives and attributes of sovereignty, thus passing, not simply the power of exercise, but the specified sovereign power itself. Strictly speaking, a Confederation has no sovereign power. A Federal State does have sovereign power to the extent, but only to the extent that such power has been delegated and given over to it by the several Unitary States forming the Federal Government.

In creating a Federal State or government, the Unitary States entering into it do not part with all of their sovereign prerogatives but only with those given over to the Federal State by the instrument creating it. As to all powers not so delegated the several Unitary States retain unimpaired sovereignty unlimited in any way except by the grant of power made to the Federal State by the agreement of the several contracting sovereigns.

It is true that if any particular Federal State be granted large sovereign prerogatives and shall become strong in the exercise of its powers, it may thus acquire physical force superior to that of any one of the States entering into its organization, and this being true from the point of view of physical force, the Federal State might be superior to, that is, stronger than, any one of its members. But ethical notions have largely entered into the modern idea of government and, these notions impose binding limitations upon the exercise of physical force. So we must say that the

Federal State might become physically and practically able to disregard the compact among the several States which gave it being, but that morally it is bound not to do so, and legally should not do so.

Within the sphere of its political authority a Federal State acts directly upon its citizens as individuals and not indirectly through the States. This is in sharp contrast with the impotency of a Confederation in this respect.

As a Federal State is invested with sovereign power as to certain matters, and is practically the chosen representative of all of the several States creating it, the responsibility of preserving and exercising these sovereign prerogatives rests upon it and it must protect them to the extent of its ability from attacks by other nations and against encroachments and withdrawals by the several States. By entering into being and entering upon the discharge of the functions assigned it, it becomes the agent of all the States constituting it to carry out the will of all as expressed and embodied in the creative act, and it is its solemn duty to meet this responsibility.

It is apparent that the conception of a Federal State carries with it of necessity the idea of dual sovereignty, that is, of two sovereign powers, each operating within the same territory and upon the same people but each restricted as to the political and legal matters over which it has jurisdiction. To deny this conception is to deny the possibility of the existence of a Federal State. Where the line of separation between the two jurisdictions shall be depends, necessarily, upon the original agreement of the Unitary States entering into the Federation. So much of sovereign power and prerogative as is conferred upon the Federal State is to be determined by a fair and honest interpretation of the instrument evidencing the agreement by which it was created; or, speaking in the terms of American law, by the proper construction of the constitution creating the Federal Government.

Another important matter necessarily arising is who shall interpret this agreement. This in turn depends upon the agreement itself.

Government in the United States.

Passing from the theoretical to the practical we find that in the United States the method of founding or organizing governments

is by written instruments called constitutions. When each of the original colonies was founded in America, it had some sort of a written charter from the English King and parliament conferring upon the founders such governmental authority as they saw fit. These differed widely in their details and appreciably in some matters of more importance; but they had this in common: they were written instruments emanating from the sovereign, conferring political power and authorizing the maintenance of government.

Under these several instruments the respective colonies began their political life. Each was separate from each and all the others, though they had much in common. The people sprang from the same stock, came from the same country, spoke the same tongue, and had years of common experience and tradition. Besides they found in the new world the same enemies, difficulties, and dangers. These gave them community of need and sympathies, and as time passed on these devedoped into a community of strength. When they found themselves confronted with a common oppressor, menacing them with a common danger, they made common cause against him and overthrew him for the common good.

In declaring independence they acted together, yet each for itself. The declaration is that "These United Colonies are, and of a right ought to be, free and independent States; that they are absolved from all allegiance to the British Crown and that all political connection between the States and Great Britain is and ought to be totally dissolved; and that, as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent States may of right do."

Before the adoption of this declaration several of the States changed their charters into constitutions, or rather, had substituted constitutions adopted by themselves for the charters theretofore granted by the King and Parliament. The Second Continental Congress advised such action and a large majority of the States had either amended their charters radically so as to make them practically constitutions or had substituted constitutions for the charters before the adoption of the Articles of Confederation. It is thus apparent that historically, as well as naturally and logically, the political autonomy and sovereignty of the States

existed and was recognized before any action was taken to bring the States into any sort of political combination.

The Confederation.

The first effort at political union among the States resulted in the adoption by the Second Continental Congress, on the 15th of November, 1777, of the "Articles of Confederation and Perpetual Union between the States." This congress recognized that it had no power whatever to bind the several States by its action in the premises. It therefore proposed that these Articles be adopted by each of the States separately and should become operative only after such adoption by all. The several States took up the matter and passed favorably upon it from time to time. It was ratified by the last State, Maryland, on March 1st, 1781.

The government resulting from this action, if the combination was strong enough to be called a government, was in the nature of a Confederation or League between independent sovereignties. It lacked efficiency and was incapable of any decisive action. It had not sufficient inherent strength to hold its several members together. So long as the Revolutionary War continued the pressure from external foes compelled the several States to observe in some manner the action of the Confederation. As soon as the war was over and this outside pressure thus withdrawn, the tendency in each State was to emphasize and cultivate its local interests, although this might involve injury to some other State or to the country at large. It soon became apparent that the Confederation was too weak to meet the demands of the situation.

United States.

This confederacy thus proving weak and unsatisfactory, the perpetual union created by the articles referred to was superseded by the government under the present Constitution of the United States. This Constitution was prepared and signed by the delegates from twelve States on September 17, 1787, and submitted to the several States for ratification, with the provision that "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying." This Constitution having been ratified by the requisite number of States, went into effect on the first Wednesday, fourth day of March, 1789. By it the present government was created and established.

The purpose of its creation, as recited in the Preamble to the Constitution, was "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty."

In order to accomplish these purposes, the framers of the Constitution and those who adopted it committed to the government thus created all national and interstate matters and conferred upon it such powers as, in their judgment, were proper and necessary to enable it effectively to meet the ends of its creation. All powers not delegated expressly, or by proper implication from those expressed and the purposes designed to be accomplished, were reserved to the States by the people. The grant of these powers to the Federal government was, *ipso facto*, a surrender of them by the several States, so that we have a division of political matters between the Federal and State governments. Neither sovereign and neither government is unlimited. We find, therefore, that the Constitution of the United States deals only with national and interstate affairs, and the constitutions of the several States only with internal or domestic affairs.

Constitutions.

It is provided in the Federal Constitution that that Constitution, and treaties made in pursuance thereof, and acts of Congress thereunder, are the supreme law of the land. The constitutions of the several States, within their spheres are likewise supreme. We therefore have this condition: that all persons, whether officers of the Federal or State governments, or private individuals, are bound to obey and support the Constitution of the United States and the treaties and acts of Congress that conform thereto, and also all State laws within the sphere of State action. That in case of conflict between the Constitution of any State or its statutes and the Federal Constitution, the latter will prevail, and all State action in conflict therewith is void. That the actions of all State officers, executive, legislative, and judicial, must also conform to and be governed by the Constitution of their State; and if such action violates this Constitution, it is void and of no effect; and that the officers of each government are bound to respect and uphold the constitutions and laws of both, within their respective jurisdictions.

Constitutions, being the direct acts of sovereignty, control all acts of legislation by the same government contrary thereto; and the Constitution of the United States renders nugatory and void any attempted State legislation repugnant to it.

Constitutions are delegations of power by the people ordaining them to the several agencies created by them and to the several officers provided for in them. This statement seems to be correct although it contradicts expressions found in numerous books, to the effect that, as to the legislative department, State constitutions are limitations of power. The truth seems to be this: no one is authorized to exercise legislative power except the sovereign itself, or those to whom it has delegated such authority; but a general grant of such power carries with it the right to legislate on any subject matter within the jurisdiction of the sovereign making the delegation; and if power to legislate on any particular matter within such jurisdiction is desired to be withheld, this intent must be specified in the constitution.

As the United States government has only such powers as are conferred upon it by the Constitution, the subjects upon which Congress may legislate must be set out in the Constitution expressly or by proper implication. As the States have all powers not conferred upon the Federal government, a general grant of legislative power to a State legislature carries with it the right to legislate on all subjects within State jurisdiction not withheld from them.

Construction of Constitutions.

As, in the American system, constitutions are the supreme law of the land, binding on all governmental agencies created thereby, all officers acting thereunder and upon private citizens, it necessarily follows that most important questions as to the proper construction and application of these constitutions in their practical working effect, and as to the respective powers and duties of the several departments of government created by them, must arise. In some instances it is expressly stated by whom the nature and extent of the powers conferred are to be determined; but these constitute the exceptions and not the rule.

In the actual administration of the government, the powers conferred upon each department must necessarily be determined primarily by it and its officers; otherwise, they could take no ac-

tion, as they would have no intelligent guide as to their powers and duty. Serious questions often arise as to whether or not the construction thus placed upon the instrument and upon statutes passed under it is conclusive upon all other departments of government. The answer, in most instances, must be determined by the general spirit and scope of duty imposed upon each department and officer, rather than by technical rules or literal and express provisions.

These questions presented practically a new phase of governmental or political difficulty. In England, there is no written constitution and no division, express or exclusive, of the powers of government among different departments. Parliament is practically supreme, and no question as to the constitutionality and validity of its action could actually arise. If it did, it would be decided by itself; for, under the English system, the House of Lords is the court of last resort, so that Parliament has combined within itself the ultimate legislative and judicial power.

Under the Constitution of the United States, the question, as an original proposition, was not free from difficulty. All legislative power is granted to Congress, and it is required to observe the Constitution in the exercise of this power. This necessarily devolves upon Congress and its several members the responsibility of passing upon the constitutionalty of any proposed measure, and makes it the duty of each member to oppose and of the collective body to reject it if it does not conform to the Federal Constitution. No bill, therefore, can become a law unless, in the judgment of Congress, it conforms to the Constitution. Again, all bills, after being passed by Congress before becoming laws are required to be presented to the President, as the chief executive, and, in the event of his disapproval, he is authorized to veto the proposed law; so that, having passed the scrutiny of the legislative department, the bill is again submitted to the executive department before it can be promulgated as a law of the land.

After the measure has gone through both processes and is declared operative, rights, or supposed rights, arise under it and are asserted in the courts; and the question then arises: Does the enactment conform to or contradict the Constitution? The courts and judges are also sworn to observe the Constitution and enforce it. Can this oath be kept if the judgment of the legislative and executive departments was erroneous and that which they had

promulgated as in conformity with the Constitution is, in fact, violative of it, unless the judiciary have the power to review the question and determine for itself the constitutionality of the measure? These questions necessarily arose early in the history of the government.

One of the clearest and most interesting discussions of the subject and enunciations by the Supreme Court of the United States with reference thereto is found in the case of Marbury v. Madison (1 Cranch, 137, decided in 1803), in which the Court, speaking through the Chief Justice, used the following language:

"The question, whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental; and, as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government of limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repug-

nant to it; or that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation; and, consequently, the theory of every such government must be that an act of the legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect, Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted upon. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case so that the court must decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the legislature shall do what is expressly forbidden, such act, notwithstanding such express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagent to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And, if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cot-

ton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

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

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts as well as of the legislature.

Why, otherwise, does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they were sworn to support?

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as * * * , according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government; if it is closed upon him, and can not be inspected by him?

If such be the real state of things, this is worse than solemn

mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation that, in declaring what shall be the supreme law of the land, the Constitution is itself first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument."

The doctrine thus announced has never since been seriously questioned with regard to the Federal Supreme Court and its power to pass on the acts of Congress. The duty and power, however, are not limited to that court. They extend to every court, State or Federal and to the State constitutions and State statutes. All courts are alike charged with the duty of enforcing the law within the limits of the jurisdiction respectively delegated to them, and in doing so it is necessary that they shall determine what the law is and distinguish between it and its semblance, however plausible and pretentious may be the claims of the latter. Hence, every judge or court before whom a case is tried must hear and determine questions affecting the validity of such acts of Congress or of State legislatures as are directly and pertinently involved in the case before it. If the question be one arising upon the Constitution of the United States, and rights claimed under that instrument are denied, the point can be carried up by proper appellate proceeding to the Supreme Court of the United States for its ultimate decision; or, if the point pertain to the State Constitution, it can be carried to the highest State Court having jurisdiction over the questions involved; but in this process of exercising original and appellate jurisdiction each court before whom the question is pending must, in determining its own course of conduct, pass on and adjudicate whether or not the statute is constitutional. This practically puts in the power of the judiciary the right of determining ultimately the proper construction of the Constitution, and the validity of all legislative action taken or attempted to be taken thereunder. When the doctrine was first announced, serious apprehensions were entertained in some

quarters that it would give to the judicial department of the government undue prominence and power and thus, for political considerations, the policy was by some persons regarded as bad. As a legal proposition, however, it has remained impregnable, and is now a settled rule of law, if precedent can settle a rule of law, in our system of government.

Application of the Doctrine.

While the general doctrines above announced remain unquestioned, there are still points of difficulty frequently arising as to their application. It not infrequently occurs that the power of the legislative or executive department of the government to act upon certain matters or in a certain way is made dependent upon the existence of specified facts. In such cases, should the power of the judiciary extend to a revision of the finding by the legislative or executive department as to the existence of such facts and consequent authority by such department to act? The question is important, and the answer is not uniform.

As a typical case, we may take constitutional provisions denying to the legislature the right to pass special laws except after notice has been given in a designated way and for a designated time. Suppose the legislature, acting under such a constitution, shall pass a special act without the notice having, in fact, been given as required in the constitutional provision. The act, in every other respect, is passed formally and regularly, is approved by the executive, and published as law. Can the courts go behind this record, inquire into the facts as to notice, ascertain that no notice had been given, and thus declare that the attempted act was passed without authority and is, therefore, void? There is a difference in the decisions, but the decided weight of authority answers in the negative.

The doctrine is this: If the action taken by the legislative department is such that it might, under the existence of designated facts, lawfully have been taken, the fact that the legislature has so acted is a conclusive adjudication that the facts prerequisite to the exercise of its power were inquired into and found to exist, and no other department of the government can reopen the question and set up its judgment or conclusion in opposition to that of the legislature. The distinction between this question and an inquiry into the constitutionality of the subject matter of an act lies in this: If the subject matter of a proposed enactment be con-

trary to the constitution, then under no state of facts could the legislature enact it into law; there is an entire absence of power, and nothing short of an amendment to the constitution could confer it. Whereas, in the other case, the power to do the act is conferred, but its exercise is made to depend upon certain conditions of fact, and the determination of these conditions, being necessarily involved in the exercise of the power, a mistake in the determination would be, not the usurpation of undelegated authority, but a mistake in the exercise of constitutional right. If this be the true conception of the subject, it is but another application of the ever-recognized distinction between the attempted exercise of the power not possessed, which is always void, and the mistaken or erroneous exercise of power actually conferred, which is never void, though in many instances it may be avoided by revisory proceedings.

Minor Political Organizations.

In governments charged with the regulation of internal affairs, it is essential that the territory under the general jurisdiction be subdivided into smaller districts or portions, so as to give better opportunity to attend, first to matters of general concern, and second to local needs and interests.

As the United States Government deals only with national matters it is not necessary for it to have any organized political subdivisions. Its territory is divided into judicial and collection districts, but these are mere matters of convenience in administering the law.

Subdivisions of the State.

The State is the political unit in American institutions. Combined under the Federal Constitution they form the United States; divided they give the various minor political subdivisions. These are known as districts, counties or parishes, precincts, townships, cities and towns, and possibly by other names.

Those designated as districts are usually very loose in their organization, and are created principally for convenience in dividing the people for election, taxation and educational and judicial purposes. They rarely have any governmental agencies or machinery provided specially for them except returning officers of election, school trustees, and other similar boards. The

creation of these districts is generaly by statute, and the extent and nature of their organization and their powers and duties are set out in the creative acts.

Counties.

The most important among the minor divisions are counties. These are political subdivisions of the State occupying designated portions of the territory of the State. They possess, to a limited degree, political autonomy. Each has a designated place within its territory known as the county seat, or county site, at which all public business pertaining to the county is attended to, where all county officers are required to keep their offices, and where the more important courts are held. They have a number of local officers, consisting usually of a judge, who presides over the local county court; a sheriff, who is the chief executive officer of the county; a treasurer, a clerk, various taxing officers, school officers, etc., who are usually elected by the qualified voters living in the county.

Counties are usually the units by which liability to jury service is determined and by which venue in more important courts is fixed. That is, in determining in what court one may be sued, the court is always designated and frequently selected by reference to county boundaries; and liability to jury service is determined in the same way, no one in a State court being subject to jury service outside the county of his residence.

The county financial and business matters are conducted by local boards or officers designed differently in different States. The principal business of these boards is to regulate taxation, establish and maintain public highways, court houses and jails, provide for the care of the poor and take charge of and manage all property belonging to their respective counties. In this way, the general sovereignty of the State distributes its duties and brings the actual control of local affairs and the operations of the government with reference to them close to the whole people, thus localizing and lessening the burdens of many public duties and facilitating the actual administration of public affairs.

From these considerations, counties are regarded as both local and general in their nature and functions; but as many of the duties discharged by them pertain directly to and very greatly

affect the general interests of the State and the administration of the general law, they are usually considered as maintained for general governmental purposes rather than for local benefit, and consequently are regarded as very largely, if not entirely, under the direct control of the State.

Counties are usually, if not always, organized under general laws which confer all their powers and rights and fix their duties. These general rules are rarely changed by any special law or legislative action as to particular counties, so that the legal status of all the counties in a State is ordinarily the same. Sometimes, under peculiar conditions, some special enactment will be passed changing some of the general provisions of the law or, it may be, limiting their operation as to some designated county for a limited time for limited purposes. These special actions, however, are exceptional.

Counties are regarded as public corporations having legal existence and as possessing legal rights and owing limited legal duties. These rights and duties are of two general kinds, governmental and business. As to the first, counties are not subject to suit at the hands of individuals unless they have assumed or undertaken obligation by legally authorized contract. As to their business functions, there is a slightly larger range of liability, but even in these regards their legal obligation to individuals is very limited.

Counties may acquire, own and dispose of property and make contracts to enable them to discharge their public duties and may maintain suits in their own name against any one violating these rights, or any of them. Their capacity to sue as plaintiffs is not limited, but is the same as that of an ordinary individual. On the other hand, their liability to suit is limited. Wherever they are authorized to make contracts and do so, and then violate the contract, they may be sued. They are not liable to suit for torts except in those cases in which some constitutional or statutory provision creates such liability; that is, at common law the county can not be sued for a tort, and if such suit can be maintained, it must be by reason of some written law.

Counties are created by the state and have no inherent or original powers or prerogatives. All their powers are derived from the state in which they exist and are subject to be taken from them whenever the state so desires.

Counties are in turn divided into subdivisions called sometimes

precincts, sometimes townships. These are made for the still greater convenience of the people in matters still more local. The New England township is said to be the best example of local self-government that is to be found. As such direct representative of sovereignty, the sovereign's immunity to suit, except by its own consent, was, in a large measure, accorded to the township in the beginning of our government, and from this, as an historical basis, has grown up to a large extent the doctrine of non-liability of counties for conduct otherwise tortious.

Cities and Towns.

Experience demonstrates that, for both business and social purposes, people will congregate in large numbers within small spaces. This massing of population creates the necessity for better and special means of protecting private rights and supplying public needs. Better highways, better sanitation and better protection against fire and against crime, larger and better facilities for water and light and transportation, and many other matters equally important and yet local in their nature, require additional organization of the community in which these needs exist. Such organization is secured by the incorporation of these thickly-settled districts into new political units, known as cities or towns.

These corporations, while public and governmental, are still more for local than for general purposes, and tend more to the special convenience, advantage and protection of the inhabitants of the designated territory than of the State at large, and the powers conferred and duties and liabilities imposed are made to correspond to these conditions. As a rule, but a small share of the general powers or of the general duties of government are conferred on these local corporations, and as those which are conferred are for local benefit and the advantages accruing are limited in a great measure to residents in the particular territory, immunity from responsibility is not recognized in behalf of the corporation, and it will, ordinarily, be held liable on all authorized contracts and on all torts committed in carrying on its local concerns, in the same way and to the same extent that a private corporation would be.

They are, however, not responsible for wrongs committed by their officers in the exercise of their general governmental functions. As to those they are immune from suit.

There are two general methods of creating such corporations: First, by the passage of general laws providing for their creation, specifying how the corporation shall be effected, the powers to be possessed by it and the duties and liabilities to which it is subject, and authorizing the inhabitants of any district or locality having the legal requirements as set out in the act to combine themselves into such corporation. The second method is by direct or special act of the legislature creating the particular town or city. In whichever way any town or city may be created, it has such powers and is subject to such responsibilities as its creative act or charter, whether general or special, interpreted and construed according to legal rules, shall specify.

The scheme of government for such corporations is usually local the officers consisting generally of a chief executive, known as a mayor, taxing officers, officers charged with the duty of keeping public records, and officers charged with the duty of keeping public funds, a city board, known as councilmen or aldermen, some officer or officers having local judicial authority, and police officers and commissioners for various purposes, but whose duties usually relate to some public utility. The general legislative power of the corporation, so far as it is invested with such power, is conferred upon its board of aldermen or council. These powers are, of course, local, and are supplementary to the general regulations or laws of the State. The judicial officers of the city are usually restricted in their jurisdiction to the enforcement of city ordinances and State laws against petty misdemeanors.

The selection of the several officers is usually entrusted to the people of the city directly, by election, or indirectly, by the election of certain of their officers and the appointment by them of the remainder. Whether this right of local self-government may be regulated, modified or taken away by the legislature of the State, either in original acts of incorporation or in amendments to charters and, if so, in what way and to what extent, are quite interesting and unsettled questions. The courts of different States have differed with regard to them. In Texas, the question has recently been raised as to the power of the legislature to authorize the governor to appoint commissioners to exercise many of the most important powers of the government of the city of Galveston. The two courts of last resort have come to directly opposite conclusions on the subject; the Court of Criminal Ap-

peals holding that criminal ordinances passed by such commissioners or by a board or council of which they were members, were void, and the Supreme Court holding that civil ordinances, or action taken in civil matters, by the same board with the same constituents, are valid. (See Ex Parte Lewis, Court of Criminal Appeals 73 S. W. 811, and Brown et al. v. City of Galveston, Supreme Court, 75 S. W. 488.)

PART II.

THE UNITED STATES AND STATE GOVERNMENTS AND THEIR RELATIONS TO EACH OTHER.

CHAPTER I.

THE UNITED STATES GOVERNMENT.

Having considered political power in the abstract and American governments in a general way, we come now to deal with them in the concrete, as manifested and organized in the government of the United States and the several States of the Union. As the latter are so numerous, it is impracticable and would only lead to confusion to attempt to take up each and consider it in all its details. We will therefore present those matters which are common to them all, seeking thus to show the genius and spirit of our State institutions.

COMPARISONS OF THE TWO GOVERNMENTS.

The people of the several States of the Union live under two governments, each having jurisdiction over certain matters as to which it is supreme. Each is based upon the consent of those governed and is republican in form.

The State governments are formed by the people of the respective States, acting directly. The Federal government was formed by the people of the United States, acting indirectly through their State organizations.

The States, being formed by the direct act of the people, are the direct and primary representatives of sovereignty and have all the political power not expressly or impliedly conferred upon the Federal government. The Federal government, being a government of delegated authority, has no power or jurisdiction except that conferred by the Constitution creating it.

The State governments are supreme in their domestic affairs, but they have surrendered their control over national and international affairs. The Federal government is supreme in national and international, and in most interstate affairs, but has no jurisdiction over the domestic or internal affairs of the State.

The several States were originally unitary States. They delegated certain of their sovereign prerogatives to the United States. It is now settled that this delegation was irrevocable and the powers thus conferred cannot be withdrawn. The United States Government is, therefore, federal and not confederate in its nature. The result is "An indissoluble Union of indestructible States."

The systems of agencies which constitute these two governments are separate and distinct. In most of the States, the same persons are forbidden to hold office under the two Governments at the same time. The general scheme of the two is the same. Each is based upon the idea of the sovereignty of the people; each has a written constitution; and each has division of the powers of government into legislative, judicial, and executive, and provides for the exercise of these several powers by separate bodies of officers; each is largely based upon the English Common Law ideas and conceptions of law and legal rights and duties. The constitution of neither can be understood except by resorting to the common law as a means of interpretation and construction.

In matters of legislation, the powers of the two governments are usually exclusive, though in a small and diminishing class of cases they are concurrent.

In the matter of judicial enforcement of rights under the laws of either, their powers are frequently concurrent, and in all cases the judicial officers of each must observe and enforce the laws of both so far as these laws affect substantive rights.

When a particular subject matter is of such nature that its regulation will affect both National and State matters, the government having direct and immediate jurisdiction is authorized to regulate it, and the indirect consequences must be borne by the other. Thus the chartering of railroads in the several States is within the jurisdiction of the several States, although the existence or non-existence of such roads of necessity affects interstate commerce; on the other hand, fixing freight charges upon inter-

state commerce is in the jurisdiction of the Federal government although these charges affect very seriously the maintenance of the railroads as domestic carriers.

Suffrage and Its Regulation.

As we have seen, in our American institutions sovereignty inheres in the people collectively and not in each citizen individually. The exercise of sovereign power is necessarily in the control of the sovereign. Voting is an exercise of sovereign power. Suffrage, therefore, is not a right inherent in the individual citizen, but is in the body of citizens collectively, consequently no one has a right to vote except those upon whom the sovereign power confers the privilege. It is for this reason that the people in their constitutions may prescribe qualifications without which persons cannot vote legally, and may also, by constitutional provision, authorize the Legislature to prescribe such qualifications. The only limitation on this power is that contained in the Fourteenth Amendment to the Constitution of the United States forbidding the disfranchisement of any person on account of race, color, or previous condition of servitude. Subject to only this limitation, the people of each State determine who may vote therein.

Under the Constitution of the United States the people of the several States determine also who, within their respective jurisdictions, shall vote for Federal officers. This, of course, is subject to the limitations imposed by the Fourteenth Amendment just referred to. No Federal officers, except members of the House of Representatives in Congress are elected by a direct vote of the people. The President and Vice-President of the United States are elected indirectly by the people by means of an electoral college in each State. The Federal Constitution provides that all persons entitled to vote for members of the largest house of the State Legislature in each State may vote for representatives in Congress and for members of the electoral college in that State. United States Senators are elected by the Legislatures of the respective States, the members of which are, of course, elected by the qualified voters from the respective districts in each State. All other Federal officers are appointed. Thus it is seen that each State, by the exercise of its sovereign power, limited only by the Fourteenth Amendment to the Constitution, determines who, within its borders, is qualified to vote for State and Federal offi-

cers. The State also fixes the qualifications of electors for local officers.

The right to vote is limited in all the States, the disfranchised classes differing somewhat in each State from every other. The rule is that adult males, that is, males over 21 years of age, not subject to disqualification by reason of unsoundness of mind or previous conviction of crime, are permitted to vote. In some States there are property qualifications, in some educational, and in some a combination of the two. In others, the payment of designated taxes is a condition precedent to the right to vote. In a few States, women possessing the qualifications prescribed for men are permitted to vote. As before stated, the enfranchised classes are fewer in the aggregate than the disfranchised, so that the government is really entrusted to a minority of those who are subject to its laws.

LEGISLATIVE DEPARTMENT.

The legislative powers of the United States government are vested in the Congress of the United States. This body consists of two branches, the Senate and the House of Representatives. The Senate is composed of two senators from each State, elected by the legislature thereof. Each senator has one vote, and holds office for six years. Vacancies occurring during recess of the legislature are filled by appointment by the governor of the State. Such appointee holds until the legislature at its next session shall choose his successor and such successor shall qualify. To be eligible to the Senate, one must be at least 30 years of age, an inhabitant of the State by which he is elected, and must have been a citizen of the United States for nine years. The time and manner of electing senators is primarily with the legislatures of the several States, though Congress has the power of changing these regulations, except as to the place of holding the election.

The number of the senators is the same from each State, without reference to its territorial extent, the number of its inhabitants, its wealth, or other considerations. This is a recognition of the political autonomy and local sovereignty of the several States. On the floor of the United States Senate, each senator is the equal of every other, and the State which he represents has equal voice and right in that body. As no bill can become a law without the

concurrence of the Senate, the power of each State and the protection thus afforded to it is great.

The Senate, when in session, is presided over by the Vice-President of the United States, and when, by reason of the death of the President or Vice-President there is no Vice-President, the body provides its own presiding officer by election from among its own members. The Vice-President has no vote, except in case of a tie; but the member elected president pro tempore does not lose his membership in the body, and is allowed to vote upon all questions.

On the other hand, the members of the House of Representatives are chosen by popular election by the qualified voters in each State. These members are apportioned among the States according to the number of their inhabitants, ascertained by the last preceding United States census, and excluding Indians not taxed provided that each State shall have at least one representative. The basis of representation is, however, subject to be cut down in any State in which the male inhabitants, citizens of the United States and 21 years of age, are disfranchised for any cause except for crime or participating in rebellion, in such proportion as the number thus disfranchised bears to the whole number.

Members of the House hold office for two years. If a vacancy occurs at any time, it is filled by special election ordered by the governor of the State.

In providing for the election of representatives, the legislature of the State may divide the State into separate districts, and may have a representative from each district elected by the voters thereof, or it may have them all elected by the voters of the State at large; or they may divide the State into a number of districts, less than the whole number of representatives to be elected within the State, and have one elected from each of the districts and the others from the State at large.

By making this branch of Congress elective and apportioning its members according to population and limiting the term of office to two years, it was designed to give to the people direct and responsible representation, and as the concurrence of the houses is essential to the passage of a bill, laws contrary to current popular sentiment can not easily be enacted. To be eligible as a representative, one must be 25 years of age and an inhabitant of the State in which he is chosen, and must have been a citizen of the United

States for seven years. The House chooses its own presiding officer, called the Speaker of the House. He has a vote upon all questions.

Each house is the exclusive judge of the qualifications of its members, makes its own rules of procedure, and may, by a two-thirds vote, expel a member. A majority of the members of each house is a quorum. Journals of their proceedings are required to be kept. All bills raising revenue must originate in the House, but the Senate may propose or concur in amendments to such bills. Both houses must concur in the passage of a bill before it becomes a law.

Bills which have passed both houses are presented to the President for his action. If he approves a bill he signs it and files it with the Secretary of State; if he disapproves it, he returns it to the house in which it originated with his objections; it may then be reconsidered, and if it shall be passed by two-thirds vote in each house, it becomes a law, notwithstanding the President's objection. Failure by the President to act upon a bill in ten days is equivalent to approval by him. This power in the President to disapprove of proposed legislation is called the veto power. It extends not only to bills or proposed statutes, but also to every order, resolution, or vote of Congress which requires the concurrence of both houses.

This power was used rather sparingly in the early history of the government, but its use has grown more frequent in later years.

Express Powers of Congress.

1. To lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States and direct taxes must be apportioned among the States in accordance with population.

2. To borrow money on the credit of the United States.

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

6. To provide for the punishment of counterfeiting the securities and current coin of the United States.

7. To establish postoffices and post roads.

8. To promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries.

9. To constitute tribunals inferior to the Supreme Court.

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.

13. To provide and maintain a navy.

14. To make rules for the government and regulation of the land and naval forces.

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

18. To make all laws which shall be necessary for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof. (Article I, Section 8.)

19. To impeach Federal officers, the charges being made by

the House and heard and determined by the Senate. (Article I, Section 3, clauses 6 and 7.)

20. To fix times of choosing presidential electors. (Article II, Section 1, clause 4.)

21. To change time, places and manner of choosing United States senators and congressmen, except as to places of choosing senators. (Article I, Section 4, clause 1.)

22. To regulate the succession in office of President, when no President or Vice-President. (Article II, Section 2, clause 6.)

23. To prevent slavery in the United States. (13th Amendment.)

24. To protect citizens of the United States and of the several States against unlawful abridgment of their privileges and immunities, and against deprivation of legal rights except by due process of law. (14th Amendment.)

25. To reduce representation of each State in Congress and the Electoral College, whenever male inhabitants of 21 years of age are disfranchised for any cause except for crime or participation in rebellion. (14th Amendment.)

26. To prevent disfranchisement of citizens on account of race, color, or previous condition of servitude. (15th Amendment.)

EXECUTIVE DEPARTMENT.

President.

It is apparent that when the Constitution was adopted, the President was the only executive officer peculiarly in the minds of the people. The plan for his selection is elaborate. Security against vacancy of the presidential office by the death, inability, or resignation of the person elected was provided for by the establishment of the office of Vice-President. This was as far as the scheme of succession was worked out in detail. But still it was foreseen that two vacancies might occur in the course of four years, and Congress was given power to provide for this by declaring what "officer shall then act as President." Congress has exercised this power, and it is now the law that the following cabinet officers in the order named, if they possess the necessary qualifications under the Constitution and have been appointed by the President and confirmed by the Senate and are not under impeachment, shall act as President in case of death, removal, resignation, or inability of both the President and Vice-Presi-

dent, viz.: Secretary of State, Secretary of the Treasury, Secretary of War, Attorney-General, Postmaster-General, Secretary of the Navy, and Secretary of the Interior. The person so installed shall continue therein until the disability of the President or Vice-President is removed. Congress has also provided for a special election for President, under the conditions stated above.

Manner of Election.

The President and the Vice-President are not elected by direct vote of the people, but by a number of electors, selected in each State as its legislature may determine, and equal to the whole representation of that State in Congress. These electors meet in their respective States, and each votes by ballot for one candidate for President and one for Vice-President. A list of these ballots is then made up, certified, sealed and transmitted by messenger to the capital of the United States, directed to the President of the Senate. This officer opens the lists and counts the ballots in the presence of both houses of Congress, and announces the result. If any person has secured a majority of the votes cast by the electors for President, he is declared elected to that office. If any has secured a majority of the votes cast for Vice-President, he is declared elected to that office. If no one receives a majority of all the votes for President, there is no election to that office, and the House of Representatives proceeds at once to choose a President by ballot from the three candidates having the highest number of votes. In such election the representatives vote by State, the representatives from each State having in the aggregate one vote. Two-thirds of the States must participate, and a majority of all the States is necessary to an election. If there is no election of a Vice-President by the Electoral College, that fact is announced, and the Senate proceeds to elect that officer, choosing between the two candidates having the largest vote. The senators vote individually and not by States. Two-thirds constitute a quorum, and a majority of the whole Senate is necessary to a choice.

It follows, from the above provisions, that a majority of the votes cast for the electors by the people is not necessary to an election of a President or Vice-President; in fact, it has several times occurred that the man elected President had received a

minority of the popular vote. The several political parties nominate their respective candidates. These parties may be about equally divided in one State, and one of them carries it by a thousand majority and elects all of the electors of the State from that party. This, of course, gives the whole vote of that State to the candidate of the successful party. In another State, equally populous and having the same number of electoral votes, the two parties are not equally divided, but practically all the votes belong to the party which was defeated in the other State. The candidate of this party gets almost all the popular votes of that State, but in the Electoral College he only gets the electoral vote of that State, which, in the supposed case, is the same as that given the opposing candidate by the first State. As between these States there would be a tie in the vote, and no election; but a third State selects electors favorable to the candidate who was successful in the first State; they put their vote with the votes of the first State and make an election. The majority of the successful candidate in the third State may have been small, and the total popular vote secured by the successful candidate in States one and three may not equal the majority of the unsuccessful one in the second State, yet the one getting the majority of the electoral vote gets the office, to the exclusion of the one who has the majority of the popular vote.

Executive Departments.

The duties of the President are very great. He is charged with general enforcement of the law. He is the head of all the several departments of the executive branch of the government, and upon him rests the ultimate responsibility as to each. These departments are now nine in number, viz.: Department of State, of the Treasury, of War, of Justice, of the Postoffice, of the Navy, of the Interior, of Agriculture, and of Commerce and Labor. The first of these historically antedates the office of president itself. Those of the Treasury, of War, of Justice, of the Postoffice, and of the Navy were created practically upon the organization of the government. The Department of the Interior was created in 1849, of Agriculture in 1889, and of Commerce and Labor in 1902.

Each of these departments is in charge of a chief, or head called secretary of the particular department, except in the case

of the Department of Justice, in which he is called the attorney-general, and in the Postoffice, in which he is called the postmaster-general. In the departments there are thousands of subordinate officers, each of whom is responsible to his chief, and whose official action, in its ultimate results, affects the President either for good or bad.

The several heads of these departments constitute the President's Cabinet. They have two meetings each week. Their purpose is to keep the President fully informed upon all matters of importance, mutually to advise and counsel one another and the President and to receive instructions from him. The President is the real authority, and has the final decision of all questions in his hands. He gets the best information and advice he can and then determines the large matters of policy himself, leaving the details and administrative part of the scheme to the head and subordinates of the department to which the matter pertains.

It is a singular fact that there is no reference in the Constitution to any of these departments, as such, except in general terms. In stating the duties of the President, it is said that he "may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices." This does not seem to foreshadow Cabinet meetings of the kind now in vogue. There is nothing in the Constitution indicating the number of the departments, nor the manner of their establishment or organization; hence the whole matter is left with Congress and the President. The present arrangement has grown up under their joint action, and is very effective; it has the advantage of flexibility and ease of adaptation to varying conditions, as the governmental needs may suggest or require.

Pardons.

The pardoning power is also vested in the President. It is one of extreme importance and delicacy. Errors are constantly made in the administration of the criminal law, and in many instances change of conditions subsequent to the trial make it proper to relieve from penalties, justly and legally imposed at the time the judgments were entered. These nice balancings between justice and mercy, determinations as to upholding the adjudications of the courts, and setting them aside in proper cases, taxes

to the utmost both the brain and sympathy of the most capable. This all falls upon the President.

Treaties.

The next duty imposed upon the President is to make treaties with foreign nations. In this he acts in conjunction with the Senate, but the initative is with him. Usually the terms of the agreement are passed upon and arranged with the foreign power, and the matter in its final form is presented to the Senate for its judgment. Occasionally the President asks the judgment and advice of the Senate before arranging the final terms with the other nation.

A treaty is an agreement between two or more independent States, and not a legislative act. But, under the Constitution of the United States, treaties made with other nations are declared to be a part of the law of the land, and, in this sense, they are binding upon all the persons subject to the governments entering into them, and must be obeyed both by the officers in their public actions and by the citizens in their private capacities.

Appointing Power.

The President appoints all ambassadors and other public ministers, consuls, and judges of the Supreme Court and all other officers of the United States except Senators and Representatives, unless there be express law authorizing some one else to appoint. In all important offices, this appointment must be concurred in by two-thirds of the Senate. In case of such inferior officers as Congress may designate, the appointment does not need confirmation by the Senate. Congress can lodge the power of appointment to inferior positions with the courts or the heads of departments. All Federal offices of consequence are appointed by the President. The highest he selects for himself, usually in conference with the leaders of the political party by which he was elected. The less important are filled on recommendation of members of Congress from the district in which the office is to be filled, or by political influence or standing.

This power of appointment, extending, as it does, throughout the whole United States, and to many officers to foreign places, gives a patronage which is dangerous in the extreme to the purity and efficiency of the public service; but no better scheme has been

devised, and as trust must be reposed somewhere, the present plan will likely continue, modified by the doctrines and methods involved in the Civil Service and similar laws.

There are a great many Federal offices the term of which is not fixed by law or expressly made to depend upon good behavior. In such cases it seems that the power to appoint carries the power to remove, and this gives still further power to the party in control of the government.

Powers in Connection with Legislation.

It is the duty of the President, from time to time, to give information to Congress as to the state of the Union, and make recommendations as to needed legislation. This duty he discharges by sending to Congress messages at various times. Usually the most important of these are those sent in at the meeting of each session of Congress. They are state papers of great value and importance, indicating the policy of the administration and its attitude toward all public questions.

The President may, when necessary, convene both or either house of Congress, and if they can not agree as to adjournment, he may adjourn them to such a time as he may see fit.

He has the veto power, which more closely identifies him with the legislative department, and, in reality, gives to him a larger share in determining what the law shall be than to any other one person. His right to send messages and to make official suggestions to Congress gives him a very appreciable share in initiating measures of which he approves, and the veto power gives a very large opportunity to prevent the enactment of measures of which he does not approve.

Intercourse with Foreign Nations.

The President is also the officer designated to receive ambassadors and other public ministers. This, and his power to nominate the representatives of this government in foreign States, makes him practically the medium of communication between the United States and all other governments and peoples.

In addition to the duties enumerated, he is charged with the responsibility of enforcing the laws generally. So his time is fully occupied with matters great and important enough to satisfy the cravings of the most ambitious.

JUDICIAL DEPARTMENT.

Judicial Function.

In order that the will of the sovereign, as announced by the proper agencies, may be practically effective, it is essential that there be some sanction attached; that is, there must be either reward for conformity to the established rule or penalty for departure from it. These would sometimes be useless unless there were some method provided for applying them to individual conduct. This application, to be just, involves investigation as to the particular conduct under consideration, and ascertaining the truth concerning it. When this truth is ascertained, the conduct, as it is found to exist, must be compared with the announced legal standards, and the sanctions antecedently provided for such conduct, whether of approval or disapproval, must be authoritatively applied and the result announced. Then this result must be enforced. This process involves essentially different powers and functions from those involved in making laws. In our government they are exercised by a separate department. These powers are designated the judicial function, and the department exercising them is the Judicial Department. This department consists of tribunals created by the sovereign, and known as courts. The duty of these tribunals is to investigate and determine the nature of individual conduct and to determine its conformity or non-conformity to the law, and to apply to it the sanctions of the law and authoritatively announce the conclusion thus arrived at; and, finally, to set in motion and superintend the executive agents of the government in enforcing such decision.

Thus it is seen that the judicial function of the government deals with the particular conduct of particular persons, and acts directly upon such persons, or their conduct, or both, and that in doing this it exercises three distinct powers:

(1) The power to hear and investigate;

(2) the power to determine the truth of the matter and to apply to it the sanctions of the law; and

(3) the power to have the conclusion thus arrived at enforced through the proper agencies.

In our governments, both State and Federal, there are numerous classes of courts, each class having power to exercise the judi-

cial function as to designated cases. This authority of each class of courts to act for and to represent the sovereign in the exercise of judicial functions in the designated cases is the jurisdiction of that class of courts. The sovereign creating each court determines how much and what judicial power it shall have. Within the power thus delegated the court is the duly authorized agent of the sovereign, and all the power of the government is pledged to uphold and maintain it. Beyond these limits the court is without authority, and its action is void.

Jurisdiction is classified in different ways, according to the basis of separation. Of these, the two following classifications are most important to us now: First, into original and appellate; second, into exclusive and concurrent.

Original jurisdiction is the power to hear and determine a case in the first instance, to originally entertain and dispose of the suit. Appellate jurisdiction is the power vested in a superior court to rehear a case which has been tried in some inferior tribunal and correct any errors which may have occurred in its progress. Exclusive jurisdiction is the exclusive power to hear cases of certain kinds; no other court but the one under consideration, or the class of courts to which it belongs, having such power. Concurrent jurisdiction exists when courts of different classes have the right to hear and determine the same case or cases.

Judicial Power of the United States Government.

As all the powers possessed by the United States Government are conferred upon it by the Federal Constitution and its Amendments it follows that it has no judicial power except such as is thus granted. Within the scope of this delegated authority Congress may create courts and confer jurisdiction upon them. Beyond that it cannot go.

That we may get the extent of this power properly in mind we will give the provisions of the original constitution and the several amendments with reference to judicial authority and then summarize these.

Article III, Constitution of the United States.

"Section 1. The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish. The judges,

both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases in law and equity, arising under this Constitution; the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States, between citizens of the same State claiming land under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make.

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

The foregoing is the judiciary article of the Constitution, as originally adopted omitting only the sections as to treason.

It was objected that there were not restrictions enough around the judiciary, and several amendments to cure these defects were proposed and adopted, as follows:

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

Amendment V. No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indict-

ment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in the actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI. In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law.

Amendment XI. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

These constitutional provisions and acts of Congress, passed in pursuance thereof, constitute the plan made by the people of the United States for exercising their judicial functions.

Summarizing these we find that the Judicial Power of the United States Government includes and is limited to the following matters:

(1.) To all cases in law or in equity arising under the Constitution and laws of the United States and treaties made, or which shall be made, under its authority.

(2.) To all cases affecting ambassadors and other public ministers and consuls.

(3.) To all cases of Admiralty and Maritime jurisdiction.

(4.) To controversies to which the United States shall be a party.

(5.) To controversies between two or more States.

(6.) Between a State and citizens of another State.

(7.) Between citizens of different States.

(8.) Between citizens of the same State claiming lands under grants of different States.

(9.) Between a State, or citizens thereof, and foreign States, citizens, or subjects.

Federal Judicial System.

The judicial power belonging to the Federal Government is divided among a number of different classes of courts which, taken collectively, constitute the Federal Judicial System.

It is noticeable that only one court is provided for by name in the Constitution, and the number or qualifications of judges for that court are not given, and only two classes of cases are placed within its jurisdiction: those in which ambassadors, ministers, or consuls are to be affected, or in which a State is a party. As to all other matters, Congress is left free to provide. This gives great elasticity to the system, and enables Congress to provide such courts and to give them such jurisdiction within the limits of the powers of the Federal government as the development of the country shall require.

While this freedom exists as to the power to be conferred upon the different courts, there are several provisions in the Constitution which are quite restrictive as to the methods of procedure in these courts when created. Thus, the differences between Law and Equity are recognized, and it is held that this recognition requires the continuance of the distinction; and that the references to trial by jury mean a jury of twelve men according to the course of the common law, etc.

Congress has passed several judiciary acts since the foundation of the government, each providing such inferior courts as the interests of the country seemed to demand. The system now existing consists of the Supreme Court, provided by the Constitution, nine Circuit Courts of Appeal, a large number of Circuit Courts, a still larger number of District Courts, United States Commissioners, and a number of Courts of Claims of different designations, and courts for the District of Columbia.

Each class of courts thus created has certain classes of cases

which it may try and determine, and has no power over other cases or controversies not embraced in such classes.

Jurisdiction of Federal Courts.

In considering this matter we will limit our discussion to those tribunals which constitute the Federal Judicial System proper and in dealing with these we will begin with the lowest and proceed to the highest.

District Courts.—These courts have original jurisdiction over the following matters:

(1.) Of all criminal cases under Federal laws which do not receive capital punishment.

(2.) Of all suits under the Federal laws for penalties and forfeitures.

(3.) Of all common law actions by the United States, or their officers in their official capacity.

(4.) Of all cases under the postal laws.

(5.) Of all equitable proceedings to collect United States revenue from the land of the delinquent.

(6.) Of all Admiralty and Prize cases.

(7.) Of all suits of aliens for "torts," when in violation of the law of nations.

(8.) Of proceedings under the "Civil Rights" laws.

(9.) Of Bankruptcy proceedings.

There are some other unimportant matters.

Circuit Courts.—The Federal courts having the largest original jurisdiction are the circuit courts. Of these are a great number, distributed throughout the Union and sitting at such places as provided by law. They may be held by Justices of the Supreme Court, by circuit, or by district judges. Usually they are held by the latter.

The jurisdiction of these courts is extensive and important. In some cases, as those arising under the patent and copyright laws, it is exclusive of both the State courts and other Federal courts, and this without reference to the amount in controversy; that is, all litigation regarding patent rights and copyrights must be begun in a circuit court of the United States, and can not be tried in any other. In some cases it is exclusive as to State courts, but concurrent with Federal district courts, as in some proceedings for penalties and forfeitures under Federal laws,

and some arising under the "Civil Rights" acts. In some cases it is concurrent with the State courts, but exclusive as to all other Federal courts, as in suits between citizens of different States involving two thousand dollars or more. Sometimes the jurisdiction depends upon the citizenship and residence of the parties, and sometimes upon the nature of the controversy. We can not go into matters in detail, or even with technical accuracy; but, in general terms, the jurisdiction of these courts, Federal Circuit Courts, is as follows:

(1.) Cases in which the United States are plaintiffs or petitioners.

(2.) Cases "between citizens of the same State claiming land under grants of different States." In neither of these classes of cases is the amount in controversy considered in determining jurisdiction.

(3.) Cases "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority," which involve $2,000 or over.

(4.) Cases "in which there is a controversy between citizens of different States," which involve $2,000 or over.

(5.) Cases "between citizens of a State and foreign States, citizens or subjects," which involve $2,000 or over.

(6.) "All crimes and offenses cognizable under authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them."

(7.) Cases arising under the patent and copyright laws of the United States.

The jurisdiction, in the cases mentioned in the classes 3, 4 and 5, is dependent upon the amount in controversy, which must, in every instance, be two thousand dollars or over, exclusive of costs. In all these cases, that is, in classes 3, 4 and 5, the jurisdiction of these Federal courts is concurrent with the courts of the several States having jurisdiction from the States to try similar matters. If the complainant shall go into the Federal court, his complaint may be tried there; if into the proper State court, his complaint may be tried there.

While this last statement is correct, and the State court may try it, still it is in the power of the defendant, by taking the

proper steps at the proper time, to remove a case of either of the kinds now under consideration from a State court into the Federal circuit court of that district. The details of this proceeding do not concern us. When the Federal statute is complied with, it destroys the jurisdiction of the State court, and transfers the case to the Federal court for further action.

The Circuit Courts also have some special powers as to penalties, which need not be considered. They have appellate jurisdiction in Bankruptcy matters.

Circuit Court of Appeals.—These are the next highest courts in the Federal judicial system. There are nine of them, one in each of the several circuits assigned to the judges of the Supreme Court. Theoretically, each of these courts is composed of the Supreme Court Justice in whose circuit it is held and two circuit judges of that circuit; but, in reality, the members of the Supreme Court are fully employed with their duties in that court, and do not sit in these courts. The statute creating the courts provides that they may be held without the presence of the Supreme Court Justice, either by three circuit judges, or by two circuit judges and a district judge, or by one circuit judge and two district judges, and the courts are composed in this way.

Circuit judges are judges appointed by the President and confirmed by the Senate, whose primary duty it is to hold Circuit Courts, and district judges are appointed in the same way to hold district courts; but the statutes confer upon both circuit and district judges the power to sit upon the Circuit Court of Appeals when called upon to do so, and to hold circuit courts and district courts. So, there is great elasticity in the system, so far as the constituent members of the respective courts are concerned.

Circuit Courts of Appeal have no original jurisdiction. All their power is to revise cases tried in the circuit and district courts. This appellate jurisdiction extends to all cases tried in either of said courts in which the appeal does not go directly to the Supreme Court, as set out hereafter. This jurisdiction is said to be final in all cases which are brought into the Federal courts by reason of the diverse citizenship or alienage of the parties, in all patent cases, in all cases arising under the revenue laws, in all criminal cases not imposing a death penalty, and in Admiralty cases. As hereafter explained, this so-called final

jurisdiction is, in fact, subject to review by the Supreme Court. All other cases decided by this court may be carried to the Supreme Court for revision under express provisions of the statute provided they involve one thousand dollars or over.

Supreme Court.—The Supreme Court holds its sessions at Washington City and consists of nine members, one called the Chief Justice, who is its presiding judge, and eight Associate Justices. These are appointed by the President, subject to the approval of the Senate. They hold for life, or during good behavior. This is the highest court in the United States, if not in the world. It has both original and appellate jurisdiction.

Its original jurisdiction includes all cases affecting ambassadors, other public ministers, and consuls, and those in which a State is a party. As to ambassadors, this jurisdiction is not only original, but it is also exclusive, in the strictest sense. No other court, either Federal or State, can entertain such suits. As to suits in which a state is a party, the jurisdiction is exclusive so far as the Federal courts are concerned, no such court having the power to entertain and try such suits unless there be other grounds of jurisdiction, such as the involving of a Federal question.

Its appellate jurisdiction is quite extensive. It is of three kinds:

(1) Over cases brought to this court directly from Federal courts of original jurisdiction, that is, from district and circuit courts.

(2) Over cases that have gone from Federal courts of original jurisdiction to the Circuit Courts of Appeal, and which may go from there to the Supreme Court.

(3) Over cases tried in State courts and involving what are technically known as Federal questions.

Taking them in order, THE FIRST, that is, cases brought to this court directly from Federal courts of original jurisdiction, covers the following cases:

1. Those in which the jurisdiction of the trial court is in question. In these cases, the question of jurisdiction is raised in the lower court, and the case is finally tried there; then the aggrieved party either takes the case to the Supreme Court on the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case.

2. Prize cases.

3. Criminal cases in which the death penalty is assessed.

4. Cases involving the construction and application of the Federal Constitution.

5. Cases calling in question the validity of any act of Congress, or the validity or construction of any treaty of the United States.

6. Cases in which a State statute or constitution is attacked as being contrary to the Federal Constitution.

Jurisdiction of the second of these classes of cases extends to all cases over which the Circuit Court of Appeals has jurisdiction which involve as much as one thousand dollars.

This jurisdiction is, however, exercised differently in different cases. There are certain classes of cases, which have been given in connection with Circuit Courts of Appeals, in which it is said the jurisdiction of these courts is "final." But it is further provided "that in any case pending in the Circuit Court of Appeals, that court may certify to the Supreme Court any questions or propositions of law arising in the case, concerning which it desires the instructions of the Supreme Court;" and further, that the Supreme Court may, in its discretion, require the Circuit Court of Appeals to certify to the Supreme Court, "for its review and determination," any case pending or decided by the Circuit Court of Appeals in which the decision would be otherwise final. So, it is possible for the Supreme Court, in this way, to revise any decision or determination arrived at in the Circuit Court of Appeals, which is called final.

All cases tried by the Circuit Courts of Appeals, and which do not fall into the class above considered, may be revised by the Supreme Court, provided the matter in controversy exceeds one thousand dollars, exclusive of costs.

Jurisdiction of the third of these classes of cases includes the power to review "the final judgment or decree in any suit in the highest court of a State in which a decision can be had, in each of the following cases:

1. When the validity of a treaty or statute of the United States is questioned in the State court, and the decision is against such validity.

2. When any authority that is claimed under the United States government is called in question in a State court, and the existence of the authority is denied.

3. Where a State statute is attacked in a State court as being contrary to the Federal Constitution, or the treaties and acts of Congress, and the statute is sustained.

4. Where authority exercised under a State is attacked in a State court as contrary to the Federal Constitution, treaties, or laws, and the authority is sustained.

All these cases raise "Federal questions," and the right of final decision of all such questions is in the Supreme Court of the United States. It is immaterial whether such a question arise in a criminal or civil case, in a high or low court. When it has been passed upon by the last State court to which the case can be carried, and has been decided there adversely to the power of the Federal government, the case can, by proper proceeding, be taken directly to the Supreme Court of the United States for final decision.

Federal Practice.—The practice in the Federal courts is according to the recognized rules of the common law and equity courts, as it existed at the time of the organization of the Federal government, with some statutory modifications. The most important modification is that, in the Common Law cases, the rules of pleading and practice shall conform to the law of the particular State in which the court is being held, so far as may be. The extent of this conformity is left largely to the discretion of the Federal judge trying the case. This rule of practice does not apply to Equity cases.

The foregoing pages present, in very general outline, the plan of the Federal government and its several powers. They show, to some extent, recreative, perpetuative, and functional parts of the Federal Constitution.

Its remaining parts are, in the main, restrictive, consisting principally of express limitations upon the powers of the Federal and State governments, and guarantees to the latter and to the citizens of each. The express limitations upon the powers of the general government will be enumerated here, and those portions

relating directly to the States and citizens will be postponed until we have taken up the State governments proper, and will then be treated as the concluding portion of this general division of our subject.

Express Limitations in the United States Constitution upon the Powers of the Federal Government.

1. On regulating suffrage. (Fifteenth Amendment, Section 1.)
2. On requiring tests for office. (Article VI, Section 3.)
3. On granting titles of nobility. (Article I, Section 9.)
4. As to religious matters. (First Amendment.)
5. As to freedom of the press. (Idem.)
6. As to assembling of the people. (Idem.)
7. As to petitions for redress. (Idem.)
8. As to the bearing of arms by the people. (Second Amendment.)
9. As to suspension of writ of habeas corpus. (Article I, Section 9.)
10. As to bills of attainder and ex post facto laws. (Article I, Section 9.)
11. As to quartering soldiers in private houses. (Third Amendment.)
12. As to denial of due process of law. (Fifth Amendment.)
13. As to taking private property for public use. (Fifth Amendment.)
14. As to seizures and searches. (Fourth Amendment.)
15. As to taxation. (Article I, Section 9, No. 5.)
16. As to expenditures of public money. (Article I, Section 9, No. 7.)
17. As to slavery. (Thirteenth Amendment.)
18. As to procedure in criminal cases. (Fourth, Fifth, Sixth, and Eighth Amendments.)
19. As to civil procedure. (Seventh Amendment.)

By act of Congress passed since the preparation of this text, and which goes into effect Jan. 1, 1912, the jurisdiction of several of the Federal Courts has been greatly changed. This act is given in the appendix.

CHAPTER II.

STATE GOVERNMENTS.

The State Governments.

The several States have inherent in them all the powers that pertain to independent sovereignties which are not given over to the Federal government or denied to or withheld from them by the Federal Constitution. (Constitution of the United States, Articles IX and X.)

The original thirteen States, located along the Atlantic seaboard, were primarily separate and distinct colonies, planted by the English Government at different times and under different charters. At their inception they were dependent upon the mother country alike for protection and support. As they increased in population and developed their resources, it was natural that their isolation and necessary dependence upon themselves for many things should beget in them a general spirit of independence in governmental affairs.

This natural law of growth asserted itself toward the close of the eighteenth century; and, moved by a common impulse, they refused longer to submit to British political supremacy, and by the success of their united efforts demonstrated that the war was a revolution, and not a rebellion, that they were patriots, and not rebels. Having thus, by making common cause, established that they were independent of the English throne, they undertook to guarantee further security against foreign foes by entering into a compact or confederacy. This proving unsatisfactory, they "formed a more perfect union," under the Federal Constitution. This instrument, and the government created by it, we have already briefly considered.

In forming this union the States did not surrender their political autonomy nor all of their sovereign prerogatives. Each remained a State having large powers and high responsibilities, and the general government is one of united States, not an amalgamation of States. This was distinctly understood when the Consti-

tution was formed and adopted, but fearing that there might be a mistake or misconception on the subject, the tenth amendment to the Constitution was submitted and adopted. So that since that time, in the Constitution itself, it is expressly provided that "the powers not delegated to the United States, by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people."

As we have seen, all of the powers delegated to the Federal government are national in their character. That government has no jurisdiction over local or domestic affairs. It is therefore imperative that each State, or, more properly, the people in each State, shall organize and maintain a system of government fully equipped and adequate to meet efficiently all demands made upon sovereignty in the control of local matters. These domestic or internal affairs are of incalculable importance, and their neglect would mean local anarchy and inevitable disaster. While it is true that the several States could not successfully meet the responsibilities resting on the National government and discharge its functions, it is equally true that the National government, as constituted in and created by the Constitution, could not exist unless supplemented and maintained by the several State organizations. Their conditions of dependence and advantage, while differing in kind, are essentially mutual. Neither could maintain itself without the other.

The Federal Constitution guarantees to each State a republican form of State government. It also guarantees that it shall not be divided into more than one State, or combined with any other State without its consent. It also undertakes to protect each against invasion by any enemy, and, upon proper application of its officers, against domestic violence. Other guarantees will be considered later.

Since the formation of the United States government, it has acquired, by different methods, large accessions of territory, and, under the authority of the constitution, numerous States have been formed therein and have been admitted into the Union. The Republic of Texas came in by mutual agreement of the sovereigns; the Texans on the one hand, and the people of the United States on the other. It is an accepted constitutional rule that as these States come into the Union they take just the same position

toward the Federal government, have just the same privileges and powers, and owe just the same duties as did the original States upon the formation of the Union. So that, in our discussion, we need make no special reference to one class as distinct from the other.

We will now proceed to discuss generally the plan and functions of the State governments in the Union.

Form of Government in the Several States.

In form, these several governments are republican. The Federal Constitution guarantees to them this form. Just what is a republican form of government has never been authoritatively decided. It would seem, however, to carry with it the substantial characteristics and qualities of the governments existing in the several States at the time the Constitution was adopted. What modifications of this form or departures from it would make the respective State governments unrepublican can not be stated with accuracy. This much may, however, be assumed with certainty, that no government could be republican which does not recognize sovereignty as vested in the people to be governed, and in which they do not substantially control and rule in all governmental affairs, either by direct vote or through representatives selected by themselves; and which does not provide for the reasonably-efficient exercise of the three great political functions of legislating, adjudging and applying legal sanctions, and executing the laws. When we speak of sovereignty as vested in the people, we must not be understood as meaning in each and every person subject to the government, but in a portion of them sufficiently large and representative to insure that the government will, in fact, represent the popular will and subserve the public interests as distinguished from the will and interest of a minority.

The government existing in each State at the organization of the Union possessed these characteristics, and each that has entered the Union since has also had them.

State Constitutions.

Each of the State governments is based upon a written constitution, adopted by the qualified voters in the State. These instruments are subordinate to the Federal Constitution, laws and treaties; but, with that limitation, each is the supreme law of the

State ordaining it. By them all State governmental agencies are created, and they constitute at once the source and limits of their respective powers. We find in these constitutions creative, perpetuative, functional, and restrictive provisions. They call the State government into being, provide for its perpetual existence, declare the powers and duties of its several departments and officers, and limit governmental action along designated lines by express reservations of rights and powers in the people and by express denials of power to the government. They all provide for legislative, judicial, and executive departments, and give, with more or less detail, the powers and duties of the respective offices created in each. The general nature of these several departments and their respective functions have been considered in connection with the Federal government, and need not now be dealt with further.

LEGISLATIVE DEPARTMENTS.

The legislative functions of the States are performed through representative bodies known as legislatures. These consist of two houses, one called the senate and the other called the assembly, or house of representatives. The senate is the smaller body, and usually its members hold for longer terms than members of the house. The members of both houses are elected by the persons residing in their respective districts and possessing the qualifications prescribed by the laws of the State. Each is the judge of the qualification and election of its own members. The senate is presided over by the lieutenant-governor, and the house by a speaker elected by the members from among their own number. Each body has such clerks and other subordinate officers as it shall provide. In passing laws, the houses act separately. A majority vote is necessary to pass any measure, and, in some instances, it is provided by law that a larger vote shall be necessary. Bills for raising revenue, in most, if not all, of the States, must originate in the house, but must be concurred in by the senate before becoming laws. Bills of all other kinds may be introduced in either house by any member thereof.

Before becoming a law, many, if not all, of the constitutions require that a bill must be read and voted upon favorably in each house on three separate days, and it must then be engrossed and signed by the presiding officer of each house in open session.

Pending measures are open for discussion, subject to the general rules of parliamentary bodies, or the special rules adopted by the house in which the matter is being considered.

Bills, after being legally passed, must be submitted to the governor of the State for his action. If he approves the act, and files it with the secretary of state, or if he fails to act upon it within a limited time, it becomes a law. If he disapproves it, he endorses this fact upon it, giving his reasons, and returns it, with his objections, to the house in which the bill originated; and, unless it is taken up and passed by both houses by a vote of two-thirds or over in each, it is defeated; if it is passed by such vote it becomes a law, notwithstanding the veto.

State legislatures deal with those matters not given over or delegated to the Federal government. As to the latter, they can not legislate. The extent of their power would be to memorialize Congress upon the subject, and thus seek to influence its action. As to certain matters in the scope of the Federal authority, it has been held that the State legislatures could act until Congress had actually taken jurisdiction and exercised its powers. As the government grows older, this doctrine is becoming of less practical importance; for Congress is gradually extending its notice to every interest or matter within its jurisdiction, and it would now be difficult to find a subject upon which it may rightfully legislate which has not been acted upon by it. So that this is, even now, rather a theoretical or speculative subject than one of serious practical importance, though one phase of it will remain for consideration so long as the government lasts. This is: What power has a State legislature over a matter which is within the jurisdiction of Congress, and upon which it has once acted and has subsequently repealed or annulled its laws? It depends somewhat upon the nature of the matter. Take the subject of Bankruptcy: The Constitution confers upon the Federal government the power to establish a uniform system of bankruptcy throughout the Union. Congress has done so. While this congressional legislation stands, the State legislatures can not deal with the matter. If the National bankrupt law shall hereafter be repealed, can the State legislature re-enact insolvent laws operative within their own territories? It seems, as to this matter, they can.

EXECUTIVE DEPARTMENTS.

The chief executive officer of the several State governments is called the Governor. He is chosen by the direct vote of the qualified electors of the State. His general duty is the execution of all the laws in force in the State. A common constitutional expression on this subject is "He shall cause the laws to be faithfully executed." He is commander-in-chief of the State militia and, as such, has control over that body, except in times of war, when its members are mustered into the service of the United States.

He usually has the appointment of such State and district officers as are not elective, but his appointments are subject to confirmation or rejection by the senate.

He has the pardoning power. In many States this power is vested in the governor absolutely. In others he acts upon the advice of or in connection with a pardoning board.

As the chief executive, he is usually free from any direct interference with his official action by any other department or officer of the government, or by any individual. He can not be compelled to do his duty, nor be held personally responsible for any damage resulting from his official action or failure to act. In his individual capacity, he is subject to suit or to criminal prosecution for his personal wrongs; but officially he is exempt from responsibility before the courts. His only liability to punishment for official wrongs is by impeachment, before the senate, or by defeat, if he should be a candidate for re-election.

The qualifications for this office, the terms, and compensation differ in different States.

Lieutenant Governor.

The next executive officer is the lieutenant-governor. His duties are to act as governor in the absence, disqualification, inability, removal or death of the governor. In most States he is also the presiding officer of the senate.

Divisions of the Executive Department.

There are several divisions of the executive department in the several States, some having more than others, and the titles of the several heads of the same division differing in different States. They usually embrace the following:

(1.) A department of state, the head of which is usually desig-

nated as the secretary of state. He is the keeper of the official seal of the State and of the State records proper, that is, of the records of the legislative department and of the governor's office. He issues all commissions to officers and all proclamations by the governor.

(2.) A treasury, the head of which is designated the State treasurer. He keeps and pays out all State money.

(3.) A department of public accounts, presided over by an officer sometimes called the State comptroller, sometimes the State auditor. In this department are kept all accounts of indebtedness to and by the State. Through it all vouchers or drafts on the treasurer are issued for money due by the State. All records as to State taxes and moneys due the State are kept here. In short, it is in this department that the general bookkeeping of the State is done, where its financial budgets are made out and all financial information is kept. The several officers handling State funds are required to keep strict account of everything connected therewith, but these finally find their way into the comptroller's department, by various systems of reports, and the general results are summarized and shown there.

(4.) A department analogous to that in the Federal government known as the department of justice. There is no general or uniform designation of this department in the several States. Its head is the attorney-general, who is chief legal adviser of the governor and all the heads of the other departments. He also represents the State in the more important litigation to which it is a party. The prosecution of criminal cases in courts of original jurisdiction is usually left to local officers, appointed or elected for that purpose, known as district or county attorney or commonwealth attorney, and by numerous other appropriate designations. These, in theory at least, act under the general supervision and subject to the advice of the attorney-general of the State.

(5.) A department of public education, which has direct charge of public educational matters within the State, so far as the common schools are involved.

(6.) A department to deal with fire, life, and other forms of insurance. The purpose of this department is to investigate as to the solvency and business methods of different insurance companies doing or seeking to do business within the State, and to

advise the governor and legislature concerning them and to make suggestions as to their proper regulation, and to take active supervision of them and see that the laws as passed are obeyed by the companies.

(7.) A land department. This, of course, exists only in those States which own and have granted public lands. Its purpose is to keep proper records and information as to these lands, to investigate the claims of all persons desiring to acquire any parts of them, whether the whole title or a less estate, and to prepare and execute, or have executed, the proper conveyances for the land when it is to be disposed of by the State.

Doubtless there are other departments in some of the States, but these are the most frequent.

The manner of selecting the heads of these several departments, and the degree of their subordination to the governor or chief executive, differ in the different States. In some they are elected by the people, in some appointed by the governor, and in others some are appointed and some are elected.

Besides these State offices, there are a great many lower offices belonging to the executive department. The most important of these are sheriffs. One sheriff is elected in each county, and is the chief executive of the county. To him all the commands of the governor, as to the execution of the law in his county, ordinarily come. To him all legal process to be executed in his county is directed, and it is his duty to carry out the commands thus received. He is the executive officer who attends the higher courts held in his county and carries out their lawful orders and decrees. He is aided in all this by deputies appointed by him, and in the case of necessity, has the power, under the law, to summon any citizen or number of citizens to his assistance. Constables, or bailiffs, are executive officers in still smaller territorial subdivisions, and have duties, in the county in which their precinct lies, analogous to, but not exclusive of, the sheriffs.

JUDICIAL DEPARTMENT.

The judicial power of the several States extends to all matters not exclusively within the jurisdiction of the Federal courts under the Federal Constitution and treaties. A great many matters are within the exclusive jurisdiction of the State courts. A great many are within the concurrent jurisdiction of courts of

the two governments, and quite a number are within the exclusive jurisdiction of the Federal courts.

Taking these up in reverse order, we find:

(1) That the Federal courts have jurisdiction exclusive of the State courts in the following classes of cases:

1. Suits affecting ambassadors, other public ministers, and consuls.

2. Suits between two or more States.

3. Suits between the United States and a State.

4. Suits against the United States.

5. Suits to enforce rights not existing under general law, but dependent exclusively upon acts of Congress, and jurisdiction over which is by Congress conferred on designated Federal courts, as Bankruptcy proceedings, patent and copyright suits.

6. Admiralty proceedings.

7. Proceedings to collect Federal revenue.

8. Prosecutions under the criminal laws of the United States.

(2) That the jurisdiction of the State and Federal courts is concurrent over all matters over which the Federal courts have jurisdiction and which are not embraced in the eight classes enumerated above.

This is the reverse of the general rule as to legislative power; for, usually, the fact that either government has the power to control a certain matter by legislation, of itself excludes the other from concurrent power of regulation. Otherwise, there would be two lawmakers, each establishing rules for the government of persons as to the same matters. These rules would either duplicate each other and one be unnecessary, or they would contradict each other, and thus put the subject persons in a position where they must choose between these conflicting laws, and unavoidably render themselves liable to the penalty for violating one.

With the judicial departments this is entirely different. The judicial function is not to make rules of conduct, but to ascertain what rules have been properly made and determine whether or not certain conduct of certain individuals conforms to or violates these established rules. And as the legitimate legislative action of each government results in law, and as all persons within the United States are subject to both governments and must obey the laws of each, it follows that the courts of either may, or

rather must, take into consideration the laws of both in determining the lawfulness or unlawfulness of conduct, and in applying the sanctions of the law thereto. So that in the great majority of cases rights dependent upon the Common Law or upon the Constitution and laws of the United States, as well as those dependent upon the Constitution and laws of the State, may be enforced through State courts. This is not true of those matters which have been enumerated as in the exclusive jurisdiction of the Federal courts; but, in any other class of cases, it is no objection to the exercise of jurisdiction by a State court that the case might have been brought in a Federal court.

In this connection, however, we must not lose sight of the right of removal of certain cases from the State to the Federal courts. This right is based upon the fact that the courts of the two governments have concurrent jurisdiction; for, if the suit is not within the jurisdiction of the State court in which it is begun, in legal contemplation there is no suit to remove, the proceeding is void. On the other hand, if the Federal court, into which it is sought to remove it, has no jurisdiction, the removal proceeding is void. The right to remove is, therefore, a preference given to a Federal court to try a case which both it and the State court have, in law, the right to try. The same case can not be pending in two different courts at the same time; so, in order to give the right of removal at all, it is essential that the law declare the effect of the removal to be to destroy, or, as it is technically called, to oust the jurisdiction of the State court as to that case.

(3) The State courts have jurisdiction exclusive of the Federal courts over all matters not declared by the United States Constitution to be within the judicial power of the Federal government and over all matters within the judicial power of the Federal government which have not been assigned by Congress to any Federal court for adjudication. The matters, declared to be in this power, were set out *seriatim* in dealing with the Federal government, and need not be repeated.

State Judicial Systems.

The judicial power in the several States is the same in each. It includes and extends to all matters not exclusively in the jurisdiction of the Federal courts. Each State determines for itself,

within the limitations of the Federal Constitution as to a republican form of government, due process of law, etc., how this power shall be exercised.

Each State determines for itself the system of courts which it will establish, the power to be conferred upon each, and the methods of procedure which are to be followed. There is great uniformity in the general ideas running through these systems, but great deal of dissimilarity in details

The general plan is as follows:

A large number of inferior courts are provided for, which have jurisdiction over trivial matters, suits for small debts and petty misdemeanors. The officers of these courts are chosen by the people of the small precinct or territory, in which their powers are to be exercised. The proceedings in them are informal. In many instances the result reached is final; in some cases, however, appeal may be taken to some higher court in the system, usually the one next above that in which the trial was had.

There is, next, a class of courts having larger powers and more extensive territory, but still quite limited in their jurisdiction, in which are tried civil suits more important than those committed to the first class, yet relatively unimportant when compared with the higher interests of the people, and more serious crimes. Appeal is usually allowed from the judgment of this class of courts to some designated superior court, whose decision is, ordinarily, final.

Next, there is a class of courts having original jurisdiction of all more important civil and criminal matters. These are usually courts of general jurisdiction, authorized to try all cases not assigned to some other particular class of courts.

Next, there are higher courts, which have appellate or revisory power, and in which cases are tried after the trial in the court of original jurisdiction. These courts are very important institutions, which have large influence in shaping the growth and development of the laws of the several States. Their opinions, or reasons given by them for the conclusions arrived at in disposing of cases, are published, and constitute the reports of the several States. These are binding upon the lower courts in the State in which they are rendered, and are persuasive in all other jurisdictions.

Courts of Law and Equity.

In many of the States the old distinction between Common Law and Chancery courts has been abolished; in a smaller number the distinction remains in a modified form; and perhaps in a very small number it remains without any practical modification. These differences necessarily make differences in the several judicial systems of the respective States. Where the distinction remains as at Common Law, or with only slight modification, there are either two classes of important courts of extensive original jurisdiction, or else the same courts maintain separate dockets for cases at law and suits in equity. Under either of these plans, the separate jurisdiction of law and equity may be preserved and the peculiarities in the practice of Common Law and Chancery courts kept up.

Common Law courts only take jurisdiction over Common Law actions, entertain Common Law defenses, and give Common Law relief. The rule in such courts is to try all matters of fact directly involved in the case by a jury and as far as practicable upon the testimony of witnesses given in open court.

In courts of equity only equitable causes of action can be submitted, equitable defenses entertained, and equitable remedies given. In these courts, ordinarily, matters of fact are tried by the judge without a jury and the testimony is given by depositions and not by witnesses personally before the court.

Extraordinary Governmental Agencies.

In all the States the distinction between the legislative, judicial and executive functions are recognized. The exercise of these functions is delegated to separate departments of government. In some of the State constitutions it is further provided that the exercise of these powers shall not be combined and that no officer belonging to one department shall exercise powers pertaining to another.

Governments organized on this plan work well and for many years were deemed sufficient. Later, conditions have arisen which seem to demand greater concentration of power in the hands of certain officers in order to secure prompt and efficient remedies against serious dangers to the well-being of the public and to the rights of private individuals.

To meet these conditions new forms of governmental agencies

have been provided ordinarily under the designation of commissions. The most frequent of these are created for the purpose of dealing with railroad companies and other large corporations operating as common carriers or in other enterprises coming under the general head of public utilities.

Most of the powers ordinarily conferred upon such commissions are executive, but blended with these are usually found certain legislative and judicial powers necessary in order to make their action effective.

The concentration of such vast powers in the hands of a few men is not desirable and should not be done unless it is clearly apparent that conditions exist which make this form of control necessary. In the main, the action of these various commissions has been salutary and productive of general good.

The powers conferred upon these commissions and the manner of their exercise differ too much in the different States for detailed discussion to be profitable.

Guarantees in the Federal Constitution to the Several States.

1. Republican form of government. (Article IV, Section 4.)
2. Protection against invasion, and, on proper application, from domestic violence. (Idem.)
3. Shall not be divided nor combined. (Article IV, Section 3.)
4. Equal suffrage in the Senate. (Article V.)
5. One representative. (Article I, Section 2, No. 3.)
6. That its citizens shall have equal rights in every other State. (Article IV, Section 2.)
7. Appointment of militia officers. (Article I, Section 8, No. 16.)
8. As to control of elections for Federal officers. (Article I, Section 4.)
9. As to apportionment of direct taxes. (Article I, Section 2, No. 3.)
10. Against taxes on exports. (Article I, Section 9, No. 5.)
11. No preference in regulation of commerce or revenue. (Article I, Section 9, No. 6.)
12. Against suits in Federal courts by citizens of any other State or foreign nations. (Eleventh Amendment.)

13. Right of extraditing criminals. (Article IV, Section 2, Nos. 2 and 3.)

14. The verity and authenticity of its public acts and records. (Article IV, Section 1.)

Limitations on the Powers of the States.

Next are the limitations in the Federal Constitution on the power of the States.

1. On regulation of suffrage. (Fifteenth Amendment, Section 1.)

2. Shall not enter into any treaty, alliance or confederation. (Article I, Section 10.)

3. Shall not grant letters of marque or reprisal. (Idem.)

4. Shall not coin money. (Idem.)

5. Nor emit bills of credit. (Idem.)

6. Nor make anything but gold and silver coin a legal tender in payment of debts. (Idem.)

7. Nor pass any bill of attainder, *ex post facto* law or, law impairing the obligation of contracts, or grant titles of nobility. (Idem.)

8. Nor lay any imposts or duties on imports or exports without the consent of Congress, and then only for benefit of United States Government. (Article I, Section 10, No. 2.)

9. Shall not lay duty on tonnage. (Idem.)

10. Nor keep troops nor ships in time of peace. (Idem.)

11. Nor make any agreement or compact with another State or nation, without the consent of Congress. (Idem.)

12. Nor engage in war, except in case of actual invasion. (Idem.)

13. Shall not make or enforce any law that shall abridge the privileges or immunities of citizens of the United States. (Fourteenth Amendment, Section 1.)

14. Nor deprive any person of life, liberty, or property, without due process of law. (Idem.)

15. Nor deny to any person within its jurisdiction the equal protection of the laws. (Idem.)

CHAPTER III.

RELATIONS BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE STATE GOVERNMENTS, AND BETWEEN THE SEVERAL STATE GOVERNMENTS.

POLITICAL ORGANIZATION IN THE UNITED STATES.

This subject has necessarily been touched upon in our preceding discussions but a more connected treatment seems desirable.

The States.—The original thirteen States of the Atlantic seaboard preceded in point of time both the old Confederation and the present government of the United States. Each of these States had existed for years as a British colony separate and distinct from each of the other colonies. Each was founded under the sovereign power of England and for many years recognized its dependent condition politically as well as practically. Ultimately dissatisfaction arose between these colonies and England and in 1775 a war of rebellion, or invasion, as looked at from the English or American point of view, was begun. As all the colonies were subjected to a common peril, they made common cause for the conduct of this war though at first they had no sort of organic connection. While matters were in this condition, the Second Continental Congress, which was in reality an assembly of ambassadors from the several States, on the tenth day of June, 1776, passed two resolutions, the first providing for a committee to draft a Declaration of Independence, and the second, for a committee to draft Articles of Confederation between the several States. Prior to this time, the Legislatures and conventions of several of the States,. or colonies, as they were then called, had passed resolutions advising or instructing their delegates in Congress to declare independence. The resolutions from Virginia, which seem to have been the immediate cause of presenting the matter to the Continental Congress, instructed its delegates in Congress "to propose to that respectable body to

declare the United States colonies free and independent States, absolved from all allegiance or dependence upon the Crown or Parliament of Great Britain."

The resolution introduced in Congress in obedience to these instruction declares "That the United Colonies are and ought to be free and independent States; that they are absolved from all allegiance to the British Crown; and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved."

This resulted, as stated above, in the appointment of a committee to draft the Declaration of Independence. This committee reported and the report was adopted on the fourth of July, 1776. With the language of that instrument all are familiar.

The several States, while they were considering declaring their independence, were concurrently changing their governments in such way as to conform them to separation from English authority. Some of these changes ante-dated the idea of separate and independent existence, and were adapted to the conditions of estrangement between England and her colonies, then supposed to be temporary only, and so contemplated renewal of allegiance upon proper adjustment of the current difficulties. The changes made later, however, were conscious and intended preparations for separate Unitary States.

The committee appointed to draft Articles of Confederation did not report until some months after the Declaration of Independence. The report by it was adopted November 15, 1777. The Confederation contemplated was not to come into existence until the Articles of Confederation were adopted by all the States. The last State did not adopt them until March 1, 1781, and hence the Articles did not become operative as to any until that date.

It is clear, therefore, that these thirteen States ante-dated the Confederation and of necessity the United States Government as it now exists. The Declaration of Independence declares as to the political status of these States at that time that "We therefore, the Representatives of the United States of America, in General Congress Assembled, appealing to the Supreme Judge of the World for the rectitude of our intentions do, in the name and by the Authority of the good people of the Colonies solemnly

publish and declare, that these United Colonies are and of Right ought to be Free and Independent States; that they are absolved from all allegiance to the British Crown and that all political connection between them and the State of Great Britain is and ought to be dissolved; and that as Free and Independent States they have full power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do."

Up to this time there were no articles of Confederation or agreement existing among the colonies or States. Their common need had forced concerted action. The Continental Congresses were the result of the peril in which each of the colonies found itself. It was an assemblage of delegates from each colony called together for the common good. It received all its authority from the Legislatures or Conventions of the several States. It proved the desirability of concerted action and opened the way for the establishment of a Confederation among the States. Its action was limited strictly by the needs of the time and was extended as differing conditions demanded. It acted as it deemed best for the public good and its action was acquiesced in, not because antecedently authorized or legally binding upon the States but because acquiescence under the then existing conditions was conducive, if not essential, to the existence of the States.

The Confederation.—The Articles of Confederation recommended by the Continental Congress on November 15, 1777, were to go into effect when adopted by all of the thirteen States. These Articles were acted on from time to time, the majority adopting them in July of 1778. Maryland was the last to adopt. This action was taken March 1, 1781, at which time the Articles became effective.

This instrument is styled "Articles of Confederation and Perpetual Union between the States," naming each of the thirteen original colonies.

Its first three articles are as follows:

Art. 1. The Style of this confederacy shall be "The United States of America."

Art. II. Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and Right, which is

not by this confederation expressly delegated to United States, in congress assembled.

Art. III. The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

These articles are sufficient to show that the union formed by them was designed to be, and in fact was, only a confederation as that term has been heretofore explained. It gave legal form and authority to the common understanding that had theretofore existed among the States.

The government created by it consisted of a Congress which was little more than an assembly of ambassadors from the several States. There was only one House or body. The number of delegates from each State could not be less than two nor more than seven. The delegates were selected annually in such manner as the Legislature of each State should direct. Each State paid the expenses of its own delegates.

Each State had one vote in Congress, irrespective of the size or population of the State or the number of delegates it had in the body. The powers of this Congress were very limited. It could levy no taxes, and while it could wage war and declare peace, it had no means of defraying expenses of either.

It had no executive and no permanent judicial officers. The Articles were to be observed inviolable by every State and the Union created by it was declared to be perpetual. The Articles could not be amended unless the alteration was agreed in the Congress of the United States and was afterward confirmed by the Legislature of each State. In a short while the inherent weakness of this plan asserted itself. A number of attempts were made to amend the Articles of Confederation but the consent of all the States could never be secured for any one of these.

Formation of the Government of the United States.—Disagreements arose between the several States, particularly with reference to commerce. Several of the States called for Conventions of representatives from all the States for the purpose of con-

sidering these differences and for the formation of a stronger government. Finally a meeting was called to be held in Annapolis to consist of commissioners from all the States for the purpose of considering their trade relations. Commissioners from only five States actually attended. These commissioners recommended a convention of representatives from all the States "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union." The commissioners sent copies of this resolution to Congress and to the Legislatures of the respective States. A number of the States approved of the plan and selected delegates before any action was taken by Congress. Later, Congress took the matter up and recommended that such Convention be called to meet at Philadelphpia on May 14, 1787. In this resolution Congress declared that the sole purpose of the Convention would be to revise the Articles of Confederation and that all the amendments would have to be submitted to Congress and to all the States.

The Convention met in Philadelphia and organized on May 25. Every State in the Confederation, except Rhode Island, was represented. This Convention prepared the Constitution of the United States and adjourned September 17, 1787. The Constitution thus prepared was not an amendment nor series of amendments to the Articles of Confederation as contemplated by the call of Congress, but an entirely new, independent, and complete instrument. It was not submitted to Congress. It was to be submitted for ratification to the several States and it was expressly provided that "The ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same."

The result of the action of the Convention was to propose to the States of the Union an abandonment of the Articles of Confederation and of the government created thereby and the substitution therefor of the constitution drafted by it, and the government to be organized and operated thereunder. This proposition was not to be decided by the Congress of the old Confederation but by each of the States acting through Conventions appointed as the several States should determine.

The new government was to come into existence as to any nine

States so desiring so soon as it was ratified by that number. The effect upon the other four States, if only nine should ratify, is not expressly declared in the instrument, but as the effect of the ratification by nine is expressly declared to be the establishment of the constitution between the States so ratifying the same, and as no State was to be bound by the constitution until it was ratified by it, it is clear that the effect upon non-ratifying States must be to leave them out of the Union. As the coming into the Union of the nine ratifying States would necessarily withdraw them from the old Confederation, that government would be at an end and the several non-ratifying States must have been thrown back to their original status of Unitary States.

The States acted with reasonable expedition, and within less than a year nine of them had ratified the constitution. Thereupon Congress passed an act providing for the organization of the new government. The first Wednesday in March was set as the time for "commencing the proceedings under the constitution." The constitution went into effect on that date, the fourth of March, 1789. At that date all the States had ratified the constitution except North Carolina and Rhode Island, so that the government of the United States was actually organized and operated as among the other eleven States, North Carolina and Rhode Island being, for the time, separate Unitary States.

Later each of these States ratified the Constitution and came into the Union on the same footing that the other States had.

The foreging is a very brief outline of the origin, formation, and organization of the United States Government.

Recapitulation.—The inherent primary sovereignty was in the people of the several States. Each State had been a separate colony dependent upon England. When each colony declared its independence, it assumed all the prerogatives which it had theretofore exercised and those which the English King and Parliament had exercised over it and thus became a political unit possessing all the power and prerogatives included in the term sovereign.

Under the pressure of common needs these several States cooperated without any written treaty or compact through the Continental Congress and in this condition waged and practically concluded the Revolutionary War. Next, these several States entered into the league formed by the written instrument known as

the Articles of Confederation and Perpetual Union. By this compact they surrendered none of their sovereign powers, though they delegated the exercise of some of these powers to the Confederation into which they had entered.

Later still, the Confederation proving inefficient, these several States abandoned that form of co-operation and by their own voluntary act, each acting for itself, formed and entered into the present United States of America.

Constitution of the United States.—The instrument calling this new government into being and determining its nature, and the nature and extent of the powers conferred upon it and the mode of their exercise, is the Constitution of the United States.

This instrument provides for its own amendment, to be accomplished in specified ways. This power of amendment has been invoked many times. Fifteen amendments have in fact been made, so that to be entirely accurate at this time we should say that the powers of the United States government are those conferred upon it by the constitution as originally adopted and by the several amendments thereto. Every power thus conferred, either expressly or by fair and proper implication, belongs to, and may lawfully be exercised by that government.

Powers not thus conferred remain in the respective States and in the people. This was generally conceded at the time the constitution was adopted, but to make the matter absolutely clear the Tenth Amendment was adopted. This Amendment declares: "The powers not delegated to the United States by the constitution, nor prohibited by it to the States are reserved to the States respectively or to the people."

It cannot be doubted that the powers spoken of here are sovereign powers. It is equally plain that such of these sovereign powers as exist in the United States were not inherent in it but were delegated. It is equally clear that the powers of the States are recognized as inherent and primary and as continuing to exist in the States or the people unless they have divested themselves of them by delegation to the United States. This is unquestionably a division of sovereign prerogatives. The States and the people of the States as the possessors of all sovereign powers voluntarily delegated a portion of these powers to the United States and expressly reserved all powers not so delegated.

The line of separation between the powers retained by the States and the powers delegated to the United States is drawn in and by the Constitution of the United States, and all issues arising on this subject can be rightfully settled only by the proper construction of that instrument.

The Government of the United States.—The government created by the adoption of the Constitution of the United States and known as the United States of America came into existence on the first Wednesday in March, 1789. This government still exists and is one of two political powers to which all the people within its boundaries are subject. Territorially, it embraces all of the States, including not only the original thirteen but thirty-three others. It also includes New Mexico, Arizona, and Alaska on the North American Continent, and a number of insular possessions.

The constitution contemplates the formation and admission of new States into the Union. It is a well settled rule of law that the constitutional rights of each State in the Union must be identical with the constitutional rights of every other State, so as each new State has come into the Union, whether by organization within territory already belonging to the United States, or by annexation, its political status becomes and is identical with that of every other State. So that, the political powers of each of the new States and their relations to the United States are to be tested by the same rules and governed by the same principles as those applicable to the original thirteen States under the Constitution and its Amendments.

The matters within the political authority of the United States are enumerated in the constitution, and the powers which the United States Government can exercise are granted in and flow from that instrument. These powers we have enumerated in treating of the United States Government proper. They cover matters of national and international and inter-State concern and are limited to these. It is not necessary for a power to be expressly named in order for the United States Government to possess it. If the effective exercise of a power named properly involves the exercise of some other power as incidental thereto, the existence of the incidental power will be implied. Thus, there is no power expressly conferred upon the Federal Government to

charter a corporation, but the government is expressly granted the power to do a great many things which necessarily require the use of money and hence to facilitate its financial activities it is held that the government may charter National Banks.

So also with the power of eminent domain. There is no express grant of this power to the Federal Government. The words or their equivalent do not occur in the Constitution nor its amendments. The only provision which contains any reference to such power is the declaration in the fifth Amendment that "private property shall not be taken for public use without just compensation." It is, however, held that the United States Government has this power and may exercise it to acquire property for proper governmental purposes, not only in the District of Columbia, and in the territories, but also within the several States.

Legislative Powers usually exclusive.—Whether or not the grant of the power to the United States Government makes such power exclusive depends upon the nature of the power and the provisions of the constitution. If the power is legislative in its nature it is almost always exclusive. There are few matters over which Congress and the several States may legislate concurrently; indeed, it may be doubted whether there are any such matters at this time. In the inception of the government the right of the States to legislate on some matters subject to control by Congress was recognized on the ground that the States might act until Congress had done so. This doctrine was of vast practical importance at one time but has gradually become less and less so on account of the increased activity of Congress in the exercise of its legislative powers. It would be difficult now to find a subject within the Legislative power of the United States upon which Congress has not acted.

An analogous doctrine, that is, whether the withdrawal of Congressional action and control over certain matters may reinstate the State's power of control over these, is still of practical consequence. For illustration, Congress has power to legislate regarding bankruptcy. When the financial situation justifies it it passes bankrupt laws. These of necessity practically supersede State laws regulating insolvency and the estates of insolvents. When Congress repeals a bankrupt law, the question

necessarily arises, What is the effect upon the State laws regarding insolvency? Will the State law revive or will it remain inoperative? If it does not revive of its own force, is the State free to re-enact it or some similar law? The practical answer to each of these questions is that the law itself may be enforced without further State legislation and that the State can enact new laws on the subject if it so desires.

Judicial Powers largely concurrent.—We have already seen that the judicial power of the Federal Government and of the State governments are largely concurrent. There are a few matters to which the judicial powers of the States do not extend. These are matters relating to the ambassadors and representatives of foreign governments and controversies between the States. These are not only within the exclusive power of the Federal Government but are within the exclusive jurisdiction of the United States Supreme Court. There are also rights which have no Common Law basis but depend entirely upon Congressional action, such as patent rights, and rights growing out of United States copyright laws, or bankrupt laws, which are exclusively within the jurisdiction of the Federal courts. The enforcement of all criminal and revenue laws of the Federal Government is exclusively in the power of the United States. So also all cases of admiralty. These embrace most if not all of the matters which are exclusively within the judicial power of the Federal Government.

All other matters within that power are also within the judicial power of the States and either Congress or the respective States may create courts to hear and determine them. In point of fact, there are some cases which the Federal courts might lawfully be authorized to try, which cannot now be tried in them because Congress has not given any Federal court jurisdiction over them. Among these are cases involving less than two thousand dollars between citizens of different States, and between citizens of a State and foreign States, citizens, or subjects, or which involve a Federal question.

Jurisdiction of the State courts is exclusive over all matters not within the judicial power of the Federal Government, or which are not exclusively within that power and which have not been given over to any Federal court for trial, as in the case of

suits between citizens of different States involving less than two thousand dollars. As we have seen Congress might create a court to try such cases but has not. Therefore, they must be tried, if at all, in the State courts. The same is true as to cases involving Federal questions or suits between citizens and aliens.

Executive Powers usually exclusive.—The executive powers of the two governments are exclusive except with regard to co-operation in providing and maintaining State militia and suppressing rebellion and insurrection.

Taxation.—Both the Federal and State governments have the power of taxation.

The Federal constitution expressly confers upon Congress the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and to provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." It further requires that "direct taxes shall be apportioned among the several States which may be included within the Union according to their respective numbers." And practically reiterates this in the provision that "no capitation or direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken." "No tax or duty shall be laid on articles exported from any State."

Within the limits of these provisions Congress may impose such taxes as it sees fit except that it cannot tax the political activities of the State nor the means or instrumentalities through which these are carried on. This last would exempt from taxation public property belonging to the State and that belonging to its political subdivisions and the salaries of officers.

The Federal Constitution, of course, does not grant to the States any power to assess or collect taxes. This power is inherent in the States and may be exercised by them except so far as it is expressly or impliedly limited by the Federal Constitution. There are two express limitations, each found in Section 10, Article I, of the constitution as follows: "No State shall, without the consent of Congress, lay impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of

the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress.

"No State shall, without the consent of Congress, lay any duty of tonnage."

In addition to these express limitations upon the taxing power of the State there is another arising by implication. This prohibits taxation in any way or to any extent of the property of the Federal Government or the instrumentalities through which it carries out its governmental functions and exercises its powers.

Relations between the States.

So far as the States have given over their sovereign prerogatives to the Federal Government they are of necessity parts of this government and their relations as to these matters are, of course, domestic.

As to all matters not given over to the Federal Government each State retains its own sovereignty and as to all such matters each is to be regarded as a foreign sovereign and government from the point of view of every other State. There are certain provisions in the Federal Constitution which, as to certain matters, modify or control these relations between the States as to their domestic affairs, but the general rule is as stated above.

This doctrine was announced early in the history of the government as to bills of exchange, promissory notes and other contracts. It is not, however, limited to matters of contract, but extends throughout the whole range of State sovereignty subject to the limitations indicated above.

Among the more important of the Constitutional provisions effecting these modifications are the following:

(1) Art. IV, Sec. 1, "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

This prevents any State from disregarding or setting aside the public acts, records, and judicial proceedings of any other State. It does not, however, prevent any State or its officers from inquiring into the nature of purported public acts, records and judicial proceedings, or of the power of determining whether

they are really public and judicial in their nature. If this fact be established the State must recognize the force and effect of the act, record, or proceeding.

Congress has prescribed the manner by which such act, record, and proceeding in one State shall be proved in another.

(2) Art. IV, Sec. 2. "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

Privileges and immunities here do not include political rights but are restricted to those rights and privileges which have no direct relation to or involve the exercise of political power.

(3) Art. IV, Sec. 2 (Continued). "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

This section is the basis of the right of extradition of criminals from one State to another. To be subject to extradition the person must be charged with crime in the State making the demand. For this reason the executives upon whom demand for extradition is made have always claimed and exercised the right of inquiring into the sufficiency of the charge as made in the State from which the demand comes. In some later instances, the Governor upon whom the demand has been made, has claimed the right of going beyond the sufficiency of the proceedings making the charge and passing upon the probable guilt or innocence of the party and on the motives causing the prosecution. This extension of the scope of inquiry seems unwarranted by the language of the constitution and is probably violative of the guarantee with reference to "full faith and credit of the public acts, records, and judicial proceedings" of other States.

(4) By the provisions of Article I, Section 10, the States are forbidden to enter into any treaty, alliance, or confederation and without the consent of Congress to enter into any agreement or compact with another State. The first of these inhibitions is absolute; the other simply forbids any agreement or compact with another State in the absence of Congressional consent. With such consent, an agreement or compact with another State may be made.

(5) The same article and section forbids any State, without the consent of Congress to lay any impost or duties on imports or exports for purposes of revenue, or to lay any duty of tonnage.

These provisions apply as between the States and are limitations upon the power of each as to taxing commerce originating in or destined to another State.

CHAPTER IV.

EXTRACTS FROM DECISIONS OF U. S. SUPREME COURT.

For the purpose of supporting the views expressed above we give some extracts from the decisions of the Supreme Court of the United States.

Gibbons v. Ogden, 9 Wheaton, 1, decided in 1824.

This case involved a consideration and determination of the powers of Congress under the Inter-State Commerce Clause of the constitution.

Marshall, C. J., delivered the opinion of the court, and, after stating the case, proceeded as follows:

"The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains are repugnant to the Constitution and laws of the United States.

"They are said to be repugnant:—

"1. To that clause in the Constitution which authorizes Congress to regulate commerce.

"2. To that which authorizes Congress to promote the progress of science and the useful arts.

"The State of New York maintains the constitutionality of these laws; and their legislature, their council of revision, and their judges, have repeatedly concurred in this opinion. It is supported by great names—by names which have all the title to consideration that virtue, intelligence and office can bestow. No tribunal can approach this question without feeling a just and real respect for the opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them with that independence which the people of the United States expect from this department of the government.

"As preliminary to the very able discussions of the Constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the

political situation of these States anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate upon common concerns and to recommend measures of general utility, into a legislature empowered to enact laws upon the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by fair consideration of the instrument by which that change was effected.

"This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers that which grants, expressly, the means for carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the Constitution which has been pointed out by the gentlemen of the bar, or which they have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not found in the Constitution, would deny to the government that which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument—for that narrow construction which would cripple the government and render it unequal to the objects for which it is declared to be instituted and to which the powers given, as fairly understood, render it competent—then we can not perceive the propriety of this strict construction, nor adopt it as a rule by which the Constitution is to be expounded. As men whose intentions require no conceal-

ment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it must have been understood to have employed words in their natural sense and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can inure solely to the benefit of the grantee; but is an investment of power for the general advantage in the hands of agents selected for that purpose, which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred." * * *

"In our complex system, presenting the rare and difficult scheme of one general government whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous State governments, which retain and execute all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has the right to exercise, the powers of the other."

McCulloch v. Maryland, 4 Wheat. 416, decided in 1819.

This case involved two main questions:

First. Did Congress have the implied power to incorporate a bank to faciliate the transaction of the financial affairs of the United States?

Second, If Congress did have such power, could the operations of a branch of this bank located in the State of Maryland be taxed by that State?

The court answered the first question in the affirmative and the second in the negative. Portions of the opinion on each branch of the case are given.

On the first point, among other things, the court says:

"The government of the Union, then (Whatever may be the influence of this fact on the case) is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required it to be enforced by all those arguments which its enlightened friends, while it is was pending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

"In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition must be settled.

"If any one proposition could command the universal assent of all mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have in express terms, decided it by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states shall take the oath of fidelity to it.

"The Government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance

of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'

"Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be minutely and expressly described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;' thus leaving the question whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word into the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the human means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

"Although, among the enumerated powers of the government, we no not find the word 'bank' or 'incorporation,' we find the

great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be contended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constituton, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed. It is not denied that the powers given to the government imply the ordinary means of execution. That for example of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying the money from place to place, as the exigencies of the nation may require, and of employing the usual

means of conveyance. But it is denied, that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them it be necessary to erect a corporation.

"On what foundation does this argument rest? On this alone: The power of creating a corporation is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

"The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

"The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some State constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependant upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the states the whole residuum of power, would it have been asserted

that the government of the Union was not sovereign with respect to those objects which were entrusted to it, in relation to which the laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished." * * *

"But the constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government to the general reasoning. To its enumeration of powers is added that of making 'all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.'

"The counsel for the state of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

"In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained whether Congress could exercise its powers in the form of legislation.

"But could this be the object for which it was inserted? A government is created by the people having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a senate and house of representatives. Each house may determine the rules of its proceedings; and it is declared that every bill which shall have passed both houses,

shall, before it becomes a law, be presented to the President of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of Congress. Could it be necessary to say that a legislature should exercise legislative powers in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention that an express power to make laws was necessary to enable the legislature to make them? That a legislature endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

"But the argument on which most reliance is placed, is drawn from the peculiar language of the clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be 'necessary and proper' for carrying them into execution. The word 'necessary' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of granted powers, to such as are indispensable and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

"Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense,

would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive should be be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying 'imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,' with that which authorizes Congress 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the general government without feeling a conviction that the convention understood itself to change materially the meaning of the word 'necessary' by prefixing the word 'absolutely.' This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

"Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to that end. This provision is made in a constitution intended to endure for ages, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which the government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been as unwise to provide, by immutable rules, for exigencies which, if foreseen at all, must

have been seen dimly, and which can be best provided for when they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

Having answered the first question in the affirmative the opinion proceeds with the second in part as follows:

"2. Whether the State of Maryland may, without violating the Constitution, tax that branch?

"That the power of taxation is one of vital importance; that it is not abridged by the grant of a similar power to the Government of the Union, and that it is to be concurrently exercised by the two governments, are truths which have never been denied. But such is the paramount character of the Constitution that its capacity to withdraw any subject from the action of even this power is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a State from the exercise of its taxing power on imports and exports—the same paramount character would seem to restrain, as it certainly may restrain, a State from such exercise of this power as is, in its nature, incompatible with, and repugnant to, the constitutional laws of the Union. A law absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used.

"On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds.

"This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitutions and laws of the respective States, and can not be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth

or error of which, and on their application to this case, the cause has been supposed to depend. These are: (1) That a power to create implies a power to preserve; (2) that a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve; (3) that where this repugnancy exists, that authority which is supreme must control, not yield to, that over which it is supreme.

"These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence and strength of argument seldom, if ever, surpassed have been displayed.

"The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

"That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the Constitution, and, like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article on taxation itself, is subordinate to, and may be controlled by, the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared can be admissible which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution.

"The argument on the part of the State of Maryland is, not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the

Constitution leaves them this right, in the confidence that they will not abuse it.

"Before we proceed to examine this argument, and to subject it to the test of the Constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States. It is admitted that the power of taxing the people and their property is essential to the very existence of the government, and may be legitimately exercised, on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general sufficient security against erroneous and oppressive taxation.

"The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government can not be limited, they prescribe no limits to the exercise of this right, resting constantly on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against its abuse. But the means employed by the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given to the people of a particular State, not given by the constituents of the legislature which claims the right to tax them, but by the people of all the States. They are given by all, for the benefit of all; and, upon this theory, should be subjected to that government only which belongs to all.

"It may be objected to this definition that the power of taxation is not confined to the people and property of a State—it may be exercised upon every object brought within its jurisdiction.

"This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

"The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission. But does it extend to those means which are employed by Congress to carry into execution powers conferred upon that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given, by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State can not confer a sovereignty which will extend over them.

"If we measure the power of taxation residing in a State by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department: What degree of taxation is the legitimate use, and what degree may amount to the abuse of the power? The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is an usurpation of a power, which the people of a State can not give.

"We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union for the execution of its powers. The right never existed, and the question whether it has been surrendered can not arise.

"But, waiving this theory for the present, let us resume the

inquiry whether this power can be exercised by the respective States, consistently with a fair construction of the Constitution?

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all government.

"But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

"If we apply the principle for which the State of Maryland contends to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government and of prostrating it at the feet of the States. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the State.

"If the States may tax one instrument, employed by the government in the exercise of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government to an excess which

would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.

"Gentlemen say they do not claim the right to extend State taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the tenth section of the first article of the Constitution; that, with respect to everything else, the power of the States is supreme and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the States be established—if their supremacy as to taxation be acknowledged—what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded, the declaration that the Constitution and the laws made in pursuance thereof shall be the supreme law of the land is empty and unmeaning declamation."

Veazie Bank v. Fenno, 8 Wall. 533, decided December 13, 1869.

This case involved the power of the United States Government to tax bills issued by State banks.

Among other objections to the law it was urged that as the bank was created by the State and issued bills under a franchise from the State, that the doctrine announced in McCulloch v. Maryland would apply and the tax was consequently unconstitutional. In passing upon this point the court uses the following language:

"Is it, then a tax on a franchise granted by a State which Congress, upon any principle exempting the reserved powers of the State from impairment by taxation, must be held to have no authority to lay and collect?

"We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right

to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State Government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

"But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bankbills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue."

Buffington v. Day, 11 Wall. 113, decided April 3, 1871.

This case involves the power of the United States to tax the salary of a State officer. Mr. Justice Nelson delivered the opinion of the court:

"This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

"Day, the plaintiff, in the court below and the defendant in error, brought a suit against Buffington, the Collector of the Internal Revenue, to recover back $61.51 and interest, assessed upon his salary in the years 1866 and 1867, as Judge of the Court of Probate and Insolvency for the County of Barnstable, State of Massachusetts, paid under protest. The salary is fixed by law and payable out of the Treasury of the State. The case was submitted to the court below on an agreed statement of the facts,

upon which judgment was rendered for the plaintiff. It is now here for re-examination. It presents the question, whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State.

"In the case of Dobbins v. Erie Co., 16 Pet. 435, it was decided that it was not competent for the Legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the Government, which could not be interfered with by taxation or otherwise by the States, and that the salary or compensation of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office, was also, for like reasons, equally as exempt.

"The cases of McCulloch v. Maryland, 4 Wheat. 316, and Weston v. Charleston, 2 Pet., 449, were referred to as settling the principle that governed the case, namely: 'That the State governments cannot lay a tax upon the constitutional means employed by the Government of the Union to execute its constitutional powers.'

"The soundness of this principle is happily illustrated by the Chief Justice in McCulloch v. Md., 'If the States,' he observes, 'May tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government.' 'This,' he observes, 'was not intended by the American people. They did not design to make their government dependent on the States.' Again, p. 427, 'That the power of taxing it (the bank) by the States may be exercised so far as to destroy it, is too obvious to be denied.' And in Weston v. Charleston, he observes: 'If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction

of the State or corporation which imposes it which the will of each corporation and State may prescribe.'

"It is conceded in the case of McCulloch v. Md. that the power of taxation by the States was not abridged by the grant of a similar power to the Government of the Union; that it was retained by the States, and that the power is to be concurrently exercised by the two governments; and also that there is no express constitutional prohibition on the States against taxing the means or instrumentalities of the General Government. But, it was held, and we agree properly held, to be prohibited by necessary implication; otherwise, the States might impose taxation to an extent that would impair, if not wholly defeat, the operation of the federal authorities when acting in their appropriate sphere.

"These views, we think, abundantly establish the soundness of the decision of the case of Dobbins v. Erie Co. (supra), which determined that the States were prohibited, upon the proper construction of the Constitution, from taxing the salary or emoluments of an officer of the Government of the United States. And we shall now proceed to show that, upon the same construction of that instrument, and for like reasons, that the government is prohibited from taxing the salary of the judicial officer of a State.

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired except so far as they were granted to the Government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the 10th Article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States respectively, or to the people.' The Government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

"The General Government, and the States, although both exist within the same territorial limits, are separate and distinct

sovereignties, acting separately and independent of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the States within the limits of their powers not granted, or, in the language of the 10th Amendment, 'reserved' are as independent of the General Government as that government within its sphere is independent of the States.

"The relations existing between the two governments are well stated by the present Chief Justice in the case of Lane Co. v. Oregon, 7 Wall. 76 (74 U. S. XIX, 104). 'Both the States and the United States,' he observed, 'existed before the Constitution. The people, through that instrument, established a more perfect Union by substituting a national government, acting with ample powers directly upon the citizens, instead of the Confederate Government, which acted with powers, greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the National Government, are reserved.' Upon looking into the Constitution it will be found that but a few of the articles of that instrument could be carried into practical effect without the existence of the States.

"Two of the great departments of the government, the Executive and the Legislative, depend upon the exercise of the powers or upon the people of the States. The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the General Government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their government for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but

the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the Judicial Department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States, under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was to establish a judicial department, it would have been more accurate, and in accordance with the existing state of things at the time. to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the Federal Government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the General Government as that government is independent of the States.

"The supremacy of the General Government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power 'to lay and collect taxes' enables the General Government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the States.

"We do not say the mere circumstance of the establishment of the Judicial Department, and the appointment of officers to administer the laws, being among the reserved powers of the States, disables the General Government from levying the tax, as that depends upon the express power 'to lay and collect taxes' but it shows that it has an original inherent power never parted with, and in respect to which the supremacy of that government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power,

and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the Federal Government, stand upon as solid a ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in Dobbins v. Erie Co. from taxation by the State; for, in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the General Government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally as exempt from federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

"But we are referred to The Veazie Bk. v. Fenno, 8 Wall. 533 (75 U. S. XIX, 482), in support of the power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in McCulloch v. Maryland, namely: 'That the power to tax involves the power to destroy.'

"The power involved was one which had been exercised by the States since the foundation of the government and had been, after the lapse of three quarters of a century, annihilated from excessive taxation by the General Government, just as the judicial office in the present case might be, if subject, at all, to taxation by that government. But, notwithstanding the sanction of this taxation by the majority of the court, it is conceded, in the opinion, that 'the reserved rights of the States, such as the right to pass laws; to give effect to laws through executive action; to

administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State Government, are not proper subjects for the taxing power of Congress.' This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain."

Kohl v. United States, 1 Otto, 367, decided March 27, 1876.

This was a proceeding by the United States Government to condemn a site for a postoffice in the city of Cincinnati. The opinion was delivered by Mr. Justice Strong and is in part as follows:

"It has not been seriously contended during the argument that the United States Government is without the power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent an acquisition of the instrument or means by which alone governmental functions can be performed. The powers vested by the Constitution in the General Government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories and arsenals, for navy yards and lighthouses, for customhouses, postoffices, and courthouses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a State prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the Government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the state governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenures by which the lands are held. It may be exercised, though the lands are not held by grant from the Government, either mediately or immediately, and independent of the consideration whether they would escheat to the Government in case of a failure of heirs. The

right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vatt., ch. 20, 34; Bynk. lib. 2, ch. 15; Kent, Com., 338-340; Cooley, Const. Lim., 584 *et sequentia.* But it is no more necessary for the exercise of the powers of a state government than it is for the conceded powers of the Federal Government. That Government is as sovereign within its sphere as the States are within theirs. True its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

"But, if the right of eminent domain exists in the Federal Government, it is a right which may be exercised within the States, so far as it is necessary to the enjoyment of the powers conferred upon it by the Constitution. In Ableman v. Booth, 21 How., 523 (62 U. S. XVI., 175), Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish postoffices and to create courts within the States was conferred upon the Federal Government, included in it was authority to obtain sites for such offices and for courthouses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that

but an implied assertion, that, on making just compensation, it may be taken?"

