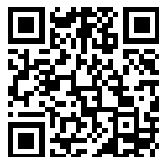

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COMMERCIAL LAW

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GANO'S COMMERCIAL LAW $\neq$ REVISED

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Commercial Law Revised

W. P. I

PREFACE

The authors of this edition of Gano's Commercial Law have had a definite aim in the plan, arrangement, scope, and purpose of this text, in which they have incorporated the results of their experience in business, in legal practice, and in the class room.

In general, the plan of the text is to treat each subdivision of a subject intensively in an expository manner, and whenever necessary to clarify each principle of law or subject explained, by a concrete example which is usually an actual court case. These cases have been selected with great care from authoritative sources and stated in such a clear and concise manner that the student will readily comprehend them.

Each subdivision is followed by questions which are intended primarily to aid the student in lesson preparation. The "Important Points" following each general subject will focus the student's attention and afford him a means of rapid review.

The test questions and case problems may be used in various ways, at the discretion of the teacher. Their use will enliven the subject and add to the interest of the student.

The important statutes near the end of the book will be useful for reference and will put the student in closer touch with the great questions of the day, many of which involve a knowledge of these statutes.

The illustrative legal forms have been collected in an appendix near the end of the book where they are readily accessible for reference or for class assignments.

In the plan of this book the arrangement of general subjects is not a material factor. The different subjects treated may be taken up and studied in any order, but the arrangement is logical and a proper sequence has been observed. Following a brief discussion of law in general, and property to which commercial law directly relates, there is a very full treatment of the rules of law governing contracts. This forms the basis for the discussion of the subjects immediately following: sales, agency, and negotiable paper. These four subjects are the most important, as the

business man comes most frequently into contact with them. The other subjects may be taken up in any order. We believe, however, it is more logical to study all the subdivisions of contract law before the laws relative to the different types of business organizations, and that the bankruptcy laws, which relate directly to business organizations, should follow.

The scope of the book has been made sufficiently broad and complete to satisfy the needs of business school and high school students, and the important phases of the subject have been treated in such a full and comprehensive manner as will give the student a thorough working knowledge of the fundamentals of applied commercial law.

In addition to this the authors have endeavored to make the text thoroughly teachable by omitting involved technicalities and including ample illustrative and problem material. Technical terms have rarely been used and when used they have been defined at once. Definitions of common legal terms are added, just before the index, for the convenience of the student.

While the purpose of this text is primarily for class use, it will be valuable to any one who may desire information on the various topics of commercial law. It should be noted that the text is based on the common law, except those subjects in which uniform statutes have been quite generally adopted, and that an attorney should be consulted for possible statutory modifications. This book is not intended to teach the student to be his own lawyer, but to give him a thorough and correct understanding of the fundamental principles of commercial law.

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COMMERCIAL LAW

LAW IN GENERAL

Definition. — In a general sense the law with which we are concerned is a rule of action or conduct prescribed by the supreme governing authority, commanding that which is right and prohibiting that which is wrong. The laws of nature, or scientific laws, are entirely outside the scope of this book. From the standpoint of business or commerce, law may be defined as the system of principles and rules which relate to the actions of men in their dealings and relations with one another.

The supreme authority is any organized form of government. The legislative department of the national government makes laws for the people of the United States. The legislative department of each state does the same for the people of the state; counties, cities, villages, and towns likewise have legislative departments which make laws or regulations for the people. All these legislative departments lay down many rules or laws for the guidance of all within their jurisdictions or boundaries.

There must be no conflict of authority. No state can make a law which conflicts with the Constitution or statute laws of the United States. Nor can a county, city, or town make regulations which conflict with the laws of the state in which it is located.

Origin of Law. — There has been some form of law or "rule of action" from the earliest time. An individual isolated from others in an uninhabited region might be said to be without law, but as soon as any number of human beings are associated together, rules and customs become recognized in the regulation of their rights and soon have the force of law.

In the time of the nomadic tribes the chief dictated many of the laws by which his people were governed. In later times kings made many laws. To-day laws for the most part are made by representatives elected by the people to the different lawmaking or legislative bodies.

The less civilized people of early times needed few laws, but the highly organized state of society at the present time requires many laws.

Law Classified. — Law may be classified as moral, international, and municipal.

Moral Law. — The code of ethics which prescribes the right and wrong in the conduct of one toward another is called the moral law. Its rules are enforced by the sentiment of the people derived from their belief in, and understanding of, right and wrong. It is moral law that tells us to deal honestly, to speak truthfully, and not to take advantage of any one.

It is necessary, sometimes, to make a distinction between what is morally right and legally right, or morally wrong and legally wrong. For example, a man is morally but not legally bound to support a dependent parent. The rules of law tend to represent the collective moral sense of the community, but they rarely reflect that sense in its entirety, because lawmaking bodies do not usually act as rapidly as morals are developed, being held back by the force of precedent and the necessity for avoiding numerous and sudden changes in law. There are many legal rules which have no moral quality, but are based on the necessity for having some rule, e.g. the rule requiring vehicles to pass to the right. A legal right can be enforced at law, while a moral right which does not amount to a legal right cannot be enforced.

International Law. — The law which regulates the intercourse of nations is international law. It consists of rules and principles founded on customs, treaties, the weight of opinion as to justice, and the mutual obligations which civilized nations recognize as binding upon them in their dealings with other nations. The conduct of the vessels of different nations toward one another on the high seas, which are open to all, is a question of international law, as are the rights and protection of representatives of one country within the boundary of another.

Municipal Law. — The rules of action prescribed by the supreme power in a state or nation, or a subdivision of a state or nation, commanding what is to be done and prohibiting what is not to be done, constitute municipal law.

Every state or nation must have some head or supreme

power, and in a republic like ours this power rests in the people and is administered by the officers whom they elect. The laws are made by the legislators, administered by the executive department of the government, and interpreted by the courts which apply these laws to the cases that are brought before them.

It is necessary in civilized nations that the conduct of man in relation with his brother man be regulated and restricted. Otherwise a resort to arms would be the only redress for a wrong. So it is that municipal law is required in order to insure justice and harmony. Because of this branch of the law contracts can be enforced, possession of real property acquired by its true owner, and crimes punished.

Municipal Law Classified. — Municipal law can be classified as constitutional law, statute law, and common law and equity.

Constitutional Law. — Every nation or state has a constitution, either written or unwritten, under which the nation exists and which as the basis of its power regulates, distributes, and limits its different functions and departments. The law embodied in these constitutions, especially as applying to the establishment, powers, and limitations of the government, is known as constitutional law. The United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. This limitation of governmental powers is a provision of constitutional law.

Statute Law. — A statute law is a law made by a legislative body. The laws passed by Congress or by a state legislature and the ordinances passed by a city council or board of aldermen are all statute laws. In this class also come laws proposed by initiative petitions and adopted by vote of the people.

The law that is embodied in constitutions, in acts of Congress, in acts of state legislatures and all other legislative bodies, and in acts adopted by vote of the people, is known as the "written law." The modern tendency is to reduce all rules of law to written law, generally displacing the unwritten rules of common law and equity.

Common Law and Equity. — The great body of municipal law in early English practice was known as the common law

and consisted originally only of customs. These, however, because of long usage, came in time to have the force of laws. As the affairs of a growing commercial country became more intricate, the hard and fast rules of common law which were firmly bound down by precedent were found inadequate for all the needs of the people, and there sprang up the chancery courts which decided controversies from an equitable standpoint and gave relief independent of precedent. This chancery or equity court still exists in a modified form, but the distinction between common law and equity has in a great measure disappeared. The distinction of to-day consists in the relief sought; if it be merely money damages, then it is a common law case; if some extraordinary relief, as prohibiting a man from erecting on his land a powder factory which would endanger his neighbor's dwelling, or correcting a deed of land which was improperly drawn, then the case is in equity.

Criminal and Civil Law. — Both common law and statute law can be divided into criminal and civil law.

Criminal Law. — The preservation of society demands that certain rules be laid down regulating the acts of its members toward the community in general. A violation of these laws is an offense against the state and is called a crime. The law which treats of crimes and their punishment is called criminal law. It forbids one man to steal from another, making it a crime, because such acts endanger the security of property and the safety of society, and a punishment of imprisonment for such an offense is therefore provided.

Civil Law. — As distinguished from the criminal law, that branch of law which looks to the establishment and recovery of private rights is called civil law. It controls the private rights and remedies of men in their relations with each other, in contrast with those that are public and affect the community in general.

Penalties. — A crime is an offense against the state in which it is committed, and the penalties are fines, imprisonment, and, for a few offenses, death.

In a criminal case the state, through its officers, is the plaintiff and the one who committed the crime is the defendant.

In a civil case the injured party is the plaintiff, the one against whom action is brought is the defendant, and the penalty is damages in the form of a judgment, which is directed against the property of the defendant or, in a proper case of equitable relief, against the defendant personally.

Commercial Law. — Commercial law is a branch of the civil law, and includes the laws regulating the rights and relations of persons engaged in trade or commercial pursuits.

Importance of Commercial Law. — Certain principles of commercial law are involved in every business transaction. It is important, therefore, that everybody who has business to transact should have such knowledge of the fundamental principles of commercial law as will enable him to avoid mistakes which might involve him in legal difficulties. The legal maxim, "Ignorance of the law excuses no one," applies to all.

Sources of Laws. — Our laws may be considered as derived from three sources, the common law, the statutes, and the constitutions. The common law, which was derived primarily from the English law, was established in this country by the early English settlers. It is made up of the rules and customs which were in use from time immemorial and came to be recognized as laws. It is also termed the *unwritten law*, because in the early times it consisted merely of the customs of the people. Now it is embodied in the decisions of our courts, the great mass of our reports of these decisions being the common law in this way reduced to writing.

The United States and also the several states have their lawmaking bodies. Congress and the legislatures from time to time pass laws, which are known as statute laws, also called *written laws*. These statutes may expressly change the common law, as is often the case, when the condition of the state or the progress of the people requires it. For instance, by the common law a wife could hold no property, as at her marriage it reverted to her husband, but by the statute law in all of the states this is changed, and now in most of them she can hold property to the same extent as though unmarried. In other cases the statutes declare and put in express terms a part of what formerly existed in the common law; for example, under the common law persons

meeting on the highway were to turn to the right, and the same rule is now laid down in the statutes.

Order of Authority. — In the United States the Constitution is first in authority, and, in so far as it applies, all other laws must give way. It provides that certain subjects that come within the province of the general government shall be under the exclusive authority of Congress, and that the constitutions and legislatures of the several states cannot provide or make laws to the contrary. On the other hand, all subjects not expressly confided to Congress are left to the state authorities, and are under the control of the constitution and statutes of the state. Every state statute must be in conformity with the constitution of the state, as well as with the Constitution and laws of the United States. The common or unwritten laws also must be in conformity with the statutes of the state, as well as with the state constitutions and the Constitution and laws of the United States.

QUESTIONS

1. What is law? Why is law necessary?
2. What is meant by the "supreme authority"?
3. What is the rule as to the conflict of authority in making laws?
4. What is the origin of law?
5. How are our laws made?
6. Why is it that highly civilized people need many laws?
7. What are the three general classes of law?
8. What is the difference between a moral right and a legal right?
9. Interpret the following: "Law is based on right and justice."
10. How are international laws made?
11. Wherein does municipal law differ from international law?
12. What are the classes of municipal law?
13. Explain the following statement as it applies to law: "The constitution is the framework of government."
14. In what are our common law rules embodied?
15. Into what two classes are common law and statute law divided?
16. How is criminal law enforced? What are the penalties?
17. How is civil law enforced? What are the penalties?
18. What is the importance of commercial law?
19. What are the sources of law in the order of authority?
20. What is the source of the early laws in this country?
21. In what way do laws limit individual liberty?

IMPORTANT POINTS

In the order of authority our laws may be classified as follows:

- 1. Constitution of the United States.**
- 2. Laws of Congress.**
- 3. Constitutions of the states.**
- 4. Laws of the state legislatures.**
- 5. The common law.**

Law is a rule of action.

The authority of any municipality or political subdivision does not extend beyond the boundaries thereof.

Much of the early unwritten or common law has been embodied in statute laws.

The correct decision in law is usually the same as the answer to the question: What is right?

Municipal law is the law in force in a particular country, state, county, or city.

Individual liberty is restricted only so far as is necessary to secure observance of the rules of law.

International law can be enforced, in the last resort, only by war.

Municipal law is enforced by courts of law maintained for that purpose.

In criminal cases the state prosecutes.

In civil cases the injured party brings suit.

Most of our common law rules come from reported decisions of courts of record.

Law is necessary for protection and the security of rights.

PROPERTY IN GENERAL

Property. — The term “property” implies ownership, and ownership implies certain rights, such as the right of possession and the right of use. The owner of property has the right of possession of the things owned to the exclusion of every one else, and he has a right to the exclusive use of the thing owned in any way he sees fit to use it, so long as he does not, in its use, interfere with the rights of others.

Property has Value. — Property has value because it has uses which create a demand for it: the greater the demand for a particular property, the more valuable it becomes, and its possession and control are more eagerly sought. It is due to this fact that many laws have been made and are still being made for the purpose of regulating property rights, ownership, and transfers.

Early Laws. — Early laws had for their purpose the settlement of quarrels and the suppression of violence resulting from disputes over rights of ownership and possession of property. They necessarily established rules under which an individual who has acquired property would be recognized and protected as its owner.

One of the earliest distinctions of this early law was the division of property into two classes, real and personal.

Real Property. — Real property includes land and everything that belongs with the land or is permanently affixed thereto, as trees and houses. It is generally defined as fixed or immovable property.

Personal Property. — Personal property includes all property that can be easily moved from place to place or carried about. Furniture, stocks, bonds, money, cattle, clothing, and personal effects are classed as personal property.

It sometimes happens that property in one condition is classed as real, and the same property in another condition is classed as personal. Coal in the mine is real property, but as soon as it is mined and ready for use it is personal property.

Likewise trees and grass or shrubs which grow naturally are realty, while growing or standing, but as soon as they are cut for use they are personalty. Crops which are planted and cultivated are considered personalty.

Possession. — Possession is not essential to ownership. Any one may own property which he does not possess. The possession of the property may be with some one else for a certain purpose or under certain conditions. This may bring about a joint interest which restricts the rights of ownership in that the owner will have to respect the rights of the one in possession of the property. For example, the owner of a house may lease it for a term. The tenant has certain rights which the owner must respect.

Kinds of Ownership. — Ownership is either several or joint. When the ownership is several, one person is the sole owner. When the ownership is joint, two or more persons are owners. In an ownership called a "joint tenancy," if one owner dies his interest passes to the surviving owners. In an ownership called a "tenancy in common," if one owner dies his interest passes to his heirs. If it is desired, at any time, to divide the property, those interested may agree among themselves on a division, or they may resort to a court to have an equitable division made.

Limitations upon Ownership. — While ownership of property implies exclusive rights as to possession and use, there are certain limitations which must be considered.

1. The owner must not use his property in such a way as to injure others.

2. The owner of property must respect the mandates or judgments of a court, and his property may be taken by due process of law to pay his debts.

3. Taxation is a sovereign right of a nation or municipality, and the owner of property must respect this right. Failing to pay his taxes he may forfeit his right of ownership.

4. The state reserves to itself the right to control private property under certain extreme conditions, as in the case of uprisings and riots. This is an example of what is known as police power.

5. The "right of eminent domain" gives to a sovereign power (nation, state, city, etc.) the right to take private property for public purposes by paying the owner a fair compensation.

QUESTIONS

1. What does property imply?
2. What does ownership imply?
3. What are the two classes of property?
4. Give an example of each class.
5. Give an illustration of one kind of property being changed to the other kind.
6. What is meant by absolute ownership in property?
7. What limitations are placed on ownership?
8. Explain the police power of a state.
9. What is the right of eminent domain?
10. What are the different kinds of ownership?
11. Are trees and plants growing naturally and attached to the soil realty or personalty?
12. Are cultivated crops realty or personalty?

IMPORTANT POINTS

Property is anything that is owned.

Property is of two kinds, personal and real.

Real property includes all fixed or immovable property.

Personal property includes all property which is easily moved from place to place.

Ownership is several when held by one person and joint or in common when held by more than one person.

The ownership of property is subject to the rights of others, debts, taxation, police power, and eminent domain.

Ownership of property is acquired through gift, grant, purchase, devise, or inheritance.

CONTRACTS

I. IN GENERAL

Definition. — A contract is an agreement between two or more parties, resulting from an offer or proposition and its acceptance. This agreement is governed by many rules of law.

All contracts are agreements but not all agreements are contracts. To be a contract, an agreement must be legally enforceable.

Brown agrees to sell a bicycle to Moore for \$25. Moore agrees to pay \$25 for the bicycle and pays \$5 to bind the bargain. This is a contract. If Brown refuses to deliver the bicycle, Moore has an action at law against Brown for damages.

Arnold promised to meet Swift at the Union R. R. Station at nine o'clock A.M. He failed to appear. This is not a contract, as the parties did not intend it to be a contract. It is a broken promise which gives no right of action for damages.

Oral and Written Contracts. — Contracts may be either oral or written. All contracts under seal and some simple contracts, as explained later, must be written; but the majority of contracts in business are simple, unwritten contracts. When we consider that every time anybody pays his fare on a trolley car or makes a purchase in a store he has made a contract, we realize how great is the number of simple, unwritten contracts.

Written Contracts. — While an oral contract may be just as valid as a written one, it is desirable to have a written contract where a number of conditions and specifications are involved or where the contract is to continue in force for some time. An oral contract that is in dispute must be established by the testimony of witnesses or circumstances must be relied upon to determine the rights of the parties. A written contract is established by producing the written copy, and no oral evidence can be admitted to vary or contradict that which is written. (For forms of written contracts see Appendix.)

Express and Implied Contracts. — In an express contract the agreement on each side is completely stated.

Martin expressly agrees to pay Harris \$12 per ton for 5 tons of coal if Harris will deliver it to Martin's home on the following day. Harris expressly agrees to deliver the coal. As the terms of this contract are fully stated, it is an express contract.

In an implied contract, the terms are understood from acts, conditions, or circumstances.

Mr. Martin stops at the coal dealer's office and orders 5 tons of coal to be delivered to his home. Nothing is said about the time of delivery or payment. It is implied that the coal will be delivered promptly and that Mr. Martin will pay the market price for it when delivered or when he receives the bill.

Formal and Simple Contracts. — Contracts are again classified as formal and simple.

Formal contracts must be in writing and under seal; that is, with a seal affixed.

In early times the seal was an impression on wax, but statutes have relaxed the rigor of the rule, and now the impression may be on a wafer or on the document itself, and in some states a scroll or mark made with the pen, or the word "seal," printed or written, if used in place of the seal, is sufficient.

L. S. are letters commonly used to designate a seal. They are the initial letters of the Latin words *locus sigilli*, meaning the place of the seal.

The principal requisite to the validity of the seal is that it must be the intent of the parties to use the scroll or mark as such, and this is usually expressed by the words, "In witness whereof we have hereunto set our hands and seals the day and year first above written," or some form equivalent thereto.

A simple contract (known also as a parol contract) is one not under seal; it depends for its validity not upon its form but upon the presence of consideration. It may be a contract required by the Statute of Frauds to be in writing. It may also be a contract that is valid whether written or oral; for instance, a contract of employment for less than a year.

Snyder employed Marsh for six months at \$100 per month. Marsh agreed. This is a simple contract.

Executed and Executory Contracts. — An executed contract is one in which the terms of the agreement have been fulfilled. It is a contract which has been completed.

Marks sold Jordan a trunk for \$40. The trunk was delivered and the \$40 paid. This is an executed contract.

An executory contract is one which has not been completed.

Hand sold Lang 100,000 feet of lumber at a certain price, to be delivered during the twelve months following and to be paid for when delivered. This is an executory contract, until the lumber has all been delivered and paid for.

In some cases the contract may be executed on the part of one party to the contract and executory on the part of the other party, as when goods purchased are delivered but not yet paid for.

Bilateral and Unilateral Contracts. — A bilateral contract is one in which both parties to the contract are bound by promises they have made, as in the last example above.

A unilateral contract is one in which only one party is ever bound by a promise; it is an offer in the form of a promise which is accepted by an act.

Hand offers to sell and deliver 100,000 feet of lumber, within two months, for \$4,000. Lang accepts the offer by paying the \$4,000 in cash. This contract is, from the beginning, executed on the part of Lang, and executory on the part of Hand; therefore the written agreement would need to be signed by Hand only.

Divisible and Entire or Indivisible Contracts. — When a contract is made up of two or more parts, which are independent of each other, the contract is divisible and the party to the contract who performs part as agreed, but not all, may recover for the part performed. When a contract has only one indivisible promise or act on one side and one on the other it is an entire contract and must be completely performed.

Matthews purchased from Bliss a team of horses for \$400, a harness for \$150, and a wagon for \$200. The harness was stolen before delivery, but as this is a divisible contract Bliss can deliver the team and the wagon, and he is entitled to be paid for them. But if the contract stated \$750 for the outfit and did not mention distinctly the articles and the price of each, it would be an entire contract and complete performance would be required.

In installment contracts, where, for example, 100 tons of coal are to be delivered each month for twelve months, it is difficult to decide whether failure for one month would be a breach of the whole contract or not. Decisions on this question vary in the different states.

Necessary Elements. — There are four elements at the foundation of all contracts. These are:

1. Competent parties.
2. Agreement (Offer and Acceptance).
3. Legal subject matter.
4. Consideration.

QUESTIONS

1. What is a contract?
2. Are all agreements contracts? Explain and give examples.
3. How are contracts classified? Give examples.
4. Explain the difference between an express and an implied contract.
5. Give an example of an express contract; of an implied contract.
6. Explain the difference between a formal contract and a simple contract.
7. What is the seal? What is its effect?
8. What is necessary to constitute a seal?
9. On what does a simple contract depend for its validity?
10. Give an example of a simple contract.
11. When is a contract said to be executed? Give an example.
12. When is a contract said to be executory? Give an example.
13. When is a contract said to be executed on the part of one party and executory on the part of the other party?
14. What is a bilateral contract? Give an example.
15. What is a unilateral contract? Give an example.
16. When is a contract said to be divisible? Give an example.
17. When is a contract said to be entire or indivisible? Give an example.
18. What are the four necessary elements in every enforceable contract?

2. CONTRACTING PARTIES

Two or More Parties Necessary. — We have learned that a contract is an agreement between two or more parties. The question arises as to what persons can be parties to a contract.

There must be two competent parties to every binding contract. An individual cannot contract with himself; that is, a man as trustee or agent cannot, in such capacity, deal with himself in his individual capacity.

Ward appointed White as agent with a power of attorney to sell certain property. White purchased the property and executed the transfer to himself. This transaction was invalid. White as agent could not contract with himself.

The parties to a contract are usually designated as party of the first part and party of the second part. In this connection we must distinguish between parties and persons; while there must be two parties to every contract, there may be any number of persons.

Harrison, Morgan, and Smith, of the first part, contracted with Loomis and King, of the second part.

Infants. — Legally, all persons under the age of twenty-one are infants or minors, except that by statute in a few states females are declared of age at eighteen and males or females upon marriage at any age. An infant becomes legally of age on the day preceding his twenty-first birthday.

Law Protects Infants. — It is an accepted principle of law that an infant is not competent to contract, and the law affords him certain protection so that he shall not be imposed upon or advantage taken of him. The law provides in general that any contract made by an infant is voidable at the option of the infant.

The Contract of an Infant is Voidable and Not Void. — An infant's contract may contain all the necessary elements and be in every respect a good contract, yet he may, nevertheless, avoid it; that is, he need not perform his part if he does not wish to do so. An infant may even after he has performed the contract return the property and demand his money back, or vice versa.

A void contract is one that is not a contract at all because it is unenforceable. A voidable contract is one that may or may not be avoided at the option of one of the parties thereto.

When a contract with an infant is made by a person of full age, the infant alone has the right to avoid or disaffirm the contract. No one but the infant, or his legal representative after his death, can disaffirm a contract which the infant has made.

Lambert, an infant, contracted for the purchase of an automobile for \$1450. He paid \$100 cash at the time of signing the contract and agreed to pay \$1350 when the car was delivered. Before delivery he disaffirmed the contract and demanded a return of his money. This he has a right to do and the automobile company will have to return the \$100 and cancel the contract.

Carpenter, an infant, had traded horses. He tired of his bargain and, having tendered back the horse he received, demanded his original horse. He has this right and can recover his horse even though he could not tender back the horse he got in the trade.

If the infant falsely represents himself to be of age he does not forfeit his right to avoid the contract, but he may be liable to a criminal prosecution for fraud.

Affirmance of Executed Contracts. — The question at once arises, Must the infant, upon becoming of age, disaffirm to avoid the contract, or will it be considered to be avoided unless he actually affirms it? The answer depends entirely upon the nature of the contract. The rule varies in its application to executed and executory contracts. In the case of an executed contract the benefit which the infant sought to bestow has been given to the other party and is good until it is disaffirmed, and the disaffirmance must be by express words or by some distinct and positive act which leaves no doubt of the intent.

Towle, an infant, sold a horse to Dresser and took two notes in payment. Later he tendered back the notes, rescinded the contract, and sued for possession of the horse. It was held that he could recover the horse. This, it will be seen, is a case in which express disaffirmance is necessary. This case also holds that the disaffirmance can be made during the infancy, and this suit was brought by Towle, through his father, while he was yet an infant. — *Towle v. Dresser*, 73 Maine 252.¹

Silence for a reasonable time after majority will be construed, in many cases of this kind, as an affirmance, if it is coupled with a retention of the benefits.

¹ The cases cited throughout this book arose in the state or country indicated in the title. Thus the case of *Towle v. Dresser*, 73 Maine 252 arose in the state of Maine and will be found in volume 73 of the reports of the Supreme Court of that state at page 252. Towle was the plaintiff in this case and Dresser the defendant.

In most of the states the plaintiff's name is given first, followed by the abbreviation "v.," standing for the Latin word *versus*, meaning against, and this is followed by the name of the defendant. The title of the above case should be read, Towle against Dresser.

In some states the title of the case is changed when it is appealed to a higher court, and the name of the person appealing from the decision of the lower court is placed first, so if the appeal should be taken by the defendant, the title would be exactly reversed. If that were the rule in Maine and the defendant had been taking the appeal, the title in the above case would have been *Dresser v. Towle*; but this is not the practice in a majority of the states.

Some of the reports of the courts are not known by the name of the state, but by the name of the reporter who compiled and edited the decision. In such cases the name of the state has been inserted in parenthesis, as in the case of *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28.

Affirmance of Executory Contracts. — On the other hand, if the contract is executory, it is necessary for the infant to affirm, upon becoming of age, or the contract is avoided. In such an agreement infancy is a defense if the contract is sued upon, unless it can be shown that the contract was affirmed after maturity.

Edwards, one month before he became of age, contracted with the Eureka Co. for the purchase of a building lot 50' x 150', in the city of Atlanta. He was to take title ninety days later. This contract required that Edwards affirm it on becoming of age, and as he failed to affirm, the contract was declared avoided.

Disaffirmance of Contracts.—The rule is well established that the infant cannot avoid a part and affirm the rest. He cannot affirm as to part and disaffirm as to the balance.

Heath, an infant, purchased a horse and wagon for \$125, on the understanding that the horse was worth \$75 and the wagon \$50. After he became of age he tendered the horse and demanded the return of \$75. He must either disaffirm the contract entirely or not at all, and cannot return part of what he has received and demand part of what he paid.

When an infant disaffirms an executed contract he must return whatever he has received under the contract, if he has the property, and he is liable to an action at law for its recovery. If the property has disappeared *he may still disaffirm the contract even though he cannot return the thing received, or its equivalent.*

West, an infant, purchased furniture by paying for it on the installment plan. He made several payments and not being able to make further payments, he refused to give up the furniture even after the seller agreed to refund the amount paid. He must give up the furniture as he cannot retain the benefits and refuse to fulfill the contract.

Clark, an infant, purchased a valuable watch, which he did not need, on credit. The watch was stolen from him and he refused to pay for it. Clark has a right to disaffirm, even if it is not possible for him to return the watch.

Agents Appointed by Infants. — There is a particular class of infants' contracts that are always void and therefore of no effect. This class is the infant's power of attorney under seal, which is in no case valid. Power of attorney is a written instrument by which one party appoints another to act for him. Many jurisdictions extend the rule to every appointment of an agent in any case, except where such appointment is necessary. When, however, the welfare of the infant requires the employment by

him of others to perform services in his behalf, his appointment of an agent will be valid. The reason for these rules is that the law will not permit an infant to perform by an agent what he could not do personally, but what he might or could do personally he can do through an agent.

Contracts for Necessaries. — There exist a number of cases in which an infant cannot avoid payment for benefits received, the principal illustration being his contracts for necessaries. Necessaries include food, clothing, shelter, education, medical attention, and those things needed for the comfort and welfare of the infant.

If the law did not give protection to parties furnishing the necessaries of life to an infant, we can see that many cases would arise in which the infant might suffer. Therefore the law says that when an infant is not supplied with necessaries by his parents or guardian or others to whom he may look, he may contract for them himself. The law creates a promise on the part of the infant to pay what they are reasonably worth, but this does not mean that the tradesman can charge what he pleases, so it will be seen that the infant is still protected.

Cain, who was an orphan about nine years of age, boarded with Hyman for about two years. An action was brought for his board. The court held that the law will imply a promise on the part of an infant to pay a reasonable price for necessaries furnished to him.

— *Hyman v. Cain*, 48 N. C. 111.

Necessaries Defined. — The question is often in dispute as to what are necessaries, and the rule generally laid down is that they are anything required by the particular person for his reasonable comfort, subsistence, and education, regard being had to his means, occupation, and standing in society. It has been held that a watch and other useful articles of jewelry might be considered as necessaries.

Foote, a minor fifteen years of age, and the owner of a large fortune, had his teeth filled by Strong, a dentist. The bill rendered amounted to \$93. It was proved that the teeth were decayed and pained Foote. Held, that the work was for necessaries. — *Strong v. Foote*, 42 Conn. 203.

An infant is liable for necessaries supplied to his wife the same as if he were an adult.

A tradesman who furnishes an infant with supplies is bound to show that they are necessities, and if the infant already has a sufficient supply, he cannot recover.

Barnes brought an action for the price of necessities furnished Toye, an infant. The defense was that the infant was already sufficiently supplied with goods of the same class and was not in want of these. The court held that Toye could show that the goods were not necessities as he was already supplied with sufficient goods of a similar description, and it was immaterial whether Barnes did or did not know of the existing supply.

— *Barnes v. Toye*, 13 Q. B. D. (Eng.) 410.

Infants Liable for Torts. — That an infant has a right to avoid his contracts and that the law gives him protection, does not imply that he is not liable for wrongs or torts which he commits. The law does not uphold or protect any one guilty of torts or wrongful acts.

A tort is a wrongful act, other than a breach of contract, for which a court will give damages.

Examples of torts are assault and battery, trespass, slander, negligence, threatened violence, and illegal detention of goods for which damages can be recovered.

Insane Persons. — Since a contract requires a meeting of the minds of the contracting parties, it is evident that a person lacking the mental capacity cannot make a valid contract. Some insane persons appear perfectly rational and others have rational periods. It is difficult, therefore, to determine the mental condition of the party, and one may deal with an insane person and be in ignorance of his insanity.

The rule as generally adopted in this country is that if the insanity of an individual has not been decreed by the courts, and a party dealing with him is ignorant of the insanity, and the contract is fair and has been so far executed that the parties cannot be restored to their original position, the insane party is liable on the contract.

But if the lunatic has been declared by the courts to be insane, or the party dealing with him knew of his insanity, the contract is void.

Carter, an attorney, upon the request of Beckwith, who had been legally declared insane, instituted proceedings to have him adjudged sane, and to have the control of his property restored to him. In this proceed-

ing it was determined that he was still insane, and the application was refused. After Beckwith's death, Carter presented his claim for services. It was held that he could not recover on the ground of a contract with Beckwith, as any contract entered into with a person judicially declared insane is absolutely void. — *Carter v. Beckwith*, 128 N. Y. 312.

If the lunatic afterwards becomes sane, he may then ratify or disaffirm all of his voidable contracts, the same as an infant upon attaining his majority, unless he has been declared insane by a court, in which case the court will have to remove this disability.

The contracts of an incompetent person for necessities are subject to the same rules as those of an infant.

Idiots. — There is a distinction between idiocy and insanity. An insane person is one who has had reasoning power but through some cause has lost it. An idiot never has had reasoning power; he was born mentally defective. A contract with an idiot is always voidable, and in most cases it is absolutely void.

Aliens. — An alien is a person who owes his allegiance to a foreign power. During times of peace all valid contracts are binding between aliens and citizens. In certain states restrictions are imposed on aliens in acquiring and holding land. In case of war between this country and the country to which the alien owes his allegiance he is an alien enemy; and, where the safety of this country demands it or the contracts result in giving aid or comfort to the enemy, contracts between an alien and a citizen of this country may be declared void. Contracts entered into during peace may be suspended during the war, or, in the interests of trade, contracts may be allowed to continue, either by treaty or by special trading agreements.

Married Women. — In early times under the common law married women had no property or contract rights. Now we find that by statute a married woman can conduct her own separate business, can contract independently of her husband, and in fact in most of the states she has the same legal rights and powers as an unmarried woman, except generally a married woman cannot bind herself as a surety or guarantor.

One should consult the laws of one's own state before entering into a contract with a married woman, as a few states still restrict her freedom to contract.

QUESTIONS

1. How many parties must there be to a contract?
2. Can an individual contract with himself? Explain.
3. How are parties to a contract usually designated?
4. Distinguish between parties to a contract and persons.
5. Who is an infant or minor?
6. When does a person become legally of age?
7. How does the law protect infants who enter into contracts?
8. What is a void contract? What is a voidable contract?
9. Are infants' contracts void or voidable?
10. Is a contract between an infant and an adult binding upon the adult? Explain.
11. Give an example of an infant's contract that may be avoided by him.
12. An infant bought a bicycle on credit; has he a right to keep the bicycle and not pay for it?
13. The bicycle which the infant bought on credit was stolen from him; can he avoid paying for it?
14. Explain an infant's right to affirm or disaffirm an executed contract. What steps must he take?
15. Is it necessary for an infant to affirm an executory contract if he wishes to live up to it?
16. When will silence amount to affirmation?
17. When is infancy a defense to an action on an executory contract? When is it not a defense?
18. Can an infant avoid a part of a contract and affirm the rest? Explain.
19. What class of infants' contracts are always void? Explain.
20. What exception is there to the rule that an infant's contracts are voidable at the option of the infant? Why this exception?
21. What is included under necessities?
22. Can a dealer collect from an infant more than the necessities are worth? Or for necessities that the infant did not need?
23. Is an infant liable for his torts? Explain. Give examples.
24. What is the rule as to the contracts of insane persons?
25. When is a person said to be insane and incompetent to contract?
26. Can an insane person make a valid contract? Explain.
27. Has a lunatic a right during a sane interval to affirm or disaffirm his voidable contracts?
28. What is the distinction between idiots and lunatics?
29. Who is an alien?
30. What are the rules governing contracts with aliens?
31. What are the rules governing a contract with a married woman? Explain.

3. OFFER AND ACCEPTANCE

The Foundation of a Contract. — Every contract is the result of an offer, by one party, which is accepted by another party. Traced back to its origin a contract amounts to this: The first party says, "I will take a certain sum for this article"; to which the second party answers, "I will accept your offer and give you the specified sum."

You enter a furniture store. The tradesman by exhibiting his wares virtually says he will take the stated price for such articles. You say you will take a certain chair, marked \$10. Here we have an offer and acceptance.

The offer must be explicit. If A says, "I may take \$100 for this horse when I get ready to sell him," this is not an offer which B can accept and thereby create a contract.

The acceptance must be absolute and on the exact terms contained in the offer. If A offers to sell a load of hay for \$10, and B says he will give him \$9 for it, no contract is made because there is no acceptance of the offer.

The Offer and Acceptance must Pertain to the Same Object. — A may offer to sell his bay horse for \$100. B says, "I will give you that amount for your gray." There is no contract because the minds of the parties have not met.

Myers owns four auto trucks, all different makes. Jerome said to Myers, "I will give \$1000 for one of your trucks." Myers replied, "I will accept \$1000 for one." This is not a contract, as there is a chance that Jerome has one truck in mind and Myers has another, and their minds have not met on the same proposition.

The Offer must be Communicated to the Party Accepting it. — The offer may be communicated orally, in writing, or by acts and conduct, or it may be published. In whatever way it is communicated it must actually reach the party accepting it. A contract cannot result until the offer reaches the offeree and he accepts it.

An offer unintentionally communicated indirectly cannot be said to have been communicated.

Dann says to Lewis, "I will sell my horse to Brush for \$200, if he will give that amount." This does not constitute an offer to Brush, even though Lewis, without authority, tells Brush about it, as it cannot be said to have been communicated by Dann.

In some states it is held that a person who gives information concerning the parties to a crime without any knowledge of the reward which has been offered, cannot claim the reward, as the offer has not really been communicated to him. Other states hold that he can recover, as the reward is a public offer and when acted upon binds the offerer. The weight of authority seems to be in favor of denying the right of the plaintiff to recover when he had no knowledge of the reward prior to the time of the giving of the information.

When a man works for another without his request or knowledge, there is no contract and he cannot recover.

Jackson owned a field in which Bartholomew had a stack of wheat which he had promised to move in time for plowing. Notice having been given, he promised that it would be moved at 10 A.M. Relying on this promise, Jackson, shortly after 10 A.M., set fire to the stubble in a distant part of the field, but later found the stack was not removed, so did it himself to save the grain, and then sued Bartholomew for the work. Held, the services were rendered without request and with no promise express or implied to pay for them, and there can be no recovery. The judge said, "If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the services rendered as gratuitous."

—*Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28.

If, however, the person for whom the work is being done knows of it and does not order the doer to stop, acceptance is implied and he will have to pay.

The Acceptance must be Communicated. — Not only must the offer be communicated, as we have seen, but the acceptance must also be communicated, and whether it reaches the offerer or not, it must be something more than a mere mental assent.

Andrews offered Loomis \$500 to erect a portable garage. Loomis, intending to accept the offer but without communicating his acceptance to Andrews, purchased the lumber and proceeded with the work. Later Andrews decided he would not need the garage and notified Loomis withdrawing his offer. Loomis cannot recover damages as he failed to communicate his acceptance to Andrews and there was no contract.

Acceptance must be Made as Prescribed. — The offerer may prescribe a particular way in which the acceptance must be made. For example, if the offer is made by mail and expressly requires that the acceptance shall be telegraphed back, it will not be sufficient to send the acceptance by mail.

Adams offered by letter to sell Snow 600 bushels of potatoes at \$1 per bushel and stated in his letter — "If you wish these potatoes at this price, wire me at once." Snow waited three days and then sent Adams a letter accepting the offer. There was no contract, as the acceptance was not made as prescribed.

There must be No Qualification in the Acceptance. — If Aller offers to sell his automobile to Baker for \$600, and Baker accepts if Aller will take \$300 down and his note for the balance at 30 days, the acceptance is qualified and does not constitute a contract.

Harper offered to sell Randell 600 tons of coal for \$5 per ton. Randell replied, "I will buy 500 tons at the price named." This was a qualified acceptance and no contract resulted.

A qualified acceptance is a refusal of the offer and terminates the offer. If Randell after his first reply had accepted the offer exactly as made, still no contract would have resulted, as there was no longer an offer open for his acceptance. In each case, however, the reply made by Randell might be treated as a new offer, and a contract would be created by Harper's acceptance of that offer.

An Acceptance is Binding as soon as Made. — An acceptance is binding as soon as made, even though it has not come to the knowledge of the offerer. If the offerer requires or suggests a mode of acceptance, he takes the risk of the acceptance reaching him. A common illustration of this is the case of an offer made through the post office, for in such a case it may be assumed that the acceptance is to be made in the same way unless otherwise expressly stated. When made in the required way, it is held that as soon as the acceptance is sent the contract is made. And the completion of the agreement dates from the time of mailing the letter or sending the telegram, and not from the time of receiving it.

The Merchants Fire Insurance Company wrote they would insure Taylor's house for \$57. This letter was received on December 21, and on that day Taylor accepted the offer and sent his letter of acceptance with check inclosed. On December 22, and before Taylor's letter of acceptance and check reached the Merchants Fire Insurance Company, the house was burned down. Held that this contract was completed when the letter of acceptance was mailed, and therefore the company was liable.

— *Taylor v. Merchants Fire Insurance Co.*, 9 How. (U. S.) 390.

The offer may be withdrawn any time before acceptance, but the notice of withdrawal dates from the time it reaches the offeree. The offer is made irrevocable only by acceptance.

Barron wrote to Newcome as follows: "I will sell you my farm tractor for \$600 and you may have ten days in which to accept." A week later Barron sent a letter withdrawing the offer, but before it was received by Newcome he wrote Barron agreeing to buy the tractor at the price named. As Barron's offer was accepted by Newcome before he received the withdrawal notice there was a valid contract that could be enforced.

The Parties may Fix a Time during which the Offer will Remain Open. — When the time an offer is to remain open is fixed by the parties the offerer is not bound to keep the offer open for this time unless he is paid something for doing so, as his promise is without consideration and is not binding. An offer that is not withdrawn is construed to be open for a reasonable time. What constitutes a reasonable time depends entirely upon circumstances of the case, the relations of the parties, and other facts which would tend to determine what would be fair and just under the circumstances. In some cases it might be a few days and in others a number of months.

Stone offered to sell his feed store to Harmon for \$2800. No time was set for accepting the offer. Six months later Harmon notified Stone that he would accept the offer. Under the circumstances, six months would be an unreasonable time for Stone to keep the offer open and he would not have to sell his feed store to Harmon if he were not disposed to do so.

Taking an Option. — Sometimes an offer is made and a certain amount is paid by the offeree to the offerer for keeping the offer open a certain length of time. This is called taking an option and constitutes an enforceable contract.

An Offer may Lapse. — The lapse of an offer may be caused by the expiration of the time named or a reasonable time or by death or insanity of either party before acceptance or, in the case of a partnership or corporation, by the dissolution of the concern. The reason is that there are no longer two parties in existence capable of contracting.

Pratt gave a note to the trustees of a church as a subscription to enable them to procure a bell. Pratt died before the bell was purchased. Held, that the note was an offer and could be revoked until acted upon by purchasing the bell. The death of the offerer revoked the offer and the note could not be collected. — *Trustees v. Pratt's Estate*, 93 Ill. 475.

Silence not Acceptance. — When the offerer words his proposition in such a way that silence on the part of the offeree is to be considered as an acceptance of the offer, the silence of the offeree does not bind him to the contract.

“A man cannot be forced to break silence or be bound in a contract.”

Broom wrote to McGuire as follows: “I am offering potatoes at \$2 per bushel and if I do not hear from you by return mail I shall ship you 500 bushels at this price.” McGuire will not have to reply and he may refuse to accept the potatoes.

QUESTIONS

1. From what does a contract result?
2. Mention some ways in which offers may be made.
3. Explain the meaning of the following statements:
 - “The offer must be explicit.”
 - “The acceptance must be absolute.”
 - “The offer and acceptance must pertain to the same thing.”
 - “The offer must be communicated to the party accepting it.”
 - “The acceptance must be made as prescribed.”
4. Under what conditions do courts, as a rule, hold that a reward is collectible?
5. Can a man who works for another without his request or knowledge collect?
6. Must the acceptance be communicated? Explain.
7. What is a qualified or modified acceptance?
8. Does a contract result from an offer and a qualified acceptance?
9. When is an acceptance binding?
10. When is an acceptance by mail binding?
11. When may an offer be withdrawn? When is a withdrawal effective?
12. How is an offer made irrevocable?
13. State the rules in regard to the time of acceptance.
14. State the way in which the offer may be terminated.
15. What may cause the lapse of an offer?
16. What is an option? Give an example.
17. Does silence ever amount to an acceptance? Explain.
18. Give an example of an offer prescribing a particular way of accepting.

4. REALITY OF CONSENT

An agreement resulting from an offer by one party and its acceptance by another party indicates that the minds of the parties have met on a definite proposition, but the one qualify-

ing element, *reality of consent*, may be lacking. There are five different things that may deprive an agreement of *reality of consent*: first, mistake; second, misrepresentation; third, fraud; fourth, duress; fifth, undue influence.

Mistake. — A mistake is a misunderstanding, wrong idea, or wrong impression relative to some material fact connected with the contract.

The parties may not have meant the same thing. It may not have been the intent of one or both of two parties to make a contract into which they have been brought by the misrepresentations of a third party. Should such a condition be occasioned by the carelessness of either party, he is not excused; as when a man, able to read, signs a contract thinking it is something different from what it really is.

Ebert, who had been induced through misrepresentation to sign a promissory note, proved that at the time he signed the note he was unable to read or write the English language, and that it was represented to him, and he believed it to be, an agreement in reference to a patented machine, about which the party to whom he gave the note had been talking to him. Held that the note, having been procured by false representations as to the character of the instrument itself, and Ebert being ignorant of its character and having no intention to sign such a paper, the note was void.

— *Walker v. Ebert*, 29 Wis. 194.

The mistake as to the nature of the transaction usually arises from some deceit which ordinary diligence could not foresee or from some accident which ordinary diligence could not avert.

Again, the mistake may be in the identity of the one with whom the party deals. X may enter into a contract, thinking and intending to contract with Y, when in fact he has been dealing with Z. There is no meeting of their minds, for X never contemplated dealing with Z.

Potter was supplied with ice by the Boston Ice Co. and, becoming dissatisfied, terminated his contract and made a new one with the Citizens Ice Company. Two years later this company sold out to the Boston Ice Co. The court found that Potter had no notice of the change. Held, the Boston Ice Co. could not recover for ice furnished Potter, as there was no meeting of the minds of these parties to this action. A man has a right to select and determine the persons with whom he will deal, and cannot have others thrust upon him without his consent. — *Boston Ice Co. v. Potter*, 123 Mass. 28.

Bevington received an order for linen signed "A. E. Blenkarn, 753 Broadway." The name and address were not distinct and Bevington

thought the order was from the firm of Blenkiron & Co., 783 Broadway, with whom he had previously dealt. Bevington accepted the order. There was no contract because of Bevington's mistake as to the identity of the person with whom he was dealing.

There may be a mistake as to the subject matter of the thing contracted for, as where one party contracts expecting to receive one article and the other party thinks the agreement refers to another. The parties clearly have not agreed upon the same thing and the agreement is void.

It transpired that Kavanagh was negotiating for one piece of land and Kyle was selling another. It was held by the court that, as their minds did not meet on the subject matter, they could not be said to have entered into a contract, and although there was no fraud on the part of Kyle, the mistake alone was a good defense. — *Kyle v. Kavanagh*, 103 Mass. 356.

The mistake may be as to the existence of the thing contracted for.

Thwing made a contract to sell certain timberlands to Hall, thinking they contained seven million feet of fine lumber, Hall also believing there was good lumber there. The facts were that, unknown to either party, the land had been practically stripped of good lumber. Hall sent a man who mistook the location and reported good timber. Held, a mutual mistake, which was a sufficient cause for the court to cancel the contract. There was a mistake as to the existence of the thing contracted for.

— *Thwing v. Hall*, 40 Minn. 184.

When a mutual mistake is made regarding the legal effect of the contract where neither party is at fault, the contract is void.

Hughes entered into a contract with Morgan to furnish two auto buses and drivers at \$40 per day for service on a bus line which Morgan was going to operate. It happened that Morgan could not secure a permit to operate the proposed bus line, so the contract failed. To have operated the bus line without a permit would have been illegal.

Misrepresentation. — Misrepresentation is defined as an innocent misstatement of fact as distinguished from fraud or a willful misstatement, and as thus defined it is almost, if not entirely, identical with mistake.

A party, in making a misstatement, either does it willfully, which is fraud, or does it innocently, which is a mistake; still many writers and judges make a distinction between misrepresentation and mistake.

Innocent Misrepresentation. — An innocent misrepresentation or nondisclosure of fact does not vitiate a contract unless it belongs to a special class of agreements in which the utmost good faith is required or is between persons who occupy a peculiar relation of trust and confidence to one another. Such contracts are called *uberrima fides* (utmost good faith) contracts. Examples are contracts of insurance and contracts between principal and agent, parent and child, etc.

Fraud. — Fraud is a false representation of fact, made either with a knowledge of its falsity or recklessly, without belief in its truth, with the intention of having it acted upon by another party, and actually inducing him to act upon it to his damage. Where fraud enters into the making of a contract, the contract will not only be voidable, but the party guilty of committing the fraud is liable to a criminal action.

A party about to purchase a farm asked the owner whether the neighborhood was sickly or not, and declined to purchase if it was. The owner assured him that it was free from sickness, whereas fever and ague were prevalent in the locality. The court held that the agreement to purchase could not be enforced, it having been induced by the vendor's misrepresentations. — *Holmes's Appeal*, 77 Pa. State 50.

Fraud may also arise where there is active or artful concealment.

Jones bought a horse which had a sweeny, stiffness in the neck, and other ailments. He cut the cords of his neck and doctored him up. Later Edwards came and wanted to buy a farm team. Jones showed him this one and another horse, saying they were sound, as far as he knew, but that he never warranted a horse. He did not say a word as to the former ailments. Held, that it was fraud on the part of Jones in not acquainting Edwards with conditions affecting the value of the horse, which, if known, would have prevented him from buying. — *Jones v. Edwards*, 1 Nebr. 170.

One who conceals a fact which he ought, as a legal duty, to disclose is guilty of fraud.

In an action upon a life insurance policy, the defense was fraud in obtaining it. In the physician's examination it was asked whether insurer had cough, occasional or habitual expectoration, or difficulty in breathing. The answer was, "No cough; walking fast upstairs or up hill produced difficulty in breathing." The facts were that he had raised blood for two and one half years and that he died three months after the policy was issued. Held, that there was a fraudulent concealment and misrepresentation which would avoid the policy.

— *Smith v. Aetna Life Insurance Company*, 49 N. Y. 211.

The false representation may arise from the suppression of the truth, amounting to the suggestion of a falsehood.

Grigsby sold Stapleton a herd of cattle at the ordinary market price, knowing that they had Texas fever, a disease not easily detected by one having had no experience with it. He did not disclose this to Stapleton. Held, that Grigsby was guilty of a fraudulent concealment, for which he was liable. — *Grigsby v. Stapleton*, 94 Mo. 423.

Mere nondisclosure does not vitiate a contract unless the parties stand in a relation of confidence to each other, and one party has the means of knowing facts that are inaccessible to the other. He is then bound to tell everything that is likely to affect the other party's judgment.

King bought of Knapp at an auction sale a lot in the city of New York, paying ten per cent down. Printed handbills were circulated containing a diagram of the lot, which represented it to be 25 x 100 feet, the handbill also stating this to be the size. Relying on the description, King purchased the premises without inspection. As a matter of fact a building upon the adjoining lot encroached upon the premises. This was known to Knapp, but there was no mention of it in the handbills or at the sale. King refused to complete the sale and brought action to recover the amount paid. Held, King had bought under the suppression of a material fact, and the contract could not be upheld. — *King v. Knapp*, 59 N. Y. 462.

It is held also that in contracts for the sale of shares of stock in a company the utmost candor and fullness of statement are required of the promoter and of those who make statements upon the strength of which purchasers subscribe.

Hatch, a supposed representative of a certain mining company, represented to Barns, a prospective purchaser of shares of stock, that the company was doing a business of a million a month; that it had paid a dividend of 10 per cent from the beginning, and as a result of the enormous business it was doing the dividends would be increased. On the strength of these statements, which were all false, Barns subscribed for one hundred shares of stock at ten dollars each to be paid for in ten installments of one hundred dollars each. Barns, learning the facts, can avoid the contract and Hatch is liable to criminal action.

The statement, in order to render the contract voidable because of fraud, must be a misrepresentation of fact. A mere expression of opinion which turns out to be without foundation or a statement of intention which is not carried out will not invalidate the contract.

Butler borrowed money of Gordon and gave as security a mortgage upon real estate containing some sandstone quarries which had not been

sufficiently worked to show their value. Butler furnished the certificates of two persons, saying they had lived near the place for twenty years and giving the value of the property in their best judgment to be an amount one hundred and fifty per cent more than the loan. Upon a sale under foreclosure the land brought one sixth of the amount of the loan. Gordon sued, charging fraud. Held, he could not recover; that an action will not lie for an expression of opinion, however inaccurate, in regard to the value of property which depends upon contingencies that may never happen. — *Gordon v. Butler*, 105 U.S. 553.

The representation must be a statement of something that exists or has happened; for instance, that a wagon cost \$50—not that the wagon is worth \$50, which would be a statement of opinion, or that if you buy this wagon you can sell it again in the spring for \$50, as this is merely a prediction for the future.

The law tolerates considerable prevaricating by the tradesman, in the matter of puffing his goods or wares, provided the thing bargained for is open to the inspection of the buyer.

Poland bought out a half interest in Brownell's stock of goods and business. He looked over the stock and books and had ample opportunity to investigate. Held that he had no right to hold the seller upon his representations of the value of the goods or the amount of business he had previously done. The Judge said, "It is everywhere understood that such statements and commendations are to be received with great allowance and distrust." — *Poland v. Brownell*, 131 Mass. 138.

The representation, in order to render the contract voidable because of fraud, must be made with a knowledge of its falsity or without belief in its truth.

Cowley brought an action for fraud in that Mrs. Dobbins represented to him that William Dobbins left an estate of \$40,000 above all liabilities, whereas in truth he was insolvent. The evidence showed that Mrs. Dobbins believed her representations to be true. Held that Cowley had no cause of action. — *Cowley v. Dobbins*, 136 Mass. 401.

If a man makes a false statement, honestly believing it to be true, he is not liable for fraud. He can be held only when he knows it to be false or has no knowledge either of its truth or falsity. The false statement must be made with the intention of its being acted upon, either by the party to whom it is made, or by others to whom that party communicates it.

Avery made false representations to a mercantile agency as to the financial responsibility of the firm of Avery & Reggins, of which he was a member. This firm asked credit of Eaton, who went to the mercantile

agency and obtain the information given by Avery, and relying on this he extended the firm credit. In an action for fraud it was held that the purpose for which such information is given to mercantile agencies is to enable them to furnish it to their subscribers for guidance in extending credit; and that Avery would therefore be liable, as the case justified the finding that the false statements were made with the intent to defraud any person who might inquire of the agency. — *Eaton v. Avery*, 83 N. Y. 31.

The false representation must actually deceive, as in the case of *Eaton v. Avery*. If Eaton had not been deceived by the information, he could not have succeeded in his suit.

The effect of fraud on a contract is to give the injured party grounds for an action for damages for deceit. And the person who has been led into a contract by means of the fraudulent misrepresentations may either affirm the contract and compel the fulfillment of the agreement or he may avoid it, provided that he signifies his intention to do so as soon as he becomes aware of the fraud. If he accepts any benefits under the contract after he learns of the fraud, the contract is affirmed.

Duress. — Duress is actual or threatened violence or imprisonment exercised upon a man, or some member of his immediate family, whereby he is forced to do some act against his will. To amount to duress, the power to put the threat into execution must be apparent.

A contract entered into by a party under duress is voidable at his option. The duress must be inflicted or threatened by a party to the contract or one acting for him and with his knowledge, and the subject of the duress must be the contracting party himself or his wife, parent, or child.

Morrill procured several promissory notes to be executed by Nightingale under coercion and intimidation, caused by threats of arrest, and he also had a warrant of arrest issued by a Justice of the Peace, not for the purpose of punishing Nightingale for a crime but to compel him to pay the money or execute the notes. Held, that this constituted duress and was a good defense to the action to recover on the notes.

— *Morrill v. Nightingale*, 93 Calif. 452.

At common law wrongful detention of goods did not constitute duress, but by the modern doctrine threats of destruction or detention of goods constitute duress and will avoid a contract. Duress may also consist of threats of illegal or wrongful imprisonment or of resort to criminal prosecution for an

improper purpose. Threatened arrest in lawful prosecution does not constitute duress.

Undue Influence. — In the creation of a contract undue influence arises where the parties are not on an equality as to knowledge or capacity.

A promise made by a child to its parent, a client to his attorney, a patient to his physician, a ward to his guardian, or a person to his spiritual adviser, will not necessarily be set aside by the court, but such relations call for clear evidence that the party benefited did not take advantage of his position.

Buckholz was the stepfather of Tucke, who had been accustomed for many years to obey him implicitly and to rely on him in all business matters. When Tucke came of age Buckholz induced him to execute deeds of his property for less than one half its value, telling him he was likely to lose the land and making requests that were practically commands. Held, the deeds were obtained by undue influence and should be set aside.

— *Tucke v. Buckholz*, 43 Iowa 415.

Undue influence, like duress, renders the contract voidable at the instance of the injured party.

A guardian induced his ward to accept certain shares of stock in settlement of a balance due to the ward, representing that the stock was a good investment and would pay good dividends, whereas it was purely speculative. Held, a transaction between a guardian and his ward requires the utmost good faith on the part of the guardian and this transaction should be set aside at the request of the ward.

— *McConkey v. Cockey*, 69 Md. 286.

QUESTIONS

1. What does an agreement between the parties to a contract indicate?
2. Mention five different things that may deprive an agreement of reality of consent.
3. What is a mistake as applied to a contract?
4. Can a man, able to read, who signs a contract without reading it, be held liable?
5. Give an example of each of the five kinds of mistakes.
6. Distinguish between misrepresentation and fraud.
7. How does an innocent misrepresentation affect a contract?
8. When does a misrepresentation amount to fraud? Give example.
9. Where fraud enters into the contract what is the effect?
10. In what different ways may fraud arise?
11. What is the effect of nondisclosure?

12. Will a mere expression of opinion affect a contract?
13. When can a man who makes a false statement be held liable?
14. What happens if a defrauded party accepts benefits under the contract after he learns of the fraud?
15. What is duress? Give an example. What is the effect?
16. How will undue influence affect a contract? Give an example.
17. Is fraud an actionable wrong? Explain.

5. SUBJECT MATTER

Subject Matter of a Contract. — The subject matter of a contract is that which the promisee agrees to do or not to do, or about which the contract is made. It is the act or thing to which the agreement relates.

Harris enters into a contract with Evans & Co. whereby Evans & Co. is to build a pleasure boat, according to a certain design, for Harris. The boat is the subject matter of the contract.

The subject matter of a contract may be anything of value, credits, or services.

The Object of a Contract must Not be Unlawful. — The object of the contract must not be contrary to law. Certain things are forbidden by law, and if these things are in the contemplation of the parties at the time the contract is entered into, it is not enforceable; otherwise the law would be aiding in an indirect way what it expressly forbids.

The contracts usually forbidden by law are gambling or wagering contracts, contracts for usury (interest in excess of the legal rate), and, in some states, contracts for unnecessary acts to be performed on Sunday.

This principle applies only to executory contracts, for if the contract has been voluntarily executed by the parties it is binding; the law will not compel the return of anything acquired under such a contract any more than it will compel its performance. The rule is that if parties have voluntarily completed a contract, illegal as to the subject matter, the law will leave them where they are.

Illegal Objects. — The object of the contract may be illegal by express statutory enactment or because of rules of the common law. The statutes declare some contracts illegal and void,

and impose a penalty for the making of some others without rendering the contracts void. A statute requiring a lawyer or a physician to be licensed renders a contract made without compliance with it void.

Buckley, acting as a real estate broker in Chicago, purchased certain property for Humason. The ordinance of Chicago required all real estate brokers to be licensed and fixed the license fee at \$25, providing a penalty for its violation. Buckley at this time had no license. In an action for his commissions it was held that he could recover nothing for his services. Business transacted in violation of law cannot be the foundation of a valid contract. — *Buckley v. Humason*, 50 Minn. 195.

In the above case, if the contract had been executed, the money paid could not be recovered. When an illegal contract has been executed the law leaves the parties where they are.

A law requiring weights and measures to be sealed, as a condition precedent to a sale of goods by a merchant, renders a contract made in violation thereof void.

A Massachusetts statute provided that all oats and meal should be bargained for and sold by the bushel. Held, the seller could not recover the price of the meal and oats sold by the bag. — *Eaton v. Kegan*, 114 Mass. 433.

Sometimes a statute simply imposes a penalty and does not invalidate the contract.

Where a city has an ordinance requiring a license of a peddler before he is allowed to sell his wares a penalty is imposed for violation of this ordinance, but usually any contracts which he made before he secured a license are allowed to stand.

In this country statutes against wagers or bets have been passed in most of the states, and all wagers are now practically declared contrary to public policy and void.

Love made a wager of \$20 with Harvey that the body of one Dr. Cahill was buried on a certain side of the main avenue in Holywood cemetery. The stakeholder, although forbidden so to do, paid the \$40 left with him to Harvey. Held, that all wagers are unlawful. The party receiving the money from the stakeholder after being forbidden to receive it is liable to the other for a return of the money, even though he be the winner of the wager. — *Love v. Harvey*, 114 Mass. 80.

Adams and Corbin enter into a contract whereby if Adams's horse wins a race with Corbin's horse, Corbin shall pay Adams \$100, but if Corbin's horse wins the race, Adams shall pay Corbin \$100. Adams's horse won the race and Corbin paid the \$100. Afterwards Corbin learned that wagering contracts were illegal in his state and he attempted to recover the \$100 paid. As the contract was completed Corbin had no redress.

Statutes in many states also prohibit the desecration of the Sabbath day, and any contract entered into on that day contrary to the statutes is void. It is generally held that a contract entered into on Sunday to be performed on any other day is valid, if the parties thereto recognize it as valid on a subsequent week day, while a contract entered into at any time which is to be performed on Sunday is void. Statutes in the different states vary in this regard.

Sunday contracts which result from necessity such as calling a doctor, or contracts which do not concern worldly business such as contracts in aid to a church, are not affected by the statutes.

The court held, in an action on a promissory note made on Sunday, that contracts made on Sunday are void, and a promissory note made upon that day will not support an action. — *Clough v. Goggins*, 40 Iowa 325.

In some states it is illegal for one to follow his "ordinary calling" or work; in others, to make any contracts, etc. The different statutes differ so materially that no general rule can be laid down as to what acts are prohibited.

Aside from the contracts declared unlawful and void by statute, there are contracts which are illegal at common law. The courts will not enforce an agreement to commit a crime or to do a civil wrong.

Held, that in a composition of a debtor with his creditors, any contract with one of them whereby he is to receive more than his *pro rata* share is void and any security given upon such a promise is void.

— *White v. Kuntz*, 107 N. Y. 518.

Contracts Against Public Policy. — All contracts which if enforced would be contrary to the good of the public or opposed to the welfare of the community, are said to be against public policy and therefore void. Those contracts which tend to injure the government in its relations with other countries, those with alien enemies which involve any communication over the border line, and those in restraint of trade are illustrations of this class of contracts.

A contract to break a law of a sister state is also against public policy.

Agreements to prevent or hinder the course of justice are

illegal; as, to agree to conceal a crime of which one has knowledge, to refrain for a certain consideration from prosecuting a criminal, to agree not to testify as a witness, to influence a witness's testimony, or to bribe a juror.

Held, that a contract to deed a certain piece of property, where the real consideration was an agreement to drop a criminal prosecution against the grantor's son, was void as against public policy.

— *Partridge v. Hood*, 120 Mass. 403.

A contract tending to injure the public service is contrary to public policy and therefore void — for example, an agreement by a public officer to assign his salary to a creditor, or an undertaking to influence the action of a legislature by lobbying, or an agreement to hinder or prevent competition for public contracts.

Agreements which tend to promote and encourage litigation are also void; that is, it is not legal to speculate in lawsuits. A may have a cause of action against B but it is not lawful for C to buy the action for the purpose of instituting suit. The rule was formerly more strict than now. The holding in most states at the present time is that an attorney can institute a suit on a "contingent fee," which means that he is to receive for his services a percentage of what he recovers. In the earlier days this was forbidden.

Agreements contrary to good morals are illegal. So also are contracts which affect the freedom or security of marriage, as an agreement not to marry, and contracts made in consideration of the procuring or bringing about of a marriage, or mutual agreements to obtain a divorce.

Restraint of Trade.—There is another class of agreements, known as contracts in unreasonable restraint of trade, which are prohibited by law as against public policy. It is for the good of the community and the welfare of the individual that competition in trade should exist and that every man should be free to engage in the occupation or vocation he may prefer. Still it is but fair that a man in selling out his business shall include with it the good will, and refrain from opening up a like business at the next door or on the same street. The rule is, therefore, that if the restraint imposed upon the one party is not

greater than the protection the other party requires. the contract is valid.

Martin sold his lumber business, situated in Denver, to Long and agreed not to engage in the lumber business for a period of five years. This is a contract in general restraint of trade and cannot be enforced. If Martin had agreed in writing not to engage in the lumber business in the city of Denver for a period of five years, this would have been a contract in reasonable restraint of trade and would have been enforceable.

From the nature of the case it will be seen that a covenant to refrain from engaging in the same business within the same city might be reasonable in a grocery business, while in another business, the limitation of the whole state would be only just, as in the case of a manufacturer of heavy machinery requiring a wider territory for his sales.

Dandelet sold his dyeing and scouring establishment, and leased the premises to Guerand, entering into a covenant that he would not at any time thereafter engage in a like business in the city of Baltimore. Held, that this covenant was valid, as it was not too comprehensive in its restriction. — *Guerand v. Dandelet*, 32 Md. 561.

Roeber, who was engaged in the manufacture and sale of matches throughout the United States, sold his stock of machinery and good will to Diamond Match Co. He covenanted that he would not, at any time within ninety-nine years, engage in such business in any of the states or territories except Nevada and Montana. Held, that the covenant was valid, as the restraint was reasonable considering the interests to be protected. — *Diamond Match Co. v. Roeber*, 106 N. Y. 473.

Perry sold his patent on a sandpapering machine to Berlin Machine Works and in the contract agreed "not to manufacture, sell, or cause to be sold any sandpapering machines of any description." He violated the agreement and Berlin Machine Works sued for an injunction and damages. It was held that the agreement was not a just and lawful protection to the business of manufacturing and selling under the patent, was in unreasonable restraint of trade, and therefore void.

— *Berlin Mach. Works v. Perry*, 71 Wis. 495.

QUESTIONS

1. What is the subject matter of a contract? Give an example.
2. What may be the subject matter of a contract?
3. Can an illegal object be the subject matter of a contract? Explain. Mention some illegal objects.
4. What contracts are usually forbidden by law?
5. Will courts entertain an action based on an illegal contract? Explain.
6. Can a lawyer or physician practice in your state without a license?

7. How does the law regard contracts made on Sunday? What is the law of your state?
8. Mention a contract which would be against public policy.
9. Is there any difference in effect between an illegal agreement and one against public policy?
10. What is the effect of a contract in violation of an existing law?
11. Are wagering contracts lawful in your state?
12. Explain the meaning of "in restraint of trade."
13. Under what conditions are contracts in restraint of trade binding?
14. Distinguish between general restraint of trade and reasonable restraint of trade. Give an example of each.

6. CONSIDERATION

Consideration in an Executory Contract. — Consideration is the inducement to a contract. There must be some act or thing of value given or promised by the promisee in order to make the promise of the promisor enforceable, unless the terms thereof are fully carried out or executed. Therefore there must be consideration in every executory contract.

Jackson offered Hart \$500 for the automobile he was driving. Hart accepted the offer and a sale resulted. The \$500, which was the consideration, was what induced Hart to sell his automobile.

A contract under seal is in a way, under the common law, an exception, for the seal is said to import a consideration, and the instrument being sealed, no other evidence of consideration is required. Now, however, in a few of the states, the seal is by statute regarded as only a presumption of consideration in an executory contract and is not sufficient without some actual consideration. But if the seal is used on a gratuitous promise for the purpose of creating a consideration, the effect is the same as at common law.

A father gave his daughter a written instrument under seal by which he promised to pay her \$312. This was understood to be a part of the money which the father had owed his wife, now deceased, and he felt it should go to the daughter, although there was no legal obligation. The defense to this promise was want of consideration. Held, that as the promise was intended to be a gratuitous one the seal imported sufficient consideration. — *Aller v. Aller*, 40 N. J. Law 446.

The Consideration must have Value. — While consideration is an essential element of every legally enforceable contract,

it is not necessary that the consideration be adequate in value to the thing promised, but it must be of some value in the eyes of the law. It will be seen that it would be impossible for the courts to require an adequate or full consideration, as they would then have to determine the merits of every bargain.

A may elect to sell a piece of jewelry worth \$100 to B for \$10. The fact that the consideration is not equal to the value of the article does not affect the contract. An article worth \$1000, or any amount, might be transferred by sale to the purchaser in consideration of \$1, or any amount, being paid. In the absence of fraud the contract would be good.

Moore came into possession of a watch which he sold to Lambert for \$10. Shortly afterwards Moore learned that the watch was valuable and easily worth \$100. He tried to collect \$90 from Lambert. As fraud had not been practiced, Moore could not recover. Courts will not attempt to make bargains for people.

The Consideration must be Legal. — The doing or promising to do an illegal act is not sufficient consideration to support an agreement.

It was held that a contract to pay money in consideration of the abduction of a person is unenforceable and void.

— *Barker v. Parker*, 23 Ark. 390.

McBratney, an attorney, sued for services in presenting the claim of the Miami Indians at Washington. It was contended that the services were those of a lobbyist and illegal. The court held it was for the jury to decide whether the services were those of an attorney in drawing papers and making agreements, or of a lobbyist in influencing the legislators. If the former, he could recover; if the latter, the consideration was illegal and void, and he could not recover. If for both, the illegal part of the consideration vitiated and avoided the whole contract.

— *McBratney v. Chandler*, 22 Kans. 692.

A Consideration must be Possible. — A promise to do an impossible act is never a sufficient consideration to support a promise. This does not mean a mere pecuniary impossibility, but an obvious physical impossibility. The non-existence of the thing given as consideration would render the consideration void and a promise made thereon invalid.

Strong contracted to travel for Harper and Company for one year; during this time he was to represent them in every state in the United States, and spend at least two weeks in each state. This was a physical impossibility and the contract was void.

The Consideration must be Present or Future. — A past consideration is no consideration at all, for it confers no value. It is simply some act or forbearance in time past, which has been conferred without bringing about any legal liability. If afterwards, from a feeling of thankfulness or good will, a promise is made to the person by whose acts or forbearance the promisor has been benefited, such promise is gratuitous and cannot be enforced.

James Kingston, the son of a wealthy merchant, was taken ill while traveling some distance from home and strangers cared for him for several weeks until he recovered. His father, when he heard of this, promised to pay the strangers \$1000 for what they had done for his son. As this promise was made after the son had been cared for, it could not be enforced. This is an example of a moral obligation, but no legal obligation existed.

Bowman was nominated for senator. Dearborn rendered services and furnished literature to advance Bowman's cause, but without any solicitation on Bowman's part. After the election Bowman gave Dearborn his note for \$60 for such services. The court held that the note was void for want of consideration. Past performance of services constitutes no consideration for an express promise, unless the services were performed at the express or implied request of the defendant.

— *Dearborn v. Bowman*, 3 Met. (Mass.) 155.

Some courts hold that if there was an express or implied request when the act was performed, the subsequent promise is supported by a consideration, as the request showed that the promisor intended to pay for the act. So in the example last cited if Bowman had requested Dearborn to render the services, Bowman's subsequent promise to pay would have been enforceable.

Consideration in an Executed Contract. — A contract that has been executed will not be set aside because of lack of consideration; it is therefore those contracts which have not yet been carried out that we are to consider.

Matthews purchased of Smith a quantity of fertilizer and gave his note for it. When it became due, he said the fertilizer was not good and had injured his land; still he paid the note, and then brought suit to recover the money paid. Held, that as he had paid the money with a full knowledge of the facts he could not maintain his action.

— *Matthews v. Smith*, 67 N. C. 374.

Consideration for a Gift. — A familiar illustration of lack of consideration is the case of a gift. A mere promise to give a

present is void for want of consideration, but when the promise is executed by the delivery of the gift the defect is remedied, and the gift cannot be reclaimed.

Miss Brewer's father pointed out a colt to her when she was but twelve years old and said, "This is your property; I give it to you." It was known by the family as her colt, but the father kept possession of it until he died. The daughter brought an action to recover the horse. Held, that it being a gift, there was no valuable consideration. To make the agreement valid there must have been either an actual or a constructive delivery. There having been no delivery, the title did not pass to the daughter.

— *Brewer v. Harvey*, 72 N. C. 176.

Newton handed Camp some money to put in the savings bank for him, and when the books were brought back he said, "I give you these bank books." Camp kept them, and in an action by Newton's administrator to recover the books it was held that this was a good delivery, sufficient to constitute a complete gift. — *Camp's Appeal*, 36 Conn. 88.

A Promise may be a Sufficient Consideration. — The consideration must come from the promisee, and it may consist of a present act or a promise to be performed in the future. In the latter case the promisee is also a promisor, and his promise may be to give or to do something, to refrain from doing something which he has a legal right to do, or to surrender some right.

Mrs. Kilcome promised to pay Flanagan a certain sum if he would drop a lawsuit which he had commenced against her. This was done, but she did not pay it, and suit was brought for the sum promised. It was held that there was a valuable consideration for the promise, even though it be shown that she would have succeeded if the suit had come to trial. Mrs. Kilcome surrendered her right to have it tried.

— *Flanagan v. Kilcome*, 58 N. H. 443.

An action was brought on a note given in consideration of a parent naming a child after the maker of the note. The court held that this was based upon a sufficient consideration. The parent surrendered his right to name the child. — *Wolford v. Powers*, 85 Ind. 294.

Consideration for the Discharge of a Debt. — The payment of a smaller sum of money in satisfaction of a debt for a larger sum is not a sufficient consideration for the discharge of the entire debt, as it is, in fact, doing no more than the party is already legally bound to do.

Waters owed Hempy \$600 which was several months past due. Waters offered Hempy \$400 in full satisfaction of the debt, which he accepted and gave a receipt in full. The debt is not paid and Hempy can sue Waters

for the balance due. Part payment of a debt after maturity does not cancel it or bar action to recover.

If something else than money is taken in part satisfaction of the debt, the rule will be different.

If Waters had paid Hempy \$400 cash and given him a wagon worth not more than \$50 which Hempy accepted in full satisfaction of the debt, the debt would have been canceled. The acceptance of a chattel of uncertain value in full satisfaction of a debt cancels the debt. This is true even though the debt is past due.

Thomas owed Singleton \$826.15, and in full settlement he gave Singleton two notes, one for \$200 and one for \$213.07, guaranteed by one Nix. Held, that, although payment or promise to pay part of a debt is not good consideration for the release of the balance, when the creditor receives a guaranty from a third person, or a note indorsed by a third person, the release will be good. — *Singleton v. Thomas*, 73 Ala. 205.

But if the amount due is in dispute, the promise to pay any sum in settlement of the disputed claim is valid, even though such sum be less than that actually due. The liquidation of the claim constitutes a good consideration.

Croft was indebted to Howe. The amount of the debt was in dispute. Croft claimed it was \$785 and Howe claimed it was \$875. They reached a compromise agreement whereby Croft paid \$830. This compromise was fairly made and the debt was canceled even though \$875 was the correct amount.

It has been held where part payment is made and accepted and a release under seal is given for the whole debt, that the debt is canceled.

Call owed money to the Union Bank which he did not pay. Later he paid part of the debt and received from the bank a receipt and release under seal for the whole debt. It was held that the release being under seal was good without full consideration. — *Union Bank v. Call*, 5 Fla. 409.

A promise of additional compensation to a party for carrying out his uncompleted contract is not enforceable, as the undertaking of the promisee to do what he is legally bound to do does not furnish consideration for the promise.

Carhart contracted to build a house for Stone to cost when completed \$12,000. During the course of construction Carhart reported that a certain kind of material which the specifications called for had advanced in

price to such an extent that he could not use it unless Stone would agree to pay \$500 more than the original contract price. Stone agreed to this and Carhart completed the house. Stone will not have to pay the \$500 as Carhart did for it no more than he was already legally bound to do.

Five men were engaged as a crew on a pleasure yacht to make the round trip from Duluth to Buffalo. When the yacht reached Buffalo, one man left the crew. The owner of the yacht told the other four men that if they would man the yacht on the return trip he would divide the salary of the man who left the crew among them. They agreed. The owner of the yacht is not bound, as the men are doing no more than they originally contracted to do.

Ayres entered into a contract to build a certain section of road for C. R. I. & P. R. Co. After building a part Ayres informed the C. R. I. & P. R. Co. that he owed for supplies and could not go on at the contract price. C. R. I. & P. R. Co. told him to go on and his actual expenditures would be met and his creditors paid. Held, that the agreement was without consideration, as it simply bound Ayres to do what he was already under a legal obligation to do.

— *Ayres v. C. R. I. & P. R. Co.*, 52 Iowa 478.

Accord and Satisfaction. — This is the making and executing of an agreement by which one party agrees to give or perform, and the other party agrees to accept, in satisfaction of a claim, something other or different from what he is entitled to. It results in the settlement of a claim by compromising the amount which is in dispute, or by giving something else than that which was originally agreed upon.

Whitney sued on four promissory notes. Cook pleaded that the notes had been discharged by an agreement by which Whitney agreed to accept an interest in Cook's claim against the United States in satisfaction of the notes. Held, the agreement constituted an accord and satisfaction and was a good defense to the suit. It depended on the intention of the parties whether the agreement or its performance was to constitute full satisfaction. — *Whitney v. Cook*, 53 Miss. 551.

Settlement to Avoid Litigation. — A settlement to avoid litigation, where the party forbears to sue or consents to drop a pending suit, is a valuable consideration, and the promise made for this consideration can be enforced.

Parker had been in the habit of going into Enslow's store and filling his pipe from tobacco left on the counter for the use of the public. Enslow, for a joke, mixed powder with the tobacco, and when Parker lit it, an explosion followed and injured his eyesight. Parker threatened, and was intending to sue Enslow. As a compromise and settlement of this cause of action, Enslow gave Parker a promissory note, upon which he sued. The court held that as the note was given in settlement of a threatened suit,

if the payee supposed or believed that he had a cause of action and the note was given and accepted in good faith as a compromise, it was supported by a sufficient consideration and could be enforced.

— *Parker v. Enslow*, 162 Ill. 272.

Compromise with Creditors. — If the creditors of a party agree with each other and with the debtor to accept a part of what he owes each of them in discharge of the whole debt, the forbearance of each one is the consideration to the others, who might otherwise lose the whole. A compromise with all the creditors is therefore held to be for a valuable consideration, and such an agreement can be enforced.

Jones & Co., an insolvent firm, entered into a written agreement with their creditors whereby the creditors were to accept twenty-five cents on the dollar in payment of their several claims and give receipts in full, provided that all of the creditors assented to the agreement. Held, that this was a valid agreement, and that the firm by complying therewith was discharged from the balance of the indebtedness.

— *Pierce v. Jones*, 8 S. C. 273.

Consideration for Extension of Time. — But a promise to extend the time of payment of a debt already due is void for want of consideration unless the debtor makes some concession; as, giving some security, paying interest in advance, or doing something that will form a consideration for the promise to extend the time.

It was held, that an agreement to extend the time of payment of a promissory note upon the payment of the interest in advance is valid, as it is founded upon a valuable consideration.

— *Warner v. Campbell*, 26 Ill. 282.

Moral Obligations. — A distinction is sometimes made between “good” consideration and “valuable” consideration. In defining these terms, Blackstone says, “A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relative, being founded on motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant, and is therefore founded on motives of justice.”

Accordingly it was held by some old authorities that a moral obligation was a sufficient consideration to make a promise valid.

But the courts are now practically united on the point that neither a moral obligation nor a "good" consideration is sufficient to make a promise valid and enforceable at law.

A father promised his son that he would give him twenty shares of bank stock when he became of age. As this promise is supported by "good" consideration, which in reality is no consideration, it is not binding. The father is morally bound to fulfill his promise, but he is not legally bound. "Good" consideration will not support an executory contract, but it will support an executed contract.

Consideration for Subscriptions. — Some courts hold that there is no consideration for subscriptions to a fund for a special purpose unless the purpose is carried out. Others hold that one subscription is consideration for another and that the promises mutually support each other. Still other courts hold that if the organization accepting the subscription agrees to carry out the purpose, this promise on their part is consideration for the subscriptions, and the subscribers are bound. In reality there is no consideration for a voluntary subscription, but the court rulings are justified by the conditions surrounding such cases.

A fund of \$100,000 is raised by popular subscription for a new Y. M. C. A. building. Is Mr. Blank, who subscribed \$1000, legally bound by his subscription? According to the first ruling, if the Y. M. C. A. officials act upon the subscription and start the building, he is bound. According to the second ruling, he is bound with the other subscribers, as one subscription is consideration for another, and if one subscriber pays, all others are legally bound. According to the third ruling, if the Y. M. C. A. officials accept the subscriptions and agree to erect the building, all subscribers are legally bound.

Contracts Entered into over the Telephone. — In these days a great deal of business is transacted by means of the telephone. When a contract is entered into in this way a question may arise as to the identity of the contracting parties, and in case this identity cannot be established to the satisfaction of the court or jury, the contract may be declared void. For this reason it is best to require the confirmation in writing of all contracts entered into over the telephone.

Brown sent to McGuire a carload of coal which he claimed McGuire had ordered by telephone. McGuire refused to accept or pay for the coal. Unless Brown could prove that McGuire had ordered the coal he could not enforce the contract.

QUESTIONS

1. What is consideration in a contract?
2. Is consideration in a contract necessary? Explain.
3. How does the seal affect a contract in regard to consideration?
4. Is it necessary that the consideration have value? Explain.
5. What may be consideration in a contract?
6. Does the law with reference to consideration apply to executed contracts the same as to executory contracts? Explain.
7. How does illegal consideration affect a contract? Give example.
8. Can a thing that is impossible be the consideration in a contract?
9. Explain the meaning of "consideration must be present or future."
10. Under what circumstances, if any, can a promise to pay for services performed in the past be enforced?
11. Is a mere promise to make a gift enforceable? Explain.
12. May a promise be a sufficient consideration? Give an example.
13. What is the usual way of discharging a debt?
14. In case of part payment of a debt, if a receipt is given in full, is the debt discharged?
15. Under what circumstances will part payment discharge a debt?
16. Mention a case where the court will look into the adequacy of the consideration.
17. Give an example of inadequate consideration.
18. Will a compromise of a disputed claim constitute a good consideration? Explain.
19. How will a release under seal in case of part payment affect the debt?
20. Explain "accord and satisfaction."
21. Is a promise to forbear bringing suit sufficient consideration?
22. Is a compromise with creditors a sufficient consideration?
23. Discuss a promise to extend the time of payment of a debt.
24. Distinguish between a legal obligation and a moral obligation.
25. Is a person who subscribes to a fund bound by his subscription?
26. Why should contracts entered into by telephone be confirmed?
27. Name the elements in the following:
 - (1) Kent offered to employ Houston as a yard foreman for one year at \$125 per month. Houston accepted the offer and started to work.
 - (2) Myers rented a store building on Main Street, from Jackson, for one year for \$1200 and paid one month's rent in advance.
 - (3) Harris entered the University of Minnesota and paid one year's tuition, \$150, in advance.
 - (4) Whitmore & Co. engage space in Lincoln's garage for three trucks at \$15 each per month.
 - (5) Morran and Wilkins enter into a written agreement whereby Wilkins is to erect a house for Morran, according to certain plans and specifications, for the sum of \$12,000.

7. OPERATION OF CONTRACTS

Parties Acquiring Rights under Contracts. — We have now considered every element necessary for a valid and binding contract, and the question arises as to the extent and limitation of the rights conferred and of the obligations incurred.

As a general principle only the parties to a contract acquire any rights under it. It is clear that it cannot impose liabilities upon any one not a party to it. A man cannot voluntarily and without being asked to do so pay another man's debts and thus establish himself as a creditor.

Jameson paid a debt of \$600 for a friend of his without being asked to do so. If the friend does not see fit to pay Jameson he cannot recover.

Rights of Third Parties. — In nearly all of the states (Massachusetts and Michigan excepted) if a contract is made by E with F for the benefit of G, G may recover upon it, although the consideration came from E and F's promise was made to E.

Empy lends \$100 to Foster and Foster promises Emphy that he will repay it to Grant. Grant can maintain an action against Foster upon this promise made for his benefit.

The contrary ruling is illustrated by the following case:

A father agreed with his son that he would revoke a provision in his will in favor of his daughter and devise the same property to the son in consideration of the son's paying the daughter \$10 a month as long as she might live. The daughter was not a party to the agreement. Held, that she could not enforce it. — *Linneman v. Moross*, 98 Mich. 178.

The New York courts in the celebrated case of *Lawrence v. Fox*, 20 N. Y. 268, held that the third person, for whose benefit a promise was made, might maintain an action upon the promise, provided that he was the person directly intended to be benefited, and provided that the promisee was at the time under an existing obligation to him, which the promisee sought to discharge by giving him the benefit of the promisor's promise. The facts in this case were that one Holly, at the request of Fox, loaned him \$300. Holly stated at the time that he owed that sum to Lawrence and had agreed to pay it to him the next day. Fox, in consideration of the loan, promised Holly that he would pay the sum to Lawrence on the next day. Lawrence sued Fox on this promise and the court held that he could recover on the promise, although he was not a party to it.

The rule as applied in New York state has been very largely adopted throughout the United States.

Harrison purchased Lambert's interest in the firm of Lambert and Hoyt, and agreed with Lambert to pay his obligations to the partnership

creditors. The creditors of the old firm of Lambert and Hoyt may sue Harrison on this promise made for their benefit.

X sold certain real property to Walker, the property being mortgaged to Dean. As a part of the purchase price Walker agreed with X to assume the mortgage and pay the amount named therein to Dean. Held, that Dean, who was not a party to this agreement, could claim the benefits thereof and maintain an action to recover the amount of the mortgage from Walker. — *Dean v. Walker*, 107 Ill. 540.

Joint and Several Liability. — When two or more persons are liable in a contract, their liability may be joint or several.

1. Persons jointly liable must all be sued together, a discharge to one discharges all, and if one dies the liability rests in the survivors.

2. If the persons are severally liable, each for only a part of the contract, they must be sued individually, and a discharge to one does not discharge the others. There is no survivorship.

Assignment of Rights and Liabilities. — Having now determined upon whom the rights and liabilities fall, we must ascertain how and when other persons may take their places and succeed to their rights, if at all. It is well established that the promisor cannot assign his liabilities under the contract; that is, the promisee cannot be compelled to accept performance from any but the promisor. This is only just, for if A contracts with B to have him do a certain thing for him, A is entitled to know with whom he is dealing, as he may have taken into consideration B's particular adaptability to the work.

This rule is qualified in the case of B undertaking to do certain work for A in which no particular knowledge or skill is required. He can then have the work done by another, but still B is responsible for the work being well done.

H agreed to sell to Groezinger all the grapes he might raise in a certain vineyard during a period of ten years, and Groezinger agreed to pay therefor \$25 per ton. At the end of five years H sold the vineyard and assigned the contract to LaRue. Groezinger refused to accept grapes from LaRue, saying he had no contract with him. Held, that the contract could be assigned, as it was not for services of a personal nature.

— *LaRue v. Groezinger*, 84 Calif. 281.

The case of *Boston Ice Co. v. Potter* (page 27) is not in conflict with this rule, as the courts hold that the promisor cannot assign his liability unless the agreement contemplates that some

one else is to do the work or aid in it. This is true in the case of a contractor agreeing to build a house, as it is plainly within the contemplation of the parties that he will employ men to do part or all of the work.

Deverman, a noted artist, agreed to paint a picture of a certain landscape for Morwitz. Deverman, not being able to paint the picture, attempted to deliver to Morwitz on the contract a picture painted by an assistant and student in Deverman's studio. As this contract calls for services of a personal nature, Morwitz may refuse to accept a picture painted by any one other than Deverman.

Gamzon contracted to build an apartment house for LeRoy. The building of an apartment house requires the services of many different artisans, such as carpenters, masons, and plumbers, and it is clearly within the contemplation of the parties that others are to assist in the construction of this apartment house and the subletting or assigning of parts of the work would not affect the contract.

As to rights and benefits under a contract, the general rule is that a contract involving only money or property can be assigned, but a contract involving personal service or some particular characteristic of a party cannot be assigned. In other words a contract to pay money may be assigned, and also a contract to deliver goods, but a contract of employment cannot be assigned. An assignment is effective against the other party to the contract only after he has received notice of the assignment.

Adams owed Mozier \$500 for goods sold and delivered. On May 1 Adams paid Mozier \$100 on account. On May 15 Mozier assigned his claim to Sheerman. On June 1 Adams paid Mozier \$100 more on account. On June 15 Sheerman gave Adams notice of the assignment. Adams will be required to pay only \$300 to Sheerman, as both payments were made before he received notice of the assignment.

An assignment conveys to the assignee no better title than his assignor had. In other words, the assignee is subject to all the defenses that might be brought against the assignor up to the time notice of the assignment has been given. This rule, however, does not apply to negotiable paper, which is treated in a later chapter.

Rights under an assigned contract, if assignable, can be enforced by the assignee in his own name if the party liable has been given notice of the assignment. In the Boston Ice Co. case (page 27), Potter had no notice of the assignment by the Citizens Ice Co. to the Boston Ice Co.

Aside from the assignment of the rights and liabilities under a contract by the voluntary acts of the parties, they may also be transferred by operation of law.

By the death of a person all of his rights under his contracts pass to his executor if he leaves a will, or to his administrator if he dies without one. This is not the rule if the contract depends upon his performing some acts of personal service or skill. In such cases the contract dies with the party.

Lacy contracted with M to work upon his farm as an ordinary farm laborer for one year from March 1. In July M died. Held, that his death terminated the contract. — *Lacy v. Gelman*, 119 N. Y. 109.

By the bankruptcy of a party all of his property, including his rights under his contracts, passes to the trustee. This is explained fully in a later chapter on Bankruptcy.

Novation. — This is the substitution of a new contract for an existing contract, either by substituting different parties or different terms, and must be in all respects a valid contract.

Adams contracts with Johnson for the purchase of his automobile. Adams decides that he does not want the car, so he enters into an agreement with all concerned whereby Brown is to take his place as the purchaser. This is a novation; Brown has been substituted for Adams.

Cummings had a contract for the sale of 500 tons of coal to Sherman for \$6 a ton. The parties made a new agreement, canceling the old one, by which Cummings agreed to sell and Sherman to buy 1000 tons of coal for \$5.50 a ton.

QUESTIONS

1. Who acquires rights under a contract?
2. Can a man voluntarily pay the debt of another and establish himself as a creditor?
3. Can a third party acquire rights under a contract? Give an example.
4. Can the creditors of an old firm hold liable a new member of the firm who agreed at the time he entered to assume responsibility for the debts already contracted?
5. Define joint liability, and several liability, and give an example of each.
6. Can a promisor assign his liabilities under a contract?
7. Can a contract for personal services be assigned? Explain fully and give examples.
8. What rights under a contract are assignable?
9. Does the assignee get any better title than the assignor had? Explain.

10. Can an assignee enforce rights in his own name?
11. Is notice of an assignment necessary? Explain.
12. Give an example of an assignment by operation of law.
13. What happens to rights under a contract in case of death of a contracting party?
14. What is a novation? Give an example.

8. STATUTE OF FRAUDS

Outline. — In the year 1676 a law was passed in England, entitled "An act for the prevention of frauds and perjuries." This statute required that written evidence should be supplied in proving certain contracts.

The statute commonly called "the fourth section of the Statute of Frauds" which has been reenacted by nearly all of the states, provides in substance that in order to be enforceable the following contracts, or some memorandum of them, shall be in writing and signed by the party against whom it is sought to enforce the contract or by his authorized agent:

1. The promise of an executor or administrator to pay from his own funds or estate the debts of the estate he is administering.

Johnson, the administrator of an estate, promised the undertaker that if the estate was not sufficient to meet all expenses he would assume responsibility for the funeral expenses and pay them from his own funds. As this promise was not in writing it could not be enforced.

2. The promise of any one to answer for the debt or default of another—that is, to guarantee that another will pay his debts or fulfill his legal obligations.

Morton was asked to guarantee payment of a debt contracted by Clark. He said that he would pay the debt if Clark failed to do so. In order to bind Morton on this guaranty it would have to be in writing, and it would have to be given before or at the same time the debt was contracted or there would have to be some new consideration for the guaranty.

3. The promise, as distinguished from a mutual promise to marry, to perform any special act, as to transfer property rights, in consideration of marriage, in a case where the marriage is the consideration for such promise.

Whalan promised Miss Green that he would give her 500 shares of U. C. R. R. stock if she would marry him. She consented. Unless this agreement was in writing, signed by Whalan, she could not claim the stock.

4. Any contract for the sale of land or any interest in or concerning lands.

Graves contracted verbally with Jameson for the purchase of a certain building lot. They were to meet Jameson's attorney ten days later for the purpose of executing papers necessary to transfer title. In the meantime Jameson received a better offer and sold to another party. As this contract was not in writing Graves had no right of action.

By the common law a lease of land was not required to be in writing, but this rule was changed in England and the United States by the adoption of the Statute of Frauds. By special statute in some states a lease for one year or less need not be in writing, even though it is to commence at a future date.

(For other contracts of sale, see page 94.)

5. Any contract, which by its terms is not to be performed within one year from the time of the making thereof; but if performance within one year is possible, it does not have to be in writing.

Some time prior to November, Hillhouse and Jennings made an oral agreement by which Hillhouse was to work for Jennings for one year from November 21. It was held that the contract was within the Statute of Frauds, and not being in writing it was unenforceable.

It must be remembered that this special requirement is in addition to all other requirements. In these contracts, as in all others, there must be competent parties, agreement, legal subject matter, and consideration. Most contracts may be proved by oral evidence; these contracts may be proved only by written evidence.

Object. — The object of this statute was to lessen the perjury in the testimony of witnesses, especially in the important cases included therein, and it therefore required that these contracts be evidenced in writing. In nearly all of the states of the Union this statute has been reenacted in somewhat the same form, although the language of the different statutes varies. This statute does not render any oral contracts void, but says that no action shall be brought on them in the cases mentioned above. It takes away the remedy. When action is brought in court upon contracts of the kinds mentioned, it is necessary to show the written agreement. The oral agreement is valid, and after it is made, a sufficient writing may be given.

A verbal contract was made which belonged to the class required by the Statute of Frauds to be in writing. It was broken, and the parties afterwards entered into a written agreement containing the terms of the oral contract. After the writing was signed an action was brought for a breach of the contract which occurred before the written agreement was executed. Held, that the contract was sufficient to satisfy the statute. The writing was not the contract itself, but the evidence necessary to prove it. — *Bird v. Munroe*, 66 Maine 337.

The Statute of Frauds is a defense, solely, and the party availing himself of it must set it up, otherwise it is waived.

When Memorandum is Sufficient. — The writing need not be a formal contract. A memorandum or note containing the terms of the agreement, if signed by the party to be charged or his authorized agent, is sufficient.

Action was brought to compel Brown to perform his part of the following contract and to convey the land to Hurley.

\$50

"LYNN, April 14, 1866.

"Received of John and Michael Hurley the sum of fifty dollars in part payment of a house and lot of land situated on Amity Street, Lynn, Mass. The full amount is \$1700. This bargain is to be closed within ten days of the date hereof." This was signed by Brown. Brown claimed that the writing was not sufficient, as there were several houses and lots on the street. It was shown that defendant owned no other house and lot on the same street. The court held that the writing was sufficient, and that evidence could be given as to the particular house meant.

— *Hurley v. Brown*, 98 Mass. 545.

The memorandum or note required to be in writing need merely contain the agreement and may consist of several writings or a number of letters and memorandums.

Promise of an Executor or Administrator. — The promise of an executor or administrator to answer damages out of his own estate, that is, to render him personally liable for the debts of the deceased, must be in writing. But the writing does not import any consideration, and there must be a consideration to this as to any contract.

Shepherd, who owed Smithwick for board, died. Shepherd's administrator, in a conversation with Smithwick, stated that "he would see it paid" or, "it should be paid." Held, that the promise was not enforceable because it was not in writing. — *Smithwick v. Shepherd*, 4 Jones (N. C.) 196.

Promise to Answer for the Debts of Another. — In the case of a promise to answer for the debt, default, or miscarriage of another, there must be three parties: the debtor, the creditor,

and the person who guarantees the debtor's account. To bring the case under the rule requiring a writing there must not be an absolute promise to pay, but a promise to pay if the other defaults.

To illustrate, A goes to a grocery with B and says, "Give B a bill of groceries, and if he fails to pay for them, I will." Such a promise is under the statute and must be in writing. But if A says, "Give B the bill of goods and I will pay for them," or, "I will see that you are paid," this is an independent promise, making A the principal debtor, and is not within the statute.

Boston, a physician, brought suit to recover for services rendered Farr's stepson. Farr said to Boston, "Go and get a surgeon and do all you can for the boy; I will see that you get your pay." Held, the jury were justified in finding that it was an original promise on the part of defendant by which he charged himself with the bill, and did not come within the statute. — *Boston v. Farr*, 148 Pa. State 220.

The test seems to be whether the party for whose debt the promise is made continues to be liable; if so, the promise is within the statutes.

Agreements in Consideration of Marriage. — The agreement here meant is not the promise to marry, but the promise to settle property or to make a payment of money in consideration of, or conditioned upon, a marriage.

It was held that a verbal agreement made by the woman before marriage, whereby she released and renounced all interest in her proposed husband's estate after his death, was void under the Statute of Frauds.

— *McAnnulty v. McAnnulty*, 120 Ill. 26.

Contracts for the Sale of Lands or Any Interest in or Concerning Them. — This section does not apply to the deed of conveyance of land, as that must be written and sealed without statutory requirement. But the statute here refers to any agreement to buy or sell land, or to any interest in or concerning lands, as a grant of a right of way over one's land, which is an interest concerning the realty and within the statute.

Agreements Not to be Performed within the Space of One Year. — The mere fact that the contract may or may not be completed within one year is not sufficient to bring it within the statute. It must be the plain intent and purpose of the

contract that it is not to be performed within that time, to bring it within the statute. If its performance depends upon a contingency that may or may not happen within the year, no writing is necessary.

It was held that a contract of partnership to continue for three years was void under the Statute of Frauds unless in writing.

— *Wahl v. Barnum*, 116 N. Y. 87.

An agreement to support a person during his lifetime is not within the statute, as he may die within the year.

Z, a stepfather, gave D, his stepson, the use of his farm during Z's lifetime in consideration of D's supporting Z and his wife during their lives. Held, that such an agreement is not within the statute.

— *McCormick v. Drummett*, 9 Nebr. 384.

But a contract for a year's service to be entered upon in the future, even the next day, must be in writing under the statute.

About the middle of March Oddy and James entered into a verbal agreement by which James employed Oddy to superintend his cement works for one year from April 1 next. Oddy worked until August 3, when James discharged him. Oddy sued, and James set up that the agreement was void under the Statute of Frauds. Held, for James. The contract was not to be performed within one year, so must be in writing.

— *Oddy v. James*, 48 N. Y. 685.

QUESTIONS

1. What is the Statute of Frauds?
2. What contracts must be in writing under the Statute of Frauds?
3. Is any formal written instrument necessary? Explain.
4. How are most contracts proved?
5. How must contracts within the Statute of Frauds be proved?
6. What is the object of the Statute of Frauds?
7. How general has been its adoption?
8. Explain the following: "The Statute of Frauds is a defense, solely, and the party availing himself of it must set it up, otherwise it is waived."
9. Give an example of an oral promise to answer for the debt of another that would not be enforceable.
10. Is an oral contract to sell land enforceable?
11. Merritt agreed to pay Love \$20 per month to care for a horse until he died. In case the horse lives three years would this contract have to be in writing to be enforceable?
12. Lyng agreed to work for Booth for one year and to begin work on the first of the following month. Must this contract be in writing?

9. DISCHARGE OF CONTRACT

Discharge by Agreement. — As the contract is created by the agreement of the parties, so the parties may, if they choose, terminate and discharge it in a like manner. If the contract is executory, each party may waive his rights under it, and the waiver of the rights of one is the consideration for the waiver of the rights of the other. It is virtually a new contract, the subject matter of which is the waiver of the old contract, and all of the elements of a contract are necessary to constitute a valid waiver. If one party has performed his part of the contract, there must be some consideration for his release of the other party.

Andrews offered Hoff ten cords of wood and Hoff agreed to work for Andrews five months to pay for it. Before anything had been done Andrews released Hoff from his promise to work and Hoff released Andrews from his promise to deliver the wood. The contract was discharged.

Suppose that after Andrews had delivered the wood he released Hoff from his promise to work five months. Hoff's liability would not be discharged, as there would be no consideration for Andrews's release.

A waiver may be effected by the substitution of a new contract which so changes the terms of the old one that it either expressly or impliedly waives the old agreement, but the intention to discharge the old contract must be clear. The contract may by express terms provide for its own discharge, as, for instance, a stipulation that one party may terminate it upon giving certain notice or performing certain conditions.

A policy of insurance provided that if the premises should become vacant and remain unoccupied for a period of more than ten days, without the assent of the company indorsed upon the policy, the policy should become void. The premises became vacant and remained so for over three months. They were then occupied and thereafter burned. Held, that by the terms of the policy it was terminated and discharged by the vacancy, and subsequent occupation did not revive it.

— *Moore v. Phoenix Insurance Co.*, 62 N. H. 240.

Discharge by Performance. — This is the termination of the contract contemplated by the parties when it is made. The terms having been carried out and the conditions performed, the contract is satisfied and discharged. This of course requires performance upon both sides. If but one party has performed,

he alone is discharged and not the contract, for it remains in force until all of its provisions are carried out. If the contract is for the sale of a table for \$40, the contract is discharged when the table is delivered and the money paid. If the table is delivered but payment not made, it is discharged as to the seller but not as to the purchaser.

To constitute a performance the terms of the contract must be carried out as to time, place, and conditions. Although a substantial performance is held good, the party will be liable for the damages caused by his deviation from the exact terms of the contract.

Nolan brought an action to recover on a contract for building Whitney a house. The court found that he had endeavored to live up to the agreement and, acting in good faith, had substantially performed his part. He could therefore recover, notwithstanding some slight defects in the plastering for which compensation would be made to Whitney.

— *Nolan v. Whitney*, 88 N. Y. 648.

Gillespie Tool Company brought an action to recover the contract price for drilling a gas well. The contract called for a certain depth and diameter. The tool company had drilled the required depth, but the diameter of part of it was less than the contract specified. The only excuse for this was the saving of time and expense. Held, that this was not a substantial compliance and the company could not recover, although the well answered every purpose a larger one would.

— *Gillespie Tool Co. v. Wilson*, 123 Pa. State 19.

When the contract calls for the payment of money, the party to whom it is to be paid need not accept a note or check. But if it is accepted, the question arises as to whether or not this discharges the original contract, or whether the note or check is to be regarded as a conditional payment. If it is but a conditional payment, it does not discharge the contract until it is paid. The intent of the parties governs here, but in the absence of any proof of intent to the contrary, the presumption is, in most of the states, that it is taken conditionally.

The taking of a note for a preëxisting debt was held to be no payment unless the creditor expressly agreed to take the note as payment and to run the risk of its being paid. The giving of a receipt for the amount is not enough to establish such a positive agreement.

— *Stone & Gravel Co. v. Gates Iron Works*, 124 Ill. 623.

A contract in which the performance of one party is to be satisfactory to the other gives rise to a nice question and we are

confronted with the inquiry, Can the whims and personal taste of the party for whom the work is done prevent the fulfillment of the agreement when the performance is to all intents and purposes well accomplished? The answer seems to be that if it is a matter of personal taste, as a contract for painting a portrait, or if it is a contract for the sale of goods where the parties can be put *in statu quo* (i.e. the same condition in which they originally stood), the agreement will be strictly construed and the buyer will be the sole judge.

Brown expressly agreed to make a suit of clothes for Foster that would be satisfactory to him. The clothes were made and delivered, but Foster declined to accept them. Brown proved that they could easily be altered and made to fit. But the court held that under the agreement it was for Foster alone to decide whether or not he would accept the clothes. It was Brown's fault if he entered into a contract that made his compensation dependent upon the judgment and caprice of another.

— *Brown v. Foster*, 113 Mass. 136.

An artist who agrees to paint a "satisfactory" portrait cannot recover unless the buyer is satisfied, as the question of reasonable satisfaction does not enter into contracts involving personal taste.

— *Pennington v. Howland*, 21 R. I. 65.

But if it is a contract for work or labor which does not involve the question of personal taste, as for machinery or mason work, the courts hold that the party for whom the work is performed must be satisfied when in justice and reason he ought to be satisfied. That is, if the work has been substantially performed it must be accepted.

Hawkins agreed with Graham in writing to furnish and set up a heating system in Graham's mill according to certain specifications, and he was to be paid upon its satisfactory completion. If the system was not satisfactory, he was to remove it at his own expense. Held, that the question as to whether the system was satisfactory was to be determined, not by the particular taste and liking of the mill owner, but by the judgment of a reasonable man. — *Hawkins v. Graham*, 149 Mass. 284.

Richardson agreed to sink a well for Mead which would produce a flow of water satisfactory to Mead. It was held that Mead cannot arbitrarily say he is dissatisfied and refuse to pay, if the well does satisfy his needs and should satisfy a reasonable man. — *Richardson v. Mead*, 11 S. D. 639.

Legal Tender. — The payment of money must be made in what is termed legal tender, unless the creditor consents to accept something else. Legal tender is money which Congress has declared must be accepted if offered in payment of an un-

disputed debt. All gold coins and silver dollars are legal tender for any amount. Silver coins of denominations less than the dollar are legal tender in amounts not exceeding ten dollars. Minor coins such as nickel and copper pieces are legal tender in amounts not exceeding twenty-five cents. Federal Reserve notes are legal tender. United States notes or "greenbacks" are legal tender in any amount, except for duties on imports and interest on the public debt. National bank notes are not legal tender, but are accepted by the United States government for all debts except duties on imports. Gold and silver certificates are not legal tender. In actual practice the national bank notes and the gold and silver certificates are taken without question and pass as freely as any other kind of money, and their acceptance constitutes good payment. The receipt of counterfeit money does not constitute payment, and it can be returned within a reasonable time and good money demanded in its place.

Tender. — The creditor may refuse to accept the money which the debtor claims is due him. In such a case if the debtor makes a sufficient tender of the amount the debt is not canceled, but interest from that time stops and he will be relieved from paying any costs in a suit against him for the debt. To constitute a sufficient tender the exact amount of money must be produced and offered, and the offer must be made unconditionally, that is, it must be made without any reservation. Even the offer to pay upon condition that the creditor give a receipt for the money is not a good legal tender. Unless the contract provides a place of payment, the tender must be made to the creditor personally if he is within the state.

Hart owed Mead \$540. Hart went to Mead's office, tendered payment, and demanded a receipt. This was not a good tender, as a condition was attached. Hart met Mead on the street where he tendered payment. This was not a good tender, as it was not made in a proper place. Hart offered Mead silver certificates to the amount of \$540 in payment of the debt. This was not a good tender, for silver certificates are not legal tender. Hart went to Mead's home one evening and tendered currency in payment. This was not a good tender, for it was made at the wrong time and place. Hart tendered nine fifty-dollar bills and one one-hundred-dollar bill and demanded the change. This was not a good tender, for the exact amount should be tendered.

Had Mead accepted any of these tenders the debt would have been canceled.

Impossibility of Performance. — We have seen that when the act to be performed is an impossibility on the face of it, no contract exists, as such an act is not a valid consideration. But the question comes up when the impossibility arises after the formation of the contract, and the rule then is that it does not excuse performance.

Anderson contracted in March to raise and deliver to May 591 bushels of beans. Anderson delivered only 152 bushels because most of his crop was destroyed by early and unusual frost. Held, that this did not excuse his nonperformance. When such causes may intervene they should be guarded against in the contract. — *Anderson v. May*, 50 Minn. 280.

But if the promisor makes his promise conditional upon an event, the happening of which makes the performance impossible, this of course excuses him, as where a clause is inserted providing for the contingency of fire, or strikes, or floods. If the promise is made unconditionally, the promisor takes all risk.

There are contingencies which may arise, however, which the courts hold are sufficient excuse for not fulfilling the contract. Among these are impossibilities arising from a change in the law of one's own country.

Miller leased from Cordes, a wooden building in Grand Rapids, Mich., for ten years. The lease contained this covenant, "If said building burns down during this lease, said Cordes agrees to rebuild the same in a suitable time, for said Miller." Miller occupied the premises for two years, when it was destroyed by fire. About the time of the fire an ordinance was passed prohibiting the erection of wooden buildings within certain limits which embraced this site. Held, that the covenant was released by the ordinance, making its fulfillment unlawful. — *Cordes v. Miller*, 39 Mich. 581.

Another contingency which will excuse the failure to fulfill is where the continued existence of a specific thing is necessary to the performance of the contract. The destruction of that thing through no fault of either party discharges the contract.

The lessee of a coal mine covenanted in his lease to work the same during the continuance of his lease in a good and workmanlike manner. The court held he was excused from further performance when the coal mine became exhausted. — *Walker v. Tucker*, 70 Ill. 527.

Cleary entered into a contract with Sohler to lath and plaster a certain building. After he had partially completed his part of the contract the building burned. Held, that Cleary was excused thereby from ful-

filling the remainder of his contract, and could recover a reasonable amount for the work already done. — *Cleary v. Sohler*, 120 Mass. 210.

A contract for the rendering of personal services is discharged by the death or illness of the promisor.

Rosa contracted with Spalding, who was proprietor of a theater, to furnish an opera troupe to give a certain number of performances. The leader and chief attraction of the company became ill and unable to sing, and Rosa did not perform his agreement. In an action to recover damages for the breach it was held that as the illness of the chief singer made it practically undesirable and impossible to appear without him, and as it was caused by circumstances beyond his control, it constituted a valid excuse for nonperformance. — *Spalding v. Rosa*, N. Y. 40.

Blakely and Sousa made an agreement by which Blakely was to be manager and Sousa the leader of a band which was to tour the country. The peculiar abilities of both Blakely and Sousa were an important consideration in making the contract. It was held that the death of Blakely dissolved the contract and that his administratrix could not substitute another manager and insist on the performance of the contract.

— *Blakely v. Sousa*, 197 Pa. State 305.

Discharge by Operation of Law. — Where a new law is passed which makes an existing contract illegal, the parties will not be expected to perform, and the contract will be discharged.

Gains contracted to erect a five-story frame apartment house for Lurch on a certain lot near the center of the city. Before the permit was secured a city ordinance was passed establishing a "fire zone" and in this zone all buildings must be hereafter constructed of brick or some fire proof material. Lurch's lot was within this zone, so the contract was discharged.

Other examples may be found in case of war. When two countries go to war contracts between citizens of the respective countries on which nothing has been done are discharged. Contracts on which something has been done may be suspended until the war is over.

Discharge by Alteration of a Written Instrument. — If a written instrument is altered or erased in a material part by a party to the contract, or by a stranger while the instrument is in the possession of the party to it, and with said party's consent and without the consent of the other party to the instrument, the contract will be discharged, if the alteration is made with an intent to defraud; but if innocently made there can be recovery on the original consideration.

A promissory note dated October 11, was made by Steele and Newson, payable to their own order one year from date. It was indorsed by them

to Wood. "September" had been struck out and "October" put in as the date. The change was made after Steele had signed the note as surety and without his knowledge or consent. Held, that it was a material alteration and extinguished Steele's liability. — *Wood v. Steele*, 6 Wall. (U.S.) 80.

But if the alteration be made without intention to defraud, there can be a recovery on the original contract.

At the maturity of a joint promissory note a renewal note was given which was invalidated as to one of the makers on account of a material alteration made after he signed. The alteration was the insertion of the words "with interest" without his knowledge or consent. Held, that recovery could be had against him on the original cause of action, as there was no fraudulent intent in the alteration. — *Owen v. Hall*, 70 Md. 97.

Discharge by Breach. — We have already considered how a contract may be terminated and discharged by fulfilling the terms thereof. We have now to consider how it may be discharged by failure or refusal of one or both of the parties to fulfill the agreement. When the terms of the agreement have been broken, there arises in the place of the contract a new obligation under which the party in default is placed. That obligation is to pay to the other party the damage arising therefrom. The injured party acquires a new right through the breach called a right of action.

A contract may be broken in any one of three ways:

1. A party may renounce his liability under the contract.
2. A party may, by his own acts, make it impossible for himself to fulfill the contract.
3. A party may wholly or partially fail to perform what he promised.

Breach by Renouncing Liability. — When one party to the contract renounces his liability thereunder before performance is due and declares that he will not perform, a breach of contract arises and the injured party may at once institute an action for damages.

Roehm brought an action to recover damages for breach of a contract to accept and pay for hops. Before the time of delivery Horst advised Roehm that he would not accept the hops. The Court held that the absolute refusal to abide by the contract, made before performance was due, gave Roehm an immediate right of action for damages.

— *Roehm v. Horst*, 178 U.S. 1.

If during the course of the performance one of the parties clearly refuses to continue with his part, the contract is broken,

and the other party is excused from further performance, — in fact, he must not go on if his continuing would increase the damage.

Marsiglia delivered to Clark a number of pictures to be cleaned and repaired. After he had commenced Marsiglia gave him orders to stop, as he had decided not to have the work done. Clark, however, finished the work and claimed the whole amount of the contract. Held, that he had no right to increase the amount of damages by going on with the work. When the contract was broken he was entitled to just compensation for the injury he had sustained by the breach of the agreement.

— *Clark v. Marsiglia*, 1 Denio (N. Y.) 317.

Breach by Making Performance Impossible. — If one of the parties puts it out of his power to perform before the performance is due, the other party need not wait, but may consider the contract broken.

Marsh promised in writing to pay Wolf a certain sum of money. The note contained the following condition: "This note is made with the express understanding that if the coal mines in the Marsh Ranch yield no profit to me this note is not to be paid and the obligation herein expressed shall be null and void." Thereafter and before the mines had yielded anything Marsh sold them. Held, that the yielding of profit by the mines was a condition precedent to the payment of the note, but Marsh had rendered the happening of that condition impossible by selling the mine; therefore he must pay the note. — *Wolf v. Marsh*, 54 Calif. 228.

And this is true if the impossibility is created after the contract is performed in part.

Woodberry, the owner of a steamboat, employed Warner, a pilot, at a salary of \$720 per year with the further agreement that as soon as the net earnings of the boat should amount to \$8000 he should become the owner of a one-fourth interest. In about two years Woodberry sold the boat. Held, that as he had put it out of his power to fulfill the contract, he was liable to Warner for the value of his services over and above his regular wages. — *Woodberry v. Warner*, 53 Ark. 488.

In order that one party may recover damages for a breach of contract on the part of the other the first party must show that the second party's promise was not dependent upon the acts of the first party; that is, if A is to draw a ton of coal for B for \$7, A cannot sue B for payment until he has performed his own part.

Clark owned a farm of 200 acres and agreed to pay Weber \$100 if he would find a purchaser for it. Weber found a man who bought part of it, and then sued for the \$100. Held, that he could not recover, as he was

not entitled to the money until he had performed his part of the contract and found a purchaser for the whole farm. — *Weber v. Clark*, 24 Minn. 354.

This rule does not apply to contracts in which the promises are independent of each other. Here a breach by one does not discharge the other.

The covenant in a lease provided that Tracy, the lessee, might have the refusal of the premises at the expiration of the lease for three years longer. When the lease expired the Albany Exchange Company, the landlord, refused to renew it at the same rate, but asked \$200 per year more. Tracy was somewhat in arrears of rent at the expiration of the first lease. Held, that the payment of the rent was not a condition precedent to the right of Tracy to a renewal of the lease, the covenant to renew and the covenant to pay rent being independent promises. Tracy could bring his action for breach of the contract to renew, although he was guilty of default in the payment of his rent. — *Tracy v. Albany Exchange Co.*, 7 N. Y. 472.

Breach by Failure to Perform — Entire and Divisible Contracts. — It is clear that when one party wholly fails in the act that was the entire consideration for the second party's promise, and that must be done before the second party can be required to perform his part, the second party will be excused. But certain cases come up in which one party has done part of what he promised or a part of the contract has been carried out, and we have to consider whether or not the whole contract has therefore failed. In other words, is it an entire or a divisible contract? A common illustration of the cases under which this question arises is an agreement to deliver and pay for goods in installments at different times.

Myer sold to Wheeler ten carloads of barley, like sample, to be delivered from time to time on the railroad tracks at Calmar, Iowa, and Wheeler was to pay seventy cents per bushel for each carload when delivered. After the first car was delivered Wheeler refused to allow more than sixty-five cents, saying that the barley was not equal to sample, but urged Myer to ship balance. Myer refused. Held, that the contract was divisible, and that the refusal to pay for the first carload did not entitle Myer to rescind and refuse to deliver the other carloads; that Myer could recover the actual value of the car delivered, and Wheeler could recover damages for the failure to deliver the other nine cars. — *Myer v. Wheeler*, 65 Iowa 390.

But the courts in this country generally seem to hold the contrary view, and make the test the real intent of the parties. If it was intended to be all one contract, the courts do not make it divisible because it is to be executed or carried out at stated periods.

Norrington made a contract of sale to Wright of 5000 tons of iron rails for shipment from a European port at the rate of about 1000 tons per month, beginning in February, the whole contract to be shipped before August. Norrington shipped only 400 tons in February and 885 tons in March. As soon as Wright learned of the failure of Norrington to ship as agreed, he refused to accept and pay for what was shipped, and sought to rescind the whole contract for the failure to ship 1000 tons per month. In this case the contract was held to be entire and not divisible, and Wright had the right to rescind the whole contract. — *Norrington v. Wright*, 115 U.S. 188.

QUESTIONS

1. How may a contract be discharged by agreement? Give an example.
2. How may a waiver be effected?
3. When is a contract said to be terminated by performance?
4. Give an example of a contract substantially performed.
5. When a contract calls for the payment of money, does the acceptance of a check discharge the contract? Explain.
6. What rules of law are applied to "performance by one party satisfactory to the other party?"
7. What is legal tender?
8. (a) What constitutes a good tender in the payment of a debt?
- (b) What is the effect of a good tender?
9. How does impossibility of performance affect a contract?
10. Give an example of a contract where performance is impossible.
11. How should the promisor protect himself against contingencies which may arise?
12. How does death of the promisor affect a contract involving personal services?
13. When will a contract be discharged by operation of law?
14. Under what conditions will the alteration of a written instrument discharge the contract?
15. When is a contract said to be discharged by breach?
16. In what three ways may a contract be broken?
17. What right has the injured party when the other party to the contract renounces his liability?
18. What happens if one party refuses to continue with his part of the contract?
19. How may a contract be broken by making performance impossible?
20. How may a breach result from failure to perform?
21. When is a contract said to be entire or indivisible? When divisible?

10. DAMAGES

Nature and Extent. — As we have already learned, the party who is guilty of a breach in the performance of his part of the

contract may be compelled by the courts to make good the loss incurred by the other party. If the contract be discharged by the breach, the party not in default is released from further performance. He may also recover a *pro rata* amount upon the part performed if he has done anything under the contract. In certain cases there is also provided the extraordinary relief of an injunction or a specific performance.

If the action brought by the party not in default is for money damages, the amount allowed will be the loss or injury caused as the natural result of the breach or that would ordinarily be within the contemplation of the parties. The object is to compensate the party injured and not to punish the party in default.

Banta contracted to construct a refrigerator for Beeman, who was engaged in preparing poultry for market, and with a knowledge that he intended to make use of it at once for freezing and keeping chickens for the May market, expressly warranted that the freezer would keep them in perfect condition. This it failed to do, and as a consequence a large number of chickens spoiled. It was held that Beeman, in an action on the warranty, could recover as damages the difference in the value of the refrigerator as constructed and its value as it would have been if made according to contract, and that he could also recover the market value of the chickens lost, less the cost of getting them to market and selling them.

— *Beeman v. Banta*, 118 N. Y. 538.

Specific Performance and Injunction. — The special relief of specific performance and injunction is granted only when money damages do not constitute an adequate remedy, as in a contract calling for the conveyance of land. The particular place could not be duplicated elsewhere, and it might have a special value to the purchaser for which money would but poorly compensate him. Specific performance would therefore be decreed at the instance of the purchaser compelling the vendor to convey, but it would not be decreed against the purchaser to compel him to accept the property because there would be an adequate remedy at law in the way of damages, as the owner could sell to some one else, and the difference between what the purchaser had agreed to pay and what he could get for the land after the breach would be the amount of his damages.

So also the remedy by injunction is exercised only in special cases in which damages would not afford adequate relief to the injured party. An injunction is an order from a court restraining

one from doing a certain thing, the doing of which would cause injury to some one else.

Douglas contracted with Vale for the purchase of a tract of land, near a rapid stream of water, on which to erect a factory. When the time came to deliver the deed to the property Vale refused delivery on the ground that the neighbors in the vicinity objected to a factory being erected on this particular site. As this contract calls for the conveyance of land, Douglas has the special relief of specific performance. Vale will have to deliver the deed according to the terms of the contract.

Cort, a theatrical manager, sought to restrain the Lassards, who were acrobats, from performing at a rival theater in the same place. The Lassards had agreed to perform for Cort exclusively for six weeks, and Cort alleged that he had prepared for them and advertised them and that he would lose large profits, as they were unique attractions. Held, that when a contract stipulates for special, unique, or extraordinary personal services, involving special merit, skill, or knowledge, so that in case of default the same services could not be easily obtained elsewhere nor be compensated for by an action at law, a court of equity will be warranted in applying its preventive remedy of injunction.

— *Cort v. Lassard*, 18 Oregon 221.

Damages Allowed. — Damages are allowed only for actual loss sustained. The amount of damage is estimated by the judge or jury after hearing the case. The party damaged must show by a preponderance of evidence that he has suffered a loss in dollars and cents as a result of failure on the part of the other party to the contract. The damages must be shown to be a direct or natural result of the breach of contract. No damage as an indirect result of a breach of contract will be allowed.

Evans purchased a machine, for use in his factory, from the Bedford Manufacturing Company. The machine was not delivered and Evans brought suit for damages, claiming that he had lost a great amount of business by not having the machine. He could collect no damage resulting indirectly from the non-delivery of the machine. The only damage he could collect would be the difference between the price he agreed to pay for the machine and the price he would have to pay for one elsewhere.

In order to avoid the necessity of proving in court the amount of damages suffered the parties sometimes provide in the contract that in case of breach damages shall be paid at a specified rate or lump sum. Damages so fixed in advance are called liquidated damages. The amount fixed must be reasonably near the actual loss of the injured party. If it is so large as to amount to a penalty the stipulation will not be enforced, as courts seek to recompense the injured party and not to punish the guilty.

Duties of Injured Party. — When a contract is broken the party damaged must do his part to reduce the damages as much as possible.

Harcourt was a business tenant in a building in which a water pipe broke and damaged his stock. Feeling that the landlord was responsible for the loss, he did not put forth any effort to move or protect his goods. Under the circumstances Harcourt could not collect damages which resulted from a neglect of duty.

QUESTIONS

1. What are damages? How are damages recovered?
2. What determines the amount of damage allowed?
3. What is specific performance?
4. When will the special relief of specific performance be granted? Give an example.
5. What is an injunction?
6. Is injunction a remedy for a breach of contract? Explain.
7. Define and explain liquidated damages.
8. What are the duties of the injured party as to decreasing the amount of damages?

II. DISCHARGE OF RIGHT OF ACTION

As the breach of a contract gives rise to a right of action for the damages suffered, we have to determine how this right may be discharged, and we find there are three means by which it may be effected, namely, by mutual agreement, by the judgment of a court, and by the Statute of Limitations.

By Mutual Agreement. — The parties may discharge the right of action by mutual agreement if a valuable consideration be given as a payment in satisfaction of the damages, or if the agreement is made by an instrument under seal.

Spaulding agreed in writing to pay Hale six sevenths of any loss he might be subjected to as the indorser of a certain note. Thereafter Hale executed, under seal, a receipt "in full satisfaction of Spaulding's liability on the document." This discharged the right of action on the original agreement. — *Hale v. Spaulding*, 145 Mass. 482.

By Judgment. — The party may prosecute the right of action in the courts and obtain a judgment, the right of action being then merged in the judgment. A judgment is the final determination by a court of the rights of the parties in an action.

By Statute of Limitations. — If the right of action is not

merged in a judgment or discharged by consent within a given time, the law will refuse to enforce it by reason of the lapse of time under what is termed the Statute of Limitations.

This statute, which was first enacted in England, provided that all actions upon account, and some others, shall be commenced and sued within six years. Like the Statute of Frauds it has for its object the discouraging of litigation and the suppression of perjury, as the lapse of time makes the proof less certain and the resurrection of old and stale claims would be a fruitful field for fraud and perjury. A provision similar to the English statute has been enacted in all of the states. In New York and most of the other states the period is six years on contracts not under seal and twenty years on sealed instruments or judgments of the court duly recorded. Certain other actions are barred in three years, two years, and one year.

The statutes in the different states vary, and in a number of them negotiable instruments are not barred for a longer time than simple contracts. In most of the states real property actions are given a longer period to run.

When the Time under the Statute Begins. — The time begins to run from the day the injured party would be entitled to bring a suit for the claim.

In an action to recover money paid under mistake it was held, that it was barred unless the action was brought within six years from the date of the payment of the money, because the right of action accrued upon that day. — *Sturgis v. Preston*, 134 Mass. 372.

Most of the statutes provide that the absence of the defendant from the state at the time the cause of action arises will postpone the running of the statute until his return.

Emerson made a note, due in 1863, but did not come into the state until 1868. It was held that an action on the note, begun in 1870, was not barred by a three-year Statute of Limitations, because the statute did not run during the debtor's absence from the state.

— *Hoggett v. Emerson*, 8 Kans. 262.

If the plaintiff is under disability, such as infancy, insanity, or imprisonment, at the time the right of action arises, the time will be extended. But the disability must exist at the time the statute begins to run or it will have no effect.

New Promise. — The promise or right of action may be renewed, either by a new agreement, which by some of the statutes must be in writing, or by a payment on account. The statute then begins to run under the new promise or after the new payment.

Blaskower, between the years 1878 and 1885, sold to Steel a quantity of cigars. On May 18, 1885, there was a credit on the account. The court held, that this credit revived the whole account for a further statutory period, and the claim would not outlaw until six years after the payment.

— *Blaskower v. Steel*, 23 Oregon 106.

QUESTIONS

1. What is the meaning of "discharge of right of action"?
2. In what three ways may a right of action be discharged?
3. What is a judgment?
4. What are usual provisions of the Statute of Limitations?
5. When does time under the statute begin to run? Mention two exceptions; explain in full.
6. How does a new promise or a payment on account affect the running of the statute?
7. After how long will an action on an open book account be barred in your state?
8. After how long will an action on a note given for one year be barred in your state?

IMPORTANT POINTS

A contract is an agreement between two competent parties based upon sufficient legal consideration to do or not to do some particular thing which is possible to be done and is not prohibited by law.

The four necessary elements in every binding contract are: competent parties, agreement, legal subject matter, and consideration.

Contracts under seal are known as formal contracts.

A parol contract is one not under seal. It may be oral or written.

An express contract is one in which all of the conditions and terms are fully stated.

An implied contract is one in which some condition or term is not expressed, and the circumstances of the case determine the missing condition.

An executed contract is one fully performed.

An executory contract is one wherein something is yet to be done by one or both of the parties.

The parties to a contract must be competent under the law.

Infants' contracts in general are voidable and not void.

An infant's contract with an adult is binding upon the adult.

An infant has a right to ratify or disaffirm his contract upon becoming of age. He may disaffirm at any time before he becomes of age.

An infant cannot disaffirm a part of a contract and affirm a part.

An infant's contract for necessities at a reasonable price is binding.

The right of a married woman to make a contract has been enlarged by statute until she has nearly the same right as any other person.

Contracts between citizens and alien enemies are void if they tend to give aid, comfort, or information to the enemy.

A promise not supported by consideration cannot be enforced.

"Good" consideration alone will not support a promise.

Past consideration will not support a promise.

Part payment of a debt after it is due does not cancel the debt, even though it is accepted in full satisfaction and a receipt in full is given.

In case the amount of a debt is in dispute and a compromise agreement is entered into, this agreement is binding.

There is no contract until the minds of the parties meet.

Agreement is the offer on the part of one party and the acceptance on the part of the other party to a contract.

Unless otherwise directed, the acceptance should be made in the same way the offer is made.

An offer may be withdrawn at any time before there is an acceptance unless consideration has been given for keeping it open a stated time.

An offer made by mail is binding as soon as the letter of acceptance is mailed.

There must be no condition attached to the acceptance.

The offerer cannot bind the offeree on a contract where he so words his proposition that the absence of a reply will be considered to be an acceptance of the offer.

Business relations, past dealings, and customs are sometimes factors in determining the meaning of a contract.

The acceptance must be communicated.

A mere intention to accept is not a good acceptance.

An acceptance properly made binds both parties.

Contracts obtained by duress or undue influence are voidable.

Assignments of contracts may be made by act of the parties or by operation of law.

Contracts to pay money or deliver goods are assignable.

Contracts involving personal services are not assignable without the consent of the parties concerned.

The assignee of a contract is subject to all the defenses that

might have been set up between the original parties, up to the time of notice of the assignment.

A third person who interferes with the performance of a contract is liable to the injured party.

Witnesses may be called to prove an oral contract.

The instruments themselves are the best evidence of written contracts.

In case a written instrument is lost or destroyed the existence of the contract may be established by parol evidence.

Parol evidence cannot be used to vary, change, or contradict the terms of a written contract.

Contracts entered into over the telephone, for the protection of all concerned, should be confirmed in writing.

The subject matter of a contract may be any legal act to be done or omitted.

Wagering contracts are void.

Fraud practiced in connection with any contract makes the contract voidable at the option of the innocent party.

Contracts in general restraint of trade are void. Contracts in reasonable restraint of trade are binding.

There must be some consideration in every executory contract.

Consideration must be present or future.

A promise to do or to forbear doing some act is sufficient consideration.

Any thing or any promise which is a loss or inconvenience to the promisor is sufficient consideration in a contract.

Consideration does not have to be adequate.

Where there is some uncertainty as to the meaning of terms in a contract the intention of the parties is ascertained.

Letters exchanged between two parties may constitute a contract.

In general a contract is divisible when the consideration is divisible.

Liquidated damages which amount to a penalty cannot be sustained.

Specific performance is a remedy only where money damages are not adequate.

If one party fails to perform, the other party may treat the contract as terminated.

A contract is discharged by any means whereby the relationship of the parties thereto is terminated.

A contractual obligation may be terminated by agreement, substitution, implication, performance, death of one party, impossibility of performance, payment, operation of law, breach, accord and satisfaction, Statute of Limitations, bankruptcy.

The effect of tender is to stop the running of interest and the payment of costs. The following rules must be observed in tendering payment:

1. The exact amount due must be tendered.
2. It must be in legal currency of the country.
3. It must be unconditional.
4. The tender must be kept good.

The debtor is under obligation to seek the creditor and tender payment.

Payment by check does not cancel the debt until the check is honored at the bank.

The Statute of Limitations does not extinguish the debt, but bars suit to recover.

Time under the Statute of Limitations begins to run when a suit might be brought to enforce the obligation. A note given for one year would be enforceable for seven years in states where the time under the statute is six years.

When one party renounces his contract the injured party may take action at once without waiting for the time under the contract to expire.

TEST QUESTIONS

1. When are formal contracts necessary?
2. What importance is attached to the use of the seal?
3. What is the relative importance of consideration in executed and executory contracts?
4. How does incompetency of one of the parties thereto affect a contract?
5. What purpose does a "power of attorney" serve?
6. How is the identity of the parties to a contract a factor in determining its validity?
7. Under what conditions will misrepresentation vitiate a contract?
8. Is an adequate consideration necessary to the validity of a contract?
9. Are contracts entered into over the telephone binding? Explain.
10. Under what conditions is the remedy of specific performance available?
11. If a minor ratifies a contract on becoming of age, must he do so in writing?
12. What is the meaning of "performance satisfactory to one of the parties" and "substantial performance"?

13. What is the effect of a strike on the carrying out of a contract?
14. Are the rights of an assignee affected by any counter claim or set-off?
15. Can a minor avoid his contract when he cannot return the article received under the contract? Explain.
16. Is a consideration of one dollar generally sufficient?
17. How are contracts enforced or damages collected?
18. What are the provisions of the fourth section of the Statute of Frauds?
19. Under what conditions is a person bound by a contract which he does not read before signing?
20. How may an existing contract be changed?
21. When the parties cannot agree on the meaning of a contract, what should they do?
22. What facts outside the contract may have a bearing on its interpretation?
23. How are injunctions secured?

CASE PROBLEMS

Give the decision and the principle or principles of law involved in each case.

1. Morris says to Larson, "I will sell you my horse and delivery wagon for \$200." Larson replies, "I will take them at that price." Is there a contract? Explain.
2. A agrees to give B \$10 for delivering to him one ton of hay. B delivers the hay, but A has not yet paid him for it. Is the contract executed or executory on A's part? On B's part?
3. Baker offers to sell Holt his automobile for \$600. Holt replies, "I will accept your offer and take the machine at \$600, provided you will accept \$300 in cash and my note at two months for the balance." Is this a contract? Give reason.
4. If Baker agrees to Holt's proposition in problem 3, is there a contract?
5. Green, in the course of conversation with Lane, agreed to sell his automobile for \$600. Lane replied he would accept. Nothing more was said. A few days later Lane demanded of Green the delivery of the automobile. Green in the meantime had decided not to sell. What are the rights of the parties? Explain.

6. Jackson, a grocer, by mistake sent a bushel of potatoes to the home of Loomis, where they were consumed. It was known that a mistake had been made before the potatoes had been consumed. Will Loomis have to pay for the potatoes? Explain.

7. Carpenter, an infant, traded with Smith a flock of sheep for a horse. Later, becoming tired of his bargain, he tendered back the horse and demanded his sheep. At the time of the trade Carpenter had stated that he was over twenty-one years of age, when, in fact, he was but eighteen. Could he recover his sheep?

8. After the trade in problem 7, suppose that Smith becomes tired of the bargain, tenders back the sheep, and demands the horse, claiming his right to disaffirm the contract because Carpenter was not of age. Can he recover his horse?

9. In problem 7 suppose neither party tires of the bargain, but Carpenter, after he becomes of age, is in debt and his creditors seek to recover the sheep on the ground that the contract was made during Carpenter's infancy. Can they succeed?

10. Edwards, an infant, agreed with Larkin to purchase his automobile. After Edwards became of age and before he had disaffirmed the contract, Larkin sued him for damages because of his failure to take the machine. Was the contract binding, or was Edwards bound to disaffirm the contract upon becoming of age?

11. One Stewart sold to Haines, an infant, a suit of clothes, which were necessities and with which he was not properly provided. The suit was reasonably worth \$25. Stewart charged him \$50 for it. Could Haines recover the \$50 or any part of it?

12. Strong, an infant and a son of a laboring man, bought of McGuire a gold watch worth \$50. McGuire sought to hold Strong for the price of the watch, claiming that it was for necessities. Could he recover?

13. In problem 12, if Strong were the son of a bank president and a wealthy man, would the contract be for necessities?

14. In problem 13, if Strong's father had already provided him with a good gold watch before he purchased the watch of McGuire, could McGuire recover as for necessities?

15. Dent, an infant, contracted for the purchase of furniture. He paid \$100 at the time of signing the contract and agreed to pay \$25 each month for twelve months. When the furniture was delivered Dent refused to accept it and he demanded the return of the \$100 paid. What are the rights of the parties?

16. Larson, an infant, bought a watch on credit for which he agreed to pay \$75. He kept the watch but refused to pay on the ground that it was bought during infancy. What are the rights of the parties?

17. Cosgrove, an infant, bought a horse for \$200 from Demuth. Within six months the horse died. What are the legal rights of the parties when Cosgrove becomes of age?

18. A contracted with B, an insane person, not knowing of B's insanity. B's condition was such at times that it was not noticeable that he was of unsound mind. Under their contract A purchased a horse and wagon of B and paid him a fair price for it, and afterwards disposed of the wagon. Could B repudiate the contract?

19. Harper owes Wilson \$100 which is due to-day. Wilson calls to collect, but on request of Harper, agrees to wait 60 days longer. Can Wilson, notwithstanding this new agreement, collect the amount before the expiration of 60 days?

20. Morton meets with an accident and becomes unconscious from injuries. Bowers hires a conveyance and takes Morton home. Is Morton liable to Bowers for the expense? Explain.

21. Williams, an infant twenty years old, buys a horse of Jackson and pays the price agreed upon. Two years later Williams seeks to return the horse and recover the purchase price. Can he recover?

22. Manning wrote Johnson: "I will sell you two hundred tons of first-grade rye straw at \$20 per ton. Answer by return mail." Johnson accepted as directed, but the letter was never received by Manning. Did a contract arise? Explain.

23. Leslie, in company with Gates, went into Hart's store and said on one occasion: "Let Gates have a suit of clothes and I will pay for it," and on another occasion under the same circumstances he said, "Let Gates have a suit of clothes and I will pay for it if he does not." Is Leslie liable in either case? Explain.

24. Howe wrote to Marks as follows: "I will give you \$20 per M for 50,000 No. 1 H. red brick delivered f.o.b. this city." Marks did not reply, but shipped one carload at once, which Howe refused to accept. What are the rights of the parties?

25. Fisher wrote Daniels, offering to sell him one hundred barrels of apples at \$10 per barrel, giving him ten days in which to accept or reject the offer. On the third day thereafter Fisher, without notice to Daniels, sold the apples to Gacon and on the fourth day Daniels wrote to Fisher accepting the offer. What are the rights of the parties?

26. Clark wrote Harper on the 21st of June that he would sell him his piano for \$250. On the 25th of June Harper deposited in the post office an acceptance of the offer. This letter in the regular course of the mails reached Clark at noon on the 26th, but about nine o'clock on the morning of the 26th Clark sold the piano to another party and sent Harper word. Could Harper recover damages for breach of contract against Clark?

27. In the above case suppose Clark sent the offer to Harper by a messenger. Harper, instead of replying by the messenger, sent the letter through the mail, but before the letter reached Clark he had sold the piano. Could Harper recover for breach of contract?

28. Bates writes to Conley, "I will sell you 100,000 feet of No. 1 cypress siding for \$90 per thousand." Conley replies at once by letter, "I will accept your offer." Bates supposed he had offered to sell 10,000 feet and when he discovered his mistake he refused delivery. What are the rights of the parties? Does a contract exist? Explain.

29. Stone promises to give his grandson \$100 when the grandson becomes of age. Stone does not fulfill his promise. Can the grandson compel him to pay?

30. If in the above case Stone had paid the \$100, could he recover it?

31. One Powers promised Evans \$100 if he would name his child after Powers. The child was so named and Powers refused to pay. Could Evans recover?

32. Blake owed Ayers \$500 which was due July 1. July 2 Blake paid \$400, and Ayers, in consideration of getting the money then, agreed to accept it in full payment. Thereafter Ayers sued for the balance of \$100. Could he recover?

33. In problem 32 if the sum owed by Blake to Ayers had been in dispute, Ayers claiming it to be \$500 and Blake claiming it to be \$350, and they had agreed upon a settlement of \$400, which was accepted in full payment, could Ayers then sue for the balance of \$100 which he claims to be due?

34. Berry owes Hunt \$100 which is due. Hunt makes a promise to extend the time of payment one year. Thirty days after Hunt makes this promise to extend the time of payment, he sues Berry for the amount. Berry claims the amount is not yet due. Can Hunt recover?

35. If in the above case Berry gives Hunt a chattel mortgage on his household furniture in consideration of the extension of one year, can Hunt sue before the year has elapsed?

36. Young, who had lost his watch, which he valued at \$250, offered through the local paper a reward of \$25. Hinkle found a watch in which

was inscribed Young's name. He advertised it and Young claimed the watch. Later Hinkle learned that a reward had been offered by Young. Can he recover it?

37. Anderson, a dealer in paints, offered a well-known brand, through an advertisement in a local paper, at \$4 per gallon. Green, a painter, ordered 100 gallons and inclosed his check for \$400 in payment. Anderson refused to sell him the paint and returned his check. Did a contract exist? Explain.

38. Gibson rescues Rogers from being run over by a railroad train. Out of a spirit of thankfulness Rogers promises to give Gibson \$100. When he fails to keep his promise, Gibson sues him. Can he recover?

39. Gilbert, who is unable to read or write the English language, signs a paper which is presented to him as an agreement for a particular kind of paint. It turns out to be a promissory note for \$50. Is the note valid?

40. Ingham contracted with Brown to purchase one of the two horses which Brown owned. Ingham thought he was buying the bay horse, while Brown thought he was selling the brown horse. Could Ingham recover damages for Brown's refusal to deliver the bay horse?

41. Nobel sells Dyer his grocery store and stock of goods. Dyer has an opportunity of inspecting the store, and does look through it. Most of the stock had previously been injured by a flood which filled Nobel's cellar. Dyer purchases, and later upon discovering this, sues Nobel for damages. Can he recover?

42. Allen was indebted to Watson for the sum of \$800. Allen, not being able to pay the full amount, offered Watson \$500 in cash and a secured note for \$150, which Watson agreed to accept in full satisfaction of the debt. Is the debt discharged? Explain.

43. Gordon sells Brownell a horse, telling him that it is the best horse in the neighborhood, and that if he keeps it until fall he can sell it for \$50 more than he pays for it. As a matter of fact the horse is an inferior animal and Brownell loses on his purchase. Can he recover damages from Gordon?

44. If in problem 43 Gordon had represented that the horse was but eight years old, when in fact it was twelve, but Gordon believed it was only eight, could Brownell have recovered damages?

45. If in the above case when Gordon stated the horse was but eight years old he knew that he was twelve, but made the statement falsely, and Brownell knew all the time that the horse was twelve years old and was not deceived by the statement, could Brownell recover damages of Gordon?

46. A statute in New York state requires a physician to have a license before practicing. A physician practicing without such a license sues for his services. Can he recover?

47. Cooley makes a wager with Baxter that Newman will be elected governor at the coming election. Newman is defeated and the money is paid to Baxter. Cooley brings an action to recover the money wagered. Can he succeed?

48. Berton, who is an important witness against Frank, a criminal on trial, is promised \$100 by Frank if he will refrain from testifying. He refuses to testify against Frank, and later sues him for the \$100. Can he recover?

49. Anson promises Barber \$500 if he will not marry in two years. At the end of two years, Barber, having not married, demands the \$500. Can he recover?

50. Cross sold his meat market to Sterling and agreed that he would not engage in the same line of business in the same city, which had 10,000 inhabitants, for the period of ten years. Was this agreement valid?

51. If in the above case Cross had agreed not to engage in the same business within the state for a period of ten years, would the agreement have been valid?

52. If Cross had been engaged in manufacturing automobiles, would the restrictions in problem 51 have been valid?

53. Adams and Bentley go into a grocery store together. Bentley is asked by the grocer to pay an account which he owes. Being unable to pay it, he refuses. Adams thereupon, without Bentley's knowledge or request, pays the bill to save his friend's credit. He then seeks to recover the amount from Bentley. Can he recover?

54. Holder wrote to Bronson & Co., as follows: "I am closing out all the No. 1 H. brick I have on hand at \$12 per M. If I do not hear from you by return mail I shall ship you one carload at the price named." Bronson & Co. did not reply and Holder shipped the bricks. Was there a contract? Discuss the rights of the parties.

55. Blanchard offered apples to Minard at \$8 per barrel and gave him until 3 o'clock the next day to decide. About noon the next day Blanchard received an offer of \$8.50 per barrel and sold them. Before 3 o'clock Minard accepted the offer. Minard sued Blanchard for breach of contract. Can he succeed?

56. Benedict said to Marrell: "Your offer to sell 1000 boxes of XXX oranges at \$3.80 per box interests me and I will give you \$25 to keep

this offer open until 2 o'clock to-morrow." Marrell agreed. Two hours later Marrell sold the oranges to some one else for \$4 per box. There was a sudden rise of \$1 per box in the price of oranges. What rights has Benedict? Explain.

57. Liman owes Davis \$500. Liman agrees to sell to Noble a team of horses for \$550, provided Noble will pay him \$50 in cash and will pay Davis \$500 within ten days. Noble takes the team and pays the \$50 in cash. Liman departs from the country. Davis brings action against Noble for the \$500. Can he recover?

58. Drake undertakes to do certain fine decorating and interior finishing in Hopkins's house. Drake assigns the contract to Cooper, who seeks to go on with the work. Can he complete the work and recover of Hopkins?

59. Grant, who was administrator of the estate of Shepherd, stated orally to Downs, a creditor of Shepherd's, that he would see that Downs was paid the sum due him; if it did not come out of the estate he would pay it himself. The estate did not pay. Could the promise be enforced?

60. Samuels employs Lynch to work for him for the period of one year from the coming March. Must this contract be in writing to be enforceable?