Munn v. The People of Illinois, 4 Otto, 113, decided March 1st, 1877.

This was a case involving the right of the State of Illinois to fix by statute maximum rates which could be charged for the use of grain elevators in the city of Chicago. Munn contended, among other things, that such regulation was contrary to the Fourteenth Amendment to the Federal Constitution which declares that no State shall "deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

In considering this branch of the case the court took up the matter historically and traced the principle embodied in the foregoing provision through Magna Charta into the constitutions of the various States and into the Federal Constitution. In this discussion Chief Justice Waite says:

"When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament and, through their State Constitutions or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes a part of the powers of the States and of the people of the States was granted to the United States and to the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions."

PART III.

LAW GOVERNING CONDUCT OF PERSONS.

CHAPTER I.

MUNICIPAL LAW AND ITS SUBJECT MATTER.

Definition.

Law is a continuous rule of being or action established by power capable of enforcing it.

The primary idea of the word is to lay down, to establish, to impose. This carries the idea of an authoritative law-giver. The second idea is obligation on those subject to the rule. The law being supported by authority, it must be observed by those to whom it applies. A third idea is command, or the expression of mandatory will, as distinguished from request and advice. The fourth idea is continuity. It is a rule to be observed habitually and constantly, not for one occasion only. The fifth idea is sanction or penalty. As the law is to be obeyed, and as its subjects may not always obey willingly, there must be penalty provided for its violation, and enforced against all those who disobey.

These are all the essential elements of law: (1) A law-giver, having power to enforce his will; (2) a person or persons subject to and required to observe this will; (3) a command or authoritative expression of this will; (4) the continuous nature of the command; (5) a penalty attached to disobedience.

It is apparent that many rules of action called laws do not possess all these characteristics. This is only a mode of saying that the word law has shared the fate common to so many of our English words, and has many meanings varying more or less from its primary and strict significance. These variations in its meaning occur even with regard to political and governmental affairs. The expressions, International Law and Municipal Law,

are equally current; but it requires only a moment's thought to see that in the latter the word is used in its strict sense, carrying all the ideas set out above; whereas, in the former, the use is much less accurate. Each use is, however, accepted and approved.

International Law is a system of rules recognized among civilized nations for the government of their conduct among themselves. These rules have been established by usage and custom, rather than by antecedent agreement or authoritative enunciation. They do not emanate from any political power having jurisdiction over the nations yielding obedience to them, and depend more upon "the consent of the governed" and on moral sanction than upon force. Some of these rules are of such long standing and are so thoroughly recognized that to disregard them would practically place the offending power outside the pale of civilized nations, and, if war ensued from such violation, would practically combine all other sovereigns recognizing the rules of international law against the offender. Other rules are not nearly so well established, and their enforcement rests upon moral suasion and comity alone.

Municipal Law deals with the organization and maintenance of government, the administration of its internal affairs, and the conduct of individuals; and, as these are all subject to the same sovereign political power, capable of enforcing its will, they are laws in the true sense. The law-giver is the sovereign; those subject to the law are the various governmental agencies created by the sovereign, and natural and artificial persons within its jurisdiction who are bound to obey. The rules are mandatory, not persuasive or advisory and continuous, operating uniformly. They are enforced by sanctions prescribed by the sovereign, consisting either in reward for obedience, prevention of disobedience, or punishment for disobedience accomplished.

Many definitions of Municipal Law have been given. Probably the most familiar one is that by Blackstone: "A rule of civil conduct prescribed by the supreme power in the State, commanding what is right, and prohibiting what is wrong." (I Blackstone's Commentaries, 44.) Much has been written with reference to this definition, part in criticism and part in commendation. The criticism has been directed mainly toward the last phrase—"com-

manding what is right and prohibiting what is wrong"—charging that this introduces the idea of moral quality into the law itself; whereas, moral considerations, strictly speaking, are addressed to and should control the law-making power in determining what rule of conduct should be established, and do not enter into the validity or invalidity of the rule after it has been authoritatively determined and announced. In deference to this, numerous writers adopt the first phrase as a complete definition. Again, criticism has been directed toward the word "prescribed," alleging that it makes too emphatic the idea of antecedent announcement or pre-writing. These latter critics seek to justify their objections by citation of numerous instances in which courts have determined and enforced the claims of litigants when no directly applicable written law or precedent could be found for so doing. The correctness of these criticisms depends upon the view taken as to such judicial enunciations. If they be looked upon as creating new rules of conduct, the criticism is just. If, however, they be regarded simply as declaratory of rules that have all the while existed in the will and mind of the sovereign, and which are included in the general principles adopted and announced by it to regulate conduct, but which have not theretofore been enforced specifically because no facts to which they were applicable had been presented to the courts, then the criticism is unjust. Each of these views has its advocates and its arguments. Personally, I hold to the latter.

Bouvier's Law Dictionary defines law as follows: "That which is laid down; that which is established. A rule or method of action, or order of sequences.

"The rules and methods by which society compels or restrains the action of its members.

"The aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction, and according to which it will regulate, limit, or protect the conduct of its members."

The first of these definitions by Bouvier gives the general conception of law. It is appreciably broader than the one we have given above, including in it order of sequence as well as authoritative command. This was evidently done so as to include the now common use of the word in relation to the operations of

nature. If we limit our thought of nature to the material universe and its processes, the latter become simply orders of sequence; if, however, we look through nature to its Author, we find that the orders of sequence have their origin in an authoritative and intelligent will to which their uniformity and continuity are referable.

The second definition of the three quoted is broader than municipal law, and embraces all social rules and restraints upon conduct.

The third is quite an accurate definition of municipal law as dealing directly with the conduct of individuals. This conduct is the principal subject matter of municipal law, and the definition may therefore be accepted as good as far as it extends.

There is, however, another point of view which seems to me of importance in our American jurisprudence, which is not covered adequately in any of the definitions quoted, or others with which I am familiar, but which is necessarily involved in our institutional form of government. Our constitutions are laws, yet there is much in them which is not applicable to or designed to regulate the conduct of individuals as such. They are creative instruments and result in legal institutions to which they give life and for which they prescribe the laws of being. These creative and functional provisions seem to me to be readily separable from the rules of conduct established by the sovereign for the government of its members. If this be true, the definition of law ought to be broad enough to include both classes of rules.

I suggest the following definitions:

Law, as a general concept, is a continuous and mandatory rule of being or action established by power capable of enforcing it.

A municipal law is a continuous rule of being or conduct established and enforced by the supreme political power having jurisdiction.

The law of any nation or State is the system or mass of such rules established and enforced by it.

Municipal Law includes all the rules established by any nation or State for the formation and maintenance of its government; the regulation of the conduct of its agencies; for the regulation of all those subject to its authority. It includes all the positive law of a State.

Under these definitions may be treated all phases of municipal law, institutional and individual.

DIFFERENT KINDS OF MUNICIPAL LAW.

There are many kinds of municipal law, of which the following are probably the most important:

Unwritten.	Written.
Substantive.	Adjective.
Public or General.	Private or Special.
Constitutional.	Statutory.
Common.	Roman.
Civil	Criminal.
Equity.	Common Law.
Contract.	Non-Contract.
Law-Merchant.	Ecclesiastical.
Ex Post Facto.	Retroactive.
Military.	Martial.
Maritime	

THE UNWRITTEN OR COMMON LAW.

Definition.—Under this head are embraced all those general rules, both as to rights and procedure, which have never been formulated in statutes or constitutional provisions, but which are nevertheless enforced by the government.

Its Extent.—This unwritten law embraces by far the larger part of the law of the land. Our statutes and constitutions are, in a large measure, meaningless, except as aided, construed and supplemented by it, and a very large portion of our rights and duties are dependent on it exclusively.

Its Creation.—In the language of the law, these rules are legally adopted customs, which have been recognized and enforced from "time when the memory of man runneth not to the contrary," and are, hence, considered as authoritative expressions of the sovereign will. It is not necessary to undertake to trace their origin. As the legislative function embraces the duty of law-making as well as the power of so doing, where a condition exists in which certain conduct is permitted or approved by usage and common consent, unless some legislative action is taken in opposition to or in correction of it, this inaction is an authori-

tative approval. This, at least, is the very plausible theory frequently set forth.

Probably the history of Texas gives us as fine an illustration as could be gotten. Texas was under the dominion of the Spanish and Civil Law. The the Anglo-American came, bringing with him the thoughts, education, and habits of the Common Law. Almost at once he began the struggle for Common Law institutions, and even before the Revolution, in many communities, a large share of the rights and rules of conduct were based on the Common Law. This continued, until we find, in the Declaration of Independence and Constitution of the Republic, a most comprehensive embodiment of Common Law ideas and principles, and in a few years after the independence of Texas was established we find Congress, by specific enactment, repudiating the Civil Law and adopting the Common Law, as far as applicable to existing conditions. Here the process was that, on the Revolution becoming effective, the pre-existing rules of Civil Law continued, without express legislative sanction; and when a change from this continuous condition was desired, express legislation indicating this desire was passed. It did not undertake to formulate or write the Common Law, however, but simply said that the unwritten law of England shall henceforth be the unwritten law of Texas. This unwritten law, with our Constitution and statutes, is our State law at this time. As indicated by the appellations—unwritten or Common Law—these laws have never been put into express words or terms by parliament or legislature. They are, in a large part, founded on reason and justice, and exist in the minds and hearts of the people and in the precedents in adjudged cases. There are no new principles brought into them, but constant new application of old principles to new combinations of fact. It is this which gives the English and American law its elasticity and capacity to meet the constantly varying conditions of advancing civilization.

WRITTEN LAW.

Constitutional Law.

From the English point of view Constitutional Law consists of the fundamental principles and established customs and usages which have been recognized and enforced from time imme-

morial as the foundation of the government. These, in some instances, have been embodied in great State papers, such as the Magna Charta, etc., but such instruments are regarded rather as declaratory than as creative.

From the American point of view, it includes the principles and rules embodied in written instruments, adopted by direct act of the people as the basis and charter of the government founded by them.

They are binding alike on all governmental agencies who manifest and carry out the will of the sovereign in other matters, as they are on private persons, and can not be rightfully disregarded, set aside, or modified, except by the people, as provided in the instrument, or by revolution.

The Federal Constitution.

1. *History.*—July 4, 1776, the Declaration of Independence was passed by the Congress of the Thirteen United States of America, at Philadelphia.

November 15, 1777, delegates of the United States, in Congress assembled, agreed to articles of confederation among the original thirteen States, subject to approval by the legislatures of the several States.

These articles having been approved by the several legislatures of the several States, they were ratified by Congress on July 9, 1778.

September 17, 1787, the present Constitution was completed and signed by the convention which proposed it. It was ratified, at different times, by different States, and became operative March 4, 1789. (5 Wheat., 420.)

Its Effect.—With it came into being the Government of the United States of America. (19 How., 397.) There has been nothing like it in the world's history.

The government created by it is one of delegated powers. There are three different kinds of power recognized in it. There is no prohibition of the exercise of more than one of these by the same officer. The legislative power is vested in Congress. It is the supreme law on all matters within its scope.

Amendments.—It provides a method of amendment, and this power has been frequently exercised; there are now fifteen amendments—additions to the original instrument.

The Constitution of the State.

2. The Constitution of a State is the direct expression of the sovreign will of the people. In it they embody their plan of government and provide for all the agencies through which they desire to exercise their power. In it also they reserve to themselves certain designated powers, which are not to be exercised by any of their agents. As to all matters within the jurisdiction of the State, it is the supreme law, and must be obeyed. If it should undertake to deal with matters of Federal jurisdiction, it would, as to them, be inoperative and of no effect.

Statutes.

Definition.—Statutes are written expressions of the will of the sovereign, formulated and adopted by the legislature, or rather the legislative department of the government. They constitute by far the greater part of the written law.

To be effective, they must be enacted in conformity with the Constitution of the government.

The scheme for legislation in the Federal and in the State governments is practically the same. The legislative power is vested in the two separate houses or bodies of officers, called respectively the Senate and House of Representatives. A bill, except for raising revenue, may originate in either house, but must pass both houses and be signed by the presiding officer of each before it becomes a law. It must then receive the approval, affirmative or negative, of the chief executive, or be passed over his veto on a two-thirds vote of each house.

The manner of enacting laws is set out with considerable detail in the Constitutions both State and Federal.

The effect of statutes passed by Congress, in conformity to the Constitution of the United States, is to establish the rule expressed therein as a law, to be obeyed by all persons subject to the United States, and it is binding alike on the President and the heads of departments, the Federal judiciary, and on all State officers. If it is in not in conformity with the Federal Constitution, it is binding on no one.

The same is true of enactments of the State legislatures, with this additional statement, that they must conform to the Constitution, laws and treaties of the Federal Government, and also to the Constitution of the State. If they meet these require-

ments, they must be obeyed by all; if they do not, they are not law, and are of no effect.

The constitutionality of Federal and State statutes is a matter of judicial cognizance. Such questions as to the enactments of either government may be raised and decided in the courts of either, with this difference: If the question be the validity of a Federal statute, the decision of the Supreme Court of the United States is alone final and binding on all persons, while the decision of the State courts on such question will not necessarily be followed by the Federal courts—they will deal with the question as an original matter. If the question be a conflict between a State statute and the Federal Constitution or a treaty, the Federal courts will not be bound by the decision of the State court, but the latter must follow the former. If the question be a conflict between the statute and the State Constitution not presenting a Federal question, the decisions of the State courts are binding on everyone.

Treaties.

A treaty is "A compact made between two or more independent nations with a view to the public welfare." Under our system of government the power to make treaties is exclusively in the United States. No State with us can enter into any agreement with any other State or any foreign power, without the consent of Congress.

Treaties by the Federal Government are entered into by the combined action of the President and Senate. By the terms of the Constitution they are declared to constitute a part of the supreme law and must be observed by the United States and the several state governments and all private persons.

Substantive Law.

5. This term is used in contradistinction to Adjective or Remedial Law—the law of procedure—and covers all rules of conduct on which primary rights rest, everything that goes into the nature or existence of legal rights and wrongs, not being mere rules of procedure for the purpose of enforcing substantive rights.

Adjective Law.

6. Adjective or Remedial Law includes all rules of procedure and those rules which govern the agencies of the government and all parties in seeking and obtaining redress or remedy for wrongs.

Public Law.

7. Public or general laws are those which relate to and operate generally on all persons or things included in the class subject to the law.

Private Law.

8. Private or special laws are those which relate to some particular thing or persons, and do not operate generally on all persons or things of the same kind and similarly situated.

Common Law.

9. This term has at least three distinct meanings:

(1) As distinguished from Written Law, as we have seen it includes every rule enforced by the sovereign and not embraced in constitutional or statutory enactments or treaties.

(2) As a general system of jurisprudence, it is used to denote the entire body of English Law, written or unwritten, as distinguished from the Roman or Civil Law. This is its broadest use, and embraces in it everything from those fundamental concepts and institutions which distinguish English and American civilization from that of other developments, to the most unimportant rule which governs in the most trivial affairs of English or American life.

(3) In a narrower sense it embraces only those principles, rules and methods of procedure which govern the Common Law Courts, as distinguished from Courts of Equity and Ecclesiastical Courts.

Roman Law.

10. Roman Law is the great system of jurisprudence which prevailed in the Roman Empire, and from there has been transmitted through the countries of Central and Southwestern Europe and their dependencies in all parts of the world. It is the only rival of the English Common Law, regarded as a system of jurisprudence. It is of very great importance to the lawyer of the extreme West and Southwest, because of the former jurisdiction of Spain and Mexico over this territory and the great influence which that fact has on its law. In many regards it is more nearly allied to the Roman than to the Common Law system. This is particularly true as to land holdings, marital relations or rights of husband and wife, and the system of pleading and procedure.

Civil Law.

11. This term has two distinct meanings:

(1) It is often used as equivalent to Roman Law, as distinguished from the Common. This meaning is covered by the preceding paragraph.

(2) It is used in opposition to Criminal Law, to indicate all the rules which determine and regulate the rights and remedies of private parties as between themselves. In this sense, it covers all of Equity, Contract, Tort or Non-Contract Law, and much of the various other classes.

Criminal Law.

12. Criminal Law includes all the rules established and enforced to protect the rights of the public from violation by acts of individuals. The Common Law is very elaborate and exhaustive on this subject, and is the base of all American Statutory Law.

Equity.

13. Equity, as a system of law, includes all those rules of substantive and remedial justice which are recognized in and administered through courts of Chancery as distinguished from Common Law courts.

In England at an early period the rules of the Common Law became fixed and changeless. The courts followed precedent, and were limited in their jurisdiction by the forms of action adopted. The bringing of a suit was not by petition to the court, setting out the facts constituting the grievance of the party, and asking for the appropriate remedy, but by application to the clerk for the issuance of a certain form of writ. The clerk could not change or increase the kinds of writs which he was authorized to issue, and a party could not get access to the court or judge without a writ of the appropriate and prescribed form; so that, if the injury were one not appropriately falling into one of the established forms of writs, the injured party was without a remedy.

As time passed and the progress of the world advanced, this condition became intolerable, and petitions for relief in special cases were made to the King, as the fountain of justice, and these he referred for action to his chief councilor, the Chancellor, who was keeper of the King's conscience, and later of the Great Seal

of State. The Chancellor granted or withheld relief, as the case seemed to require. From this grew the jurisdiction of the Chancellor or Chancery courts to administer relief in cases of great injustice in which the Law courts could give no relief; hence, we find that Equity is often spoken of as a system of remedial justice administered in courts of Chancery for the purpose of supplementing the Law courts and giving relief in necessary and meritorious cases in which the law, by reason of its fixedness and the inadequacy of the forms of action, could not do justice to the parties.

The same tendencies and influences which crystallized and fixed the procedure of the Common Law courts asserted themselves in the Chancery courts, and the instances in which injustice would be prevented there, or, in other words, the kind of cases in which relief would be granted there, and the nature of the remedies which would be applied, gradually became reduced to and governed by fixed rules or maxims, and unless the particular complaint made to the court comes within some of these, the suitor is now as helpless in a Chancery court as in a court of Law. So the early view, of a system co-extensive with natural justice, no longer obtains, and the rules of Equity are as fixed and unchangeable as those of law, though they have a broader scope.

As the primary purpose of Equity was to give relief in cases in which the Law gave no remedy, it is a fundamental maxim of that system that Equity will afford no relief where there is an adequate legal remedy. In some instances, however, the law courts would grant some kind of relief, but experience demonstrated that these remedies were not adequate, that is, that they fell short of practical justice between the parties, and from this there grew up a number of cases in which Chancery courts would take jurisdiction, although there was some remedy at law. In these the aggrieved party has his choice of forum and can sue in either, and hence there is, to a limited extent, a concurrent jurisdiction between Common Law and Equity or Chancery courts. So we see that, at this time, the term Equity has the significance given it above.

Contract Law.

14. Sovereignty recognizes the right in many instances of persons to create, modify, or destroy legal rights and relations by

agreement among themselves: The rules of law governing agreements and determining the legal effect and force thereof and regulating the legal relations, and rights and duties resulting therefrom constitute Contract Law.

Non-contract or Tort Law.

15. These terms indicate the rules of law which create, regulate, and define the legal relations, rights, and duties of persons in the absence of agreement between them, and the rights and duties recognized or imposed by law as incidental to some relation or relations established between the parties by agreement. The rules of contract and of non-contract or tort law supplement each other and taken together comprise the entire mass of rules of law regulating and determining the rights and duties of individuals as between or among themselves.

The Law Merchant.

16. This embraces, first, those rules and customs brought by the merchants of Continental Europe into England when they set up their trading establishments in London; second, these rules, as modified by contact with the English Law, and as finally incorporated into the English system as a substantial part of it, as they exist today.

At the time the German merchants came to London, Law was largely personal instead of local. In their primitive state men were organized in familes and tribes which had no fixed locations. As they wandered they carried their tribal customs and rules with them. This fact influenced many of our laws in their formative period, but none more than the rules now under consideration. The foreign merchants brought their business rules and customs with them, and naturally insisted upon their observance by those with whom they dealt. These were, in many respects, principally as to consideration of contracts, assignability of choses in action, and extension by law of the time for the payment of debts, directly opposed to the local Common Law. Conflict was inevitable, and the result was a compromise consisting in the body of rules governing commercial business which we now designate the law merchant.

Ecclesiastical Law.

17. The law governing the Church and things ecclesiastical. William the Conqueror separated the civil and ecclesiastical juris-

dictions of the English tribunals, assigning to the latter authority over all matters pertaining directly to the Church, the order of the clergy and their conduct in religious matters, and to such matters affecting non-ecclesiastical persons as related to "the health of the Soul." This was a very indefinite jurisdiction, and under it the courts took cognizance of matters pertaining to the marriage state, both as to the celebration of the ceremony and its dissolution by divorce, and then of matters testamentary, guardianship, and kindred subjects. No such separate jurisdiction exists in America, and even in England the subject matter of this law and the jurisdiction of the ecclesiastical courts have been much reduced in later years, and now relate almost exclusively to the affairs of the Church, considered as an established legal institution.

Ex Post Facto Laws.

18. *Ex Post Facto* Laws are written criminal laws attempting to deal with conduct after it has taken place, to the substantial prejudice of the person guilty of such conduct. They are usually divided into classes as follows:

(1) Those which make conduct which was innocent when it transpired punishable afterward as a crime.

(2) Those which aggravate the crime; that is, increase the degree of criminality in an act after it has been committed.

(3) Those which increase the punishment for a crime after it has been committed.

(4) Those which change the rules of evidence so as to require less proof to support a conviction than was required when the offense was done. (Story's Constitution, 212; 3 Dall., 390.)

These are all clearly *ex post facto* laws, but it may be doubted whether they include all laws subject to this objection.

Such laws are forbidden by the Constitution of the United States and of Texas, and, I think, of every State in the Union.

Retroactive Law.

19. Retroactive and Retrospective Laws are civil enactments relating to past matters. The objections to changing past conditions, as to civil rights and remedies, are not so great as in criminal cases, yet they are sufficient to have caused the insertion in many constitutions of a clause prohibiting such action by the legislature. This clause is confined, in its operation, to laws which

will affect vested rights of property. The legislature may pass acts which will take away remedies or change personal rights without violating its provisions, so long as the change is not so great as to interfere with or impair vested rights.

Military Law.

20. Military Law consists of that system of rules and regulations which is provided for the government of soldiers and of persons belonging to the army and navy. "The law applicable to military service and affairs." This law does not apply to persons not engaged in military service. In the United States it consists of constitutional and statutory provisions, supplemented by a few Common Law rules, all interpreted according to Common Law principles. This law is administered through military tribunals—courts-martial.

Martial Law.

21. "This branch of law may be defined, in brief, as the law of necessity and force, invoked for the protection of society, when and where the civil law is paralyzed." (Studies in Juridical Law, 113.) "Martial Law is the law of necessity, the ordinary law, and the laws of nature intermingled in such manner and proportions as the military power deems to be required by the particular emergency, when it supersedes or otherwise takes a control superior to the civil power." (1 Bish. New Criminal Law, Sec. 45.) This is a necessity of war. It becomes operative only upon actual hostilities, and continues only for such time thereafter as good order and necessity require. "Military Law is that branch of the law of the land prescribed by the government for the conduct of the citizen as a soldier. It is administered by military tribunals, and is in force in time of peace as well as war. But it does not suspend the civil law for any breach of which the soldier is liable to the same trial and punishment as the civilian. Martial Law, on the other hand, is the military rule and authority in time of war." (Studies in Juridical Law, 113.)

Maritime Law.

22. This has been defined as "that system of law which particularly relates to the affairs and business of the sea, to ships, their crews and navigation, and to the maritime conveyance of persons and property." (Bouvier's Law Dictionary.)

"The maritime law is a law common to all nations. It consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established in all the commercial countries of the world, to regulate the dealing and intercourse of merchants and mariners in matters relating to the sea." (Benedict's Admiralty.)

Purposes of Sovereignty in Establishing Government and Making Laws.

In States in which sovereignty is lodged in the great mass of individuals composing the community the purposes for which government is maintained and laws are enacted are first, to protect the people as a whole in their civil and political rights, and second, to protect each individual member of the community in his liberty and just opportunities and privileges. The basic thought in liberty, right and justice is the same, equality of opportunity and in the enjoyment of those benefits and advantages which opportunity brings when properly and justly utilized. Properly organized government and properly determined law can have no other end but these. So far as those who make the laws appreciate and apply this fundamental truth their government and law will be good, so far as they disregard it their government will be bad.

These ends are secured by determining what courses of conduct will lead to, and what courses of conduct will interfere with, the accomplishment of this purpose and in encouraging and enjoining the former and forbidding and punishing the latter. When a certain course of conduct is enjoined by law, this is equivalent to a declaration by the law-making power that such conduct is approved by it as leading to liberty, right, and justice. When a certain course of conduct is forbidden by the law-making authority, this is equivalent to a declaration by that authority that such conduct will not lead to the public good or the individual well being of those subject to the law. To state the matter differently, every law, whether positive or negative, is an expression by the law-making power that conduct in accordance with such rule is conducive to the public good and therefore proper, and conduct contrary to such rule is subversive of the public good and therefore improper.

The questions necessarily arise, by what standards are the lawmakers to test the propriety or impropriety of proposed rules of

conduct and how closely shall they adhere to such standards in the enactment of law? Law is essentially practical and its standards must be practical. Notwithstanding this fact its standards of propriety must always conform in large measure to moral principle. Laws are not made for the direct purpose of making men moral but in any enlightened community courses of conduct which the law commends must essentially conform to moral standards simply because moral conduct in the great majority of instances is conducive to the public welfare and to the individual good of the persons composing the community.

These truths are so manifest and so nearly universal in their application that it seems almost unnecessary to mention them. Still it is not infrequent, when it is proposed to enact some measure into law, to hear the objection that the conduct sought to be secured thereby is moral and therefore outside the domain of municipal law. This can never be a good objection. That a measure though moral is still impractical or would not be conducive to the public good is a legitimate argument against it, but the fact that the rule enjoins moral conduct or conforms to principles of right cannot of itself take the matter out of the jurisdiction of law.

A moment's consideration of the provisions of criminal law will demonstrate that in almost every instance conduct denounced as criminal is also immoral. This is equally true, though perhaps not quite so readily apparent in civil law. In almost every instance the conduct required by law of individuals when dealing with their neighbors conforms to the requirements of morality. Neither the criminal nor the civil law covers the whole field of ethics, but each, so far as it extends, in a very large measure conforms to and enjoins obedience to ethical principles. It must necessarily follow that the fact that a proposed rule of conduct is in itself moral cannot be an objection to its legality or against its being enacted into law.

CONSIDERATIONS CONTROLLING SOVEREIGNTY IN ENACTING LAWS.

In political organizations in which no class distinctions are recognized and the sovereign power is vested in the people, or a large percentage of them, law is developed public sentiment, formulated and enforced through governmental agencies. In such

communities, the rules of conduct prescribed necessarily reflect the social, educational and moral conditions of the people. The standards most usually applied by a people and their representatives in determining what rules of conduct should be enforced are moral, but these are not the sole matters to be considered. Questions of policy and of practicability must be given due weight. Hence, the rules of conduct prescribed by law usually embody so much of the people's conception of the morally right in regard to such conduct, as they can practically enforce through the agencies at their command. These practical considerations are often of very great weight. In them may be found, to a large measure, an explanation of the law's failure to provide compensation for moral injuries. Some preventive measures are adopted; but, where moral injury has actually been received, the law never undertakes to give damages in compensation. This is not because the law does not recognize that man has a moral nature and that it is worthy of protection; but because it has no means by which practically to determine the fact or extent of injury, or by which to measure such injury in dollars and cents. The same consideratons prevail in many other matters, and afford an explanation of most, if not all, of the omissions for which the law is at times criticised.

Rightness as a quality may, in a general way, be defined as propriety enforced by power.

Propriety consists in conformity to established rule, and is an indispensable element of rightness. Frequently, we emphasize the idea of conformity to standard to such extent as practically to exclude the second notion from view; still, it seems that the idea of sanction or enforcement by power is as really a part, though not so large a part, as is conformity, in the conception of propriety.

When we speak of the morally right we mean that which is proper, judged by moral standards, and which is enforced by such sanctions and penalties as moral forces can control. So of that which is religiously right; this is conformity to religious standards, resulting in religious approval and reward; its opposite, non-conformity to religious standards, subjects to religious disapprobation and penalty. Social rightness is conformity to social standards, and brings social approval; social unrightness is

nonconformity to social standards, and always subjects to such penalties as society has at its command. So on through the entire range of conduct, and judgment concerning it. Every time we change the standards of propriety and the power by which conformity is to be enforced, we change the quality of conduct which will result in conformity, or rightness, or in nonconformity, or wrongness. This general doctrine is as true of legal standards and penalties and of legal rights and wrongs, as in any other department of life.

The question arises: Is there no absolute right and wrong, no quality in conduct which will unerringly determine its character?

Most certainly there is. God lives. He is infinite perfection in all His characteristics and attributes. His standards are perfect, and conformity to them gives absolute right; nonconformity gives wrong or sin. We being emanations from God, formed in His image, endowed with intelligence, capacity for appreciating the moral quality of conduct, and freedom of choice between good and evil, should conform our lives to these absolute standards which exist in the mind of God, and are in strict harmony with Him, His character and government; and, if we fail to do so, we place ourselves out of line with Him, and subject ourselves to the penalties for such nonconformity. In the nature of things, he who is subject to law and does not conform thereto must accept the penalties of nonconformity. The declaration of these moral standards, the conditions of conformity thereto, and the penalties for the violation thereof, form a large part of Divine Law.

Human Law expresses man's idea of propriety, so far as he is capable of enforcing it by the means at his command. As the intelligence and moral excellence of the law-giver advances and his conception of propriety approaches nearer to the absolute standard existing in the mind and law of God, so will human law approach the absolute perfection of the divine.

We hear much of the relation between law and justice, sometimes in the form of congratulation on the gradual nearing of the two, sometimes in the form of lamentation that they are still so far apart. Nothing human is perfect, but it is certain that man's conception of right is growing better and truer day by day, and his capacity for apprehending and applying just remedies is also

improving, so that each year finds the law nearer than before to the absolute standard of right. He is the true reformer who, with patient toil and faithful service, brings first himself and then those about him to a higher and clearer conception of the absolute right and to purer habits of life and conduct, and thus becomes a center of moral light to those about him. No man has a finer opportunity in this line than the lawyer.

Legal Rights.

When certain conduct is approved by the law-making power of any government, and it makes rules requiring such conduct to be observed by those subject to it, prescribes penalties for the violation of such rules, and provides machinery or agencies to apply such penalties, such conduct is right in that government. Persons failing to conform voluntarily to these rules are by the sovereign subjected to the prescribed penalties, and are thus, in legal contemplation, made to conform. This compulsion to conformity always consists in some form of control over the person compelled, either making him do or forbear to do in some way. This idea is so essential in the law that many times compulsion occupies a very prominent place in the legal conception of right as a quality, and many authors, when they turn from the abstract to the concrete, define a legal right with almost exclusive reference to this idea, and say that a legal right is "the capacity in one or more persons to control by law definite acts and forbearances by another or others." While these authors are entitled to much respect, their views can not be accepted as controlling further than they embody true ideas. The conception conveyed by the language quoted above does not seem to be adequate, and in some connections is quite confusing. To illustrate: We are told by the highest authority, and all recognize as true, that a cause of action consists of a legal right in one person, the violation of this right by another, and directly resulting injury. If, in this formula, we limit the idea of legal right to simple capacity to control by law, the result is confusing, if not unintelligible. The same is true in many other legitimate uses of the word right. It seems, therefore, that the term carries with it a different, or at least an additional, idea, embracing something vested in and per-

taining to the person having the right, with reference to which he may control by law the conduct of others. For these reasons, I prefer the following definition:

A legal right is some power, claim, interest, or advantage which one or more persons enjoy under the protection of the law, secured to him or them by the sovereign by giving to him or them the capacity to control by law the conduct of others with reference thereto.

The correlative term to legal right is legal duty. This represents the necessity imposed by law on one or more persons to recognize and respect and to leave inviolate some power, claim, interest or advantage, existing in another or others, and constituting the right to which the duty is correlative.

Whatever language may be adopted to express the thought, the conception of a legal right involves the idea of capacity to control the conduct of others by law, he or they who have the legal right having the power to control by law the conduct of him or them owing the corresponding legal duty, so far as such conduct affects such right.

The sovereign's recognition of a power, claim, interest or advantage in one person, and its undertaking to compel another or others to observe and respect the same, constitutes the legal obligation existing between such persons with reference to the recognized power, claim, interest or advantage. Thus, if one person have a claim against another which is well founded in morals, the latter would be morally obliged to recognize it. This would constitute no legal obligation; if, however, the sovereign having jurisdiction over both persons should say: "This claim is proper, and I will enforce it," this recognition and undertaking to enforce by the sovereign gives legal obligation to the claim, and at once transforms it into a legal right.

Legal rights may exist in the whole body of the people collectively, or in private persons. The mass of rules made for the protection of public rights against individual wrongs is called Criminal Law; the mass of rules made for the protection of the private rights of individuals is called Civil Law.

The rights existing in the public and protected by the Criminal Law, and subjection to punishment for violation thereof, are dependent upon the will of the sovereign, and are in no wise

dependent upon the assent and acquiescence, individually, of the person charged with the offense.

The private rights protected by Civil Law, many of them, exist independent of the assent of the parties owing the correlative duties. These constitute the rights protected by tort, or non-contract law. The law recognizes the power of persons, under certain restrictions, to create new rights, or modify or destroy previously existing ones by agreement. Agreements having such characteristics that the law will recognize and enforce them are called contracts, and the rules governing the formation, effect, and enforcement of such agreements are called Contract Law.

CHAPTER II.

MUNICIPAL LAW AND ITS SUBJECT MATTER (CONTD.)

SUBJECT MATTER OF LAWS.

The subject matter of private laws are persons and things, and the conduct of persons with reference thereto. I should prefer to limit it to human conduct, but persons and things have so long been included that it is not desirable to omit them except for sufficient reasons, which do not seem to exist. They are, therefore, retained, and the idea of conduct added.

PERSONS.

A person is a being capable of having legal rights and owing legal duties.

Persons are of two kinds, natural and artificial; the first including all human beings, whether normal or abnormal, and the second including certain ideal entities recognized by the law as existing separate and apart from the actual persons composing them, having such powers and capacities and subject to such restrictions and duties as are determined in their creation. These artificial persons are known as corporations.

Natural persons are classified in various ways. When viewed with reference to their relation to particular governments, they are separated into citizens or subjects, denizens, and aliens; with reference to their representation of sovereignty, into public and private; with reference to their capacity to act for themselves, into those *sui juris* and those *non-sui juris*. These classes are again subject to subdivision.

Citizens.

A citizen is one of the sovereign people. (19 How., 404.) A constituent member of the State. (92 U. S., 342; 21 Wall., 162.)

All persons, except Indians, born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States in which they reside. (U. S.

Const., fourteenth amendment.) The only difference between the rights and duties of native and naturalized citizens is that the latter can not become President or Vice-President of the United States.

Birth may be actually or constructively within the United States. The first includes all actual births within the territory of the United States, except of children of parents resident here in the diplomatic service of some foreign government, or who are alien enemies within the territory. (169 U. S. 649.) The second includes all births in foreign countries, or on the seas, when the parents are citizens and engaged in the diplomatic service of the United States, and also when both parents are citizens of the United States but temporarily absent. (5 Blatch. 18; 50 Fed. Rep., 310.)

Naturalization.—The Federal Constitution puts the subject of naturalization in the hands of Congress (Const., Art. I, Sec. 3c-5), and Congress has passed general laws on the subject, under which the State governments are authorized to act. (Act April 14, 1802.) This power of Congress to naturalize, so as to make citizens of the United States, is exclusive, and can not be exercised by the States. (2 Story on Const., Sec. 1104; 7 How., 556; 19 How., 393; 143 U. S., 160.) The States may, however, confer such rights upon persons resident within their borders as they see fit, even though they be such as are usually enjoyed only by citizens. (10 How., 393; 143 U. S., 160; 4 Dill., 425; 5 C. C. A. [T. C. A.], 31 and note.) The State can thus confer the right to vote, and as voters for the Federal representatives and presidential electors are the same as qualified voters for house of representatives in the particular State, it follows that the State can practically withhold the right of suffrage in Federal elections from citizens of the United States and confer it upon persons not such citizens. (See former authorities.)

Who May Be Naturalized.—Any alien friend who is a white person or of African descent may be. But Chinese, Sandwich Islanders, Japanese, and Burmese can not. But it has been held that a Mexican may be.

The children of the above classes, born in the United States, and whose parents are not in the diplomatic service, are citizens. (10 Fed., 456.)

Process of Naturalization.—There are two distinct steps in naturalization: (1) The declaration of intention. (2) The actual adoption into citizenship. The first is a sworn statement by the alien, before some court of record or its clerk, that he desires to become a citizen of the United States, and renounces all foreign allegiance. This must precede the final action by at least two years. The final action is taken by appearing before a court of record, in open court, and declaring on oath that the person will support the Constitution of the United States, and renounces all foreign allegiance. He must also prove that he has made the former declaration in due form, that he has resided in the United States for five years and in the State or territory in which the court is held for three years, that he is well disposed to the United States, and has conducted himself properly during his residence here.

Naturalization confers citizenship, but not necessarily all political privileges. Citizenship and allegiance are correlative terms, and the citizen is entitled to the full protection of the law in all his rights, personal and property, but he is not necessarily entitled to all political privileges, or rights, as they are frequently termed. Political privileges or rights are enjoyable by such persons only as the sovereign sees fit to designate. Many citizens have limited political rights, as women and infants, who are not permitted to vote, persons who are deaf or blind, or who can not read or write, who are ordinarily relieved from jury service, persons not having legal qualifications, and hence debarred from holding office, etc. The privilege of voting can be taken away from classes once enjoying it, provided the exclusion be not based on race, color, or servitude. The provisions of the Federal Constitution, as to rights of citizens, have been already given.

Subjects.

This term applies, or is sometimes used to apply, to the same persons as citizen, but this is not accurate. Its proper meaning is confined to monarchical forms of government, and indicates one who owes permanent allegiance to a monarch.

Denizens, in English Law, are persons not citizens and not naturalized, but who have been granted some special privileges by the King. By analogy the term is here applied to persons not

citizens, but residents who, by treaty or by some legislation, enjoy some privileges beyond those enjoyed of common right by all residents, and who owe a qualified allegiance on that account. The condition is anomalous and infrequent, and the status of the person in each instance depends on the treaty or statute out of which the relation grows. (Andrews' Amer. Law, 3.)

Aliens are citizens or subjects of a foreign nation or State; that is, persons born out of the jurisdiction of the United States, and who have not been naturalized.

An alien woman who marries a citizen becomes a citizen, but the converse does not hold good, and a citizen woman who marries an alien does not thereby lose her citizenship. (56 Fed., 536.)

Aliens have such rights and privileges in a country as its laws allow them. (149 U. S., 698; 12 Wall., 457; 153 U. S., 458.)

The policy of the United States has usually been liberal in its dealing with aliens, and they ordinarily enjoy large privileges here. Their purely personal rights and rights in and to personal property are almost, if not entirely, identical with the rights of citizens in those regards. Their rights as to real property are more limited, and are usually defined by statute. (For Texas statutes see Rev. Stats., 1895, Arts. 9-15.)

The above applies to alien friends. Alien enemies are the subjects of States at war with the United States. Formerly they could hardly be said to have legal rights. The tendency of modern civilization is to ameliorate this condition.

Persons Sui Juris, or Normal Persons.

Persons who possess normal intellects and wills, and who are not subjected to influence supposed by law to be controlling, are called *sui juris*. Persons in this normal condition, in governments such as ours, are the real sovereigns and law-makers. The governments are organized, maintained, and operated by them; the law is the result of their judgment, and embodies their authoritative will. Each is subject to it, and each has a voice in its making, and one of the chief guarantees of justice and moderation is found in the fact that they who make the laws are also bound to obey them. As the rules for regulating the conduct of all persons are made and enforced by these normal individuals, it follows that the law practically embodies their standards of

right and their conceptions of propriety, modified, of course, by matters of practicability, as before indicated. It is, therefore, essentially true that the law's standard by which to measure conduct is the average man.

Not only are the laws made by him, but primarily they are made for him, and the rules of conduct prescribed are such as he should observe, and the protection afforded it such as he should have.

Persons Non-Sui Juris, or Abnormal Persons.

The class of persons designated as non-*sui juris* includes those who are abnormal, or rather below normal in intellect or will, and those who are subjected to influences by others which are supposed by law to be controlling. Such persons, while in this condition, have no direct part in the formation or operation of the government, nor any voice in the making of the laws, though they frequently share in its burdens and always in its benefits. The rules regulating their rights and duties vary from those provided for the normal person as their special needs may require. These variations usually take the form of lessened capacity to divest themselves of rights or to assume obligations. The extent to which these deviations go, and the circumstances and length of time under which they exist and the methods of their termination vary with the different facts on which their disabilities are based.

The classes of persons usually regarded *non-sui juris* are persons mentally unsound, persons under duress, persons in a state of intoxication, infants and married women.

Considering these in their order, we have:

Insane Persons.

1. The lack of mental capacity to enable one to appreciate intelligently the nature of conduct and the natural consequences to result therefrom, or of sufficient will power to enable him to determine his course with regard thereto, of necessity removes the person from among the normal and constitutes incapacity both in fact and in law. So it is everywhere held that such a person shall be protected from the consequences of his voluntary acts, so far as they result in injury to the public or in attempted voluntary assumption of new legal relations; that is, from lia-

bility for crime and improvident contracts. But such an one is still capable of doing actual injury to another, and in such case the loss must be borne by one or the other, the abnormal agent or the innocent sufferer. It is held as a very general rule that it is better for it to fall on the agent than the victim. If, however, the wrong be such an one that an affirmative evil intent is an essential element, a person *non compos mentis* being incapable of entertaining such an intent, can not commit the wrong.

We therefore find these rules to be of practically universal application.

(1) An insane person, one mentally incapable of understanding the nature and consequences of certain acts or omissions or of controlling himself with regard thereto, is not responsible, criminally, therefor.

(2) A person in this condition can not, by agreement, bind himself to do or forbear any act or omission so as to create a valid contract or obligation against himself, except it be for necessaries. If, however, the other party to the agreement acted in ignorance of this abnormal condition and without legal notice thereof and has changed his condition in dependence on the contract, the right to be relieved from the agreement is coupled with the requirement that the insane person shall put the other person in *statu quo*. Such an one can not represent himself before the courts, but must appear by guardian, regular or special.

(3) Such a person is responsible in compensatory damages for torts committed by him which do not include an element of intent to do evil. If the tort be one to which a specific evil intent is necessary, he can not commit it, and is not responsible for it. He can not be held responsible for punitive or exemplary damages.

If the condition is temporary, and not dangerous to others, the negative protection afforded by the above rules of non-liability is deemed sufficient. If it be continuing but not violent, in addition to the non-liabilty, a guardian should be appointed to conduct the affairs of the insane person, under the direction of the proper court. If the condition be violent, other considerations enter into the matter and the safety of the public, as well as of the individual, is to be considered, and if necessary he may be restrained of his liberty.

Persons under Duress.

2. Duress is another partial incapacity. It consists in such a state of facts as amounts to coercion, overcoming the will of the party and destroying, for the time being, his free agency. In such case the person apprehends the nature and consequences of his act, but is not free to choose between performing it and leaving it alone. The circumstances must be such as to be calculated to overcome the will of the *particular person* and must, in fact, have had that effect. When this is shown, it will avoid a contract into which the person has been forced; but, with the exception of coercion exercised by the husband over the wife, it is not a defense to an action for tort. In some instances, it excuses an act otherwise criminal, and in others it does not. For rules governing this subject, reference must be had to works on Criminal Law.

Drunken Persons.

3. When drunkenness has been so protracted and severe as to result in *delirium tremens*, it is recognized as a species of insanity, and is governed by the general rules given above. When it is temporary, it relieves from liability on agreements entered into under its influence, provided the party act promptly and justly, in disaffirming when he becomes sober. Drunkenness does not relieve from liability for tort or crime, except when some intent of which the person is incapable is an essential element of the wrong. If a person desiring to do a wrong, whether a tort or a crime, makes himself drunk in order to do so, his intoxication will be no defense, nor even mitigation, but will rather be an aggravation.

Married Women and Infants.

The disabilities of coverture and infancy will be considered in a subsequent portion of our work.

THINGS.

A thing is any existence not a person, natural or artificial. They are divided into corporeal and incorporeal. Corporeal things are those which are discernible by the physical senses, usually having tangible form and substance. Incorporeal things are those existing only in thought or idea. They may be quite as real, practical, and important as things tangible, though they

can not be discovered by the physical senses. Probably the most familiar illustration of an incorporeal thing is a debt. One man loans to another a sum of money which the borrower promises to repay at a certain time. The borrower obtains the money, the lender obtains the enforcible promise of repayment, or the debt from the borrower to him. In legal contemplation this debt is as real as the money for the repayment of which it was incurred. Another illustration is found in an easement which one man has upon the property of another, say a right of way across his land. The right of way is not the land, but a simple right of user in a designated manner for designated purposes; yet, this right of user is real, valuable and protected by law.

The law is concerned in and deals with things only as they are connected with persons, and are the subjects of rights or bases of liability as between persons.

The relationship between a person and a thing by which the former is entitled to full legal dominion over the latter is called ownership. Ownership may be resolved into several elements, each of which may be the subject of legal right. These elements are possession, use, profit, modification, and disposition. When the relationship between a given individual and a given thing embraces all these elements, he is a general owner. When the relationship between the person and the thing embraces some one or more, but not all, of these elements, or all of them for a limited time or to a limited extent, the relationship is called limited or special ownership.

When the facts are such that the law recognizes and undertakes to enforce and protect the relationship between the individual and the thing, the person has a legal right in and to the thing to the extent of such recognition and protection.

The rules of law regulating these relationships between persons and things constitute the law of property, and are essential to the well being and the safety of every State. The different interests that persons have in things, when recognized and protected by law, are called estates, and the facts and instruments by which these estates are proven are called titles.

The most important classification of things, legally speaking, is into real and personal property. This classification takes into account both the nature of the thing and the quality of the estate

held in it. Real property includes all immovable and enduring things, whether corporeal or incorporeal, held under an estate that is inheritable, indeterminate in its duration, and lasting as long as one life. Personal property includes all property not real, as defined above.

To properly regulate the conduct and rights of persons with reference to things is one of the most important duties of government. The law governing these matters will be given at more length in subsequent chapters on property.

CONDUCT.

The real subject matter of private municipal law is human conduct. As legal rights involve and their enjoyment is secured by control over the conduct of others, and as legal duty involves subjection of conduct to control, it seems to follow logically that the only way in which the law can deal with persons or things is by prescribing and enforcing rules of conduct for or with reference thereto. This is correct practically as well as theoretically. It is, therefore, essential to have accurate ideas as to what is conduct; what its characteristics must be for the law to take cognizance of it; for whose conduct each person is responsible, and to what consequences of conduct legal liability attaches.

Conduct is both affirmative and negative, and the law takes cognizance of both.

Affirmative conduct, includes all human activity that in any way manifests itself outside of the actor, that is, everything said or done by any human being. No particular form of manifestation is necessary; it may be by speech, by look, or by any other outward sign or action. It does not include unmanifested thought or feeling.

Negative conduct, includes all failures to act when action is a duty. Simple failure to act when there is no duty requiring action is not conduct, but whenever a legal duty to act exists failure to meet this duty is just as much a manifestation of the person, his disposition and character as affirmative action could be.

The law takes cognizance of, and undertakes to regulate and control both these affirmative activities and wrongful failures to act, so far as in the judgment of the law-maker they appreciably violate the just rights of others and are of such kind that they

can be dealt with practically through governmental agencies. If conduct, affirmative or negative, does not violate the just rights of others or is of such kind that it or its consequences cannot practically be inquired into and justly weighed and determined, the law does not undertake to control it.

The law does, however, as just said, take cognizance of all outward conduct, affirmative or negative, which, in the judgment of the sovereign, needs and is practically subject to control. It declares its will concerning such conduct in authoritative rules, to be observed by all persons to whom they are addressed, and which are sanctioned by appropriate rewards for conformity or penalties for nonconformity. Conduct approved by the sovereign is lawful; conduct disapproved by the sovereign is unlawful, and subject to penalty.

To subject one to legal penalty, his conduct must be unlawful. As we have seen, on the one hand, that all rules of law result in the establishment of legal rights and duties between either the public and individuals or between or among individuals as such, and on the other that no legal right or duty can exist except by the force of some rule of law, it therefore follows that every unlawful act or omission must violate some legal right and its correlative legal duty, and no lawful act can have such effect.

It is said by writers of high authority that one may break the law, become legally a wrong-doer, in three ways:

By doing an unlawful act.

By doing a lawful act in an unlawful way.

By failure to do that which is a legal duty.

The first of these corresponds to our division of affirmative wrong conduct, and the third to negative wrong conduct. I have been unable to find any appropriate place for the second subdivision, and its introduction seems to lead to confusion. It is used to include those instances of wrong which consist of some one or more affirmative unlawful acts, committed in the prosecution of some enterprise in itself lawful, as an assault by a conductor upon a passenger on his train. Here the operation of the train, the general enterprise, is lawful; but the particular manner of doing it in the supposed case, viz.: assaulting the passenger, is unlawful. It seems all such cases are embraced strictly in the first head, affirmative wrongdoing. It is not the

lawful enterprise of running the train that constitutes the legal wrong, but the affirmative act of assaulting the passenger. This is in itself a distinct and independent violation of the law, and is not, it seems, aptly described as an unlawful way of doing a lawful act. We will therefore look more directly to the particular conduct, and include all legal wrongs under the two heads; affirmative acts violative of legal rights, and negative conduct in disregard of legal duty.

Affirmative Wrong-doing.

There are so many and such widely differing methods of doing wrong affirmatively that it is not practicable either to deal with them all in the same way, or even to enumerate and classify them with any advantage at this stage of our study. The law deals with each in the manner that is deemed most reasonable and effective, seeking to establish rules of conduct which shall at once best subserve the public good and be most just to individuals, making its rules general, applying to all persons alike, and proportioning the penalty for wrong-doing to the nature of the wrong. In many instances the condition of the wrong-doer, his intent and motive, are taken largely into account. In public or criminal law these considerations many times are controlling; in civil law they have greater or less weight according to the circumstances of the case. These matters have been somewhat considered, and will be taken up in subsequent chapters.

Negative Wrong-doing.

Every affirmative violation of a right involves a failure to discharge the correlative duty, but usually the law deals with these in their positive aspect of affirmative wrong, and they fall under the head treated in the preceding section. It is with omissions, failures to do what should have been done, that we are now dealing. These are of fewer kinds than affirmative wrongs, and the strong tendency is to group them under the general head of negligence. All, of course, can not be forced into this head, and those which can not be are dealt with specifically, under appropriate designation. But after all these are excluded, the wrongs still remaining under the general term negligence are so numerous and their underlying doctrines are so important that they require special attention

CHAPTER III.

MUNICIPAL LAW AND ITS SUBJECT MATTER (CONTD.).

MENTAL CONDITION AND ATTITUDE, AS AFFECTING CONDUCT.

We have already considered this subject briefly in several connections, but some further treatment of some phases of it seem desirable here.

Human conduct is complex, consisting of external acts, affirmative or negative, and mental condition and attitude. Both in ethics and in law, some of the most difficult questions which arise are involved in the true determination of the quality of conduct. In a general way, the standards employed in each are the same, though, for practical reasons, the law can not cover the full ground occupied by ethics. One difference is readily apparent: Ethics goes to the very root of the matter, and deals with mental conditions, desires, motives, while they are still in the mind and heart of the individual; while law can not notice or deal with these until they are in some way manifested. Something prejudicial to the rights of the public, or of one or more individuals, must be done manifesting this mental condition before the law can take cognizance of it. The whole purpose need not be fully accomplished to bring it within the law's jurisdiction. Any external manifestation of the inward state sufficient to indicate clearly its existence and nature is sufficient; but something of this sort must appear. We may, therefore, dismiss unmanifested design and motive from consideration.

Exceedingly difficult questions still remain with reference to the effect of mental capacity and of design and motive on conduct. Shall conduct, unaccompanied by motive or design, as the action of an insane person or pure accident, lead to legal responsibility? Shall all action prompted by evil motive and which results in injury to another be punished? Shall all action prompted by proper motive go unpunished, no matter how harmful to others?

When each of the foregoing questions has been answered, shall the answer be of universal application, enforced inexorably, under

all conditions, or shall it be only a rule of general application, admitting of exceptions? And if so, in what shall the exceptions consist, and when shall they be recognized? Again, if difference in mental capacity shall be taken into account, in what shall these differences consist, and how and by what standards shall they be determined? In short, in determining the law's recognition of and control over outward conduct and its consequences, how far shall the presence or absence of mental capacity, or of intent to do the act, and accomplish the result, and how far shall the motive inducing such intent be regarded? No legal questions are more difficult to answer, whether the attempt be made theoretically or practically.

Deducing our answers from the body of the law, we find that no statement of universal application can be made, and to approximate an intelligible reply, the questions must be subdivided, and looked at from at least three points of view: (1) From the point of view of criminal law; (2) of tort law; and (3) of contract law.

Taking these up in their order and approximating, we find the result to be as follows:

In Criminal Law.—In determining the quality of conduct, in criminal law, mental capacity, the purpose to do, and the motive with which a thing is done or foreborne are almost universally considered, and made conclusive; that is, mental capacity and guilty knowledge or evil intent are essential elements in almost all crime. There are a few minor police regulations in which this is not true. To illustrate the place of motive and intent, in criminal law, let us take homicide. Taking human life is not necessarily criminal. The quality of the act depends upon the mental capacity of the slayer and the prompting motive and the accompanying intent. If the person committing the homicide is insane, it is no offense. If it be by an officer in obedience to the judgment by a court of competent authority, after due and legal trial, it becomes a legal duty. If it be in the necessary defense of one's life, it is justifiable. If it result from inevitable accident, it is excusable. If it be from slightly culpable negligence, it is a misdemeanor. If upon implied malice, it is murder in the second degree. If it be upon express malice aforethought, it is murder in the first degree. In all these cases, the physical fact of taking life is the same, but the legal act, by absence of mental

capacity, or modified by motive and intent, ranges from legal duty to one of the most atrocious crimes. The same thing is true with reference to dealings with property. If one person takes property belonging to another, under an honest but mistaken claim of right, the act would not be criminal; but the same physical act, accompanied by a fraudulent design to appropriate to one's use the property of another, thus depriving the owner of it, would be theft. So, to pass a forged instrument would not be a crime, while to knowingly do so is a felony. So, as stated above, we may conclude that the mental attitude of the actor is an important and controlling consideration in criminal law.

In Tort Law.—The rules constituting the law of torts are established by the sovereign for the protection of the private rights of individuals. The validity of these rules and the legal rights and duties resulting from them do not depend upon the assent of the parties. The sovereign says, through its regular agencies, that certain rights are just, and entitled to legal protection, and that all other persons must recognize them, and leave them inviolate. This duty of noninterference is imposed upon the persons owing it by the will of the sovereign, and is not assumed by the assent or conduct of those from whom it is due. It is apparent, if the assent of the party obliged is not essential to the obligation, that no question of his mental capacity or incapacity can enter into the existence or nonexistence of the duty. It is a rule of almost, if not universal application, that if a duty exists and is not discharged, or is affirmatively violated, the motive of the person disregarding or disobeying the duty is not to be considered in determining his liability to give just compensation for loss resulting from the breach. If one person owns property, and another destroys it, the loss in value must be borne by one or the other, or be divided between the two. The extent of the loss is neither increased nor lessened because the party occasioning it was insane, or acted designedly or inadvertently. The almost universal rule of tort law is that he who, by wrongful conduct, directly occasions injury to another must make the loss good, without reference to mental condition, or to design or motive. This is not universally true; for, in a few exceptional cases, whether or not an act or omission is to be regarded as a tort depends upon whether it is prompted or accompanied by an evil motive.

In such cases absence of mental capacity or of evil motive prevents the conduct from being unlawful, and, of course, all legal liability therefor. These cases seem always to be those in which the act or omission would, under general principles, be unlawful, but in which, for some reason of public policy it is licensed or permitted to go unpunished if unaccompanied by evil motives. In such cases, the license or permission is limited to those instances in which the act or omission is strictly inadvertent, or accompanied with and prompted by proper motives, and is not extended to those instances in which evil motives exist. So as to these, that is, cases prompted by evil motives, the evil motive destroys the law's license, and they are left on the original basis of unlawfulness and the consequent liability.

To illustrate: The general rule of law is that every one is entitled to complete immunity of his body from all contact whatsoever by other persons. Under this doctrine, the application of any force, however slight or however innocent the motive, would be unlawful. But society could not exist upon this basis. To make unlawful and actionable all the casual contacts of social life would be impracticable, and would put well-disposed persons completely at the mercy of the ill-natured and litigious. Therefore, as a matter of public good, the law declines to take cognizance of the slight and inconsequential applications of force incident to ordinary life, so long as they are merely casual, and not the result of evil design or motive. If, however, one, designing to humiliate or insult or injure another, applies to his person no more force than frequently occurs in the conduct of ordinary affairs, the law holds him responsible, and will not only prosecute him criminally, but gives to the individual whose person has been thus maliciously interfered with a right to recover damages.

And so through the whole range of human conduct. Whenever an interference with individual right is excused on the grounds of public policy and convenience, the excuse is designed for the law-abiding and well-meaning, and not as a shield to the vicious.

When we say that the absence of evil motive is not ordinarily a defense against liability in the law of torts, we mean a defense against just compensation for injuries actually sustained. There is an anomalous doctrine known as punitory or exemplary damage. It has no place in enlightened jurisprudence, but is so

firmly established by precedent that it seems useless to decry against it. Under this doctrine, where a wrong has been committed against an individual through gross wantonness or with evil motive, the wrong-doer may be compelled, at the suit of the injured party, to pay to him a sum in addition to the actual injury sustained, by way of punishment or "smart money." Such damage is only recoverable in cases of gross wantonness or malicious injury, and in this character of cases and as to this kind of damage the mental attitude of the wrong-doer is material.

In Contract Law.—Contract obligation always has its legal basis in the agreement of the parties. Assent of the mind being essential to an agreement, mental capacity at the time the contract is entered into is always a controlling question, and if there be no such capacity, there can be no assent; if there be no assent, there can be no agreement; if there be no agreement, there can be no contract, so that contract obligation can not exist except as a result of mental capacity existing when the obligation is assumed. It must, however, be borne in mind that contract obligation comes into being as soon as an agreement having all the legal requirements is entered into, and that obligation, once fixed, is not thereafter affected by change in the mental condition of the parties, subsequently arising, and the obligation must be met by the parties upon whom it rests, and motives and reasons for failure can not be received as a discharge thereof. We therefore find that the mental capacity of the parties to an agreement, at the time it is entered into, is of vital consequence, and that no true contract obligation can be assumed in the absence of such capacity, but that subsequent mental conditions or motives inducing the breach of contract obligation are immaterial, and are not be taken into account in determining the rights of the parties.

In this connection, we must distinguish between ordinary contracts which may be performed by a single act, or which do not involve continuing personal performance, and those which do have the last characteristic. If the agreement be for service, or in any other way involves the exercise of mental or bodily capacity, the loss of either to such an extent as to render performance impossible will, as a rule, relieve from liability for subsequent nonperformance by the disabled party, and would also relieve the other from further obligation under the agreement; the law

making such adjustment for any partial performance which had taken place before the disability occurred as justice requires, under all the circumstances of the case.

Recapitulating, we find that, in criminal law and tort law, duty is imposed by the sovereign and not assumed by the obligor, while in contract law the duty is not imposed by the sovereign, but is voluntarily assumed by the obligor, and is then recognized by the sovereign.

That in determining what conduct shall be unlawful from the criminal law point of view capacity to understand the act and its consequences, the design to do the act, and the motive prompting it, are of the uttermost consequence, and in almost all instances give legal character to the conduct.

That in determining what conduct is unlawful, from the tort point of view, the question is usually to be decided by the nature of the overt act or the manner of its performance, and not by the accompanying mental condition and attitudes; that in a few exceptional cases, as explained above, this rule is not applied. That where conduct is unlawful in itself, and is either malicious or grossly wanton, in addition to compensatory damage the law allows punitive or exemplary damage; that, in such cases, the mental attitude is important.

That in contract law mental capacity at the time the agreement is entered into is absolutely controlling; that subsequent mental attitudes either as to mental capacity or motive are immaterial, except in those instances in which the contract contemplates service of some kind.

Standards of Mental Capacity.

Whenever legal responsibility for conduct is made to depend on the mental capacity of the party at the time of the act or omission, the standard or test by which to judge such capacity is: Did the person, at the time of such act or omission, have sufficient mental capacity to understand the nature and consequences of such conduct, and to contemplate and realize its natural and probable results? If so, the person is capacitated and legally responsible; if not, he is incapacitated and legally irresponsible. The test is confined to the particular matter under investigation and the condition of the mind at the time the act was done or determined

upon. The range of inquiry may be widely extended in order to arrive at the truth with reference to the mental attitude as to the particular conduct at the particular time, but ultimately, the test is: Did he understand the nature and consequences of that particular act or omission, and was he capable of contemplating and appreciating the natural and probable results at the time the transaction occurred?

Ignorance and Mistake.

How shall conduct based on design or actuated by motive, induced by ignorance of material matters or mistake regarding them, be classed and judged? Stating it differently: Shall ignorance, or mistake of law or of fact, ever be taken into account in determining the quality of conduct; and, if so, when, and under what circumstances, and with what effect?

It is a very general rule that simple ignorance of law does not excuse conduct otherwise illegal, nor constitute a defense against claims or demands otherwise good. This is true in criminal, tort, and contract law.

Deception as to the law may be considered in determining rights and liabilities between the deceiver and the deceived, when the latter had, under the circumsstances, a right to rely upon the former for legal information and he purposely, or through gross negligence, misled him.

Ignorance of fact, in criminal law, excuses when not attributable to negligence. Mistake of material fact, not attributable to negligence, will excuse, in criminal law, when the conduct under investigation would have been lawful had the assumed fact been real. Ignorance of fact, or mistake of fact, rarely excuses, in tort law, from liability for actual damages. As the existence of a tort always depends on the unlawfulness of the act or omission, in some rare cases, when the element of unlawfulness is dependent entirely upon the criminal law, ignorance or mistake which prevents the act from being criminal will also prevent it from being tortious. These instances are exceptional and rare.

Ignorance or mistake of material fact by both parties to an agreement will, in contract law, entitle either to set aside the agreement. Ignorance or mistake of fact by one party, not attributable to wrongful conduct by the other, or not going to

the existence or identity of the subject matter, or to the terms of the agreement, will not avoid the agreement. If, however, either party be mistaken as to the subject matter in the mind of the other, or as to the terms of the agreement, there is no meeting of the minds, and so no contract. Care must be taken here to distinguish between mistake of the terms of the agreement, that is, as to the words used, and mistake of the meaning of words; for, if both parties use the same words, but with different meanings, the words will control and be given their usual meaning and both will be held to the agreement thus interpreted. If the ignorance of one party be attributable to the other under such circumstances as to constitute fraud, the defrauded party can avoid the agreement.

Accidents.

There is another phase of conduct which should not be omitted, that is, those occurrences which take place without intent on the part of any one to bring them about, usually called accidents. It is not unusual, even in law books, to define an accident as the happening of an event without human agency. Such events certainly are accidents but there are many other events in which human agency has been the real occasion of the occurrence which are as truly accidental as those included in the above definition. It is with accidents in this latter sense that the law deals most frequently and with regard to which the student of law should have the most accurate conceptions.

A better legal definition is, The happening of an event without human agency or, if through human agency, without the concurrence of the will of him by whose conduct it is caused.

The law divides accidents into two classes, avoidable and inevitable. Avoidable accidents include all such happenings as would have been prevented if all the parties sought to be held liable had fully discharged all their legal duties to prevent the same. Inevitable accidents include all those happenings which occur without human agency and those which occur through human agency notwithstanding the parties sought to be held liable had fully discharged all their legal duties in the premises.

Keeping this distinction in mind it is apparent that an avoidable accident should lead to liability on the part of those whose

failure of duty occasioned it to the full extent of the damage directly resulting therefrom; and that inevitable accident cannot be made the basis of liability at all except by some one who by, agreement or law, has become responsible for loss occasioned thereby as an insurer.

It must always be borne in mind that liability for avoidable accidents, as for all other legal wrong, is limited to the directly resulting consequences, that is, those which should have been anticipated as the natural and probable result of the wrongful conduct. Thus, a railroad train was scheduled for a certain time. It was delayed a considerable time by the negligence of one of the operatives. In proceeding upon its way on the delayed schedule, it encountered a cyclone, which crossed its track for a width of about one-fourth of a mile; the train was wrecked and its passengers injured. Had the train been on the regular schedule, it would have passed the point where the cyclone crossed the track some time before the cyclone arrived. The fixed rule of law that a wrong-doer is not liable for all consequences of his wrongful act, but for those only which he intended, or which an ordinarily prudent person would have foreseen as probable and natural, was applied, and it was Held: that the resulting wreck was an inevitable accident, as there was no causal connection between the negligence which delayed the train and the injury—as no human foresight could have anticipated that such delay would naturally or probably result in a meeting of the train with the cyclone.

CHAPTER IV.

MUNICIPAL LAW AND ITS SUBJECT MATTER (CONTD.).

TO WHOSE CONDUCT DOES THE LAW LOOK IN AWARDING BENEFITS AND FIXING LIABILITY?

Primary Range of Right and Liability.

The normal person is entitled to all benefits directly arising from his own lawful conduct put forth in his own behalf; on the other hand, he is legally responsible for all injurious consequences arising directly from his own unlawful conduct. The scope of his own action and the benefits arising therefrom and the liabilities attaching thereto constitute the primary range of right and liability. Extensive as this sphere of action, and as far-reaching as its consequences are, it by no means covers the whole field of right and liability resulting from conduct.

Secondary Range of Right and Liability.

This brings us to the larger subject of the rights and liabilities of one person growing out of the conduct of another. It is apparent that, in carrying on the social and business activities of the world, no one can confine his own operations strictly to himself, but of necessity must come in contact with others, and for any effective life he must operate with and through others. This practical condition is recognized by the law, and by far the greater number of rights to which one is entitled and liabilities to which he is subjected grow out of and depend upon the conduct of other persons.

There are numerous legal doctrines upon which these rights and liabilities are based. These are: (1) legal identity; (2) substitution; (3) co-operation; (4) express agreement; (5) non-assignability of duty and (6) in a few rare cases public policy as expressed in some statute creating such liabilities. There are other analogous doctrines, which are sometimes treated as leading to such right and liability, such, for illustration, as the ownership of property, but which, upon closer inspection, appear not

to belong in this enumeration, as liability arising from ownership is referable to the conduct of the owner himself.

Legal Identity.

In the first edition of the text the term merger was used to indicate the doctrine now under consideration. That term has a well established legal meaning. The doctrine being dealt with is only one of a number of applications of this meaning and hence the phrase legal identity seems preferable in this connection.

Legal identity is, therefore, used to indicate the Common Law doctrine that the legal existence of the woman passes into that of the husband upon marriage. The old Common Law doctrine is fairly well expressed in the statement that upon marriage the man and the woman became one and that one is the man.

This doctrine has been very much modified in later years but some of its legal results remain in the present law. Except as modified by statute, in Common Law countries upon marriage all the property rights of the woman, speaking generally, that is, the title to her personalty and the beneficial use of her realty vest in the husband and he is made responsible for all of the wife's antenuptial debts. The beneficial results of her conduct inure to his benefit and civil liability resulting from her wrongs, so far as it attaches to any one, rests upon him. In some cases this doctrine is carried so far as to make him liable for her criminal acts.

In the Roman Law this Common Law doctrine of merger is unknown; the marital relation is more in the nature of a conjugal partnership, each spouse retaining his and her separate property rights and obligations, and each being entitled to the profit arising from his or her respective estates.

It is difficult to state any general rules of American law on this subject at this time, as Common and Civil Law ideas have acted and re-acted upon each other until there is no longer uniformity on the subject. Enough of the general Common Law doctrine, however, remains in our American jurisprudence to hold the husband responsible for all torts committed by his wife, even though in opposition to his will, and for all contracts made by her in procuring necessaries for herself and family, even

though he had expressly forbidden the agreement. It is customary to treat this last liability as arising from agency by necessity, but it is apparent that it is but an application of the doctrine of legal identity.

This power of the wife to bind her husband against his will for necessaries must be distinguished from her general authority to act and make contracts for him in the reasonable and proper conduct of their household affairs. This last authority is clearly one of agency and comes properly under the doctrine of substitution.

Substitution.

The second of these doctrines is that which permits one person to substitute another for himself in the exercise of ordinary powers and rights. The doctrine does not extend to powers, rights or privileges growing out of special and confidential relations in which the rights of other persons or of the public are involved. These must be exercised by the person himself, or not at all. The range of practical substitution is, nevertheless, extensive, and of extreme importance. The effect of the substitution is to make the substitute or representative, the *alter ego* or other self, of the constituent or party making the substitution, within the limits of the activity, enterprise or matter included within the substitution, or, as it is frequently expressed, the constituent is bound by the act of the representative committed within the scope of the employment. As to what matters are embraced in the substitution, and how the substitute is to perform his service, the agreement of the parties and instructions given by the constituent to the substitute are binding as between them and are to be taken as the basis of adjustment of their rights respectively. These agreements and instructions constitute the true bounds or limits of the substitution and are, therefore, also binding upon all parties who have knowledge of them. They are not binding, however, upon third persons not having knowledge or notice of their existence. The constituent having substituted his representative for himself in the exercise of a certain power or right, third persons not otherwise advised are permitted to judge of the extent and scope of the substitution and the authority of the substitute by the facts and circumstances surrounding

the transaction as they would be reasonably interpreted by a man of ordinary judgment and prudence. Hence it follows that, although the constituent may have expressly forbidden the doing of a certain thing within the reasonably apparent scope of authority of the substitute, if, nevertheless, the substitute does do the forbidden thing, and in so doing unlawfully interferes with the rights of others, who have no knowledge or notice of these orders or instructions, these third parties can look to the constituent and hold him responsible for the unauthorized and forbidden wrong done by his substitute.

The most common examples of substitution are in the relations of master and servant and of principal and agent. In the first, the master is the constituent, the servant is the substitute; in the second, the principal is the constituent and the agent the substitute. It is quite difficult to draw clearly the line of separation between these two relations and to determine, under all circumstances, which, in fact, exists as between two individuals. The most intelligent basis of classification seems to be that a servant is one who is employed to exercise powers or rights when the employment does not contemplate the exercise of the power to contract and thus the establishment of new legal relations with other parties, and that an agent is one who is employed to exercise the powers and rights of the constituent to contract in such way as to bring about or establish new legal relations with third persons. Even this basis of separation is not free from confusion as, under it, in many instances the same persons will, at the same time, sustain toward each other both the relation of principal and agent and master and servant, so that as to one act or series of acts their rights and liabilities would be judged by the rules of law applicable to master and servant, while as to other concurrent acts or series of acts they would be judged by the rules of law applicable to principal and agent. This much of confusion seems to be inherent in the situation. Fortunately, the rules of law as to the two relations are based upon the same general principles, and in their main features are identical.

Legal substitution, with few possible exceptions not requiring notice in this connection, always results from agreement of the parties. This agreement usually precedes the act done by the substitute for the constituent, sometimes it is concurrent with the

act, and sometimes is subsequent. The latter method of substitution is called ratification, and has some characteristics peculiar to itself. The first two classes, that is, the antecedent and concurrent, have nothing peculiar in their nature nor special in their designations, except that in some contracts of service the minority or coventure of the servant is not an incapacity as to entering into the agreement and subsequent incapacity to perform the agreement will terminate it.

Co-operation.

The third doctrine upon which one is held responsible for the conduct of another is co-operation. Where two or more persons act together with a common design and understanding to accomplish a common purpose, each is responsible for the conduct of the other, within the limits of the common design. The doctrine is simple, but far-reaching. In Civil Law, it is usually known as co-operation, or joint action; in Criminal Law, as conspiracy. In this, as in the doctrine of substitution, the limit of liability as between the parties themselves, in those cases in which adjustment between them is permitted at all, is the common understanding and agreement; but as between each of these parties and third persons affected by their conduct, the limit of liability is the reasonable scope of the enterprise. To illustrate: A and B agree together to acquire and conduct a certain business, and A is put in charge, with an understanding between the two that the business is to be conducted in a certain way and within a certain limit of expense. If A should disregard this understanding and conduct the business on other lines and at greater expense than agreed upon as between him and B, their rights will be adjusted on the basis of the understanding, and A must bear the loss incident to his departure. If, however, A should do some act within the reasonably apparent scope of the business or enterprise which should affect third parties, such parties could hold both A and B responsible for injurious results; unless, of course, the third party had knowledge of the limit of A's authority. This illustration is an example of joint action in a lawful enterprise, and gives the rules of law applicable there. If we change it and have A and B engaged jointly in an unlawful attack upon C. here no right of contribution would exist as

between A and B, both being guilty before the law. If A should injure C by act within the original plan, B would be equally responsible with him for such injury. Also, if A should do some act which had not been specifically agreed upon, but which was such an one as should naturally and probably have been anticipated as a part or direct result of the carrying out of the common design, both would still be responsible. If, however, A should depart from the common design and do some act not included therein, or not so connected therewith as to have been reasonably anticipated as a part of or natural result of the scheme, then A alone would be responsible

Express Agreement.

One person may further become responsible for the conduct of another, not generally, but to a designated person or persons by express agreement to that effect. The most frequent illustrations of this are contracts of suretyship, and of insurance. In the first, the party bound expressly agrees with the designated person that another designated person will do a certain thing, and if he does not, he, the surety or indemnifier, will do the act himself. In the second, the party agrees for a certain consideration passing to him from another interested in the happening of a certain event or contingency, that upon such happening he will pay to him or to those designated by him a certain sum of money. Here, as in the case of fire insurance, the act or omission bringing about the contingency contemplated, is not limited to any one person or persons, but may be the conduct of any one, except the willful destruction of the property by the insured, which would bring into operation other principles of law. In this class of cases dependent upon express contract, the nature, extent and terms of liability depend upon the agreement itself, construed by the applicable rules of law.

Non-Assignability of Duty.

The law recognizes the assignment of rights, in many instances, and the delegation of power. It also recognizes the substitution of another to discharge duty, in many instances, though not in all; but such substitution is not of itself a discharge of the duty or a release of the original obligor. The obligation or duty still

remains upon him who primarily owed it. If the substitute shall discharge the obligation according to its terms, it is, of course, thereby extinguished. If he does not, the original obligor is bound to the obligee, and can not avail himself of the fact that he employed another to discharge the duty for him. To state it differently the law permits the delegation of the discharge of duty but does not permit the assignment or transfer of the duty itself without the consent of him in whose favor the obligation exists.

To illustrate: If one person owes another and gives to a third person the money with which to pay the debt, and this third person does pay the debt, the obligation is as fully discharged as if payment had been made by the debtor directly; but, if the third person entrusted with the money shall abscond, the debt remains undischarged, and it is no defense against the creditor's claim that the debtor had provided the means and employed another to make the payment. This illustration, while simple, sets forth a principle far-reaching in the law, which is applied under many and widely different conditions and circumstances. Indeed, the doctrine seems to be of universal application that the discharge of duty can not be given over or assigned to another with the effect of relieving the original obligor from liability, except by the consent of the person to whom the duty is due. By a tripartite agreement between the obligor, the substitute and the obligee, the former may be discharged and the substitute become solely responsible. But this grows out of the assent of the obligee.

Another familiar illustration of this doctrine is found in its application against railroad companies, based on their duty to protect passengers. If a conductor in charge of a train should commit an assault upon a passenger, the passenger would have a dual basis of liability on the part of the company. First, the doctrine of substitution; that the company had selected a conductor, put him in its place to control and operate its train, and that his unlawful conduct within the scope of his employment was, therefore, the conduct of the company, his constituent, for which it is responsible. The second would be the non-assignability of the duty of protection. When a carrier receives a passenger for the purpose of transportation, it owes to him the duty of reasonable care for his protection en route, and if it fails to discharge

this duty of using reasonable care for this purpose and injury results to the passenger, it is responsible for the nondischarge of the duty. If, however, the assault is not committed by the conductor, but by a fellow passenger, the doctrine of substitution does not apply; and, if recovery can be had at all, it must be based upon the fact that the company has failed to use reasonable care to protect the injured passenger from the unlawful acts of the stranger.

Public Policy.

In rare instances a legislature from considerations of public policy will enact a statute to the effect that one person shall be liable for the conduct of some other person. Some of these statutes have been upheld as not violative of the provisions of the State and Federal constitutions, regarding due process of law and equal protection and have been upheld. These instances are so rare that they do not require detailed treatment or discussion in a treatise of this kind.

Analogous Relations Sometimes Supposed to Lead to Liability.

Liability is often charged to a person because of his ownership of some particular thing or things. Sometimes the circumstances are such that, on casual consideration, it seems that the owner is responsible to other persons for the conduct of third parties with reference to things owned by him. It is possible that this is really true in a few instances, but in almost all, if not all, cases of such liability, in its last analysis, it may be traced either to the affirmative conduct of the owner himself, or to the fact that he has failed to discharge some non-assignable duty resting on him as owner. Instances are very rare, if indeed, any in fact exist, in which one is responsible for the condition of his property which does not result from his own affirmative act, or his failure to use due care for the rights of others; and, whenever either of these conditions exist, the liability is really due to his own conduct, or it is based on the conduct of some one substituted for him in the exercise of his right of control or use of the property.

TO WHAT CONSEQUENCES OF CONDUCT DOES LEGAL LIABILITY EXTEND?

When we consider that, from the beginning of the world up to the present time, there have been infinite lines of unbroken causation, that everything that is now results from that which has been, and that nothing could be as it now is except for that which has preceded and led up to it, and consider that this applies as well to the injurious consequences of conduct as to any other thing in life, we see the absolute necessity of some rule by which to determine how far back of an injury the law will go in fixing legal liability. A person is unlawfully injured by the explosion of dynamite. Who shall pay? The man who directly occasioned the explosion, the man who sold him the dynamite, the man who made the dynamite, the man who invented dynamite, or the man who invented or discovered the constituent elements which go to make up the explosive? Some rational and fairly just answer must be given to questions of this sort, or litigation would be interminable, and the liabilities of life too great to be borne. Something has been thought and a great deal has been written on this subject, and many tests have been submitted, and have proved more or less efficient and just in their application. Numerous incidental matters have been dragged into the discussion at different times and by different persons, such as the effect on legal responsibility of the intervention of an independent agent or agents between the wrongful act of the party sought to be charged and the consequential damages for which recovery is desired. And the end is not yet.

The simplest, most just and satisfactory test and, as it seems, the true one, is found by applying to the facts the law's original standard of measurement, the average man. The rule thus obtained is that the law holds each person responsible for such consequences of his conduct as were either intended by him as results, or as a reasonably prudent person situated as he was would reasonably have anticipated as the natural and probable consequences of the act or omission. This test is simple in itself and fairly easy of application. If it be adopted, it eliminates much of the confusion arising in the application of some of the others by reason of the intervention of independent agencies. The rule on that subject would be reduced to this: If the intervention of the

independent agent should have been reasonably anticipated, such intervention and its co-operative effects are among the consequences of the original act which a reasonably prudent man would have foreseen and which, therefore, every man is justly held to have foreseen and contemplated; if, on the other hand, the circumstances are such that such independent intervention would not reasonably have been anticipated, it breaks the causal connection, and no liability attaches to the original wrong-doer.

This doctrine is as applicable in cases within secondary range of right and liability as those within the primary. If a person is to be held responsible at all for the conduct of another, the consequences of the conduct for which he is held are determined by the same rules as in cases of wrong by him personally.

We are not now discussing the vexed question of remuneration or contribution among wrong-doers, but the simple proposition as to what consequences of wrong legally attributable to him each wrong-doer is held responsible for.

This subject is usually treated as the doctrine of remote and proximate cause, and most of the learning and much of the confusion in the books pertaining to it can be found under those catch-words.

CHAPTER V.

MUNICIPAL LAW AND ITS SUBJECT MATTER (CONTD.)

STATUS AS AFFECTING LEGAL RESPONSIBILITY.

The ordinary rules of law are made by normal persons for the government of normal persons, and there is no occasion to discuss status as applicable to them further than to say that all persons are primarily presumed to be normal, and if any individual is generally, or as to any particular thing under investigation, abnormal, these facts must be made to appear in his behalf, or he will be judged and his rights and liabilities tested by the ordinary rules. If, however, his condition be generally abnormal, or if he be abnormal as to the particular matter under investigation, and this is made to appear, then, in determining his legal rights and liabilities, he will be judged by such of the general rules as are not affected by his particular incapacity, supplemented by the special rules applicable to his particular abnormal condition.

The principal abnormal conditions are mental unsoundness, drunkenness, duress, infancy and coverture. Some of these are incapacities both in law and in fact; some of them are incapacities in law, wthout any corresponding incapacity in fact.

Mental Unsoundness.

This, in its different effects upon conduct, and consequently upon the responsibility of the party, has been considered at some length under the preceding head of what constitutes conduct, and need not be again dealt with here.

Drunkenness.

The use of intoxicants, not so extensive as to affect the intellect and judgment to the point that the person does not understand the nature and consequences of his conduct, is not an incapacity. If, however, the mind has been so far affected as temporarily to deprive one of the capacity to understand and appreciate the nature of his conduct and its natural and probable consequences,

he is, for the time being, of unsound mind, and is not legally responsible for any act, or its consequences, which involves formed design and purpose or evil motive. This statement must be modified to this extent: if the evil design and motive exist in the mind of the party and he, desiring and purposing to carry them out, shall voluntarily intoxicate himself and while in this condition execute the design formed while sober, he will be responsible as though he had not been intoxicated.

If the intoxication is so severe and protracted as to bring about a fixed state of mental unsoundness, as is usually the case in *delirium tremens,* the law then deals with the condition as a disease, and the responsibility of the party is measured by the same rules as any other person suffering from insanity.

Duress.

Duress is coercive undue influence brought to bear on the will, without reaching the intellect by means of force or threats. That is to say, it is threatened injury to the person or property of the party, or those under his protection, of such nature as practically to deprive him of free choice in the matter. Its effect is different in different departments of the law. In Criminal Law, where evil intent and motive is usually the gist of the charge, duress is almost always a defense. In Tort Law, where acts and their consequences are the principal consideration, it is not a defense, except in those few instances in which evil motive is an element of the tort, or when exercised by the husband over the wife. In Contract Law, as the basis of liability is the free assent of the party bound, duress, operating upon the mind of one of the parties to the agreement, destroys the legal element of assent, and the supposed agreement or contract extorted from him is voidable at his instance. If, however, contract obligation has been voluntarily assumed, duress producing breach is not an excuse for the breach. The party is still bound by the contract, and it may be enforced against him.

Infancy.

In Common Law countries a person is deemed to be an infant or minor until he attains twenty-one years of age. Persons under that age differ very greatly in point of fact both in intel-

lectual and will power. It is also apparent that no sudden great change takes place in the capacity and power of a person upon attaining this age. Many persons under the age of twenty-one are better developed and more discreet than many others above that age. Still some line of separation between the minor and the adult must necessarily be drawn and the Common Law places it at twenty-one years, and declares all persons under that age to be infants and minors and all over that age to be adults.

Every adult is presumed by law in absence of proof to the contrary to be capable of caring for himself and to be legally responsible for all his conduct. Frequently this is not true in fact. In such cases the nature and extent of the actual incapacity must be plead and proven to entitle the party whose conduct is under investigation to the benefit of it or to subject him to its disabilities as the case may be.

The legal effects of minority cannot be stated so readily and positively. These differ according to the point of view and to approximate accuracy we must consider the matter separately with reference to the criminal, tort, and contract law.

At Common Law children below seven years of age are conclusively presumed to be incapable of committing crime and no proof will be received to show that some particular child under that age did in fact have sufficient intelligence to entertain criminal intent. Between the ages of seven and fourteen an infant is presumed to be incapable of criminal intent but this presumption may be overcome by proof showing that he had discretion sufficient to understand the nature and illegality of the act constituting the offense. An infant above the age of fourteen is *prima facie* as responsible for crime as an adult.

The general rule of law is that an infant is responsible for torts committed by him to the same extent as an adult. Duty in the law of torts is imposed by law and does not depend upon the capacity of the party doing the wrong to voluntarily assume obligation and as the legal duty exists its violation necessarily leads to liability for the actual damage inflicted.

There are a few torts in which evil intent is an essential element and an infant, so young as to be incapable of such intent, cannot commit such a tort. Where a tort is committed with evil intent the wrong-doer is responsible for exemplary damage

beyond the amount necessary to compensate the injured party. A child incapable of entertaining such evil intent cannot be held liable for exemplary damage.

In Contract Law, infancy is prima facie good ground for avoiding the contract by the infant, though the adult party to the agreement is bound. An infant is, however, bound by contract for necessaries for himself, at least to the extent that he must pay for them, though the price agreed upon will not be enforced if it be shown that it is unreasonable or unfair. An infant may repudiate or avoid his contracts for personal property, either during his minority or within a reasonable time thereafter. He can not repudiate his contracts with reference to real estate during his minority, but may within a reasonable time after he attains his majority. Failure to disaffirm the contract in a reasonable time after attaining majority or the claim or exercise of rights under the contract after majority in such way as to indicate affirmative acquiescence in the contract, or in such way as to prejudice appreciably the right of the other party, destroys the right of rescission. If the infant or *quondam* infant still has under his control anything acquired by the contract, or had this under his control when he attained his majority, he can not repudiate the contract without making restitution of the property or value which he has or had at his majority. If, during his minority, he consumed, squandered or lost the property or money and did not, when he attained his majority, have anything received by him under the contract, he is excused from restitution.

Coverture.

Among the effects of marriage upon the woman at Common Law was incapacity to bind herself by contract. Having lost all control over her property, and being without capacity to acquire more, by her own effort, the fact of her nonliability was of no material loss to parties with whom she dealt. She was, however, regarded as the agent, by necessity, of her husband to bind him for the reasonable value of necessaries for herself and children, and this agency could not be repudiated by the husband except upon proof that he had, in good faith, provided for her so that the necessity from which the agency was said to arise did not, in fact, exist. The extent to which she could thus bind him and his

property as an agent by necessity, varied with their station and condition in life. The limits were narrow, and usually strictly adhered to. Under the ordinary domestic relations, her authority to bind her husband by an implied agency was much greater. Her authority thus to bind him was implied from the marital relation, unless something was done by the husband to show a different intent on his part. Notice that he would not be bound, or a course of dealing which put others upon reasonable notice of the fact that he would not recognize the wife as his agent beyond the limits of agency by necessity as fixed by law, would relieve him from liability for her ordinary undertakings in his behalf. These matters are somewhat apart from the subject directly under consideration. Returning to that, we find that at Common Law the married woman was incapaciated to bind herself by contract, or to convey property. The effect of coverture upon the contractual power of the woman in most, if not all, the States of the Union, is now largely a matter of statute. These statutes, except in Louisiana, are looked upon as amendatory of the Common Law and are construed with that as a background, so that we may say that, in all of the States except Louisiana, the capacity of a married woman to contract is regulated by the Common Law, as modified by the applicable constitutional and statutory enactments of the particular State.

Coverture does not affect the woman's liability for tort, except in the one case of duress by the husband. As to this it is said that, if it be clearly shown that the woman was coerced by her husband into the commission of the wrong, he, and not she, is liable therefor. If the tort by the married woman is not concurred in by the husband, still both she and he are liable; but, if he is compelled to pay, he may have compensation from her separate estate, if any she has. If the tort is committed by them jointly, or if committed by the wife with the acquiescence or approval of the husband, both are responsible to the third party, and contribution or restitution between them must be determined by the general rules of law without reference to the fact of coverture.

Coverture has no effect upon liability for crime. In a few instances, coercion by the husband, although not amounting to duress such as would relieve from liability, is taken into account, and punishment of the woman mitigated.

Coverture does not incapacitate a woman to act as the servant, or agent, of another, and as such she may exercise powers and make contracts for and in behalf of her principal just as though she were unmarried. The theory is that the servant, or agent, is but a substitute for the master, or principal, and that the legal capacity of the constituent is acting through the representative, so that the lack of capacity in the latter is immaterial.

RELATIONS TO SOVEREIGNTY.

Governmental Agencies.

We have found that there are two classes of persons, natural and artificial. Sovereignty deals with and through persons of each class. Its direct representatives are different legal entities, created by it to act as its agents in the exercise of its governmental functions. Many of these various agencies are recognized in law as having legal existence distinct from that of their constituent members. In their several capacities as separate entities they have various dealings in the business world and perform many acts to which, if performed by ordinary individuals, legal liability would attach. These legal agencies, existing only in theory or contemplation of law, as public corporations, can act only through natural persons, and these natural persons, for the time being, representing the governmental agencies, we know as different classes of officers. So that we see that the corporate governmental agency is the direct representative of sovereignty and the natural persons exercising the powers and discharging the duties of these governmental agencies are its indirect representatives. Many questions have arisen as to how far governmental agencies and public officers should be responsible for their conduct and its results. Questions of public policy, of necessity, come in for consideration, as well as matters of private right. The adjustments and resulting rules have been fairly though not absolutely uniform and the results may be stated with reasonable, though not perfect, accuracy.

Direct Representatives of Sovereignty.

The most extensive direct sovereign agent in the United States is the Federal Government, standing for the people of the United States, created by their will and carrying out their purposes. Legal responsibility is enforced through the courts, and these

courts are but departments of the government created by the sovereign; and the question has often arisen: Shall the creator be called to account before tribunals of its own formation and be judged by its own creature? Closely related questions are: Shall the people of the United States, in their governmental capacity, be subject to suit in a State court? and shall the States severally be subject to suit in the United States courts or the courts of other States? The universal answer is that the Federal Government is not subject to suit in either State or Federal courts, except upon its express consent given. It has been quite liberal in this regard, and has authorized suits against itself in a great many instances, and has even gone so far as to organize and maintain several courts for this express purpose, which have no jurisdiction over any other matters; so that, in effect, this Government has given its consent to be sued in its own courts in almost all classes of cases that can arise against it. If, however, any claim should come up not provided for in these several permissive statutes, suit could not be brought upon it. The Federal Government has never given its consent to suits against itself in a State court, and can not be sued in them.

The several State governments are the direct representatives of sovereignty in the several States; and, as such, are immune from suits either in their own courts, the courts of other States, or the Federal courts, unless they shall have antecedently authorized or consented to such proceeding. There are general provisions in the Constitution of the United States, acceded to by all the States, by virtue of which any of the States may be sued in the Supreme Court of the United States either by another State or by the Federal Government. No other Federal court can entertain a suit against a State at all, and the Supreme Court can not, except within the particular instances specified in the Federal Constitution. There are no general laws of the several States subjecting their respective State governments to suit in their own courts, so that they may not be sued or held legally within their own tribunals, unless, by special statutory enactment, they have given authority for the proceeding. No State has ever given its consent to be sued in the courts of another State, and no such jurisdiction exists.

Political Subdivisions—Counties.

Each State in the Union, for its general convenience in the administration of its internal affairs, is subdivided into small districts, usually called counties, sometimes parishes or shires. These divisions have certain political autonomy, and through their political agencies transact business and exercise such of the functions of sovereignty as are committed to them. They are not recognized as being so directly representative of sovereignty as the State government; still, they share in immunity from legal responsibility and suit, to a very great extent. They are never responsible for injuries occasioned in the direct exercise of their political or governmental authority. They are never responsible for torts of any kind, unless there be some constitutional or statutory provision upon which such liability can be based. When they are given authority to contract, this is construed as permission to the other contracting party to sue, in the event the contract is broken by the county. In many States it is required, as a condition precedent to a suit against a county for money, that the claim shall be presented and demand made to the county officers charged with the administration of its financial affairs.

Incorporated Cities and Towns.

The next political subdivisions recognized by law as capable of sustaining legal relations are cities and towns incorporated either under general or special laws. These are regarded as still further removed from the general sovereignty of the State and as more particularly representing local interests, and there is a consequent diminution of immunity from suit. These corporations also have their dual life, the one phase consisting of the exercise of political or governmental authority and the other of the conduct of their local business affairs. So far as the first powers are concerned, we may say, generally, that no liability at all exists; that is, that a city or town is never held legally responsible for injuries resulting directly from the exercise of a general governmental power. On the other hand, they are held responsible for all injuries directly resulting from the exercise of their powers as local business agents, or as representatives of the local business interests of their respective communities. These rules are easy of statement, but exceedingly difficult of ap-

plication. Just where the line of separation between the general governmental power and the local business function is to be drawn is not yet fully determined. For illustration: The maintenance of a public road by the county is regarded universally as the exercise of a general governmental power, and for injuries resulting in such maintenance, or in negligent failure to maintain, no liability on the part of the county exists. But when a city is incorporated and takes charge of its streets and highways, while these continue to be public thoroughfares, they are held to be maintained more particularly for the benefit and convenience of the inhabitants of the city than of the people of the State as a whole; and so, for injuries resulting from their negligent maintenance, the city is held responsible. Again, with reference to public utilities, such as water, light and gas works and sewers, the city is ordinarily held responsible for tortious conduct of its agents or representatives resulting in injury to others. This rule applies to Common Law torts. Where conduct which is not tortious at Common Law is declared to be tortious by statute, and designated persons alone are declared to be responsible for such torts, cities are not usually held as included under the general designation of persons, but if the legislature desires to fix liability upon them it must be more specific and use apt terms specially referring to them.

It is not ordinarily necessary to present a claim to the city council or other financial board or representative before suit is brought upon it. If it be one upon which the city is liable, no demand need be made; if the city is not liable, demand would, of course, be useless.

Other Less Organized Subdivisions.

In each State there are subdivisions of the counties into precincts or townships; sometimes into school districts; and again, a county or number of counties may be constituted into a political district, for convenience in the election of officers and in the administration of the law. The exact powers and responsibilities of these several divisions depend upon the statutes creating them. Ordinarily, their organization is very limited and of a very loose nature, and they have no financial responsibility, and but few questions have ever arisen as to their liability as legal entities.

The general statement may be made that their lack of organization, and of assets or means of raising money, are practical difficulties in the way of enforcing liability, that are insurmountable, even if a theoretical liability were recognized as existing. It is exceedingly doubtful whether any such liability could be sustained theoretically. As stated above, the extent of their powers, rights and liabilities is dependent, in each instance, upon the creating act, and extends as far and no farther than such act, properly construed and interpreted, may go.

Indirect Representatives of Sovereignty—Officers.

The liability of officers for acts done under guise of official authority has given rise to a great deal of discussion, in which widely different positions have been taken and which has resulted in adjudications not easily reconciled. It may be stated, however, as a universal rule, that no personal liability ever attaches to an officer from the discharge of his official duty in a lawful way. Whatever the consequences to others may be, so far as the officer is concerned, they must be borne without reimbursement or compensation; but when the officer, under the guise of official authority, does that which the law does not really warrant him in doing, shall he then be responsible personally and make good to the injured party the damage sustained? No answer of universal application can be made. In some instances, the officer is held responsible; in others, he is not. The most usual statement of the line of demarcation between liability and nonliability is that the ministerial officer is responsible for mistakes or intentional wrongs done under the guise of his office, but the judicial officer, or the officer whose duties require the exercise of discretion, is not. Properly understood, this doctrine is correct, but the language, as usually employed, is somewhat misleading. There are few, if any, offices all of the duties of which are ministerial, and there are few, if any, all of the duties of which are judicial, or involve official discretion. So that to make liability depend upon the nature of the office can not be accurate. The better doctrine is that the officer is liable when the duty is ministerial, and not liable when the duty involves official discretion, and to apply this rule to each official act, or claimed official act, under investigation. This necessarily involves the determination of what is a minis-

terial act or duty, and what is one involving official discretion. The answer is by no means easy. No act, private or official, which involves intelligence or reason can be said not to involve the exercise of judgment, and in this sense every act involves discretion; and, if ministerial be the opposite of discretionary, in this sense, there would be no ministerial action. This would, of course, be to destroy our basis of separation. The true point of view seems to be that, if the act involves official discretion, its performance or omission does not lead to liability, but that the fact that the act involves individual or personal discretion does not prevent its being ministerial and does not relieve from liability for mistakes or wrong committed under guise of office. Official discretion, in this connection, would mean a discretion exercised by the officer as a representative of the government. That is to say, the scope of his agency or delegated power includes the right of exercising judgment as to the particular matter before him, not alone for his guidance, but also with authority to bind others by such exercise of judgment. To state it differently, the fact that an officer must get information, investigate facts and weigh them and exercise judgment as to what he shall do in his office, does not of itself, make his action involve official discretion. All these duties may rest upon him and his act, when performed, still be ministerial. But if his official duty requires the investigation and determination of these facts, in order to enable him to act intelligently in the discharge of his office, and further authorizes him to bind other parties as to their legal relations, rights and duties by the conclusion arrived at by him, then the act involves official discretion, and is not ministerial. Intended or negligent wrong in the discharge of ministerial duty always leads to liability. Very frequently a wrong determination of fact, made in good faith by a ministerial officer, and acted upon to the injury of another, leads to liability. Mistake in the exercise of official discretion rarely leads to personal liability. In a few rare cases, where the mistake is of such nature that it could not reasonably be believed that a person fairly qualified to discharge the duties of the office would have made the mistake, liability will attach.

If the foregoing views be correct, it is immaterial to what department of government the officer belongs, or by what name he

may be called. Still, the rule as to liability would apply much more frequently to officers in the executive department of the government than to those in either the legislative or judicial departments. This is true because of the nature of the discretion involved in the discharge of the duties of the several departments—almost all legislative and judicial action involving official discretion, as defined above, and the large percentage of executive action not so doing.

CHAPTER VI.

LEGAL RIGHTS AND THEIR CLASSIFICATION.

Definition.

A legal right is a power, claim, interest, or advantage which one or more persons enjoy under the protection of law, secured to him or them by the sovereign, by giving him or them the capacity to control by law the conduct of others with reference thereto.

Every legal right has its correlative legal duty which is inseparable from it. The consideration of the one necessarily involves consideration of the other.

It may well be said that the sole end of private law is to determine, define, and protect legal rights. No claim or advantage or privilege is protected by law until its justice, propriety, and value have first been recognized by law. No one can be legally called to account and punished for conduct unless such conduct invades the legal right of another. To know fully the law of legal rights in all its aspects is to know fully the law of the land. It is exceedingly important, therefore, to get a clear and thorough understanding of rights and duties and to hold this information in the mind in a readily available form.

CLASSIFICATION OF LEGAL RIGHTS.

Legal rights are of different kinds and a great many different classifications of them have been made by different writers and at different times. Many of these are fairly accurate and comprehensive but none are entirely satisfactory as a basis for a simple and comprehensive treatment of the subject.

So many classifications have been made that one more will not perceptibly increase the confusion, and the following is suggested:

1. Personal Rights,
2. Civil Rights,
3. Political Rights,
4. Rights against Particular Persons,

5. Rights in Things,
6. Rights in Persons,
7. Remedial Rights.

Under Personal Rights, we will treat all those rights which pertain to a man's personality considering him as a human social being.

Under Civil Rights, we will treat those rights which are guaranteed under the XIV and XV Amendments to the Constitution of the United States.

Under Political Rights, we will treat all those rights which pertain to a man as a member or subject of some particular government.

Under Rights against Particular Persons, we will treat all those rights which are correlative to duties which are owed by particular individuals.

Under Rights in Things, we will treat all those rights which a person may have in things, usually known as property rights.

Under Rights in Persons, we will treat all of those rights which one may have in the capacities and personality of another.

Under Remedial Rights, we will treat of all those rights which arise upon the violation of any right of any of the preceding rights.

PERSONAL RIGHTS.

These rights include all those which pertain to man as an individual, considered as a human being simply, and as a member of society generally.

Under these are included:

1. Personal security, covering body, mind, and morals to the extent that the law affords protection to each.

2. Freedom of action, covering also the three departments of man's being, to the extent that the law affords protection in the use of each.

Bodily Security.

The most obvious right which a person has is to retain his body uninjured by wrongful conduct of others. This is the first right felt and appreciated by men, and is one to which the law gives very great attention. This protection is afforded in two ways:

(1) By recognizing the interest of the public in the safety and well-being of each individual and making injury to his body, with few exceptions, a crime; and (2) by recognizing the right as a private one in the individual, and giving redress for its violation by a civil action. While the general purpose of the law is the same in each instance, the point of view is different, so that sometimes injury to the body will be criminal when the person injured can not have a remedy; sometimes it will be actionable in behalf of the individual, though not criminal; and more frequently still, the same facts will lead to liability both to the public and to the individual. In short, the law undertakes to protect the body of the individual, as far as it can be done practically, against all wrongful injury, by whomsoever or by whatever means the injury may be attempted. The difference in means and methods of committing these wrongs leads to different manners of dealing with the wrong-doer, and to different names for the offense and different penalties or compensations for the wrong; yet the law includes them all in its denunciation, and treats each in such way as to be most conducive to the good of the individual concerned, and of the general public.

The recognition of a person's right in his body, and giving him a cause of action for injuries inflicted upon it wrongfully, have been part of the Common Law from time immemorial. The right is necessarily personal, and the injury to it of the same nature. The Common Law, stressing this idea of the personal nature of the right and the injury, did not recognize a claim for damages for its violation, as either assignable or heritable. Such claim died with the death of the injured party. The wrong conduct resulting in the injury was also regarded as strictly personal, and the claim for damages against the wrong-doer did not survive his death. So at Common Law, the death of the injured party, or of the wrong-doer, before the claim for damage had been reduced to judgment, destroyed the claim; if suit had already been brought, but had not proceeded to judgment before such death, it abated. If no suit had been brought before such death, none could be thereafter instituted. These Common Law rules have been changed, to some extent, in most of the States, if not all; the extent and nature of the changes varying with the judgment of the several legislatures.

Homicide, while severely punished criminally, was not a tort at Common Law. Clearly the injured party could maintain no suit, and the law did not recognize any cause of action as surviving in his estate, as such, or in any of the members of his family. In 1846, the British Parliament passed a statute, known as Lord Campbell's Act, giving a right to designated relatives of the deceased to sue the wrong-doer and recover damages when homicide had been committed under specified circumstances. Since that time, almost all the American States have passed statutes to the same effect. These statutory rights pertain to the designated surviving members of the family of the deceased, and will be dealt with under the fifth classification of rights.

Use of Force.

We may summarize the rules of law for the protection of the body as follows:

The general rule is that the use of any force by one person upon the body of another is unlawful. To this, there are five exceptions:

(1) When the force is applied in obedience to the command of the law, as an officer in arresting a person charged with crime for whom he has a warrant, or to prevent a public disturbance or breach of the peace.

(2) When applied in proper self-defense.

(3) When the act is committed reasonably in the proper control of one subject to some special relation, as the moderate correction of the child by the parent, or of the pupil by the teacher.

(4) When occurring under the license of the law for reasons of public policy, as in the ordinary contacts of life.

(5) When it is a result of inevitable accident.

Security to the Mind.

Hurt to the mind is of two general kinds, the first involving mental impairment which may consist of the destruction or weakening of the mental faculties, and the second involving only mental pain or suffering without impairment of faculties.

These injuries may be occasioned in an almost infinite variety of ways. For legal purposes they may be divided into hurts resulting from or accompanied by physical injury on the one hand, and hurts unaccompanied by physical injury on the other.

We may therefore divide mental injuries into four groups:

(1) Those involving impairment of the faculties resulting from or accompanied by physical hurt.

(2) Those involving mental pain and suffering merely, not extending to impairment of faculties, and resulting from or accompanied by physical hurt.

(3) Those involving impairment of the faculties not resulting from nor accompanied by physical hurt.

(4) Those involving mental pain and suffering merely, not extending to impairment of faculties and not resulting from nor accompanied by physical hurt.

The law on the subject of mental security is not definitely settled. The law took cognizance of and undertook to protect the body before it did the mind. In the earlier cases involving mental injury the question arose in connection with bodily hurt, usually being presented as to whether or not damage for mental hurt could be recovered in connection with damage for hurt to the body. It was only in later years that protection of the mind against hurts not resulting from bodily injury arose.

The present rules may be fairly stated as follows:

(1) The law does recognize a person's right in and to his mind and undertakes to protect him against mental injury as far as this can be done practically.

(2) The law uniformly gives redress for wrongs which injure the body and also injure the mind, either by impairment of the faculties or simply by occasioning mental pain and suffering though not extending to impairment of faculties.

(3) It also gives redress for impairment of faculties where this can be satisfactorily shown although there be no accompanying physical hurt.

(4) There is much uncertainty as to the rules governing cases involving mental pain and suffering unaccompanied by physical hurt. Much authority can be found on both sides of the question. The cases allowing damage for mental suffering under these circumstances contend that the law in allowing damage for such suffering when accompanied by bodily hurt, recognizes this as a legal element of damage susceptible of being measured and expressed in terms of money, and this being so, the party who has sustained such damage by the wrong of another is justly en-

titled to redress. The cases denying such recovery contend that though mental anguish when properly established, is a just element of damage, proof of it is so difficult to make and the opportunities for simulation and fraud are so great, that to permit recovery in cases where no bodily hurt can be shown would open too wide the door for fraud and vexatious litigation. These courts further urge that the difficulty in showing causal connection between the act complained of and the mental hurt is very great where there is no physical injury. This difference of opinion makes it quite difficult to state satisfactorily the rules of law applicable to such cases.

The results may be approximately summarized as follows: Compensation for mental suffering not produced by nor accompanied by physical injury, is not ordinarily allowed. Such compensation is allowed in cases where the wrong producing it was intentionally committed, and also in cases where, by reason of some special relation between the parties, or other special facts, the mental suffering should have been anticipated as the natural and probable result of the wrong.

Security to Morals.

To afford protection to a man's moral nature is even more difficult and impracticable than to his mind. The result is that the law does not undertake to give damages or compensation to a person because another has caused his morals to deteriorate. The subject is too intangible and causal connection too hard to trace, the doctrine of contributory negligence too generally applicable, and the just measurement of the injury in dollars and cents too uncertain. So that no protection to the morals of the individual, by giving him money for their impairment, is provided. This does not mean that the law does not recognize man's moral nature, nor undertake to afford some protection to it. When the practices or conduct complained of are continuous in their nature and their consequences clearly demonstrable, and the complainant is in no wise implicated in the wrong, it may sometimes be prevented by dealing with it as a nuisance. Besides, a number of criminal laws are designed to punish and prevent immoral practices.

It is readily perceived that the law, as to the matters considered in this and the last preceding paragraph, is not settled, but is

still in the formative state. What the ultimate result may be, no one can tell. In no branch of the law does the idea of impracticability of dealing efficiently with the proposed matter afford more difficulty or emphasize more clearly the necessity of separating municipal law from moral. The difficulties are not easy to overcome, and will be solved only by repeated experiment and honest effort.

Freedom of Action.

This right, as it would exist in a person in a state of nature, is necessarily modified by membership in any society or government. It is in this modified form that we deal with it here. It is a very general and indispensable right. Its extent is to do any and everything one may desire, except such things as may be violative of the just rights of others. It covers the privilege to go where one pleases, do anything he wishes, engage in any business he sees fit; in short, to conduct himself at all times and at all places as he may desire, unless he shall thereby invade the just rights of others. The law should abridge these rights and interfere with their exercise only so far as the public good and equality in rights of individuals may demand. These two considerations, however, necessitate very material and continuous limitations upon the freedom of action of the individual. The recognition of every person's right of bodily security is a limitation on every other person's actions with regard thereto. A recognition of property rights necessarily excludes all persons except the owner from equal use and enjoyment with the owner in the thing owned. So, throughout the whole catalogue of private rights, as each is secured to its possessor by capacity to control by law the conduct of others, its enjoyment necessarily involves a proportionate loss of self-determination by others. The just and proper balancing and adjustment of these rights and limitations is one of the most delicate and difficult duties of sovereignty. The result, when it shall have been successfully attained, will be the perfection of civil liberty.

Any interference by one person with the freedom of action of another is wrongful, unless authorized by law; that is, the rules governing the conduct of individuals in these respects, as in all others, are made by the sovereign and not by private individuals, and each person is equally permitted to carry out his own designs

and purposes uncontrolled and uninterfered with, except as the law may prescribe.

This right of freedom from restraint, except as authorized by law, is protected by both criminal and civil law, and invasions of it, usually called false imprisonment, are punishable as crimes and subject to civil liability to the injured party.

In addition to the criminal penalties and liability to damage in civil suits, so jealous is the law that it has provided, in behalf of the persons restrained of their liberty, a special remedy of *habeas corpus*. This is a command issued by a court or judge, upon the appication of the person detained, or of some one in his behalf, or upon the motion of the judge himself, if he believe just cause for so doing exists, commanding the person, whether officer or private citizen, who has another in his possession and custody, to produce or bring such person before said court or judge, or some other court or judge having jurisdiction, at a time and place named in the writ, then and there to show cause why such person should not be set at liberty. This is an ancient and most highly prized writ and is one of the most effective safeguards of our liberty. By it any one who is unlawfully detained may invoke the power of the government in his behalf and have his detention and its legality inquired into and if it be unlawful secure his release. So greatly was this remedy prized by the English people that its continuance and uninterrupted use were among the guarantees which they compelled the King to give in written charter. It is equally esteemed in America. Article I, Section 9, Clause 2, of the Constitution of the United States declares: "The Privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of invasion or rebellion, the public safety may require it." Similar guarantees are contained in most, if not in all, of the State constitutions. Some of the State constitutions go even further and declare that the writ of *habeas corpus* is a legal right and should never be suspended.

A large part of those portions of State Constitutions usually designated as bills of Rights are guarantees of personal freedom of action intended to protect the citizen in his liberty.

These guarantees are not identical in phraseology nor even in scope in all the constitutions, but their real spirit and substance is largely the same. Among the most frequent are provisions

against unreasonable seizure and search; to secure the privilege of bail in reasonable amount; to insure a speedy and public trial by an impartial jury; to entitle a person accused of crime to full information as to the nature of the charge against him; to guarantee against testifying against himself in criminal cases; to guarantee the right of being heard by himself or counsel in every trial to which he is a party; to be confronted with witnesses against him; and forbidding that he shall twice be put in jeopardy for the same offense or tried again for the same offense after a verdict of not guilty.

CHAPTER VII.

LEGAL RIGHTS AND THEIR CLASSIFICATION (CONTD.)

PERSONAL RIGHTS (CONTD.).

THE RIGHT TO CONTRACT.

The right to contract as well as a number of the rights dealt with in the paragraphs immediately succeeding this may well be included under the preceding head of Freedom of Action but these special kinds of action are so important that it is better to deal with them under separate headings.

The right to contract is the right to create, modify or destroy legal rights by executory agreement of parties. It is apparent that this right is very important and its exercise far-reaching. In recognition of these facts the law limits this right in many ways. In the first place it is quite careful to determine and define what agreement is, and in the second place, it is equally careful in determining what characteristics agreement must have before the law will undertake to recognize it as affecting legal rights.

Agreement.

Agreement is the real meeting of the minds of two or more parties. It involves two elements: first, a common understanding and second, a concurrence of the wills of the parties. That is, the parties to an agreement must understand the matter alike in all its material features, and, so understanding it, must have the same will concerning it. Absence of either of these elements prevents agreement. It is for this reason that mutual mistake or duress prevents agreement and that fraud vitiates it. Mutual mistake prevents agreement because the minds of the parties are dealing with different subject matter and their understandings do not meet. Duress prevents agreement because, though the understandings meet, there is no mutual concurrence of will. Fraud vitiates agreement because there is no real meeting of

the minds on the basis of truth but only a supposed or fictitious meeting of the minds on the basis of the fraudulent misrepresentation.

These matters may be made plainer by example. If A and B attempt to enter into an agreement regarding the sale of a piece of land, have the same tract in mind, inspect it together, discuss the terms of the sale, have a common understanding concerning all these matters and then have the same will regarding it, that is, A wills to sell the particular tract of land on the designated terms to B, and B wills to buy the particular tract of land on those terms from A, and this common understanding and will are declared between them, there is agreement.

If A and B attempt to enter into an agreement regarding the sale of a piece of land, but A has one tract in his mind and B has another in his, there is no meeting of the minds on a common subject matter and no agreement. This transaction could not effect a sale of the land or a change of legal rights. It is not a sale of the tract which A thought he had sold because B never agreed to buy that. It is not a sale of the tract which B thought he had bought because A had never agreed to sell that. The transaction would be mutual mistake and not an agreement.

If A has a tract of land and B is anxious to acquire it and goes to A with a deed ready for signature, reads the deed over to A, explains it to him, and offers him five hundred dollars in cash for the land, and A refuses this, and B presents a pistol toward A and compels him to sign the deed, takes the deed and leaves the five hundred dollars, this would not be an agreement. A and B understood the transaction alike. There is no mistake about the matter, but A's will did not act voluntarily in signing the deed. He was compelled to do so in order to save his life. There is no mutuality of will, hence no agreement. It is a case of duress.

A has a tract of land which he desires to sell and which he knows to be barren and worthless. B desires to buy a tract of land for farming purposes. A designedly misrepresents the tract which he owns and states to B that it is fine farming land, in a good state of cultivation, yielding large crops. B, being unacquainted with the land, believes A's statements regarding it and is so induced to buy it and does buy it. This would be a clear

case of fraud. It is not a case of mutual mistake for A knew the exact truth about the land all the while. It is not a case of duress for A has not used force or threats to overcome B's will. It is not a case of true agreement because B did not agree to buy the tract of land as it really was, but to buy a tract having the qualities falsely attributed to A's tract by A. The assent of B's mind was not given to the purchase of the real tract but of the non-existent tract which A described. The law deals with this anomalous situation by declaring that the transaction will bind A, if B so desires, but will not bind B if he desires to be relieved.

Essentials of Contract.

The foregoing gives the idea of agreement. The next inquiry arising is, does the law recognize and undertake to enforce all agreements, or does it limit its recognition to those having certain characteristics or elements? The answer is that the law is quite careful regarding the creation, modification, and destruction of legal rights by agreement of parties and requires that every agreement, to be enforceable at law, must have certain characteristics.

These characteristics are:

1. Legally competent parties,
2. Legality of purpose,
3. Consideration,
4. Proper form.

A true agreement having each of the four foregoing elements is legally enforceable and is properly called a contract. It is a very general rule that agreements still unperformed, which lack any one or more of these characteristics, will not be enforced either by compelling the parties to fulfill the promise or by allowing damages for refusal to do so.

Parties.—Agreement necessarily implies at least two parties. The general rule is that every person is legally competent to enter into binding agreements. And the parties undertaking to make an agreement are presumed by law to be competent until proven otherwise.

The persons who have not the power to contract, or rather whose power to contract is specially limited, are insane persons, drunken

persons, minors, and married women. These limitations are not imposed by way of reflection or penalty but as a means of protection against improvident impulses of the parties themselves or undue influence of others. It follows that the limitations are enforced in those classes of cases in which the real interest of the abnormal party is subserved by recognizing the power to bind himself, hence we find that agreements of insane and drunken persons and of minors for purchase of necessaries are sustained. The same considerations do not apply with equal force in the case of married women, as they are permitted by law to obtain necessaries on the credit of their husbands. Still in many states a married woman can bind her separate property for necessaries, even though her Common Law disabilities have not been removed in other respects.

Purpose.

Of course, the law can not undertake to uphold any person in its own violation, and therefore it can not recognize or attempt to enforce any agreement which has a direct unlawful purpose. There are some very nice questions as to just how closely connected the agreement must be with the proposed violation of the law to render it unenforcible. It seems to be clear that, whenever the purpose is to violate the law, and this intent is common to both parties, the agreement is unenforcible. If the purpose be to commit a heinous offense, and this is entertained by one person and known to the other, the result is the same. If, however, one has an unlawful purpose, unknown to the other, it will not avoid the agreement to the injury of the innocent party. If the purpose be not heinous, but be to break some statutory provision not involving moral turpitude, if it be known to but not acquiesced in by the other party, the result is unsettled, in our law. The foregoing statements are general, and apply alike to all cases of contracts, except in a few of those which are merely *mala prohibita* and as to which the legislature did not intend to affect the enforcibility of the agreement by prohibiting it. These cases are extremely rare, but do sometimes arise.

It may be well to consider agreements forbidden by statute more in detail.

In these cases the effect upon the agreements, and on the rights

and liabilities of the parties under it, is exclusively one of legislative intent. Whatever the intent may be, the courts must enforce it. These agreements may be placed in five groups:

Group 1: Agreements expressly prohibited by law, with express penalty of nullity. Here there can hardly be said to be any room for construction. The law says the attempted agreement is void and can not be enforced, and that ends the matter.

Group 2: Agreements expressly prohibited, with a criminal penalty, but nothing said as to consequences civilly. Here, as I understand, the courts apply the rule that no cause of action can arise from a violation of the criminal law, in behalf of the wrong-doer. And as both parties to the agreement are wrong-doers, the attempted contract is unenforcible.

Group 3: Agreements forbidden by statute, no penalty, civil or criminal, being denounced. These are put on the same footing as the preceding classes. The effort to enter into the forbidden agreement being itself unlawful, no cause of action arises from it. There is some conflict in the cases, but I think that this rule is sustained by the weight of authorities.

Group 4. Agreements prohibited expressly, but where the whole act, taken together, shows that the legislature did not design that the agreement should be void. Here, as in other cases, the legislative intent is respected and the contract is declared not to be void, but the penalty contemplated by the legislature is imposed upon the party or parties.

Group 5: Contracts expressly prohibited, with an express penalty prescribed by the act, which is not nullity, but which is for the benefit of certain persons. In such cases the contract will be enforcible in favor of, but not against, the person in whose favor the penalty is provided.

Consideration.

To support an unexecuted promise at Common Law, there must be some consideration. This is something of value, in the eye of the law, moving from one party to the other, either for the benefit of the promisor or to the detriment of the promisee. It is not the same as motive. Motive may be ex parte, or unilateral. Consideration is something in the minds of both parties, which both recognize as inducement to the promise. (Bouvier's Law Dic-

tionary, "Consideration.") It may take many forms, but must always be present in some form in an enforcible agreement. It need not be in such proportion to the thing promised as to be adequate, though inadequacy may be considered, in connection with other evidence, as indicating fraud, or undue influence, or unconscientious advantage.

At Common Law instruments under seal are said to import consideration. Whether this means that the seal is a substitute for consideration and so dispenses with consideration in fact, or is presumptive evidence of consideration and hence only relieves from the necessity of pleading and proving it, is an unsettled matter. Whichever view be taken a contract under seal can be enforced at Common Law without the necessity of either pleading or proving that it was based upon or supported by consideration.

At Common Law written agreements not under seal and verbal agreements do not import consideration and will not be enforced unless consideration in fact exists.

The Civil Law and the Law Merchant did not regard consideration as essential to the obligation of agreement. The present rules of the Law Merchant recognize it as essential, but presume it to exist in all negotiable contracts. This presumption is *prima facie* only as between the original parties, or others having notice, but is conclusive in behalf of innocent purchasers of paper before maturity, for value, without notice. If any one of these facts is wanting, the consideration may still be inquired into.

Form.

Form of some kind is essential to contract. This is but another way of saying that the assent of the parties to the agreement must be manifested and evidenced in some way before the law can take cognizance of it and enforce it. In the great majority of instances the agreement is evidenced by spoken words, and frequently words and acts are sufficient and, in rare instances, acts unaccompanied by words may be taken as sufficiently indicative of assent.

In certain classes of contracts coming under what is usually denominated the Statute of Frauds, form is emphasized to such extent that the law requires the agreement to be reduced to

writing and signed by the parties. In some agreements the law goes beyond this and requires that the writing be sealed.

Whatever may be the requirements of the law as to the form of any particular agreement these requirements must be complied with or the agreement will be non-enforceable. This general rule is subject to a few exceptions which need not be considered at this time.

The Right to Acquire, Hold and Dispose of Property.

This is an important right, which pertains to individuals as members of society. It must be carefully distinguished from the actual ownership of some particular thing, which would be classed under the fourth general heading of rights in things. The matter now under consideration is the general capacity, which a person has in law, to acquire and hold property. The right exists in all normal persons, and may be exercised by them, in conformity with the law, as often and to as great an extent as they may be severally able. Property can only be acquired by lawful means, used for lawful purposes, and disposed of in lawful ways; but, within these legal limits there is no restriction upon the amount of property that any one individual or number of individuals may acquire and hold.

Perhaps the distinction between the personal right now under consideration, that is, the general right to acquire and hold property, on the one hand, and the right in a particular thing which the owner has already acquired and is now holding, on the other hand, may be plainer by illustration: Suppose an auction is being held. Any one has a right to bid for the property on sale. A particular thing is offered, and a number of persons bid for it. As each one makes his bid, he therein exercises his right to acquire property, and if the article be struck off to him, this specific thing will become his. He does not, by thus exercising his authority to acquire property and buying a particular thing exhaust it; and, if another article is put up and he desires it, he still has capacity as a buyer, and if he bids and that article is struck off to him, he will own that also. In each case, by the exercise of his general capacity to buy, he has acquired actual ownership over a specific thing, and has rights in that thing and can control the conduct of others with reference to it. Suppose, in the

progress of the auction, some one shall falsely and maliciously state to the auctioneer that the bidder is insane or insolvent, and thus induce the auctioneer to refuse his bid, although it is the highest; this unlawful interference with the general right to acquire property, existing in the bidder, would prevent the vesting in him of the ownership of the thing bid for, and he would not acquire any right in it; still, he would have a cause of action against the unlawful intermeddler for interfering with his right to buy. This right to buy is the matter now under consideration, and is a personal right.

The second phase of this right is the capacity to hold property It is one of the most important among the personal rights. It is so closely connected with the owner's rights in the property held that it need not be discussed at this time, except to say that it is practically without legal limitation, save in the case of corporations and aliens, who are each often limited as to the quantity of real estate which they may own, and the length of time they may hold it.

The right to convey property is also an important one. This, also, is subject to legislative control so far as the public good may require. If dealing in any particular article or commodity is contrary to the general good by affecting injuriously either the safety, health or morals of the people, such dealings may be either prohibited or regulated, as the best interests of the public may demand. When such course of dealing is continuous or extensive, it would be regarded as the conduct of a business, and would come under the next paragraph; but even the single act involved in a single disposition may be prohibited or regulated.

Right to Carry on Business.

This right is rather a combination or outgrowth of the two just discussed—the right to contract and to acquire, hold and dispose of property; but as it is often practically presented as a right to follow a certain occupation or prosecute a certain business enterprise, it needs some consideration. Every individual has an unquestioned right to occupy his time, means and capacity in any way that he sees fit, so long as he does not unduly interfere with the just and legal rights of other individuals, or the community at large. But, whenever such interference begins, his right ceases. It is, therefore, one of the unquestioned preroga-

tives of the State to provide special regulations for, or wholly to prohibit, such occupations and engagements as interfere, in a way that can be practically appreciated, with the safety, health or morals of the community. This right has been exercised, from time immemorial, by all civilized governments; and, as civilization advances and public opinion becomes better informed and establishes higher standards as to health and safety, the exercise of the right by the government is proportionately extended.

A Right to Form Special Relations.

This right is closely allied to, yet somewhat different from, those which we have just been considering. It is an extensive and practically valuable right. Under it fall the right to form family relations and other social connections and combinations. Its exercise is regulated largely by social sanctions and public opinion. It is not, however, beyond the control of governmental agencies, as we see in the statutes forbidding marriage between persons within certain degrees of kinship or belonging to different designated races, and also in the regulations as to marriage ceremonies and similar enactments.

Freedom of Speech.

So valuable to the public and to individuals is this right regarded that it is guaranteed, both in our Federal and State Constitutions. Nothing on this subject was contained in the Constitution of the United States as originally adopted, but the omission was made so formidable an objection to the instrument that a provision curing the defect was incorporated in the first amendment, and Congress has been thenceforward forbidden to make any law abridging the freedom of speech or of the press.

This amendment has no application to the several state governments but there is a similar article in almost, if not in every State Constitution. We give the one in the constitution of Texas as fairly typical.

"Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law will ever be passed curtailing the liberty of speech or of the press." These provisions, read casually, would seem to guarantee unrestrained license in the matter of expressing thought; but this is not true. Freedom of

speech is not license of speech, but is liberty of speech—that is, the right to speak, limited by due and just regard for the rights of others. Each man's right of speech stops where the other man's right of reputation sets in. It is as much the duty of the sovereign to protect the one in his just good name as to guarantee to the other the right to express himself on proper occasions on proper subjects. So that, notwithstanding these constitutional provisions, reasonable and just laws are enacted punishing defamation, both criminally and civilly.

Freedom of Thought.

Thought, unexpressed by word or act, is the individual concern of the mind producing it, and the law does not take cognizance of it. When it is expressed, it becomes conduct, and is regulated by the rules applicable to freedom of action.

Freedom of Conscience.

This is in the same category as freedom of thought. When the conscience manifests itself in words or conduct, these become proper subject matter for legal cognizance. The law is very tender in its regard for the conscientious scruples of the individual, and allows to him the very largest latitude consistent with the safety of other individuals, and of the public. But one can not, under claim of obedience to conscience or to a religious duty or in worship, do acts which are directly invasive of the rights of others, or detrimental to the public safety.

If a sect or an individual should conscientiously believe that human sacrifice was pleasing to or commanded by the god whom he worshipped, he still would not be permitted to take the life of the proposed victim and justify it as a religious rite. Also, if a sect should undertake to carry on some public form of meeting which was manifestly indecent or immoral, it would be prohibited from so doing. Still, if the act or acts be not clearly contrary to public morals and to the legal rights of others, the government will not interfere.

Right to Reputation.

Character is what a person really is; reputation is what he is generally thought to be. In the early stages of social life but little, if any, protection was afforded to reputation. As the world

progressed in enlightenment and its appreciation of real values, social and business standing were seen to depend very largely upon what was generally thought of a person, and the law took cognizance of his right to a fair reputation and threw its protection around it. The general rule of law on this subject may be stated thus: A person has a legal right to a reputation exactly corresponding with his character—no better, no worse. To this general rule there are a few exceptions, made from considerations of public policy. These exceptions are all made against the protection of the reputation.

The truth of the matter stated is always a complete defense in any civil suit for defamation. So that, if one has a reputation better than his character and another shall, by telling the truth, reduce his reputation to the level of his character, no matter how injurious this may be to the individual, it is never a tort. The law looks at the matter differently, however, when the rights of the public are concerned, and often, to prevent breach of the peace and preserve public order, it will make the utterance of charges of certain kinds against individuals criminal and punishable as such, whether they be true or false.

The exceptions to the rule that false defamatory statements are actionable are based on considerations of public policy. They are but an application, in this particular matter, of the general rule that the public safety is the supreme law. We find, therefore, if the person making the utterance is one charged with an official duty and the utterance is made in the discharge of or in immediate connection with such duty, the injury must be borne by the person defamed, and no redress can be had from the officer. This is true, even if the officer making the statement knows it to be false and acts maliciously; provided, always, it is made in the discharge or is directly connected with the discharge of his public duty. The nonliability to private suit for utterances made by public officials under the circumstances indicated, is absolute and unconditional, and statements thus protected are known as absolutely privileged communications.

When the person making the defamatory statement does not owe a public duty, and is not discharging such a duty, but still sustains such relation to the person to whom the statement is made that he owes to him a duty of giving information concern-

ing the person defamed, out of consideration of this private duty the law gives to the person giving the information a conditional privilege to speak. This privilege is not absolute, but is conditioned upon the absence of malice and the presence of good faith that is, when a statement is made, in the attempted discharge of a duty to give private information, the person making the statement, in order to claim the privilege arising from such duty must be able to show that he was not actuated by malice, and honestly believed the statement to be true. If these conditions are shown, he is not liable for any injurious consequences of the statement made, although it were really false.

These two doctrines of absolutely and conditionally privileged communications constitute material limitations upon the right to protect one's reputation. Subject to them, the general rule, as stated above, is that each person is legally entitled to a reputation which is the exact equivalent of his real character; and hence no statement is, legally speaking, defamatory or injurious, which is true and only tends to bring his reputation to the level of his character. Every statement that is not privileged, which is false and does bring the reputation below the standard of character, is actionable, the amount of recovery depending in each case upon its facts and circumstances.

CHAPTER VIII.

LEGAL RIGHTS AND THEIR CLASSIFICATION (CONTD.)

CIVIL RIGHTS.

The term civil rights has come into frequent use in connection with Amendments XIII and XIV to the Federal Constitution and acts of Congress thereunder. As thus used the term is very comprehensive covering a great many of the rights included in other classes and perhaps a few not included in any other. They embrace the right to equal protection of the law, to due process of law, to equal enjoyment of public privileges, and to share only equally in public burdens.

Equal Protection of Law.

These are rights dependent on membership in some particular State or goverment. The first and most important of them is to have equal protection under the law. There are several provisions in the Federal and State Constitutions guaranteeing this right. The first section of the fourteenth amendment to the Federal Constitution is in these words:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." But this must be a denial by governmental action and not by act of the individual, to be an infringement of this principle. The privileges and immunities guaranteed by this amendment are those pertaining to the person by nature, or by reason of citizenship or membership in the United States government, and do not include political rights in the several State governments.

Due Process of Law.

The guarantee as to due process of law is for the benefit of all persons, and can be invoked by any one whose rights are being dealt with by the governmental agencies of either the Federal or State governments, or whose rights are involved in any litigation pending in the courts of either sovereignty.

The phrase, due process of law, is hard of definition. The courts have frequently declared that it is better policy not to attempt to define it, but to deal with each case in which it is invoked upon its special facts and circumstances. While this may be practically convenient, it is theoretically very unsatisfactory. It is an expression of great age, and is by some early English authors regarded as equivalent to the law of the land, and this view seems to be generally entertained by judges and writers in the United States.

While exact limits may not be set to it, still it may definitely be stated to include certain fundamental ideas. The right guaranteed forbids the government to deprive any citizen of rights either of person or property except in due conformity to the rules and principles of the Common Law. As said by Johnson, Justice, in Bank v. Okely, 4 Wheaton, 235, it is apparent that "as to the words from *Magna Charta* incorporated in the Constitution of Maryland, after volumes spoken and written with the view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the power of government, unrestrained by the established principles of private rights and distributive justice."

Judge Cooley, in his work on Constitutional Limitations, 441, says: "Due process of law, in each particular case, means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights, as these maxims prescribe for the class of cases to which the one in question belongs."

Mr. Webster, in his brief in the Dartmouth College case, 4 Wheaton, 518 says: "By the law of the land is more clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, lib-

erty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

The phrase is not limited to judicial proceedings. On the other hand, exercise of the power of eminent domain, or of the police power, or the taxing power according to the usages and customs and general principles of law and justice applicable in each particular case, is due process of law. The rule frequently is invoked with reference to legislative action depriving, or tending to deprive, individuals of property or personal rights without judicial investigation and adjudication.

The general requirement as to the deprivation of right in judicial proceeding is that the party whose right is to be affected must have had prior information as to the intent to deprive him of such right, and the facts or grounds upon which such deprivation is sought; and, second, he must have an opportunity to be heard before some legally constituted tribunal, with reference to such charges, both by discussion and consideration of the charges and their nature and his legal privileges and rights with reference thereto, and also by the introduction of competent testimony in his own behalf and the exclusion of illegal and incompetent testimony against him. The methods of depriving a citizen of his legal rights, by other departments of the government in exercise of other powers, do not frequently involve this process of information conveyed to him as to the charges and investigation concerning the charge, but in each case the established usages of the Common Law must be followed.

The fifth amendment to the Constitution of the United States guaranteed the right of due process of law to all citizens of the Federal government, so far as the action of the Federal government was concerned. The fourteenth amendment, as quoted above, extends this guarantee, and makes it embrace the State governments, and their action as well. So that now, neither State nor Federal government can deny to a citizen "due process of law." Similar guarantees of this same right are found in the Constitution of each State of the Union forbidding the government organized thereby from interfering with or denying to the citizen this right.

POLITICAL RIGHTS.

Suffrage.—The most important political right is participation in government. This is, strictly speaking, a right derived from the law as made by the sovereign. Those members of the community in which sovereign power is lodged determine, by their own judgment and will, what classes of persons shall participate in the exercise of sovereignty. In such determination, the majority rules, so that we sometimes find that this right will be extended to include persons not theretofor entitled to participate; a most conspicuous illustration being the enfranchisement of the negro, as the result of the Civil War. Again, it sometimes occurs that the majority of the electors will determine that certain qualifications which such majority possesses, but which are not enjoyed by a minority of their present number, shall be essential to the exercise of the right of suffrage; and, when this will is properly declared and announced, those persons who were formerly enfranchised, but who are now disqualified, can no longer insist upon the right of suffrage, as one pertaining to them as individuals, and of which they could not justly be deprived.

The usual method of exercising this right of participation in government is by voting. Who shall vote in any particular government is always determined by the will of the sovereign in that government. As pointed out before, the qualification of electors in the Federal government depends, in each State, upon the will of the people of that State, subject only to the limitations of the fifteeth amendment, which forbid the disqualification of any person as a voter on account of race, color or previous condition of servitude. In all other respects the several States may make such regulations as to suffrage as they see fit. These regulations do, in fact, differ largely in the different states and it would not be profitable to attempt to deal with the matter in detail.

The right to vote is the right to express one's choice with regard to any matter and to have such expression counted and given its proportionate weight in the determination of the issue.

It is the duty of the state to protect the voter in the exercise of his franchise. To accomplish this it is necessary to secure to him not only an expression of his preference but also to provide that his vote shall be counted and estimated at what it is really worth. Each legal vote cast at an election is of equal value and should have equal weight. To permit illegal voting is to destroy this

equilibrium and to diminish the relative value of every legal vote in opposition to which an illegal vote is received.

Office Holding.

Holding office is another method of actual participation in the administration of government. It will be readily seen that this is not a right pertaining personally to any man or set of men, but only to such persons as, according to the rules and usages of law, are selected for this purpose and inducted into office.

Jury service is rather a duty than a privilege. Clearly the sovereign has the right to designate what class of persons shall perform this important function, how they shall be selected, and under what limitations they shall serve.

Right of Petition.

The right to present petitions to different governmental agencies is one recognized as existing in all people. For its denial it would be practically very difficult to give adequate and appropriate remedy, except by criminal prosecution and removal from office, or by impeachment. It is more, in its nature, an effort to persuade than a right practically enforcible by law.

RIGHTS AGAINST PARTICULAR PERSONS.

These are rights which exist only in behalf of particular persons against particular persons. They are not rights pertaining to any one or more designated persons and enforceable against the whole world nor are they rights pertaining to everyone against a particular person or persons. They exist only in favor of a particular person or persons and are enforceable only against a particular person or persons.

Dependent on Contract.

By far the larger share of these rights arise from agreement or contract between the parties having the right and owing the correlative duty. In some instances, however, they grow out of special relations between parties which do not depend upon agreement between them.

Such of these rights as depend upon contract are regulated largely by contract law and the agreements from which they result must have the characteristics that have been heretofore indi-

cated, viz., genuineness, competency of parties, legality of purpose, consideration, and proper form.

This class of rights is very extensive and covers most of the results of the business activities of the world. They include agreements to pay money, to render service, or to do or not to do any of the innumerable things that are covered by the contracts of men in carrying out their several occupations.

In this class are all the respective rights between master and servant, principal and agent, common carrier and patron, bailor and bailee, and all other such special relations as may exist between particular persons.

Not Dependent on Contract.

In this class are the rights existing between parent and child as such. They are scarcely to be regarded as rights in the strict use of the term. The authorities usually speak of them as rights of imperfect obligation; that is, as conditions which the law recognizes, and which it takes into account in construing and determining the legal effect of the voluntary acts of the parties, and yet out of which, considered strictly as such, no enforceable obligation arises. That is, the parent is recognized as morally and legally bound to support the child; and if he fails to do so and a third party supplies the child with necessaries, the parent may be forced to pay for them; but the child would have no cause of action for the pain or inconvenience or injury sustained by it by reason of the want of proper nourishment and support. So the parent is entitled to the wages of the child earned during minority and if the child works and earns wages the parent can compel the party for whom the service was rendered to make the payments to him; but if the child does not work, and does not earn wages, the parent can not sue him for such failure and compel him to pay to the parent the value of the child's time. These conditions are anomalous, but must not be overlooked.

The rights and duties existing between an officer of the law and those with whom he deals in his official capacity also come under this head. The same is true as to all rights and duties incidental to other special relations which do not depend upon contract.

RIGHTS IN THINGS.

When a person sustains such a relation to a thing that he has over it the dominion known as ownership, we say, and say truly, that he has a right in the thing. Such rights are enforceable

against all persons, and not against specific or particular persons, and, for this reason, they are very frequently called rights in *rem,* or rights enforceable against the whole world. These terms and designations are quite appropriate and would be very useful but for the fact that they have been used by so many persons and in so many different senses that it is almost impossible to keep in mind just what different persons mean by them; and so it seems best to use the simpler expression of rights in things. These rights are also known as property rights. This is quite an apt designation.

Ownership.

Ownership, in full sense, has five elements: (1) The right of possession; (2) of use; (3) to receive profits or increment; (4) to modify or destroy; (5) to dispose of. When these five powers, or privileges, combine in one person as to any one thing, such person is the general owner of such thing. These rights of the general owner are exclusive, and the law, in recognizing them, gives to him the capacity to control others with reference to the thing thus owned. He may keep it in his possession or, if he desires, place it in the possession of some other person willing to receive it; he may use it himself exclusively and deprive all other persons of any participation in such use; he may receive and appropriate to himself, to the exclusion of all others, all profits and benefits arising from it; he may change its form or nature, or destroy it entirely, and he may also dispose of it, or transfer his title or estate to other persons. Thus, if A owns a tract of land and any one else enters into possession of it and seeks to appropriate its use and benefit to himself, the sovereign will, upon proper application by A, or his proper representatives dispossess the intruder and restore A to possession; and will also compel the wrong-doer to account to A for the reasonable value of the use of the land, while unlawfully detained by him, and for any injury he may have done to it during his possession. The same is true of personal property. The owner can compel the trespasser to surrender the thing to him, and account for the reasonable value of its use, and also for damages done to it by him. If the wrong-doer has destroyed it or taken it away so that the owner can not regain the thing itself, he may compel payment of its value.

Thus we see that a person invested with complete ownership in a thing can prevent its use, possession, injury or destruction by

another, or hold such other responsible for a disregard and violation of his (the owner's) rights in either of the elements of ownership. The owner also has the affirmative right of possession use and enjoyment himself, without liability to any one therefor. He may also modify or change the thing owned. If it be personal property, he may absolutely destroy it. If it be land, he can remove or destroy the improvements thereon, quarry the rock, cut the timber, or in any way lessen or diminish its value, and in no event will he be liable to any one else for so doing.

His right of ownership also extends to the power of disposition over the property; that is, he may transfer his estate or ownership to another and substitute the latter for himself in his relation to the thing. This right of disposition, or power of substitution, may be exercised either fully, by transfer of the whole estate to the whole property, or partially by transfer of some estate less than all, or by transfer of the whole estate to some part of, but not to all, of the thing owned. From the transfer of some interest, claim or estate less than the complete ownership results what is known in law as special or limited ownership of property.

When we say that the person is the general owner of a thing and has complete and unlimited estate in it or title to it, we speak relatively. We mean he has the highest form or character of title and the most beneficial ownership which the law recognizes. We do not mean that he can enjoy any one of the incidents of ownership absolutely and without limitation. All ownership is not only subject to limitation while it continues, but the estate itself, with all its incidents, may be taken from the owner at any time, if the public good requires it. If this taking be under the exercise of the power of eminent domain it must ordinarily be accompanied by compensation, or provision for compensation. If, however, the taking be under the exercise of the police power, the owner is not, in all instances, guaranteed even this right of compensation. Here, also, the public safety is the supreme law, and if it be demonstrated that the public safety requires the sacrifice of the property of the individual, the right of the individual must yield.

So, as to changes or modifications of the thing, and so also in the regulation of the right of disposition. Illustrations of the latter are constantly occurring. The statutes regarding the transfer of real estate require that they be in writing. Denials to minors and married women of the power to sell land at all, or

only in prescribed ways, etc., are so familiar to us that we merely note them as limitations on this right.

So we may regard it as a settled rule of law that there are real and effective limitations on the rights which the law denominates as absolute or general ownership. They grow out of two legal principles: that the public safety is the supreme law, and that every one must so use his own as not to interfere with the just rights of others. We may, therefore, define general ownership of a thing as: the right to exclusive dominion over it and to the exclusive possession, use, and enjoyment of it and the power of changing or disposing of it, subject only to the rights of the public in the thing and to control of the owner in its use and disposition as reserved in the Constitution and Law.

Special ownership.—Special ownership is some interest or estate in a thing existing in one not the general owner, by which he is legally entitled for a limited time and to a limited extent, and for limited purposes, to exercise dominion or rights of ownership over it.

This special property is some interest or estate carved out of or separated from the general ownership, either by act of the parties or by operation of law. The following are illustrations of special ownership:

1. Some title or estate less than absolute, as the hiring of a chattel or the leasing of land.

2. A legal right to possession, coupled with some duty concerning the thing, as a common carrier having freight in his possession, or an officer holding property under legal process.

3. Simple prior possession, as by finder of lost property, or by a trespasser as against all persons except the owner.

4. Some pledge or encumbrance of the property, as a deposit of note as collateral security, or a mortgage on real estate.

In these and all other instances the rights and liabilities of the special owner depend on the facts of the case. Usually these rights grow out of or result from contract with the general owner, in which cases the rights of the parties depend on the contract construed and interpreted by law. Sometimes they grow up by operation of law, as in case of administration and receivership, etc. In all cases the rights of the parties are such as the law creating the estate provides.

Ownership is acquired (1) by discovery, (2) by conquest,

(3) by production, (4) by increase, and (5) by legal succession to the rights of another, as by purchase, gift, inheritance, prescription, etc.

Practically anything may, under proper conditions, become the subject of man's dominion and legal right. The exceptions usually given are human beings, light, air, and water. In a general way, these are correct, but not literally so. The law does recognize ownership, under special circumstances, in water, air, and light. These we will consider later.

The subjects of ownership are usually divided into real and personal property, or into land and chattels. The lines of separation are not always clearly drawn, and it is frequently difficult to determine in which class a given estate or thing falls. This classification involves both the nature of the thing owned and the nature of the estate or interest held in it. The distinguishing characteristics of real property are, as to the thing owned, permanency and immobility, and as to estate inheritability and indefinite duration not shorter than one life. All property and estates which are not real are personal. Everything which may be owned, and which does not come within the meaning of real estate, is personalty. We will consider the general subject of property more at length hereafter.

RIGHTS IN PERSONS.

This is not the usual method of classifying the kind of rights now under consideration. It, however, seems the simplest and most natural.

Some separate classification is necessary to distinguish these from rights inhering in one's own person, rights in things, and rights against persons, as heretofore discussed.

These rights consist in the legally protected privileges, claims, and interests which one person has in another. They always result from some special relation existing between the person having the right and the one as to whom the right exists.

This special relation may be dependent on contract between the parties, or it may be independent of contract. These privileges and interests differ materially from property, in the sense we use that term regarding things. Under our law, a person is not a subject of ownership. Nor can one acquire over another that

species of dominion which the law denominates ownership, but still he may have legal rights of a different kind, resembling that in some respects.

The most important of these rights result from the relations which are usually spoken of as domestic, viz.: husband and wife, parent and child, master and servant.

The husband has certain well established rights regarding the person, services, society, and affections of his wife, and any one violating any one of these will be subject to suit therefor. So the wife has similar rights though not to the same extent, perhaps, with regard to the husband. It is well settled that the parent is entitled to the services of the child, and that the child is entitled to maintenance and support from the parent. This last, however, is a right which is not directly enforceable. So the master is entitled to the services of the servant, and any person who, by direct and unlawful act, prevents his rendering such service is responsible for damages.

Possibly the most clearly defined and strikingly illustrated instance of the rights which one person has in another is furnished by the statutory provision for compensating certain persons for injuries sustained by them by the wrongful killing of another. While the deceased person lived, these other parties sustained to him such relations as to make it, in most instances, his legal duty, and in all instances his moral duty, to aid and serve them to some extent. This service he may not render, but if the relationship is such as to make it the legal duty to render it, or if the duty be a moral one, and there be proof of actual recognition and observance of the duty by the deceased, the statute recognizes this fact, and allows compensation to the designated parties for what they have lost in the death of the relative. This compensation is not for the injury sustained by the dead person, nor for the mental pain or suffering of the living, but for the pecuniary loss they have sustained by reason of the death of the other party.

These are purely statutory rights, and no one is entitled to them except those mentioned in the statute, and no one is responsible except those made so by the statute. The liability only arises when the killing occurs in the manner set out by the statute. In other words, the rights are purely statutory, and the statutes are strictly construed.

REMEDIAL RIGHTS.

These rights are of two kinds:

(1) Such as are recognized by law as existing in individuals, to be exercised by them, usually known as the right of self-help or self-defense, and

(2) Those created by law, consisting in the right to compensation, through governmental agencies, for wrongs already committed, and the right, through such agencies, to prevent the commission of threatened and imminent injury.

In the state of nature which preceded law, whatever remedy one had depended on his capacity to care for himself. He determined what his rights were, and upheld them with the strong hand, as far as he was able. With the coming of government there necessarily came limitations upon the individual. The extent and nature of these limitations differ in different governments, and in the same governments at different times. As these limitations on self-determination of right and self-execution of remedy are established by law, the law itself, as a compensation, affords protection to such of the claims theretofore asserted by the individual as it deems proper to recognize and perpetuate. Sometimes this protection is effected by recognizing in the individual the privilege of preventing or suppressing the threatened wrong, but usually by announcing its recognition of the right and affixing certain public penalties or private remedies for its violation, and establishing tribunals to act for it in investigating alleged violations of such rights, and applying the penalty or remedy as the law and the facts may require. This gives us our two classes of remedies, those applied by the individual in his own behalf, and those applied by the law through its duly authorized representatives.

Self-Help.—The first of these classes is small in number, and rarely, if ever, extends to redress for injuries already sustained. They usually consist in the privilege of defending one's self and members of his family, or even other parties, from some immediate and serious bodily harm, sought to be inflicted by another. In some instances, the rule is enlarged so as to include defense of the rightful possession of property. The general rules governing this subject are:

(1) The injury sought to be prevented must be unlawful and substantial in its nature.

(2) It must threaten the person of the one sought to be defended, or property in actual possession of the person exercising the privilege.

(3) It must be real danger, or the circumstances, as they reasonably appear to the party acting, must be such as to give a reasonable appearance of danger.

(4) The danger must be immediate and present, and not prospective or future.

(5) No more force must be used than is reasonably sufficient to prevent the threatened wrong.

Unless these facts concur, the remedy by self-help is not recognized.

Remedy Through Governmental Agencies.—The second class of remedies, those afforded through governmental agencies, are much more numerous. The instrumentalities through which they are usually applied are the courts. Ordinarily, the law says certain acts, violative of the rights of others, must not be done, or that certain acts conducive to the good of others must be done, and provides a penalty, or means of redress, for a violation of the rule of conduct thus created, rather than agencies through which to see that the rule is obeyed. Usually this remedy provided by the law is compensation in money for the injury or damage sustained.

In a few instances, the remedies are not compensatory, but preventive, as injunctions forbidding the doing of threatened wrongs, the abatement of nuisances, compelling persons to give peace bonds, etc. When the remedy is compensatory, the law determines the elements of damage to be taken into account for the violation of every right, and gives rules, as accurate as the nature of the injury will permit, by which to estimate or measure in money the amount of such damage, and allows to the injured party as compensation for his injury the amount thus ascertained. In some cases of extreme atrocity, other damages, called punitive or exemplary, are allowed, by way of example in addition to the amount estimated for compensation, but these cases are rare.

It is frequently said that there is no legal right without a legal remedy, and this is a fairly accurate statement.

As the application of remedies is the almost universal way of protecting legal rights, the relation between the two is exceedingly close. Yet it must be observed that the remedy is not the

right; it is only the means by which the right is protected and practically made available. The remedy by which the right is protected may be taken away and another substituted in its stead without destroying the right, provided the substituted remedy be substantially as effective as the original one; but any change resulting in appreciable lessening of the remedy would work a corresponding depreciation in the right. Such changes seem to be within the power of the State legislature as to rights not depending on contract, as there is nothing in the Federal Constitution on the subject. The clause denying to the States the power to pass laws impairing the obligation of contracts, however, prevents them from taking away all remedy for breach of contract, or so changing the remedy as to destroy its practical efficiency.

Summing up, we may say that the following things are essential to the existence of a remedial right of this second kind:

(1) A right in one or more persons recognized and protected by law.

(2) A violation of this right by a wrongful act or omission of one or more persons, accomplished or imminent.

(3) Injury, actual or presumed by law, resulting to the person or persons having the right, directly from its violation.

The injury may be threatened, if imminent and practically sure to follow the wrong, or may be accomplished, having already resulted from the wrong, or may, in case of continuing wrongs, be both accomplished and prospective.

Effect of Locality on Remedial Rights.

Crimes.—As crimes are offenses against the positive law enacted for the benefit and protection of the sovereign, and as the power of the sovereign is limited by the territorial boundaries of the country in which it exists, it would seem to be logical and fundamental that punishment could only be inflicted for crime committed in the country in which the criminal law was enacted and in force; we do find this very largely the case. A second thought, however, will show that some acts or omissions done or suffered outside the State may very seriously affect its welfare and security. Suppose one person stands near a State line and maliciously shoots another who is in another State. Is he to be unpunished? Is the sovereign on whose soil he stood powerless because no wounding or killing occurred within its territory, and

is the other without jurisdiction because, at the time the wrongful act was done by him, he was not on soil belonging to it? Whatever may be said about the logic of these propositions, the law answers them both in the negative, and holds that the offender is subject to punishment in either jurisdiction if it have a criminal law covering the case. And so in a great many other cases. Thus we find that the criminal laws of the different States make provision for the punishment of a number of acts and omissions committed outside the State, but which directly affect the peace and welfare of the commonwealth.

Torts.—As a tort is a violation of duty imposed by law, the same limitations would seem to apply to them as to crimes, and we will find this true, to a great extent. This is, however, much modified by the principles of comity or good will between governments, and under them many laws imposing duties are given more or less affect beyond the territorial limits of the government enacting them.

With respect to the place of giving redress, wrongs not involving breach of contract are divided into two classes: Local and Transitory.

A local wrong is one which can only be done at one place.

A transitory wrong is one that might have been done anywhere.

Thus, land is immovable, consequently injury to any particular parcel of land can be done at only one place, viz.: where the land is situated.

Personal property may change its location, and is subject to be injured wherever it may be; hence, injuries to it are deemed transitory. It is true any given injury must have occurred at some one place, still, on account of the movable nature of the property and its liability to injury in different places, the law looks upon the injury as transitory.

The rule is that local wrongs can only be redressed by the government in whose territory the wrong is committed; transitory wrongs may often be redressed wherever the wrong-doer may be.

Transitory wrongs committed in one government and sought to be redressed in another may be divided into four general classes, as follows:

(1) Those in which the right claimed to have been violated is not recognized and no remedy is given in the country where the

facts occurred, but in which the right claimed to have been violated is recognized and a remedy is provided in the country where the suit is brought.

(2) Those in which right and remedy both exist where the facts occurred, but neither where suit is brought.

(3) Those in which the right is the same in both places, but materially different remedies are provided.

(4) Those in which the right and remedy are substantially the same in both places; in this class the distinction must be made between cases arising under the common law and those arising under statute.

In cases one, two and three no redress is given.

Class four requires more careful consideration. The American courts presume ordinarily that the common law is in force everywhere, unless the contrary is pleaded and proved. If, therefore, the matter complained of be a tort at common law redress can be had. If the wrong is not a tort at common law, but is under a statute in force where the act was done which is substantially the same as the statute on the subject in the state where suit is brought, then redress may be had, but the existence and terms of the statute where the act was done must be pleaded and proved by the person to be benefited thereby. If there is any substantial difference between the statute where the act was done and the statute where the suit is pending, this, under the later cases, seems to defeat the right to the suit.

Contract.

As contract rights and duties grow out of the acts of the parties thereto, and not out of direct act of the sovereign, they are regarded as transitory, and go with the person into whatever jurisdiction he may be. So if the agreement is valid in the country where it was made usually it will be enforced wherever the parties may be found. However, it must not be contrary to the criminal law or public policy of the place where it is sought to be enforced.

CHAPTER IX.

SPECIAL KINDS OF CONDUCT AFFECTING LEGAL RIGHTS AND DUTIES.

In our consideration of legal rights, we have found that some of them are inherent in man as an individual, and would exist in him if there were but one man. Others are not so inherent, but pertain to him only in connection with and in relation to other persons and things, and that the relations out of which these grow differ. Some are social relations and some governmental; and of each of these there are numerous subdivisions. It is also apparent that many of these relations are concurrent, and that the same individual may, and in practical life really must, sustain a great many of these relations at the same time, and so will have many legal rights and owe many legal duties differing in kind and consequences, at the same time. It is also apparent that life and its various relations are constantly changing, and that these changes are individual as well as collective, and hence each person has different legal rights and duties at different times.

These changes in legal rights and duties involve, first a change of fact and second the law's recognition of this change in fact as sufficient to work a change in legal right and duty; that is, if a person at a given time has certain fixed legal rights and duties and some new fact comes into his life, this new fact may or may not change some one or several of his legal rights or duties. This will depend upon the law's recognition of the fact as sufficient to have this effect, or its failure so to recognize it.

Suppose A owes B one thousand dollars, which is due. Here B has the legal right to demand and receive from A that much money, and A owes the legal duty to pay it. The legal relation of debtor and creditor exists between the two. A pays B. This fact is recognized by the law as destroying B's right to demand and receive the money and A's duty to pay it. It completely ends the relations of the parties as to that debt, B no longer being creditor and A no longer being debtor. But suppose that,

instead of paying B, A should ask of him an extension of time of payment, and B, without any consideration for so doing, should tell A he could have an additional six months in which to pay. This would not in any way affect their legal relations, because the law does not recognize such a promise as valid, and will not undertake to enforce it. Having no consideration, and being executory, the law will pay no attention to it, and B could sue A the next day and recover judgment. The difference is this: in the first case, A and B have done certain things which the law recognizes as sufficient to change their legal rights and duties. In the second, they had done certain things which the law does not recognize as sufficient for that purpose. Before we are competent to judge of the legal rights and duties of any person at any time we must have some knowledge of the kind and quality of conduct which is recognized in law as sufficient to create, modify or destroy such rights or duties.

The rights which are known as personal are not created by conduct. They are inherent in human personality and come into being with life. They may, however, be modified or destroyed by conduct. All other rights are, however, dependent upon conduct for their existence, and so may be and are created as well as modified and destroyed by it. The questions necessarily arise: What kinds of conduct does the law recognize as sufficient to modify or destroy absolute rights, and to create, modify, or destroy others? Detailed answers would cover the whole body of Civil and Criminal Law. We may, however, get fairly accurate general conceptions, which will be very helpful as foundation or basic doctrines, out of which, in their various combinations, all the detailed rules of law proceed.

CONDUCT VIOLATIVE OF CRIMINAL LAW.

Rights of individuals may be lost or modified by conduct violative of criminal law. Such violation may result in loss of property rights, as when the penalty is a pecuniary fine; or loss of freedom of action, as when the punishment is imprisonment; or even in loss of life as when the crime is so heinous as to require the death penalty. The rules regulating conduct which leads to such result constitute the Criminal Law, in all of its minuteness. In some States these rules are embraced in common

or unwritten law. In the Federal Government and in a number of the States, the entire Criminal Law is set out in statutory enactments, and no act or omission is punishable as a crime unless it be expressly so provided in the acts of Congress, on the one hand, or of the State legislature on the other. It would not be profitable to take up these Criminal Law rules at this time.

CONDUCT AFFECTING PRIVATE RIGHTS.

Passing to conduct affecting the rights of individuals as between or among themselves we find it impossible of comprehensive and accurate classification. There are, however, special kinds of conduct very frequent among the activities of life which may be studied profitably though not with the exactitude of scientific classification.

Some of these kinds of conduct we will present in the following order:

(1) Agreement resulting in contract,
(2) Agreement not resulting in contract,
(3) Conduct not in reality involving agreement yet dealt with as contract,
(4) Negligence,
(5) Fraud,
(6) Estoppel,
(7) License,
(8) Waiver,
(9) Laches,
(10) Limitation,
(11) Notice,
(12) Death.

Agreements Resulting in Contract.

Agreements having the characteristics recognized by law as giving them validity are the most usual and simple means by which legal rights and duties are created, modified, and terminated. Such agreements are called contracts. We have also found that the essentials of contract are (1) Actual meeting of the minds of the parties, including both understanding and will, (2) Legally competent parties, (3) Legality of purpose, (4) Consideration, and (5) Proper form.

Contracts are divided into several different classes. The most important of these for our present purpose are into executory and executed contracts and into express and implied contracts.

Executory contracts.—There is difference of opinion as to the proper distinction between executory and executed contracts. There is high authority, holding that an executory contract is one of which no term has been performed by either party and that performance by either party, makes the contract executed, though it be still unperformed by the other. The simplest line of separation is to regard all contracts as executory so long as one or more of the terms of the agreement consist of unfulfilled promises and we will use the words in this sense. Sometimes these unfulfilled promises are on both sides; that is, each party to the agreement may have undertaken some one or more acts or forbearances for the advantage of the other, and all or some one of these undertakings on both sides may still be unperformed. Such a contract would be executory on both sides, because each would still be bound or obliged to do something in fulfillment of the agreement. Such a contract is bilaterally executory. Sometimes the unfulfilled promises are only on one side; that is, one party has done all he has undertaken to do, but the other has not, and so still rests under legal obligations to fulfill his part. Such a contract is unilaterally executory.

Executory contracts, whether unperformed by one or both, are, as to the parties, who have not performed subsisting promises, which are taken into account and enforced by law.

Executed Contracts.

Executed contracts are those which have been fully performed on both sides, so that nothing remains to be done under them. It is frequently held that full execution discharges the contract by fulfillment, and so destroys it. This is true where the agreement is regarded simply as a basis of legal obligation; but when the agreement is looked upon, as we are now doing, as a means of creating, modifying or destroying legal rights, it can not be dismissed from legal consideration; for it, though performed as a promise, is still the basis of present subsisting legal rights.

To illustrate: A promises to sell to B a designated thing for one thousand dollars, the thing to be delivered in thirty days,

and the money to be paid in sixty days. Before the first thirty days expires the agreement is bilaterally executory, neither party having performed. When the thirtieth day comes and A delivers the thing, he performs or executes his part, and for the next thirty days the contract, from A's point of view, is unilaterally executed; from B's point of view it is unilaterally executory. The sixty days elapse, and B pays. The contract becomes bilaterally executed. Nothing more is to be done under it by either party, and in that sense it has become a thing of the past, *functus officio.*

But the agreement had a wider scope than simply binding each and both of the parties to do something. Its real design was to change the ownership of the thing which was sold. Before the contract it was A's; by the contract, it became B's. This ownership is a continuing condition, or relation, and B's estate, having grown out of and been secured by the contract, is a continuing right; and the contract still exists as the basis of this right. If A should become unmindful of his agreement and sue B for the thing, B would interpose A's contract of sale as an insurmountable barrier between A and the reclaiming of the thing. So, as a muniment of title and basis of right, the executed contract still lives. The continuing nature of the executed contract to sell is readily apparent, as a basis of this right. The same is true when considered as a prevention of or defense against liability. Suppose, in the case put, B should afterward want his thousand dollars back, and sue A for it, saying the money was his and he let A have it, and now he was entitled to have it repaid. A could reply to him: "You let me have the thousand dollars at the time claimed, but you did so in the discharge of your liability under your agreement, and that agreement entered into your conduct in paying and into mine in receiving the money, and in this sense and for this purpose it still lives and must be recognized. You can not get back your money." So we must fix in our minds that whatever words and forms of expression we use, contracts do not drop out of the business life of the world, or of the law's cognizance, simply because they have been fully performed by both parties.

Express Contracts.—Express contracts are those in which all the terms are definitely understood and expressly stated in words.

They may be either written or oral. In such agreements nothing is left for presumption or implication and the intent of the parties and their consequent rights and obligations are determined by the language used between them.

Implied Contracts.—These are dealt with as of two kinds, contracts implied in fact and contracts implied in law.

Contracts Implied in Fact.—Contracts implied in fact are those in which the minds of the parties have really met though some of the terms of the agreement have not been expressed in words but are clearly indicated by other conduct of the parties, interpreted by the customs and habits of the parties and of the community in which they live. In such cases the terms of the agreement not expressed in words are gathered or implied from all the facts and circumstances of the case. These are really the only true implied contracts.

The distinction between the two, express and implied contracts, may be made clearer by illustration. Thus, if A goes to B's store and says "I wish to buy this sack of flour," pointing out a particular sack, "and will give you two dollars for it tomorrow if you will send it to my house this morning," and B says, "All right, I will send the flour." This is an express oral contract. Its parties, subject matter, and terms are all shown conclusively by the language used. There is nothing left to be added by implication.

If B owns a store and A is in the habit of buying goods from him on a credit and A goes to the store and says to B "Send a sack of good flour to my house and charge it to me," and B says "All right, I will do so." Clearly there is an agreement here. A portion of it is expressed in words. A has indicated his desire and offer to buy from B a sack of good flour to be delivered at A's house within a reasonable time, and to pay to B its fair market value according to the course of business dealing between them. B has accepted A's offer and indicated his purpose to sell A the sack of flour on the terms proposed. Still the agreement did not in language indicate the amount that A was to pay or when payment was to be made. As to these two items the agreement is indefinite, but it is perfectly plain that A intended to pay something for the flour at some time. The law permits a jury to interpret the conduct of the parties reasonably, according

to the customs and course of dealing between them and make these indefinite terms to the contract certain. Still it cannot be designated an express contract and is known as an implied contract. Speaking a little more accurately, it is a contract implied as a fact from the conduct of the parties. When the terms are thus implied as facts the legal effect of the contract is just the same as if all its terms had been set out in the most accurate language.

Contracts Implied in Law.—There is another class of so-called implied contracts, usually designated as contracts implied in law or quasi-contracts. These arise from states of fact in which it is apparent that no agreement, definite or indefinite was entered into between the parties but which are of such nature that common honesty requires that the parties should be compelled to adjust their rights and duties just as if a contract had existed between them. They really are not contracts at all, but are states of fact to which the law arbitrarily applies the fiction of agreement and compels settlement between the parties as if they had agreed to do what the law conclusively finds they should have agreed to do.

Agreements Not Resulting in Contract.

The next question for consideration is: Are agreements, lacking some one or more of the characteristics essential to contracts, ever sufficient to create, modify, or terminate legal rights? If we consider agreements strictly and simply as such, they are not. No agreement, not constituting contract, and entirely unexecuted on both sides, is ever enforcible in law or equity.

While this is true, still such agreement, aided by other facts, does frequently create, change, or destroy rights. We will consider, briefly and in order, agreements lacking one of the essential elements of a contract, and ascertain, if we can, the circumstances under which they have the effect indicated, and the reason for giving such effect.

Agreements Lacking Competent Parties.

A perfect contract, binding alike on both parties, can not exist except as between two or more parties, all of whom are capable, in law, of assuming obligations. This idea is frequently expressed by saying that contracts must be mutual, and that an undertaking

which seeks to bind only one of the parties and leaves the other unbound is not binding upon either. This is the general rule. Agreements, otherwise good, are not usually void because one party is under legal disability, but the capable person can be compelled to comply, if the incapable one shall perform his part, or tender to do so. This is true as to all classes of natural persons. It is not true of corporations which have entered into agreements which they are not authorized to make. These, so long as executory on both sides, are void.

If the incapacity be infancy, and if the contract be for necessaries, both are bound, but if the contract is not for necessaries the adult is bound, though the infant may repudiate it at the time and under such rules as to restitution as the law prescribes.

If the incapacity be mental unsoundness, if the contract be for necessaries, both are bound. If not for necessaries, the capable person is bound and also the incapable one, unless the capable one knew of the mental unsoundness of the other, or he had been legally adjudged unsound. In either of the latter events, the contract can be repudiated by the incapable person. If the capable one acted in good faith, restitution must be made, so far as may be.

If the incapacity be coverture, the contract is binding upon the capable party; and, if executed and evidenced in due form of law, it is binding upon the married woman also. If it be executory as to the woman, she can not be compelled to perform, unless it be for necessaries for herself or children, or for the benefit of her separate estate.

If the contract be with a corporation, and is simply unauthorized, and has been performed by either party, the other can compel performance or restitution. This last doctrine is an important one, and needs some elucidation. Corporations are authorized only to do the acts and transact the business covered by their charters. If they enter into an agreement to do an act not embraced in their charter, this agreement, so long as executory on both sides, is absolutely nonenforcible. If it is performed by either the corporation or the other party, the one so performing can compel performance by the other; that is, the unauthorized agreement is validated by unilateral performance. This is the

rule fixed by the weight of authority, including the Supreme Courts of the United States and most, if not all, of the States.

The peculiarity is not in the rule or its results, but in the reason given for it. The prevailing custom is to say that the one who has received the benefits, under the agreement, is estopped to set up the want of legal power in its execution. The standard definitions of estoppel all include the idea of deception. He who has deceived another to his prejudice can not be heard to controvert the truth of his own former statement, is its basic principle. In the class of cases now under consideration, the element of deception is almost always lacking. The courts pay little, if any attention to its presence or absence, but enforce the agreements, or require restitution, as well in those cases in which both parties have been equally cognizant or equally ignorant of the facts as in those in which there has been deception. So, in reality, they are not cases of estoppel at all, but are illustrations, pure and simple, of the law's requirement of common honesty in business dealings, where there is no element of affirmative illegality in the transaction.

Recapitulating, we find that a fully executed agreement between a capable person on one side and an incapable one on the other is good, as against the capable person. It is good as against the incapable person, if she be a married woman and the agreement is executed in the forms of law. If the incapable be an infant, or person of unsound mind and the agreement be for necessaries, it is good. If it be not for necessaries, the infant can repudiate it, in a reasonable time after his majority, by making restitution of such of the proceeds as he had when he attained his majority. If it be not for necessaries, the person of unsound mind can repudiate it by making restitution, as far as in his power, if the other party knew of the mental unsoundness and acted in good faith. If he did not act in good faith, complete restoration is not required. If the unsoundness was not known to the capable, and had not been judicially declared, the agreement will be enforced. If the party be a corporation, and the agreement simply unauthorized, its execution vests the rights of the parties, and neither can avoid it.

If the agreement is between natural persons, and is executory, it is binding upon the capable person, but not on the incapable.

If it has been performed by the incapable party, he can compel performance by the capable one, or he may repudiate it, under the rules as to restitution given as above. If it has been performed by the capable, he can not repudiate it nor compel restitution, under the doctrines stated above.

If the agreement is with an artificial person, and beyond its powers, neither party is bound, if entirely executory; but if fully executed, both are bound. If unilaterally executed, its enforcement can be compelled by the party performing, subject to the right of the other to restore what has been received under the agreement. These seem to be the rules as to change of rights and assumption of liability by agreement which falls short of perfect contract, because of lack of legally competent parties.

Agreements Lacking Consideration.—These agreements should be considered under three heads: (1) Ordinary common law agreements not under seal, (2) Common law agreements under seal, and (3) Agreements of the Law Merchant.

(1) It is a thoroughly established doctrine that an unsealed, executory Common Law agreement is not enforceable unless it has legal consideration. So long, therefore, as such an agreement remains executory it cannot be the basis of legal right or liability. It does not follow, however, that when such agreement has been voluntarily performed it does not affect legal rights. Just the opposite is true. Such an agreement, fully executed, will vest legal rights, although but for the voluntary performance it would have been without legal effect.

To illustrate: if one person promises to give a designated thing to another and the latter agrees to receive it, this agreement, while it remains executory is unenforceable at law or in equity because there is no consideration supporting it. But, if in pursuance of the promise the donor delivers the thing to the donee, the title passes to the donee and the donor cannot reclaim it. Stating it tersely, a promise to give is not enforceable; a consummated gift passes title. Under some circumstances third persons who have just debts against the donor may follow the gift into the hands of the donee and subject it to the payment of the donor's debts, but as between donor and donee the title has passed as irrevocably as it would upon the sale of the article.

One of the most interesting classes of agreements unsupported by consideration comes under the general head of license. License, in its broad sense, is very comprehensive, covering and giving legal character to that large part of human activity, lying between conduct in the exercise of the legal right of the actor on the one hand, and conduct violative of the legal rights of other persons on the other. In this broad sense the subject does not come within our present topic.

We are here concerned only with those licenses which arise by agreement with the licensor, unsupported by any legal consideration from the licensee. Such licenses are perfect examples of the kind of agreements now under discussion and follow the general rules of law governing them. We, therefore, find that an unperformed or executory license is without legal force as to the future and may be revoked at the will of the licensor, and further, that a license which has been fully performed, has entered as a fact into the lives and relations of the licensor and licensee, and has fixed permanently the legal nature of the acts performed under it, and cannot be disregarded by the licensor or by the courts in determining the legality of such action.

If the license was designed to extend over a series of acts or a period of time, and is unsupported by a consideration, but has been acted on to some extent or for a portion of the contemplated time but not fully, it, and the rights of parties under it, are subject to both the rules of law just stated; that is, such license is subject to revocation at the will of the licensor without creating any liability on his part, but it will nevertheless be a complete defense for any action taken by the licensee thereunder, before revocation.

(2) Common Law agreements under seal are said to import consideration and be enforceable. The form of the agreement gives it higher dignity and it will be enforced by the courts even though it is an executory promise. Whether this validity is conclusive, and lack or failure of consideration can not be plead or proved against such an instrument or is merely *prima facie*, permitting the agreement to be avoided by proof of lack or failure of consideration, in the earlier periods of the law, is not clear. The tendency of the later cases and the weight of American au-

thority is to the effect that the seal is only *prima facie* evidence of consideration and that by proper pleading and proof the agreement can be avoided either for lack of or for failure of consideration. In many States the doctrines regarding sealed instruments have been abolished or modified by statute. Some of the statutes bring the sealed instrument down to the level of other written agreements, while others raise the unsealed instrument up to parity with the sealed.

Sealed instruments which have been fully executed effectively pass legal rights, whether they were originally supported by consideration or not.

(3) There are certain kinds of contracts for the payment of certain sums of money at a certain time, known as promissory notes, bills of exchange, and checks which may be made payable to a designated person or his order, or to bearer. These are called negotiable instruments, and pass from hand to hand like money. They are not Common Law contracts, but of the Law Merchant. That is, the Common Law, which is a purely English product, did not recognize such contracts. But the merchants of Continental Europe found them exceedingly useful in their business enterprises, and, by their habit of dealing, introduced and used them among themselves. Gradually their business convenience was recognized in London and other English cities and more gradually still the English law adopted, to some extent, the custom or law of the merchants and made it a part of the law of the realm.

The Law Merchant did not regard consideration as a necessary part of a contract, and in the adjustment of the two systems, a compromise was made on this subject, the result of which is substantially this: As between the original parties to the instrument and all others, except innocent purchasers for value and without notice, consideration is necessary to the validity of the promise; but the existence of consideration will be presumed, unless its want or failure be shown. As between the payors of the instrument and one purchasing it in due course of trade before its maturity, paying value for it and having no notice of the absence of consideration, this presumption of consideration is conclusive, and the payors are not allowed to show its absence.

Agreements Defective in Form.—Ordinarily, in American law, contracts, otherwise meeting the requirements of the law, are

valid without reference to the means by which they are evidenced. That is, in the great majority of instances, the law does not prescribe any particular methods by which the agreements of parties shall be created or evidenced; but any manner of manifesting the agreement, whether by written or spoken words, or by conduct, is sufficient. There are, however, numerous agreements as to which the law does prescribe certain formalities, namely: expression in written words, duly executed by the persons to be bound. Most of these requirements are embraced in the enactments known as the Statutes of Fraud. The purpose of such enactments is to give certainty and permanence to such contracts, and thus to guarantee to all parties to them the quiet and secure enjoyment of their rights thereunder. These statutes are of English origin. These English statutes are not recognized as Common Law, and so are not of force in America. Desiring to enjoy the benefits arising from their general provisions, the several American States have enacted laws covering their main features, though differing in their scope and details.

These statutes usually require all contracts for any of the following purposes to be in writing:

(1) All conveyances of land, or estates in land, for longer than a designated period.

(2) All undertakings by one person to answer for the debt, default, or miscarriage of another.

(3) All contracts not to be performed within one year.

(4) All contracts by the representatives of the estate of a deceased person, to become personally responsible for the debts of the deceased.

In some States other classes of agreements such as contracts in consideration of marriage and sales of goods, etc., of a designated minimum value, are embraced; but the four classes named above are the ordinary and typical requirements.

We are not now considering the construction of these several statutes, nor to what class of contracts they apply, but this: If it be conceded that the statute does apply and has not been complied with in a particular agreement, may such an agreement still be effective to create, modify, or terminate legal rights?

In a few cases, arising under the first subdivision given above, relating to conveyance of land, such an agreement does have such effect. If one person shall sell to another a designated

parcel of land and put him in possession of it, or acquiesce in his taking and holding possession, and the purchaser shall pay all the purchase money and make improvements on the land, the agreement to sell will be enforced and the seller be forced to make a written conveyance of the property. The reason given by the courts in announcing this rule is that the statute was enacted to prevent the perpetration of fraud, and that to insist upon the letter of the statute under the facts as set out above would be to make it the instrument of its own overthrow and work a practical defeat of the legislative purpose in passing the law. This is but another long way of saying that one must observe common honesty in his dealings. I do not mean to convey the idea that this principle is always, and under all circumstances, recognized and enforced by the law, but that it is one of its cardinal principles, and is one which, year by year, is coming to have more influence both in statutory enactment and in judicial decision, and that the world's progress in intelligence and moral development is gradually establishing this as the standard of conduct in business affairs.

There seem to be no relaxations of the statutory rules in agreements falling under the second, third, or fourth subdivisions. The only relief given as to them has been in the construction of the statutes and the refusal to apply them in cases in which manifest injustice would result, if the application could be avoided by any fair interpretation.

Agreements Lacking Legality of Purpose.—The rule here is that "from a violation of the law no cause of action can arise" in behalf of the wrong-doer. This maxim, and the principle on which it is founded, render unenforcible all executory agreements tainted with unlawfulness of purpose in mind of both parties. This is true not only when the agreement is bilaterally executory, but also in cases of unilateral execution. The one who has performed his part of the contemplated wrong can not, by reason of his wrong-doing, compel the other either to go forward with the agreement or to restore what he has received under it. The same holds true in cases of bilateral performance. Neither party can get relief against the other, because each, being a wrong-doer in the very matter out of which he claims that his right has arisen, has, as to enforcement or rescission of the agreement, put him-

self without the pale of the law, and has no standing in court. The law leaves both parties to such an agreement just where they have put themselves, and will not interfere between them.

From this it follows, as a consequence, though not as an intended or desired one, that such agreements, so far as executed, are sufficient basis for legal rights created thereby. Take the familiar example of a debtor who desires to defraud his creditors and who, for such purpose, transfers property to a third person, to prevent its seizure and sale for his debts. This intent to defraud is unlawful, and both of the parties to the conveyance having participated in it, neither can come into court and maintain a suit for its enforcement. Nor can the debtor, after he has compromised or otherwise relieved himself of his just debts, compel the fraudulent holder of the property to restore it to him. He can maintain no suit on the fraudulent agreement either to enforce it or set it aside. The title, therefore, as between the parties to the fraud, remains where they placed it. Nor could a third party, not affected by the fraud, dispute the title of the grantee. It is no business of his how the property was acquired. If, however, the creditor whom both the grantor and the grantee designed to defraud should ascertain the facts, he could proceed against the property for his debt, establish the fact that it was sold to defraud him, and subject it to the payment of his debt. The same is true of other agreements having unlawful purposes, as between the parties they cannot be made the basis of litigation, but the law leaves each without remedy as against the other. As to third parties not included in or specially affected by the unlawful design, they are good, as basis of property rights. As against persons sought to be injured thereby, they are inoperative.

Conduct Lacking Element of Assent and Yet Dealt with as if Contract. Quasi-Contracts.—The condition stated in the paragraph heading is an anomaly, yet it is an existing one in England and those jurisdictions in which the methods of judicial procedure are based upon the Common Law. There are two grand divisions of the law: the first embracing the rules governing substantive rights, and the second those covering remedial process or procedure. These necessarily act and react upon each other. As a substantive right has no beneficial existence unless the law of procedure gives a practical remedy for its violation, absence of

remedy is fatal to its enjoyment. In this way the substantive law is limited by the law of remedy.

At an early day the remedial process of the Common Law became fixed. There were certain established methods of procedure, called forms of action. Each of these began with its appropriate writ and concluded with its appropriate judgment. The form of each of these writs was fixed and unchangeable. This writ determined the method of procedure in the case and the nature of the remedy which could be granted. If a party had a substantive right which, according to these forms of action, should have been protected by an action of one kind and he erred in the selection and attempted to establish his right in another form of action, the mistake was fatal, and no remedy at all could be obtained. He could not recover the remedy appropriate to his right, because the fixed form of action to which he had resorted did not permit; he could not recover the remedy appropriate to the form of action because his right did not entitle him to that.

These forms of action were grouped into two classes: those *ex-contractu* and those *ex-delicto*, between which there was a great gulf fixed. In the first group were put all actions for breach of contract, and in the second all for tort. The fixed forms of procedure were binding upon the courts, but, fortunately, they were not binding upon the social and business world; these continued to develop and, in their development, new combinations of fact and new rights and duties necessarily arose. These rights were not always adjusted between the parties, and resort to the courts became essential. Under this pressure the courts were constrained to do substantial justice, notwithstanding the forms of action and adopted legal fictions. Instead of changing the rules of procedure, they would declare, as a matter of law, that things were true which they, and everyone else, knew were not true, and by this fiction would bring a case within a given form of action, when, in reality, it did not belong there.

This was the process in the matter under consideration. Certain states of fact arose for which the forms of action provided for breach of contract were convenient and appropriate, but they could not be used because, as soon as it developed on the trial that the rights of the parties were not based upon contract, the

case would be thrown out. To obviate this the courts said: "We will adopt, in advance, the legal fiction that these facts are to be dealt with as if the parties had entered into certain agreements, and the objection that they did not shall not be considered." This course of dealing led to the name quasi-contracts, that is, facts not really constituting contract but which, by fiction of law, are dealt with as if they did. We can readily forgive the legal fiction and its adoption, in this instance, for the very laudable purpose for which it was indulged in, viz.: the prompt administration of practical justice. Professor Keener, in his work on Quasi-Contract, says that the principle upon which the whole doctrine is based is "that one person should not be allowed unduly to enrich himself at the expense of another." This is a good statement of the rule, within the limitations put upon by it by the author, and it ought ever to be enforced. However, it seems to me but a special application of the broader doctrine of common honesty.

The cases dealt with as *quasi-contract* are so different in their facts that it is difficult to generalize from them, but they all present these features: One or more persons, by some course of conduct, obtain an advantage over another or others, so unjust and so unconscionable as to shock the moral sense of the man of average judgment and conscience; and the law, as the exponent and authoritative embodiment of common judgment and conscience, will not permit the transaction to stand, but compels an adjustment of the equities between the parties in such way as may be most just, under all the circumstances.

CHAPTER X.

SPECIAL KINDS OF CONDUCT AFFECTING LEGAL RIGHTS AND DUTIES (CONTD.)

NEGLIGENCE.

Negligent conduct is very important and far reaching in its consequences. It is frequently quite as hurtful to another and his rights to fail to observe duties due to him as to do him affirmative injury. Failures to discharge specific duties are most frequently dealt with under the specific heads of law regulating the rights and duties involved, and are not now under consideration.

After dealing with these specified failures, as each seems to warrant, declaring a great many things that must, and a great many other things that must not, be done, the law admits its inability to cover all kinds of objectionable conduct, or at least the undesirability of attempting to do so, and says that, in addition to all these specific rules, the fundamental principle that every person must so conduct himself and so use his own as not unduly to interfere with the just rights of others, requires that each person shall observe a reasonable degree of care in regulating himself so as not to injure other persons. This reasonable care being thus imposed as a legal duty, failure to observe it becomes a legal wrong, which is denominated negligence.

We may, therefore, define negligence as the failure to observe that degree of care for the welfare of another which the law enjoins as a duty.

It must be noticed that the gist of the wrong is a failure to perform duty and not the motive which prompts the failure; that is, negligence, in a legal sense, is a failure to observe a legally required degree of care for the welfare of others, and not a mental condition or attitude. The failure may result from inadvertence, forgetfulness, misapprehension, or design; but the law does not require the injured party to look into the mind of the wrong-doer and determine at his, the sufferer's, peril what his, the wrong-

doer's, mental attitude really was. That can be known, certainly, only to the negligent person, and to require the sufferer to prejudge the fact, and determine whether the wrong proceeded from forgetfulness or willfulness, and thus put him in the power of his adversary, would be manifestly unjust. Therefore, the law says the wrong-doer having failed to use the degree of care required for the protection of his fellow, must make good to him the injury he has sustained. If, in any particular case, there be willful intent to injure, and this is known and can be proved, it will subject the wrong-doer to larger penalties in addition to the just compensation he is required to make.

Sometimes conduct is characterized as grossly negligent. This means that there is such entire absence of care as to indicate a wanton and reckless disregard of the rights and interests of others. In a few instances of positive written law, negligence must be gross to give a cause of action; but this is rarely, if ever, true, except in cases of positive requirement of the written law.

We have defined negligence as the failure to observe that degree of care for the welfare of another which the law requires as a duty. The question necessarily arises, what degree of care is thus required? The answer is obtained by resort to the law's unit, or standard, of measurement, the average man; and we find that the care required is such as an ordinarily prudent person would have exercised under the facts and circumstances of the case. So universal has this idea become, that the ordinary definitions of negligence are substantially one or the other of the following:

Negligence is the failure to use that degree of care for another which a reasonably prudent person would have used under the circumstances; or,

Negligence is the doing some act, to the injury of another, which a reasonably prudent person would not have done, under the circumstances; or the failure to do some act for the protection of another which a reasonably prudent person would have done, under the same circumstances.

In many connections, either of these definitions is practically correct, and many charges by judges to juries trying cases of this kind containing one or the other have been commended. They do not, however, give a correct general conception of the subject,

for the following reasons: While the average man, or man of ordinary prudence, which is the same thing in this connection, is always the law's standard by which to measure conduct, still, in some cases, the application of the standard to the conduct is not left to be made by judicial officers in the progress of a trial, but has antecedently been made and the result announced as a matter of law.

Sometimes this antecedent application and annunciation of rule has been made by the legislature, as in case of a railroad train approaching a public road-crossing. Here the legislature has determined that the average man, in control of appliances as dangerous as a railroad train, when approaching a place where others have equal rights with himself, would give reasonable notice of his presence and intention. It therefore declares, by statute, that such notice must be given by certain required signals, and further declares that failure to give such signals is negligence.

Sometimes the antecedent application and announcement has resulted from long experience and numerous litigations and judicial decisions, which have become established precedents. Take, for illustration, the rules governing common carriers of persons. There are no statutory provisions on the subject, but from time immemorial such carriers have been doing business, and controversies have arisen between them and their passengers, and these controversies have been decided by the courts. By this process the degree of care which an ordinarily prudent person would use as a common carrier of persons has been deduced and declared, and we now have the established legal rule that it is the highest degree of practicable care. So, in trying a case of this kind, the judge does not charge the jury the general proposition that the carrier must use such care as an ordinarily prudent man would use under the circumstances; but, recognizing that the law has already determined that an ordinarily prudent person, acting as a common carrier of persons, would use the degree of care above indicated, the highest practicable, charges as a matter of law, that the particular carrier whose conduct is under investigation was required to use that degree of care.

These illustrations suffice to show the necessity of defining negligence as failure to use legally required care, and leaving

the degree of care in particular cases to be indicated in the general doctrine of the care of the average man, or in the terms of the particular rule which the law has formulated to govern the particular class of cases, as the nature of the case may determine.

FRAUD.

General Conception.

Fraud is a word in very general use. In ordinary parlance it means deception resulting in unfair advantage to the deceiver or in unfair disadvantage to the deceived. It is the deception resulting in hurt that really constitutes the fraud, though the word is frequently used as indicating the means by which the deception is accomplished. This necessarily results in confusion. It is therefore essential that we fix in mind this distinction, that fraud is the deception and not the means by which the deception is brought about.

Again, we must get clearly in mind that fraud is deception and not the motive operating in the mind of him who brings about or obtains advantage from the deception. If a person makes a false material statement knowing it to be false and intending thereby to influence another to perform some act which, will be of undue advantage to the deceiver, and does so influence him, the transaction is undoubtedly fraudulent. Again, if a person is himself deceived as to a matter and really believes a statement to be true when it is not, and so believing, makes the statement to another thereby desiring to influence such other and induce him to perform a certain act which is of material advantage to the one making the statement, and thus induces him to whom the statement is made to do the act, fraud, though not so readily apparent, still exists. The statement is false. It is made to influence and induce action by the party to whom it is made which he would not have taken but for the influence of such false statement. Under its influence, he acted to his hurt, and is thereby injured. There is deception as to a material point influencing conduct and directly resulting in hurt. This constitutes fraud. It is true that there was no intent to deceive at the time the statement was made, no intent to obtain undue advantage, but each of these results has in fact been accomplished,

and the injury to the deceived is just as great and as directly traceable to the deception, as if the intent to deceive existed.

There is a marked difference in the moral nature of the conduct at the time it takes place; in the one case, at the time the statement is made the man making the statement is a conscious and intended deceiver designing to obtain advantage; in the other case, he is himself deceived as to the facts and does not design to deceive his neighbor or to profit by falsehood. It would be quite unjust to regard him as intentionally dishonest at the time the transaction took place. If, however, when the facts become known to him, and when he is conscious that the statement from which he has derived material advantage is false, he continues to hold to this advantage and refuses to make proper adjustment with the party deceived, he is equally as guilty in morals, as if the intent to deceive had originally existed in his mind. We may therefore conclude that he who innocently deceives his neighbor to the latter's hurt, and refuses to make proper adjustment of the hurt when the deception becomes known to him, is as morally guilty as he who primarily designed to deceive in order to gain personal advantage.

This fact is not always recognized. It is much more commonly accepted now than it was in the earlier stages of social and ethical development. It is quite probably that among our ancestors centuries ago a very broad distinction existed between the two and that the present recognition of their moral equality has come about by the slow processes of general ethical development. As the law is a fairly correct register of the public conscience, this development in moral discernment should be clearly traceable in the growth of the law.

Legal Conception.

As heretofore stated law is based upon morality limited by practicability. The morality upon which any system of laws rests is necessarily that of the law-maker, and in governments where the law is made by the people it represents the average morality of the community, limited by practical considerations. From this point of view, the law represents, with fair accuracy, the common conscience of the people among whom it obtains so far as the rules of conduct approved by such common conscience can be practically enforced through governmental agencies.

Common Law Conception.—The general principles just announced and their operation are especially apparent in the rules of law and of equity as to fraud. In the beginnings of our jurisprudence when the Common Law was in its formative state, the English people recognized that it was morally wrong to knowingly deceive another to his material hurt. Hence the Common Law has always recognized known deception as to a material fact resulting directly in damage, as a legal wrong, and has always given a remedy therefor.

This rule being established by the decisions of the courts necessarily came within the doctrine of *stare decisis*. The cases announcing the rule became precedents and the exact language used in the decisions of the courts tended strongly to limit the law and prevent remedy for fraud unless it could be shown in the strictest sense that the party charged with the fraudulent statements knew them to be false at the time he made them. On the other hand, the just demands of a developing people for remedy in cases not within the exact language of the early decisions grew stronger as time passed on. The pressure finally became irresistible and relief from some source inevitable.

The first relief came through the Common Law courts by the extension of the meaning of the words known and knowingly as used in the ancient opinions. The first step was to include among known false statements all false statements made by a party as true, when he did not really know whether they were true or false but believed them to be false. This can hardly be called real extension, though it was so looked upon by the Common Law judges. In such a case there is every element of moral turpitude that exists in the case of a known false statement. The person making the statement is really ignorant as to whether it is true or false, but he believes it to be false, yet asserts it to be true in order to obtain advantage. He is clearly willing to deceive and an actual deceiver, and is morally and legally on an equality with him who makes a false statement knowing it to be false.

The next enlargement came by extending the words known and knowingly so as to include statements as to the truth or falsity of which the party making them had no information but which he believed to be true and, to support this belief, stated that they were true as of his personal knowledge; thus leading the other person to believe that he had investigated the matter

and found the statements to be true, and was affirming their truth as the result of such investigation. In such cases there is no intent to deceive as to the main fact contained in the statement, but there is intent to deceive as to the means of information upon which the statement is based, and by this incidental deception to increase the weight and influence of the main statement. The Common Law very justly says that in these cases there exists an intent to deceive in a matter so inseparable from the other facts which induce action by the injured party, that it is impossible to tell to what extent the falsehood really influences the injured party, and that this unlawful intent vitiates the whole transaction and puts it upon the same basis as a known false statement as to a material fact.

Further than indicated in the last two paragraphs, the Common Law courts of England, as such, do not seem to have gone in giving relief for fraud.

Recapitulating, we may state that the Common Law courts of England will grant relief for fraud as a tort only in cases in which the party making the false statement either,

(1) Knew the statement to be false at the time he made the same, or

(2) Did not know whether the statement was true or false but believed it to be false, yet stated it to be true, or,

(3) Did not know whether the statement was true or false but believed it to be true and accompanied such statement by the assertion that he knew it to be true.

One of the best definitions of fraud for which the Common Law courts will give relief is that given by Mr. Anson in his work on Contracts, as follows: "Fraud is a false representation of fact, made with knowledge of its falsity, or recklessly, without belief of its truth, with the intention that it be acted upon by the complaining party, and actually inducing him to act upon it."

Conception in Equity.—While the Common Law courts, in deference to their ancient precedents and the doctrine of *stare decisis,* have never gone beyond the cases just indicated in giving relief for injuries resulting from deception, the Equity courts have been, and are, more liberal.

These courts originated much later than those of the Common

Law and consequently established their doctrines and maxims at a time when the common conscience was better developed. In addition to this, the purpose of their creation was to grant relief in cases of manifest injustice for which no remedy could be had in the courts of the Common Law.

Among the earliest and most important classes of cases over which this new jurisdiction was extended were cases involving fraud. The cases under this head first brought to these courts were confessedly those in which the Common Law afforded no relief, because the injured party could not show that the deception resulting in his hurt had been knowingly brought about. To deny relief under such circumstances would have been to confess that in this respect Equity was no broader than Law, and thus to contradict the fundamental idea upon which the whole system of Equity Jurisprudence is based. Very logically, therefore, the courts of Equity declined to limit relief in cases of deception within the narrow boundaries of the Common Law on that subject, and entertained jurisdiction in many instances in which there had been real, although not intended deception. A new phrase was used to indicate this new doctrine, and for many years "Equitable Misrepresentation" has been as thoroughly recognized as a basis for relief in chancery courts as "Deceit" has been at Common Law.

Equitable Misrepresentation.—This phrase, in Equity, includes all cases of material deception resulting in injury to a person not chargeable with legal or equitable wrong, whether the party occasioning such deception did so consciously with intent to deceive, or unconsciously with innocent intent.

This equitable doctrine requires only two concurrent, fundamental facts; first, actual deception as to material facts, brought about or existing under such circumstances as to be justly chargeable to the conduct of one person and, second, hurt to another directly resulting therefrom. To entitle to equitable relief it does not insist on the existence of evil or improper motive on the part of the deceiver; but is satisfied with the two facts, deception through the conduct of one person and directly resulting hurt to another.

The number of cases which may be relieved in Equity under this doctrine but in which no remedy could be had at Common

Law is very large, and the practical results upon the law as a system of jurisprudence is very great.

These differences between deceit and equitable misrepresentation are still retained in United States' Courts and in most, if not all, of the States which recognize the old English distinction between Law and Equity. In a number of the States this distinction has been abolished by statute. The statutes having this effect are not identical and the consequent results in the different States are not entirely uniform. In some, the practical changes have not been great, while in others an action for damages can be maintained for equitable misrepresentation as fully, to all intents and purposes, as upon Common Law deceit.

Conduct Fraudulent per se.—In the last several paragraphs we have considered the question of motive as entering into the fraudulent character of conduct. In many cases this is very important and in a still larger number the fact of deception of some sort is essential to the law's conception of fraud. Notwithstanding this, there are a few classes of cases in which neither motive nor deception are of any consequence. These are those states of fact which are declared by law to be fraudulent in themselves.

When the law denounces a transaction as fraudulent *per se* the motive upon which the parties thereto acted, or whether anyone was deceived thereby becomes entirely immaterial. The law has set its absolute disapproval upon the transaction and the matter ends with that.

The classes of cases which are declared fraudulent *per se* are small and embrace only such transactions as give large opportunity for fraud and in which experience has taught that fraud very generally exists. Hence the law, taking a practical view of the matter, says that it is better to declare such conduct fraudulent within itself, and thus prevent opportunity for overreaching and unfair advantage, than it is to leave the matter open and sustain such transactions unless some complaining party shall be able to prove deception and consequent hurt.

One of the most common illustrations of acts deemed fraudulent *per se* is found in mortgages of stocks of goods exposed for sale at retail when the mortgagor retains possession of the stock and control of the business. Such a transaction in a given case

might be perfectly honest and of advantage to all parties, but the opportunity afforded to dishonest merchants acting in collusion with preferred creditors to defraud other creditors is so great. and the temptation is so strong, that as a matter of public policy the law declares that every such mortgage shall be deemed fraudulent.

Matter as to which Deception must Exist.—While the law recognizes deception as the very gist of fraud, it is still quite particular regarding the nature of the matters as to which the deception must exist and limits its recognition to deception as to material facts, past or present.

This doctrine eliminates from the conception of fraud mere matters of opinion or surmise. As to these the conjecture of the one party is legally supposed to be as reliable as that of the other, and unless a misrepresentation includes a fact, the party is not legally justified in relying upon it.

Thus, if a party desires to sell a horse and as an inducement to the purchase states that the animal has a certain pedigree and could easily be trained to trot a mile in two and a half minutes Here the statement as to the pedigree of the horse is a statement of a fact and if false, the deception as to this, if the other elements of fraud concur, is fraudulent. But the other statement as to the effect of training and the speed which the horse might attain as the result, is a matter of opinion as to which the law presumes the purchaser is as well qualified to judge as the seller, and fraud can not be predicated upon this statement.

It is also required that the fact pertain to something past or present. Statements as to matters to take place in the future are regarded in much the same light as opinions, at least they are looked upon as matters which no one in the ordinary business affairs of life is supposed to guarantee or assure.

When the statement as to the future assumes the nature of a promise the law looks upon it as an expression of intention and if it is the present intent of the promisor to comply with his undertaking, subsequent failure to do so, does not relate back to the date of the promise and make the transaction fraudulent. On the other hand, if at the time the promise is made the promisor has no present intention to comply with his undertaking, then, or at the time his promise matures, the law regards the promise

as a false statement as to a present mental condition and recognizes it as a fact, and if the other elements of fraud concur, will deal with it as fraudulent.

This distinction between a future promise honestly made, which is not deemed fraudulent, and a false representation as to a present mental attitude which is deemed fraudulent is quite clear in the case of the purchase of personal property. A man honestly intending to pay his account, according to agreement, buys goods from a merchant promising to pay in sixty days. Before the expiration of the sixty days some adverse conditions arise and the purchaser, though anxious to pay, is financially unable to do so. In this case, the law recognizes the honest intention of the purchaser at the time he bought the goods and holds that the title to the goods has passed absolutely to him, and is unaffected by his subsequent default in payment, and the only remedy of the merchant is to sue on his account and collect the debt. But if at the time the buyer obtains the credit he is acting dishonestly and has no intention of paying for the goods, and uses his promise to pay in the future to hide his present dishonest intent, and thus acquire possession of the goods of the merchant without paying him therefor, the law looks upon this promise as a subterfuge and declares the false statement as to the present state of mind and intention of the buyer to be fraudulent. Upon proof of such facts, the merchant could rescind the agreement to sell and get back the goods which had been fraudulently procured.

While the law does not ordinarily regard a promise to do in the future as a present fact, it scrutinizes very closely all statements by the promisor as to his present or future ability to perform, made as a basis for future performance. Thus, if a man desiring to secure credit, as an inducement to the extension of the credit, should represent that he now has a certain amount of property or a certain income, these latter statements relate to present conditions and if false are regarded as fraudulent.

Materiality.—Not only must the statement be as to a fact past or present but the fact must also be material. The law is intensely practical and does not justify a man in drawing silly or unreasonable conclusions and suffering himself influenced by matters not ordinarily or reasonably calculated to have such effect.

A material fact is one which, taken in connection with the other circumstances of the case, is reasonably calculated to influence the conduct of the party to whom it is addressed, and so to induce him to take the action desired by the one making the statement. The ordinary test as to whether or not any given statement is reasonably calculated to influence the party to whom it is addressed is the effect, that under the circumstances surrounding the parties, the statement would have upon a man of ordinary prudence and judgment. If in any particular case a statement not reasonably calculated to influence an ordinary man is relied upon as material because it did in fact influence the particular party to whom it was made, the peculiar circumstances which caused it to have such effect must be shown before the law will recognize the statement as material. These peculiar circumstances may consist of confidential relations between the parties, mental feebleness, or any other fact which actually causes the statement to have a controlling influence.

Means by which Deception is Accomplished.—Many expressions to be found in the decisions of the courts and in legal treatises make the means by which fraud is consummated so emphatic as to justify the conclusion that the artifice made use of to accomplish the deception is the fraud. Indeed high authority can be found for the proposition that it is not desirable to define fraud for the reason that as soon as its methods of accomplishment are enumerated by the law, and the whole ground of fraud is thus covered, evil disposed parties will find other methods by which to accomplish their purposes, and these, not being within the enumeration, the transaction could not be regarded as fraudulent.

Notwithstanding these authorities the true conception of fraud distinguishes between the deception and the means or artifice by which the deception is brought about and regards the deception as the basic idea in fraud. In thus dealing with fraud in its essence no danger can arise from a definition, if any one can be found capable of formulating one.

The means by which deception is accomplished or availed of in such way as to make any particular person responsible therefor as fraud involves two general questions. First, How was the deception brought about, continued, or permitted to continue? Second, What connection did the parties, sought to be charged,

have with such means? These two phases of the subject must be kept in mind or confusion will result. As fraud consists in deception resulting in injury, there can be no fraud as to any particular person unless he is actually under a misapprehension as to a material fact or facts, and no one is chargeable with fraud unless he has in some way responsible connection with the hurtful misapprehension. This guilty connection may consist in causing the deception or in affirmatively fostering and continuing a deception already existing, or in simple failure to disclose the truth. The first and second of these come under the head of affirmative conduct, and the third, under the head of negative conduct.

The means by which deception is caused or brought about is called misrepresentation; the means by which deception is affirmatively continued is called concealment; and the means by which deception is simply permitted to continue is called non-disclosure.

Misrepresentation.—This includes any and all conduct by which an untrue idea is conveyed to the mind and a false impression made thereon. It usually consists in words, oral or written, but this is by no means necessary. The method of creating the false impression is immaterial. If the false thought and belief are created in the mind of the party sought to be influenced thereby, the means by which this is accomplished is legally of little significance. Different methods employed may necessitate different means of proving the facts and in this way may make the actual establishment of fraud more or less difficult, but the legal effect, no matter by what means the facts may be proved, is the same. False impressions created in the mind by affirmative conduct always come under the general head of misrepresentation.

Concealment.—Concealment differs from misrepresentation in this: it never creates a false impression, but the wrongdoer finding the mind of him with whom he is dealing already under the influence of a false idea does something which is reasonably calculated to prevent, deter or hinder the deceived party from ascertaining the truth. Concealment goes beyond simple failure to relieve the mind of the deceived party of the false impression and in some way comes between him and the ascertainment of the truth. To all intents and purposes it is legally and morally as reprehensible as misrepresentation. Concealment always in-

volves affirmative conduct in some way and to some extent. Such conduct may be very slight and very limited but unless the wrong-doer in some way prevents or deters the deceived person in the ascertainment of the truth, properly speaking, he is not guilty of concealment.

Non-disclosure.—Non-disclosure on the other hand, is always purely negative, consisting in a failure to give information or relieve the mind of the deceived party of false impressions already existing. As we have already seen, failure to act does not come within the law's cognizance and jurisdiction unless the party so failing is under legal duty to do that which he has failed to do. Applying this general principle to the matter in hand neither law nor equity, as a general rule, holds a person responsible for failure to relieve the mind of another party of false impressions, unless the facts and circumstances in the case show it to have been a legal duty on his part to give information concerning the matter as to which the deception exists.

This duty of disclosure may arise from several states of fact.

(1) The duty arises and is enforced whenever there are confidential relations existing between the parties. For example, such as principal and agent, parent and child, trustee and beneficiary, attorney and client, etc. In each of these and similar relations the law enjoins upon the person trusted to make full and fair disclosures of all facts pertaining to or involved in the trust, and the failure to do so, if resulting in hurt to the party who is uninformed, leads to legal liability.

(2) While the ordinary rule of the Common Law in the sales of personal property is *caveat emptor,* which requires the purchaser to be on his guard and diligently exercise his own powers for his own protection, this rule is not extended to cases of latent defects not open to ordinary observation or discoverable by the use of ordinary care. In case of such latent defect it is the duty of the seller to disclose the same to the purchaser and failure to do so is regarded as fraud.

(3) In its tenderness for human health and life the law requires that those who sell food, or material from which it is known the purchaser intends to make food, shall disclose any and all defects therein, especially those which, in any manner, tend to make the food physically injurious.

(4) In later years there is a strong tendency to extend the doctrine announced in the last paragraph to sales of feed stuffs for animals.

(5) The same or a closely related principle is quite generally applied in the sale of diseased living animals, making it the duty of the seller, if aware of the fact, to inform the buyer of the diseased condition of the animal or animals offered for sale. This rule is more rigidly enforced when the disease is infectious or contagious and hence not only affects the value of the animals then subject to it but makes them a direct source of danger to other stock with which they may be brought in contact.

(6) In addition to the foregoing, there are occasional cases of great hardship in which the law gives relief. These are cases in which the means of information as to material facts are not equally open to both parties and in which the party having the information knows that the other is ignorant as to the facts, and consciously and intentionally takes advantage of such ignorance in procuring an agreement, which it is practically certain the ignorant party would not have made had he been advised of the facts, and thus obtains an unconscionable advantage. In such cases the courts scrutinize the facts very closely and require that injustice must be clearly apparent before relief will be granted.

Results of Deception.—To be actionable as fraud the deception must always result in pecuniary injury to the deceived party. If a person induced by false suggestion makes a contract which results in his pecuniary gain he cannot maintain an action on purely sentimental or ethical grounds. Thus, if a person, in order to sell a tract of land, should falsely represent that it was arable and productive and so should induce another to purchase it, if in fact the land though barren and unfit for cultivation had in it minerals, making it more valuable than farming lands, the purchaser could not maintain an action by reason of the false statements as to the productiveness of the land. The law looks largely to pecuniary results, and to a large extent awards its remedies in the form of money compensation for financial loss. Applying this rule to the example stated the purchaser's case must fail. Though he did not get just the thing that he desired he obtained that which was worth more on the market, and in legal theory his remedy is in his own hands, viz., to sell the valuable

thing which he has and buy the thing which he had formerly desired. So long as this remedy is within his own control the law does not undertake to give him redress through governmental agencies.

Parties Affected by Fraud.—In most fraudulent transactions the deception is produced or exists in the mind of one of the parties to an agreement. These cases fall under one or the other of the heads, fraud in inducement or fraud in *esse contractus.* These are discussed later.

There are, however, a good many fraudulent transactions to which the person injured is not a party, but is a third person whose rights are prejudiced by the fraudulent conduct of others. This prejudice results from some false state of facts or conditions brought about by the defrauding parties. These cases therefore come strictly within our original conception of fraud, viz., deception resulting in unfair disadvantage to the party deceived.

Classifications of Fraud.—Having thus considered the general features of fraud it may be well to give some of its ordinary classifications.

When classified as to motive, fraud is known as actual, constructive and fraud *per se.*

Actual fraud includes all cases of intended known deception resulting in undue advantage.

Constructive fraud includes those cases in which there was actual deception but no intent at the time to deceive.

Fraud *per se* includes those transactions which the law declares to be fraudulent without reference to the motive actuating the parties.

When classified with reference to the rules of Common Law and of Equity, fraudulent transactions are divided into deceit and equitable misrepresentation. This division is almost the same as that into actual and constructive fraud.

Deceit, which is actionable at Common Law, includes only cases of intentional deception. These embrace therein first, those instances in which the statement was known to be false, second, those in which the falsity of the statement was not absolutely known to the party making it but in which he believed it to be false, and third, those cases in which the party making the state-

ment believed it to be true but had not investigated to ascertain its truth or falsity yet stated it to be true as of his own knowledge.

Equitable misrepresentation includes those cases in which the statement was not known to be false and was made innocently, though in fact it was false. These cases are spoken of as equitable misrepresentation to indicate that courts of equity will afford relief in such cases although courts of law will not. If a case is one of deceit and adequate redress can be had at law, courts of equity will not take jurisdiction over it. If, however, there are facts and circumstances in connection with the case of such nature that relief at law would not be adequate, or if there are additional facts or circumstances which give jurisdiction of the case to courts of equity on other grounds, equity will take cognizance of and give appropriate relief for deceit.

The remedy for deceit at Common Law is by judgment for damage. The remedy in courts of equity for misrepresentation or deceit, when it takes jurisdiction of the latter, may be rescission of the agreement, or damages, or both, according to the facts of the case.

When classified as to the parties to be affected frauds are divided into those perpetrated upon one or more of the parties to the agreement and those in which some or all the parties to the agreement conspire to defraud a third person or persons.

Frauds, as between parties to the agreement, are subdivided into fraud in inducement and fraud in *esse contractus*.

Fraud in inducement may be defined as deception of one party to an agreement, unlawfully caused or availed of by the other party to the agreement, with regard to some material fact, by means of which deception, the deceived party is induced to give apparent, though unreal, assent to the agreement resulting in injury to the deceived.

This definition puts the stress or emphasis upon the deception of the injured party. He must be under a false impression. No one who knows the truth concerning a matter can claim to have been defrauded by acting on a statement regarding this matter which he did not believe to be true.

This deception must have been unlawfully occasioned or availed of by the other party to the agreement. It is absolutely essen-

tial that the party charged with fraud be in some way identified with the deception constituting the fraud. This identification or privity may be by affirmative conduct creating a false impression or by taking advantage of a false impression already existing in the mind of the other party and in some way preventing or hindering him from ascertaining the truth. These two phases are covered by misrepresentation and concealment. The identification may be by taking advantage of a known deception and failing to disclose the truth. A party is never legally responsible for failing to disclose the truth unless his relations to the other party or the nature of the particular agreement is such as to make it his legal duty to disclose the facts. This availing of deception without occasioning it and without doing anything to prevent the deceived party from ascertaining the truth is known as non-disclosure.

The deception must be as to a fact, past or present, not opinion or future promises, though a promise which involves a false impression as to a present mental condition is regarded as a false statement as to a present fact.

The deception must actually influence the party deceived, so that by reason thereof he gives his consent to the agreement sought by the other party. This influence must be so great that but for the deception the assent would not have been given. The assent resting upon this false and fictitious basis cannot justly be regarded, morally or legally, as equivalent to assent based upon truth. The assent based upon deception is properly held to be apparent only and unreal. If assent were given with full knowledge of the facts neither party would have cause to complain. If assent were given on a false basis when the party getting the advantage was in no way responsible for the deception it would be unjust to him to hold him legally liable therefor. The law would regard the injury of the deceived party as the result of his own fault in failing to advise himself, and not as the result of the conduct of the other party who had been guilty of no legal wrong.

The action induced by, and based upon, the deception must result in injury to the person deceived, otherwise he has no legal ground of complaint.

These are the essential elements of fraud in inducement. If all of them concur the law takes cognizance of the case as one of deceit or equitable misrepresentation according to the facts of the particular case.

Fraud in *esse contractus* consists of deception which results in obtaining false evidence of assent to a hurtful agreement to which no assent in fact was ever given.

The possibilities for fraud of this kind arise from the fact that some contracts are required to be evidenced by writing and that all contracts, if so desired by the parties, may be evidenced in this way. It is a general rule of law, when parties have reduced their agreements to writing and executed them as required by law, that the written instrument merges into itself all previous and contemporaneous agreements by the parties covered thereby, and is the best legal evidence as to the final understanding and promises of the parties. This is a salutary rule, in the great majority of cases, but it is not impossible that in some instances through carelessness or mistake, or willful wrong, the written paper should be really incorrect and, instead of embodying the real agreement, may mean something else. This possibility of difference between assent and the evidence of assent gives another opportunity for deception and unfair advantage. For illustration: One person sells another a piece of property for one thousand dollars, to be paid in six months, and the purchaser agrees to give his note for this amount, payable at that date. The transaction so far is perfectly fair, no deception has been practiced; the seller undertakes to prepare the papers to consummate the deal. In doing so, he prepares two notes for signature, one for one thousand dollars, payable in six months, just as agreed upon; the other for two thousand dolars. He submits the first to the buyer, who inspects it, and, finding it all right, undertakes to sign it. His attention is called off and the seller, without the buyer's knowledge, substitutes the two thousand dollar note for the one the buyer has just read. The latter, without negligence on his part, signs the note for two thousand dollars and delivers it to the seller, believing it to be the note for one thousand dollars. This is a case of fraud, not in procuring the original agreement to pay one thousand dollars, but in procuring the false evidence of that contract which shows the note

to be for two thousand dollars. Here the buyer's mind does not receive or act at all on a proposition to pay two thousand dollars for the thing; but, without any consciousness upon his part that he is doing so, he is deceived into signing a written instrument of whose terms he is ignorant, and evidencing an agreement to which he has not given even an unreal assent.

The distinction between this and deception practiced to procure the assent of the mind to the terms of the agreement, by misrepresentation as to material facts inducing the agreement, is readily perceptible. It is too plain and practical for the law to ignore it, and its recognition results in the separation of frauds between parties to contracts into frauds in inducement and frauds in *esse contractus*.

Results Following.

When conduct is fraudulent in the sense above set out, it is manifest that it has large influence in determining legal rights. If it constitute fraud as defined at Common Law, it gives to the injured party a right to compensation from the fraudulent party for all damages sustained directly therefrom and also gives a right to have the contract canceled in a court of Equity. If it does not meet the Common Law requirements as to known falsity, but comes within the equitable doctrine of misrepresentation, it entitles the injured party to cancel the contract, and compel restitution of what he has given under it. In several States it has either or both of these consequences, as the justice of the case may require. The fraudulent party can never take advantage of his own wrong to obtain relief from the consequences of the contract.

These results are usually stated by saying that a contract procured by fraud is voidable at the instance of the defrauded party, and that he can recover all damages sustained by him as a direct result of the fraud, but that the contract procured by fraud is binding on the fraudulent party.

Fraud in *esse contractus* is absolutely fatal to the validity of the instrument procured thereby. It can not be enforced by the original fraudulent party, or any one claiming under him, even though the instrument be negotiable in form and be in the hands of an innocent purchaser for value and without notice.

Frauds Upon Persons Not Parties to the Transaction.

These frauds are committed usually, if not always, by means of conveyances or other disposition of property upon which a third party has some claim or demand. Sometimes the claim on the thing may be some title or estate in it, sometimes it is a specific charge or lien, and sometimes it is a general right to collect debts by its sale under judicial process. The fraudulent purpose, actual or imputed, is so to deal with the property as to destroy or defeat the title or claim of the third party. Fraud of this kind is also both actual and constructive. It is actual, in those cases and as to those persons, who, conscious of the right of the third party, perform the act detrimental to him with the intent and purpose to delay or defeat such right. It is constructive, in those cases and as to those persons who do not know of such unlawful purpose, yet who are so connected with the unlawful act as to receive unfair and unconscionable advantage by reason thereof; and also in those cases which, from long experience, the law denounces as fraudulent, without reference to the motives of the parties, because they are so often accompanied by actually fraudulent purpose, or give such great opportunities for fraud. An example of actual fraud is found in the conveyance by an insolvent debtor of property subject to execution, made with the purpose to hinder, delay, or defeat the rights of his creditors. An example of the first kind of constructive fraud is found in the gift of property, subject to execution, by a person who believes he has enough left to pay his debts, but who, in fact, has not; and constructive fraud of the second kind is found in the mortgage of a stock of goods exposed to sale at retail and leaving the mortgagor in possession and control.

Fraud of the kind now under consideration affects legal rights differently, according to the circumstances of the case and the attitude of the parties toward the transaction. The rules may be stated, very generally, as follows:

(1) In cases of actual fraud, where the fraudulent purpose is known to both parties and shared in by them, the law will not undertake to enforce any executory terms of the fraudulent agreement, nor to restore either party to his original position. It simply applies the doctrine that from a known unlawful and immoral act no cause of action can arise to either party to the

transaction knowingly participating in the wrongful action; the vested rights of either are not in any way to be disturbed thereby. As to third parties having no vested rights at the time and not subsequently misled thereby to their injury, the transaction, and all of its consequences, are sustained. As to third parties thereafter acquiring interests for value without notice, and in good faith, the transaction will hold, so far as is necessary to protect such bona fide rights.

(2) In cases of actual fraud by one party, unknown and unparticipated in by the other, the transaction will not, in any way, protect the one having the fraudulent purpose. It will protect the innocent person, so far as equity may require; that is, if a party has paid value for property conveyed to him with intent to defraud the creditors of the seller, of which the purchaser had no notice, the creditors could not reach the property in his hands. However, if he had not paid value, but had taken the property as a gift, the creditors could still proceed against the property. He would be in no worse condition after than before.

(3) Acts declared to be fraudulent by the law. In these cases the intent of the parties to the particular transaction is of no consequence. For reasons of public policy, the law denounces all transactions of certain kinds as fraudulent and they can not be effective to the injury of third persons. If, however, they have been executed, they will hold, as between the parties.

CHAPTER XI

SPECIAL KINDS OF CONDUCT WHICH AFFECT LEGAL RIGHTS AND DUTIES (CONTD.)

ESTOPPEL.

Estoppel is cutting off or precluding a person from denying the truth of a statement previously made by him. It is applied to two classes of statements:

(1) Statements made in some solemn form, as by deed or some public record; or

(2) Statements which have deceived some one and by so doing have caused him to act in such way that it would be injurious to him to allow the party making the statement to deny its truth.

The first is called estoppel by deed and the second estoppel *in pais*.

Estoppel by Deed.—This is quite an ancient doctrine and has long been in high favor with the courts. It precludes or cuts off a person from denying what he or some one in privity with him has formerly declared to be true, in a formally executed sealed instrument or which he has solemnly admitted to be true in the course of judicial proceedings. The doctrine is based on considerations of public policy as tending to secure verity in public records and stability of rights held under solemn instruments.

Estoppel in Pais.—This doctrine is based on the same broad principle of justice as the Law against fraud, viz., that one person shall not be permitted to mislead another to the latter's injury. In fraud, he who has made the false statement inducing another to act thereon, when the deceived party finds it to his interest to set up the falsehood, is compelled to pay to the injured party the damage sustained by reason of the falsehood or else to put him back in the position he occupied before he was deceived. In estoppel, the deceived party finding it to his interest to compel the party deceiving him to settle with him upon the basis that the false statement is true, invokes the false statement and compels

adjustment upon that basis. In fraud the party injured by reason of the deception sets up the deception as a reason for not being bound by the agreement induced by it. In estoppel the party who has acted upon the false statement compels the one making the false statement to make that statement good by now acting upon it as true.

In the law of estoppel the terms misrepresentation, concealment, and non-disclosure have the same meaning as in the law of fraud. That is, one may be estopped by affirmatively making a false statement by which another is deceived, or he may be estopped by preventing one who is already deceived from obtaining correct information, or he may be estopped by failure to give information, when the circumstances are such as to make it his legal duty to disclose the facts.

The following conditions must exist to constitute an estoppel *in pais*.

(1) There must be a misrepresentation or concealment or non-disclosure of material facts, using these terms in the sense which they have in the law of fraud.

(2) The matter misrepresented or concealed or non-disclosed must be plain and certain, and ordinarily must relate to past or present facts, not to mere matter of opinion.

(3) The party sought to be estopped must know the truth regarding the matter unless he is so related to the facts that he is in law chargeable with knowledge of them or it is his legal duty to know them.

(4) The party setting up the estoppel must be ignorant of the facts.

(5) The party sought to be estopped must know of the deception of the other and design that he should be influenced and induced to act thereby. In some instances recklessness as to the rights of the other party may supply the place of intent.

(6) The person setting up the estoppel must be in fact deceived and act upon the deception in such manner as to do him substantial injury unless he is permitted to protect himself by estoppel.

The doctrine of estoppel is an exceedingly salutary one and runs through the whole body of the Civil Law.

LICENSE.

Definition.—License is a privilege or permission which one or more persons have to use, enjoy, or in some way profit by some thing or right belonging to another.

The license may be given either by law or by the person whose rights or property are affected thereby.

Licenses by Law.—There are numerous privileges allowed by law to persons which, without such legal permission, would be violative of the rights of those whose interests are affected thereby. Some of these privileges are express, often being based upon express legal command.

Very frequently the command of the law to do a certain thing carries with it by necessary implication permission or license to do other things incidental to the carrying out of the command. As when an officer has a writ to arrest one accused of crime he is thereby licensed to enter the premises of the party sought to be arrested or of other persons where the officer has reason to believe the accused may be found. Or if an officer has a writ commanding him to seize certain property belonging to a party, he is hereby authorized to enter the premises where the property is to take it.

The law extends many licenses in the ordinary affairs of life because they are conducive to the public welfare. For example, strictly speaking the application of force to the body of another is unlawful. To justify any particular application of force the party must bring himself under some recognized rule of law authorizing him to use the force. Perhaps the most far reaching and frequent exception invoked for this purpose is the license given by law to the casual contacts of ordinary life. It would be both foolish and impracticable for the law to withhold its license from such contact.

Licenses given by law ordinarily cannot be revoked by him with whose rights they interfere, but they may in almost all instances be forfeited by the wrongdoing of the licensee. For example, an officer has a writ commanding him to seize the property of a debtor and sell it for the payment of his debt. The debtor cannot cancel this command or any of the privileges of the officer incidental thereto, but if the officer shall seize the property under the writ and thereafter shall violate the command

of the writ in dealing with the property, this departure from the command of the law forfeits the officer's right under the writ, and he becomes a trespasser as to all he has done thereunder and is responsible to the owner as such.

Licenses Given by the Person Whose Rights Are Affected.—We have already found that at Common Law unperformed promises not having all the essentials of contract cannot be enforced, and that those promises which do have the elements of contract may be enforced. Many licenses actually existing result from attempts to enter into contract in which the agreement lacks one or more of the elements of contract. The elements most frequently wanting are consideration and form. Occasionally the defect is in the nature of the thing undertaken or the purpose to be accomplished.

Again, numerous licenses arise from agreements which the parties do not intend shall amount to contract, but shall result in revocable privileges.

Not infrequently licenses arise as incidents to valid agreements to the performance of which they are necessary. These are called licenses coupled with an interest. They are so closely related to the contracts out of which they arise that they may well be regarded as implied terms thereof.

Such a large number of licenses resulting from agreement are based upon agreements lacking consideration that it is customary to speak of licenses arising from the acts of parties as distinguishable from contracts by the absence of consideration. In this class of licenses are embraced all those permissions given to perform acts or exercise privileges of such kind that oral authority would be good therefor, but which are without consideration. Such permission or license cannot amount to a right because the agreement out of which it grows is non-enforceable at law and for its violation there can be no legal remedy. Such licenses are, therefore, necessarily revocable at the will of the licensor. Such revocation ends the privilege conferred by the license and the licensee can no longer legally exercise it. Notwithstanding this, the same doctrine that recognizes and legalizes voluntary agreement as bases of legal rights when such agreements are performed applies here and as a result the license, while it existed, was a complete legal justification for everything done by the

licensee in accordance therewith and no action can be maintained for such action after the license is revoked.

There are certain agreements that are required to be in writing in order to make them legally enforceable. If an agreement of this kind is entered into by parol, in the majority of cases, it constitutes merely a license, not a contract. For example, the law requires conveyances of estates in land for longer than a designated term, usually one year, to be in writing. If a person were to orally agree to sell land, the purchaser promising to pay consideration therefor and should suffer the purchaser to take possession, these facts would not constitute a conveyance of the land, but a mere license to occupy and enjoy it. If the grantor refused to go forward with the sale the grantee could not compel him to do so. If the grantor demanded possession of the land the grantee could not successfully resist his right of re-entry. To regard the parol agreement as a conveyance, or even as an enforceable agreement to convey, would be in direct violation of the statute. Notwithstanding the agreement for the sale of the property cannot be legally enforced and is subject to revocation at any time by the grantor, it was still good as a license to enter and hold possession of the land until its revocation, and as such is a complete defense against liability of the grantee as a trespasser. If, however, the grantee should continue to hold possession after the license is revoked, his possession would become unlawful and subject him to all the liability of a trespasser from the time his right under the license ceased.