61. If Samuels employs Lynch to work during the life of Samuels, would an oral contract be valid?

62. Roberts enters into an oral contract with Archer whereby the latter is to do a job of interior decorating and complete the work within fifteen months. Archer works five months and then is discharged by Roberts, who claims that the contract is void under the Statute of Frauds. Can Archer recover on this contract? Explain.

63. Larson wrote to Moore, "I will sell 100 acres from my Hartley tract for \$200 per acre." Moore replied by letter, "I will buy 100 acres at the price you name." Is there a contract? Explain.

64. Hustis sold his drug business to Andrews for \$5000 and agreed not to start in the drug business again in the same city. Six months later Hustis bought out the City Drug Company and started in business again. What are Andrews's legal rights?

65. Baldwin, a grain buyer, called on Wilson while the latter was preparing a field in which he expected to sow wheat. Baldwin offered Wilson \$500 for the crop when it should be harvested and Wilson accepted, both parties signing a contract to this effect. Baldwin refused to fulfill his contract. Is he bound? Explain.

66. Gage sold Stone his express business, including equipment and good will. He represented to Stone that there were 15 customers who paid \$25 per month each and the business was earning \$5000 a year. Stone discovered that these representations were false. What are his rights?

67. Emerson enters into a contract with Foster, who agrees to build him an engine and boiler and install it in his flour mill in complete running order to the entire satisfaction of Emerson. Foster does the work, and the plant seems to run satisfactorily; but Emerson is not satisfied, says he does not want it, and orders Foster to take it out. Expert machinists claim that the work is done in a satisfactory manner. Must Emerson accept it, or has he the right to reject it under the agreement?

68. Hawks orders a suit of clothes of Blare, his tailor, and specifies that he will not take them unless they are satisfactory to him, he being the sole judge. The suit, as far as any third party could determine, is a good fit; but Hawks says he does not want it, as it is not satisfactory to him. Can he refuse to accept the suit?

69. Darrow agrees with Fisher to manufacture and deliver 1000 pairs of shoes in 90 days, but because of a strike in Darrow's factory he is unable to fulfill his agreement. Is the strike which renders the performance of the contract practically impossible an excuse for his nonperformance?

70. If in the above case Darrow's agreement to furnish the shoes to Fisher had stipulated that the contract was subject to strikes, etc., would he have been liable for nonperformance?

71. Breden employs Heinrick to paint his house. When the work is partially done the house burns. Does this excuse Heinrick's nonperformance of his contract, and can Heinrick recover a portion of his pay?

72. Hall gives Wood his promissory note, payable one month after date. Wood changes the note, making it payable twenty days after date. What effect has this upon the instrument?

73. If in the above case the alteration was made without any intention to defraud, could Wood recover on the original contract?

74. Young employs Burr to deliver 100 loads of stone for him within 30 days, for \$100. After he has delivered 10 loads, Burr, within 3 days after the agreement is made, throws up the contract and says that he will not perform any further. What remedy has Young? May he proceed at once with his remedy, or must he wait until the 30 days have expired?

75. In the above case, suppose that Burr, after delivering five loads, refused to perform further until he received his pay for the whole contract. Had he the right?

76. For breach of the contract to deliver the stone in problem 74, what would be the damages that would be allowed for the injury? That is, by what rule would they be measured?

77. A publisher has been sending his magazine to you every month for over a year. You never subscribed for the magazine nor have you ever received a bill from the publisher. Can he compel you to pay for the magazine? Explain.

78. An Oregon mill owner visited a Chicago lumber dealer and bargained to sell the dealer 100,000 feet of lumber which was piled in the mill owner's yard ready for shipment. Afterwards it was found that the lumber had burned before the contract was closed. Was there a contract? Explain.

79. A son of a well-to-do business man was taken ill while away from home. A family who knew the father took the young man into their home and cared for him for some time. When he returned home his father learned of this and wrote a letter to the family, promising to pay them \$50 per week for caring for his son. Later he refused to pay. Is he liable?

80. Dibble offered to sell his trucking business and equipment to Lawrence for \$5600. Lawrence was undecided and asked for an option for one week for which he paid \$50. In the meantime Dibble received an offer of \$6200 and he told Lawrence that he had decided not to sell just yet, intending to accept the other offer later. What course is open to Lawrence?

81. Graham contracted to build a house for Bowers for \$18,000. When the house was nearly completed Graham told Bowers that he could not finish the house for the price named in the contract and that it would cost \$2000 more. Bowers agreed to pay the \$2000 and Graham completed the house according to the specifications. In settling with Graham, Bowers paid the \$18,000 but refused to pay the \$2000. Can Graham collect?

82. Myres, whose shop had been robbed, offered and paid \$25 to a policeman for catching the thief. Later Myres learned that the policeman was not legally entitled to it; can he recover the \$25? Explain.

83. Hartman Lumber Co., Augusta, Georgia, sent a circular letter to Hartford Builder's Supply Co. as follows:

"A break in the lumber market makes it possible for us to offer No. 1, Georgia pine lumber in any dimension at \$60 per M feet f.o.b. Augusta."

The Hartford Builder's Supply Co. wrote at once that they would take 100,000 feet of various dimensions at the price named in the circular letter which they received. The Hartman Lumber Co. refused to make delivery. Was there a contract? Explain.

84. A hotel where Demuth and his wife were guests was destroyed by fire. Demuth offered \$500 to any person who would rescue his wife from the burning building. Dodson heard the offer and rescued Mrs. Demuth from the burning building, but Demuth refused to pay. Can Dodson collect? Explain.

85. Osborn, who has been adjudged insane, purchases a valuable picture from Gordon and gives his note for \$25,000 in part payment. Discuss the rights of the parties.

86. Mattis entered into a contract with a member of the legislature named Horton, agreeing to pay him \$100 if he would procure the passage of a certain bill. Horton procured the passage of the bill. Could he collect the \$100?

87. Lamb contracted with Morton for the purchase of a factory site. When the time came to execute the deed Morton refused to complete the sale. What are Lamb's rights?

88. Darrow owes Lyman \$1000 on a promissory note which has run eight years. Lyman was absent from the state the last three years and when sued his defense was that the note had outlawed under the Statute of Limitations. How would the case be decided?

89. Bepler owed Jerome \$150. Howe, a friend of Bepler, subsequently promised to pay the debt. He failed to do so and Jerome sues him. Can Jerome recover? Explain.

SALES OF PERSONAL PROPERTY

I. IN GENERAL

Sales of Goods Act. — The law as to the sale of goods has been complicated by the different rules in force in the different states or localities. To correct this condition a uniform "Sales of Goods Act" has been adopted in a number of states.

Other uniform acts which are allied with sales are: the Warehouse Receipts Act and the Bills of Lading Act. The Warehouse Receipts Act has been adopted in all the forty-eight states. The Bills of Lading Act and the Uniform Sales Act are being adopted generally.

The object of these acts is to combine the best features of the laws in the different states.

The discussion of the subject of sales in this chapter is based on the Uniform Sales Act.

Contract to Sell; Sale. — There are two kinds of agreements to be considered in this chapter, namely contracts to sell and sales. A contract to sell is a contract whereby the seller agrees to transfer the property in the goods to the buyer at a future time for a consideration called the price. A sale is an agreement whereby the seller transfers the property in the goods to the buyer for a consideration called the price. Both are contracts and subject to all the requirements of a valid contract. The parties must be competent to enter into a binding contract. There must be mutual assent and there must be a consideration. If there is an absence of consideration, the transfer is a gift. The price or consideration must be paid or promised in money. This distinguishes sale from barter.

Barter. — A barter is the exchange of one article of personal property for another. The same rules apply to a barter as to a sale, and we can consider that the law applicable to a case of barter is practically the same as that explained in this chapter on sales. It seems, however, that the power or authority vested in an agent to sell does not give him authority to barter.

Grey appointed Haskel as agent to sell mining stock. Haskel traded 50 shares of stock for an automobile. Haskel did not have this right and Grey would not have to accept the automobile, as authority to sell does not give authority to barter.

Delivery and Payment. — To complete the sale it is necessary for the seller to deliver the goods and for the purchaser to pay for them, and unless there is an express agreement to the contrary these acts are concurrent. Delivery in this sense does not necessarily mean the passing of the article itself, but rather the passing of the ownership or title. That is to say, the delivery need not be actual; it may be constructive. It is actual when the article itself is handed over. It is constructive when a bill of sale or a receipt is handed over instead.

Transfer of the Right of Property. — There must be a transfer of the right of property, that is, a transfer of the absolute property in the thing sold, in order to constitute a sale. This "absolute property" is a term used to distinguish it from a special property or right in personal property. For instance, when property is pledged, the special property passes to the pledgee and the general title remains in the owner. The transfer of a special property in a chattel constitutes bailment and will be considered in another chapter.

Morton deposited \$1000 worth of bonds with his banker to secure a loan of \$1000. This is a pledge to secure a debt and not a sale. When Morton pays the debt the bank will return the bonds.

Edwards delivered 500 bales of cotton to a buyer who agreed to store them for three months and within this time to buy them at the market price or to return them as Edwards may elect. Inasmuch as this contract provides for the return of the same cotton that was delivered it is one of bailment and not of sale.

Sale and Bailment. — The rule is that if the identical thing is to be returned, even though in a different form, as wheat ground into flour, it is a bailment; but if the identical thing is not to be returned, the general rule is that it is a barter or a sale.

The court has ruled: "Where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or

flour or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer." — *Powder Co. v. Burkhardt*, 97 U. S. 110.

The importance of the distinction is realized when we perceive that if it is a bailment the title does not pass from the original owner by the delivery, but if the transaction constitutes a sale, the title passes. The question often arises when the stock or material delivered is destroyed by fire, or otherwise, and it is required to be determined upon whom the loss shall fall. An exception to the rule is the case of a warehouseman who receives grain and mixes it with like grain in the same storage. Here there is evidently no intention to return the identical grain, but some of the same kind; still some cases hold that this transaction is one of bailment in which title does not pass, but others follow the general rule and hold it a sale under which the title passes to the warehouseman.

QUESTIONS

1. Why has the uniform "Sales of Goods Act" been adopted in a number of states?
2. Define a sale and a contract to sell and state the difference between them.
3. What contract requirements apply to sales?
4. Does an agent who is appointed to sell have authority to barter?
5. What constitutes a complete sale?
6. What is the difference between a bailment and a sale? Between a sale and a gift? Between a sale and a barter?
7. Does an inadequate price affect the agreement to sell?
8. When is delivery said to be actual? When constructive?
9. Why is it important to determine just when the title to the property is transferred?

2. PARTIES TO A SALE

Seller and Purchaser. — The parties to a sale are the seller or vendor and the purchaser or vendee. The general rule is that no man can sell goods and convey a valid title unless he is the owner or his duly authorized agent. Possession is not an essential to the right to sell, ownership being enough, and the rightful owner can sell what is wrongfully held by another.

Webber, while in possession of a delivery wagon belonging to Davis, sold it to Mann for a good price. In this transaction Mann gets no title to the wagon and does not become the owner. Davis can demand the return of the wagon and Mann will have to look to Webber for the return of the money paid.

Seller must have Good Title. — The principle of a holder in good faith which is discussed under the negotiable instrument law does not apply in the sale of personal property, the general rule being that one cannot give a better title than he himself has.

Bennett & Co. had a quantity of cotton seed hulls in storage with one Johnson as warehouseman. Brooks purchased them from Johnson. It was held that Brooks acquired no better title than Johnson had, although he purchased the goods in good faith and for a valuable consideration, and Bennett & Co. recovered the value of the hulls.

— *Bennett & Co. v. Brooks*, 146 Ala. 490.

When a person has acquired goods by fraud or trick from the true owner, he has a voidable title. If he transfers the goods for value, to a bona fide purchaser who has no knowledge of the fraud, such purchaser is allowed to retain the goods against the original owner, on the principle that where one of two innocent parties must suffer through fraud, the loss should fall on the one who made the fraud possible.

Truxton had delivered to one Morrow a large quantity of tin cans by reason of false and fraudulent misrepresentations made to him by said Morrow. While the cans were in Morrow's possession they were levied upon by a sheriff, representing bona fide creditors of Morrow. In a suit to recover the cans it was held that Morrow had a voidable title; that the sheriff stood in the same position as the creditors; that they, having taken the cans in good faith and for a valuable consideration, without knowledge of the fraud, had acquired a good title to the property as against the original seller; and that Truxton could not recover the cans.

— *Truxton v. Felt & Slagle Co.*, 17 Del. 493.

The distinction between the last two cases is that Johnson had no title at all, and so could convey none, whereas Morrow had a voidable title which became a good title on being transferred to a bona fide creditor or purchaser.

However innocent, therefore, the person may be who buys property from one not the owner, he obtains no title whatever, except in a few special cases, as, for instance, the one just mentioned, and in the case of negotiable instruments. It follows

then that a person buying goods that were either lost or stolen has no claims on them as against the true owner.

An auctioneer who sells stolen goods is liable to the owner, notwithstanding that the goods were sold and the proceeds turned over to the thief without knowledge that they were stolen.

— *Hoffman v. Carow*, 20 Wend. (N. Y.) 21.

A thief acquires no title and can convey none, and no matter how many sales or transfers of the property there may have been after the thief disposed of it before it came into the possession of the holder, the true owner can recover. It makes no difference that the purchase was made in good faith and for full value.

Breckenridge brought an action for the value of wheat which his hired man had stolen and sold to McAfee. Held, that a thief acquires no title to property stolen and can confer none on a person to whom he sells the same. And such person is liable to the owner for the value of such goods without regard to his innocence or good faith in making the purchase.

— *Breckenridge v. McAfee*, 54 Ind. 141.

Pledgee may Sell. — An exception to the rule that a person not the owner cannot sell personal property is the case of a pledgee, or one with whom the chattels are left as security for money loaned, as he can sell after default in payment by the owner. So also the master of a vessel can sell the cargo in cases of absolute necessity, but actual necessity must exist or the purchaser gets no title.

Factor may Sell. — A factor or commission merchant is a person to whom goods are shipped or consigned for the purpose of sale. A sale made by him conveys a good title and binds the original owner under statutes passed in most of the states, even though he goes beyond his authority and sells when he is not authorized to do so by the owner; but the factor or commission merchant must have actual possession or he will not give a good title if he exceeds his authority. This statute is limited to mercantile transactions and applies only to factors or commission merchants.

If the owner of goods trusts the possession of them to another, thereby enabling the other party to hold himself out to the world as having not only the possession but also the ownership of the goods, a sale by such party to a person without notice

who acted upon the strength of such apparent ownership will bind the true owner, if the person having possession is one who from the nature of his employment might ordinarily be taken to have the right to sell.

Roberts, a truckman, hired a truck from Bartow for one year. The agreement was that Roberts should be allowed to paint his name on the truck and use it as his own. During the year Roberts sold his business and entire equipment including the hired truck to Darrow. As the owner of the truck in question allowed Roberts to paint his name on the truck and to hold himself out as the owner, the purchaser got a good title and Bartow cannot demand the return of the truck. Roberts will have to settle with Bartow.

As we have learned in contracts the purchaser must be a party competent to contract except in the case of necessities.

QUESTIONS

1. What are the parties to a sale called?
2. Who has a right to offer an article for sale?
3. Under what conditions can a buyer get a better title to goods than the seller has?
4. To whom do stolen goods belong, regardless of who has bought them?
5. Can the finder of lost property transfer a good title to it?
6. Who is a pledgee?
7. Under what conditions has a pledgee a right to sell pledged goods?
8. When has the master of a vessel a right to sell the cargo or any portion of it? Does the purchaser get a good title?
9. Who is a factor?
10. Has a factor a right to sell goods consigned to him and accept a note in payment from the buyer?
11. Under what conditions can a factor give a good title to goods consigned to him to sell?

3. THE CONTRACT OF SALE

Sales Contracts. — In the contract to sell the title has not passed to the purchaser. It is simply an agreement to make a transfer at some future time. In the sale the title has passed and the sale is complete. At the time of the sale the subject matter or thing sold must be in existence. If it has ceased to exist, the sale is void. That is, if the agreement is to sell certain

goods, which have been destroyed without the knowledge of the seller at the time the agreement is made, the agreement is void, as the subject matter of the sale had ceased to exist before the contract of sale was entered into. Similarly if there is a contract to sell certain goods, and they are destroyed without the fault of either party before the title passes to the buyer, the contract is avoided.

Norton sold 621 bales of cotton, marked and numbered as specified in the contract, at a certain price. After Norton had delivered 460 bales the remaining 161 bales were destroyed by fire. In an action for damages the court held that where the title has not passed to the buyer and the property is destroyed without the fault of the seller so that delivery is impossible, the seller is excused from delivery. — *Dexter v. Norton*, 47 N. Y. 62.

Future Goods. — The subject matter of a contract to sell may be either existing goods, owned or possessed by the seller, or future goods, to be manufactured or acquired by the seller. At common law the natural products or expected increase of what was already owned, constituted a special class of future goods. For example, growing crops, wool to be clipped from sheep, cheese to be produced from milk, etc., were said to have "potential existence" and a buyer could acquire a present title to them. This distinction has been abolished by the Uniform Sales Act, although it still obtains in states where the act has not been adopted.

It was held that, where a lease of a farm provided that all crops raised by the tenant were the property of the landlord until the rent was paid, the landlord acquired title to the crops on account of their potential existence, and could hold them against creditors of the tenant.

— *Smith v. Atkins*, 18 Vt. 461.

A purported sale of future goods operates as a contract to sell and the buyer obtains no present title, but if the seller fails to deliver, the buyer has a right of action for damages.

When Title Passes. — The question of when title to the goods passes from the seller to the buyer is an important one, since the risk of loss follows the title. The Uniform Law provides that, in a contract to sell specific goods, the title passes when the parties intend it to be transferred, and states various rules for ascertaining intention.

1. When there is a contract to sell specific goods in a

deliverable state, title passes when the contract is made, whether the time of payment, or the time of delivery, or both, be postponed.

Baker made a contract with McDonald to buy thirty stacks of hay then in McDonald's field, the hay to be measured and payment and delivery to be made later. It was held that under this contract title passed to McDonald at once. — *Baker v. McDonald*, 74 Nebr. 595.

2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods to put them in a deliverable state, title does not pass until such thing be done.

Restad contracted to sell to Engemoen a cow and a steer, Restad to feed and fatten them and deliver them about two months later. It was held that title did not pass at the time of the contract, as the seller had to do something to put the goods in deliverable condition.

— *Restad v. Engemoen*, 65 Minn. 148.

3. When goods are delivered to the buyer on "sale or return" the title passes on delivery, but the buyer may transfer the title back to the seller by returning the goods within the time fixed, or within a reasonable time.

When goods are delivered to the buyer on approval, or on trial, title passes when the buyer signifies his approval, or retains the goods, without rejecting them, beyond the time fixed by the contract or beyond a reasonable time.

Mengel bought a match machine from Forsaith Machine Company on approval. He retained the machine for a year and declared himself dissatisfied with it. It was held, that he had retained the machine an unreasonable time, that title had passed, and that he must pay for the machine.

— *Forsaith Machine Co. v. Mengel*, 99 Mich. 280.

4. When a contract is made to sell unascertained or future goods, that is, goods to be weighed or measured or goods to be made by the seller, the buyer becomes the owner when goods answering the description in the contract are delivered to him or to a carrier for transmission to him.

Gratto agreed to build a boat of a certain description for the Yukon River Steamboat Co., who was to pay for it in installments. The boat was built and launched, but was sold by Gratto to some one else. It was held that no title passed, by force of the contract, to the Yukon River Steamboat Co., since the boat had not been delivered.

— *Yukon River Steamboat Co. v. Gratto*, 136 Calif. 538.

F.O.B. and C.O.D. Shipments. — The shipping term “f.o.b. Chicago” means that the seller must deliver the goods free on board in Chicago, either transported or ready to be transported. Where the goods are shipped f.o.b. destination, the title does not pass to the buyer until they reach their destination, but where they are shipped f.o.b. shipping point, the title passes to the buyer as soon as the goods are delivered to the common carrier.

In c.o.d. (cash on delivery) shipments, whether the title passes or not depends upon the law of the state where the sale is made. This term under the Uniform Sales Act indicates that the seller intends to withhold delivery until the goods are paid for, and the title does not pass until payment is made and the goods delivered.

Mail Orders. — In case of an order by mail the title passes as soon as the seller selects the goods and they are delivered to the common carrier, who is considered the agent of the buyer. The goods must be according to the contract; otherwise the buyer may reject them. This general rule may be changed by a special contract.

QUESTIONS

1. Is the physical existence of the subject matter necessary to the sale? Explain.

2. In the case of destruction of the subject matter in a sale, who bears the loss?

3. In a contract to sell who bears the loss if the goods are destroyed?

4. What are future goods?

5. Can future goods be the subject matter of a contract to sell?

6. Explain “potential existence.”

7. Mention the four rules of the Uniform Law which relate to the passing of title in a sale.

8. (a) What is the difference between a sale on trial and a sale with the privilege of returning the goods? (b) When does the title pass in the case of each?

9. Hinkel took a vacuum cleaner home with him on a ten-day trial. He neglected to return it within the ten days; will he be liable for the price of the cleaner?

10. What is the distinction in a sale between ascertained goods and unascertained goods?

11. Can a portion of a larger quantity be sold and title passed without separating the portion sold from the larger portion? Explain by giving an illustration.
12. When does the title pass in f.o.b. shipments?
13. What does c.o.d. indicate under the Uniform Sales Act?
14. When goods are ordered by mail, when does the title pass to the buyer?

4. WRITTEN CONTRACTS OF SALE

Contracts in Writing. — Except as required by the Statute of Frauds, an oral sales contract is as valid as a written contract. However, in any important purchase, it is desirable to secure from the seller a bill of sale. This is a formal instrument in writing (see form in Appendix) by which the seller transfers his interest in certain specified personal property to the buyer. It certifies that the buyer is the owner of the property and warrants the title thereto.

The Statute of Frauds. — Section seventeen of the English Statute of Frauds provides: "No contract for the sale of goods, wares, and merchandise, for the price of ten pounds sterling or upward, shall be allowed to be good except:

1. The buyer shall accept part of the goods sold, and actually receive the same; or
2. Give something in earnest to bind the bargain, or in part payment; or,
3. That some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

As will be seen, the statute includes most of the articles regarded as personal property under the terms, "goods, wares, and merchandise."

The English statute has been followed in most states in this country; but the amounts vary from \$10 to \$2500.

Value and Price. — A distinction is made between the words "in value" and "in price." "In value" is used where the Uniform Sales Act is in force, and "in price" was used in the old statutes.

The value is what the goods are worth in the market; the price is the amount agreed upon by the parties.

The Note or Memorandum. — Under the Statute of Frauds the note or memorandum need not be formal. It may be a sales memorandum, a letter, a telegram, or it may consist of several papers, passing between the parties, which amount to a sales contract. The memorandum must state the essential facts, the parties, the price, if agreed upon, and specify the articles to be sold. It must be signed by the party to be charged or by his authorized agent.

The two exceptions are:

1. When a part of the purchase price has been paid; or
2. When a part of the goods has been delivered and accepted.

Under the Uniform Sales Act the payment may be made at any time; under the common law, when the contract is made.

It was held that a written memorandum of a sale of goods did not satisfy the requirements of the Statute of Frauds when it omitted to state that payment was to be "net cash on delivery f.o.b. Baltimore" which was one of the terms of the contract. — *Fisher v. Andrews*, 94 Md. 46.

Part Payment. — Part payment makes the contract good and enforceable, and the parties concerned will have to complete the contract or suffer damages. The amount paid may either be a part of the price or "earnest" given or paid to "bind the bargain." Strictly speaking, this should be in addition to the price, but in most cases the payment is allowed to apply on the purchase price. In England the amount paid as "earnest" is no part of the purchase price. The amount is not material.

Part Delivery. — The contract is enforceable where the buyer has received and actually accepted part of the goods. That is, the buyer must take possession of the goods and indicate his decision to become the owner. This may be done by words or by conduct.

"Part of the goods" must be taken from the actual goods to be delivered. Samples or specimens, as such, are not considered "part of the goods."

Other Exceptions. — When the amount of the contract is less than the minimum established by law in the state, the contract need not be in writing. Suit could be brought on an oral contract and proof would be all that would be necessary

to enforce it, but oral contracts are hard to prove. But when there are a number of articles each of which is valued less than the minimum amount established by law, the contract must be in writing if the value of all the articles together is greater than that amount.

When a contract of sale above the minimum value has been executed, even though it was not in writing, the sale stands.

Work or Service Provisions.— When the contract is essentially one for work, labor, or services, although a transfer of personal property is included, the contract may be oral.

Hayes placed an order with a machine shop for an automobile part which had to be made to fit a certain car that Hayes owned. This order was for more than the minimum amount specified in the statute, but as it chiefly involved work and skill it did not come under the statute, and no written contract was necessary.

Numerous tests were adopted by different courts to settle this question. The provision of the uniform "Sales of Goods Act" is that the Statute of Frauds applies to all contracts or sales of goods "notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply."

The fact that the goods are not in existence, or that they are to be made or prepared by the seller, is not important. The real test is the one given in the preceding paragraph.

Rules often Referred to.— The New York rule, before New York state adopted the Uniform Sales Act, provided that if any work was to be performed on the article to put it in shape for delivery, the contract was not a sale but a contract for work and services.

Under the English rule if the contract would result in the transfer of a chattel, the contract is one of sale, even though work and services were involved.

The Massachusetts rule, before Massachusetts adopted the Uniform Sales Act, provided that if the contract is for articles in existence or the kind

the seller makes in the ordinary course of his business, even though not at the time in existence, it is within the statute; but if it is for articles to be manufactured especially for the purchaser and not for the general market, it is not.

Any of these rules may apply in states which have not adopted the Uniform Sales Act.

QUESTIONS

1. What is a bill of sale?
2. What distinction is made between "in value" and "in price"?
3. What are the provisions of the seventeenth section of the English Statute of Frauds?
4. How does the statute of your state differ from the English statute?
5. What will constitute a sufficient note or memorandum of sale under the Statute of Frauds?
6. Explain the meaning of "earnest."
7. What are the rules governing part payment? Under the Uniform Sales Act when may part payments be made?
8. What are the rules governing part delivery?
9. Mention a sales contract which would have to be in writing to be enforceable, and one which would not have to be in writing.
10. What are the "work or service" provisions as applied to sales contracts?
11. Hensel ordered a suit of clothes to cost \$75. Will this contract have to be in writing to be binding?
12. The suit is not satisfactory to Hensel. Will he have to take it (a) if the contract is in writing, (b) if the contract is not in writing?
13. If an article valued at more than the minimum amount under the statute is sold, but the seller has to get new parts and paint it before delivery, will the contract have to be in writing?
14. How is it possible, where a sales contract comes under the Statute of Frauds, to avoid using the written form?

5. CONDITIONAL SALE

Installment Sales. — It is common in business for certain articles such as pianos, sewing machines, furniture, etc. to be sold conditionally, the title to remain in the vendor until the purchase price shall be fully paid. This mode of making sales is employed by all installment dealers who sell goods on weekly or monthly payments. The payment of the last installment is a condition precedent to the passing of the title to the purchaser.

As between the original parties, a conditional sale is valid and the title does not pass until the condition is fulfilled, even though the property is given into the possession of the vendee at the time the parties enter into the contract.

Action was brought to recover an engine, sawmill, and lot of tools sold by McRea under a contract of sale which expressly agreed that the title should remain in the vendor until the purchase price was fully paid. Payment was never fully made. It was held that the title did not pass to the purchaser until the payment was made. The contract constituted a conditional sale and the vendor could recover the property.

— *McRea v. Merrifield*, 48 Ark. 160.

But the opportunity for fraud is great if the party in possession, that is, the vendee, is enabled to present every appearance of ownership when the title does not rest in him. A third party who purchases of him without notice of the title in the vendor may easily be imposed upon and defrauded. Still the general rule is that in the absence of any fraud in the conditional sale the condition is valid against third persons. The seller can give no better title than he possesses.

A mule was sold conditionally by McIntosh to a third party, the title to remain in the vendor until the animal was paid for. The mule was afterwards sold by this third party to Beam, who bought it in good faith for a valuable consideration and without notice of the conditional sale. Held, that McIntosh could recover. The purchaser acquired no better title than the seller had. — *McIntosh v. Beam*, 47 Ark. 363.

Filing Conditional Contracts. — Statutes have been passed in many of the states requiring every such contract of sale to be filed, and if it is not, the condition is void as to persons who buy of the party in possession without notice of the conditional contract.

Penland sold a horse to one Bleckley for \$30, but Bleckley not having the money it was agreed that he should take the horse, but that title should remain in Penland until paid for. The horse was taken from Bleckley by Cathey levying under a judgment. It was held that the attempted reservation of title in Penland was void since the contract, not being in writing and recorded, as required by statute, was invalid against third parties.

— *Penland v. Cathey*, 110 Ga. 431.

In some states many formalities are required in the filing of the sales contract, while in a few states the sales contract as filed is only required to be signed by the purchaser. In some states an

affidavit by the seller, setting forth the nature of the sale, is required. Other states require the contract to be witnessed. Most of the states require the contract to be acknowledged by the buyer.

In some states, however, the vendor's title in a conditional sale is good against third parties without filing.

In any particular case, it will be necessary to consult the state law.

Sale on Trial. — Sale on trial or on approval is another form of conditional sale as explained on page 92.

Chattel Mortgage. — The chattel mortgage is a special form of conditional sale. It consists of the sale of certain chattels or goods, subject to defeat upon the payment by the vendor or mortgagor of a certain debt or the performance of a certain obligation. It differs from an ordinary conditional sale in that the title passes to the purchaser at once, but it is liable to be defeated upon the fulfilling of certain conditions, while in an ordinary conditional sale the title does not pass until the conditions are fulfilled.

A chattel mortgage is frequently employed by a borrower of money as security for the loan. The goods may remain in the possession of either party, but if they are allowed to remain in the mortgagor's possession, the statutes of nearly all of the states require that the mortgage shall be filed with some public officer, where it will be open to the inspection of the public, as a protection to third parties who might otherwise buy the mortgaged property in good faith and without notice of the mortgage. As between the parties themselves the mortgage is valid without being filed.

Foreclosure. — After default in the payment of the mortgage, the mortgagee must foreclose the mortgage in order to cut off all of the rights of the mortgagor. The procedure differs under the statutes of the different states. It consists in giving notice to the mortgagor and selling the property at public sale. The mortgage itself may contain provisions for the foreclosure. The mortgagor is usually allowed the time until the date of the sale in which to pay the amount due and redeem the property mortgaged.

The Rule as to Losses. — The usual rule in sales is that the risk of loss follows the title to the goods, and in some states that rule is applied to conditional sales and in case of destruction of the goods the loss falls on the vendor. However, in most states the courts hold that the loss falls on the vendee, because he is in possession of the goods and has exclusive control of them.

QUESTIONS

1. Give an example of an installment sale.
2. Under what conditions does the title pass to the purchaser in an installment sale?
3. (a) Has the purchaser of goods on the installment plan a right to sell them? (b) Can he give a good title to the goods?
4. Can a merchant who has purchased goods on credit sell them and transfer a good title?
5. Wherein do conditions differ in questions 3 and 4?
6. Why is it important to require that conditional contracts be filed?
7. Give an example of a sale where there is a change of possession of the goods without a change of title.
8. What is a chattel mortgage? What purpose does it serve?
9. What right has the mortgagee in case the mortgagor fails to pay the debt?
10. Who is responsible if the property is destroyed before payments are completed?
11. Mention some particulars in which laws on conditional sales differ.

6. WARRANTIES

Classification. — We have seen that a condition in a contract of sale which is required to be performed before the contract is completed will defeat the sale if it is not carried out. Aside from this there are certain warranties which are collateral undertakings on the part of the seller to be responsible in damages if certain conditions as to quality, amount, or title of the article are not as represented. The warranty is a separate contract, and, if made at a different time from the contract of sale, it must be supported by a separate consideration. If made at the same time, the consideration of the sale will also operate as a consideration for the warranty.

Mrs. Green purchased a coat for which she paid a good price. A friend of hers told her it would fade, and she took it back to the merchant, who

warranted the coat not to change color. The merchant is not bound by this warranty, as it was made after the sale, and there was no consideration.

Had the merchant warranted the coat not to fade at the time the sale was made, the consideration of the sale would have been consideration for the warranty.

There are two classes of warranty, express and implied.

Express Warranty. — The express warranty, as its title would indicate, is an express undertaking or agreement made by the seller. No special form of words is necessary to create a warranty. Any statement framed with the intention of making a warranty will be so construed. It must be distinguished from a mere expression of opinion on points regarding the chattel, of which the seller has no special knowledge and on which the buyer may be expected to exercise his own judgment. A warranty is an assertion of a fact of which the buyer is ignorant.

The vendor, in selling a patent right in a ditching machine, exhibited the letters patent and the model and stated that if properly constructed it would work well. It was claimed that it was properly constructed and did not work well. It was not shown that the vendor had ever made and used a machine constructed after this model or that he represented that he had made and used one. The court held that the statements were nothing more than mere expressions of opinion, which did not amount to a warranty. — *Hunter v. McLaughlin*, 43 Ind. 38.

It was held that a statement by a piano agent that the instrument is "well made and will stand up to concert pitch" is a warranty, it being a representation of fact. — *Stroud v. Pierce*, 6 Allen (Mass.) 413.

If the representation is a warranty, the contract will not be broken if the representation is untrue, but an action for damages will arise. If it is a mere expression of opinion, there is no remedy if it turns out to be unfounded.

A general warranty is held not to include defects apparent on simple inspection and requiring no skill to discover them, nor defects known to the buyer.

Morey sold Dean a horse that was a cribber. Held, that he was not bound to disclose this fact to Dean, as the horse was subject to the inspection of the buyer, and a simple examination of the horse's mouth would have shown the defect. — *Dean v. Morey*, 33 Iowa 120.

Implied Warranty. — Implied warranty differs from express warranty in that although it exists in the contract of sale, it is not mentioned or stated in express words. In every contract of sale there is an implied warranty that the seller has the right

to sell the goods, or will have such right when title is to pass. At common law this warranty of title was not implied when the seller was not in possession of the goods sold, but the Uniform Sales Act seems to have altered the common law in this respect.

Nevels sued the Kentucky Lumber Co. for damages for refusal to accept certain logs he sold to them. Nevels had bought all the poplar timber on a tract, but it appeared that he had bought from a man who owned only an undivided one-fourth of the tract, and so he did not have a good title to the logs. It was held that there was a breach of implied warranty of title and the Kentucky Lumber Co. was justified in refusing the logs. — *Nevels v. Kentucky Lumber Co.*, 108 Ky. 550.

As to the implied warranty of quality, we find the maxim, *caveat emptor*, meaning "Let the buyer beware," to be the general rule of law. When there has been a sale of specific goods which the buyer has an opportunity to inspect, he buys at his own risk as to quality, unless there is an express warranty. There is no implied warranty of the quality. The vendor is under no obligation to communicate the existence of even latent defects in his wares unless, by act or implication, he represents that such defects do not exist.

Harvey sold Frazier some hogs which, unknown to both parties, had a disease of which they died later. Action was brought on the implied warranty of soundness of the hogs. Held, that when there is no express warranty and no fraud in the sale of personal property, the purchaser takes the risk of its quality and condition. — *Frazier v. Harvey*, 34 Conn. 469.

But when the chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is reasonably fit for the purpose intended, if that purpose is communicated to the seller.

Held, that the vendor of a patent churn, being himself the manufacturer, and contracting to furnish the purchaser with a quantity of churns, must be held to have warranted that they were useful and reasonably suitable for the intended purpose; and if they proved to be worthless, there would be a breach of the implied warranty which would be a good defense against an action for the purchase price. — *Tabor v. Peters*, 74 Ala. 90.

If the sale is by sample, there is an implied warranty that the quality of the bulk is equal to that of the sample.

Myer sold Wheeler 10 carloads of barley like sample, to be delivered from time to time. Wheeler had never seen the barley. Held, that there was a warranty that the barley would be equal to the sample.

— *Myer v. Wheeler*, 65 Iowa 390.

To constitute a sale by sample it must appear that the contract of the parties was made solely with reference to the sample exhibited.

The court held that the sale of an article which was represented to be five per cent better than the sample shown was not a sale by sample.

— *Day v. Raguet*, 14 Minn. 273.

In a sale by description there is an implied warranty that the goods shall be salable, aside from the fact that a condition precedent to the sale is that the goods shall answer the description. In such a case, the buyer having no opportunity to inspect the goods, the rule of *caveat emptor* does not apply, and the buyer has a right to expect that he is getting a salable article answering the description in the contract, and not an article that is worthless.

Weiger sold Gould oats and represented them to be a good grade of white oats, such as he was purchasing at forty cents. Held, that Weiger must deliver salable oats and cannot deliver wet, dirty oats.

— *Weiger v. Gould*, 86 Ill. 180.

When a person buys of a manufacturer an article made for a particular purpose, there is an implied warranty that it is fit for the desired purpose, also that it is free from latent defects, arising from the process of manufacture and unknown to the purchaser, which render it unfit for the purpose intended.

Niles agreed with Rodgers that he would deliver to him at a future time three steam boilers with which to run the engines in his roller mill. Held, that there was an implied warranty that the boilers should be free from all such defects in material or workmanship, either latent or otherwise, as would render them unfit for the usual purposes of such boilers.

— *Rodgers v. Niles*, 11 Ohio State 48.

Conditions. — The two kinds of conditions are “pure condition” and “promissory condition.” A pure condition is one over which neither party has any control. For example, a contract is made to manufacture trolley cars if a certain franchise or right of way is secured, or a contract is made to buy goods “on arrival.” The parties to the contract would not be bound unless the conditions are carried out. The franchise may not be secured, or the goods may never arrive.

A promissory condition in a sales contract is a statement to

the effect that the goods will answer a certain description, or that they will be ready for delivery on a certain date.

Where the Uniform Sales Act applies, the promissory conditions only are treated as warranties.

SECTION ON IMPLIED WARRANTY FROM UNIFORM SALES ACT

IMPLIED WARRANTIES OF TITLE. In a contract to sell or in a sale, unless a contrary intention appears, there are

1. An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass;

2. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale;

3. An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

4. This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

IMPLIED WARRANTY IN SALE BY DESCRIPTION. When there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description, and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

IMPLIED WARRANTIES OF QUALITY. Subject to the provisions of this act, of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except in the following paragraphs 1, 2, 5, and 6.

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

2. Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

3. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

4. In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

5. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

6. An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

QUESTIONS

1. What is a warranty?
2. What are the two classes of warranty?
3. Is a warranty made after the sale good?
4. What is an express warranty?
5. Distinguish between a warranty and a mere expression of opinion.
6. In case of breach of warranty what right arises?
7. What is the meaning of the term *caveat emptor*?
8. Mention a case where *caveat emptor* applies.
9. Distinguish between an express warranty and an implied warranty.
10. Under the Uniform Sales Act is there an implied warranty of title if the seller is not in possession of the goods?
11. What is the general rule as to the implied warranty of quality?
12. When is there an implied warranty of fitness for a particular purpose?
13. What is the implied warranty in case of a sale by sample?
14. What is necessary to constitute a sale by sample?
15. Hooker ordered a casting for a particular machine; what is the implied warranty on the part of the seller?
16. In case of a sale by description, what is the implied warranty?
17. Does the rule of *caveat emptor* apply where the buyer does not have an opportunity to inspect the goods?
18. Why is it desirable to secure a warranty?
19. If a buyer relies on his own judgment, will statements made by the seller be held to be warranties?
20. What is the difference between the two classes of conditions?
21. To which condition does the Sales Act apply?

7. REMEDIES FOR BREACH

Rights of Seller. — The parties may not fulfill their contract of sale, and the question then arises as to what are their respective rights. The vendee may refuse to complete the contract of

sale by declining to accept the goods, or after accepting and retaining the goods, he may refuse to pay the purchase price. In case the goods have not been delivered and the title has not passed to the purchaser, the vendor may elect to avail himself of any one of three remedies.

1. He may resell the goods, after having tendered them and been refused, and recover damages for the loss, if any; or,

2. He may store the goods for the vendee and sue for the entire purchase price; or,

3. He may keep the goods and sue for the damages, which will be the difference between the contract price and the market price at the time and place of delivery.

The Uniform Law limits the right to store the goods for the buyer and recover the full contract price to cases where the goods cannot readily be sold for a reasonable price. The right of resale is given when the goods are of a perishable nature, or the buyer has been in default in the payment of the price an unreasonable time. It is not essential to the validity of a resale that the seller shall give the buyer notice of his intention to resell, nor of the time and place of the resale, but the seller is bound to exercise reasonable care and judgment in making the resale.

If the title and possession have passed to the purchaser, the only remedy is an action against the purchaser for the contract price, or if not for the contract price, for the reasonable value of the goods.

Seller's Lien. — While the seller has possession or control of the goods which have not been paid for, he has what is known as a seller's lien on them; that is, he may refuse to deliver them until he is paid, unless the contract of sale provides otherwise. This lien is lost by giving up possession of the goods and the buyer will not have to return them, even though he does not pay for them.

Stoppage in Transitu. — The seller who has sold goods on credit has a right under certain conditions to stop delivery of the goods while they are in the hands of the common carrier (express, railroad, or steamship company). This is known as the right of stoppage *in transitu*.

Conditions which give rise to the right of stoppage *in transitu* are:

1. The goods must have been sold on credit.
2. The buyer must be insolvent at the time the delivery of the goods is stopped.
3. The goods must be in the hands of the common carrier at the time the right of stoppage is exercised.

The seller exercises this right by notifying the common carrier not to deliver the goods to the buyer or his agent.

This right exists when the purchaser becomes insolvent after the sale or was insolvent when the sale was made, though the fact was unknown to the seller.

The right of stoppage *in transitu* extends not only to the seller himself but to an agent who, upon the order of his principal, has purchased goods and paid for them with his own money. So also a third person who advances the money for the purchase and takes an assignment of the bill of lading can exercise the right of stoppage *in transitu*.

Gossler advanced the money on a cargo of iron for Schepeler and received the bill of lading as security for the advance. Gossler sent the bill of lading to Schepeler, who became insolvent before he received the goods. Held, that Gossler could stop the goods in transit and could retake them and compel Schepeler to deliver to him the bill of lading.

— *Gossler v. Schepeler*, 5 Daly (N. Y.) 476.

This right can be exercised only against an insolvent or bankrupt person. By an insolvent is meant one unable to pay his debts in the usual course of his business.

It was held that the fact that the vendee's notes went to protest because of his inability to pay them in the regular course of business was sufficient to justify the vendor in exercising the right of stoppage *in transitu*.

— *Durgy Cement Co. v. O'Brien*, 123 Mass. 12.

The Uniform Law provides that a person is insolvent who has ceased to pay his debts in the ordinary course of business, or cannot pay them as they become due, whether he has committed an act of bankruptcy or is insolvent within the meaning of the federal bankruptcy law, or not.

If the vendor stops the goods when the purchaser is solvent, he does so at his peril, and will be obliged to deliver the goods in addition to becoming liable for damages to the vendee.

The right of stoppage *in transitu* is defeated in case the bill of lading is in the hands of the buyer and he transfers it to a third person who in good faith pays value for it. The third party can hold the goods.

Rights of Buyer. — When the seller refuses to deliver the goods to the buyer, who has acquired the right of ownership:

1. The buyer may sue the seller for damages for withholding the goods.

2. The buyer may bring an action in replevin to force the seller to deliver the goods to him.

An action in replevin is an action brought by one who is entitled to the possession of certain goods to compel the one who is wrongfully retaining possession of them to give them up. It is based on the principle that the one who is the owner of the goods is entitled to the possession of them.

3. If the buyer does not have the right of ownership, but instead the right of contract to have the goods delivered to him, he may sue the seller for damage for breach of contract, or under certain conditions may demand specific performance.

The amount of damages will be the difference between the contract price and the market price at the time.

It was held that a purchaser can recover as damages from a vendor who refuses or fails to deliver the goods bought, the difference between the agreed price and the market price at the time they ought to have been delivered, that is, the loss which the vendee would suffer if he had to go out and buy the articles in the market. — *Harralson v. Stein*, 50 Ala. 347.

The remedy of specific performance will be granted by a court of equity when, from the peculiar nature of the case, money damages are an inadequate remedy. This means simply fulfilling a contract according to its precise terms (page 67).

Myer purchased three pieces of antique furniture from The Molton Co. for which he paid \$300. The Molton Co. refused to deliver the furniture. As this furniture cannot be obtained elsewhere, Myer is entitled to the remedy of specific performance. He can bring action and a court of equity will compel The Molton Co. to deliver the furniture.

Remedies for Seller's Breach of Warranty. — When there has been a breach of warranty on the part of the seller:

1. The buyer may keep the goods and deduct from the purchase price (or, if he has paid for the goods, may recover from

the seller) an amount equal to the difference between the value of goods as contracted for and the value of the goods as delivered.

2. The buyer may refuse to accept the goods, or, if he has already accepted them in ignorance of their condition, he may return them within a reasonable time after discovering the breach of warranty. He should give prompt notice to the seller.

When an order for goods separately specifies the quantity and price of each article, the contract is several and the buyer may retain the articles which are in accordance with the contract and refuse or return those which are not.

When the buyer refuses or returns the goods, he has a right of action for damages against the seller for breach of the covenant of warranty.

8. AUCTION SALES

Sales at Auction. — In an auction sale the assumption is that the goods will be sold to the highest bidder. By-bidding is illegal in most states. By-bidding is bidding on the articles offered for sale, by pre-arrangement with the seller, for the purpose of running up the price or keeping the articles from being sold for less than the seller is willing to accept.

A purchaser who buys an article where by-bidding was practiced may return it and demand a return of the money paid.

General Regulations. — Auction hand bills are usually printed which contain the regulations. These regulations must not conflict with any law in force with reference to auction sales.

Bids are made by signs or nods.

The sale is made when the auctioneer lets his hammer fall.

The auctioneer may refuse to recognize insignificant bids.

The seller may reserve the right to reject any or all bids.

The sale may be made on some conditions which are specified.

The buyer must comply with the conditions of the sale or forfeit any amount deposited on the purchase.

The seller has a right of action for damages against a buyer who fails to take property "knocked down to him."

The auctioneer acts as agent for the seller in selling the property.

The seller is bound to carry out the sales made by the auctioneer according to the sales memorandum.

The auctioneer is not allowed to bid for himself.

The law usually requires an auctioneer to have a license.

The auctioneer has a lien on the property for his commission and he may require that he be paid before giving up the property to the purchaser.

QUESTIONS

1. What three rights has the seller for breach of contract on the part of the buyer?
2. What limitation is placed by the Uniform Law on the right to store goods?
3. If the title and possession have passed to the buyer, what is the only remedy the seller has for breach of contract?
4. (a) What is the seller's right of lien? (b) When does it arise?
5. What conditions give rise to the right of stoppage *in transitu*?
6. Who may exercise the right of stoppage *in transitu*?
7. How does the seller exercise this right of stoppage?
8. How is insolvency of the buyer determined?
9. What risk does the seller assume when he stops the goods?
10. How may the right of stoppage *in transitu* be defeated?
11. What are the rights of the buyer when the seller refuses to deliver the goods?
12. In case of suit what would determine the amount of damage?
13. Explain the term "specific performance."
14. Grant contracted to purchase a picture by a noted artist. The seller refused delivery; what remedy has Grant? Why?
15. What remedies has the buyer in case of breach of warranty on the part of the seller?
16. Wherein does an auction sale differ from a regular sale?
17. What are the rights of the purchaser where by-bidding is practiced?
18. Downs bought a carload of potatoes from Fennel. When the potatoes were delivered, Downs refused to accept them. What remedies has Fennel for Downs's breach of contract?
19. In what case must the seller sell the goods on the buyer's failure to accept them?

IMPORTANT POINTS

A sale is a contract.

All the elements and underlying principles of a contract are found in a sale.

In a sale, the price must be a money consideration.

In a barter, one article is exchanged for another article.

Where no price is mentioned, a reasonable price is presumed.

In a sale, the title and possession may pass together, or either may pass without the other.

In a bailment, there is a change of possession without a change of title.

In a mortgage, the title is transferred as security. The possession generally does not pass.

The one who offers goods for sale warrants that he is the owner, or has a right to sell them.

An agent appointed to sell has no authority to barter.

The price agreed upon may be any amount. It need not be adequate.

Any one who is competent to contract can contract to buy or sell.

An infant as agent for an adult may contract to buy or sell.

As a rule, a person who buys property from one not the owner obtains no title.

If the owner of an article makes it possible for another party to hold himself out as the owner, an innocent purchaser of the article gets a good title as against the true owner.

A good title never accompanies stolen goods.

The finder of lost property never acquires a good title to it.

Pledgee may sell when pledgor fails to fulfill conditions of pledge.

The master of a vessel may sell any portion of cargo when conditions make it necessary.

Destruction of the goods before the contract was made and without the knowledge of either party renders the contract voidable.

When goods which are the subject of a sale are destroyed, the one vested with the title must suffer the loss.

When the title passes in a sale is, as a general rule, determined by the intention of the parties.

A sale of part of a mass of similar goods passes title without separating the part sold. If the goods are not all alike the part sold must be separated before title passes.

There can be no complete sale in the case of unascertained goods.

The sales contract may be oral, except where the Statute of Frauds requires that it be written.

A sales memorandum, containing the essential facts, and signed by the party to be charged, will, as a rule, satisfy the law requiring written contracts.

A bill of sale is a formal written contract of sale.

Work and service contracts do not come under the Statute of Frauds.

A conditional sale is a sale based on some specific conditions mentioned in the contract.

In a sale on trial, title does not pass until conditions have been fulfilled.

A chattel mortgage is a conditional transfer of title to personal property to secure a debt.

In an installment sale, the goods may be delivered in installments, or the price may be paid in installments.

When the title to property is passed, the right of ownership becomes absolute.

A warranty is a separate contract which amounts to a collateral undertaking.

Implied warranties are just as effective as expressed warranties.

Caveat emptor applies only where the buyer has a chance to inspect the goods.

Mere statements of opinion do not constitute warranties.

The seller has a right to demand payment as a condition precedent to delivery.

The seller may stop goods in transit if they have been sold on credit and the buyer is insolvent.

Specific performance is a remedy only where money damages will not suffice.

Things not in existence cannot be the subject of a sale, although they may be the subject of an agreement to sell.

A contract of sale will not be set aside because of inadequacy of price, unless there is proof of fraud or undue advantage.

What is termed "giving a refusal" of an article to a party who may or may not take it within a certain time is not valid unless the agreement is supported by consideration or under seal.

When goods are sent to a party by mistake and he makes use of them with full knowledge of the facts, he becomes the purchaser and must pay full value for the goods.

A fraudulent representation to be actionable must be false; must have been known to be false by the seller at the time it was made; must be in regard to a material part of the contract; must be made with the intent that it be relied upon; and the buyer must rely on it to his injury.

Fraud renders a sale voidable and not void.

Possession of personal property is not title. It is evidence of title but will not protect one who buys against the true owner.

TEST QUESTIONS

1. Are uniform state laws desirable on all subjects that affect business?
2. Of what importance is the question, whether a transaction is a sale or a contract to sell?

3. Can an article not in existence become the subject of an executed sale? Explain.
4. Must selection precede the transfer of the ownership of goods? Explain.
5. Is a written contract necessary when a sale comes under the Statute of Frauds, if both parties carry out the contract?
6. Does a statement on the part of the buyer to the effect that the goods are to be used for a certain purpose affect the sale? Explain.
7. Under what circumstances has the buyer the right to have the contract of sale carried out specifically?
8. Do conditional sales contracts in your state have to be filed? If so, where are they filed?
9. (a) What purpose do chattel mortgages serve? (b) Where do chattel mortgages have to be filed?
10. What constitutes fraud in sales contracts?

CASE PROBLEMS

Give the decision and state fully the principles of law involved in each case.

1. Morton kept a borrowed plow for several months and finally sold it to Ham, who thought Morton was the owner. Has Ham a good title?
2. Pond, a hired man, stole several chickens from the farmer for whom he worked and sold them to a hotel-keeper, who consumed them, not knowing they had been stolen. What legal remedy has the farmer?
3. Dorety bought a moving van from Owen, on which was painted "J. W. Owen — Storage — Moving." The moving van did not belong to Owen. Did Dorety get a good title as against the true owner?
4. Ordway contracted to deliver to Logan 1000 bales of hay at \$25 per ton, to be paid for as delivered. Ordway had delivered 650 bales when a fire destroyed the 350 bales remaining. What should be the result of an action by Logan against Ordway for damages for breach of contract?
5. Dyre, an apple buyer, contracted with Metz, an exporter, for the sale of the apples from an orchard Dyre expected to buy. Was this transaction a sale or a contract to sell? Explain.
6. Bowden agreed to buy a wagon from a blacksmith who was to repair one wheel and paint it before delivery. Bowden paid ten dollars on the purchase price. Before the wagon was ready for delivery the shop and its contents, including the wagon in question, was destroyed by fire. Who should bear the loss?

7. Tolle accepted on thirty days' trial a machine for use in his laundry. After keeping it six months without paying for it, he sought to return it on the ground that it was not satisfactory. The seller refused to take the machine back and brought action to recover the price. How should this case be decided?

8. Nixon contracted to build a portable garage for Hand. The garage was to be built according to a design which Nixon had, and the price was to be \$700. When the garage was completed for delivery Hand refused to accept it, claiming it was not built according to directions. Under the circumstances what courses are open to Hand?

9. Swartz contracted orally with Green for the purchase of 1000 bushels of wheat at \$2 per bushel. Swartz was to take the wheat within thirty days, but failed to do so. Green waited nearly sixty days and then brought action for damages, as wheat had dropped in price in the meantime to \$1.50 a bushel. How should this case be decided?

10. Jackson contracted to purchase and sell 100 light auto delivery trucks during a certain season. He purchased and delivered forty and then before the season was half over he declared his intention not to accept or sell any more trucks. What rights has the seller? Can he take action at once or must he wait until the time under the contract expires?

11. Kent ordered a new body for his automobile from the Rush Auto Body Co., to be built according to a design furnished by Kent and unlike bodies built regularly by the Rush Co. When the body was completed for delivery, Kent refused to accept it and claimed he was not bound by the contract, as it was not in writing. How should this case be decided?

12. "I hereby agree to purchase 1000 50-pound chests of Y. H. tea from the Gordon Co., 100 chests to be delivered each month for ten months, same to be paid for as delivered.

J. C. FLINCH."

Does this memorandum satisfy the requirements of the Statute of Frauds?

13. Brewer purchased a piano on a conditional sale contract, payments to be made in installments. Before paying all the installments he had an auction sale and sold all his personal property, including this piano. Parks purchased the piano, not knowing Brewer had purchased it on the installment plan and had not paid all the installments. Did Parks get a good title? Explain.

14. Morley purchased a quantity of office furniture on which there was a chattel mortgage. He did not know that there was a mortgage on the furniture. Did he get a good title as against the mortgagee? When he discovered that the furniture was mortgaged, what could he do?

15. Dempsey has a chattel mortgage on a number of articles belonging to Wood. Wood failed to pay the debt secured by this mortgage. What course is open to Dempsey?

16. Lowery purchased a used automobile from Sanderson, who warranted it to be in good running order. After using it a few days, Lowery discovered that several of the bearings were worn out, that the car leaked oil, and that one spring was cracked. Could Lowery maintain an action against Sanderson for breach of warranty and collect damages?

17. Ingham contracted to buy 1000 bushels of oats by sample. When the oats were delivered the first lots were clean and like the sample, but those delivered later were dirty and unfit for market. Ingham refused to accept the later deliveries, and the seller took action for breach of contract. What should be the outcome of this case?

18. Wilkins and Company sold a bill of goods amounting to \$1200 to J. C. Hemper, Denver, terms 5% ten days, net sixty days. After the goods had been shipped Wilkins and Company learned through the Bradstreet Agency that Hemper had filed a petition in bankruptcy. What can Wilkins and Company do to protect their interests?

19. Benson, not knowing its real value, sold a very valuable piece of antique furniture for \$50. The purchaser paid \$10 on the purchase price and agreed to call the next day, pay the balance, and take the article. In the meantime Benson's friends told him the piece of furniture was worth \$500 and discouraged him in making the sale. When the purchaser called Benson offered to give back the \$10 paid and refused to deliver the article. What can the purchaser do?

20. Gaynor purchased a team and wagon at an auction sale. After the team had been "knocked down to him" a neighbor who knew the team told him they would run away and were not safe to drive. Gaynor refused to take the team or to comply with the terms of the sale. Is he bound? Explain.

21. Allen delivers to Barker 100 yards of cloth to be made into coats. When the coats are nearly completed Barker's shop burns and the coats are destroyed. Upon whom will the loss fall?

22. Brown delivered two black walnut logs at Smith's sawmill. Smith in return was to give him 500 feet of planed pine lumber. What was the transaction, a sale, a barter, or a bailment?

23. Groves sold to Smith his horse which had broken out of the pasture lot and wandered away, its whereabouts at the time being unknown to Groves. Later it came back to Groves's farm and Smith claimed it. Could he recover?

24. Gordon loses his watch and it is afterwards picked up on the street by Hogan, a jeweler. Hogan puts it in his shop and sells it to Lane. Gordon discovers it in the possession of Lane and sues for its recovery. Lane bought the watch in good faith, believing it to belong to Hogan, and paid what it was reasonably worth. Who gets the watch?

25. In the above case, if Hogan had stolen the watch, would the result have been any different?

26. Good sold a team of horses to Farnum. He was driving the horses when the sale took place and immediately delivered them over. It was found afterwards that the horses did not belong to him, and an action was brought against him for breach of warranty. Was there any warranty? If so, what?

27. Suppose at the time Good sold the horses he did not have them in his possession, but stated that they were in Cain's livery stable. Farnum brought an action against him for breach of warranty. Was there any warranty? If so, what?

28. Frank sold a carload of apples to Jeffreys, nothing being said as to their quality. They were in the possession of Frank at the time and each party had an opportunity to inspect them. It was found that they were of an inferior grade, and Jeffreys sued for damages for breach of an implied warranty of quality. Could he recover? What rule would apply?

29. Hayes contracted to make for Young a new improved hayrack. When Young received it he found that it was not suitable for the purpose for which it was purchased and would not remain in position on the wagon. Was there any implied warranty on the part of Hayes?

30. Meyer purchased a quantity of cloth from Scott. The order was taken from a sample which Scott carried with him. When the cloth was received it was an entirely different quality, being much lighter in weight. Meyer sued for damages on an implied warranty that the cloth was to be like the sample. Was there such an implied warranty and could he recover?

31. Aaron sold Bailey 100 barrels of sugar to be delivered in 30 days. When the time for delivery arrived, Bailey refused to accept the sugar or pay the purchase price. What three remedies had Aaron?

32. If the sugar had been delivered and accepted by Bailey, but Bailey had refused to pay for it, what remedies had Aaron?

33. Watson went to Treulib and Co., fish merchants, and bought \$20 worth of clams, stating that he intended to use them the same day at a clam bake. The clams proved to be unfit for food. Treulib and Co. refused to take them back or to return the money paid for them. What are Watson's rights? Explain.

34. Mahoney buys a stove from Fisher, paying \$5 down and signing a contract which provides that the stove has been merely leased to Mahoney, the title remaining in Fisher until the whole purchase price of \$40 is paid. Mahoney at once sells the stove to Burns, who gives him \$20 for it, believing the stove belongs to Mahoney. Can Fisher take the stove from Burns?

35. If the above transaction takes place in a state requiring conditional contracts to be filed, and the above contract is not filed, who is entitled to the stove?

36. Coon, a sewing-machine agent, sells a machine to Mrs. Randall, telling her that it is the best machine on the market, and that it runs so easily that it will nearly run alone. She finds out that the machine is of inferior quality, runs hard, and does not work well, so seeks to recover damages for breach of warranty. Does the representation constitute a warranty?

37. A stove is sent to Lyng by Fisher for trial, to be returned if not found satisfactory, no specified time within which it must be returned being given. Lyng keeps the stove a year without offering to return it and then, when a bill is presented for the stove, he says that it is not satisfactory and offers to bring it back. Has the sale been completed, and can Lyng be compelled to pay?

38. C, a commission merchant, receives a carload of watermelons from Logan & Co., with instructions to hold them until Logan & Co.'s agent arrives. C sells them to Weaver as soon as they are received. Logan & Co. brings an action against Weaver to recover them. Who is entitled to the melons?

39. Harrison, a horse dealer, employed Rice to purchase a horse for him to match one he then owned. Rice bought a horse, taking a bill of sale to himself. Harrison knew of this and allowed Rice to keep the horse and bill of sale. Rice sold the horse without authority to Hooker. Could Harrison recover the horse from Hooker?

40. Clark, a farmer, sells to Spence in the spring, the hay and corn that he shall raise on his farm during the coming season. The corn has not yet been planted. Is the sale good?

41. Clark also sells to Spence the wool from 100 sheep which he agrees to buy within 30 days, but which he does not yet own. Is the sale good?

42. Brown goes to Anderson, a cattle dealer, and out of a herd of 50 cattle in the field buys 10, pays for them, and promises to take them the next day. Without picking out the particular 10, he leaves. Has the title in these 10 passed to Brown or is it still in Anderson?

43. In the above case suppose Brown, before leaving, picked out and branded the 10 cattle, paid the purchase price, and agreed to call and drive them away the next day. Did the title pass to Brown or was it still in Anderson?

44. Potter goes to Carns, a grain merchant, and buys 50 bushels of wheat out of a bin containing several thousand bushels. He pays for the wheat, but it is not measured. That night the warehouse burns. Upon whom does the loss of the 50 bushels of wheat fall, Potter or Carns?

45. Fitch makes a written agreement with Boyd for the purchase of 1000 yards of silk at \$1 per yard, to be delivered May 31. On May 1, Fitch meets Boyd and tells him that he cannot use the silk and will not take it. What are Boyd's rights and what is the measure of damages if any?

46. Miner found a very valuable uncut diamond. Without knowing what it was he sold it to Ashley for \$20. Ashley took it to an expert, who bought it for \$5000. Miner sued to get the full value of the diamond. Could he collect? Explain.

47. Wheeler, a tailor, contracted with Banks to make a suit of clothes and an overcoat for him for \$60. When the suit and overcoat were finished, Banks refused to take them and when sued pleaded the Statute of Frauds. Is his defense good? Explain.

48. In a horse deal with Bryan, McKay stated that his horse was 8 years old and sound. Bryan found on examination that the horse was 12 years old and was suffering from spavin; nevertheless he bought the horse for \$150. Later Bryan became dissatisfied, claimed that he had been defrauded, and sued for damages. What should be the outcome of the suit? Explain.

AGENCY

I. IN GENERAL

Definition. — Agency is the legal relation existing between one party known as the principal and another party known as the agent. This relation is usually the result of a contract whereby one party is to act for the other, and this contract is known as an agency contract.

The capabilities of one person are limited, and it can readily be seen how impossible it may be for any one to transact all his business without assistance, and we realize how important a business factor this legal relationship of agency is when we consider that by far the greater part of the world's business is carried on through the instrumentality of agencies. Transportation companies, insurance companies, the government departments, and the various sales organizations are the best examples of agency.

The Principal. — The principal is the person for whom another acts as agent. Any person who is competent to contract may appoint an agent to act for him. The theory of agency is based on the fundamental principle that whatever a person may do for himself he may have another person do for him.

The Agent. — The agent is the person employed by another to do some act or acts for the employer's benefit or on his account. Any one who is capable of doing as directed may act as agent. One particular fact to be noted is that a person may be legally incompetent to act for himself, yet he may lawfully act as agent for some one else.

Classes of Agents. — Agents are usually classified as general, special, and public.

General Agent. — A general agent is one who is authorized to transact all of his principal's business of a particular kind, or in a certain place. Having received from his principal a general authority to do certain acts, he is not limited to the performance of a specific act, but is permitted a certain amount of discretion in carrying on the particular line of business for which he is

employed. The acts of a general agent, while acting within the scope of his authority, will bind his principal, whether or not they are in accordance with his private instructions. If he is apparently clothed with authority, the principal is bound.

One Chappell was appointed general agent to manage Gasharie's store, buy and sell goods, issue notes, etc. He purchased goods on Gasharie's credit, which was contrary to orders. Held, Chappell was a general agent and as such his acts were binding on Gasharie, even though contrary to his private instructions. — *Manning v. Gasharie*, 27 Ind. 399.

Special Agent. — A special agent is one who is appointed for a special purpose, or to transact a particular piece of business. He is given but limited authority. His acts do not bind his principal beyond the scope of the particular authority given him.

In the case of a general agent there has been general power delegated, the authority is necessarily broad, and a person dealing with such agent may reasonably infer that he has the authority usually conferred upon such agents under like circumstances; while in the appointment of a special agent, the object is to accomplish a special purpose or to carry out a particular piece of business, and one would naturally infer the authority was limited.

In the case of a railroad company, a ticket agent would be considered a special agent to sell tickets, and his duties and authority would be confined to the sale of tickets, while the general superintendent of the road would be considered a general agent, as he would have general duties to perform and general authority over all departments of the road.

Public Agents. — All public officials and all employees of every department of our government are public agents. In one particular there is a difference between public agents and other agents. A public agent who exceeds his authority in the making of contracts is not liable, for the reason that every one is supposed to know what authority a public agent has.

If the Chief of Police in a certain city should contract with a local painter to paint the building used as police headquarters and the painter should perform his part of the contract, he could not collect from the city, as he had not been officially authorized to paint the building, and he could not hold the Chief of Police, as he is not liable in this instance for having exceeded his authority.

Del Credere Agents. — Sometimes an agent who is employed to sell goods guarantees his principal against loss from any of the customers to whom he sells. In such case the agent is termed a "*del credere* agent." In the United States it is the rule that the agent is held primarily and not as a guarantor, so his promise need not be in writing. Sales made in this way amount practically to sales by the principal to the agent.

Persons Known as Agents. — A person appointed as agent may be known as agent, factor, commission merchant, broker, attorney, or special representative to some person. Sometimes other employees may be authorized to act as agent; for instance, chauffeurs, factory workers, and domestic servants may, at times, act in the capacity of agent. There is this distinction between servant or employee and agent. The servant or employee is considered a mere mechanical worker, whereas the agent is a business representative, and it is his duty to represent his employer in business transactions. There are many cases, however, where the employee is also an agent; for example, the chauffeur may be directed to buy supplies for his employer, or the domestic servant may be authorized to purchase provisions for the household, in which cases they are acting as agents.

QUESTIONS

1. What is an agency? How is an agency created?
2. Why is the subject of agency important?
3. What are the parties to an agency called?
4. What does the word "agent" mean?
5. Why are agents necessary?
6. Who may act as principal? Who may act as agent?
7. Has an infant a legal right to act as agent?
8. What are the different classes of agents? Define each.
9. What limit is there on the authority of a general agent?
10. What limit is there on the authority of a special agent?
11. What is the principal difference between public agents and other agents?
12. Who is a *del credere* agent?
13. May servants and other employees act as agents?
14. Give some examples of agents.
15. What is the distinction between employees and agents? Give examples.

2. HOW CREATED

Agreement. — The relation of principal and agent may be created in several different ways. The ordinary way is by agreement, as where one man employs or appoints another to represent him in a certain transaction or in a general way. This is really an agency by contract, except in case of a gratuitous agent (one who is not to receive any pay for his services), and all the rules governing contracts govern also the relations of the principal and agent as between themselves.

The reason why a gratuitous agent is not an agent by contract is that, there being no consideration, the agreement cannot be enforced as a contract, as we have learned in the chapter on contracts.

Form of Agreement. — An agent by agreement may be appointed orally except in the following cases:

1. When, by the terms of the agency the service is not to be performed within one year; then, by the Statute of Frauds, the agreement must be in writing.

Southgate made an oral agreement in February with Hinckley that Hinckley would carry on Southgate's gristmill for one year from April 1, next. Hinckley offered to perform, but Southgate would not allow him. It was held by the court that the case was clearly within the Statute of Frauds, since the work was not to be performed within one year; consequently the oral agreement could not be enforced.

— *Hinckley v. Southgate*, 11 Vt. 428.

2. When the contract between the principal and the third party, to be executed by the agent, is required to be under seal; then the authority of the agent to execute the instrument must itself be under seal.

In a suit on a bond signed by one Williams as agent for one Pierce, it was proved that Williams' authority was oral. It was held that authority to execute a sealed instrument must itself be under seal and Pierce was not liable on the instrument. — *Overman v. Atkinson*, 102 Ga. 750.

The following are exceptions to the rule that an agent to make a contract under seal must receive his appointment under seal:

1. When the agent signs the contract in the presence of his principal.

2. When the instrument signed by the agent, although under seal, is not required to have a seal.
3. When the agent signs as a member of his firm.
4. When the agent signs for a corporation.

Agent's Appointments under Seal. — The formal way of appointing an agent is by a written instrument under seal known as the power of attorney. Certain instruments such as deeds and mortgages are required to be under seal and are usually witnessed and then acknowledged before a notary public (an official appointed to take acknowledgments, administer oaths, etc.), and for this reason the power of attorney by which the agent receives his authority to make a deed and mortgage or any other instrument under seal on behalf of his principal must be executed in the same formal way.

A contract for the sale of land does not necessarily have to be under seal, although it must be in writing under the Statute of Frauds. An agent could contract for the purchase or sale of real property, but he could not execute a sealed instrument such as deeds or mortgages without having a power of attorney.

Ratification. — The second way in which the relation of principal and agent may be created is by ratification.

The assent of the principal to the act of the agent may be given either before or after the agent's act. If given before, then it is an agency by agreement and has already been explained. If given after the act has been performed by the agent, it is a ratification of this act and gives the same effect to it as though there had been a previous appointment. This may be true in a case where the agent had no previous authority whatever, or where the agent had some prior authority but exceeded this authority in the particular act. The ratification operates as an extension of the authority to this act.

The principal may ratify an agent's acts:

1. By expressed words.
2. By acquiescing in them and allowing the agent to continue.
3. By accepting the benefits resulting therefrom.

It was held that where a person was clothed with some authority as agent, the ratification by his principal of his unauthorized acts relates

back and makes such acts of the agent the acts of the principal from the beginning, the same as though they had been duly authorized at the start. — *Merritt v. Bissell*, 84 Hun (N. Y.) 194.

A person without authority purchased a bill of goods for persons about to form a copartnership, in their name and on their credit as partners. They received the goods and sold them. One of the partners afterwards repudiated the purchase, claiming that the other partner was to buy the goods and that the agent had no authority to buy for him, and he so advised the sellers. Held, this was not sufficient. He should have restored the goods, but as they kept the goods they were liable as partners; they had ratified the act by retaining the benefit. — *Pike v. Douglass*, 28 Ark. 59.

The ratification to bind the principal must be made with a knowledge of all the material facts; if made under a misunderstanding, or through a misrepresentation, the principal will not be bound. The principal must repudiate the agent's unauthorized act within a reasonable time after he learns of it, or he will be presumed to have ratified it.

But if the principal ratifies the act it must be as a whole, for he cannot accept the benefits of a part and reject the remainder.

An axiom of the law is, "A man cannot take the benefits of a contract without bearing its burdens."

A subscription agent, canvassing for a history to cost \$10, had a book for signatures, and on this it was printed that no terms except those printed thereon should be binding. A justice of the peace consented to sign on condition that his office fees from that time to the time of delivery of the book should be taken in payment. This was agreed, and he was given a written memorandum by the agent to that effect. Held, if the company ratified the contract it must be upon the terms agreed upon. As the agent went beyond his authority they could repudiate the contract and refuse to deliver the book, but they could not repudiate part and still hold the subscriber.

— *Eberts v. Selover*, 44 Mich. 519.

Necessity. — The third way in which the relation between principal and agent may be created is by necessity.

This is where the relations or positions of the parties are such that the authority of the principal is presumed. The leading illustration of this is the case of husband and wife. The wife can contract for the necessities of the household and bind the husband for their payment.

It was held that a wife becomes her husband's agent by necessity to procure board and lodging for herself and minor children on his credit when he has driven her away without means of subsistence.

— *East v. King*, 77 Miss. 738.

Another illustration is that of a shipmaster, who has authority in case of necessity to purchase supplies for the vessel and pledge the credit of the owner.

A libel was filed against a vessel for necessary supplies and labor furnished to the vessel in a foreign port on the authority of the shipmaster. It was held that the vessel and owner were liable, as a master has authority in a foreign port to bond his owners for necessary repairs and supplies.

— *The H. C. Grady*. 87 Federal Reporter 232.