Agreements which are unlawful in their purpose or nature are never contracts. The law is not fully settled as to whether or not such agreements can ever be good as licenses. The weight of authority and principle concur in the proposition that strictly speaking they cannot.

Among the most interesting class of cases of this sort are those which relate to the application of force to the body. It seems to be universally conceded that an individual may lawfully agree to the use of a reasonable amount of force to his person applied in such way as is not reasonably calculated to do him appreciable harm. This rule is both reasonable and useful. Many of the necessary activities of life could not be carried on without it. The right to engage in lawful games and sports comes under its

sanction. The performance of surgical operations and other like proper applications of force for the benefit of him to whom it is applied are justified by it. With these classes of cases we have no difficulty.

When, however, it is sought to license by agreement the unreasonable and dangerous application of force to the body of another, or application of even slight force for the purpose of violating the law, different rules of law are brought into play. It seems perfectly clear that no agreement seeking to accomplish either of these ends could be valid as a contract. This is well established by the authorities. It seems on principle equally clear that no such agreement is good as a license. The law ought not to countenance agreements made in violation of its own provisions or permit parties to justify their conduct on the theory that the party injured was himself willing that the hurt should be inflicted. Laws are not made by the agreement of a few individuals nor ought such individuals to be privileged by agreement to set the law aside and thus practically repeal it. The weight of authority agrees with this course of reasoning.

Just here a curious result is announced by many of the courts. Two persons agree to fight in violation of the criminal law. One injures the other. The injured party sues for damages. The defendant sets up the agreement as a license to prevent recovery. The court holds that the agreement was in violation of law and was therefore not a license and that the defense set up is not good. This is perfectly logical and legal but the curious fact is that the court having declared the agreement unlawful and hence not a sufficient basis for license, stops its investigation as to the effect of the illegality of the agreement upon the conduct of the parties and gives to one of the conspirators against the law a remedy against the other for damage received in its known and conscious violation. It seems clear that the true legal doctrine is that the agreement is an unlawful conspiracy from the carrying out of which no cause of action could arise in behalf of either conspirator.

WAIVER.

Waiver is an express or implied yielding of some right or privilege to another without consideration, but under such circumstances as to cut the party off from further setting up the

same to the disadvantage of the party in whose favor the waiver was made. It is very closely connected with estoppel, differing from it mainly in the fact that it usually relates to something to be done, or forborne, in the future. To make a waiver binding, the circumstances must be such as to make it clearly unconscionable to permit the party to again assert the right or privilege, or the waiver must be expressly authorized by law.

LACHES.

This is a failure to use due and reasonable diligence in the prosecution of a right. Before it can be effective to cut off rights, the delay must be so long as to cast serious suspicion on the original justness of the claim or raise a strong presumption of settlement or abandonment. It is an equitable doctrine, and is frequently denominated Stale Demand, though there are appreciable differences between them. It is frequently said that, to constitute a defense, laches must have continued for the length of time which would constitute a bar by limitation, in a court of law, on a similar cause of action. This does not seem altogether correct, for sometimes it is true that delay less than the statutory period will be fatal to the equitable proceeding, if such delay be accompanied with some other evidences of suspicion, adjustment or abandonment.

CONDUCT CONSTITUTING A BAR UNDER STATUTE OF LIMITATION.

This is delay to enforce, or attempt to enforce, a right, through the courts, for the length of time which the law says shall constitute a complete bar to the successful prosecution of a suit based on such right. These are primarily legal defenses, but Equity will follow the law in this respect, and will refuse to recognize and enforce any right which would be barred in the law courts. The terms upon which limitation can be based are always fixed by law, either Common or Written, and to avail himself of the bar the party seeking its protection must be able to establish facts bringing him within these terms. This he may do by admission of his adversary in his pleadings, or by pleading and proof in his own behalf. The usual requirements, when property is involved, are that the party invoking the bar has had continuous adverse

and peaceable possession of the property for the length of time mentioned in the law. If special additional facts, such as a recorded title to him, payment of taxes, etc., are made essential by the law, he must both plead and prove them.

At Common Law, limitation was said to be a shield of defense, but not a sword of offense; that is, it was a protection against successful suit against the person entitled to it, but it never ripened into a title which he could make the basis of an action by him, if he should be dispossessed. To do the latter, at Common Law, he was required to show such facts as would raise a presumption of a grant to him, and thus show what was called a title by prescription. Under many statutes, these prescriptions are done away with, and one who holds possession of the property for the time, and under the conditions required by statute, becomes the owner, and may sell the property or maintain any action, either legal or equitable, for it.

Usually there are exceptions in statutes of limitations in favor of persons *non sui juris* from any continuing cause. These vary, according to the judgment and policy of the legislature. Married women are no longer included among the exceptions, under the statutes of Texas.

Statutes of limitation, when the time is reasonable, giving fair opportunity for enforcement of the right before its loss, are salutary as statutes of repose, whose tendency is to quiet titles and prevent stale litigation.

It sometimes occurs that, when a wrong is committed, the injured party is under two disabilities. When this is the case, the statute of limitations does not begin to run till the removal of the one continuing longest; as, if a woman be an infant and of unsound mind both when her property is taken, limitation would not begin to run against her right to sue until after the cessation of both these disabilities.

In some instances, when the cause of action accrues the party is under one disability and, before the removal of that, another will arise: As if a wrong is done an infant, and before he obtains his majority he becomes insane. In such case, the disabilities are not to be added: but. when the one existing at the time the right to sue arose is removed, limitation begins to run.

NOTICE.

Frequently the results of one's conduct are materially affected by his information or lack of information regarding facts connected with the transaction. We are not speaking now of mental condition, as a status, nor of mistake of fact, either mutual or unilateral, by parties to an agreement, as affecting its validity between them, but of information or ignorance by a normal person of facts connected with or involved in a transaction, as this mental attitude affects the rights of third persons.

These conditions of mind may be classed as follows: knowledge, notice, and ignorance. They are usually treated under two heads, notice and absence of notice. There is a great deal of confusion in the books upon the subject. It is much simpler to use the three heads given above; and, having once learned to think clearly in these terms, the student can readily test what he sees in the authorities by them, and thus clear the situation very greatly.

Knowledge is actual information of the fact under consideration. Whenever a person actually knows a fact he has knowledge of it, and if such knowledge affects his legal rights and duties, he can not ignore the information and avoid its consequences.

Notice is implied knowledge. It is a state of facts in which the person whose rights and duties are being considered is really ignorant of the facts, but still he is dealt with and his rights and duties determined as if he had knowledge. This implication may be either of law or of fact.

Implications in Law.—Implications in law exist whenever the law says that under certain conditions all persons shall be conclusively presumed to know certain facts or when it says that under certain conditions certain persons shall be conclusively presumed to know certain facts. These are legal implications of knowledge. The first is illustrated by the law of registration. For purposes of public policy the law provides a system by which all conveyances of land may be placed in a public record, to which all persons have access. It then says to all persons dealing with land: "You should place your deeds upon this record," and to all other persons that, when a deed is actually placed upon this record according to law, to which they have access, they must examine these records before dealing with the land, and that they

shall be held to know just such facts, no more and no less, as they would have discovered by an examination of them. This applies to all persons, and is often called constructive or record notice.

The second is illustrated by the law's dealing with recitals in deeds under which a person holds property. The deed may have been made years before the present holder had any concern with the property, and he may never have actually seen the deed; but, if it is a part of his title, he is conclusively presumed to have knowledge of what it recites, and is to be judged accordingly. This implication is not general against everybody, as the first is, but is special against those persons only who hold under the deed containing the recital. This is sometimes treated as estoppel by deed.

These legal implications of knowledge are conclusive, and their consequences are in no wise affected by showing that the person whose rights are being determined was, in fact, totally ignorant on the subject.

Implications in Fact.—These are based upon such conditions or facts as first create a duty to inquire, and second afford reasonable opportunity for correct information as to the true state of affairs. This is frequently called putting one upon inquiry. Thus, if one person has the legal title to property in him, but another is the real owner, and the first offers to sell it to a third person, knowledge by the third person of the superior right of the second would subordinate the rights he would acquire, by the purchase, to the superior equity of the second; but ignorance of those rights would, if the purchaser acted in good faith and paid value, destroy such rights as against the purchaser, and he would take the property freed from the claims of the second party; but if the purchaser had knowledge of such facts, as would be reasonably sufficient to raise a well-founded belief that the third party did have rights in the property, the law requires him to follow up the suggestion thus made to him, and use reasonable diligence to ascertain the truth; and if he does not, it charges him with knowledge of all facts which reasonable injuiry would have developed. If he does use reasonable diligence to follow up the suggestion, and can not discover the facts, he has done his duty and is not charged with knowledge.

It must be observed that the suggestion of right in the third

person arises here from facts coming to the knowledge of the person sought to be charged with information. These suggestive facts vary with each case, and are to be judged by the testimony as to all the circumstances. After all these facts, as such, are determined, their weight or effect as to suggestion of right in the third person is then to be determined, in order to ascertain the duty of inquiry imposed upon him thereby; and then the nature and extent of the inquiry made, and its sufficiency, are all to be considered. All these are matters for the jury to decide. If they think that the evidence in the case would have put an ordinary man upon inquiry, and that the particular person whose conduct is being considered made no sufficient investigation, he will be charged with knowledge. If either of these is answered in the negative he is not so charged.

DEATH.

Death terminates all temporal interests and titles of the deceased. He is no longer in a position to enjoy or assert legal rights, or to be subject to legal duties. As a matter of public policy, the law undertakes to regulate the property rights and obligations formerly pertaining to the dead, and to make just provision for passing them, in qualified and modified form, to others.

So long as a person lives he has a right to the use, enjoyment, and disposition of all his property, and is liable for the payment of all his debts. These debts may be collected from him by suit and judicial sale of all property belonging to him not exempt from execution. The aggregate of his property constitutes his assets, and the aggregate of his debts is the extent of his liability. These debts are not, ordinarily, charges or liens upon his property, but each or all of them may be, or become so, if the debtor shall contract in due form, or if the creditor shall take the necessary action, through the courts, to make them so. So long as any particular thing owned is unencumbered, or uncharged for the payment of debts, the owner may dispose of it, if he does so in good faith. If it be encumbered, or subject to a lien, the sale or disposition of it would not relieve it of the lien, unless the money received were used to pay off the debt, or the purchaser

were one in good faith, for value and without notice of the lien. So long as the person lives, his power of disposition over his property continues, and, under the law as to Wills, he may most frequently make a disposition of it to become effective at his death. This we will consider later. All the property one owns at his death constitutes his estate, and all the debts he owes at his death are collectible out of this estate, if there be sufficient to pay them after satisfying the needs of the surviving members of the family of which the deceased constituted the head.

To a limited extent the family is recognized in law as having legal existence. Claims of kinship are also recognized, even though the relationship be not such as to make the persons between whom it exists members of the same family, legally speaking.

Taking the foregoing into consideration, we find that death has the following effect upon legal rights and duties:

(1) It removes the deceased from the jurisdiction of all governmental agencies. They can no longer regulate his conduct, nor at his instance enforce any rights or legal liabilities.

(2) Death terminates all rights and ends all duties which are strictly personal in their nature. It does not destroy property rights, nor rights against others, nor duties due them, which are liquidated and vested. At Common Law it destroyed all remedial rights, and their correlative duties, which were based upon violation of personal rights, but not those based upon violation of property rights. Under the statutes, in many States, these rules are much modified, and now many remedial rights, based upon violations of designated personal rights, survive. These statutes are not uniform, and an attempt at classification would not be profitable here.

(3) Upon the death of a person, all of the property which belonged to him, taken together, constitutes the assets of his estate, and all debts due by him, and all remedial rights existing against him, and which survive his death, constitute the liabilities of his estate.

(4) All persons not under disability, and all married women, are authorized to dispose of their assets by will, duly executed, and pass their titles to such persons as they may designate, and are also authorized to nominate one or more persons to take charge

of the assets, and manage and dispose of the estate as the will provides.

(5) If the property of the deceased is not disposed of by legal will it does not thereby escheat, but passes to those persons named by law as heirs, to be taken and held in such proportions as the law directs. In determining who shall be heirs, the law gives preference to the members of the immediate family of the deceased, and, if there are none such, then to more remote kindred. If there be no kindred within the degrees of relationship designated as heirs, the property escheats to the State.

(6) The rights in these assets taken under a will, or by inheritence, or by escheat, are subject to the just debts and liabilities of the deceased, and also to certain statutory rights of the family, if there be one, and the devisee or heir is not entitled to immediate use and enjoyment of the property, in contravention of these rights of creditors and the family, if one exist.

(7) If there be neither creditors nor family, the devisees, or heirs, as the case may be, are entitled, at once, to the beneficial enjoyment of their respective estates. In the case of heirs, this right extends to the distributive share in the whole assets, taking such title as the deceased had. In the case of will, the estate, being devised through the will, is, of course, measured by its provisions.

(8) It results, from the foregoing, that, if there be no debts or claims against the estate and no will, there is a simple and direct passage of the decedent's title and assets to his heirs, and no governmental intervention is necessary.

(9) If there be debts and liabilities, there is no one charged particularly with paying them, and as the estate, except such assets as are exempt by law, is subject to these debts, it follows that the interests of all parties require the appointment of some suitable person to take charge of the assets, manage and control them, and apply so much of them as may be necessary to their discharge. This is accomplished by proceeding in a court having jurisdiction over such matters, frequently called a probate court. This court appoints a suitable person to take charge of and manage the property, under the supervision and control of the court; to apply its assets to the several claims against the estate, in the

order directed by law; to pay over and deliver the balance to the devisees, in case of a will, and to the heirs, when there is no will.

This process of controlling, applying, and distributing the estate is called an Administration. When the person in charge is named in the will, he is called an executor; where there is no will, and he is selected and appointed by the court he is called an administrator.

If there are no debts against an estate, administration may still be necessary, if there be a will. Every will is an instrument changing the course of legal transmission of title; that is, in the absence of a will, designated classes of persons inherit the estate; and, therefore, if a will be made making a different disposition of the assets, or any of them, the title of the devisees under the will depends upon the existence and terms of the will, and not upon the general rules of inheritance, as applied to the particular case. It is, therefore, necessary to have the genuineness and effect of the will judicially ascertained and declared, before any one could be fully authorized to carry it out, or assert rights under it. And for these purposes the probate courts may take cognizance of estates and the rights of devisees therein. In an administration of this kind, the court compels the recognition and adjustment of all proper claims against the deceased, and construes the will and determines the powers and duties of the executor and the rights of devisees thereunder. The court will retain jurisdiction over the estate, so long as it may be necessary to protect the legal rights of all persons, and then require the delivery of the property to those entitled under the will, or under the general law when the will does not apply.

(10) In the administration of estates, in several of the States of the Union, the family of the deceased, if there be one, is recognized as having certain rights in the assets. Sometimes these are superior to the rights of creditors; sometimes they are not.

CHAPTER XII.

SOME SPECIAL RELATIONS AFFECTING LEGAL RIGHTS AND DUTIES.

There are many special relations which may exist between or among individuals, which give rise to, modify, or destroy legal rights. These relations are of various kinds and it would be impracticable to undertake to deal with each class separately. The discussion under this heading will be confined to the more important personal relations leaving those which grow out of or are directly connected with rights in particular things which will be considered under the head of property, and those which involve matters in which the public has a special interest which will be treated under the head of Public Utilities.

The three most important classes of personal relations are:

(1) Domestic Relations.

(2) Those involving Substitution.

(3) Those involving Co-operation or Community of Interest.

DOMESTIC RELATIONS.

Under this head we will treat of marriage and the family, husband and wife, parent and child, and guardian and ward.

It is customary to place master and servant in this group. Formerly, when the great majority of servants had their homes and rendered their services in and with the family of the master, this was fairly accurate. Under present conditions the duties and services rendered by employees in connection with business activities are so much more important and receive so much more attention from the law than those which are truly of domestic nature that the classification has become confusing if not misleading. Master and servant will, therefore, be considered in the second group, Relations involving Substitution.

Marriage and the Family.—The proper basis for all domestic relations is the marriage agreement and the resulting social and legal institution called the family. This institution lies at the foundation of all well ordered social and governmental stability and right development. Without the family and the home neither

social order nor political liberty is possible. The family is the unit of all civilization and from it all larger social and political organizations develop.

Marriage presents five different aspects:

(1) A contract between the parties.

(2) A religious institution.

(3) A civil institution.

(4) A combined religious and civil institution.

(5) A status.

Each of these views is true from its own standpoint.

The law, in its ordinary treatment of the subject, regards marriage as a status established by contract of competent parties, sanctioned by the government, and which can not be destroyed by act of the parties without the consent of the State.

Common Law Marriage.—An agreement *in præsenti* between a man and a woman, not disqualified, that they are now man and wife, accompanied by cohabitation, is sufficient to constitute marriage at Common Law. The parties must be competent, though competency does not have the same tests as ordinarily. The intent must be to be man and wife. It must be a present intent, that is, an agreement that they then and there are and are to remain man and wife, and there must be a cohabitation, or living together in the same house as man and wife. Such marriages are good in most of the States.

Statutes Regulating.—Marriage is primarily a matter of local or State concern. Its results in some regards may be far-reaching and incidentally involve social and legal rights and relations outside of the State in which the marriage is contracted or in which the family has its home. These latter matters are incidental merely.

This fact is recognized in the organization of our State and Federal governments and the right of control over, and the power to regulate marriage and marital relations were not given over to the Federal Government but were reserved to the several States. Marriage is, therefore, directly under the control of the several State Governments, the Federal Government having no power to deal direct with the subject. Congress cannot legislate on the subject, nor can the Federal Courts deal directly with marital rights, though they may hear and determine issues otherwise

properly within their jurisdiction, notwithstanding such decisions may involve and require the determination of marital questions.

In each of the States of the Union there are statutes regulating marriage. Such statutes usually cover two distinct subjects; first, the competency of parties to enter into the marriage relation; and second, the manner and conditions under which the ceremony may be performed.

The provisions of such statutes determining the competency of parties are mandatory, and persons who do not possess the designated qualifications cannot lawfully marry within the State where the statute is in force, either according to the Common Law or in compliance with the statutory provisions.

The provisions of such statutes as to the manner of celebrating marriage ceremonies are usually directory merely. Ordinarily these provisions deal with two matters. First, they designate the persons by whom marriage ceremonies may be performed, who usually are specified officers of the law and ministers or priests of the various religious denominations. Second, they provide for the keeping of public records of the marriages performed by issuance of a license and filing the same, together with an indorsement by the person performing the ceremony, showing when and where and by whom the marriage was performed, in the archives of some public office.

While statutes as to the method of celebrating the rites of matrimony are usually regarded as directory merely and not prohibiting or invalidating Common Law marriages within the State, still it is within the power of the Legislature to make such provisions mandatory and exclusive. When this is done Common Law marriage within the State would be unlawful and would not be recognized by the courts.

The general rule of law, subject to a few important exceptions, is that a marriage valid in the State or country in which it takes place is valid everywhere. The principle exceptions to this rule are first cases in which marriage between parties who have attempted to enter into that relation is not only forbidden by the laws of the State into which the parties move, subsequent to the marriage, but is also made a criminal offense, and second, cases in which the recognition of the marriage in the latter State would interefere with and overthrow the recognized legal rights of some citizen of the latter State.

Competency of Parties.

The parties must be respectively male and female; all such parties are competent, except those subject to some one or more of the following impediments or disabilities:

(1) Non-age. In males, under 16; in females, under 14.

(2) Physical defects. These must be natural and incurable defects existing at the time of the marriage.

(3) Prior subsisting marriage.

(4) Want of mental capacity.

(5) Relationship within the prohibited degrees.

Effects of Marriage.

(1) It changes the status of each of the spouses, and they are no longer single persons, but are husband and wife.

(2) It combines them in a family, or institution, of which the husband is the head, his powers and responsibilities varying in different States and countries.

(3) Their cohabitation thereafter is lawful, and each is legally entitled to the *consortium* of the other.

(4) Children born to them are legitimate.

(5) They are thereafter entitled to certain rights, such as homestead exemption, etc., which single persons can not acquire.

(6) At Common Law all the personal property of the wife, and all her choses in action which are reduced to possession during the marriage, are vested in the husband. It gives him the right to use and enjoy her real estate during the marriage, and, under some circumstances, gives him an interest in it after his wife's death, known as the estate by courtesy, and makes him responsible for all the wife's ante-nuptial debts, and for all torts committed by her during coverture.

As to the wife, it deprives her of all her personal property, including her choses in action, which the husband takes into possession; subjects her real property to use of the husband; gives her an estate in portions of his lands after his death, called her dower, and destroys her right and power to make contracts for herself. She is entitled to support and maintenance from him, and when he fails to furnish these, she is his agent to procure them.

These Common Law results of marriage have been very greatly modified by legislation in the respective States. The provisions

of these statutes vary too greatly to attempt even to summarize them. They extend from slight ameliorations of the woman's condition in a few specified respects to enlargements of her rights so extensive as to put her almost on business equality with man.

These enlargements, however, relate in the majority if not all the States to two general subjects; first, the capacity to hold property; and second, the capacity to enter into contracts. In legal theory at least the husband still remains the head of the family, with power to determine all questions which do not relate to the separate rights of the wife.

(7) Marriage is a status. That is, it is a continuing condition, which when once established can not be changed at the will of the parties. While marriage always results from agreement, no simple agreement of parties, unrecognized and unsanctioned by law, can establish the relation. As the law's recognition is essential to its establishment so its approval and action is necessary to its ending, during the life of the contracting parties.

Death is everywhere recognized as severing the marital tie. At Common Law and in almost all the States the surviving spouse is recognized as having rights and interests in the estate of the deceased spouse but in none of these jurisdictions is there any inhibition against the remarriage of the survivor.

(8) Another of the results of marriage is the establishment of a family. A family may be defined as: A legal institution, consisting of a number of persons between or among whom there exists the legal right to demand support and maintenance on the part of some and the legal duty to provide support and maintenance on the part of the other or others, which rights and duties arise from status and not from contract.

The normal family has its origin in marriage, and consists of a husband and wife and children dependent upon them. Collections of individuals may vary from this normal type, and still be recognized as a family; thus, the husband or wife may die, or there may be no children, and the family still exist. Or, if a son cares for his widowed mother, who lives with him, they constitute a family. In all of these cases, there are several persons bound together by ties of kinship, the one owing the legal or moral duty to support the other arising out of such relationship. It is this relationship, giving rise to and sustaining this duty of support,

which is called status in the definition above given. If there be no such status, but two or more persons agree to live together, the one to work for and maintain the other, they would not constitute a family; for the basis of the relations between them would be contractual not static. If the agreement were marriage, of course status would result thereupon, and a family would exist.

The distinction between families and other groups of persons living together should not be lost sight of for it is frequently quite important in determining the legal rights and duties of the persons constituting the group among themselves as well as between the group or its different members and third persons or the public.

Liabilities of One Spouse for Acts or Omission of the Other.

Criminally.—Neither spouse is responsible for the criminal conduct of the other, unless participated in by the one sought to be charged. There were presumptions at Common Law as to coercion of the wife when the offense was committed in the presence of the husband, but these can not now be said to be presumptions of law, but are matters for the jury. Neither can be compelled to testify in a criminal cause against the other, except in cases where the offense was committed against the witness. In civil suits they are not excused from testifying, except as to confidential relations, which can never be elicited, except in criminal cases when of advantage to the party accused.

Torts.—The husband alone is responsible for torts committed by him, though, as the community property may be taken to pay judgments against him, the wife usually suffers with him. Husband and wife are jointly and severally liable for torts of the wife, unless the wife were under duress by the husband, in which case, contrary to the general rule, she is excused.

Miscellaneous Effects.—Ordinarily the domicile of the husband is the domicile of the wife. An alien woman marrying a citizen of the United States becomes a citizen, but a citizen marrying an alien does not lose her citizenship.

Upon the death of either spouse the other has preference in administering the state, which may be taken out regularly as by any one else, or may be a community administration.

During marriage the husband primarily has the right to the

custody of the children, but this is now of little moment, as the courts will do what they deem best for the children.

Divorce.—The Common Law and the law of all the States with the exception of South Carolina recognize divorces, properly obtained through governmental agencies. In some States divorces may be granted either by the Legislature or through the courts, but in most of them the function is recognized as exclusively judicial and divorce can only be obtained by proper judgment of a competent court.

At Common Law there were two kinds of divorce, one from the bonds of matrimony, the other from bed and board. The former is a complete dissolution or annulment of the marriage bond restoring to each spouse, respectively, the status of a single person; the latter does not completely annul the marital relation but provides for and legalizes the living apart of the the spouses, modifying and adapting their property and contractual rights and powers to the peculiar condition in which they are situated.

The grounds upon which a judgment of divorce may be based, the nature of proceedings necessary to obtain such a judgment, and the adjustment of the property rights of the spouses and their respective relations to and rights regarding their children are regulated by the statutory provisions in the different States.

Actions for divorce affect the status of parties and hence are usually regarded as proceedings *in rem.*

Where both parties are *bona fide* residents of the State in which the divorce proceedings are instituted it is universally conceded that the court can enter a decree of divorce which must be recognized as of full force and effect at any time and in any tribunal in which the question may arise.

It is equally well settled that if either spouse is a *bona fide* resident and brings suit against the other and gets service on him or her within such State or if the defendant voluntarily submits himself or herself to the jurisdiction of the court, the court can render a decree of divorce which will be good everywhere.

When we pass from cases in which there is personal service on the defendant in the State or voluntary appearance by the defendant to those in which jurisdiction over the defendant is dependent on some kind of extra-territorial service we encounter doubt and uncertainty.

According to the great weight of authority among the State courts and, as had been commonly believed, according to the decisions of the Supreme Court of the United States until recently, the proper court of a State in which either of the spouses is a *bona fide* resident could grant decrees of divorce which must be respected everywhere even though the service was by publication. However, in a recent case, *Haddock v. Haddock,* the Supreme Court of the United States has held that the judgment of a court of a State in which the plaintiff in a divorce proceeding is *bona fide* citizen, but in which the spouses had never lived together as husband and wife when based upon extra-territorial service, is not binding upon and need not be recognized by the courts of another State.

The distinction made between this and other decisions by that court which had recognized the validity of divorce granted against a non-resident defendant in a State Court served by publication is based upon the locality of the marital domicile. The court held, first, that if the spouses lived together as husband and wife in a certain State, and the one abandoned the other and left such State, that the continued residence of the abandoned spouse in such State coupled with the fact that the last marital domicile was there gives to the courts of such State jurisdiction over the *res* involved in the litigation, and second, that simple residence in a State, no matter how *bona fide* or how long continued, does not give the court jurisdiction over the *res,* and the decree of divorce based on extra-territorial service and granted by a court of the State in which the parties have never lived together as husband and wife, is not legally binding upon the courts of other States.

If this decision is to be taken as final the law with reference to the effect of divorces granted in cases in which the service is extra-territorial it seems may be stated thus:

(1) The courts of the State in which both spouses reside may grant decrees of divorce that will be valid everywhere.

(2) If the parties do not live in the same State, the one continuing to reside in the State where they last lived together as husband and wife, and who is a *bona fide* inhabitant of said State may obtain a divorce therein which will be binding everywhere, whether supported by personl service within the State, voluntary appearance of the defendant or extra-territorial service.

(3) If the spouse who has abandoned the State of the last marital residence and has become a *bona fide* inhabitant of some other State, procures a divorce in the latter State based on personal service within the State or voluntary appearance of the defendant it will be good everywhere, but if it is based upon extra-territorial service it will be good within the State where rendered and within such other States as recognize it voluntarily, but no other State is compelled by the Constitution of the United States to recognize the divorce.

(4) If upon or after separation both parties remove from the State of the last matrimonial domicile, that a divorce granted to either in the State of his or her residence will have only such effect as stated in paragraph three.

What will be the effect of *Haddock v. Haddock* upon the State courts and the extent to which it will be followed by them cannot now be stated.

The case aroused much adverse criticism by the bar. Whether this view is concurred in by the bench remains to be seen.

If we leave the case of *Haddock v. Haddock* out of consideration the rules as established by the great weight of authority in the State courts prior to the rendering of that decision, are substantially as follows:

(1) The law in cases coming under paragraph one above is the same as stated therein.

(2) The law as stated in paragraph two above is as stated therein.

(3) The law in cases covered by paragraph three would differ from the statement made therein and divorces gotten under conditions stated in that paragraph are good everywhere without reference to the kind of service.

(4) The law as to cases covered by paragraph four would differ from the statement made therein and divorces granted under the facts set out therein would be good everywhere without reference to the kind of service.

Stating the matter more briefly, before the case of *Haddock v. Haddock* was decided, the law, as declared by the great weight of American authority, was to the effect that each State owed the duty to each of its *bona fide* resident inhabitants to determine conclusively his or her marital status and that the existence of

this duty carried with it the power necessary to its performance and that its exercise was not affected or limited by the fact that declaring the status of such *bona fide* inhabitant involved the declaration of the status of a non-resident, and hence a decree of a State court granting a divorce to a *bona fide* resident of the State though based on extra-territorial service was absolutely valid and entitled to recognition everywhere.

Second, the case of *Haddock v. Haddock* limits the foregoing proposition and declares that the *bona fide* residence of one spouse within a State does not give such State or its courts complete jurisdiction over the *res* involved in a divorce proceeding. That while the court has sufficient jurisdiction to grant the decree which must be respected within that State, such a judgment is not of universal obligation. That to give complete jurisdiction over the *res,* not only must one of the spouses be a *bona fide* inhabitant of the State where the suit is brought but the marital domicile of the parties must also have been within the State, and unless these facts concur the judgment of divorce is not entitled, as a matter of law, to recognition outside of the State wherein it was rendered.

Husband and Wife—This has been sufficiently presented in discussing marriage and its effects and will not be further treated.

Parent and Child.

The next special relation which we will consider is parent and child. This is altogether independent of any contract between the immediate parties. It is a natural one, that has ever existed and must ever exist in all continuing communities. Sovereignty must take cognizance of it, and make some rules for its government. Children are of two kinds: natural and civil or by adoption.

Legitimate Children.—These are natural children born in lawful wedlock. They have the highest rights and privileges accorded to this relationship. They are entitled to the care and protection of their parents, and to support and education during minority.

These rights are, to a great extent, incapable of effective enforcement through the law. This is usually expressed by saying that the correlative duties owed by the parent are of imperfect

obligation. Still, the duties are recognized to the extent that, if the parent performs them, he has no right to compensation from the child; and this is true even in cases where the parents are poor and the child rich.

If the father does not perform the duty of maintenance, he is bound for necessaries furnished the child. Some of the authorities put this upon the ground of implied agency on the part of the child, but even these make the father practically liable. The cases are not quite so strong when the father is dead and the mother is sought to be held liable. Here the relative conditions and positions of the parties must be considered, but usually some way is found to hold the mother for necessaries, unless it is apparent that the credit was extended to the child personally. Even when the father is sought to be held, he will be entirely relieved by proof that the credit was extended to the child. This duty of maintenance ceases when the child attains majority. This occurs, with a male at the age of twenty-one years, for the female on attaining that age, or upon marriage; though, even after that, benefits conferred by the parent on the child are *prima facie* voluntary, and will not of themselves create an implied contract for compensation. The duty may also be terminated by manumission, or freeing the child, and putting him on his own resources.

The rights of the parent against the child are the right of reasonable government and control, and the right to his services during his minority. The control must be exercised reasonably in view of all the facts and circumstances of the case, and may be enforced by reasonable and appropriate remedies, including personal chastisement.

A child owes to the parent obedience and respect, and must render for him such proper services as the parent shall demand. The parent can hire the child to other proper persons to perform proper services, and the wages earned will belong to the parent. The State, however, has the right to regulate such employment of children and prevent hiring to improper persons, or for improper purposes, or unlawful occupations, or unreasonable hours. These comprise the principal rights and duties between the parties incident to the relation.

The relation, however, carries with it certain rights and duties

between the parties to it and third persons. Some of these have been considered, such as the liability of the parent for necessaries for the child, and duty of the child to carry out contracts of employment made by the parents. But, taking these up again, we find:

(1) Neither the parent nor the child is, by reason of the relationship, responsible for the crimes of the other.

(2) Neither is on that account responsible for the torts of the other.

(3) Neither is responsible for the contracts of the other, except the parent for necessaries furnished the child on the parent's credit, and the child for the parent's contract of hiring the child to render reasonable service.

Illegitimate Children.—These are natural children born out of wedlock. If the child be born immediately after the marriage it is still regarded as legitimate. If it be born after the marriage ends but within the period of gestation it is regarded as born during wedlock and is legitimate. A child born during the marriage of the parents is presumed to be legitimate. This presumption can only be overthrown by facts which show to a moral certainty that there was no opportunity of access by the husband to the wife. If such opportunity exists proof will not be heard to show that cohabitation did not in fact occur between husband and wife.

In many States by statute subsequent marriage of the parents of illegitimate children renders the children legitimate. This was not the rule at Common Law.

At Common Law an illegitimate child did not inherit from any one, no matter what the relationship. He had no right of maintenance or education against the father, though if the father actually supported him or expended money on him in any way, no implied promise arose of repayment. He had an imperfect right to maintenance against the mother which, under some circumstances, would be enforced in his behalf by proper public officers.

Children by Adoption.—Adoption is the process by which one person receives and accepts the child of another to be his or her child or heir.

Strictly speaking, adoption was not known to the Common Law. In the United States it is a matter of State regulation depending upon statutory enactment.

The most ordinary method of procedure under these statutes is by petition to some designated court giving notice to the parent or parents of the person sought to be adopted if living and upon hearing having a decree entered by the court declaring the fact of adoption and the rights and liabilities of the parties incident thereto. These rights and liabilities must be such as the statute in the particular State provides. Usually the person adopting assumes substantially the duties and acquires substantially the rights of parent, and the person adopted, those of child.

The extent to which inheritance will follow adoption depends upon the statute under which the action is taken. Usually the adopted person will inherit from the one adopting as though a natural legitimate child and the one adopting will inherit as if the parent. Ordinarily the fact that a person has been adopted into one family does not prevent or interfere with his inheritance from his natural parents or other relations. Not infrequently the statutes provide that if the person adopted inherits anything from the adoptive parent, upon his death the property so received shall revert to the heirs of the adoptive parent and not to the heirs of the person adopting him.

The general rule is that adoption having been effected in accordance with law, the status thus acquired cannot be revoked nor changed by the parties.

Usually upon the adoption of a child, the right to its custody and control passes to the adoptive parent, though under some statutes this is not a necessary result.

Under some statutes adoption to the extent of making the party adopted an heir of the person adopting him may be accomplished by the party adopting filing with the proper officer a written instrument executed with the same formalities as a deed for the conveyance of land. It does not seem to be necessary to have the assent of the party adopted or of his parents to give effect to such an instrument. Under these statutes the parents of the person adopted by an instrument in writing executed as required in case of deeds to land may transfer their parental authority and custody over the child to the party adopting him. Such transfer, when accepted by the transferee, passes over the parental control and custody from the parents to the person adopting him. Such transfer, contrary to the general rule of public policy, is irrevocable.

Transfers of Parental Authority.—Not infrequently parents attempt to transfer their parental rights and duties as to their children to third persons without complying with the statutory provisions regulating such matters. Parental rights and duties are not recognized as assignable at Common Law and unless supported by statute such transfers are non-enforceable but are revocable at the will of the parent. Such agreements are not contracts but are regarded as licenses which protect the persons acting under them from legal liability to the parents for the detention and exercise of control over the child prior to revocation by the parent. If the party having the custody of the child under such an agreement refuses to deliver the child to the parent on demand the parent can maintain an action of *habeas corpus* for the child and recover its custody. . The foregoing is the rule of law in the absence of proof showing the parent to be an improper person to have charge of the child. If proof of that sort is made the court will make such disposition of the child as its interests require.

Guardian and Ward.—A guardian is a person who is legally entitled to the custody of the person, or estate, of a living person who is laboring under some legal disability, and who is called a ward. The most frequent disabilities of this kind are minority, mental unsoundness, and habitual drunkenness.

The parents, first the father and, in his absence, the mother, are the natural guardians of the persons of their minor children, but not of their estates. The latter are appointed by the proper court, preference being given to the father, and then to the mother, unless, in the particular case, there be some reasonable objection.

In case of the death or disqualification of the parents, the proper court will appoint a guardian for the persons of the minor children, and if the children have property for which no guardian has been previously appointed, of their estates also.

The guardian of the persons of minor children, whether their parents or one appointed by the court, has the right to the custody of the children and to reasonable control over them. The parents, as natural guardians of their persons, are not primarily subject to the control of any special court, but any guardian appointed by a court, either of the person or estate, is strictly un-

der the control of the court appointing him, and must manage both the minor and his estate as the court may direct.

When a parent is guardian of the estate of his child, he is held to the same responsibility as to the property as any other person would be. He may spend of his own estate on his child as he sees fit, but he can not spend the property of the child except as the law permits. Primarily, the parent is required to support and educate his child from the parent's estate; but, if this is not practicable, he is usually permitted to expend for the child's maintenance and education the income of the child's estate, but can not go beyond that without authority from the court. If he does so, only in rare cases of extreme emergency will the court permit him to reimburse himself from the child's estate. The guardian must keep strict accounts and make reports at stated times as to his management of the property. If he desires to sell any of the ward's property, he must submit the facts to the court and get an order from it, or he can not do so.

These general rules apply to other guardianships, as of insane persons or habitual drunkards, and these need not be further considered.

CHAPTER XIII.

SOME SPECIAL RELATIONS AFFECTING LEGAL RIGHTS AND DUTIES (CONTD.)

RELATIONS INVOLVING SUBSTITUTION.

In our study of conduct, under the head of law, as heretofore presented, there are certain relations in which one person substitutes another for himself in the exercise of some power, the enjoyment of some right, or prosecution of some enterprise, and that, to the extent of substitution, the latter becomes the other-self of the former, who thereupon becomes legally entitled to all the benefits arising from his conduct in that behalf, and, as to third parties, subject to all liabilities incident thereto. The two principal relations in which this doctrine of substitution applies are master and servant, and principal and agent.

Master and Servant.

A master is one who employs another to do for him and under his direction something which does not involve the master's power to enter into contractual relations.

A servant is one who undertakes to do for another and under his direction something which does not involve the master's power to enter into contractual relations.

The relation, it is said, always depends upon contract between the parties. It is more accurate to say that it always depends upon agreement. For the rule holds good here as elsewhere that performance validates a voluntary executory agreement, hence an agreement to serve which lacks consideration and is therefore legally non-enforceable will still be good to fix the relation of master and servant provided it be actually performed by the rendering and acceptance of service. Still agreements of this sort are so uniformly supported by consideration that we will deal with the relation as based upon contract, noting the deviations from the rule stated, if any, which apply to the cases of voluntary service.

The relation is never imposed by law. Legal subjection of one person to another whereby the former is made to serve the latter no longer exists in the United States. Involuntary servitude exists only where it is exacted as a penalty for crime and the relations between the government and its officers, on the one hand, and persons working out sentences for crime, on the other, are not those of master and servant.

Under the contract in its ordinary forms the master undertakes to employ the servant and pay him either specified or reasonable wages and superintend the work and the servant undertakes to render the required service with reasonable faithfulness and efficiency and obey the directions of the master.

It is sometimes quite difficult to distinguish this relation from that of principal and agent or of employer and independent contractor.

According to the later and better authorities, the principal difference between a contract of service and one of agency is that under the latter the agent is authorized to exercise his employer's capacity to contract, while under the former no such authority is conferred upon the servant.

The distinction between the relation of master and servant and of employer and independent contractor consists chiefly in the fact that the master controls and directs the servant, not only as to the general results to be accomplished, but in the details necessary to bring about the result. As to all these matters, the master's will is dominant and the servant is but his substitute or instrument through which he performs his work. The independent contractor, on the other hand, as the term implies, ascertains from his employer the results that he desires accomplished and undertakes to bring these about by his own independent means and responsibility. In this relation there is no domination of the contractor by the employer but independent action by the contractor leading to personal responsibility on his part.

This distinction may be made clearer by an example. If a person owns a lot and desires to build a house on it he may pursue one of two methods in doing so. He may buy the material and employ workmen and direct the work himself; or, he may adopt plans and specifications and employ a builder who will himself undertake to provide all material and labor and complete the

house according to specifications and deliver it to the owner in a finished condition. If the owner adopts the first of these methods, the relation between him and the men whom he employs to do the work on the house under his control and direction would be that of master and servant. If he adopts the second method, the builder who undertakes to construct the house at his own expense without supervision or control except such as may be necessary to insure that he complies with the contract, would be an independent contractor. In this case the owner would have no authority to select the workmen or to control or direct them in the work. His sole right in the matter would be to see that the builder complied, at the builder's own expense and through workmen employed and selected by him, with the terms of the building contract. In the one case the owner acts by and through the servant as his substitute; in the other, he employs the builder to accomplish designated results through the builder's independent and uncontrolled action.

Who May Be.—As the relation of master and servant grows out of agreement, any person who may make other contracts may agree to become either master or servant. Persons under legal disability are very often found in one or the other of these positions. So frequently is this the case and so important it is that they be permitted to sustain one or the other of these relations that it sometimes seems that there is a relaxation of the rules of law as to contractual power in such agreements. It is possible, however, that these cases are not real relaxtions but may be explained either on the ground of contracts for necessities, or of the validation of a non-enforceable promise by performance, or in the case of married women, on the ground of implied agency or agency by necessity for the husband. So we may fairly state that the rules as to competency to contract are the same in agreements creating the relation of master and servant as in other contracts.

Rights and Duties as between Master and Servant.—As the relation of master and servant results from agreement it follows that the parties as between themselves may fix their respective rights and duties by the agreement subject only to the ordinary rules of law as to consideration, legality, and form.

To this general rule there are some exceptions based sometimes on the condition and capacity of the servant as in limitations upon

the hours and kinds of labor that may be performed by children, and in others, upon the extra-hazardous nature of the service, as in the employment of servants by railroad companies. In the cases of extra-hazardous service, these exceptions are based on legislation fixing certain liabilities upon the master, or recognizing that certain liabllities are fixed upon him by the Common Law and, in either case, forbidding the parties by agreement to waive or limit such liability. They occur principally with reference to the doctrine of fellow servants and the defenses of contributory negligence and assumption of risk. Notwithstanding these statutes, it is still true that as to parties not embraced in them the general Common Law rule obtains that they may fix their respective rights and liabilities by agreement.

It is very unusual, however, for parties entering into this relation to agree expressly and in detail as to all their respective rights and duties.

As the relation is common, it becomes necessary for the law to take cognizance of it and make general regulations to govern the parties to it in regard to those points as to which their minds have not, in fact, met. Hence, we have a number of legally recognized rights and duties incident to this relation, which the parties have never in fact contemplated, and which might, usually, have been changed by them by agreement, but which still govern them as legal requirements, unless so modified.

The most important of these duties of the master are:

(1) To use reasonable care to provide the servant with reasonably safe premises in which to perform his duties and the same care to keep them in such condition.

(2) To use reasonable care to provide him with reasonably safe appliances with which to operate and the same care to keep them in such condition.

(3) To use reasonable care in selecting reasonably competent and faithful fellow-servants and the same care to see that they remain so.

(4) To make reasonably safe and proper rules for the reasonably safe conduct of the business and to use reasonable care to see that they are observed.

These four rules cover the principal Common Law duties as to care owed by the master to the servant. They are rules requiring

reasonable care, not rules imposing liability as an insurer. The law does not require the master to insure the safety of the servant in any of the matters covered by these rules but only to exercise reasonable care for his safety. This duty of reasonable care is a continuing one. It must not only be observed as to providing premises and tools, selecting fellow-servants, and making rules, but also requires the use of reasonable care in inspecting the premises and appliances and guarding the servant against deterioration in either, and also a careful watching over the fellow-servants so as to ascertain any incompetency or habits of negligence and recklessness. This continuing duty also requires that reasonable care be exercised to see that rules which have been promulgated are fairly observed in the actual carrying on of the business.

If the master has observed these continuing duties at Common Law, he is not responsible to the servant for hurt which may occur to him in the service, but if he fails in any one of these duties and the servant, without fault on his part, is injured as a direct result of such failure by the master, the master must make just compensation for the injury received.

In connection with the third rule above stated is the Common Law rule as to fellow-servants. This doctrine is but an enlarged and special statement of the rule above announced, that if the master has used reasonable care in the employment of fellow-servants and reasonable care to ascertain the competency and trustworthiness of the servant, he is not responsible to one of his employees for injuries resulting from the wrongful conduct of his fellow-servant. The master, having used reasonable care to protect the servant, is without fault as to wrongs committed by a fellow-servant, which the use of reasonable care by the master in his employment and retention could not prevent. Stated thus, and with proper limitations as to who are fellow-servants, the rule is a just and proper one. Considerations of public policy and the desire to protect the weak against the strong have, however, led the Congress of the United States and the Legislatures of many of the States to abolish this Common Law doctrine as to railroad companies and the receivers and operators of these roads so far as servants actually engaged in the operation of cars, is concerned, and to materially modify it as to other servants of such masters. These statutory enactments cannot be discussed in detail.

At Common Law, persons are deemed fellow-servants if they are engaged by a common master for the purpose of accomplishing a common purpose and are subject to the same general control. The doctrine as thus stated is very broad, and many of the statutory changes are limitations put upon it narrowing the application of the doctrine.

Closely connected with the doctrine of fellow-servants and probably developed by it is the doctrine of vice-principals. This may be said to be a Common Law limitation of the Common Law doctrine of fellow-servants as broadly stated above. It effects that part of the fellow-servant doctrine that requires that the parties be under the same general direction.

It is apparent that in any business conducted on an extensive scale there will be many grades of servants. For instance, in the business of railroading there must be a department of construction and maintenance presided over by a general superintendent. If the line of road is extensive, different divisions will be established each being under the supervision of a division superintendent. Each of these divisions will be subdivided into sections, each of which will be in control of a section boss. While the general superintendent has general direction over the entire line, his authority is usually exercised directly on the division superintendent, and each division superintendent in turn, exercises control over the section foreman, and the section foreman in turn controls and directs the section hand who actually works upon the track. This illustration, while it shows the desirability of grades in employment, also shows the opportunity for complication in applying the fellow-servant doctrine so far as it involves the idea of the parties being under the same general direction.

To meet this situation, the doctrine of vice-principal arose as a limitation upon the general rule as to fellow-servants. This doctrine declares that if one servant be given the control and authority over another and has over him the power of employment and discharge, that the two are not fellow-servants, although, in a broader sense, they are clearly under the general direction of the same master, or some representative of the master, of a higher grade than either of them. As applied in the illustration given above the section foreman has direction and control over the sec-

tion hand with the power to enforce obedience to his orders by discharging the hand and is therefore, as to the section hand, a vice-principal and not a fellow-servant. Hence the railroad company, the common master of both, is responsible to the section hand for injuries directly resulting from the wrong of the foreman.

The vice-principal doctrine may be stated thus: that if two persons are in the employ of the same master, the one having the right to direct the work of the other and to discharge him, the one having control is not a fellow-servant with the other but is a vice-principal for the master, and the master is responsible to the subordinate servant for injuries resulting to him from the wrongful conduct of the superior.

The rule, however, does not work the other way. So far as liability of the master to the superior servant is concerned, he, and the man under his control, are fellow-servants and the master is not legally responsible to the vice-principal for injuries resulting from the wrong of his subordinate.

Non-Assignability of Duty.—We have given a good deal of space to the discussion of the doctrine of fellow-servants and its modification by the later doctrine of vice-principal because these rules have, for a long time, been firmly imbedded in the Common Law. A far simpler and more satisfactory solution of most of the difficulties involved in the situation is found in the fundamental doctrine of the non-assignability of duty.

This doctrine, broadly stated, is that the law, though it permits the delegation of the discharge of duty, never permits the assignment or divestitute of the underlying obligation. Applying this doctrine to the relation of master and servant it results that each of the duties of the master enumerated above rest upon him and the obligation cannot be shifted by him to another so as to relieve him therefrom. He may, and in the great majority of instances in actual life he does, substitute another for himself in discharging the duty. The law recognizes the substitution so far as to accept performance of the duty by the substitute as full discharge of the obligation, but the law positively refuses to recognize this substitution as itself a discharge.

Applying this general doctrine to the matter in hand the master must meet each of the obligations resting upon him. If

he does so in person, well and good. If he does so by substitute, this is equally as satisfactory. But the appointment of a substitute to perform a duty, not followed by performance, is no fulfillment of obligation. For example, a master's business requires the use of dangerous machinery. The law says he must use reasonable care in inspecting each machine at the time he acquires it and must continue to use such care to ascertain its true condition after it has been installed and put in operation. If, in fact, the master exercises such care, either in person or through a servant, he is not responsible for injuries to his servants resulting from latent defects in the machine. If, however, the master employs a servant to inspect the machine for him and makes most rigid requirements of him as to the inspection, but the servant neglects to inspect and another servant is injured by reason of the defect in the machinery which could have been discovered by the exercise of ordinary care, the master is responsible for the directly resulting hurt.

The same is true as to each of the other duties of the master enumerated above.

If this doctrine were in fact properly applied to the master's duties as to the employment and retention of servants, it is earnestly believed that this would eliminate many, if not all, of the difficulties of the fellow-servant and vice-principal rules. It is gratifying to note that the broad doctrine of non-assignability of duty is gaining more and more attention and recognition, and has, by several courts of good standing, been applied as to the duty of the master in the employment of servants.

Assumption of Risk.—After the master has used this care, the servant is regarded as having assumed the risks incident to the business engaged in. This has two limitations: (1) If the servant be young or unskilled, and does not know the dangers incident to the business, the master should give him warning. (2) If the master is advised of defects, and promises to fix them, the servant is entitled to depend on this for a reasonable time, and his continuing in the employment for such time, in the belief that the master will keep his promise, is neither an assumption of risk nor contributory negligence. Continuance beyond a reasonable time, however, will be a defense against the master's liability.

A number of States have legislated on this subject also. Some

of the statutes are merely cumulative, being practically statutory declarations of the existing Common Law rules. Others of them limit, more or less, the Common Law doctrine, some going so far as to almost set it aside.

Compensation and Reimbursement.—In all cases of employment in which the master has agreed to pay a specified price and the service has been rendered according to contract, the servant is entitled to the stipulated wages. This is subject to the rule of law that persons under legal disability are not bound except for necessaries and are bound for them only for the real value and not for the contract price, and if the master in any given case is under legal incapacity his obligations would be governed by the exception and not the rule. Where the amount of wages is not agreed upon but services are actually rendered and accepted the law ordinarily presumes or implies a contract to pay their reasonable value. To prevent such an implication, the circumstances must be unusual and tend strongly to show an intent to serve voluntarily. The right to compensation, of course, depends upon rendering the service as contemplated by the employment.

Nice questions have arisen as to the liability of the master for wages when the contract contemplated the continuance of the service for a definite term and the servant partially performed his agreement, and then, without fault of the master, abandoned the employment. The weight of the later authorities seems to be that in such cases, the servant is entitled to reasonable compensation for the service rendered less the damage which he occasioned the master by the breach of the contract.

If the contract contemplates service for a term and the master, without fault of the servant, refuses to permit the servant to continue in his employment throughout the term, the master owes the servant the agreed price of the service for the length of time it was rendered, if the wages were agreed upon, plus the damage resulting to the servant from the breach of the contract. If the rate of wages was not agreed upon, the master owes the reasonable value of the service rendered plus the damage occasioned to the servant by the breach. The proper measure of damage in these cases seems to be somewhat in doubt. It is, however, conceded that the servant may use reasonable diligence to obtain employment of similar character for the remainder of the term, and if

he secures such employment, his damage would be the value of his time consumed in finding the employment plus the difference between the wages he would have gotten under the first contract and the wages he actually received during the term. If he could find no employment by the exercise of reasonable diligence, his damage would be the wages for the entire term, at the price agreed upon, if fixed, or the reasonable value, if the wages were not fixed.

The master owes the further duty of reimbursing the servant for any amount he may be compelled to pay for damages occasioned a third person by obedience to the commands of the master which the servant thought to be lawful by reason of any mistake of fact. If the servant knew that he was violating a legal right of the injured party, he would be a joint tort-feasor with the master in carrying out the command, and would not be entitled to reimbursement, or even contribution.

Servant's Duties.—The servant owes to the master obedience to all proper commands connected with the employment, faithful performance of the service he has promised to render, care and diligence as to the interest of his master, and also in his conduct toward third parties, so as not to bring his master under legal liability to them. The servant must compensate the master for loss arising from the non-observance of these duties, or any of them.

Ending of the Relation.—As the relation arises from contract, it may be terminated by the same means—mutual agreement. It is ended by the death of either party, also by expiration of the term of employment and, if no term is agreed upon, at the will of either party.

Liability of Each of the Respective Parties for Wrong Done by the Other.—While it is true that, as between themselves, the master and servant may very largely determine what their rights and liabilities shall be, it by no means follows that their agreements will be binding upon third persons. It is a fundamental principle of law that one person can not, by agreement with a second person, relieve himself from liability to a third. To accomplish this, the third person must, in some lawful way, assent to the change of his rights. Therefore, we find another important body of legal rules which govern the master and servant in their conduct toward third persons, and determine the liability of each to third persons for acts or omissions of the other. It must be

observed that no one can relieve himself from the consequences of his own wrong, as to third persons, by the co-operation of others in wrong-doing, and so we may state it as a universal rule: If the conduct complained of is a violation of a legal right of a third person, the guilty party is responsible to the person injured, whether, as to some other person, he sustained the relation of master or servant, or not.

With this, we enter the secondary range of liability, that is, those liabilities that result to one person by reason of his attempting to accomplish purposes of his own through some other person as an instrumentality. The old doctrine of the law is that what one does through another he does by himself, or the doctrine of representation, or substitution. This doctrine is far reaching in its application and consequences. In this connection it covers every case in which one puts another in to act for him unless the action involves the exercise of the power to contract. So far as the rights of the third party against the master for the conduct of his servant are concerned, the real inquiry is, what was the reasonably apparent scope of the employment? The contract between the master and servant, unless its terms were known to the third party, in which case it would be conclusive as to the extent of the substitution, is material only as fixing the relation of the parties as master and servant and as tending to show the extent of the substitution. It is to be considered in the light of all the circumstances in aiding the inquiry as to what was the reasonably apparent scope of authority. It is by the reasonably apparent scope of authority that the master is bound. This is determined by a reasonable interpretation of the conduct of the master and the conduct of the servant under the authority acquiesced in by the master. If the act resulting in hurt to the third party was within the scope of his authority as fixed by a reasonable interpretation of the facts surrounding the transaction, the master is liable, although in fact the wrongful act exceeded the actual authority of the servant or was even directly opposed to the instructions of the master.

Another basis for the master's liability to third persons for the wrong of the servant is the doctrine of non-assignability of duty. If the master owes a duty to a third person, and delegates its performance to his servant, the master is responsible to the third

party for injuries resulting directly from the wrongful conduct of the servant in relation to the duty, whether such wrong consists in affirmative misconduct in an attempt to discharge the duty or negative misconduct by failure to discharge. The reasons for this doctrine need not be again discussed.

CHAPTER XIV.

SOME SPECIAL RELATIONS AFFECTING LEGAL RIGHTS AND DUTIES (CONTD.)

RELATIONS INVOLVING SUBSTITUTION (CONTD.)

Principal and Agent.

A principal is one who has employed another called the agent to exercise the principal's contractual powers and thus bring him into new relations with third parties. Like master and servant, it is a relation involving the doctrine of substitution. It covers those cases of substitution which do not come under the head of master and servant. While the substitution is for a different purpose than that in master and servant, it is still true substitution and a great deal that has been said under the former head is applicable here.

How Formed.—Agency may be created in several ways:

(1) By agreement.

(2) By estoppel.

(3) By law.

It is customary to speak of agency by necessity as an additional subdivision but it seems that this is but an illustration, or one method, of creating agency by law.

Agency by Agreement.—In agreements creating agency the same rules of law govern as do in all other kinds of undertakings. In order to form an enforceable executory contract creating and sustaining the relation of agency, there must be the four ordinary essentials, of contract viz: competent parties, consideration, lawful purpose, and proper form.

The rules as to competency of parties, so far as affects the contracts of agency between principal and agent, do not differ at all from those governing in other agreements. So that any two

legally capable persons can enter into an agreement by virtue of which one is to act for and bind the other within the terms of the contract. Again, a legally capable person can legally employ a married woman or a minor to act as agent for him. Such contract would be binding upon the competent party as fully as if the other party were an adult. The infant or married woman would not be bound to carry out the agreement but could repudiate the agreement under the same conditions that he or she could any other agreement except one for necessaries. So long as the infant or married woman does act as agent, the agreement entered into by the principal through such agent, is just as binding on the principal as if the agent had been legally competent to contract for himself. This results from the fact that the agent, in entering into an agreement for the principal, is exercising a contractual power of the principal and not of the agent. The agent is but the means through which the contractual power of the principal is extended and joins with that of the other contracting party. This power of the principal is not diminished by its transmission through the *non sui juris* agent.

If the agent under disability actually serves as agent and renders service for the principal, he or she is as fully entitled to compensation as if not subject to legal disability.

When the case is reversed and an incapable person, as a married woman, minor, or insane person, undertakes to become a principal and to enter into agreements through an adult agent, the same rules that we have considered above apply, but they work out different results. It is still the contractual capacity of the principal that is sought to be exercised, but as the principal in the supposed case has only limited contractual power, the effect upon the agreement is just the same as if the incapable principal had undertaken to enter into it in person.

Consideration is as essential to support an agreement of agency as any other, but here also an agency voluntarily undertaken, if executed by the agent, will bind the principal.

The purpose to be effected by the agency must be lawful. The law cannot undertake to sustain individuals in agreements contrary, either to its express provisions or rules or against public policy. An attempt to create an agency for an illegal purpose would result, not in a contract of agency, but in an unlawful

conspiracy, under which each party would be legally liable for all wrongs committed by either within the common understanding.

There is some difficulty in announcing exactly the rules of law as to the form of agency agreements. It is quite frequently said that wherever the contract to be entered into by the agent must be in writing the authority of the agent must be in writing also. Though repeatedly so declared by high authority, the rule thus announced is not legally accurate. There are a number of conditions under which oral authority may be given to an agent to execute written contracts in the name of the principal. For example, a merchant verbally requests the clerk who does the purchasing in the name of the firm to send a written order for goods to the wholesale dealer and sign the name of the firm thereto. The wholesale merchant fills the order. The bill is not paid. There can be no question that the firm is bound by the order. Or, changing the illustration somewhat, if the bill from the wholesale house has come in and it was the understanding that the retail merchant should give his note for the amount due and the purchasing clerk, in pursuance of instruction from the merchant, or even in accordance with the general customs of the business, should make out the note and sign the merchant's name to it, this would be a valid note by the merchant. Both these are illustrations of written contracts entered into by the principal through an agent having only parol authority for so doing.

The true rule on the subject seems to be that the principal may, by parol, authorize an agent to execute written contracts in the principal's name in all instances except those in which the law specifically provides that the authority must be in writing. The most common example of such requirement is found in the Statute of Frauds with reference to the execution of conveyances for estates in land for a term longer than one year. In such cases, that is, those in which the law so expressly requires, the authority must be in writing.

To prevent confusion it is well here to call attention to the difference between authority to make a sale of land, and authority to convey. The former may be given by parol, and if an agent so authorized shall find a purchaser willing to take the land under the terms specified by the agreement with the principal, though the proposed purchaser could not compel the principal to convey

the land to him, still the agent, having done all he undertook to do for the principal, would be legally entitled to his compensation.

When Formed.—The contract of agency may precede, be concurrent with, or subsequent to the act by which the agent binds the principal.

The first two of these, contracts which precede or are concurrent with the agency act, have nothing peculiar beyond what has been pointed out in the foregoing discussion and need not be further considered.

The third, authority conferred after the act performed by the agents, presents a number of peculiar features. The agreement by which a person adopts and makes his own an agreement previously made in his behalf by one having no authority to act for him is called ratification.

For ratification to take place so as to bind the principal and the party with whom the assumed agent entered into the agreement, five facts must concur, viz.:

(1) At the time the agreement was entered into by the agent, the agent must assume to represent the subsequently ratifying principal, and must act in his behalf.

(2) The ratifying principal must have been in existence and legally competent to contract at the time the assumed agent entered into the agreement.

(3) The principal must subsequently give real assent to the agency act as his own, and must at this time be competent to contract.

(4) The subsequent assent must be given in the form in which antecedent authority would have been required to be given.

(5) The act ratified must have been lawful at the time it was performed, and it must continue to be so at the time of the ratification.

When these facts concur, the ratification goes back to the date of the agency act and, as between the parties, vests the ratifying principal with just such rights, and subjects him to just such liabilities, as would have existed had the agency act been antecedently authorized. If the rights of innocent third parties have intervened, they will not be cut off by the ratification.

Agency by Estoppel.—This exists when one person has given another reasonable grounds to believe that a third person is his

agent, and the second party, influenced by this reasonable belief, has dealt with the third as agent of the first, and in so doing has put himself in such an attitude that it would be inequitable to permit the first to deny the agency of the third. Agency by estoppel is extended so far, and so far only, as justice to the deceived party requires. Whenever he is fully protected, the law is satisfied, and will not press the estoppel further.

Agency by Law.—Agency by law exists where the law authorizes one person to exercise for another the latter's right to contract. This is apparently a contradiction in terms, as the right to contract is the right to create, modify, or destroy legal rights by agreement, and agreement implies the free assent of the mind. Still, conditions arise in which justice and public policy require that certain action be taken by unwilling parties, and in cases of urgent necessity the law intervenes and in its own name confers authority upon someone, usually a public officer, to do the act in behalf of the unwilling individual. To illustrate, a man owns property and is in debt. He does not pay nor will he sell the property and apply the proceeds to the debt. By taking the proper steps, the creditor can have his rights as such established in court and have the proper officer of the law to seize and sell the property of the debtor in order to obtain funds with which to pay the debt. The officer, by the sale under this legal authority, conveys whatever interest and estate the debtor has in the thing sold. He thus, under authority derived from the law, becomes the instrumentality through which the property right of the debtor in the thing sold is passed over to the purchaser and he may well be regarded as the debtor's agent by law for such purpose.

Agency by necessity may also properly be put in this class of agency by law.

Agency by necessity is sometimes said to exist under circumstances which it seems might well be regarded as a proper basis of implied contracts of agency. Wherever this is true the proper disposition of the case would be to classify it as agency by agreement. In those instances in which agency cannot be implied as a fact, that is, in which no assent of the principal can be presumed, if the agency exists at all, it must be by implication of the law, and the case would be properly included under the present head.

Termination of Relation.

In agency created by agreement, the parties to the relation may terminate it at any time by mutual assent. Provision for the termination of the relation may be and frequently is made in the agreement creating it. This is always true in cases in which the continuance of the agency is expressly limited to a certain time, or in which it is expressly understood that the agency is to terminate upon the happening of a certain contingency. It is also entirely permissable for the parties to end their relation at any time by mutual agreement. The contract of agency, unless it be one technically known as an agency coupled with an interest, is always made subject to certain implied conditions, the happening of any one of which will either itself end the agency or be sufficient ground to justify the other party in withdrawing from it. The events most usually having such effects are death, insanity, protracted sickness, or other cause resulting in permanent physical disability of either party, or the marriage of the principal if she be a woman. If the principal be a man, and the agency is one authorizing the sale of land, the marriage of the principal and his designating and occupying the land as a homestead will have the same effect.

The relation may also be terminated at any time by the withdrawal of either party. The law will not undertake to compel a person to act as agent for another. It would be powerless to compel faithful and efficient service if it should undertake to do so and, recognizing this inability on its part, does not attempt specific performance of agency agreements by the agent. For somewhat different though practically the same reasons it rarely undertakes to compel the principal to retain and recognize an agent with whom, for any cause, he has become dissatisfied. The relationship presupposes special confidence and mutual acceptability. These are matters beyond the control of the law.

While it is in the power of either party to withdraw from the agreement, it is not within his right unless the agreement has previously been broken by the other. The one withdrawing wrongfully is responsible to the other for all the damages directly resulting from such conduct. In what these damages shall consist and how they are to be measured depends upon the nature of the

agency and the facts of each case, and it would not be profitable to undertake a discussion of them here.

Withdrawal from the relation by the principal is called a revocation; withdrawal by the agent is called renunciation.

Duties of the Parties as Between Themselves

While the relation exists, it is one of trust and confidence, and requires the utmost good faith between the parties. The agent, especially, can not use to his own advantage information or opportunities coming to him by reason of his employment; but must turn everything in connection with his employment to the advantage of his employer, if it can honestly and fairly be done. The agent must faithfully serve his principal, and give to him all the time, energy and capacity which a fair construction of the agreement includes. The principal must pay his agent the price agreed upon, or if no agreement is made as to compensation, then the reasonable value of the agent's services, and must also reimburse him for any reasonable and proper expense he has incurred or liability he has become subject to by reason of the proper performance of his duty.

Rights and Liabilities as to Third Persons.

Within the scope of his employment, the agent is the substitute, the other self, of the principal, and as to third persons not otherwise advised, it is this active, substituted self which wills and acts in performance of the agency acts; and his principal is bound to such third persons just as if he had actually been present and had willed and acted just as the agent did at the time. The scope of employment, as between the principal and agent and others having knowledge of them, is fixed by the terms of the agreement, and the instructions actually given by the principal to the agent. As to third persons not so advised, the authority of the agent is limited to the power which a reasonably prudent and capable person would reasonably believe him to have, from all the facts and circumstances of the case. There are a great many other interesting doctrines regarding this subject, but we must omit them for lack of time and space in which to deal with them.

CHAPTER XV.

SOME SPECIAL RELATIONS AFFECTING LEGAL RIGHTS AND DUTIES (CONTD.)

RELATIONS BASED UPON CO-OPERATION OR COMMUNITY OF INTEREST.

Joint Actors.

When persons agree together to co-operate in the accomplishment of a common end, each agreeing to do his part toward the common purpose, they become co-actors and each is responsible for anything done by the other in carrying out the agreed purpose. An act is held to be within the common purpose if it is so connected with it that, under all the facts and circumstances, a man of ordinary prudence and judgment would have anticipated it as likely to arise.

If the common intent is wrongful and unlawful, the parties, by reason of the agreement, become co-conspirators, and when the enterprise is entered upon in pursuance of the common understanding they become joint wrong-doers or tort-feasors.

In each case the parties are jointly and severally liable to injured persons for any damages which may result to them directly and proximately from a violation of a legal right. But there is this difference: in the first case, the purpose and intent of the parties being lawful and the violation of the right of the third person not being desired, the right of contribution exists between them, and if either is compelled to pay the third person he can usually recover from his co-operator a just share of the amount paid out by him; while in the second the parties, having designed to do wrong and to violate the law, the courts will not attempt to adjust equities between them, but will leave the loss on him who is compelled to pay, without giving any right to contribution.

Employer and Independent Contractor.

This is a relation growing out of contract by which one undertakes to accomplish for another some desired purpose ac-

cording to a general plan agreed upon by the parties, but in which the manner and means of accomplishing the purpose are left to the employee. As he exercises his own judgment as to these and employs his own means and agencies to bring about the desired result, he is called an independent contractor. It is in this respect that he differs from the servant. The latter is subject to the will and judgment of the master as to all matters concerned in the execution of the plan, while the independent contractor takes the general plan and works it out by his own means and judgment. The employer here is concerned only with the results. It follows that, as the independent contractor is acting for himself and not for his employer, the latter is not responsible for the wrongs of the former unless they are, first, the result of defect in the plans furnished by and of course agreed to and participated in by the employer, making him a joint wrong-doer or tort-feasor with the contractor, or second, unless they result from the nonperformance of some duty resting on the employer, which he employed the contractor to perform. Under the principles already discussed he would then be responsible. It is nearly always the case that when the employer is responsible the contractor is also, but the reverse is by no means true, for the contractor may be guilty of a great many wrongs committed in carrying out the details of the work, which were not participated in by the employer.

The name of this relation and, indeed, many of its real characteristics, would not suggest placing it in this group at all; but as the general plan is agreed to by both the employer and the contractor, everything done in pursuance of that involves unity of design and action, and as to that there is co-operation and community of interests, and hence I place it in this class.

Partnership.

Partnership is an association of two or more competent persons in a business enterprise in which they combine either capital, skill, or labor, or one or more of these, for their joint profit.

Partnership involves, and calls for the application of, the rules of law governing both co-operation and substitution. So far as each partner represents and acts for himself he is co-operating with his other partners as they respectively act for themselves. So far as he represents and acts for his partners he is a substi-

tute for each of them. In the language of many of the cases partnership is mutual agency. This only presents half the truth, as it is at the same time mutual agency and mutual principalship.

To illustrate: A desires to go into business. He puts ten thousand dollars into the enterprise and employs B to take charge of and manage it for him. Here, A is the sole principal and B the sole agent, and the relation is one of principalship and agency. Again, A and B each desires to go into business. Each has five thousand dollars. They agree to combine their capital, skill, and labor and to share in the profits. This constitutes partnership. Here A is principal in the business to the extent of five thousand dollars, and whenever he acts for the business, so far as he is effecting his own interests, he is acting as principal; but B also has five thousand dollars in the concern, and when A sells any article for the firm he passes B's interest as well as his own; so, as to that, he is agent. So in everything either of them does in the business, so far as he acts for himself, he is principal; so far as he acts for his partner, he is agent; and this condition is true of each member of the normal partnership.

A partnership is not regarded in law as a legal entity or person separate from its members. It is not, by law, declared to have distinct and separate legal rights or owe separate legal duties. Yet, in many material ways, this conception asserts itself. It is the prevailing business view, and is so interwoven in the every-day affairs with which the law deals that it has been found impossible to disregard it entirely. Thus, we constantly read of firm property and firm assets, firm debts and individual debts of partners, etc.

Suits by and against partnerships must be conducted in the names of the individual members and not the name of the firm.

Partnerships are created by agreement of the parties, and hence are subject to all the rules of Contract Law. They can be entered into only by natural persons having capacity to contract, or by corporations duly authorized for lawful purposes, which must be some form of business undertaken for profit. The contract must contemplate the combination of capital, labor or skill of the respective parties, resulting in a joint proprietorship in the business and its capital or profits, one or both. The mutual promises and contributions of the respective parties furnish the considera-

tion to support their several undertakings. Each member of the firm has an equal voice in the management of the business, and each, in the absence of agreement to the contrary, is entitled to an equal share in the profits, though on dissolution the capital is to be withdrawn in proportion to the original contribution. Inequality of contribution, coupled with very slight evidence supporting the contention, will be sufficient to show agreement for participation in profits in proportion to contributions.

Usually partnerships are terminable at the will of either party. If in any case there is a definite time fixed for its continuance, it is still within the power, though not within the right, of either party to end the relation, by simply withdrawing from it. He would, of course, be responsible to the other or others for any damages occurring from the breach. Death of either member ends the firm; so does the withdrawal of any member, or the taking in of a new member. No number of persons less than the whole membership of the firm can form a partnership. Each member is liable for all the debts of the firm, but has a right of repayment from the firm, if it be solvent, or of contribution from the other members when the firm is insolvent. The interest of each member in the firm assets is subject to be taken for his individual debts. This is regulated, in most States, by statute, and usually the levy is made by serving notice on some member of the firm at the place of business, and then selling the interest of the debtor partner. The sale dissolves the firm, and the purchaser acquires just the rights and interests which the debtor had at the time of the levy, which will be ascertained by taking an account of the concern as of that date.

According to the weight of authority firm creditors have no lien on firm assets, but each of the partners has a right to see that all firm property is applied to payment of firm debts before it is distributed among the members of the firm, or to their individual creditors.

Partnerships being formed by contract, agreements of that kind entered into by infants are voidable by the infant, but binding on the adult. So long as the infant remains in the firm he has the same rights, and is subject to the same liabilities, as an adult. The same general rules apply to persons mentally incapable.

The firm is responsible for all torts committed by any member

within the scope of the partnership business. The scope of the business is determined here, as in the case of agencies, by the partnership contract if that were known and relied on by the third person, or by the reasonable interpretation of the conduct of the parties, where the terms of the contract are not known.

In a number of the States provision is made by statute for limited partnerships. Under these statutes, a person may contribute capital to a firm to a designated amount and make a public record to that effect and can limit his liability for the debts of the firm to the capital thus paid in by him. If, however, he takes any active part in the management of the firm, he is as responsible as the other partners.

Partners are of different kinds: (1) Active, including those who take active part in the management of the business of the concern. (2) Silent, those who are known to be partners but have no voice in the management of the affairs of the firm. (3) Dormant, or those who have a voice in the management of the affairs of the firm but who are not known as partners. (4) Secret, or those who are partners, but who neither take part in the affairs of the firm nor are known as partners.

CHAPTER XVI.

SOME SPECIAL RELATIONS AFFECTING LEGAL RIGHTS AND DUTIES (CONTD.)

RELATIONS BASED ON CO-OPERATION AND COMMUNITY OF INTEREST (CONTD.)

CORPORATIONS.

General Definition.

A corporation is an entity created by the supreme political power, acting either alone or in conjunction with private persons, having under a prescribed name such rights, powers, and privileges, and owing such duties as are provided by law; and endowed, either perpetually or for a designated time, with capacity for continuous existence and legal identity unaffected by change of members.

Public Corporation.

An entity created by the supreme political power, of its own volition, for governmental purposes; having such powers and jurisdiction and charged with such duties as are provided by law; endowed with the capacity of continuous existence under a designated name.

Private Corporation.

(1) A legal entity created by the joint action of the supreme political power and one or more private persons, for some purpose agreed upon between them, either wholly nongovernmental or, if of a public nature, prosecuted for private gain, having, under a designated name, such rights, powers, and privileges, and owing such duties as are provided by law; endowed, either perpetually or for a specified time, with capacity for continuous existence and legal identity unaffected by change of its members.

(2) A legal entity created by the joint action of the sovereign and one or more individuals, authorized in its own name to act

for and represent such private persons in accomplishing some purpose or purposes, either wholly nongovernmental, or, if public, prosecuted for private gain, agreed upon by the State and such individuals; having capacity for continuous existence and legal identity unaffected by change in the individuals for whom it acts; having such powers and owing such duties as are provided by law.

(3) A number of individuals merged into one body by the joint action of the sovereign and themselves, or their predecessors in right, for the accomplishment of designated purposes; possessing, under a designated name, the power of succession and legal identity, either perpetually or for a designated time; and having such other rights and powers and subject to such duties as are provided by law.

The corporate idea is so complex and assumes so many different phases that it is extremely difficult to give a definition at once accurate and concise.

The first of the definitions above given is designed to cover the general conception of the corporate entity in public, *quasi*-public, and private matters.

The second, is limited to the public corporation and the last three to private corporations including therein *quasi*-public as well as the strictly private.

The three definitions of a private corporation are given in order to emphasize different views of the subject. The two most important of these different views are:

(1) That a corporation is a legal entity capable of sustaining legal relations; and,

(2) That a corporation is a combination of individuals, having existence as one body under the law.

The first two of the definitions of a private corporation present the legal entity idea, and the third, the idea of the collective individuals. Both these views must be constantly kept in mind, and care must always be taken in dealing with the rights and liabilities of a corporation under any given state of facts, to get a clear conception as to the proper meaning of the word in that connection.

The word entity means being, and a legal entity means a being recognized by law as capable in itself of having legal rights and

owing legal duties. The law so regards a corporation. And it is in this sense that corporations are spoken of as artificial persons. This view is not a legal fiction adopted for convenience merely, but represents a fact ordinarily involved in the corporate conception. It is of great practical and legal utility, and ought not to be disregarded.

While definitions one and two of a private corporation both present the idea of legal entity, the second makes more prominent the fact that this entity is created to subserve the purposes of, and act as an agent for, the members of the corporation. This thought seems occasionally to be lost sight of by the courts so that they emphasize and stress the entity idea unduly.

It is a simple truth of common knowledge that persons desiring to engage in certain businesses for their own profit often incorporate for such purpose. The corporation is brought into being, not for its own account or advantage, but in the hope of developing profit for those who organize and operate it. The money that each shareholder pays for his stock is only a contribution or payment made by him in the hope of securing personal gain. The money so paid is to be used only by the corporation and by it only in the prosecution of the corporate enterprise. The giving over of the money by the corporation to the control of any other person, or its use by the corporation for any other purpose than that designated in the corporate agreement, would be not only a diversion of the money from its legally intended use but a subversion of the corporate purpose. From these facts it seems apparent that the private corporation is designed by its members to act as an agent for them in advancing their private interests by the use of the corporate capital by the corporation for corporate purposes, and that this fact should neither be lost sight of nor ignored by the law.

The third definition does not present the idea of the private corporation as a distinct legal entity but stresses the thought of the individual members. It recognizes that these individuals are, by joint action of themselves and of the State, merged or combined in exceedingly close business relations but still presents the aggregate members as the corporation. It is apparent that this idea falls somewhat short of conception of the distinct legal entity.

Conditions not infrequently arise in which the view of the aggregate members, as constituting the corporation, leads to a much simpler and more direct solution of legal difficulties, and as this view is absolutely true in itself, it should always be kept in mind.

The advantage of this view may be illustrated by a consideration of cases such as the Sugar Trust cases in New York. A number of corporations had been formed for the purpose of handling and refining sugar. By their charters, each of these companies had the legal right to engage in that business as a corporate concern. The capital of each had been gotten from its shareholders to be managed by it and employed by it in the prosecution of the sugar business by that corporation in its corporate capacity. Later, it was thought desirable to combine the several corporate enterprises into one large sugar business, in which a small number of designated persons should have complete control of the entire enterprise and of the business of each of the separate corporations. It was recognized that no one of the corporations, considered as a legal entity, could enter such a combination, so some other method must be devised. The plan adopted, stated briefly, was for the several corporations nominally to keep up their separate existence, conforming to all legal rules and requirements, but that all the stockholders or members of the corporations should go into a combination of their interests and appoint a small number of persons, who, under the authority thus received from the aggregate of the stockholders, should actually control and manage the entire business of each and all of the sugar companies. This was done.

The State proceeded against the several sugar companies, charging them with unlawful combination and the formation of a Trust to control the prices of sugar. The corporations, with a great show of technical truth, replied that no one of them as a legal entity had taken any corporate action combining or tending to combine with any other company and that if combination existed, the corporations as such were not parties to it. These facts were absolutely sustained by the records of each corporation. The fact, however, remained that, in reality, the officers of the respective corporations were not in control of the business being done by the corporation and with its means and facilities, but

that a few individuals actually were controlling the entire sugar industry as represented by these corporations.

Technically speaking, the corporate entities had committed no affirmative wrong; actually, the stockholders had formed a Trust. The practical questions presented to the court on these facts were:

(1) Can the stockholders of a number of corporations, by agreement among themselves, lawfully effect a combination of the business of the corporations so unifying it as to divest each corporation of all control over its corporate business and center this control in a board of managers selected by the stockholders?

(2) If this be unlawful, will the several corporations be legally responsible for the misconduct of their respective stockholders, that is, were the legal entities responsible for this unlawful conduct of the members?

The Supreme Court of New York very properly said that the conduct of the stockholders, acquiesced in by the entities, was the conduct of the corporation, and dissolved the Trust and forfeited the charters of the respective sugar companies.

Enumeration of Essentials and Powers.—There are certain elements or qualities without which a corporation cannot exist. Some of these are characteristic of corporate being; that is, are possessed only by corporations and hence serve to distinguish corporations from all other legal conceptions, combinations, or institutions. Others pertain to corporations and to other persons, and combinations as well, and hence are not characteristic.

These essentials are:

(1) Characteristic.
  (a) Merger by law of the individual members into one body.
  (b) Capacity for continuous existence of the body unaffected by change of membership, and perpetual succession of the members.

(2) Not characteristic.
  (a) Power to contract to some extent.
  (b) Power to own and use property to some extent.
  (c) Power to sue and be sued in collective capacity.
  (d) Power to have corporate name.

Powers practically but not absolutely essential.—

(1) To have a common seal.

(2) To make by-laws.
(3) To receive and enjoy special privileges or franchises

Powers not essential but usual.—

(1) To issue transferable shares of stock.
(2) To do business without imposing liability upon its shareholders.

Essentials.

Returning to the essentials of the corporate idea we find the distinguishing qualities of a corporation are, first, merger by law of the individuals into one body, and second, the capacity of this body for continued existence unaffected by change of its members, and the right of perpetual succession of the members. These ideas are so closely related that one condition cannot exist in fact without the other. Unless the different individuals are merged into a body which the law recognizes as such, there could be no combination that would remain unaffected by change of membership, nor could there be any right of perpetual succession nor legal substitution of one member for another. While these ideas are closely related, there is enough of distinctiveness in each to make it desirable to keep the three in mind. The merger of the individuals into one body is the act performed by the sovereign and the charter members of the corporation which results in the creation of the corporation. The capacity for continued existence, unaffected by change of members, and the legal succession of one member to another are qualities or characteristics of the corporate being so brought into existence.

The corporate capacity for continuous existence and the right or power of individuals to succeed one another as members are so closely connected that they are very often spoken of together under the head of capacity for perpetual succession. It is clearly inaccurate to speak of a continuing body as perpetually succeeding itself. The body continues, maintaining its legal identity without reference to the change of individuals composing its membership. This continuing body is so constituted that its members may go out and others be substituted for them without affecting its continuity. Still the continuity of the body, and the outgoing and incoming of different members, are different things. In a sense, they seem inconsistent, and the continuity of the body may

be said to remain, not on account of the change of membership, but notwithstanding such change.

When we say that these elements of a corporation are characteristic of it, we mean that they exist in their fullness only in corporations, and hence serve to distinguish corporations from all other kinds of combinations.

It is true that there are certain combinations known as joint stock companies, in which there is succession of membership but in these there is not that complete merger of the individuals into one body that the law accords to corporations, viewed either as legal entities, or combinations of individuals. Ordinary partnerships possess neither of these elements. They are not regarded as legal entities and every change of membership changes the partnership or firm.

There are other elements of a corporation consisting of powers which may be exercised by them. These are not characteristic of corporations but are possessed by them in common with natural persons and other kinds of combinations. Some of these powers are essential to corporate life and activity; others are not absolutely essential but are practically so; and others are not essential to corporate existence but are helpful and usual. These different powers have been enumerated and classified just above, and will be discussed now without special reference to those classifications.

A corporation cannot live and accomplish any corporate purpose unless it has a corporate name, and has some power to own and use property, and to contract. Without these elements it could engage in no enterprise and accomplish no purpose.

Another essential to a corporate being, as almost uniformly stated in the authorities, is the power to sue and be sued in the corporate name. As has been stated, capacity to have legal rights and owe legal duties is inseparable from the law's conception of a person. Having a legal right necessarily involves having capacity to control others by law. Owing legal duty, necessarily involves subjection to control by law. Legal control, in the great majority of instances, is exercised through the courts. So that declaring that a corporation may have rights and owe duties is legally equivalent to saying that it may sue and be sued.

Power to have a common seal and to make by-laws are exceed-

ingly important in corporate existence. The corporate seal affords a safe and appropriate way of attesting corporate action, and the power to make by-laws or rules for the regulation of its business is almost, if not quite, indispensable to corporate activity.

The power to receive and enjoy special privileges is an important one. These special privileges are capacities or advantages not ordinarily enjoyed as of common right. They are usually classified as franchises and immunities.

A franchise is an affirmative privilege, power, or advantage, not exercisable or enjoyable as of common right, but which is conferred by special grant from the sovereign. The two ideas essential to a franchise are, first, that the privilege does not exist as of common right but, second, has been received and is held under special grant from the sovereign. There is a loose use of the term in which it includes all corporate capacities or privileges. If these are to be regarded as franchises at all, they are such only in a very limited sense and are included in the franchise to be a corporation.

In the earlier history of corporate law, when corporations were created only by special grant the privilege thus conferred in fact was, and was properly designated as, a franchise. The term has, however, lost much of its force in this connection since the passage of laws authorizing the creation of corporations under general enabling acts, which may be taken advantage of by almost all persons. Still, as most of the acts require some special qualification for incorporators, they can hardly be said to be matters of common right. The other idea of grant of authority from the sovereign still remains, though it can no longer be accurately designated as a special grant. The power to organize into and be a corporation is, therefore, still a franchise. It is, however, a franchise enjoyed by the incorporators or members of the corporation, and not by the corporate entity which results from the exercise of this franchise by the incorporators.

Franchises are usually, if not always, affirmative privileges or powers, authorizing action.

Negative privileges are properly called immunities. These rarely, if ever, authorize action or confer positive rights. They are rather exemptions from burdens that are born by persons generally. Probably the most common example of immunity is

freedom from taxation. The general rule of law is that taxation should be equal and uniform. If the law relieves any person, natural or artificial, from liability from his proper share in this burden, such exemption would be, not a franchise, but an immunity.

Another of the powers usually enjoyed by a corporation, though by no means essential to corporate being, is the privilege of issuing shares of stock as evidence of membership and of rights in the corporation. Such shares are exceedingly convenient as evidence of the respective rights and liabilities of members as among themselves and in the corporation.

Shares of stock are so closely connected with membership in the corporation and with corporate capital, that further discussion of them is deferred until we reach those subjects.

Another ordinary incident to corporate operations is freedom of its members from liability for debts of the corporation beyond the amount represented by the shares held by each. This limited liability is not essential to corporate organization. In England and Scotland, there is no such limit unless special provision therefor is made in the charter. The prevailing rule in the United States, however, is that the stockholders of a corporation are not bound for its debts. Each stockholder, upon subscription, owes the corporation for the full amount of the face value of the shares held by him, and at all times thereafter such balance as may remain unpaid on this subscription. Provision is frequently made, in case of insolvency by the corporation, for the collection of any debt due from the shareholder to the corporation for his shares, and the application of the money to the debts of the concern. This, however, is not making the shareholder pay the debt of the corporation. It is simply compelling him to pay his own debt to the corporation and passing the money to the corporate creditor or creditors.

Whether or not the members of corporations created by any State or by the Federal Government shall be liable for all the debts of the concern, or to some less extent, or not at all, is determined by the law governing the creation of the corporations. While the American rule is, as stated, that the shareholder is not responsible for the debts of the concern, this is not of universal application. Quite frequently the shareholder is made responsible

for the debts of the company to an amount equal to the full face value of the shares held by him. In such cases, if the shareholder has not fully paid for his shares, he is liable for the balance as for a debt due the corporation, and in addition is liable to the creditors in an amount not to exceed the full face value of the shares. If he has paid for his shares in full he is only liable for the item last named.

Different Kinds.

Corporations are usually divided into public, *quasi*-public, and private corporations.

Public Corporaions.—Public include those that are organized for governmental purposes. Such, for example, as the United States Government, the several State Governments, and incorporated cities and towns.

Less closely organized political subdivisions, such as counties, school districts, etc., are frequently called *quasi*-corporations, thus indicating the lack of compactness and thoroughness of organization. The doubt implied in the use of the qualifying term *quasi* relates to this lack of organization, and not to the public nature nor the purpose for which the imperfect organization is provided. As public corporations of different sorts are dealt with in another connection, they need not be further considered here.

Quasi-Public Corporations.—This term is frequently used to indicate corporations which, though organized for private gain, still subserve public purposes, such as railroad and telegraph companies, water and light companies, etc. Here the doubt implied in the word *quasi* relates, not to the organization, nor to the fact of corporate life, but as to whether or not the corporation should be regarded as a public or private enterprise.

The activities and businesses pursued by these corporations are essentially public in their nature, but when private individuals organize and operate such companies it is always with the view to their individual gain. The public nature of the business makes the company a public utility and subjects it and its operations to special regulation and supervision which would not be tolerated as to strictly private enterprises. Yet the capital employed and the profits earned and the management, save as affected by the

special supervision and regulation above referred to, are all private.

It is not surprising that the law has found some difficulty in correctly classifying these companies. It has been quite customary to deal with them under the title of *quasi*-public corporations. The tendency of the later authorities, however, is to regard them as private concerns and to deal with them as private corporations. Much, if not all, that has been or will be said in the text regarding strictly private corporations is equally applicable to these.

Private Corporations.—As indicated in the preceding paragraph, and by the definitions heretofore given, private corporations include all those organized for the purpose of private gain, whether the business or enterprise in which they engage is strictly private or governmental in its nature. Private purposes for which corporations may be chartered is a matter of statutory regulation, it being one of the fundamental rules of corporate law that private corporations cannot be created by private individuals without express authority of written law.

The several State Governments can authorize the creation of private corporations for any and all purposes except so far as they are forbidden to do so by the Constitution of the United States or of the respective States. There is no express authority in the Constitution of the United States for the creation of corporations by Congress, and no such general power exists. Congress may, however, charter *quasi*-public corporations whenever doing so is reasonably necessary to enable the Federal Government to effectively exercise any of the powers conferred upon it by the Constitution. It is under this implied power that National Banks are chartered, and that a few railroad companies have been created by Congress.

Stock Corporations.—By far the most important class of private corporations are those which are organized, or at least capitalized, on the basis of shares of stock, and usually known as stock corporations. Our subsequent treatment of the subject will be largely confined to companies of this kind.

How Formed.—It is customary to say that private corporations are created by the State. This is true to the extent that the State must always assent to and take part in such creation. It is, how-

ever, misleading in so far as it seems to carry the idea that a private corporation may be brought into being by the action of the State alone. This cannot be done. The assent and co-operation of the members of the private corporation are as essential to its creation as is action by the State. Neither Congress nor the Legislature of any State can authoritatively require any person or collection of persons to invest their money or engage in any designated business enterprise. This can no more be done under the guise of chartering a private corporation than by any other method. It may, therefore, be taken as settled law, that co-operation between the government and private individuals is essential to the creation of any private corporation.

The foregoing statement is not true as to public corporations. Each State may create such political subdivisions within its borders and give to them such corporate organization as it sees fit, so long as it does not interfere with vested private rights in so doing. The State can change the boundaries of counties or school districts as it sees fit, taking care always to protect the vested rights of the creditors of the former county or district. It can withdraw or repeal the charter of a city and substitute an entirely new form of city government as it sees proper, provided always it protects the vested rights of creditors and of others who would be affected by the change.

The validity of such action by the State is not dependent upon the assent of the individuals living in the territory thus dealt with. It is true that such action is very rarely taken except upon request or consent of the citizens to be affected. This, however, is due to a sense of propriety and not lack of governmental authority.

At Common Law.—It is said that at Common Law there were four ways of creating corporations: By Common Law grant, by grant by the king, by prescription, and by act of Parliament.

The first and second of these methods have no application to American law and cannot be regarded as having been brought over from England into our American system. Whether or not a private corporation can be created within the United States by prescription, I have not found decided; but as there can be no Common Law grant or grant from the Executive Department to

form the presumptive basis of such prescriptive right, it is practically certain that no such corporation could exist.

By statute.—Practically the sole method of creating private corporations within the United States is by legislative action. In those cases in which the Federal Government may create private corporations it acts through Congress. The States act through their respective Legislatures.

There is nothing in the Federal Constitution expressly conferring the power to charter private corporations on any department of the government. After protracted controversy it is now the settled doctrine that Congress can, in the exercise of its general legislative powers, or for the benefit of the whole Union, charter private corporations as an incident or means for properly carrying out any of the express powers conferred upon the Federal Government. Congress also has the power to create private corporations within the District of Columbia, and in any Territory within Congressional jurisdiction as such.

There are two methods of creating corporations by legislative action; one, by special act chartering the particular corporation created thereby; the other, by passing a general law authorizing the formation of corporations for designated purposes and in designated ways by persons possessing designated qualifications. These laws are known as general enabling acts.

The Federal Constitution does not prescribe how private corporations may be created by Congress so that in the instances in which Congress is competent to act, it may authorize corporations either by special charter or by general enabling act. It has in fact pursued both methods, and its action under each method has been sustained by the Supreme Court of the United States.

In the absence of inhibition in the State Constitution the Legislature may adopt either of these methods to the exclusion of the other, or may use both concurrently. In several of the States, there are provisions in the Constitution against creating private corporations by special act. The purpose is to prevent the Legislature from conferring special or monopolistic privileges or franchises upon particular corporations.

Enabling acts specify, with more or less particularity, the purposes for which corporations may be created under them. Natur-

ally, these purposes differ somewhat in the different States though there is fair uniformity among them with regard thereto.

Powers.—As private corporations can only be created by the joint action of the government and of private individuals, it is evident that the agreement between the State and these individuals from which the corporation results is the standard and measure of the rights and powers possessed by the corporation. These powers, speaking in very general terms and yet announcing a mandatory rule of law, are to carry out the corporate enterprise by means of the corporation as an active agency. This is the real intent and purpose of the agreement; for this it is entered into. Strictly speaking, neither party to the agreement, that is, neither the State nor the members of the corporation collectively nor singly, has any legal right to add to or take from this agreement, or to disregard or violate it. The corporation resulting from this agreement is equally bound by it, not as a party to the contract, but as a creature deriving its life therefrom.

It is readily apparent that it is very important to have correct legal ideas concerning this agreement, how it may be entered into, in what it consists, and the rules of law by which it is to be interpreted. These matters will be considered more carefully under the head of Charters and Membership.

The powers of a corporation are of three general classes:

(1) Those implied by law as necessarily involved in corporate existence.

(2) Those expressly conferred by the charter.

(3) Those implied by law as reasonably necessary to enable the corporation to carry out the powers expressly conferred by its charter.

The powers incident to corporate existence are the following:

(1) To have continuous existence for the term limited in the charter.

(2) To sue and be sued in its corporate name.

(3) To contract to the extent necessary to carry out the corporate purpose.

(4) To own and use property, both real and personal, to enable it to carry out its purpose.

(5) To have a common seal.

(6) To make by-laws.

Powers expressly conferred by the charter depend, in each case, upon the charter of the corporation and its legal construction. It is to prevent undue discrimination in favor of particular corporations in the grant of these powers that a number of the State Constitutions forbid the Legislatures to charter corporations and require them to pass general enabling acts which will be uniform as to all corporations created under them.

There is some difference of opinion as to the exact force and scope of the doctrine of powers implied in behalf of the corporation as incidental to those specially conferred. By some courts it is said that the law will imply all such powers as are proper to be exercised in carrying out the express power. Other courts say that the power must be reasonably necessary to carry out the express power, while still others say that the powers must be necessary. The rule announced in the second expression, that is, that those powers which are reasonably necessary to the proper carrying out of those expressed in the charter, and none others will be implied, is sustained by principle, and apparently by the weight of authority.

Ultra Vires.—It is familiar American law, though the rule is different in England, that a corporation has no powers not conferred by charter and that the three classes of powers above enumerated cover all that are conferred, so that anything done or attempted to be done beyond these powers is *ultra vires.*

There is a great deal of confusion on this subject, and much of it is attributable to a loose use of the words, including in them acts and omissions which are open to other legal objection besides mere want of authority. The true meaning of the term is beyond power, that is, simply unauthorized, and they should be limited to cases in which the transaction is, in its nature, unobjectionable, but is outside the charter powers of the corporation.

As to agreements.—It is as much beyond the lawful authority of a corporation to enter into an illegal agreement as it is of an individual, but such attempt at contract fails, not because the charter of the corporation did not authorize it to enter into it, but for the more fundamental reason that the agreement, in its nature, is contrary to law, and will not be recognized and enforced, without reference to the particular parties who attempt to enter into it. We must, therefore, discard from our present consider-

ation all agreements which are affirmatively unlawful, leaving them to be dealt with in the books on Contracts, and confine ourselves to such contracts by corporations, or their representatives, as are in themselves permissible, but are beyond the powers of the particular company whose conduct is under investigation. We will find it profitable here to separate agreements from torts.

An *ultra vires* agreement, considered and judged by itself, unaided by other facts or circumstances, is never enforced by law. That is, an *ultra vires* agreement, unexecuted on both sides, can not be the basis of a legal right or legal duty. No action can be maintained on it to compel specific performance of the undertaking, nor for damages for refusal to perform. On the other hand, such an agreement, fully performed, will be recognized as a sufficient basis for rights acquired and vested thereunder, and neither party can maintain an action for rescission and to be put *in statu quo* because of such defect in the agreement. In these extreme cases we have no difficulty. The uncertainty exists as to cases in which there has been partial, but not complete, performance.

As to agreements in these conditions, there are three different holdings:

(1) That partial execution, if it has gone so far as to make it impracticable to put the parties in substantially the same condition as they were before, vitalizes the agreement, or estops the party in whose favor performance has been made from setting up the defect in the agreement, and it thus becomes practically a contract which will be enforced according to its terms.

(2) That partial execution will estop the benefited party from setting up the defect in the agreement until he puts the other person *in statu quo*, and hence will validate and enforce the agreement, unless he gives back the advantage received, or in good faith offers to do so, in which case he would be discharged.

(3) That equity will require the benefited party to put the other *in statu quo*, and, while it will not enforce the agreement according to its terms, it will compel restitution, or repayment, or such other action as may be just and right in the premises.

As to torts.—As torts are always unlawful, it follows that, in a strict sense, all torts by corporations are unauthorized. It does not follow, however, that a corporation has no actual power to

commit a tort. On the other hand, it is daily demonstrated that they have such power, and are constantly exercising it. It is this actual power and practical condition to which the law looks, and for the wrongful acts done or omissions suffered a corporation must make compensation. Just as in case of a natural person a tort by him is always unauthorized by law, yet, in fact, he does the wrong and his lack of lawful authority does not shield him. It is practically settled, in both the Federal and State Law, that a corporation is responsible for torts of its agents and representatives in the same manner and to the same extent that a natural person is responsible for the torts of his agents and representatives.

CHAPTER XVII.

SOME SPECIAL RELATIONS AFFECTING LEGAL RIGHTS AND DUTIES (CONTD.)

RELATIONS BASED ON CO-OPERATION AND COMMUNITY OF INTEREST (CONTD.)

CORPORATIONS (CONTD.)

Charter.—The charter of a private corporation created by special act of the Legislature consists of this act read in the light of all applicable constitutional provisions. The charter of a corporation created under a general enabling act consists of the articles of incorporation filed under the terms of such act, taken in connection with the enabling act, and all other applicable statutory and constitutional provisions.

In cases of corporations created by special act there can be but little difficulty in ascertaining what instrument constitutes the charter. It is the special act passed by the Legislature and accepted by the incorporators. Serious questions may arise as to the validity or proper interpretation of this act in whole or in part, but that the special act, so far as it is constitutional and valid, when properly construed, is the charter, does not admit of doubt.

Difficulty, however, is sometimes found in ascertaining what is the charter of the company organized under a general enabling act. All such acts require the execution and filing in some public office of a written statement as to the name and purpose of the corporation, its location, amount and shares of stock, if it be a stock company, the length of time the corporation is to exist, the names of those who are to be its first officers, and the names of some of those who are its stockholders. This instrument is rarely, if ever, required to contain any statements as to the method of corporate organization or action, or as to the powers of the corporation. Sometimes this instrument is called a charter in the

enabling act, though more frequently it is designated as articles of incorporation.

It is perfectly clear that if the powers of the corporation and its manner of action are to be derived from its charter, that if the written instrument above referred to is the charter of a corporation created under an enabling act, the corporation so created would be a failure. Unless the corporation has powers beyond those to be ascertained from this written instrument considered by itself, it can do nothing effective in the business world. So the law holds that the charter is the written instrument and so much of the enabling act as is applicable to corporations created under it for the purposes and of the kind mentioned in the written instrument, read, of course, in the light of all applicable constitutional provisions.

To ascertain what is really the charter of the corporation created under a general enabling act, we must therefore look:

(1) To the written instrument prepared and executed by the proposed incorporators and ascertain the nature and purposes of the corporation sought to be created.

(2) Next we must ascertain whether or not the general enabling act authorizes the creation of a corporation of that kind and for those purposes.

This inquiry is absolutely essential. No corporation can be created by the act of private individuals alone. The State's assent to and co-operation in the creation of the corporation is imperative. This action on the part of the State as to the kinds of corporations specified in the general enabling act and the purposes for which corporations may be formed, is evidenced by the passage of that act and is limited thereby. For individuals to undertake to form a corporation of some other kind or for other purposes than those provided for in the enabling act, would be for them to create a corporation without the concurrence of the State. So-called articles of incorporation or charters, filed by individuals but not contemplated by the enabling act under which such action is claimed to be taken, are necessarily inoperative as efforts to create a corporation. Such an instrument, under some conditions, might be regarded as an agreement between the parties out of which legal rights and duties might grow, but it could not be the basis of corporate life.

If, however, the corporation and purposes indicated by this written instrument are within the provisions of the enabling act, the corporation will be created by the filing of the instrument in accordance with law.

As this corporation is created under the enabling act it derives its powers therefrom and so much of the enabling act as is valid and applicable to that particular corporation created for the specified purposes, taken in connection with the written instrument filed by the incorporators, is the charter of the corporation.

Charter as a Contract.—For years it has been the settled doctrine of the American courts that the charter of a corporation, whether the company be created by special law or general enabling act, is a contract. Properly understood and limited, this doctrine is unquestionably true. However, it is easily susceptible of untrue and improper application and interpretation.

The charter of a corporation is a true and genuine contract, having all the required elements of an enforceable agreement:

(1) As between the State, on the one hand, and the aggregate or combined body of incorporators, on the other; and,

(2) As between each individual incorporator and the combined body of incorporators.

The corporation regarded as a legal entity cannot, in the nature of things, be a party to the contract which brings it into existence. As to it, the charter is its law of being, absolutely and imperatively binding upon it, not because it was in existence and gave its consent to the charter when it was formed, but because the charter brought it into life and gives to it all of its capacities and powers.

It might be said that, though the corporation was not in existence when the agreement, evidenced by the charter, was formed, after the corporation came into being, it adopts or ratifies the charter. The objection to this view is that it is not possible in law nor true in fact. A corporation, non-existent at the time the contract was made, cannot ratify such contract under the settled rules of law. Again, both ratification and adoption are necessarily based on voluntary action and agreement can neither be ratified nor adopted by a person, natural or artificial, who is not free to reject it. No one would contend that a corporation

is legally free to reject and repudiate its charter. Beside this, no corporation in fact goes through any such process as ratification or adoption of its charter in order to make its provisions binding upon it. The corporation regarded as a legal entity therefore, cannot truly be said to be bound by its charter by reason of agreement on its part. The agreement is between the State and the body of incorporators, and each of these parties is bound by it as such. The legal entity results from this agreement and is bound by it, not on account of its assent thereto, but because it derives its life therefrom and has only such life, and is legally capable of only such action, as is authorized thereby.

Returning to the question of the charter as a contract between the State and the body of incorporators, or a corporation, using this term to indicate the body of incorporators and not the legal entity, we find that it has all the essentials of an enforceable agreement.

(1) There are legally competent parties. The State is everywhere recognized as capable of entering into any agreements not forbidden by the Constitution of the United States nor of the particular State, nor by those fundamental moral principles which protect the health, safety, and morals of the people.

The law ordinarily regards all persons capable of entering into ordinary agreements as competent to become members of corporations. In some instances competency for this purpose is limited. For instance, it is sometimes provided that a portion of the incorporators must be residents of the State granting the charter. In other cases, it is enlarged, as by statutes authorizing married women to act as original incorporators. In every case, those proposing to join in the creation of the corporation must be competent under the law authorizing it.

The consideration, as between the State and the body of incorporators, is readily apparent. It consists in the mutual promises of the parties and in the benefit that each is to derive from the co-operation of the other in forming the corporation and from the carrying out of the corporate business.

The corporate enterprise and the purpose for which the corporation is created must be expressly authorized by law, so that in this sense we must have legality of purpose. The purpose must also be legal in a deeper and broader sense. The State can-

not, by agreement with individuals, bind itself to part with or abandon the exercise of its sovereign prerogatives and hence cannot, by a charter, cut itself off from the proper exercise of its police power.

This doctrine is well illustrated in the case of Stone v. Mississippi, 101 U. S. 814. In that case the Legislature of Mississippi had granted a charter to a lottery company. The company organized and paid the State a considerable sum of money for the charter and for the privilege of doing business in the State. A later Legislature passed an act repealing the charter. The company refused to recognize the validity of this act, claiming that the charter was a contract and its validity could not be impaired by State legislation. The Supreme Court of the United States held that the clause in the Federal Constitution, taking from the States the power to impair the obligation of contracts, was controlling upon the legislative action of a State but as the maintainance of a lottery is immoral and against public policy the charter of the company had never been a valid contract and the constitutional doctrine was not applicable.

Charters must be evidenced in the manner and form provided by law, so in this respect, they comply with the requirements of the law as to contracts.

Charters are also contracts between the body of incorporators and each individual incorporator. The discussion as to parties, consideration, legality of purpose, and form, contained in the preceding paragraph, is equally applicable here.

These four essentials of contract cannot be discovered or traced if we undertake to regard the charter as evidencing any contract except the two above indicated.

We have heretofore endeavored to show that a corporation regarded as a legal entity brought into being by its charter, cannot be contractual party thereto.

It is because the charter is a contract between the State and the body of incorporators as such, that the State is legally authorized and justified in holding these incorporators and their successors in right bound by the terms of the charter, and in enforcing appropriate penalties against them for violation of its terms.

It is because the charter is a contract between each individual

stockholder and the corporate body, that any stockholder, however small his share, may prevent the misuse and diversion of corporate funds and willful corporate mismanagement.

It is because the charter is a contract as between both sets of parties above mentioned that it comes within the protection of the guarantee in the Federal Constitution against State legislation impairing the obligation of contracts, and that the States are forbidden to alter or repeal charters once validly and unreservedly assented to. This is the fundamental doctrine of the great Dartmouth College Case.

In recognition of this fact and of the further fact that it is often desirable for the State to have practically full control over corporations created by it, it is now customary to incorporate either in the State Constitution or in the statutes authorizing the creation of corporations the reservation of the right to repeal or amend charters. Such provisions are regarded as parts of and affecting all charters granted after their adoption. Under such conditions, the State has a right to repeal charters granted by it. It must, however, make proper and fair provision for winding up the affairs of the company and protecting the legal rights of all parties concerned. The reserved power to amend may also be exercised. Amendments of little consequence made under this reserve power are binding on the incorporators and the corporation. If, however, the amendment makes a material change in the purposes or management or operations of the corporate enterprise, it is not operative without the assent of all the incorporators. If the amendment is not accepted by the incorporators, the company must wind up its affairs. It cannot continue to operate under the old charter because the State, one of the parties to the agreement evidenced by that, has, under legally reserved power, withdrawn its assent, and it is no longer a contract. It cannot operate under the charter as amended because the incorporators have rejected that and it is not an agreement. The incorporators are, therefore, allowed a reasonable time within which to accept the amendment, and if they do not do this, the corporation is dissolved and its affairs must be wound up.

Charter as the Law of Being to the Corporate Entity.—While it is true that the charter of a corporation is not an agreement between the legal entity resulting therefrom and any other person

or persons, still it is absolutely binding upon this legal entity and must be obeyed in every respect by it. This obligation is deeper seated and more imperative than if voluntarily assumed. It is a fundamental law of life. From the charter the entity derives all its powers. It has no life except as conferred by it. No power of action except in conformity with it. Deviation from it in any respect must be unauthorized and unlawful. The result of the deviation depends upon its nature and extent. If the sin is small, the penalty is proportionately small; if the sin is great, the penalty is proportionately great; if the sin is sufficiently grievous, the penalty is death, usually designated forfeiture of charter.

Capital Stock.

Capital stock is the aggregate amount of money which the charter of a corporation provides is to be put into the corporate enterprise. This, as all other matters, is of concern both to the State and to the incorporators and is fixed by the terms of the charter and can neither be increased nor diminished except by agreement of both parties.

At Common Law, and in many of the States, the full amount of stock mentioned in the charter must be taken by valid subscription before the corporation can be organized and begin business. In some of the States there is special authority for organizing the company and putting it into actual operation when only a designated portion of the stock has been subscribed for. This gives rise to the necessity for distinguishing between the amount of capital stock which may be issued, and that which has in fact been issued. The first is called the authorized stock of the corporation, and the second, its actual stock.

The instances are very rare indeed in which one person would desire and be able to pay for all the stock in the corporation. So to facilitate the disposition of stock and to distribute the benefits of the corporation and enlarge the number of the persons interested in it, this capital stock is divided into proportionate parts, and offered for subscription in amounts less than the total of the authorized stock.

These proportionate parts of the capital stock offered as separate investments are called shares and anyone who acquires a

share becomes a shareholder, or stockholder, or member of the corporation.

Shares are ordinarily acquired by subscription and as the general rule is that all shares must be taken before the organization of the company subscriptions are generally made before the filing of the charter. As the company is not then in existence it cannot be a party to the contract. Many nice questions have arisen as to the manner in which subscriptions may be taken before the charter is granted and as to the validity of these agreements among the several subscribers. Most of these questions are, however, eliminated by statutes in the several States regulating the matter.

In those States in which the corporations may be organized before all the stock is taken, the stock which is taken before organization is acquired by subscription under the local regulations as in other cases. The stock which has not been subscribed when the company is organized is a potential asset in its hands which may be disposed of by it by subscriptions to which it is a party.

A subscription in this connection is a promise to take a designated amount of the stock of the corporation and pay for it a designated portion of its face value upon the organization of the company if it has not been organized, or on some day agreed upon, if the company is then in existence, and to pay the balance of the face value of the stock at such times and in such manner as shall be called for by the proper corporate authorities. It is an implied term in every subscription unless it be expressly stated therein that the subscriber will pay the full face value of the stock and the amount in cash demanded of him shall be the same in proportion to his stock as that demanded from every other subscriber, and that future payments shall be required from all shareholders at the same times on the same terms and in amounts proportionate to the shares held by each subscriber. All subscriptions for stock in the same corporation may, therefore, be said to be related and mutually dependent contracts entitling all shareholders to the same rights in proportion to their shares and subjecting them to the same burdens in the same proportion.

In rare instances, stock may be acquired from a corporation after its organization by purchase. Purchase here has the same

significance that it ordinarily has and means the acquisition of a share from the company by sale upon terms agreed upon. If the purchase is cash and the full face value of the share or over, it seems that neither previous shareholder nor creditors of the company could complain. If, however, the purchase is for less than the face value, or on credit to be paid for at times designated in agreed amounts, the transaction does, under the ordinary circumstances, injure both the existing shareholder and the creditors of the concern. Under ordinary conditions, the corporation is not recognized as having the power to make such sales. If such sales are sustained at all it is when the company is in such condition that its stock can be bought on the market for less than its face value and not exceeding the amount paid or promised to be paid for the stock. Under such circumstances it is sometimes to the substantial interests of the company, and hence of its shareholders and creditors, to permit it to make sales of this sort and so obtain money to put into the business.

Shares of stock after they have been acquired from the company are transferable, all the rights and liabilities incident to the share passing with its transfer. The transfer, however, does not carry with it rights to dividend which have been declared previous to the transfer, nor subjection to calls for unpaid purchase money on the share which have been made prior to the transfer unless the corporation has a lien upon the share for such payment or the right to forfeit the share for non-payment.

Membership.

A member of a stock corporation is one of the persons who compose the corporate body; that is, a person who, with his associates, was an original party to the contract with the State from which the corporation resulted; or one who, in conformity with that contract, has been let in as an additional co-contractor on the side of the individuals acting in its formation, by subscription after organization; or one who, in conformity with that contract, has succeeded to the rights and responsibilities of such a former member; or, in rare instances, one who has been let in the contract on the side of the individuals by purchase of stock from the corporation after organization.

In all stock companies membership is incident to ownership of stock. As indicated, membership may be acquired in four ways:

(1) By subscribing for stock before organization and being one of the charter members.

(2) By subscribing for stock after organization

(3) By purchase or acquisition of stock from some holder after he has acquired same from the company.

(4) In rare cases, by purchase of stock from the company after incorporation.

Shares of stock are transferable, and the effect of sale is to change the membership dependent on the sold share from the seller to the buyer and to relieve the seller from liability for future calls, and to entitle the buyer to all dividends thereafter declared.

Rights Incident to Membership.—Membership ordinarily carries with it the following rights and liabilities; if in any case there is a departure from these it is exceptional, and the exception must be shown:

(1) Right to participate in the government of the corporation and its affairs by taking part in stockholders meetings.

(2) Right at reasonable times and for proper purposes to inspect the books and records of the concern.

(3) Right to share in dividends.

A dividend is a percentage of the profits of the corporate business which by action of the proper authorities has been withdrawn from the corporate fund and distributed for the benefit of the members in proportion to their shares of stock.

After a dividend is declared and before it has been paid it is a debt due by the corporation to the shareholder.

(4) Right to preference in subscription for increased stock in proportion to his present holding.

(5) Right to share in the distribution of the assets upon dissolution of the concern.

(6) In extreme cases the right to control the conduct of the corporation and its officers in carrying out the corporate business.

As membership is dependent upon ownership of shares of stock, those rights and liabilities which are in their nature apportionable exist in proportion to the shares held by the party. Thus, at a stockholders meeting the votes are taken per share, and not per

member, assessments are made and dividends paid on the same basis.

A dividend is a percentage of the profits of the corporate enterprise withdrawn from the business, and distributed among the members in proportion to their shares of stock.

Liabilities Incident to Membership.—The first liability is to pay to the corporation, or its representatives, the amount of subscription to stock, upon proper assessment and call.

An assessment is the fixing of the amount of money needed by the corporation for a given purpose or purposes, and distributing the amount among the several shareholders in proportion to their respective shares, thus fixing the sum or per cent per share that each stockholder is to pay.

A call is a demand made upon a stockholder for his share of an assessment.

The corporation, while a going concern, has, at Common Law, the right to sue for the amount of any assessment upon failure by stockholders to pay, after notice. There are two common statutory remedies: forfeiture of the stock, and sale of the stock without suit.

In case of insolvency, absolute, or in some instances going no further than present inability to command cash with which to make immediate payment, the creditors of the company may proceed against the stockholders and collect the amount unpaid on their respective subscriptions, provided this does not exceed the amount of the debt.

Internal Government.

Business management is vested in, or divided between, the stockholders and board of directors. Ordinarily the stockholders determine the general policy of the business and elect the board of directors, make by-laws for their government, and leave to the directors and officers elected by them the actual management of the concern.

The directors are the managing body of the corporation, and for it and in its name carry on its business. They elect its officers, usually from among themselves, and define their duties, when not prescribed in the by-laws, and overlook their affairs. The general

officers usually select and employ their respective subordinates in their several departments.

Corporate Funds.

The assets or funds of a stock corporation consist, at first, of its capital stock, and, subsequently, of all property and valuable franchises acquired by it in the prosecution of its business, either by realizing on its corporate stock or capital, or by profits in its business, or otherwise. The property acquired in any of these ways may be utilized in the prosecution of the business, and in this there may be many purchases and sales, and purchases again, but through all these mutations in the things owned, so long as the ownership is in the corporation, the things constitute corporate assets or funds, and are to be dealt with as such.

This brings us to the mooted question whether or not the assets of a corporation are a trust fund. There is a great deal now being said in the decisions of courts and the magazine articles on both sides of the question. The question seems to me to be more a matter of words than of substantial difference. When the Supreme Court of the United States says that a corporation owns its property just as an individual or natural person owns his, and some State supreme court says that the assets of a corporation are a trust fund, it seems that, technically, neither is correct, but that, substantially, each is right from the point of view each occupied at the time.

That a corporation owns its assets, in the full sense of the term, just as an individual owns his, I do not think can be said. The individual has right of possession, without accountability to anyone therefor. He has the right to use it as he sees fit, so long as he does not interfere with the just rights of others in their persons or property in so doing. He can change the use as he pleases. He can even destroy the thing without incurring legal liability to any other person. These incidents of ownership do not equally exist in case of a corporation. It can not use the property in its hands except for the furtherance of the corporate enterprise, and has no right to destroy it except as such destruction may occur in the legitimate use of the property in the furtherance of the corporate business. So, I think, it is inaccurate to say a corporation owns its property just as an individual owns his.

But it is certainly correct to say that a corporation is entitled to equal protection of the law in the use and enjoyment of its property for corporate purposes, and that its rights are as sacred before the law and must be enforced with the same conscientious regard for justice and law, as those of an individual.

On the other hand, the corporation certainly has power over its property and an interest in it beyond those of an ordinary trustee. In a technical sense, there is no strict relation of trustee and *cestui que trust;* so that the technical rules of procedure in such cases should not be enforced. Still the property is charged with the accomplishment of a certain purpose, and can not be lawfully applied to any other, and if the managing officers of the corporation or any of the stockholders or any number of them shall attempt to use it for other and different purposes, they can be restrained from so doing if the wrongful purpose is known before its accomplishment, or can be held in damages if the wrong has been consummated. This is certainly not true as to an individual having general ownership of a thing. The trust fund theory, therefore, has much of truth in it.

The foregoing observations apply while the corporation is still attempting to carry on the corporate business. When the corporate enterprise is abandoned and the company ceases to be a going concern, the trust idea becomes of much greater practical importance.

In those States holding to the trust fund theory, the moment the corporate officers abandon the effort to carry out the corporate purpose, their power over the assets ceases, except as trustees, to use them in paying the corporate debts and turning over the surplus, if any, to the stockholders. This trust must be discharged fairly and without favoritism or preference between the creditors. So in these States no preferential assignments can be made by a corporation nor can any preferences be obtained in the distribution of the assets of an insolvent corporation by attachment or other legal proceedings.

In general, we may say that creditors of a corporation, while it is a going concern, have the same rights and remedies against it that the creditors of a natural person have. This applies only to private corporations, as public corporations enjoy privileges in this regard not pertaining to individuals. In case of *quasi*-public

corporations there are some special rules and doctrines differing from the strictly private, but we have not time to take up these.

Corporations De Facto.—General enabling acts always, and special laws providing for the organization of corporations frequently, require that individuals organizing the corporation, under the authority conferred, shall perform certain acts. Questions necessarily have arisen as to the extent to which these provisions must be complied with in order to bring the corporation into being.

The rules on this subject are fairly well settled and may be stated as follows:

(1) Literal compliance with the provisions of the valid law always results in the creation of a lawful corporation.

(2) Substantial compliance with the terms of the corporate law has the same result.

(3) Effort in good faith to comply though it falls a little short of substantial compliance, and actual organization and entry upon the corporate business, does not result in a corporation in law, but does result in an organized combination of the individuals known as a corporation *de facto.*

(4) Effort at performance of the requirements, even though in good faith, which does not approximate substantial requirement does not create a corporation but leaves the rights and liabilities of the parties to be determined by other rules of law.

(5) Effort at performance, not in good faith, and not strictly in conformity with the statute does not result in the formation of a corporation either *de jure* or *de facto.*

(6) Attempts to form corporations when there is no valid law authorizing incorporation for the purpose or purposes named is ineffective and does not result either in a corporation *de jure* or *de facto.* This is true whether the attempt be made without the semblance of statutory authority or in compliance with a legislative enactment which is unconstitutional.

We may define a corporation *de facto* as an organization and combination of persons resulting from a bona fide attempt on their part to form a corporation under a valid law in which they have not quite come up to substantial compliance but under which they have actually organized and entered upon the corporate business.

Before there can be a corporation *de facto* there must be:

First, a valid law under which organization is sought to be made.

Second, the action of the incorporators must fall just a little short of compliance with this law.

Third, just what this requirement means it is difficult, if not impossible, to state more definitely. If the effort results in substantial compliance, a *de jure* corporation is formed; if it falls unreasonably short of substantial compliance, no kind of corporate life results. The space between these two statements is vague and in each particular case must be determined by the court from its own facts in the exercise of a sound discretion.

The action taken by the incorporators must be in good faith. If there is any fraud or attempt at evasion of the law a corporation *de facto* will not exist.

Fourth, the parties must in fact organize what they believe to be a corporation and this corporation must actually enter upon the corporate business.

So far as private persons are concerned a corporation *de facto* stands in law upon the same footing as a corporation *de jure*. Its rights will be protected and its duties enforced and the rights of the respective members among themselves will be just the same as if the corporation were one *de jure*.

When the relations between the State and the corporation are considered from the standpoint of the State, the rule is quite different. As there has been neither literal nor substantial compliance with the terms of the law, the State has never in fact assented to the formation of the corporation and its assent as assumed by the members may be withdrawn at any time and the charter or supposed charter declared forfeited and the business of the concern wound up. In doing this the State must protect the vested rights of the incorporators and creditors of the concern. The procedure in such cases is usually practically the same as in the dissolution of a corporation *de jure* by lapse of time or for other reasons.

Foreign and Domestic Corporations.

A foreign corporation is one created by a government whose laws are not enforced at the place at which the status of the corporation is being considered. A domestic corporation is one cre-

ated under a law which is in force at the place where the matter is being determined.

Under these definitions, a corporation created under the laws of any foreign government or of any State in the Union beside the one in which the status of the corporation is to be determined is a foreign corporation. Under it corporations created under a valid act of Congress in the exercise of its general powers, or under the law of the State in which the question is pending is a domestic corporation. A corporation created by Congress in exercising its jurisdiction in the District of Columbia or any of the territories, is a foreign corporation, in any State or other Territory.

Domestic corporations have such powers, and such only, as are conferred by their charters. Foreign corporations considered strictly as such have such powers, and such only, in any given State as are accorded to them under the rules of comity. Strictly speaking, a foreign corporation is not legally entitled to recognition, existence, or the right to do business in any State outside of that of its creation. In that it does business not as a foreign but as a domestic corporation.

Corporations, legally speaking, are not citizens either of the State in which they are created or of the State in which all, or a majority, of their stockholders are citizens. Not being citizens, they do not come within the protection of that clause of the Federal Constitution which guarantees to the citizens of each State equal privileges and immunities in every other State in the Union that the citizens of the latter enjoy. This clause, therefore, does not interfere with the State's power to exclude foreign corporations from its territory, or from doing business therein, or from imposing such conditions upon their entry within its territory or doing business as the State shall see fit.

It is quite customary for the several states to waive their right of exclusion and under the law of comity to permit foreign corporations to do business within their respective territory. In later years it is, however, not unusual for the State to impose reasonable conditions upon this privilege. These conditions usually consist in requiring full and satisfactory disclosure of the financial status and solvency of the concern, the payment of a State tax or license fee, and taking out a permit or license. Such

restrictions are valid unless they contravene the Inter-State Commerce Clause of the Federal Constitution or attempt to deprive the corporation of its right to litigate its legal rights in the Federal Courts.

If a corporation is authorized by its charter to engage in commerce and does engage in commerce in such way and under such circumstances that a particular transaction or series of transactions is really Inter-State, or foreign commerce, such act or business is within the exclusive regulation of Congress and the States can neither forbid nor regulate it.

While the foregoing statement that a corporation is not a citizen of the State creating it is an established doctrine of the Federal Courts that for the purpose of determining jurisdiction in the Federal Courts, when this is dependent upon diverse citizenship of the parties, it will be conclusively presumed that all of the stockholders of the corporation at the date of the institution of the suit were resident citizens of the State in which the charter was granted, and the question of jurisdiction will be decided on this presumption without permitting any proof to the contrary.

CHAPTER XVIII.

PROPERTY.

One of the most important and complicated subjects with which the law deals is property. Anything like a satisfactory treatment of it would cover several volumes. It is too important, however, to pass over without a very brief outline or treatment of its general features.

There are three closely related ideas involved in the subject:

(1) The legal right of dominion over a thing, usually called ownership.

(2) The subject matter of such dominion, or the thing owned.

(3) The legal evidence of ownership, or title.

While these three ideas are closely connected they are easily separable and must not be confused.

OWNERSHIP.

General Conception.

Ownership involves dominion over the thing owned, the legal right to have it, to use it, and to enjoy it, to do with it substantially as one sees fit; subject only to the general rules of law which prevent one from so using his own as to unjustly injure his neighbor.

The word property is from the same root as the word appropriate, the primary meaning of which is to take to one's self; to apply to one's exclusive benefit. The word dominion, which is frequently used as indicating ownership, signifies control, authority over, power to do with according to one's will. Each of these ideas is embraced in the law's meaning of the word ownership.

The word property is often used as indicating this proprietorship in and dominion over the thing, but more frequently it is used with reference to the thing appropriated, or over which the dominion may be lawfully exercised. On account of this dual

use of the word property, we will use the term ownership in this immediate connection.

When the law recognizes the propriety of the appropriation of a particular thing by a particular person and his dominion over the thing, and undertakes to protect him therein his ownership becomes a legal right.

This right to acquire, hold and enjoy property is indispensable to our present modes of life and its accompanying civilization. Without some recognition of proprietary interest in and dominion over particular things by particular persons, society could not be maintained on anything like its present basis.

This conception of property and right of dominion is conducive not only to the individual good, but to the general well being of the community. It has always been conceded that these property rights are not absolute and unlimited. When the law says that it recognizes the dominion of a certain person over a certain thing and will protect him in his claims thereto, it does not mean that his dominion is absolute and not subject to reclamation by the public, nor that his use of the thing according to his own will is unlimited. Because A has the undisputed and unconditioned ownership of a gun is no reason that the law should permit him to murder B with it; nor because B has fee simple title to a tract of land is he therefore authorized to maintain upon it anything which would be a nuisance to his neighbor. The law places reasonable limitations upon the dominion of the owner over his property as well as upon the uses to which he may apply it and the manner of such uses.

Elements of Ownership.

Using the term in its fullest legal sense, ownership embraces five elements:

(1) The right of possession.
(2) The right to use.
(3) The right to receive profits or increment from.
(4) The right to change, that is, to modify or destroy.
(5) The right to dispose of.

When these five rights are combined in one person as to one thing, without limit as to time, this is the highest estate which the law knows.

Each of these rights in the owner is exclusive, except, of course,

in cases in which there are a number of co-owners holding the property rights in combination. The Common Law recognizes several combinations of interests. These, however, are principally important as to estates in land, and can be more appropriately treated in connection with that subject.

Right of Possession.—Possession means immediate, physical dominion over a thing. The word is used with reference to many different kinds of things over many of which the physical dominion would, from the respective natures of the things, have to be exercised in different ways. If a man has his purse in his hand, we say it is in his possession; if he places it in his pocket, it is still in his possesion; if at night he places it in his safe, it is still in his possession. We say that he who occupies a house is in possession of it, also that he is in possession of the yard and immediately adjacent premises. If the claim of right under which he occupies the house extends to a thousand acres of land on which the house is situated, we say that he is in possession of the whole tract. It is apparent that the man has not the same physical contact with, and power over, each of the things of which we have affirmed that he was in possession. The one idea common to all the different states of fact is, that the party said to be in possession had the immediate physical dominion over the thing possessed.

The law stresses this idea of dominion to such an extent that it frequently recognizes a thing as in possession of a person when there is really no actual physical contact between it or any part of it and himself.

Possession is called actual when it involves actual physical contact and control exercised over the thing.

Possession is called constructive when there is the legal right of physical dominion and control over the thing but no actual contact or physical control over it or any part of it.

To illustrate; if A is the legal owner of a tract of land and has it all enclosed within a fence and lives upon it, in the strictest sense he is in actual possession of the land. If he owns the tract of land and has only a portion of it enclosed and lives upon it, he is still, in legal contemplation, in actual possession of the whole tract. He is in actual physical possession of a portion of it and in order to sustain his legal right to the remainder the law re-

gards this physical dominion over the part as extending to the whole.

If A owns a tract of land and neither he nor anyone else has actual physical control over any part of it, A is, in legal contemplation, in constructive possession of the whole. He is legally entitled to such possession and as no one has an actual physical occupancy of the land, his legal right of possession draws to itself by construction of law immediate physical dominion over the thing owned.

If A owns a tract of land, but is not in possession of any part of it, and B enters upon it, encloses it all under fence and uses it as his own, the law would recognize this as actual possession by B. It is not legal but it exists in fact, and so existing the law takes cognizance of it.

If A owns a tract of land and B enters upon and takes actual possession of only a portion of it, such actual possession will destroy A's constructive possession of the part actually held by B, but will have no affect upon the remainder. This last statement must be taken with the qualification that under the statutes of some of the States actual possession of a part of a tract of land will draw to itself constructive possession of some designated amount of the balance of the tract for the purpose of supporting the statute of limitation.

If there are conflicting titles to a tract of land, so long as it is not in the possession of either of the claimants, it is legally in the constructive possession of the true owner. If either claimant takes actual possession of any part of it, the other claimant not being in possession, this will be regarded as actual possession of the whole tract by the one actually occupying the part.

If there are two claimants and each is in actual occupancy of a part of the land, the true owner will be regarded as in actual possession of all not actually occupied by the adverse claimant whose possession will be limited to the part actually enclosed by him.

It is apparent from the foregoing that the actual possession of property may be taken wrongfully and hence may be in one person when the legal right to the possession is in another. This is always a legal wrong committed by the one taking possession against the one entitled to it. Such unlawful possession should always be surrendered to the true owner upon demand. If this is

not done, the owner can always recover the possession of the property unless the adverse holding has extended for such length of time and under such circumstances as to constitute a bar under the statutes of limitations.

While wrongful actual possession is never good against the owner, unless it has ripened into a defense under the statutes of limitations, it is not an invasion of the right of anyone except the owner and so long as it remains undisturbed by the true owner it may be, and frequently is, looked upon as sufficient evidence of right in the thing possessed against anyone interfering with it except the true owner.

Right to Use.—Ownership also carries with it the right to use the thing owned. The right to use is the right to apply the thing owned to benefit, convenience, or pleasure of the owner, that is, the right to subserve his purposes by the employment of the thing owned. This right extends to the application or employment of the thing in any way which does not unduly interfere with the just rights of the public or of any individual. These limitations are real and must constantly be kept in mind. Ownership does not carry with it the license to use the thing owned in any way that the owner may see fit, but only the liberty to use it with due regard for the just and equal rights of other persons.

The Right to Receive Profits or Increment From.—The next incident of ownership is the right to receive pecuniary advantage from the profits or revenues derivable from the thing owned and the increment or increased value thereof. This is a very valuable right, without which capital would practically lose its productive quality. These benefits include such items as rents, or hire of property, interest on money, dividends on stock, increased value of the thing which is owned, the natural increase of animals and similar accessions of value. In many instances, this profit results from the judicious use of the thing owned by the owner. In many others, it is received by him from another as compensation for the privilege of using the thing owned by the latter. In other instances it represents, or takes the form of an increase in value of the thing owned; and in still others, it comes from the production by the thing owned of other things having value.

The Right to Change.—Another of the rights incident to ownership is the right to change the thing owned. This right extends from the slightest modification to the complete destruction of the thing. It is an exceedingly useful and practical right. Under it all improvements and manufactures are carried on. If the owner of property were required by law to keep the thing owned always in the same condition, life, for the short space during which it could be maintained at all, would be unendurable. Man could use neither food nor clothing, nor enjoy nor derive benefit for any length of time from anything which he had. In the reasonable exercise of this right, many of the largest and most frequent opportunities of life are enjoyed.

The Right to Dispose of.—The last of the elements of ownership is the right or power to dispose of the thing owned. This consists in the legally protected privilege of transferring one or more of the other rights of ownership to another person in such way that he shall thereby acquire such legal right. This is an indispensable right and one very frequently and freely exercised. The claim or advantage transferred may be any of the four preceeding rights combined without any limitation thereon, or it may be some one or more of these rights for a limited time, to a limited extent, and for limited purposes. The estate created by the transfer would depend upon the nature and purpose of the transfer and the agreement of the parties.

Transfers of these rights may be effected in many ways. The most frequent methods are by agreement between the parties and by operation of law. In so far as they are effected by agreement between the parties they are governed by the rules of law applicable to that subject including the law of contracts.

Acquisition.

Ownership of a thing may be acquired in a number of different ways. A number of classifications of these methods have been made by different persons, at different times.

The classification accepted by Blackstone as coming from Littleton gives only two modes of acquisition of real estate, one by purchase and the other by descent. As to things personal, he mentions twelve methods, 1. By occupancy, 2. By prerogative, 3. By forfeiture, 4. By custom, 5. By succession, 6. By marriage,

7. By judgment, 8. By gift or grant, 9. By contract, 10. By bankruptcy, 11. By testament, and 12. By administration.

It is apparent that this classification is too ancient and involves and is based upon legal rules and conditions many of which are now obsolete. A treatise which undertook to trace out the historical development of the law might well afford to give time and attention to it, but if the effort is to bring into the mind of the student a simple understanding of the living law as it now exists in American jurisprudence upon a simple effective working basis it is highly probable that an effort at elaborating them would result more in confusion than helpfulness. I do not wish to be misunderstood here. The historical approach to the law, searching out what has been, is essential in the process of legal education. This necessarily comes as a part of the treatment of each particular legal subject when taken up for detailed study. The purpose of the present treatise is, as far as it may practically be done by the author, to present the dominant principles and general rules that constitute the frame work of American Law as it now exists, to the end that the student, at the beginning of his course, may be given a fair general view of the fundamental doctrines which are to be elaborated later on, as to each particular subject when taken up in detail.

The classification which is perhaps as full and simple as any is as follows:

(1) By discovery.
(2) By conquest.
(3) By production.
(4) By increase.
(5) By legal succession to the rights of another.

Discovery.—Discovery is a recognized method of acquiring property in the thing discovered. The most frequent application of the doctrine is in connection with the discovery, so called, of new countries by virtue of which fact, the government under whose authority the discover was acting asserts title and dominion over the land. The doctrine has its application, however, in private law and he who really discovers a thing of value is regarded as entitled absolutely, or to a less extent specified by law, to its uses and benefits.

Conquest.—This method also has application among the nations of the earth. When one people successfully wage war against another and overpower them, the conqueror asserts political rights, to a greater or less extent, over the territory of the conquered, and becomes the owner of the public property of the subjugated people. This is not recognized as a legal method of acquiring ownership over private property that belongs to or is in the possession of another person. If it has any application as a basis of private right it is in those cases where some one has subdued or tamed some animal, wild by nature, and has so acquired a property right in it.

Production.—Production is a well recognized basis of private property right. He who, by his own skill and labor in the use of his own faculties or of things already belonging to him or by a combination of these, produces some new thing, the law recognizes as owner of the thing. As, for example, the crop which a man raises on his own land, or the implement which the smith manufactures from his own material by his own labor, or the book produced by the author, or the picture drawn by the painter, are respectively recognized by law as belonging to him by whom each is produced. The law goes further than this and recognizes that he who has produced or manufactured a thing at his own expense, though in so doing he may have employed the labor and skill of others, is the owner. If two or more co-operate in the production of a thing, each contributing his due share and proportion, there being no understanding between them, express or implied, the production will belong to both jointly. If two or more co-operate in the production of a thing under an agreement express or implied, that the production is to be at the expense of one who is to pay the other or others for their contribution, whether of capital, material, skill, or labor, the law respects the agreement and regards the thing produced as belonging to him who is recognized as owner by the agreement and makes him a debtor to the other party or parties contributing for the amount agreed upon if they so specify or to the reasonable value of the contribution, if there be no understanding as to the amount.

Difficult questions arise when a thing really belongs to one person, and another, obtaining possession of it, so changes the thing by working upon it or by incorporating it with other things as to

put it into an essentially different form, or give it an essentially different character from that which it had. For instance, a man owns a tract of land with trees growing on it suitable to be sawed into lumber. Another, without the knowledge or consent of the owner goes upon the land, cuts down the growing trees and saws them up into lumber ready for the market. Some of the lumber he sells to another party who uses it in the building of a house. To whom does the unsold lumber in the possession of the man who sawed it belong? To whom does the house built by the third party out of the lumber belong? The answer of the law is that the lumber belongs to the owner of the trees, if he sees fit to assert his title. While the form of the tree has been changed, still the timber that was in the tree can be identified as the lumber in the yard. Though changed in form, there is no such change in substance or in use and no such incorporation with other things belonging to another person as to prevent or render unusually difficult identification in fact, or to make reclamation of the identical thing seriously hurtful to another, so the lumber belongs to the owner of the trees. The case is different with the house. Here, while the identity of the thing may be fairly traced, it has become so united with and incorporated in the premises of another that it cannot be detached therefrom without serious sacrifice of value. The ownership of the lumber could not draw to itself the ownership of the land on which the house is builded. To separate the house, as a building, from the land would require serious invasion of the rights of the owner of the land and also serious loss in value beside the appropriation, by the former owner of the trees, of the results of the labor and expense of him who built the house. To permit the owner of the trees to enter on the land and tear down the house and reclaim the individual pieces of lumber would be subject to all the objections just argued against the removal of the house to an even greater extent than in such removal. In view of these facts, the law does not permit the owner of the trees to follow and reclaim the lumber in the house but gives him remedy against the man who cut the timber for the market value of the lumber.

There is quite a contrarity of opinion upon the points just stated. Some of the courts hold that the owner of the timber cannot recover the sawn lumber, or its market price, if the owner

elects to do that, unless the cutting of the trees and the sawing of the lumber is done in bad faith, that is, with knowledge that the trees did not belong to him who cut them, but wherever the cutting and sawing is done in the honest belief that the trees belong to him who cut them, the true owner can only recover the market value of the trees as they stood upon the ground.

There is also difference of opinion in the cases as to the burden of proof on the subject of good faith. Some of the courts hold that the owner, to entitle him to recover the value of the manufactured product must show that the wrongful manufacturer acted in bad faith, while others hold that proof of the wrongful taking and exercising dominion over the property of another is sufficient to subject the wrongful manufacturer to liability for the manufactured value unless he shows that he acted in good faith in taking and dealing with the thing.

Increase.—Increase of or from the thing owned enures to the benefit of the owner. This is true whether the increment comes in enhanced value of the thing, whether due to changes in it made by the owner or by advantageous circumstances or by natural growth or accretion of the thing itself, or by the development or production by the thing owned of other things having separate existence. Thus, if a man buys a tract of land and puts it in cultivation, all its enhanced value enures to his benefit. If he buys a tract of land and leaves it unimproved but by change in environment such as the development of the country, the building of railroads, etc., the land increases in value, this increment, though unearned by him, still enures to his benefit. If a man owns a flock of sheep, the wool grown upon them is his, as are the lambs also.

Legal Succession to the Rights of Another.—This is by far the most common method of acquiring property. Practically everything subject to ownership in use in the ordinary social and business life of the community belongs to some person or persons. The rights of these owners may be transferred or passed over from them to other persons who thereby succeed to such rights.

The methods of transferring property are numerous and have been classified in many different ways. Perhaps as simple a classification as we can make is as follows:

(1) Transfers by concurrent action of both parties.

(2) By act of the transferee alone.
(3) By act of the transferor alone.
(4) By operation of law.
(5) By act of governmental agencies.

By Act of Both Parties.—Under this would be embraced all changes of ownership based upon agreement of parties. These are of two general kinds. (a) Those in which the agreement has all the essentials of contract, and (b) those in which, though the agreement lacks one or more of the elements of contract, still is so far executed that vested rights have passed under it.

Contract is the most frequent method by which ownership is transferred. This covers a very large majority of the business transactions of the world. To be effective these agreements must be genuine involving mutual understanding and mutual will and must have the four essential elements of contract.

Such agreements as constitute title to real estate are usually spoken of as conveyances and are evidenced by formal written instruments executed in conformity with the local law, known as deeds. Contracts transferring estates in land less than a freehold are usually called leases and if for a period longer than that designated in the applicable statute of frauds, usually one year, they are required to be executed with the same formalities as conveyances of real estate. There are numerous other contracts which affect the title to land not included in the foregoing, but the two mentioned are the most common.

Contracts which transfer the title to personal property for a price in money are known as sales. Contracts by which one piece of personal property is transferred in consideration of the transfer of other personal property are called barters or exchanges. Contracts regarding ownership of personal property which affect only the possession and not the title are known as bailments.

Agreements not amounting to contract which still affect the ownership of property are principally gifts, which, as we have seen, when fully executed, pass title to the thing given.

The effect of agreements lacking each of the other elements of contracts as to vesting rights has been heretofore considered under the head of Agreements not Amounting to Contract, pp. 231–241, *supra.*

By Act of the Transferee.—Under this head comes the acquisition of property by adverse possession and user. This is usually treated under the head of prescription or limitation.

Prescription arises when one, not the owner of property, has been in possession of and has used it as his own for such length of time that the law presumes a grant in his favor from the owner. To have this effect the possession must be continuous for a required term, must be held as a matter of right in opposition to the ownership and claim of the true owner, and no legal proceedings must have been instituted against the possessor by the owner for the recovery of the thing. In the language of the law, the possession must be uninterrupted, adverse, and peaceable. When these three facts concur and continue for the length of time recognized as applicable to the particular kind of property, they give title to the original trespasser.

At Common Law limitation, strictly speaking, did not give title to the thing owned but was merely a defense to any suit brought by the true owner for its recovery. It was complete protection so long as the wrongdoer retained possession of the thing. But if he lost possession, and the true owner acquired it, the one in whose favor limitation had run could not recover the property from its rightful owner by law.

Limitation arises when property has been held uninterruptedly adversely, and peaceably for a designated length of time, under such circumstances that the Common Law did not presume a grant. The presumption of a grant in cases of prescription, and the absence of such presumption, in limitation, is the fundamental difference between the two doctrines at Common Law. The practical consequences that grow out of this fundamntal difference are very important.

Under many of the statutes of limitation as they now exist in the different States, this Common Law doctrine is set aside, and the uninterrupted, adverse, peaceable possession of property for the time required by statute vests title in the holder. In view of the prevalency of these statutes limitation is given as a means of acquiring title.

At Common Law, and under most statutes, if at the time the adverse possession begins the true owner of the property is under legal incapacity, neither prescription nor limitation runs against him or her until the legal incapacity terminates. If there are two

or more disabilities, prescription or limitation does not begin to run until the removal of all. If the owner is under no disability when the adverse possession begins, a disability beginning thereafter does not affect the running of the statute.

There are some things, such as water and light, that are ordinarily regarded by law as common property, not subject to ownership by a particular individual. The law, however, recognizes legal rights in the use of these. If, therefore, one person shall use water or light in a manner or in amount beyond his right and under such circumstances as to constitute an actionable invasion of another's right to use and shall continue such use uninterruptedly, adversely, and peaceably for the required length of time, his right to continue the use, in the manner and for the purposes and to the extent that he has so used it, will be protected by the law of prescription or limitation according to the facts. Such right, however, cannot be extended so as to cover uses for different purposes or in a different manner or to a greater extent. Deviation from the accustomed use to any appreciable extent would be an additional burden upon the other party unsupported by previous usage.

By Act of the Transferor.—At Common Law and under the Statutes of the several States persons having the proper qualifications can dispose of their property by will. The usual qualifications are that the person shall be twenty-one years of age, or married, and of sound mind. Wills, to pass the title to real estate, must be in writing and signed by the testator. The will must be either wholly written by the maker or must be signed in the presence of and attested by two or more witnesses. Oral wills are recognized as valid means for transferring personal property. Sometimes the amount of property is limited. For an oral will to be good it must be made, if by an ordinary person, in the conscious presence of death, the testator must be of sound mind, and the dispositon of the property must be certain. The will must be proven by several witnesses and as so proven by the different witnesses must be of the same legal effect and in substantially the same language.

Wills made in conformity with law are recognized as valid conveyances of property. As, however, the will constitutes the title to the property, before it can be available as such its genuineness

and authenticity must be proven before and declared by some court of competent jurisdiction. The will, when thus probated, vests the rights therein conferred upon the devisees and legatees according to its terms.

Rights under a will, as those acquired by inheritance, are subject to such conditions regarding the same as are imposed by law, and in case of wills by the terms of the instrument. The principal condition imposed by law grows out of the maxim "That a man must be just before he can be generous" and consequently that the rights of the devisees and heirs are subject to the just claims of creditors.

In a number of States there are provisions for the care and maintenance of the family of the deceased, such as the allowance for temporary support and protection in the use of the home which are superior to the claims of either creditors, devisees, or heirs.

As no one is required by law to accept property under a will, it might be more logical to include this manner of acquiring property under the head of Transfers by Concurrent Action of Both Parties, but as a will does not take effect till after the death of the testator and no acceptance prior thereto could preclude the testator from subsequently changing the will, the transfer cannot strictly be spoken of as resulting from the concurrent action of both parties.

By Operation of Law.—In this head are included transfers by inheritance. The Common Law and the statutes of the different States recognize the ties of kinship and the fact that in the great majority of lives, one of the great stimulants for industry and economy is the desire to provide for one's family. Hence it is that the law of inheritance in some form exists in all Common Law countries.

The details of this law depend upon the sovereign's conception of public policy. In monarchical or other aristocratic forms of government care is taken to create and preserve large estates in land and the laws of descent are made so as to effect this purpose. In democratic countries, where equality of opportunity is the basic doctrine, the laws of descent reflect this policy and estates are distributed on more nearly equal terms.

In contemplation of law the right of the heir in the property of

the deceased vests immediately upon the latter's death. This investiture of right is by operation of law and is not dependent either on the desire of the deceased or the acceptance of the heir. It is true that it is subject to repudiation by the heir. No one is compelled to receive an estate by inheritance against his will, but acceptance, being so common, and under most conditions, both reasonable and beneficial to the heir, in the absence of repudiation by him, it is presumed.

There are a number of other conditions under which title is transferred as the result of legal proceedings without the affirmative consent of the party divested of title, but in none of these is the transfer by direct operation of law as all of them require the active intervention of governmental agencies.

By Act of Governmental Agencies.—One of the chief functions of sovereignty and its main purpose in the organization of government is to protect the well being of the public and enforce the just rights of individuals. In order to enable it to accomplish this twofold purpose it frequently becomes necessary to exert its power in forced changes in the ownership of property.

Transfers made for Public Purposes.—Transfers of title made for the public good usually are effected:

(1) Under the power of eminent domain.

(2) Under the taxing power.

(3) By escheat.

(4) By forfeiture.

Eminent Domain.—The property rights of one individual cannot be taken from him and transferred to another for private use unless such transfer be based upon some unlawful conduct of the former owner judicially ascertained. Altogether different rules apply when property is needed for public uses. All private ownership is subject to the superior interests and rights of the public and if the well being of the public so requires private property may be taken and applied to the public use without or against the consent of the owner. This right and power to take the property of the individual and apply it to the public benefit is the power of eminent domain. Its exercise by the Federal Government is regulated by the Federal Constitution, and by the several State governments by provisions in their respective constitutions all of which require that just compensation shall be made to the

owner of the property. The uses for which property may be taken under this power must be public. What is a public use is difficult of ascertainment. Such use includes all governmental purposes, whether the actual use of the property is to be made by the government through public officers or by specially authorized individuals whom the government permits to act for it in discharging its governmental duties. But the term is broader even than this and includes uses and purposes which are for the public benefit whether they be of such kind as are ordinarily regarded as governmental or not.

The maintenance of public buildings, such as State capitols, courthouses, etc.; of public highways, such as the ordinary country roads or railroads; of public means of communication, such as the transmission of the mails, are public obligations in the strictest sense. Property may therefore be taken for such uses, whether the actual user of the property is to be by governmental agency direct or by private persons, natural or artificial. This difference, however, is recognized in many of the States. Compensation must always be made no matter by whom the public service is to be effected. If, however, the property is to be used by direct governmental agency, payment need not be made nor secured in advance. If the use is to be made by private persons, the payment must be made or secured at the time the property is taken.

Taxation.—Title to private property is also subject to be divested under the taxing power of the State. Justice and law alike require that all property should bear its equitable part in the burden of taxation. If any particular owner fails to pay his lawful share of the tax when properly assessed against him, the State by taking proper action can sell so much of his property as is necessary to bring the amount of his tax and the costs and pass valid title to the purchaser.

By Escheat.—The use and development of the lands within a State are essential to its well being. The State may, therefore, take steps necessary to prevent the ownership of land from lapsing or to prevent its being held in perpetuity or by aliens. If, therefore, one owning land dies without heirs and without making a will and without owing any debts the State can by legal procedure, known as an escheat, have these facts ascertained and order the

property sold and the proceeds to be placed in the public treasury subject to the claims of lawful heirs if any shall appear. The title to the property would pass to the purchaser at the sale and it would thus become become available.

It is usually regarded as bad public policy to permit corporations to acquire and hold lands beyond the amount reasonably needed for use in carrying on the corporate business. The laws of the several States, therefore, usually require sales of all surplus lands held by corporations within a reasonable time after same are acquired. If this is not done, the government can institute a proceeding and escheat the property. That is, sell it and divest the corporation of title and vest it in the purchaser, paying over the proceeds of the sale, less the cost of the proceeding, to the corporation.

It is also regarded as bad public policy to have the lands within a government owned by aliens. In many States there are statutes authorizing the escheat of lands so held if not disposed of voluntarily by the alien within a designated time after acquisition.

By Forfeiture.—Forfeiture is a divestiture of right by reason of wrongful conduct of the one having the right. In some instances the right forfeited is ownership of property. This in most instances involves investiture of some other legal person with the right which has been lost by the former owner. Occasionally the right simply lapses, not passing to anyone. If the right forfeited had been received directly from the State it either revests in the State or lapses according to the nature of the case. If the right forfeited had been directly acquired from a private person it either reverts and revests in this person or lapses. In every case of reversion of ownership the process of forfeiture has resulted in the passing of title.

Transfers of Title by Governmental Agencies for Good of Individuals.—Transfers of title made to enforce the just rights of individuals are almost invariably effected by the exercise of the judicial power of the government. This power is usually put forth in proceedings:

(1) To declare forfeiture of private rights.

(2) To enforce specific performance of contracts for the conveyance, sale or barter of property.

(3) Suits to recover possession of specific property or remove cloud from the title.

(4) Suits for partition.

(5) Suits for trover and conversion.

(6) Suits for the collection of damages.

In the first four of these the transfer of the title is very frequently accomplished by the judgment of the court directly without the necessity of action by any other officer or by a party to the litigation, the court in its judgment or decree declaring the title to the property involved in the litigation to be in the one party or the other. Sometimes, even in these cases, the decree does not act directly upon the title but requires the transfer of the title by some designated person. The most frequent illustration of this occurs in a suit in equity for the specific performance of a contract to convey land. Here, ordinarily, the decree does not by its own terms transfer the title from the defendant to the plaintiff, but requires the defendant under the pains and penalties of contempt, to execute such conveyance as the contract contemplated. This rule is changed in some States by statute.

In actions for trover and conversion the effect upon the title to the thing converted is indirect, that is, it is not specifically declared in the judgment nor is any transfer of title required to be made by the parties. It is manifestly unjust to allow the plaintiff to compel the defendant to make compensation to him for the full value of the property converted and also permit the plaintiff to continue to be the owner of the thing for which he has been fully paid. It is, therefore, universally conceded that if one person owns property and another wrongfully exercises such dominion over it as to constitute a conversion of it, and the owner sues the wrongdoer, charging him with the conversion, and recovers against him a judgment for the full value of the thing and collects the full amount of the judgment. the concurrence of these facts vests in the defendant all the estate in the thing which the plaintiff had. Whether or not all of these facts are necessary to vest the title in the defendant is not so well settled. Some courts hold, that bringing the suit for the conversion of the property and claiming the full value as damage is an election on the plaintiff's part to regard the defendant as having acquired the title to the thing and owing the plaintiff therefor. Other courts hold,

that instituting the suit is not a final election by the plaintiff but that prosecuting the suit to judgment and entry of judgment is such an election and the title passes at that time. Others, again, hold that even obtaining a judgment is not sufficient but that the collection and retention of any part of the adjudged value is sufficient. As above stated, all concur in the view that receiving full compensation passes title.

Suits for the collection of damage never result in direct transfer of title. In such actions, if the plaintiff is successful, the court declares the defendant to be justly indebted to him in the amount ascertained to be due and authorizes the clerk or proper officer of the court to issue a writ authorizing the marshal, sheriff, or other proper executive officer to collect the amount due from the defendant and if the amount is not paid to seize upon and sell sufficient property belonging to the defendant to bring the debt and costs of collection. If the money is not paid and the officer seizes and sells property of the defendant in accordance with the judgment and the writ, he thereby divests the former owner of his estate in the thing sold and transfers it to the purchaser at the sale. The officer is authorized and required to execute a proper conveyance of the property showing the facts of the sale and his authority to make the same and transferring the title to the purchaser.

CHAPTER XIX.

PROPERTY (CONTD.)

Limitations Upon Property Rights.

The law recognizes no such thing as absolute property rights in private persons. The highest title known to the law is subject:

(1) To the State's right of eminent domain.

(2) To the taxing power of the State.

(3) To the police power of the State.

(4) To just and uniform regulation necessary to the protection of the equal and just rights of others.

Eminent Domain and Taxation.—The limitations upon the rights of the owner by reason of the State's right of eminent domain and taxation are sufficiently disclosed in the discussion of those subjects just presented.

Police Power.—The police power of a State is its authority to care for and protect the health, morals, and safety of the people. It has never received exact definition. Under it a great many different kinds of governmental action is justified. Many of these affect more or less directly ownership of property in one or more of its aspects. It is, perhaps, not an over statement of the modern law on this subject to say that the State in the exercise of its police power may take possession of private property, regulate or prevent its use, modify or destroy it, or require or forbid the owner's disposal of it, whenever it is demonstrable that the health, morals, or safety of the public so require.

If a commodity offered as a food can be shown to be positively injurious to health the State can prevent its sale for use as a food, and if it be necessary in order to accomplish this can take possession of the thing and destroy it. If it is demonstrable that the use of any particular thing is hurtful to the health or morals of the individual using it, and consequently to the public. its use may be regulated or absolutely prohibited as the public interest may requre. If the thing owned is of such nature or is in such

condition as to be a serious menace to the health or property rights of a number of other individuals it may be destroyed if this be necessary to their safety.

The first of these doctrines is illustrated in the enactment and enforcement of pure food laws and in other sanitary regulations. The second, in laws regulating or prohibiting the carrying of deadly weapons, sale of morphine, cocaine, and intoxicating liquors. The third, in the impounding or killing animals infected with contagious diseases and in the destruction of property to prevent the spread of fires in cities. Innumerable other illustrations might be given but these will suffice to show the general nature of the limitations now under consideration and the nature and extent of the power under which they are imposed.

Regulations Necessary to the Proper Protection of Individuals.—The limitations imposed upon the individual ownership of property for the just protection of others are very numerous and very important. By far the larger portion of them refer to and regulate the uses to which the property may be applied; a smaller number relate to the condition in which property is kept; and a few grow out of the nature of the property itself.

There is an ancient maxim of the law that a man must so use his own as not to injure another. The statement in this form may be regarded as excellent moral advice but in the light of numerous decisions applying or refusing to apply it can hardly be said to be an accurate statement of the law. It is too comprehensive as a statement of the limitation upon the right of use. There are many conditions under which a person may legally use his own although the direct consequence of such use may be hurt to another. If we regard the maxim quoted as a correct statement of the general rule of the law and the cases coming under the latter statement as exceptions to it, the result will be much confusion and perplexity. To avoid this, some of the later cases have attempted to restrict the rule by amending the maxim, making it read "One must so use his own as not to injure the legal rights of another." As thus modified it is a true statement of a fact but can hardly be regarded as the enunciation of a legal rule of any value either to the student, the practitioner, or the administrator of the law, for, in its final analysis in that form, it simply announces that a man must not use his property unlawfully.

This is a truism which affords no test whatever by which to distinguish between lawful and unlawful use.

It is practically impossible to formulate a general statement which will indicate either all of the uses to which one may lawfully put his property, or all of the uses of his property which the law forbids. This is particularly true as to affirmative wrongdoing by the owner. The legal nature of each particular act may be readily ascertainable when tested by the particular rules of law applicable thereto. And this is most frequently the case. There seems, however, to be no general rule sufficiently comprehensive to include all these affirmative misuses and at the same time specific and accurate enough to be of much practical value in determining the legal nature of any particular act.

Passing over to the negative conduct the difficulties, while great, are appreciably diminished. The rule here is that the law requires of every owner of property to use such care to prevent hurt therefrom to another as a reasonably prudent person should use under the circumstances of the particular case. If he has used such care, and notwithstanding this, injury results to another, the cases are rare and controlled by special considerations in which liability will be adjudged. If he has failed to use such care and injury to another directly results therefrom, he is almost invariably held liable for such damage, non-liability, if it ever exists, growing out of some peculiar special rule of law.

Apart from and in addition to the limitations which the law puts upon the owner's right to use the thing there are many others which grow out of or are incident to the nature of the estate or interest which the owner has. These will be better considered under the head of Special Ownership.

There are a number of limitations upon the owner's right to receive profit from things owned. The most conspicious examples of this are found in those instances in which the owner has applied the thing owned to a public use. Under these circumstances sovereignty claims and exercises the right of controlling and limiting the charges which may be exacted of members of the public for the use of such property, as in the case of railroads, telegraphs, grain elevators, etc.

Probably the most common example of limitation by law upon the amount of profit which may be realized from property em-

ployed in private enterprise is found in the usury laws of the different States. These laws forbid that the owner of money shall collect or receive interest thereon in excess of a specified per cent. The limitation is applied without reference to whether the money was earned in the prosecution of a public or *quasi*-public business or is to be employed in such business. Let the transaction be ever so private in all of its features, the limitation still applies and contracting for and accepting usurious interest would still be unlawful.

There are material limitations on the owner's right to dispose of property. Often these limitations are found in certain requirements as to the form and manner of evidencing the disposition. This is illustrated in the laws regulating the conveyance of real property and not infrequently the transfers of personalty. Sometimes the limitation goes beyond regulation and forbids disposition of the property either to or by certain persons or at certain times or under specified conditions and in extreme cases, absolutely.

These limitations should not be and are not imposed arbitrarily but only under such circumstances as are required by sound public policy for the proper protection of the community and of private individuals.

General Ownership.

When the five elements of ownership as to a thing are all in one person he is regarded in law as the general owner. He is sometimes spoken of as the absolute owner. In view of the fact that the greatest estates known to the law are subject to many of the limitations just discussed it is not accurate to designate them as absolute.

The general ownership of real property is called a fee simple estate. As to personal property there seems to be no more specific designation than general ownership.

Special Ownership.

When the estate of the owner does not include all of the five elements of ownership to the full extent to which they are recognized by law it is known as special ownership. It is apparent that these estates may be very numerous and quite different, the one from the other. The interest of the special owner may be

limited to any one of the five elements of general ownership, and need not be complete or exclusive in that regard. If the general owner of a thing should lose it and another should find it and take it into his possession for the purpose of finding the owner and restoring the thing to him, this possession would be lawful and as against every one except the true owner would be protected by law. But the finder would have no right to use nor to profit by nor to change nor dispose of the thing found. If the thing were of such a nature that use would be beneficial to it the law would justify using it so far as would be advantageous to it, but if the finder should use it for his own advantage and not for the benefit of the thing this would be unlawful. The finder would not be legally justified in profiting by, modifying, destroying or disposing of the thing.

Even if a person comes into possession of property unlawfully by trespass, or even by theft, his claim to the thing evidenced by his actual possession will be recognized and protected so far as the good order of society requires. If, therefore, B steals property of A and has it in his possession and C steals it while it is in the possession of B, in indicting C for his theft the indictment may allege that the thing stolen belonged to B and was taken from his possession and C could not avoid conviction by proving that B was not the true owner but only held the thing by reason of his theft. To state the matter differently C could not go behind B's actual possession as evidence of title and prove B's wrong in order to escape punishment for his own crime. It is in this sense that we speak of actual possession as giving title or constituting evidence of ownership.

Special ownership extends from the very limited interest, based upon actual possession as just discussed, through all the various combinations of the elements of ownership, up to that high estate known as general ownership. As to real property it includes all estates less than fee simple. As to personalty it includes every legal right which a person may have in a thing less than general ownership.

TITLE.

Legal evidence of ownership or estate is known as title. Title and ownership or estate are so closely connected that the terms are frequently used inter-changeably, but the most accurate tech-

nical use limits ownership or estate to the right in the thing and title to the means by which the existence of the estate may be proven. A man buys a tract of land paying its full value and obtaining a fee simple estate. This right of full and complete ownership is his estate. The deed from his vendor to himself, in connection with the deeds under which his vendor had previously held the property, constitutes his title, by which the fact that he owns this land may be proven.

As indicated in the foregoing illustration, one means by which title is proven is by formally executed written instruments conveying the thing. This is the method required in transferring real estate, leasehold estates in land for longer than one year, and a few, though very few, transfers of other personal property.

In most instances, the title to personal property exists in parol merely. That is, is evidenced by facts which are not reduced to writing but must be proven by oral testimony. The law permits parties transferring any kind of personal property to evidence this by written instruments, but if this is only permitted and not required, so far as third persons are concerned, the fact of acquisition of the property may still ordinarily be proven by parol testimony. As between the parties to the contract, the rule as to the paper being the best evidence is more rigidly enforced.

Actual possession of a thing, whether real or personal property, is evidence of ownership and will protect the one in possession in holding the thing unless he who demands it can prove a superior right in himself.

Uninterrupted, peaceable, adverse possession for the period required by law does not constitute title under the Common Law but does under the statutes of many of the States.

SUBJECT MATTER.

Almost everything except human beings, and water, light and air, in their natural condition as provided by nature, is subject to legal ownership. There are many things that are not owned. These consist mainly in animals of different kinds which have never been reduced to possession by man nor brought within his continuous dominion in such way as to belong to anyone. If any individual shall domesticate one or more of such animals, bringing it under his actual possession and control, it, and its increase,

would belong to the captor. So, if anyone acting within the limits of the game law shall kill a wild animal, thus reducing it to possession, it thereby becomes his property.

THE QUALITIES OF THINGS.

Things Permanent and Things Transitory.

Some things are permanent, that is, exist indefinitely; while others are transitory, lasting only for a short while. The length of time for which different animals will live varies greatly, but experience proves that even the most long lived must ultimately die, and hence all living animals, considered by themselves, are regarded as transient. In a few instances, as deer or game in the parks of the land holders in England, the particular animal is not considered as a thing apart from the others in the herd on the premises and the whole herd is regarded by legal fiction as a part of the land upon which it is kept, and so the herd, and its constituent members, are looked upon as permanent. This, of course is a legal fiction of very narrow application.

Things Movable and Things Immovable.

Some things are immovable, that is, cannot be taken from place to place, while others are of such nature that they may be moved at any time, and some can be restrained in one locality with difficulty. Immovable things are not necessarily tangible or discernible by the senses. An easement is never tangible, but is usually of such nature that it can only be enjoyed or rights under it exercised at a particular place.

Things Corporeal and Things Incorporeal.

Things, again, are divided into corporeal and incorporeal. Corporeal things are those which may be discerned by the natural senses; incorporeal, are those which exist only in thought or legal contemplation.

There is frequently such close relation between certain corporeal and incorporeal things that the mind, and even the law itself at times, confuses the two. To illustrate, A loans B a thousand dollars which B promises to pay back in six months. These facts clearly create a debt of B to A. This debt, legally speaking, is a real thing, having actual existence. It is not discernible by the senses and is, therefore, incorporeal. As a part of the

contract by which B borrows the money he executes and delivers to A his promissory note due six months thereafter, and payable to A or order. This note does not create nor constitute B's debt to A, but it is the best evidence of that debt and the terms of the agreement between the parties with reference thereto, and is very frequetly spoken of as the debt itself. Its close connection with the debt and its value is shown by the fact that A's transfer of the note carries with it the transfer of the right to demand and receive the money from B; and by the further fact, that if B does not pay the debt and A brings suit against him to collect it, he is not permitted to prove the existence of the debt except by the production of the note, so long as it is in existence and subject to his control. So far is this rule carried that if A has purposely and wrongfully destroyed the note he cannot thereafter prove the existence of the debt by any evidence whatever and so cannot compel its payment by law. On the other hand, the fact that the note is not the debt is conclusively shown by the rules of law which enable A to sue for and recover the amount due on the note notwithstanding the note has been innocently lost or destroyed by him.

These same conditions exist with regard to many other rights and the evidences of the right. This is true of a share of stock in a corporation and the certificate of stock which is the legal evidence of the existence of the share. It is perhaps the real difference between estate and title.

It is clear that differences so great as those between things permanent and transitory, things movable and immovable, and things corporeal and incorporeal, cannot be entirely ignored by the law. On the contrary, these distinctions are taken very largely into account by the law in dealing with things and in estates or interests in things, and the methods by which title may be proved.

Things Real.

Things which, in their nature, are permanent and immovable, or to which these qualities are attributed by fiction of law are called things real. Things not possessing these qualities or to which these qualities are not attributed by law are things personal or chattels.

The terms most generally used to denote things real are lands, tenements, and hereditaments. Each of these in some measure suggest the idea of permanency and immobility. Land signifies the earth's surface; a tenement is such property as, under the old Common Law, could have been held by feudal tenure. These holdings were always lands or things immediately connected therewith. Hereditaments were things capable of being inherited. Under the old Common Law, lands and estates in land went to the heirs of the deceased owner, while chattels were used to pay the debts of the ancestor, the surplus, if any, going to the personal representative of the deceased rather than to his heirs.

Under the American Law in which feudal tenures were never known, and under which personal property is as heritable as land, the terms tenements and hereditaments have become less applicable and the word land is now used, ordinarily, to indicate all immovable and permanent things. Following this testimony of the law, we will use the word land in this sense most frequently in our treatment of the subject.

Things real include both corporeal and incorporeal things. The corporeal are now generally included under the term land, including the surface of the earth and things permanently annexed thereto and in law, made parts thereof. The incorporeal, at Common Law, were held to include a number of heritable rights issuing out of or exercisable in connection with corporeal things. Of these the most important at this time are known as easements.

Land.—Land embraces all the material substances which constitute the surface of the earth, including soil, rocks, minerals of all kinds, and water; also trees, and all other natural vegetation growing from and attached to the soil; and all permanent structures and improvements erected on the soil by the owner, or others lawfully in possession, with the intent to fix or attach the same permanently thereto, or erected by trespassers regardless of the intent with which they are made. Structures so annexed are called fixtures.

According to the ancient Common Law, he who owned any portion of the earth's surface was held to own to the center of the earth below and to the vault of the heavens above. Under this doctrine, no one could dig so deep into the earth as to get below the estate of him who owned the surface, nor could he go so

high in space as to be above this estate. The latter doctrine, that is, that ownership of the surface extends to the vault of the heavens, is being questioned of late years. What the result will be cannot now be determined. If the right of the owner of the soil stops short of the vault of the heavens at just what distance above the surface it shall cease and how high one passing over it must go to avoid being a trespasser is not yet ascertained.

As immobility is one of the principal characteristics of land, it seems, and in fact is, somewhat inconsistent to regard water and liquid minerals as land. Here as in many other instances the law is practical rather than logical, and hence regards water, oil, and other liquid substances found in or upon the surface of the earth as parts of the earth in or upon which they are collected and includes them in the term land.

While liquid minerals and water are regarded as land the law recognizes their natural mobility and declares them to be parts of the particular tract of land upon which they may be temporarily located. The rule as to ownership is modified by these facts. The liquid mineral belongs to him upon or within whose land it is. As to these minerals the ownership attaches to and vests in the mineral itself so long as it remains upon the particular tract of land, and if it is taken from the land and appropriated by the owner his title thereto becomes fixed and permanent. If, however, the owner does not appropriate the liquid mineral while it is on his premises, but permits it to pass off onto other lands, his right is lost and he cannot follow and reclaim the mineral.

But if a trespasser shall enter upon the land and separate the mineral therefrom and seek to appropriate it, this appropriation enures to the benefit of the owner of the soil and the mineral so taken into possession, is the property of such owner and the trespasser is responsible to him therefor. The liquid mineral was actually separated from the soil at a time that it was the property of the owner of that particular tract of land and was reduced to possession on his premises and its passage onto the lands of adjacent proprietors was thus prevented. It thereby became the subject of ownership, not as a part of the realty, but as a distinct commodity, and having belonged, at the time of its separation, to the owner of the land from which it was taken, his title continues.

The rules which govern the adjustment of the rights of parties

and the measure of damage vary with the varying circumstances of the particular cases.

The rules governing ownership of water are peculiar and are reserved for special treatment.

Fixtures.—The most interesting and difficult questions on this subject arise in connection with fixtures. These are structures, or annexations, to the soil which, from their nature, may or may not be permanent or immovable. Whether they are part of the freehold depends mainly on the intent with which they are put on the land. In most cases this intent is a matter of fact, to be determined by all the circumstances; in a few cases it is presumed by law. The tests to be applied are very tersely given by Judge Moore, in Hutchins v. Thompson (46 Texas, 551). He says: "The criterion to determine whether a chattel has become an immovable fixture consists in the united application of the following tests:

"(1) Has there been a real or constructive annexation of the articles in question to the realty?

"(2) Was there a fitness or adaptation of the articles to the and purpose of the realty with which it is attached?

"(3) Was it the intention of the party making the annexation that the chattel should become a permanent accession to the freehold, this intention being inferable from the nature of the article, the relations and situations of the parties interested, the policy of the law in respect thereto, the mode of annexation, and the purposes and uses for which the annexation was made?"

Of these tests, prominence is given to the intention of the party to make the article a permanent accession to the freehold; the others are chiefly of value as evidence of this intention.

When the annexation is made by one who is unconditional owner both of the land and of the thing annexed the question is almost exclusively one of intent in fact.

When annexation is made by one who has only a conditional title in the land and absolute title in the chattel, his right of possession of the realty being derived from another, and being dependent upon the performance by him of some act which he may or may not do, as he should prefer, the intent to permanently annex and make part of the freehold is conclusively presumed in favor of the party having the reversionary interest. If

such conditional interest shall cease because of failure of party in possession to perform the act necessary to perfect his title, or continue it, the chattel will go with the land, as in case of party in possession under a conditional contract of purchase, either precedent, as where purchase money is not paid, or subsequent, as where defeasance is based on breach of condition subsequent.

Where the attachment is made by a tenant, he may remove, but he must exercise his right during the term. This is particularly true as to trade fixtures. There is a difference of opinion in case of renewal of the lease after annexation, when no right of removal is reserved in the second lease. The larger number of authorities hold that the right is lost, but quite a number hold the other view.

Where the annexation is made by a trespasser, if it be permanent in its nature and attached to the soil, either directly, as a house, or indirectly, by attaching to a house already built, the law conclusively presumes that it is an immovable fixture and declares it to be a part of the land. If the trespasser making the attachment knew that he was such, the owner of the land gets the attachment without any liability for compensation. If the trespasser had good reason to believe and did believe that he was the owner of the premises when he made the improvement, the attachment nevertheless belongs to the owner of the land, but in equity, and in many States under special statutes, the owner is required to make just compensation for the benefit which he receives from the improvement. There are numerous equitable and statutory rules governing these adjustments but the fundamental doctrines are as above stated.

Easements.—So far we have considered corporeal things real. There are certain rights issuing out of and exercisable over or in connection with land which are also regarded as real. The most important of these, in modern law, are known as easements.

A proper definition of an easement is difficult to give. Mr. Cooley does not attempt it. Mr. Bishop (Non-Contract Law, 862) says: "The terms easement and servitude are correlative, the easement being a right in the nature of an estate, and the servitude its corresponding burden. More exactly, an easement is an incorporeal hereditament, or chattel interest, attached to the person of an individual, or the public, or the land of either, in

another's land; a servitude is the burden imposed on the land by the easement. There can be no easement without a servitude, or servitude without an easement." The estate entitled to the easement is called the dominant estate; that subject to it, the servient one.

In 6 American and English Encyclopædia of Law, 139, it is said: "An easement is a privilege, without profit, which the owner of one neighboring tenement hath of another, existing in respect of the several tenements, by which the servient owner is obliged to suffer, or not to do, something on his own land, for the advantage of the dominant owner."

Neither of these definitions is entirely satisfactory, though each is fairly accurate. I suggest the following:

An easement is an incorporeal right which the public or an individual has in the use, control, or enjoyment of lands belonging to another which does not give the right of possession or profit.

Easements must be distinguished from "profits," which give a right to take or remove the soil itself, or something growing thereon, and from leasehold estates which entitle the holder to possession. The term easement is restricted to those incorporeal rights which relate to the use of the property of another which do not contemplate or require possession of the land, as a right to pass over it in a certain way, for a certain purpose, or at a certain time; or, to such as constitute restrictions on the owner's right to use for certain purposes or in certain way, and yet give no right of entry or use by the party enjoying the right, as a limitation on the right of the owner to conduct certain businesses on the land not amounting to nuisances, or permit another to do so; or to the right to interfere with or prevent the passage of water, or light, or air from the premises of one owner onto those of another.

The easement may be in a person, without reference to his ownership of land, in which it is called an easement in gross; or it may exist in regard to or in behalf of one tract of land on or against another tract, in which case it is called an easement appurtenant.

Easements appurtenant can only exist as between two or more tracts of land. The tract in favor of which the easement exists is known as the dominant estate, the tract subject to the easement is

known as the servient estate. In some instances, the one estate is dominant from one point of view and servient from another. Take the case of the respective rights and duties of owners of adjacent tracts of land crossed by the same running stream. If we consider the matter from the point of view of the upper proprietor's duty to let the water pass off his land onto the lower tract, the lower tract is the dominant and the upper the servient. If, however, we change the point of view and consider the duty of the owner of the lower tract to receive onto his land the water passing thereon from the higher tract, the higher tract becomes the dominant and the lower the servient.

Easements appurtenant run with the land, that is, they are so attached thereto that they pass with the land with every change of ownership.

The right to an easement may be established by showing an express contract granting the right, or facts from which a grant may be presumed or from which title by limitation may arise. In every case of grant or prescription the right depends upon the grant, real or presumed, and its exercise must conform to the terms of the grant. If a right of way is expressly given across an estate at a particular place it can be exercised nowhere else. If it be for particular purposes, as to go to mill or draw water or get wood, it is limited to use for such purposes and can not be enlarged so as to embrace another not fairly within the grant. The same is true of easements from implied grants, as a way of necessity. The party can only claim a necessary way, not the most convenient to him, and this having once been established, must be strictly adhered to. And so of prescriptive rights of this character. Here the grant is presumed from a continued use for a fixed time, and use for such time, in one manner, for one purpose, and to one extent, will not give right to use in a different manner or for a different purpose or to a greater extent. This is also true of rights acquired by limitation.

The infringements of these rights vary with the nature of the rights themselves. He who has an easement in the property of another, in gross, or as owner of the dominant estate, is entitled, in law and equity, to its full enjoyment. As before said, his right is limited to the grant, real or presumed, and no act or omission not violative of the right could be a legal injury. The remedy is

damages for wrongs already done, and injunction against continuance, and, in proper cases, abatement of the physical conditions which constitute or produce the infringement of the right.

Tenures.—In legal theory the paramount title to all lands is in the sovereign. Under the feudal system large portions of land were granted by the king to the higher order of nobility to be held by them in consideration of their loyalty to him and of services to be rendered to him and to the state. These nobles in turn let the lands out to others who were to hold under them and to render them fealty and service. After the conquest of England by William of Normandy many of the lands in England were held under these feudal tenures. The basis of feudal tenures was royalty supported by aristocracy, both served by the common people. To perpetuate this policy it was necessary to have large landed estates. To maintain this system it was necessary to establish very great and mandatory limitations upon the alienation of land and to limit its inheritance to one male in the line of descent. Each of these ideas is repugnant to our American institutions.

The colonists from England who settled the Atlantic Seaboard necessarily brought with them the English Common Law as it then existed. But it was equally necessary that this Common Law should, even at the beginning of the settlements, be modified somewhat to suit American conditions.

As the colonies increased and prospered and became more and more self-sustaining, they slowly and intermittently made still greater departures from the inapplicable portions of the Common Law.

Finally, when the States revolted and established their independence, thus throwing off their allegiance to the king of England, the collective people of each state as the sovereign within its territory succeeded to such prerogatives of royalty as survived such radical changes in political theory and governmental institutions.

Among these prerogatives that attached to the people of each State was the sovereignty of the soil or the paramount title to all lands within its territory. All lands theretofore granted within the boundaries of the respective States were, from that time on, holden under the State. All land that had not been granted to

private individuals became public domain and property of the State. Some of this, the States continued to hold as belonging to them respectively and to grant to private owners from time to time as the Legislature of each provided. Some of the land, further in the interior, which was claimed by the States, was by them ceded to the United States Government.

Later the United States acquired large territories by treaties with different European governments and Mexico. The lands thus acquired were some of them granted to private owners by the United States Government, and the paramount title to some of them was passed to States created within this territory. When the Republic of Texas achieved its independence, it succeeded to the former sovereigns who had exercised jurisdiction over its territory, in this right of paramount title to the land. Upon annexation with the United States this sovereignty over its territory was retained by Texas.

From this brief historical statement it is seen that feudal tenures never obtained in any part of the United States and no land within the boundaries of the Union is now held thereby. On the contrary all tenures in the United States are allodial, that is, are derived from the sovereign either without consideration or for consideration paid in money or services. No feudal service is or could be lawfully exacted in return for the grant of estates in land. Almost universally the State grants its land by fee simple title. This title, of course, is subject to the powers of eminent domain and of taxation and the limitations heretofore discussed as growing out of the just rights of others.

The State may, of course, lease its lands or grant other titles less than the fee. This policy has occasionally been pursued by some of the States.

CHAPTER XX.

PROPERTY (CONTD.)

ESTATES.

The word estate at Common Law is defined as "The degree, quantity, nature, and extent of interest which a person has in real property" (Bouvier's Law Dictionary, Estate). It signifies the extent and nature of the owner's right in the thing owned.

In its earlier use it was limited to interests in real property but now is applied to interest or ownership in chattels.

It extends from the smallest right recognized by law in things to full ownership. Having so broad a range, it of necessity includes interests of a great many different kinds. These, in their various distinctions, cannot be taken up in detail in a work like this. A few of the more important classes of estates in real property will be enumerated and partially defined.

Different Kinds of.—An estate in fee simple is the largest possible interest and fullest ownership that one can have in land. It exists wherever the estate enures to the benefit of the present holder and his legal heirs without condition or limitation. Such an estate is, by its nature, inheritable; still the entire right is regarded as in the present owner and he may alienate the land and convey to the grantee the entire fee. He may carve out of it and convey any smaller estate not prohibited by law.

A fee-tail is an inheritable estate which descends only to the heirs of the body of the decedent or to such of them as come within the terms of the grant by which the estate is created. The holder of an estate tail could not alienate it so as to cut off the rights of the designated heirs. These estates are forbidden by the constitutions of many of the States of the Union.

Estate of freehold includes all estates in land of inheritance or for life except copyholds and leaseholds.

Copyhold estates do not exist in America.

Leasehold estates are estates created by a contract known as a lease under which the lessee is entitled to the benefits and possession of the land for a period specified in the contract. The term may be either for life or for a designated period of time or during the pleasure of one or both parties.

Estates for years are leasehold estates for a definite or limited time.

Estates for life are estates which cannot extend beyond the life or lives of designated persons. In no event is such an estate inheritable. If it be limited expressly to the life of the tenant it terminates upon his death. If it be limited to the life of another or others by its express terms it ends with the death of the survivor of those during whose lives it was to continue. It is also limited by legal implication to the life of the tenant. It is, however, reckoned among the freehold estates.

A reversion is the right or estate existing in one who has a fee simple estate in land and has conveyed some less estate to another, or one who has conveyed the fee in the land subject to some contingency, to receive back the full estate upon the ending of the less estate or the happening of the contingency terminating the estate in fee, which he has conveyed.

A remainder is a right or estate in land which is to be enjoyed upon the termination of some less estate created at the same time that the remainder is.

Reversions and remainders differ in that the right to the reversions exist in him who grants the less estate or the contingent estate before he makes the grant and the estate simply returns to him from whom the less estate emanated while in a remainder the less estate and the remainder are both created by grant from a common grantor, the remainder to take beneficial effect only upon the expiration of the less estate.

Thus, if A owns a farm, and rents it for ten years to B, after the ten years have passed the farm will go back, or revert, to A, to his heirs, or to his assignees, that is, to A, or to some one holding an estate derived from A, after the renting of the farm. But if A, by deed, shall pass the title to the land to B for ten years, and after that to C, the estates of B and C both being created at the same time, then C would be a remainderman. The property could not revert to him, because he never had it. His only inter-

est in it is an estate, the beneficial uses of which will begin after the ending of B's interest. There is a great deal written about these different estates, and many fine distinctions are made between them and their subdivisions, but we can not go into detail.

One of the most important kinds of estates in land is mortgages. These are conveyances made by the owner, to be void upon payment of money owed by the mortgagor, or some one in whose behalf the mortgage is given.

At Common Law, the effect was to convey the legal title to the land to the mortgagee, to be reconveyed, upon the payment of the money which the instrument was given to secure. In some States the debt is regarded as the principal thing, and the mortgage as security for the debt; so that, in such States, whatever destroys or settles the debt, terminates the mortgagee's right in the land.

While the mortgage continues, and before default in payment of the debt, the fact of the mortgage makes no difference in the mortgagor's right to possess the land, and enjoy its revenues. He can not rightfully commit waste upon it, or so deal with it as to diminish its value, and if he is doing so the mortgagee can prevent him, by the proper proceedings.

Upon default of payment, at Common Law, the creditor could enter into possession and take the revenues of the property. Equity, however, relieved the harshness of this rule, by allowing the debtor to come in, within a reasonable time, pay the debt and all proper charges, and redeem the land from the mortgage. This is called the Equity of Redemption. The term is also frequently applied to the right given to the debtor, by statute, in some jurisdictions, to come in, even after the sale of the land under judgment of a court, and pay all the debt and costs, and get the land back.

Upon default of payment, in those States in which the mortgage is regarded as a mere incident to the debt the mortgagee can not enter upon the land, but must bring suit for the debt, and obtain a judgment and get a decree ordering the land sold to pay the debt and costs. This is called a decree of foreclosure. Even after such a decree, the debtor may pay the amount due on it, at any time before the actual sale of the land; but, if it is not paid by that time ordinarily the interest of the debtor in the land is gone, and he has no further right to redeem it. Mortgages must

be executed in the same way and recorded just as conveyances of land are.

It is frequently expensive to bring suit and obtain decree of foreclosure; and, to obviate this, the debtor, instead of giving a simple mortgage, as discussed above, may give a mortgage with power of sale, or a deed of trust. These are instruments, executed by a debtor, or some one interested in him, conveying the land for the purpose of securing a debt, and authorizing the grantee in the conveyance to sell the land, without the necessity of suit, and to apply the proceeds to the payment of the debts secured by the instrument.

When the one to whom the conveyance is made is the creditor, the instrument is still a mortgage, but differing from those just discussed, in the power which the mortgagee has to sell the property and pay the debt without suit. In recognition of this difference, the instrument is called a mortgage with power of sale.

When the conveyance is made to a person not the creditor, it loses its distinctive characteristics as a mortgage; and, as the title conveyed is not an absolute one, but one which the grantee holds for the purpose of securing the payment of the debt to a third party, it is called a deed of trust. The instrument gives to the trustee the right to sell the land, on the terms and in the manner designated in the deed; and hence, there is no necessity to sue to enforce payment from the land. The trustee sells it in accordance with the provisions of the instrument.

Even when the security takes this form, the debtor in some States, has the right to the use and profits of the land, not only before default in payment, but afterward until the sale is actually made, and payment at any time before the sale is completed will destroy the power given in the instrument, and save the property to the debtor.

If the one authorized to sell shall refuse or neglect to do so, or shall be incapacitated from so doing, the power can not be executed by any other person, unless the instrument provide some method of substituting another to act, and this method has been followed. Otherwise, the creditor must sue and obtain decree of foreclosure.

The effect of sale, under a properly executed power, or under a decree of foreclosure, is to pass to the purchaser of the land the

title and estate of the mortgagor therein at the date the mortgage or deed of trust was given, or at any time thereafter; so that, if the debtor has sold it, since giving the mortgage, the purchaser at the sale made to pay the debt, will take title superior to that of the one purchasing from the mortgagor, unless, of course, the latter were an innocent purchaser, without notice and for value.

Estate by curtesy is the life estate which a husband has at Common Law in the lands of which his wife was seised either in fee-simple or in fee-tail during the coverture. It is dependent upon the fact of issue capable of inheriting the land having been born to them during coverture.

There are a number of different kinds of dower at Common Law. The most frequent was that known as dower by Common Law. This is substantially the only kind that exists in the United States.

Dower by Common Law is a life interest which the wife has in a third part of all the lands and tenements of which her husband was seised of an inheritable estate at any time during the coverture and which any issue she might have had might by possibility have inherited.

Dower does not exist in a number of the States of the Union. In most, if not all, of those in which it does exist it is determined and defined by statutes based upon and modifying the Common Law as just stated.

The foregoing comprise the different kinds of interests known to the Common Law which are of the most practical importance at this time. It is apparent that almost any one of these estates may be vested in one person to the exclusion of all others, or that several persons may be concurrently interested therein. Of the latter kind of estates the three most important are estates in common, estates in coparcenary, and estates in joint tenancy.

Estates in common are estates in which two or more persons hold joint possession of property though their rights depend upon several and distinct titles.

Estates in coparcenary exist when two or more persons have or are entitled to joint possession of property under the same title derived at the same time by inheritance. Their shares or interests need not be equal.

Estates of joint tenancy are estates acquired by purchase and

under which the several tenants hold equal shares. The word purchase here is used in its Common Law signification, including every means of acquisition except by inheritance. The most important peculiarity of joint tenancy is the doctrine of survivorship under which upon the death of each tenant the share previously owned by him passes, not to his estate or heirs, but to his joint tenants.

The distinctions between these several estates are not nearly so important in many of the American States at this time as they formerly were, as the law of such States has repudiated the doctrine of survivorship among joint tenants and now practically deals with all persons having concurrent interests in property as tenants in common.

Real and Personal Property.

Among the legal terms in very frequent use are real estate and real property on the one hand and personal property, personalty and chattels on the other.

Of these the first two are used as practically synonymous. This is true also of the last three.

Technically there are supposed to be nice shades of difference between the terms in each group. Practically it may be less confusing to deal with those in each group as having the same meaning.

Real Estate.—Each of the words in this phrase has significance. The first indicates the nature of the thing to which the phrase may be applied; the second suggests the idea of ownership or interest, though it does not indicate its character. To understand the phrase we must take in both of these points of view.

The word real, as used at Common Law, in nearly all instances applies to land and suggests its two leading characteristics, permanency and immobility. This is true here, and hence real estate is never applied to nor made to include anything that is not permanent and immovable, either in fact or in legal contemplation. It has been seen in the discussion of things real that the term land includes practically all things having these qualities, though in a few instances the law attributes these qualities to things which do not in fact possess them. We found also that there are certain rights incident to or enjoyed in connection with land which are immovable. These rights may or may not be permanent. In

those cases in which they are permanent, they are classed among things real.

The subject matter of real estate is therefore land, permanent fixtures attached thereto, and permanent rights incident to, issuable out of, or enjoyable in connection with land, known as easements, and certain other things, such as deer in parks or in landed estates, and some others to which the law ascribes the idea of permanency and immobility.

Passing over to the nature of the estate which the law requires in this connection, we find that it must have two characteristics, viz., inheritability and indefiniteness of duration. If an estate lack either of these qualities it does not meet the law's requirement as to real estate.

We may, therefore, define real estate or real property as things real held by inheritable and indeterminate title.

Personal Property.—It seems to be the generally accepted rule that all property or estates which are not real estate are properly classed as personalty.

At one time there was a third class known as chattels real but this idea and classification has lost favor and fallen into disuse.

Personal property and its synonyms, personalty and chattels therefore, includes all things which are not in their nature either in fact or in theory of law both permanent and immovable. This is true without reference to the nature of the estates or title by which they are held. The highest title known to the law over a transient movable chattel cannot be regarded as real estate.

These terms also include all estates or interests in things real which are not inheritable and must terminate at a definite time. An estate in land for the life of the owner, while it is regarded as a freehold is not real property. The subject matter of the ownership is immovable and permanent and the estate is indeterminate in duration but it is not heritable and hence is personal property only. A leasehold estate in land for ninety-nine years, or a longer definite period, is not real estate. The land is real, the estate is heritable, but its duration is limited to a definite period, hence it is regarded as a chattel interest.

Licenses.

Having briefly considered the principal estates in land, we now take up the subject of license.

Simple permission or invitation to enter one's land is a license. Licenses are not estates, and are exhausted, usually, by one user, or may be revoked at the will of the owner of the land.

Licenses are of three kinds:

(1) Those impliedly given by the owner.

(2) Those expressly given by the owner.

(3) Those given by law.

The first are such as are presumed to be given by the owner of the estate, in absence of legal requirement, and without express invitation or statement, to the licensee. They embrace all those invitations which are presumably extended to members of the public to come to the place of business of every man who is conducting any business sustained by and dependent on public patronage. This is presumed, as a matter of course, from his entering on such business. The license is, however, limited to the purpose for which the business is carried on.

On the same principle, persons are generally presumed to have permission to enter the private premises of another to see any of the occupants socially, or on legitimate business, or to make proper inquiries for information. This license is, of course, much more restricted than the former, and it would require much less to indicate a revocation.

Express license exists in every case in which the owner of an estate has expressly invited or permitted another to come upon his premises.

A mere license, whether express or implied, is always revocable, unless the facts and circumstances are such as to work an estoppel against the licensor. Such estoppel arises when the license is coupled with a legal interest. Thus, if A owns a lot and has a quantity of hay stored on it, and sells the hay to B and gives him permission to enter and take it off, such license is coupled with an interest in B, his right to remove the hay, and is, therefore, irrevocable by A, but may be lost by lapse of a reasonable time without user. And if A should refuse B permission, within a reasonable time, to enter and remove the hay, he would be responsible for damages. If, however, instead of selling hay, or other personal property, A had sold B one hundred standing trees, and given no written permission to enter and cut them, or no written evidence of right, such license would be revocable at

any time, because the trees, being a part of the real estate, would not pass by parol sale, and B would acquire no legal right or title to them, and would not have acquired any legal interest, under the license to enter.

A parol license to one to enter and erect improvements on land and use them for a specified time, will prevent the entry from being tortious, but it is revocable, even though the licensee has, with the knowledge of the licensor, expended large sums of money on the improvements, and they are permanent in their nature. The right to use and enjoy the land of another in such manner can only be acquired by contract in writing, and parol permission can not be enforced.

Licenses by Law.—In a few cases the law gives the right to enter the lands of another.

(1) In case of fire one may enter upon the premises burning to put out the fire, or he may enter on the adjoining premises, though belonging to another, for the purpose of fighting the fire.

(2) Where a public highway is obstructed, travelers may cross the premises adjoining without responsibility, provided they do no more injury than is reasonably necessary.

(3) In some States in case of preliminary survey of lines of railroad entry may be made without liability.

(4.) An officer, having process, may enter the premises of another to serve it. In case of felony, breach of the peace, or search warrant, he may break down the door, if necessary, but he cannot do so to serve other process.

Trespass ab Initio.—An officer entering premises to serve a warrant or seizing or taking possession of property under a warrant is justified in obeying the command contained in the writ. If, however, he should go beyond the authority conferred by the writ and perform acts not covered thereby, or if having entered upon lawful obedience to the process he shall fail to do what the writ requires, he loses any benefit from the writ and is regarded in law as a trespasser from the beginning.

Thus, an officer has a writ commanding him to seize and sell property belonging to a debtor named therein and pay the proceeds over to the judgment creditor. If he shall seize the property and sell it and pay the money over as directed by law he is not responsible for the fact that the property brought less than

its real value at the legally conducted sale. But if he takes the property and sells it and retains the money himself this breach of legal duty makes him a trespasser from the beginning and he is responsible, not for what the property brought at the sale under the process, but for the full market value at the time and place at which he took possession of it.

Fences.—An important matter in connection with the ownership of land and of living animals is shall the owner of the land protect it from intrusion by animals, or shall the owner of the animals prevent them from intruding upon the lands of others? At Common Law the owner of the animal was required to restrain it, and if he permitted or caused it go upon the lands of another he was responsible for the trespass. In about half the States of the Union this Common Law rule still obtains. In the others it has either been abolished by statute or has been disregarded as inapplicable to the local conditions. In these latter States the owner of land must fence it so as to keep stock off, otherwise he cannot recover any damage for entry by an animal not directly attributable to the conduct of the owner. Even in these States, however, if the owner of the animal purposely causes it to go upon the land of another without the latter's consent, express or implied, he thereby becomes a trespasser and liable as such.

We may, therefore, say that at Common Law and in about half the States of the Union a fence is a barrier or obstruction to keep animals in and in the other States of the Union a fence is a barrier or obstruction to keep animals out.

Rights in Water.

Rights in water, or riparian rights, as they are frequently called, are of sufficient importance and interest to warrant a brief, separate treatment.

The law recognizes three kinds of water: Subterranean, Surface, and in Streams. The rules governing each of these are different.

Subterranean Water.—These are waters in the ground, which do not come out through natural openings, but are reached by excavations of some sort. The depth or manner of excavation is not material, provided the opening is an artificial one, and the water is obtained only through that means or is a natural one

from which water does not flow. There is great practical difference in the different excavations in their depth, size, and manner of making; but so long as the water is and remains strictly subterranean, there are no legal differences growing out of these varying physical conditions.

A man may dig his well on his own land, and use the water from it for any purpose, not in itself unlawful, although it may result in the deprivation of his neighbor. Thus, if one have a well on his land which furnishes him an ample supply of water, and the owner of an adjacent tract digs a well and obtains water of just the same kind, and the use of the latter well is followed by failure of the former, no liability attaches to the digger of the second well.

The reason usually given for this is that the failure of the first well is not the direct and proximate result of the digging of the second. In the first place, it is by no means sure that this was, in fact, the cause; but, even if the conditions were such, after the second well was dug, as to make this probable, or even certain, yet it would not follow that this actual result should have been foreseen by a reasonably prudent man as a probable result. The source of the underground supply of water can not, ordinarily, be known, and usually one would not have any good reason to believe that, by digging the second well, the first would be injured, and the law judging the rightness of conduct by the conduct itself, and its probable results, does not hold it unlawful because it afterwards transpires that it has resulted in unforeseen injury to another. This is practically the doctrine announced in the cases.

It sometimes happens that one, in excavating for water, finds such a supply that it rises through the opening and flows out over the surface of the ground. These are called artesian wells. So far as the use of the water thus obtained is concerned, the rules of law seem to be the same as in regard to other wells, but an additional cause of difficulty arises: What is to be done with the surplus water? Must the man who has brought it up take care of it, or may he let it go? If he must care for it, for how long, and to what extent?

The weight of authority is that he must care for it, either by confining it on his own premises in such a manner as not to injure others, or by securing for it a passage to some ancient water

course and emptying it there. This must be a stream having a bed and a channel sufficient to carry off the aggregate of its natural supply and that coming from the well. For inundation and other injuries resulting from the flow, before it safely empties into the stream, the digger of the well is responsible.

Surface Water.—This includes all water falling as rain, sleet, or snow, before it has found its way into the channel of a water course. This is called surface water, so long as it is spread out over the surface of the ground, and until it reaches some running stream and mingles with its waters. If it has run down into low places or ravines which are usually dry, it is still surface water and any proprietor of land has the right to prevent its coming onto his land, even if in doing so he cause it to injure another. He does not owe the duty of receiving it from the adjoining land. His right, however, is limited to a refusal to receive. If he once permits it to come upon his land he cannot thereafter obstruct it on his land so as to throw it back upon the land of the upper proprietor.

The foregoing are the doctrines of the Common Law and obtain generally in the United States except in those States which, either by statutes or by the action of their courts, have followed practically the rules of the Roman Law or modifications of these rules.

In a number of States there are statutes regarding surface water regulating the rights of particular classes of persons, as, for instance, railroad companies in the building of their tracks, etc.

Water in Streams.—The rules of law, as to this third class of waters, differ materially from those announced above, and require special treatment.

A water course, as the words are used in this connection, has been defined as "A stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel having a bed, sides or banks, and usually discharges itself into some other stream or body of water."

It will be observed that the water supply need not be sufficient to cause the stream to flow all the time. It must flow habitually, though not necessarily uninterruptedly. There must be a definite channel, that is, a bed or place where the water passes along over

the same depression or lower surface, which is bounded or limited by ascertained and definite sides or banks. When these facts concur, the water thus confined and seeking a regular outlet is a water course or stream. Water standing in a definite depression, and not flowing, is not a stream. Water flowing in a defined channel is not necessarily a stream, as surface water after a rain. Sometimes there is a well defined channel, but no water, except immediately after rains; again, there are channels down which water flows frequently, but not continuously. How often is it to run, how long during each year? This must be answered from facts in each case. If there be a well defined channel down which water passes habitually it is enough, though it may sometimes be dry. If, however, it is usually dry, though water flows in it occasionally, it is not a stream.

The water passing in these streams is not owned by anyone. The proprietors of the land crossed by or bordering on the stream have legal rights, in its use, but have no property in the water itself. These rights, like all others, have their correlative duties, and the proprietors of the several estates must have regard at all times to the obligations under which each rests to the other. All persons who own land along a stream are co-proprietors in its use.

These uses are of two kinds: domestic or natural on the one hand, and artificial or commercial on the other.

As to the first, the right of use is very extensive, and the proprietor who first gets access to the water lawfully, may completely exhaust it, in these natural or domestic uses, without incurring liability in so doing.

It is not so with the second, artificial or commercial use. Here no one has an exclusive privilege. The upper proprietor can use it for these purposes, provided, after his use, he permit it to leave his land at the same place, in the same quantity and of the same quality, that it would have done but for such use. It is apparent that the rights and liabilities of the parties vary greatly, as the use made of it is of the one or the other class. It therefore becomes important to understand what uses fall in each class.

Domestic or natural purposes embrace drinking purposes for one's family and his own domestic animals, culinary purposes and washing, and all the uses about one's premises necessary to sustain life.

Artificial and commercial uses are all those in which water is not used directly to sustain life or give comfort, but as a means of pecuniary profit, or indirect means of comfort. This seems to be the line of separation.

It works out different results in different localities. It seems to be considered, everywhere, that the uses mentioned under the head of domestic purposes are such, and that for any of these purposes the upper proprietor, or one first getting lawful access to the water, may use it, to the entire exhaustion of the supply.

In some of the Northeastern States running mills and factories seem to be necessary to support life, and therefore are called domestic, or natural, and irrigation there is called commercial, or artificial; while in the Northwest the holdings are just the reverse, and running factories and mills are held to be artificial uses and irrigation a natural use.

Conveyances.

Form.—It is a settled rule of law in the United States that transfers of land, or any interest or estate in it for any considerable length of time, must be in writing, and signed by the party attempting to convey. In many States, the instrument, to be a complete deed, must be signed in the presence of two witnesses, or acknowledged before some duly authorized officer; and, in some States, it must be sealed. The deed should clearly identify the parties to it, both grantor and grantee, should accurately and correctly describe the property conveyed, and the nature and extent of the estate, or interest, transferred.

The length of time for which land may be leased by parol differs in the different States. There are differences, also, as to whether contracts or covenants incident to the sale of land, such as warranty of title, etc., should be in writing.

It is an agreed rule of construction of grants and deeds that a deed calling for a public way or a nonnavigable stream conveys title to the center of the way or stream. This title is subject, in such case, to the easement in use of the way and passage of the water.

Registration.—The same public policy that makes it desirable that transfers of land should be in writing leads to some system of giving permanent and public evidence of the existence and nature of these transfers. So, all the American States have

adopted some method of public registration of land titles. These differ in detail, but, in substance, are the same.

The plan, in general terms, is as follows: A public officer is provided in each county, who keeps his office in some convenient place, usually the county court house, who is required to receive, file, and copy into a public record, all instruments conveying any estate or interest in land within his county, which have been executed in the manner required by law. He must keep indices to these records, both direct and cross. After recording the original instrument, he gives it back to the owner. The time when the instrument becomes public record, under some statutes, is when it is filed; under others, when it has been indexed. As soon as it is recorded, all persons are charged with notice of its existence and contents, so far as it effects a transfer of or encumbrance on the land, and they must thereafter deal with that land as if they had knowledge of the rights created by such instrument.

Innocent Purchasers.—As the law, by providing for the registration of titles to land and making the record notice of the rights of all persons holding under properly recorded instruments, has put it in the power of every man to notify all others of his rights in any land in which he may have claim, evidenced by any conveyance, it exacts of every one, having any such interest, the duty of giving notice of it, by putting his evidence of right upon record; and, if he does not, he subordinates his rights to the rights of innocent persons who, in good faith, have acquired rights in the land for value, without any actual notice of the rights of him or those who have failed to make the proper record. This is known as the doctrine of innocent purchasers.

Four things must concur to constitute one an innocent purchaser:

(1) The interest against which the claim is set up must be of such nature as to come within the registration laws; that is, such an one as could lawfully be placed upon record, or of such nature that it could have been put in such form.

(2) The subsequent purchaser must not have known of the prior right he is now seeking to overthrow, and the facts must not be such as to have put him upon inquiry.

(3) He must have acted in good faith in acquiring his interest.

(4) He must have paid value for his claim.

Violation of Rights in Land.

Rights in land may be invaded by unlawful entry or trespass upon it, or by committing any act injurious to the land, as by removing its lateral support; or by commiting waste upon it; or by invading it by noxious gases, bad odors, noises, etc.; or by diverting from it water to which it is entitled; or by any act or omission unlawful in itself or its direct consequences, injuriously affecting such right; or by conduct unlawfully affecting the title. Whether or not any particular act injurious to a particular tract of land, or something pertaining thereto, is a tort as to any particular person, of course depends on such person's relation to the land.

Unless the owner of the fee has parted with some less estate in his land to another, he is entitled to its exclusive use, enjoyment and possession, and can maintain an action for any unlawful act or omission injuriously affecting him in regard thereto.

If he has parted with some less estate, the nature and extent of such estate, and the nature of the injury, together, determine whether the cause of action is in him, or the party having the less estate.

Controversies frequently arise between the owner of the fee and those having a less estate, as to their respective rights and interests. Usually these estates are created by contract, and the respective rights thereunder are matters of Contract Law. There are, however, some questions as to legal rights of landlord and tenant, arising in cases in which the contract is silent, which are properly questions of Tort Law.

One of the most ordinary incidents and rights of ownership is possession, and any unlawful invasion of this right gives a cause of action to him whose right is disturbed.

The same wrongful act may frequently result in injury to several persons. Thus, if A owns a tract of land with an orchard on it, and rents the land and the orchard to B for a year, and B goes into possession, here the fruit from the trees would go to B for a year, but the interest and title in the trees would be in A, subject to B's present right. C enters and cuts down the trees. This act deprives B of his growing fruit and A of his trees, and each would have a cause of action. And so in innumerable cases, which will readily occur to you.

Facts Proving Title.

The rule is ordinarily stated, he who sues for a trespass upon and injury to, or the withholding from him of land must deraign title from the sovereignty of the soil and recover on the strength of his own title. This is true, when properly understood; but it is misleadng, without explanation. One might well understand from it that the plaintiff in every suit would be compelled to trace his title back to the State.

This is unquestionably the general rule, and the plaintiff must always be ready to do this, unless he clearly comes under one or the other of the following exceptions.

(1) If he and the defendant both claim title to the land, and their titles have a common source; that is, if at some time, since the State parted with its title, it was held by some one under whom both plaintiff and defendant claim to own, then he need go no further back in the chain of title than the common source: as, if A once owned the land, and sold it to B, and subsequently sold it to C, B and C, and all parties claiming under them, are said to deraign title from a common source, A. In such a case, in a controversy between B and C as to this land, the plaintiff need not do more than show that both claim under A, and that his title from A is superior to that claimed by the other party. This he may do by introducing copies of the deeds of defendant, or the deeds themselves, if he can produce them; and such deeds are not to be taken as showing title in the defendant, unless the defendant shall himself put them in evidence.

(2) Where plaintiff's title has been acquired under the statute of limitations, either by himself or by some one whose estate and right he has, he can recover without going back of his possession, except so far as to show the facts necessary to sustain his claim under the particular statute relied on by him.

(3) When the plaintiff was in actual possession at the time the defendant entered; such prior possession will entitle him to recover against a naked trespasser. Of course, if the party disturbing the possession is the owner, or holds under him, he can, by showing this, defeat the right based simply on prior possession unaided by other right or title.

This doctrine is limited to the actual possession, and does not include "constructive" possession, in the strictest use of the term.

Indeed, this doctrine could not be practically invoked, for such possession is but an incident of ownership, and for one to show himself in such possession he must show his title and prove it.

The party complaining of an alleged violation of his rights in real estate, and who proves prior possession only, in support of his claim, is subject to be defeated by proof of the fact that the party complained against is the true owner, or his representative. In most instances, such right may also be defeated by proving, affirmatively, that the legal title to the land is in a third party; proof of an outstanding equity is, however, not usually sufficient for such purpose.

CHAPTER XXI.

PROPERTY (CONTD.)

PERSONAL PROPERTY.

We have already defined both real and personal property. It may be well, however, to repeat that everything which is transient or movable, no matter what the nature of the estate in it may be, and also every interest or estate in things immovable and permanent which is not heritable or which has a definite time to expire, is personal property.

Some personal property is corporeal and much is incorporeal. The law deals with each after its kind prescribing for each class such rules as will work the greatest justice in the greatest number of cases.

To attempt to give the details of these different provisions would be to cover a very large part of the law.

The methods by which property may be acquired have been discussed at some length. Practically all these methods apply to personal property according to its kind.

As personal property lacks the quality of permanency and ordinarily is of a kind that is subject to a great many transfers, the general rule is that title to it may be shown by parol proof and that written instruments are not required as evidence of transfer. This rule is not universal. Its most common exception is in the case of leasehold interests in land for periods longer than one year. In some kinds of commercial paper, particularly that payable to order, the highest and most beneficial title can only be passed in writing.

The distinction between general and special property in things is recognized as well in the law of personal as of real things. That is, one may be the general owner of a thing, his estate including all five of the elements of ownership, or he may have some less estate limited in some respect as to one or more of these elements.

While it would not be profitable to consider all the different

methods by which title to personal property may be acquired, there are a few so important as to demand attention.

Transfers of Title.

Sales.—A sale is the transfer of personal property for a price in money. As sales are species of contracts they involve genuineness of assent, competency of parties, consideration, legality of purpose, and form.

In addition to these requirements which are essential to all contracts it is necessary that there be some thing the title to which is passed by the sale. This thing must be in existence, definite and ascertained.

Existence of the thing may be actual or potential. Actual existence needs no explanation. In the law of sales the product or increase of things actually in existence and then belonging to the seller which will come into being according to natural laws and the usual course of dealing with the thing are regarded as existing potentially or as in potential existence.

Thus, if a man owns a flock of sheep which have just been sheared the sheep are in actual being and are, of course, proper subject matter of sale. In the natural order of things these sheep will continue to grow wool which will be ready for shearing within a few months. This wool is in potential existence and may be sold by the owner of the sheep. Or, if a man owns a farm which he is cultivating, the matured crops are not in existence at the time of planting but as planting and cultivation in the ordinary course of nature result in matured crops, the matured crop is regarded in law as in potential existence.

Not only must the thing to be regarded in potential existence be an actual product of some thing then in actual existence and capable of definite ascertainment but the thing actually existing must, at the time of the sale, belong to the seller.

Thus, while A may sell the wool still to be grown on a flock of sheep belonging to him, he cannot sell the wool to be grown on a flock of sheep owned by B even though he intends to purchase the sheep. To allow this doubles the uncertainty. First, there is the uncertainty as to the growth of the wool. The flock of sheep may die or become diseased and hence produce no wool. Second, there is the uncertainty of A being able to buy the sheep from B. Hence the law declines to take this double risk.

Not only must the thing sold be in existence, as just explained, but it must be definitely ascertained and identified. If a man had a thousand bushels of corn in the crib he may sell it all or he may sell any undivided interest or share in it, as one third or one half, and title will pass. But he cannot sell fifty bushels and pass title to any particular fifty bushels until both parties, or one of them under the authority of both, separates the particular fifty bushels which is sold from the general mass of corn in the crib.

To this rule there is an exception made in the case of grain in public elevators and of oil in reservoirs. The reason for these exceptions is a matter of business convenience, rather than legal principle.

To constitute the transfer a sale it must be for a price in money. This price may be paid in cash, or part cash and part at some later date, or all at a later date. The time of payment is immaterial, but the consideration must be money.

The general rule at law is that the seller of personal property can convey no better title than he has. In other words, the doctrine of innocent purchaser is not generally applicable in transfers of personal property.

To this rule there are a few exceptions. The first relates to negotiable instruments; the second, to the sale of property by one who has a prima facie, though defeasible, title, as where one has procured the title to the property by fraud. The third is where a person, though not the owner, has all the *indicia* of ownership when he holds such evidence through the wrongful conduct of the real owner.

The seller impliedly warrants the title to the thing sold but does not ordinarily warrant its quality or soundness. The cases in which the law implies a warranty of the quality or fitness of the thing are those in which it is the legal duty of the seller to disclose defects. These, and the principles governing them, have been discussed under the general head of Fraud and the special head of Non-disclosure.

Sales and contracts to sell are subject to the general rules of law as to legality of purpose. This has been discussed under the head of Rights against Particular Persons and need not be repeated further than to say that if the agreement under consid-

ation be performed so far as to transfer the title, the law will not open up the matter and restore the title to the original seller because the sale was made for an unlawful purpose. But if the illegality of purpose be known to and acquiesced in by the seller, or if the offense contemplated be a heinous one, known to the seller, whether he acquiesce in it or not, he cannot compel the purchaser to pay any unpaid portion of the price. If the agreement be one to sell and not a consummated sale, the enforcement of its performance will be subject to the general rules heretofore stated.

Barter or Exchange.—A barter or exchange is the transfer of the title in one thing in consideration of the transfer of the title in another thing.

It differs from a sale only as to the consideration. In sales this is always a price in money and in barter some thing of value other than money or a promise to pay money by the seller.

In all other respects the rules governing sales are applicable to barter.

Gifts.—A gift is the transfer of the title to a thing without consideration. As heretofore seen promises to give are non-enforceable but when the promise is performed and the thing actually delivered to the donee title passes and the donor cannot thereafter lawfully reclaim or retake it.

If the donor, at the time he made the gift, was insolvent, or if by making the gift he makes himself insolvent, his creditors can follow the thing given into the hands of the donee and sell it or enough of it to satisfy their just claims.

Bailments.—The most usual kind of special ownership in personal property is bailment. A bailment is the possession of personal property belonging to another for the fulfillment of a certain purpose or purposes with respect thereto.

To be the subject of bailment the property must be corporeal, though corporeal evidences of incorporeal rights, such as promissory notes, certificates of stock, may be bailed.

The purposes for which bailments may be made are as various as the exigencies of business and social life.

Bailments usually arise from agreement of parties though sometimes they grow out of the wrongful act of the bailee in taking possession of property belonging to another and dealing with it as his own. In these latter cases it is never legally obligatory on

the owner to treat the wrongdoer as a bailee. He is simply permitted to do so if he finds it to his advantage.

Bailments are usually divided into three general classes:

(1) Those for the sole benefit of the bailor.

(2) Those for the sole benefit of the bailee.

(3) Those for the mutual benefit of both parties.

In the first class of cases, Bailments solely for the benefit of the bailor, the law requires the bailee to use only a slight degree of care. These are usually cases in which the owner of property induces another to take possession of it and keep it for him without any compensation. As the bailee gets no reward for his trouble and sometimes not even for his expense the law does not regard it as just to exact of him even as much care as a man ordinarily exercises in his own business affairs.

In the second class of cases, Bailments solely for the benefit of the bailee, the law requires of the bailee a high degree of care. As the bailee is getting the benefit of the possession and use of the property of another solely for his own advantage without paying the owner anything for it, the law regards it just to require of him a higher degree of care than is ordinarily exercised by a man in the conduct of his own affairs.

In the third class of cases, Bailments for the mutual benefit of both parties, the law looks upon the bailment as an ordinary business transaction and requires ordinary care by the bailee.

Every case of bailment must come in one or the other of these classes. These general doctrines run through and determine the whole body of the law regulating the duties of a person in possession of personal property belonging to another when the transaction is purely private. In some classes of bailments the public, as well as the bailor and bailee are interested. In such cases the rights of the parties are affected by the public nature of the business and are governed by rules peculiarly adapted to the special facts and conditions. The most frequent illustrations of this kind of bailment occur in the business of common carriers and inn-keepers.

Incorporeal Personal Property.

There are a number of incorporeal things which are personal property. Some of them are of very great value. The most im-

portant of these are choses in action, patent rights, copy-rights, good will, and trade marks.

Chose in Action.—A chose in action is a legally enforceable claim for money which the creditor has no means of collecting except by suit.

It is immaterial whether the claim arise from a contract or for breach of contract or from a tort so long as it is a right to demand and receive money recognized by law and enforceable by suit.

At Common Law choses in action were not assignable. The reasons given usually were the personal nature of contracts in the earlier view of the law, and that to permit such assignments would encourage litigation.

The first serious modification of this doctrine resulted from the recognition, in a somewhat modified form, of the law merchant, of which negotiability of certain promises to pay was one of the most important doctrines. The next step was to recognize assignments of Common Law choses in action to such an extent that payment by the debtor to the assignee would discharge the debt. Next came the practice of permitting the assignee to institute and maintain suits on such choses in action in the name of the assignor, but to the use of the assignee. This was later followed by recognizing the right of the assignee of choses in action arising out of contract to sue in his own name.

The prevailing rule now is that choses in action consisting of contracts to pay money, or legal demands for money based upon breach of contract, and legal demands for money growing out of torts in violation of property rights may be assigned, but that claims for damage for torts in violation of personal rights are nonassignable.

This change in the law has, in some instances, been effected by statute and in others by judicial action. The statutes in some States go beyond the rules stated above and permit the assignment of all choses in action whatsoever.

Patents.—When a person invents some new and useful appliance or machine, or discovers some new process by which to make some useful article, he confers a benefit upon the public. In recognition of this fact, and as an encouragement to such enterprise, the law grants or secures to the inventor, or discoverer, a monopoly in the production of the thing, or use of the process, for

a reasonable time. There is no recognition of this right to monopoly at Common Law. The Federal Constitution confers upon the United States Government the exclusive power to deal with such rights. So we have all patent rights emanating from and regulated by that government, and all suits for their violation must be brought in the Federal courts. The acts of Congress on this subject are quite voluminous and detailed.

Two facts must exist to make an invention or process patentable; (1) It must be new. (2) It must be useful. The first is required because only he who is first in originating the idea is thought to be entitled to protection, and the second because the public is not interested in the matter unless it be of some practical benefit. If these two facts exists, and are shown, the inventor or discoverer may, by complying with all of the legal requirements on the subject, obtain from the Federal Government, through its proper officers, a certificate of these facts, carrying with it an exclusive right or monopoly in the sale of the thing, or the use of the process, for the time specified. Any other person making and selling the thing, or using the process, will be liable to the patentee for damages, and, in many instances, to further penalties. As these rights do not exist except under the acts of Congress, any one who makes his invention or process public, without attempting to comply with those acts, is held to waive his preferential rights. This waiver is, however, in the behalf of the public, and not some other individual; so no one else justly obtain a patent giving him exclusive rights in the premises, but any and all persons would be equally entitled to enjoy and participate in the benefits.

Copyrights.—Copyrights are the rights which an author or artist has in his literary or artistic productions. These are also exclusively in the jurisdiction of the Federal Government. To a limited extent, they are recognized and protected at Common Law. At Common Law an author or artist was not compelled to make his production public, nor would a limited giving out of the literary matter or display of the work of art be such a publication as would entitle another to use or reproduce it, and any attempt to do so would be unlawful. If, however, the production were once made public, or published generally, the producer lost his

monopolistic right in and over the thing, and others could reproduce it with impunity.

The protection thus afforded is very inadequate, and has been supplemented by congressional action. The author or artist must show that he is the real originator of the book, picture, etc., and, if it be a book, must deliver two copies to the Librarian of Congress at Washington, D. C., and pay a small fee for a certificate, and his statutory copyright is thereby secured.

Just what constitutes a violation of this monopolistic right is frequently difficult to decide. The right covers the manner of presentation of the idea, both in the organization of the subject, the language used, and the illustrations employed. The fundamental truth contained in the book or picture no man can monopolize. The truth is free, and must ever remain so. The manner of expressing the truth is personal and individual, and is properly a subject matter of individual ownership, and is justly protected by the law. The application of these general doctrines is difficult, and involves matters of technique and detail outside our present purpose.

Good Will.—This is a phrase having a technical meaning. Mr. Bouvier defines it as "the benefit which arises from the establishment of particular trades or occupations. The advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or influence, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." It is the reasonable expectation of continued patronage in the business. It is due largely to the business reputation of an establishment, and includes the trade or patronage drawn by it. It is frequently quite a valuable asset.

Trade Marks.—Closely connected with Good Will are Trade Marks. A trade mark is some symbol or emblem which a manufacturer or dealer in goods, wares, or merchandise puts on or attaches, in some way, to commodities put upon the market, to indicate that they are manufactured or sold by him. The purpose is to identify the goods and pledge the reputation of the user of the

trade mark that they are what they purport to be. It is this that gives them value. This value is often very great. An article with an established reputation will often be in demand when a similar article, probably just as good, but which is unknown, will scarcely be called for by customers. Sometimes certain dealers have such reputation that the public will readily buy any article recommended or manufacteured by them. Either of these conditions adds largely to the selling qualities of the article, and when they are combined, as is frequently the case, the advantage is, of course, greater.

Trade marks are means of identifying commodities put upon the market and of showing by whom they are made and sold. When an article thus indicated has an established reputation, the temptation to others to adopt the marks by which it is known, and use them to increase the sales of similar commodities dealt in by them, is very great. The injurious effects upon the owner of the trade mark are of two kinds: (1) His trade is directly decreased by substituting the spurious article for the genuine; (2) the substitute may be greatly inferior to his, and so the reputation he has established be injured. It is, therefore important that rights in trade marks and the means for their legal protection be understood. Unlike patents and copyrights, they are Common Law rights, and are not peculiarly within the jurisdiction of the Federal Government.

These rules may be somewhat briefly summarized as follows: When a person adopts a trade mark, consisting of symbols and other indicia, descriptive of his manufactured articles or commodities, and uses it in his business, he thereby acquires a right to the exclusive use of all arbitrary symbols so adopted, and also of any arbitrary combination of words or any new and arbitrary application of any common word by which he gives to it an arbitrary meaning in that particular combination; but he does not acquire the right to an exclusive use of a common word descriptive of the commodity or the purposes for which it can be used. All persons have the right to use common words in their common meanings, and no one can acquire a monopoly in such use.

The right stated above depends on the adoption and use of the trade mark, and not on any patent or copyright legislation. If the commodity be such that it comes within the patent laws, or

the symbols or indicia are such that they can be copyrighted, rights may also be acquired under such legislation; but trade mark rights, as such, are recognized and protected independently of these statutes.

When the right to a trade mark exists it may be infringed in three ways:

(1) By a fac-simile reproduction.

(2) By such an imitation, though not a reproduction, as is reasonably calculated to deceive the public into the belief that the article indicated by and sold under the imitation is the same as that indicated by and sold under the genuine trade mark. In determining this question, the entire trade mark and label, and size and appearance of the package as exposed for sale, are to be considered; the similarity does not have to be so great as to render the difference incapable of detection except by putting the two in proximity, but it is sufficient if it is so close as reasonably to be calculated to deceive the purchasing public in the open market.

Under the circumstances set out in this and the preceding paragraph, no fraudulent purpose or design to imitate is necessary to constitute an infringement.

(3) Infringement may be effected by the purposed and designed imitation of a trade mark, with the design to avail of the reputation of the article sold under the genuine trade mark, and put the substituted article on the market and induce purchasers to buy it in the belief that it is the article indicated by the genuine trade mark. In case of such willful wrong, there need not be such imitation as is calculated to deceive the public, but only such as might possibly deceive. The remedies for infringement are damages for loss already sustained by reason of it, and injunction against continuation of the wrong.

TRANSMISSION OF PROPERTY ON THE DEATH OF THE OWNER.

Ownership of property, according to the American idea, carries with it not only the right of dominion over the thing owned, but also the power of disposition after death. This power of determining who shall succeed to the ownership of things owned, after the death of the present owner, is exercised by making a will, or testament, as it is sometimes called. The law regulates this power, both in the manner of its exercise, and the manner of es-

tablishment and proof of the will and, in some respects, as to its effects. These regulations differ in the several States, though their main features are the same.

Wills.

Usually any person capable in law of disposing of property during life may dispose of it by will, and very frequently, if not universally, this power is extended so as to include married women, and sometimes married men who are minors. The formalities with which wills are to be executed are not uniform, but they usually require that the will be written and executed in the presence of two or more witnesses. Sometimes personal property may be disposed of by parol will, but this is not the rule. As to the effect of the will, the rule is that the property passes as provided in the will, but it is always subject to the just claims of the creditors of the deceased, and frequently to the right of use by surviving members of the family. Death does not pay a man's debts, and the property he leaves is, primarily, to be appropriated to their payment, and the same general policy which prohibits one giving away property needed to pay his debts makes his disposition of it by will subject to the same limitations. So if a piece of property be willed to a person, with all the legal formalities, still he will receive no beneficial interest from it if there is not enough other property in the estate to pay the debts of the testator. There are, also, some family rights in the property of the deceased which are superior to rights created by will. The most striking example of this is in the homestead laws. The husband can not sell the homestead during his life without the joinder of the wife; so, if he wills it to some one else, the title thus acquired would be subject to the continued use of the property by the family, as long as they so desire, or as long as the family shall continue to exist. Subject, however, to this right, the property would go to the devisee in the will, and he would be entitled to its use and enjoyment after the homestead terminated.