QUESTIONS

1. How is the relation of principal and agent established?
2. Who is a gratuitous agent?
3. Why is it that a gratuitous agent is not an agent by contract?
4. In what three ways may an agent be appointed?
5. What are the exceptions to the rule that an agent may be appointed orally?
6. Is an appointment in writing preferred to an oral appointment? Why?
7. What is meant by an implied appointment?
8. What exceptions are there to the rule that an agent, to make a contract under seal, must receive an appointment under seal?
9. What is a power of attorney?
10. How is an agency created by ratification?
11. Name three ways by which a principal may ratify an agent's acts.
12. What are the special rules governing ratification?
13. How may an agency be created by necessity? Give an example.
14. What are the usual powers of an agent?
15. If Brown should act for Grant without authority, what two courses are open to Grant?

3. OBLIGATION OF PRINCIPAL TO AGENT

Compensation. — The principal is under obligation to the agent to compensate him for his services.

When the agreement fixes the compensation the agent is to receive, this, of course, will control.

Wallace agreed to work for a given time at a certain salary. He stayed beyond the time, and nothing was said about the salary for the additional period. It was held that he could recover the salary only at the rate agreed upon. It was said that the best valuation of services was that mutually agreed upon by the parties themselves.

— *Wallace v. Floyd*, 29 Pa. State 184.

In the absence of an express contract, the law will imply an agreement to pay what the services are reasonably worth, unless it can be fairly inferred that the services were intended to be gratuitous.

Sloan hired out to work for McGuire during harvest; nothing was said about wages. As Sloan is an able-bodied workman and did a good day's work, it is implied that he can collect from McGuire what other workmen are receiving in the same locality and what his services are reasonably worth.

Even if the service was unauthorized but is subsequently ratified, and the benefit is accepted by the principal, the agent, ordinarily, can recover for the service to the same extent as though the service had been originally authorized.

Gelatt was employed to sell real estate on the owner's terms. He sold on other terms, but the principal ratified the sale. Held, that the agent was entitled to his commissions as originally agreed.

— *Gelatt v. Ridge*, 117 Mo. 553.

The principal is also under obligation to reimburse the agent for any sums which he may have paid out, or for which he may have become individually liable in the due course of his agency and for the principal's benefit.

Maitland, a broker, purchased for Martin certain bonds which Martin left in his hands several years, when he directed that they be sold. It was then learned that three of the bonds had been repudiated by the state where issued. Held, that the broker might be reimbursed; that the loss fell on Martin if the broker acted within the lines of his duty and in good faith.

— *Mailland v. Martin*, 86 Pa. State 120.

The agent is further entitled to indemnity from his principal for the consequences of any act performed within his authority and in the execution of his employment. But to be entitled to indemnity the act must be lawful, or the agent must have been ignorant of the fact that the act was illegal.

Moore brought an action to be reimbursed for damages which he had been obliged to pay because of certain acts performed by him as agent for Appleton in dispossessing a third party of lands claimed by Appleton and which Moore had reason to believe belonged to Appleton. Held, that the act was not manifestly illegal, and that the law implies a promise of indemnity by the principal for losses which flow directly and immediately from the execution of the agency. — *Moore v. Appleton*, 26 Ala. 633.

The Employer's Duty to Employees. — The employer's first and most important duty to his employees is to afford them protection by providing a safe, sanitary, and suitable place in which to work, and safe tools with which to work. In addition to this no workman is required to expose himself to dangers of working with reckless or incompetent associates. If the employee himself is in any way careless, the rule of contributory negligence relieves the employer from responsibility.

Laws have been passed in many states which define the duties of employers and the rights of employees. There are two classes of these laws:

1. The employers' liability laws, which aim to define the employer's duties and liabilities and to change or remove the objectionable rules of the common law.

2. The workmen's compensation laws, which aim to regulate and systematize responsibility for injury and to provide insurance for the injured.

Detailed information on these laws and on other important statutes will be found in a chapter on important statutes near the end of the text.

QUESTIONS

1. What are the obligations of the principal to his agent?
2. How is the compensation of the agent fixed?
3. In case nothing is said about compensation, what is implied?
4. What is the rule if the service rendered was unauthorized?
5. What are the obligations of the principal in the matter of (a) reimbursing the agent? (b) indemnifying the agent for loss?
6. What are the employer's duties to employees?
7. Under what conditions is the principal liable for injury to the agent?
8. What is an employers' liability law?
9. What is a workmen's compensation law?
10. What is meant by "contributory negligence"?

4. OBLIGATION OF AGENT TO PRINCIPAL

Agent must Obey Instructions. — The agent is under obligation to his principal to obey the principal's instructions. So long as the agent carries out his instructions he is protected,

but if he goes contrary to them and loss ensues, he is liable for the damage; as, where an agent is instructed by his principal to send a certain claim for collection to A, and instead he sends it to B, and loss ensues, the agent is liable.

The Express Company received for collection a draft with instructions to return at once if not paid. They instead held the draft until the drawee wrote for some explanation. They then failed to present it for two days after the drawee had received a reply from the drawer, and at this time the drawee became insolvent. Held, that the Express Company was liable to the drawer. — *Whitney v. Merchants Union Express Co.*, 104 Mass. 152.

Adams hired Robinson as her agent to lease certain premises for \$600 per year with good and approved security. Robinson leased the premises without security in violation of his instructions. Held, Robinson was liable for any damages suffered by Adams. — *Adams v. Robinson*, 65 Ala. 586.

Agent must Use Judgment.— The agent owes the duty to his principal to exercise judgment and skill necessary to the prudent and careful discharge of his agency. This prudence and skill can generally be said to be the same as is ordinarily observed by prudent and careful men, under similar circumstances and engaged in similar business.

Thus, an agent to purchase a carload of wheat must exercise and possess only such knowledge and skill as is common to careful dealers in grain; while an agent to purchase an expensive and intricate engine is bound to exercise the caution and skill of an engineer.

Reynolds was general manager of the San Pedro Lumber Co. and it was one of his duties to cause to be kept regular and accurate accounts of the San Pedro Lumber Co.'s business. Such accounts were not kept and the San Pedro Lumber Co. suffered losses because of it. Held; Reynolds was the agent of the San Pedro Lumber Co., and was required to exercise reasonable skill, diligence, and care in the performance of his duties. For his failure to do so he was responsible to his principal.

— *San Pedro Lumber Co. v. Reynolds*, 121 Calif. 74.

Fiduciary Relation. — There exists between the principal and his agent what is said to be a fiduciary relation, which means that their relations are such that the utmost good faith is required in their dealings. An agent cannot, therefore, acquire any rights that are contrary to the interests of the principal. He must not act for both the principal and the third party in a transaction without their consent.

Worden was appointed the Company's agent to sell a herd of cattle and horses. The agent produced a purchaser to whom a sale was later made. In an action by the agent to recover for his services it was shown that the agent had acted for both the buyer and the seller, neither of whom knew that the agent was acting also for the other. The court held that neither party was liable to the agent for his services.

— *Alla Inv. Co. v. Worden*, 25 Colo. 215.

This rule is based on the principle that no one can serve two masters.

Neither must the agent use his position or authority for his own benefit.

Miles was employed by Bunker to buy a certain horse for him for \$80 or as much less as he could, and was to have \$1 for his trouble. Miles bought the horse for \$72.50, and returned to Bunker no part of the \$80. The court allowed Bunker to recover the balance of \$7.50, holding that the agent could not make a profit for himself out of the transaction.

— *Bunker v. Miles*, 30 Maine 431.

An agent authorized to sell or rent will not be permitted to buy or lease the property himself without the principal's consent.

Kerfoot owned certain land and employed Hyman to sell it for a certain amount. Hyman bought it himself and took the title in the name of a third party, but for his own benefit without the owner's consent, and at the same time had a part of it sold for as much as he obtained for the whole of it for Kerfoot. Held, that the agent must account to Kerfoot for the excess received, and the remainder not sold will revert to the principal. — *Kerfoot v. Hyman*, 52 Ill. 512.

Also an agent commissioned to compromise a claim cannot purchase it at a discount and then enforce it in full against the principal.

The agent is under obligation to his principal to render a true account of all of the proceeds and profits of the agency. In the absence of an express agreement to the contrary the agent must render an account to his principal upon demand or within a reasonable time.

Subagents. — Another obligation of the agent to his principal is to act in person, except when authorized either by his principal or by established custom to appoint subagents. The reason for this is obvious: the principal employs the agent because of his confidence and trust in his ability and honesty to act in his stead, and the agent appointed cannot delegate to another the duty or trust which has been confided to him.

Still, an agent can in some cases appoint subagents to perform duties which do not involve an exercise of his discretion, but are merely mechanical or ministerial acts.

Penwick was employed by Bancroft to sell a piece of realty and to fix the price, etc. After looking over the property he employed a subagent to find a purchaser, and this subagent did find such a purchaser and sold the property. It was held that the agent might properly appoint such a subagent, as there was no discretion placed in the subagent, and Penwick could employ such party as he wished to help him in carrying out the agency.

— *Renwick v. Bancroft*, 56 Iowa 527.

Sometimes, from the nature of the case, it is implied that the agent is to appoint another agent for his principal. In that case the first agent is relieved from liability for the acts of the third party if he himself uses care and discretion in his appointment; whereas if he but employs a subagent, he is personally liable to the principal for the acts of the subagent to the same extent precisely that he would be in case they were his own acts.

The most common illustration of this point is the case where a holder of commercial paper, payable at another place, places it in the hands of his home bank for collection. In such cases it is generally held that the home bank has authority, implied from the nature of the transaction and the usual course of business, to appoint a bank at the place of payment of the paper agent for the principal, and the home bank is not liable for the negligence or default of the other agent if due care was used in the selection.

Planters & Farmers Nat'l Bank sent for collection to First Nat'l Bank in Wilmington, N. C., a draft in Planters & Farmers Nat'l Bank's favor, drawn on one Adams residing in Washington, D. C. First Nat'l Bank sent the draft to a firm in Washington for collection, the firm then being in good standing and credit and regarded as solvent. The firm collected the money and failed before turning it over to the First Nat'l Bank. It was held that where the business obviously or reasonably cannot be done by an agent except through a subagent, or where there is a known and established usage of substitution, then the principal has authorized such substitution and the agent is not liable for the failure of the substitute if care has been exercised in the selection.

— *Planters & Farmers Nat'l Bank v. First Nat'l Bank*, 75 N. C. 534.

Gratuitous Agent. — It may be well to note also the legal relation of the agent who undertakes to perform some service for the principal without compensation.

In such a case the promise being without consideration is not enforceable, and the agent cannot be held liable for neglecting or refusing to perform.

Goods were sent by Vickery to Lanier with a request that they be insured. Lanier said he would procure insurance, but did not do so. No offer was made to pay Lanier for his services. Held, there was no agreement between the parties, as there was no consideration, and Lanier was not liable for his failure to perform. — *Vickery v. Lanier*, 58 Ky. 133.

But if the agent enters upon the performance of the undertaking, he is bound to exercise skill and care in what he does.

A party undertook voluntarily and gratuitously to invest money for another. It was held that in such a case the gratuitous agent must use due diligence and exercise proper caution or he will be liable, and if he is given positive instructions, he will be liable if he disregards them.

— *Williams v. Higgins*, 30 Md. 404.

The question of gratuitous agent often comes up in the case of bank directors, who fill their offices without compensation.

If bank directors are guilty of negligence in permitting their bank to be held out to the public as solvent, when in fact it is insolvent, and thereby induce parties to deposit their money there and it is lost, such depositors may recover from the directors, as they are bound to exercise care and diligence in their offices. — *Delano v. Case*, 121 Ill. 247.

QUESTIONS

1. What is the principal obligation of an agent to his principal?
2. Under what conditions is the agent liable for damage suffered by his principal?
3. What prudence and skill is an agent expected to show in the discharge of his duties as agent?
4. What is the meaning of fiduciary relation?
5. Can an agent use his position for his own benefit?
6. Who are subagents? Give an example of a subagent.
7. Under what conditions has an agent the right to appoint some one else to do the work for him?
8. Is the gratuitous agent liable for neglecting or refusing to do what he agreed to do?
9. What is the responsibility of a gratuitous agent who attempts to perform?
10. To whom do the profits made by an agent belong?
11. If an agent disobeys instructions, what can the principal do?
12. Can an agent act for both parties (principal and third party)? Give reasons.

5. OBLIGATIONS OF PRINCIPAL AND AGENT TO THIRD PARTY, AND OF THIRD PARTY TO PRINCIPAL

Obligation of Principal to Third Party. — The main object of agency is to effect a contractual relation between the principal and the third party. The identity of the principal may be disclosed or it may be withheld. In the case of either a disclosed or an undisclosed principal, he is bound by such acts of the agent as are within the actual or apparent scope of his authority.

The difficult question then is to determine what is the scope of his authority. If the principal clothes the agent with apparent authority to do an act, the principal is bound, although the agent had private instruction to the contrary, or had a limit put upon this authority.

A doctor employs an agent to buy for him a particular horse. He has no apparent authority to buy a team or any other horse. Should a stock dealer employ an agent to buy horses for him, the agent has apparent authority to buy a team, although he may have had private instructions to the contrary. The one is clearly a special and the other a general agent.

It seems settled that when the agent has apparent authority the principal is bound. It is only required in such a case that the person dealing with the agent, acting with average prudence and in good faith, is justified in believing that the agent possesses the necessary authority.

Notice to Agent. — It is the rule that notice to the agent of anything within the scope of the agency is notice also to the principal. And the principal is chargeable with knowledge of all the facts that have been brought to his agent's attention in the transaction in which the agent is acting for the principal.

If this were otherwise, the principal would be in a position to claim ignorance whenever he might wish to do so, and therefore would be in a better position than if he dealt with the third party direct.

Obligation of Agent to Third Party. — When an agent makes a contract on behalf of his principal, he may in certain cases bind himself. If he holds himself out as having authority to act for a principal in a transaction in which he has no such

authority, he is liable to the third party for the damages suffered, not on the contract which he purported to make for the principal, but for breach of his implied warranty of authority.

Pitcairn, the agent for an insurance company, obtained and delivered to Kroeger a policy of insurance on his store, containing a clause that no petroleum should be kept on the premises. Kroeger told Pitcairn it was necessary to keep a little, and Pitcairn assured him if he kept only a barrel it need not be noted in the policy, and was all right. The store burned, and Kroeger could not recover because he had a barrel of petroleum. Held, Pitcairn, the agent, was liable, as he gave positive assurance in excess of his authority. — *Kroeger v. Pitcairn*, 101 Pa. State 311.

The agent is also presumed to represent not only that he has authority, but that his principal was competent to give such authority.

In the case in which there is no real principal, but the one so represented is fictitious, the agent himself becomes the principal, and is liable as such.

It was held, an unincorporated organization cannot be a party to a contract, and persons contracting in the name of such an organization are themselves personally liable either as being themselves in fact principals, or as holding themselves out as agents for a principal which never in law existed. — *Lewis v. Tilton*, 64 Iowa 220.

In some instances, the agent expressly pledges his credit, and of course in such cases he is liable.

Obligation of Third Party to Principal. — It is clear that the third party is liable to the principal for contracts entered into with the agent, within his authority, or which are subsequently ratified by the principal.

The third party is also liable to the principal for moneys or property obtained from the agent by duress or fraud; hence, if an agent is compelled to pay illegal charges to protect his principal's interest the principal may recover of the third party.

The third party may also be liable to the principal for fraud or wrong, or for collusion with the agent to injure the principal.

It was the duty of the manager of a city gas works to obtain and recommend bids for coal and supplies. Lever, a coal dealer, bribed the manager to recommend his bid, and added the price of the bribe to the bid. In an action against them, it was held that the Mayor, for the city, could recover the damages from the agent who had accepted the bribe, or from Lever who had given it. They were joint wrongdoers, and could be held jointly or severally. — *Mayor v. Lever*, 1891, 1 Q.B. (Eng.) 168.

A third party is also liable for unlawfully interfering with the agent in the performance of his duties as agent.

It was held, that maliciously to cause the arrest of the Railroad Company's engineer while running a train, and then to delay the train and thereby damage the company, is actionable, and the railroad company can recover for such damages from the person so causing the arrest.

— *Railroad Co. v. Hunt*, 55 Vt. 570.

QUESTIONS

1. What is the main object of agency?
2. What is meant by "undisclosed principal"?
3. What acts of an agent bind the principal?
4. What is meant by "scope of authority"?
5. Is the principal bound where the agent had apparent authority?
Explain.
6. What is the rule as to notice to the agent? Why?
7. When is an agent liable to a third party? Give an example.
8. What is the obligation of the third party to the principal?

6. LIABILITY OF PRINCIPAL FOR TORTS OR WRONGS OF AGENT

General Rule. — The principal is liable for the contractual obligations of his agent in his behalf, and there are various ways in which he can be rendered liable by the agent for the agent's torts or wrongful acts.

The rule is that the principal is liable for the wrongs committed by the agent in the course of his employment and for the principal's benefit.

This is obviously true where the principal commands or ratifies the act, and we find that it is also true where the principal neither ratifies nor commands it. The law considers that when a person chooses to conduct his affairs through another, he must see that they are managed with due regard for the rights and safety of others.

A principal was held liable for the tort of his agent in selling to Lutz a diseased horse, which ran with other horses of Lutz and caused several of them to die. — *Lutz v. Forbes*, 13 La. Annual 609.

Fraud and Negligence. — Fraud is one of the wrongs of frequent occurrence in the relation of agency, the agent having

made false and fraudulent representations in carrying out his principal's business. It is the general holding that the principal is liable for the agent's fraud in the course of the principal's business and for his benefit.

The negligence of the agent is among the wrongs for which the principal is liable, if such negligence was committed in the ordinary discharge of the agency.

An agent of Shaw hired a driver, wagon, and team from Ewing, and through the agent's negligence one of the horses was drowned. Held, the principal was liable for the damages resulting from the negligent act of his agent. — *Ewing v. Shaw*, 83 Ala. 333.

When the wrong is committed by the agent in the course of his employment, and even to benefit himself personally and not his principal, some authorities hold that the principal is nevertheless liable.

An engineer willfully and unnecessarily blew the whistle and frightened a horse. Held, that the railway company was liable for acts done by its engineer maliciously, wantonly, and willfully while in the exercise of his duties, whether in the course of his employment or not.

— *Cobb v. Railway Co.*, 37 S. C. 194.

Others hold that the principal is not liable.

A railway engineer intentionally and wantonly backed his engine toward a street car that was crossing the track, with the simple intent of frightening the passengers, without colliding with the car. As a result Stephenson, a passenger, was frightened and jumped from the car and was injured. Held, that the act of the engineer was without any reference to the service for which he was employed and not for the purpose of performing his employer's work, and that the principal was not responsible.

— *Stephenson v. Southern Pacific Co.*, 93 Calif. 558.

More recent court decisions show an inclination to hold the principal liable under such circumstances.

Liability for Malicious Wrongs. — But it is held that the principal is not liable for the malicious wrongs or crimes of the agent, unless he expressly authorized the same. There is an exception to this in the case of laws or statutes which are said to be in the nature of police regulations designed to promote the safety and health of the community. In cases of this kind the principal is liable, even though the agent act directly contrary to instructions and without his knowledge and consent.

The laws regulating the speed of automobiles on the public roads, and those prohibiting the selling of tobacco to children, may be mentioned as examples under this head. •

QUESTIONS

1. What is the rule as to a principal's liability for the agent's torts or wrongs?
2. Give an example of an agent's tort for which the principal would be liable; one for which the principal would not be responsible.
3. Are authorities agreed on the liability of the principal for an agent's wrongs? Explain.
4. Is the principal liable for the "malicious wrongs" of an agent?

7. TERMINATION OF THE RELATION OF PRINCIPAL AND AGENT

The agency may be terminated by limitation, by acts of the parties, or by a change in the condition of the parties.

Termination by Limitation. — If the contract of agency is by its terms to continue for but a limited time, the agency terminates when the time expires; or if the particular business for which the agency was created has been completed, the agency is terminated.

An agent was employed to negotiate for the purchase of certain property. He obtained the contract for the conveyance, the first payment was made, and the agent was paid for his services. Held, the agency was then terminated, as the object for which the agency was created had been accomplished. Here the agent, after he was paid for his services, bought in the property at tax sale, and the principal sought to set it aside on the ground that he was still his agent, but as the agency was held to be terminated, the court refused to interfere. — *Moore v. Stone*, 40 Iowa 259.

Termination by Act of the Parties. — Under certain conditions either party may terminate the relation. This may be done by mutual agreement, by the principal revoking the agent's authority, or by the agent renouncing the agency.

Since the principal appoints the agent, and the relation is one of confidence for his own protection, he has the power to terminate it at will. It is therefore the general rule that the principal may terminate the agent's authority at any time and with or without good cause.

It may be well to note here the distinction between the power to terminate the agency and the right to terminate it. The principal generally has the power, but if it violates an agreement with the agent, he does not have the right to so terminate the agency, and he is therefore liable to the agent for damages.

There was a written contract for one year, fixing the agent's compensation. This was renewed the next year, and from then on was lived up to, but nothing was said about the agreement. Held, that there was a tacit renewal from year to year, and that the principal could not, during the year, deprive the agent of his salary before the expiration of the year. Though the power of revocation existed, the right to revoke did not exist.

— *Standard Oil Co. v. Gilbert*, 84 Ga. 714.

The revocation of the agency by the principal need not be made in any formal way, but may be by oral instructions or by written notice. In some cases it may be implied by the conditions; as, when a principal gives an agent authority to sell his house, and before the agency is executed it is destroyed by fire, in which case a revocation must be implied.

A revocation is binding only upon those who have notice of it. The principal must therefore not only give notice to the agent but to those who upon the strength of the previous authority are likely to deal with him; otherwise he may be held for the acts of the agent after the revocation.

An Agency Coupled with an Interest. — There is a class of cases in which the principal has no authority to revoke the agency. This is where, as it is said, the agency is coupled with an interest; as when the agent has an interest in the subject matter of the agency by way of security. For example, when a person has possession of property with power to sell and apply the proceeds to the payment of a debt due the agent, such a case constitutes an agency coupled with an interest.

Graves, wishing to sell his house and lot, as he has to move to another place on account of his health, entered into an agreement with a local real estate agent, in whose hands he put his house for sale, whereby the agent advanced him \$1000, which amount he is to deduct from the sale price when the house is sold. Graves cannot, without the agent's consent, revoke this agreement, as the agent has an agency coupled with an interest.

As to the rights of the agent to renounce the agency, it seems that he also has the power but not the right to renounce

at will. And the renunciation may be either express or implied; as, if the agent abandons his work, the principal may consider the agency as renounced.

Change in Condition of the Parties. — The agency may also terminate by a change in the condition of the parties caused by death, insanity, bankruptcy, marriage, and war.

Death. — The death of either the principal or the agent terminates the agency, and it is no longer binding on the estate of the deceased or the survivor. And in this case no notice of the termination need be given to third parties. The agency terminates upon the principal's death, and any contract made thereafter by the agent acting for the principal is a nullity.

An agent appointed by one Wiley commenced an action against Merrett and conveyed land to and received money from him. It developed that, unknown to any of the parties, Wiley had died before the commencement of the suit. Held, that Wiley's death revoked the agency and the conveyance by the agent and the payments to him were both void.

— *Clayton v. Merrett*, 52 Miss. 353.

Insanity. — If either the principal or the agent become insane, the effect is to terminate the agency, as the principal is no longer competent to enter into a contract, and the agent, if insane, is not competent to carry out the instructions of the principal. But if the principal has not been legally declared insane, persons dealing with the agent in ignorance of his insanity are protected.

Any other cause that may render the agent incompetent to carry out the agency will also terminate the agency, as the illness of the agent or his imprisonment.

Bankruptcy. — The mere insolvency of either party does not affect the agency, but it will be terminated when either party becomes technically bankrupt, because when a party becomes a bankrupt his property passes out of his hands and he is unable to carry out any contract in reference to it. The above rule does not apply, however, when the agency is coupled with an interest. In the case of the bankruptcy of the agent his authority ceases except to perform some formal act not involving the transfer of any property.

Marriage. — Under the common law many restrictions were placed about a married woman, the control of her property pass-

ing to her husband. Consequently, upon her marriage, any contract of agency in which she was principal was dissolved, as she no longer had the power to deal with her own property. But every state has passed laws enlarging the rights of married women, in most instances giving them full power to own and manage their property and to carry on their own separate business. The result is that a married woman may appoint agents, and the act of marrying does not affect her status in a business way and therefore has no effect on the relation of principal and agent, nor does it dissolve an agency then existing.

War. — It is the general law in this country that the existence of a state of war between the country of the principal and that of the agent terminates the agency. This is because of the rule prohibiting all trading or commercial intercourse between two countries at war.

QUESTIONS

1. Mention three ways by which an agency may be terminated.
2. How may an agency be terminated by limitation?
3. How may an agency be terminated by acts of the parties?
4. Distinguish between the power to terminate an agency and the right to terminate it.
5. How may an agency be revoked?
6. On whom is the revocation binding?
7. Give an example of an irrevocable agency.
8. Has the agent the right to renounce the agency at will?
9. What change in the condition of the parties will terminate the agency?
10. In what cases is it necessary to give notice to third parties of the termination of an agency?
11. Does mere insolvency of either the principal or the agent terminate the agency?
12. What exception is there to the rule that bankruptcy terminates the agency?
13. What are the rights of married women with reference to appointing agents?
14. How does war affect an agency contract between citizens of two countries at war?
15. An agent was employed to sell an automobile. In a fire the automobile was destroyed. Did this terminate the agency?

IMPORTANT POINTS

Agency is a subdivision of contracts and is regulated by the laws of contracts.

Agency is the legal relation existing between a principal and an agent, and is usually created by agreement.

Only one who is competent to contract for himself can act as principal.

Any one who is capable of following instructions can act as agent.

The principal difference between special agent and general agent is the extent of authority.

The general assumption is that an agent is a personal representative.

Any one who acts for another without pay is not liable for failure.

That an agent may make contracts under seal, his appointment must be under seal.

The formal way of appointing an agent is by power of attorney.

Ratification creates an agency as well as agreement.

Where an agency is created by necessity, the principal is bound.

The obligations of the principal to the agent include compensation, reimbursement, indemnification, and protection.

The obligations of the agent to the principal include obedience, loyalty, judgment, skill, and honesty.

The agent cannot appoint another to do what he is expected to do.

Subagents may be appointed where circumstances require it.

An undisclosed principal is bound by the acts of his agent the same as a disclosed principal.

The principal is bound by the acts of his agent so long as the agent acts within the scope of his authority.

A principal is bound when the agent acts within his apparent authority.

Notice to the agent concerning agency matters is notice to the principal.

When an agent exceeds his authority he is personally liable; except that a public agent who exceeds his authority is not liable.

A third party is liable to an undisclosed principal when the agent acts within his authority.

A third party is liable for unlawfully interfering with an agent in the performance of his duties.

A principal is usually liable for torts or wrongs committed by an agent in his behalf.

A principal is liable for fraud of the agent practiced in the course of the principal's business and for his benefit.

The principal is usually not liable for malicious wrongs committed by the agent.

When an agency is terminated, in every case except death, notice should be sent to all parties who have dealings with the agent.

Legally, the agent's acts are considered the acts of the principal.

Through the medium of the agent contractual relations are established between his principal and a third party.

Agencies may be joint, or joint and several.

The principal may, at any time, revoke the authority of the agent.

The agent may, at any time, renounce the contract of agency.

An agency coupled with an interest cannot be terminated by the principal.

The agent must make accounting to his principal of funds belonging to the agency.

An agent has no legal right to act for himself contrary to his principal's interest.

An agent cannot represent both parties to a transaction without the knowledge of both.

An agent warrants existence and competency of his principal.

State of war between the respective countries of the parties to an agency terminates the relationship during the war.

A contract made by an agent subsequent to the death of his principal is void.

TEST QUESTIONS

1. Why does it concern a merchant who sells a suit of clothes to a minor on credit whether the minor is acting as agent for his father or acting for himself?

2. How can you tell whether an agent is acting as a general agent or as a special agent?

3. Are there any reasons why a written appointment of agency is more satisfactory than an oral appointment?

4. Can a married woman bind her husband by any contract pertaining to household affairs?

5. Waters acts for Brown without authority. What courses are open to Brown?

6. Is there any difference between the obligations to the principal of a general agent and of a special agent?

7. What has a third party who deals with an agent a right to know?

8. In all contracts made through an agent, who are the real parties?

9. Under what circumstances would an agent have a claim for damages against his principal?

10. What is meant by the agency being terminated automatically?

11. What is the effect where an agent has an interest in the subject matter?

12. Hooker gave Mason authority to buy grain and pay a certain price for it. He pays more. Under what circumstances would the principal be bound?

13. A merchant directed his salesman not to sell a certain article from stock. The salesman, nevertheless, sold the article. Has the merchant a right to revoke the sale?

14. An agent, although acting for a principal, made a contract with a third party in his own name. Is the principal liable?

15. A purchasing agent bought supplies after the death of his principal. Is the contract binding?

16. Grant instructed Bowers to sell his automobile for \$600. Bowers sold it for \$750. To whom does the \$150 belong?

17. What is the meaning of the terms "subsequent ratification," and "prior authority"?

18. What is the essential difference between the power and the right of an agent to act?

19. Has an agent a right to delegate authority or power to some one else?

20. Explain the meaning of the statement, "A principal who accepts the benefits cannot refuse to be bound."

CASE PROBLEMS

Give the decision and the principle of law involved in each case.

1. Hadden was employed by a railroad company as a local ticket agent. He contracted with Bard, a carpenter, to build a partition in the waiting room of the station. The carpenter completed the partition and sent the bill to the railroad company's main office. The company refused to pay the bill, claiming the agent had no authority to have this work done. Bard takes action against the agent. Can he recover? Explain.

2. Morton was elected to the city council from his district. Very soon after his election he contracted with Green, a local contractor, to pave a street in his district. The contractor did the work and presented his bill to the city council. The council refused to honor the bill and Green brought action against Morton. Can he recover? Explain.

3. A maid, employed by Mrs. Blain, had been allowed to order provisions from local dealers for Mrs. Blain's use in the household. On one occasion, the maid ordered a quantity of provisions which she appropriated for her own use. Mr. Blain refused to pay the bill and the dealer brought action to recover. Can he succeed?

4. Brown and Co. appointed one Cary, who was but nineteen years old, as their agent to buy certain goods for them. Later they refused to take the goods, setting up that the agent was an infant and the contract could not be enforced. Was this a good defense to the contract?

5. Wright, a farmer, is on his way to town and Young, his neighbor, asks him to bring back for him a wheel for his mowing machine, which has been broken. Wright agrees to do this without any compensation. Wright forgets to obtain the wheel and returns without it. Young is unable to proceed with his work and sues Wright for damages. Can he recover?

6. The Brown Medicine Co., by oral agreement, employ Hartman, who is an experienced agent, to travel for them, advertising and selling their medicines. By their agreement he is to travel in every state in the Union and is to spend not less than two weeks in each state. Hartman, before commencing his work, obtains a better offer elsewhere, and the company sue him for breaking the contract. Can they recover?

7. An agent was authorized to sell a car of coal for his principal at \$6 a ton. Contrary to his authority he sold it for \$5 per ton, and received \$120 down. The principal accepted the \$120 and delivered 20 tons of coal, then refused to deliver more until the full price of \$6 a ton was paid. Could the principal refuse to deliver the balance under the contract?

8. Blum represented himself as Weinberg's agent but had not been so appointed. Without authority he made a contract with Loeb in Weinberg's name and in negotiating the contract spent \$500 for traveling expenses. Weinberg agreed to carry out the contract. Can Blum recover for his services and expenses and if so how much?

9. Bown & Co., through the Merchants Bank of Denver, draw on S. P. Kendall, merchant, of New York. The Merchants Bank forward the draft to their correspondent, the Commercial National Bank of New York. This bank negligently fails to present the draft for one week, and in the meantime S. P. Kendall becomes insolvent. Bown & Co. sue the Merchants Bank of Denver. Can they recover?

10. The American Bicycle Co. opened a store in Buffalo and placed Hunt there in charge of the business. He employed Harvey as head clerk at \$40 per week. Hunt was expressly instructed by the company not to

pay any employee over \$30 per week. Harvey worked several weeks and sued the company for his wages. Could he recover?

11. Darrow is driving on the city streets, and through the negligence and carelessness of the street car motorman he is run into and injured. Can Darrow recover of the street car company?

12. An agent, without any authority so to do, accepts a bill of exchange in the name of his principal, believing that the principal will ratify his act. The principal refuses to ratify. Is the agent liable?

13. Van Horn appointed Barth, his agent, to represent him for one year at a salary of \$100 a month. At the end of three months he discharged him without cause. Could Van Horn so discharge his agent, and if so, was he liable to Barth for damages?

14. Suppose that in the above case Barth deals with parties as the agent of Van Horn after he has been discharged. The parties with whom he deals have no knowledge of his discharge. Can they hold Van Horn on the agreement made by Barth?

15. An agent employed to sell goods for his principal sells to Howard the day after his principal's death, neither Howard nor the agent knowing that the principal is dead. Can Howard hold the principal's estate on the contract?

16. If in the above case the principal had become insane, but had not been legally so declared, could the principal have been held?

17. Cory is purchasing agent for Rice. Rice dies while traveling in Europe. After Rice's death, but before the news arrives, Cory, acting for Rice, contracts for an automobile to be delivered next month. Rice's executor refuses to take the car. Has he the legal right to do so? Explain.

18. Ross was engaged as agent by the Childs Toy Co. to advertise their goods by distributing hand bills in various towns. In one town Ross was fined \$25 for violating an ordinance, of which he was ignorant, prohibiting the distribution of hand bills without a license. Could Ross recover the \$25 from his employer?

19. Warren owned a house and lot which he desired to sell. He put the property into the hands of a real estate agent, with instructions to sell it for \$20,000 and to remit the proceeds to him after the deduction of 5% commission. The agent sold the house for \$21,000 and kept the \$1000 in addition to his commission on \$20,000. What are Warren's rights?

20. Jackson appointed Muth his agent to sell his automobile, instructing him to sell for cash only. Muth accepted the purchaser's note for part of the price and the note was uncollectible. Has Jackson any claim against Muth?

21. Foster, on moving from the city, sent most of his furniture to a local auctioneer to be sold. The auctioneer advanced \$100 in part payment, with the understanding that he should withhold this amount when the furniture was sold. Later Foster wrote to the auctioneer revoking the agreement. Had he this right? Explain.

22. An agent was authorized to sell goods for his principal at a stated price. The agent without authority sold at a less price, made part delivery, received payment for part delivered, and turned the amount over to the principal. When the time came to deliver the balance the principal advised the buyer that the agent had exceeded his authority and therefore he, the principal, would not permit further delivery. What are the buyer's rights? Explain.

23. Norman & Son placed with an agent of a manufacturing company an order for machinery subject to the approval of the manufacturing company. The manufacturing company wrote Norman & Son that they would give the matter their attention, but they did not definitely accept the order. Thereafter Norman & Son countermanded the order. The manufacturing company shipped the machinery and Norman & Son refused to take it. Were Norman & Son liable?

24. An agent, in selling goods for his principal, makes false representations without the knowledge or consent of the principal. A defrauded customer brings an action against the principal, who defends on the ground that the agent, in making such false representations, exceeded his authority. Is this a good defense? State the principle involved.

25. Slater, as agent for the Commonwealth Fire Insurance Company, insured a building belonging to Rowe. At the time of the interview Rowe stated to Slater that the building was used for storage purposes only and that at times he kept a quantity of paper stored in it. To this Slater replied that he would be allowed to do this and his policy would hold good. The policy contained a provision that the company would not be liable for loss by fire of any unoccupied building in which loose or inflammable material was stored. The building burned and Rowe took action against the Insurance Company. Can he recover? What are his rights?

26. The publishers of a daily paper hired a young and inexperienced driver to deliver papers to their different city agencies. By his careless driving he knocked down and injured an elderly gentleman. Are the publishers liable?

NEGOTIABLE INSTRUMENTS

1. IN GENERAL

Definition. — A negotiable instrument may be defined as a written instrument or evidence of debt which may be transferred from one person to another by indorsement and delivery, or by delivery only, so that the legal title becomes vested in the transferee. The principal forms of negotiable instruments are promissory notes, bills of exchange, foreign and inland, and checks. (See forms in Appendix.)

Negotiable instruments are an important factor in business transactions of the present day, passing from hand to hand, in a sense, as a substitute for money. As a means of transferring funds and paying debts the check is as common among business houses as money itself, while the promissory note is also a very important factor of our business system. The note is taken to the bank when the borrower desires money advanced to him by that institution. It is given to close a business transaction when so agreed if the date of payment is a day in the future; and as a large part of the business of to-day is transacted on credit, we can see the great usefulness of the promissory note as a transferable evidence of debt.

The term "negotiable" is applied to these instruments because they pass freely from hand to hand, they by their terms providing for such transfer.

Statute Law. — It is very important that contracts which are to pass from hand to hand and from state to state with almost the freedom of money should be subject to practically the same laws and rules, and to this end a statute covering the principal questions concerning negotiable instruments has been adopted in all of the forty-eight states except Georgia, giving a uniformity that renders these instruments more freely negotiable than they would otherwise be. This statute is known as the Uniform Negotiable Instruments Law. We speak of negotiable instruments as contracts, and in reality they are

written contracts, possessing special characteristics which give them privileges and qualities different from those in ordinary contracts.

Essential Conditions. — The question arises as to what conditions are essential to constitute a contract a negotiable instrument. In general we find that no exact form need be followed, although custom has prescribed forms that are very generally used, but an instrument to be negotiable must conform to the following requirements:

1. It must be in writing (printed forms may be used).
2. It must be signed by the party executing it (maker or drawer).
3. It must be negotiable in form, i.e. payable to the order of a designated payee, or to bearer.
4. It must be payable in money, and the amount must be definite and certain.
5. It must be payable absolutely and unconditionally.
6. It must contain a promise or order to pay.
7. It must be payable on demand or at a fixed or determinable future time.

The Instrument must be in Writing. — The first requirement is that the instrument be in writing. No oral contract could be negotiable. By a written contract we mean one in either writing or printing or both, and the writing may be executed with any substance, as ink or pencil.

The whole instrument must be written. No essential part, as the names of the parties, or the amount, can be omitted from the writing.

The Instrument must be Signed by the Party Executing it. — It is usual that the signature be made by writing the name of the signer, but it is not necessary, as he may affix his mark or any other character intended to be a signature.

It is usual to place the signature at the close of the instrument, but if it is shown that it is meant for a signature, it may be placed on any other part, unless the statute requires that the name be subscribed.

A note and a power of attorney to confess judgment were both written on the same sheet of paper. The note was not signed by the maker, but his

signature was written after the power of attorney at the foot of the sheet. It was held that the note was sufficiently executed.

— *Heslip v. Anderson*, 134 Ill. Appeals 8.

The Instrument must be Negotiable in Form. — The instrument must be payable to "Order" or "Bearer." If made payable to a particular person or persons only, it is not a negotiable instrument, and falls under the rules governing a simple contract. In other words, the intent of the party making the instrument to execute a negotiable paper must appear by some express words showing such a purpose.

A note read as follows:

MURFREESBORO, TENN., Feb. 5, 1903.

On the 24th day of December, 1903, I promise to pay to Robert B. Meeks the sum of Three hundred (\$300) dollars, with interest from date.

J. R. HARRELL.

This was held to be not negotiable, since it did not contain the words "or order," which are necessary to negotiability.

— *Gilley v. Harrell*, 118 Tenn. 115.

The Instrument must be Payable in Money, and the Amount must be Definite and Certain. — The very reason it must be payable in money is that if it were payable in any other commodity the value might not be definite and certain. If payable in a given number of bushels of wheat, the person taking it would be obliged to determine the value of wheat at that place; the value at another place might be materially different. By the term "money" is meant the legal tender of the country; that is, a note payable in Spanish money is not a negotiable instrument in the United States.

The Attoyac River Lumber Company issued to its employees checks which were redeemable only in merchandise at the Company's store. It was held that the checks were not negotiable instruments.

— *Attoyac River Lumber Co. v. Payne*, 57 Tex. Civil Appeal 327.

In a suit on a note made and dated at Buffalo, N. Y., for \$2500, payable twelve months after date at the Commercial Bank of Buffalo, N. Y., in *Canadian money*, it was held that the note was not negotiable. A promissory note, in order to be negotiable within the meaning of the law, must be payable in current money and not in the money of some other country.

— *Thompson v. Sloan*, 23 Wend. (N. Y.) 71.

A note "payable to the Protection Insurance Co., or order, for \$271.25, with such additional premium as may arise on policy No. 50, issued at the Calais Agency" was held to be a non-negotiable instrument, the amount payable being indefinite and uncertain. — *Dodge v. Emerson*, 34 Ma ne 96.

The sum payable is considered fixed and certain although it is payable with interest, or in stated installments, or with exchange, or with the costs of collection in case payment is not made at maturity, or if the holder is given the option to require payment in money or some other way. But an instrument promising to pay money and something else is not negotiable, as there is no sum certain in money.

An instrument containing a promise to pay \$3400 and one half of the wheat grown on certain land was held to be non-negotiable.

— *Thomson v. Koch*, 62 Wash. 438.

The Instrument must be Payable Absolutely and Unconditionally. — If the instrument is so drawn that any condition may arise which would render it of no effect, it is not a negotiable paper. Consequently, a promise to pay a certain sum out of a designated fund is not negotiable, and this is the case even though the fund exists at the time or the condition that would nullify the contract never arises.

An instrument reading "Please pay to the order of Woodward \$600, the same to be the last \$600 due me on my contract, and charge the same to my account" was held not to be a negotiable instrument, being payable out of a specific fund. — *Woodward v. Smith*, 104 Wis. 365.

Promise or Order. — The instrument must contain a promise or order to pay.

\$17.14

BRIDGEPORT, CONN., Jan. 22, 1863.

Due Currier & Barker seventeen dollars and fourteen cents, value received.

FREDERICK LOCKWOOD.

It was held that the above instrument was not a promissory note.

— *Currier v. Lockwood*, 40 Conn. 349.

This is merely a due bill. It does not contain a promise to pay. A bare acknowledgment of a debt does not in legal construction import an express promise to pay.

The Negotiable Instruments Law provides that an instrument is payable to bearer when payable to "Bearer"; or to "A or Bearer"; or to the order of a fictitious or non-existent person, as "Estate of A"; or when the payee does not purport to be the name of a person, as "Cash," or "Pay Roll."

When the instrument is payable to order the payee must be named or indicated with reasonable certainty.

\$2500.

LA CROSSE, WISCONSIN, Sept. 2, 1897.

Four months after date I promise to pay to the order of twenty-five hundred dollars. Value received.

JOHN WILDING.

It was held that this was not a negotiable instrument, as it neither designated the payee nor left a blank space for the payee's name.

— *Smith v. Wilding*, 123 Wis. 377.

The Uniform Law provides that negotiability is not destroyed by the fact the instrument is payable to one or some of several payees. Thus a note payable to A, B, or C is negotiable upon indorsement by any one of the three.

The Time must be Certain. — The time of payment must be definite and fixed. That is, the date of payment must be definitely stated, or it must be on or before a certain definite date, or at a certain time after the happening of an event that is sure to occur, or on demand. A note payable a certain number of days after the death of a person is negotiable, the date being certain because the time is sure to arrive.

It was held, that the following was a negotiable instrument, as the meaning was that it should be payable after the death of the maker: "After my death date I promise to pay Hanson Camp or order the sum of \$750 without interest." — *Shaw v. Camp*, 160 Ill. 425.

But the contingent event must be certain to occur or the promise will not be absolute, and the fact that the contingency has happened does not cure the defect.

CASTLETON, April 27, 1844.

Due Henry D. Kelley fifty-three dollars, when he is twenty-one years old, with interest.

DAVID KELLEY.

In an action on the above instrument it was proved that Henry D. Kelley became of age before the action was commenced. The court held that the instrument was not negotiable, as payment was contingent on an event that might or might not happen. The money was therefore not payable "absolutely and at all events," and the paper lacked one of the necessary elements of a negotiable instrument.

— *Kelley v. Hemmingway*, 13 Ill. 604.

The law simply requires that the time of payment shall be sure to arrive.

Omissions. — The date, the place where the instrument is drawn, the place where it is payable, and the term "value received" may be omitted and the instrument will still be good.

The law provides that when the date is omitted any holder

may insert the true date. He may fill in any other particulars which have been omitted, but in doing so he must act honestly and according to the original agreement or he will lose his rights.

QUESTIONS

1. What is a negotiable instrument?
2. What are the principal forms of negotiable instruments?
3. In general what use is made of (a) the check, (b) the promissory note?
4. Why is the term "negotiable" applied to checks, notes, etc.?
5. What is the Uniform Negotiable Instruments Law?
6. What are the essential requirements of negotiable instruments?
7. Explain the statement: "The instrument must be in writing."
8. Where should the signature be placed?
9. What makes an instrument negotiable in form? Explain fully.
10. Why must a negotiable instrument be payable in money?
11. What is meant by the term "money"?
12. Explain the meaning of "payable absolutely."
13. What are the words usually used to indicate negotiability?
14. Is an instrument negotiable which is payable to "O. H. Jarvis or James Shan"? Explain.
15. Is a negotiable instrument payable after death good? Explain.
16. Explain the statement, "The time must be certain."
17. What are the four ways of fixing the due date?
18. What may be omitted from a negotiable instrument without affecting its validity?

2. PROMISSORY NOTES

Definition. — A promissory note is an unconditional written promise made by one or more persons to pay to another or his order or bearer a certain sum of money at a specified time.

The party who makes the note and whose promise is contained therein is called the *maker*, and the party to whom the promise is made is called the *payee*.

Form. — There is no form of note prescribed by law. In ordinary business practice a printed blank form is used, which may be filled in. The words "with interest" indicate that the note bears interest from its date. In the absence of such words, it bears interest only after maturity.

Notes are either several, joint, or joint and several, depending on the wording and the number of makers.

BANGOR, MAINE, Aug. 11, 19—.

Thirty days after date I promise to pay to the order of J. W. Strauss
One Hundred $\frac{00}{100}$ Dollars.
\$100 $\frac{00}{100}$. H. S. DICKSON.

This is a several note, as it has only one maker.

In a joint note there are two or more makers and the obligation to pay rests upon them jointly, and they must be sued together; if one is released the other or others cannot be held.

DENVER, COL. Aug. 11, 19—

Thirty days after date we promise to pay to the order of E. E. Bishop, One Hundred $\frac{00}{100}$ Dollars.
\$100 $\frac{00}{100}$. L. W. MANKER,
E. D. LANDER.

This is a joint note and the makers are responsible jointly for the payment of the note. This note is worded "We promise to pay," but it might be worded "We jointly promise to pay."

When two or more persons make a note and agree to pay jointly and severally the form is substantially as follows: —

\$400 $\frac{00}{100}$. FALL RIVER, MASS., Aug. 2, 19—.

One month after date we jointly and severally promise to pay to the order of The Fall River Savings Bank

Four Hundred $\frac{00}{100}$ Dollars
payable at the office of the bank.

GEORGE M. HOLDEN,
R. W. PENHOLLOW,
E. E. BISHOP.

Upon this joint and several note the makers may be sued together or any one can be held severally for the full amount.

If a note is worded, "I promise to pay" and is signed by two or more parties, it is considered a joint and several note.

\$400. RYON, WIS., Nov. 4, 1856.

Thirty days after date, for value received, I promise to pay Putnam C. Dart, or order, four hundred dollars with interest at the rate of twelve per cent per annum.

J. C. SHERWOOD,
WM. C. SHERWOOD.

This was held by the court to be a joint and several note; joint because signed by both parties and several because each defendant promised severally. — *Dart v. Sherwood*, 7 Wis. 523.

The following note was held to be joint and several, and separate judgments might be rendered against the two makers.

\$270.

STOCKTON, March 14, 1875.

One day after date I promise to pay Lorenzo Ely, or bearer, two hundred and seventy dollars at the post office in Stockton. Value received with use.

THOMAS W. CLUTE,
J. B. CLUTE.

— *Ely v. Clute*, 19 Hun (N. Y.) 35.

In a few of the states the distinction between joint notes and joint and several notes has been abolished, and all notes signed by two or more parties have been declared to be joint and several.

In either a joint note or a joint and several note if one party has to pay the whole amount he has a valid claim against the other makers for their shares.

The Negotiable instruments Law provides that the signature of any party may be made by a duly authorized agent. Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, without disclosing his principal, does not exempt him from personal liability.

An action was brought on an instrument reading, "I, J. L. De Give, President of the Southern Historical Association, hereby agree to pay Governor A. D. Candler \$250," and signed "J. L. De Give, President." It was held that De Give was personally liable on the instrument, as the word "President" was merely descriptive.

— *Candler v. De Give*, 133 Ga. 486.

The proper way for an individual who is acting as agent for another individual to sign an instrument is: "James Lane, by George Chapman, Agent." An officer of a corporation should sign as follows: "Michigan Rubber Company, by George Chapman, President."

\$637.40.

MILWAUKEE, Jan. 1, 1887.

Ninety days after date we promise to pay to Leo Liebscher, or order, the sum of six hundred and thirty-seven dollars and forty cents, value received.

SAN PEDRO MINING & MILLING CO.,
F. KRAUS, President.

Liebscher demanded judgment against the corporation and Kraus as joint makers of this note. The court held that it was the note of the

company alone and that Kraus signed for the company as its president. The signature alone showed plainly enough that Kraus was acting as officer or agent of the company. — *Liebscher v. Kraus*, 74 Wis. 387.

Some cases are in conflict with the above. It would be safer for Kraus to put "By" before his name.

QUESTIONS

1. What is a promissory note?
2. What are the parties to a promissory note called?
3. How are promissory notes usually made out?
4. What is a several note?
5. What is a joint note?
6. What is a joint and several note?
7. In a joint and several note if one party has to pay the whole sum, what are his rights?
8. What are the provisions of the Negotiable Instruments Law with reference to signatures?
9. How would you sign as agent for J. C. Milton and Co.?
10. Is a promissory note a contract? Explain.

3. BILLS OF EXCHANGE

Definition. — A bill of exchange, or draft, is a written order from one person to another to pay to a third party or his order a certain amount of money at a specified time.

The parties to a bill of exchange or draft are: the drawer, the party who draws the draft; the payee, the party to whom the draft is payable; and the drawee, the party on whom the draft is drawn, or the one who is to pay it.

Bank Draft. — When the drawer and drawee are banks the bill of exchange is known as a bank draft and constitutes a common method of paying the debts of parties residing in different localities.

Allen owes Brown of Boston \$100 and wishes to pay him; therefore he goes to his bank in Chicago and purchases a draft on a New York bank and sends it to Brown. This draft he has made payable to himself and on the back indorses "Pay to the order of William Brown" and signs "Charles M. Allen."

The draft might have been made payable to Brown on its face, but the advantage of the other form is that when the draft is returned to the Merchants Bank, having been indorsed by Brown, it contains a complete record of the transaction, and in case of a dispute is a receipt which Allen could procure for use in evidence.

The banks have an arrangement among themselves through the clearing house and their correspondents in the large financial centers like New York and Chicago, by reason of which they can issue these drafts. Here it may be seen how the bill of exchange or bank draft acts as a convenient transfer of obligation without the necessity of conveying money between distant points.

Bills of Exchange may be either Foreign or Inland. — A foreign bill of exchange is a bill drawn in one state or country and payable in another state or country. An inland bill of exchange is one made payable in the same state in which it is drawn. In the United States, however, a more usual distinction is between domestic bills, drawn and payable in the United States (whether in the same or in different states), and foreign bills, drawn or payable in a foreign country.

A bill drawn or payable in a foreign country is usually drawn in duplicate or triplicate, and upon the payment of one the other or others become void. The several copies are termed a set, the object in having them so drawn being that if one is lost, the other, or others, being sent by different routes, will reach their destination. The first copy presented is the one paid.

Time and Sight Drafts. — A time draft is one payable at a given time after demand or sight or date. It is usually worded "At thirty days' (or any number of days) sight pay to the order of" etc., or "Thirty days (or any number of days) after date pay to the order of" etc. When a draft is payable at a certain number of days' sight it must be accepted by the drawee; the time is reckoned from the date of the acceptance. A draft payable a certain number of days after date does not have to be accepted; however, it is best to have it accepted, as otherwise the payee runs a greater risk of having it dishonored after holding it the full time.

A sight draft is worded, "At sight pay to," etc., and is payable on presentation.

The draft is a common means employed by business houses to collect debts due them from parties residing in other places. The creditor draws upon the debtor for the purpose of making the collection.

Jackson, who is doing business in Chicago, owes Rupert, a wholesaler in New York, \$1000. Rupert draws a sight draft on Jackson payable to "Myself" for \$1000 and indorses it to his bank in New York for collection. The New York bank sends the draft to its correspondent (some bank) in Chicago, who collects it and the proceeds are returned and placed to the credit of Rupert in the New York bank.

The bill of exchange and promissory note, like the bank draft, may be transferred by the payee, and so may pass from hand to hand, and thus take the place of money.

Acceptance. — A bill of exchange being an order on the drawee to pay a certain amount of money to a third party, it is not binding upon the drawee until he has accepted it. The acceptance is signified, if a sight draft, by payment; if a time draft, by the drawee writing the word "Accepted" and the date across the face of the draft and signing his name. After he has accepted the bill, he becomes the acceptor and his obligation is then fixed and absolute and can be enforced against him, his position becoming much the same as that of the maker of a note. The acceptance may be upon the bill or in a separate written statement. Barring the case of an acceptance for honor, which will be discussed later, the only person who can accept a bill is the drawee.

\$1000.

NEW YORK, Aug. 11, 19—.

At sixty days' sight pay to the order of J. M. Brenen one thousand dollars and charge to the account of
To E. H. Pell, Denver, Colo.

HOMER JOHNSON.

E. H. Pell writes across the face of this draft, "Accepted Aug. 21, 19— E. H. PELL." This is a regular acceptance and the draft is due sixty days after Aug. 21.

A drawee may accept the draft payable at a certain bank where he has funds on deposit, or he may qualify the acceptance in almost any way he sees fit. He may reduce the amount; he may change the time; or, he may attach a condition. The holder is not bound to take a qualified acceptance, and he may declare the draft dishonored.

When the drawee accepts a draft unconditionally he is bound by its terms, even though it is not genuine.

In an action to recover the money paid on a forged draft, the court held that the drawee could not recover from an innocent holder. It is a well-settled rule that it is incumbent upon the drawee of a bill to be satisfied that

the signature of the drawer is genuine, and he is presumed to know the handwriting of such drawer, and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act and can neither repudiate the acceptance nor recover the money paid to an innocent holder.

— *National Park Bank v. Ninth National Bank*, 46 N. Y. 77.

The Bill must be Presented to the Drawee for Acceptance or Payment. — Until the bill is accepted the drawer is the party liable to the payee. He agrees that the drawee will accept it or he himself will pay it if proper presentment and demand be made upon the drawee and notice of dishonor be given him. If the bill is payable a certain length of time after sight, it must be presented for acceptance and the acceptance secured before the time will begin to run. The acceptor should always include the date in his acceptance on this kind of draft. If the bill is payable at sight or on demand, it must be presented to the drawee for payment within a reasonable time. If the drawee refuses to accept, the drawer must be duly notified and he thereupon becomes liable for the bill.

A bill of exchange dated December 18, 1851, was not presented for payment until two years and nine months thereafter. The draft contained no specific date for payment. Held, that the draft was payable on demand and must be presented for payment within a reasonable time to hold the drawer and indorser; and that an unexplained delay of two years and nine months is unreasonable and the drawer and indorser are released.

— *Chambers v. Hill*, 26 Tex. 472.

When the drawee refuses to accept, the bill is said to be dishonored.

Acceptance for Honor. — Mention has been made of acceptance for honor. This is also known as acceptance *supra protest*.

When a bill has been protested for dishonor by nonacceptance, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, accept the bill *supra protest* for the honor of any party liable or for whose account the bill is drawn. The acceptor for honor is liable to all parties to the bill subsequent to the one for whose honor he has accepted, and his undertaking is to pay the bill, if it is duly presented to the drawee for payment, is dishonored by nonpayment, is protested, and notice given to such acceptor.

Virtual Acceptance. — There is another mode of acceptance known as “virtual” acceptance, which is practically a promise to accept. If the virtual acceptance consist of a written unconditional promise to accept a bill already drawn or one to be drawn in the future, it is binding in favor of one who has taken it for value with a knowledge of the acceptance and in reliance thereon. The promise must clearly describe the bill and must be absolute in its terms.

Burk wrote to Marsh as follows: “Mr. A. D. Hunt, whom you know, has offered me a thirty-day sight draft on you for \$300 which he says you owe him on account. I wish to know, before taking this draft, if you will honor it when it is presented to you.” To this Marsh replied as follows: “I am indebted to Mr. A. D. Hunt in the sum of \$300, on open book account, which is due in thirty days, and I will accept his thirty-day sight draft on me for this amount payable to your order.”

This is a virtual acceptance, absolute in its terms, and binds Marsh in the event Burk takes the draft on the strength of this communication from Marsh.

QUESTIONS

1. What is a bill of exchange?
2. How many parties are there to a bill of exchange and what are they called?
3. (a) What is a bank draft? (b) Explain its use.
4. Distinguish between foreign and inland bills of exchange. Distinguish between domestic and foreign bills of exchange.
5. How are foreign bills usually drawn?
6. What is a time draft?
7. What is a sight draft?
8. What use is made of drafts?
9. Is a bill of exchange transferable? Explain.
10. What is acceptance as applied to drafts? How is it made?
11. What is the acceptor's obligation?
12. When should a draft be presented to the drawee for acceptance?
13. When the drawee refuses to accept, what is said of the draft?
14. What is an acceptance for honor? Explain.
15. What is a virtual acceptance? Explain.

4. CHECKS

Definition. — A check is an order to a bank upon demand to pay to the order of some person named, or to bearer, a sum of money to be charged to the account of the maker.

A check is drawn by a party having money on deposit in the bank and, as shown in the definition, is a special form of bill of exchange with the bank as drawee. A check is intended for immediate payment upon presentation, and the implied contract of the drawer is that the bank will pay the check. In case it does not, the drawer is entitled to notice of dishonor, except in the special cases provided for in the Uniform Law.

Check must be Presented without Delay. — The payee of a check must present it for payment within a reasonable time, or the drawer will be discharged from loss occasioned by his delay. What would be a reasonable time would depend upon circumstances, but it is generally considered that the check should be presented within a day after its receipt.

A reasonable time for the presentment of a check is, by the consensus of authority, limited to the next business day, or if the drawee bank is in another place, on the day following its receipt at the place of payment.

— *Aebi v. Bank of Evansville*, 124 Wis. 73.

McCarthy drew a check on Clark and Brothers, bankers, to the order of Morrisen, who held the check over three months before presenting it for payment. During that time Clark and Brothers had failed, but McCarthy had withdrawn his deposits before the failure. Held, that McCarthy was not released from liability on the check, as he had not been injured by the delay in presentment.

— *Morrisen v. McCarthy*, 30 Mo. 183.

Certified Checks. — A check purports to be drawn upon a deposit made by the drawer in the bank upon which it is drawn, and although in fact there may be no such deposit, it is still a check.

Checks pass freely between parties as money, yet, unless the drawer is known to have on deposit in the bank funds sufficient to meet the check, or unless his solvency is known, a person is not safe in accepting the check. It is therefore customary in such cases to have the bank certify the check, that is, the cashier or teller stamps the word "Certified," or "Accepted," and the date with his signature on the face of the check. The bank then takes the amount from the drawer's deposit and puts it in a separate account. The result is that the check is thereafter the check of the bank rather than of the drawer, and it is good as long as the bank is solvent. When the holder has the check certified, the bank by so certifying becomes the principal and

only debtor, and the holder by accepting the certified check discharges the drawer and all indorsers. But if the drawer procures the certification before delivering the check, he is not thereby released from further liability.

Russ received a check from Minot, on the First National Bank, for \$500. Russ did not have an account in the bank and as he did not wish to carry \$500 about on his person he took the check to the bank and had it certified. By this act Minot is relieved from further liability. The bank alone is liable to Russ and in case it fails, Russ will have to bear the loss.

Had Minot procured the certification before delivering the check he would not be relieved from further liability. If the check is presented for payment within a reasonable time, and not paid because of the failure of the bank, Minot would have to pay it.

Special Statutes. — Some state laws provide a definite time during which a check may be presented for payment, for instance ten days, and if the bank fails within this time the maker of the check is not released from liability. Other states make the drawing of a check against a bank in which the drawer has no funds a criminal offense punishable by a fine and imprisonment, one or both. The laws of one's own state should be consulted.

QUESTIONS

1. What is a check?
2. When must a check be presented?
3. What is a certified check?
4. Under what condition would the maker of a check that had been certified have to bear the loss if the bank failed?
5. Under what conditions would the holder of a certified check have to bear the loss in case the bank failed?

5. SPECIAL FORMS OF NEGOTIABLE INSTRUMENTS

Special forms of negotiable instruments other than those mentioned are in common use, namely: certificate of deposit, cashier's check, voucher check, traveler's check, letter of credit, express money order, post office money order, warehouse receipt, order bill of lading, trade acceptance, collateral note, judgment note, and bond.

A **Certificate of Deposit** is issued by a bank or banker showing that a certain sum of money has been deposited there, payable to a certain person or to his order.

A **Cashier's Check** is a check issued by the cashier of a bank and is frequently used in place of the certified check. It is an order on a bank, signed by its cashier, payable to a certain person or order.

The **Voucher Check** is a regular check to which is added a description of the particular account that is being paid. The voucher is to be signed by the one authorized to receive the check, and when it is signed it serves as a receipt for payment of a particular account, while a canceled check serves only as a receipt for payment of a certain sum.

Travelers' Checks are drafts for small amounts which are procured from banks or from express companies. They are useful to travelers, as they can be cashed in any country as money is needed for expenses.

A **Letter of Credit** is a form of draft which may be purchased at banks dealing in this form of exchange. It is payable, in whole or in part, at the convenience of the purchaser and serves very much the same purpose that travelers' checks serve.

Money Orders, which may be purchased from express companies or at a post office, are orders on the issuing agency payable at a specified branch and are used to transmit funds from one place to another. Either express or post office money orders permit one transfer by indorsement.

Warehouse Receipts are receipts given for salable commodities which are stored. A complete sale can be effected by selling the commodity and indorsing the warehouse receipt to the purchaser. In a few states the warehouse receipt is not negotiable.

The **Order Bill of Lading** is issued by transportation companies to shippers or consignors. It is a receipt and a contract which may be used by the consignor to secure advance payment on a consignment. This he does by indorsing the bill of lading to his banker to secure a draft on the consignee, which the bank takes for collection and may cash in advance. The bank, through its correspondent, will require payment by the consignee before delivering the bill of lading to him.

Trade Acceptance. — A special form of bill of exchange, known as a trade acceptance, has recently been authorized by the Federal Reserve Act and is in common commercial use.

A trade acceptance is defined by the Federal Reserve Board as "a bill of exchange drawn by the seller on the purchaser of goods sold, and accepted by such purchaser." It differs in use from a promissory note, in that a note is generally used to borrow money or settle past due obligations, whereas the trade acceptance shows on its face that it was given for a current transaction involving the sale of goods. In Great Britain the trade acceptance is in general use in financing mercantile transactions. A similar practice has begun in this country, and under the encouragement of the Federal Reserve Board it is expected that it will rapidly become the usual method of financing sales.

The advantages of a trade acceptance are that the credit created by the sale becomes immediately available to the seller, by discounting the acceptance, instead of being tied up in a book account; the date of payment is definitely fixed, and less liable to be unduly extended; and if legal proceedings are necessary for collection they are much more simple and easy.

A **Collateral Note** is one to which is added a certificate stating that the maker has deposited with the payee certain securities, such as bonds, as collateral to secure the payee against default in payment and authorizes the payee to sell the securities in case of such default.

The **Judgment Note** is a promissory note with a clause added by which the maker confesses judgment in case the note is not paid when due.

Bond. — A bond is a written promise, under seal, usually one of a series, to pay a certain sum of money (in amounts varying from \$50 to \$1000) at a fixed time in the future, usually ten or more years, and bearing interest at a fixed rate payable annually or semiannually.

Most bonds are negotiable. A negotiable bond might be considered a promissory note under seal. They are issued by the United States government, states, counties, cities, towns, and business corporations for the purpose of borrowing money. In

the hands of the owner they may be used as security for procuring loans and for this purpose they are extensively used.

Bonds are usually secured by a mortgage or deed of trust of the property of the borrower, which is described on the bonds and by virtue of which the property is held in trust for the bondholders. Such bonds are called mortgage bonds. Bonds may also be issued without other security than the credit of the borrower and are called debenture bonds. Coupon bonds are payable to the holder and have attached to them interest coupons which may be cut off by the owner and cashed as the interest falls due. Registered bonds are payable to a specified person whose name is registered by the government or corporation selling the bonds and the interest is paid direct. They are transferable only by indorsement and registering the name of the transferee. The registering of bonds is a measure of protection to the owner, as in case they are lost or stolen no one but the true owner can recover on them.

QUESTIONS

1. What is (a) a cashier's check, (b) a certificate of deposit, (c) a voucher check, (d) a traveler's check, (e) a letter of credit?
2. What is (a) a money order, (b) a warehouse receipt, (c) an order bill of lading?
3. What is (a) a collateral note? (b) a judgment note?
4. What is a trade acceptance? What are its uses and advantages?
5. Define a bond. How are bonds used?
6. Classify and define the different classes of bonds.

6. NEGOTIATION

Definition. — By negotiation we mean the transfer of a negotiable instrument from one person to another in such a way that the transferee is the legal holder thereof.

Assignability. — In general the law permits the assignment of any contract for the payment of money or the delivery of goods, (page 50). In an assignment, however, the title passes to the assignee subject to all the defenses which might be brought against it in the hands of the original owner. It is in this particular that *assignability* and *negotiability* differ.

Thirty days after date I promise to pay to Charles E. Boust
 One Hundred Dollars.
 \$100 W. H. FINCH.

While this is not a negotiable note, as it is not payable to "order" or to "bearer," it may be a good contract between Finch and Boust. The payee may transfer this instrument but the transfer will be an assignment and not a negotiation.

Negotiability. — Negotiability applies to all written promises or orders to pay money to "order" or "bearer," which conform to the requirements of a negotiable instrument, and all such promises or contracts may be transferred or assigned by one party to another by indorsement and delivery or in some cases by delivery only. Such transfer constitutes negotiation. When a negotiable instrument is negotiated from one party to another it passes free from certain defenses that might have been entered against it in the hands of the original holder, and the transferee has the right to collect it.

Principal Characteristic. — The principal characteristic of a negotiable instrument, and that which makes it pass freely as a substitute for money, *is that in the hands of a third party who purchases it in good faith and for value before it is due; it is enforceable*, while the original holder, perhaps, could not enforce it for the reason that the party who made the instrument has a good defense or counterclaim.

Vance gave his son a promissory note for \$500 without receiving any consideration for it. The son cannot collect of the father, as between the father and son lack of consideration is a defense, but had the son transferred this note before maturity by indorsing it to an innocent party for value, the innocent party could collect from the father, and no defense could be offered.

Connel holds a note for \$400 against Hartman; Connel is indebted to Hartman for \$150 for services rendered. Should Connel hold this note until it is due and demand payment of Hartman, the counterclaim of \$150 which Hartman holds against Connel can be deducted from the amount of the note and the difference paid. Should Connel transfer this note before it is due, by indorsing it to an innocent purchaser for value, the counterclaim could not be enforced against the innocent purchaser.

Indorsement. — Negotiable paper is transferred by indorsement and delivery, that is, by the payee signing his name on the back and handing it over to the transferee. When an instru-

ment is made payable to bearer, an indorsement, though usually made, is not necessary to give a good title to the transferee, delivery being sufficient, but if it is payable to a certain person or order, the indorsement is necessary to give title.

Kinds of Indorsements. — Indorsements may be blank, in full, or special, and may be unqualified or qualified.

The first indorsement should be written on the left or stub end of the instrument about one inch from the top.

Blank indorsement:

James C. Barry

In a blank indorsement the payee simply writes his name on the back of the instrument the same as it appears in the instrument, and it is then payable to bearer. Any holder may convert a blank indorsement into a full or special indorsement by writing, "Pay to order of (holder's name)" over the blank indorsement.

When a payee's name is incorrectly spelled in the instrument he should indorse with the name as given in the instrument and below sign his name properly spelled.

It is not safe to carry about negotiable paper indorsed in blank, as it is payable to bearer and if it is lost or stolen the holder might be able to recover on it.

Full or special indorsement:

*Pay to order of
L. W. Newman
James C. Barry*

A full indorsement does not destroy the negotiability of the instrument. It could not in this case be negotiated or transferred again without L. W. Newman's indorsement.

An unqualified indorsement places no restrictions on the further negotiation or transfer of the instrument or upon the indorser's liability. The blank and full indorsements exhibited are examples of unqualified indorsements.

Qualified indorsement:

*Without recourse
James C. Barry
or
Pay to order of
L. W. Newman without
recourse
James C. Barry*

A qualified indorsement simply passes title to the instrument without rendering the indorser liable for payment in case the maker fails. The indorser is liable, however, if the instrument is not a good contract.

Restrictive indorsement:

*Pay L. W. Newman
only
James C. Barry*

A restrictive indorsement destroys the negotiability of the instrument. It is payable to the indorsee only. Other forms are: "Pay L. W. Newman for collection," which means that Newman is an authorized agent for the collection of the instrument; or, "Pay Merchants Bank for deposit only," which restricts the instrument to use for deposit to the account of the indorsee. This is a common indorsement when deposits are sent to the bank by a messenger.

Indorsement with a waiver:

*Protest and notice
waived
James C. Barry*

By waiving protest and notice the indorser gives up the right of protest and notice of nonpayment in case the maker fails to pay and he is liable unconditionally. Protest is fully explained later.

Indorsing payment:

*Aug. 12, 19—
Received One Hundred
Dollars on the within
note.*

When part payment is made on a promissory note the amount paid is indorsed on the back of the note as shown.

The one receiving payment does not sign his name; the fact that the authorized payee has possession of the note indicates sufficiently that he was the one who received the payment.

Obligation of Indorser. — By indorsing an instrument unqualifiedly the indorser becomes responsible to the transferee or rightful holder of the instrument for payment in case the maker fails. In order to hold the indorser responsible the holder must fulfill certain requirements as to protest and notice of nonpayment which are fully explained later.

In indorsing an instrument, regardless of the kind of indorsement used, the indorser admits and guarantees that the instrument is genuine, that he has good title to it, that all prior parties had capacity to contract, and that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

Indorsement: Where and How Made. — The indorsement must be on the instrument itself or on a paper attached to it. The indorsement must relate to the entire instrument; a part cannot be transferred by indorsement, or a part to one party and the remainder to another.

David Bush gave a note to Kiddell for £473 sterling. Kiddell afterwards made the following indorsement: "I assign over to Hudson Hughes the sum of \$1930.50 as part of this note of hand. BENJAMIN KIDDELL."

Afterwards he made another indorsement and assigned the residue to Hughes. The court held that each indorsement was bad, as it affected only part of the note, and that being so, two bad indorsements would not constitute one good one. — *Hughes v. Kiddell*, 2 Bay (S. C.) 324.

Any writing intended to transfer the title to the instrument will be construed as an indorsement.

LINNEUS, May 30, 1873.

I promise to pay James H. Blethen, or order, \$137.50 at ten per cent interest, on demand.

EBENEZER TOZIER.

On the back of this note was written, "I this day sold and delivered to Catherine M. Adams the within note.

JAMES H. BLETHEN."

Held, that Blethen assumed all of the liability of an ordinary indorser. This indorsement but expressly stated what every indorsement impliedly states, a sale or transfer of the note. The liability of an indorser can be limited or qualified only by express terms.

— *Adams v. Blethen*, 66 Maine 19.

Presentment and Demand. — To fix the liability of the drawer or indorser, the first step is presentment to the drawee or maker and demand. Bills of exchange payable a certain time after sight are presented for acceptance; notes, checks, and bills payable on demand or sight are presented for payment. Presentment consists in exhibiting the instrument to the payer or handing it to him, while demand is a request to either accept or pay it, as the case may be. If the paper is payable at a bank, the mere fact that at the time of maturity the paper is at the bank at which it is payable is sufficient presentment and demand, provided the bank has knowledge of the fact.

Presentment and demand must always be made at the place designated in the instrument. Promissory notes are often drawn payable at a particular bank, in which case they are called bank notes, but the place of payment designated may be some other place than a bank.

A demand for payment was made by a letter addressed to the maker at a business building in Los Angeles, which was not shown to have been the place of payment named in the note. The demand was held insufficient as not having been made at the proper place and also because there was no presentment. — *Merchants Bank v. Bentel*, 15 Calif. Appeals 170.

In case there is no designated place of payment, it is said that the paper is payable generally. This means that it is payable at the place of business or residence of the maker of the note or acceptor of the draft, and when he has a known place of business, that should have preference over his residence.

A note was payable generally at Union, Iowa. It was presented at the maker's former place of business and at a bank in town, but no further inquiry was made. Held, the presentment and demand were insufficient.

— *Trease v. Haggin*, 107 Iowa 458.

If there is no place of payment specified and the maker or acceptor has no known place of business or residence, then it may be presented to the person to make payment wherever he can be found, or at his last known place of business or residence. Failing to present does not discharge the maker or acceptor.

Time. — Presentment for payment must be made on the day on which the instrument falls due, unless some "inevitable accident" or other legal obstacle prevents such presentment.

The fact that both the holder and indorser know that the note will not be paid when due and that the maker is dead and the estate insolvent does not relieve the holder from his obligation to make presentment and give notice of dishonor.

Maturity. — Drafts, bills of exchange, and promissory notes formerly had days of grace, that is, three days were added to the time stated in which the instrument should become due. The purpose of this was to give the payer in the early days of slow transportation an opportunity to arrange for payment.

Days of grace have been abolished by statute in all the states except in Massachusetts and New Hampshire, where grace is allowed on inland bills of exchange payable at sight, and in Texas, where grace is allowed on all paper payable otherwise than on demand.

If by its terms an instrument is payable a certain number of days after date, the day on which the instrument was drawn is excluded; thus a note dated January 10, payable thirty days after date, is due February 9. If the date of maturity is a legal holiday or Sunday, the instrument is payable on the next succeeding business day.

Where days of grace are allowed, the date of maturity is extended for three days, but if the last day of grace falls on a holiday or Sunday, the instrument is payable on the preceding day.

But when the time is reckoned by the month, as it is when the instrument is made payable one or more months after date, the note falls due on the corresponding date of the month in which it is due. Thus a note dated January 31, 19—, due one month after date, would mature February 28, 19— (or February 29, 19—), where no grace is allowed, and if dated February 28, it would be due March 28.

An instrument dated November 8, and payable twelve months after date, was held to have matured on November 8 of the following year, and a presentment on November 9 was not proper.

— *Lewy v. Winkelson*, 135 La. 105.

Not only must the presentment for payment be made on the right day, but it must be made at a reasonable time on that day. If presented at a bank, it must be during banking hours. In other cases the time must be at a reasonable hour.

Presentment for payment was made at the maker's house between eleven and twelve o'clock at night, the maker being called up from bed for that purpose. Held, that the presentment was at an unreasonable hour, and the demand was not sufficient. — *Dana v. Sawyer*, 22 Maine 244.

A note payable at a bank was presented after banking hours and the clerk still there refused payment, although funds had been left with the regular teller to pay it. Held, that the presentment and demand were not sufficient.

— *Newark India Rubber Mfg. Co. v. Bishop*, 3 E. D. Smith (N. Y.) 48.

The demand must be made by the holder or his duly authorized agent, upon the proper person, who is the maker or acceptor, or, if he is dead, his personal representative.

A note was signed "A. G. Cunningham, Agent." Nothing appeared on the face of the note showing for whom he professed to act. Presentment and demand of payment was made upon S. A. Cunningham, the wife of A. G. Cunningham. Held, that the demand was insufficient. By the signature the note was made by A. G. Cunningham, and the demand to bind the indorser must be made on him. — *Stinson v. Lee*, 68 Miss. 113.

Notice of Dishonor. — After payment has been refused and the instrument dishonored, notice of such dishonor must be given to the drawer of a bill of exchange and to each indorser of a bill or note, and any drawer or indorser to whom such notice is not given is discharged.

This notice under the common law must be given within a reasonable time, but by the Negotiable Instruments Law it is expressly stipulated when the notice is to be given. If the parties reside in the same place, it must be given the following day. If they reside in different places, and notice is sent by mail, it must be deposited in the post office so as to go the day following the dishonor; if given otherwise than through the mail, it must be done in time to be received as soon as the mailed notice would have been.

The bank was the holder of a promissory note, payable at said bank, made by James H. Jenkins and Anthony Debrell, and indorsed as follows, "A. Debrell, S. Turney, John W. Simpson." Turney's residence was within one mile of the bank. The note was due on February 1, and was protested on that day. On February 3 notice was sent Turney from the bank. Simpson, the next indorser, gave him no notice. The court held that the notice was not given in time. If it had been given by Simpson on the 3d, it would have been good, as each indorser is given a day to notify his prior indorser, but this was not done. The notice given was not valid as to the bank, so could not be to any one to whose benefit it would inure.

— *Simpson v. Turney*, 5 Humph. (Tenn.) 419.

The notice may be given by the holder or his agent or by any party who may have to pay the debt and who is entitled to be reimbursed.

A note with two indorsers was dishonored and notice given by the holder to both indorsers. The second indorser sued the first, and it was held, that the notice was sufficient; that it was not necessary for the second indorser to give notice to the first. It was sufficient that notice was given him, and the notice of the holder inures to the benefit of any indorser. — *Stafford v. Yates*, 18 Johns. (N. Y.) 327.

Notice to Indorsers. — When there are several indorsers the last indorser can look to the previous one, or in fact to any one who has indorsed before him, as well as to the maker or acceptor. Therefore it often happens that the holder upon dishonor of the instrument gives notice to the last indorser, and he in turn gives notice to the prior indorser, to whom he will look to be reimbursed in case he is obliged to pay the instrument.

The holder of a note notified the third indorser by mail and inclosed notices for the second and first indorsers. The third indorser notified the second and inclosed notice for the first. The second indorser received the notice on the 6th, and mailed notice to the first indorser on the 7th, in time to go on the second mail closing at 1.30 P.M. The first mail closed at 9.30 A.M., and defendant contended that notice should have been sent by that mail. The court held that the notice was sufficient and that plaintiff had used due diligence in giving notice. — *Smith v. Poillon*, 87 N. Y. 590.

The notice of dishonor may be either oral or written, and can be either delivered personally or sent through the mail. Some cases hold that the postal service cannot be used when the parties reside in the same town, but by statute in some states the post office can be used even in that case.

Hobbs took a written notice of dishonor to Straine's office, and finding no one there, left it. The court instructed the jury that if they determined that it was left in a conspicuous place, it was sufficient. Held, that this was correct. It is sufficient to charge the indorser if the notice is delivered personally, left at the indorser's place of residence or business, or deposited in the post office addressed to him at his residence or place of business with the postage prepaid. — *Hobbs v. Straine*, 149 Mass. 212.

Waiver. — Notice may be waived, and frequently the indorser adds "protest waived," the effect of this being to waive presentment and notice of dishonor as well as formal protest.

Protest. — Protest is a formal declaration in writing and under seal, made by a notary public, certifying to the demand and dishonor. When it is impossible to command the services of a notary, protest may be made by a resident of the place, in the presence of two respectable citizens who sign as witnesses of the act of presenting. Protest is required by law in the case of foreign bills of exchange, and is customary with other dishonored instruments also. The notary (or resident) makes the presentment and demand, and upon refusal issues a certificate of protest.

After attaching the instrument to this certificate the notary mails a regular form notice to all indorsers.

Irregular Indorser. — Frequently there appears on the back of a bill or note the name of a person who is not a party to it and to whom it was never indorsed. Such a person is known as an irregular or anomalous indorser. The object of such an indorsement is to give additional security to the payee. A person so signing his name is liable as indorser, according to these rules: if the instrument is payable to a third person, he is liable to the payee and all subsequent parties; if payable to the order of the maker or drawer, or to bearer, he is liable to all parties subsequent to the maker or drawer; and if he has signed for the accommodation of the payee, he is liable to all parties subsequent to the payee.

Such indorsements are frequently used when the payee of a note wishes to get it discounted at a bank, that is, to get the money on it. The bank requires an indorser, and the payee gets a friend to indorse the note. The irregular indorser is liable to the bank the same as any other indorser.

A note was made by a railway company and indorsed by four individuals not otherwise parties. It was held that their liability was that of irregular indorsers, that as such they were entitled to the rights of indorsers, and could not be held liable on the note without notice of presentment and demand. — *Rockfield v. First National Bank*, 77 Ohio State 311.

Accommodation Party. — An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, for the purpose of lending his name to some other person. Such party is liable to

any holder for value and to all parties except the party accommodated. For example, Marsh wishes to borrow money, but the bank will not lend it on his note. Marsh goes to Colby, who makes a note to Marsh's order, which he discounts at the bank. Colby is liable to the bank and all subsequent holders, but is not liable to Marsh.

An accommodation party has the same right under the statute as to notice of dishonor as any other party.

A note made by a corporation was indorsed for its accommodation by certain of the directors. Held, that the indorsers were entitled to notice of dishonor, the same as any other indorsers and failure to give the notice was not excused because they were directors of the maker.

— *Houser v. Fayssoux*, 168 N. C. 1.

The Holder or Payee. — We have yet to consider the position and rights of the holder or payee of the instrument. Whether he be the original payee or an indorsee, he is the party in whose hands the instrument rests and who has the right to the money which it represents. We have already learned that negotiable instruments have a distinguishing characteristic not possessed by any other contract, which is that when they have passed into certain parties' hands under particular conditions they are valid and enforceable, even though not valid between the original parties to them. A holder possessing such rights is called a holder in due course.

Holder in Due Course. — A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any defects in the instrument or in the title of the person negotiating it.

The instrument must be complete and regular on its face.

A note recited that it was payable "On or before four — after date." It was held that the instrument was not complete and regular on its face, and that one who took such an instrument could not be a holder in due course. — *Philpott's Estate*, 169 Iowa 555.

He must be a holder "for value." He must have given value for the instrument or must have taken it after value was given by another. This is the provision of the Negotiable Instruments Law and changes the rule in many states, which was that to be a holder for value a person must have parted with a present consideration. Where the holder comes into possession of the instrument through false pretenses or for wrong motives he cannot be said to be a holder in due course.

DeWitt, being acquainted with Perkins and knowing that he was responsible, purchased shortly before maturity a promissory note against him for \$300, paying therefor \$5. As between the original parties the note was invalid for want of consideration. Held, that DeWitt was not a holder in due course. The consideration paid by him was nominal. It was on the face of it merely either a gift or a subterfuge to get the note into other hands to cut off the defense of want of consideration.

— *DeWitt v. Perkins*, 22 Wis. 473.

We have discussed in the subject of contracts what is necessary to constitute a valuable consideration.

The purchaser of a negotiable instrument must take it before maturity. The mere fact that a note or bill is past due is considered sufficient notice of defect to put the purchaser on his guard, and a party buying past due paper is not a holder in due course. Likewise, if the purchaser of a bill of exchange has notice that it has been presented for acceptance and dishonored, he is not a holder in due course.

The Fairfield County National Bank sued on a note on which Hammer had defenses against the original payee and first indorser. The note had not been paid at maturity and the Fairfield County National Bank took the note after maturity. It was held that the Fairfield County National Bank was not a holder in due course and was subject to the defenses available against the payee. — *Fairfield County Nat. Bank v. Hammer*, 89 Conn. 592.

QUESTIONS

1. What is meant by "negotiation"?
2. What contracts are assignable?
3. What is the difference between assignability and negotiability?
4. Would a note payable one year after the maker becomes fifty years old be negotiable? Would it be valid for any purpose?
5. What is the principal characteristic of a negotiable instrument?
6. How is negotiable paper transferred from one party to another?
7. When may an instrument be negotiated by delivery?

8. Mention the different kinds of indorsements.
9. What is the effect of a blank indorsement?
10. How can a blank indorsement be changed to a special indorsement?
11. A check was made payable to John Bartow when the name should have been John Barstow. How should it be indorsed?
12. What is the effect of a full or special indorsement?
13. What is an unqualified indorsement?
14. What is the effect of a qualified indorsement? Give an example.
15. What is the effect of a restrictive indorsement? Give an example.
16. Explain the meaning of "protest and notice waived."
17. How should part payment be indorsed on a note?
18. What does the indorser of a negotiable instrument admit and guarantee?
19. What is the obligation of an indorser?
20. Is it necessary that the indorsement be made in any particular place or way?
21. Is it allowable to indorse a part of the amount to one party?
22. Why is presentment and demand necessary?
23. What is a bank note?
24. When and where should presentment for payment be made?
25. Explain the term "maturity" applied to drafts and notes.
26. Who must make "demand" and upon whom must it be made?
27. What is a "notice of dishonor"?
28. To whom, how, and when should notice of dishonor be given?
29. When there are several indorsers, how is each affected in case the note is dishonored?
30. What is a protest and when is it necessary?
31. Who is an irregular indorser?
32. What is the object, usually, of an irregular indorsement?
33. Who is an accommodation party?
34. What rights has the holder or payee?
35. Who is a holder in due course?
36. What are the provisions of the Negotiable Instruments Law with reference to a holder "for value"?

7. DEFENSES

In General. — It can be stated as a general proposition that a holder in due course takes title free from all defenses, or, as is often stated, "free from all equities," except such as affect the very existence of the instrument and which are said to constitute absolute defenses; that is, defenses which may be used against the holder.

Personal Defenses. — Personal defenses arise out of the transaction and relate to the acts or conditions surrounding the instrument rather than to the instrument itself, and are good and available as between the original parties. They are not good as against a subsequent holder in due course.

Fraud. — Fraud is generally a personal defense only, but when it vitiates the entire contract it is available to the maker as an absolute defense, if he can show that he was not negligent in allowing himself to be defrauded.

Maxwell sold securities to Childs by means of a fraudulent representation as to their value, and received a note from Childs in payment. Childs could refuse to pay the note if Maxwell held it until maturity, on the ground that it had been secured by fraud. If Maxwell should transfer the note to a holder for value, such a holder could enforce the note against Childs, as the defense of fraud in such a case is a personal one and does not affect the rights of a subsequent holder in due course.

Duress. — Where a negotiable instrument is obtained through duress, as between the immediate parties, it is voidable. The same rule, in the case of duress, applies to negotiable contracts as applies to other contracts.

Lack of Consideration. — Lack of consideration in any executory contract is a defense, and this rule applies to negotiable instrument contracts the same as to any other contract, except when the instrument comes into the hands of a subsequent holder in due course; then it ceases to be a defense.

Counterclaims. — A counterclaim is a defense as between the immediate parties to an instrument, but as against a subsequent holder in due course it is of no avail.

Barnes holds Evans's note for \$300. Barnes owes Evans on open account \$100. As between Barnes and Evans, the \$100 is a good counterclaim; but should Barnes transfer Evans's note to a holder in due course, that holder could maintain an action to collect the full amount of the note.

Delivery. — A negotiable instrument is incomplete and revocable until delivery, for the purpose of giving effect to the instrument, is made. As between immediate parties, or a remote party not a holder in due course, the delivery must be made by or under the authority of the proper party, and may be made conditionally, or for a special purpose and not to transfer title to the instrument.

Sayre sued on a note in the usual form, made to his order by Leonard. The defense was that the note was delivered to Sayre on condition that it was to be void if Leonard's partner, Wingo, ratified a certain transaction and that Wingo had ratified it. Held, that, as between immediate parties to the instrument, the defense of conditional delivery was available. This was properly proved by parol evidence and Sayre could not recover. — *Sayre v. Leonard*, 57 Colo. 116.

But where the instrument is in the hands of a holder in due course, a valid delivery by all parties prior to him so as to make them liable to him is conclusively presumed. This provision of the Negotiable Instruments Law changes the prior law in some states, where it was held that a party could escape liability by showing that he had not delivered the instrument, but it had been stolen or delivered without his authority.

Tobin arranged to buy two horses from one Leonard and had prepared a check to Leonard's order for the price. Leonard delivered the horses in Tobin's absence and his clerk delivered the check to Leonard without authority. As soon as Tobin returned he discovered the horses were unsound and stopped payment on the check, but meanwhile Leonard had negotiated it to Buzzel, a holder in due course. It was held that Buzzel could recover, as the defense of nondelivery was not available against a remote holder in due course.

But an incomplete instrument not delivered will not be a valid instrument in the hands of any holder, if completed and negotiated without authority.

Bennet accepted a bill of exchange in blank and left it in his desk. It was stolen by one Cartwright and negotiated to Baxendalle, a holder for value. Held, Baxendalle could not recover.

— *Baxendalle v. Bennett*, L. R. 3 Q. B. Div. (Eng.) 525.

Absolute or Real Defenses. — Absolute or real defenses are those which may be used against any holder of negotiable paper.

Illegality. — The mere fact that a contract is illegal is not an absolute defense to a negotiable instrument in the hands of a holder in due course; but if the contract is expressly made illegal and void by statute, an absolute defense is created.

If the maker of a note should agree in the instrument to pay a rate of interest in excess of the legal rate in a state where usury is forbidden by statute, an absolute defense would arise.

Incapacity of Parties. — The contract represented by the instrument may not be binding, for the reason that the party or

parties did not have the capacity to contract; as, the note or bill of an infant or lunatic. Still, if a valid negotiable instrument comes into the hands of an infant, he may, if of full mental capacity, transfer it to another.

Fraud. — Fraud as illustrated in the following example is an absolute defense.

T. H. Brown signed an instrument in the following form:

North East, April 3, 18-

Six mos. after date I promise to pay J. B. Smith or bearer \$50 when I sell by order Two Hundred and Fifty Dollars worth of Hay and Farm Stock for value received with legal interest, without appeal, and also without defalcation or stay of execution.

The instrument was torn apart at the vertical dotted line and the left-hand portion was discounted for J. B. Smith. Brown had been in no wise negligent in signing this instrument and he could not be held.

— *Brown v. Reed*, 79 Pa. State 370.

Alteration. — Another failure of contract arises when there has been a material alteration, for in this instance the minds of the parties have not met in the contract. When the instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

An action was brought against Horn and Long, the makers of a promissory note. The note was given for a threshing machine, and was originally drawn payable to "H. C. Pitt's Sons' Manufacturing Company," and after delivery to the company it was altered by substituting the name of "O. B. Hildreth" as payee. The alteration was made without the knowledge or consent of Long, and he never ratified the change. Horn and the payee made the change. Held, that this was a material alteration and released Long, although the bank was a holder in due course.

— *Horn & Long v. Newton City Bank*, 32 Kans. 518.

An action was brought against Wood and Higgins as makers of the following promissory note:

\$1000.

NORTH HADLEY, Mar. 31, 1868.

For value received, we promise to pay L. L. Draper, or order, one thousand dollars on demand, with interest at 12 per cent.

GEO. A. WOOD,
H. S. HIGGINS.

Higgins defended on the ground that the note he signed had been changed by substituting "we" for "I" and adding the words, "at 12 per cent." It was shown that Wood made the changes in good faith, but

without consulting Higgins. Held, that the note was void as against Higgins. — *Draper v. Wood*, 112 Mass. 315.

Any alteration of a negotiable instrument which changes its legal effect is a material alteration.

After a note was given by Moore, with Fuller as surety, Sullivan innocently procured Rudisill to sign as surety. The court held the note void, but allowed a recovery upon the original consideration. When a promissory note has been innocently altered without any fraudulent purpose, the payee may recover in an action on the original consideration. It was also held that the signing by a party as a joint maker, after the execution by the original maker and without his knowledge and consent, is a material alteration. — *Sullivan v. Rudisill*, 63 Iowa 158.

There must be an intent to make the alteration, and it must be made, of course, without the consent of the maker or acceptor of the instrument. The alteration must also be made by a party to the instrument or one in lawful possession of it. The holder cannot be prejudiced or injured by the act of a stranger without his consent.

A person not a party to the instrument, without authority wrote across the face of a draft the words, "Payable in United States gold coin." Held, that the alteration was not such as to vitiate the draft, although, if the alteration had been made by the payee or by his instruction, it would have invalidated the bill, as the change was evidently material.

— *Lagenberger v. Kroeger*, 48 Calif. 147.

Forgery. — When a signature to a negotiable instrument is forged, it is unenforceable in the hands of any holder who must derive title through the forgery.

The fact that there is an absolute defense to an instrument does not discharge all of the parties to it, or through whose hands it has passed. As we have seen, such defense exonerates the maker or acceptor of a negotiable instrument, but it does not relieve the liability of the indorser, because every person who negotiates such an instrument warrants that it is genuine, that he has a good title to it, and that all prior parties have capacity to contract.

Tishomingo Savings Inst. indorsed a bill of exchange to which they claimed title through a forged indorsement. The court held that the indorser warranted the genuineness of the prior indorsements on the bill and also his title to the paper. Should it be ascertained even after the payment of the bill that any of the indorsements were forged, the drawee

can recover the amount of the bill from the party to whom he paid it, and each preceding indorser may recover from the party who indorsed the bill to him. — *Williams v. Tishomingo Savings Inst.*, 57 Miss. 633.

QUESTIONS

1. What is a defense as applied to negotiable paper?
2. What are the two principal classes of defenses?
3. What are personal defenses? Name them.
4. What are absolute or real defenses? Name them.
5. How does fraud affect a negotiable instrument contract?
6. Is a party to a note bound when his signature was obtained by fraud?
7. What is the effect of duress on a negotiable instrument contract?
8. Under what conditions is a negotiable instrument contract that lacks consideration good?
9. When may counterclaims be offered as a defense?
10. How does no delivery affect a negotiable instrument? Explain.
11. Is a note given by a party who is without capacity to contract good? Explain.
12. Is a note given for an illegal object good? Explain.
13. How does alteration or forgery affect an instrument? Explain.
14. What constitutes a material alteration?
15. What is the effect of a forged signature?
16. If a valid instrument comes into the hands of an infant, has he a right to transfer it to another?
17. Is a holder in due course affected by a personal defense?
18. Does an absolute defense discharge all parties? Explain.
19. Will one who takes an overdue note be a holder in due course?
20. To be a holder in due course, is it necessary to pay face value for the instrument?

8. DISCHARGE

Payment. — Negotiable instruments are discharged by payment. A payment by the maker or acceptor to the holder, and the surrender of the instrument to him, ends the transaction and releases all the parties to the paper.

Hayes-Eames Elevator Co. issued its check on the Bank of Bromfield and it was paid by that bank. Later the bank reissued the check to Aurora State Bank, a holder in due course. It was held that when the Bank of Bromfield paid the check the instrument was entirely extinguished. The bank did not become a holder within the meaning of the Statute and had no right to negotiate the instrument.

— *Aurora State Bank v. Hayes-Eames Elevator Co.*, 88 Nebr. 187.

The agreement of the maker of a note or of the acceptor of a bill of exchange is that upon the date of maturity of the note or bill he will pay absolutely the amount named therein to the payee or indorsee. His promise is absolute, and it can be discharged only in some one of the ways in which a contract can be discharged, as by payment, material alteration, etc.

The only condition the maker can require is that the holder surrender the note or bill, and the maker is not obliged to pay without receiving the instrument, as otherwise he might be compelled to pay a second time, should the instrument come into the hands of a holder in due course.

Best made a promissory note to Lamberson, who indorsed it before maturity to Crall. Without notice of this transfer and before maturity Best paid the amount of the note to Lamberson and got his receipt for the payment. After the note became due Crall sued as indorsee. Held, that Crall may recover, as one who pays to the payee of a negotiable note the amount thereof before maturity, without surrender of the note, does so at his peril and may be required to pay the amount again to a holder in due course. — *Best v. Crall*, 23 Kans. 482.

When a payee has lost the instrument and so cannot surrender it, relief is generally given him by compelling the maker to pay, upon being furnished a bond to indemnify him against any loss because of the reappearance of the note.

When the maker pays a note, as a safeguard he should detach his signature or deface the note in such a way that it could not be negotiated again.

Payment by Indorser. — Payment by one of the indorsers after the instrument has been dishonored does not discharge it, as the prior indorsers and the maker or acceptor are still liable. The payment to extinguish the instrument must be made by or for the party primarily liable.

Gleason made a note which was indorsed by Lill for his accommodation. Gleason refused to pay the note at maturity and it was paid by Lill, who sued to recover the amount so paid. It was held that the note was not extinguished by payment and the indorser by his paying it succeeded to the rights of the holder against the maker and could recover on the note. — *Lill v. Gleason*, 92 Kans. 754.

The instrument may also be discharged by the intentional cancellation thereof by the holder or by any other act that would discharge a simple contract.

A husband gave his wife a note. Later he purchased personal property to the amount of the note, for their joint use, and at his request and insistence she mutilated the note. It was held that the mutilation at the husband's request was with the purpose of discharging the note and therefore the note was invalid. — *Kester v. Kester*, 38 Oregon 10.

Discharge of Indorser. — An indorser or drawer is discharged by any act that discharges the instrument or that discharges a prior party. Thus, the third indorser on a promissory note would be discharged by any act that would discharge either the maker (which would cancel the instrument) or the first or second indorser. Any agreement on the part of the holder of a negotiable instrument to extend the time of payment, unless with the assent of the indorsers, discharges the indorsers' liability.

QUESTIONS

1. What is the usual way of discharging a negotiable contract?
2. What danger accompanies payment before maturity?
3. How should the payment of a negotiable instrument be safeguarded?
4. Does payment by one indorser discharge prior indorsers? Explain.
5. How may an indorser be discharged?
6. What is the advantage of being a holder in due course?

9. INTEREST AND USURY

Definition. — As the question of interest is one that very frequently arises in connection with negotiable instruments, it is well to consider it here. A common definition of interest is, "The compensation paid for the use of money." The amount upon which the interest is reckoned is called the principal. The interest is usually a certain annual per cent of the principal.

In most of the states the rate of interest is prescribed by statute and known as legal interest, and when no rate is designated by the parties this rate will prevail. The usual legal rate is 6 per cent. The laws of one's own state should be consulted.

The statutes of the different states also determine whether or not a higher rate may be agreed upon between the parties and, in most cases, say how high a rate may be charged by agreement.

The taking of a higher rate than that allowed by the statute of a particular state is called usury and is punished in some of the states by the forfeiture of all of the interest; in others, by the forfeiture of both principal and interest. Where such statutes exist, a person agreeing to accept usurious interest cannot collect either the money due or the interest.

Claims on which Interest can be Collected. — Interest can be collected on all claims or amounts where it is mutually agreed by the parties that it is to be paid, as on a promissory note which contains the words “with interest” or “with use,” or some words to the same effect. It can also, without stipulation in the agreement, be collected upon debts from the time they become due until they are paid; in other words, all overdue debts draw interest. An illustration is the case of a promissory note containing no provision for interest, as such a note draws interest from the date it becomes due until it is paid, but does not draw interest before maturity.

It was held that a note payable five years after date “with six per cent interest from date” did not of itself fix the time when interest should be payable, nor did a statute authorizing the calculation of interest by the year determine that interest should be paid annually. But a provision in the note giving the maker the privilege of making payments on account of principal “at interest date” indicated that the parties intended interest to be paid annually.

— *Illinois Nat. Bank v. Trustees of Schools*, 111 Ill. Appeals 189.

But when the amount of the debt is not determined and is uncertain, or where the debt consists of a running account with payments at different periods, it is held that interest does not attach.

Pengra sued to recover rent under a lease of water power. The lease provided that a fixed amount of rent should be paid quarterly, with a deduction if the water supply was deficient. During the period for which rent was due the water supply had been deficient and also Wheeler had furnished supplies and made repairs against his rent account. Held, that was a case of mutual running accounts and no interest could be allowed either party.

— *Pengra v. Wheeler*, 24 Oregon 532.

Compound Interest. — Interest upon interest cannot be collected in the absence of a special agreement, and some jurisdictions do not allow it then.

QUESTIONS

1. Define (a) interest, (b) legal rate, (c) usury.
2. What is the legal rate in your state?
3. On what claims can interest be collected?
4. Under what conditions can compound interest be collected?

10. CREDITS

Forms of Credit. — Every negotiable instrument we have studied is a form of commercial credit. Credit, as used in business, means postponed cash payments. The open account is a form of credit where there is no negotiable credit instrument as evidence of its existence. The open account is often converted into other forms of credit by means of negotiable instruments, such as the bill of exchange or draft, the promissory note, and other negotiable instruments.

Extent of Credit. — It is hard to estimate what part of the world's business is done on credit or on postponed cash payments, but it is safe to say by far the greater part. The capital invested in our great enterprises is represented by stock certificates, bonds, mortgages, term notes, and other kinds of credit instruments. It is this fact that makes the negotiable instrument so important.

Classes of Credit. — The classes of credit which concern us in this connection are: personal credit, business credit, banking credit, and investment credit.

Personal credit is the credit a merchant, a banker, or any one extends to an individual. This is done through loans and open accounts.

Business credit is the credit established through the various business transactions. In this connection the account purchase and the short-term bank loan are the most common.

Banking credit is the credit business firms and others obtain from a bank by means of short-term loans. Banks are the financial agents of the country. They accept money from depositors and under the banking laws they are permitted to loan under approved conditions a large portion of the deposited funds; in this way credit is extended in a general way to such business enterprises as, in the judgment of the banks, merit it.

Investment credit is the credit extended to a business through the purchase of its credit instruments, such as mortgages, corporate bonds, and long-term notes, which are issued against the fixed assets of the business. The ultimate source of this credit is, for the most part, individual investors.

All the different credit instruments are subject to the laws governing negotiable instruments.

Discount Loans. — Many individuals and firms need at different times additional ready funds to finance certain business transactions. These funds are usually secured by discounting a short-term note at the bank where their deposit account is kept.

The Federal Reserve Act. — The Federal Reserve Act, which operates generally throughout the country, has greatly facilitated the securing of bank loans and has increased the ability of merchants to borrow funds or extend their credit.

Section 13 of this act, which relates directly to bank loans, reads as follows:

“Upon the indorsement of any of its member banks, which shall be deemed a waiver of demand, notice, and protest by such bank as to its own indorsement exclusively, any Federal Reserve Bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes — the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this act. Nothing in this act contained shall be construed to prohibit such notes, drafts and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturity at the time of discount of not

more than ninety days, exclusive of days of grace; provided, that notes, drafts, and bills drawn or issued for agricultural purposes or based on live stock and having a maturity not exceeding six months, exclusive of days of grace, may be discounted in an amount to be limited to a percentage of the assets of the Federal Reserve Bank to be ascertained and fixed by the Federal Reserve Board."

The Federal Reserve Board. — The Federal Reserve Board consists of seven members, including the Secretary of the Treasury and the Comptroller of the Currency and five members appointed by the President. The Board exercises general supervision over reserve banks and regulates the activities of member banks.

The Federal Reserve Board is empowered to issue Federal Reserve Bank Notes to Federal Reserve Banks upon receiving on deposit commercial paper from such banks. These Federal Reserve Notes are legal tender, and are redeemable in gold or lawful money at any Federal Reserve Bank, or at the United States Treasury. This makes it possible for the Federal Reserve Bank to furnish relief in a stringent money market or when a panic is threatened.

QUESTIONS

1. What are the principal forms of credit?
2. What are the different classes of credit?
3. What is personal credit and how is it extended to individuals?
4. How is business credit established?
5. What is banking credit and how is it obtained?
6. What is investment credit and what is its principal source?
7. How are discount loans secured?
8. What are the main provisions of the Federal Reserve Act with reference to loans and discounts?
9. Who compose the Federal Reserve Board?
10. What are the functions of this board?
11. How can the Federal Reserve Bank give relief in case of a stringent money market?

IMPORTANT POINTS

Negotiable instruments are credit instruments which pass freely from one party to another by indorsement and delivery or by delivery.

A distinguishing quality of negotiable paper lies in the fact that any person, not an original party, who is a holder in due course may collect it without regard to personal defenses that may be good as between the original parties.

A forged signature makes the instrument absolutely void in the hands of one claiming through the forger.

A check is considered a conditional payment only.

Presentment of a negotiable promise to pay is an exception to the rule that "the debtor must seek the creditor."

A negotiable instrument is a contract which, as between the immediate parties, requires consideration the same as any other contract.

Where the sum payable is expressed in figures and also in words, and there is a discrepancy between the two, the sum expressed in words prevails.

The written provisions of an instrument prevail, where there is a conflict between what is written and what is printed.

When it is not clear in what capacity a person has signed an instrument, he is considered an indorser.

A check made payable to a fictitious payee is payable to bearer.

As to the liability of the maker or makers, notes are either several, joint, or joint and several.

When the makers of a joint note indorse the note they become severally liable.

A holder in due course is one who acquires the instrument under the following conditions:

1. That it is complete and regular upon its face.
2. That he acquired it before it was due.
3. That he acquired it in good faith and for value.
4. That he was ignorant of any defects in the instrument or in the title of the transferor.

An infant who comes into possession of a negotiable instrument rightfully may transfer it by indorsement.

A bill of exchange drawn in one state and payable in another state is considered a foreign bill of exchange.

A foreign bill of exchange that has been dishonored must be protested.

Any notary public has authority to protest, or any resident of the place where the instrument is dishonored, in the presence of two or more witnesses.

The protest must be annexed to the instrument and must specify:

1. The time and place of presentment.
2. The fact and manner of presentment.
3. The reason for protesting the instrument.
4. The demand made and the answer given, if any, or the fact that the right party could not be found.

One who cannot write may have an instrument signed as follows :

J. C. Walker.

X his mark.

Some one writes Walker's name, he makes his mark, after which the party who wrote his name writes "his mark."

The consideration paid for a negotiable instrument need not equal its face value.

Payable absolutely means that there must be no condition named in the instrument to prevent an absolute liability.

Any future time that is sure to arrive satisfies the law.

In the case of ambiguous statements or signatures the law permits oral evidence to explain the intentions of the parties.

All time drafts, whether due after sight or after date, should be presented for acceptance.

The drawee who accepts a draft on which the drawer's signature was forged is liable.

A bank that pays a forged check is liable.

When an instrument has been dishonored and payment refused, notice, unless waived by indorsement or otherwise, must be sent to drawer and all indorsers.

An instrument must be presented promptly at maturity.

Personal defenses may be used against original parties; absolute defenses may be used against all parties.

Until delivered a negotiable instrument is incomplete and revocable as between original parties.

TEST QUESTIONS

1. Is the following a negotiable instrument?

PHILADELPHIA, PA., August 3, 1920.

Due Joseph Mitchell \$100, value received. GEORGE SNYDER.

2. An instrument is written in lead pencil in the following form:

BUFFALO, NEW YORK.

I, James Andrews, promise to pay to Thomas McGrath or order
One Hundred Fifty.....Dollars
Value received.

Mention three particulars in which this paper is not in the usual form.

3. Is the following a negotiable instrument? Has it any legal effect?

CLEVELAND, OHIO, September 1, 1920.

Five months after date I promise to pay George Williams the sum of
Twenty-five.....Dollars
Value received. E. D. PARSONS.

4. Is an instrument payable to one of three different persons named negotiable?

5. Is there any reason why the following is not a negotiable instrument?

Three months after date for value received I promise to pay Charles Barton, or order, One Hundred Dollars or Ninety-five Dollars if payable 60 days after date.
ELMER CLARK.

6. State whether or not the following is a negotiable instrument. For value received, I promise to pay Thomas Rice or order \$100 when he shall be graduated from college.
CHARLES ELLIS.

7. What kind of promissory note is the following?

One month after date for value received I promise to pay E. F. Sherwood \$100.
EDWARD F. GRANT,
JAMES GRANT.

8. A note is signed, "James Willis by John Rogers, Agent." Which of the two parties is liable?

9. A note is signed, "Frank Getman, Agent of William Carr." Which is liable on the note, Getman or Carr?

10. A note is signed "Erie Gas Company, Edward Booth, President." What is the effect of this signature?

11. The indorsement on a \$500 note was as follows: "Pay George Harris or order \$300 of the within note. H. E. YOUNG." Is this a good indorsement?

12. Why is a note protested?

13. When is protest of a negotiable instrument required by law?

14. Explain fully the legal effect of an indorsement waiving a protest.

15. What is the distinction between a personal defense and an absolute defense?

16. Is the following instrument negotiable? "On September 1, 1920, I promise to deliver to H. C. Dewitt or his order 150 bu. of A-1 grade shell corn for value received.
H. W. EDWARDS."

17. If the indorsee of a note knew that the indorser had no interest in the note and had only signed for accommodation, would that release the indorser from liability?

18. If you receive a negotiable instrument indorsed in blank, how can you protect yourself from the danger involved in the loss of the instrument?

19. Benson accepts a check on which there is an erasure and something has been rewritten. Is he a holder in due course?

20. Explain the following as applied to a promissory note: (a) negotiable in form, (b) payable in money to a designated payee at a time that is certain, (c) unconditional promise to pay, (d) holder in due course.

21.

OMAHA, NEBRASKA, June 1, 1920.

Sixty days after date I promise to pay to the order of Edmond Shaw
 One Hundred and $\frac{00}{100}$ Dollars
 at the First National Bank.

Value received

\$100 $\frac{00}{100}$.

W. D. WATSON.

Explain the nature of each of the following indorsements on the above note:

(a) *Edmond Shaw*

(c) *Pay A. L. Evans only*
Edmond Shaw

(b) *Pay to the order of*
A. L. Evans
Edmond Shaw

(d) *Pay Merchants National Bank*
for deposit
Edmond Shaw

22. Answer the following questions as applied to notes. What will make an ordinary note a judgment note? How is the maturity of a note determined? How long will a note run on which no payments are made before action to collect is legally barred?

23. What is the indorser's contract? Explain fully.

24. (a) Name three forms of promissory notes and explain the effect of each. (b) Name three forms of liability on notes.

25. What is the obligation of the drawee of a draft before and after the acceptance?

CASE PROBLEMS

Give the decision and the principle of law involved in each case.

1. A promissory note, given to A. W. Read by O. E. Jansen, was not signed, but on the same sheet of paper following the note were listed the securities which Jansen gave Read to secure payment of the note. Jansen's signature followed the list of securities. Is this a good note? Explain.

2. Rowe purchased a negotiable note before maturity. The note on its face was for \$500. The purchaser was acquainted with the maker and knew that he was solvent. He paid \$25 for the note. Was he a holder in due course?

3. If the purchaser had taken the above note after maturity and paid the face value, \$500, for it, would he have been a holder in due course?

4. Humpy becomes the holder in due course of a note upon which the maker's name was forged. Can he collect of the indorser?

5. Rich made and delivered a promissory note payable three months after date to the order of Gaynon. Gaynon after receiving the note changed the time of payment to four months without the knowledge or consent of Rich. Did this affect Rich's liability on the instrument?

6. Downs becomes a holder in due course of a promissory note which was given by Rice to Bates without consideration. Downs sues Rice on the note and Rice sets up the defense of no consideration. Can Downs recover?

7. Dyer executed a promissory note to Merrit for \$100 payable three months after date. One month after date he paid the note. The note instead of being destroyed was lost and came into the hands of Mellon, a holder in due course. Can Mellon recover on the note?

8. Brown makes a note for three months, but says nothing in reference to interest. He pays the note nine months after having made it. Can interest be collected upon it, and, if so, for how long?

9. On the day of maturity, Foust, a holder in due course, presented a note to Simpson, the maker. Simpson refused to pay, stating that he had received no consideration for the note. What are the rights of the parties? Explain.

10. Fitch and Mowery gave a note to Swan on which J. E. Green's name as indorser had been forged. Swan transfers the note to Hickey by indorsement. Fitch and Mowery become insolvent. How are the parties to this note affected? Explain.

11. Jacobs indorsed for the accommodation of Hardman a note for \$1000 payable 60 days after date. Hardman changed the time to 90 days and discounted the note at his bank. When the note came due Hardman failed to pay and the bank protested the note and sent notice of nonpayment to Jacobs. What are the rights of the parties? Explain.

12. Willson, the payee of a negotiable instrument, indorses it to Baker by full indorsement. When the note came due the maker, J. C. Williams, refused payment, claiming that the note had been given as a result of duress. Is this a good defense against Baker? Explain.

13. Balford wrote his name on a blank note and left it where it was picked up by Hearn, who filled it in for \$1000 and transferred it to Maxwell, an innocent purchaser for value. Maxwell indorsed the note and discounted it at his bank. Can Balford be held? Explain.

14. Suppose Maxwell in problem 13 had known the fact, but agreed with Hearn to take the note for the purpose of collecting from Balford; could Maxwell have collected it?

15. Could a bank have collected the note in problem 14 if Maxwell, knowing the fact, had indorsed it to them and they became holders in due course?

16. Norton gave Roder his three months' note for \$500. Roder indorsed the note to Walker to apply on account. The note was not pre-

sented for payment at maturity, but was presented two weeks later. Is the indorser liable? Explain.

17. At 2 o'clock on the afternoon of January 5, Milton accepted a check from Conley for \$5000 on the Merchants National Bank. The same afternoon Milton went to the Merchants National Bank to cash the check, but he decided that he did not wish to carry that amount of money around, so he had the check certified. He was called out of town that evening and when he returned the bank had failed. What course is open to Milton? Explain.

18. Lamb is the holder of a negotiable note on which appear the following indorsements:

Homer Cranford
Pay to Charles White or order
F. D. Coon
Pay to Sam Harvey or order
without recourse to me
Charles White
Sam Harvey

The note is due; Lamb presents it to the maker and demands payment, which is refused. What should be his procedure? Explain fully the rights and the liabilities of each of these indorsers.

19. Odell indorsed a note for the accommodation of Engle. Engle discounted the note at his bank and at maturity he failed to pay it. The bank tried to collect from Odell, who set up the defense of no consideration. Is he liable? Explain.

20. Clary had his check certified by his bank and sent it to Mendel and Company to apply on account. Mendel and Company held the check for twenty-eight days before depositing it. The bank certifying the check failed and closed its doors twenty-nine days after the check was certified and before it was returned. Who must bear the loss?

21. Taylor made out a note, complete in every particular, payable to Bryan and locked it up in his safe. That night he was taken ill and died suddenly. Bryan knew the note had been prepared for him and brought action to recover it. (a) Is it a good note? (b) Has Bryan any rights? Explain.

22. A note is worded "We jointly promise to pay" and signed by Harvey Long and Edmund Drew. It was not paid when due, and as Long was to be away for a period of time, J. C. Humphrey, the holder, took action against Drew. Can he succeed? Explain.

23. In problem 22 had Long and Drew both indorsed this note, would the result of the action have been different?

24. J. W. Vance gave O. E. McClure a note for \$500 and in connection with the promise to pay he stipulated that he would pay the \$500 when due or assign to the payee a half interest in a threshing machine which he owned. When the note came due he refused to do either and set up as a defense the nonnegotiability of the instrument. Has the payee a valid claim against Vance? Explain.

25. Jarvis made a note dated at Detroit, Michigan, and payable in Canadian money. The note was indorsed, in the usual course of business, by the payee to M. O. Dodd. Jarvis failed to pay and M. O. Dodd, after due notice, brought suit against the indorser. Can he collect? Explain.

26. Hatch holds a note for \$500 against Dart. Hatch is indebted to Dart for \$500. Hatch transfers the note to Lyman in the usual course of business for value. When the note falls due, Lyman presents it to Dart, who refuses payment on the ground that Hatch is owing to him an amount equal to the face of the note. Lyman protests the note and serves notice on the maker and indorser. Has the maker a good defense? Explain.

27. Holcomb transferred a note to Merritt by indorsing it without recourse. The note was signed by J. C. Crumb, a well-known builder, but the signature had been forged, a fact known to Holcomb when he transferred the note. When the note came due Merritt presented it to Crumb, who discovered that the signature was a forgery. Merritt took action against Holcomb. Can he recover? Explain.

28. Johnson indorsed a note to Stewart as follows: "Pay A. H. Stewart only. L. W. Johnson." Stewart indorsed it in full to O. T. Thayer. The maker of the note failed to pay and Thayer brought action against the indorsers. Is either of the indorsers liable? Explain.

29. Hardy signs and delivers a blank note to Spaulding and directs him to fill it in for an amount sufficient to settle a claim held by Lansing, to whom Spaulding was to deliver the note. Spaulding filled in the note for \$500 and negotiated it to Black, who demanded payment at maturity. Hardy refused to pay the note and set up as a defense, fraud and lack of consideration. Is he liable? Explain.

30. Lowry thought that he was signing a subscription blank for a set of encyclopedias, when in reality he signed a cleverly contrived promissory note. This note was negotiated and it got into the hands of an innocent party, who took action to recover. Can he succeed?

GUARANTY

Definition. — A guaranty is a contract resulting from a promise by one party to answer for the debts, defaults, or legal obligations of another party. It is collateral to the main contract.

Jerome will not give Hines credit unless North will guarantee payment of the account. North agrees to pay if Hines fails to do so. On the strength of this guaranty in writing which North gave Jerome, Hines secured the credit he desired. In case Hines fails to pay, North is liable.

Parties. — There are three parties to a guaranty. The guarantor, the one who gives the guaranty; the creditor, the one to whom the guaranty is given; and the principal, the one whose performance or obligation is guaranteed.

The Contract. — The contract must be in writing as required under the Statute of Frauds, and signed by the guarantor. As distinguished from an original undertaking, whereby one assumes responsibility and is liable for the performance of his part of the contract, it is an agreement to assume liability in case the principal, the one whose performance or obligation is being guaranteed, fails to meet his obligation. That is, it is a promise contingent upon a failure or default.

Shelton contracted to erect an office building for Moon. One provision of the contract was that Shelton should secure two guarantors, satisfactory to Moon, who would guarantee to reimburse Moon for any loss he may suffer as a result of Shelton's failure in any particular to fulfill his contract.

The legal requirements of this guaranty are:

1. That it must be in writing and signed by the guarantors.
2. That it must be given concurrently with the original contract as an inducement for Moon to enter into a contract with Shelton or if made at another time, some consideration must be given for the guaranty.

The contract of indemnity which is a simple contract must not be confused with the contract of guaranty. If the contract is one of indemnity only, that is to indemnify a person for any

loss he may suffer by reason of doing something at the request of the guarantor, the contract need not be in writing. In such cases there are but two parties.

Saunders engaged Lee, a truckman, to transfer some goods from a warehouse to Saunders's store. The streets were slippery and Lee refused to take his truck out. Finally Saunders told Lee that he would make good any loss resulting from accident caused by the slippery streets. Lee was induced by this promise to attempt to move the goods, and his truck slid against the curb and damaged a wheel. Saunders will have to reimburse Lee, as this is an indemnity contract between two parties and does not need to be in writing.

If the promise is an original instead of a collateral one it does not have to be in writing.

North says to Jerome, "Let Hines have such articles as he desires and I will see that you get your pay." In this instance North becomes the original debtor and the contract does not need to be in writing.

Consideration. — Contracts of guaranty like all other contracts must be supported by consideration. When the contract of guaranty is made at the same time as the contract guaranteed, the consideration for the original promise will also be the consideration for the collateral promise.

When the contract of guaranty is made subsequent to the contract which it guarantees, a new consideration is required.

Morrison leased a store to Economy Furniture Co. Several weeks after the execution and delivery of the lease Bullen signed a written guaranty of the lease. When sued on the guaranty Bullen defended on the ground of no consideration. The Court held that the guaranty, made after the principal contract, was a separate and distinct contract and was not binding without a new and independent consideration.

— *Bullen v. Morrison*, 98 Ill. Appeals 669.

Guaranty of Collection and Guaranty of Payment. — There is a difference between a guaranty of collection and a guaranty of payment. In a guaranty of payment the guarantor agrees to pay if the principal does not, while in a guaranty of collection he agrees to pay if the debt cannot be collected from the principal.

Wymann indorsed a note for Hunt as follows: "I hereby guarantee payment of the within note" and signed his name. In this case if Hunt fails to pay the note when it is due, Wymann will have it to pay.

Had Wymann indorsed the note as follows: "I hereby guarantee the collection of the within note" and signed his

name, the payee of the note would have to show that he could not by any means collect of Hunt before he could hold Wymann.

Kinds of Guaranty. — There are many different kinds of guaranty known in business. The most common are: guaranty of quality of goods, guaranty of credit, guaranty of honesty or fidelity, and guaranty of title to real property.

There are many business concerns engaged in making guaranties and selling guaranty insurance. The title guaranty companies and the fidelity insurance companies are the most common.

The purchaser of a building lot, who wishes to make sure that the title to the lot is free from defect, makes application to a title company to have the title searched and insured. The title company have their experts make a search and if they find no defects they issue to the purchaser of the lot a title insurance policy whereby they guarantee to indemnify him for any loss which he may suffer by reason of defects in the title to the lot which he purchased.

Fidelity insurance companies guarantee the honesty and fidelity of employees and others who are trusted with the custody of property and funds belonging to some one else.

Nelson secured a position as cashier with the Shore Line Navigation Company. They required him to furnish a bond for one thousand dollars, by which his honesty and fidelity would be guaranteed. Nelson made application to a bonding company, who furnished the bond. Should he default, the bonding company will have to reimburse his employers for any loss that they may suffer up to the amount of the bond.

Notice of Acceptance. — Notice of the creditor's acceptance of the guarantee is not necessary when the guaranty is made at the same time as the main contract, but in case of a continuing guaranty it seems to be the prevailing opinion that notice by the creditor is necessary to hold the guarantor.

Monroe gives a continuing guaranty to Wilson, the creditor, for payment for all goods purchased by Rhodes. In this case it would seem to be the safest plan for Wilson to notify Monroe each time Rhodes makes a purchase. The notice should give the date of purchase and the amount.

Notice of Default. — Courts differ on the question of whether the creditor must notify the guarantor in case the principal defaults in his obligations covered by the guaranty.

In states requiring notice the following rules are observed:

1. Failure to notify guarantor always discharges him if he is injured as a result of not being notified.

2. The guarantor is discharged for want of notice if the amount for which he is bound is not known to him.

In view of the many conflicting rules and opinions, the safer plan is to give notice.

Discharge of Guarantor. — A guarantor may be discharged from his contract of guaranty for the following reasons:

1. Alteration of the contract of guaranty.
2. Voluntary release of the principal.
3. Extension of time to the principal.
4. Revocation of guaranty by guarantor.
5. Surrendering possession of securities by the creditor.
6. Failure of creditor to take action against the debtor after notice.

7. Death of the guarantor.

8. Continued employment of principal after dishonesty was discovered.

9. Where the main contract is illegal and nonenforceable.

Alteration of a Contract of Guaranty. — Where the creditor has changed the terms or made any other material alteration in the contract with the principal without the guarantor's consent, he is discharged.

Foster guaranteed the payment of a 6% interest 60-day note given by Hatch to Munson. Munson on request of Hatch and without Foster's consent changed the time to one month. This is a material alteration and discharges Foster.

Release of the Principal. — Where the creditor voluntarily releases or discharges the principal without the consent of the guarantor the guarantor is also discharged.

Miner guaranteed a debt owed by Van Dyke to Wheeler. Wheeler agreed with Van Dyke to accept 60 per cent of the amount of the debt and give him a release under seal for the full amount of the debt. This discharges Miner.

Had Van Dyke been forced into bankruptcy and paid only 60 per cent on a dollar, this would have been an involuntary release and Miner would not be discharged.

Extension of Time. — When the creditor makes a definite extension of the time of payment to the debtor, without the consent of the guarantor, the guarantor is discharged.

Bower guaranteed payment of a debt due September 15. The creditor, without Bower's consent, extended the time to November 15. This act of the creditor in extending the time discharged Bower.

Revocation of Guaranty. — When the consideration for the guaranty is an act to be done in the future by the creditor, the guarantor may revoke the guaranty any time before the act is done and by so doing he is discharged. This applies to continuing guaranties.

Cummings guaranteed payment for all goods purchased by Steele from Post, on and after September 1. On December 1, Cummings notified Post that he would no longer guarantee payment for goods purchased by Steele. As soon as Post receives this notice, Cummings is discharged as a guarantor for all indebtedness incurred thereafter.

Surrender of Securities. — When the creditor voluntarily surrenders securities held by him as security for the debt guaranteed, the guarantor is discharged.

Failure of the Creditor to Take Action. — In some states, when the guarantor directs the creditor to take action, which he has a legal right to take, and the creditor fails to do so, the guarantor is discharged.

This rule does not apply to an indorser of a negotiable instrument.

Death of Guarantor. — Death of the guarantor discharges the contract of guaranty and has the same effect as a revocation. In some states notice of the death must be given in order to relieve the guarantor's estate from further liability.

Continued Employment of Principal after Dishonesty was Discovered. — When the employer willingly retains in his employ a dishonest employee, after he is known to be dishonest, the guarantor, who guaranteed his honesty, will be discharged.

Main Contract Nonenforceable. — When the main contract is illegal and not enforceable against the principal, the contract of guaranty, which is collateral to the main contract, could not be enforced and the guarantor would be discharged.

Anderson guaranteed the payment of a note with interest at 8% in a state where 8% was more than the legal rate. Because of the usury, the contract was illegal and nonenforceable and Anderson would be discharged from his contract of guaranty.

Guarantor's Liability. — Under the terms of the contract, the guarantor's liabilities are fixed. In substance he guarantees

performance on the part of some one else, and if the one whose obligation is guaranteed does not fulfill it, the guarantor is liable.

Rights of Guarantor. — A guarantor who has been required to pay his principal's debt or obligation has certain rights which he may exercise.

1. He has a right to claim indemnity from his principal.
2. He has a right to be subrogated to the creditors' claims to all collateral securities.
3. He has a right to demand contribution from his co-guarantor.

Right of Indemnity. — The guarantor has a right to recover from his principal all moneys rightly paid on account of the guaranty, together with all expenses reasonably incurred by him in defending any action by creditors.

Right to be Subrogated. — When the guarantor pays the debt, he is entitled to all securities held by the creditors as security for the debt which he has paid. Such a substitution of one person for another in the rights of a creditor is called subrogation.

Contribution from Co-guarantors. — When two or more persons guarantee a debt or obligation and one has to or does pay the entire debt, he is entitled to contribution from each co-guarantor for his *pro rata* share, unless a different basis of liability has been agreed upon by the guarantors.

Guaranty Compared with Suretyship. — In the case of a guaranty, the guarantor becomes liable only where the principal fails, while in the case of suretyship the surety makes the principal's debt or obligation his debt or obligation and he is bound severally with the principal, upon the original contract.

Hayes gave Banning a promissory note for \$500. Jewett signed the note with Hayes as surety. When the note falls due, Banning may ignore Hayes entirely and demand payment of Jewett and Jewett will have to pay the note.

Suretyship. — Aside from the difference in the nature of the contracts, suretyship and guaranty conform to the same legal requirements, and the principles of law applicable to one are applicable to the other.

QUESTIONS

1. What is a contract of guaranty?
2. Who are the parties to a contract of guaranty?
3. What are the special requirements in a contract of guaranty?
4. Why must a contract of guaranty be in writing?
5. What is the usual consideration for the guarantor's or surety's promise?
6. When will a new consideration be required to support a contract of guaranty?
7. What is the difference between a guaranty of collection and a guaranty of payment?
8. Mention the different kinds of guaranty.
9. What is the purpose of a guaranty of title to real property?
10. Under what circumstances would an employer require a fidelity bond of an employee?
11. What are fidelity bonds and who issues them?
12. What are the rules governing notice of acceptance by creditors?
13. In case of default, must notice be sent to the guarantor? Explain.
14. How is the guarantor's liability fixed?
15. How may a guarantor be discharged from his contract?
16. What are the special rights of the guarantor?
17. How does the liability of a surety differ from the liability of a guarantor?
18. What must the creditor do before he can proceed against a guarantor? Against a surety?
19. What is the right of subrogation?
20. When there are two or more guarantors and one settles the whole debt, what special right has he?
21. If the creditor and the principal debtor, without the consent of the guarantor, alter the original contract, how does this affect the guaranty?
22. What effect does the death of the guarantor have upon his contract?

IMPORTANT POINTS

A contract of guaranty or suretyship is subject to all legal requirements of contracts in general.

A guarantor's undertaking is collateral to that of his principal.

A surety is one who makes his principal's debt his own debt.

A guarantor is usually entitled to demand or notice within a reasonable time after default of payment.

A surety is not entitled to demand or notice. He is bound whether notice is given or not.

If one surety or guarantor pays the whole debt he is entitled to contribution.

TEST QUESTIONS

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No additional consideration is required in a contract of guaranty or suretyship made concurrently with the original contract.

A new consideration is required in all contracts of guaranty and suretyship which are entered into subsequent to the original contract.

A guarantor's obligations are fixed by the terms of the contract.

Causes which will discharge the principal will serve to discharge the guarantor or surety.

An indorser's contract is collateral to that of the maker or principal the same as a guarantor's contract, while a surety's contract is primary and directly enforceable.

TEST QUESTIONS

1. How must a contract of guaranty be evidenced?
2. What is the difference between an indorser's contract and a guarantor's contract?
3. When a guarantor is not notified of a default by the principal, what is the effect on the guarantor's liability?
4. May the creditor proceed against the guarantor without first proceeding against the principal?
5. How does the liability of surety differ from that of the indorser of a negotiable instrument?
6. Davis is indebted to Lamb and is unable to pay his debt. The debt was overdue when Davis induced Merritt, a friend of his, to sign a guaranty of the debt. Is Merritt liable on the guaranty? Explain.
7. In the case just mentioned, Lamb agreed to withdraw legal proceedings if Davis would get some one to guarantee the debt. Merritt was induced by Davis to guarantee the debt. Is Merritt liable? Explain.
8. Maxwell is a surety for Green on Green's debt. Maxwell pays the debt before any demand has been made on Green by the creditors. Is Maxwell entitled to be reimbursed by Green?
9. James is the guarantor of Burt's debt to Hinds. Hinds gave Burt a release. What effect does this have on James' obligation? Explain.
10. Has the surety a right to take advantage of any defenses that might be used by the debtor?

CASE PROBLEMS

Give the decision and the principle of law involved in each case.

1. Cochran wished to open an account with Dean and to purchase provisions on credit. Dean would not give Cochran credit unless some one

GUARANTY

would guarantee payment of the account. Cochran induced a friend of his, by the name of Jacobs, to sign a statement as follows:

"I hereby guarantee to any person selling goods to Cochran, not exceeding \$500, that if he does not pay the account when due, I will." Dated and signed, John C. Jacobs.

When the account came due, Cochran failed to pay and Dean took action against Jacobs. Can he recover?

2. Had this guaranty been made in writing as shown above after the goods had been purchased and the credit given, could Dean have collected from Jacobs?

3. Sullivan contracted to erect a house for Bertine. Bertine required that Sullivan furnish a bond, signed by two responsible citizens, that he, Sullivan, would faithfully perform his contract and that he would reimburse Bertine for any loss. Sullivan failed to pay his subcontractors and the masons filed a mechanics' lien against the house. Bertine had to settle this lien, which was more than the amount he still owed Sullivan. He took action against the bondsmen. Can he recover from them? Explain.

4. Rupert guaranteed the collection of a certain note. When the note became due, the holder presented it to the maker, who refused payment, and then sent notice to Rupert that payment had been refused and that he would look to him for the payment of the note. Rupert paid no attention to this and very soon after the holder of the note took action against Rupert to recover payment. Can he succeed?

5. Hersh purchased a building lot and had the title searched and insured by the Central Title Guaranty Company. Some time after, Hersh received notice that there was a tax lien of several dollars against the property. He notified the title company and they refused to pay the lien, claiming that they were not responsible for tax items. Hersh took action against the title company to recover damages. Can he succeed?

6. Clary secured a position as messenger with a local bank. The bank required that Clary furnish a fidelity bond of \$1000, which he did. Clary was found guilty of appropriating bank funds to his own use. The bank notified the Bonding Company and forwarded a claim to them for the funds which Clary had appropriated, but did not discharge Clary. The Bonding Co. refused to reimburse the bank for the loss and the bank took action to recover. Can it succeed? Explain.

7. Harding guaranteed the payment of a 3-months note given by Murry to Philips. After Harding had guaranteed the payment of this note, Philips changed the time to 6 months and added with interest at 6%. Harding did not hear anything from his contract. When the note became

due, Murry failed to pay and Philips notified Harding. Harding discovered the alterations and refused to settle. What are the rights of the parties?

8. On October 27 Adams gave his promissory note to Marsh, with Wendell as surety. The note was due on December 27. When it became due Wendell requested Marsh to collect the note. Instead, he orally agreed with Adams for a consideration to extend the note for one year. At the end of this time Adams failed to pay and Marsh took action against Wendell to recover. Can he succeed?

9. Ward signed a note with Harvey at Harvey's request and Harvey agreed to hold Ward harmless and to indemnify him against loss. Ward paid the note and brought suit against Harvey without giving him any notice of his payment. Can he collect?

10. Baker was surety on a bond of an executor. The executor misappropriated funds belonging to the estate, and when demands were made on him by those who were entitled to the estate, he said he was unable to pay. Suit was then brought against Baker as surety, who defended on the ground that no demand had been made on him. Is he bound? Explain.

BAILMENT

1. IN GENERAL

Definition. — Bailment is defined as a delivery of some chattel by one party to another, to be held according to the special purpose of delivery, and to be returned or redelivered when that special purpose is accomplished. As we have already seen, a bailment differs from a sale, in that the title to the property does not pass in a bailment. Practically every case in which one receives and holds or handles the personal property of another, without buying it or receiving it as a gift, is a case of bailment. When one borrows or lends a book, hires a horse, or sends a package by express, he is within the rules of bailment. Where the possession but not the title has passed to the vendee, which case we have considered in the chapter on sales, the vendee holds as bailee.

The parties to a bailment are the bailor, or the owner of the chattel who delivers it over, and the bailee, who is the party vested with the temporary custody of the chattel.

All loans of articles to be used for a certain purpose and to be returned by the borrower when that purpose has been accomplished; all storage agreements whereby one party takes into his custody and care for a compensation or otherwise the goods or property of another; and all cases of hiring the use of any article or chattel for any particular purpose are bailments. Whenever an article is found and taken into custody by the finder; when an article is taken to a shop to be repaired; and, in fact, whenever there is a change of possession of goods for a purpose agreed upon by the parties without a change of ownership, the agreement is a bailment contract and subject to the rules and laws governing bailments.

How Created. — A bailment is created by a contract between the bailor, the party who owns or controls and delivers the goods, and the bailee, the party to whom the goods are delivered. (Goods in this connection may be any personal property.) The contract should specify the purpose for which the bailment is created, the duration of the bailment, the use that is to be made of the thing bailed, and any other facts which may be necessary to determine the respective rights of the bailor and bailee.

Classification. — Bailments are generally classified as follows:

1. Bailment for the benefit of the bailor,
2. Bailment for the benefit of the bailee,
3. Bailment for the benefit of both the bailor and bailee.

The last bailment, for the mutual benefit of both parties, is again classified as ordinary and exceptional, the exceptional bailments being those of innkeeper and of common carrier. All other cases of bailment for mutual benefit of bailor and bailee are ordinary bailments.

Degrees of Care. — In all cases of bailment a certain degree of care is required of the bailee. A lack of the required care is termed negligence and renders the bailee liable.

There are three degrees of care, namely, great, ordinary, and slight. Ordinary care may be defined as the care which a person of ordinary prudence would take of his own property. Anything more than ordinary care would be considered great care and anything less would be considered slight care. While there are three degrees of negligence mentioned by some authors the weight of authority seems to favor but one degree, and whether or not negligence exists in a particular case will depend upon whether the bailee has given the property the required degree of care.

When the bailment is for the benefit of the bailor, the bailee is expected to take slight care of the property, and failing to do so he would be responsible for negligence, which some would term gross negligence.

When the bailment is for the benefit of the bailee he is expected to take great or extraordinary care of the property, and should he fail to do so, he is responsible for negligence (slight negligence).

When the bailment is for the benefit of both the bailor and bailee, the bailee is expected to take ordinary care of the property, and his failing to do so would amount to negligence (ordinary negligence).

Besides the degree of care that is demanded of the bailee, the law requires that he act honestly and in good faith. He must not abuse his trust nor sell, pledge, or otherwise deal with the property in his hands as though he were the owner.

Tortious Bailee. — When property comes into possession of one not its owner as a result of theft, fraud, or of finding any lost property, a tortious bailment results. This bailment is not the result of a contract but is imposed by law for the protection of the owner. A tortious bailee will be held more strictly accountable for the care of the property than an ordinary bailee. He will be absolutely liable for any loss that may occur while the property is in his possession, even if he is not negligent. When one finds property he is not bound to take it into his custody, but if he does he must assume full responsibility. He should make a reasonable effort to find the right owner and in case he fails to do so, he may treat the property as his own. If he fails to make an effort to find the owner he is a tortious bailee. Expenses incurred by the finder in connection with the article found, may be recovered from the owner before the article is surrendered to him.

Liability Varied by Contract. — As a general rule the parties to a bailment may by contract vary the rights or liabilities of the parties, making the liability of the bailee either greater or less than it would otherwise be, except that the law will not allow the bailee to be exempt, even by contract, from the consequences of his own willful misconduct.

Bailment through an Agent. — Either party to a contract of bailment may act through an agent, and delivery to the agent of the bailee is delivery to the bailee.

QUESTIONS

1. What is a bailment?
2. What is the difference between a sale and a bailment?
3. What are the parties to a bailment called?
4. Give an example of a bailment.
5. How is a bailment created?
6. What should the bailment contract specify?
7. How are bailments classified according to the benefit?
8. What are the three degrees of care required of the bailee?
9. How may ordinary care be defined?
10. How is it determined whether or not the bailee has been negligent?
11. What requirements other than the care does the law impose on the bailee?
12. Wherein does a tortious bailment differ from an ordinary bailment?

13. What responsibility is imposed on the finder of a lost article and what are his duties with reference to the article found?
14. May a bailee vary or limit his liabilities by contract? Explain.

2. BAILMENT FOR THE BAILOR'S SOLE BENEFIT

Definition. — This class of bailment arises frequently in everyday life. Every undertaking of a friend or neighbor to hold or convey an article of personal property gratuitously and as a favor comes under this class.

To illustrate, A stores B's wagon in his barn gratuitously; or he takes it to perform some work upon it, as to paint it, without charge; or it may be he carries it from one place to another, as to take B's wagon home for him. A bailment for the bailor's benefit may come under any one of these three classes, or it may combine two or all of them.

Liability of Bailee. — An agreement by the bailee to carry out the gratuitous bailment cannot be enforced because of the lack of consideration, but when the bailee receives the property and carries out the bailment, he is bound to do it with care, and he will be liable for neglecting to take the required care of the property or for wrongful acts in relation thereto.

It is often difficult to determine whether a bailment is gratuitous or is for the mutual benefit of the parties, that is, whether or not the bailee is entitled to compensation. The original intent of the parties is the test. If the bailee receives the chattel in the usual course of his business, and business usage and his ordinary method of dealing give him the right to demand compensation, the bailment is not considered gratuitous, even though nothing was said as to compensation.

Barton took twenty-five U. S. bonds to his bank and left them there for safe keeping; nothing was said at the time about compensation. As the bank makes a business of taking valuable securities and documents for safe keeping and charging for doing so, Barton will be expected to pay the bank's regular charges for keeping his bonds.

But if the bailee undertakes the service for a near relative or personal friend, or out of mere charity or favor, and if the trust puts him to but little trouble and the bailment is out of his usual course of business, it is presumed to be without compensation.

Lowe expects to be away for a month and he leaves his motorcycle with a friend of his to be cared for during this time. As this is a bailment out of the usual course of the friend's business it is presumed to be without compensation.

Degree of Care Necessary. — In this class of bailment, as we have seen, only the lowest degree of care and diligence is required of the bailee; that is, slight care, and he is not held liable for loss or injury unless guilty of not exercising the required degree of care.

No absolute rule can be laid down as to just how a gratuitous bailee must care for the chattel in his charge. The circumstances of the case control; that is, different care would be required of the person who receives a watch or a valuable vase, from that expected of the person who receives a wagon or a load of stone. It is said that a gratuitous bailment seldom demands skilled labor or care, and the gratuitous bailee is excused from the results of inevitable accident, accidental fire, etc.

Spooner and Mattoon were soldiers in camp, occupying tents 10 rods apart. Spooner had considerable money, and fearing it might not be safe left it with his friend, Mattoon, without expectation of reward, for safe keeping. For two nights he so left it, and came for it in the morning. On the third morning he did not call for it, and Mattoon started for Spooner's tent with the money. He put it under his arm inside of his vest, so that the pocketbook would not be seen. It slipped out and was lost. Held, that Mattoon was not guilty of gross negligence, so was not liable.

— *Spooner v. Mattoon*, 40 Vt. 300.

Use of Property. — In bailments of this class the question arises as to whether or not the gratuitous bailee may use the thing bailed to him. Clearly, he cannot make any use of it except for the bailor's benefit, otherwise the bailment would not be included in this class. When the bailee accepts the custody of an animal, he undertakes to feed and care for it. Proper care would require him to drive a horse for exercise, to milk a cow, etc., but the profits derived from the use of the animal in this class of bailment go to the bailor. The bailee has a right to incur necessary expenses in caring for the thing bailed.

Dillon deposited in the hands of Devalcourt merchandise to be sold, the proceeds to be applied on a debt which he owed to Devalcourt. Held, that whatever useful and necessary expenses Devalcourt incurred in fulfilling the bailment were chargeable to Dillon.

— *Devalcourt v. Dillon*, 12 La. Annual 672, A.

Termination. — This class of bailment is terminated either by the accomplishment of the purpose of the bailment or by the express act of either party. The bailee may surrender the article bailed, and so terminate the relation, or the bailor may make a demand and recover the chattel. When the bailment is for the purpose of accomplishing some act, as the delivery of a chattel from one place to another, the bailee, after undertaking the bailment, must accomplish it with at least slight care, or be responsible for breach of contract. But by mutual assent, the bailment may be terminated at any time. The delivery of the identical chattel is necessary. If it is in a bettered condition, the bailee derives no benefit; and if in worse, it is not his loss unless due to his lack of slight diligence or care.

QUESTIONS

1. Give an example of a bailment for the bailor's benefit.
2. Is an agreement for a gratuitous bailment enforceable by either party?
3. May either party to a bailment contract act through an agent? Explain.
4. What degree of care is necessary in a bailment for the bailor's benefit?
5. In such a bailment, when may the bailee use the thing bailed?
6. How may a bailment for the bailor's benefit be terminated?

3. BAILMENT FOR BAILEE'S SOLE BENEFIT

Definition. — This class of bailment consists of the gratuitous loan for use. The bailee is what we call in ordinary language the "borrower." When a man lends his lawn mower or his bicycle to a friend to use and afterwards to be returned, the loan is a bailment for the bailee's sole benefit.

The bailor must voluntarily give the possession of the article to the bailee without exacting any recompense for its use. This bailment must be distinguished from the loan of something that is to be consumed and afterwards to be paid back in kind, as flour or grain, which is in fact no bailment at all, but a barter; that is, the exchange of the particular property for another of a like kind.

The loan may be for a definite period or at the will of the bailor, who may terminate it whenever he pleases.

Clapp sued to recover the possession of a wagon and two mules which he had loaned to Nelson for "a day or two," but which Nelson had neglected to return. Held, that when property is loaned for a definite period or for a day or two or a week or two, if it is not returned at the end of the longer period, the lender can bring an action for it without first making a demand for the property. — *Clapp v. Nelson*, 12 Texas 370.

Responsibility of Bailee. — The bailee being the only one benefited, the duty devolves upon him to exercise the highest degree of care or diligence in the use of the chattel, or, as it is expressed, he is bound to use great diligence, and is responsible for every loss which is occasioned by not doing so.

Great diligence, then, is such as one more than ordinarily careful would bestow upon his property under like circumstances. Such a high degree of care being required of the gratuitous bailee, he is held strictly to the terms of the bailment, and when he deviates from these terms he is liable for the loss or damage ensuing.

Cuthbertson borrowed a horse to ride to the residence of one Cline and return next day, but instead he rode a mile and a half farther and in a different direction. The horse died during its absence on the third day after leaving home. It was admitted that there was no negligence. Held, that without regard to the question of negligence the bailee is liable for any injury which results from his departure from the contract.

— *Martin v. Cuthbertson*, 64 N. C. 328.

But where the borrower, while using the chattel within the terms of the bailment, encounters some accident whereby the thing loaned is injured or lost without even slight negligence on his part, he is not liable. If the chattel is injured or destroyed by inevitable accident or by fire, or if it is an animal and dies a natural death, the loss will not fall upon the bailee unless he is in fault.

Beller loaned a flag to Schultz. After it was hoisted a hailstorm came up and damaged it. Held, that in the absence of proof that Schultz had failed to take due care of the flag, he was not liable. A borrower of property is not an insurer, even though it be gratuitously loaned.

— *Beller v. Schultz*, 44 Mich. 529.

Use of Property. — As we have seen, this class of bailment carries with it the right to use the chattel, subject to such conditions and limitations as the bailor may be reasonably sup-

posed to have made. Such expense as may be necessary to preserve the chattel while in use is to be paid by the borrower, as feeding and sheltering a horse or other domestic animals. But any extraordinary expense which wholly preserves the property for the owner may properly be chargeable to the bailor.