Inheritance.

If the owner dies without making a will, the property passes to his heirs, under the law of the State in which it is situated. Generally, heirship is made dependent upon nearness of relationship to the deceased. The distribution of the property is fixed by the

law applicable to the kind of property in question. Personal property is usually governed by the law of the country in which the deceased had his permanent residence; land, by that in which it is situated.

Laws of inheritance are within the will of the legislative department of the government. No one has vested rights under them prior to the death of the ancestor; so the legislature can make such disposition of the residue of estates after the debts are paid as it sees fit, and can put such limitations and attach such incidents to inheritance as it chooses, such regulations to be operative as to the estates of all persons who die after their enactment. They can not be made retroactive, and destroy rights under laws in force at the time of prior deaths.

Administration.

The property of a deceased person, if there be a will, is taken charge of by the person appointed in the will for the purpose, called an executor, or by suitable persons appointed by the probate courts. Sometimes the will provides that the executor shall manage the estate free from control by the courts. In such a case, this provision is respected so long as the executor is conducting the affairs of the estate properly, in accordance with the will and the law. If he does not, he will be removed, and the estate will be taken charge of by the probate court, through some suitable person, who will administer it in conformity with the will and the law. If no such provision is in the will, the executor is under the general supervision and control of the probate court, and carries out the provisions of the will as construed and enforced by the court. If there is no will, the probate court selects some discreet and proper person and takes charge and closes up the estate through him. The administration of an estate includes taking it into possession, managing and controlling it until all just claims aganst it are proved up and satisfied, and then distributing the residue, if any, among the devisees, if there be a will, or among the heirs, if there be no will. This is a most important duty, and can not be too carefully performed. If there is no will, and no heirs are known, the residue of the estate is placed in the treasury of the State, to await claims of persons who may present themselves as heirs within a specified time; if no one comes forward and establishes a claim within that time, it goes to the State.

CHAPTER XXII.

PUBLIC UTILITIES AND PRIVATE PROPERTY APPLIED TO PUBLIC USES.

Matters Purely Public.—The truth expressed in the ancient maxim that public safety is the supreme law is probably the basis of all organized government. In the United States where all governments are organized by the sovereign people through written instruments called Constitutions, these instruments are at once the sources of and limitations upon governmental authority. They are the direct expressions of the sovereign will and their mandates are binding upon the government and all governmental agencies created thereby as well as upon private individuals. In any particular State, therefore, the supreme law as above defined is limited by all pertinent constitutional provisions and the government cannot lawfully interfere with the individual contrary to the constitutional provisions even though it might be demonstrable that such interference would subserve the public good. Limitations of this kind, so far as the States are concerned, are found in both the Constitution of the United States and of the particular State.

The Federal Constitution stands upon a different basis. It is, strictly speaking, a creative instrument. The government brought into being thereby has such powers, and such powers only, as are conferred upon it by that instrument. Still, the people of the United States insisted upon incorporating in the original Constitution and in numerous amendments thereto positive restrictions upon the exercise of governmental power.

Notwithstanding these facts, there is much authority in the Federal and State governments, particularly the latter, for the just subordination of private interest to the public good. In what respects and to what extent and by what means this should be accomplished are often matters of violent social and political discussion. And the end is not yet.

There are certain purposes so essentially public that there is no disagreement as to the government's right, or even duty, to accomplish them through public agencies. Such as the enactment of law, the administration of justice, and other similar activities.

PUBLIC UTILITIES.

There are certain other public duties essential to our present social conditions, which we are accustomed to have performed, in a great measure, by private individuals. Such as the maintainance of railroads and telegraph and telephone companies. The interest of the public in these enterprises, in the safety and efficiency of the services rendered by those conducting them and in the charges made therefor are so clearly matters of public concern that they have passed from the field of discussion.

There are other services such as supplying water, light, and sewers in thickly settled communities, which are so closely connected with the public convenience, health and safety, that there is no room for doubt as to their public nature.

Such enterprises are often conducted by public and often by private means. All of them, viz., railroads, telegraphs, telephones, light plants, water plants, sewers, and others of similar nature, whether operated by public or private means are clearly public utilities and the law is justified in dealing with them as such.

When such enterprises are carried on at the public expense, through public agents there can be no doubt of the State's right to supervise and control them in any way it sees fit, so long as it does not misappropriate public funds or conduct the business in such manner as to interfere with the legal rights of individuals.

When such enterprises are undertaken by private persons their public nature subjects them to reasonable and proper regulation and supervision by the State. This is true whether the parties engaged in the enterprise have been granted special privileges or not. But the doctrine is particularly applicable in those cases in which, owing to the public nature of the business, the parties engaged therein have had public concessions made them or special privileges and authority conferred upon them.

When these enterprises are conducted by private persons, whether individual or corporate, the control exercised over them should always be reasonable and just both to the public and to

the owners. The law should not lean to the public and so impose undue burden upon the owners of the property; it should not lean to the owners and so permit undue burdens to be placed upon the public.

Extent of Governmental Control.

The respects in which this special right of control exists are:

(1) The right of supervision and inspection. This right extends to the whole plant, covering premises, appliances, and operatives.

(2) The reasonable regulation of the manner of conducting the business. This extends to every department of the operation inefficiency in which would result in hurt to the public.

(3) The regulation of charges for services rendered. This right to regulate covers both reasonableness and uniformity in the charges.

(4) As incidental to the foregoing powers, the State has the right to control the amount of liability which may be incurred in connection with such businesses and to see that the money or funds received for the business are really applied thereto.

(5) When the business is carried on by a private corporation, the State creating the corporation or in which it is doing business, has the right to inspect the books, papers and records of the concern. This is usally known as the visitorial power of the State.

Special Privileges.—As all the enterprises of which we have just spoken are public in their nature, it is permissable and customary to confer upon the parties undertaking to carry them on certain privileges necessary for their efficiency.

Among the most important of the privileges usually conferred, is the power of eminent domain, under which property may be taken, upon just compensation being made therefor, without the consent of the owner for use in carrying on the public enterprise. It is under this power that railroad companies can compel the sale to them of lands for their right-of-way and depots, telephone and telegraph companies can acquire property over which to erect their lines, and gas and water companies to lay their pipes, etc.

This power cannot be exercised by any company organized for any of the foregoing purposes unless the State has conferred such power on the class of companies to which the particular one claiming the right belongs; for, while it is lawful for the State to

confer such power, it does not exist in the absence of constitutional or legislative grant.

Persons operating public utilities, such as light plants and telephones, and who furnish their patrons with appliances to be used upon their premises, have the right to enter upon the premises at reasonable times and in a proper manner, for the purpose of inspecting and repairing the appliances and, at the expiration of the contract of service, to remove the same.

All such concerns have the right to make reasonable and uniform charges for services rendered which may, if they see fit, be collected in advance of rendering the service.

Duties Due to the Public.—Persons engaged in any enterprise known as a public utility owe to the public and to each individual patron the following duties:

(1) To render efficient service.

(2) To render such service promptly.

(3) To render such service without subjecting the patron or his known rights to unreasonable danger.

(4) To render such service uniformly and without unjust discrimination.

(5) To charge only reasonable and uniform rates.

(6) To treat their patrons with reasonable courtesy.

These comprehend the duties ordinarily required of persons engaged in such enterprises. In some cases, especially as to common carriers, there are rules of exceptional stringency. These, however, may be regarded as special application of the general doctrines above announced to the details of that particular business rather than the announcement of additional rules.

COMMON CARRIERS.

A common carrier is one who undertakes for value to carry goods or passengers or both for all who apply, over a designated route or within a designated territory, in or upon designated kinds of vehicles.

The authorities differ as to whether a carrier of passengers should be called a common carrier or a public carrier. This difference grows out of the fact that a passenger cannot be subjected to the dominion of the carrier to the extent and in the manner that freight is, and hence it is contended that as there is no bailment, properly speaking, of a passenger the carrier transporting

him should be indicated by a different name from that used for one who transports things.

That there is a difference in the dominion exercised over a person and a thing during transportation is undoubtedly true. This difference finds expression or recognition in the different rules of law enforced as to carriage of persons and of things. Whether or not it is better to use the one name to designate the carrier in both instances or to use the different names as indicating the legal distinctions, is practically a question of terminology and is not an important one. I prefer the use of the one name as less confusing and requiring less repetition.

A common carrier has a right to designate the route over which he will carry, or the locality in which he will do business. He also may determine whether or not he shall carry passengers or freight or both. He may even restrict his business to the carriage of certain kinds of things. He may limit his business to carriage at fixed intervals or may undertake to carry at any and all hours.

To state the matter broadly, the carrier may determine for himself the time, place, and extent of his business. But once having done this he must serve effectively, uniformly and without unjust discrimination, and for reasonable compensation all who seek his services within the limit of the business as fixed by him.

Duties and Liabilities.—The duties of a common carrier are embraced under the six heads given above as due from all persons supplying any public utility. In some respects the requirements made of the carrier are more strict and exacting than are laid upon others.

Efficient Service.—The carrier must render efficient service. This rule is enforced according to the nature of the business undertaken. It would be manifestly absurd to require of the carrier operating a local delivery wagon the same equipment and service as may be justly demanded of a railroad company. But the principle is the same. In each case the law requires equipment sufficient to render reasonably efficient service to the public within the limits and to the extent the carrier holds himself out as serving the public.

Considering this duty of efficient service as resting on railroad companies, somewhat in detail, we find that these companies are required:

(1) To acquire and maintain proper road beds, depots, stations and terminal facilities.

(2) To have sufficient rolling stock reasonably safe and convenient, with which to handle the amount of business which their location and connections ordinarily supply.

This rolling stock is not required to be of the latest or most improved kind, but it must be reasonably adequate for and adapted to the purpose for which it is used. The carrier is not required to keep sufficient rolling stock and equipment to meet exceptional and extraordinary demands, but must provide enough to handle satisfactorily and promptly the amount of business which should reasonably be anticipated.

(3) To have a reasonably sufficient number of capable and trustworthy operatives.

This requirement extends to every branch of the service undertaken for the public. It is because of this duty, that the State may require tests as to the competency and fitness of servants, and that a sufficient number be employed, and limit the hours of continuous service which may be required of them.

(4) To make and enforce reasonable and proper rules for the conduct of the business.

In a business so extensive and complicated as the operation of a railroad it is impossible to have order, efficiency or safety in the absence of reasonable rules regulating the conduct of all those engaged in carrying out the enterprise. This duty is analogous to that imposed upon the master for the safety of his servants, but as we are dealing with it now, it is a duty due from the common carrier as such to its patrons.

Prompt Service.—Promptness is one element of efficiency but it is so important a duty in transportation, both of persons and freight that it seems worthy of separate treatment. It is the duty of a railroad company to make ample provision for handling freight and passengers with reasonable expedition. What is reasonable expedition in any particular case depends largely on the general business conditions existing at the place where the service is sought, and the special nature of the service demanded. One train a day going in each direction might be reasonably sufficient to handle the passenger traffic of a small community, whereas, equally efficient service for all who desired transportation in a

metropolis might require a great many trains a day. The company is required to meet these local conditions.

Again, promptness in transportation frequently depends on the nature of the commodity transported. In the case of live stock or of ripe fruits, quick delivery is essential to prevent injury to the freight in transit, while a shipment of granite or pig iron might be held indefinitely without hurt to the thing from its inherent qualities.

All these matters the law takes into account in determining the question of promptness. We may, therefore, say that promptness is a relative term dependent on the nature and extent of the business as affected by locality and other pertinent facts and the nature of the thing shipped. The general rule of Law is, that both passengers and freight, must be carried within a reasonable time considering all the circumstances of the case.

Safe Service.—This heading, taken literally, is misleading as applied to most public utilities. Restricted to common carriers it implies a duty greater than that imposed by law as to passengers, and though accurate as a general statement as applied to freight, it is subject to several exceptions.

The rule of safety as to ordinary public concerns is that they must not injure intentionally and must use reasonable care to prevent injury.

As to common carriers of passengers the rule against intentional hurt has full force, and the rule as to care is made more exacting, so as to demand that the carrier use the highest practical degree of care to prevent hurt to the passenger. It is clear that this is not the liability of an insurer. This duty of care applies to premises, appliances, and servants and in some instances goes even beyond these and requires protection against wrongs committed on its premises by outside parties not in the employ of the carrier.

According to a large number of authorities, amounting perhaps to the weight of authority, the duty as to care and protection of passengers while on the premises of the company, but not being actually transported is limited to exercise of reasonable care.

All authorities concur that during the transportation, that is, from the time the passenger enters the vehicle of the carrier until he alights therefrom and during the process of entering and

alighting, the carrier owes the highest practicable degree of care so far as premises, equipment, and employees are concerned. The degree of care as to protection from interference by third persons even while in the vehicles of the carrier is frequently stated as reasonable care.

Passing to the carriage of freight, we find the general rule as to safety is absolute, though subject to five exceptions. It may be stated thus: It is the duty of a common carrier of freight to transport safely all freight tendered to it within the line of its business and to deliver the same uninjured at the place of destination. It is customary to add within a reasonable time. This duty is included in the requirements of promptness which have already been considered.

This doctrine makes the carrier an insurer of the safe delivery of the freight subject to its right to be relieved from liability, if it can show that the injury resulted from any one of the causes recognized in the several exceptions. It, therefore, follows that in a suit for failure to deliver or for delivery in an injured condition, the shipper need only prove the fact of shipment and nondelivery or injury to the thing and this fixes liability upon the carrier unless it pleads and proves affirmatively that the destruction or injury comes within one of the recognized exceptions.

These exceptions are:

(1) That the thing was injured or destroyed by the act of God.

(2) That it was injured or destroyed by a public enemy.

(3) That it was injured or destroyed by some inherent vice or defect in the thing shipped.

(4) That it was injured or destroyed by the fault of the one making the claim against the company or by some one for whose conduct he is responsible.

(5) That the thing was taken from the carrier by authority of law.

No Unjust Discrimination.—A common carrier must serve without unjust discrimination all who desire to patronize him. The law does not forbid all discrimination. This would be to require an impossibility. It is, however, imperative that no discrimination which is unjust or unreasonable shall be made. This is one of the most important doctrines regarding common carriers. It is the very essence of their duty. Control-

ling as they do such important activities and means by which they could give such great advantages to any favored locality or person, and could do such great injury to localities or persons upon whom they impose undue burdens, it is of prime importance that the law shall require just and impartial treatment of all their patrons.

This duty of uniformity of treatment applies to the entire conduct of the business of the carrier. It must afford equal facilities to its patrons in having access to its premises and vehicles. It must not unjustly discriminate between them as to the time and manner of receiving passengers and freight or of handling either, but must accord to each and every patron the same fair opportunity that is afforded to the most favored.

While the foregoing statements are correct it is only unjust discrimination that is forbidden. Equality of opportunity and of service and not identity of treatment is what the law demands, hence carriers are not forbidden to make reasonable and just discriminations.

If two persons should each come to the same freight depot at the same time, one desiring to ship live stock and the other furniture, the law would neither require the carrier to rush through the furniture within the same time that the live stock should be carried and delivered, nor would it require that the live stock be held back to the same speed of transportation as would be reasonable for the furniture. On the contrary, it would require the carrier to deal with each of these shipments according to its kind, hurrying through the live stock and handling the furniture more slowly.

Again, all discrimination as to charges for service is not unlawful. Because a carrier charges passengers for short distances three cents a mile does not make it unlawful for it to sell tickets for long journeys at a less rate; nor because freight in a small package is charged a certain rate per pound is it obligatory to charge the same rate on car load lots.

These illustrations will show that it is not identity of charge that is required, but that it is unjust discrimination that is forbidden.

When it is said that common carriers must serve without discrimination all who desire transportation for themselves or for

their freight and must observe a high degree of care for the safety of the passenger and insure the safety of the freight subject to specified exceptions, we have announced apparently conflicting and impracticable rules, for it not infrequently happens that indiscriminate service for all would jeopardize the safety of all.

For example, a passenger coach with numerous passengers aboard arrives at a station and a man infected with smallpox offers to enter the car. If, because the company has received the other passengers, it is therefore compelled to accept and carry him, it would jeopardize the health and safety of all passengers then on the car and all who might subsequently enter it. Under such conditions the law says that the infected passenger is not fit for transportation, thus discriminating between persons who are sound and those infected or suffering from contagious disease. This is not only just but is imperatively demanded by the carrier's duty to protect passengers already in its custody. So we see the duty to carry passengers is not to carry all persons but all persons not in such condition as to be dangerous to other passengers. The source of danger need not be disease. If one offering himself for transportation is drunk and disorderly, or disorderly without being drunk, he may be rejected without liability on the part of the carrier.

This doctrine, so far as applicable, controls also shipments of freight. No one could legally demand of a common carrier that it receive nitro glycerine or dynamite for transportation in an ordinary car with ordinary freight, unless it had been specially and most carefully prepared for such transportation. To accept it in any other condition would be to jeopardize the nitro glycerine or dynamite itself, everything in the car with it, the car containing it, and possibly the whole train and train crew. This would be unreasonable and unjust and the law refuses to make any such requirement.

Charges.—The charges of common carriers must be uniform for identical service and must be reasonable in amount.

What we have just said with regard to discrimination applies here. The charge must be the same for the identical service under identical conditions, but changes in the nature or extent of the service, or in the facilities furnished, or the conditions under

which the service is rendered very often require corresponding changes in the charges.

The difference between first and second class passage on steamships is everywhere recognized. The passenger in the hold and the one in the state room of the same ship, are carried from the same port over the same route to the same port, but there are great differences between the comfort and facilities that they have enjoyed. The steamship company having given to the one appreciably better service than it did to the other is legally entitled to charge correspondingly more. The same is true within limits as to all other common carriers.

There is even greater latitude for difference in charges upon different kinds of freight. Some articles can be carried in rough cars and will stand rough handling and scarcely be said to be liable to loss or injury during the trip, while others are delicate, requiring specially prepared cars and special care and attention during the transit, and notwithstanding all these precautions are still liable to serious injury while en route.

It is clear that if the law is to be just it must take all these different matters into account in determining the reasonableness of freight charges, and it accordingly does so.

Courtesy.—Courtesy is usually regarded more as a social than a legal duty but there can be no doubt that it is legally incumbent upon common carriers and their servants to treat courteously all their patrons.

There is very little litigation in which the sole charge against the carrier or its servants is lack of courtesy but the issue often arises incidentally and discourteous and rude treatment are often condemned in the opinions of the judges and are taken into account in estimating the amount of damage recoverable. This is particularly true as to female passengers and in cases of unlawful ejection of passengers.

Right to Change Legal Duties by Contract.

The duties of common carriers as hereinbefore discussed are those which exist at Common Law. It will be observed that many of these are duties in which the public as well as particular shippers are interested. Where the duty is one of real public concern, such as uniformity and reasonableness in charges, the duty cannot be varied by agreement in such way as to prejudice the public

interests. The effect of the agreement as between the parties, when this is dependent entirely upon the Common Law, is this; if the agreement involves no breach of public duty and is in itself, under all the circumstances of the case, reasonable and just, as between the parties it will be enforced. No agreement between a common carrier and a patron which is contrary to the best interests of the public, or which is in itself unreasonable, can be enforced.

There is practical uniformity in the decisions of the Common Law Courts on the proposition that the agreement must be reasonable in the eyes of the law in order to be valid, but there is marked difference in the application of this doctrine by different courts to substantially the same states of facts.

To illustrate, if a person desiring to ship animals tenders them for shipment and in the bill of lading or contract of shipment agrees that the value of the animals does not exceed one hundred dollars per head, and the contract stipulates that the freight charges are based on this agreement, the Supreme Court of the United States holds that the agreed value is binding and if one or more of the animals are killed in transit, even through the negligence of the company, the shipper can not recover more than one hundred dollars for each animal that was killed, although in point of fact they may have been worth much more. This court says that the shipper, having agreed to this value and having accepted the freight charge based thereon and thus having gotten the benefit of the agreement, cannot reasonably be heard to object to the agreement when it injures him.

On the other hand, some of the Supreme Courts of the States hold that it is always unreasonable to permit a party to undertake to relieve himself by agreement made before the commission of a wrong from the consequences of such wrong, and therefore, if the killing of the animals resulted from the negligence of the carrier, it cannot take advantage of the agreement to limit its liability to a sum less than the damage directly resulting from its own breach of legal duty.

Control by Federal and State Governments.

The Supreme Court of the United States, by an unbroken line of decisions, has settled that the transportation of passengers and freight by common carriers is commerce. Transportation be-

tween different States, or from a State to a foreign country is, therefore, within the jurisdiction of the Federal Government under the Inter-State Commerce clause of the Federal Constitution. Transportation entirely within one State is domestic commerce and within the regulation of that State.

Transportation in which the point of shipment is in one State and the point of destination in another is inter-State commerce. Transportation which has its point of shipment and its point of destination in the same State is ordinarily domestic commerce.

If, however, during any part of the carriage the freight shall be carried out of the State in which it was received, and into another State, or should be carried out of the State in which it was received onto the high seas, the shipment would be inter-State or foreign commerce, according to the facts, even though the point of destination was within the same State as the place of shipment.

Congressional Action.—Acting under the Inter-State Commerce Clause, Congress has passed many laws regulating the duties and liabilities of Common carriers engaged in inter-State and foreign commerce. The principal one of these is the statute creating the Inter-State Commerce Commission and its various amendments. The general effect of this Congressional regulation is to limit the powers and enlarge the liabilities of the common carriers.

State Action.—In many of the States there are statutes modifying the Common Law liabilities of common carriers. In almost every instance the effect of these statutes is to restrict the powers of carriers engaged in domestic commerce to a greater extent than is done by the Common Law.

Among the most common of these statutes are those creating State Railroad Commissions and those which forbid common carriers to make any contract limiting in any wise their duties and liabilities as fixed by the Common Law.

The statutes creating State Railroad Commissions in their general outlines have been held constitutional. Objections have been successfully made to some of the particular provisions of some of the acts. The State statutes denying the power of the common carriers to limit their Common Law liability are uniformly held to be valid so far as they affect domestic carriage. They have no effect ordinarily on inter-State or foreign transportation.

Agreements to Carry Beyond Carrier's Own Line.—If a natural person engage in the business of common carriage he can designate the locality in which he will operate and the route over which he will carry. If the carrier be a corporation, its locality and route is indicated in its charter. Strictly speaking, it is a carrier only within the territory or over the route specified therein.

It is apparent, however, that both the interests of the public and of the various common carriers, particularly railroad and steamship companies, require co-operation among the different companies and promptness and continued liability in the transportation of freight over connecting lines.

Questions necessarily arose in shipments that were to pass over more than one line as to the respective rights and duties of the different carriers and the shipper. It has been held, with reasonable uniformity, that the legal duty of a railroad company only requires it to carry freight or passengers over its own line of road and to deliver it or them safely to the next connecting carrier. As a legal proposition this seems to be satisfactory, but as a matter of business the shipper is, or at least is supposed to be, largely at the mercy of the respective carriers. Constant effort has, therefore, been made by the courts, and in a good many States by the Legislatures, to fix upon the initial company the liability of a common carrier over the entire route.

So far as the matter rested upon the Common Law doctrine it seems clear that no one of the connecting lines is a common carrier of the freight while in the possession of or on the line of any of the other roads, unless it has agreed to become liable as a common carrier over the entire route of carriage. This seems both just and legal.

It is very commonly held that any one carrier in the line of transportation may, by contract, assume the liability of a common carrier over the entire route. This doctrine having been established it necessarily led to questions of construction of contracts between different carriers in order to ascertain whether or not each carrier is responsible only for damage occurring on its own line or for that occurring anywhere in transit. In some States the Legislatures have taken up the matter, and have passed statutes providing in substance, that any contract which fixes a through rate of charge over all the lines, should be regarded as fixing

Common Law liability upon each of the lines for damages occurring anywhere on the route. Some of these statutes have been held constitutional. As an original question their constitutionality seems doubtful.

We may state the law on this subject, therefore, as follows:

(1) A railroad company is not compelled by law to act as a common carrier or assume the liabilities of a common carrier for freight or passengers after it or they have passed off of its line and have been received by a connecting carrier.

(2) A railroad company may lawfully assume such liability by contract.

(3) The tendency of the courts is to hold contracts for transportation which contemplate continuous carriage over separate lines of road as through contracts, and hence to hold anyone of the roads to the Common Law liability of a common carrier for injuries occurring anywhere during the transit.

(4) In some States, statutes have been passed declaring that shipments contemplating continuous transportation for through rates of freight shall be regarded as fixing Common Law liability on each of the roads for injuries occurring anywhere on the route.

In the absence of a contractual obligation, either actual or imposed by construction of law, each of several connecting lines of road is responsible as a common carrier only for injuries occurring on its own line. The difficulty, particularly in shipments of freight, in proving just where the hurt occurred often works quite a hardship on the shipper. To meet this some of the courts have undertaken to announce certain presumptions as applicable to cases of this sort. Some hold that in the absence of proof it will be presumed that the damage occurred on the line of the last road over which the shipment passed; others intimate, if they do not hold, that it will be presumed that the damage occurred on the first road. Where any such presumption is established by the local law it may be safely relied upon. Unless it is thus clearly established, the party claiming damage must prove definitely upon what line and when and how the injury was occasioned in order to recover.

Telegraph and Telephone Companies.

One of the most essential needs of the public is the transmission of information. One of the most extensive and beneficial branches

of the Federal Government is the Post Office Department. Through it the Federal Government acts directly in carrying written and printed matter, not for the purpose of changing the locality of the material upon which the information is placed, but for the sole purpose of communicating the information placed thereon.

Long after the establishment of the Post Office Department the art of communicating thought by means of electricity was developed. This came as the result of private industry and capacity and at private expense. The appliances used for this purpose were of such kind that the government issued patents to protect the inventors in their use. Thus the business of communicating by telegraph began as a private business carried on by instrumentalities owned by private individuals and protected by monopolistic privileges. It was soon demonstrated that this method of quick transmission of ideas was safe and practicable. The business world increased its use of the telegraph and the telegraph companies responded by increase and betterment of facilities. This process of development has gone on and the commercial world has so adjusted itself and its methods to this rapid transmission of information that it is indisputable that the telegraph is now a public utility.

In recognition of this fact a number of years ago the English Government took charge of the business of telegraphing in England and all telegraph and telephone lines in the island of Great Britain are owned and operated by the government. This method of government ownership has not been adopted in the United States and these businesses are conducted by private persons almost invariably by private corporations chartered for such purpose.

The public nature of the business and its effects upon the interests of the community at large demonstrate that these enterprises are public utilities. As such, they owe to the public each of the six duties hereinbefore enumerated.

There is a controversy still unsettled as to whether or not these companies are common carriers. The better opinion is that they are not. They do not carry any corporeal thing. Their sole function is to transmit information, which, of course, exists only in thought. The material part of the message, that is to say the

paper with the words written on it, is not sent but remains in the receiving office. By aid of electricity the words represented by the written characters are transmitted by sound to the ear of the person at the receiving instrument, so that it is only sound embodying thought, or thought as embodied in sound, that is transmitted. This would seem to be conclusive against the proposition that these companies are common carriers. This, however, does not affect the fact that they are public utilities owing to the public all the duties above enumerated and are subject to special regulation and control with regard thereto.

While the duties of all parties subserving public uses are the same the emphasis or stress is laid differently according to the nature of the service. As we have found, great attention is given to the safety of the thing transmitted in the case of common carriers, and the time of delivery is not particularly emphasized. In the case of telegraph and telephone companies, emphasis is laid upon the duty of promptness. All the other duties rest upon them and must be faithfully observed, but the need of the public which these companies specially meet is rapid transmission of information, and this need these companies must meet or be subject to liability. It is true that as to the time of delivery, the language in which the rule is stated is the same with reference to common carriers and telegraph companies. The service must be rendered within a reasonable time. But the lapse of a period of time, which would be perfectly reasonable and therefore legal in carrying freight, might well be very unreasonable and hence illegal in the transmission of a dispatch.

Reasonableness is always to be determined by the nature of the thing undertaken and the facts of the particular case. Men do not resort to the use of telegraphs and telephones to transmit information that will await the slower processes of the mail. It is because quickness is of prime importance that these agencies are employed. Hence it is that as to these companies the law is quite insistent upon the duty of promptness.

It is true that the law insists on reasonable and proper discharge of each of the other duties. The service must be efficient in every other respect as well as with regard to time. It should be rendered with reasonable safety to the known rights of the patron. As to telegraph companies this requires that the message as

delivered by the sender be transmitted safely; that is, just as delivered to the company at its receiving office. Failure to transmit correctly makes out a *prima facie* case of liability against the company for any damage directly resulting therefrom. Still the company can relieve itself from this liability by showing that it exercised reasonable care in its effort at transmission, and that the change in the message was not due to any defect in its appliances nor to any fault by its servants.

Telephone companies, as usually operated, do not undertake to transmit messages through their employes but only to furnish proper appliances and connections through which their patrons may communicate with each other. For errors in transmission due to the conduct of either patron, the telephone company is not responsible. If, however, its instruments or line are defective or if the company or their agents fail to use proper care in finding the parties called for they are responsible for any directly resulting damage.

These companies must not unjustly discriminate between patrons desiring service. The principles regarding discrimination are the same here as with regard to common carriers which have already been discussed. The application, of course, differs with the differing facts, but the doctrines are the same.

These companies are subject to governmental control both as to uniformity and amount of their charges. Identity of service rendered under identical conditions must be charged for at uniform prices, which must in all cases be reasonable. Appreciable difference in service, or the conditions under which it is rendered, will justify difference in charges. But the requirement as to reasonableness still applies.

These companies owe to their patrons the duty of courteous treatment.

We have treated telegraph and telephone companies together because of their practical legal identity. After most careful investigation the English courts announced the doctrine that telegraph and telephone companies are engaged in the business of transmitting intelligence by sound by means of electricity and this identity of purpose and of means make the two businesses the same to all intents and purposes, notwithstanding different appli-

ances and different methods of using electricity. The American courts hold the same doctrine.

Other Public Utilities.

The duties above enumerated and the foregoing discussion of them as regards common carriers, and telegraph and telephone companies, *mutatis mutandis,* apply to all other public utilities, such as water works, gas works, sewers, etc.

PRIVATE PROPERTY CHARGED WITH PUBLIC USES.

Besides the use of public property by the public for public purposes, and the use of private property for public purposes when such property has consciously been dedicated by its owner to such purposes, as has been discussed in the preceding portions of this chapter, according to many authorities private property may be used for such purposes or in such ways by the owner, as against his will, to charge the property with a public use, and thus subject the charges for such use to regulation by governmental authority.

To just what uses and for just what purposes the owner must apply his property in order to thus affect it, is difficult to ascertain from the cases. The language used in many of them is quite broad and would seem to go, if it does not go, to dangerous lengths, jeopardizing materially the rights of owners. The actual decisions, however, when tested by the facts and the actual questions raised and the points really decided, are not so broad.

Thus, in the case of *Munn v. the People of Illinois* (94 U. S. 113), Chief Justice Waite uses this language:

"Property does become clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to control."

Here the broad statement is made that property becomes subject to public control for the common good whenever it is used in

a manner to make it of public consequence and to affect the community at large. This is the test given by which to determine the right of the public to fix maximum charges for the use of private property. Whenever it is so used the owner has subjected himself to the legislative power to fix the price which he may charge for such use. Unless it is so used, the charges are a matter of private concern to be fixed by agreement.

It would be exceedingly difficult to go through the list of occupations and businesses in which men are engaged and determine by this test to which class a great many of them belong. To what extent the use must be a public consequence or to what extent it must affect the community at large, is not stated and would be difficult of statement. So, this language, considered by itself, affords but little help in the actual determination of the question.

If, however, we read the language in the light of the facts of the case and of the issues presented to the court and put upon it the limitation thus arising from its legal context, a good deal of the uncertainty disappears.

In this case a few grain elevators were handling all the vast output of grain for five or six of the Northwestern States as it passed through Chicago to the Atlantic seaboard. The proprietors of these elevators had ceased to compete and had for some time fixed the charges for storing and handling grain by them by agreement to be operative for a term of one year. The situation gave to these proprietors a practical monoply in the handling of grain in Chicago. By their voluntary act, in the pre-arrangement of uniform charges they had changed the possible monopoly into an actual one. It is this monopolistic arrangement that caused the Legislature of Illinois to enact a law fixing maximum charges.

These facts limit the broad language of the court materially. The real doctrine of a case is always to be determined by, and limited to, the facts and issues before the court. Thus limited this case teaches that private parties, who find themselves so circumstanced that by combination they can obtain a monopoly in handling a large part of a commodity, that is essential to the life and well being of the public, and who avail themselves of such opportunity and enter into agreements, fixing charges continuing for long terms, thus cutting off competition among themselves, and so practically depriving the owners of such commodities who

need their services of any opportunities to fix prices by agreement, thereby subject themselves to having maximum charges fixed by the government.

Thus stated, the rule is just and in keeping with ancient doctrines which have ever been against monopolies.

The cases sustaining the right of the government to regulate charges for mills, coaches, ferries, and such matters, may all be referred either to the doctrine controlling the cases in which the owner has consciously dedicated his property to a public use, or is exercising some public prerogative or special privilege in conducting it. The right to enact usury laws stands upon a special basis historically easy of explanation and practically just in its operation. But this special regulation should not be taken as a basis for enlarging the doctrine by analogy.

Whatever difficulty there may be in stating the doctrine accurately and in such way as to afford an accurate test as to the cases falling within it, the fact remains, that there is such a doctrine and that it is possible under some conditions for the owner so to use his property as to subject his right to charge for such use to regulation by law. If this control is limited to cases that are practically monopolistic there seems to be no element of danger in it. If, however, it is to be extended to cover all the cases which might, by ingenious reasoning, be brought within the broad language of some of the opinions, it constitutes a serious menace to private ownership.

PART IV.

PROCEDURE.

CHAPTER I.

LEGAL SANCTIONS.

Necessity for.

We have endeavored, in the foregoing pages, to present, in a very general way, the rules of being and conduct prescribed by the sovereign to be observed by all persons subject to its authority. These are frequently called the Substantive Law. We have found that one of the essential ideas of law is authoritativeness; that it is a rule imposed and enforced by competent authority.

We have further found that this idea is carried into the conception of legal rights and duties; that the first always carries with it capacity to control by law, and the second, subjection to such control.

This control is made possible by the lawmaking power providing sanctions, that is, commendation or reward for conduct conforming to legal rule, and condemnation and penalty for conduct violating legal rule.

The legal idea of sanction includes both reward and penalty. This is larger than the ordinary view which is limited to approval and reward. Without such sanctions attempted regulation of conduct would lose its dignity and force as law and become mere suggestion or advice. Not only must these sanctions be determined upon and announced, but they must also be actually and practically enforced. This enforcement must be by sovereignty itself.

It is not sufficient to suggest rewards and penalties, and leave their application to the parties interested. This would lead to endless confusion and strife. So, to meet the full measure of its

duty, the sovereign must provide agencies through which these sanctions can be applied.

These agencies are called courts. As their purpose is to apply legal sanctions, to be efficient they must be organized with reference to such application, and must be given such members and such powers as will enable them to discharge this function thoroughly, promptly, and authoritatively.

The effective and just application of legal sanctions involves three processes:

(1) The investigation of the conduct to be commended or condemned, and ascertainment of its nature.

(2) The comparison of this conduct with the rules of law governing conduct of that kind and the determination of its conformity or nonconformity thereto, and the consequent award of approval or penalty.

(3) The practical enforcement of the result thus arrived at.

Neither of these can be omitted and the plan of applying sanctions be complete. As the end ultimately to be attained is the application of sanctions, the plan for accomplishing it will, of necessity, be largely influenced by the nature of the sanctions to be applied.

Classification of Sanctions.

As rights are public and private, so are the sanctions by which they are protected. The sanctions sustaining public rights are provided in the Criminal Law, and those sustaining private in Civil Law. The general idea in these is the same; that is, to enforce obedience to the rules of conduct prescribed by the sovereign, but the sanctions appropriate to the vindication of these different classes of rights differ materially in their nature, each being adapted to the rights sought to be protected or the wrongs sought to be prevented. They have a good many points in common, however, and these may be profitably considered together before proceeding to those respects in which they differ.

Sanctions may be arranged into several classes, each division being based on different characteristics. The first, based on their general nature, is into rewards and penalties; the second, based on the instrumentalities through which afforded, is into individual and governmental; the third, based on the nature of the

rights sought to be vindicated, into public and private. As these classifications are based on different characteristics, the general classes are not mutually exclusive; but, as the divisions in each classification are based on the same characteristics, these are mutually exclusive. To illustrate: there are private penalties afforded through governmental agencies, and public penalties afforded by the same means; but there are no such things as public-private sanctions. And so throughout the whole of the different groupings.

Rewards.—Rewards are recognitions of propriety. Sometimes they go beyond the simple fact of recognition, and include some affirmative benefit bestowed in consequence of proper conduct. They rarely take this latter form in the law, though in exceptional cases they do, as in case of payment of money for arrest of persons charged with heinous offenses; but, ordinarily, the approval of proper conduct and protecting the individual in the benefits accruing to him therefrom is as far as the law goes. This recognition is adequate, and promotive of the general interests. The subject is theoretically very interesting, but is of no special practical legal value. In our subsequent treatment, we shall deal with penalties.

Penalties.—It is manifest that simple disapproval of improper conduct would be entirely inadequate to vindicate the right violated, or to deter others from a repetition of the wrong, so in its sanctions for wrongful conduct the law goes further and inflicts punishments proportioned to the wrong.

These punishments may be divided into preventive penalties and compensatory, or redressive penalties. The first are designed to prevent some particular legal wrong then imminent, and the second to give remedy for wrongs already sustained and to deter similar wrongs. This division runs through both of the other general classifications given above, so that in the second general classification we have preventive public penalties and preventive private penalties applied through governmental agencies; in the third, the division, though recognized, is less important as practically all sanctions applied by individuals are preventive, redressive measures by individuals in their own behalf being rarely recognized as lawful.

Sanctions Applied by Individuals.

We have considered these under the head of self-help, as involved in remedial rights, and refernce to that head is made for treatment of the general nature and extent and limitations of remedies of this kind. In Civil Law the right of the individual to help himself without calling in governmental agencies, is confined almost exclusively to preventive remedies. If an injury of a substantial nature to a legal right is imminent, or from the circumstances, as they exist, such injury reasonably appears to be imminent, the private individual may use all reasonably adapted and proportioned means to prevent it. He can not go beyond that which is reasonably adapted to the threatened wrong, nor go beyond the point of adequate protection, but this far he may go without incurring liability. There were some forms of redressive remedy, quite extensively recognized at one time, such as retention of cattle trespassing on land, or distraint for rent, which have fallen largely into disuse, having been, in a great degree, superseded by simpler and less dangerous statutory remedies through governmental agencies. Enough of such remedies remain to justify retaining the idea that some legal wrongs may be redressed by individual action.

In Criminal Law there is a slight recognition of the idea of redress by individual action. This is manifested in two ways: First, by express extension of the time in which action may be regarded as preventive, as the provision, in case of homicide, that if one interferes to prevent the killing of another he shall be regarded as acting on the defensive, if he act while the slayer is inflicting injury on his victim, although the mortal wound may already have been given; or in case of robbery, where the time is extended to include any act done while the robber is in the presence of the one robbed, without having separated from him since the offense.

Second, in the mitigation of the penalty for offenses when the injured party had given serious provocation just preceding the offense, as when one has used insulting language toward another and the latter strikes him on that account.

Sanctions Applied by Governmental Agencies

As the law provides both preventive and redressive sanctions for both public and private rights, it will be convenient to con-

sider these in combination, rather than to take up each of the four classes separately.

Public.—The sanctions designed to protect public rights are provided by the Criminal Law and their enforcement is secured in accordance with the rules known as Criminal Procedure. These sanctions are preventive and redressive. The idea conveyed by the word preventive here is not the tendency to discourage crime generally by punishing wrongdoing after it is committed. This general deterrent effect results from the application of redressive sanctions. The thought conveyed by the word preventive, in this connection, is the coming between an attempted crime and its injurious consequences and thus preventing the infliction of the injury designed by the wrongdoer.

Preventive sanctions in criminal law are few. They include the abatement of public nuisances, destruction of counterfeiting tools, and other similar measures, requiring peace bonds from persons threatening the life or safety of particular individuals, the writ of *habeas corpus* in cases of false imprisonment, and some others.

The other class of sanctions, the redressive, or punitory, are punishments inflicted for previous violations of law. They can not be called redressive in the same sense that the term is used in connection with private rights. The latter are principally compensatory, intended to put the injured party as nearly in the condition in which he was before the injury as can be done practically, while the former can not accomplish this even approximately, and are designed to punish the wrongdoer and demonstrate the undesirability of wrongdoing.

Punitory sanctions, or punishments, are much more common and varied. They are, in Common Law countries, confined principally to the following: pecuniary fines, imprisonment, death, forfeiture of property rights, or of civil and political rights and privileges, transportation, and outlawry. The law-making power considers the nature of the wrong being dealt with, and selects from among the penalties above enumerated the one or more which seems most just and effective, and fixes that as the punishment to follow upon the designated wrong. In many States this right to choose is restricted by constitutional provisions, such as: "No citizen shall be outlawed; nor shall any person be transported out of the State for any offense committed within the

State." "No conviction shall work corruption of blood or forfeiture of estate." "Excessive bail shall not be required nor excessive fines imposed, nor cruel or unusual punishments inflicted."

These provisions are binding on all departments of the government, and no punishment violative of any of them can be imposed or enforced.

The penalties may be certain, or in the alternative, as a pecuniary fine on the one hand, or a fine or imprisonment on the other. They may be fixed in extent or amount, as imprisonment for a fixed time, or they may be confined within designated minimum and maximum limits, as a fine of not less than $50, nor more than $250. They may combine two or more kinds of punishment, as a pecuniary fine and imprisonment, or imprisonment and forfeiture of civil rights, etc. In short, the penalties imposed for crimes may be such as the legislature may select, singly or in combination, subject only to the constitutional limitations existing in the particular State.

Remedies to Protect Private Rights.—We have here the two classes, preventive and redressive sanctions. The latter are much more numerous and earlier in their origin, and so the terminology of this part of the law has been developed principally in connection with them. As their design is to compensate for injury sustained, to remedy a wrong already undergone, they are most frequently thought of and spoken of from this point of view, and are designated remedies, and we shall also employ that term, though as to the preventive sanctions, its accuracy may not be readily apparent.

In the main, the distinction between preventive and redressive remedies is not difficult to make, but in some instances the nature of the wrong and the complete vindication of the right involved requires a blending of the two. This occurs usually in continuing wrongs. In such cases, the classification would not be strictly accurate if the proceeding be considered as indivisible. If, however, we consider all the facts and look upon so much of the remedy as is designed to cut off future injury as preventive, and so much as compensates for past wrong as redressive, the difficulty will be greatly lessened, if not entirely removed.

Preventive Remedies.—Preventive remedies are those which looking to the future, and judging it by the past and present conduct of the person or persons complained of, anticipate either the immediate beginning of wrongful conduct, or the continuation of a course of such conduct already begun, and undertake to forestall it and its injurious consequences, by dealing directly with such conduct and compelling the person to desist from prosecuting his unlawful designs. These evil designs may require affirmative wrongdoing on his part to accomplish them. If so, the law forestalls this by forbidding and restraining him from doing. This remedy is called an injunction. This wrongful conduct may be simply negative, omitting to discharge some legal duty requiring affirmative action. If so, the law becomes affirmatively mandatory, and compels the doing of the designated act. Several remedies of different names are employed for this purpose. They include mandatory injunctions, decrees of specific performance, *mandamus*, granting writs of possession of particular property, abatement of nuisances, etc. The more important of these will be discussed in connection with the several courts which enforce them.

Redressive Remedies.—Redressive or compensatory remedies are those which, dealing with injuries already sustained, undertake to make compensation for them. The law's idea of compensation is payment to the injured party of a sum of money justly equivalent to the value of that which is lost as a direct consequence of the wrong of which he complains. Sometimes this is very easy of accomplishment; sometimes more difficult, but still practicable; and in other cases, owing to the nature of the injury and the surrounding facts, it is wholly impracticable. The last class of cases, unless the facts entitle to some other remedy, are beyond the jurisdiction of municipal law, and no redress can be afforded.

Damages.—This money estimate of injury is called damage, and the rules of law for calculating its amount are the legal measures of damage. When the injury is to a right in things, the measurement is usually simple. If the wrong involve the destruction or other total deprivation of the thing, its reasonable market value at the time and place of the injury is ordinarily the

measure. For example: If A owns 10 bales of cotton and B unlawfully takes it and applies it to his own use, the law will inquire what the cotton could have been sold for at the time and place when and where B took it, and make B pay to A that sum, as the equivalent of the cotton; and, as A was all the while entitled to the use of the cotton; or as if he had sold it for cash on the day B took it he could have had the use of the money since that day, the law makes B pay him the value of this use, which it estimates at the legal rate of interest on money so that A would recover from B two items of damage: (1) the cash value of the cotton as of the date B took it; and (2) additional compensation for the use of his money by B estimated as equal to the legal rate of interest for the time B has had it. This is the simplest form of measuring damages. It is the method in all cases in which the wrong consists in the total deprivation of a thing which has a market value unless the wrongdoer acted in bad faith. If the thing has no market value the law makes full investigation as to its nature and qualities and uses, and arrives at its intrinsic value as nearly as it can and allows this. If the wrongdoer knew he was acting unlawfully, the owner can recover the highest market price which could have been gotten for the thing at any time between the commission of the wrong and the trial of the case.

If, instead of totally destroying or appropriating the property, B had injured it, as in case of the cotton by setting fire to it and consuming part of it and lessening the market price of the remainder, here it would not be just to permit A to keep what was left of the cotton and compel B to pay him the full value of all of it; so the law changes its measure, and compels B to pay the full market price for that destroyed and the difference in market value of that remaining; that is, it finds the market value of the destroyed cotton as of the date of its destruction, and allows A that and damages for its detention, as above, and then ascertains what the balance was worth on the market in its injured condition at the time and place of the injury, and what it would have been worth at the same time and place uninjured and allows A the difference between these two values and also compensation for the detention of this. If B acted in bad faith the highest market value rule would apply.

If the wrongdoer has simply taken the property and has it, the owner may pursue either of two remedies: he may sue for the thing and have it restored to him and make the wrongdoer pay the reasonable value of its use while he has had it, or he can sue him for the value and damages for its detention, as in case of loss. In some States, these two remedies may be sued for in the same action, the judgment being in the alternative, first that the defendant return the property and pay for its use, or, if this be not done, then that he pay the value and compensation for its detention.

When the injury is to rights against particular persons, when damage is the appropriate remedy, it is usually easy to compute. To illustrate: A owes B a debt on a note or on open account and does not pay. The measure of damage is the amount of the debt, principal and interest. If the contract be one for service and it is broken by the master or principal the servant or agent can recover the value of the service already rendered and unpaid for, and also the contract price or reasonable value of the service which he was to have rendered, less the amount he has earned, or, by reasonable effort, might have earned, during the remainder of the time for which he was hired; and so on, through the whole catalogue of similar wrongs. When the right is one arising from contract, and is of such kind that it is practicable and more just to require the party in default to do the act he has promised to do, this will be required of him.

When the wrong is one violative of a personal right, as assault and battery, or false imprisonment, or slander and similar cases, there is no exact and accurate standard by which to measure the damage. Resort can not be had to market value, for there is none. The law does the best it can to represent the injury fairly and dispassionately in terms of money and awards this. Loss of time and expense directly resulting can be measured with approximate accuracy; diminished wage-earning capacity may also be approximated, but the elements of pain and suffering, whether physical or mental, are very vague and uncertain. The best that can be done is to take the judgment of fair and unbiased men of ordinary intelligence as to the amount which should be paid. When the injury becomes too indefinite to admit even of this

method of dealing, the law abandons the attempt at compensation, and refuses to entertain the case.

As noted before, compelling the payment of damages is by far the most common remedy. There are others, some of which have been referred to above, which, though less frequent, are still of great importance. These will be considered in connection with different kinds of courts through which they are given.

CHAPTER II.

COURTS.

Nature and Organization of Courts.

Having arrived at a fairly accurate conception of the purposes to be accomplished through the courts we are in position to study intelligently the nature and constitutent members and organization of these tribunals.

Definition.

A court is an agency of sovereignty, created by it or under its authority, consisting of one or more officers, for the purpose of hearing and determining issues of law and fact regarding legal rights and alleged violations thereof and applying the sanctions of the law, exercising its powers in due course of law, at times and places previously determined by lawful authority.

A court is not "a place where justice is judicially administered." It is the tribunal, created by sovereignty as its agent to administer justice judicially, at designated times and places.

As an agency of sovereignty it exercises delegated powers and administers the will of sovereignty as expressed and embodied in the law. Strictly speaking, a court has no will or preferences of its own. It is the official instrument through which sovereignty investigates the conduct of individuals, applies to such conduct the standards of the law, forms and announces its judgment, and enforces its will.

The judicial function of government involves the exercise of three powers:

(1) The power to investigate and decide the facts and apply the law to the facts as ascertained.

(2) The power to determine and announce the result of the investigation and application.

(3) The power to enforce, or more accurately, to supervise the enforcement of the result announced.

The courts of a government are the tribunals through which it exercises this judicial function.

The United States Government and each of the States has organized a system of courts dividing among them its judicial power, giving to each class of courts so much of this power as it sees fit. The amount of power thus given to each court is its potential jurisdiction. It can rightfully hear and determine any and all cases committed to it by the sovereign. Any attempt to try a case of any other kind would be unauthorized and the action void.

Courts are ordinarily created by the direct act of sovereignty by constitutional provision. This is not necessary, however, as the constitution may authorize the creation of all courts constituting the judicial system or some portion of them by the Legislature. The Constitution of the United States creates only the Supreme Court of the United States and does not give the number of judges constituting that nor undertake to state all the jurisdiction of that tribunal. Many of the States pursue the same policy.

A court, considered abstractly, exists only in legal contemplation. Like a corporation, which it much resembles, it can do nothing of itself. All of its functions must be discharged through natural persons and the law frequently speaks of these persons in their official capacity as constituting the court. These officers comprise a judge or judges, a jury, a clerk, and an executive officer known as marshal, sheriff, constable, etc., and attorneys-at-law.

Judges.

It is manifest that an agency as complicated and important as a court can not be operated without some responsible head who is authorized to give general direction to its operations and supervise the action of all its subordinate and correlated parts. The officer occupying this position is the judge. One such officer is essential to the practical working of the court. Frequently there is a larger number of them with some one designated to act as the presiding officer, or chief, among them. The judge is the head of the court, presides at its sessions, exercises general control over all its actions. He decides all questions of law arising in the course of the trial, determines such facts as arise incidentally,

hears and decides all motions during the trial, and determines what judgment shall be rendered. He supervises and directs the clerical officers in keeping the records and issuing process and the executive officers in the discharge of their duties. In criminal cases and civil suits triable in Common Law courts according to the Common Law he does not decide the questions of fact involving the merits of the case. These are committed to other officers, known collectively as a jury.

The Jury.

A jury is a body of men selected as required by law, whose duty it is, under the general direction of the judge, as to matters of law, to pass on the issues of fact in a case. Juries are grand and petit.

A grand jury is one impaneled in a court having jurisdiction of criminal matters for the purpose of investigating alleged violations of law committed within the county or district in which the court is held, and determining whether or not there is probable cause to believe the accused person is guilty as charged. If they so find, they advise the proper legal representative of the government, and he prepares a bill of indictment formally charging such person with the designated offense and this is signed by the foreman of the grand jury and returned by the grand jury into open court. This written instrument is called an indictment. It must have certain requisites. It must show affirmatively that it is filed by the authority of the government; must identify the accused with reasonable certainty; must set forth the offense against the law in plain and intelligible language, giving facts and not conclusions, unless there be ancient and established precedent for the latter.

The Constitutions of most States make indictment the only basis of criminal prosecutions of serious nature, and this can not be dispensed with by legislative action. The effect of an indictment is to subject the accused to trial on the charge presented in some court having power to finally hear and determine the case.

A petit jury is one impaneled in a court for the purpose of passing on and finally deciding the issues of fact in a case or cases pending in the court. They are the judges of the credibility

of witnesses and of the weight of testimony, except when there are express rules of law applicable to the latter. Whether any proposed evidence is legally to be received is a question of law for the judge. The effect of the testimony, when admitted, is generally with the jury. Juries have, for centuries, been regarded as most imortant factors in the administration of the law. From the time of the introduction of written constitutions it has been customary to declare in them that "the right of trial by jury shall remain inviolate." There is no question that, although the system is subject to abuses, it is of very great practical benefit and advantage both to litigants, in reaching just and equitable decisions in cases, and to the public as a great educational institution. In the latter respect, it affords to the great body of the people their best administrative and practical information and instruction in the law of the land and the nature of our public institutions. In cases in which there are no juries, the facts are decided by the judge.

Clerks.

These are officers, members of the court, whose duty it is to keep the records and files and issue all process required by law.

Sheriffs or Marshals.

These are the executive officers of the court whose business it is to attend the court and carry out all its orders, whether given directly by the judge from the bench, or through the clerk by issuance of proper process.

Attorneys-at-Law.

Attorneys, or counselors, at law are men who, from special study and training, are fitted to assist the judges and juries in the discharge of their duties by taking charge of the interests of litigating parties, carefully and intelligently investigating cases before time set for hearing, by properly preparing them for trial and by the true and fearless presentation of the rights of their clients during the trial. Their position is a very responsible one, and affords fine opportunity for rendering substantial aid in administering justice in individual cases, and also for leadership in all legal and political reforms. They live close to the heart of the business community in their private consultations, and have the

ear of the judge and jury and general public in their court-house work. Their position is one of great public trust, and if they prostitute their opportunities to selfish and unjust ends they become great public evils. If, on the other hand, they are honorable, and just, and true, they give to their several communities moral and political ideals and examples of untold good. They are officers of the courts in which they practice, and must procure licenses from the government before entering upon their profession. These licenses may be revoked by the courts at any time, for unprofessional conduct and breach of trust, either to a particular client or to the public. It is unfortunate that the practice of the profession is not more closely guarded against false and designing men who use it for ulterior purposes.

Different Kinds of Courts.

At different stages of the law's development, and at the same time in different States, there have been quite a number of different courts. These may, for our purposes, be classified as follows: Courts exercising Common Law jurisdiction; courts exercising Equity jurisdiction; courts exercising blended Common Law and Equity jurisdiction; and certain special courts, as Courts of Admiralty, Ecclesiastical Courts, Probate Courts, and Courts Martial. There are others, but they are not of sufficient practical importance to claim any share in our limited time.

As to the three general classes of courts, we will deal in the order of their development. The treatment will necessarily be brief, but we will endeavor to make it accurate as far as it extends.

Common Law Courts.—If we take up the matter historically, we find that of the courts existing in England at the time of the colonization of America and introduced into the original States of the Union, the oldest are those known as the Common Law courts. These courts have both civil and criminal jurisdiction; though, as they originated in the early stages of social, business, and political development, the civil matters with which they deal are in the main, confined to such classes of cases as arise in crude and primitive conditions of society, and relate to the use and possession of land, breaches of agreement and torts involving force in some form.

In those early days kings were believed to rule by divine right and to be the real source of all political power, including all judi-

cial functions. All the higher courts after the Norman Conquest were held by the king, or by some one to whom he delegated the authority; and, until *Magna Charta,* they had no fixed place for their sessions, but followed the person of the king wherever he might be. By that instrument, one of them, known as the Court of Common Pleas, was located in Westminister, and location of the others followed. As the institution of a suit in one of these courts was really a petition to the king to give aid against the wrongdoer, the king, when thus solicited, would have the chancellor, who was keeper of the Great Seal, to issue a writ commanding the person complained against to appear before some designated court to answer the complaint. This writ would also specify the matters complained of, and would authorize the court to which it was returnable to inquire into the matter, and award the remedy. These writs were, therefore, the means of bringing the complaint of the person representing himself as injured and the alleged wrongdoer before the court and were, at the same time, the source of authority in the court to hear and decide the case. Naturally, these writs assumed fixed forms.

They were of several kinds, adapted to the different wrongs complained of. At first the proceedings were plastic. As each kind of writ presented a different kind of complaint and would support a different judgment, the whole proceeding for trying cases under such a writ was designated a form of action, there being as many different forms of action as there were different writs.

In process of time these methods of procedure in each kind of case became so established that they were regarded as binding alike on the officer who issued the writs and on the court which tried the cases. And, unless the complaint made came within one of the established writs and forms of action, no writ would issue, and no trial could be had. So that redress for civil injuries was limited to certain kinds of wrong, others being without remedy. As the business interests of the community advanced, and new conditions of life arose, this became intolerable. Some slight relief was afforded by act of Parliament, but this was limited to only a few cases of hardship, very closely related to some of those with which the law courts were accustomed to deal. No general amelioration of conditions was effected.

The only thing left was to resort to the king by petition, and this would sometimes be granted and sometimes would be referred to the chancellor to act for the king in the premises; and from this latter practice arose the Courts of Chancery and the system of principles and procedure known as Equity. Before we take up these, we must get some better general ideas of a Common Law court and its methods of action, and the nature of relief afforded by them.

A Common Law court consisted of a judge or judges and jury. By *Magna Charta,* and subsequent action, these courts were located at Westminister, and all trials were, in theory, held there. Under the rules of procedure then in force, jurors to try each case were to be gotten from the neighborhood in which the transaction in litigation occurred. This idea, in connection with trials, was a strong one, and the clerk of the court in Westminister would issue a writ commanding the sheriff of the county in which the cause of the litigation arose to summon a jury from that neighborhood and cause them to come to London at a designated time to try the designated case. The shire or neighborhood from which the jurors were to be summoned was called the venue of the case. We still retain the word, with substantially the same meaning. All formal court proceedings then were conducted in Latin, and the two important words in the writ issued to the sheriff requiring him to summon the jury were *venire facias,* do you cause to come, and the writ itself soon took that name, and this is still retained; and a writ requiring a sheriff to summon an ordinary jury is still called a "venire;" and, if the jury be a special one, as in a capital case, it is called a "special venire." And, by an easy and frequently adopted method of using words, we often hear the jury itself, that has been summoned by this writ, called a "venire." Many of our familiar law phrases have similar derivation.

It soon became exceedingly onerous to compel all jurors and witnesses in every case to come to London to court, and the expedient was adopted of sending one or more of the judges to the county where the witnesses and juries were, there to try the facts of the case and bring back to the court at Westminister a record of what had been done; and the court at Westminister would accept this record as true and enter judgment on it just as if the

proceedings had transpired there in full court. The conservatism of the Common Law judges was too strong to permit them to do this by direct action. They did it in this fashion: they would cause the proper officer to issue a writ to the proper sheriff requiring him to summon the jury to come to Westminister as before, but would put in the additional provision that they would be excused from coming if one of the justices from the court to which the writ was returnable should come into the county and try the case before the date mentioned in the writ; if he did come, they were to meet him at the time and place in the county mentioned. The judge always came to the designated place at the time set, and the jurors did not have to go to London. The writ, in this form, was also in Latin, and the important words in the clause incorporating this new condition were *nisi prius,* unless before, so the courts which were held by the judges throughout the country under these new writs were called Nisi Prius Courts, and the judges who went out to hold them Nisi Prius Judges. These terms afterward came to signify Common Law courts and judges, as distinguished from courts of Equity and judges presiding over them.

As the courts of Common Law were the earliest agencies of this sort established, they naturally were adapted to crude and primitive conditions of society. The matters over which they had jurisdiction were of those kinds which first demand the attention of the people, and were limited to criminal cases and civil controversies about land or breaches of contract of the simpler kinds, and wrongs to the person or personal property, almost always committed by force. The remedies given were practically limited to two kinds: (1) restoration of specific property, real or personal, and (2) award of damages. Remedies falling within either of these two classes were known as ordinary remedies; all others, as extra-ordinary.

Every civil proceeding in a Common Law court is known as an action. They were of three general kinds: real actions, which pertained exclusively to land and estates in land; personal actions, which pertained to personal rights and personal property; and mixed actions, which involved both recovery of real property and damage done to it. These several classes, or rather, the first

and second, were subdivided into numerous different classes, each having its appropriate name and peculiar method of procedure.

The principal real actions were the writ of right, the writ of entry, the writ of formedon, the writ of dower, the writ of right of dower, and the writ of *quare impedit*. These were so complicated and technical, when in use, as to make their study tedious, and, as they have long been superseded by more rational processes, need not be further considered.

Personal actions were divided into those arising *ex contractu*, that is, from breach of contract; and those arising *ex delicto*, that is, from wrong not a mere breach of contract. Each of these classes was again subdivided. Those *ex contractu* into assumpsit, debt, and covenant; and those *ex delicto* into trespass, trespass on the case, trover and conversion, and replevin, with the action of detinue sometimes classed in the one and sometimes in the other. Mr. Smith, in his work on Elementary Law, makes the following brief, yet comprehensive, statement as to these personal actions:

"Actions *ex contractu* are those based upon contract, express or implied; actions *ex delicto* are those based upon delict or tort. An action of assumpsit is one brought for the recovery of damages for the breach of a simple or parol contract. An action for debt is one brought for the recovery of a liquidated or certain sum of money. An action of trespass is one brought for the recovery of damages for a direct and forcible injury to the plaintiff's person or corporeal property. An action of trespass on the case lies to recover damages for an injury to person or property which is either not forcible or not direct. An action for trover is one brought to recover damages for the wrongful conversion of personal property. An action of replevin is one brought for the specific recovery of personal property and for damages for its detention." (Smith's Elementary Law, 317.)

Detinue is an "action for depriving one of the possession of personalty acquired originally by lawful means." (Anderson's Law Dictionary, title Detinue.)

The only mixed action was ejectment, which was a proceeding in which specific real property could be recovered, and also damages for its unlawful use and occupation, and injury done to it. Compared with the old real actions which it superseded, it was

simple and almost rational; compared with the later proceedings which have superseded it, it is cumbersome, technical, fictitious, and ineffectual.

The foregoing were the civil actions which could be maintained and the remedies which could be obtained in Common Law courts. If a grievance did not come within one of them, these courts could give no relief.

All matters of law in these courts were to be heard and decided by the judge or judges, as were also all matters of fact arising incidentally in the progress of the trial. All matters of fact involving the merits of the case were decided by a jury.

Courts of Equity.—Courts of Equity, or Chancery Courts, are of much later origin than the courts of common law. In a very true sense their existence is a protest against the rigidity and narrowness of the common law courts and their methods of procedure. When grievances arose for which no remedy was provided at law special petitions were addressed to the king and these would be referred to the "keeper of his conscience," the chancellor, for investigation and such action as equity and good conscience might require. At first, the action was more advisory than mandatory, but as time passed and precedents became established, resort to this method of relief became more frequent and the procedure more fixed. It became expedient to do more than advise and the writ of subpœna was devised. By this writ the person complained of was compelled to come into the presence of the chancellor and abide his decision. If the chancellor upon investigation was satisfied that the party complained of was in default he dealt with his person until he was compelled to do the proper thing in the premises as determined by the chancellor. If the wrongdoer insisted upon continuing in his wrong he was forbidden to do so and was restrained or enjoined by retaining custody of his person until he desisted and then subjecting him to recapture and holding if he should renew his wrongful conduct. If the wrong was an omission, and it was practicable to compel performance, this would be decreed and compliance enforced in the same way. By this and similar changes the powers of the chancellor were transformed from giving advice addressed to the conscience of the evil-disposed to issuing authoritative commands enforced by pains and penalties imposed upon his body.

As the only occasion for originally resorting to the extraordinary petition to the king was that no remedy could be had at law, absence of legal remedy was a condition precedent to relief in this way. Later, entire absence of remedy was not required, and if the suitor could show that he had no adequate legal remedy, he could maintain his suit, if otherwise entitled. It followed from the same fact, that equitable remedies would differ from and in a sense supplement those at law. A perfectly symmetrical development of the Equity idea would have produced a system of courts in which all wrongful conduct, incapable of correction at law, would have been investigated and appropriately redressed. The practical always falls short of the ideal, and so, no complete system of administering justice, as then apprehended, did in fact result; and though the courts of Equity and their remedies afforded great and salutary relief, they did not reach all cases of injustice incident to life, even in its development at that time.

In process of time, the jurisdiction of Equity came to include the following classes of cases; (1) Those in which it was desired to prevent wrongdoing. (2) Those in which it was desired to compel the doing of some act beside the restitution of specific property or the payment of money. (3) Those in which it was desired to compel the disclosure of facts within the knowledge of the adverse party. (4) Those in which a number of parties were interested in such a way that they could not be placed in two groups and complete justice done between them. (5) Those in which rights asserted were of such kind that the Law courts did not recognize or undertake to enforce them. (6) Those in which duties once enforcible at law had been discharged in such a way as to make it unjust to compel further discharge, yet not in such way that the Law courts would recognize the discharge. Having attained these proportions, the growth of Equity ceased.

A great many cases come under one or more of these heads, and the powers and jurisdiction of these courts are correspondingly large. Still, if a grievance does not come within these, Equity will not relieve.

The proceeding in Equity was adapted to the nature of the tribunal and the remedies it afforded. It was begun, not by issuing a writ by the king's secretary, which is but another name for the chancellor, as at Common Law, but by a special petition to the

king, setting up the facts which constituted the special wrong from which the relief was sought. This petition was originally addressed to the king in person; but, after the establishment of the Court of Chancery, it was addressed to the chancellor. It set out the special facts on which relief was sought, and asked for the appropriate remedy. The parties against whom relief was sought were named, and, after the writ of subpœna came into use, this was prayed for especially against each defendant, naming him. This was necessary, as the remedy was to be enforced only against his person, and not by any writ running against his property. So it became a rule in Equity that no one not named in the prayer for subpœna was a party to the suit, and this doctrine is still enforced in these courts. The subpœna required the defendant to appear before the chancellor, at a time and place named, to show cause why the relief asked by the complainant should not be granted. This cause consisted of some reason in law or in fact which, under the principles of Equity, would defeat the complainant's case, as set out in his Bill of Complaint, as the petition was called. The defendant was not, as at Law, confined to any one defense, but could interpose as many as he might have, if he presented them in proper order. These defenses and their order are thus summed up by Mitford and Tyler, in their work on Pleading and Practice in Equity: "The person against whom a bill is exhibited, being called upon to answer the complaint made against him, may defend himself (1) by demurrer, by which he demands the judgment of the court whether he shall be compelled to answer the bill or not; (2) by plea, whereby he shows some cause why the suit should be dismissed, delayed, or barred; (3) by answer, which, controverting the case stated by the plaintiff, confesses and avoids, or traverses and denies, the several parts of the bill; or, admitting the case made by the bill, submits to the judgment of the court upon it, or upon a new case made by the answer, or both; or (4) by disclaimer, which at once terminates the suit, the defendant disclaiming all right in the matter sought by the bill."

The issues thus joined between the parties were all decided by the chancellor. No jury was ever impaneled in an Equity court, and, consequently, this reason for taking the chancellor into the different counties did not exist. The inconvenience as to wit-

nesses was obviated by taking their testimony by deposition. This is a process of having the witness appear before some designated officer by or before whom they are interrogated under oath, and their answers reduced to writing and signed by the witnesses, and then returned into court by the officer. This obviated the necessity of the personal attendance of the witnesses before the chancellor. It became the settled practice in that court, and is still retained in all courts of strictly Equity jurisdiction and procedure. So that neither jurors nor witnesses are ever in attendance upon them.

The final conclusion arrived at in Equity is not called a judgment, but a decree. It is much more flexible and adaptable than a Common Law judgment, and awards to the different parties the different remedies to which each shows himself entitled.

The distinction between courts of Equity and courts of Law was maintained for many years in England, and was a distinctive feature of English procedure when the American governments were founded and institutions established. It was transported to this continent, was recognized in the Constitution of the Federal goverment, as it is in those of many of the States. It never existed in Texas, and was abolished in New York in 1846, and in the majority of the States since that time. In some of the States retaining the two systems, the two sets of courts and of presiding officers are retained, the courts of Law being held by judges, and the courts of Equity by chancellors. In the Federal government, and in a number of the States, the distinction between the two jurisdictions and procedures is retained, but the same officer presides over both tribunals, acting as judge in the Common Law court and observing all of the methods of the Common Law in cases coming under his Common Law jurisdiction; and, as chancellor, in the Equity court, and, in that, exercising the powers and following the procedure applicable to those courts.

Courts of Blended Jurisdiction.—In the majority of the States the difference between the two jurisdictions and procedures has been abolished. In Texas, it never was recognized. In these States the same tribunals entertain jurisdiction of both Common Law and Equity causes, recognize and enforce both legal and equitable rights, and award both legal and equitable relief. The proceedings are very much more simple and direct than in either of the systems of courts which have been super-

seded by them. Most of the States which have this blended system have adopted codes of procedure, regulating all pleading and practice matters thereby. These are called code States, and the pleading, code-pleading. Strictly speaking, Texas is not a code State. She has never attempted to regulate the pleadings in her courts by a code. On the contrary, the Congress of the Republic, in 1840, in adopting the Common Law, expressly repudiated its system of pleading, and declared that "in the courts of this State the pleadings should continue, as theretofore, to be by petition and answer." This left to the courts the question of what pleading had previously been under the Spanish system. This they did, and by a combination of regulation, first by rules promulgated by the courts, and second by decision of cases when presented, they have developed the present Texas system. This is, in effect, the simple, direct, clear presentation to the court, by the respective parties to the suit, of the matters of fact upon which they severally rely in their efforts to induce the court to act as they respectively desire that it should. This is the fundamental conception of pleading in all systems, and the less of conventionality and form that is incorporated with it, consistent with due and orderly proceedings in the litigation, the larger opportunity the court has to administer justice. The essential idea is that the court and each of the opposing parties shall be definitely and authoritatively advised, in reasonable time, of the respective claims of all parties, what each relies upon and expects to prove, and that a permanent record of this be made and kept. When this is done the purpose is accomplished. Unless it is, the scheme is a failure, or, at least, defective.

CHAPTER III.

HOW JURISDICTION OVER A CASE IS ACQUIRED.

As different as are these several classes of courts, there are some fundamental doctrines which must obtain in them all. They all exercise judicial power in its three phases: hearing, determining, and enforcing, and must all be organized with reference to this. The methods by which these processes are performed are different, but each of the processes must be gone through with, with fair efficiency, or the particular tribunal is a failure. We have already considered the different matters over which these several classes of courts have jurisdiction. We will now take up the general principles governing the exercise of these powers, and afterward some of the peculiarities of each.

Parties.

The power of courts is limited to dealing with legal rights and wrongs, and awarding legal remedies. These rights must always belong to, or be united in, one or more persons, and the wrongs be committed by one or more persons, and the remedy awarded to and against one or more persons. In every litigation there must be at least two persons interested, the one seeking relief and the one against whom the relief is sought. In the great majority of instances both these persons are named in the proceeding; in exceptional cases they are not both named, but, theoretically, they are always there, or have been afforded legal opportunity to be there. These persons appear before the courts in all sorts of groupings. Sometimes there is one on each side of the case, sometimes one on one side, and several persons, or the whole world, on the other; sometimes there are several on each side. The rule is, that whoever is to be bound by the decision or judgment must be before the court, on one side or the other.

Persons who are before the court in any capacity are technically called parties. The person who is dissatisfied with existing

conditions and who wants some relief from them, and applies to the court for this relief, is the actor. He is called the plaintiff, or petitioner, or complainant, or relator, or by any other appropriate name. He against whom the complaint is made is usually called the defendant, or the respondent. If a third person, who is not originally brought into the litigation, has a legal interest in the proceeding, he may come in in many kinds of cases and make himself a party. He is called an intervener.

These parties of various kinds bring their differences to the court to be investigated and decided, and have the result authoritatively enforced. These differences always relate to matters of law or fact, or both, and their effect upon the legal rights and duties of the respective parties.

Things.

Things here have the same meaning as in other connections in the law, and include all existences not looked upon as persons. Usually, however, when regarded as subject to control by a court, they are limited to tangible or corporeal things which may be taken into possession, or such ideal matters as are fixed and continuing, and directly connected with persons, and going to make up status. Status is a condition or standing before the law, having reasonable permanence, an established and continuing legal condition, as citizenship, coverture, insanity, etc., which ordinarily cannot be changed by the will of the party interested without the co-operation of the law.

Subject Matter.

This is different from both persons and things, in this connection. It means the rights claimed by the several plaintiffs, the wrongs charged against the defendants, and the remedies sought. For example: A and B both claim title to a lot in a city; B is in possession and refuses to give it up to A; A sues B for the lot and to have his title declared better than B's and to get possession of the property. Here A is the party plaintiff, and B is the party defendant. The thing involved is the lot, and the subject matter of the suit is the rights claimed by each party in the lot, the wrong which each charges against the other with regard thereto, and the remedy each desires to obtain by the litigation.

Issues.

These are matters of law or fact affirmed by one party to a suit and denied by the other. One litigant says: "The law is this, and under it I have certain rights;" the other says: "Not so. The law is not as you contend, and you have not the legal right you claim." This is an issue of law. The litigants may agree upon the law, but one may still contend that a certain fact is true, and applying the admitted law to it, say: "I have certain legal rights." The other replies: "Not so. The law is as you claim, but the facts are not as you contend and for this reason you have not the legal rights claimed." This is an issue of fact. Both the law and the fact may be in dispute. Here we would have both the above contentions, and issues both of law and of fact in the same case. A matter thus affirmed by one party and denied by the other is called an issue.

It is the province of the courts to decide such issues authoritatively. Before they can do this, a number of facts must exist and a number of processes must be gone through.

Jurisdiction.

First, the court to which resort is had must have authority from the sovereign to try the questions involved in the suit and to control the parties between whom these questions are to be decided.

This is potential jurisdiction, authority to act for sovereignty in deciding issues and binding parties. It is derived solely from the sovereign, and can neither be enlarged nor diminished by the parties to a controversy.

Not only must the court have this delegated power, but the power must be actually applied to and put in operation upon both the subject matter constituting the issues, and the parties to the litigation. This actual exercise of potential jurisdiction is active jurisdiction. In some instances the persons interested in the litigation, and the thing about which they desire to litigate, may both be brought fully and completely within the active jurisdiction of the court; if so, the court can hear and determine all the questions involved in or relating to the controversy. In other instances the court can not obtain such full jurisdiction over one or the other. If no jurisdiction can be obtained, none can be ex-

ercised; if partial, but not full, jurisdiction can be obtained, the exercise of control will be partial only.

Kinds of Proceedings.

There are three general classes of proceedings in courts, known, respectively, as proceedings *in personam*, proceedings *in rem*, and proceedings *quasi in rem*.

The first of these deals strictly with persons and personal obligations, and to support the action of the court therein there must be full jurisdiction, that is, both potential and full active jurisdiction over the subject matter of the suit and the persons sought to be bound. As no thing is involved specifically, no control over any specific thing need be obtained.

The second deals directly with a thing or status, and if the court has potential jurisdiction over the subject matter of the suit, and active jurisdiction over such subject matter and the thing, it is not necessary to have the persons interested all brought before it by name or by summons, but the court deals directly with the thing within its jurisdiction, and binds all persons by such action.

In the third, there must be potential jurisdiction over the persons, subject matter and thing involved, but it is not necessary to have complete and full control over either persons or thing. The court deals with the persons, not generally, but only so far as they are concerned in the thing; and with the thing, not generally, but only so far as the particular parties to the suit are concerned.

It is apparent that different methods of acquiring active jurisdiction over persons, subject matter, and things would be permissible in these different proceedings.

Potential Jurisdiction.

Potential jurisdiction is always a grant from the sovereign. It can have no other source. It must always exist in every proceeding of every kind over the persons and subject matter involved in the litigation, and if a thing is to be directly affected, over that also.

In establishing a system of courts persons, subject matter and things are considered in apportioning jurisdiction. Sometimes certain courts will be given authority to hear cases to which certain persons are parties, as the Supreme Court of the United

States, has exclusive jurisdiction over suits between States. Sometimes proceedings *in rem* can be heard only in a court where the *res* is located. But subject matter is usually the most important consideration in apportioning jurisdiction. One class of courts will be authorized to try cases involving certain rights, or certain wrongs, or certain remedies, and another class, suits involving others. This is practically the only basis of distribution of judicial power among the courts constituting the present judicial system in most of the States.

Active Jurisdiction.

This is acquired over the person in two general ways:

(1) By voluntary submission of the party.

(2) By compulsory process.

The first attaches whenever the party, whether plaintiff, defendant or intervener, comes before the court, invokes its aid, or takes part in its proceedings. The second is acquired by the court through its proper officers issuing and having served some proper process commanding the person to come before it, at a time and place named, for the purposes designated in the summons.

Process is an order issued by the proper judicial officer commanding a designated person to perform a certain act, or forbidding him to perform a certain act. It may be either oral or written. It is usually in writing under the seal of the court. A written process is called a writ.

The process by which active jurisdiction over parties to suits is obtained is called citation. It is always written and under seal of the court, if the court have a seal. It commands the officer, or other person to whom it is addressed, to summon the person or persons whose presence before the court is required to appear before the designated court at a time and place named to answer the complaint made against him and present his side of the controversies involved in the case.

The action of the person to whom the writ is directed in notifying the person to be summoned of the pendency of the suit, is called service of the process. Service must always be made in accordance with the command contained in the particular writ. The methods of service are of two kinds: one by notification given to the party to be served in person in a manner prescribed by law, the other, by publication of the citation for a designated length of

time in a newspaper or newspapers. The first is called personal service, the other, service by publication. It is customary for citations to be directed to an officer, but if the statute so provides, the process may be directed to a private person having the qualifications designated in the statute. When service of a citation is made when the person served is outside of the State from whose court the process issues, it is called extra-territorial service. It is apparent that there may be various methods of issuing and serving citations. The effects upon the court's power to control the defendant served differ with these differing conditions.

Every sovereign has very full control over its citizens or subjects. It can, consequently, lawfully provide any method of acquiring active jurisdiction over them which affords reasonable opportunity to come before the court and have a hearing as to their rights. Citation issued and service had upon a citizen in conformity to the statutes of his State, which affords this fair opportunity will be good, giving complete active jurisdiction over him, whether the service be personal or by publication within or without the State.

As to persons not citizens and not resident within the State, the powers of the sovereign are not so great. No complete jurisdiction can be gotten over these while without the State, either by personal or public notice. If such persons are within the State, personal service will be good.

Complete active jurisdiction over a thing is acquired by taking it actually into the custody of the court, through some officer, as by seizing a stock of goods, or taking actual possession of land. A qualified or partial control over a thing may be acquired by specifically describing it and the rights claimed in it in the pleadings, and submitting these to the court.

Status is brought within the active jurisdiction of courts having potential jurisdiction in the matter by some person directly interested in it submitting the question of status to the court and asking an adjudication of it.

Active jurisdiction over subject matter is obtained by the submission of issues to the court for adjudication. A claims certain rights; B violates them; A wants redress. He goes before the court authorized to adjudicate these matters, and presents them to the court for determination. This invocation of the court's

powers as to these matters subjects them, the rights, the wrongs, and the remedies, all to the court. It takes control of them all and does in the premises as the law commands. This submission is limited to the matters in good faith sought to be presented to the court; so that, if there be other controversies between the same parties not included in this invocation, they are not affected thereby. Thus, if A has two notes against B, both due and unpaid, and he sues on one, this subjects all of A's rights and B's liabilities on that note to the active jurisdiction of the court, and authorizes the settlement of all matters between them based upon that note. But this suing upon one note does not bring the other before the court, and the court could not adjudicate anything concerning it.

If the party complained against has additional matters he thinks the court ought to consider in connection with those submitted by his adversary, he must present them to the court in the manner provided by law. If he does so, and they are proper matters for adjudication in connection with the plaintiff's complaint. the court will take active jurisdiction over them and adjudicate them also.

Recapitulating and making a practical application of the foregoing doctrines in each of the three kinds of proceedings we find:

(1) No court can adjudicate a matter unless it has potential jurisdiction over the persons who are parties, over the subject matter of the suit, and over the thing to which these legal rights and duties pertain. This is true in all three kinds of proceedings.

(2) In proceedings *in personam* the court must have full active jurisdiction over the persons and the subject matter. Active jurisdiction over the persons may be obtained either by voluntary submission by the person or by due service of process by the court. Such service may be gotten upon anyone within the State either by personal service or by publication in conformity to the local statutes. Such service may be gotten upon citizens of the State in which the court is held by extra-territorial service, either personal or by publication. Non-resident non-citizens cannot be brought within the active jurisdiction of the court in proceedings of this kind by any sort of extra-territorial service.

(3) In proceedings *in rem* the thing or status sought to be determined must be within the potential jurisdiction of the court,

and must be brought within the complete active jurisdiction of the court by seizure of the thing and taking it into the custody of the court pending the litigation, or by actual submission of the facts upon which status is based and request for adjudication.

In these proceedings regarding things it is not essential that there be any service upon the parties unless this is required by local law. Where status is involved and no one but the petitioner and the public are concerned, as in naturalization proceedings, no service is necessary. In cases in which some other person is directly interested in the question of status, as in divorce proceedings, service of some kind must be had upon such interested party. In divorce cases where both parties are residents within the State, either personal service or service by publication upon the defendant is good. According to the great weight of authority, if the plaintiff is a *bona fide* resident of the State in which the proceedings are had, extra-territorial service upon the defendant, whether personal or by publication, is good. According to the decision in *Haddock v. Haddock*, extra-territorial service in divorce cases is not good, at least judgments based thereon are not binding in other States, unless the suit is brought in the State in which the plaintiff was at the time a *bona fide* resident and in which the marital domicile of the parties is located.

(4) In proceedings *quasi in rem*, the court undertakes by its judgment to bind the parties to the litigation only so far as their rights in the thing submitted to the court are concerned, and to bind the thing involved in the litigation only so far as these parties are concerned, and hence either personal service or service by publication is good, whether the party or parties served was within or without the State at the time of the service.

CHAPTER IV.

PLEADINGS.

As the business of courts is to hear and determine controversies as to legal rights and wrongs, and to award or withhold remedies as the law and facts of the case may require, some means of presenting these controversies must be provided. This means is pleading. On the part of the plaintiff, it is stating to the court the facts which constitute or show his rights in the matter presented, the violation of those rights by the defendant, the injury resulting to the plaintiff and the prayer for the appropriate remedy; or, as it is technically called, the plaintiff's cause of action. On the part of the defendant, it is a statement of the reasons why the plaintiff ought not to maintain his suit, or, speaking technically, the defendant's grounds of defense.

In the earliest stages of legal procedure doubtless all of these statements were made orally after the court had convened. This is still the method in unimportant civil cases and by the defendant in criminal cases, but for many years the pleadings for all parties, in all civil cases of importance, and by the State in criminal cases, have been required to be in writing. As pleadings are but the embodiments of the controversy between the parties, it is apparent that they must vary with differing controversies; and as controversies of different kinds used to be settled in different courts, it naturally followed that the pleadings or manner of stating these controversies varied also. These differences in jurisdiction of courts, and in remedies, and in pleadings, still remain in the Federal system, and in those of many of the States. In other States these differences of jurisdiction do not exist, and the differences in pleading are also practically ended.

Definition of Pleading.

We may define pleading as the process by which the several parties to a suit make known to the court and the opposite party their respective contentions in the case; the plaintiff thereby

seeking to induce the court to give him some remedy against the defendant, and the defendant seeking to induce the court not to do so.

Manner of Presenting and Joining Issues.

Tendering Issues.—As the purpose of a suit is to enforce a legal right, and force the defendant to respect it in the future, or make compensation for its violation in the past, it follows that there must be some rule or rules of law on which the plaintiff bases his claim. If the matter submitted to the court be one about which there is no law, the court is powerless, as it is only authorized to apply and enforce the law. So it follows that every time a plaintiff comes before the court with a given state of facts, and asks remedy thereon, he necessarily asserts that the rules of law are such that these facts entitle him to the relief sought. This is a tender of issue to the defendant on this asserted rule or rules of law. The presentation of the facts to the court, for its investigation and decision, is also an assertion that the facts are true, and this is a tender to the defendant of an issue or issues of fact. If the plaintiff fail on either of these issues, he can not recover. In justice the defendant should be permitted to controvert either or both of these issues and to deny the plaintiff's propositions of law or his statement of facts, or both. Different systems of procedure differ widely on these points.

As all persons, and particularly those selected to act as judges, are presumed to know the law, it is never necessary, and rarely permissible, to plead matters of law. So that pleadings tendering issues are statements of facts. The rule is that every fact that the pleader desires the court to consider in determining what it will do must be plead. The court will not go outside of the party's own statement to hunt up facts on which to base or withhold action in his favor. This is probably the most important rule of pleading, enforced alike in all jurisdiction and under all systems. There are some exceptions to it, however. Conditions which are almost universal need not be plead; as, in suing on a contract, it need not be alleged that the parties were competent, or the purpose lawful. These are true of so large a proportion of agreements that these general conditions are presumed as to all, unless the exception be plead and proved. So of the course of the seasons, the great thoroughfares of commerce, etc.

In addition to being full, pleadings should be clear, concise, accurate, and logical. These are, however, matters of form and are not so essential as fullness. Fullness is not to be confounded with prolixity and verboseness. These are great vices in any composition, and particularly in pleading, and usually are resorted to for lack of definite information and thought. There are also certain formal parts of pleadings which must not be ignored. The court to which it is addressed, the term to which the suit is brought, the names and residences of the parties, unless they are already in the record, should be shown, and also the relief sought, if any.

Defensive Pleadings.—These are reasons given by the defendant why the court applied to ought not to give the relief sought. These may be few or many in a given case. They are divided into general classes, which are not mutually exclusive of each other: (1) Into defenses of law and defenses of fact; (2) into defenses against the particular suit and defenses against the cause of action on which the suit is founded. As said, these classifications are not mutually exclusive. There are legal defenses which only destroy the present suit, leaving the cause of action unsettled, and legal defenses which settle both the suit and the cause of action on which it is based. In like manner there are defenses based on facts which accomplish each of these purposes.

Defenses based on matters of law are made by demurrer; those based on facts are made by denials, general or special, by matters in confession and avoidance, or by matters of estoppel. Defenses which only settle the particular suit are called dilatory defenses or pleas; those which go to the whole cause of action, are defenses or pleas in bar.

A demurrer admits the facts to be as the adverse party claims, but insists that they are not legally sufficient to entitle him to the relief sought. The issue thus joined is always decided by the judge.

A general denial raises the issue that, whatever be the law, the facts submitted by the adverse party are not true, and therefore he is not entitled to the relief sought.

A special denial is a denial of some one or more facts set up by the adverse party.

A plea in confession and avoidance admits that some or all of the facts set up by the adverse party are true, but insists that

there are other facts which, taken in connection with those admitted, destroy their legal effect and hence disentitle the plaintiff to the remedy to which the admitted facts would otherwise entitle him.

A plea in estoppel insists that, whatever may be the truth regarding the facts alleged by the adverse party, he cannot legally recover on them because by his conduct regarding the matter he has precluded or shut himself off therefrom.

These defenses of fact, in Common Law courts, are tried by jury; in Chancery courts, by the judge or chancellor; and in courts of blended jurisdiction, by either the judge or the jury, as the nature of the case and the action of the parties shall require.

Order in Which Pleadings are Filed.

The first pleading in a case is by the plaintiff. It should contain facts which make out a *prima facie* case, entitling him to the relief sought. The next comes from the defendant, and is in reply to that of the plaintiff. If this reply consist only of denials of law or fact, or both, the pleadings close there. If it introduce new matters, the plaintiff may reply to this new matter. If this be only by denials of law or fact, or both, the pleadings close with it, but if it bring in new matter, the defendant may reply to it, and so on indefinitely. The pleadings rarely go beyond two instruments by each party, and usually conclude with only one on each side.

These different instruments have different names in different systems. At Common Law the order of filing pleadings and their respective names were as follows: (1) the plaintiff's declaration; (2) defendant's plea or demurrer; (3) the plaintiff's replication; (4) defendant's rejoinder; (5) plaintiff's sur-rejoinder; (6) defendant's rebutter; (7) plaintiff's sur-rebutter.

In Equity, the order was as follows: (1) the plaintiff's bill of complaint; (2) the defendant's answer, plea, disclaimer or demurrer; (3) plaintiff's replication.

In Texas, they are as follows: (1) plaintiff's original petition; (2) defendant's original answer; (3) plaintiff's first supplemental petition; (4) defendant's first supplemental answer; (5) plaintiff's second supplemental petition; (6) defendant's second supplemental answer; and so on indefinitely, if it be necessary.

Under the Codes of the different States the instruments of pleading have different names. In the majority, the first pleading filed by the plaintiff is called a complaint, in others it is called a petition; in all, the first pleading by the defendant is called an answer. In most of these States the pleadings setting up facts, stop here. In a few, the plaintiff is permitted to file a response to the defendant's answer. This is called a reply. In none of the Code States can the defendant file any response to this.

Number of Defenses.

In no one respect does the modern method of pleading differ more from the ancient Common Law than in the number of defenses which the defendant may make. Formerly, he was confined to one defense, either of law or fact, and no matter how many good reasons there might really exist why the plaintiff should not recover, the defendant could only get the advantage of one of them. This was somewhat modified in the later Common Law procedure, and was practically abrogated in Equity. In practically every State, it is provided that a defendant may make as many defenses as he may have, provided only he present them at the same time and in due order.

Amendments.

The Common Law was very rigid in its requirements as to pleading, and very limited in its permission to amend and cure defects in them. This has been very greatly changed in the modern practice, and the danger now seems to be that the stability of our procedure is somewhat endangered by the ease with which mistakes may be corrected. The rule in modern practice is that defects in any pleading may be cured, as matter of right, by filing an amendment at any time before a designated stage in the trial of the case, and may be cured even after that, if the judge shall think justice and right require.

Notice of Filing Pleadings.

The filing of the first pleading by the plaintiff is, under the modern practice, the beginning of the suit; and, unless the defendant enters an appearance in some way, he must be notified in the manner required by law. Telling him of the fact, or other actual notice to him, is not sufficient in actions at Law, though in some Equity proceedings, where the chancellor has already

granted an interlocutory order, it is sufficient, for some purposes. In most jurisdictions after both parties are before the court, they are expected to keep themselves advised as to its proceedings, and getting leave from the court to file any pleading, and filing it, is all that is required in case of any proceeding. Frequently, even leave from the judge is not necessary. In other jurisdictions notice should be given.

Motions.

Frequently, in the progress of litigation, it is desired to have the court take some action which is incidental to the main proceeding, as appointing an auditor, or ordering a survey of land, etc. Such action is invoked by an application usually less formal than the pleadings, and called a motion. These are either oral or in writing. Sometimes great particularity is required, and the truth of the matters presented must be supported by affidavit. Each kind of motion is dealt with as justice and expediency seem to require.

CHAPTER V.

EVIDENCE.

To enable the court to decide issues of fact correctly, it must have some means of investigating and ascertaining the truth regarding them. The means by which a fact is proved or disproved is called evidence, and the rules of law governing the securing, introduction and effect of evidence constitute the law of evidence.

These rules relate to four general matters:

(1) Who must prove?
(2) What must be proven?
(3) By what means may he prove?
(4) When is the proof sufficient?

Taking these up in order, we find:

Who Must Prove?

He must offer evidence who is dissatisfied with the existing conditions. The person conceiving himself to be aggrieved brings his suit to induce the court to give him relief. He states his grievance in his pleading, and when the trial comes on must introduce testimony sufficient to establish the truth of his complaint. He therefore takes the initiative in offering evidence. When he has produced testimony sufficient to induce the court to act as he desires, he closes. By the introduction of testimony having the foregoing effect he has satisfied himself with the state of the case, but this same process has resulted in dissatisfying his adversary. Before any testimony was given the latter was perfectly willing to submit the case to the court and receive a decision in his favor. because the plaintiff had not proved his case; but now he can not do so, for the plaintiff has made out his case. Therefore, the defendant here takes up the laboring oar and offers his testimony. If he succeeds in overthrowing the case made by the plaintiff, he in turn becomes satisfied with the present record, and the plaintiff dissatisfied with it, and the defendant desists, and the plaintiff begins again. So the process would go on indefinitely, but for

certain limits placed upon the parties, in the interest of order and expedition of the business of the court.

Under the old Common Law the pleadings were continued until they were narrowed down to one issue of fact which alone was submitted to the jury. Under these conditions, the foregoing facts were expressed in two rules. The first was, The burden of proof is on him who asserts the affirmative of the issue; and the second was, The burden of proof never shifts. So long as the procedure forbade the submission of more than one issue these two rules could be enforced without confusion. But as in the modern practice a number of issues may be submitted in the same case to the same jury at the same time, on some of which the plaintiff and on others the defendant holds the affirmative, a different statement is now necessary.

It is still true that as to each issue in a case the burden of proof is on him who seeks benefit from its establishment, so that unless he offers testimony *prima facie* sufficient to support his contention on that issue, it will be decided against him. If he does make out a *prima facie* case as to the particular issue, the necessity of overcoming this by his adversary at once arises, and either he must introduce testimony to disprove the *prima facie* case or that issue will be decided against him. If he succeeds in accomplishing this, he thereby makes it necessary for the other party to strengthen his case on this point. This he can do only by introducing further proof. It is clear that this is a process in which the necessity of introducing further evidence changes from time to time from the one party to the other. In this sense the burden of proof as to each issue does shift from one party to the other. But after all the testimony on this issue is in, it is still incumbent upon him who seeks benefit from the issue to satisfy the court that his contention as to this issue is correct. So that the burden of ultimately proving the truth of each issue at all times rests upon him who seeks benefit therefrom. In this sense the burden of proof as to any issue never shifts from him who will profit by its establishment.

The foregoing statements are equally applicable to proving a case considered as a whole. He who is dissatisfied with existing conditions, and on that account brings suit to obtain relief, must show such facts as *prima facie* entitle him to relief. When this is

done the burden of disproving this *prima facie* case passes over to the party complained against. He must now show facts which destroy the legal effect of the plaintiff's *prima facie* case. He may do this by disproving the facts relied upon by the plaintiff, or by proving additional facts which show the plaintiff not entitled to relief. If he succeeds in either, the plaintiff must meet this situation as to the whole case and introduce facts strengthening his contention. After all the evidence is in the plaintiff must be able to show that he is entitled to relief upon the whole record. Thus it is seen that during the progress of the trial the necessity for introducing testimony, not only as to particular issues but as to the whole case, has changed from time to time from one party to the other so that in this sense the burden of proof has shifted from time to time. Still after all the testimony is in the necessity for making out his case, or rather of satisfying the court that he has made it out, rests on the plaintiff. In this sense, the burden of proof never shifts.

What Must be Proven?

The party offering evidence must prove the substance of his pleading. He is not required to prove every detail of his pleading, but such facts as are, in substance, legally equivalent to it. Facts are legally equivalent if, applying the same rules of law to each, they establish the same legal right and the same legal wrong and entitle to the same remedy. If they tend to show different legal rights, or different violations, or entitle to different kinds of remedy, they are not legally equivalent.

Means of Proof.

This opens up by far the largest field in the law of evidence. Under it come all rules:

(1) As to the instruments through which evidence may be introduced, witnesses and their qualifications, written documents and their admissibility, and physical things, or real evidence, or representatives of them, as photographs, etc.

(2) The nature of the the matters which may be introduced.

(3) The relation of these facts to the matter in controversy.

Witnesses.—A witness is one who gives evidence in a legal proceeding, subject to the penalties of the law for false swearing. The general rule is that all persons are competent witnesses. The

several exceptions are: (1) Persons who have not sufficient intellect to relate transactions as to which they are interrogated, or who do not understand the obligation of an oath; (2) persons who have been convicted of a felony and who are unpardoned. At Common Law, interest in the suit and lack of religious belief disqualify, and these remain in all States in which they have not been changed by statute. This has, however, been done in most States. There are other exceptions in particular kinds of cases and as to particular persons but these we cannot discuss.

At Common Law witnesses were required to be sworn and thus to call upon God to attest the truthfulness of their testimony. This is still true in all the States which have adopted the Common Law unless it has been changed by statute. In a number of the States statutes have been enacted requiring witnesses to be sworn in the way most binding upon their consciences and subjecting them to the pains and penalties of perjury, whether the oath or promise of truthfulness be made with or without reference to God's attestation.

Questions as to the competency of witnesses are decided by the judge. The credibility of witnesses and the weight to be given to oral testimony are matters for the jury. Ordinarily the construction and legal effect of written evidence is for the judge, though the authenticity and genuineness of the papers, if properly put in issue by the pleadings, is decided by the jury.

Testimony from witnesses must be given by the witnesses themselves. In the earlier Common Law practice it was required that the witness himself should be brought before the court. He was then sworn and examined in open court before the judge and jury. This is still required in criminal cases, with some few deviations in interest of the defendant. In courts of Equity, the witnesses give their evidence in depositions. This has now been extended to Common Law courts, until the rule now is that the testimony of any witnesses in a civil suit can be taken and used, subject to a few exceptions varying in the different courts. Depositions are written statements made by a witness out of court and under oath, in response to questions propounded to him by the parties to a cause. The methods of asking and answering the questions differ, but the foregoing are the distinguishing characteristics.

The party introducing a witness before the court examines him

first, eliciting from him such facts as the witness knows and the party desires. When he is through, the adverse party takes the witness and cross-examines him on the matter drawn out in the first examination, and then the party introducing him is afforded opportunity to examine him on any matter on which he may seemingly have contradicted or modified his former statements, and on any new matter which the second party may have elicited. Here the examination closes unless, for good reason, the judge sees fit to extend it. Each witness is dealt with in this way. Written instruments are offered by the party desiring them. Their genuineness must be shown, either under some Common Law or statutory rule, or they will be excluded, on objection.

If one party attempt to prove any fact not admissible for any reason, or by any improper way, the other party makes his objection, stating his reasons, and the judge decides the question. The person against whom the decision is given may except to it and save the point for revision on appeal.

Written Instruments.—There are four general classes of documents whose contents or effect may come up for consideration. These are:

1. Documents which are the sole repositories of matters which the law says must be evidenced by writing of designated kinds and characteristics.

2. Documents which are public and authentic repositories of specific matters, and which may be resorted to as secondary evidence in specific cases, but are not exclusive sources of evidence of the matters contained therein.

3. Those papers which are repositories of matters of agreement between parties to them and their privies, voluntarily chosen by such parties for that purpose, the matters therein evidenced being of such nature that they could have been proved by parol but for such choice of the parties.

4. All written instruments whose contents and effect may become material in the investigation of any matter before a court, and which do not come within one or the other of the preceding classes.

The first of these general classes is divided into several subclasses, the most important of which are:

(1) The official records evidencing the acts of public officers in which the public, as such, is directly interested. This class

includes all records of the executive and legislative departments which are public in their nature.

(2) Official records of public acts of public officers in which certain private parties are directly and primarily concerned, but in which the public also has a material concern and interest.

This class includes all records and file papers of judicial proceedings.

(3) Private writings evidencing private rights of such a character that the law says they can only be evidenced in that manner.

This class includes all private writings evidencing contracts and rights which the law requires to be evidenced by written instruments. They are mostly those contracts which the Statute of Frauds requires to be expressed in writing. They are pricipally of the following classes:

(a) Contracts by which one undertakes to bind himself for the debt, default, or miscarriage of another.

(b) Contracts not to be performed within a year.

(c) Contracts by an executor or administrator to bind himself for any debts of the estate represented by him.

(d) Contracts creating an estate in lands for more than one year.

(e) Reservations of rights in chattels loaned to another and permitted to remain in his possession for more than two years.

(f) Ante-nuptial contracts, and some others of infrequent application.

(4) Official records of official acts of officers of political subdivisions of the State, such as counties, municipalities, towns, etc.

Under this are included records of county officers, as county surveyor, assessor, etc.; of cities and towns, such as minutes of city council, city assessor, etc.

The second of these general classes embraces:

(1) Registers of deeds and other private papers affecting private rights, kept, under the provisions of law, by public officers.

(2) Official registers of facts respecting personal status, as births, marriages, rolls of soldiers, etc.

(3) Records required by law to be kept by private persons regarding matters of a *quasi*-public character, as records of corporate meetings of railroad companies, and other *quasi*-public corporations.

The third of these general classes embraces all those instruments which private parties have prepared and executed in order to show the agreement which they have reached, or fact to which they have assented, when such action was voluntary on their part; that is, when the transaction was not such as the law required to be in writing.

The fourth class indicates its scope sufficiently without further elucidation.

Genuineness Must be Proved.

No paper belonging to any of these classes can be received in evidence unless its genuineness and authenticity is proved according to the rules of law applicable thereto.

If the paper is a public record it may be proven by a duly authenticated copy. The attestation and authentication, if the record is one existing in the State in which the copy is to be used, must be made according to the requirements of the local law. If the record exists in some other State, it must be authenticated and attested in compliance with the act of Congress.

If the paper is a private one, its genuineness may be proven according to the local law. These laws usually admit of two methods; one, as prescribed by the local statutes, and the other, as at Common Law. The local statutes cannot be given. At Common Law, if the paper has no subscribing witnesses its execution may be proven by any one who saw the party executing the instrument sign his name thereto, or by proof of the genuineness of the signature to the instrument by any one who is familiar with the hand writing of the party whose name is signed and can swear to its genuineness. If the paper has a subscribing witness or witnesses, its execution must be proved by one or more of the witnesses if they are living, and within the jurisdiction of the court. If all the witnesses are dead or inaccessible, the paper may be proven by proving the genuineness of the signature of the witnesses in either of the methods above indicated with reference to unwitnessed papers, or if this cannot be done, by proving the handwriting of the party executing the paper as above indicated.

If the instrument is thirty years old or over, comes from the proper custody, and is attended with circumstances corroborative of its genuineness, it is presumed to be genuine and is received in evidence without further proof, subject to rebutting evidence as to its authenticity.

Best Evidence Rules.—The law requires the production of the best evidence of which the case is, in its nature, susceptible, and no other evidence is ever received unless it be brought within some positive rule of law providing an exception to or relaxation of this rule.

This doctrine has application in those cases in which the inquiry involves the contents and legal effect of written instruments.

Rule 1.—A written instrument is the primary and exclusive means of proving its contents. Other evidence of such contents, either written or parol, is never received unless it be brought within some positive rule of law providing an exception or relaxation of this rule.

It would more accurately express the present state of the law to restrict the rule announced above to private writings, and to make another to the effect that public documents of all sorts may be proved by properly attested and authenticated copies, the method of attestation or authentication being determined in each State by the law of that jurisdiction.

This would save numerous exceptions and relaxations of the rule as announced, but the books are too full of the old formulæ to permit so radical a departure; hence I give you the rule as above.

Rule 2.—The legal effect of a written instrument must be determined by its own terms, and extraneous evidence is not admissible to change such legal effect. Therefore, evidence tending to change such legal effect by varying the terms of the instrument, explaining such terms, giving to them, or any of them, a meaning different from the ordinary legal interpretation thereof, adding other terms thereto, or eliminating any of those used therefrom, or by any other means, is never to be received unless it be brought within the operation of some positive rule of law providing an exception or relaxation of the rule here stated.

To state the two rules together concisely: The written instrument is the best evidence of its contents, and the contents of the instruments are the best evidence of its legal effect.

These rules relate to the contents and legal effect of the instrument, and have no application in instances in which the mere existence of the paper may be involved incidentally or collaterally.

Relaxations of Rule 1.—There are numerous relaxations of the rule that the written instrument itself is the primary and exclu-

sive means of proving its contents. These are based on considerations of convenience and necessity, or of public policy. They may be classified as follows:

(1) Relaxations based on the nature of the writing.

(2) Relaxations based on locality and possession of the instrument.

(3) Relaxations based on loss or destruction of the instrument.

(4) Relaxations based on connection of the paper with the litigation.

These are of sufficient importance to require more detailed consideration.

Relaxations based on the nature of the writing.—This embraces all those cases in which the physical conditions render it impracticable to produce the original writing, as written inscriptions on walls, tombstones, and other like heavy and immovable substances. In such cases, the writing may be proved by parol testimony.

Also those cases in which the writings are scattered over voluminous books and records, or are themselves voluminous and of a kind as to which expert testimony would be admissible. Here the expert may examine the writing and give, by parol, the result of his investigations.

Also those in which the public and physical inconvenience combine to render production of the original impracticable, as in the case of public records, or voluminous records of more private nature. In all such cases secondary evidence is admissible; the statutes of each State provide the conditions.

Under these Statutes all public records of public officers in the several States may be proved within the respective States by copies made by the official custodian thereof, and duly certified by him to be true and correct, such certificates being attested by his official signature and by the seal of his office, if he has a seal. This doctrine embraces legislative, executive, and judicial records, and file papers in judicial proceedings.

Legislative and executive records may be proved also by copies published by authority.

In a few instances, in which the records are voluminous, the facts simple, and no great liability to mistake exists, the officer may certify that a matter appears of record, or is shown by the record, without giving a copy.

If the record be one of another State of the Union, the matter is regulated by the statutes and Constitution of the United States.

This relaxation also includes records of private corporations, etc., copies of which, duly attested by the proper corporate officer and seal of the corporation, may be admitted for or against the the corporation.

Relaxations Based on Locality and Possession of the Paper.—This involves all cases in which the private paper exists, but is beyond the jurisdiction. (1) Outside of the United States. (2) Outside of the State, but in the United States. (3) Outside the county in which the court is held, but in the State.

In all of these cases the law is practically the same. The party desiring to use secondary evidence must show to the court that he has used all the means which the law places at his command to procure the testimony; but if, having done all he can to obtain the testimony he has failed, secondary evidence will be received.

Relaxations Based on Loss or Destruction of Instrument.—Where it is claimed that an instrument is lost or destroyed, the party offering secondary proof must show that there was such a paper; that it was genuine; and that he was not legally responsible for its nonproduction. The last he can do by proving that he had nothing to do with its loss or destruction; or, if he did, that the circumstances are such as to to acquit him of suspicion of suppressing the testimony by so doing. Having done this, he must prove its contents as accurately and fully as he can.

Relaxations Based on the Connection of the Paper with the Litigation and with the Parties to It.—If the paper is directly in issue and within the jurisdiction of the court, but in the possession of one not a party to the suit, to entitle the party to introduce secondary evidence, he must also have exhausted his legal means of procuring the paper. In case of ordinary witness, within the jurisdiction of the court, he should serve him with a subpœna *duces tecum*, which is a command from the court where the case is pending to attend the trial of the case and bring the paper with him. If the witness cannot be compelled to attend by subpœna, as a female, a sick or aged person, a nonresident of the county, etc., effort should be made to take his deposition and

have the paper attached. Whenever the proper effort has been made and the paper is not produced, secondary evidence is admissible. If the witness attends, but declines to furnish the paper to be filed and used in evidence, if the paper be his property and neither party to the suit has any property in it or direct interest in it, the court will not compel the party, over his objection, to part with his property, and will either permit it to be examined by the jury and a copy left and the original returned to the owner, or will permit secondary evidence in the first place and not use the instrument at all. If the instrument belongs to the party to the suit and is unlawfully in the possession of the witness, and this fact is manifest to the court, the court will compel the party to permit the paper to be used in evidence.

If the paper is directly in issue but in the possession of the adverse party, the means provided by law is to give notice to such party to produce the paper. This notice is not necessarily an official process, though it may be given through the officers of the court. It is usually given by the party or his attorney. It must describe the paper desired with reasonable accuracy; must be given to the party having it in possession or control a reasonably sufficient time before the trial to enable the party to procure and produce it. The instrument cannot be demanded until the party desiring it enters on his case. If it is produced, its genuineness does not have to be proved, for it is practically admitted by both parties; if it is not produced, the party desiring the secondary evidence must prove the existence and genuineness of the paper, and then must show its contents as accurately and fully as he can.

If the paper is a private one between parties other than those litigating, and is not directly in issue in the case, the rule as to the paper being the best evidence of its contents is not so strictly applied. A number of authorities say that it is not to be applied at all. The better considered cases, however, hold that the spirit of the rule, but not its letter, will be applied, and if the circumstances were such as to charge the party with notice that such evidence would be needed and the paper could have been procured by him by the use of reasonable diligence, after he had such notice, secondary evidence will not be admitted; but unless these conditions exist such proof will be heard.

Unless the circumstances of the case bring the offered facts within one or the other of the preceding instances of relaxation, and compliance with the prescribed preliminaries are shown, no evidence as to the contents of the paper can be offered except the paper itself.

Exceptions to Rule 2.—The rule that the contents of a written instrument are the best evidence of its legal effect also has some real exceptions. There are also some instances in which parol testimony is received that are often treated as exceptions to this rule, which, upon closer inspection, are found not to be exceptions but matters outside of the rule to which it has no application.

The real exceptions exist in those cases in which the parties are excused from producing the written instrument and are permitted to prove the facts evidenced thereby by parol, or those in which, though the instrument is in evidence, parol testimony may be received of facts the effect of which is to modify the instrument in some regard and give to it a different interpretation, meaning, or legal consequence than it would have if left to speak entirely for itself.

Under these real exceptions parol testimony will be received in the following cases:

(1) When the official character of a person is not directly in issue but arises incidentally; parol evidence will be received to show that he acted and was recognized as such officer without requiring the production of his commission.

(2) When a party is in fact an agent of another and has entered into a written contract in connection with the business of his principal, but in his own name, parol proof may be received as to the fact of agency, although this makes the contract binding on parties not mentioned therein.

(3) The real consideration of a contract may be proved by parol although it is different from that set out in the paper itself. This exception does not extend to cases in which the real or recited consideration consists of promises or undertakings. This would be to change, not the consideration only, but the agreement itself.

(4) Words or phrases used in a contract relating to a particular business may be explained by parol testimony showing their meaning according to the custom and usuage of the particular

business in the locality in which the contract was drawn. No custom or usage which is contrary to any rule of law or any settled rule of legal construction can ever be shown.

(5) A written contract which contains no conditions may be shown by parol never to have gone into effect because it was not to be operative until the happening of some event which has never taken place.

(6) In contracts of sale of personal property, facts from which the law implies a warranty of quality may be shown by parol though the written contract is silent on that subject.

(7) Receipts for money may be explained, modified, or contradicted by parol.

(8) An instrument appearing on its face to be an absolute deed may be shown by parol to be a mortgage.

(9) Facts creating a resulting trust may be shown by parol.

Parol testimony is often received in connection with written instruments to show that there is in fact no contract between the parties, or to prove such facts as are necessary to make the contract operative by identifying the matter to which it relates; or to prove additional agreements relating to the same thing or subject matter partially covered by the written contract, but which were not understood nor intended by the parties to be covered by the writing.