It is expected when a person borrows an article to use that the use will be personal; that is, the thing borrowed will be used by the borrower. Circumstances may change this. For example: a merchant, who is not known to engage in manual labor, may borrow a plow. It would not be expected that he was to use the plow, but instead, that it would be used by some one employed by him.

As soon as the bailment is ended, either by the expiration of the term, the act of the bailor, or the mutual agreement of the parties, the borrower must immediately deliver the property to the bailor or his order.

QUESTIONS

1. Give an example of a bailment for the bailee's benefit.
2. What degree of care is the bailee expected to exercise?
3. Under what conditions would the bailee be liable even though he exercised the required degree of care?
4. Would the bailee be liable in case of accident if he had been duly careful?
5. What are the rules with reference to the use of the property where the bailment is for the bailee's benefit?

4. BAILMENT FOR MUTUAL BENEFIT

Definition. — This class of contract differs from those just considered in that the benefits to be derived are mutual instead of being confined to one side. It is a business transaction rather than an act of favor or friendship.

Bailments of this class may consist of (1) the hired service about a chattel, (2) the hired use of a chattel, or (3) pledge or pawn.

In mutual benefit bailments it is essential that there be a recompense for the use of the chattel or for the work to be bestowed upon it. The amount may be definitely fixed or, in the

absence of an agreed price, it may be such as shall be determined to be just and reasonable.

Chamberlin owned a horse for which he had no use, and, to avoid the expense of keeping it, requested Cobb to take it and do his work with it in consideration of its feed and keep. Held, to be not a mere gratuitous loan, under which Cobb would be required to exercise extraordinary care, but a contract for the mutual benefit of both parties, under which Cobb was required to exercise ordinary care in the keeping and care of the animal. — *Chamberlin v. Cobb*, 32 Iowa 161.

Hired Service about a Chattel. — In the hired service about a chattel the bailment may be for the purpose of having the chattel stored or cared for, or it may be for the purpose of having work performed upon it, or for the purpose of having it carried from place to place. Among the hired custodians who store or care for property are safe depositaries, who for a consideration keep valuables in a safe place, and warehousemen, who for a certain charge keep goods and merchandise in storage. The hired work upon a chattel includes that of the wagon-maker who takes a wagon to repair it, of the watchmaker who takes a watch to adjust it, and of other classes of mechanics who receive chattels to bestow labor of different kinds upon them. The hired carriage of a chattel may be performed by a private carrier, who for hire undertakes to transport a particular chattel, or the public or common carrier who follows as a business the conveying of chattels or persons. Private carriers are within the usual rules of a mutual benefit bailment, while public carriers, including railroads and express companies, come within a special class, which will be discussed later.

In the bailment for hire the degree of care or diligence required of the bailee is said to be ordinary diligence, or such care as a prudent person exercises toward his own property under like circumstances. He is therefore liable for loss or injury to the chattel caused by ordinary negligence or, in other words, a failure to bestow ordinary care and diligence.

Piella wrote to Knights that he had a customer for a diamond and requested him to send some for examination. The diamonds were sent by Knights and were stolen while in Piella's possession. It was held to be a bailment for mutual benefit and Piella was not liable for the loss unless he failed to use ordinary care and diligence in his custody of the goods.

— *Knights v. Piella*, 111 Mich. 9.

While the chattel is in the possession of the workman employed in working upon it, if it is destroyed by inevitable accident or through some natural cause and without any fault upon his part, he will not be liable.

A greater degree of care is required of the safe depository who stores jewelry and valuables than is required of a cattle keeper. So the exact care and precaution required of the bailee depends much upon the circumstances of the particular case.

A bailee who stored cotton for hire, permitted some of it to remain with the roping off, the bagging torn, and the under portion in water so that it became stained and much was damaged. The court held that there was a want of ordinary care and the bailee was liable.

— *Morehead v. Brown*, 51 N. C. 367.

When the bailee is to perform some work upon the chattel, he must exercise such skill as a prudent workman of the same class would bestow upon a similar undertaking. And for a failure to exercise ordinary skill he will be liable as for a lack of ordinary diligence.

Meegan took Smith's boat to make certain repairs upon it. Held, that he was bound to use ordinary diligence in the care of the boat and was liable for any damages to it occasioned by launching it into the river at a time and under circumstances of great danger which ought to have been foreseen and which resulted in the destruction of the boat.

— *Smith v. Meegan*, 22 Mo. 150.

Thus it is apparent that the skill required in different cases varies greatly according to the nature of the work required, but in all cases honesty and good faith are required of the bailee.

Rights of the Bailee. — The bailee, for hire, has the right to the undisturbed possession of the chattel during the accomplishment of the purposes of the bailment, and when the work is completed he has the right to demand suitable compensation. This compensation may be fixed in advance or left to be computed later on a basis of what is just and reasonable.

Redelivery. — When the service required by the bailment has been completed, it is the bailee's duty to deliver the chattel to the bailor, and it is the duty of the bailor to pay the compensation. The delivery back must be to the bailor, his agent, or to his order. It is customary for warehousemen who conduct places of storage, also wharfingers who keep wharves on which goods are received and shipped for hire, to give to the bailor,

or owner of the goods, at the time the goods are delivered, a receipt known as a warehouse or wharfinger's receipt. These receipts are generally considered as representing the property itself and are assignable from one person to another, and the warehouseman is held to be the bailee of the person to whom the receipt is transferred.

A bill of lading represents the property for which it is given, and by its indorsement, or delivery without indorsement, the property in the goods may be transferred where such is the intent in making the indorsement or delivery. — *Dodge v. Meyer*, 61 Calif. 405.

Lien. — Although, as we have said, it is the duty of the bailee to deliver back the chattel, still he may keep possession until he is paid for his services on the chattel or payment has been tendered to him. This right is called a lien and exists in favor of any bailee who has performed services in regard to the thing bailed such as repairing it or storing it.

This lien holds only for the service bestowed upon the particular chattel, and lasts only while the bailee retains possession.

Bowers had a truck repaired by Andrews. Andrews, by right of lien, may retain possession of the truck until Bowers pays him for the work done. He cannot, however, hold the truck for any other debt.

Hired Use of a Chattel. — The hiring of a chattel for use is frequently illustrated in everyday transactions, as in the hiring of a bicycle or a rowboat. After the contract is made it is the bailor's duty to deliver the chattel and to allow the bailee or hirer to have possession for the agreed purpose or during the stipulated time.

Buck leased Hickok a farm for one year, and agreed to provide a horse for Hickok to use during the term. He furnished a horse at first, but took it away and sold it before the expiration of the term. Held, that Hickok had an interest in the horse for the period, and could recover damages from Buck for taking it away. — *Hickok v. Buck*, 22 Vt. 149.

It is the bailee or hirer's duty to use the chattel with care, and for no other purpose than that for which it was hired. He also has a further duty to return it at the termination of the bailment and to pay the consideration for its use. As in other instances of a mutual benefit bailment, the bailee must use ordinary care and diligence. This is the rule only when the chattel is used as agreed. And if the bailee uses the hired property in

a way materially different from that mutually agreed upon, he is in most instances liable absolutely for any resulting loss or injury.

Kyle hired a horse of Fisher to drive to a certain place. He drove beyond the place stated, and the horse fell dead while being driven. Kyle was held liable for the value of the horse. A person who hires a horse for a specific journey and drives him beyond that journey takes upon himself all the consequences of such additional drive, and if the horse dies while being so driven, the hirer is liable. — *Fisher v. Kyle*, 27 Mich. 454.

Pledge or Pawn. — This class of mutual benefit bailments consists of the loan or deposit of a chattel as security for some debt or agreement. This mode of securing a debt differs from a chattel mortgage in that the possession is transferred in the pledge, while in the case of a chattel mortgage the possession is generally retained by the owner. In the mortgage the title passes conditionally to the mortgagee, while in a pledge it remains in the bailor.

Collateral Security. — “Collateral security” is another term applied to this class of bailments, but the term has a broader meaning and includes chattel mortgages as well. The name “pawn” is the old expression, and is still in use as applied to a class of persons called pawnbrokers, who make a business of loaning money on articles of personal property deposited with them. But the same object is accomplished by the banker who loans money and accepts as collateral security, stocks, warehouse receipts of grain, bills of lading, etc. From this we can see that the subject of a pledge may be any kind of personal property, including bills and notes, certificates of stock, bonds, and bank deposits. But the thing pledged must be in existence, for if it has ceased to exist, the pledge is void; as in a case where the chattel has been burned or, if an animal, it is dead.

It was held, that the giving of a savings bank book to a third person for delivery to a creditor as security for a debt will create a valid pledge of the book and deposit. — *Boynston v. Payrow*, 67 Maine 587.

The pledgee must exercise ordinary care and diligence toward the thing pledged, and when the property is delivered as security for a particular loan, it cannot be held as security for any other.

Baldwin borrowed \$100 from Bradley and pledged with him, as security for this loan, one \$100 government bond. When Baldwin paid the \$100 Bradley refused to return the bond until a preëxisting debt of \$50 was paid by Baldwin. Bradley has no right to hold the bond for any other debt than the one for which it was given as security.

The bailee must keep the chattel in his possession, and if he voluntarily surrenders possession to the owner, the benefit of the bailment or pledge as security is lost. An exception is the redelivery of the thing pledged to the bailor for some temporary purpose and with the understanding that the pledgee is again to have possession, in which case the security is not lost.

The pledgee has the right to use the chattel pledged if it is of such a nature that it requires use; for instance, a horse may be driven for exercise. But if the article pledged would be the worse for usage, then the pledgee is prohibited from using it. All profits derived from the article pledged belong to the pledgor and must be accounted for to him, but all necessary expenses for the keeping of the property are chargeable to the owner.

Unlike other bailments, the pledgee may assign or repledge his interest in the article pledged, but only subject to the original pledge; that is, the original pledgor may always recover the article by satisfying the terms of the original pledge.

The pledgee has a right to the undisturbed possession of the chattel pledged. After the pledgor has made default in paying the debt secured, the pledgee may sell the chattel, after giving the pledgor a reasonable notice of the time and place of sale, which notice must be preceded by demand of payment. The sale, unless the pledgee is a pawnbroker, must be by public auction, and the goods must be struck off to the highest bidder.

Sell borrowed \$100 from Ward and pledged a musical instrument and a dress suit as security. Ward accepted a note for the loan, which was a redemption of the pledge and entitled Sell to the return of the articles. The instrument was returned, but the suit had been sold by Ward and the proceeds credited to Sell. This action was to recover the value of the suit. It was held, that Ward had no right to sell the suit without calling upon Sell to redeem and giving him notice of the time and place of sale. This not having been done, the sale was unlawful and Sell was entitled to recover. — *Sell v. Ward*, 81 Ill. Appeals 675.

In case the pledged property consists of notes, bills, or bonds, which will soon become due, the proper procedure is to hold

them until maturity and collect them if possible, applying the proceeds on the debt.

A pledge of commercial paper as collateral security for a debt does not, in the absence of a special power to that effect, authorize the pledgee to sell the security so pledged either at public or private sale upon default of payment of the original debt by the pledgor. The pledgee is bound to hold and collect the same as it becomes due, and apply the net proceeds to the payment of the debt so secured. — *Union Trust Co. v. Rigdon*, 93 Ill. 458.

The pledgee has the further remedy of bringing an action in the equity court to foreclose his claim upon the article pledged, and when large amounts are involved, this is a frequent procedure. When the original debt has been discharged without recourse to the property pledged, the pledgor is entitled to the return of his chattels, the object of the bailment having been accomplished. But before the pledgor is entitled to the return of the chattels pledged, the principal debt and also the interest and all necessary expenses incidental to the pledge must be paid. A tender made by the pledgor to terminate the pledge must include both the interest, if any, and all such necessary expenses.

QUESTIONS

1. How do mutual benefit bailments differ from other bailments?
2. Name three classes of mutual benefit bailments and give an example of each.
3. What is essential in a mutual benefit bailment?
4. What degree of care is the bailee expected to exercise?
5. What degree of skill must the bailee exercise?
6. What rights has the bailee?
7. What duty is imposed on the bailee with reference to redelivery?
8. Explain the bailee's right of lien.
9. What are the rights and duties of a bailee who hires a chattel for use?
10. What is a pledge or pawn bailment and wherein does it differ from a chattel mortgage?
11. Explain the meaning of the term "collateral security."
12. May pledged securities be held for any other debt than the one for which they were pledged?
13. Has the pledgee a right to use the thing pledged? Explain.
14. Has the pledgee a right to assign or repledge his interest in the pledged article? Explain.
15. What are the rights of the pledgee?
16. What remedy has the pledgee where the pledgor does not fulfill his contract?

5. INNKEEPERS

Definition. — An innkeeper is one who keeps a house, or inn, for the lodging and entertainment of travelers. In the modern sense he is a hotel keeper, an inn being the same as our hotel or tavern. The innkeeper or hotel keeper differs from a boarding-house keeper in that his is a public calling and he is required by law to receive and give accommodations to all persons of good behavior who apply and offer to pay for their accommodation, unless his house is full. Boarding-house keepers, or restaurant keepers, can receive or refuse such persons as they please.

Guests. — The relation of innkeeper arises only with reference to such parties as are his guests, a guest being one who as a transient traveler partakes of the entertainment of the inn or hotel. He may be a guest, although he does not stay overnight.

A person receiving a gratuitous accommodation is not a guest. To create the relation of guest the innkeeper must receive pay for the accommodation.

Innkeeper's Liability. — The innkeeper is a bailee of the property and baggage of the guest, and this includes wearing apparel, jewelry, and money.

By the common law the responsibility of the innkeeper as bailee was exceptionally great. He was in most cases held to be an insurer of the goods and liable if they were lost, even without any fault on his part, unless the loss was occasioned by the guest's negligence or by an act of God, — flood, lightning, etc.

Hulett's goods were destroyed by fire while he was a guest at Swift's hotel. The cause of the fire was unknown, but Hulett was free from negligence. Held, that the innkeeper was liable. An innkeeper is an insurer of property committed to his custody by a guest unless the loss be due to the negligence or fraud of the guest, or to the act of God or the public enemy. — *Hulett v. Swift*, 33 N. Y. 571.

Other cases go so far as to relieve the innkeeper from liability in case of loss if he can show positively that he was in no way negligent, but this is a modification of the common law rule.

When property committed to the custody of an innkeeper by his guest is lost the presumption is that the innkeeper is liable for it, but he can relieve himself from that liability by showing that he has used extreme diligence. — *Houth v. Franklin*, 20 Tex. 798.

The innkeeper is responsible for the acts of his servants and employees the same as for his own acts.

A suit was brought against Proctor, an innkeeper, for a coat which had been left by Rockwell who was a guest at Proctor's hotel. The coat had been given to a negro in charge. It was held that Proctor was liable as innkeeper for the act of his servant. — *Rockwell v. Proctor*, 39 Ga. 105.

Therefore the innkeeper is liable for any theft of the guest's property, and he is not excused on the plea that he selected his servants carefully and performed his own duty well.

Limitation of Liability. — The statutes in most of the states now allow the innkeeper to relieve himself from the extreme rigor of the common law, permitting him to limit his responsibility for money and valuables by requiring the guest to deliver them into his special custody. This is generally done by requiring that they be placed in the innkeeper's safe. But notice of this requirement must be given as required by the statute, or the common law liability will attach.

Lang went to the Arcade Hotel, and retained in his own possession money and jewelry, although the innkeeper had provided a safe for the deposit of such articles and had posted notices of the privileges as required by law. Held, the hotel was not liable for the theft of the money and jewelry. — *Lang v. Arcade Hotel Co.*, 9 Ohio 372.

Termination of Relation. — The liability of the innkeeper for the guest's personal property exists as long as the owner of the property maintains his relation as guest of the hotel or inn.

Burckhardt paid his bill at the Brown Hotel so as to cash a draft, but it was understood that he would return, meanwhile retaining his rooms, and he gave no orders for the removal of his baggage. During his absence his trunks were moved from the rooms and one was lost. Held, that Burckhardt was still a guest of the hotel and the Brown Hotel Company was liable for the loss of the trunk.

— *Burckhardt v. Brown Hotel Co.*, 13 Colo. Appeals 59.

But after the relation of guest has ceased, the innkeeper is liable for property left with him only as an ordinary bailee.

Innkeeper's Lien. — As we have seen, the innkeeper is compelled to receive any proper person who may apply for accom-

modations, but he need not receive those who cannot pay, and he may require payment to be made in advance.

When he is not paid in advance, the law gives him a lien for all unpaid charges upon the property which the guest has brought into the house and placed in the custody of the innkeeper or bailee.

The innkeeper can detain the property until he is paid, but if he voluntarily surrenders it, the lien is lost. Statutes in most of the states now give boarding-house keepers a like lien, but by common law it extended only to innkeepers.

QUESTIONS

1. Who is an innkeeper?
2. What is the difference between an innkeeper and a boarding-house keeper?
3. Who is a guest?
4. What is the difference between a guest and a boarder?
5. To what extent is an innkeeper liable for the property of his guest?
6. Are there any circumstances under which an innkeeper would be relieved from liability in case of a loss of his guest's property? Explain.
7. Is an innkeeper responsible for the acts of his servant? Explain.
8. In what way may an innkeeper relieve himself from liability? Explain.
9. Explain the innkeeper's right of lien.
10. When is the relation of a guest of a hotel said to be terminated?

6. COMMON CARRIERS

Carriers of Goods. — A carrier of goods is one who undertakes to transport personal property from one place to another. He may be either a private carrier who comes under the class of ordinary bailees or a common carrier who is subject to special rules. A common carrier is one whose regular calling is to transport chattels for hire for all who may choose to employ him, while a private carrier is one who transports goods gratuitously or only in special cases.

A carrier may be one who operates by land or by water, the laws regulating their liability being much the same. Express, railroad, and steamboat companies are everyday examples of common carriers. In order to constitute one a common carrier

two things are necessary: first, a continuous offer to the public to carry, and second, the charge of a compensation for the service.

Goods and Payment for Carriage. — Common carriers are said to be carriers of "goods," and this term includes animals, money, and in fact any article of personal property that is subject to transportation. Generally speaking, a common carrier is bound to receive whatever may be offered him for transportation, when the charges are paid or offered to be paid. Payment must be offered, as the carrier is under no obligation to carry free or upon credit. If he does not obtain his pay upon receipt of the goods, he may hold them until his charges are paid, the law creating a lien upon the goods for the charges and expenses in favor of the common carrier. This compensation is sometimes termed "freight," when applied to the charge for carrying goods. After the goods have been delivered to the carrier the shipper cannot retake them without paying the freight, and if they are intercepted before reaching their destination, the full freight can be recovered by the carrier. The consignor or shipper is the party primarily liable for the freight and not the consignee or the person to whom the goods are shipped, unless the consignee expressly agrees to pay it.

Regulation of Charges. — Under the common law a carrier could charge different rates to different shippers for the same article, provided that all charges must be reasonable. Generally throughout the United States, statutes have provided that uniform rates must be charged and have created Commissions which must fix or approve all rates.

Right to Refuse Goods. — As we have said, a common carrier is generally bound to receive whatever is offered to him to carry. This rule is subject to three qualifications, viz.: first, the carriage of the chattel must be for hire; second, the carriage must be within the carrier's facilities for conveyance; third, the carriage must be in the line of the carrier's vocation.

We have already discussed the first qualification. As to the second, it is but reasonable that the carrier may refuse to receive goods when he has not sufficient room or adequate facilities for carrying them safely. He is under no obligation to

furnish extra equipment to satisfy an unusual demand. So, if the article carried be larger or heavier than the carrier can handle, he may refuse it on that ground. Furthermore, he may decline to receive particular property which may at the time be exposed to extraordinary danger or hazard on his route.

The fact that the Illinois Central Railway was under the military control of the officers of the United States Army was a sufficient excuse for the road to refuse to receive freight while it was under such a control, it not being safe for the road to undertake the carriage of freight.

— *Phelps v. Illinois Central Railway*, 94 Ill. 548.

The article offered for transportation may not be in the line of the carrier's vocation. A freight carrier may not necessarily hold himself out to carry passengers. He need carry only the class of goods included in his public profession.

This was an action for damages against the Midland Railway Co. for refusing to transport five tons of coal. The railway company never carried coal and did not hold itself out for any such business, and could not, unless it gave up its passenger traffic. Held, that a common carrier is not bound to carry every description of goods, but only such goods, and to and from such places, as he has publicly professed to carry, and for which purposes he has conveyances.

— *Johnson v. The Midland Railway Co.*, 4 Exch. (Eng.) 367.

Interstate Commerce Act. — The carrier may prescribe reasonable rules as to the time and manner of receiving goods. He cannot be required to receive them at an unreasonable hour or place, and he may insist that the goods be packed in a reasonable way. By statutes passed in most of the states the carrier is prohibited from discriminating in favor of one customer over another either in rates or privileges of any kind. The common carrier must not select his patrons arbitrarily, but must furnish equal facilities to all.

To further this object a statute was passed by the Congress of the United States in 1887 which is known as the Interstate Commerce Act. This law was designed to regulate the commerce between the states and applies to all common carriers, either by land or water, who transport persons or property from one state to another or between the United States and foreign countries. It provides that no discrimination shall be made between large or small, constant or occasional, shippers, and that no charges shall be unjust or unreasonable. It also

provides that proportionate charges shall be made for long and short distances. The law further requires that the schedule of rates shall be published and filed with commissioners who are appointed to oversee the enforcement of the law and are known as the Interstate Commerce Commission. The law also makes it unlawful for any common carrier who comes under its provisions to enter into any combination or agreement by which the continuous carriage of freight from one point to another shall be delayed or interrupted.

All of the large railroad and express companies come within the provisions of this law.

QUESTIONS

1. Who is a common carrier of goods?
2. What is the difference between a common carrier and a private carrier?
3. Give some examples of common carriers.
4. What is necessary to constitute one a common carrier?
5. What does the term "goods" as applied to common carriers include?
6. What are the rules governing the carriage of goods?
7. How are charges usually regulated? Explain.
8. Under what conditions has a common carrier a right to refuse goods?
9. What is the purpose of the Interstate Commerce Act?
10. What are the main provisions of this law?
11. What carriers are subject to the provisions of this law?

7. LIABILITY OF COMMON CARRIERS

When Liability Begins. — The common carrier becomes responsible for the goods when they are delivered to him for carriage and accepted by him in the capacity of a carrier. The delivery should be made to the agent or person whose business it is to receive freight, not to any one who may be about the place of delivery.

In the case of expressmen and other carriers who go after the goods and receive them at the shipper's residence or place of business, their liability begins when they receive the goods.

Receipts. — It is always prudent for the shipper or sender of the goods to demand of the carrier a receipt for the articles

delivered. This is termed a freight receipt or bill of lading. Originally a bill of lading was given only by a carrier by water, but it is now given by all carriers. It consists of a writing showing the receipt of the goods and the terms of the contract of carriage in brief form.

Limits of Liability. — As in the case of the innkeeper, the liability of the common carrier is exceptionally great. He is held liable as an insurer of the goods against all risks of loss or injury, except when the loss arises from the following causes: (1) by an act of God, or by a public enemy, (2) by the act of the shipper, (3) by the act of the public authority, (4) from the nature of the goods. In the early times this strict measure of responsibility was placed upon the carrier for reasons of public policy. In an age of thieving and lawlessness the carrier had many opportunities to defraud his customers, and, by collusion with thieves and robbers, to cause the shipper to be defrauded. To this absolute liability as an insurer there were only two exceptions under the common law, and these were losses occasioned either by act of God or the king's enemies. But modern methods make the reason for the rule less urgent, and modern legislation has relieved the carrier's liability in the other cases just specified.

Loss or Injury by Act of God. — This includes those causes which man neither produced nor can contend against; as, accidents caused to the goods while the carrier is within the line of duty, by lightning, tempest, earthquake, flood, sudden death, snow, rough winds, freezing, and thawing.

It was held that an injury to property in transit, caused by an earthquake, was the result of an act of God and the So. Carolina Ry. Co. was not liable for the injury. — *Slater v. So. Carolina Ry. Co.*, 29 S. C. 96.

But a prudent man will foresee the less violent of these causes, such as snow and freezing, and a carrier will not be excused for loss in such cases, unless he has exercised prudence and foresight in regard to them.

Fruit trees shipped on the Pacific R.R. were frozen while *en route*, and the freezing was held to be an act of God for which the company was not liable, unless caused by unnecessary delay in transporting the trees or by their careless exposure to the cold. — *Vail v. Pacific Railroad*, 63 Mo. 230.

Loss by Fire. — Loss by fire, unless caused by lightning, is not an act of God and a common carrier is not excused from loss by this cause unless it is expressly contracted for.

Unless a carrier limits his responsibility by the terms of a bill of lading or otherwise, he cannot escape the obligation to deliver the goods at their destination unless prevented by the public enemy or by an act of God. A loss by accidental fire is not a sufficient excuse unless the fire be caused by lightning. — *Parker v. Flagg*, 26 Maine 181.

Loss or Injury by Public Enemies. — This is a loss caused by those at war with one's country.

Wood contracted with McCranie, a carrier by boat, to remove certain cotton belonging to McCranie to places deemed safe from hostilities during the Civil War. It was stored where it was deemed safe, but hostilities arose there and the cotton was destroyed. Held, that Wood had performed, as far as was in his power, and the goods having been destroyed by the public enemy, he was not liable. — *McCranie v. Woods*, 24 La. Annual 406.

But the violence of mobs or rioters does not bring the participants within the term "public enemies."

Loss or Injury by Act or Fault of the Consignor. — This arises when the shipper carelessly packs the goods and they are injured, or when he incorrectly addresses them so that they are delayed or lost, in which cases the carrier is not liable.

Klauber shipped some clothing which was not entirely covered and while being transported by the American Express Company was damaged by rain. Held, that the owner is not required to cover goods shipped so that they shall be safe from rain, mud, and fire, and the Express Company here is liable. If there had been a hidden defect in the packing from which damage resulted in the ordinary course of handling, it would have been the act of the owner and the carrier would have been relieved.

— *Klauber v. American Express Co.*, 21 Wis. 21.

Congar shipped via Chicago R.R., trees and other nursery stock from Whitewater, Wis., directed to "Iuka, Ia." The consignee was a resident of Iuka, Tama Co., Ia. The defendant took them to Iuka, Keokuk Co., Ia., in consequence of which delay the stock became worthless. Chicago Railway Co. proved that they examined the maps and found the place in Keokuk Co. Held, that the company was not responsible. The negligence, if any, was upon the part of Congar in not marking the goods with the name of the county or the road by which they were to go.

— *Congar v. Chicago Railway Co.*, 24 Wis. 157.

Any deception or bad faith on the part of the shipper as to the article shipped, whereby it is made to appear less valuable or less liable to be injured, will relieve the carrier from responsibility for any injury.

An action was brought against the American Express Company to recover for the value of a package containing a wreath, made partially of glass, which was broken. The company was not informed of the fragile nature of the goods shipped. Held, that in order to charge a common carrier as insurer he must be treated in good faith, and concealment or suppression of the truth will relieve him from liability.

— *Perkins v. American Express Co.*, 42 Ill. 458.

Loss or Injury Arising from the Nature of the Goods. —

When the loss arises, not from any act of the carrier, but because of the inherent nature of the goods, the carrier is relieved. This applies to the natural decay of vegetables and fruit and other perishable commodities, also to the loss of live stock arising from their own viciousness and habits, as when cattle gore or trample upon each other. But the carrier must take such care of live stock as prudence and foresight demand, and must feed and water them, unless the shipper undertakes this duty.

Cooper tried to recover damages for live stock shipped over the Raleigh & Gaston R.R. It was held that the strict common law rule as to the liabilities of carriers has been modified in favor of carriers of live stock, on account of the nature of the goods, and where the damage arose from the natural death of the animals or from their viciousness, and could not be prevented by foresight, vigilance, and care, the carrier is not liable. — *Cooper v. Raleigh & Gaston R.R. Co.*, 110 Ga. 659.

A cargo of oranges and lemons was shipped from Italy to New York. On the voyage the vessel was damaged by storm and put into port for repairs; by reason of the delay some of the fruit decayed. It was held that there could be no recovery for damages arising from the inherent nature of the cargo, even though caused by the delay, unless there was some fault, misbehavior, or negligence of the master or crew contributing to the damage.

— *The Brig Collenberg*, 66 U. S. 170.

Loss or Injury Caused by Public Authority. — An example of such a loss is a seizure of the goods by process of law, or by the direct act of one's own government.

In an action against a railroad company for failure to deliver wheat shipped, the answer was that while the wheat was being shipped, one Johnson took out a writ of replevin, and by virtue of this writ the sheriff of the county seized the grain and took it out of the possession of the company. Held, that the common carrier is excused from liability when the goods are seized by virtue of a legal process and taken out of his hands.

— *Yohe v. Ohio Railway Co.*, 51 Ind. 181.

Limitation of Liability by Contract. — The carrier in most of the states may limit his liability to a certain extent by contract with the shipper. That is, by special agreement a lighter

degree of responsibility may be stipulated for. He may stipulate not to be liable for loss by fire, robbery, accidental delay, or dangers from navigation, provided he is not himself in fault; but he cannot contract away his liability for the fraud, misconduct, or negligence of himself, his agents, or servants. Notwithstanding his attempt by contract to limit his liability, he will still be held to the responsibility of a mutual benefit bailee, and he is required to exercise ordinary care and diligence, as well as honesty and good faith.

The bill of lading given by the Hartford Steamboat Co. when the goods were shipped provided that the company should not be responsible for damage to the goods from any perils or accidents not resulting from their own negligence or that of their servants. Held, that the exemption stipulated for was valid and lawful and the carrier was not liable for loss caused by the boat running upon a rock.

— *Camp v. Hartford Steamboat Co.*, 43 Conn. 333.

The carrier is also allowed to state a reasonable limit to the amount for which he shall be held liable in case of loss, unless the shipper shall state the valuation at the time of the delivery of the goods to the carrier. Express companies generally contract that in case no valuation is given, they will not be liable for a sum to exceed \$50, and such a provision is generally upheld.

Durgin shipped goods by American Express Company and received a receipt stating that the goods were of the value of \$50 and the company should not be liable for a greater amount, unless the value was stated in the receipt. No such value was stated. The goods were lost. It was held that the shipper was bound by the terms of the receipt, although the value of the goods was more than \$50.

— *Durgin v. American Exp. Co.*, 66 N. H. 277.

Delivery by Carrier. — The carrier is bound to transport the goods with reasonable dispatch, and by the prescribed or customary route, and at the termination of the journey to deliver them over to the consignee or his authorized agent within a reasonable time.

A stipulation in the bill of lading exempting the company from liability for loss arising from delay for any cause, is unreasonable, and will not relieve the carrier from liability for losses caused by negligence.

— *Berje v. Railway Co.*, 37 La. Annual 468.

The carrier is liable absolutely to deliver to the right party. If he delivers to the wrong party, no matter how cautiously and

innocently, he is liable. Delivery on a forged order or through the fraud of a stranger will not relieve him.

Glidewell sued the Little Rock, M. R. & T. Ry. Co. for the loss of goods. The railway company received the goods, but by mistake of the conductor they were delivered to a stranger and were lost. Held, the company was liable for the value of the goods. A carrier is liable for goods lost by misdelivery, whether made through mistake or by fraud or impositions practiced on it. — *Little Rock, M. R. & T. Ry. Co. v. Glidewell*, 39 Ark. 487.

When the carriage is by water a delivery on the usual wharf is sufficient, but while on the wharf, goods should be handled with reasonable care. A railroad company may deliver the goods at the depot or freight house, and according to the laws of many states, must also notify the consignee, and is liable as a common carrier until the consignee has had a reasonable opportunity to remove the goods.

Other states hold that the delivery and safe storage of the goods in the freight depot relieve the carrier from further liability other than as a warehouseman.

If such carriers as express companies in the cities, whose custom it is to deliver to the consignee at his residence or place of business, deliver at any other place or store the goods in the depot as is practiced by freight companies, such delivery will not be sufficient. This rule applies also to draymen and teamsters.

QUESTIONS

1. When does a common carrier's liability begin?
2. Why is it advisable for the shipper to demand a receipt of the carrier? Explain.
3. What is the liability of a common carrier of goods?
4. Mention four causes of loss for which a carrier will not be liable.
5. What causes of loss are included under acts of God? Explain.
6. Are there any exceptions to the rule that the carrier is not liable for loss caused by acts of God?
7. Is a carrier liable for loss caused by fire? Explain.
8. Is a carrier liable for loss resulting from strikes? Explain.
9. Under what circumstances is the shipper liable for loss?
10. Who is liable where loss results from the nature of the goods? Explain.
11. Has a carrier a right to limit his liability by contract? Explain.
12. What are the duties of a common carrier with reference to delivery? Explain.

8. CARRIERS OF PASSENGERS

Definition. — A common carrier of passengers is one who transports persons from one place to another for hire. A public carrier may be both a carrier of goods and of passengers. The passenger may be carried by water or by land. The common carrier of passengers is bound to receive and carry all persons who shall apply and are ready and willing to pay for their transportation.

Rights and Duties. — A carrier may refuse to carry when he has no more room or when the party applying is not a suitable person. He need not receive a drunken person, a notorious criminal, or a person infected with a contagious disease. Neither is he obliged to take persons to a place which is not on his route, or at which he is not accustomed to stop.

It was held, that where an unattended passenger becomes sick or unconscious or insane after entering upon a journey, it is the duty of the company to remove him from the train and leave him until he is in a fit condition to resume his journey.

— *Atchison Railroad Co. v. Weber*, 33 Kans. 543.

The fare required of the passenger must be reasonable, and in many states it is regulated by statute. The carrier is bound to have means and appliances suitable to the transportation, and to use all reasonable precautions for the safety of passengers. He can prescribe reasonable rules as to showing tickets, etc. The carrier is not an insurer of the lives and safety of the passengers, but he is held to a high degree of care, and will be liable for even slight negligence. While the carrier does not warrant the safety of the passengers, he is held to the highest degree of care practicable under the circumstances.

A passenger was injured because the carrier did not allow her a reasonable time to alight from the train, but started it suddenly whereby she was thrown to the ground. Held, that a carrier is not an insurer of the safety of passengers, but is required to exercise the highest degree of care, foresight, prudence, and diligence demanded by the conditions, such rule being for the purpose of stimulating efficiency in the carrier and in the interest of humanity and the general welfare. In this case the carrier was held liable for the injuries. — *Florida Ry. Co. v. Dorsey*, 59 Fla. 260.

In most of the states the carrier is not permitted to limit his liability for injury to the passenger. It is considered con-

trary to public policy to exempt the carrier from liability for even slight negligence when the lives and safety of human beings are concerned.

Baggage. — The passenger who pays his fare to the carrier is entitled to have certain baggage taken without charge, and for this baggage the carrier is liable as for the carriage of freight. Baggage in this sense includes such articles of personal necessity, convenience, and comfort as travelers under the circumstances are wont to take on their journeys. It does not include merchandise or a stock of goods used in the traveler's business.

Courson sued for the loss of certain quilts, pillows, pillow cases, sheets, etc., contained in his trunk carried on the Central of Ga. Ry. Co.'s railroad, and intended for his use in housekeeping when he reached home. It was held that a carrier's liability for baggage is confined to such articles of personal convenience and adornment as are usually taken by a passenger on a journey and does not extend to articles intended for housekeeping. — *Courson v. Central of Ga. Ry. Co.*, 10 Ala. Appeals 581.

A carrier was held not liable for delay in the delivery of a sample trunk containing photographs of articles of furniture which McElroy was engaged in selling as a commercial traveler, such articles not being included in the term "baggage."

— *McElroy v. Iowa Cent. Ry. Co.*, 133 Iowa 544.

The carrier is also liable for money which the passenger includes in his baggage for his traveling expenses and personal use, not exceeding a reasonable amount.

A passenger is entitled to carry sufficient money and personal effects as baggage to reasonably supply his wants for the entire journey, and the carrier is liable for their loss. — *Godfrey v. Pullman Co.*, 87 S. C. 361.

If the baggage is not delivered into the actual custody and keeping of the carrier, but is retained in the possession of the passenger, the carrier is under no such liability for its safety.

A carrier's liability for baggage does not commence until the actual delivery of the baggage to the carrier, and therefore a carrier was not liable for loss of a trunk for which a check or receipt had been issued, but which actually was in the passenger's private dwelling.

— *Hosking v. Southern Pac. Co.*, 148 Ill. Appeals 11.

The carrier may by special contract make reasonable modifications of his liability for baggage. But the carrier cannot relieve himself wholly from liability, and the limitation must be brought to the passenger's notice and must be reasonable. Con-

ditions limiting the carrier's liability to each passenger to a given amount have been upheld.

A railroad company cannot limit its liability for the safe carriage of a passenger's baggage by a notice printed upon the face of a ticket, unless the passenger's attention is called to it when purchasing the ticket, or unless the circumstances are such that it would be negligent of him not to read it. The clause in the ticket was that the company would not be liable for lost baggage excepting wearing apparel, and then only for a sum not to exceed \$50. — *Mauritz v. Railroad Co.*, 23 Fed. Rep. (U. S.) 765.

The liability of the carrier for the baggage does not terminate until the passenger has had reasonable opportunity to take charge of it after it has reached its destination. If it is not claimed after a reasonable time, the carrier may store it, and his liability as a carrier ceases, he being liable thereafter only as a warehouseman.

Jones delivered his trunk to the Central of Ga. Ry. Co. for transportation. After its arrival it was taken from the railroad station by somebody other than Jones and lost. Held, that Jones's failure to take the trunk away within a reasonable time after its arrival terminated the Central of Ga. Ry. Co.'s liability as carrier, but its liability as warehouseman remained; and the trunk having been lost by the negligence of the station agent, the Central of Ga. Ry. Co. was liable.

— *Jones v. Central of Ga. Ry. Co.*, 150 Ala. 379.

QUESTIONS

1. Who is a common carrier of passengers?
2. What are the rights of a common carrier of passengers?
3. What are the duties of a common carrier of passengers?
4. What degree of care is required of a common carrier of passengers?
5. To what extent is a common carrier of passengers liable for their safety?
6. Has a carrier of passengers a right to limit his liability? Explain.
7. What are the rights of a passenger with reference to baggage? Explain.
8. What does the term "baggage" include?
9. What is the liability of a carrier for baggage?
10. In what way may a carrier limit his liability for baggage? Explain.
11. Is the carrier liable for money which a passenger has in his baggage? Explain.
12. When does a carrier's liability for baggage terminate? Explain in full.

IMPORTANT POINTS

A bailment is a delivery of goods by one party to another, without change of ownership, for a specific purpose.

A bailment is created by contract and is subject to the same rules of law as a contract.

No one can be made a bailee without his consent, express or implied.

Only personal property can be the subject matter of a bailment.

The two general classes of bailments are gratuitous and for hire.

The three degrees of care required are slight, ordinary, and great.

Negligence is a breach of duty to exercise the required degree of care.

The skill required of the bailee who attempts to do a piece of work is that which a workman doing such work should possess, and the degree of skill depends on the nature of the work.

A bailee who deviates from the original purpose of the bailment is liable for all losses.

In a bailment for the bailor's sole benefit, the bailee is entitled to be reimbursed for any expense in connection with the thing bailed.

Bailments for hire include the hiring of care and custody, hiring the use of a thing, the hiring of labor, and the hiring of carriage.

The bailee has a lien on property on which he has bestowed services that have not been paid for.

The bailee is not responsible for loss caused by an inevitable accident.

An inn or hotel is a public place for the entertainment of transient guests.

The liability of the innkeeper is said to be extraordinary.

Steamship and sleeping car companies are not innkeepers.

A common carrier is one who makes a business of carrying goods or passengers.

The business of common carriers is, for the most part, regulated by statute.

A common carrier has the right of lien on the goods carried to secure the payment of charges.

A carrier of goods has a right to limit the amount for which he shall be liable in case of loss.

A carrier may refuse to carry any one who refuses to pay the fare in advance or who does not conduct himself properly.

TEST QUESTIONS

1. Barth, a friend of Edwards, agreed to keep Edwards's motor-cycle for him while he was away on his vacation. Barth rode the motor-cycle to a ball game and it was stolen. Is he responsible? Explain.

2. In case goods are burned up while in transit and no carelessness on the part of the railroad company can be proved, does the loss fall on the railroad company? Explain.

3. Can a person who has stolen goods ever become a bailor of the goods stolen?

4. Goods consigned to Hall were lost through acts of a mob of strikers. Would the carrier be liable?

5. Would the carrier be liable if goods were lost through acts of an army while the country was at war?

6. A railroad company's receipt stated that it would not be liable for accidents of any kind that might cause loss. Has the company a right to limit its liabilities in this way?

7. Brown, a respectable person, applied to the Pennsylvania Railroad Company for transportation on one of their passenger trains, offering to pay the usual fare. Have they a right to refuse him if there is sufficient room on the cars?

8. Under what conditions has the bailee a right to use the property bailed?

9. What is the liability of a person who accepts goods delivered to him to which he is not entitled?

10. What special privileges are granted to boarding-house keepers that are not granted to innkeepers?

11. To what extent have statutes allowed an innkeeper to limit his liability?

12. A shipper concealed money in a box of merchandise sent by express. The money was lost. Is the express company liable? Explain.

CASE PROBLEMS

Give the decision and the principle of law involved in each case.

1. Brown borrowed Green's automobile without Green's permission, and while driving it carefully was run into by another, and both cars were destroyed. Brown was exercising the greatest care, and was not guilty of any negligence whatever. Is he liable for the value of the borrowed car?

2. Adams, a farmer, intending to go to town the next day, promises Groves that he will take two bags of wheat for him without charge. The next morning he starts away without it, and Groves is put to the necessity of hiring a man to take the wheat for him. Can he recover damages from Adams for breach of Adams's agreement?

3. If in the preceding case Adams had taken Groves's wheat on his wagon and started to town with it, but in loading it had carelessly put a plow on the top of it, in consequence of which the bag was torn open and the wheat scattered along the road, could Groves have recovered of Adams for the loss of the wheat?

4. Bernard, as a favor to Webster, receives a sum of money to keep for him until next day. He puts it with his own in his pocketbook which was in his coat pocket. That night Bernard's house was robbed, and the pocketbook that also contained money of his own was taken from his coat, which hung on the foot of the bed. Was Bernard liable? What degree of care was required of Bernard?

5. Nelson borrows a bicycle from Wood, rides it to a ball game, and leaves it in the bicycle rack unlocked. The bicycle is stolen. It was left in the same place with many other bicycles, but no one was placed in guard over it. Is Nelson liable to Wood for the bicycle?

6. Andrews borrowed a horse of Bailey with which to work his garden. He kept the horse two days, and then sent it back. While Andrews had the horse he cared for it and furnished its feed. One shoe was off, and he had the horse shod. The horse was injured during the bailment through the slight negligence of Andrews. What are the rights of the parties?

7. Dodge employed a keeper of a garage to care for his automobile. The keeper of the garage left the door open, and Dodge's car was stolen. Was the garage keeper liable?

8. Pulver takes his wagon to Hooker, who represents himself to be a wagon maker, and employs him to repair it. Hooker is incompetent and does not understand the business, and as a result the wagon is damaged. Is Hooker liable?

9. Harris takes his desk to a cabinet maker to be repaired and re-varnished. After the work is completed he sends for the desk, and the cabinet maker refuses to deliver it until he receives his pay, whereupon Harris brings an action to recover the possession of the desk. Can he succeed without paying for the work?

10. In the above case, if the cabinet maker had let Harris have the desk, could he have compelled Harris to deliver it back to him or else pay him for his services?

11. Reed enters Porter's hotel, and leaving his baggage with the clerk, goes to dinner. After dinner he calls for his baggage, meaning to go away on the next train. The baggage is lost. Does the relation of innkeeper and guest exist between them?

12. Hewlett becomes a guest at Porter's hotel, and while he is there the hotel is destroyed by fire. Porter is free from negligence. Is he liable to Hewlett for baggage lost in the fire?

13. Porter gave notice to his guests according to statute that he would be liable for money or valuables only when they were placed in the office safe, and not when they were left in their rooms. Hewlett left \$1000 in bank notes locked in his trunk in his room. This was broken into and the money stolen. Was Porter liable?

14. Hewlett was received as a guest by Porter, and after staying three days packed up his trunk preparatory to leaving. Porter refused to allow him to remove his trunk from the hotel until his bill was paid. Had Porter this right?

15. The Pony Railroad Company, owners of a small line of railroad being constructed to convey passengers to a pleasure resort, were called upon to transport for Newton a heavy boiler. The company refused to accept it on the grounds that they had no car sufficient in size to carry it nor any facilities to transport it. Had they the right so to refuse it?

16. Conger ships a barrel of crockery which has been but carelessly packed and with no mark placed upon it to give the carrier notice of its contents. While being handled in the usual course of transportation the crockery is broken. Is the carrier liable?

17. Clark shipped a carload of cattle from Chicago to the city of New York. While on the way one of the cattle, being vicious, gored a number of others so that they died from their wounds. Is the company liable?

18. The carrier receives certain goods to be delivered to one J. R. Myers of the city of New York. When the goods reach there, a person applies to the freight office and asks for the goods, stating that his name is Myers. The goods are delivered to him, and it later transpires that the party who applied was not the consignee of the goods, but a party who obtained them fraudulently. Can the consignee recover the value of the goods from the carrier?

19. Certain goods are carried by the New York Central Railroad consigned to one Powell at Buffalo. The goods reach Buffalo and are placed in the depot at four in the afternoon. A notice is mailed to Powell which reaches him the next morning. Within that time a fire occurs and the goods are destroyed. Is the railroad company responsible?

20. Drew, a passenger on the New York Central Railroad, had his trunk checked and placed in the baggage car of the train upon which he received transportation. The trunk, which was lost, contained his wearing apparel, a dress for his wife, which he had purchased on the journey,

some presents for his friends, and a sum of \$20 in a purse, which money he intended to use on his journey. Was the railroad company liable for all of the contents of this trunk? If not, for what portion of it was the company liable?

21. If the company had expressly contracted with Drew that their liability for baggage should be limited to \$50 and he had had notice of this limitation, would they have been liable for a greater amount?

22. Briggs checks a hand bag at a railway company's parcel room, pays 10 cents, and receives a check. When he returns later and presents the check, it is discovered that the bag has been stolen. Is the railway company liable? Explain.

23. Cooper receives at 4 P.M. on the afternoon of a certain day, by registered mail, \$10,000 in negotiable bonds. It is too late to lock them in his safe deposit box, so he goes to his bank, the vault of which is still open, and gets the bank to take the bonds for safe-keeping overnight. When he goes to get his bonds the next morning they cannot be found. Cooper sues the bank for the value of the bonds. What must he prove to recover?

24. Anson, while traveling, stops at the Denver Hotel and for safe-keeping places his valuables with the owner of the hotel, who puts them in the safe for that purpose. The safe is broken open and Anson's valuables are stolen. Anson brings action against the owner of the hotel. Can he recover? Explain.

25. Warren delivered to the N. Y. C. R. R. Co. in New York a trunk to be forwarded to Chicago and two days later called for it at Chicago. It could not be found. Warren sued the company and in the suit proved the delivery to the company, the demand, and the value. The company did not offer any evidence. Should Warren recover? Explain.

26. Carr finds on the sidewalk a purse containing \$10, which has been lost by Chase. Chase learns that Carr has found the purse and demands its return. Carr declines to return the purse and its contents unless Chase pays him \$1 for his trouble. Can Chase recover the purse and its contents? Explain.

27. Harcourt found a valuable dog and took him into his custody. He advertised and tried to find the owner, but did not succeed. After about a month had passed, the owner of the dog discovered him in Harcourt's possession and demanded his return. Harcourt refused to return the dog to the owner until he was reimbursed for the expense incurred in advertising and caring for the dog. The owner took action to recover possession of the dog. Can he succeed? Explain.

28. Mrs. Darrow, who was to be away for several weeks, left her silverware with Mrs. Emmel, a friend and neighbor of hers, to be cared for during her absence. While Mrs. Emmel was out one afternoon, her house was robbed, and her own silverware as well as Mrs. Darrow's was stolen. Mrs. Emmel admitted that she left the door of her house unlocked the afternoon she was away. Should Mrs. Darrow bring action against Mrs. Emmel to recover the value of her silverware, could she succeed? Explain.

29. Dempsey borrowed a wagon from Thomas to use in hauling stone. Later and without telling Thomas he decided to use the wagon to make a trip to the village, a distance of about three miles. While the wagon was standing on the street, it was run into by an automobile and was badly damaged. In an action by Thomas to recover the value of the wagon, Dempsey proved that he had been in no way negligent. Can Thomas recover? Explain.

30. Hendricks delivered 50 bushels of wheat to a miller and was to receive in return for it a certain amount of flour. That night the mill and its contents were destroyed by fire. On whom does the loss of this wheat fall? Explain.

31. Samuels took his hand bag on a train with him and put it in the rack above his seat. While he was out of his seat the bag was stolen. He sued the railroad company for the value. Should he recover?

32. Rankin hired Lowery to pasture 10 head of young stock for the summer. Lowery's pasture was near a railroad and his hired man left the gate to the pasture open so that two head of the young stock got on the railroad track and were killed. Rankin took action against Lowery to recover the value of the stock killed. Can he succeed? Explain.

33. Hopper delivered a quantity of mahogany lumber to Hensel, a cabinet maker, to be made into furniture. Hensel had the work about half done when the wood and furniture were stolen. How will this case have to be adjusted? Explain.

34. As a result of an accident on a railroad, a quantity of fruit consigned to Benedict was delayed and suffered much damage. Benedict took action against the railroad company to recover. Can he succeed? Explain.

35. A street car, running down grade, got to running at an excessive speed, though not beyond control of the motorman. A passenger became frightened, jumped off, and was severely injured. He took action against the street car company to recover damages. Can he succeed?

INSURANCE

1. IN GENERAL

Insurance.—The term “insurance” signifies indemnity against losses. Certain misfortunes may happen which, although by no means frequent in the experience of the average man, are of so much importance and may entail upon him such severe loss that he seeks a mode of protection. The impending loss may be the destruction of one’s property by fire, flood, or cyclone; or it may be the loss of one’s earning capacity, by accident to his person; or the loss to his family, by reason of his death.

Insurance is based on the principle of distribution and sharing of losses.

Insurance Companies.—For the purpose of affording protection against these calamities there exist many large corporations known as insurance companies, which engage in the business of assuming such risks for a certain compensation known as a premium. These premiums, although comparatively small, being contributed by the many, form a large fund, out of which the losses to the few are indemnified.

Every state has an insurance official, whose duty it is to regulate and inspect the different insurance companies doing business in his state and to see that they are solvent and that their affairs are properly conducted.

Definition.—Insurance is defined as a contract whereby for a stipulated consideration one party undertakes to compensate the other for damage to a particular subject resulting from a specified peril. The party agreeing to make the compensation is called the insurer, or the underwriter, the other party to the contract being the insured. The written contract is called the policy, and the event insured against, the risk.

2. FIRE INSURANCE

Definition.—Fire insurance is a contract whereby the insurer agrees to assume the risk and indemnify the insured for loss caused directly or indirectly by fire.

Insurable Interest. — The insured must have an insurable interest in the property insured. This means that he must have an interest of such a nature that the fire insured against would directly injure him. If the person had no interest in the property upon which he obtained insurance, the only object would be a mere speculation, and the contract would not be upheld in law.

Graham had insured certain property in a factory, of which he was manager on a salary, under a contract having a number of years to run and which also secured to him important and valuable privileges to purchase the business. It was held that he had an insurable interest in the property, since its destruction would cause him a pecuniary loss.

— *Graham v. Insurance Co.*, 48 S. C. 195.

This interest may be an existing interest; as, for example, the absolute ownership, or a life interest, or a right by mortgage or lien. Or it may be only an interest in expected profits or goods, as a shipowner's right to insure goods upon which he has a claim for freight.

The owner of property does not lose his insurable interest by mortgaging, leasing, or giving an executory contract to sell it, as more than one person can have an insurable interest in the property. For example, A owns a house and lot, and leases it to B, mortgages it to C, and gives D an executory contract of sale. Each one of these four parties has an insurable interest in the house.

Divided Interest. — When a house subject to a mortgage is insured for its full value, the mortgagee can recover on the policy up to the amount of his mortgage, and the owner can recover the balance of the policy being the value of the house less the mortgage. The mortgagee is entitled to recover the amount of his mortgage up to the amount of the policy whether the owner's equity is adequately insured or not. The mortgagee loses his claim to the insurance as soon as the mortgage is paid.

Form of Contract. — The contract of insurance is usually in writing; although it may be oral, unless expressly required by statute to be written. In most states a standard form of policy has been established by statute.

This contract requires a meeting of the minds of the parties,

and certain terms must be definitely settled upon, viz.: the property insured, the title or interest of the insured, the risk insured against, the rate of premium, and the term of duration of the insurance.

An oral contract of insurance made with an agent representing two companies, the company assuming the risk not being specified, is unenforceable. An oral contract of insurance must possess all the requisites of a contract. In this case the agent not having designated which of his two principals he intended to bind, neither is bound, as there could be no "meeting of the minds."

The contract is binding and in force as soon as the agreement is completed, although the written policy may not have been actually delivered, nor in fact ever have been issued.

Taylor made a valid oral contract for insurance with the Franklin Fire Ins. Co. Before a policy was issued the property was destroyed by fire. It was held that a court of equity would compel the issuance and delivery of a policy even after the loss, and enforce payment thereon.

— *Taylor v. Franklin Fire Ins. Co.*, 52 Miss. 441.

Effect of Fraud.— Any concealment of a material fact inquired into by the insurer will, if made intentionally by the insured, avoid the policy. Still neither party is bound to volunteer information regarding matters of which the other has knowledge or of which in the exercise of ordinary care he ought to have knowledge. But the insured must not withhold information which would affect the judgment of the insurer.

One of the questions in the application for insurance was, "What is the distance, occupation, and material of all buildings within 150 feet?" No answer was made to this question and the company sought to avoid the policy on that ground. Held, that they might have refused to issue the policy or have sought further information, but that by issuing it they waived the answer to this question. — *Paul v. Armenia Ins. Co.*, 91 Pa. State 520.

Representation. — A representation in connection with this subject is said to be a statement of fact made at the time of, or before, the contract relating to the proposed adventure, and upon the good faith of which the contract is made. A material misrepresentation of fact, whether innocent or fraudulent, avoids the contract.

Warranty. — A warranty is a statement of fact or promise of performance relating to the subject of insurance or to the risk,

inserted in the policy itself or expressly made a part of it, which, if not literally true or strictly complied with, will avoid the contract. It differs from a representation, which, as we have seen, is a collateral inducement outside of the contract and need be only substantially complied with, whereas the warranty must be contained in the policy and must be strictly performed.

Any statement or description on the part of the insured on the face of the policy which relates to the risk is an express warranty, and such a warranty must be strictly complied with or the insurance is void.

—*Wood v. Insurance Co.*, 13 Conn. 533.

If questions in the application are not answered or if the answers are incomplete but not false, there is no breach of warranty, provided the insurer accepts the application without objection.

Although the breach of warranty or misrepresentation of a material fact may not contribute to or cause the loss, nevertheless the policy is avoided, for the risk is different from that which the insurer undertook to assume.

The application contained a statement that the factory insured was operated for the account of the owner and that it was immediately superintended by one of the owners. This statement was untrue. It was held that the misrepresentation avoided the policy whether they were material to the loss or not. — *Wilson v. Conway Ins. Co.*, 4 R. I. 141.

QUESTIONS

- * 1. On what principle is insurance based?
2. What is the source of this protection known as insurance?
3. How is fire insurance defined?
4. What is an insurable interest? Give three examples.
5. What are the requirements in insurance contracts?
6. What must the policy contain?
7. Is an oral contract of insurance binding? Explain.
8. What is the effect of fraud practiced in obtaining insurance?
9. How will a material misrepresentation of fact affect the contract?
10. What is a warranty as applied to insurance contracts?
11. What is the effect of not answering questions asked by the insurer?

3. FIRE INSURANCE POLICY

Standard Form of Policy. — Statutes have been passed in several states adopting a standard form of fire insurance policy,

the object being to establish a uniformity of contract and to avoid conflict between different companies insuring the same property.

Policies may be either open or valued. In an open policy the amount in case of loss is not fixed by the policy. It simply states within what limits the company will be liable. A valued policy fixes definitely the amount payable in case of total loss. When a fire occurs the company pays the actual loss up to the amount named in the policy.

Loss by Fire. — Loss by fire includes loss which is caused by the burning of the property insured or which is the result of fire in close proximity, the heat from which damages the property insured. It also includes the loss or damage by the water from the fire engines or from the exposure or theft of the goods during their removal to a place of safety at the time of a fire.

It was held that the damage and expense caused by removing, with a reasonable degree of care suited to the occasion, insured goods from apparent immediate destruction by fire, are covered by a policy insuring the goods against "loss and damage by fire," although the building in which they were insured and from which they were removed was not, in fact, burned. — *White v. Insurance Co.*, 57 Maine 91.

It includes loss by fire caused by lightning, but does not include loss caused by lightning unless a lightning clause is inserted; therefore it is customary to include such a clause.

If the fire is caused by the act of an incendiary, or by the acts of the insured while insane, or by the careless acts of a third person, the insurance company is liable.

Location. — The standard policy contains a statement of the location of the property insured; and, if it is removed to another or different place without the consent of the insurer, the policy is no longer in effect. So if a party insures his household furniture while living on a certain street, and then moves to another street, the insurance ceases to be in force. The reason for this rule is plain, for the risk is likely to vary in different locations, and whether it does or not, the insurer has the right to know what risk he is assuming.

A policy of insurance against fire was issued on furniture described as contained in a house on McMillen Street, Providence, R. I. The insured, without the knowledge of the insurer, moved the articles to a house on

another street, in which they were burned. Held, that the insured could not recover. The statement of the location of the goods is a continuing warranty. — *Lyons v. Insurance Co.*, 14 R. I. 109.

Amount Recoverable. — The market or cash value of the property at the time of the fire is the amount that can be recovered of the insurance company if this sum does not exceed the amount of the policy. If the property is only partially destroyed, the amount that may be recovered is the difference in the value of the property before and after the fire. The insurer generally reserves the right to replace the property, and in case he elects so to do, this takes the place of money damages.

Additional Insurance. — The standard policy of insurance contains a clause which provides that the policy shall be void in case the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy, without an agreement indorsed or added thereon, allowing such additional insurance. The reason for this provision is that the companies do not wish to have the property insured for more than its value, and they also desire to know whether any other insurance is carried on the property, so that in case of loss, if insured in several companies, each need contribute only its proportionate share.

Alienation Clause. — The standard policy also contains a clause known as the alienation clause, which renders the policy void if any change other than the death of the insured takes place in the interest, title, or possession of the subject insured (except change of occupants without increase of hazard), whether by legal process or judgment, or by the voluntary act of the insured. This section means any parting with or sale of the premises, and does not include the giving of a mortgage upon the insured premises.

Assignment. — A fire insurance policy is not assignable, and if assigned without the consent of the insurer it is void.

A corporation was insured under a policy containing a provision that it should not be assigned without the consent of the insurer. The corporation transferred all its property, including the policy, to the Miles Lamp Chimney Co., a corporation having the same stockholders as the original corporation, but the consent of the insurer was not obtained. Held that the Miles Lamp Chimney Co. acquired no rights under the policy.

— *Miles Lamp Chimney Co. v. Erie Fire Ins. Co.*, 164 Ind. 181.

If with the consent of the company the property insured as well as the policy is assigned, a new contract is formed which will not be affected by any act of the assignor.

Unoccupied Dwelling. — The standard form of policy also provides that if the property is a dwelling and remains vacant or unoccupied without the consent of the company for the period of ten days the insurance is of no effect. This clause is held to be a reasonable restriction, as the insurer is entitled to know that the premises are receiving ordinary supervision. It means that the dwelling must have some one living in it.

The policy insured a "dwelling house" and provided that it should be void if the premises were unoccupied for more than ten days. At the date of the policy and for more than ten days thereafter, the house was unoccupied, but Thomas's servants had been in the house for two days before the fire, cleaning and preparing it to be occupied. Held, the policy was void because of breach of condition. The presence of the servants did not constitute occupancy within the policy.

— *Thomas v. Hartford Fire Ins. Co.*, 21 Ky. Law Rep. 914 (53 S. W. 297).

Factory Buildings. — There is a further provision rendering the policy void if the subject insured is a factory building and is operated after 10 o'clock at night or some other given hour, or is not operated for ten consecutive days or some other specific length of time.

The policy of insurance on a flour mill contained the provision that if the mill were shut down 20 days without notice to the company, the policy would be suspended from the expiration of that time until the mill resumed work. Held, that the stoppage of the mill for more than 20 days without the required notice suspended the policy, though the mill was stopped for necessary repairs. — *Day v. Insurance Co.*, 70 Iowa 710.

Renewals. — The policy is often renewed by a short form of receipt which obviates the necessity of a new policy. This renewal, which may be either in writing or by parol, in substance creates a new contract on the same terms and conditions as those agreed upon in the old policy.

Cancellation. — The standard form of policy contains a stipulation that the policy may be canceled at any time by the company, or at the request of the insured upon giving five days' notice of such cancellation. And in case of such cancellation the unearned premiums paid shall be returned to the insured.

Mortgaged Property. — When the property insured is mort-

gaged and it is desired that in case of fire the insurance shall be paid to the mortgagee to satisfy his claim, it is the custom to attach a mortgage clause which provides that the insurance shall be paid to the mortgagee named as his interest may appear. In such cases it is customary for this mortgagee to hold the original policy.

Notice of Loss. — After a loss it is the duty of the insured to give immediate notice to the company. Under the standard form of policy this notice must be in writing. The damaged goods must be inventoried, and a proof of loss duly sworn to must be filed within sixty days.

Unless the notice is given as stated and the proof of loss filed within the specified time, no recovery can be had on the policy.

Pro Rata Clause. — The standard policy contains a *pro rata* clause, under which the insured can not recover more than the amount of his loss in the property insured, where there is more than one policy on the same property. Thus a man may have his house insured in three companies, as follows: in number one for \$4000, in number two for \$6000, and in number three for \$2000. The house is damaged by fire to the amount of \$6000. The insured can recover only this amount, and the companies will be compelled to pay their *pro rata* portions; that is, number one will be required to pay \$2000, number two \$3000, and number three \$1000. This rule does not apply to the case of several persons with different interests in the same property, but to the case of any insured who, if he recovered the full amount on all policies, would be getting double insurance upon the loss.

QUESTIONS

1. What is the object of the "standard form of policy"?
2. What does the policy against loss by fire include?
3. Is damage caused by lightning covered by a policy against fire?
4. Is the company liable if the fire was caused by an incendiary?
5. How does change of location of the property insured affect the policy? Why?
6. In case of fire what amount is recoverable on the policy?
7. (a) What is the "additional insurance" provision in the standard policy? (b) What is the reason for this provision?
8. What is the "alienation clause"?

9. Are fire insurance policies assignable? Explain.
10. What are the provisions of the standard policy with reference to occupancy of dwelling property?
11. Mention some of the provisions applicable to the insurance of factory buildings.
12. (a) How may a policy be renewed? (b) How may it be canceled?
13. What is a "mortgagee clause" in insurance policies?
14. In case insured property is damaged by fire, what steps should be taken?
15. What is the "*pro rata* clause" contained in the standard policy?

4. LIFE INSURANCE

Definitions. — Another form of insurance is life insurance. This kind of contract appears in an almost endless number of forms. It is in its simplest form an agreement upon the part of the insurer to pay a specific sum of money upon the death of a certain person, called the insured, to a specific person called the beneficiary. The consideration paid by the insured is called the premium, and is generally a certain amount payable annually or monthly.

Forms of Agreement. — There are many different forms of life insurance agreements. The most common are termed endowment insurance, term payment insurance (10, 15, or 20 payment life policies), investment or income insurance, and straight or whole life insurance. In most forms of life insurance except the whole life policy, the insured, after paying the premium for a given number of years, will receive a certain sum of money, or if he dies before the expiration of the period, the amount of the policy will go to the beneficiary. The beneficiary, instead of being a specific person, may be the estate of the insured.

Insurable Interest. — Every person has an insurable interest in his own life and also in the life of any person upon whom he depends either wholly or in part for education or support, and in the life of any person who is under a legal obligation to him for the payment of money. In short, a person may be said to have an insurable interest in the life of any one whose death would naturally cause him a pecuniary loss or disadvantage.

Bevin advanced to Barstow \$300 and some articles of personal property, under an agreement that Barstow should go to California and labor there for

at least one year, and then account to Bevin for one half the profits. Bevin then insured Barstow's life for \$1000. Held, that Bevin had an insurable interest in Barstow's life and could recover the amount of the policy.

— *Bevin v. Life Insurance Co.*, 23 Conn. 244.

A partner has an insurable interest in the life of his copartner, and a creditor of the partnership in the life of each partner.

A creditor of a firm has an insurable interest in the life of one of the partners thereof, although the other partner may be entirely able to pay the debt, and although the estate of the insured is perfectly solvent.

— *Morrell v. Life Insurance Co.*, 10 Cush. (Mass.) 282.

A woman has an insurable interest in her husband's life, and a man has the same interest in the life of his wife. Mere relationship is not enough to give an insurable interest. There must be an element of dependency coupled with the relationship. A nephew has no insurable interest in the life of his uncle nor has one brother in the life of another.

If the person taking out the policy has an insurable interest to support the policy at the time it is obtained, he may make it payable to any one, and it is generally held that he may subsequently assign it to any one whether such beneficiary or transferee has an insurable interest or not, unless it is apparent that the transaction is a mere cover for a wagering contract.

If the person taking out the insurance had an insurable interest at the time, the fact that the interest ceases does not affect the policy. Therefore, if a man insures the life of his debtor and the debtor subsequently pays the debt, the policy may still be continued and enforced at the death of the party insured.

In the case in which the insured designates another person as beneficiary the right of such beneficiary as a general rule becomes vested at once and it cannot be disturbed by assignment or in any other way without the consent of such beneficiary, unless the right to make a new appointment is reserved in the policy itself.

When a father takes out a policy of insurance upon his own life in favor of an infant daughter, paying all of the premiums himself and retaining the policy, the contract is between the insurance company and the daughter, and upon the father's death the legal title to the policy vests in her and she is entitled to the possession of it.— *Glanz v. Gloeckler*, 104 Ill. 573.

Premiums. — The premiums on life insurance are graded according to the age of the insured. The person insured must undergo a physical examination, as only healthy persons are insured. The amounts of the premiums are determined by average results computed upon the length of life of a large number of persons carefully arranged and tabulated. These results so arranged are called mortuary tables.

Effect of Concealment. — The contract of life insurance, like that of fire insurance, requires the exercise of good faith between the parties, but to avoid the policy the concealment of a material fact not made the subject of an express inquiry must be intentional.

Misrepresentation. — A misrepresentation, if material, will avoid the policy. The same rules apply to misrepresentations in life insurance as in fire insurance, but warranties are statements of facts which are a part of the policy and must be strictly performed or the policy is avoided.

The policy made the application a part thereof. In the application the insured falsely stated that she had not consulted a physician and had not had a certain disease. These false answers constituted a breach of warranty and avoided the policy regardless of their materiality.

— *Flippen v. Life Ins. Co.*, 30 Tex. Civil Appeal 362.

Life insurance companies generally ask many questions in their applications and unless the application is expressly incorporated in and made a part of the policy, the answers to these questions are considered as representations and not as warranties. If they are so included, they must be strictly true.

If the questions are not answered or are only partially answered, there is no misrepresentation or breach of warranty.

In the application this question was asked, "Has any application been made to this or any other company for insurance on the life of the party? If so, with what result?" To this inquiry there was no answer. Held, that the failure to disclose unsuccessful applications for additional insurance did not avoid the policy. The issuing of the policy without further inquiry was a waiver by the company of the right to inquire further.

— *Phoenix Life Insurance Co. v. Raddin*, 120 U. S. 183.

Forms of Policies. — There is no standard form of life insurance policy, and the forms of the different companies vary materially. It is customary to have the policy provide that the

application be made a part of the contract, thereby making the statements in the application express warranties. So a denial that one is affected with a disease avoids the policy if untrue. The application often inquires as to what other insurance is carried, and a deceptive statement on this point is fatal to the policy. So also a statement as to age is material and the answer must be correct.

Payment. — If the policy contains a provision that the insurance ceases unless the premium is paid when due and that the policy is not to take effect until the first premium is actually paid, the condition must be strictly complied with or the policy fails. Prompt payment is essential.

Sickness or other inability to comply with the terms of payment offers no excuse. If the insurer accepts the payment of the premium after it is due, the breach will be waived.

Suicide. — If the policy contains no express stipulation to the contrary, the insurance company is liable on a policy if the person insured commits suicide, in case a third party is the beneficiary. If the insured is the beneficiary, the rule will be otherwise. The policy frequently contains a clause exempting the company from liability if the insured commits suicide within a certain time.

A policy, payable to the insured, his executors, administrators, or assigns, contained no stipulation against suicide. The insured killed himself while sane. The court held that there could be no recovery on the policy, as being contrary to public policy and opposed to sound morality.

— *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139.

It was held that suicide while sane is no defense to an action on a policy of life insurance payable to third persons as beneficiaries, where there is no stipulation against suicide in the policy, since the beneficiaries have acquired vested rights in the policy which cannot be defeated by the wrongful act of the insured. — *Patterson v. Life Ins. Co.*, 100 Wis. 118.

When the exemption does not expressly state that the company shall not be liable whether the insured be sane or insane, the suicide clause does not vitiate the policy if the suicide is committed while the person is insane. If the clause contains these words, "it is vitiated in case of suicide under any conditions"; then, if the insured dies by suicide, sane or insane, the policy becomes null and void.

A life insurance policy provided that it should be null and void if the insured died by suicide, "sane or insane." The company pleaded that he

died from a pistol wound, inflicted by his own hand, and that he intended inflicting such a wound to destroy his own life. Held, that the policy was avoided even though the deceased was of unsound mind and unconscious of his acts when he inflicted the wound.

— *Bigelow v. Life Insurance Co.*, 93 U. S. 284.

Notice of Death. — In life insurance the company generally requires immediate notice of death and due proof that the person insured is dead.

QUESTIONS

1. In its simplest form, what is life insurance?
2. What are the different forms of life insurance agreements?
3. When may a person be said to have an insurable interest in the life of another?
4. Has a creditor an insurable interest in the life of a debtor?
5. Has a nephew an insurable interest in the life of an uncle?
6. What are the rules concerning an insurable interest at the time the policy is taken out and subsequently?
7. How are premiums on life insurance graded?
8. How is the amount of the premium determined?
9. How does the concealment of a material fact affect a contract of life insurance?
10. What will render a life insurance contract void?
11. How are answers to questions in the application considered?
12. Are life insurance policies uniformly the same? Explain.
13. What are the usual premium provisions in a policy?
14. Under what conditions is an insurance company liable if the person insured commits suicide?

5. MARINE INSURANCE

Definition. — Marine insurance is a contract by which the insurer agrees to indemnify the insured against certain perils or risks to which his ships, cargo, and profits may be exposed during a certain trip or during a specified time.

Insurable Interest. — The rules governing this class of insurance closely follow the laws of fire insurance. The person procuring the policy must have an insurable interest in the property insured. The owner always has an insurable interest, even though the property has been chartered to a person who agrees to pay its value in case of loss. The charterer also has an insurable interest in the ship. Practically the same rules apply to the insurable interest here as in fire insurance.

Effect of Fraud. — The requirement of good faith between the parties is even greater in marine insurance than in any other branch of insurance. The reason for this is that the insured has every opportunity to know all of the facts and the insurer but limited opportunity to determine them. A concealment of a material fact either innocently or fraudulently avoids the contract.

Misrepresentation. — So a material misrepresentation of a fact, whether innocently or fraudulently made, avoids the contract. The rule is even more strict here than in fire insurance.

A policy of marine insurance was obtained at and from Genoa. The load was put on at Leghorn, bound for Dublin, but the vessel put in at Genoa and had been there about five months before sailing. Richardson contended that the policy was vitiated because of the nondisclosure to the insurer that the vessel was not loaded at Genoa. Held, that Hodgson could not recover. The concealment of the port of loading vitiated the policy.

— *Hodgson v. Richardson*, 1 W. Black (Eng.) 463.

Warranty. — A warranty, as in fire insurance, must be strictly performed. In marine insurance there are three implied warranties which are understood in every contract. They are in respect to seaworthiness, deviation, and legality.

Seaworthiness. — There is implied the warranty that the ship is seaworthy at the time of the commencement of the risk. A ship is seaworthy when reasonably fit to perform the services and encounter the ordinary perils incident to the voyage. This means that the ship shall be staunch, properly rigged, and provided with a competent master and a sufficient number of seamen.

The steamship West was insured for a voyage from Montreal to Halifax. At the time of starting the voyage there was a defect in the boiler of the vessel which was not apparent in a river, but which disabled the vessel when she got into salt water. It was held that the implied warranty of seaworthiness had not been complied with as the vessel sailed with a defect which rendered her unseaworthy for the complete voyage.

— *Quebec Marine Ins. Co. v. Com. Bank*, 7 Moore, P.C.N.S. (Eng.) 1.

Deviation. — The second implied warranty is that there shall be no voluntary deviation or departure from the course fixed by mercantile usage, for the voyage contemplated by the policy; and also that there shall be no unreasonable delay in commencing or making the voyage.

A deviation is justified when caused by circumstances over which neither the owner nor master had any control, as when forced from the course by stress of weather, a mutinous crew, etc.

If the master of a vessel which has been insured, in departing from the usual course of the voyage from necessity, because of leaking of the vessel, acts in good faith and according to his best judgment, and has no other object than to conduct the vessel by the safest and shortest course to the port of destination, the insurance will not be forfeited.

— *Turner v. Insurance Co.*, 25 Maine 515.

Legality. — The third implied warranty is that the voyage shall be legal, both in its nature and in the manner in which it is prosecuted. Smuggling voyages and trading trips to an enemy's port are cases of illegal voyage.

Losses. — The loss may be total, in which case the whole insurance is ordinarily recoverable; or it may be partial, and then only a *pro rata* part can be recovered. When the loss is total, it may be an actual total loss or a constructive total loss. An actual total loss occurs when the subject insured wholly perishes, as when a vessel is so completely wrecked that it can not be repaired.

When a policy of insurance upon a vessel is against "actual total loss only," if the vessel is afloat or it is practicable to put her afloat, or if she is capable of being repaired, at any expense, it is not such a total loss.

— *Carr v. Insurance Co.*, 109 N. Y. 504.

A constructive total loss occurs when the article insured is so far damaged or lost that it can not be reclaimed or repaired, except at a greater cost than its value. For example, a vessel may be sunk in shallow water, but the cost of raising it would be greater than it is worth.

An insured vessel was thrown on the rocks, her rudder and keel torn off, one side beaten in so that the cargo of salt was washed out and the vessel was in danger of destruction. Held that the vessel was a constructive total loss. — *King v. Middletown Ins. Co.*, 1 Conn. 184.

The rule adopted in some jurisdictions is, that if the property insured by a marine insurance policy is damaged to such an extent that its value is reduced one half or more; that is, if there is a one-half loss or more, the person insured may abandon the property as a constructive total loss, and claim the full amount

of insurance. Notice of the abandonment must be given the insurers so that they may take measures to claim the property and avail themselves of whatever may be saved.

General Average. — From very early times, it has been the custom where goods were thrown overboard to save the vessel from sinking, for the owners of goods on board and the owners of the vessel to share proportionately the loss caused by sacrificing certain goods that the vessel and a portion of the cargo might be saved.

QUESTIONS

1. What is marine insurance?
2. Has a person who hires a ship for the season an insurable interest?
3. Will a misrepresentation innocently made affect a marine policy?

Explain.

4. What are the three implied warranties in marine insurance?
5. Explain the terms "total loss" and "partial loss."
6. When is a loss said to be a "constructive total loss"?
7. What is the meaning of the term "general average"?

6. CASUALTY INSURANCE

Definition. — Casualty insurance is an indemnity against loss resulting from bodily injury or the destruction of certain kinds of property. It may be accident insurance, which is an indemnity against personal injury by accident, or it may be one of the numerous classes of insurance that have sprung up within the past few years, granting indemnity against almost every conceivable form of catastrophe. Among these special forms of casualty insurance may be mentioned plate glass, boiler, employers' liability, fidelity, credit, title, and automobile insurance.

Accident Insurance. — Accident insurance is a branch of life insurance, the latter insuring against death by any cause, while the former insures against death or injury caused by accident. This class of insurance usually provides a certain payment in case of accidental death, a weekly indemnity for either permanent or total disability by reason of accident, and a fixed sum for such permanent injury as the loss of one or both of the hands, feet, or eyes. An accident in this sense is an unforeseen event which results in injury to one's person. Being thrown from an automobile

in a collision and being struck by a falling timber are accidental injuries.

While the injured was pitching hay, the handle of the fork slipped through his hands and struck him in the body, inflicting an injury which caused inflammation resulting in his death. Held, that the death was the result of an accident.

— *North American Insurance Co. v. Burroughs*, 69 Pa. State 43.

Unless the policy expressly excludes death by poisoning, the accident policy is held to cover death due to the accidental taking of poison.

Employers' Liability Insurance. — Employers' liability insurance is a class of protection afforded to employers engaged in manufacturing or other business, against liability for damages for personal injuries caused by the negligence of the employer or his servants. One occasion for this class of insurance has arisen because of the fact that when an employee in a factory is killed by reason of some faulty machinery his survivors may sue the employer for damages. The insurance company in which the employer has insured this risk defends the case, and if the proprietor is defeated, the insurance company pays the loss. (See Important Statutes, page 379.)

Fidelity Insurance. — Fidelity or guaranty insurance is a contract by which an employer is insured against loss by the fraud or dishonesty of his employees. It is in fact a guaranty of the honesty of an employee. Fidelity insurance companies issue bonds guaranteeing the faithful performance of contracts as well, and in all cases in which bonds are required it is now the common practice to purchase them of such a company.

Credit Insurance. — Credit insurance protects merchants and tradesmen from loss through the insolvency or dishonesty of their customers. For a certain premium the insurance company guarantees the merchant against bad debts. The merchants must usually bear a certain small per cent, and all losses over that amount are paid by the insurance company.

Title Insurance. — Title insurance is a guaranty to the owner of real property that his title is clear. It is an insurance against defects in the title to the property insured, and in case of loss by reason of liens or incumbrances prior to the interest of the insured, the company indemnifies him.

Plate Glass Insurance. — Plate glass insurance is another branch of casualty insurance frequently employed. Many of the larger stores and offices have plate glass fronts representing a large investment, and to avoid the danger of loss the owners employ insurance companies to take the risk of the breaking of these windows. A certain premium is charged by the companies assuming this risk, the premium being based upon the cost price of the windows.

Elevator Insurance. — Elevator insurance consists of a contract which covers the risk incidental to the use of elevators, including both the damage to the elevators themselves and to persons or property that may be injured by the use of, or by accident occurring to, such elevators.

Steam Boiler Insurance. — Because of the frequent explosions occurring from the use of steam boilers the damage caused not only to the boilers themselves but to surrounding property is insured under this head. This insurance does not cover a loss by fire, even though it be caused by the explosion, but does cover the injury to persons or property from such cause.

Health Insurance. — Some companies issue insurance policies against sickness. These policies name a list of diseases, and in the event of sickness caused by any one of the diseases named in the policy the insured receives a stated indemnity, usually payable weekly. Sometimes the policy covers doctors' bills, hospital expenses, and loss of earnings.

Burglary Insurance. — This is a form of casualty insurance, and as the name implies, it is insurance against loss of property by theft. It applies only to theft committed by breaking into the building where the property insured is kept.

Automobile Insurance. — Automobile insurance has become a very important branch of the insurance business. What is known as the "full cover" policy insures against loss resulting from fire or explosion, damage by fire to personal effects in the car or to other property set on fire by the burning car, transportation accidents, theft, collisions, loss of life or injury to occupants of the car and legal liability for expenses in connection therewith, and loss of life or injury to others and legal liability for expenses in connection therewith.

The companies will, as a rule, issue policies covering any single risk just mentioned.

Other Insurance Contracts. — Almost every risk to which one may be subjected can be covered by insurance. Other common forms are: tornado insurance, burial insurance, rent insurance, strike insurance, and the insurance of property while in the process of transportation by mail or otherwise.

QUESTIONS

1. What is casualty insurance?
2. What are the different forms of casualty insurance?
3. Is accident insurance life insurance? Explain.
4. What are the usual indemnity provisions in an accident policy?
5. What risk does employers' liability insurance cover?
6. Why is fidelity insurance considered necessary?
7. What is the purpose of credit insurance?
8. To what class of property does title insurance apply?
9. What is plate glass insurance?
10. What risk does elevator insurance cover?
11. What loss does steam boiler insurance cover?
12. What is the "full cover" policy in automobile insurance?
13. What are the main provisions of a health insurance contract?
14. Burglar insurance is protection against what losses?
15. Mention other kinds of casualty insurance.

IMPORTANT POINTS

The principal kinds of insurance are fire, life, marine, and casualty.

The two principal kinds of insurance companies are mutual companies and stock companies.

A mutual company is an association of persons who insure each other. Theoretically an assessment is levied on each policy holder whenever a loss occurs. In practice, the policy holders pay regular premiums and any surplus, after payment of losses and administration expenses, is returned in the form of dividends.

A stock company is a corporation which charges a fixed rate for insurance and out of the fund thus created pays losses.

No one has an insurable interest in property unless its destruction would cause him financial loss.

The risk is the event insured against.

An insurable interest is the first requisite in insurance contracts.

A fire insurance policy may be canceled by either party by giving five days' notice.

Fire insurance contracts are not assignable. They may be transferred by the company on application from the insured.

A coinsurance clause in a fire insurance policy provides that, in return for a reduced rate, the insured must keep his property insured up to a certain percentage of its value, usually 80 per cent.

Answers to questions and statements made by the insured which are included in the policy amount to warranties.

False representations or misstatements which have any material effect on the policy render it void.

The contract of fire insurance is binding as soon as agreed to, even before the policy is written.

The fire insurance policy covers loss resulting indirectly from the fire, as loss caused by water in putting out the fire.

The conditions named in an insurance policy are a part of the contract and binding upon the insured and the insurer.

In fire insurance, the hour and minute that the contract begins and ends is stated.

Insurance companies may reinsure property on which they have issued a policy.

In case of fire, officers of the insurance company, known as adjusters, usually inspect the ruins, appraise the damage, and name the amount which the company will pay. If the insured is not satisfied he may bring suit in court.

When the policy contains a rebuilding clause, the company may replace or repair the property in lieu of paying damages.

Any change of ownership of insured property renders the policy void unless a transfer of the policy is made by the insurance company.

An insurance agent is one who represents insurance companies.

An insurance broker is one who solicits and places insurance with various companies. He is the agent of the insured.

Insured dwelling property should not be allowed to remain unoccupied more than ten days at one time.

A renewal receipt serves to renew a fire insurance policy.

Any pecuniary dependency amounts to an insurable interest in a life.

Relationship does not give an insurable interest in a life.

In an incontestable policy, the company agrees that after a certain time it shall not be forfeited for any cause except nonpayment of premiums.

Many secret societies provide insurance for their members, on the mutual or assessment plan.

The beneficiary of a policy has a vested right of which he cannot be deprived without his consent, unless the policy contains a clause reserving to the insured the right to change the beneficiary at will. In either case the consent of the insurer is necessary.

Concealment and misrepresentation, if intentional, will render a life insurance policy void.

Life insurance policies usually contain restrictions as to travel and occupation.

Innocent concealment of a material fact renders a marine policy void.

Willful deviation from the regular route or voyage will render a marine policy void.

The three implied warranties in marine insurance contracts are:

1. That the vessel is seaworthy.
2. That there will be no deviation from the usual course.
3. That the voyage shall be for legal purposes.

In case of emergency the captain of a vessel may throw overboard part of the cargo and the rule of general average will apply.

Casualty insurance is an indemnity against loss resulting from accidents.

TEST QUESTIONS

1. Must the contract of insurance be in writing? Explain.
2. What insurable interest is sufficient to uphold a fire insurance policy?
3. If Green made a contract to sell his house to Young, would Young have an insurable interest in the house?
4. Would taking poison by mistake be an accidental injury under an accident insurance policy?
5. Give three illustrations of persons who may have an insurable interest in the life of another person.
6. On October 10, you insure your house for a period of three years, paying the premium in advance. On December 1, you sell the house to Joseph Moore. What would you do with the policy of insurance?
7. What supervision is exercised over insurance companies?
8. Would a builder who had contracted to erect a large apartment house have an insurable interest in the material and building in the course of construction? Explain.
9. (a) When does a fire insurance contract become binding on the insurer? (b) When does a life insurance contract become binding on the insurer?
10. Who may conduct an insurance business?

CASE PROBLEMS

Give the decision and the principle of law involved in each case.

1. Dyer owns a house and lot which is mortgaged to Perkins for \$1000. Teets has a lease of the property for one year, and Dunn has agreed with

Dyer to purchase the property, Dyer having given him a contract whereby he is to deed it to Dunn as soon as he has paid \$1000 on the purchase price. Which of the above parties have an insurable interest in the property?

2. Did Dyer, the owner in the above case, lose his insurable interest in the house and lot when he mortgaged it to Perkins? Did he lose his insurable interest when he gave the contract to Dunn?

3. Moore goes to Emery, an insurance agent, and asks him to insure his house for \$5000, giving him a description of the property. Emery agrees to insure it for one year and states that the premium will be \$12. Emery has authority to bind the insurance company. Moore's house burns before the policy of insurance is delivered to him. Can he recover?

4. If, in the above case, Moore's house had been set on fire twice within one month previous to applying for the insurance, would the fact that this information was not imparted to Emery affect the contract?

5. Rice, upon applying for insurance upon a warehouse, is asked the distance of the warehouse from the railroad, as the insurance company will not insure such buildings within 30 feet of the track. Rice, believing his answer to be true, states that the warehouse is about 40 feet from the track, as the party from whom he has recently purchased the building stated that to be the distance of the building from the track. The building, in fact, was less than 25 feet from the track. Would this affect the policy?

6. In a policy of insurance in which the application was attached to and made a part of the policy, the party obtaining the insurance has represented that the building insured was brick for the first two stories and frame for the third story, when, in fact, the building was brick for only the first story and the remaining stories were frame. Did this avoid the policy?

7. Hall insured his household furniture located on the first floor of a building, other tenants occupying the upper floors. Fire broke out in the upper floors and Hall's goods were damaged by smoke and water, but the fire did not reach him. Can Hall recover the damage under his fire insurance policy?

8. If, in the above case, Hall had moved his goods out to avoid their being ruined by water, and temporarily placed them across the street until a place could be found to store them, and about an hour after they were placed there a certain part of the goods were stolen, could the value of the stolen goods be recovered under the fire insurance policy?

9. If, in the above case, the remainder of the goods left in the street were damaged by rain which came just after they were removed from the building, could this damage be recovered under the fire insurance policy?

10. If, in problem 7, the fire had been caused by lightning and Hall's goods had been destroyed by the fire, could he have recovered, nothing having been said in the policy about lightning?

11. Evans insures his house and barn, and in the policy there is a condition that the insurer will be liable for fire caused by lightning. Lightning strikes his barn, tearing off the roof and greatly damaging it, but the barn does not catch fire. Can Evans recover the damage from the insurance company?

12. If, in the above case, Evans's barn had been set on fire by an incendiary, could he recover the damages from the insurance company?

13. If the insured owner, during a period of temporary insanity, sets fire to the barn himself, could he recover from the insurance company?

14. Waters insures his household furniture while living in a certain house on Edmunds Street. Within a month after taking out such insurance, he moves about one block away to a house on Meigs Street. Both of the houses are frame dwellings, and there is apparently no difference in the hazard. The policy contains a clause that if the property is removed without the consent of the insurer the policy is no longer of any effect. Shortly after moving, Waters' furniture burns. Can he recover from the company?

15. If Springer takes out a fire insurance policy of \$1000 on a house worth \$2000 and the house burns, what amount can he recover? If the insurance policy is for \$3000 and the house is worth \$2000, how much can he recover?

16. Levitt insures his house and then sells it. The policy of insurance contains the alienation clause. Shortly after the house is sold it burns. Can Levitt recover under the policy?

17. If, in the above case, Levitt had mortgaged instead of sold his house, could he have recovered under the policy?

18. If Levitt, upon selling the property in problem 16, had assigned the policy to the purchaser without obtaining the consent of the company, could the purchaser recover under the policy in case of fire?

19. Taylor takes out an insurance policy upon the life of Henderson, his business partner, who owes him \$10,000. After the policy has been running about two years, Taylor and Henderson dissolve partnership, and Henderson pays Taylor all that he owes him; but Taylor continues the policy upon Henderson's life. Is it valid?

20. Aller insures his own life in favor of his wife. After two years he obtains a divorce from her, then marries another, and, wishing to make her the beneficiary under his policy, seeks to change it. Can this be done?

21. In an application for a life insurance policy, Ford, the applicant, was asked if any of his brothers or sisters had died of consumption. No answer was given. Ford had, in fact, lost two brothers by this disease. The policy was issued. Would the concealment render it void?

22. Dwight applied to a life insurance company for a policy of insurance upon his life. He stated in answer to a question that he was engaged in running a grocery, while in fact he was a farmer. One occupation was not considered a greater hazard than the other by the insurance company. Would this affect the policy?

23. If, in the above case, the answers of Dwight had been included in his policy and made a part of it, would the misstatement affect the policy?

24. An insurance policy contains a stipulation that the company will not be liable if the insured commits suicide, and he dies from the effects of a revolver bullet fired by himself while insane. Is the company liable on the policy?

25. If the stipulation in the policy had been that the company shall not be liable if death is caused by suicide committed when either sane or insane, would the company have been liable in the above case?

26. Richardson loads his vessel with merchandise at Albany, runs it down the Hudson River to New York, and there obtains a marine policy on the ship and cargo at and from New York to London. He does not state anything in reference to the loading at Albany. Would this affect the policy?

27. Elliott took out an accident policy insuring him against "bodily injuries sustained through external violence and accidental means." He was killed by accidentally drinking poison. Was the company liable?

28. Watson calls at the office of a duly authorized agent of an insurance company and asks the agent to insure his house for \$3000. The agent agrees to write a policy for the amount. One day later the house is destroyed by fire. Watson has not received the policy nor paid the premium. Will Watson be able to recover from the insurance company? Explain.

29. Carter insured his house in the Mutual Insurance Company. At the time arrangements were made for issuing the policy Carter told the agent of the company that the house was 200 feet from any barn or stable. Later the house was destroyed by fire and the insurance company refused to pay the policy on the ground that the house was only 195 feet from a stable. Has the company the right to refuse payment? Explain.

30. Doran insured his life, naming his wife as beneficiary. When Doran died he was heavily indebted to the Fourth National Bank. His widow collected the insurance and the bank sued her to have the insurance money applied to the payment of Doran's debt. Was the bank entitled to recover?

REAL PROPERTY

I. IN GENERAL

Definition. — Real property or real estate is defined as land and whatever is affixed to and issuing out of the land. It will therefore be seen that it includes not only the land itself, but buildings erected thereon, as well as trees growing therefrom and oils and minerals included within the land extending downward to the center of the earth.

Crops which are planted each year and which are considered the fruits of labor, are personal property. If, however, the owner of land and of the cultivated crops thereon sells this land, these crops will go to the purchaser unless they are specially reserved by a clause in the deed or in some other writing executed simultaneously with it.

Rights in Streams and Lakes. — In the case of navigable waters, the title of the water and the land beneath is held by the state and adjoining owners have no greater rights therein than other people. Their ownership ceases at the water's edge.

In the case of non-navigable waters, the adjoining owners have title thereto to the center of the stream or lake and have the exclusive right to use and enjoy the waters over their lands. They are not permitted to change the direction or interfere with the flow of running streams to the injury of others.

A grantee from the United States, of land in Missouri on the banks of a navigable river, such as the Missouri River, takes only to the water's edge and not to the middle of the stream. The owner of the bank is not the owner of an island which springs up in the river, no matter whether it be on one side or the other of the center of the stream. — *Cooley v. Golden*, 117 Mo. 33.

Ice belongs to the owner of the land over which it forms, except when it is on navigable waters, in which case it belongs to the one first appropriating it.

When the water of a flowing stream, not navigable, freezes while in its natural channel, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream, who has a right to remove it. A person who owns the land on one side and cuts the ice beyond the center of the stream is liable to the owner of the land lying under the ice which was taken. — *State v. Pottmeyer*, 33 Ind. 402.

The owner of the bank along the Kansas River, a navigable river, does not own to the center of the stream, neither does he own the ice which is formed on the stream adjacent to his land without first taking possession of it. — *Wood v. Fowler*, 26 Kans. 682.

Corporeal and Incorporeal Real Property. — Corporeal real property includes the land itself and the buildings, trees, minerals, and other tangible appurtenances thereto. The examples of real property just discussed belong to this class. Incorporeal real property is an intangible right in the land which does not amount to the ownership of it. The principal illustration is an easement, which is defined as a right that the owner of one tract of land may exercise over the land of another. A right of way which a man has over the land of his neighbor for the purpose of reaching his own land is an easement. Lots in a city are sometimes sold with the covenant that the purchaser will not build within a given number of feet from the street. This creates an easement in favor of the seller. The easement may be granted perpetually or for a limited time.

An owner of land conveyed a part of it, with an agreement that the tract should be preserved for residence purposes, and not for hotel, club, or camping purposes. Held, that the deed and agreement together created an easement on the entire tract for the benefit of those who might become owners of separate parcels thereof and was enforceable by any purchaser against any other purchaser. — *Boyden v. Roberts*, 131 Wis. 659.

An agreement between the owners of adjacent city lots that if one will build a dwelling upon his lot three feet back from the line of the street the other will set his buildings back the same distance when he builds, creates an easement in the party so building in the land of the other.

— *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72.

QUESTIONS

1. What is real property and in general what does it include?
2. (a) What are the rules as to property rights in the case of navigable streams and lakes? (b) In the case of non-navigable streams and lakes?
3. To whom does ice that forms on navigable waters belong?
4. (a) What is corporeal real property? (b) Incorporeal real property?
5. Give an example of an easement.

2. ESTATES IN LAND

Definition. — The estate is the interest which one has in land. This interest may amount to absolute ownership or it may be only a temporary or conditional ownership. Under the early

English law, what is called the feudal system was in force and the absolute title to all real property was in the king, all others holding under him as tenants. The king generally granted large tracts of land to his nobles or followers, who in return for the grant rendered him certain military service in the wars which were frequently occurring between the different nations in those times. Each follower of the king had his followers or servants to whom he rented the land, and who gave him a certain amount of their time as soldiers for the king. The estate of the tenant in the land was called "fee." This feudal system does not exist in the United States, but many of the terms and rules still used in real property law are derived from it.

Estate in Fee Simple; Eminent Domain. — Estate in fee simple is the nearest approach to complete and absolute ownership of real property. Excepting the right the state has to take the owner's land for taxes or under the power of eminent domain, it can not be taken from him without his consent, except by creditors to pay his debts. It is an estate which exists for a man during his life, and if not disposed of by him descends to his heirs. When an estate of this nature exists in land, the owner can use the land as he chooses, provided he does not cause injury to others, and he may dispose of it or grant privileges in reference to it as he may desire. The land can be taken by the state, under the right of eminent domain, for public use only, as for a road, railway, etc., and in every case just and adequate compensation must be given the owner. This right is often delegated to corporations or private persons who perform some public function, as railroad companies, telegraph companies, etc.

The Supreme Court of the United States has defined eminent domain as being "The ultimate right of sovereign power to appropriate, not only the public property, but the private property of all citizens within the territorial sovereignty, to public purposes."

— *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420.

Were it not for this right in the state the construction of a highway or a railroad might be prevented by the arbitrary acts of a single individual.

Life Estate. — The fee in all real property must rest in some one, but there may be carved out of it various lesser estates.

The absolute owner has the right to do what he will with his land, therefore he may grant the use of it for life or for a term of years to another person. Estates ranking next to estates in fee are life estates. There are estates in land which are limited by the life of some human being. It is not necessary that the estate shall last during the life, but that an estate be created which may continue during that period. An estate to a woman during her widowhood is a life estate, although she may remarry and thus defeat it before her death.

Tanner and one Bartlett executed an instrument under seal by which Tanner leased to Bartlett two acres of land with use of water and the privilege of conducting it to a cheese house to be erected by Bartlett. Bartlett agreed to pay \$30 per year for the premises while he should use them for the manufacture of cheese, and when the premises were no longer to be used for that purpose, they were to revert to Tanner, Bartlett having the privilege of removing all buildings and fixtures erected by him. Held, that the agreement created a life estate in Bartlett provided he continued to use the premises for the manufacture of cheese and paid the rent.

— *Warner v. Tanner*, 38 Ohio State 118.

Tenant for Life. — The owner of the life estate, or the tenant for life, as he is called, unless restrained in the grant to him, may dispose of his interest in the land, or out of it may grant a less estate, as for a certain number of years, but he can grant to another no rights in the land that will extend beyond his life. The life tenant can recover nothing for the improvement which he makes on the property, and he is bound to make ordinary repairs at his own expense.

A life tenant by placing permanent improvements upon the land, however much they may enhance the value of the estate, can not create a charge for the moneys thus expended against the party who takes the next estate or the remainder. Such improvements are deemed to have been made by the life tenant for his own benefit and enjoyment during the pendency of his estate. — *Hagan v. Varney*, 147 Ill. 281.

A life tenant is bound to keep the premises in repair. If a new roof is needed, he must put it on, and if paint wears off, he must repaint.

— *Re Mary E. Steele*, 19 N. J. Equity 120.

The life tenant has the right to cut timber on the land for use as fuel and for the purpose of repairing the buildings and building fences.

An action was brought against Smith, a life tenant of certain premises, for cutting down and carrying away two oak trees. They were cut and sold

for the purpose of paying for labor and material in building fences on the land. Held, that a tenant for life may cut trees for fuel, wood, and fencing, but can not sell wood to pay for fencing the land. To justify the cutting, the trees themselves must be used for these purposes.

— *Elliot v. Smith*, 2 N. H. 430.

A tenant for life must not commit waste, that is, cause or allow any permanent and material injury to the property that would affect the interest of the owner of the fee. The one who is entitled to the property after the estate for life has terminated has the right to have it come to him without being impaired by injury to any part of the premises. For example, a tenant for life has no right to cut and carry away timber.

The tenant may continue to work mines or take gravel from pits that have been previously worked, but if he opens new mines or quarries, he is guilty of waste.

In an action for waste brought against life tenants for mining coal and quarrying limestone, it was shown that the quarries and mines were opened and had been worked before the life estate of defendants began. Held, that mines and quarries open at the beginning of a life estate may be worked by the life tenant even until they are exhausted, without rendering him liable in damages for waste. — *Sayers v. Hoskinson*, 110 Pa. State 473.

Emblements. — Emblements are the annual products of the land which are the result of the tenant's labor, and which he is entitled to take away after his tenancy has ended. All grains and other products which are planted and cultivated by one having an interest of uncertain duration, may be removed by him if that interest terminates without his fault before they are harvested.

Whittle was a tenant of certain lands for the life of his wife. During her lifetime he planted his annual crops. Thereafter she died, thus terminating his life estate, but he remained in possession of the lands a reasonable time to harvest his crops. Held, since the estate of the life tenant was terminated without his fault, he was entitled to the crops. — *King v. Whittle*, 73 Ga. 482.

Therefore, the representative of a tenant for life is entitled to emblements, since the tenant's estate is of uncertain duration.

The executor of a tenant for life is entitled to crops sown during the tenant's lifetime but maturing after his death. It does not affect this right that the life tenant was rapidly failing in health and had reason to expect his early death when the land was sown. — *Bradley v. Bailey*, 56 Conn. 374.

If the life tenant terminates the estate by his own act, he can not claim emblements.

Estates in Remainder and Reversion. — When the life estate ends, the final ownership of the property must rest with some one, and it may either be granted to a person named or revert to the original owner or his heirs. If the estate that is left is given to some one else it is called an estate in remainder; if it comes back to the original owner or his heirs it is called an estate in reversion.

Estates by Marriage. — Estates by marriage may now be included under the heads of Curtesy and Dower. Under the common law there existed an estate during coverture, or during marriage, but this has been practically abolished by statute in all of the states. The estate during coverture arose from the common law disability of a married woman to hold property; therefore the husband acquired an interest in all of the wife's real property, which gave him a right to the use and profits of it until the marriage was terminated by death or divorce. If the wife died first, her real property at once descended to her heirs, unless a child was born of their marriage, in which case the husband was entitled to curtesy.

Curtesy. — Curtesy is the estate for life of the husband in the real estate of his wife. Under the common law such an estate was created when the wife died before the husband if a child had been born which might have inherited the property. These conditions existing, the husband had a life estate for the remainder of his life in the real property of which the wife died possessed. It was not necessary that the child should live until the mother's death; if it lived but a moment after birth, it was sufficient to vest this estate in the husband. This estate by curtesy has been abolished by statute in some of the states, while in others it exists only in case the wife dies without disposing of her real property by will. In some states the husband takes the same interest in the wife's estate as the wife takes in the husband's.

Dower. — Dower is the provision which the law makes for the support of a widow out of the lands of the husband. Under the common law it was a life interest in one third of the husband's realty. By statute in a few of the states this has been changed to a life interest in one half of his realty. In order to give rise to this estate, it is necessary that there be a legal mar-

riage, that the husband own the land during some time after their marriage, and that the husband die before the wife. The husband may own the real property but an instant, still that will be sufficient to cause the wife's right of dower to attach. Therefore, if A buys a piece of land of B to-day and sells it to C to-morrow, the right of A's wife attaches. But this is not so if it is the same transaction, as, if A buys a farm and gives back a purchase money mortgage, the wife of A gets a dower interest in the farm subject to the mortgage.

Wheatley and Calhoun purchased from Mackay a tract of land and simultaneously executed a mortgage of the land to secure the purchase money. It was held that the rights of the mortgagee were paramount to those of the purchasers' wives and that the wives' dower attached only to the equity of redemption. — *Wheatley v. Calhoun*, 39 Va. 264.

Under her right of dower the wife has no vested interest until the husband dies. He may sell the land without her consent, and she will have no right in it until his death; but after that event, into whatever hands it comes the wife can claim her interest. Therefore, if one takes land from a married man, the wife must join in the conveyance in order to cut off her right of dower. The wife cannot release her dower to her husband nor to any one else except the person to whom the land is conveyed.

A married man cannot defeat his wife's dower by devising his real property to others by his will, except by making a provision for his wife which is expressly stated to be in lieu of dower. In such a case the wife may elect whether to accept the provision or insist on her dower right.

Statutes in many of the states have changed the law as to dower. In some states both dower and curtesy have been abolished. In a few of the states the wife is not required to join in a conveyance with her husband, as she takes dower only in the property of which he dies possessed.

Homestead. — Homestead right is an exemption of certain property from sale for debts, generally the home and a certain number of acres of ground or land of a given value. Under the common law there was no such provision, but statutes have been passed in many of the states creating a homestead law. These statutes vary in the different states, and grant the exemption

only to the head of a family or one upon whom there rests the duty to support dependent persons living with him. A husband and wife constitute such a family.

An unmarried man whose indigent mother and sisters live with him and are supported by him is the head of a family in the sense in which the term is used by the state constitution [of Georgia], and is entitled to a homestead.

— *Marsh v. Lozenby*, 41 Ga. 153.

This homestead exemption is acquired by occupancy of the premises as a home. In some states there must be recorded a notice that the premises are claimed as a homestead.

Estate for Years. — Estate for years is an estate in real property less than a life estate. This estate will be treated in the section on Landlord and Tenant.

Equitable Estates. — The estates which we have been discussing are termed legal estates. There also exist equitable estates; that is, the legal title may be in one party, while the equitable title is in another. Property may be conveyed to A to hold in trust, or as trustee, for the benefit and use of B. A is the legal owner, but holds the property only for the purpose of turning over the profits to B, who is the equitable owner. In this case, A is the trustee and B is the *cestui que trust* or beneficiary.

Estates in Severalty and Joint Estates. — Estates are divided, according to the number of owners, into estates in severalty and joint estates, estates in severalty being those in which the ownership is in one person. Joint estates are those which are owned by two or more persons. The common classes of joint estates are joint tenancies and tenancies in common. The chief distinction between the two is that in the case of a joint tenancy, upon the death of one of the joint tenants his interest vests in the survivor or survivors, while upon the death of a tenant in common his interest passes to his representatives. In the United States, all joint estates are presumed to be tenancies in common unless it appears that there was a contrary intention.

QUESTIONS

1. What is an estate in land?
2. Explain the meaning of "estate in fee simple."
3. What is the right of eminent domain? Mention some conditions under which the right of eminent domain may be delegated.

4. Who is a tenant for life and what are his rights?
5. What restrictions are imposed on a tenant for life?
6. What are emblements, and what are the tenant's rights with reference to emblements?
7. What is (a) an estate in remainder? (b) An estate in reversion?
8. How are estates by marriage classified? Define each.
9. Under what conditions will the husband have an estate by curtesy in his wife's real property?
10. Under what conditions does the wife's dower interest attach to her husband's real property?
11. (a) When does the wife's right of dower attach to her husband's real property? (b) When does it become effective?
12. When and why is it necessary for the wife to join the husband in deed to real property?
13. What are homestead rights and what constitutes a family?
14. What is the difference between legal estates and equitable estates?
15. When is an estate said to be held in trust?
16. How are estates divided according to the number of owners? Explain.
17. (a) What is the chief distinction in the two classes of joint estates? (b) In the United States, what is the presumption in the case of a joint estate?

3. OWNERSHIP, SALE, AND CONVEYANCE

Ownership. — Ownership of real property was acquired in the first place by taking possession of it and asserting the rights of ownership. This is the way some of the early settlers in undeveloped regions acquired their property. This method of acquiring ownership is preserved to a limited extent by acts of Congress which permit settlers to secure title to such land, owned by the United States, as may be designated from time to time, by living on it for a prescribed period and filing a claim to it.

Title. — The title to real property is the means by which the ownership is acquired and held. It is, in other words, the evidence which a person has of the right to the possession of property. It may be either by descent or purchase. The title by descent is acquired either by will or by the law of descent, controlling the disposition of the real property of a person dying without a will. Purchase includes all other means of acquiring the title to real property, whether by gift or for a valuable consideration.

When any one has been in open continuous undisturbed possession of property under a claim of right adverse to the owner for a certain length of time, usually twenty years, he is said to have a good title to it. This is "title by prescription."

Land Contract. — When the title is acquired by purchase, the transaction is the result of a contract or an agreement of one party to purchase or take the property upon the prescribed terms, and of the owner to sell and convey the particular property for the stated consideration. This agreement is often called a land contract, and is required by the fourth section of the Statute of Frauds to be in writing. It must be remembered that this contract does not convey the land, but agrees to convey at some future time. If the conveyance immediately follows the making of the agreement, the contract to convey is unnecessary, but in the passing of the title to real property much care is necessary to ascertain that the title of the person about to sell, or the grantor, is clear; that is, that no third party or parties have any claims on it. To ascertain that the title is clear, a search is made in the public office where records of important documents such as deeds and mortgages are kept. When the results of this search are put in writing, the document shows all of the transactions affecting the particular piece of land, and is called an abstract of title. It requires some time to obtain this abstract of title and to perfect other arrangements for the conveyance of the property, and the land contract binds the parties to their agreement during this interval.

Deeds. — The conveyance of the title to the property may be absolute, in which case it is made by deed, or conditional, in which event it is made by mortgage.

A deed, in real property law, is defined as a written contract, signed, sealed, and delivered, by means of which one party conveys real property to another. The two principal kinds of deeds are warranty and quitclaim. The warranty deeds are conveyances which, besides granting the land, contain certain warrants or covenants concerning the title. A quitclaim deed merely grants whatever interest the grantor has and nothing more.

Conditions. — All deeds must be in writing (or printing), and must have parties competent to contract. To constitute a valid

deed, or conveyance of property, it is also requisite that there be (1) property to be conveyed, (2) words of conveyance, (3) description of the property, (4) a writing signed, and in some states sealed, by the grantor, (5) delivery and acceptance, (6) acknowledgment in some states, witnesses in others, and in still other states the instrument must be registered.

Property to be Conveyed. — The first condition is self-evident, as a valid deed can not be given unless there is real property to convey.

Words of Conveyance. — The deed must contain words of conveyance, called the granting clause, which consists of words sufficient to transfer the estate to the grantee. In most deeds the words, "do hereby grant, sell, and convey," constitute this clause. The words "give, grant, bargain, and sell" are sometimes used, or again the phrase, "grant, bargain, sell, remise, release, convey, alien, and confirm."

It was held that a writing as follows, "This indenture witnesseth, that I, Jacob Smith, warrant and defend unto Christena Smith, her heirs and assigns forever," certain real estate that was then described, the instrument being then signed, sealed, and acknowledged like a deed, was not effective as a conveyance, as it contained no granting clause, nor words signifying a grant.

— *Hummelman v. Mounts*, 87 Ind. 178.

The granting clause should contain the names of the parties, also the words defining the estate, as "unto the said party of the second part his heirs and assigns forever." By the clause used in this case an estate in fee is granted. Under the common law, if the word "heir" was omitted and the grant was to the grantee alone, only a life interest would be conveyed.

It was held that a grant to A for her natural life and at her death to her children, conveyed a life estate to A and then an estate to her children during their lives, but that they did not take it in fee, as the grant contained no words of inheritance. — *Adams v. Ross*, 30 N. J. Law 505.

A grant to A and "his successors and assigns forever," conveyed only a life estate. The court said that it is a well-settled rule of the common law that the word "heirs" is necessary to create an estate of inheritance.

— *Scdgvick v. Laflin*, 10 Allen (Mass.) 430.

But this rule has been changed by statute in some of the states, and a conveyance showing an intent to grant a fee will be so construed.

The conveyance clause may contain exceptions; that is, there may be reserved something that would otherwise pass with the property conveyed. The exception, for instance, might be of a right of way over the land, or the right to mine coal or minerals. The exception must be stated and particularly described.

The habendum is that part of the conveying clause which begins with the words "To have and to hold." It designates the estate which is to pass. If it does not agree with the granting or conveying clause, it is void, and if the conveying clause defines the estate granted, the habendum clause is not necessary, although it is usually employed.

Where the granting clause grants an absolute estate to A, and the habendum recites that a life estate was given to A, remainder to B, A takes an absolute estate. When the granting clause and the habendum do not agree, the latter gives way to the granting clause.

— *Ralliffe v. Marrs*, 87 Ky. 26.

Description. — The deed must contain a description of the property sufficient to identify it. The description may include references to maps, monuments, distances, or boundaries.

A creek is a monument which may be referred to as a boundary in a deed or mortgage. — *Travelers Insurance Co. v. Yount*, 98 Ind. 454.

The description often closes with the words, "with the privileges and appurtenances thereto belonging." But it is not considered that this clause adds anything to the deed. The appurtenances are such rights as watercourses, rights of way, rights to light and air, etc., and these are all included in the general grant, unless they are expressly reserved.

Signature and Seal. — At common law a seal was necessary to the legality of a deed, but in many states this requirement has been abolished. Between the parties themselves to a deed a consideration is not necessary to its validity, although it may in some cases be attacked by creditors of the grantor. A date is not strictly necessary to the validity of a deed, and when used may be placed in any part of the instrument. It is generally at the commencement or just before the signature at the end. A deed takes effect from the time of delivery, and the presumption is that the date of delivery is the date of the instrument.

It is usual for the deed to close with the testimonium clause,

which recites, "In witness whereof the party of the first part has hereunto set his hand and seal the day and year first above written," and immediately thereafter the grantor signs his name. By the Statute of Frauds the deed is required to be signed. In some states the statutes require that the deed be subscribed, and in that case it must be signed at the end, otherwise it may be signed at any other place.

While the laws of North Carolina require all deeds conveying land to be signed by the maker, the signing is not necessarily required to be at the end of the deed. If the signature is in the body of the instrument, it is sufficient. Nor is it essential that the maker should actually sign his name. He may authorize another to do it in his presence, or he may affix his mark, which will have the same effect as his own writing.

— *Devereux v. McMahon*, 108 N. C. 134.

Delivery and Acceptance. — A deed does not become operative until it is delivered and accepted; that is, the instrument must pass out of the control of the grantor, but it must be his voluntary act, and if taken without his consent, as by theft, it is not a delivery.

A deed had been signed, sealed, and acknowledged in due form, but remained in the possession of the grantor until his death, and he managed the property and received the rents and profits. It was held that the grantees named in the deed received nothing by it as it was ineffective for lack of delivery. — *Fain v. Smith*, 14 Oregon 82. •

The instrument may be intrusted to a third person to be delivered to the grantee on the performance of some condition. This is termed a "delivery in escrow." To constitute a valid delivery in escrow there must be no power in the grantor to recall it.

The grantor duly executed the deed and said, "I deliver this as my act and deed." The grantee not being present, the grantor gave the deed to his sister and said, "Here, Bess, keep this, it belongs to Mr. Gamoris [the grantee]." It was held that the grantor parted with control over the deed and it was good delivery to the grantee.

— *Doe v. Knight*, 6 Barn & C. (Eng.) 671.

Not only must there be a delivery, but there must be an acceptance by the grantee, though acceptance will sometimes be presumed from the grantee having possession of the deed or from the beneficial character of the instrument.

A deed is one of the forms of a contract and the grantor and grantee must agree, the former to convey and the latter to accept. Therefore there

must be more than a mere manual delivery of the deed; it must be accepted and assented to. Where it is beneficial to the grantee, delivery and acceptance will easily be presumed from many circumstances, such as acknowledgment, recording, possession and enjoyment of the estate by the grantee, etc.

—*Kearny v. Jeffries*, 48 Miss. 343.

Acknowledgment. — Acknowledgment is necessary to entitle the instrument to be recorded in some states, and in other states it is necessary to give it validity. An acknowledgment consists in the grantor going before an officer designated by law and declaring the deed to be genuine, and that it is his voluntary act, the officer making a certificate to this effect.

In some states one or more witnesses to a deed are required by statute in case there is no acknowledgment in order to entitle it to be recorded, while in other states they are necessary to give it validity.

Record. — The statutes in all of the states provide for the registration or recording in some public office of all deeds and other instruments affecting real property. Instruments so recorded are notice to the whole world that they exist, as every one can examine the records. Therefore the first instrument recorded has priority over another like instrument on the same property. But as between the parties themselves and all parties having actual notice, the instrument is in most of the states equally valid without recording. It is only against subsequent purchasers who buy in good faith that unrecorded instruments are of no effect.

Warranties. — A deed may be a full warranty deed (see Appendix), which contains the five covenants of title, or it may be a simple warranty deed containing only the covenant of quiet enjoyment and covenant warranting the title of the grantor. Upon a breach of a covenant the grantor is liable for damages. They are undertakings by which the grantor warrants certain facts to the grantee.

Seizin. — In the full warranty deed above mentioned the first covenant is that of seizin and right to convey. This is a covenant that the grantor has possession of the property granted and has a right to convey it. He must have the very estate in quantity and quality which the deed purports to convey. This covenant is broken when the grantor is not the sole owner, or when the

property is in the adverse possession of another, or when the land described does not exist, or there is a deficiency in the amount of land conveyed.

The Mercantile Company had obtained its title to some land by the foreclosure of a mortgage, but the foreclosure proceedings were defective and the titles of six of the eight owners, against whom the proceedings were brought, were not divested. Therefore the covenant of seizin in the deed from the Trust Company was held to have been broken and damages were awarded. — *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271.

This covenant is often set forth in the deed after the following manner:

“The party of the first part does hereby covenant and agree that at the time of the ensealing and delivery of these presents he was the lawful owner and was well seized, in fee simple, of the premises above described, free and clear from all lien, right of dower, or other incumbrances of every name and nature, legal or equitable, and that he has good right and full power to convey the same.”

Quiet Enjoyment. — The second covenant is that of quiet enjoyment, and is to the effect that the grantee and his heirs and assigns shall not be legally disturbed in their quiet and peaceable possession of the premises, but that they shall possess it without suit, trouble, or eviction by the grantor or his heirs or assigns.

A covenant of quiet enjoyment relates to the grantor's right to convey the premises. It is a covenant that the grantee shall not be rightfully disturbed in his possession, and not that he shall not be disturbed at all. So where it appears that the grantee was kept out of possession by a party who had no right or claim, it is not a breach of the covenant.

— *Underwood v. Birchard*, 47 Vt. 305.

Incumbrances. — The third covenant is one against incumbrances, and warrants that there are not outstanding rights in third parties to the land conveyed. It is a covenant against both mortgages and easements in favor of third parties. It is broken by an outstanding mortgage, an unexpired lease, an easement, unpaid taxes, or judgments that are unsatisfied.

A judgment against the vendor of land entered before the execution of the deed, was a breach of the covenant against incumbrances.

— *Holman v. Creagnules*, 14 Ind. 177.

The usual covenant against incumbrances was broken by outstanding taxes which were a lien on the property when the deed was made, and the grantor can be compelled to pay them. — *Milot v. Reed*, 11 Mont. 568.

Further Assurance. — The fourth covenant is one of further assurance, and is an agreement by the grantor to perform any acts that may be necessary to perfect the grantee's title, including the execution of such further instruments as may be required for this purpose.

A deed made by Pascault to Cochran contained the covenant of further assurance. A defect in title appeared, whereupon Pascault purchased all the outstanding rights and deeded them to Cochran. It was held that this was full performance of Pascault's obligation under the covenant.

— *Cochran v. Pascault*, 54 Md. 1.

Warranty of Title. — The fifth and last covenant is the warranty of title, which is an assurance by the grantor that the grantee shall not be evicted from part or all of the premises by reason of a superior title in any one else. This covenant is broken by an eviction from any or all of the premises, the removal of fixtures by one having a right to do so, or the taking of the premises by one having a better title.

Held, that eviction by process of law is required to enable one to maintain an action for breach of covenant of warranty.

— *Norton v. Jackson*, 5 Calif. 262.

Quitclaim Deed. — The quitclaim deed contains none of the covenants of a warranty deed, and purports to grant only what interest the grantor has, if he has any. The quitclaim deed does not even aver that he has any title. If he has a defective title, the grantee has no claim on him. The words of conveyance differ from those in the warranty deed. This form of deed is used when the grantor has an interest in land, as one of several heirs or as a joint owner, and wishes to convey his share to another heir or to the other joint owner. It is also employed when a person having an easement or other minor estate in land wishes to transfer his estate to the owner in fee for the purpose of clearing the title.

Covenant against Grantor. — The covenant against the grantor is the only covenant used in a quitclaim deed. It is also sometimes used in a warranty deed, when the grantor is not willing to warrant the title absolutely, but is willing to covenant

that he has not himself done or permitted to be done anything that would injuriously affect the title to the premises. Such a deed is called a special warranty deed. One form of this covenant is as follows: "The said party of the first part covenants with said party of the second part that the party of the first part has not done or suffered anything whereby the said premises have been incumbered in any way whatever."

It was held that a deed with a special warranty against all persons claiming by, through, or under the grantor, can not be extended to a general covenant of warranty against all persons.

— *Buckner v. Street*, 15 Fed. Rep. (U. S.) 365.

Transfer by Will and Inheritance.— A will is an instrument by which a person disposes of his property, to take effect after his death. When real property is left to some one by will it is said to be devised, and the person who so receives it takes it by devise.

When a man dies without making a will he is said to have died "intestate," and the law, through a court for this purpose, determines which of his relatives shall take his property, either real or personal. Their title is acquired by inheritance.

QUESTIONS

1. (a) How may ownership to real property be acquired? (b) What is the usual way at the present time of acquiring ownership?
2. What is the title to real property?
3. Explain title by prescription.
4. What is a land contract and when is it necessary?
5. What is a deed and when is it used?
6. What are the requisites of a valid deed?
7. What are the words of conveyance?
8. What should the granting clause contain?
9. May the conveyance clause contain exceptions? Explain.
10. What is the "habendum"? Is it necessary?
11. How should the property be described in a deed?
12. Is a seal necessary to the legality of a deed?
13. What are the special requirements in the execution of a deed?
14. When does a deed become operative?
15. What is "delivery in escrow," and when is it valid?
16. What is an acknowledgment and when is it necessary?
17. Is it necessary to have witnesses to a deed?
18. Why is it usually required that deeds be recorded? Explain.

19. What is the difference between a full covenant warranty deed and a simple warranty deed?
20. What are the five covenants in a full warranty deed?
21. What is a quitclaim deed?
22. How is property transferred by will?
23. How is title to property acquired by inheritance?

4. MORTGAGES

Definition. — A mortgage is a conveyance of land as security for a debt or some other obligation, subject to the condition that upon the payment of the debt or the performance of the obligation the conveyance becomes void. The debtor, or the person who gives the mortgage, is called the mortgagor and the creditor, or the person to whom it is given, is the mortgagee.

Equity of Redemption. — Under the common law the mortgage was strictly a conveyance, and the mortgagee held the legal title to the property. His title was subject to be defeated upon the payment of the debt secured, and in default of the payment his estate became absolute. This often led to hardship and injustice, for the value of the property might be greatly in excess of the mortgage debt. The courts of equity recognized this injustice and extended relief by giving the mortgagor the right to redeem the land by paying the debt with interest. This right was termed an "equity of redemption," and to cut off such right an action was brought in court giving the mortgagor a certain time in which to pay or else lose the right entirely.

Lien. — Now, in many of the states, the mortgage is looked upon as a lien which the mortgagee has on the mortgaged premises, the mortgagor still being the legal owner subject to the lien which the mortgagee holds upon the land as security for his debt.

Any Interest in Realty which is Subject to Sale may be Mortgaged. — A widow may mortgage her right of dower, or a mortgagee may mortgage his mortgage, and an heir may mortgage his undivided interest.

A and B entered into a written contract, by which B bound himself to convey certain lands to A. Held, that A may mortgage his interest in the land under this contract. Everything that is the subject of a contract or that may be assigned, is capable of being mortgaged.

— *Neligh v. Michenor*, 11 N. J. Equity 539.

Form. — A mortgage is in substantially the same form as a deed, with the addition of the defeasance clause. This is a clause containing a statement that the conveyance is made conditional upon the payment of a specific amount, which amount being paid, the instrument is void. A mortgage is executed with all of the formality of, and in practically the same manner as, a deed. As a rule, when the mortgage is given to secure a debt, it is accompanied by a note or bond or other evidence of indebtedness, making the mortgagor personally liable, so that the mortgagee may look to him personally in case the mortgaged property is not sufficient to pay the debt. This is not necessary to the validity of the mortgage, as there may be a valid mortgage without any personal liability on the part of the mortgagor, in which case the creditor's only right to payment is out of the mortgaged property.

Defeasance Clause. — This is the clause showing that the instrument is given as security for a debt. No particular form is necessary so long as this condition appears. And although on its face the instrument may be a deed, a court of equity will permit it to be shown that the agreement really was that the conveyance should be made as security for a debt and not absolutely; therefore when this is shown, although the instrument be a deed in form, it will be declared a mortgage.

Covenants. — The mortgage may or may not include one or more covenants. They are usually inserted for the better security of the mortgagee. One clause gives the mortgagee the right to sell the property; that is, to foreclose the mortgage upon default of the payment of any part of the principal as agreed.

The insurance clause is inserted to protect the mortgagee's interest in the buildings on the mortgaged premises.

Another clause, called the interest, tax, and assessment clause, compels the mortgagor to pay the interest, taxes, and all assessments levied against the property, and in case of default for a given number of days, the mortgagee may, if he choose, consider the whole amount of the debt due and proceed with the same remedies as though the time within which the debt was to have been paid had expired.

A short form of mortgage is shown in the Appendix.

Assignment. — The mortgagee may desire to sell the mortgage or transfer it to another party. This he may do, as the interest of the mortgagee in the property mortgaged is subject to sale as well as the interest in the property remaining in the mortgagor. The assignee takes the mortgage with all of the rights of the assignor, but no others. The mortgage can be assigned only by an instrument in writing and under seal, and the assignment should be recorded, to protect the assignee against a subsequent fraudulent assignment.

Foreclosure. — The remedy of the mortgagee when the debt secured by the mortgage is not paid as agreed is to foreclose his lien. The foreclosure of the mortgage means the proceedings by which the mortgaged premises are applied to the payment of the mortgage debt, and by which the equity of redemption is barred or cut off. This remedy usually consists of an action in the courts from which a judgment is obtained, decreeing that the property be sold and the proceeds applied toward the payment of the mortgage debt. If anything remains after the costs of the proceedings and the mortgage debt are paid, it is turned over to the mortgagor. This action bars all rights of the mortgagor to the property and cuts off his equity of redemption. All parties interested in the property must be made parties to the action, so that they will have notice of the proceedings and can present their claims to the court if they desire. The statutes generally require that the property be advertised for sale in the papers for a certain length of time before the sale takes place. In case the property does not sell for enough to satisfy the debt, a personal judgment on the note or bond is taken for the balance, this being called a deficiency judgment.

Record. — Mortgages are required to be recorded in the same manner as deeds, in order to give notice to subsequent purchasers of the property. If not so recorded, they are in most states valid as between the original parties, but not against persons who have purchased in ignorance of the existence of the mortgage. But in some states the statutes require the mortgage to be recorded in order to render it valid.

Discharge. — If the mortgage is paid according to its terms when it becomes due, it is discharged; or payment after it is due,

but before an action is brought to foreclose, discharges the mortgage. In order to cancel the mortgage on the records, an instrument called a satisfaction of mortgage or discharge of mortgage, executed by the mortgagee, must be filed in the office where the mortgage was recorded, otherwise the mortgage, although paid, would still appear by the records to stand against the property.

Second Mortgage. — The mortgagor may place a second or subsequent mortgage on the property. Unless it is otherwise stipulated, the mortgages take priority according to their date; that is, the second mortgagee gets nothing until the first is paid in full. But in case the first mortgage is not recorded and the second mortgagee has no notice of it, the second mortgage will, if recorded, have priority.

Any mortgagee may foreclose his mortgage when it is past due or the mortgagor is in default, but he can not affect the interest of a prior mortgagee by such proceedings, although he may cut off any subsequent mortgagee. By foreclosing his mortgage, therefore, the holder of a first mortgage will bar the second mortgage, and if the property sells for only enough to pay the first mortgage, the second mortgagee will lose. Of course if the property sells for more than enough to pay the first mortgage, the balance will be applied on the second mortgage. If the second mortgagee forecloses, he must sell the property subject to the lien of the first mortgage.

Deeds of Trust. — Mortgages may be given by means of a deed of trust to a third party as trustee. These are called deeds of trust. The trustee has the right to foreclose. Should he fail to exercise his right, a bondholder may foreclose, for the benefit of the other bondholders. Before he can do this, he must show the court that the foreclosure is necessary to protect the interests of the bondholders and that the trustee refused to take action.

QUESTIONS

1. What is a mortgage on land?
2. Explain the term "equity of redemption."
3. Is a mortgage a lien on the property mortgaged? Explain.
4. What interests in realty may be mortgaged?

5. How do a mortgage and a deed compare in form?
6. What is the defeasance clause? Explain.
7. Mention three covenants usually contained in a mortgage.
8. In what way is the debt usually represented?
9. (a) Are mortgages assignable? Explain. (b) What are the requirements?
10. What remedy has the mortgagor when the debt is not paid?
11. Is it necessary to record mortgages? Explain.
12. What is necessary to discharge and cancel a mortgage?
13. Can a second mortgage be placed on property? Explain.
14. Can a mortgagor who holds a second mortgage foreclose? Explain.

5. LANDLORD AND TENANT

Estates for Years. — We have discussed estates in fee simple and estates for life. But estates in real property may be created for a shorter definite period. These are called estates for years. The grantor is known as the lessor or landlord, and the grantee as the lessee or tenant. The contract creating an estate for years is a lease. It is important to observe that an estate for years, or a leasehold interest in real estate, is classed as personal property.

Taylor, at the time of his death, left a will giving his real estate to a certain person and his personal property to his son absolutely. Taylor owned a number of leases of property, some of which were to run ninety-nine years. Held, these leases passed as personal property to the son.

— *Taylor v. Taylor*, 47 Md. 295.

Leases. — By the Statute of Frauds in most states the lease must be in writing, if for a longer time than one year. Generally, if for one year or less it may be made orally, and this is true even though the term is to commence at a date in the future. In a few states leases can be made for only a limited number of years, while in others a lease for more than a certain number of years must be recorded.

Covenants. — A common form of lease is shown in the Appendix. Besides the provisions in it, any further agreement between the parties may be incorporated in the writing. A lease is but a contract, and the full agreement of the parties should be set forth. Frequently the following covenant is inserted: "It is further mutually covenanted and agreed that, in case the buildings or tenements on said premises shall be destroyed or so injured by fire as to become untenable, then this lease shall become

thereby terminated, if said second party shall so elect; and in such case, he shall vacate said premises and give immediate written notice thereof to said landlord, in which case rent shall be due and payable up to and at the time of such destruction or injury."

Term. — The term of the lease is the time for which it is to run. If the tenant has been in possession under a lease for one or more years, and he retains possession without executing a new lease, he is presumed, in the absence of some agreement, to be a tenant from year to year, which means that his term after the expiration of the lease is one year, and if he remains in possession after the next year he is a tenant for another year.

Express and Implied Covenants. — The covenants contained in a lease are either expressed or implied. The implied covenants exist whether they are mentioned or not; the express covenants must be included in the express conditions of the lease, and may be many or few.

The implied covenants, on the part of the lessor, are those regarding quiet enjoyment and the payment of taxes. The usual words of grant in a lease are "demise and lease," or "grant and demise," these words being said to import a covenant of quiet enjoyment. This covenant is broken when the tenant is evicted by some one who has a paramount title.

Hanley leased certain premises to Banks, the lease containing no covenant of quiet enjoyment. Hanley raised and adjusted the building to conform to the grade of the street, doing the work while Banks was in possession and in such a manner that Banks' possession and use of the premises was seriously interfered with. Held, that the law always implies a covenant of quiet enjoyment from the fact of the leasing, and that the covenant is broken by any event which prevents the tenant from enjoying the premises as amply as he is entitled to by the lease.

— *Hanley v. Banks*, 6 Okla. 79.

The landlord also impliedly covenants that he will pay all taxes assessed against the premises during the term. There is no implied covenant on the part of the lessor, or landlord, that the premises are in a tenantable condition.

In an action for rent of a store leased to one Coulter, the defense was, that the store was rented for the selling of musical instruments, and that it was so imperfectly and defectively constructed that rain came through the roof and ceiling, causing damage to the instruments. Held, that in the letting

of a store, room, or house, there is no implied warranty that it is, or shall continue to be, fit for the purpose for which it is let. The tenant must determine for himself the safety and fitness of the premises.

— *Lucas v. Couller*, 104 Ind. 81.

On the part of the lessee, or tenant, there is an implied covenant that he shall pay the rent stipulated for.

The lessee also impliedly covenants to repair, and if the leased premises consist of a farm, it is implied that he is to cultivate it in a husbandlike manner. The covenant to repair is not to rebuild when the property is burned down, but, as it is said, to keep it "wind and water tight"; that is, to keep the roof from leaking and the siding tight. The premises must be kept in repair, except for ordinary wear and tear.

An implied covenant may be set aside by express covenants.

Rights and Liabilities under a Lease. — Aside from the covenants in a lease there are certain rights and liabilities which arise from the relation of landlord and tenant. In the absence of an agreement to the contrary the tenant is entitled to the exclusive possession of the premises. He is liable for waste and is estopped from denying his landlord's title; that is, the tenant cannot for any purpose claim that the premises do not belong to his landlord.

If a tenant recognizes the title of his landlord by accepting a lease or by paying the rent, he will be estopped during the term of his tenancy from disputing it, although the want of title may appear from the landlord's own testimony. — *Gray v. Johnson*, 14 N. H. 414.

The tenant is entitled to emblements when his estate is cut off by some contingency without his fault.

Shoemaker owned some land, of which he gave a deed in trust to Toms to secure a loan. Shoemaker afterwards leased the land to Worst for a year and Worst paid the rent in full. Before Worst had harvested his crops Toms foreclosed his claim and sold the property to Gray. Gray at once claimed the crops as owner of the land, but Worst as lessee gathered them before leaving. In this action for the value of the crops it was held that the lessee was entitled to them and Gray could not recover.

— *Gray v. Worst*, 129 Mo. 122.

The landlord is under no obligation to repair unless the lease expressly binds him to such duty. And he is entitled to the fixtures annexed to and made a part of the realty. The questions as to when the fixtures may be removed by the tenant, and

when they may be claimed by the landlord, will be discussed in the following chapter on "Fixtures."

The tenant sued the landlord for the value of a front window in the leased store. The window had been broken by a storm during the tenancy and replaced by the tenant, the landlord having refused to put in a new one. Held, that he could not recover. The landlord is not bound either to repair leased premises himself or to pay for the repairs made by his tenant unless he has expressly contracted to make the repairs.

— *Turner v. Townsend*, 42 Nebr. 376.

Assigning or Subletting of Lease. — Unless the tenant is restrained by an express covenant against subletting or assigning, he may assign or sublet his lease without the consent of the landlord. If the interest granted by the lessee is for a shorter time or for rights inferior to those granted in his own lease, it is a sublease.

Where a lessee executes an instrument conveying the whole of his unexpired term, but reserving rent at a rate and time of payment different from those in the original lease, and a right of reentry on nonpayment of rent and the breach of other conditions, and also providing for a surrender of the premises to him at the expiration of the time, the instrument is a sublease and not an assignment. — *Collins v. Hasbrouck*, 56 N. Y. 157.

And in the case of a sublease the subtenant is not liable for rent to the original lessor, but only to the original lessee.

If the interest conveyed by the tenant is his whole interest in the lease, it is an assignment of the lease, and the assignee is liable to the original lessor for rent. In the case of an assignment of the lease the landlord may look to either the original lessee or to the assignee of the lease for the rent. The assignee takes all of the interest of the original tenant and is bound to pay rent, to repair and to use the property in any special way provided for in the lease. But these obligations of the assignee of the lease do not in any way release the original lessee from his obligation to his lessor.

Eviction. — At the expiration of the lease the landlord is entitled to the possession of the premises, and if the tenant does not surrender them, the landlord may institute proceedings to evict him. The statutes in the different states provide the procedure by which the tenant holding over after his lease has expired may be evicted on short notice. This is termed "summary proceedings." This form of procedure is also provided by statute for

the eviction of the tenant when he does not pay his rent. The landlord who wishes to evict a tenant by summary proceedings obtains a process from some court which is served upon the tenant, and if it is found by the court when the case comes up for a hearing that the landlord is entitled to the possession of the premises, the court empowers one of its officers to evict the tenant from the premises.

As a result of the shortage of houses after the World War, some of the states passed laws to limit increases in rent and to prevent evictions of tenants willing to pay reasonable rent. This was done under the police power of the state, to protect public health against profiteers.

Where the tenancy is not for any fixed period, but is a tenancy from year to year or month to month, it cannot be terminated by either party except by notice. Under the common law a tenancy from year to year could be terminated by notice six months before the expiration of the period, and in the case of a tenancy for a shorter period, as from month to month, by a notice equal to the length of the period.

In monthly tenancies a month's notice to quit is sufficient, but the notice must be to quit at the end of one of the monthly periods.

—*Steffens v. Earl*, 40 N. J. Law 128.

Until this notice has been given, the landlord can not evict the tenant, and until the tenant has given a like notice to the landlord, he is liable to be held for the rent unless the landlord accepts his surrender of the premises. The statutes in the different states have in many instances changed the common law rule and a shorter notice is rendered sufficient.

QUESTIONS

1. How are estates for years created?
2. Must a lease of land be in writing? Explain.
3. What are the usual covenants in a lease?
4. When is the tenant presumed to be a tenant from year to year?
5. What are the usual implied covenants in a lease? Explain.
6. What are the tenant's rights and liabilities under a lease?
7. What are the landlord's rights and liabilities under a lease?
8. Has a tenant a right to sublet? Explain.
9. In case of an assignment of a lease who is responsible for the rent?

10. When and under what conditions has the landlord a right to evict a tenant?
11. What are the notice requirements in case of eviction?

IMPORTANT POINTS

The conditions and term, and the rights and obligations in connection with the holding of land constitute "tenure."

An estate is a specific right or interest in land.

Fee simple means a full ownership, clear of any conditions, limitations, or restrictions.

A freehold is an estate of inheritance or a life estate. It has an indefinite duration.

A leasehold is an estate of definite or fixed duration.

An estate of inheritance is one which descends to the heirs of the owner upon his death.

A person who possesses a right to real property during his life or the life of another has an estate for life.

All leaseholds of real property, regardless of the term, are considered personal property.

Realty covenants are written agreements fixing rights and liabilities.

Real property is acquired by occupancy, prescription, will, inheritance, or deed.

A will made by the owner of property is a means of disposing of the property after his death.

A will must be witnessed by two persons who are not beneficiaries.

When real property is left by will, it is said to be devised and the person to whom it is willed takes it by devise.

When a person dies without making a will, his property descends to his heirs by inheritance.

When property descends by inheritance the law determines which relative shall take the property.

The purchaser of mortgaged property who assumes the mortgage becomes liable absolutely for the mortgage; while the purchaser who accepts the property subject to the mortgage, without assuming the mortgage, is liable only to the extent of his equity or interest in the property.

The special kinds of mortgages are:

1. Deeds of trust. A mortgage may be given as a deed of trust to a third party as trustee.
2. Purchase money mortgages. These are mortgages given for part or the whole of the purchase price of land.
3. Building and loan mortgages. These are given to secure funds for the purpose of erecting buildings.

When one person holds property for the benefit of another, he is said to hold it in trust as a trustee.

Restrictions in deeds for the benefit of the surrounding property are binding so long as they are not against public policy.

TEST QUESTIONS

1. What are the ways by which title to real property may be acquired?
2. A has a farm upon which there is a pond one half mile in diameter. Has A the right to prohibit people from fishing and rowing upon this pond?
3. A's farm has a small river running through it. Has A the exclusive right to fish on the part running through his property?
4. In the above case, if the river had been a navigable stream, what exclusive rights would A have had?
5. Give an illustration of (a) corporeal real property; (b) incorporeal real property; (c) easement.
6. Why is it advisable before buying real property to have the title searched?
7. What is an abstract of title?
8. Wilson owns the absolute title in a farm. He dies leaving his widow the use of it during the remainder of her life. She leases it to Johnson for one year. What estate in the land did Wilson have? What estate did his widow receive after his death? What estate did Johnson have? Were there other rights in the property?
9. (a) In the above case could Wilson's widow grant to any one an estate in the land that would exist beyond her own life? (b) Could she grant an estate in the land that would last as long as she lived?
10. Had Wilson's widow, in question 8, the right to cut timber on the farm for the purpose of repairing the buildings? For use as fuel? To sell for lumber? To use in manufacturing wagons?
11. Explain what is meant when it is said that a life tenant must not commit waste.
12. Suppose there was a coal mine on Wilson's farm in question 8, which he had been working during his life. Can his widow continue to work it under her life estate? Can she open it and work it if it had never been worked?
13. If Wilson's widow should sow a field of wheat on the farm and then die before it was harvested, would the wheat belong to her estate, or to the person to whom Wilson had left the farm after his widow's death?
14. Harden, a married man, buys a farm for \$5000, and gives back a purchase money mortgage for \$4000, paying the balance of \$1000 in cash. Harden's widow does not join in the mortgage. Upon Harden's death will

his widow have dower in the whole farm, or will the mortgage which she did not sign come in ahead of it?

15. If, in the above case, the mortgage given by Harden had not been a purchase money mortgage, but had been given some years after Harden had purchased the farm and his wife had not joined in it, would the widow's dower right be subject to the mortgage?

16. Property is conveyed to A to hold in trust for B, a minor child, until he shall become of age, the use and benefit of the property to go to B. What estate in the land has A? What estate has B?

17. A gave a deed to B. In the granting clause it recited that an absolute conveyance was given to B. In the habendum it recited that B had a title in fee subject to a life estate in C. What estate did B get under the deed?

18. Is a deed valid as between the parties when it is not recorded? Is it valid as to third parties who had no notice of it and who acquired rights to the land after it was given?

19. How does the transfer of property on which there is a mortgage affect the mortgage?

20. Does the covenant to repair require the rebuilding of the premises if they are burned down?

21. Emery hires a building for one year and then leases all but one room to Boland for the whole length of his term. Which does this constitute, an assignment or a subletting?

22. If in the above case Emery had rented the entire building for the full term of his lease to Boland without any restrictions, what would it have constituted, an assignment or a subletting?

23. If the tenant's lease of the property is for a definite time, how may the landlord evict him at the end of his term, provided he does not voluntarily surrender the property?

24. In the purchase of mortgaged property what is the difference between the purchaser assuming the mortgage and buying the property subject to the mortgage?

CASE PROBLEMS

Give the decision and the principle of law involved in each case.

1. Fisher draws a deed of a house and lot, naming his grandson as grantee. He places the deed in his safe, and after two years dies. The deed is found and the grandson claims the property under it. Can he hold the property?

2. If, upon drawing the deed in the preceding case, Fisher had given it to his banker to hold until his death and to deliver to the grandson at that time, could the grandson hold the land? What kind of delivery to the banker would this have been?

3. Hall sold a farm to Dexter. In the deed there was a covenant of quiet enjoyment. After Dexter obtained possession, Griffin, a third party, claimed title to the farm and brought an action against Dexter to recover it. In this case Griffin was defeated, as the court decided he had no claim whatever. Was Hall's covenant of quiet enjoyment broken? If Griffin had recovered in his action, would the covenant of quiet enjoyment have been broken?

4. If in the above case Hall's deed had contained a covenant against incumbrances and there had existed a judgment on record against Hall which was a lien upon the property, would the covenant have been broken? If there had been unpaid taxes against the property, would the covenant have been broken?

5. If Hall's deed to Dexter, in problem 3, had contained a warranty of title, and after Dexter had possession Griffin had gone upon the land and removed a building which he had erected temporarily and which he had the right under an agreement to remove, would the covenant have been broken?

6. Miner rents a house and lot of Slater for one year at the annual rental of \$200. At the end of the year nothing is said and he remains for another year, paying his rent. After remaining in the house for two months of the third year Miner vacates it. Slater claims the rent for the whole year. Can he recover?

7. Hamilton rents a house and lot of Turner. He does not pay his rent and Turner sues him. Hamilton claims that Turner is not the owner of the property, and it develops upon the trial that a third party has a paramount title. Can Hamilton defeat Turner's suit for rent in this way?

8. Fox leases his farm to White for one year. Brown, a mortgagee, forecloses a mortgage on the farm against Fox and sells it to Wilson, who takes possession and ousts White before he has an opportunity of harvesting his crops. To whom do the crops belong, Wilson or White?

9. Snow rented part of his house to Gates for one year on an oral contract, rent payable monthly in advance. Gates paid the first month's rent and at the end of two weeks notified Snow that he had decided to move. Is he held by the lease? Explain.

10. A father transferred to his son for a consideration of \$1 a piece of real estate worth \$5000. The deed was duly executed and delivered. Can

the son defend successfully a suit to set aside the transfer on the ground of inadequate consideration? Explain fully.

11. In a purchase of a house and lot from a married man, you insist that his wife join in making the deed. What is your reason for doing so? Would you likewise require that a husband join in a deed made by a married woman? Explain.

12. L. K. Ward, a married man, died. His will disposed of his property as follows: daughter, \$6000 cash; son, 200 acre farm; wife, \$6000 cash. What are the widow's rights?

13. Milton contracted orally to sell to the Hartman Lumber Co. all the standing timber on a certain wood lot owned by Milton. Before the lumber company started to cut and haul the logs Milton served notice on them not to touch the timber as they would do some damage crossing a field belonging to him which he had agreed to let them cross. What are the rights of the parties?

14. The owner of a farm agreed to give a certain person a deed of it as security for a debt. In conformity with this agreement, the owner of the farm immediately, upon returning to his home, executed and acknowledged the deed and sent it to the County Clerk's office to be recorded. The person in whose favor the deed was executed did not know that it was made and left at the County Clerk's office, as neither he nor any person representing him was present to receive it. Was this a good delivery within the law? Explain.

FIXTURES

Personal or Real Property. — We understand in a general way that real property is land and rights concerning it. As distinguished from this, personal property is property of a personal or removable nature, and includes all property rights not included in the classification of real property. *Personal property is also called chattels.* We often find much difficulty in distinguishing between the two classes of property. It is plain that a house and lot or farm is real property, and it is equally apparent that a horse and wagon or a suit of clothes is personal property. As we have seen, also (page 283), a leasehold interest in real estate is personal property.

Personal property also includes “choses in action”; that is, rights of action against another person for money or property. Promissory notes, drafts, shares of stock, corporation bonds and debts are all choses in action. Any right of action for damage to property is a chose in action.