It is under the first of these doctrines that parol testimony is received to show mutual mistake of the parties which does not contradict or vary the terms of the contract but establishes the fact that no contract ever exists. Proof of facts showing fraud or duress are received on the same principle. The effect of this testimony is to show that there was never genuine agreement and consequently that no real contract ever existed.

Under the second of these doctrines parol testimony is received, not to destroy nor to modify the contract, but to give it real effect according to the real intent of the parties. Thus, if A buys a horse from B and receives a bill of sale for him, and B has two horses, to each of which the description in the bill of sale is equally applicable, parol testimony showing which horse in fact was sold only makes certain and effective the agreement between the parties.

The third doctrine, by its own terms, is outside of the rule. Here the party offering the parol testimony recognizes fully the terms and effect of the written contract, but says in addition to that agreement that there were other agreements closely related to but not covered by nor contradictory to that which ought to be enforced.

Demonstrative or Real Evidence.—This brings us to the consideration of the use of things as evidence. If the inquiry involves the existence or present condition of some material thing, the most direct and logical evidence conceivable is the thing itself. This is partially recognized by the law, and in many cases such evidence is received. It is under this rule that the instrument with which crime is alleged to have been committed, as a gun or knife, or the garnments worn by the party at the time of injury showing the effects of violence, etc., may be brought before the court and shown the jury. Many similar instances could be given.

The full force of the doctrine is, however, much limited by other considerations. Among these are:

(1) Impracticability, and inconvenience to the court and jury.

(2) That the party is not confronted with the witness, and has no opportunity of cross-examination.

(3) Impossibility of making any accurate record, or furnishing to the appellate court any complete transcript of what took place and was considered in the trial in the court below.

(4) When exhibition of the person is not voluntary, but is sought to be compelled, violation of sanctity of the person of the one compelled to make the exhibition, and compelling one to give evidence against himself.

(5) Immodesty and impropriety of the proceeding.

(6) Arousing prejudice by such exhibition.

(7) Arousing sympathy by the exhibition.

Different courts deal differently with these several objections. Anciently, such evidence was received in many cases; later, it became less frequent; but, later still, it seems to be gaining ground.

The trend of the modern authorities seems to be that, if there be a material thing which can be produced before the court and its condition is reasonably calculated to throw light on the matter in controversy, it will be received and considered. But, if the dispute involve a locality or something which can not be brought

before the court, the judge and jury will not be compelled, at the request of either party, to leave the courtroom and make an inspection; though, if all the parties to the suit agree freely and without compulsion for the court to do so, and this is done, it will not be error. Also, if the controversy involves the condition of the body of a person, the person himself may exhibit the part involved before the court and jury, provided the exhibition is not immodest and indecent, but that he can not be compelled to make such exhibition at the demand of the adverse party. Some courts claim the power to appoint one or more physicians to make an examination of the person and testify as to the result; others disclaim any such power. How this last point will finally be decided, it is impossible to tell at this time.

Closely akin to the foregoing subject is the use of material representations of material things in evidence. This is very frequently done, but always on condition that proof be offered showing the correctness and accuracy of the representation. The most frequent illustration of this doctrine is in the use of maps or plots of localities which are involved in the issues before the court, as in cases of location of lands, boundaries, and of books in unlawful interference with copyrights, etc. Models of bridges and other structures are often used. With the art of photography there arose a new occasion to apply old rules, and many interesting decisions have been made as to the admissibility of such representations. The present holding is that the photograph is not *prima facie* evidence of its own correctness, and hence is not admissible without proof as to its accuracy and reliability; but when this is proved, the photograph will be received. The same rule obtains as to X-ray pictures.

CHAPTER VI.

EVIDENCE (CONTD.)

Nature of the Matters Which May be Introduced.

Facts.—The first rule here is that only facts are to be received. Opinions, inferences and suppositions are to be excluded. Facts, in this connection, are matters which are within the personal knowledge of the witness, which have come to him directly through the use of his senses at the time the matter transpired. If the witness claims to have such knowledge, and the matter is of such kind that it may be apprehended through the senses, it is a fact, within this rule, without reference to its truth or falsity.

To the rule excluding opinions there are some exceptions. The first is in behalf of the opinions of experts. Experts are persons who, from previous study and experience, have more than ordinary information on special subjects. These subjects must be such as are not open to ordinary observation, but require peculiar training and skill to understand. Persons possessing these peculiar qualifications are permitted to give their opinions as to the matters within their special sphere of knowledge. These opinions may be based on facts coming within the knowledge of the expert, or he may have facts detailed to him hypothetically and be asked his expert opinion on them.

The second exception is as to nonexperts, that is, ordinary witnesses. The rule as to these is that they can not give opinions, but must state the facts within their knowledge, and let the jury draw all inferences. In the case of the expert, he is supposed to be better qualified than the ordinary juror to make correct deductions in his special line; but, with the nonexpert, no such presumption holds. He and the jurors are supposed to be on an equality as to this. So the exception in his case is based on a different reason. In some matters, it is impossible for any one to convey to another all the impressions received by him. These incommunicable impressions, and the facts constituting them, are often potential in determining the quality of conduct. In such

case, the nonexpert witness gives the facts in his mind as far as he can, and then is permitted to express his opinion, based on the related facts and those accompanying them which he is unable to reproduce.

Let us take, as an example, a case in which the sanity of a person is involved. This is a matter as to which there is special information and skill. One who has made a specialty of mental disease, if he knows the person and has had opportunity for examination and treatment, can testify as to the facts, and, in addition, give his expert opinion as to the mental condition. If he does not know the person, he can stay in the courtroom while the trial is progressing, and give his opinion from the facts as detailed by the witnesses. Or, if he has not heard the testimony, he may be asked, if certain facts be true, what his opinion is. Thus, an expert can give his opinion in either of three ways. A nonexpert can not give his opinion except on facts within his own knowledge. That is, if he knows the person, he may tell all he has seen, heard or noticed of his conduct, so far as he may be able, and if he has had good opportunity for observation he can then give his opinion as to the mental condition. So in other similar matters.

There are other statements that may be received in evidence which, in their nature, are largely matters of opinion. Take evidence as to the value of property of ordinary kinds. This can rarely be reduced to a certainty. In a few instances, in which the thing can be strictly classified and has a regular market price, as cotton or grains, this can be done; but, usually, there is no fixed market price for the particular thing in controversy. In such cases, witnesses who are shown to have fair knowledge of the thing and selling prices of things of like kind at the time and place to which the inquiry relates, may state their estimates.

Classifications of Evidence.—There are a number of different rules regarding facts which may be received in evidence. That these may be understood and applied, it is well to follow some of the legal classifications of the subject as follows:

(1) When classified with reference to its sources, evidence is divided into original and hearsay.

(2) With relation to its nature, into primary and secondary.

(3) With reference to its form, or the means through which it

is presented to the court, into parol, written, and real or demonstrative.

(4) With reference to its connection with the matter to be proved, into direct and circumstantial.

(5) With reference to its conformity to testimony already in the the record, into contradictory and corroborative.

(6) With reference to its repetition of what is already in the record, into independent and cumulative.

It is evident that these several groupings are not mutually exclusive.

Original and Hearsay.—Original evidence is that given by a witness, as of his own knowledge. It represents that which the witness claims to have experienced or to have observed himself. Its value and weight depends on the credibility of only one person.

Hearsay evidence is that given not as of the witness' own knowledge. The fact sought to be established thereby did not come within the experience or observation of the witness himself but of some other person who has made statements in the witness' presence reciting certain matters involved in the controversy and the witness repeats these statements for the purpose of proving that the matters recited therein are true. Hearsay testimony thus necessarily involves the credibility of two witnesses; first, that of the party making the statement in the presence of the witness, and second, that of the witness who undertakes to repeat it for the purpose of showing the truth of the matters recited.

Hearsay does not include all repetitions of statements made by others. When the purpose is simply to prove that a certain statement was made by a certain party at a certain time, and not to prove the truth of the matter contained in the statement, the testimony is not hearsay.

It must be borne in mind that the purpose of evidence is to develop the truth. Those sources and means of information which are most directly connected with the facts sought to be proved are first to be resorted to and exhausted before the less satisfactory aids can be invoked; hence, original evidence is always preferred to hearsay, and the latter is rarely admitted until it is reasonably certain that the former cannot be adduced as to the particular point under investigation. Even when it is shown that original

evidence cannot be procured it by no means follows, that hearsay will be admitted, for even under these circumstances, the admission of hearsay is exceptional. The rule is that he who is unable to procure original evidence to sustain his contention must abide by the result. This is not an arbitrary rule without sanction of justice and support of reason but is founded on sound principle.

Among the strong reasons urged against hearsay are the following:

(1) It introduces into the case a double opportunity for unintentional or willful falsity. The credibility of two witnesses has to be passed on; this involves as to each of these the questions as to meaning, character, capacity, motive, opportunity, etc.

(2) The party whose statement is repeated in making it was not subjected to the same processes for securing care and exactness in his statement, nor are his motives to confine himself strictly to the truth so great.

(A) He most frequently has no idea at the time of making the statement that there is any especial importance to be attached to it, or any special reason for him to be careful as to his words, or that serious consequences are likely to follow therefrom.

(B) He does not have his conscience bound by an oath.

(C) He is not subject to punishment for perjury.

(D) He cannot be cross-examined.

(3) The judge and the jury do not have the same opportunity to pass upon the credibility of the witness as they would if he were before them in person, and they could observe his conduct, bearing, etc.

These reasons are sufficient to sustain the general rule of the law that hearsay is not to be received, and to compel the party desiring to introduce it in any particular case to show some affirmative authority for so doing.

Primary and Secondary.—Primary evidence is that which the nature of the fact offered to be proved shows is the natural and first means by which such fact is susceptible of proof.

Secondary evidence is that which in itself suggests that there is a better and more direct means by which the fact offered to be proved, might be proved.

It is upon the distinction between primary and secondary evidence that the so-called best evidence rule is based. This rule is

that every fact must be proved by the best evidence of which it is in its nature, susceptible of being proved. This rule is both inclusive and exclusive requiring the production of the best of primary evidence, and excluding secondary.

This rule has its most frequent application with reference to the contents and effect of written instruments, as to which it has been considered at some length under Means of Proof.

The rules pertaining to the form of evidence and the means through which it is presented have already been considered.

Direct and Circumstantial.—The distinction between direct and circumstantial evidence is based upon the connection of the proposed fact with the issues in the case. Direct evidence is that which tends immediately to prove or disprove some fact in issue in the case. Circumstantial evidence is that which tends to prove or disprove the existence of some fact the truth of which is not directly in issue but the existence or nonexistence of which affords a reasonable basis for believing or disbelieving some matter directly in issue in the case.

Both direct and circumstantial testimony are admissible, if relevant and offered by the proper means of proof. The weight to be given direct testimony is ordinarily a matter left to the jury for determination without instruction from the judge. It is usual, however, in criminal cases depending on circumstantial evidence, to instruct the jury specially with reference thereto. The rule on this subject is substantially as follows: Every fact in the chain of circumstances which the jury relies upon as a basis for its verdict of guilty, must be proved with the same degree of certainty as is required as to the main fact in issue, that is, beyond a reasonable doubt; all the facts so established and so taken into account must be consistent with each other; and must not only be consistent with the guilt of the accused, but must be inconsistent with every reasonable hypothesis except that of his guilt.

Contradictory and Corroborative.—Items of testimony which are inconsistent and conflicting, tending to lead the mind to different conclusions, are called contradictory. Items of testimony which tend to lead to the same conclusion are called corroborative. This distinction does not relate to the admission or rejection of evidence, but to its effect upon the verdict.

Independent and Cumulative.—Testimony which brings a new fact into the record is called independent. Testimony which duplicates or repeats facts already in the record is called cumulative. This distinction is chiefly of value in connection with motions for a new trial based on newly discovered testimony. If the newly discovered facts are independent, the court will consider them, and other necessary circumstances concurring will grant the new trial. New trials are very rarely granted to give the benefit of newly discovered testimony if such testimony is cumulative in its nature.

Res Gestæ.—There are some matters which are frequently presented to the court as evidence which are quite difficult to classify. From some points of view they may be regarded as original testimony, while from others they seem to be hearsay; sometimes they may be looked upon as primary and at others as secondary evidence. Among the more important of these matters of doubtful nature are verbal declarations made at the time of the occurrence of some act under investigation or so immediately theretofore or thereafter as to be legally regarded as a part of the transaction. These declarations are usually known as *res gestæ.*

Words used at the time and place of any transaction and so intimately connected therewith as to be a part and parcel of it, are as admissible as any other matter then and there transpiring. They are received in order to put the judge and jury as nearly as possible in the exact position of the parties and to enable them to understand as fully as possible everything that took place, and thus to qualify them to judge of the conduct of the parties from the most intelligent point of view possible. It is immaterial whether such statement be made by the parties whose conduct is under investigation or by others.

The admissibility of such statements depends upon their connection with the matter at issue. If that is so close that they may fairly be said to be a part thereof, they are admissible. If the statements are not strictly speaking simultaneous with the act under consideration but precede or follow it, the question arises: What length of time must elapse before the words are so separated from the transaction as to preclude the repetition of the statement as evidence? In such case the facts and circumstances must be considered, and if from them the statement, notwith-

standing the slight difference in time, can fairly be held to be a a part of the transaction, that is if the statement preceded and was the then present cause of the act or acts under consideration, or if it succeeded and is the immediate and unstudied outgrowth of such act or acts. it should be admitted; but if there was time and opportunity for second thought it should be rejected as hearsay.

Dying Declarations.—Closely related to the rules governing *res gestæ* are those regulating the admission of dying declarations. Dying declarations are admissible as testimony only in those cases in which the cause of the death of a human being is in issue in a criminal case. As the fact of death is directly involved, statements made by the party dying relating to the cause of the death, are in some regards analogous to the statements we have considered in the preceding paragraph as *res gestæ*. But the two are by no means identical. *Res gestæ* includes statements or explanations made by any one at the time the transaction occurred. Statements which may be admitted as dying declarations are limited strictly to those made by the dying person, and even these must be shown to have been made voluntarily, with a consciousness of impending death and while he is in possession of his mental faculties. When these facts concur testimony will be received to prove the statements of the dying party. If the act of the defendant in a criminal case causing the death, and the death occur almost at the same time, the dying declarations might well be regarded as *res gestæ*. If any considerable time elapses after the injury before the death, the declarations are purely hearsay.

Statements made against Interest.—Under this head we will consider both admissions and confessions. The legal distinction between these two is that admission is used to indicate statements made against one's interest which affect his rights in a civil suit, while confession indicates such statements used in criminal cases.

The principle upon which such statements are received in evidence in civil and criminal cases is the same, though out of its tenderness for the life and liberty of the individual the law is, in some respects, more guarded in receiving confessions than admissions.

When admissions or confessions are made solemnly in the

progress of a trial, they are more in the nature of substitutes for evidence than of evidence itself. A plea of guilty in a criminal case properly entered is a damaging confession which relieves the State from the necessity of introducing full testimony, though by statute in some States evidence must still be introduced to enable the jury or the judge to act intelligently in fixing the amount of punishment. An admission in the pleadings of a party to a civil suit, or a statement in the progress of the trial made in open court, that certain alleged facts are true and need not be proved is rather a waiver of the necessity of proving the facts than evidence of them.

Unless the admission or confession is made in open court or is contained in the pleadings of the parties the testimony offered regarding it is necessarily hearsay. It always consists in the repetition of something said by a party to the suit at some previous time, for the purpose of proving the truth of the matter contained in the statement. Receiving of such statements in evidence, therefore, is an exception to the general rule excluding hearsay. This exception is based on the fact that men are careful regarding their own interests and rarely make statements hurtful to themselves unless such statements are true.

The effect of admissions solemnly made in a civil suit is to bind the party absolutely on the point admitted. Care, however, must be observed to ascertain the nature and extent of the admission. Sometimes it will bind the party only for the trial during which it is made and during appeals from the result. In such case, if there is another trial, the party may relieve himself from the admission. Again, if the party admits that a certain witness would testify to a certain matter as a fact, this is very different from an admission that the testimony of the witness is true. Under such conditions the party making the admission must argue his case just as though the named witness had been present and testified as stated in the admission, but he would still be free to attack the credibility of the witness and to dispute the truth of the statement by any legitimate means. If, however, he admits that the statement is true he is cut off from controverting the statement.

The effect of confessions of guilt in a criminal case also depends on the manner and form in which they are made. If the

confession take the form of a plea of guilty entered in open court it is practically conclusive as to the fact of guilt, though testimony is often required in those cases in which the judge or jury are allowed choice and discretion in fixing the penalty. Where a confession is claimed to have been made out of court the distinction is recognized between statements made before arrest and those made while in custody of the law. Many safeguards are thrown around the reception of the latter in evidence which are not required as to the former. These are largely statutory and differ in the different States.

The Relation of the Facts to the Matters in Controversy.

No testimony can be received unless it be relevant to the issues joined between the parties.

Testimony is relevant when it reasonably tends to prove the truth or falsity of the issues under investigation. All relevant testimony is admissible if offered in conformity with the rules governing the production of evidence, unless its introduction be forbidden by some positive rule. There are a few such prohibitory rules, based mostly, if not exclusively, on considerations of public policy.

Mr. Greenleaf's statement of the general rule on this subject is: "Evidence must correspond with the allegations, and be confined to the point in issue." It is frequently announced in these words: The *allegata* and *probata* must correspond.

The question again arises: What circumstances can reasonably aid the court in its search for the truth involved in the case? The answer is: Such circumstances as are so connected with one or more of the issues in the case, or its legally related facts, as to be reasonably calculated to have one or more of the following effects on the mind of the jury:

(1) To establish a rational belief in the truth of some matter alleged in the pleading.

(2) To strengthen such belief, if it be already somewhat supported by presumption or evidence.

(3) To prevent such belief.

(4) To weaken or destroy such belief, if it exists either by presumption or from evidence.

The next question is: What are the issues in any case? In this

connection, they may be defined as all matters of fact affirmed on the one side and denied on the other.

The next question is: Must the testimony relate to all the issues, or may it relate only to all facts in one issue, or to one fact only of one issue, and still be relevant? The answer is: If it have the proper connection with any fact directly involved in any one issue, it is relevant.

The next question is: Are there any facts, not directly involved in any of the issues in a case, but yet which the law regards as so related to such facts as to make the testimony as to such related facts relevant? The answer is: Yes.

There are numerous instances in which such facts are admitted. These are usually, if not always, instances in which the offered facts tend directly to aid in weighing and valuing the testimony offered in regard to the matters directly in issue. They may be classified as follows:

(1) Facts which tend to show the meaning of words or expressions used in evidence or by witnesses, as by showing that a remark attributed to one of the parties was spoken in jest, or that the party was in the habit of using the words in question in an unusual sense, etc.

(2) General facts which go to show the character of the party in respect to the matter under investigation.

(3) Facts which go to show the capacity or opportunity of a party to the suit as to the particular matter under investigation.

(4) Facts which are concomitant with, and explanatory of, a fact directly in issue or explanatory of some fact already received in evidence for the purpose of directly supporting the facts directly in issue.

(5) General facts as to the reputation of a witness for truth and veracity in his own community, but no particular instances of untruth nor individual opinions can be received.

(6) Facts which go to show the capacity or opportunity of the witness as to the matters testified to by him.

(7) Particular facts which go to show the attitude of the witness toward the case or the parties, such as interest, friendship, ill will, inducements offered by or conduct of parties, and in short, all facts which go to show bias in reception of impression, motive or inducement to color or misrepresent facts.

There is this difference to be observed. Those facts which relate directly to matters directy in issue may always be proved, if offered in conformity to rules as to the production of testimony; but facts which relate indirectly to matters directly in issue, or which relate only to facts which are indirectly connected with the issues, are frequently rejected, from considerations of public policy.

Thus, if one were indicted for perjury, all direct evidence as to the offense would be received. But to show that he had previously been convicted of a similar offense would be inadmissible, although all would recognize that this would have a decided influence on the mind of the ordinary man in producing a belief of his guilt. Such proof, though logically relevant, is inadmissible, because it might result in injustice to the defendant by the introduction of evidence he was not prepared to rebut, and because it would tend to multiply issues and unduly protract the litigation. Again, whenever a witness is introduced, his credibility at once becomes a material question in the case. Here the law permits inquiry as to his general reputation for truth in the neighborhood in which he lives, for this is a matter on which every one is supposed to be able always to defend himself; but particular instances in which he has deceived, or even in which he was supposed to have sworn falsely, and the opinions of particular individuals as to his credibility, are excluded, not because they would not probably throw light on his character, but because of the undue advantage which might thus be taken, and the numerous issues which would thus be raised.

Functions of the Judge and Jury as to Evidence.

In Common Law courts the judge decides all questions of law and such questions of fact as arise incidentally in the trial of the case. The issues of fact joined by the parties in their pleadings are decided by the jury. In these courts juries are empaneled as a matter of course unless expressly waived by the parties. It is permitted, however, even in these courts for the parties by the consent of the judge to dispense with a jury and submit all matters of fact as well as of law to the judge. These are still the rules in the Federal Courts. In many of the States there are statutes which dispense with juries even in law cases unless one

or the other of the parties shall demand a jury trial in conformity with the local law.

In courts of chancery no jury was ever impaneled, but questions of fact were decided by the chancellor. If, in some particular case, the chancellor desired to do so, he could certify to a Common Law court designated issues of fact involved in a case pending before him and request that they be passed on by a jury in the Common Law court, and that the verdict found by the jury be certified to him by the Common Law court. Even in such cases the verdict was not conclusive upon the chancellor but only advisory. He could accept or reject the conclusion of the jury as his judgment and conscience dictated. These rules also still obtain in the Federal courts. In many of the States the law and equity jurisdictions have been blended and the same rules govern in the trial of law and equity causes.

In the trials in cases in which juries are impaneled it is the province of the judge to pass upon the admissibility of evidence, that is to say, whether any proposed testimony can lawfully be received and submitted to the jury. It is the province of the jury ordinarily to determine the credibility of the witnesses and the weight to be given to the testimony received.

As no fact is admissible in evidence unless it is relevant and as relevancy is that quality by reason of which a fact tends to prove or disprove some issue in a case, it is clear that the judge in determining whether or not a proposed fact is relevant must consider it in connection with the issues and other evidence in the case. This necessarily involves whether or not the testimony is entitled to have any weight in the case. The weight of evidence is its probative force. If a fact offered in evidence has no probative force it is not relevant and should not be received. If it has probative force and is offered in conformity with the rules governing the production of testimony it should be received.

The respective duties of the judge and jury with regard to the probative force of testimony may be stated thus: it is the duty of the judge to determine whether or not the fact offered in evidence has any probative force whatever, that is, any relevancy to the issues to be decided; it is the duty of the jury, after the judge has admitted the testimony, to determine how much probative force the particular fact should have in determining the issues of fact

in the case. To state it differently: the judge determines whether or not a proposed fact is evidence, the jury determines what weight the fact shall have after the judge has declared that it is evidence in the case.

The rule above stated that the jury are to judge of the weight of evidence is a very general one, though not universal in its application. The exception that the judge must construe and declare the effect of written instruments is as well settled as the rule itself. There are certain legal presumptions existing at Common Law or established by statutes which it is the duty of the judge to announce to the jury, giving to each presumption such weight as it is entitled to by law. Notwithstanding these exceptions, the general rule is that the weight to be given to testimony is a matter for the jury.

The credibility of the witnesses is always a matter for the jury. The competency of the witness, that is, whether he should be permitted to testify, is a matter for the judge, but the judge having decided that and having permitted the witness to testify it is the province of the jury to say to what extent he is to be believed.

Credibility of Witnesses.—The first element in the value and weight of testimony is the credibility of the witness from whom the evidence comes. In this credibility the following are included:

(1) The moral character of the witness. This involves his desire and purpose to tell the truth and his courage to carry out such purpose.

(2) The mental condition or capacity of the witness; first, to receive correct impressions while the matter to which the testimony relates is taking place, second, to retain such impressions unchanged, and third, to correctly transmit such impressions.

(3) The opportunity of the witness to exercise these faculties in the several ways indicated above, and

(4) The attitude of the witness, or his relation to the subject matter of which he testifies or the parties affected thereby. That is, the personal interest of the witness in the matter itself or any one or more of the parties to it, or his prejudice against such parties, etc.; including herein all those matters which come under the general designation of motive.

Weight of Evidence.—What constitutes the weight of evidence is so important as to justify a somewhat detailed treatment.

There are five elements which enter into the weight of testimony, four of these relate to the statement that is being considered. The fifth to the witness testifying. The latter is in reality the credibility of the witness and has been considered under that head.

The other four elements are:

(1) The meaning of the statement.

(2) The probability of the statement considered within itself.

(3) The consistency of the statement with ascertained concomitant facts.

(4) The relevancy of the statement.

The first inquiry in weighing testimony is, what does the statement mean? That is, what fact does it purport to represent or contain. In cases in which the evidence offered is documentary, that is, consists of written instruments, its meaning or import is a question to be determined by the court; unless there be in the paper some latent ambiguity which may be explained by resort to parol testimony. In such case the legal effect and meaning of such portions of the instrument as are unambiguous are for the court, and the determination of the facts evidenced by the parol testimony is for the jury. But even in such cases the legal effect of the instrument as applied to the facts as found by the jury is in most instances still a question for the court. To illustrate: if the written instrument be entirely plain or even of doubtful meaning but has no latent ambiguities in it the court must instruct the jury as to the legal effect and meaning of the paper. If the instrument be a conveyance of land, and the subject matter of the conveyance be general, equally applicable to two tracts, parol testimony would be admissible to determine which of the two tracts was in fact in the minds of the parties at the time the instrument was executed. In such a case the court would receive the parol testimony and leave to the jury the question as to which of the two tracts the contract or instrument applied, but would further instruct the jury as to the legal effect of the contract as applied to the subject ascertained by them. This doctrine is usually embraced in the statement that: "The legal effect of a written instrument is to be determined by the court."

The meaning of parol testimony is always for the jury, and each statement must be determined by the jury trying the case

according to their judgment as to what idea the witness in fact intended to convey.

Second. The probability of the statement consists in its correspondence with the present belief of the party considering it. This belief is always largely based upon experience.

As there are no two persons who have beliefs or opinions absolutely identical it necessarily follows that no statement will have just the same degree of probability to any two persons, and as in many instances the beliefs and opinions of individuals differ very greatly it follows that the degree of probability of any statement, as determined by such persons, would also differ very widely. Hence it is that probability is a very variable and uncertain quality, impossible of any legal ascertainment or measure. Each statement being left to and weighed by the particular jury according to their conception of the matter.

Third. The third element in value of testimony is its correspondence with particular facts as ascertained in the case on trial, and which were concomitant with the matter contained in the statement under investigation. This must not be confounded with probability.

To illustrate: If the first witness in a case should begin his testimony by saying that "There was a severe snow storm in the city of New Orleans on the 15th of July," such statement would not readily be accepted as true. The effect produced on the minds by the testimony in that case is against the preconceived opinion or belief that it is not at all likely to snow there in that season of the year. This statement would be improbable. If, however, the witness should begin by saying that on the 15th of July it was very warm in New Orleans, we would recognize the likelihood of the statement for the same reason; common experience teaching us that such would probably and almost certainly be the case.

On the other hand, if a witness, of whom we knew nothing, should swear that he saw A shoot B at some designated place on July 15, 1910, and both A and B were unknown to us, here there is nothing inherently improbable in the statement. There is nothing in it, considered by itself, either corresponding with or contrary to our personal opinions, for we have none on this subject. If afterward during the progress of the trial several witnesses, whom we knew and believed to be truthful, should swear that

they knew both A and B, and that at the very time the first witness says A shot B in the place named, A was with these witnesses at a different place ten miles from there, these statements as to the concomitant facts being absolutely inconsistent with the statement of the first witness, if we believe the latter statements the testimony of the first witness must be rejected; although considered by itself it could not be regarded as improbable.

If, however, these latter witnesses had said that they were near the place of the alleged shooting and heard a pistol shot, and saw A run rapidly off, and found B lying on the ground in a dying condition from a gunshot wound,—these statements would sustain the first witness or strongly corroborate his testimony, and taken in connection with it would establish the fact that B was shot by A.

Fourth. The fourth element in the value and weight of testimony consists in its connection with facts in issue, or its legally related facts; in other words, in its relevancy. This question is primarily passed upon by the court in the admission of testimony. That is, to be admissible evidence must be relevant to some degree, but the extent to which the received testimony tends to establish or strengthen, or to weaken or prevent a belief in the truth of matters under investigation, is ultimately left to the jury without any suggestion from the court, except in those instances in which the law has undertaken to attach certain weight to the testimony. This matter has already been considered at length.

When is the Proof Sufficient?

As stated under first and second rules, he who is dissatisfied must take the initiative in introducing evidence, and must continue until he has established the substance of his case as set out in his pleadings. The present inquiry is: How much evidence must he produce to constitute proof? The answer varies with varying conditions.

(1) In Criminal Law, the defendant is presumed to be innocent until his guilt is established beyond a reasonable doubt, and the State can never safely close its case until it has testimony sufficient to do that. Besides this, there are other special rules of evidence in criminal matters, such as the requirement of corroboration of accomplices, etc., and some which apply only in

particular cases, as the necessity of two witnesses in perjury and treason whose testimony must coincide and other similar provisions.

(2) In civil suits issues of fact are determined by the preponderance of evidence. This does not mean numerically the larger number of witnesses, but such testimony as, in the mind of the jury, when fairly and dispassionately considered, is entitled to prevail over that offered in opposition to it.

In both criminal and civil cases, there are numerous legal presumptions which, when applicable to a case on trial, must be considered and given due weight. But after all, testimony sufficient to establish in the mind of a disinterested person a reasonable belief of any given fact, is largely a question of good judgment. In no other one thing is the difference between the good and the poor lawyer more apparent than in dealing with this and its related questions.

CHAPTER VII.

TRIALS.

How Conducted.

The clerk of the court is required to keep a docket of all cases pending in his court. This is a book in which the style of all cases and also the date of the most important actions which are taken therein, and a short memorandum of every ruling or decision by the judge in the case are entered. Cases are entered on this docket in the order in which they are instituted. When the session of the court begins, the judge takes this docket and calls the cases in the order in which they are entered there. As each case is called for trial, some disposition must be made of it. This may be a postponement to some later time during that term of the court, or to the next term, or a trial of the case. Postponements are not made, except for good cause. A postponement to the next term is called a continuance. When the case is called for trial, all unsettled motions and questions of law arising on the pleadings are presented to the judge, and he decides them, and the matters of fact to be tried are thus definitely ascertained.

When the trial is ready to begin, if there is to be a jury, it is selected and sworn to try the case. They then determine all questions of fact involving the merits of the case. If no jury is to sit, the judge determines both the law and the facts. After the jury is impaneled, or immediately on announcing ready for trial, if there be no jury, the pleadings, as settled by the rulings on the demurrers, are read, and the testimony is introduced. After the close of the testimony, the legal propositions are discussed to the judge and the facts argued before him, or the jury, as the case may be. If there be no jury, the judge announces his decision then, or takes the case under advisement and announces it later, and judgment is entered in accordance therewith.

If there be a jury, when the argument before them is concluded the judge delivers his charge. This is a clear and accurate statement by the judge to the jury of all the rules of law applicable to the facts in evidence, by which they are to be governed in de-

liberating on the case and making up their decision. It should be fair and unbiased, giving the very law of the case being tried—no more, and no less.

After receiving the charge, the jury retire in charge of an officer, and are kept together and from association with other persons until they arrive at a unanimous decision called a verdict. This is then reduced to writing, signed by one of their number styled the foreman, and returned into open court, where it is received by the judge and inspected and, if in due form, is read by the clerk. If informal, the attention of the jury is called to the defect, and it is cured, and then the verdict is received. It is filed and is entered of record. The jury is then discharged from the case, and the attorney of the successful party prepares a formal judgment, which is entered of record.

Judgment.

The judgment is the final result of the trial. It is the culmination of the whole proceeding, and authoritatively establishes and declares the legal rights and liabilities of the respective parties to the suit in the matters of controversy and awards the proper remedy. It is binding on them, and all persons claiming under them, and cannot be disputed or avoided by any of them except by a direct proceeding for revision.

Revision of Judgments.—As nothing human is perfect, errors frequently occur in the progress of trials, and unjust and unlawful results follow. Recognizing this, the law makes provision for correcting such errors. These are of two general kinds: (1) revision in the court in which the trial was had; (2) revision by some higher court with appellate jurisdiction.

The first of these is usually accomplished by motion in the trial court. These motions are for a new trial, or in arrest of judgment. The technical differences between them we need not notice. In preparing the motion, the attorney for the unsuccessful party reviews in his own mind the entire trial and carefully considers every ruling and decision adverse to his client, and, unless the judge was clearly right in each, he selects that as a reason for a new trial. All these reasons he incorporates into a written motion and files it, and presents it to the judge. If he succeeds in convincing the judge that error has been committed to his injury, the new trial is granted. If he does not, it is denied.

If the new trial be granted, the case stays on the docket for another trial, when it is again reached in due course.

If the motion be overruled, the losing party can take an appeal to some higher court, provided for that purpose. To do so he gives notice of such appeal in open court, and files an appeal bond, or pauper's oath in lieu of bond, if he can not give it, and then files another paper called an assignment of errors. In this he sets out in detail, in distinct propositions, the various rulings and decisions of which he complains.

As no official record is kept during the trial of the evidence introduced and of many of the rulings of the court made in the progress of the trial, a statement of facts and various bills of exceptions presenting these different matters are made out, as the law requires, and, on being approved by the judge, become part of the record.

The clerk then makes out a complete transcript of the whole record, and this is filed in the appellate court, and the case there is tried on that.

If no appeal be taken, a writ of error may be sued out within a limited time. This does not differ materially from an appeal, except in the manner of informing the adverse party of the fact that a revision of the judgment is being sought.

When the case reaches the appellate court it is entered on the docket there and tried under the rules of practice applicable there. This court makes such disposition of the case as the law requires. If there has been no error committed, or if error, if it be in favor of the appealing party, or if against him is so slight as to have had no influence on the result of the case, the judgment is affirmed. If there is material error against the appellant, the judgment will be set aside or, as it is technically called, reversed. If all the facts have been developed and justice may be done in that way, judgment will be rendered in behalf of the appellant. If this can not be done, and the error can be corrected on another trial, the case will be remanded to the lower court to be tried in accordance with the decision of the appellate court. If the error can not be cured, the case will be dismissed.

In addition to the methods of revising judgments just discussed the court in which a judgment was rendered in cases of gross injustice, not attributable to the fault of the injured party, upon

proper application by him, made in the time and manner provided by law, may set aside such judgment and open up the question for rehearing. The ancient equity proceeding for this purpose was called a Bill of Review. It is very limited in its application and very technical in the rules governing it. In modern practice an appreciably broader and more useful proceeding has been introduced known as a Bill in the Nature of a Bill of Review. Both these are proceedings brought in the court in which the judgment was rendered for the purpose of setting the judgment aside and obtaining another hearing of the case.

Enforcement of Judgments.—Judgments not only determine the rights and liabilities of the parties, but also award the remedies to which the successful party is entitled. So, when the litigation is finally over, he can obtain the benefits of his trouble and expense. Most frequently the unsuccessful party, when he can resist no longer, complies with the requirements made upon him by the judgment. But this is not always so. To meet these latter cases the law provides various methods of forcing obedience. This is done by the award of various writs or process, usually called executions, and placing these in the hands of the proper executive officer, who, in obedience thereto, compels the party to do what has been adjudged to be his legal duty.

The remedy awarded in each particular suit is the one appropriate to the case and rights of the party. If it be to compel payment of money, the writ commands the officer to seize and sell enough of the property of the debtor to pay the judgment and the costs of its execution. If it be for the possession of land, the writ authorizes the officer to take the property into his possession and deliver it over to the successful party, and so on, through the whole list of remedies. Courts of Equity direct their remedies largely against the person of the defendant. Thus, if an injunction be awarded, the party must conform his conduct thereto, and, if he does not, he is put in jail. So in decree for specific performance of a contract, if the party does not obey the decree, he is dealt with as for contempt, and made to do so. The satisfaction of the judgment is, as to that case, the end of the law.

PART V.

APPLICATION OF GENERAL RULES, TO CRIMINAL, TORT, AND CONTRACT LAW.

CHAPTER I.

CRIMINAL LAW.

The laws of the several States are usually divided into Criminal and Civil Law, and this last class again subdivided into Tort or Non-Contract Law, and Contract Law. We desire, now, to follow these divisions, and take up, with a little more of particularity, the principal rules and doctrines of each of these three divisions, and present them, not in detail, but in fair general outline, showing, so far as brief treatment can do, the application in each of the general principles we have tried to develop in the preceding pages.

First in order comes Criminal Law.

The public is entitled to protection against the harmful conduct of individuals. This protection is afforded by forbidding certain conduct, providing penalties for violating these rules and subjecting persons guilty of such conduct to these penalties. What conduct is harmful and shall be punished, is determined by the legislative department of the government, and the determination thus arrived at, if not contrary to some provision of the Federal or State Constitution, is binding on the judicial and executive departments. When conduct is so denounced and penalized, it becomes criminal, and the law forbidding it and prescribing the penalty for it is a Criminal Law; and the aggregate of such laws, in any State, is the criminal law of that State. A crime is an act or omission which is forbidden by law, for the purpose of protecting the public, as such, and for which a punishment is affixed.

When we speak of the divisions of the law into Civil and Criminal, we must not get the idea that these terms are so exclusive, the one of the other, that the same matter can not fall within both

divisions; for the same act or omission may be both a crime and a civil wrong, its nature depending on the point of view. If one person owns property and another person steals it, or if one person commits an assault and battery upon another, and severely injures him, in each case the act is a violation of the good order in which the public is interested, and also of the private right of the individual involved. The Criminal Law in the first instance, will punish the offender by appropriate remedy for the offense against the public, and the Civil Law will make him responsible to the owner of the property stolen for its value. So, in the second case, the public vindicates its right to maintain the public peace, by punishing the wrong-doer for his crime, and also compels him to make restitution to the injured party for damage sustained. And so of a large number of acts and omissions. They violate both the Criminal and Civil Law, and the wrong-doer is answerable for the violation of each.

The Common Law rules, as to crimes and their punishments, are the result of long experience and much careful study. Their details are many, and it would be profitless to attempt to go into them. They are the base of the criminal laws of all the States of the Union, unless it is Louisiana. In some States the Common Law is still in force in criminal matters, except as it has been modified by statutes. In others, the Common Law has been superseded by a complete penal code, and nothing is punishable as a crime unless made so by this code.

There are no Common Law offenses against the Federal laws. So far as crime is concerned there is no Common Law enforced through the Federal Courts. This does not mean that the Common Law is not looked to for the purposes of construing Federal Criminal Statutes and interpreting words and phrases occurring therein. This is always done. But no act or omission is punishable in the Federal Courts as a crime unless it has been declared such by an act of Congress.

Classification of Crimes.

At Common Law crimes are divided into treason, felonies, and misdemeanors.

Treason, in its broadest sense, is opposition to a government to which one owes allegiance, manifesting itself in overt acts.

By the Constitution of the United States it is declared that "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." A similar provision occurs in most, if not all, of the constitutions of the several States. This gives the general American idea on this subject. If the war is waged with intent to overthrow the Federal government, or the aid and comfort is given to its enemies, it is treason against the United States. If the opposition is to a State government, it is treason against the State.

Felony, at Common Law, is any crime not treason punishable by death or by forfeiture of estate or by both. In the early history of the law, it included a great many offenses which, at this time, are regarded as relatively trivial.

The establishment of penitentiaries, or State prisons, as distinguished from county jails, and the substitution of confinement in the penitentiary for the death penalty in a great number of offenses has given opportunity for another definition of felony. It is now customary to define a felony as any act or omission constituting a crime and punishable by death or by confinement in the penitentiary, either absolutely or in the alternative. Under this definition it is not necessary that the crime be absolutely punishable either by death or sentence to the penitentiary. If the party accused of the offense may be put to death or sent to the penitentiary, the crime is a felony although the court or jury may be authorized under the law to impose only a pecuniary fine as punishment. A man convicted of such an offense and fined only is a felon.

All smaller crimes, that is, all crimes that are punishable only by fine or by imprisonment in the county jail, or by both these, or in any other way except by death or confinement in the penitentiary, are known as misdemeanors. These are not infrequently called petty offenses.

It is apparent that this last class includes the largest number of offenses and those of most frequent occurrence.

It is important to keep the distinctions between felonies and misdemeanors clearly in mind. Not only are they important in Criminal Law but they enter largely into the rules of Criminal

Procedure. The jurisdiction of different courts over offenses is frequently made to depend on this distinction and the methods of prosecution are in many important respects affected thereby.

Defining Crimes a Legislative Function.

The determination of what acts shall constitute crime and the penalties that shall be affixed therefor are legislative functions. This function may be exercised by the people directly in framing their constitution, as we have just seen with regard to treason, but ordinarily it is left with the Legislative Department of the government to determine these matters. In the United States Government this function is discharged by Congress, subject only to the limitations upon the power of the Federal Government and upon Congress, inherent in the nature of that government, as ascertained by fair interpretation of the Federal Constitution. In the several States the power is exercised by the Legislatures subject only to the constitution and laws of the United States and the constitution of the particular State.

It is apparent from the foregoing that the acts or omissions which may be denounced as criminal are very many. Subject to the limitations given above, any conduct which, in the judgment of the legislative power, is subversive of the general good may be declared to be a crime and punishable as such. In fact, the acts or omissions which are made criminal in the different jurisdictions are exceedingly numerous. From the nature of our institutions crimes as defined and punished by Congress are, to a large extent, matters over which the States have no jurisdiction, and in this sense they constitute a class to themselves, almost without duplication in the laws of the respective States; though there are a few matters, such as making or passing counterfeit money, which may be punished both by the Federal Government and by the States. On the other hand, when we compare the Criminal laws of the several States we find that the great body of the acts or omissions which are denounced as criminal in one State are so denounced in others. The details as to what constitutes the crime and what punishment shall be affixed and the method of procedure are ordinarily different in the different States, but the fundamental ideas in the Criminal Law of all the States are, to a large extent, the same. Human nature in its desires and capacities and weaknesses and temptations is largely

the same throughout the whole United States, and experience everywhere teaches practically the same lesson as to what conduct is conducive to, and what is opposed to, the public good. The Criminal Law in each community is based upon and grows out of this common experience.

Mental Capacity, Motive, and Intent as Involved in Crime.

The purpose of Criminal Law is to protect the general public against the harmful conduct of the vicious and evil-minded. It never deals with unmanifested desire or motive. However evil these may be, the law takes no jurisdiction over them until they are manifested, to some extent at least, in overt acts or wrongful omissions. There must always be an affirmative wrong-doing, or a wrongful failure to do when doing is a legal duty. So that we may say that wrongful conduct, as that term has been defined, is an essential element of every crime.

The question necessarily arises, Is the wrongful conduct all that is essential? The almost universal answer is, No. There are a few acts made criminal by positive statute which, considered in themselves, are as near devoid of moral quality as conduct may be, which will be dealt with as criminal and punished without reference to intent. Some negligent omissions, also, are punished as criminal although it may be clear that the act resulted from mere inadvertence. In the last of these classes of cases, the law very justly charges the party with his inadvertent carelessness and in effect says that inadvertence, under the circumstances specified in the law, is, in itself, a culpable mental attitude.

It is almost universally true that mental capacity and wrongful intent are elements of crime both at Common Law and under the Federal and State Codes.

Mental condition, upon which liability for crime ordinarily rests, is capacity to understand the nature and consequences of the particular act or omission under investigation. This does not mean that the party must actually have understood that his conduct was criminal. Two of the leading maxims of the law are that "Everyone is presumed to know the law" and that "Ignorance of the law excuses no one." So the legal requirement is not that the party charged shall know the legal nature of the act as being unlawful, either as a felony or a misdemeanor, but that he

have capacity to understand what he is doing and the moral qualities of his conduct and its probable consequences.

The test is applied as to the particular conduct under investigation. That is the question to be solved: Did he, at the time, have the capacity to know the nature of that particular conduct and its consequences? It is true that the investigation may take a much wider range. Possibly one of the most satisfactory ways of proving lack of capacity on any particular point would be to prove general insanity. But it must be remembered that such proof is permitted for the purpose of obtaining a satisfactory answer to the question, Is the prisoner mentally capable as to the particular conduct charged against him? If he is, although he may be unsound on other points, he is responsible; if he is not, though he may be sound on other points, he is irresponsible.

Passing from mental capacity to matters of intent and motive and purpose, we enter a more difficult field. Motive is that which actuates; which produces desire, and brings pressure upon the will to give its assent to a suggested course of conduct. Intent is the act of the will in yielding to, or rejecting these actuating motives and the state of mind thus induced. Another term closely connected with both motive and intent and sometimes used interchangeably with each is purpose. The better meaning of this word seems to be the end sought to be accomplished. It is true that this is very closely akin to motive inasmuch as the end to be accomplished is often the thing desired. It is also closely related to intent because the will can scarcely determine on a course of conduct except as leading to and accomplishing some desired end.

It is not surprising that terms standing for ideas so closely related as these three thoughts are should be frequently confused and used interchangeably. The three ideas exist and are actual facts involved in the existence of almost every crime and the student of law must become familiar with them. We will endeavor to use the three words in the senses indicated, that is, motive as standing for that which actuates and prompts the doing or not doing of a certain act; intent as the act of the mind and will in deciding what is to be done and its state or condition while this decision holds; and purpose, as the end sought to be accomplished by the conduct.

Neither one of these, nor any combination of them, unmanifested in conduct is within the jurisdiction of the law. Each of them is important in connection with conduct as fixing or tending to show its legal quality and character. Of the three, intent is probably of the greatest consequence. It is sometimes said that intent is the legally important inquiry and motive and purpose are valuable largely, if not exclusively, as evidence of intent. This does not seem, however, to be altogether accurate.

These distinctions and their practical effect may be made clearer by illustration. Homicide is the taking of the life of one human being by act, agency or procurement of another. From time immemorial homicide under some circumstances has been justifiable in law, under others, excusable, and under others, a very serious offense. Again, for centuries there have been grades in criminal homicide. Whether or not the law justifies, excuses, or punishes any particular homicide depends on the motive, intent, and purpose of him who commits it. An officer who executes a criminal under the command of the law does so intentionally and with the purpose of taking his life, but his act is justified. The law commanded it and the individual is but the instrument of sovereignty in carrying out its will. We might conceive of a case in which the executioner actually had ill-will toward the culprit and took pleasure in his death, but so long as he acts in strict accord with the mandate of the law, he is guilty of no crime.

It is equally true that from time immemorial the law has recognized the right of self-defense and within the limits regulating that subject has excused the man who killed his neighbor to prevent his own life being unlawfully taken. Here the motive is the man's love of and right in his own life. He is not actuated by a desire to injure another but by the desire to prevent the other from seriously injuring him. The intent is to protect himself, even though this may involve serious hurt to or the death of his assailant. The purpose to be accomplished is his own protection. As the motive and purpose are lawful, the yielding to the motive and the accomplishment of the purpose are lawful and the intent intervening between the two is lawful.

Passing to the grades of criminal homicide, the law recognizes the difference between cold-blooded assassination and the killing under the impulse of some sudden passion. In both cases there is

homicide committed contrary to law. In both cases there is intent to kill. In the first instance, the assassin is actuated by despicable motives to which his mind has yielded while calm and deliberate and the law gives color to his act from this motive and declares it to be murder in the first degree. In the second case, the law neither justifies nor excuses the act, but recognizes the frailty of human nature and finding that the intent to kill was formed rashly in the heat of passion, says the homicide is less reprehensible than cold-blooded murder and affixes to it a less penalty. In many of the States, the Codes have gone even further in grading felonious homicide and take into account, not only the rashness and suddenness of the act, but the nature of the provocation and punish more lightly homicides induced by conduct reasonably calculated to produce, and in fact producing, such degree of excitement or passion as to render a man of ordinary temperament incapable of self-control. Here there is the intent to kill, but it is induced by sudden passion provoked by adequate cause and the law looks upon it more leniently even than it does upon sudden passion without sufficient provocation.

We must be careful to distinguish between the intent to do an act and the intent with which the act is done, as this term is very frequently used in the law. The last, the intent with which the act is done, is much more a matter of motive and purpose than is the intent to do. Consider the offense of larceny as an example. Larceny is not the taking of corporeal personal property belonging to another knowingly and purposely, but it is the taking with the purpose or motive of fraudulently depriving the owner of the value of his property and appropriating it to the use or benefit of the person taking. If a piece of property belongs to A and B honestly believes it belongs to him and takes possession of it under this honest but mistaken belief, it is not theft. The criminal motive, or as it is usually expressed, the criminal intent is lacking. The taking is a tort and A has a civil remedy for it, but it is not a crime. If B had known the property belonged to A and had taken it to use temporarily, presuming A's consent to such use from their friendly relations, this would not be theft. The criminal motive is lacking.

We may therefore conclude that mental capacity to appre-

ciate the nature and consequences of one's conduct and criminal motive and intent are essential in almost all crime.

Evidence of Intent.—While the law insists upon criminal intent it recognizes the practical difficulty of searching a man's heart and finding his real motives and intentions. Here, as elsewhere, it meets this practical difficulty in a practical way and declares that a man's motive and intent shall be judged by his conduct. If, therefore, his conduct and the means employed by him are such as would ordinarily result in the commission of a crime and the act forbidden is actually performed by him, his intent to commit the crime is presumed therefrom. This is but an application of the familiar doctrine that a man is presumed to have intended the natural and probable consequences of his conduct. The difference between Tort Law and Criminal Law in this respect seems to be, that in the matter of adjusting the loss between individuals and awarding compensation for damages done, the Law of Torts makes this presumption conclusive, whereas, in Criminal Law, it may be overcome by the facts.

As just stated, the presumption thus indulged is not conclusive. The accused, by proper testimony, may rebut its effect and show that no criminal intent existed.

On the other hand, the law permits the prosecuting officer to prove such facts as go to show motive, intent and purpose. Frequently much of the evidence in a criminal case is directed towards these mental conditions. Very frequently the facts and circumstances developed on the trial speak more conclusively as to criminal intent than the direct evidence of the accused himself could do.

Ignorance and Mistake.—Closely related to the questions of mental attitude and intent are ignorance, mistake, duress, and fraud.

Ignorance is absence of information; mistake is misinformation or misconception; duress is coercion overcoming the will; and fraud is deception leading to improper conduct.

It is apparent that all these differ from mental incapacity or unsoundness. It is also apparent that they often enter into and affect conduct, particularly in its mental aspect.

It is said that ignorance of the law never excuses one criminally.

This, of course, means ignorance of the law with the violation of which the party is accused. Ignorance of law as to one's rights, may and frequently does enter into and determine the legal quality of his conduct. This is not always true and is never true except in those cases where specific evil intent is an element of the crime. Perhaps the most common illustration that we find of the proposition that ignorance of the law as it affects ones rights is in cases of theft and other fraudulent dealing with property. A person might know all the facts concerning his claim of ownership and these, legally speaking, might be insufficient to give him title, still if he, through mistake of law, honestly believed himself to be the owner, taking the property under that belief could not be theft. The specific criminal intent necessary in theft does not exist. Had he known the facts and known that the property was not his and had taken it with fraudulent intent, ignorantly believing that there was no law against such taking, this ignorance would in nowise constitute a defense. This would be ignorance of the law forbidding the act, which never excuses.

Ignorance of fact does excuse very frequently. To have this result the ignorance must not be due to negligence of the accused and his conduct must have been such as would have been lawful had the facts been as he understood them to be.

Mutatis mutandis, the propositions announced with reference to ignorance are applicable to mistake.

Duress.—The effect of duress is not so easily ascertained. Under certain conditions duress is a defense. This is nearly always true in cases in which the duress is exercised by actual violence. Even in these cases, however, there should not be marked disproportion between the violence applied to the person relying on the duress and the wrong which he claims he was coerced into committing. For duress by threats to constitute a defense, the threat must be to do very serious harm to the person of the accused and must be so made as to be reasonably calculated to intimidate a person of ordinary firmness and the alleged criminal act must take place in the presence of the person making the threat. If these facts concur they usually constitute a defense.

Fraud, as such, is rarely presented as a defense in a criminal action. If one party has deceived another, this state of mind, if available at all as a defense, would come under the head of

ignorance or mistake, and it is in this form that the matter usually appears.

Parties Who May Commit Crime.

The very general rule is that any person having the mental capacity to understand the nature and consequences of his conduct and to entertain the necessary criminal intent may commit crime. The reverse of the rule is also true, that no one who, at the time the particular offense charged was committed, was mentally incapable of appreciating his conduct and its consequences or of entertaining a criminal intent can be guilty of crime.

This immunity exists in behalf of those who are permanently insane or mentally defective and also those who are temporarily unsound. There is a difference of view as to the effect of drunkenness on liability for crime. The true rule seems to be that if one not then designing or desiring to commit a crime, shall become intoxicated to such extent that he does not and cannot understand the nature of his conduct and its consequences, or cannot entertain a specific evil intent which is essential to the particular crime charged, he cannot be held responsible for his conduct while in this condition. On the other hand, if one while he has his faculties about him desires to commit an offense and intoxicates himself with the intent and expectation of committing the offense while in that condition, his drunkenness will not excuse.

At Common Law and in all the States infants below a designated age are conclusively presumed to be incapable of committing crime. This age at Common Law is seven years. It differs in the different States. Above this designated age there is another period of years during which the infant is presumed to be incapable, but the presumption is not conclusive and may be overcome by proof in the particular case. After the lapse of this second period, which usually extends to twelve or fourteen years, the infant, though still a minor, is presumed to be capable of committing crime.

Coverture as such does not affect liability for crime. In some statutes it is provided that coercion of a married woman by her husband is more effective as a defense or mitigation of punishment than duress ordinarily is.

One of the doctrines of the Criminal Law is that the defendant

is presumed to be innocent until his guilt is established beyond a reasonable doubt. This presumption does not apply as to incapacity to commit crime except as to children in their earliest period of legal responsibility, during which time the presumption of incapacity obtains. To state the matter a little differently, except as to children, as above noted, the burden of proof to show incapacity to commit crime or to entertain criminal intent rests upon the defendant and not upon the State. This is the rule at Common Law and in practically all the States, though there may be one or two exceptions.

Connection of Parties with a Particular Crime.

Crimes are committed in a great many different ways. Frequently a number of persons are connected in different ways with the same offense. This connection may be of three general kinds: First, participation in the criminal act at the time it is committed; second, co-operation in the criminal enterprise prior to the commission of the act; third, actual co-operation with the criminal after the act.

Different names are used in different jurisdictions to express these different relations to the crime. At Common Law, parties actually acting together in the commission of the crime, whether immediately present or standing guard at some other place to protect those who actually do the unlawful deed, or those who do an act with design that it should be hurtful, which act does result in the crime, as he who lays poison in the way of another designing for him to take and thus to kill him, are known as principals. Those who have aided, abetted, or encouraged the commission of the crime before it takes place but who do not themselves perform the act, or take any part in the criminal enterprise at the time the act is performed, are known as accessories before the fact; while those who have no connection with the crime before or at the time of its commission, but who afterward so aid and abet the criminal as to become legally parties to the crime, are known as accessories after the fact. These Common Law names are retained in a number of the States. In others those persons who would be known as accessories before the fact are called accomplices, and the Common Law accessories after the fact are called accessories simply. Words are of secondary im-

portance, but there is material difference between instigating crime, committing a crime one's self, and shielding a criminal after the crime has been committed. These distinctions the law recognizes and enforces. Most frequently a principal is punished more severely than an accomplice or accessory before the fact, and these in turn are punished more severely than the accessory after the fact. This, of course, is not universally so, but is so frequent as to be properly designated a general rule. Another recognition of the difference is found in the usual provision that accessories after the fact, and in many instances accessories before the fact, are not to be tried in advance of the principal if he be in custody.

As accessories after the fact have no connection with the offense until after it is committed and then usually only by aiding the principal in avoiding arrest and escaping trial, it is frequently provided that close relatives of the criminal are not responsible as accessories after the fact. This is a concession to family ties and the affection which persons closely related usually sustain to one another.

Punishments.

Punishments known to the Common Law are death, imprisonment, forfeiture of estates, and pecuniary fines. These are the present prevalent Common Law penalties. Other methods of punishment have been practiced from time to time and some of them may still obtain in some of the States. The Common Law method of taking life is by hanging. This is still the prevalent mode, though electrocution has been substituted in some of the States. Imprisonment may be either in the State or Federal penitentiaries or in local jails. It may extend from a short period to a life sentence. Pecuniary fines may be in such amount as the proper authorities determine.

Defining and grading crimes and prescribing penalties pertain to the Legislative Department of the government subject to such limitations as are contained in the constitution. Cruel and unusual punishments are usually forbidden by constitutional provisions. While the fixing of penalties is a legislative function it is not necessary that the legislature should fix absolutely the length of the term of imprisonment or the exact amount of pe-

cuniary fine to be imposed. The facts and circumstances of each particular case show vast differences in the gravity of offenses which come under the same name, and it is a prevalent habit in the different States and in the Federal Government as well, to fix minimum or maximum terms of imprisonment or amounts of fine and let the court adapt the punishment to the facts of the particular case, within the limits thus indicated. Sometimes the law fixes both a maximum and a minimum within which the court is free to impose a penalty. It has been held in some instances that where the Legislature has declared an act to be penal and has prescribed no penalties that this is an adoption of the Common Law penalty attached to such an offense and that the court may impose the Common Law punishment.

There is a difference in the procedure in the different courts as to assessing the penalty by the judge or by the jury. In the Federal courts and in many of the State courts, the jury passes upon the question of guilt or innocence only, and the judge fixes the penalty within the limits fixed by law. In other States the jury passes not only on the question of guilt but also determines the penalty within legal limits.

In addition to the direct penalties for heinous offenses assessed by the court or jury, conviction of felony or treason carries with it as an incident loss of political rights and of competency as a witness. This, however, may be removed by pardon from the chief executive.

Different Classes of Offenses.

It would be useless to undertake to discuss in detail the different offenses against the criminal law of the several States or of the United States. Even different general classification of offenses are numerous.

Blackstone deals with them under fourteen general heads as follows:

(1) Offense against God and religion.

(2) Against the law of nations.

(3) High treason.

(4) Felonies injurious to the King's prerogative.

(5) Praemunire.

(6) Misprisions and contempts affecting the King and Government.

(7) Offenses against public justice.
(8) Offenses against the public peace.
(9) Offenses against the public trade.
(10) Offenses against the public health, and the public police or economy.
(11) Homicide.
(12) Offenses against the persons of individuals.
(13) Offenses against the habitations of individuals, and
(14) Offenses against private property.

It is evident that some of these subdivisions could never have existed in the United States since the War of the Revolution. Others of them are practically obsolete.

There is noted lack of harmony in the classification of offenses in the Codes of the different States, though they adhere somewhat to the same general outline. No attempt at a summary of them will be made.

PROCEDURE.

There are two essentially different kinds of proceedings in Criminal courts. One is known as a preliminary examination or preliminary trial, the other as a final trial. The purpose of the former is not to ascertain and judicially determine the guilt or innocence of the accused, but simply to decide whether or not there is sufficient probability of guilt to justify the court or magistrate making the investigation to detain the accused until the case can be passed upon by a court having jurisdiction to try it on the merits. In such investigation the presiding officer acts rather as a committing magistrate than as a judge. No indictment or presentment is necessary as a basis for such examination; there is no jury in the trial. The magistrate has no jurisdiction to acquit or convict the defendant. The extent of his power is to release him from that complaint and arrest, if he does not believe there is probable grounds to hold him for trial, or to remand him to jail or compel him to give bond for his appearance to answer trial before the proper court, in the event he shall find that he is probably guilty.

The second kind of proceedings in criminal courts are trials upon the merits. It is in these trials that the abstract rules of Criminal Law established for the protection of the public are

actually brought to bear upon and enforced against particular individuals. These trials involve the exercise of all three phases of judicial power, that is, the power to investigate conduct, to determine and adjudicate its legal character, and pronounce judgment thereupon, and to enforce such judgment, and all courts which are to try cases of this kind must be organized with reference thereto.

Juries.

It is a deeply rooted doctrine of the Common Law that every person accused of crime shall be entitled to a speedy and public trial by a jury of his peers. This rule obtains in the United States courts and in the courts of practically all of the States, though it is not imperative that a jury be provided in the trial of some petty offenses. A jury in the Federal court means twelve men and their verdict must be unanimous. The provision in the Fourteenth Amendment to the Federal Constitution providing for due process of law in the different States, does not deprive the States of authority to abolish jury trials in criminal cases nor require them to have twelve men on a jury or the unanimous assent of all the jurors to a verdict.

Pleadings by the State.—One of the peculiar institutions of the Common Law is the grand jury. This is an inquisitorial body organized by and in connection with one of the more important courts of the country, to inquire into violations of the Criminal Law within the county or district in which the court is held, and to prefer appropriate charges against all persons believed to be guilty of crime. Each grand jury is selected from the citizens residing within the district or county in which the court is held, having the qualifications prescribed by law. The number of its members is not fixed absolutely but is usually not less than twelve nor more than sixteen. Their investigations are *ex parte*. Witnesses are examined by them under oath and if a sufficient number of the grand jurors believe the party complained against to be guilty, they prefer charges against him to the court by which the jury is empaneled.

There were two methods at Common Law of preferring these charges; one by presentment, which was a return of the charge into open court by the grand jury itself without any formal preparation of a bill by the prosecuting attorney. This method,

though mentioned in the Constitution of the United States and in the constitutions of a number of the states has practically fallen into disuse.

The second method and the one now almost uniformly used in the prosecution of serious offenses is by indictment. After the grand jury has investigated the charge, and the requisite number have voted in favor of prosecuting the accused, they instruct the District Attorney or other prosecuting officer to prepare a formal written charge against the accused, identifying him by name or description, specifically stating the offense, and, as held requisite in most States, the facts constituting the offense preferred against him, together with the time and place where the offense was committed. This instrument when prepared by the prosecuting officer is ordinarily signed by the foreman of the grand jury and by the grand jury brought into open court and delivered to the judge or clerk. There are certain formalities that must be observed by the prosecuting attorney in the preparation of the paper. This paper, so prepared and presented in court, is called an indictment.

The methods of preferring criminal charges against parties which do not require action by a grand jury are information and complaint. An information is a written instrument prepared by the prosecuting officer charging the person with a violation of the criminal law and setting out the facts constituting such violation, made under the official oath of the officer and presented to, and filed in, the court having jurisdiction of the offense. This is the usual method of prosecuting more serious misdemeanors.

A complaint is a less formal written charge of a violation of the law made by a private individual under oath and filed with some criminal court or magistrate. This is the ordinary method of presenting petty offenses in the inferior courts.

Pleadings by the Defendant.

All pleadings to the merits by the defendant in criminal cases are oral, a plea of not guilty being sufficient for such purposes. Pleas in abatement and motions to quash indictments, applications for change of venue, or for continuance, and other similar matters, are required to be in writing, but the old Common Law rule as to oral pleading to the merits is still in effect.

In capital cases the defendant is arraigned before the court. This consists in bringing the defendant in person into open court and having the indictment read to him and requiring him to enter a plea thereto. This always takes place before the trial proper begins.

After the jury is empaneled the indictment is again read to them in the presence of the defendant and he pleads orally guilty or not guilty.

Evidence.

The defendant in every criminal case goes to trial protected by a presumption of innocence, which continues to protect him until his guilt is established by competent evidence beyond a reasonable doubt. The ordinary rules of evidence obtain in criminal cases in all matters not governed by some special rule modifying the general rules of law. The defendant cannot be compelled to testify against himself. At Common Law he is not permitted to testify in his own favor but under the Federal Statutes and the statutes of many of the States he is permitted to do so.

Argument of Counsel

When the evidence in the case is concluded the attorneys in the case make their argument for their respective clients. Questions of law are referred to the judge, questions of fact to the jury.

Charge and Verdict

After the argument, the judge charges the jury as to the law of the case and the jury proceeds to consider the guilt or innocence of the defendant. If the facts do not show the defendant's guilt beyond a reasonable doubt it is the duty of the jury to acquit him and bring in a verdict of not guilty. The effect of such verdict is to free the defendant from all further criminal liability for the offense for which he has been tried, or for any less offense included therein, or for any greater offense based upon the same act or omission of which the offense of which he was acquitted is an essential element.

If the jury find the defendant guilty they return their verdict into court accordingly. If it is in a jurisdiction in which the jury assesses the punishment, they must name the penalty

in their verdict; if it is not in such jurisdiction they simply find the fact of guilt and leave the punishment to the judge.

Judgments.

After the verdict has been received a proper judgment is prepared and entered declaring the defendant innocent and releasing him from the custody or adjudging him to be guilty and specifying the punishment which is to be inflicted upon him. If this is a judgment of acquittal it is conclusive; if it is a judgment of conviction it may be set aside by the court rendering it by a motion for a new trial or in arrest of judgment, or by some higher court upon appeal or on writ of error as the law of the particular jurisdiction may provide.

Constitutional Guarantees Relating to Criminal Matters.

Both in the Federal and State constitutions there are many guarantees of rights to the individual relating to liability for crime and the manner of proceeding in criminal cases.

We give those from the Federal Constitution. As it is impracticable to cover all the provisions of all the State constitutions, we give those from the present constitution of Texas as typical of those of all the States. It must be understood that these identical provisions do not occur in the constitution of the other States, but the general tenor and effect of them is common to all the States and hence a fairly good idea of the general trend of American thought and law on this subject may be obtained by a study of the quoted provisions as examples.

From the Constitution of the United States.—"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require." Art. I, Sec. 9, No. 2.

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." Art III, Sec. 2, No. 3.

"Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving

them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Art. III, Sec. 3.

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime." Art. IV, Sec. 2, No. 2.

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

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

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." Amendment VI.

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

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Amendment XIV, Sec. 1.

State Provisions—Texas Constitution Being Used As a Type.—"The people shall be secure in their persons, houses, papers, and possession from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation." Art. I, Sec. 9.

"In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and the cause of the accusation against him and to have a copy thereof. He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself or counsel or both; shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor. And no person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or of public danger." Art. I, Sec. 10.

"All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found, upon examination of the evidence in such a manner as may be prescribed by law." Art. I, Sec. 11.

"The writ of *habeas corpus* is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual." Art. I, Sec. 12.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishment inflicted. All courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." Art. I, Sec. 13.

"No person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon

trial for the same offense after a verdict of not guilty in a court of competent jurisdiction." Art. I, Sec. 14.

"The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency." Art. I, Sec. 15.

"No bill of attainder, *ex post facto* law, retroactive law, or any law impairing the obligation of contracts, shall be made." Art. I, Sec. 16.

"No citizen of this State shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land." Art. I, Sec. 19.

"No citizen shall be outlawed; nor shall any person be transported out of the State for any offense committed within the same." Art. I, Sec. 20.

"No conviction shall work corruption of blood, or forfeiture of estate; and the estates of those who destroy their own lives shall descend or vest as in case of natural death." Art. I, Sec. 21.

"Treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort; and no person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on confession in open court." Art. I, Sec. 22.

CHAPTER II.

TORTS.

General Conception.

Our work up to this time has covered many, if not all, of the general principles underlying the Law of Torts. We will now attempt their more particular application to this branch of the law, first by recapitulating some of these principles, and second by taking up a few of the more important torts and showing their application in these.

Civil Law embraces the mass of rules which govern the conduct of individuals in their dealings with and conduct toward each other. It is divided into Contract Law, and Non-Contract, or Tort Law.

The first embraces all rules regulating rights and duties assumed voluntarily by the parties.

The second embraces all the rules regulating rights recognized and duties imposed by law not depending on the assent of the parties.

As the first class includes all legal rights and duties not embraced in the latter, and as the former is susceptible of reasonably exact definition, it is usual to define the latter by use of general terms, excepting therefrom the first class. This is convenient, but to get practical benefit from it we must have some idea of the exception, that is, of contract rights and duties. A contract is defined to be: "An agreement between competent parties, based on valid consideration, to do or not do certain things." Here the duty to do or not do the thing is voluntarily assumed or undertaken by the party subject thereto. The law did not impose it upon him of its own force. It did not compel him to enter into the contract. It left him entirely free to make the agreement, or to leave it alone. Its only part in the matter is to say to him: "If you go into the contract, and assume its duties, you must observe them and carry them out." It recognizes the duties after they are undertaken by the parties, but does not impose them in the first instance.

Thus, it is apparent that the basis of legal right and duty in torts is the law, the will of the sovereign, independent of the will of the party; while the basis of legal right and duty in contract is the will of the parties to the agreement, recognized by law.

We will now consider the definition of a tort.

Definition.

The three following are from approved authorities:

1. "A tort is an act, or omission, giving rise, in virtue of the Common Law jurisdiction of the court, to a civil remedy which is not an action on contract." (Pollock.)

2. "An injury inflicted otherwise than by mere breach of contract, or, to be more nicely accurate, a tort, is one's disturbance of another in his rights which the law has created, either in absence of contract, or in consequence of a relation which a contract has established between the parties." (Bishop.)

3. "A tort, then, is any wrong, not consisting in mere breach of contract, for which the law undertakes to give to the injured party some appropriate remedy against the wrong-doer." (Cooley.)

From the point of view of the tort-feasor, a tort is an act, or omission, in breach of duty imposed by law, not undertaken by contract, for which the law gives a civil remedy. From the point of view of the injured party, it is an act, or omission, in violation of right, not created by contract existing in the injured party, for which the law gives a civil remedy.

The idea of a tort implies the following:

(1) An injured person, who is always the one having the legal right.

(2) A wrong-doer, always the one violating the right of the other.

(3) A legal right in the injured person.

(4) A legal wrong by the tort-feasor.

(5) Injury to the one having the right, resulting directly and proximately from the wrong of the other.

(6) A civil remedy for the injury.

There may be more than one injured party and more than one wrong-doer, but there must always be at least one of each.

In the definitions given above the idea of civil remedy is quite

prominent. This results from the very close, if not inseparable, connection between right and remedy. In the definitions of legal right given by many prominent writers this idea is the predominating one, and the right is said not only to depend on, but actually to consist in, the capacity to control by law the conduct of others. This control, in almost all instances, being exercisable only through application of legal remedies, and these being ordinarily afforded the private individual through civil action, the naturalness of the expression is apparent.

Torts as Contrasted with Crimes and Breaches of Contract.

The same act may be a tort, a crime, and a breach of contract. This is, of course, infrequent, but not impossible. The act assumes these different aspects from different points of view. If it be violative of the laws made to protect the public as such, from that point of view it is a crime. If it be violative of the law made to protect individuals, in absence of contract between them, it is a tort; and if there be some contract between the parties which, by its terms, duplicates their antecedent legal rights and duties, it is a breach of contract. To illustrate: A and B have a difficulty, and A threatens to follow this up by injuring B. B takes the necessary steps to have A placed under a peace bond. Afterward, A commits an assault and battery on B, inflicting serious bodily harm. In so far as this battery was in violation of the criminal law, it is a crime, and punishable as such. In so far as it violates B's right of bodily security, it is a tort; and in so far as it violates A's agreement to keep the peace, evidenced by the peace bond, it is a breach of contract.

Again, the law fixes the rates which may be charged by common carriers for particular services, and makes it criminal to make higher charges on that account. A shipper tenders freight to be carried, and the company gives him a bill of lading setting out the lawful charges. The goods are carried, and the shipper tenders the lawful and contract price of carriage and demands the goods. The company demands a higher rate, and refuses to deliver the articles. Here the overcharge is a violation of criminal law, a crime, also a breach of the legally imposed duty to carry at the rates fixed by law, a tort, and of contract duty evidenced by the bill of lading, a breach of contract.

In such case the State could prosecute for the crime and the

individual could sue for the tort, or breach of contract, as he should choose. The criminal prosecution and the civil suit, while growing out of the same transaction and supported by the same evidence, would have no other connection. The prosecution for the crime would not affect the civil suit, nor could the latter affect the former. The judgment rendered in either could not be used as evidence in the other, but each must be tried and determined according to the evidence introduced in it. The shipper could not have two recoveries and satisfactions. In many States he could sue and embrace two counts in his petition, and thus present both phases of the case to the court, and could recover on either, but as the measure of damage, in both aspects of the case, would be the same, he could have only one judgment and payment. If he sued on either the tort or breach of contract, without joining the other, this would practically be an election of remedies, which would, ordinarily, prevent a suit on the other.

These illustrations will make plain the exceptional cases in which the same act may be looked at from three different points of view; crime, tort, and breach of contract. It is quite frequent that the same act, or omission, is a crime and a tort. This is true of all intentional unlawful injuries to the person, all cases of theft, etc.

While it is true that the same act or omission may be both a tort and a breach of contract, it is still true that no act or omission which is merely a breach of contract is ever a tort. Unless there be a duty imposed by law, not depending directly on contract, there can be no tort, so that in all instances the act, or omission, in its tort aspect, must be a violation of a legally imposed duty.

We have found that rights and duties between any particular individuals change with every change in the legal relations which exist between them; and as the differences in legal relations often arise as a result of contract, it results that the legally imposed duty growing out of the new relation which the contract has created between the parties is in this indirect sense, dependent on contract.

To illustrate: The law fixes, by general rules, the respective rights of master and servant, and their duties. Ordinarily, these may be modified or changed by agreement between the parties;

but, in actual life, not one contract of hiring in hundreds attempts anything of the kind, and the legally imposed conditions exist unchanged. Now, the rights and duties of the parties are fixed by law, and if either of them violates the right of the other, thus fixed, he commits a tort. This tort would not have been possible but for the contract, by which the one became master and the other servant; yet the terms of that contract did not expressly cover the right violated. The same is true as between passenger and carrier.

In the cases in which parties enter into some special relation and agree on their rights and duties therein, and make the agreement to correspond exactly with the law fixing such rights and duties, the rights and duties may be said to have a dual basis, one contract, and the other tort law. A violation of these duties would, in such case, be both a breach of contract obligation and a tort. The wrong would be a breach of contract, but not a *mere breach of contract*, for in its other aspect the wrong is a tort. This is what Mr. Cooley means when he says a tort is a "wrong not consisting in a mere breach of contract."

How Torts May be Committed.

Mr. Cooley tells us that "one may become liable in an action for tort:

(1) "By actually doing, to the prejudice of another, something he had no legal right to do.

(2) "By doing something he may rightfully do, but wrongfully or negligently doing it by such means, or at such time, or in such manner that another is injured.

(3) "By neglecting to do something which he ought to do, whereby another suffers an injury."

This statement is very broad; but, for general purposes, it may be accepted as correct.

The wrong may be either doing or failing to do. This is the same idea that Mr. Pollock expresses in his definition in the terms "act or omission." This is embraced in Judge Cooley's definition by the word "wrong," though the idea is not made prominent by him in that connection.

In either case, the act, or omission, must be a violation of a legal right. The fact that one does, or omits to do, and that injury results, is not sufficient. This might be an inevitable ac-

cident, or the act done might be in the proper exercise of a legal right or performance of a legal duty.

The Nitroglycerine Case (15 Wall.) is a fine example of the first. Shooting a person in self-defense is an example of the second, and the execution of a prisoner under legal sentence is an example of the third. In each of these cases there is an act performed by one, directly and proximately resulting in injury to another, but no one of them is a tort, for the element of breach of legal duty is wanting in each.

As I understand Mr. Cooley's statement, quoted above, in the first subdivision he includes all acts which are in themselves violations of legal duty, no matter how performed; as, if A shall trespass on B's property, or convert it to his own use. Here the whole enterprise is unlawful, and he has no right to do the thing he has undertaken.

In the second subdivision, he includes those cases in which the general purpose and enterprise is lawful, and within the legal right of the person undertaking it, but in carrying out this lawful purpose he does, or omits, something contrary to his legal duty; as in the negligent operation of a railroad train on the road of the company. Here the company has the right to run the train, but in the particular case under investigation one of its employes does some act contrary to his legal duty, and damage results. Here the doing of the thing undertaken by the company, viz.: the running of the train, was lawful, but the manner in which it was done was unlawful.

In the third subdivision, he includes omissions of legal duty, or ordinary cases of negligence.

My own ideas on this subject have been indicated in previous chapters. They may be briefly stated thus: No act, or omission, can be a tort, unless it is a breach of legal duty. The respective legal rights and duties existing between any two persons depend upon the conditions of fact, existing between or regarding them. Any act, or omission, which violates a non-contractual right of the one, and the correlative legal duty of the other, and which directly results in injury to the one having the right, is a tort. In the great majority of cases, whether or not the act, or omission, is a violation of legal duty depends on the nature of the act, or omission, without reference to the motive actuating it.

In some instances, an act, or omission, may be, in its nature, a technical violation of another's right, yet for considerations of public policy this invasion is ordinarily excused and not declared unlawful; but this excuse will be withdrawn if the act, or omission, be accompanied with an evil motive. In such cases, whether or not it is unlawful will be determined by the motive actuating it. When it is unlawful on this account, of course it becomes tortious, and the injury directly resulting must be compensated for.

STATUS AS AFFECTING PARTIES TO TORTS.

The Party Injured.

The rule of general, if not universal, application is: All persons, natural or artificial, may have and enjoy legal rights, and have redress through the courts for violations thereof.

This rule embraces the Federal and State Governments, public municipal corporations, as counties, cities, towns, etc., private corporations lawfully organized, or existing *de facto,* partnerships and natural persons, whether *sui juris* or laboring under disability in law or fact, or both, whether resident, or nonresident. The only exceptions to this rule, if there be exceptions, are found in the case of an alien enemy, and certain private corporations: (1) Those which are not entitled to protection under the Federal Constitution, either on account of their own nature, or of the particular transaction out of which the litigation arises. (2) Those which are forbidden by law to acquire or hold property of certain designated kinds. But, even as to these, their property would be protected by the State from unlawful interference by individuals, and would only be subject to confiscation, forfeiture, or escheat to the proper government.

The Wrong-doer.

Sovereignty.—The highest and most direct representatives of sovereign power, that is, the Federal Government and the several State governments, are immune from suit for tort, unless the government involved shall have given express permission for the suit to be brought. If it does give such permission, it is, in the main, subject to the same rules of substantive law as a private party would be, under similar facts.

Counties.—Municipal corporations proper, such as counties,

school districts, etc., are immune from suit for tort, unless there be some constitutional or statutory provision making them liable.

Incorporated Cities and Towns.—These may be created in two ways: (1) By special charter; (2) under general incorporation law. It was thought, at one time, that this made a difference in their liability for torts, but it is now settled that it does not, except in such special matters as may be specifically set out in the special charter of a particular city. The law, as to these corporations, is somewhat unsettled. The general doctrine is that, as to their business affairs and interests, and torts committed in connection with or in prosecution of these, they are liable; while for wrongs committed in exercise of their general governmental power and duties, they are not. Thus, we find that a city is not responsible for the illegal acts of a police officer in making arrests, nor in performing other acts in connection with his office, nor for the destruction of property to prevent spread of fire. But for injuries resulting from defective conditions of the streets, the city is liable, provided the defect is the result of negligence on its part.

Public Officers.—Passing from these public and quasi-public corporations, we come to public officers. These are persons to whom has been delegated the exercise of certain governmental powers. Within the limits of the powers thus delegated, they represent sovereignty, and they are free from any liability for acts done lawfully, within the scope of their authority. When they go beyond this proper sphere and do, or attempt to do, acts under pretext of lawful authority which are not so in reality, they may or may not be liable, according to the nature and circumstances of the case. If the duty attempted, or pretended to be performed, is ministerial, for any wrongful act or mistake resulting in injury to another the officer is responsible. If the duty be not ministerial, but is one which requires the exercise of official discretion, as that term has been explained, there is no liability, unless it may be in a few extreme cases.

Natural Persons.—Every normal person is responsible for his own wrongful conduct.

As a rule, insane persons are responsible for actual damage occasioned by their tortious conduct. In those exceptional cases in which evil motive or guilty knowledge is an element of a tort,

they can not commit them. They are never responsible for exemplary or punitive damage.

Infants are responsible for their torts. When they are too young and immature to entertain evil motive, they can not commit a tort having such an element. If, however, they have the mental capacity to entertain such motive and, in fact, do so, they are then responsible just as adults. Parents are not, as such responsible for the torts of their children.

Married women are responsible for torts committed by them in the same way and to the same extent, as other persons, with the single exception of torts committed under compulsion of the husband, in which case they are excused.

Combinations of Natural Persons.—Private corporations, including those organized for strictly private purposes and those organized for public purposes prosecuted for private gain, are responsible for torts committed by their proper representatives in the prosecution of their business. The stock-holders, board of directors, and general officers of a corporation are practically considered as the corporation itself when acting for it and within the scope of their authority, hence the evil motive of such parties is regarded as the evil motive of the corporation. Subordinate officers, agents, and servants are regarded, not as the corporation, but as its substitutes. The company is responsible for their torts committed within the scope of their employment on the same principles and to the same extent that a natural person is responsible for the tort of his agent or servant.

Partnerships are regarded as liable for the torts of any member of the firm, committed within the scope of the partnership business, and for the torts of their agents and servants just as a natural person would be.

In joint stock companies, not incorporated, the management of the business is entrusted to designated officers and representatives of the concern. For torts committed by them within the scope of the business and of their employment, the funds of the association are responsible.

In ordinary combinations for religious, charitable, or other nonbusiness purposes, the law does not recognize the different members by reason of their membership, as either agents of the concern or of the other members, and for torts committed by the

members of such body in connection with the enterprise, only those who do the wrong or advise or encourage or receive benefits from it are held responsible.

Persons among whom there is no combination or general purpose, but who combine together for the purpose of committing a tort or a series of torts, are regarded simply as joint tort-feasors and are responsible as such. The very general rule being that each and every one is responsible for the entire damage done by all.

For Whose Tortious Conduct One is Responsible.

(1) Every normal person is himself responsible for his own wrongful conduct. Every one is responsible for torts in which he joined, or participated. All are regarded as participating in a tort who actually join in it, or who aid, counsel, or advise its commission. This results from the doctrine of co-operation.

(2) The husband is responsible for the torts of the wife. This results from their legal identity.

(3) The parent is not, as such, responsible for the tort of the child, nor the child for the tort of the parent.

(4) The master is responsible for the tort of the servant, committed within the scope of the latter's employment. As between them and persons having notice of the facts, the scope of employment is fixed by the agreement between the parties and the master's instructions to the servant unless the instructions seek to free the master from duty already owed by the master to the injured person in which case they are of no effect. As to other persons, the scope of the employment is what a man of ordinary judgment and capacity would reasonably conclude it to be, from all the facts and circumstances of the case. The foregoing liability is based upon the doctrine of substitution. The master is also responsible for the default of the servant, when he has entrusted him with the discharge of a duty resting on the master, and the servant has failed to perform that duty. This liability is based on nonassignability of duty.

(5) The rules on this subject governing principal and agent are the same as those between master and servant.

(6) Independent contractors and employers are neither responsible to third persons for the torts of the other, simply by reason of their relation. If, however, they act with common un-

derstanding, both will be liable; or, if the contractor is employed to discharge a duty resting upon the employer, and fails, both are responsible.

Damages.—In each of the cases mentioned above in which one person is held liable for the tort of the other, the liability extends to full compensation to the injured party for the damage sustained. This is true whether the particular tort involve the existence of evil motive or not. For the purpose of adjusting and determining compensation for actual injury the law imputes the evil motive of the actual tort-feasor to him who is responsible for the wrongdoer's conduct.

When we pass from compensatory to exemplary damage, the rules as to liability differ. The general doctrine is that a person who has no actual evil motive in connection with the wrongdoing is not responsible for exemplary damages.

To this rule there are several exceptions:

(1) The weight of authority holds that if persons co-operate together in the commission of a tort for the furtherance of some joint purpose or to accomplish any end desired by all, the evil motive of any one of the joint wrong-doers will be imputed to each of his associates and each tort-feasor will be held responsible to the same extent as the most guilty. The less guilty having purposely co-operated with the most guilty are by the weight of authority placed upon the same footing as they.

(2) The existence of the wife being legally merged into that of the husband, her evil motives are regarded as his and he is responsible for exemplary damages for her torts just as if committed by himself.

(3) The master is not, by reason of the relationship, responsible for exemplary damages for torts committed by the servant with evil motive, not participated in by the master. The same is true as to principal and agent. In either case, however, if the master or principal participates in the evil motive of his representative at the time the wrong was done, or if subsequently, with full knowledge of the facts, he approves and ratifies the wrongful conduct of his representative, he makes the evil motive his own and is responsible for exemplary as well as actual damage.

For What Consequences of Conduct Liability Attaches.

Each wrongdoer is legally responsible for all the injurious consequences of his conduct which he intended to result therefrom, and also for those consequences which a man of ordinary prudence and judgment, situated as he was at the time, would reasonably have anticipated as its natural and probable results. This is simply an application of the doctrine of proximate cause in the law of torts. Under it the intended wrong, however accomplished, must be compensated for, and unintended injuries, which are both natural and probable results of the wrong, must be made good. In the case of intended wrongs, the wrong-doer cannot avoid liability by saying the hurt was not a reasonable or natural consequence of his conduct. He designed to accomplish the result and did so, and is therefore liable. In the case of injury resulting as the natural and probable consequence of the wrong, he cannot escape liability by saying that he did not intend the hurt. The law makes it the legal duty of every one to anticipate the natural and probable consequences of his conduct, and holds him responsible for such consequences so far as a reasonably prudent person, situated as he was, would have foreseen them. The law having imposed the duty of care will not permit the wrongdoer to escape liability by proving that he did not comply with his legal obligation in that respect.

The law, however, limits liability for unintended consequences to those which should have been foreseen as both natural and probable. It must draw a line of separation somewhere, and practical justice, in a very large majority of the cases, is subserved by including natural and probable consequences and excluding all results which do not have both these qualities.

DISCHARGE OF LIABILITY FOR TORT.

There are a number of ways in which liability for tort may be discharged. The most common of these are voluntary settlement between the parties and suit and satisfaction of the judgment.

Where all the parties interested are *sui juris*, they are as free to contract with regard to liability for tort as for any other matter. Where they voluntarily agree upon the amount of damage and pay the amount stipulated, the matter is at an end. If, however, they simply agree upon the amount and the wrongdoer

promises to pay it in the future, if he fails to pay at the agreed time, this gives the injured party the option to insist on the promise, or to repudiate the agreement and sue for the tort.

If there are a number of tort-feasors, satisfaction in full by any one of them satisfies the claim against all. Thus, if two men commit a battery upon another, and the injured party has a settlement with or sues one of them and receives from him the money, either agreed upon as full compensation, or adjudged by the court as such, this discharges all liability on the part of both wrongdoers.

All joint tort-feasors are regarded as liable to the full extent of the damage. The injured party may sue them all together, each by himself, or in such groups as he sees fit. If he sues them separately, neither these suits, nor the recovery of judgment in some of them will interfere with the prosecution of the other suits. The plaintiff is entitled to judgment against each of the wrongdoers.

The injured party is, however, only entitled to one satisfaction. If he collects in full any one of the judgments, this cancels the judgment for damage in each of the other cases. He could still collect the costs in each case. The plaintiff has the privilege of selecting which judgment he will collect. If the judgments differ in amount the tort-feasors cannot compel the plaintiff to receive payment of any but the largest judgment.

Liability for tort may be discharged by the running of the statute of limitations, or by marriage between the parties, and, at Common Law, by death of either of the parties if the tort invaded a personal right.

Indemnity and Contribution.

Indemnity is payment in full of money which one person has paid out in the settlement of a legal demand against another. Contribution is partial payment of money under such circumstances.

The general rule is that neither indemnity nor contribution is allowed between or among tort-feasors. The basis of this rule is the old principle that no cause of action arises in behalf of a person on account of a legal wrong committed by him, or for which he is legally responsible. Stated a little differently, the rule is that the law does not undertake to enforce settlement nor

adjust accounts growing out of intentional legal wrongs between the wrongdoers. Wherever this doctrine is applicable, neither indemnity nor contribution is allowed.

It, however, sometimes occurs that none of the tort-feasors are intentional wrongdoers, and still more frequently that some of the tort-feasors are guilty of the actual wrong, while others are in fact innocent of any personal wrong doing but are held responsible to third parties on account of some relation between them and the wrongdoer. Occasionally the actual wrongdoer is innocent of any wrongful intent, and is hence less guilty than one who instigated or caused him to commit the wrong. In such cases as these the law sometimes admits indemnity or contribution according to the facts of the case.

If two persons buy a piece of property in good faith and pay for it, actually believing the title to be good and take possession of it and the true owner should sue one of them only, and recover and collect damages, the law would permit the man paying the damage to compel the other party to contribute his share of the loss.

If a master employ a servant and gives him proper instruction not to commit certain wrongful acts, and the servant, nevertheless, does commit such acts to the injury of another under such circumstances that the master is compelled to pay the damages, the law permits the master to recover the entire amount of damage from the servant.

If a master is in possession of, and claims a piece of property, and orders his servant to perform some act upon the property which damages it, as quarrying rock, the true owner of the property could compel the servant to pay him the full amount of damage. The command of the master and the good faith of the servant would be no defense against the injured third party, but under such circumstances, the servant could compel the master to indemnify him for the full amount of the damage.

These illustrations show the spirit of the rule allowing adjustments through the courts between persons, neither of whom is an intentional wrongdoer, and in favor of the less guilty of two wrongdoers, against the more guilty.

CHAPTER III.

SOME NAMED TORTS.

We will next consider a few named torts which affect both personal and property rights, and then take up some affecting each of these in the order named.

NEGLIGENCE.

The first is Negligence. We have found that tortious conduct may be either positive, by acts, or negative, by omissions, that is, by the doing of a thing forbidden by law, or failing to do something required by law. The affirmative acts are so many and so different that the law deals with them under distinct heads or names, but it deals with a great many omissions under the one head of negligence.

Definition.

Negligence is frequently defined as, "Failure to use that degree of care which the law imposes on the party, as a legal duty, under all the circumstances of the particular case."

This degree of care varies with the different circumstances and facts of each class of cases. Sometimes specific acts are required: in such case failure to meet the requirement is negligence *per se*, or negligence in law. Most frequently, however, specific conduct is not required, but the degree of care to be observed is prescribed.

Negligence is used to cover failures of legal duty, intended as well as inadvertent. This is true, at least to the extent that a charge of negligence is supported by proof of the existence of a legal duty and failure to perform it, and the defendant can not relieve himself from liability by showing that the wrong was done intentionally.

The general standard of care is such as a reasonable and ordinarily prudent person would have observed, under all the circumstances of the case. This varies with the facts of each case.

Where the relations between the parties are general, that is, those incident to ordinary social conditions, a less degree of care is required between them than is in those cases where special relations exist, involving confidence; or where weakness or incapacity on the part of one of the persons is shown, as in case of the conduct of an adult toward young children, or adults subject to some infirmity, permanent or temporary, known to the other party; or in cases where one is, for the time being, in the power and control of another, as carrier and passenger, attorney and client, doctor and patient, etc. It is manifest that an ordinarily prudent and reasonable person would exercise different degrees of care under these different circumstances, and so the care required by law varies accordingly.

Negligence as Matter of Law or of Fact.

There are some classes of cases in which the facts indicate so clearly the degree of care which a reasonably prudent person would use that the law itself applies the standard above indicated, and announces the result in a fixed rule of law. In all other cases the law announces the controlling principles, and requires the judge to instruct the jury regarding it, and requires them to make the application, and to determine, under the particular facts of the case, whether the person whose conduct is under investigation did or did not exercise such care as an ordinarily prudent person would have, under the same circumstances. In those instances in which the law has itself applied the principle and announced the rule, such rule is controlling, and must be obeyed by both judge and jury. To illustrate: The law says, when one person places himself in the care of another to be carried as a passenger for hire, that an ordinarily prudent person acting as such carrier would use a very high degree of care for the safety of the passenger, and so it announces, as a rule of law in such cases, that the carrier must use the highest practical care to secure the passenger's safety.

Again, in the case of mature persons and young children, common experience teaches that a man of ordinary prudence exercises more care for the safety of young children with whom he comes in contact than he does as to adults. The law recognizes this practical condition, and says that incapacity to care for one's self must be taken into account, when the safety of young

children is concerned, and will hold that to be negligence, in the case of such child, which would not be in case of an adult.

Sometimes the legislature makes this application, and declares certain acts or omissions are negligent. Usually, such statutes are based upon the principle we have been discussing. That is, in the judgment of the legislature, a reasonably prudent person, under given circumstances, would do certain things, and hence it declares that failure to do these things is negligence. Again, in other instances, the legislature, without declaring that certain acts or omissions shall be negligence, recognizes the degree of care which would be used by a person of ordinary prudence, under certain circumstances, and declares, as a matter of law, that such care must be observed by all persons, under such circumstances.

More frequently, however, the degree of care is not indicated or announced as a matter of law, further than this is done in announcing the general doctrine that every person must observe that degree of care for the safety and well-being of others which a reasonable and ordinarily prudent man would observe, under all the circumstances of the case, and then leaving to the jury to say, in each case, whether that degree of care has been exercised.

In all cases, the degree of care required, whether this has been specifically designated by the courts or legislature, or is expressed in the general doctrine of such care as an ordinarily prudent person would use, is a matter of law, and whether or not the required care has been used, in any given case, is always a matter of fact for the jury, except in the few instances in which the legislature has specifically enacted that doing an act, on the one hand, and not doing it, on the other, is negligence *per se*.

Right to Contract Against Liability for Negligence.

Many nice questions arise as to the right of parties to vary, by contract between them, these general rules as to the degree of care to be observed between them as incidental to certain relations. In other words: Will the law permit parties, by agreement between them, to change, as between themselves and in regard to certain matters, the general rules of law as to the care to be observed between them? In many instances it will; in some instances, from considerations of public policy, it will not.

It is not unusual to see expressions in law books that a per-

son is not permitted to relieve himself, by contract, from the consequences of his own negligence. This must always be taken in connection with the kind of care under consideration and the facts of the particular suit.

On the one hand, we have cases of common carriers of freight. At Common Law they are responsible for the safe carriage and delivery of the goods within a reasonable time, and could only be relieved from such responsibility by act of God, the public enemy, inherent vice in the articles transported, or wrong by the shipper affecting the thing shipped. This extreme liability at Common Law may be limited to the point that it reaches the carrier's negligence, and beyond that it can not go, a contract to relieve a carrier from the results of its own negligence being absolutely void.

On the other hand, the Common Law permitted persons entering into the relation of master and servant to make such modifications of the ordinary rules as to care between them as they saw fit; provided they did not undertake to consent to willful wrong, mere inadvertence could be contracted against.

Again, in contracts of fire insurance, the insuror is never relieved from liability because the fire resulted from mere inadvertence of the insured. Willful wrongs of the insured are not covered by the contract, but the very purpose of agreement is to cover loss from carelessness.

These cases illustrate the wide extremes of the law on this question.

The practical result of the cases seems to be that liability for negligence consisting in mere inadvertence may ordinarily be contracted against. In exceptional cases, it can not. Liability for negligence consisting in willful wrong-doing can not be contracted against.

This practical difference between inadvertence and willful wrong is recognized in other ways: Contributory negligence of the injured party, or of some one for whose conduct he is responsible, will constitute a complete defense in cases founded on inadvertence, but is never a defense in cases of willful injury. Exemplary damages are never allowed for inadvertence, unless it is so great as to evidence gross recklessness, but are always recoverable for willful injuries.

Remote and Proximate Cause.

As negligence, to be actionable, must always be a breach of legal duty, so it must also be the direct and proximate cause of the injury complained of. It is but the negative way of violating a legal right, and the same doctrine as to remote and proximate cause and the natural and necessary consequences flowing from it apply that do in affirmative torts. It is not required that the injurious consequences should have been foreseen, nor that they necessarily must have resulted from the failure of duty. It is sufficient if they result naturally and directly, without the intervention of any other independent agency, and might reasonbly have been anticipated as a consequence of the negligence.

If an independent agency intervene, this will break the causal connection, unless, under all the circumstances of the case, this intervention itself should have been reasonably anticipated. The usual illustration of this is the famous "squib" case. In that case one person threw a lighted squib, or explosive, into a crowd, not caring upon whom it might light. The person on whom it fell threw it from him onto some one else, who in turn threw it on another, until finally it exploded, and injured one who was, primarily, in no danger from it. He sued the person who threw it originally. The latter pleaded that he was not the person who threw it on the plaintiff, and that his act did not bring about the injury. The reply was: "But for your wrongful act, the injury would not have occurred; and any reasonable person would have foreseen that each man on whom the squib was thrown would throw it from him, and that such action was, therefore, within the scope of the consequences which an ordinarily prudent person would have looked upon as probably and naturally resulting from the defendant's act," and he was held liable.

So, in this tort, as in all others the wrongdoer is legally liable for all the injuries directly and proximately resulting from the wrong.

Failure of Duty Necessary to.

As stated above, the law requires every person to use such care for the safety and well-being of others as an ordinarily prudent person would have used, under all the circumstances of the case, and failure to use such care is negligence. For negligence to be actionable in behalf of any particular person, it must be a failure

to perform some duty due to him. Often the same acts or omissions will be actionable negligence as to one person, but not to another. When this is true, it is always because there are different relations existing between the parties. The most frequent and perhaps the clearest illustration of this, is found in the operation of a railroad passenger train. The passengers pay fare to be carried from one place to another. The company undertakes to carry them in consideration of this fare so received. This contract it cannot possibly fulfill without employing others to manage the train, so it takes of the money received from the passengers and pays other persons to act for it in running the train, thus enabling it to meet its obligations. It is perfectly apparent that the relations between the company and these classes of persons are very different. The law recognizes these differences, and says the care it must observe for the safety of these classes shall be different. As to the passengers, as we have before stated, it requires the highest degree of practical care; as to the servants, only ordinary care. Now, it may readily be conceived that an accident might occur under such circumstances as to be actionable negligence as to the passengers which would not be such as to the servants. The same thing is true as to the care of one's own premises. The owner of land must use ordinary care not to have his premises in such a condition as to result in injury to his servants or guests, and if he does not do this, and injury results to such a person, he is responsible. But he does not owe this same duty to trespassers, and if one unlawfully comes on his premises and is injured there, he can not recover, unless he can show such extreme neglect and indifference as to be equivalent to willful injury.

Contributory Negligence.

This is negligence on the part of the person injured, combining with the negligence of the party complained of, and directly and proximately contributing to the injury. The test of negligence here is the same as applies to the conduct of the party complained of; that is, it is a failure to use that degree of care for one's own safety which a person of ordinary prudence would have used, under the circumstances of the case.

It is a complete defense against injuries inflicted by simple

negligence. It does not, however, constitute a defense against a willful wrong.

As a party's conduct is to be judged by all the facts and circumstances of the case, it follows that, if the wrong of the party complained against has put the complaining party in a position of real or apparent peril, the conduct of the complainant is to be judged by those circumstances; and, also, the frailty of human judgment is to be taken into account, and he is not, under such circumstances, to be barred from a recovery because he did not act as coolly and deliberately as he would have under other circumstances. He is required to do only what a reasonably prudent man would have done, under the facts as they reasonably appeared to him.

Imputed Negligence.

This is negligence of one person imputed or charged up to another.

We have discussed the principles on which one person is legally liable for the conduct of another. These rules apply here. The master is responsible for the negligence of his servant in the conduct of his business; the same is true of principal and agent. Of course, it must be negligence within the real or apparent scope of his authority. Ordinarily, the husband is responsible for the negligence of the wife, on the principles already discussed. The parent, as such, is not responsible for the negligence of the child, nor the child for the parent.

The negligence of each joint tort-feasor is imputed to all the others if the facts are such that the omission comes within the scope of the common enterprise. This doctrine also applies as to contributory negligence; and if one for whose conduct the injured party is responsible be guilty of contributory negligence, this defeats the liability.

It has been held that the negligence of the husband contributing to the injury of the wife will ordinarily defeat her right to recovery, though his joinder with another in an intentional wrong against her will not.

Contributory negligence of a servant will defeat recovery by the master; common or private carriers for hire are not servants of their passengers, and if they are guilty of such conduct as to

constitute contibutory negligence, unless it is participated in by the injured party, it will not defeat recovery by him.

Remedies.

Remedies for negligence are adapted to the particular case. The law enjoins the use of care both as to the persons and the property of others. Whenever the legally required care is not used and injury directly results, whether it be to person or property, appropriate remedy will be awarded. In the great majority of cases this remedy will be moneyed compensation for the hurt sustained. If the injury is to property the amount is not usually difficult to ascertain. If the thing be entirely destroyed the ordinary measure is its fair market value at the time and place of its destruction. If it be not entirely destroyed, but injured, the measure ordinarily is the difference in the fair market value of the thing in the condition in which it was before it was hurt and after the injury with reasonable compensation for extra care and expense made necessary by the hurt.

If the injury is to the body, wages for the time absolutely lost and compensation for the diminished wage earning capacity in the future, if any, and for physical pain, mental suffering, and the expense reasonably incident to the injury, such as medical expenses, etc., are allowed. The weight of authority is against allowing damages for hurt to the mind occasioned by negligence unless it is accompanied by, or results from, or produces physical hurt.

In some instances, in which the negligent conduct has resulted in establishing injurious conditions continuing in their nature, the law will either allow compensation for the future hurt or issue an injunction requiring a change of the conditions. This is frequently illustrated by negligent construction of railroad tracks and embankments. In cases of this sort, the court not infrequently awards damage for the injury already sustained and requires a change in the roadbed so as to obviate future injury.

NUISANCE.

Definition.

A number of definitions from different authors will be given. Blackstone: "Anything that worketh hurt, inconvenience, and damage. Anything done to the hurt or annoyance of the lands,

tenements or hereditaments of another. * * * And, by consequence, it follows that if any one does any act, in itself lawful, which being done in that place necessarily tends to the damage of another's property, it is a nuisance, for it is incumbent on him to find some other place to do that act, where it will be less offensive. To constitute a nuisance, it is not necessary that the annoyance should be of a character to endanger health; it is sufficient if it occasions that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. Even that which does but cause a well-founded apprehension of danger may be a nuisance."

Cooley: "An actionable nuisance may be defined to be anything wrongfully done, or permitted, which injures or annoys another in the enjoyment of his legal rights."

Bishop: "A nuisance of the sort which is to be redressed at the suit of the injured party is anything done on one's premises, or elsewhere, or put into circulation, or omitted to be done, contrary to legal duty, wherefrom, through the separate action of nature, or the common course, an injury follows to or directly menaces another. Or it is any public nuisance which has wrought a special wrong to the individual."

Jaggard: "Nuisance is a distinct legal wrong consisting of anything wrongfully done, or permitted, which interferes with or wrongfully annoys another in the enjoyment of his legal rights."

Pollock: "Nuisance is the wrong done to a man by unlawfully disturbing him in the enjoyment of his property, or, in some cases, in exercise of common right. The wrong is, in some respects, analogous to trespass, and the two may coincide, some kinds of nuisances being also continuing trespass. The scope of nuisance, however, is wider. The conception of a private nuisance was formerly limited to injuries done to a man's freehold by a neighbor's act; stopping or narrowing rights of way and flooding lands by the diversion of watercourses seem to have been the chief species. In the modern authorities, it includes all injuries to an owner or occupier in the enjoyment of the property of which he is in possession, without regard to the quality of his tenure."

Addison: "In legal parlance, a nuisance may be said to be any obstruction to or injury of the legal rights of another resulting from the wrongful or unlawful enjoyment by one of his own prop-

erty, real or personal, or from his own unlawful or indecent personal conduct. Such injuries always arise as a consequence of an act done outside the property injured, and never from a direct forcible act; injuries arising from a direct forcible act of a person amount to trespass, and can only be compensated for by an action of trespass; but when a man does that upon his own premises, or upon public property, that results in injury to another as a direct and immediate consequence of such act by the invasion of some legal right of another, the act constitutes a nuisance, and is compensable only in an action on the case. Thus, if a man erects a dam across a stream that flows through his land, and thereby raises the water of the stream so as to flow the land of those above him on the stream, this is an invasion of the legal rights of such supra-riparian owner as constitutes a nuisance, or so as to cut off its natural drainage. * * * So, if a person turns the surface water of a stream from his premises so that it escapes over the lands of another in a different manner from which it would naturally go; or, if he carries on a noxious trade on his premises whereby the air that floats over another's land is corrupted so sensibly as to impair its comfortable enjoyment. Thus, it will be seen that the term nuisance covers only that kind of injuries that result from a use of one's premises that thus invade the legal rights of another not as a direct act, but as the result of an act."

Wood: "Nuisances arise, as has been before stated, from a misuse of property, real or personal, or from a person's own improper conduct.

"But the idea of nuisance is generally associated with, and more commonly arises from, the wrongful use of real property. It is only in special and infrequent instances that it arises otherwise, which will be referred to and fully explained later. They are always injuries that result as a consequence of an act done outside of the property injured, and are the indirect and remote effects of an act, rather than a direct and immediate consequence. It is a species of invasion of a person's premises by agencies operating entirely outside of the property itself, and imperceptible and invisible, except in the results produced, which are often themselves invisible, and whose presence at times is perceivable by one of the senses, and that usually not by the sight. A trespass is a direct and visible invasion of one's property, producing direct and im-

mediate results, and consisting, usually, of a single act; but injuries of the class mentioned are indirect, and the consequences of a wrongful act, and continuous, and the fact of their continuousness is one of the many reasons that make them a nuisance."

From these and other authorities the following definition is suggested:

An act, or omission, not in itself or its result a forcible invasion of another's rights, either of person or property, but which brings about a condition of things which, by the operation of natural laws and forces, proximately occasions a violation, actual or imminent, of another's legal rights in the use and enjoyment of his person or property.

Analyzing this we find following elements:

(1) Act or omission. Affirmative, doing; passive, omitting.

(2) Is not a trespass or direct invasion, no application of physical force, as that term is commonly understood.

(3) Establishes conditions, which under operation of natural laws, work an injury to another, or seriously threaten to do so in the enjoyment of his personal property.

(4) The injury may be either to the person, affecting health, or comfort, as bad odors or noises; or to the morals, as a disorderly house; or to property, by rendering it unfit for use, and thus lessening its enjoyment and value. It may be either existing or imminent.

Nature of the Injury.

As the act usually is not one involving a direct application of physical force, the disturbance is usually in the use and enjoyment, and not of the possession. Whether any particular act, or omission, having this result is a nuisance is dependent on the law's recognition of the complainant's rights.

Names are a secondary matter; it is substance which should be regarded. There are some instances of overlapping in the use of legal terms, here as in many other cases; this is comparatively unimportant.

In technical strictness, one has no right to interfere, in any way or to any extent, with the person or property of another; but, as this rule would practically cut off all social intercourse and throw every one back upon himself for all he had and for the supplying of all his wants, it would destroy the conditions which the law is

made to regulate. It is never enforced to its fullness, nor carried to its logical results. The result is a number of adjustments, more or less systematic in their nature, yet far from entirely scientific or uniform. These are, in the main, the result of the efforts to do practical justice in individual cases varying widely in their facts and environment, and decided by judges widely separated from each other in time and locality, and differing in education, judgment, and sympathy, and the wonder is that the confusion is not greater even than it is.

We have seen that even in the forcible entry and destruction of one's property the law gives license, if the emergency demands it. One person may enter upon the land of another to obtain a vantage point from which to fight a fire on the premises of a third party, and he thereby incurs no liability. He may even tear down and destroy the property of another, if necessary to prevent the spread of a fire. So one could kill a horse or dog of another affected with hydrophobia and incur no liability.

This right of doing that which damages another to protect the public interests, or, in some instances, greater injury to private parties, is not confined to any one person. It exists in every one, and constitutes one of the limitations which the law recognizes upon the generally protected right of exclusive ownership and dominion.

Again, as to the person, the law licenses such invasion of the technical right of immunity from interference as is involved in the ordinary contacts of social life.

These same principles are recognized and applied, with more or less consistency and uniformity, in regard to those rights which are usually affected by nuisances.

Take, for instance, the right of quiet and repose. In strictness, it might be said that no one should be permitted to invade his neighbor's premises with any sound whatever; that the making of any noise on the premises of another, or so near thereto that the sound would reach to it, so as to be audible to the human ear, would be a disturbance of his ether, or whatever the medium through which sound is transmitted. Technically, this is true, yet it is a scientific, physical, and practical impossibility for one to live at all under such limitations. Some adjustment must be made, and the practical question is: Where shall the line be

drawn? As the use of one's own property in any way necessarily involves some disturbance of the rights of others in their property, how far shall the active disturbance be allowed to go before it becomes a legal invasion?

No answer of universal application has yet been given. The most usual expression is found in the old maxim that each shall so use his own as not to injure another. This, to a large degree, shifts the inquiry to what is meant by injure; and this, in turn, is made to depend on the facts of each particular case, judged in the light of analogous cases. Notwithstanding this general uncertainty, there are some doctrines fairly well settled as to particular wrongs of this nature.

We will consider some of these, and attempt to discover these rules in the particular instances, and then, if practicable, to deduce from them the principles common to them all, if there be any such.

Natural Conditions Not Nuisances.—The first of these is that the injurious condition, to be a nuisance, must result from the act of man; that is, a condition which is purely natural is not an actionable nuisance. Thus, if one owns a swamp which is, in its natural state, unhealthy and injurious to the adjacent property, he is not legally liable, even though he could drain it and relieve the situation at small expense; unless he or his predecessors in estate have done some act to increase or augment the naturally bad state of affairs, he is not liable. If, however, the owner has done anything to aggravate the natural conditions, then he is responsible for the whole of any damage afterward occurring.

Must Interfere With Ordinary Person.—Another rule is that the annoyance or inconvenience must be of such a nature as to affect the average or ordinary person; an odor or noise may be a real annoyance to a person of extremely sensitive nature, which an ordinary person would look upon as one of the ordinary incidents of life. This is not true when health is involved, but only in those cases in which the act or omission is one of annoyance or inconvenience simply. This is a combination of the two legal rules, that the law's standard of measure is the average man, and that the law does not take cognizance of little things.

Injury Must Be Direct Result of Wrong.—Another of these rules is that the annoyance or injury must be the direct and proxi-

mate result of the acts or omissions complained of. Sometimes there is some difficulty in applying this doctrine. As the act complained of is not in itself an invasion of another's right of person or property, it is sometimes perplexing to see how we can call the annoyance a direct result. An examination of the definition will be helpful here. A nuisance is an act, or omission, which, though not directly an invasion of another's rights, brings about such a condition of affairs as, by operation of natural forces, works an injury. Every one is supposed to regard the laws of nature in making his calculations as to probable results of his conduct, and as nuisances result from his conduct operated upon by natural laws, they are, legally speaking, the direct and proximate effect thereof. So these cases are no exception to the general rules as to remote and proximate cause.

Nuisances in Water, Light and Air.

As nuisances are usually committed off the premises affected by them, they most frequently affect one's rights in water, light, and air. These are by no means the only methods, but they are the most frequent. We have considered water rights, and so pass them by. No one has any ownership in natural air or light. They are the free gift of nature to all men, and all the right which one has in them is to use them. But this right is invaded whenever the air is so polluted with disagreeable odors or smoke as to make it unhealthy or to render its use really annoying to the man of ordinary sensibilities; and so, also, with light. The air may be so beclouded with smoke or cinders that it will obstruct the passage of light. If this is so, it will be a nuisance. The difference between raising an obstruction on one's land, so as to prevent the passage of light and air over it to the premises of another, and polluting the air on one's premises and then permitting it to pass off in this injured conditions to the land of another, is to be kept in mind. The former, ordinarily, is not a nuisance. The latter always is, if the pollution be sufficient to produce ill health, or material annoyance. The doctrine of ancient lights does not obtain in most of the States; and one, by maintaining a window near the boundary line of another's land, does not acquire a prescriptive right to continue it. The reason given in the case, and it certainly seems conclusive, is that, as the maintenance of win-

dows is not a violation of the rights of the adjacent owner, and he can not, therefore, bring any suit for closing them or to prevent their continuance, no failure to do that which he was not legally capacitated to do could justly be regarded as acquiescence on his part.

Rights of Way.

Rights of way which one person has over the lands of another are not rights of possession. While the person having the easement may pass along the way in the manner and for the purposes covered by the right, he has no legal right to stop and occupy it or to interfere in any way with the owner's use of it, so long as such use does not obstruct his lawful passage. Obstructions to such ways are, therefore, usually classified as nuisances. They usually lack the element of direct physical force which is essential to trespass.

Ways may be created by many different methods.

Public ways are, with us, usually acquired by voluntary grant by the owner of the estate, or by the exercise of the power of eminent domain.

Private ways are acquired by grant; actual, as in case of express agreement; or presumed, as in case of prescription; or by necessity, as where a person, owning a large tract of land, sells to another a smaller tract from its interior. Here, in the absence of any agreement, the law entitles the purchaser to a passway to and from his land over that of his vendor. Primarily, the vendor has the right to lay out or designate the way, but he must do this in a reasonable manner and in a reasonable time. If he does not do so, then the vendee can select a suitable way. This he must do with due regard to the rights and convenience of the vendor. It has been questioned whether the vendor who owns a large tract and sells all of it but a small portion, which is surrounded by the portion sold, has this same right, but I believe it is now settled that he has. It is immaterial how the way be acquired; if it be once lawfully established, it must be respected by all persons, and any obstruction or interference with it is an actionable nuisance. In these cases the remedy is for damages for past injuries, and usually injunction against further maintenance of the nuisance.

TORTS VIOLATIVE OF BODILY RIGHTS.

As we found in our study of these rights, much attention is given to the protection of the body. As then stated, the general rule of law is that the application of force by one person to the body of another is unlawful; but there are five exceptions to this rule: (1) When done in obedience to the law; (2) when some special relation exists between parties justifying the act; (3) when by consent or license; (4) when it is an inevitable accident; (5) when in necessary and proper defense of the person or property. If, therefore, force is applied to the body of another and does not come under one or the other of these exceptions, it is unlawful and tortious, and for injuries resulting action may be maintained. A great many of the injuries inflicted upon the body are caused by negligence, and some of them by nuisance; these need be no further considered. Some other forms of injury are so frequent that they have been classified and named. Some of these we will now take up.

Assault and Battery.

The essential elements of the tort are the same as those of the crime of the same name. A battery is the use of any unlawful violence upon the person of another with the intent to injure him. Any attempt to commit a battery, coupled with the present ability to do so, is an assault. The intent to injure distinguishes this from negligence, and the element of force distinguishes it from a nuisance. The word unlawful takes it out of the exceptions we have just considered. It is immaterial how slight or how great the force, if the intent be to injure, the act is wrongful, and the injured party may maintain an action. As this tort is always accompanied by an evil intent, both compensatory and exemplary damages may be recovered.

False Imprisonment.

False imprisonment is also a tort affecting the body. It consists in the unlawful detention of a person against his will by force, threats, or fraud, thus preventing his regulating and controlling his movements as he sees fit, subject to the just rights of others. Most frequently, this tort is committed under the guise

of official authority. It frequently is occasioned by mistake in the identity of the person whom an officer is commissioned to arrest, so that the officer having authority to arrest A, by mistaking B for A, arrests B. Here the officer has detained, and, it may be, has actually imprisoned B, when his authority was to arrest A. He had legal authority to do one thing, and does another. He is responsible.

Malicious Prosecution.

Closely connected with wrongs of the last kind is another tort, known as malicious prosecution. This is maliciously instituting a prosecution or suit against another without probable cause, and causing his arrest or the seizure of property belonging to him. In false imprisonment, the prosecution may be properly begun against a guilty party, but in the progress of the litigation some one, not really the defendant, is arrested and imprisoned. In malicious prosecution, the institution of the suit is wrongful, prompted by malice and begun without probable cause. The machinery of the law is wrongfully put in operation against one who is innocent, and whose innocence is known to the instigator of the suit. In the case of false imprisonment, the person who properly began the proceeding against a guilty party is not responsible for the subsequent mistake by the officer in misunderstanding the writ and arresting an innocent person. The officer alone is responsible; in malicious prosecution, the proceeding is begun in the due form of law, and the process in the hands of the officer commands the doing of the very thing he has done. The officer is not responsible. The wrong lies further back, with him who maliciously and without cause instituted the prosecution. He is the tort-feasor. While the institution of the prosecution maliciously, without probable cause, and the arrest of the party, are the gist of this tort, yet, from considerations of public policy, the law requires that, in order to complete the right of action for this wrong, the prosecution must have ended and resulted in the acquittal of the party claiming injury. This is based upon two grounds: (1) because it is not desirable to have two suits pending at the same time, involving the same issues; (2) because, if the first suit should be decided against him, it would be conclusive evidence that there was probable cause to believe him guilty.

Poisoning.

Poisoning is another method of inflicting injury to the body. If this be done intentionally or negligently, and results in injury, it is a tort.

DEFAMATION.

Definition.

Defamation is the publication of a false statement reasonably calculated to injure concerning another without legal excuse.

Publication.

Publication is conveying an idea to some one or more third parties. So long as the idea is communicated only to the person defamed it is not a tort, for he is not supposed to be deceived or misled by the statement. But conveying the idea to any other individual is publication. This word has a different meaning here from what it does when we speak of the publication of a newspaper or book. There it signifies getting it into proper form and offering it to the public. Here communication to any third party is sufficient.

It also has a different meaning from that given to the word in criminal law, which includes communications not only to third persons but also to the party defamed.

Publication may be accomplished in many ways. Any method is sufficient which actually communicates the defamatory idea to a third person. When permanent means, such as printing, writing, painting, etc., are adopted, the publication is usually designated as a libel. When transitory means, such as speech, etc., are used, the publication is called slander.

Nature of the Idea Conveyed.

As publication is usually made by written or spoken words, we most frequently find it referred to as a statement. To make a statement tortious it must have two elements: It must be reasonably calculated to injure, or must be designed to and actually accomplish that result, and it must be false. Considering these two more in detail, we find: That usually the words used are to be taken in their ordinary meaning, and, if when so taken, they reasonably tend to bring one into disrepute, they are deemed defamatory. If the words, used in their ordinary and accustomed meaning, are not defamatory, they are not actionable, unless the party using them designed that they should be understood in a

special sense which was defamatory, and they were in fact so understood by some other party. In this case, the result is designedly and actually to communicate a defamatory statement, and that is all that is required. If, however, the person using the words intended them in their ordinary and harmless meaning, and the person to whom they were addressed, or some one else who heard them, put upon them a peculiar and unusual interpretation and thus made them defamatory, this would not be laid to the charge of the innocent user. We find illustrations of this in cipher dispatches. They convey no idea to the one not having the key, and hence can not be said to communicate or publish anything; but to the person having the key they are intelligible and convey information. Now, if the cipher used, as designed to be interpreted by the key, conveys a defamatory idea to the person correctly interpreting it, to him it would be a defamatory publication; but suppose a person sends a message using words in their ordinary meaning, but the person receiving it shall imagine that it is a cipher and interprets it and gets a wrong idea, the original sender would not be responsible for this false and undesigned interpretation.

Falsity of Statement.

The statement must be false. The right of the individual being to have reputation exactly corresponding with and conforming to his character, it necessarily follows that a true statement, however much it may, in fact, injure one's reputation, could only do so by depriving him of so much of his reputation as was beyond his real character, and thus could not be actionable, because it involves no violation of right, on the one hand, nor breach of duty, on the other. It is, therefore, a settled rule of law that, no matter how damaging a statement may be, or how evil the motive of the party making it, it can not be a tort unless it be false.

There is an old Common Law saying that "the greater the truth, the greater the libel." This applies only in criminal Law, and has no place in Torts. Even in our Criminal Law this is not universally recognized; in prosecutions for slander, in some States truth is a defense.

It must be remembered, however, that every one is presumed to be of good character until the contrary is proved; so, in the trial

of cases of this sort, the plaintiff is required to plead the falsity of the charges, but is not required to prove the plea. The defendant is required to show the truth, which he can do only under appropriate pleadings to that effect.

Must Concern Another.

The statement must be concerning some other person: It may involve the speaker, in connection with others, but if it involve only him it can not be a tort, for one can not commit a tort against himself.

Without Legal Excuse.

It must be made without legal excuse: The old definitions all use the term malicious, but this is not an accurate expression of the law at this time, if it ever were. It is not at all necessary that the statement shall be prompted by any ill-will, or desire or expectation of injury. If it be defamatory and false, and the circumstances afford no legal excuse for the publication, it is actionable, without reference to the motive or purpose of the party. The excuses which may be set up differ. They are usually classed as absolute and conditional privileges, and we will consider them in that way.

Libel and Slander.

Going back to the terms libel and slander, it is well to keep the difference between them clearly in mind, because most, if not all, books treat them separately; because some of the rules of law applicable to them respectively are different; because somewhat different rules of pleading govern them.

Absolute Privileges or Excuses.

These privileges grow out of the circumstances under which the statements are made, and constitute an absolute bar to liability for the wrong, however grevious the damage or wicked the motive of the person making the statement. These absolute privileges are confined to persons exercising the functions of a public office or of a position of a quasi-public nature. They exist in behalf of all legislative and judicial officers as to statements made in the discharge of, or in immediate connection with the discharge of, their official duties. Members of Congress, or of the State legislature, are absolutely privileged and free from pecuniary liability for utterances upon the floor of their respective houses. It is better

that occasionally an individual should suffer from some wrongful attack upon him than that there should be any embarrassment or fear operating on the minds of the representatives of the people in the discussion of public matters. So the judge, in the exercise of the duties of his office, can not he held accountable for his official utterances. So high executive officers, the President and his Cabinet, the Governor and heads of State departments, are not liable for any statements made in official documents of any kind. In some of the States, this absolute privilege extends also to attorneys, parties and witnesses in the trial of cases. This is not the rule in the Federal courts, however, the privilege in these courts extending only to statements which are relevant to some issue in the case.

Conditional Privileges.

These are not so far reaching as the class just considered, and extend only to cases in which the party making the statement acts in good faith, and without malice.

The privilege does not exist at all unless there be some special relation of trust and confidence between the person making the statement and the one to whom it is made. This relation must be such as to create or give rise to a duty to disclose the matter stated, if it were true; whenever this duty arises, if the person owing it, in good faith believes the statement to be true, and communicates it in an honest endeavor to discharge this duty, he is not liable. Absence of good faith, or the existence of malice, will either destroy the privilege, or take the case outside of the privilege rule, and make the person liable.

Damages.

With reference to the damage resulting, statements are divided into those actionable *per se*, and those not so actionable.

Statements actionable *per se* are those of such a nature that the law presumes damage to result, and gives a right of action for the defamation, although no actual damage can be proved in the particular case.

They are usually spoken of as being of four kinds:

1. Those charging one with the commission of a crime infamous in its nature or punishment.

2. Those charging one with having a contagious or disgraceful disease.

3. Those affecting one in his office.
4. Those affecting one in his business.

In these cases it is not necessary to prove any special damage in order to recover, though usually the amount will be small, unless there be some proof of damage. It is, therefore, always safer and better practice to have proof of actual injury, if it can be gotten.

Statements not actionable *per se*. Many false statements are defamatory and actually injurious which do not come under any one of the four classes above enumerated.

In order to make out a case on such a statement, it is necessary to plead and prove the facts constituting the damage. This must be the direct and proximate result, as in all other cases, but when these things can be proved they will show a tort, and entitle to recovery to the extent of the damage. This class is, possibly, the largest of all, and there are more cases brought under it than under any other.

TORTS AFFECTING PROPERTY RIGHTS.

We must keep in mind the essential elements of ownership, right to possession, use, enjoyment, modification, and disposition. It is a tort unlawfully to deprive an owner of any one of these rights in the thing owned, either wholly or partially; and, of course, to deprive him of all of them. The distinction between personal and real property must also be regarded in determining what conduct is tortious, and what elements of damage may be recovered for any wrong.

We will first take up some of the torts which may be committed with regard to either real or personal property.

Trespass.

Any forcible invasion of the rights of another, whether of person or property, was, at Common Law, known as a trespass. We rarely, if ever, use the term now as including wrongs to the person, but limit it to forcible wrongs to property, real or personal. In this connection, the word forcible is used in its common rather than its scientific meaning or acceptation. It is probably scientific to say that most nuisances involve some element of force, but the law does not look upon the invasion of air by odors or noises as an application of force, and in its use of the term restricts it to such force as is visible in its effects and operates through tan-

gible means. We therefore say that a trespass is a forcible invasion of another's rights, while a nuisance is an act, or omission, not involving a use of force but which, in its direct consequences, works injury to another.

Any unlawful entry upon the land of another is a trespass and a tort. We considered this at some length in our previous work, and need not go into it in detail again.

Many of these trespasses, considered in themselves, are very slight disturbances of another, but still the law recognizes them as wrongs, and will give a remedy of nominal damages. If this were not so, the trespasser might, by frequent repetitions, finally acquire a right by prescription or limitation.

The early Common Law remedies for trespasses upon land were very complicated and expensive. Even in the Common Law courts these have been superseded by the action of ejectment. This is the remedy now given in many of the States. In other States the action of ejectment has been superseded by statutory proceedings. These differ in the different states. If the trespass is one that does not involve the title, but simply possession of the land, the action of forcible entry and detainer frequently affords sufficient remedy.

Forcible injuries to personal property are also called trespasses. Whenever one person, by force, injures personal property belonging to another, it is prima facie a tort and the person committing the injury will be held liable to the extent of the damage inflicted unless he can show such facts as will legally justify him in so doing. The remedies will depend on the nature of the injury. If it results in total destruction of the property, then the liability is for the full value of the property; if the injury is only partial, the liability is for the difference in the value of the thing in its sound condition and the condition to which the injury reduces it, with reasonable and proper expense incurred in caring for it and also the reasonable value of its use while deprived of it, if the injury be only temporary.

Fraud.

We have already dealt at length with the subject of fraud and have found that most frequently it is a wrong perpetrated by one party to an agreement upon the other, though sometimes the fraud may affect one not a party to the agreement. As between

the parties to the agreement, fraud is either in inducement or in *esse contractus*. Each of these has been defined heretofore.

We also found that fraud in inducement, considered in its broadest sense, embraces both deceit at Common Law and misrepresentation in Equity. In those jurisdictions, where the difference between law and equity still remains in full force, this distinction is still recognized; deceit being a tort entitling to damage, equitable misrepresentation not entitling to damage but to rescission of the agreement or constituting a defense against an action for specific performance. In other States, where the distinction between law and equity is not recognized, both deceit and equitable misrepresentation are dealt with as torts entitling to the legal remedy for damage and the equitable remedies of rescission or non-liability for non-performance, according to the facts of the case.

The legal essence of fraud is deception resulting in hurt to the deceived. This deception must be as to a past or present fact, not matter of opinion or future expectation simply. A false statement as to present conditions made as a basis for credit or to induce other action by the party deceived, or a false statement as to present intent to keep a promise, is regarded as a present fact. The fact must be material to the matter under consideration, that is, must be of such a nature and so related to or connected with the matter under consideration, as to be reasonably calculated to induce the party to take action desired by the person guilty of the fraud. The ordinary test is, was the matter stated as a fact reasonably calculated to induce or influence action by a reasonably prudent person? If, in any given case, the person claiming to have been influenced was so circumstanced that he was more than ordinarily easy to influence, he must plead and prove these special facts. The person defrauded must have believed this material fact to be true, when in reality it was false and must have been influenced by this belief to give his assent to the agreement, and the agreement must have resulted in his injury.

All the foregoing elements are common both to Common Law deceit and Equitable misrepresentation. The difference between these relates to the manner in which the deception is occasioned and the connection of the party charged with the fraud with the

deception. In deceit, the deception must be occasioned by representations made by the party charged with the fraud, with intent to deceive the person defrauded, and when he made such representations he must have known them to be false, or must have made them recklessly without believing that they were true. These false representations are of three general kinds: First, those which the party know to be false; second, those which are false in fact, and which the party believes to be false, yet states to be true; and third, those which are false in fact, which the party believes to be true though he did not know it and yet states them to be true as of his own knowledge. Unless the statement comes under one or the other of these general classes it will not support an action for damages for deceit at Common Law.

Equitable misrepresentation includes all the statements embraced in the Common Law conception of deceit and in addition, misrepresentations made to the deceived person and honestly believed to be true by the party making them, provided the facts are such as to entitle the party to whom the statement is made to rely upon the one making it for information. Whenever this right of reliance exists, equity requires the person undertaking to give information to speak truly or bear the consequences himself. If, therefore, one makes a material statement as to a past or present fact, and thus influences another to act and it subsequently develops that this statement is false and that the action of the deceived party has been injurious to him, equity will give relief to the deceived person notwithstanding the party making the statement in fact believed it to be true and had reasonable grounds for so doing.

If a party, who is not bound to disclose, knows or has reason to believe that the other party to the negotiation is ignorant concerning some material fact and under these conditions volunteers information as to this fact, he will be bound by and responsible for any false statements he makes. While he is under no obligation to speak, if he volunteers to speak, he must speak truly.

The foregoing differences between deceit and equitable misrepresentation seem to be clearly established, though there is a tendency in some courts, even where Law and Equity are still distinct, to lose sight of them to some extent. In some of the States in which the distinction between Law and Equity is not recog-

nized, the distinctions above made between deceit and misrepresentation are no longer kept up.

When we consider fraud by concealment the question is somewhat more difficult, though the tendency seems to be to regard any artifice resorted to by one seeking to get advantage from a false impression then existing in the mind of another, to throw the deceived party off his guard or to prevent or hinder investigation which would lead to a disclosure of the truth, is legally equivalent to making a known false statement, and hence, will support a Common Law action for deceit. There is no question that such concealment entitles to relief in Equity as fully as known false statements.

It is doubtful whether simple non-disclosure of the truth can ever be regarded as Common Law deceit. In equity, if the facts are such as call for disclosure, failure to disclose resulting in injury is always actionable.

Remedy.—Only the party injured by the deception or those holding under him can maintain an action for fraud. If the party attempting to perpetrate the fraud is injured by it he is without redress.

The remedy for Common Law deceit is an action for damages. Not infrequently the matter actually arises as a defense in an action brought to enforce a contract. If, at the time that the contract was made, or at any time before the fraud was discovered, or by the exercise of reasonable care should have been discovered, the defrauded party performs his part of the agreement, his only remedy at law would be to sue the defrauding party for damages. In such case, the damage would be measured by the difference in the market value of the thing as it was represented to be and its market value as it in fact was. If the defrauded party has not paid for the thing, when he discovers the fraud, his remedy at law is to retain the thing and pay only its real market value instead of the contract price. Remedies in Equity are rescission of the contract and recovery back the amount that has been paid, if any, and such other damage as directly results from fraud; or, the defrauded party may set up the deceit or misrepresentation as a defense against an action in Equity to enforce the contract. As the equitable remedies may be had on facts showing either deceit or misrepresentation and are more complete and adequate than those which can be obtained at Law, by far

the larger part of modern litigation regarding fraud is carried on in the Equity courts.

Fraud in *esse contractus* is a tort but it rarely is a basis of a suit for affirmative relief. This kind of fraud can be perpetrated only in connection with the execution and obtaining possession of written instruments. Instruments obtained by this species of fraud are universally recognized as void and the facts will constitute a defense even against an innocent third person who has acquired the paper. Hence the defrauded party does not often find it necessary to institute suit for wrongs of this kind. He usually awaits suit by the party holding the paper and interposes the fraud as a defense. If the paper thus procured is of such kind as to cast a cloud upon the title to property or otherwise injure the defrauded party, he may sue in Equity and have the nullity of the paper declared.

DYING TO SEAL PROPERTY.

The right to keep property intact or to modify or destroy it, as one may please, is one of the incidents of ownership, and if a person, not the owner, shall make any change in the property, or its conditions, unless he has authority, express or implied, from the owner, or acts under proper authority from the government, he commits a tort. Injury to real property, when committed by one who is unlawfully in possession, is regarded as an incident of or part of the trespass involved in the wrongful taking and holding possession, and the damage may be recovered in the action to regain possession.

Waste.

When one is lawfully in possession of real property which belongs to another, and takes advantage of his possession to injure the property, this is called waste.

Waste is of two kinds: (1) Positive injury done by the affirmative wrong conduct of the person in possession; (2) permissive, which consists in failure to repair and keep up the premises when it is the duty of the one in possession to do so. The law forbids a tenant under lease which is silent on the subject of repairs to do any act which injures the property beyond ordinary wear and tear, and if he does such acts, he is responsible; on the other hand, it does not require him to keep the premises in repair or to pro-

tect them from injury from natural causes; so that it is customary to say that a tenant is responsible to the landlord for injuries resulting from his affirmative wrong-doing, but is not for permissive waste not attributable to his fault.

When one person owns an estate in land entitling him to possess and use it for a time and some other person owns the remainder or reversion, the one in possession must not do or suffer anything to be done on the premises which will injure the estate or value of the property to the remainderman or reversioner, further than is involved in using the property during his holding in the ways and for the purposes for which it was used when he came into possession. Thus, if there is coal on land and one person has a life estate in the land, if no mines were open on it when he acquired his life estate he can not open any; or, if two mines only were open, he can not open others, though he may continue to work those which were open when his estate began. The same rules hold generally as between all owners of present interests and persons having subsequent estates in the property.

Injuries to Easements.

We have already considered nuisances. In most instances, interference with one's use of an easement is a nuisance, and dealt with as indicated in the treatment of that subject. Names, however, are largely immaterial and, if one has an easement and another unlawfully interferes with it or obstructs the owner in its enjoyment, an action will lie for the wrong.

Cloud Upon and Slander of Title.

As we have seen, one of the incidents of ownership is the right to dispose of the thing. There are two torts which injuriously affect this right; the first is casting cloud on one's title by setting up an adverse claim to the property. This is usually done by obtaining, in some manner, a deed or other writing pretending to convey the title or a claim to the land to the person guilty of the wrong, and placing it upon record, and thus inducing prospective purchasers to doubt the genuineness of the title of the real owner. The usual remedy here is to sue and obtain a judgment declaring the true title to be the genuine and only one to the land, and declaring the other to be worthless. The second is very similar, and consists in making and circulating false reports concerning one's

title to his property, for example, that the deed under which he claims is a forgery, and thus destroying the reputation of his title and diminishing its market value. The remedy here is to sue for any damage which may have directly resulted from such reports, and also to have the same adjudged slanderous and false, so as to prevent future injury, and sometimes an injunction to prevent repetition might be awarded.

TORTS TO PERSONAL PROPERTY.

General Discussion.

Ownership of personal property may be general or special. The general ownership embraces the five elements of possession, use, profit, modification, and disposition. Special ownership consists in some one or more of these elements or all of them for a limited time and purposes.

Any invasion of any one of these rights, whether of the general or special owner, resulting in damage to him is a tort as to such owner. If one person is the general and another the special owner of the same thing, the same wrongful act or omission may be a tort as against both. Thus, if A owns a piece of personal property and has hired it to B for a year and C shall wrongfully destroy the property, this is a tort as against B in so far as it deprives him of the present possession, use, and profit of the thing, and is also a tort as against A, because it deprives him of the thing which would have come back to him in full ownership upon the expiration of the term of hiring.

It is manifestly impracticable to enumerate all of the various torts which may be committed regarding personal property. The great majority of them, however, fall into one of two general classes; first, wrongs which consist in the injury or destruction of the thing owned, and second, wrongs which do not injure the thing itself but which consist in taking it into possession and using or profiting by it or in some way exercising dominion over it.

The Common Law recognized these various kinds of wrongs and provided several forms of action with regard thereto. The principal of these Common Law actions were replevin, trespass, and detinue. Each of these was fairly technical and Parliament later introduced the statutory action known as trover, or trover and conversion.

The action of trespass can be maintained at Common Law only in cases where the defendant came into the possession of the property by unlawful act. If his possession was originally lawful, trespass could not be maintained against him no matter how unlawful his subsequent conduct.

Replevin at Common Law could only be used to recover possession of a specific thing. If the thing could not be had, no alternate judgment for its value or other damage could be given.

Detinue could be maintained either for the recovery of the thing or for damage for its unlawful detention.

Trover is a statutory action on the case for damages for the wrongful exercise of dominion over property, or conversion of it, as it is technically called. The judgment sought is not for the return of the property but for damages for its conversion.

These various forms of action have been entirely superseded in many jurisdictions. Even in those states in which the names are retained, they have been greatly modified by various statutes, decisions, and rules of practice. It would not be profitable to attempt to trace these. It is sufficient to say that by proper proceeding a fairly appropriate remedy may be had in each of the States for any wrong to personal property unlawfully committed. These remedies consist in one or the other or a combination of the following:

(1) The recovery of the specific thing and compensation for its use during the time of its detention, and, if, in any case, injury has been done to the thing, damages to cover such injury.

(2) The value of the thing, plus interest, or damage in the nature of interest, on this value, from the date of the conversion to the date of the judgment.

In most of the States the Common Law has been so modified as to permit the plaintiff to combine these two in one action and recover a judgment in the alternative; that is, that the property be restored, if that can be done, and if not, that the damages be paid. It is, of course, optional with the plaintiff which remedy he shall pursue.

Interference Under Process with Personal Property.

One of the most common instances of the violation of right in personal property is unlawful interference with it by officers, under supposed authority of some legal process.

While all property owned by any one, except such as is specially exempted by law, is subject to lawful seizure, under legal process directed against it, a person is protected from any invasion of his title or possession under mere semblance of legal authority. It therefore becomes important to fix clearly in mind the rules by which to distinguish between lawful and unlawful seizure.

The authorities say that, to justify the seizure, the process must be fair on its face; must run against the party whose interest or title in the property is sought to be seized, and must authorize the seizure of the very property taken in the manner made.

Process is fair on its face when it has the following characteristics: (1) It must issue from a court, and by an officer having jurisdiction to issue it. (2) It must be in the form prescribed by law, at least so far as such form is mandatory. (3) It must be directed to the officer who executes it. (4) It must be against the party whose property is seized. (5) It must authorize the seizure of the property taken and the exact disposition made thereof by the officer. Unless the property is specifically described in the writ, it must be subject to seizure under process of the kind under which the officer acts.

A failure in any of these respects will make the officer liable in actual damages.

There are exceptional cases, in which, even though all these conditions have been complied with, the officer will still be liable, as where the officer has acquired some interest in the writ, or the proceeds of the sale, beyond his costs.

Torts Against Incorporeal Chattel Interests.

Rights under patents, copyrights, and trade marks have been considered under Property. Any infringement of one of these rights, resulting in any injury, is a tort. The Federal courts have exclusive jurisdiction over suits for infringement of patent rights and copyrights. The State and Federal courts have jurisdiction over trade mark cases, according to the other facts and circumstances.

A patent right is violated by duplicating the thing, or any appreciable part of the thing patented, and placing it upon the market. A copyright of a work of art is violated by making a copy

of it, or such a substantial part of it as to be an appreciable appropriation of the thing copyrighted.

The manner in which trade-marks may be violated is set out at length in treating this subject under Property.

TORTS AGAINST RIGHTS WHICH ONE PERSON HAS IN ANOTHER.

Generally.

If one person shall unlawfully seize and detain, or carry away, the child or wife of another, in addition to the remedy by *habeas corpus* to have the person released from custody, and to the action for damages which the person detained would have for the assault and false imprisonment, the father or husband, as the case may be, has an action for the loss sustained by him in the invasion of his right in his child or wife, and can recover the damage sustained by him by reason of the wrong, and, in most instances, exemplary damages also. This tort would be called abduction or kidnapping.

Seduction of a daughter is also a tort of a similar nature. Alienating the affections of a wife is a tort against the husband At Common Law, there was nothing allowed the wife for alienating the affections of her husband; but the later cases seem to recognize something approaching equality of the spouses in this regard, and to enable the wife to sustain such an action. Unlawfully inflicting injury upon a minor child, or a wife, is also a tort against the father, or the husband, for which he may recover. The same is true of enticing away or injuring a servant. The master is entitled to just compensation for the injury sustained, in either case.

Great diversity of opinion has obtained as to whether it is actionable to induce one to break a contract which he has already entered into. It has, for some time, been held that, if the contract is one for service, it is actionable to induce the servant to break it; also if the person bringing about the breach is actuated by malice or directly profits by the breach, this renders him liable, without reference to whether the contract were one for service or not. Some of the later cases have gone further than either of these holdings, and announce the doctrine that, as to third parties, a contract creates a right analogous to a property right in the performance of the undertaking; and hence, any one inducing

ing another to break a valid contract is interfering with a substantial, legal right, and must respond for any directly resulting damage. This seems rational and just.

Injuries Resulting in Death.

Probably the most obvious example of rights of the kind now under consideration, and of responsibility for their violation, is found in the constitutional and statutory provisions for making one person compensate another for the injury occasioned by the wrongful killing of a third. This subject is usually treated under the head of injuries resulting in death.

At Common Law, homicide under many circumstances, was a most heinous crime, but was never a tort. The injured party was beyond any legal redress, and others were not regarded as having such an interest or claim in his services or to them as would constitute a legal right. It follows that all torts of this kind depend on Written Law, constitutional or statutory, and no act, or omission, not covered by such law can constitute such a tort nor do the rights conferred by such statutes exist in favor of one not named in the law as a beneficiary, nor against one not named therein as liable. In other words, the right to recover damage for the death of another is not a Common Law right, but a statutory one and can exist only according to the statute creating it. The first statute of this kind existing in any Common Law country was the act of the English Parliament, passed in 1846, and commonly known as the Lord Campbell's Act. Since that time, almost every American State has passed similar statutes, the English statute being, in the main, the model by which these were drafted. So we find a very great similarity in the statutes on this subject.

There are four things to be considered, primarily, in seeking the effect of constitutional and statutory provisions of this kind, viz.:

1. To whom the right is given.
2. Against whom it is given.
3. What acts or omissions subject one to liability.
4. What elements of damage may be recovered therefor.

Other matters, such as procedure in the case, are important, but the four things enumerated are indispensable.

Detailed consideration and accurate answer to any one of the questions or suggestions above is impossible, as each Legislature

determines each of these matters for itself and while there is similarity as to the general nature and purpose of the statutes, there is decided variety as to detail.

The beneficiaries are, in all instances, persons closely related to the deceased, consisting usually of the surviving husband or wife and children; not infrequently parents are included.

There is less uniformity as to the persons against whom the right of action is given. Some of the States give a remedy against any person whose conduct occasions the death of another under the circumstances indicated in the statute. Some give remedy against any person who is himself guilty of the unlawful conduct when the homicide occurs in a specified way, and then have other provisions fixing liability upon designated principals and masters when death occurs as a result of specified wrongs by their agents or servants. There is a tendency in the statutes to limit this secondary range of liability to businesses, such as common carriers, etc., in which the dangers are great and the necessity for unusual care in the selection of employees is apparent.

The statutes vary materially as to the conduct leading to liability. Where the liability is limited to or based on the conduct of the defendant himself, it usually embraces all unlawful acts or omissions resulting in death. Where the liability is extended to the secondary range it is usually limited to negligent acts or omissions as distinguished from intentional and willful homicides.

The damages recoverable differ somewhat in the different States. They are, however, limited everywhere to damages sustained by the surviving relatives and do not include the elements of damage which could have been recovered by the deceased in his own behalf had he survived the injury. The damage is usually, in express terms, limited to pecuniary loss. Mental suffering on account of the death of the deceased is not ordinarily allowed. In a number of the States there is a maximum limit fixed by the statute beyond which the court or jury cannot go in allowing damages. In the other States the amount is left to the sound discretion of the jury subject to correction by the judge.

As these actions have no support at Common Law, to entitle any one to recover he must bring himself within the provision of the constitution or statute upon which his suit is based. These provisions receive fair and reasonable construction but their ef-

fect cannot be extended beyond the terms of the statute by analogy or because some case arises which, though meritorious, is not within the fair interpretation of the words of the act. The procedure in these cases is usually regulated by the statute giving the right and no general discussion of that subject would be profitable.

CHAPTER IV.

OUTLINE OF THE LAW OF CONTRACTS.*

Definition.

The fundamental notion of a contract is an agreement resulting in obligation.

The term *agreement*, in this connection, means, primarily, the meeting of the minds of two or more persons as to some definite thing to be done or forborne. There must be the same thing in the minds of both parties, and their common intention with reference thereto must be communicated between them. Further, in order that the agreement may be such as can result in contract, this intention of the parties must contemplate the assumption of legal rights and duties by the parties to it—a change in their existing legal relations. *Agreement* may be defined as "the expression of two or more persons of a common intention to affect their legal relations." (Anson, page 3.)

That agreement may amount to a contract, it is necessary that it be such an one as binds the parties thereto by legal obligation; that is, such an one as the law will require the parties to carry out according to the terms of its expression. The *obligation* of contract is the legal tie binding the parties to one another, in respect to some future acts or forbearances, as to which they have expressed a common intention which changes their legal relations to one another. Certain things are prerequisite to all civil obligation, whether created by contract or otherwise: (1) there must be two or more parties bound by the legal tie; a man can not be bound to himself by a legal obligation, he can not contract with himself, even in different capacities. (2) The parties must be definite; this element distinguishes these private obligations from the political covenant which exists between the individual and the community as to his conduct, and which is enforced by the Criminal Law. (3) The act or forbearance in respect to

* This chapter was prepared by Mr. E. W. Townes, of the Houston bar, and is published by his permission.

which they are bound must also be definite. (4) The thing to be done or forborne, the subject matter of the obligation, must be reducible to a money value, and must be lawful. (Anson, pages 7 and 8.)

When the two elements, agreement and obligation, concur, we have a contract, which may be best defined as an "agreement enforcible at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others." (Anson, page 11.)

We will discuss contracts under the following heads:

(1) Essentials of Contract.
(2) Classification of Contracts.
(3) Operation of Contracts.
(4) Interpretation of Contracts.
(5) Discharge of Contracts.

ESSENTIALS OF CONTRACT.

Topics to be treated:

Offer and acceptance.	Form.
Capacity of parties.	Genuineness of assent.
Consideration.	Legality of object.

Offer and Acceptance.

Offer and acceptance is necessary to the formation of every contract; for there can be no agreement, such as is requisite to a contract, that is not the result of an accepted offer to act or forbear.

1. Possible forms of offer and acceptance are:

(1) An offer to make a promise, or to accept one. This is good in some jurisdictions but not all.

(2) The offer of an act for a promise.

(3) The offer of a promise for an act.

(4) The offer of a promise for a promise.

It is evident, therefore, that either the offer, or its acceptance, may be made by words or conduct. Where both are made by words, the resulting contract is *express;* where either is made by conduct, the resulting contract is said to be *implied.*

2. The offer must be intended to create, and capable of creating, legal relations.

3. The offer must be definite, and must include all the essential terms of the proposed agreement, either expressly or by clear implication.

4. An offer is not complete until it has been communicated to the offeree, actually brought to his knowledge. It need not be made to an ascertained person, but may be made to the public at large. It can only be accepted by a definite and ascertained person.

5. After acceptance, an offer becomes irrevocable, and the parties are bound by the legal obligation of the contract; before acceptance, the offer may be either revoked by the offerer, in which case the revocation must be brought actually to the knowledge of the offeree before he has accepted; or it may lapse (1) by the death of either party; (2) by a failure to accept in the manner prescribed, or (3) by a failure to accept within the time prescribed or, where no time is prescribed, within a reasonable time.

6. Acceptance can not be inferred from silence, it must be communicated to the offerer; but in this connection, communicated does not mean actually brought to his knowledge, as in case of communication of the offer. It means that there must be some overt act, or speech, which evidences the intention to accept; it is not always necessary that the offerer be should actually informed of this act or speech. The acceptance is complete, that is, communicated, when it has been expressed by word or act, in the manner required by the offerer, who may waive actual notice to himself, if so disposed.

7. When an offer is made it must be accepted as made, without qualification, that is, the offer must be definite, and include all the essential terms of the proposed agreement, and acceptance must be in toto and absolute; any effort to accept any part of the offer, or to qualify the same in any way, constitutes merely a new offer on the part of the original offeree to the original offerer, which the latter may accept or not, as he sees fit.

Capacity of Parties.

Of Natural Persons.—As we have seen before, every contract must have its origin in voluntary assent of the parties, in true agreement. There are some classes of natural persons that are recognized or regarded by law as wholly or partially incapable of

giving such voluntary assent, and, therefore, as incapable of making a valid contract.

The presumption is always in favor of contractual capacity; and, if incapacity of any kind is relied upon as a defense, it must be pleaded and proved by the party relying on it.

Natural persons whose contractual capacity is more or less limited are:

1. Aliens.
2. Infants.
3. Lunatics, idiots, and drunken persons.
4. Married women.

Aliens.—An alien, in the United States ordinarily has the same capacity to contract as a citizen, so far as personal property is concerned. As to contracts with reference to land, different statutory disabilities exist in different States.

Infants.—An infant, at Common Law, is a person under the age of 21 years. In several States the female becomes of age at 18 years or upon marriage. The contracts of an infant, except those for necessaries, are voidable at his option; and even in the latter, he is not bound to pay the contract price, only a reasonable price. By the weight of authority, an infant is bound by his fraudulent representations, and where he represents himself to be of age, under such circumstances as to amount to fraud, he can not avoid the contract induced by those representations.

It is held, in most jurisdictions, that any power of attorney given by an infant is an exception to the general rule laid down above, and is void, not voidable.

Where the subject matter of the contract is personal property, he can avoid either before or after coming of age.

Where the subject matter of the contract is real property, he can not avoid his contract until after he has reached his majority.

The minor may disaffirm either an executed or executory contract:

(1) When the contract is still executory on his part he can interpose infancy as a defense to an action brought against him on the contract.

(2) If the infant has performed partly or wholly, but the contract remains executory on the other side, he can recover what he has given up, and cancel the contract.

(3) If both parties have performed the contract wholly or in part, the infant may tender back what he has received, and recover what he has given.

(4) If the infant seeks to disaffirm his contract, he must return the consideration, if still under his control; if he has disposed of same, after reaching his majority, he can not disaffirm, unless he can return consideration; if he has dissipated same during his minority, he may disaffirm, without returning what he had received.

(5) The infant must avoid the contract within a reasonable time after coming of age, otherwise his silence will be taken as an affirmance.

What is a reasonable time is, in each case, a question of fact, and has been said to be "such a period as, in view of all the attending facts, would rebut any presumption of an intention to disaffirm."

(6) He can not disaffirm the contract, if he has once ratified it, after coming of age, either expressly, or by act clearly evincing an intention to ratify it.

(7) He may disaffirm expressly, or by act clearly evincing an intention to disaffirm.

An infant is liable for necessaries purchased, but can not be compelled to pay therefor more than the reasonable value. If the contract price exceed reasonable value, he can not be held to pay contract price.

What are necessaries, is a mixed question of law and fact, depending upon the position, training, social standing, means, etc., of the infant.

If the infant be emancipated, he can contract as an adult. So if his disabilities have been removed.

Lunatics, Idiots and Drunkards.—The agreements of an idiot, a lunatic, or a person too drunk to be able to give his voluntary assent thereto, are voidable unless they be for necessaries, or unless the sane person did not know of the other party's insanity or idiocy, and the contract is so far executed that the parties can not be put in *statu quo*. If one of the parties has been declared insane, an idiot, or an habitual drunkard, under the provisions of a statute the presumption is that the contract was not

made in a lucid moment. Otherwise, the burden of proving the disability is on the party setting it up.

Married Women.—At Common Law married women have no power to bind themselves by contract. The wife is the agent by necessity of the husband and as such can bind him for necessaries for herself and children. She is also presumptively her husband's agent in the conduct of the ordinary domestic affairs and can bind him by contracts with regard thereto. In each of these instances, the woman exercises the contractual power of her husband. So they constitute no exception to the rule above stated.

This rule of the Common Law has been very greatly modified in most, if not in all, of the States of the Union. All these modifications have been enlargements of the married woman's power. In many of the States married women now have extensive contractual capacity; in some they have practical control over their individual property of all kinds; in some they can conduct mercantile business either singly or as members of a firm; in many they can hold stock in corporations. In the States of the Southwest and of the Pacific Coast the old Civil Law doctrines of separate and community property of the spouses, modified by statutes, are in force. It is impossible to systematize and summarize all of these various statutory modifications of the Common Law and Civil Law rules. The law of each jurisdiction on this subject must be consulted.

Of Corporations.—A corporation is an artificial person created by the law and deriving its power from the law. The power of a corporation to contract is given by the general laws of the State, and is limited to the scope of the purpose of its creation.

Corporations have three general classes of powers:

(1) Those incident to corporate existence.

(2) Those expressly conferred by law.

(3) Those implied as reasonably necessary to carry out the express powers.

The power to contract to some extent is inherent in the idea of a private corporation. What may be done under this power by any particular corporation depends largely on the nature and the purpose of the corporation. The express powers of a corporation depend upon the terms of its charter, which, as we have seen,

consists of the act of incorporation, where the company is created by special law, and of the articles of association and the applicable terms of the statute when created under a general enabling act. The implied powers are those reasonably incident to the express powers conferred by the charter in the particular case.

Any contract made by a corporation either through its stockholders, directors, general officers, subordinate officers, or agents, within the limit of any of the three classes of powers above referred to is binding upon the corporation.

If a corporation shall attempt to enter into any contract not within one or the other of the above powers, the attempt is *ultra vires,* and its legal results will depend upon the circumstances. If the agreement has been fully performed, ordinarily the rights of parties under it will not be disturbed. If the agreement has been performed on one side and not on the other, the party who has not performed will either be compelled to perform or to put the other party in *statu quo,* as is most just under all the circumstances. If the agreement is entirely unperformed, neither party can enforce performance nor recover damage for breach.

The effect of ceasing to do business by a corporation and abandoning the corporate enterprise, by the better opinion, is, instanter, to destroy the power of the corporation to enter into contracts. Its affairs must be wound up under the rules governing the closing out of dissolved and insolvent corporations. In some jurisdictions this is accomplished by means of receivership in some competent court; in other jurisdictions, the last board of directors are constituted trustees to take charge of the assets and wind up the affairs of the concern.

Consideration.

Necessity For.—At Common Law consideration is necessary to support all simple contracts; that is, all contracts not of record or under seal.

So-called contracts of record differ so greatly from the ordinary contracts in the business world that they can scarcely be regarded as within our present subject. They pertain more to the law of procedure and the doctrines of *res adjudicata.*

Contracts under seal, it is said, do not require consideration.

Seemingly the prevailing doctrine in America is that the seal imports or satisfactorly proves consideration, and that if a sealed instrument in fact is not supported by consideration at the time it is executed, or if after execution, the consideration fails, by proper pleading and proof, these facts may be taken advantage of to avoid the agreement. If this be not true as to agreements required to be sealed at Common Law, it certainly is the prevailing doctrine as to contracts which are required to be sealed only by reason of some statute.

What is Consideration.—Considerations are spoken of as good and valuable.

Good consideration consists in natural love and affection or blood relationship. It is really more akin to motive than to actual consideration. It is never recognized as sufficient to support an executory simple contract.

Valuable consideration is a much more important matter. It has been defined in many ways. Mr. Anson says in substance that a valuable consideration is something done or forborne or suffered, or something promised to be done, forborne or suffered by the promisee on account of the promise made to him.

Mr. Hughes in his work on contracts says: "A valuable consideration is a benefit to the promising party or to a third person at his request; or an injury, loss, charge, or inconvenience, or the actual risk thereof to the party promised."

A careful study and comparison of these two definitions will give an accurate idea of the law's conception of consideration.

Consideration differs from motive in several respects. Motive, as such, is always *ex parte*. It induces the one party to act but is not taken into consideration by the other. If any particular inducement, which would be motive merely while operating upon the mind of one of the parties, becomes so connected with and embodied in the agreement as to make it a mutual matter operating alike on both parties, it would cease to be motive simply and become consideration. If a man needs a thing and desires to buy it to supply this need, his sense of need is the motive inducing him to buy but it is no part of the consideration for the purchase. The consideration in such case would be the money that he paid on the one hand, and the transfer of the title to, and delivery of the thing on the other. If, however, he makes known the speci-

fic need and the purpose for which he desires to buy and the seller says "I will sell you a thing which will supply that need and accomplish that purpose," this mutual appreciation of the motive and acceptance of it and incorporating it into the contract changes it from simple motive into legal consideration.

An existing moral obligation such as gratitude, can not furnish the consideration of a valid contract, except in the one class of cases where there has been a pre-existing legal obligation which can not any longer be asserted. For example: A owed B a debt, which is now barred by limitation, and B now has no remedy by which to collect it. A promise (in writing, as recognized by the statute formerly cited) from A to B to pay the debt will be supported by the previous debt, because of the legal obligation which once existed. The same is true if the debtor has been relieved by discharge in bankruptcy.

Adequacy.—So long as there is some consideration that has a money value, even though slight, it will support a promise, in the absence of fraud, mistake, accident, or undue influence. Inadequacy of consideration, if very marked, may be evidence which has some effect in establishing fraud, etc., but, of itself, will not be ground for avoiding the contract. Illustrations: A note executed in compromise of a doubtful claim is based upon valuable consideration, even though it should afterward transpire that the claim was not good.

Extinguishment of a bona fide debt is a valuable consideration. Extension of time on a note is also.

Consideration Must Be Legal.—A consideration that is against public policy, or public morality, or is prohibited by statute, can not support a contract.

Consideration May Be Executed or Executory, But Not Past.—An executed consideration exists where "one of the two parties has, either in the act which constitutes the offer or the act which constitutes the acceptance, done all that he is bound to do, under the contract, leaving an outstanding liability on the other party only." (Anson, 112.)

An executory consideration is one which consists in a promise to do or to forbear in the future.

A past consideration is some act done, or forbearance suffered, by one in time past, by which another has been benefited without

incurring thereby any legal liability. If, afterward, the beneficiary make a promise to the other to compensate him for such act or forbearance, the promise is invalid, unless it has some new consideration to support it.

Negotiable Instruments.—It is sometimes said that negotiable instruments are an exception to the rule that no contract can stand unless supported by consideration. This is not, in any real sense, true. Want, or failure, or partial failure of consideration may always be plead in defence of an action on a negotiable instrument, as between the original parties, "or when it (the instrument) shall have been assigned or transferred after the maturity thereof; or when the defendant may prove a knowledge of such want or failure of consideration on the part of the holder prior to such transfer."

Form.

Contracts May Be Either Written or Parol.—In English Law, two aspects or species of written contracts are recognized (1) The *specialty,* or contract under seal, and (2) the simple contract, not under seal. The difference between the two, at Common Law, is very great. The former, being an instrument of greater solemnity than the latter, proves itself, and does not require a consideration. The simple contract, on the other hand, could, for a long time, only be enforced at all where it was proven by evidence *aliunde.* This is not now the case in England. A simple contract can there be enforced, though wholly executory; consideration, of course, is necessary.

It is a general rule that a parol, or verbal, contract is as binding and valid as a written one; but there are certain exceptions declared by express legislative enactment.

Contracts Required to be in Writing.—Agreements which are required to be in writing at Common Law are very few indeed. There are, however, a number of statutory provisions requiring agreements of certain kinds to be in writing in order to be enforceable. The most important statute on this subject is known as the Statute of Frauds. The English statute on this subject (29 Charles II, Chap. 3) is the basis of all the American legislation thereon. The statutes of the several States are in the main quite similar, though few, if any, of them are identical. As they

all grow out of the English statute, we will base our discussion on that, modifying it so as to be fairly applicable to all of its American followers.

The contracts within these statutes are of several kinds as follows:

(1) Contracts for the sale of real estate, or any interest therein, or of the lease of real estate for a term specified in the statute, varying in different States from one to three years.

(2) Agreements by an executor or administrator to pay the debts of the estate out of his own property.

(3) Agreements by one person whereby he becomes chargeable for or promises to answer for the debt, default, or miscarriage of another.

(4) Agreements made upon consideration of marriage.

(5) Agreements not to be performed within one year from the making thereof.

(6) Contracts for the sale of goods, wares, or merchandise of a specified amount. In this last case, the necessity for written memorandum is obviated by either delivery of the goods in whole or in part, or the payment of earnest money or part payment of the purchase price.

The reason for the requirement of the written memoranda as evidence of the sale of land or of interest therein, or of long continuing leases is readily apparent. Land is the most permanent kind of property and rights in it to be enjoyed in the distant future are necessarily dependent upon present transactions affecting its title, and permanent evidence of these transactions is essential to the peace and well being of future owners. The English statute covers sales of lands and of all interests in and concerning them. This is broader than a number of the American statutes which are limited to sales of lands without including interests in or concerning them.

The difference between the two is illustrated in agreements warranting title to land. Under the English statutes, and those following its phraseology, a parol undertaking to warrant the title to land is not good. In States in which the statute is limited to the sale or lease of land, such an undertaking is good.

The purpose of this statute is to prevent fraud and the courts have wisely held that its terms ought not to be so rigidly enforced

as to make it an instrument of harsh injustice. Hence it is held that if land be sold by parol and the purchaser is put in possession and pays the purchase price and makes improvement on the land, the parol agreement will be enforced. To permit the seller to reclaim the property under such circumstances would defeat the very purpose for which the statute was enacted. All these facts, however, must concur to take the transaction out of the statute.

To bring a lease within the statute the agreement must show that it is for a longer term than the statutory limitation. Hence, a lease for one year where the statute fixes that limit with the privilege of continuing for two years does not come within the statute. The term might end with the first year.

The second provision relates to promises which undertake "To charge any executor or administrator, upon any promise, to answer any debt or damage due from his testator or intestate out of his own estate."

This provision is self-explanatory, and is simply a protection to executors and administrators against paying, from their own pockets, any debt due from the estate of their testator or intestate.

The third relates to agreements "To charge any person, upon a promise, to answer for the debt, default, or miscarriage of another."

Contracts of guaranty or suretyship fall within the statute; contracts of indemnity do not. The test, generally speaking, is this: Is the promisor totally unconnected with the transaction, except by means of his promise to pay the debt of another, or is he himself to derive some benefit from the contract? In the former case, the contract is one of guaranty; in the latter, one of indemnity.

A more minute analysis supplies the following rules:

In order to bring the contract within the statute so as to make writing necessary.

(1) The promise must be made to a person to whom the third person is liable.

(2) The liability of such third person, which the promisor agrees to assume, or assure, must have an existence, present or prospective.

(3) The agreement of the promisor must not be such as extin-

guishes when made the liability of the third person to the promisee.

(4) The promise must be to answer for the debt or liability of the third person out of the promisor's property, not out of that of the third person, or of another.

(5) The promise must not be made under circumstances under which the promisor is subserving some interest or purpose of his own.

The provision regarding agreements made upon consideration of marriage does not need elucidation.

The next subdivision of the statute relates to contracts "not to be performed within the space of one year from the making thereof."

This clause applies only to a contract which can not be performed within one year. If the agreement, from its terms, may or may not be performed within one year, it is not within the statute, and may be made by parol.

Also, where either one of the parties to the contract, from the terms thereof, may perform his part alone within one year, the contract is not within the statute, even though the other party can not perform his part within the year.

It follows as of course, from the above, that every contract which has been wholly executed on one side is without the statute.

It has, however, been repeatedly decided that a contract can not be made by parol to begin in futuro and extend to a time more than one year from the time of making. This does not apply to contracts of lease, because they are expressly provided for in the fourth section of the article.

The last provision of the Statute of Frauds relates to the sales of goods, wares, and merchandise.

The word sales is not used here in the technical sense of a present transfer of the title to personal property for a price in money. It is broader than this in two particulars; first, it includes all transfers of the title to personal property without reference to whether the consideration be money or other thing of value; second, it includes executory sales, usually known as agreements to sell, in which title is to pass not in the present but in the future.

Goods, wares and merchandise are the terms most frequently

used in the Statutes. They are ordinarily construed to include all personal property whatsoever, whether corporeal or incorporeal, in possession or in action. The statutes in some of the States expressly include things or choses in action, but the construction seems to be the same with or without these words.

Each statute mentions some value which the thing sold must have in order for the statute to apply. Fifty dollars is the most usual minimum in the United States.

This clause in the statute is not absolute and the necessity for the written memorandum is obviated by the seller delivering to the buyer and the buyer accepting from the seller all or a part of the thing sold, or by the buyer paying to the seller all or a part of the purchase price or something by the way of earnest money. If either of these is done there is no necessity for writing.

What is a Written Contract Under the Statute of Frauds?—We have enumerated the classes of contracts to which the statute applies. The next question is: What does the statute require with reference to such contracts?

The agreement, or some memorandum thereof, must be in writing, signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized. In order that the memorandum may be sufficient to meet the requirements of the statute, it should (1) give the names of the parties to the contract; (2) embody the substance of the terms agreed upon; (3) fix the identity of the subject matter of the agreement; (4) it must be signed by the party to be charged, or his agent.

This memorandum need not appear wholly in one document or paper, but may consist of various letters or papers, which must, however, be connected and complete. Parol evidence is permissible to connect different documents, if they refer to one another and, when taken together, furnish a complete memorandum.

Effect of Noncompliance.—The effect of noncompliance with the statute is to render the agreement unenforcible at law. It can not be said to render the agreement either void or voidable, but since the agreement can not be proved by parol testimony, it simply renders the party seeking to enforce same incapable of establishing any right under it.

CHAPTER V.

CONTRACTS (CONTD.)

GENUINENESS OF ASSENT.

Want of genuine assent may exist in agreements where there has been an apparent assent. It is, in any case, due to one of the following:

(1) Mistake.
(2) Misrepresentation or Fraud.
(3) Duress.
(4) Undue influence.

Mistake.

Mistake is an erroneous conception or belief. For the law to take cognizance of mistake it must induce conduct which is directly injurious to the party mistaken. It is sometimes quite difficult to distinguish between mistake and fraud. The line of separation seems to be that fraud is applied to misconception for which the party getting the advantage is responsible, that is, to deception either induced by him, or if not so induced, of which he has purposely availed himself, while mistake is limited to erroneous impressions which the party obtaining the advantage of is in no way responsible for.

Mistake is spoken of as of two kinds, mistake of law and mistake of fact.

Mistake of Law.—Mistake of law is a misapprehension of the law applicable to the agreement, or as to the legal effect of the agreement, the facts of the transaction being fully understood. The law here, as elsewhere, means the law in force within the jurisdiction where the agreement is entered into. All foreign laws are facts. A mutual mistake of law is never relieved against; a unilateral mistake is never relieved against unless it be on some material point and has directly resulted in injury to the party

mistaken. The cases are very rare even under these conditions, as the very general rule is that everyone is presumed to know the law and ignorance of the law does not excuse.

Mistake of law does entitle to relief, however, where the injured party, by reason of his erroneous ideas of the law, mistakes his legal rights in the subject matter of the contract so that he does not rightly apprehend the nature and extent of the rights existing in him and about which he is negotiating. If he is aware of his legal rights, no mistake as to the legal effect of the contract upon his known rights will entitle him to relief.

It is customary to speak of two other conditions as mistakes of law entitling to relief. These come within or near to the division line between mistake and fraud. They may well be treated under either.

The first of these are mistakes of law induced by the false statements of the other party to the transaction. As the law presumes everyone to know its rules and their effect upon his rights, it does not look with favor upon the claim of any person who says he has been misled or deceived as to the law, and requires strict proof of ignorance of the law on the part of the one claiming relief, and of facts which entitle him to rely upon the other for information regarding it. If these facts are shown, and the person undertaking to give the information makes material misstatements as to the law by which the other party is actually deceived and is thus induced to act to his injury, the law will give relief.

The other cases spoken of as entitling to relief on account of mistake of law are scrutinized even more closely. These are cases in which the party complaining was really ignorant of some material matter of law and his ignorance was taken advantage of by the other party, purposely and intentionally. Here there has been no deception practiced by the party getting the advantage. He simply knows of the material misconception in the mind of the other party and purposely takes advantage of it. It is a condition analogous to non-disclosure in the law of fraud and relief is never granted unless there is something in the circumstances that imposed upon the person getting the advantage, the duty of disclosing the law to the other party.

Mistake of Fact.—A mistake of fact is the ignorance, or forgetfulness, of a fact, past or present or the belief in the existence of

a fact, past or present, which did not or does not exist. The mistake may be

(1) as to the person with whom the contract is made, as if A should pay money to B, thinking he was C. with whom he had relations;

(2) as to the nature of the transaction, as if A should sign a deed to B, thinking it was only a mortgage;

(3) as to the existence of the subject matter, as if A should sell B a horse which should afterward turn out to have been dead at the time of sale;

(4) as to the identity of the subject matter, as if A should undertake to sell B a horse, B understanding that it was another;

(5) as to the terms and conditions offered and accepted, as a misunderstanding as to the price agreed upon.

A mistake of fact, to be relieved against, must be mutual, and material; or, if unilateral it must be material and not due to the party's own negligence; or it must be made under circumstances which give rise to a presumption of fraud, undue influence, or abuse of confidence.

Misrepresentation and Fraud.

The misrepresentation against which the law will relieve must be false representation as to a material fact, past or present, as to which the other party has been deceived and so induced to act, to his injury. If there is present in the mind of the party making the representation a knowledge of the falsity, or a reckless disregard of the truth or falsity, of the representation and an intention to deceive the other party thereby and have him act on it, then the misrepresentation amounts to fraud. The two terms are frequently used as interchangeable in the decisions, but the distinction is practically recognized. The first is very often called fraud, or "equitable fraud," and the second "actionable fraud," or fraud at Common Law. The effect of misrepresentation is to give the party who has been deceived and suffered a right to rescission or cancellation of the contract. It may be set up as a defense to an action on the contract. The effect of fraud is the same, except that in addition to the remedies mentioned it gives a right to damages for the injury suffered.

Elements of Fraud, or Deceit.

(1) A representation which must be

(2) False,

(3) As to a material fact

(4) Made with knowledge of its falsity, or a reckless disregard as to its truth or falsity.

(5) Made with intent to influence, and actually deceiving.

(6) Acted upon by the other party, to his injury.

Representation.—The subject matter of the representation is usually immaterial; that is, it may be as to personal property, the title to real estate, the solvency or credit of the person making it or of another, etc. The representation may be made by writing or parol, by words or conduct. In the following cases silence, or nondisclosure of the truth, will constitute a representation:

(1) Where active steps are taken to prevent discovery of the truth.

(2) Where, though the representation made is true, so far as it goes, the suppression of other pertinent facts renders it, in fact, misleading and untrue.

(3) Where, from the peculiar relations existing between the parties, the law regards the nondisclosure by one of them as a representation that the suppressed facts do not exist.

False.—The representation must be false in fact, as well as in intention. If the representation be partly true and partly false, it is fraudulent.

A representation may be false in fact, though the words used in making the statement are literally true; and, if so made with an intent to deceive, and it does actually deceive, it is regarded as false.

A representation may be true at the time it was made, and subsequently become untrue to the knowledge of the party making it before it is acted upon by the other party; in such case, a failure to disclose the change of circumstances is equivalent to a false representation.

As to a Material Fact.—A false representation, to be deemed fraudulent, must be a statement as to a past or present fact, as distinguished from

(1) An expression of opinion or belief.

(2) A prediction or promise as to the future. The exception is a promise made with no intention to perform.

(3) A statement of the law. The exceptions are: false statement as to the law made by an expert to one whom he knows to be ignorant, or made by one party to another between whom and himself there is a relation of trust and confidence, or made as to foreign laws, which are regarded as facts.

Materiality.—The fact as to which the misrepresentation is made must be one material to the contract.

Materiality is a mixed question of law and fact. The following are some of the principles that have been applied in determining it:

(1) That representations as to a fact directly affecting the subject matter of a contract, and without which the contract would not have been made, are representations as to a material fact.

(2) That, on the other hand, if a person making a contract does not rely upon the representations made by the other party, or if the same are of such a character as to constitute no inducement to enter into the contract, the represenations are not material, and do not constitute fraud; but

(3) That it is not necessary that a representation, in order to be regarded as material, should have been the only inducement to enter into the contract.

(4) That, if the representation is so trivial that it could not have influenced the conduct of an ordinarily prudent man, it is not material.

(5) That representations as to matters merely collateral to the subject matter of the contract are not material.

(6) That, if a false statement merely affects the probability that the contract will be performed, it is collateral, and under the rule just stated is immaterial.

(7) It may further be said that the real question is, not whether the party regarded it as material, but whether it was, in fact, material; so that the fact even that the party acted on the representation as material is not always conclusive as to materiality of the representation itself.

Knowledge of Falsity.—This element of fraud is not a necessary constituent of "equitable fraud," that is to say, a court will, in the exercise of its equitable jurisdiction, grant a rescission,

reformation, or cancellation of a contract, upon the one hand, or refuse specific performance, on the other, because of an innnocent misrepresentation, where the same has resulted in injury to the other party.

It has, however, been long regarded as established that fraud does not constitute an actionable wrong, that is, can not be the basis for a suit for damages, where this element is lacking. The knowledge may be

(1) Actual, where the party consciously makes false statement.

(2) Imputed, where he recklessly states something as true of his own knowledge, not, in fact, knowing whether it be true or false. Here the law imputes to him that knowledge which he has falsely assumed to have.

Intent to Deceive and Deception.—To constitute fraud at Common Law, the representation must have been made with intent to deceive. In misrepresentation in Equity it is not required in all instances that the party making the misrepresentation shall know its falsity. In such cases it is confusing to say that the misrepresentation must be made with intent to deceive. It must be made with intent to influence and it must in fact deceive. It would be absurd to allow one to avoid a contract on the ground of misrepresentations made to him if, he, at the time of entering into the agreement, knew them to be false, and made the contract notwithstanding.

Action by the Deceived Party.—Not only must the complaining party have been deceived, but he must have been induced by this deception to act in such way as to result in injury to him. Deception without action could not result in pecuniary hurt. It is equally essential that the action induced should be injurious.

Duress.

Definition.—The duress which will entitle a party to avoid a contract exists where one party, by the unlawful act of the other, or of his authorized agent, or even by the act of some third person with beneficiary's knowledge, is constrained to perform the act sought to be avoided, under circumstances which deprive him of the power to exercise his free will in the matter.

Duress may consist in actual restraint or violence, duress of imprisonment, or threatened restraint or violence, duress *per minas.*

Duress of Imprisonment.—Restraint must be unlawful.

(1) Arrest, for improper purpose, without just cause.

(2) Detention without lawful authority, whether for just cause or not.

(3) Arrest for just cause and under proper process, but for improper purpose.

The act sought to be avoided must have been done because of the restraint.

Duress Per Minas.—(a) The threatened injury may be

(1) To one's person or liberty.

(2) To one's husband or wife.

(3) To one's parent or child.

(4) By a few cases the doctrine has been extended to cover threats of injury to other blood relations—grandmother and grandson; aunt and nephew; sister and brother.

(5) To one's goods or property.

(6) In some cases to surety's principal, viz.: Those in which the surety becomes such without the knowledge of his principal's duress.

(7) To one's agent, who is induced to make contract. The principle seems to be based upon sound reason that where one's agent has been compelled to make a contract, under circumstances amounting to duress, the principal should not be bound by the contract any more than if he had made it personally under the same circumstances.

(b) Threats must be shown to have coerced; they need not, however, have been present at the time of making the contract, but the fear induced by them must be present.

(c) Threats need not have been sufficient to enthrall the mind of the ordinarily firm man, if they did actually coerce the party toward whom they were directed. It is the better doctrine, in modern times, that regard must be had, in each case, to the mental condition, age, sex, etc., of the party threatened.

Effect of Duress Upon the Contract.—With the exception to be noted later, duress renders the contract voidable, at the option of the coerced party. He must, however, proceed to avoid within a reasonable time after the removal of the duress.

It is said that the purported contract will be absolutely void, if obtained under such circumstances that there was no consent

whatever, as where one should have his hand forcibly guided in placing his signature to a written instrument, etc.

Subsequent purchasers can acquire rights under the voidable contract; never under the void.

Undue Influence.

Undue influence is defined as "moral duress," and exists in those cases where one party takes an unconscientious advantage of the other by reason of the influence which he has over him, either growing out of their relation to each other, or out of some marked inequality in the conditions under which they are dealing.

By undue exercise of such influence is meant such an exercise as coerces the will and overcomes the judgment of one party so as to render free and voluntary assent on his part impossible.

Cases of undue influence usually occur in transactions between persons who bear to each other a relation of trust and confidence, but may arise in transactions between strangers, where one of the parties is grossly ignorant, totally inexperienced, or in great personal need.

At English Law, the existence of special relations between the parties raised a presumption of undue influence, which must be rebutted by evidence. Anson says (page 222): "The court will not, necessarily, set aside a gift or promise made by a child to its parent, by a client to his solicitor, by a patient to his medical man, by a *cestui que* trust to his trustee, by a ward to his guardian, or by any person to his spiritual adviser; but such relations call for proof that the party benefited did not take advantage of his position." The rules of the different States are not uniform as to this matter.

The *effect of undue influence*, like that of duress, is to render the contract voidable at the option of the injured party, within a reasonable time after the removal of the influence.

Legality of Object.

An agreement may have every one of the substantial and formal requisites of a contract, and yet not carry with it the obligation of a contract, by reason of the fact that its object is one forbidden, or discouraged, by law.

Those objects of contracts which are forbidden by law, and which vitiate agreements into which they enter, are:

(1) Those forbidden by the Common Law, as constituting an indictable offense or a civil injury.

(2) Those forbidden by Common Law, as against public policy.

(3) Those forbidden by express statutory enactment.

Of these, both the first and second classes are spoken of commonly by our courts as coming under considerations of public policy, and we will accordingly so classify and treat them.

We will consider illegality of object from the following points of view:

1. As to the principles of construction applied in determining it.

2. In respect to its effect upon agreements otherwise binding and valid as contracts.

3. In respect to its classification.

Rules of Construction.—The following are a few of the rules that have been applied by the courts, in the construction of agreements, to ascertain the legality of their objects:

(1) The presumption of the law is in favor of the legality of the contract, as against its illegality, until the latter is clearly shown.

(2) It follows, as a corollary of the above, that where an agreement is capable of two interpretations, under one of which it would be legal and under the other illegal, favor is always to be given to the construction that renders it legal. If, however, it is shown that the intention of the parties was in accord with that construction which renders it illegal, the agreement will not be upheld, though on its face capable of the other construction.

(3) Extrinsic evidence may also always be introduced to show the real illegality of an agreement legal on its face.

(4) If the illegality appears to the court, though not set up by the defendant, it is the duty of the court, *sue sponte*, to refuse to entertain the action.

(5) If a contract is valid where executed, it is valid everywhere.

(6) But an agreement contrary to common principles of justice, or of morality, can, in no case, be enforced.

(7) If an agreement is invalid where made, it is invalid everywhere.

(8) If legal where sued upon, it will be presumed to be legal where made, until the contrary is proved.

(9) A contract must be unlawful at *the time it is made;* otherwise it can not be set aside on the ground of illegality.

Effect of Illegality.—The effect of illegality of object upon contracts in which it exists is different in different cases, depending on a variety of conditions. For instance: The illegality may exist in the subject matter of the contract, or in the consideration; it may affect the whole, or only a part of the contract, and in the latter case the illegal and legal parts of the contract may or may not be severable; the illegality may exist in the immediate object of the contract or in its ultimate effect and purpose; and, in the latter case, the parties may be *in pari delicto,* or one of them may be ignorant of the ultimate illegal purpose. Under all the above conditions, the contract may have been executed on both sides, one side only or on neither side, before the courts are called upon to pass on the effect of the illegality.

The general broad principle is well recognized that a contract tainted by illegality is void, in the sense that it is unenforcible; but this can not be stated as a rule to be applied under all circumstances.

It is believed that an examination of the authorities will bear out the following rules; for, though they may not be found strictly and consistently applied, in all instances, the principles upon which they are founded are sound, and are commonly acknowledged, and have received repeated judicial sanction.

Agreement Wholly Executed.—Rule.—Where an agreement, though unlawful, has been executed on both sides, actual rights are recognized as having been conferred by it to the same extent as if it had been lawful in its inception, and these will not be inquired into or disturbed by the courts, at the instance of either party concerned. The courts stand neuter between the parties, and will not disturb or alleviate a condition brought about by their own wrong-doing.

Agreement Performed on One Side.—Rule.—(a) Between parties *in pari delicto* an illegal agreement, executed on one side, will will not be enforced or relieved against.

Rule.—(b) Agreements otherwise voidable: Where one party to an illegal agreement was induced to enter into it by fraud, undue influence, or duress, or where he was not *sui juris* at the time of entering into the agreement, in short, in those cases in which, if the agreement had not been illegal, he could have had it avoided upon some other ground, the courts will grant relief to him, in spite of the unlawfulness of the agreement. He must, of course, return anything received under it.

Rule.—(c) *Locus Pœnitentiæ:* Where one party repents and repudiates the illegal agreement before the unlawful purpose has been in anywise put into execution, the courts hold that, unless the agreement was positively criminal or immoral in itself, he may seek the aid of the court to avoid it.

Rule.—(d) Protective Statute: Where one party repents and repudiates the illegal agreement, on no other grounds than that it was made illegal by a statute, the courts have held that, if the prohibition was imposed for the protection of a particular class, to guard them from imposition, the court will not hear one who contracted with a protected individual in the manner prohibited, when he seeks to plead the illegality of the contract to defend against enforcement, but will enforce the agreement.

In still another class of cases, the question as to whether parties will be regarded as in equal fault depends upon their intentions in entering into the contract.

When the immediate object of the agreement is unlawful, that is, where the agreement can not be performed without the doing of some act either unlawful by statute or regarded as repugnant to public policy, the agreement is always absolutely void and unenforcible. This rule is of universal and consistent application, and will be enforced regardless of the intention of the parties in entering into the agreement.

Where the immediate object or consideration of a contract is not unlawful, but the intention of one or both parties in making it is unlawful, the contract may be either void, that is, totally unenforcible, or merely unenforcible by one of the parties. Three rules may be laid down with assurance:

Rule.—(e) Unlawful purpose, participated in by both parties: If the ultimate unlawful purpose itself is, at the date of enter-

ing into the agreement, participated in by both parties, the agreement is absolutely void, and will not be enforced at the instance of either party, nor can property be recovered.

Rule.—(f) One party ignorant of the unlawful purpose: Where one party to an agreement whose ultimate purpose is unlawful not only did not share the illegal intent, but was ignorant that such an intent was entertained by the other party, his standing, as to the contract, is not affected by the unrevealed purpose; and, if the immediate object of the contract be lawful, he can enforce it, while the other party of course can not.

Rule.—(g) Mere knowledge of unlawful purpose, without active participation: (1) Where the illegal purpose of one party is the commission of some heinous crime, as distinguished from an act merely *malum prohibitum,* or not of great magnitude, then mere knowledge of such purpose by the other party, without any other participation, will render him *in pari delicto,* and he can neither insist upon performance nor ask relief. (2) Where the unlawful purpose of one party is the commission of some venial offense, or something merely *malum prohibitum,* then mere knowledge of such purpose will, in some jurisdictions, render him *in pari delicto;* in others, it will not do so without some active participation on his part in the unlawful purpose.

Agreement Growing Out of Prior Illegal Agreement.—Rule.—(h) Where an agreement grows immediately out of, or is connected with, a prior illegal one, the illegality of such prior agreement will enter into the new and render it void.

But if the new promise is founded wholly on a new consideration, it is not rendered illegal.

Rule.—(i) The test is: Is the plaintiff compelled to resort to the prior agreement, in order to make out his case? If so, the new agreement is also illegal; if not, it will be sustained.

The above test is applied to the following cases:

(1) An agreement to pay money owing on a prior illegal agreement.

(2) An agreement of one upon request of another to pay such other's debt, which arose on an illegal contract.

(3) Where such payment, as above, was not requested, but was subsequently ratified.

Assignees of Illegal Agreements.—Rule.—(j) Nonnegotiable

Paper: The assignee of a non-negotiable instrument takes it subject to all defenses, growing out of illegality or otherwise, which would have been good against the original party.

Rule.—(k) Negotiable Instruments: The assignee of a negotiable instrument, if he is an innocent purchaser for value before maturity, takes the same freed from all defenses based upon original illegality, unless the instrument is illegal by reason of some positive statute or is obtained by fraud in *esse contractus.*

Agreements Partially Illegal.—Rule.—(l) Entire Contracts: Where a contract is entire, and its various stipulations are inseparable, the entire contract is rendered void by the illegality of one of these stipulations.

Rule.—(m) Severable Contracts: Where the stipulations of a contract are severable, the illegality of one or more of such stipulations will not render the remaining ones void. That part of the contract which is legal will be enforced.

Classification of Illegal Agreements.

Agreements Contrary to Public Morality.—Rule.—(1) Illicit cohabitation, past or future, can not furnish the consideration of a valid contract.

Rule.—(2) Agreements between husband and wife for a separation, to take place in the future, are illegal; such an agreement, to take effect at once, is legal.

Agreements Prejudicial to the State in its External Relations. (1) Agreements entered into between the citizens, or subjects, of different States, after war has been declared between those States.

(2) Agreements made by a citizen, with the object of conducting hostilities against a State at peace with that of such citizen.

Agreements Prejudicial to the State in its Internal Affairs.—Agreements detrimental to public service:

(1) Assignment by public officers of unearned fees.

(2) Agreements to pay public officers more than lawful fees.

(3) Agreements involving any species of traffic in public offices.

(4) Lobbying contracts.

(5) Agreements which have the effect of placing the interest of public officers in conflict with their duty.

(6) Agreements tending to interfere with the course of public justice.

(7) Certain agreements affecting the public duties of citizens, as an agreement to pay one for his vote, etc.

(8) Agreements affecting private duties of individuals in which the public has an interest, as

(a) Contracts involving the commission of an injury to a third person.

(b) Contracts for puffing or suppressing competition at sales.

(c) Agreements tending to destroy the family relation, as agreements to procure divorce, surrender custody of children, etc.

(9) Trusts and contracts in restraint of trade.

CHAPTER VI.

CONTRACTS (CONTD.)

DIFFERENT KINDS OF CONTRACTS.

The subject matter and purposes of contracts are so various, and so many kinds of obligations of different character frequently enter into the constitution of a single contract, that it is thought best, at this time, to examine these matters in detail. It is hoped that a clear understanding, at this point, will much facilitate the study of both Interpretation and Discharge.

Covenants and Conditions.

As every agreement can be reduced to offer and acceptance, so it is believed that the terms of every contract can be reduced to covenants and conditions. Different classes of these terms, of course, have applied to them different names in particular branches of contract law, particularly in the law of real estate, which has a nomenclature of its own; but the terms themselves are generic, and under one or the other designation falls every executory term which can occur in a contract.

A *covenant* is an executory promise to do, or forbear, a particular thing.

A *condition* is a term of a contract whereby a qualification, or restriction, is annexed to a covenant, so as either to suspend its operation until the performance of some specified thing or the occurrence of some specified event, or to destroy its effect upon the nonperformance of some specified thing, or the occurrence or nonoccurrence of some specified event.

A covenant may be independent; that is, the obligation of the contract may demand its fulfillment absolutely, and in any event. Such is usually the case where, in a contract containing mutual covenants, each the consideration of the other, one party has fully performed. Here the outstanding covenant of the other party is usually absolute.

Covenants may be mutual and independent, where the parties have expressly agreed that each is to perform absolutely, and in any event. Such covenants are rare.

Covenants may be mutual and dependent; that is, each furnishes the consideration of the other, and they depend upon each other in such a way as to render them concurrent conditions. Such is the case in most contracts for the sale of goods for cash.

A covenant may depend upon a condition either (1) concurrent, as above, (2) precedent, or (3) subsequent.

A condition precedent is such an one as must happen, or be performed, before the covenant dependent on it becomes operative. After performance of the condition precedent its dependent covenant becomes absolute.

A condition subsequent is such an one as, when it does not happen, or is not performed as agreed upon, defeats the covenant depending on it. The covenant is discharged.

A covenant may depend upon several conditions, or several covenants may depend on one condition in the same contract.

Classification of Contracts.

Contracts may be classed, according to the way in which assent is expressed, as express or implied.

According to the apportionability, or non-apportionability of their mutual stipulations, they are severable or entire.

Contracts wherein there are several obligors or obligees may be classed, according to their operation on the parties to them, as several, joint, or joint and several.

Written contracts may be classed, in respect to the presence or absence of certain qualities that show themselves upon their assignment, as negotiable or non-negotiable.

Express and Implied Contracts.—As we have frequently had occasion to notice, either offer or acceptance may be made by conduct as well as words, so both covenants and conditions may be shown either expressly or by implication, and we may have either an express or implied contract.

An express contract is one the terms of which have been agreed upon by the parties and expressed in words.

An implied contract is one the agreement to the terms of which is expressed by one or both parties by conduct such as to raise a clear implication of assent.

Entire and Severable Contracts.—A contract may be entire, or severable. An entire contract is one which, by its terms, nature, or purpose, shows an intention of the parties that "each and all of its parts, material provisions and the consideration are common each to the other and interdependent;" that is, that all done, or forborne, or promised to be done, or forborne, on the one side, *taken together* forms the consideration of the acts, forbearances or promises on the other.

A severable contract is one which, by its terms, nature, or purposes, shows an intention of the parties to make certain acts, or forbearances, on the one side apportionable to certain of the acts, or forbearances, on the other, so that out of the whole several smaller contracts may be carved each supported by consideration. The intent of the parties, as indicated, usually controls.

Joint, Several, and Joint and Several, Contracts.—A contract may bind by its application, or confer rights upon, one party only on each side; or it may impose liability or confer rights upon several parties on each side.

A joint contract is one which imposes its obligation, in its entirety, on two or more persons, or confers a right upon two or more persons together. Upon the breach of a joint contract, the remedy must be enforced by or against all the joint parties.

A several contract is one in which the right conferred, or the liability imposed may be enforced by the promisee against any one of the promisors separately each being subject to a separate suit.

A joint and several contract is one which may be enforced against all the promisors together as against any one of them separately each being subject to a separate suit.

Negotiable and Non-negotiable Instruments.—The term negotiable instrument is one applied to certain written promises to pay money, the right of action on which is capable of being transferred by endorsement and delivery, in case the undertaking is to a designated person or his order, and the like; or by delivery merely, in case the undertaking is to A or bearer. The assignee, in either case, has the right to sue in his own name and, if he has taken the instrument before maturity and for a valuable consideration, takes it relieved of all defenses against prior holders of which he had no notice at the time of its acquisition except those

based on positive statutes or which deny the legal existence of the contract. This rule as to defenses goes even to the extent of infirmity or want of title; that is to say, a *bona fide* holder of the kind described above takes a good title, even from one who has found or stolen the instrument. The most usual forms of negotiable instruments are bills, notes, and checks.

A bill of exchange is an absolute, unconditional order by one person on another for the payment of a certain sum of money to a third person.

A negotiable note is a written promise by one person to pay absolutely, and at all events, a sum certain in money to a person named, or his order, or to bearer. If it lacks any one of these elements indicated, it loses its perfect negotiable character.

A check is an order upon a bank, purporting to be drawn upon a deposit of funds, for the payment absolutely, and at all events, of a sum certain in money to a person named therein, or his order, or to bearer, and is payable instantly upon demand.

To be negotiable each of these instruments must be payable at a certain time. As that is interpreted by the Law merchant, it need not be a definite time.

Other instruments than those mentioned have been admitted to partial negotiability, as, for instance, bills of lading, bonds, stocks, etc.

The distinction between negotiability and mere assignability must be constantly kept in mind.

Operation of Contract.

It may be laid down, as the general principle, that the obligation of contract, since it is voluntarily assumed by the contracting parties, can bind only those parties the one to the other, and can not include within the operation of its bond any not parties to the agreement.

Three questions arise in this connection, viz.:

1. Can a third person, not a party to the contract, enjoy and enforce rights under the contract by reason of the fact that the contract was made to his benefit? Can A enter into a contract with B whereby B is to do or forbear something in favor of C, so that C will have a right against B, under the contract, for the act or forbearance? At English Law, it was generally said that such

a contract gave to C no right which he could enforce. In America, two doctrines have, in the main, received sanction in the various States:

(1) "The Massachusetts rule" follows the English rule, that no action is maintainable by one for whose benefit a promise is made.

(2) "The New York rule." A third person (X), for whose benefit a promise is made by A, upon consideration moving from B (the promisee), may maintain an action upon the promise, provided B was, at the time the promise was made, under an existing obligation to X which he is seeking to discharge by giving X the benefit of A's promise. (Anson, 280.)

Where this last rule is followed, it is usually held that the promisee may release the promisor from the promise before the third party has accepted same and acted upon it, not afterward.

The rule announced in (2) above seems to be the rule followed in Texas. Spann v. Cochran & Ewing, 63 Texas, 240, is a case directly in point. In the opinion, the court says: "It is believed, however, that such an agreement between a debtor and a third person, made upon valuable consideration, gives to the creditor a cause of action upon which he may sue and recover from the person who has so contracted to pay him a debt originally due only by the person to whom the promise is made." Such a promise does not come within the provision of the Statute of Frauds relating to contracts to answer for the debt, default, or miscarriage of another. Suit may be brought on such a promise by a third person for whose benefit it was made in his own name.

2. Do the parties to the contract enjoy rights *in rem*, as well as rights *in personam;* that is, does a contract between A and B give to each not only rights against the other, but against the public as well? It is held that it does. The duty to respect the contractual tie rests upon all the world; and, in this indirect way, persons not parties to the contract are affected by it. "A man who induces one of two parties to a contract to break it, intending thereby to injure the other, or to obtain a benefit for himself, does that other an actionable wrong."

3. To what extent may the original parties to a contract assign their rights and liabilities, under the contract, and substitute new parties?

The liability of a contract can not be assigned, except by the assent of the third party and the original parties, given in such a way as really to effect a new contract, which is substituted for the old. *Liability can not be assigned.*

Rights under a contract may be assigned. We will notice briefly the Common Law rule, and the equitable rule.

At Common Law.—In the early history of the Common Law a chose in action was absolutely unassignable; such a course was regarded as against public policy, because promotive of litigation. It was, after some struggle, established that a foreign bill of exchange might be assigned and an action brought by the assignee on the bill; and, still later, the exception was extended to inland bills, and gradually to all negotiable paper. Later, in view of the jurisdiction of the equity courts, parties were permitted to assign debts not evidenced by negotiable instruments; but, in such cases, suit must be brought on them in the name of the assignor for the use of the assignee. In 1873 an Act of Parliament was passed in modification of the Common Law, giving to the assignee of any debt or legal chose in action all legal rights and remedies; but "(a) the assignee takes subject to equities; (b) the assignment must be absolute; (c) must be in writing, signed by the assignor; (d) express notice in writing must be given to the party to be charged, and title dates from such notice."

In Equity: Bona fide assignments of choses in action for a valuable consideration were, from an early date, enforced in equity. The rule was based upon public utility, and the advantage to commerce of the increased volume of transferable property.

Methods of Assignment.—By act of parties: No particular form of words or form of instrument is required to constitute a valid assignment. Where a chose in action is evidenced by a written instrument, assignment may be made by separate writing, or by endorsement. It is generally true that a valid assignment may be made by parol, whether the chose of action be evidenced by writing or not; and where there is no written evidence of the debt, such an assignment, of course, need not be accompanied by any delivery actual or symbolical.

Where there is a note, bond, or other written obligation evidencing the debt, there must be a delivery of the instrument.

The necessity for such delivery is, of course, obviated, where a separate assignment in writing is drawn up and delivered.

By operation of law: (a) Upon the transfer of interests in lands:

Covenants affecting lease-hold interests: It was the rule at Common Law that assignability was an incident of lease contracts, and that all leases, except those at will, could be assigned, unless some restriction was found in the terms of the lease. Under this rule, the liability for rent went with the assignment.

Covenants that run with the land: A covenant that is appurtenant to or annexed to the land, runs with the land, and a transfer of the land works an assignment of the rights and liabilities of the covenant, by operation of law.

Thus, a covenant of warranty runs with the land. The test as to whether the covenant is personal, or runs with the land, is usually this: Does the covenant extend to the thing *in esse* as part of the conveyance? Thus, where land was conveyed to a railroad company, and said company covenanted to fence same, such covenant was held to be personal, and not such as would pass to a subsequent purchaser. A covenant to keep in repair a building *in esse* at the time of the conveyance would have been such an one as would run with the land.

(b) Assignment by theory of representation.

(1) Death: Death of a party works an assignment of his rights and liabilities of a personal nature to his representative, his executor or administrator. Such assignee takes only in the representative capacity. Such contracts as depend upon the skill or personal services of the deceased, such as contracts of employment, do not survive, and do not pass to the representative.

(2) The same rule as the above applies in cases of bankruptcy, and upon exactly the same principles.

Effect of Assignment.—By the assignment of a chose in action, the assignee succeeds to all the rights and privileges of his assignor. Where the chose assigned is a nonnegotiable instrument, the assignee takes, subject to all the equities, offset, etc., existing between the original parties.

If the instrument is negotiable the indorsement to an innocent purchaser, for value, without notice before maturity, cuts off all

defenses except those given by some positive statute or which dispute the legal existence of the contract.

Interpretation of Contracts.

The subject of interpretation of contracts involves two things:

(1) The rules of evidence in accordance with which the contract itself is to be established.

(2) The rules by which the contract, once established, is to be construed and the true meaning and scope of its terms arrived at.

Rules of Evidence.

Parol Contracts.—The rules governing the proof of parol contracts are the general rules of evidence in force as to other matters, and reference is made to works on the Law of Evidence.

Written Contracts.—When it is sought to enforce contracts which are wholly or in part in writing, it is still necessary that some matters be established by parol; as, for instance, the identity of the party bound by the contract and the party sued, the existence of other facts and circumstances which change the legal effect of the written instrument—such as fraud in the procurement, etc. These rules may be classified under the following heads:

(1) Evidence as to the existence of the document.

(2) Evidence that the document is a contract.

(3) Evidence as to the terms of the contract.

Evidence as to the Existence of the Document.—(a) If the written contract itself can not be produced, the claimant must prove by parol (1) that the contract was in existence and was genuine; (2) that it is now lost, or destroyed, and that he is not legally responsible for its nonproduction; the terms of the contract may then be proved as though it had been a parol contract.

(b) To prove an instrument, at Common Law, it is necessary to call one of the attesting witnesses, if any, except where the document is thirty years old and comes from the proper custody. If there were no attesting witnesses or none of the attesting witnesses are living, then the proof of the handwriting of the party, or of the attesting witnesses as the case may be, must be made by persons acquainted therewith. Reference is here made to the works on Evidence, where these rules are more fully discussed.

(c) Where the writing does not set forth the whole contract, parol evidence may be introduced to show that fact, and to supplement, not to change, the writing. So parol evidence is admissible to show the connection between various documents which, taken together, set forth the contract. Where the contract comes under the Statute of Frauds, it seems that such evidence is not admissible, unless the documents, in some way, refer to one another.

Evidence That the Document is a Contract.—(a) Parol evidence may be introduced, to show want of genuineness of assent in any of its forms, as frauds, mistake, etc.

(b) Parol evidence is admissible, to show illegality of object.

(c) Parol evidence is admissible, to show want, or total, or partial failure of consideration; or that consideration existed, though none was recited; or that the real consideration was different from that recited.

Two exceptions to this last rule are recognized: (1) Where the consideration is expressed in a contractual stipulation, it is a term of the contract which can not be varied by parol. A deed which recites consideration can not be defeated by showing no consideration, or by showing different consideration. Of course, in both the above instances fraud, accident, or mistake could be shown.

(d) Parol evidence is admissible, to show a condition, agreed upon by the parties, which suspended the operation of the contract, as where a deed has been delivered in escrow.

Evidence as to the Terms of the Contract.—It is the fundamental rule that the instrument is the best evidence of its terms; but we find certain well recognized exceptions to this rule:

(a) Where the parties have not put all the terms of their agreement in writing, such supplementary or collateral terms as are required to complete the contract, as actually made, may be shown. In such cases, the parol evidence can not be allowed to contradict the writing, but only to supplement it, where a distinct parol contract has been partially reduced to writing.

(b) Parol evidence may be introduced to explain latent ambiguities in the terms of the contract. The ambiguity may be as to the subject matter, identity, or capacity of the parties or meaning of some word used in a local or technical sense.

(c) Parol evidence can be offered to show fraud *in esse contractus,* or mutual mistake, in reducing the contract to writing.

Construction.

After the instrument itself has been proved, as the basis of rights and liabilities, it then becomes necessary to determine, from the instrument itself, just what those rights and liabilities are. This is the purpose of Construction. In this construction the object is to give effect to the intention of the parties *as expressed in the instrument;* that is to say, the question is not: What may the parties have meant and intended? but, What is the meaning of the words which they have used? No unexpressed intention can be considered.

If the whole instrument, taken together, contains no ambiguities or seeming inconsistencies, there is no room for interpretation; but instruments of that degree of perfection are so rare, and the courts are so often called upon to settle questions as to the real intent of the parties expressed in written evidences of contracts, that a large mass of rules of construction have, from time to time, been developed, which are announced, with considerable positiveness, as forming an integral part of the Law of Contracts, and which are followed, by the courts, with varying degrees of consistency and certainty, as each case may seem to demand.

Rules Relating to Construction of Contracts as a Whole.— (1) The intention is to be determined by a reference to the whole instrument, rather than to any particular phrase, clause, or sentence.

(2) To this end, the instrument must, if possible, be given such a construction that every word or clause shall be effective; that is, a construction is to be adopted which will harmonize the various parts of the instrument. This is, however, not always possible. "Where there is a repugnance between a general and a particular description in a deed, the latter will control; although, whenever it is possible, the real intent must be gathered from the whole description, including the general as well as the particular."

(3) Transactions evidenced by several writings: Another particular application of the general principle laid down is found in the rule that "two deeds, or writings, executed at the same time,

between the same parties, and in reference to the same subject matter, are to be taken as parts of one contract and forming an entire agreement.'' The same rule applies to separate writings not executed at the same time, or not referring to the same transaction, where one is referred to by the other in such a manner as to make it, expressly or impliedly, a part of that other. If such reference is made for a particular purpose only, the connection will be recognized for that purpose only.

(4) That construction is preferable which renders the contract reasonable and equitable, rather than the reverse.

(5) The court, where it is necessary to arrive at the intent of the parties will consider the circumstances surrounding them at the time the contract was made; but this is done merely to arrive at the meaning of the words actually used in the written instrument, not to add to or take away from those words.

(6) Where the contract is, in itself, ambiguous, if the parties have, by their actions under it, or under others like it, where there has been a uniform and harmonious course of dealing between the parties, construed the instrument in a particular way, effect will be given to this construction. Evidence of such conduct, however, will not be admitted to vary the terms of a clear and plain contract.

(7) In addition to the terms expressed in the contract, the law will read into it certain terms, which are of such a nature that it is to be presumed that the parties had them in mind and intended that they should form part of the contract. Thus, it is usually held that the parties must have contracted with reference to the law in existence at the time the contract was made, so that its obligation becomes an implied term in the contract.

Rules Relating More Properly to a Construction of Specific Words, Phrases or Clauses.—(1) The words of a contract are ordinarily to be given their plain and generally accepted meaning; not so, however, when such a meaning would render the contract senseless, or where it is apparent that a different intent existed.

(2) If it clearly appears, from the remainder of the instrument, that the parties used the words in an arbitrary and unusual sense, effect will be given to that sense.

(3) Technical expression, that is, those which have a peculiar

meaning in some art, trade, or profession, will be given their technical meaning.

(4) Words which have, from the usage of the locality, or from that of the trade, profession, or business to which the contract relates, acquired a meaning different from that in common acceptation will be given the meaning sanctioned by the usage in the minds of the parties.

(5) Where language can be construed in two senses, in one of which the contract would be legal, in the other illegal, effect will be given to the former construction.

(6) Where language can be construed in two senses, in one of which the contract would be valid, in the other invalid, effect is given to the former.

(7) Where language can be construed in two senses in one of which the contract would be senseless or frivolous, though valid, in the other effectual and operative, effect is given to the latter construction.

(8) Restrictive words control general words referring to the same thing, where the intent can not be gathered from the whole instrument and the two expressions are hopelessly repugnant.

(9) Where the real intent of the parties can be gathered from the instrument, obvious clerical and verbal mistakes can be corrected, or even omitted words inserted, so as to effectuate intent of parties.

(10) Words wholly inconsistent with the nature of the contract, or repugnant to the expressed intent of the parties, may be rejected.

(11) Grammatical inaccuracies and incorrect spelling are immaterial, nor can punctuation control, where the meaning is otherwise clear.

(12) In contracts, partly written and partly printed, the written portion will control in case of inconsistency.

Discharge of Contracts.

Discharge of a contract may be effected in any one of five ways:

(1) By agreement.

(2) By performance.

(3) By impossibility of performance

(4) By operation of law.

(5) By breach.

Discharge by Agreement.

Since the obligation of contract arose, in the first instance, from agreement of the parties to it, so it may be dissolved by their agreement.

This agreement may take the form of either (1) Waiver, (2) Substituted Contract, or (3) by some provision for discharge in the original contract.

Discharge by Waiver.—By waiver, in this connection, is meant mutual release from the contractual bond, or voluntary rescission of the contract, in which the consideration for the promise of each party is the promise of the other.

Where the contract has been performed on one side, a mere agreement by which the party still bound is to be released is not good, and will not be binding on the other party. Such an agreement must be supported by consideration and have all the elements of an original valid contract.

At English Law, the negotiable instrument was not permitted to be waived, as other contracts, but the American rule is different. Such a contract may be waived as any other, but the instrument must be delivered up.

Substituted Contract.—The parties to a contract may enter into a new agreement between themselves on the same subject matter, which will either expressly or impliedly discharge the existing contract. There must, in such cases, be a valid consideration to support the mutual promise.

When such discharge is claimed by implication, the implication must be plain, the terms of the new contract must be inconsistent with those of the former.

The discharge may be my novation; that is, by the agreed substitution of a new party in the place of one of the original ones, the terms of the new contract remaining the same. To constitute a novation, there must be mutual assent of the three parties upon proper consideration, and an unqualified discharge of the person originally bound. Distinguish such an agreement from one to answer for the debt of another.

A postponement of performance for the convenience of one of the parties does not amount to the substitution of a new agreement which can discharge the contract.

Discharge According to Provisions in the Contract.—The contract itself may contain provisions for its discharge. Such provisions may take the form of conditions subsequent, upon the occurrence of which the contract is to be discharged; a condition precedent, upon the nonfulfillment of which the contract is to be discharged, or the reservation of the right by one or both parties to terminate the contract upon notice given, as in contracts of employment, and other continuing agreements.

Discharge by Performance.

A complete performance of the mutual stipulations and promises of a contract discharges the contract.

The obligation of one or the other party to the contract is frequently a money liability, in which performance on his part will take the form of payment. There are several rules to be noted as to payment:

(1) A less sum can never pay a greater so as to discharge the party so paying. There must, in such case, be additional consideration.

(2) Payment by giving a negotiable instrument may discharge the party so paying, absolutely or only conditionally. If it is agreed between the parties that the instrument is accepted in absolute payment, then the party giving it is discharged from the former indebtedness. In the absence of such agreement, the payment and discharge are only conditional, depending upon whether or not the instrument is honored at maturity.

Tender.—An attempted performance, frustrated by the other party, is called a tender. Tender may or may not discharge the party tendering, according to the circumstances.

Where one party is bound by the contract to deliver goods, if he tenders the goods at the proper time and place to the other party, or to one authorized by him to receive them, he is discharged by this from the contract, if it is otherwise fully executed on his side and is unexecuted on the other side, and refusal by the other party to accept is a breach of the contract. If the other party has executed, the tender will have the same effect only as tender of money in payment of a debt.

Where one party is bound by the contract to pay money, tender on his part and refusal on the part of the other does not discharge

the debt; but such tender, if properly made, does discharge him from any further liability for interest, costs of suits, etc.

Tender of money must be made on the day on which the debt is due, not before or after. It must be absolute and unconditional.

Tender must be kept up after having been made; that is, the party must remain ready and willing to pay.

"A tender required by a contract will be waived by a party in whose favor it was required, by acts or words on his part showing that it would not be received."

It has been held that, to constitute a good tender the precise sum due must be offered.

Discharge by Impossibility of Performance.

There may be an impossibility, legal or physical, upon the face of the contract, or there may be an impossibility due to the non-existence, not known at the time to either party, of the subject matter of the contract. The first case belongs properly to the subject of Consideration; the second to that of Mutual Mistake. In both cases the contract is void.

Impossibility of performance, however, may arise subsequently to the formation of the contract, and, in some such cases, the contract will be discharged. The general rule is that such impossibility does *not* discharge the contract.

Exceptions:

(1) Legal impossibility, arising from a change in the law of the land.

(2) Where the continued existence of a particular thing is necessary to performance, its destruction, from no fault of either party, operates to discharge the contract.

(3) Contracts for personal service are discharged by the death of the promisor.

Discharge by Operation of Law.

Under certain circumstances, a contract will be discharged by the operation of rules of law.

(1) Alteration of a written instrument or agreement: (a) The alteration must be made in a material part. (b) It must be made by one of the parties, or by one acting for him, without the consent of the other party.

(2) Bankruptcy; Bankruptcy releases the debtor from contractual liabilities provable under the bankruptcy.

Discharge by Breach.

Breach of the obligation of the contract always confers a right of action upon the other party. Sometimes it also discharges the other party from further performance. Breach may take the form of:

(1) Renunciation by one of the parties, while the contract is still executory, if unequivocal and absolute, constitutes a breach of the contract, and at once discharges the other party, if he choses. It is said that each party to a contract has not only the right to performance when due, but also "to maintenance of the contractual relation up to that time."

(2) Impossibility of performance, created by one party before performance is due, discharges the other party immediately from the contract, and gives him an immediate right of action; as where A promises to marry B upon a certain date, and, before that date, marries C, the contract is discharged by the impossibility created, and B has an immediate cause of action.

(3) In continuous contracts the same is true of renunciation by one party, or impossibility created by him, which is merely a species of renunciation, *in the course of performance;* that is, at any time before performance has become complete.

(4) Breach of contract by one party, at the time of performance due, may or may not discharge the other party:

(a) A breach in any vital part of the contract, that is, any stipulation which goes to the root of the contract so that its breach will destroy the purpose of the contract—discharges the other party from the contract.

(b) Breach of some trivial stipulation, while it gives ground for an action for damages, will not discharge the other party from performance.

(c) Breach may be waived by word or act and performance continued, in which case the promisee will have his action for damages, but will not be discharged.

(d) Whether or not complete discharge follows breach depends, very often, upon whether or not the contract is entire or severable. If it is entire, breach of a single material stipulation will discharge the promisee. If it is severable, such is not the case, and the promisee, while entitled to damages apportioned to the breach, is not discharged from further performance.

(e) Whether or not discharge results from breach depends, also, upon the character of the covenants in the contract. Covenants may be:

Mutual and independent; that is, two absolute executory promises to do, or to forbear. In this case, breach by one party of his covenant does not discharge the other from performance of his.

Mutual and dependent; that is, two executory promises to do, or forbear, each dependent on the other. The two covenants then form concurrent conditions. Breach by either party will discharge the other.

Not mutual, but one dependent upon the other; that is, a covenant on the one hand, dependent upon the prior performance of the other, called a condition.

The condition may be precedent, or subsequent; and the nonperformance of the condition precedent or the occurrence of the condition subsequent discharges the covenant depending on it. There may be covenants of all these kinds in one contract, and it is for this reason that the construction of stipulations, with reference to their breach and discharge, is often difficult.

A condition does not maintain an action for damages, it simply discharges the contract.

The construction of the various mutual stipulations of a contract to determine which are covenants and which conditions, and the relation of these to each other, is for the court. The intention of the parties will control, where it can be arrived at.

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APPENDIX.

FEDERAL JUDICIAL SYSTEM.

Brief Summary of Judiciary Act, Approved March 3rd, 1911, which goes into effect Jan. 1st, 1912.

This is a very important act reorganizing the entire Federal Judicial System. It incorporates into one statute all the acts of Congress creating Federal Courts and defining their jurisdiction, and also a great many of the statutes regulating procedure in these courts. It is, therefore, properly designated as "An act to codify, revise, and amend the laws relating to the judiciary" as set out in the title, or "The Judicial Code" as declared in the body of the act. The principal change made by it in the regular system of courts is the abolition of the Circuit Courts and the transfer of a very large part of the jurisdiction now pertaining to these courts to the District Courts. All of the jurisdiction is not transferred. For example: In suits arising under the Constitution and laws or treaties of the United States or between citizens of different states, or between citizens of a state and foreign states, citizens or subjects, the present minimum jurisdictional amount in the Circuit Court is $2,000, while in the "Code" the minimum amount in the new District Courts is $3,000.

The new District Courts are to retain substantially all the jurisdiction the present District Courts possess.

The jurisdiction of the Circuit Courts of Appeal remains practically unchanged, as does that of the Supreme Court, except as changes in the powers of the District Courts and the other special courts carry with them resultant changes in the courts of revisory jurisdiction.

As the Act has not yet gone into effect, and consequently none of its provisions have been construed, it might prove presumptuous to speak more definitely of its effect, so I content myself with the foregoing very general statements and a substantial setting out of a few of its more important provisions.

Chapter One deals with the Organization of the District Courts.

"Section 1. In each of the Districts described in Chapter 5, there shall be a court called a District Court, for which there shall be appointed a judge, to be called a District Judge." Here follow several Districts in which there shall be more than one judge and several which are combined, having one judge in two. The remaining twenty-two sections of this chapter deal with the organization of, and procedure in, the several District Courts provided for.

Chapter Two deals with the jurisdiction of the District Courts. Sections 24 and 25 are as follows:

Sec. 24. The District Courts shall have jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subject. No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: Provided, however, that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

Second. Of all crimes and offenses cognizable under the authority of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fourth. Of all suits arising under any law relating to the slave trade.

Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeal.

Sixth. Of all cases arising under the postal laws.

Seventh. Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws.

Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.

Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the

person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any revenues thereof, or to enforce the right of citizens of the United States to vote in the several States.

Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes.

Thirteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Fifteenth. Of all suits to recover possession of any office, except that of elector of President or Vice President, Representative in or Delegate to Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: Provided, that such jurisdiction shall extent only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them,

real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.

Seventeenth. Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

Eighteenth. Of all suits against consuls and vice consuls.

Nineteenth. Of all matters and proceedings in bankruptcy.

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress, against the United States, either in a court of law, equity, or admiralty, if the United States were suable. and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: Provided, however, that nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the District Courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: And provided further, that no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: Provided, that the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disabilities than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

Twenty-first. Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands; and it shall be sufficient to

give the court jurisdiction if service of original process be had in any civil proceedings on any agent or employee having charge or control of the inclosure.

Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.

Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

Twenty-fourth. Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.

Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the District in which such land is situate.

Section 25. The District Courts shall have appellate jurisdiction of the judgments and orders of United States commissioners in cases arising under the Chinese exclusion laws.

Chapter Three regulates removal of cases from State to Federal Courts.

Chapter Four contains "Miscellaneous Provisions" relating largely to matters of venue.

Chapter Five sets out the several judicial districts.

This concludes the provisions relating exclusively to the District Courts.

Chapter Six provides for nine Circuit Courts of Appeals and gives the States in each circuit. Each of these Circuit Courts of Appeals shall consist of three judges. Judges of the Supreme Court, Circuit Judges and District Judges are eligible to sit in these courts. There are detailed provisions as to the organization of these courts and matters of practice in them. The jurisdiction of these courts, as a class, is given in Sections 128–130, copied below. Other sections confer special jurisdiction as to different territorial courts, courts in Alaska, etc.

"Section 128. The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the United States District Court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine, and two hundred and forty, the judgments and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

"Section 129. Where upon a hearing in equity in a District Court,

or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the Circuit Court of Appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: Provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the Appellate Court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the Appellate Court, or a judge thereof, during the pendency of such appeal: Provided, however, that the court below may, in its discretion, require as a condition of the appeal an additional bond.

"Section 130. The Circuit Courts of Appeals shall have the appellate and supervisory jurisdiction conferred upon them by the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July first, eighteen hundred and ninety-eight, and all laws amendatory thereof, and shall exercise the same in the manner therein prescribed."

Chapter Seven deals with the Court of Claims which is not of general interest.

Chapter Eight provides for a Court of Customs Appeals to consist of a presiding judge and four associate judges. Its jurisdiction is given in section 195, as follows:

"Sec. 195. The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise, and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases."

Chapter Nine provides for "The Commerce Court" to consist of five circuit judges, those of the first court to be appointed by the President, thereafter the members to be designated by the Chief Justice of the Supreme Court from among the regular circuit judges.

Its jurisdiction is as follows:

"Sec. 207. The Commerce Court shall have the jurisdiction possessed by the Circuit Courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

"Third. Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a Circuit Court of the United States.

"Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a Circuit Court of the United States.

"Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

"The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes."

The judgments of the Circuit Courts of Appeals are subject to revision by the Supreme Court upon appeal as provided in the act.

Chapter Ten relates to the Supreme Court. This court, as now, consists of a Chief Justice and eight Associate Justices appointed by the President, who hold for life or during good behavior. The following sections declare its jurisdiction:

"Sec. 233. The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party.

"Sec. 234. The Supreme Court shall have power to issue writs of prohibition to the District Courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party.

"Sec. 235. The trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury.

"Sec. 236. The Supreme Court shall have appellate jurisdicton in the cases hereinafter specially provided for.

"Sec. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any right, title, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ.

"Sec. 238. Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States, in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

"Sec. 239. In any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight, the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Court of Appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"Sec. 240. In any case, civil or criminal, in which the judgment or decree of the Circuit Court of Appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

"Sec. 241. If any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs.

"Sec. 242. An appeal to the Supreme Court shall be allowed on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court as provided in section one hundred and seventy-two.

"Sec. 243. All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct.

"Sec. 244. Writs of error and appeals from the final judgments and decrees of the Supreme Court of, and the United States District Court for, Porto Rico, may be taken and prosecuted to the Supreme Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, or wherein the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken to the Supreme Court of the United States from the District Courts.

"Sec. 245. Writs of error and appeals from the final judgments and decrees of the Supreme Courts of the Territories of Arizona and New Mexico may be taken and prosecuted to the Supreme Court of the United States in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars.

"Sec. 246. Writs of error and appeals from the final judgments and decrees of the Supreme Court of the Territory of Hawaii may be taken and prosecuted in the Supreme Court of the United States, within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and also in all cases wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars.

"Sec. 247. Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the District Court for the district of Alaska or for any division thereof, direct to the Supreme Court of the United States, in the following cases: In prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Such writs of error and appeal shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the District Courts to the Supreme Court.

"Sec. 248. The Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby, in which the Constitution, or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court on appeal or writ of error by the party aggrieved, within the same time, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the District Courts of the United States.

"Sec. 249. In all cases where the judgment or decree of any court of a Territory might be reviewed by the Supreme Court on writ of error or appeal, such writ of error or appeal may be taken, within the time and in the manner provided by law, notwithstanding such Territory has, after such judgment or decree, been admitted as a State; and the

Supreme Court shall direct the mandate to such court as the nature of the writ of error or appeal requires.

"Sec. 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

"First. In cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said Supreme Court, then the question of jurisdiction alone shall be certified to said Supreme Court for decision.

"Second. In prize cases.

"Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity of any treaty made under its authority.

"Fourth. In cases in which the constitution, or any law of a State is claimed to be in contravention of the Constitution of the United States.

"Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

"Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.

"Except as provided in the next succeeding section, the judgments and decrees of said Court of Appeals shall be final in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases; and, except as provided in the next succeeding section, the judgments and decrees of said Court of Appeals shall be final in all cases not reviewable as hereinbefore provided.

"Writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the Circuit Courts of Appeals to the Supreme Court of the United States.

"Sec. 251. In any case in which the judgment or decree of said court of appeals is made final by the section last preceding, it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to it for its review and determination, with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court. It shall also be competent for said Court of Appeals, in any case in which its judgment or decree is made final under the section last preceding, at any time to certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for their proper decision; and thereupon the Supreme Court may either give its instruction on the questions or propositions certified to it, which shall be binding upon said Court of Appeals in such case; or it may require that the whole record and cause

be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"Sec. 252. The Supreme Court of the United States is hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings, from the courts of bankruptcy, from which it has appellate jurisdiction in other cases; and shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

"An appeal may be taken to the Supreme Court of the United States from any final decision of a Court of Appeals allowing or rejecting a claim under the laws relating to bankruptcy, under such rules and within such time as may be prescribed by said Supreme Court, in the following cases and no other:

"First. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

"Second. Where some justice of the Supreme Court shall certify that in his opinion the determination of the question involved in the allowance or rejection of such claim is essential to a uniform construction of the laws relating to bankruptcy throughout the United States.

"Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof, and may issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

"Sec. 253. Cases on writ of error to revise the judgment of a State court in any criminal case shall have precedence on the docket of the Supreme Court, of all cases to which the Government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance."

Chapter Eleven deals with "provisions common to more than one court." The first section of the chapter declares when the jurisdiction of the Federal Courts shall be exclusive of that of the several State courts, and is quite interesting. It is in this language:

"Sec. 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states:

"First. Of all crimes and offenses cognizable under the authority of the United States.

"Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

"Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

"Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

"Fifth. Of all cases arising under the patent-right, or copy-right laws of the United States.

"Sixth. Of all matters and proceedings in bankruptcy.

"Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

"Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls."

Chapter Twelve regulates juries in the Federal Courts.

Chapter Thirteen contains general provisions, principally providing against injustice or delay by reason of the changes made by the act.

Chapter Fourteen contains the repealing provisions and still further safeguards the rights of litigants whose cases should be pending when the act goes into effect.

This concludes the Act.