Patents, trade-marks, and copyrights are personal property and are also choses in action. They are forms of property which may, under certain conditions, give rise to right of action to protect the interests of the party concerned.

In all the above cases the laws are clear. But the classification of certain articles known as *fixtures*, which may be either personal or real property, is less clearly defined. The general rule is that a fixture is real property when it is actually and permanently annexed to the land or is to be used in connection therewith. A fixture is personal property when it is detached or movable. This general rule is modified by many special rules in specific cases.

Tests concerning Fixtures. — Fixtures are chattels, either actually or constructively affixed to the land. In some cases they can not be removed and are considered part of and pass with the land, while under other conditions they may be separated from the realty and do not pass with it. For example, fence posts which have been cut and used for building or repairing a fence are a

part of the real property, but fence posts which have been cut to sell would be considered personal property. The early common law was most favorable to the landowner, regarding anything attached to the realty as his property, but the rule was relaxed, at first in favor of the tenant who erected fixtures for use in his trade or business, which were held to be removable. Now, however, the question arises not only between landlord and tenant, but also between mortgagor and mortgagee, and vendor and vendee. A person selling his farm must know what he can remove and what he has sold with the land. The tenant must determine what he can take with him and what passes to the landlord because of its attachment to the realty. Different rules have been laid down by different courts.

One of the tests often applied is the intention of the party annexing the chattel to the land. This intention is inferred from the nature of the article affixed, the relation of the party making the annexation with the owner of the land, the structure and mode of the annexation, and the purpose for which it is to be used.

Hinkley entered into possession of a tract of land under a contract for its purchase, and erected large and substantial buildings with engines and machinery for manufacturing an extract of bark for tanning purposes. Hinkley failed to pay for the land, so never acquired title. In an action to recover the machinery and engines it was held that they were a part of the realty, and could not be sold as personal property as against the owners of the land. — *Hinkley v. Black*, 70 Maine 473.

It seems that there are other tests that have to be applied in connection with the intent, to determine whether or not the chattel is a part of the realty. One is the mode and degree of the annexation. That is, if the chattel is so firmly and securely affixed to, and incorporated into, the building that it can not be removed without injury to itself and the building it is generally not removable. Under the common law the mode and degree of annexation was practically the controlling question.

Looms in a woolen factory, connected with the motive power by leather bands and so attached to the building by screws holding them to the floor that they could be removed without injury to themselves or the building, are chattels. The question arose between the mortgagor and mortgagee.

— *Murdock v. Gifford*, 18 N. Y. 28.

An engine used in a building and so placed that it can not be removed without taking down part of the building is a fixture. The engine in this

case could not be removed without taking the boards off the side of the building, and the boilers were set in brick, requiring the wall to be torn down to remove them. In this case the question arose between the grantor and the purchaser. — *Despatch v. Bellamy*, 12 N. H. 205.

A person may not intend to make a permanent improvement, but the chattel may be so firmly annexed that the law will not permit him to carry out his intention of removing it. In such a case the damage to the realty must be very pronounced to constitute the chattel a part of the real property if it is the expressed intent of the party that the chattel shall remain personalty.

But, on the other hand, the fact that it may be removed without such injury does not necessarily make it personalty.

Fencing material that has been used as part of the fences on a farm, but is temporarily detached without any intent to divert it from such use, is a part of the realty and passes by a conveyance of the farm to a purchaser.

— *Goodrich v. Jones*, 2 Hill (N. Y.) 142.

Gas pipes running under the floors and between the walls are not removable fixtures, but gas fixtures and chandeliers screwed in through holes in the walls or floors are removable. Stoves and furnaces put up in the usual way by a tenant are treated as furniture and are removable, but if built into brickwork they are nonremovable fixtures.

Gas fixtures which are screwed on to the gas pipes, and mirrors which are not set into the wall but are supported by hooks so that they can be removed without injuring the walls, form no part of the realty and do not pass by deed or mortgage of the premises.

— *McKeage v. Hanover Ins. Co.*, 81 N. Y. 38.

An electric chandelier, an annunciator and similar articles attached to a house by the tenant for his own convenience, and removable without injury to the building, form no part of the realty.

— *Raymond v. Strickland*, 124 Ga. 504.

A boiler installed by a tenant to replace an inadequate boiler, screwed to pipes running through the building, but removable without injury, was not a fixture and the tenant was entitled to remove it.

— *McLain Inv. Co. v. Cunningham*, 113 Mo. Appeal 519.

Another test is the appropriation of the chattel to the use or purpose of that part of the realty to which it is connected. It seems that an article which is essential to the use for which the building or land is designed, or which is especially adapted to

the place where it is erected, is regarded as a nonremovable fixture, although it is but slightly connected with the realty.

Articles such as shelving, racks, counters, cases, etc., although personal in their nature, are realty when made to be used with real estate and essential to its beneficial use. — *Bullard v. Hopkins*, 128 Iowa 703.

An engine and boiler, bought by the owner of a mill and hauled to the mill with the intention of attaching them thereto, are realty even if not actually attached, when they are necessary for the use of the mill.

— *Patton v. Moore*, 16 W. Va. 428.

Poles used necessarily in cultivating hops, but which are taken down for the purpose of gathering the crop and piled in the yard with the intention of being replaced in season next year, are a part of the realty.

— *Bishop v. Bishop*, 11 N. Y. 123.

A mortgagee claimed the machinery in a building erected expressly for use as a twine factory. The machinery was heavy and was fastened to the floor by bolts, nails, and cleats and was attached to the gearing. Most of the machinery could have been removed without material injury to the building and used elsewhere. It was proved that the machinery was put in the building for permanent use. Held, that the evidence was sufficient to find an intent to make the machinery part of the realty. The court said the criterion of a fixture is the union of three requisites: 1, Actual annexation to the realty or something appurtenant thereto; 2, Application to the use or purpose to which that part of the realty to which it is connected is appropriated; 3, The intention of the party making the annexation to make a permanent accession to the realty. In such cases the court said the purpose of the annexation and the intent with which it is made are the most important considerations. — *McRea v. Central Bank*, 66 N. Y. 489.

This last rule in the case of *McRea v. Central Bank* does not apply between landlord and tenant, as it is held that the tenant cannot intend articles for permanent use on land that does not belong to him. This rule inaugurates the theory of constructive annexation and is contrary to the common law, which requires actual annexation to the realty.

The owner of realty, after giving a mortgage, placed on his ground in front of his house a statue of Washington, made by himself, and weighing about three tons. It was on a base three feet high. This base rested upon a foundation built of mortar and stone. The statue was not fastened to the base, nor the base to the foundation. Held, that the statue was a part of the realty and that it was as firmly attached to the soil by its own weight as it could have been by clamps and screws. In the same case a sun dial, similarly placed, was also held to be realty. — *Snedeker v. Waring*, 12 N. Y. 170.

The builders of a church left a recess in which an organ was to be placed. The organ was required to complete the design and finish of the building and was attached to the floor and intended to be permanent. Held, that the organ was a part of the realty and passed to the purchaser of the land.

— *Rogers v. Crow*, 40 Mo. 91.

Force pumps, pipes, and shafting, and machinery attached by spikes, nails, and bolts, are part of the realty.

It was held, that machinery used in a sash and blind factory and attached to the mill by spikes, bolts, and screws, and which was operated by belts running from the permanent shafting driven by a water wheel under the mill, was part of the realty. — *Symonds v. Harris*, 51 Maine 14.

Under the rule of constructive annexation some cases hold that machinery, permanent in its character and essential for the purposes of the building, becomes realty although not actually attached thereto.

Illustrations of this class of fixtures are ponderous machinery kept in place by its own weight, cotton gins, and duplicate rollers for a rolling mill, all of which are held to pass with the realty.

A carding machine not fastened to the house and requiring several men to move it, was held to be a fixture, and passed with the land to a purchaser. — *Deal v. Palmer*, 72 N. C. 582.

Other cases hold that machinery is personal property unless actually annexed. Such cases hold that heavy machinery in a factory screwed to the floor but removable without injury is not realty.

Lathes, planers, and similar machines, each a complete machine and fastened to the floor by screws to keep it steady in operation, were not covered by a real estate mortgage as they had not become part of the realty. — *Crane Iron Works v. Wilkes*, 64 N. J. Law 193.

Relation of the Parties. — The relation of the parties has some weight in determining the character of the fixtures. As between landlord and tenant the presumption is that tenants do not intend the improvements to be additions to the realty, and they are therefore allowed greater rights in removing the chattels than any other class of persons. For the encouragement of trade and the promotion of industry the rule has been established that trade fixtures erected by a tenant are removable. A carpenter shop, a ballroom, and a bowling alley erected on blocks or posts have all been held to be removable.

A scenic railway, consisting of a platform, undulating tracks, machinery, etc., erected by a tenant on leased ground, was a trade fixture and could be removed by the tenant during his term.

— *Thompson Scenic Ry. Co. v. Young*, 90 Md. 278.

As between landlord and tenant under a mining lease, engines and boilers erected by the tenant on brick and stone foundations, bolted down solidly to the ground and walled in with brick arches; also dwelling houses erected by the tenant for miners to live in, standing on posts or dry stone walls, where the intent was not to make them a part of the realty but merely to use them in the mining operations, will be regarded as "trade fixtures" and may be removed by the tenant at or before the termination of the lease.

— *Conrad v. Saginaw Mining Co.*, 54 Mich. 249.

As between landlord and tenant wooden structures or buildings resting by their own weight on flat stones laid upon the surface of the ground without other foundation are not part of the realty. But if the building is a permanent structure on a foundation it becomes part of the real estate.

— *Carlin v. Ritter*, 68 Md. 478.

The parties may agree that the chattels annexed are to remain as personalty, and effect will be given to the agreement.

The tenant must exercise his right to remove fixtures before the expiration of his term. If he does not remove them before he surrenders the premises, he can not reënter and claim them.

McCaddon after his lease had expired entered upon plaintiff's premises to remove a vault and safe he had constructed, and an action was brought to restrain him from removing them. Held, that the tenant could not exercise his right of removing trade fixtures after he had surrendered possession of the premises. — *Dostal v. McCaddon*, 35 Iowa 318.

When the question arises between vendor and vendee or mortgagor and mortgagee the presumption is stronger against the vendor and mortgagor, as being the owners of the realty they are supposed to have intended the improvements to be permanent.

The tenant placed on leased land an engine and other appliances for working oil and gas wells, under a lease which provided that the tenant could at any time remove all machinery and fixtures. It was held that the articles did not become part of the realty, but could be removed by the tenant within a reasonable time after the termination of the lease.

— *Garlan v. Hickman*, 56 W. Va. 75.

Stage appointments and theater fittings, such as scenery, curtains, ropes for scene shifting, opera chairs screwed to the floor, etc., having been specially made and so far as their nature permitted, affixed to the realty, were fixtures and passed to a purchaser of the realty.

— *Oliver v. Lansing*, 59 Nev. 219.

QUESTIONS

1. What does personal property include?
2. What are fixtures? They may be classified as what kind of property?
3. How may a fixture be annexed to realty?

4. When is a fixture said to be realty?
5. When is a fixture said to be personalty?
6. What is the most important test to be applied in case a dispute arises as to whom the fixture belongs?
7. From what is this test of ownership inferred?
8. Under the common law, what was the most important test?
9. In what way may the purpose of a person, who did not intend to make a fixture permanent, be defeated?
10. Is a fence inclosing a lot personalty or realty? Why?
11. The fence is taken down. Is the fence material, which is on the lot, personalty or realty? Why?
12. Are gas and water pipes attached to a house and running through it, personalty or realty?
13. A tenant installs lighting fixtures for his own use in a house which is not equipped with them. Has he a right to remove them?
14. When must he exercise this right?
15. A tenant supplied his own hot-air furnace, which was not supplied in a house piped for one. He set the furnace in the cellar and connected it with the pipes already in the house. Has he a right to remove it?
16. What do you understand by mode of annexation?
17. What do you understand by degree of annexation?
18. Mention the three requisites which are necessarily combined to make a fixture a part of the realty as laid down in *McRea against Central Bank*.
19. Are improvements made by the mortgagor on mortgaged property covered by the mortgage? Give an illustration.
20. What is constructive annexation?
21. Downing sold a farm on which there was a well equipped with a force pump connected with pipes to the house and barn. Has he a right to remove this pumping system?
22. Are there any conditions under which he might remove the pumping system?
23. Explain the meaning of "relation of the parties" as applied to fixtures.
24. What are trade fixtures?
25. Are trade fixtures as a rule removable by the tenant? Explain.

IMPORTANT POINTS

A fixture may be either personal or real property.

Fixtures are chattels affixed to realty or to be used in connection therewith.

Mode of annexation, purpose for which it is to be used, intention and relation of the parties annexing the fixture are factors in determining whether it is personalty or realty.

The intention of the party annexing the fixture is the most important factor in determining its ownership.

Improvements in the way of fixtures which are annexed permanently to mortgaged realty by the mortgagor are covered by the mortgage.

In case a mortgage on realty is foreclosed and the property sold to satisfy the debt, all fixtures which are considered a part and parcel of the realty are included in the sale.

Trade fixtures are fixtures used in connection with a business.

As a rule "trade fixtures" put in by the tenant are his property and he has a right to remove them.

A tenant must exercise his right of removal of fixtures before vacating or giving up his right of possession.

When the owner of realty annexes a fixture the presumption is that he intended it as a part of the realty.

CASE PROBLEMS

Give the decision and the principle of law involved in each case.

1. Mowery purchased a large building for factory purposes for which he gave a purchase money mortgage for \$5000. Afterwards he installed a quantity of machinery for use in connection with the building. His business was not successful, and when he failed to pay off the mortgage, the mortgagee foreclosed and sold the property. Mowery claimed the machinery. What are the rights of the parties?

2. Johnson sold a factory building in which were a number of machines connected therewith by means of screws, shafts, and belts. Nothing was said about them at the time of the sale. Johnson did not intend to sell the machines, but after the sale the buyer would not allow Johnson to remove them. Who is entitled to the machines? Explain.

3. Lampson leased a building in which he constructed a boiler which could not be removed without tearing down a portion of the end wall of the building. When the lease expired Lampson attempted to remove the boiler and the owner of the building stopped him. How should this case be decided?

4. Manker sold a farm on which was piled a quantity of fencing material which had been used on the farm and was to be used again. After the sale Manker moved this material away and the purchaser brought action for damages. Should he succeed?

5. Dunn rented a house which was piped for gas, but was not equipped with fixtures for lighting. Dunn supplied the necessary fixtures. Before the lease expired the owner of the house served notice on Dunn not to remove the fixtures. What are the rights of the parties? Explain.

6. Wright rented a building for use as a store, in which he installed shelves, racks, and various store accessories. When he vacated the owner

of the building enjoined him from taking any of the shelves and racks which were in any way attached to the building. Who is entitled to the articles in question? Explain.

7. Higgins owned some land which was mortgaged to Green. He erected on this land a sawmill and placed therein an engine which was built in masonry, and put in other machinery which was fastened to the floor, all of which he intended at the time to be permanent. Green foreclosed the mortgage and obtained the property. Who was entitled to the engine and machinery?

8. In the above case, if the machinery had been set on the floor and held there by its own weight, who would have been entitled to it?

9. Edwards, who is the owner of a house and lot, is repairing and painting his house. While the painters are at work the blinds are removed for the purpose of painting. Before they are replaced Edwards sells the house and lot to Gray. Are the blinds a part of the realty which passes to Gray, or are they personal property, and can Edwards remove them?

10. In the above case, do the chandeliers and gas fixtures which are screwed into the gas pipes pass to Gray or remain the property of Edwards?

11. In the above case, do the gas and water pipes pass with the realty to Gray or remain the property of Edwards?

12. Wells, who rents a house of Myles, places a furnace in the cellar and connects it with the house by pipes and registers in the usual way. It is not attached to the floor. When Wells moves, Myles refuses to allow him to take the furnace, claiming it belongs to the realty. Who gets the furnace?

13. A large stamping machine weighing ten tons is used in a building on Bowers's land which passes to Coon, the purchaser, under a mortgage foreclosure. The machine is not fastened to the building, but kept in place by its own weight. To whom does it belong, Bowers or Coon?

14. In the above case if Bowers had been merely a tenant and had placed the stamping machine in the building for his own use and Coon had been the owner of the land, could Bowers have removed the machine at the end of his tenancy, or would it have become the property of Coon?

15. Lucas, who had been a tenant in a store building belonging to Tanner, vacated the building at the expiration of his lease but left therein some fixtures to which he was entitled under the terms of the lease. About a month later, he went back to remove the fixtures and the owner of the building stopped him from taking them. Had Lucas a right to take the fixtures? Explain.

PARTNERSHIP

I. IN GENERAL

The Uniform Partnership Law. — Partnership is a very old form of business association, and the laws of the different states regulating partnerships have not been uniform. Quite recently, however, a Uniform Partnership Law has been adopted by certain states. Its adoption is becoming general. Like other uniform laws the Uniform Partnership Law combines the best features of existing laws in the different states.

The discussion of partnership in this chapter is based primarily on the Uniform Partnership Law.

Partnership Defined. — A partnership is an association of two or more persons to carry on as coöwners a business for profit. The members of a partnership are called partners, and the partners together are said to constitute a firm.

Agreement. — A partnership results from an agreement under which the partners are carrying on a business. An agreement to form a partnership at some future time does not constitute the parties to such an agreement partners. A partnership is formed simply by the contract of the parties and requires no authority from the government to create it. The contract of partnership may be entered upon by a written agreement, by an oral agreement, or in some cases by implication.

Written Contract. — It is a wise precaution to have the agreement in writing and all of the terms and conditions of the partnership expressed. The written agreement, setting forth the terms of the partnership and signed by the parties that are to compose the firm, is called articles of copartnership. A great many different clauses may be inserted, depending upon the actual agreement of the parties. (See form in Appendix.)

Oral Contract. — As we have said, articles of copartnership are desirable, but not necessary, to the formation of a partnership. By the Statute of Frauds, however, a contract of partnership for over one year must, in most of the states, be in writing.

Virginia and some other jurisdictions hold to the contrary, and expressly declare that a contract of partnership is not within the Statute of Frauds.

Implied Partnership. — Aside from a partnership formed by an actual agreement, either oral or written, which we have just discussed, a partnership may be implied from transactions and relations in which the word "partnership" has never been used, but from which the law will imply a partnership whether it was so intended by the parties or not. This implied partnership may be an actual partnership by implication or a partnership by implication as to third parties.

Partners by Estoppel. — Estoppel is a rule of law which precludes a man from denying the existence of certain facts or conditions which he has represented or allowed to be represented as existing. Through this rule a person not actually a partner may in some cases be liable or may in some cases bind others as if he were a partner.

1. When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership.

2. When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as if he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

Essentials of a Partnership. — The essentials of a partnership may be given as follows:

1. The partners (parties competent to contract).
2. The agreement or articles of copartnership.

3. The firm capital or property.
4. The business to be conducted (must be a lawful business).
5. The business motive (always profit-sharing).

Partners. — The number of persons who may unite to form a partnership is not limited, but a person, to become a partner, must be competent to contract. An infant's contract of partnership, like most of his contracts, is voidable, and may be affirmed after he becomes of age, in which case he has all of the rights, and is subject to all of the duties, of a partner.

Kinds of Partners. — Partners are (1) general, (2) secret, (3) silent, (4) nominal, (5) dormant, (6) limited or special.

General Partner. — A general partner is one of the active and known parties. He usually participates in the business and is held out to the world as a partner.

Secret Partner. — A secret or unknown partner is one who is in reality a partner active in the management of the business, but conceals the fact both from the public and from the customers of the partnership. This course is often taken when a person risks money or credit in a business, but does not wish to assume the risks and liabilities of a partner. So long as his concealment is perfect, he is protected; but if he is at any time discovered to be a partner, he may be held the same as a general partner.

Silent Partner. — A silent partner is one who as between the members of the firm is an actual partner, but who takes no active part in the business of the firm except that of recovering his share of the profits. He may be known to the outside world as a partner, but in the business itself he takes no active part. His liabilities are the same as those of a general partner.

Nominal Partner. — A nominal partner is one who is held forth as a partner, with his own consent, and is liable as a partner because he has given his credit to the firm and authorized engagements and contracts on the strength of this relation. He has no interest whatever in the business, and as between himself and the true owner there is no actual partnership, but there exists what we have spoken of as an implied partnership as to third parties, and the nominal partner will be held liable as a partner to third parties to whom he has suffered himself to be held out as a real partner.

Dormant Partner. — A dormant partner does not differ materially from a silent partner, except that he is not known to the outside world. He is both a secret and a silent partner, being both unknown as a partner and inactive in the business.

Special Partner. — A special partner exists only in those states in which the statutes provide for limited partnerships. By complying with the statute, such a partner may contribute a certain amount of capital and not become liable for the debts of the firm beyond the amount so contributed.

The Uniform Partnership Law provides how such a partnership may be formed, the powers and liabilities of the general and of the special partners and how such partnership is dissolved.

Reality of Partnership. — In the case of a partnership by implication, which has already been mentioned, a nice question often arises as to whether or not a partnership really exists. The agreement or understanding between the parties to a transaction may be such that the law will say they are partners although they did not contemplate becoming partners.

If the parties either expressly or impliedly enter into an association such as the law regards as a partnership, they will be held to stand in that relation. Whether such an association is intended to be formed depends upon the facts in each case.

There may be a partnership as to third parties though the parties are not partners as between themselves, as is the case where one holds himself out as a partner and by his conduct induces others to trust the firm on the strength of his being a partner. As to such outside parties, he will be so held although the intent and agreement of the parties between themselves do not create such a relation.

In an action brought against Marbut and Powell, doing business under the firm name of S. P. Marbut, Powell denied being a partner. He contributed the use of a dwelling, storehouse, and \$200, which he called a loan, and Marbut contributed his time to the business and \$200. No agreement was made as to the rent of the house or the interest on the money, but Powell was to receive one half of the profits of the business as profits and not as compensation for the use of the house and money. Held, that this constituted a partnership as to third parties. — *Powell v. Moore*, 79 Ga. 524.

Downey & Company had a contract for paving the city of Beaumont, on which they expected to make a profit of \$53,000. They did not have

money to finance the work and Masterson agreed to advance the money, under an agreement by which Downey & Company were to do the work, receive payment therefor, settle all bills for labor, supplies, etc., and divide the net profits with Masterson on the basis of two thirds to Downey & Company and one third to Masterson. In a suit for the price of materials furnished for the work, it was held that the agreement constituted Masterson a partner in the firm of Downey & Company and he was personally liable to Kelley Island L. & T. Co. for supplies furnished.

— *Kelley Island L. & T. Co. v. Masterson*, 100 Tex. 38.

In determining whether or not the parties are partners, the fact that they are to divide the profits and to share the losses is evidence of an intent to become partners, though this does not absolutely create such a relation. That each party is to have a voice and control in the business, and that each is to invest his capital and labor in the undertaking and is not to occupy the position of clerk or manager, are generally considered facts sufficient to determine the relation one of partnership.

One who lends a sum of money to a partnership, under an agreement that he shall be paid interest thereon and shall also be paid one tenth of the yearly profits of the partnership business if those profits exceed the sum lent, does not thereby become liable as a partner for the debts of the firm.

— *Meehan v. Valentine*, 145 U. S. 611.

One Dunn had a contract for grading a railroad. Dunn and Conner made an agreement by which Dunn furnished six mules and his services and Conner furnished sixteen mules and harness, the profits of the work to be divided equally. It was held there was a partnership as to third parties, although Conner had nothing to do with the work and was not to be responsible for debts, and Conner was liable as a partner to one who had furnished supplies.

— *Brandon & Dreyer v. Conner*, 117 Ga. 759.

Existence of a Partnership. — The authorities have differed very widely as to the rules that will control in determining who are and who are not partners, and the only safe guide is to determine the intention of the parties.

Beecher owned a hotel and Williams agreed in writing to hire the use of it from day to day, to keep it open as a hotel, and to pay Beecher daily a sum equal to one third of the gross receipts. Bush sold Williams a bill of goods and then sought to hold Beecher as a partner. The goods were sold to Williams, and Beecher was never held out as being in partnership with him. Held, that their agreement did not constitute a partnership. The court said that there can be no such a thing as a partnership as to third persons when there is none as between the parties themselves, unless the third persons have been misled by deceptive appearances or concealment of facts. — *Beecher v. Bush*, 45 Mich. 188.

The Uniform Partnership Law has laid down the following rules for determining this question:

1. Except as provided under partner by estoppel (page 303) persons who are not partners as to each other are not partners as to third persons.

2. Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself establish a partnership, whether such coöwners do or do not share any profits made by the use of the property.

3. The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

4. The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) As a debt by installments or otherwise,
(b) As wages of an employee or rent to a landlord,
(c) As an annuity to a widow or representative of a deceased partner,

(d) As interest on a loan, though the amount of payment vary with the profits of the business,

(e) As the consideration for the sale of the good will of a business or other property by installments or otherwise.

QUESTIONS

1. What is a partnership?
2. How is a partnership formed?
3. What are the essentials of a partnership?
4. What are articles of copartnership? Are they necessary to the formation of a partnership? Explain.
5. How may a partnership be formed by implication?
6. (a) How may a partnership be formed by estoppel? (b) Define estoppel.
7. Who may become a partner?
8. Name and define the different kinds of partners.
9. How does a limited partnership differ from other partnerships?
10. Is it possible for a partnership to exist when the parties thereto do not consider themselves partners? Explain.

11. What are the rules for determining the existence of a partnership under the Uniform Partnership Law?

2. RIGHTS OF PARTNERS BETWEEN THEMSELVES

Right to Choose Associates. — The first right of a partner is to choose those with whom he is to be associated in this relation, for as a person cannot be compelled to go into a partnership against his will, so he cannot be compelled to allow any one to come into the partnership without his consent. If one partner draws out or dies, his interest cannot be purchased by another who can come in without the consent of the other partners; and if they give their consent, and he comes in, the result is that a new partnership is created.

The mere purchase of interest in the partnership property of the estate of a deceased partner does not create a new partnership between the purchaser and the surviving partner of the old firm.

— *Noonan v. Nunan*, 76 Cal. 44.

Right of Purchaser or Inheritor. — The person who buys or inherits the interest of a partner in a firm merely has the right to demand a settlement of the affairs of the company and a payment to him of his share, after the debts of the firm are paid.

Partner may Sell. — Each partner has the absolute right to sell the whole or any part of the partnership property included in the regular course of the business, but a sale of any property of the partnership not ordinarily kept for sale and not within the course of the business is not within the power of one partner. For example, one partner in a grocery business can sell the stock in the regular way, but not the fixtures and store, as such sale would not be in the regular course of the business.

Drake and Thyng were partners in the brickmaking business. While Drake was away Thyng sold the stock and plant to a third party for an insignificant and inadequate sum. Drake brought action to set aside the sale. Held, that, while a partner may sell a part or the whole of any of the effects of a firm which are intended for sale, if the sale is within the scope of the partnership business, yet he cannot, without the consent of the other partners, dispose of the partnership business itself or of all the effects, including the means of carrying it on, as this is beyond the range of a partner's implied powers. — *Drake v. Thyng*, 37 Ark. 228.

Partnership Property. — 1. All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property.

2. Unless the contrary intention appears, property acquired with partnership funds is partnership property.

3. Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

Capital. — The capital of the partnership consists of such properties or amounts as are contributed to the common fund by the different partners at the beginning, or that may be put in thereafter. The claim of each partner to this partnership capital does not extend to any particular article, but is an interest in the whole, consisting of a right to share in the proceeds after the firm debts are paid. The partners are owners "in common" (page 9) of all property belonging to the firm. Aside from this, individual property of the partners may be used in the business. The store in which the business is conducted may belong to one of the partners, and he can deal with this as his own and not as a partner.

One partner mortgaged a certain number of bales of cotton out of the partnership crop for the payment of an individual debt. The mortgagee had notice of the partnership. Held, that the mortgagee had no right to the specific property but only a right to the ultimate interest of the mortgagor in the partnership effects, after all of the firm debts were paid, to an amount equal to the value of the cotton. — *Nichol v. Stewart*, 36 Ark. 612.

Good Will. — The good will of the firm is partnership property. The good will is defined to be the benefit arising from the connection and reputation of the firm, the fact that the business is established and going, that it has customers and is advertised throughout the section to which it looks for trade. The sale of the business as a whole, including stock, fixtures, etc., is understood to include the good will. So the trade-marks and trade name of a business are property belonging to the firm and pass with the sale of the business in the same manner as the good will, although either may be sold separately.

Hoopes and Merry were copartners engaged in manufacturing galvanized iron under two trade-marks, one the "Lion brand" and the other the

"Phoenix brand." Upon the dissolution of the firm Hoopes bought the business. Thereafter Merry brought action to restrain him from the use of the above-named trade-marks, nothing having been said about them in the bill of sale. Held, that the exclusive right to use the trade-marks belonging to the firm passed to the defendant. — *Merry v. Hoopes*, 111 N. Y. 415.

Good Faith. — The first duty of each of the partners to the others is that of exercising the utmost good faith toward them. The reason for this is apparent when we realize how completely each partner is at the mercy of the others. Each partner really acts as agent in the transaction of the business for the firm and for the other partners.

If one partner is the active agent of the firm, and as such receives a salary beyond what comes to him from his interest as a partner, he is clothed with a double trust in his relations with the other partners, which imposes upon him the duty of exercising the utmost good faith in his dealings; and if he obtains anything for his own benefit in disregard of that trust, a court of equity will compel him to account to the other partners for it.

— *Kimberly v. Arms*, 129 U. S. 512.

Individual Liability. — Each partner is chargeable with any loss to the firm which arises from his own breach of duty, whether through fraud, negligence, or ignorance, but he is not liable to the firm for loss arising from an honest mistake of judgment.

Although a partner may act unwisely in incurring liabilities for the firm, the resulting loss cannot properly be charged to him personally upon a dissolution, when it is not shown that his acts were wanton or fraudulent.

— *Charlton v. Sloan*, 76 Iowa 288.

If one partner takes a secret advantage of the partnership, whereby he makes a profit for himself at the expense of the firm, he can be required to restore it, the courts holding that he acted for the partnership and it will be entitled to the benefits. If the lease of a building occupied by a firm expires, one member cannot secretly take out a new lease in his own name and seek to sublet to the firm at an increased rate. The new lease taken in the name of one member of the firm will be declared by the courts as held by him for the benefit and use of the firm.

Hodge and Holden are partners engaged in the lumber business. Holden, while away on his vacation, purchased a quantity of select lumber on his own account. When he returned, he sold the lumber he had purchased to his firm at an advance in price and took the profit for himself. Hodge can require Holden to account to the firm for all profit resulting from this transaction.

Records of Transaction. — The firm must keep books of account upon which each member is bound to enter, or have entered, all of his transactions for the firm, as each partner has a right to know of all the transactions in the business.

A member of a firm whose duty it is to keep the accounts, and who claims that he has omitted to enter credits to which he is entitled, will be required to furnish satisfactory proof of the mistake he asks to have corrected. — *Van Ness v. Van Ness*, 32 N. J. Equity 669.

Compensation. — One partner is not entitled to any special compensation for his services in the partnership unless it is expressly provided for. Each partner is supposed to do all that he can for the good of the partnership, and whatever he does gives him no claim for extra compensation beyond his share of the profits of the business unless he has the consent of the other partners.

In the absence of an agreement to that effect, one partner is not entitled to charge his copartners for his services because he has done more than his just proportion of the work. — *Burgess v. Badger*, 124 Ill. 288.

The claim of the surviving partner of a firm for compensation for his services in closing up the partnership business was not allowed. The court held that a surviving partner is not entitled to any compensation for such services. — *Gregory v. Menefee*, 83 Mo. 413.

The sickness of a partner is one of the risks incident to a partnership, and does not give another partner any claim for personal services in conducting the entire business unless the articles of copartnership provide for such compensation. — *Heath v. Waters*, 40 Mich. 457.

Partners may Sign Negotiable Paper. — It is the general rule that one member can bind the firm by signing the firm name as maker, indorser, or acceptor of negotiable paper if it is done in connection with the firm business and not for a private debt or account.

The Simmons brothers were partners in the business of buying and selling cattle and produce. The court held that each member had the right to draw, accept, or indorse bills of exchange in the firm name, and bind the partnership as to third persons, dealing fairly and in good faith, regarding matters usually incident to the business. It is immaterial in such a case, as to persons thus dealing with one of the partners, that the other partner was not informed of the transaction and repudiated it as soon as it came to his knowledge. — *Wagner v. Simmons*, 61 Ala. 143.

The power of any partner to use the firm name on negotiable paper is presumed, and a stipulation between the partners that

certain members of the firm shall not so use it will not affect third persons having no knowledge of such agreement. But this rule does not apply if it is obvious that the instrument is signed, not for the firm, but for the individual benefit of a partner.

Power of Majority. — We have discussed the power of one partner, and turning now to the question of what a majority of the partners can do, we find that they may control the ordinary conduct of the firm's business, and have power to act in all matters within the scope of the partnership affairs, but they have no power to change the nature of the business, the location of the business, or the firm name.

Five persons had agreed to cut and pack a quantity of ice for sale, and after deducting all expenses to divide the proceeds equally. One of the members, with the consent and approval of two others, sold a large quantity of the ice. The remaining two brought suit to charge the others for damages in selling the ice at what they claimed was too low a price. Held, that the agreement constituted a partnership, and if there be no fraud the majority of a firm can make a valid sale of property belonging to the firm without the consent of the minority. — *Staples v. Sprague*, 75 Maine 458.

Moore, Miller, and Manning are partners in the hardware business. Moore and Miller favor putting in a stock of groceries and provisions. Manning is opposed. As this would mean a change in the nature of the business, it will be necessary for all the partners to consent, and unless they do consent, the power of any two partners to act in this instance is denied.

QUESTIONS

1. What rights has a partner as to the choice of associates?
2. Does the purchaser of a retiring partner's interest become a partner? Explain.
3. How does a change of partners affect the partnership?
4. What are the rights of a purchaser or inheritor of a partner's share?
5. Has one partner a right to sell partnership property? Explain.
6. Of what may the capital of a partnership consist?
7. What is the good will of a business?
8. What is the first duty of each partner?
9. What is the extent of the individual partner's liability for loss?
10. What is the liability of a partner who takes secret advantage of his firm?
11. What are the requirements with reference to records of transactions?
12. Has one partner a right to claim extra compensation for services to the partnership? Explain.
13. What is the rule as to one member of a firm signing negotiable paper?
14. What power has a majority of the partners?
15. What restrictions are imposed on the power of the majority?

3. LIABILITY OF PARTNERS TO THIRD PARTIES

Liability of Partners. — Each partner is liable for all of the debts of the partnership, and this is so whether he is a secret, nominal, or general partner.

Farmer and Jones had been doing business under the name of W. H. Jones. It was shown that Farmer was a dormant or secret partner. Held, that while the credit was given to a general partner, because no other was known to the creditor, yet the creditor may also sue the secret partner when discovered, and the credit will not be presumed to have been given on the sole responsibility of the general partner. — *Richardson v. Farmer*, 36 Mo. 35.

Effect of Notice. — But neither the firm nor individual partners will be liable for any particular acts of a partner if fair notice that such acts are forbidden is given to the person with whom the partner deals, prior to the transaction in question.

The partnership relation makes each partner the agent of the other when acting within the scope of his power, but when the agency is denied and the act forbidden by the copartner, with notice to the party assuming to deal with him as agent of the firm, the act is then his individual act, and not that of the firm. — *Yeager v. Wallace*, 57 Pa. State 365.

Limit of Authority. — The authority of a partner to bind the firm by contract is limited to transactions within the scope of the partnership business, and if he seeks to charge the firm with matters outside of the scope of the firm's usual business, he must show special authority from the other partners so to do. A partnership to work a farm would not therefore give one partner any implied authority to draw bills of exchange or borrow money, while a partner in a mercantile or manufacturing company would have such authority.

Harris and Drake were partners in the hay and grain business. Harris, without the knowledge or consent of Drake, purchased a building lot, in the name of the firm, which he contended they needed to increase their facilities. Harris had no authority to purchase this lot and Drake is not bound by this transaction which he did not authorize and was not a party to.

While the presumption is that a partner has no authority to use the goods or credit of the firm to pay his personal debts nor to buy goods for his personal use with the partnership funds, still he may have express authority so to do, and in that case the transaction is valid.

A partner indorsed a firm check in payment of his individual indebtedness without the knowledge, consent, or approval of his partner. It was held that such an arrangement was a fraud on the partnership and the creditor could not hold the check as he was not a *bona fide* holder under the circumstances. — *Nichols & Co. v. Thomas*, 51 Okla. 212.

Name. — A partnership should adopt some particular name under which to do business. This may be simply the name or names of one or more of the partners, either with or without the words "and company" added, or any other designation that the parties may adopt, but by statute in some states the term "and company" must not be used unless it actually represents a partner.

Fraud. — The partners are held liable for the fraud and the false representations of one partner when they are made in the course of the firm business.

One partner is not liable for the wrongful acts of another partner unless they were done within the proper scope of the business of the partnership, or were authorized or adopted by him. — *Taylor v. Jones*, 42 N. H. 25.

Notice to One Partner is Notice to All. — It is a well-established principle that notice to one partner in the course of the business is notice to all. An illustration of this is the case of partnership negotiable paper that has been dishonored, notice of which dishonor to one partner is notice to the firm.

Where timber is purchased by a firm, prior notice to one member of the firm that it was cut from land not belonging to the vendor is notice to all of the partners. — *Tucker v. Cole*, 54 Wis. 539.

Where a partnership seeks to recover as a *bona fide* purchaser of a promissory note, fraudulently procured, the burden is upon it to show that all of the members of the partnership were ignorant of the fraud at the time of the purchase. — *Frank v. Blake*, 58 Iowa 750.

QUESTIONS

1. Is a secret or dormant partner liable to third parties? Explain.
2. What is the effect of notice that the firm will not be liable for the acts of any particular partner?
3. What is a partner's limit of authority to bind the firm by a contract?
4. Have the partners a right to select a name under which to do business? Explain.
5. Is the firm liable for fraud practiced by one partner? Explain.
6. Explain the following: "Notice to one partner is notice to all."

4. REMEDIES AGAINST THE PARTNERSHIP

In the eyes of the law a partnership does not have an individuality of its own like a corporation, but it is looked upon as a collection of persons and must be sued not in the firm name but in the names of the persons composing it. In some of the states this rule has been changed, and partnerships may sue and be sued in the firm name. The members of a partnership are proceeded against for a debt of the firm in the same way that one proceeds against an individual. When the creditors of the partnership and the individual creditors of the partners come in conflict, a distinction is made and the law says they must proceed in a particular way, the object being to give the individual creditor his due out of the individual property of the partner, and the firm creditor his due out of the partnership property. If, after the partnership debts are paid, there remains a surplus, the individual creditors of a partner may proceed against this partner's share; but if, on the other hand, there are not sufficient partnership assets to satisfy the firm creditors, but there remain individual assets after the individual creditors are satisfied, such surplus is liable for the firm debts.

In case there are no partnership assets, the firm creditors are entitled to share in the individual assets of any partner equally with his individual creditors.

QUESTIONS

1. May suit be brought against a partnership in the name of the firm? Explain.
2. What are the rules as to the respective rights of firm creditors and individual creditors?
3. When may a partner's individual property be taken to pay firm debts?

5. DISSOLUTION

Duration. — When the partnership is formed, the articles of copartnership usually state how long it shall continue. Other circumstances, however, may operate to change the time, and when the relation terminates, the partnership is said to be dissolved.

Forms of Dissolution. — Dissolution may take place in any one of the following ways:

1. By provision in the articles of copartnership.
2. By the mutual consent of all the partners.
3. By the act of one or more of the partners.
4. By a change in the partnership.
5. By the death of a partner.
6. By the decree of a court of equity.
7. By bankruptcy.

1. *Contract.* — When the period for which the partnership was formed has elapsed, it is thereupon dissolved unless continued by the parties. The partnership may be formed for a temporary purpose, and in that case when the purpose is accomplished the partnership ceases.

2. *Mutual Consent.* — The partnership may be dissolved at any time by the mutual assent of all the partners, though the period for which it was formed has not elapsed.

3. *Act of a Partner.* — The firm may be dissolved by the act of one or more of the parties. This is accomplished when one partner makes an assignment for the benefit of his creditors or becomes bankrupt or, being insolvent, his interest is sold upon execution to pay his creditors. In these cases his property passes beyond his control and he can no longer perform his part as a partner. Also, where the partnership was formed for no definite period, but at the will of the parties, any partner can terminate the relation by notice to the other parties.

Blake, Huston, and Sweeting were engaged as partners in manufacturing brick. After continuing in the business about three years Huston went away, abandoned the business, and wrote to Blake, authorizing him and Sweeting to settle the business as they pleased. Thereafter Blake and Sweeting formed a new partnership and conducted the business themselves. Held, that the acts of Huston operated as a dissolution of the old firm. A partnership, when not formed for any definite time, may be dissolved by any member of the firm at his pleasure. The withdrawal of one member is a dissolution of the firm. — *Blake v. Sweeting*, 121 Ill. 67.

4. *Change in the Partnership.* — The partnership may be dissolved by a change in the membership of the firm. A partner may withdraw from the firm, or he may transfer his interest to a stranger. In whatever way the members of a partnership

may be changed, the act at once terminates and dissolves the partnership. One partner may sell his interest to another party who is satisfactory to the remaining members of the firm, and they may agree to take him in as a partner. In this case the old partnership is dissolved and a new one formed. After the partner has retired or sold out he is still liable upon all of the uncompleted contracts of the firm made before the dissolution of the partnership.

A retiring partner is bound by all previous contracts made within the lines of the business, but after the dissolution of the partnership he is not bound by any new contracts made by his former partner.

— *Goodspeed v. Wiard Plow Co.*, 45 Mich. 322.

5. *Death of a Partner.* — Another change which will work a dissolution of the partnership is the death of a partner. This is really a subdivision of the preceding class, as it is a change in the partnership. The dissolution of the partnership follows necessarily immediately after a partner's death. The surviving partners have the exclusive right to the possession and management of the partnership business for the purpose of closing it out. Frequently the articles of copartnership provide how the surviving partner shall close out the business, and when such provision is made it must be followed. The surviving partner holds the partnership assets in trust for the purpose of closing up its affairs, paying the firm debts, and distributing the remaining assets among the partners or their representatives.

Upon the death of a partner the title to the personal assets of the firm is in the survivor, who is charged with the administration of the same, first for the payment of the partnership debts and second for paying over the deceased partner's share in the surplus to his legal representatives. Unless there is a surplus none of the assets constitute any part of the estate of the deceased. — *Sellers v. Shore*, 89 Ga. 416.

6. *Decree of a Court.* — A court of equity may decree a dissolution of the firm for good cause upon the application of one or more of the partners. This relief will be granted when the partnership was entered into through fraud or for a wrongful and illegal purpose. After the partnership is formed a dissolution may be decreed because of the misconduct of one or more of the partners, but this relief will not be granted for any slight cause. Wild speculations, gross extravagance, quarrelsome and

oppressive conduct, habitual intemperance, indolence and inattention to business, or any conduct which brings disgrace and discredit upon the firm, if sufficiently serious, will constitute ground justifying such action by the court.

When one partner having the management of the partnership affairs makes false entries in the books and defrauds his copartners of a portion of the partnership receipts, the partners thus defrauded are entitled to a dissolution of the partnership and an accounting.

— *Cottle v. Leitch*, 35 Calif. 434.

Ill feeling and differences between partners will not justify the appointing of a receiver to wind up the affairs of the concern, when the term for which the partnership was created has not expired and it does not clearly appear that the parties would suffer loss by continuing in possession of the property. — *Loomis v. McKenzie*, 31 Iowa 425.

The denial by one partner of all rights of his copartners in the partnership property and his claim of the right of exclusive possession and use of it, entitle his copartners to a dissolution of the partnership.

— *Groth v. Payment*, 79 Mich. 290.

The rule seems to be, if it is obvious that the parties cannot longer be associated together with harmony and profit, the court will decree a dissolution rather than cause the partnership to be injurious to the innocent party. So also the financial inability of one partner to fulfill his part of the transactions of the firm, whether from his fault or his misfortune, will be a sufficient cause for dissolution. Insanity or permanent failure of health because of incurable disease is sufficient ground for dissolution.

The insanity of a partner does not in itself work a dissolution of the partnership, but may constitute sufficient ground to justify a court of equity in decreeing its dissolution. — *Raymond v. Vaughn*, 128 Ill. 256.

7. *Bankruptcy*. — Bankruptcy of either a partner or the firm operates as a dissolution of the partnership. This is also true when the firm or any partner makes an assignment for the benefit of creditors.

Notice. — The retiring partner, if the business is to be continued by a new firm, which may have the same or a somewhat similar name, will be liable for the debts and contracts of the firm even after he is out, if they were entered into with parties who had dealt with the firm while he was a member and had no notice of his retirement. Therefore, to render him free from liability for the debts and contracts of the new firm, he must

give notice of the dissolution of the old firm. This notice must be given either orally or in writing to those who have had previous dealing with the old firm, for the retiring partner is bound unless those who have dealt with the old firm can be shown to have had actual notice.

Stevens and one Boyd formed a partnership and dealt regularly and continuously with Scheffelin. The partnership was dissolved and notice of the dissolution was published in the newspapers, but no actual notice was sent to Scheffelin. Thereafter Boyd received further goods from Scheffelin on the credit of the firm. It was held that Scheffelin, having dealt regularly with the firm, was entitled to actual notice of the dissolution, and, in the absence of such notice, Stevens was liable for the value of the goods delivered to Boyd after the dissolution. — *Scheffelin v. Stevens*, 60 N. C. 106.

But direct notice from the firm or the retiring partner is not required if the customer has actual knowledge of the withdrawal of the partner.

Aside from notice to former customers, notice to the world is necessary to enable the retiring partner to escape liability for future debts of the continuing firm or partner. The ordinary method of giving such notice by publication in a newspaper is usually held sufficient, but the paper must be one which circulates in the vicinity.

As to persons who have never had any business transactions with a partnership, notice of its dissolution or the withdrawal of a member by publication in a newspaper published at the place of business of the firm is sufficient, but as to those who have had previous dealings with the firm actual notice or its equivalent must be shown to protect the retiring member from liability for debts subsequently incurred in the firm name.

— *Meyer v. Krohn*, 114 Ill. 574.

A change in the name of the firm by which the name of the retiring partner is dropped and general attention is called to the fact that the firm has dissolved, is sometimes held to be sufficient notice to the general public to protect the retiring partner against future dealings of the new firm.

A change of a partnership name which in itself indicates who the individual partners are, may be sufficient evidence of a dissolution of such partnership; but when the name under which the business is transacted gives no indication of the names of the persons composing the firm, a change in such name is not notice of the retirement of a person who was previously known to have been a partner in the business. — *Cogswell v. Davis*, 65 Wis. 191.

Liability of Incoming Partner. — Under the Uniform Partnership Law, a person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that his liability shall be satisfied only out of partnership property. The new or incoming partner is liable for all of the debts incurred after he came into the firm.

Discontinuing the Business. — When a partnership business has been discontinued for any reason it becomes necessary to wind up the business. This is done by fulfilling or disposing of all existing contracts, collecting all outstanding accounts, converting all assets, so far as possible, into cash, settling all claims against the firm, and making a distribution of profits or losses among the partners. When this has been done, each partner's investment or such portion of it as remains is returned to him, and the business is declared closed.

The partners who take charge of winding up the business should notify all people who have dealt with the firm of its dissolution and of the fact they are engaged in winding up the business.

QUESTIONS

1. In what seven ways may a partnership be dissolved?
2. How will acts of a partner effect a dissolution? Explain.
3. What changes in a partnership will effect a dissolution?
4. How does the death of a partner affect the partnership?
5. For what causes will a court decree a dissolution of a partnership?
6. How does bankruptcy of a partner or the firm affect the partnership?
7. Why is notice of a change in the partnership necessary?
8. How and to whom should notice be given?
9. What is the liability of an incoming partner?
10. What is the course of procedure in winding up partnership business?

IMPORTANT POINTS

A partnership may be formed by a simple contract, either oral or written, express or implied.

An association of persons who do not share in the profits of the business is not a partnership.

Each partner is a general agent of his firm for the transaction of any business within the scope of the partnership purposes.

Sharing of the profits implies sharing the losses.

In case of insolvency each partner is personally liable for all of the firm's obligations.

The firm property includes the business, firm name, good will, trade-marks, and all other intangible possessions.

Any partner may call for an accounting at any time to ascertain his interest in the business.

The partnership is a personal relation which may be terminated at will for a cause.

A partnership, in most of the states, cannot sue or be sued in the firm name.

A partnership cannot contract with nor bring suit against its members, nor can its members bring suit against it.

The law presumes an equal division of profits, but the division may be in any proportion, by agreement.

A partnership may be a trading company or a non-trading company.

A trading company is engaged in buying and selling; a non-trading company is organized for other pursuits, such as contracting, building, practicing law, etc.

Coownership of property does not constitute a partnership.

Every change in the personnel of a partnership brings about a dissolution of the old firm and a new relationship or new firm.

With the exception of a limited partner the classification of a partner has nothing to do with his liability.

Each partner owns an undivided portion of every article owned by the firm.

Each partner's power over firm property is the same.

One partner cannot give a valid deed to real estate held by the firm.

One partner can be required to account to the other partners for private gains resulting directly or indirectly from any partnership business.

A partner cannot collect an extra compensation for extra service or for overtime.

Notice to one partner is notice to the firm.

An innocent partner will not be held criminally liable for the wrongdoings of his copartner.

A majority of the partners have power over any business transaction within the scope of the partnership purposes.

The partners must agree unanimously to change the firm name, to change the nature of the business, or to change the location.

A partnership may be terminated voluntarily or involuntarily.

When a partnership is dissolved the power to carry on business is terminated except for winding up the affairs of the firm.

A retiring partner is not relieved from liability in the case of a former creditor who has not received notice.

Partners cannot make any agreement among themselves which will be effective as to creditors whereby one partner will not be liable to third persons for the debts or obligations of the partnership.

The powers of any one or all of the partners, as among themselves, may be restricted in the articles of copartnership, but these restrictions do not affect a third party unless he receives notice of them.

TEST QUESTIONS

1. What are the advantages of a partnership over trading as individuals?
2. What risk does one run when one enters a partnership?
3. What are some of the things which should be included in the articles of copartnership?
4. For what reason are limited or special partnerships formed?
5. Has an infant in a partnership a right to withdraw and require the other partners to return to him all the money he invested on the ground that he is an infant?
6. What is the good will of a firm? Can it be sold separately from the business?
7. Holmes is a member of the firm of Crawford and Holmes. Holmes sells his interest in the business to Randall. What is the result?
8. Hendricks borrows \$5000 from Bagley to promote a new business and agrees to give Bagley 25% of the profits for the use of the money. Are they partners? Explain.
9. Madden agrees to act as manager of a business for Flemming. It is agreed that Madden is to have 20% of the profits for his services. Does a partnership exist? Explain.
10. Holbrook and Clark form a partnership under the firm name of Holbrook & Co. Clark is a dormant partner. Will he be liable for the obligations of the firm?
11. Larson bought an interest in the partnership of J. B. White and Company. Does this make Larson a partner in the firm? What right has Larson?
12. Hickey and Curren are partners engaged in operating a factory. Hickey contracts to sell all the machinery in the factory. Has he this right? Explain.
13. One partner, without the consent of the other partners, gave a mortgage on real estate owned by the firm for the purpose of raising money to pay firm debts. Will the mortgage be binding?

14. What is the general rule for the division of profits?

15. Biddle and Beck are partners in the hardware business. Biddle, without consulting his partner, gave the firm note for a bill of hardware. Would the firm be liable on the note?

16. Would a third party be affected by any restrictions of the powers of a partner in the articles of copartnership? If so, when?

17. A partner, in selling goods for his firm, makes false representations amounting to fraud. Are the other partners liable?

18. Why is it advisable for a partner to give notice when he withdraws from a firm?

CASE PROBLEMS

Give the decision and the principle of law involved in each case.

1. Gaynor and Foust, intending to engage in an automobile sales and service business, agree orally to invest equal amounts of cash and give their time to the business, arranging to divide the profits and losses equally. Does this oral agreement constitute a partnership? Is it advisable to form a partnership in this way?

2. If in the above case these parties in their oral agreement had expressly understood that the partnership was to continue for five years, would the agreement have been binding?

3. George Hicks and Charles Hutchinson agree to engage as partners in the business of manufacturing furniture under the name of Charles Hutchinson, Hicks's name not appearing in the firm and he taking no active part in its management. They buy lumber, and before it is paid for, the firm fails. The lumber company did not know of Hicks's partnership in the business, the lumber being bought in Hutchinson's name. Can they hold Hicks personally for the lumber?

4. Grover and Martin have been engaged for a number of years in the wholesale grocery business. They dissolve partnership, and Grover retires from the firm, though he still allows his name to remain in the firm. After the dissolution Martin bought goods from Edwards & Co., using the name "Grover & Martin" as before. Can Edwards & Co. hold Grover as a partner?

5. Stanley is doing business under the name of A. H. Stanley, he and Moore having an agreement whereby Moore, who owns the store, contributes the rent and loans Stanley \$500. Stanley, on the other hand, contributes \$500 and his time in conducting the business. It is agreed that the profits are to be shared equally. Are they partners as to third parties?

6. If in the above case Moore had merely furnished the store and nothing else, and the agreement had been that Stanley was to give him one fourth of the profits as rent, would they have been partners as to third parties?

7. Evans, Palmer, and Davis are engaged in conducting business as copartners. Davis dies and D. C. Davis, his son, who is his executor and heir, seeks to come into the firm as a partner and take his father's place. What are his rights?

8. Leland and Scott were engaged in manufacturing and selling shoes. Leland, without the knowledge or consent of Scott, sold 100 pairs of shoes from their regular selling stock. Had he the right?

9. In the above case had Leland the right without the consent of Scott to sell all the shoes they had manufactured?

10. In problem 8, suppose Leland, without the consent of Scott, sold their machinery and lasts used in manufacturing their shoes. Had he that right?

11. Long and Best were copartners in conducting a carting business in which they employed six automobile trucks. Long gave Brown a mortgage on three of the trucks to secure an individual debt. Brown knew that the trucks were partnership property. Had Long the right to take half of the trucks as his share of the partnership assets to pay an individual debt?

12. A firm having been engaged in manufacturing collars and cuffs under a certain brand sell out their business to Carpenter and include in the sale all of their stock and machinery. They afterwards seek to sell to Young the trade-mark or brand under which they had manufactured their collars and cuffs. Carpenter claims it. To whom does it belong?

13. Carlton and Brown are engaged as partners in buying and selling produce. Brown learns of a man who has a large quantity of wheat, and as the firm are looking for wheat and he knows that they can afford to pay \$.95 a bushel for it, he goes to the owner and tells him that if he will give him one cent a bushel for his services, he will find him a purchaser for the wheat at \$.95. The owner agrees, and the firm buys the wheat. Carlton learns of the transaction afterwards and sues Brown for one half of the one cent per bushel received by him. Can he recover?

14. North and Bear are engaged in conducting a dry goods store. North is taken sick and is obliged to go away for the benefit of his health. During the time he is gone Bear conducts the business alone, and later charges the firm for extra services in running the business alone. Has he a right to such compensation, there being no agreement about the same?

15. Adams, Brown, and Coon are partners in the hardware business. Brown gives the firm of Sloan & Co. a promissory note, due in 60 days, for a bill of goods bought by his firm. He signs his note in the firm name. Has he authority?

16. In the above case, suppose Brown gives the firm's note, payable in 60 days, in payment of his individual grocery bill. Has he the right?

17. Suppose Adams and Brown, in problem 15, wish to buy a quantity of stoves for sale in the course of their business. Coon objects. Have they the right to buy them?

18. Suppose Adams and Brown, in problem 15, wishing to enlarge their stock and make a general department store of it, decide to add a line of crockery, glassware, and groceries. Coon objects. Have they the right?

19. Armour and Bowden were engaged as copartners in dealing in horses. Armour sold a horse to Merritt fraudulently representing it to be sound, when in fact it had the glanders, a contagious, incurable disease. Merritt sued the partners for fraud. Was Bowden liable as well as Armour?

20. Randall and Cole were engaged in the mercantile business. In the course of their business they received a note from Darrow which Randall indorsed in the firm name. When the note became due it was not paid by Darrow but was protested, and notice of nonpayment was given to Randall. In a suit against Randall and Cole, to hold them as indorsers, Cole set up the defense that he had not had notice. Could he be held, or was his defense good?

21. In the above case, when the action is brought against Randall and Cole, how should they be sued, as a firm or as individuals?

22. The firm of Keeler and Wilder, dry goods merchants, fail, having assets amounting to \$1500. The firm owes \$5000. Keeler has individual assets amounting to \$3000, and Wilder has individual assets amounting to \$10,000. Page, to whom the firm owes \$3000, seeks to satisfy his claim out of Keeler's personal property, while Keeler has individual creditors to whom he owes more than the amount of his property. Can Page so satisfy his claim? To what property must he look first? Could he collect from Wilder?

23. Bates is a personal creditor of Wilder. Can he proceed against the partnership property to satisfy his claim? Can he proceed against the individual property of Wilder?

24. Hooker and Johnson enter into articles of copartnership, under which they agree to continue the business as partners for three years. At the expiration of three years, does the partnership become dissolved? Can the parties by mutual assent dissolve the partnership before that time?

25. Suppose, in problem 24, that Hooker sells out his interest to Cole, who is accepted as a partner, but the firm continues under the old name of Hooker and Johnson. The new firm of Johnson and Cole contracts with one Everetts for some merchandise. Everetts had previously sold to the old firm and had received no notice of Hooker's withdrawal, although the latter published a notice of dissolution in the paper. The firm of Johnson and Cole fails, and Everetts seeks to hold Hooker liable. Can he succeed?

26. If in the above case Hooker had sent Everetts a notice, which he had received, could Hooker be held?

27. If in problem 25 Hooker had mailed Everetts a notice which Everetts had never received, could Hooker be held?

28. If in problem 25 Everetts had had notice that Hooker was no longer a partner, although it had not been sent directly to him, could Hooker be held?

29. If in problem 25 the firm of Hooker and Johnson had never dealt with Everetts before, and notice of the change of partnership had been published in the local papers, could Hooker be held?

30. In problem 25, could Cole be held liable on a contract entered into by the old firm which Cole had not expressly agreed to pay?

31. Raymond and Loomis are engaged in partnership, but do not agree. Raymond is engaged in wild speculations, is habitually intemperate, and is bringing the business into disrepute. The term during which they agreed to conduct their partnership has not yet expired. Can Loomis have the partnership dissolved in an equity court?

32. If in the above case Raymond had become bankrupt, would this have had any effect upon the partnership?

33. The partnership firm of Carter, Bailey and Co. becomes insolvent. The members of the firm are Carter, Bailey, and Green. The firm debts are \$25,000 and the firm assets are \$15,000. Carter has private property \$8000 and private debts \$2000. Bailey has private property \$4000 and no private debts. Green has no private property and private debts \$2000. How should the firm and private property be distributed among the several creditors?

34. Wilson and Fullar are partners. By mutual agreement Fullar withdraws from the firm and Ross assumes the firm debts, and further agrees to release Fullar from all the firm obligations. Atkins, a creditor of the firm when Fullar was partner, sues Wilson on a firm debt. Wilson has become insolvent and does not pay. Atkins then sues Fullar. Fullar defends on the

ground that his agreement with Wilson releases him from all liability for firm debts. Is this a good defense? Explain fully.

35. Barber, 18 years of age, joined the firm of Noland and Roberts as a junior partner and invested \$5000 cash. At the end of the year he became dissatisfied, withdrew from the firm, and demanded the return of his money on the plea that he was an infant. Should he succeed? Explain.

36. Archer and Daniels are partners in the business of manufacturing hats. Archer sells and conveys his interest in the firm to Shepard. What effect has the transfer on the partnership? What rights does Shepard, the purchaser, acquire?

37. Austin, Rowe, and Mason are partners in the grocery business located on Division St. Austin and Rowe do not like the location and desire to move the business to another street. Mason objects. Finally, during the absence of Mason, the other partners lease a place on Main St. and move the business. Give the principle of law involved and state the rights of the partners in the matter.

38. Heath and Hoven dissolve partnership. Heath allows his name to remain on the door and on the stationery used in the business. Wholesalers sell goods to the firm, believing Heath to be still a partner. Hoven becomes insolvent and the creditors take action against Heath. Is he liable?

CORPORATIONS

I. IN GENERAL

Origin. — Such vast undertakings as the modern railroads, steamship lines, large manufacturing plants, etc., which are controlled by private parties, have made it desirable and in fact necessary for a large number of persons to join in a single enterprise that can be more successfully promoted by means of their joint capital and endeavor. There has also arisen the need of some method of organization that shall be free from certain features of the copartnership law. This need is met by the artificial person known as a corporation.

The distinctive features of a corporation are:

1. It is an organization that survives the life of any one member.
2. The interest of any member may be sold or transferred without affecting the organization.
3. A member of the organization is not personally liable for debts of the corporation. He may lose what he invests but is subject to no personal liability.

The statutes in all of the states provide now for the formation of corporations, the purpose of which is to enable a number of persons to associate themselves together under a corporate name in some enterprise with the privileges just enumerated.

Definition. — A corporation is defined as a collection of individuals united by authority of law into one body, under a special name, with the capacity of continuing indefinitely or for a fixed period and of acting in many respects as an individual.

Corporations are in the eyes of the law separate from the members who compose them. The property of the corporation is owned by it and not by the members of the corporation, and a conveyance or sale of such property must be made by the corporation, as it cannot be made by the members as individuals.

The stockholders, as such, cannot convey the real property of the corporation, though they all join in the deed. . The name and seal of the corporation must be affixed by an officer or agent having authority.

— *Wheelock v. Moulton*, 15 Vt. 519.

Suits in favor of or against a corporation must be brought by or against the corporation and not the individuals who compose it personally. The corporation may convey to or take from its individual members, and may sue them and be sued by them.

Created by the State. — The authority of the state is always necessary for the creation of a corporation. No agreement among the members can accomplish such a result. The mere act of the members alone would result in a partnership. The corporation, therefore, being created by the state, has only such powers as are conferred upon it by its charter or act of incorporation.

There are several classifications of corporations, but the only one of sufficient importance for us to consider here is the division into municipal and private corporations.

Municipal Corporations. — Municipal corporations are such as are created for the purposes of government and the management of public affairs. Cities, towns, and villages are illustrations of such corporations. The legislatures give them certain powers to pass laws or ordinances, to build bridges, improve streets, etc. They may take and hold property, and may sue and be sued in their corporate names.

Private Corporations. — Private corporations are such as are created for private purposes and for the management of affairs in which the members are interested as private parties. All corporations of a private nature, as railroad, bank, or insurance companies, are private corporations as the stockholders are interested as private parties. Private corporations are either stock or non-stock corporations. Those formed for the pecuniary profit of their members generally have a capital stock divided into a certain number of parts called shares of stock. A member's interest is determined by the number of shares of stock which he holds in the company. This stock is represented by a written or printed certificate, which can be transferred from one person to another without the consent of the other members of the company.

Stock Certificates. — Stock certificates are issued to purchasers of stock as an evidence of their interest in the corporation. These certificates state the number of shares owned, their par value, and any other facts affecting the stock. Stock certificates

are signed by the president and secretary or treasurer of the corporation and are sealed with the corporate seal.

Non-Stock Corporation. — A non-stock corporation is one in which there is no stock to be transferred, and the membership of any individual depends upon the consent of the other members. Incorporated societies and mutual benefit societies are illustrations of this class.

Private Stock Corporations. — The class of corporations most common in this country and to which we will direct our attention, is private stock corporations.

The following are the powers and attributes of practically all private stock corporations:

1. To have continuous succession of members or stockholders under a special name.
2. To buy, sell, and hold property.
3. To enter into contracts, and to do all things necessary to the furtherance of the corporate business.
4. To sue and be sued in the corporate name.
5. To have a common seal.
6. To make by-laws.
7. To appoint directors, officers, and agents.
8. To dissolve itself.

Name and Continuous Succession. — The attribute of continuous succession under a special name is essential to all corporations. The corporation is not subject to dissolution by the death or withdrawal of a member. A member may transfer his shares without the consent of his associates, and the transferee comes into the corporation as a member without in any way changing or affecting its existence. A necessary attribute of every corporation is a corporate name. This is essential, as the corporation, being distinct from its members, could not otherwise be known.

Real Estate. — Most corporations have the power to hold real estate, but it is not an essential to a corporation's existence. So also the power to use a seal is ordinarily included in the privileges of a corporation, but it is not essential, as a corporation can contract without a seal.

By-laws. — The right to make by-laws is a common incident

of a corporation's powers. It is unnecessary to make them when the charter is sufficiently full to provide for all contingencies, but usually matters of detail are not included in the charter, provision being made for them in the by-laws, and every private corporation has the implied power to make them. But the by-laws to be valid must be reasonable, consistent with the charter, and within the purposes of the corporation. They are generally adopted by a majority vote of the stockholders, and having once been adopted, bind all of the stockholders whether they have assented to them or not.

Limited Liability. — One of the most important attributes of a corporation is that which exempts the stockholders from liability for the debts of the corporation. In a partnership, it will be remembered, a partner is personally liable for the debts of the firm, but this is not so in the case of a corporation except when by statute the personal liability of a stockholder is increased to a greater or less extent. In some corporations the law makes stockholders personally liable for an amount equal to the par value of their stock.

Incorporation. — A corporation can be created only by the law of the state. This may be a special law which creates and gives power to one particular company, although the constitutions of most of the states prohibit the legislature from creating a corporation by a special law except in some particular cases. The great majority of corporations are formed under the general law, which does not of itself create the corporation but authorizes persons to form a corporation by taking certain prescribed steps. It generally requires that articles of incorporation be executed by the incorporators and filed in some public office. These articles must usually set forth the names and residence of the incorporators, the name by which the proposed corporation shall be known, its principal place of business, the objects and purposes of the association (which must be lawful), the period of time for which it is to exist, the amount of capital stock and the number of shares into which it is divided, the number of directors and the names of those who are to act as directors until an election is held.

Any person who has the capacity to enter into a contract may be an incorporator. The statutes generally prescribe the number

of incorporators necessary to organize. The minimum number required in most states is three, though in a few states more are required.

In most of the states a certain number of the incorporators are required to be residents of the state in which the company is incorporated.

QUESTIONS

1. What are the three distinctive features of a corporation?
2. How is a corporation defined?
3. What makes this form of organization desirable?
4. What authority is necessary to create a corporation?
5. How are corporations classified?
6. What is a municipal corporation? What is a private corporation?
7. What is the difference between stock and non-stock corporations?
8. What are the powers of a private corporation?
9. What is the meaning of the term "continuous succession"?
10. What are the by-laws of a corporation?
11. What is the liability of a stockholder in a corporation?
12. How may a business be incorporated?
13. Who may be an incorporator?
14. What number of persons generally may organize a corporation?
15. What are articles of incorporation?

2. POWERS AND LIABILITIES OF CORPORATIONS

Powers Limited. — A corporation has only such powers as are conferred upon it by its charter or articles of incorporation. These powers may be expressly conferred, or they may be implied, either because they are incidental to a corporate existence, as the right of succession and the right to have a corporate name, or because they are necessary in order to exercise the powers expressly conferred.

A charter which gave a corporation the authority to make and keep in repair a road to the top of Mt. Washington, to take toll of passengers and carriages, to build and own toll houses, and to take land for a road, was held not to authorize the corporation to establish a stage and transportation line, nor to buy carriages and horses for that purpose. Corporations have no powers except such as are given them by their charter, or such as are incidental and necessary to carry into effect the purposes for which they were established. — *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

Implied Powers. — The powers that are incidental to a corporate existence and that will always be implied, are these: to have

continuous succession during the life of the corporation, to have a corporate name by which to contract and to sue and be sued, to purchase and hold real and personal property, to have a common seal, and to make by-laws.

A corporation has also the implied powers that are reasonably necessary for the execution of the powers expressly granted and not expressly or impliedly excluded. A corporation generally has the implied power to borrow money whenever the nature of its business renders it necessary or expedient to do so.

The general power of doing business granted to a corporation carries with it the power to borrow money for the legitimate objects of the corporation. — *Wright v. Hughes*, 119 Ind. 324.

A corporation formed for the purpose of encouraging athletic exercises has the power to borrow money for building a clubhouse upon lands leased by it, under the provisions of the statute that such a corporation may hold real and personal estate and may purchase or erect suitable buildings for its accommodation. — *Bradbury v. Boston Canoe Club*, 153 Mass. 77.

It also has the implied power to make, indorse, or accept bills of exchange and promissory notes, if such is the usual or proper means of accomplishing the results for which it was created.

Every corporation has, as a necessary incident of the powers expressly granted by its charter, the power of incurring debts in the course of its business, and of making and indorsing negotiable instruments in payment thereof. — *State v. Passaic Turnpike Co.*, 27 N. J. Law 217.

To sell or mortgage real property owned by it is another implied power of a corporation.

A corporation chartered with power to purchase and hold water power, created by the erection of dams, and to hold real estate may, when its water privileges can no longer be profitably used, sell its land.

— *Dupee v. Boston Water Power Co.*, 114 Mass. 37.

A corporation, without special authority in its charter, may dispose of lands, goods, and chattels as it deems expedient.

— *White Water Va. Canal Co. v. Vallette*, 21 How. (U. S.) 414.

But a corporation has no implied power to enter into a contract of partnership or suretyship.

The Central Railroad & Banking Co. of Georgia, which was authorized by its charter to construct and operate a railroad between the cities of Savannah and Macon and to organize and carry on a banking business, has no power, express, implied, or incidental, to purchase and run a steamboat on the Chattahoochee River, which is no part of its route, nor to form a partnership with a natural person for carrying on that business.

— *Central Railroad Co. v. Smith*, 76 Ala. 572.

As a general rule it may be said that when a corporation is given general authority to engage in business, it takes the powers of a natural person to make all the necessary and proper contracts to enable it to attain its legitimate objects.

A corporation organized as a life insurance company has power to borrow money and secure its payment by mortgaging its real estate. When general authority is given a corporation to engage in business, it takes the power, in the absence of charter restraint, just as a natural person enjoys it with all of its incidents, and may borrow money to attain its legitimate objects the same as an individual. — *Wright v. Hughes*, 119 Ind. 324.

Acts Ultra Vires. — When a corporation performs acts not within its power to perform, the acts are said to be *ultra vires*. An *ultra vires* contract, if executory, cannot be enforced; but most courts hold that if the defense of *ultra vires* will work an injustice, it will not be allowed, and this is also true if the party seeking to enforce the contract has performed his part.

The Nassau Bank, which had subscribed for stock in a railroad corporation, sued for its share of the profits. Held, that the plaintiff was not authorized to make such a contract, and the courts would not enforce it.

— *Nassau Bank v. Jones*, 95 N. Y. 115.

Where a corporation has guaranteed the payment of other persons' notes without consideration, an act not authorized by its charter, it may plead the defense of *ultra vires* and the contract will not be enforced.

— *Deaton Grocery Co. v. International Harvester Co.*, 47 Tex. Civil Appeal, 267.

Liability for Acts of Agents. — A corporation is liable to the same extent as a natural person for the frauds and wrongs of its agents and servants, committed in the course of their employment.

Goodspeed brought an action against a banking corporation for damages for maliciously bringing vexatious and unjust lawsuits against him. The defense was that a corporation was not liable for such a wrong, but the court held that a suit of this nature may be maintained against a corporation.

— *Goodspeed v. Bank*, 22 Conn. 530.

QUESTIONS

1. What powers has a corporation?
2. What is meant by implied powers?
3. Mention some of the implied powers of a corporation.
4. Has a corporation implied power to enter into a contract of partnership or suretyship?
5. What general rule may be laid down as to a corporation's powers?
6. What are "*ultra vires* acts"? Give an example.
7. What is the liability of a corporation for acts of its agents?

3. MEMBERSHIP IN A CORPORATION

Stockholders. — Membership in a private stock corporation is acquired by the ownership of one or more shares of the capital stock in the corporation. This may be acquired by subscription to the capital stock either before or after incorporation, by purchase from the corporation, or by a transfer from the owner. The certificate of stock is a written acknowledgment of the interest of the holder in the corporation. When the stock is subscribed for after the incorporation of the company, it is simply a contract between the corporation and the subscriber.

Greer was soliciting subscriptions for the building of a railway, and took a subscription book, signed therein himself, and persuaded others to subscribe. He kept the book about six months, and then, because of a disagreement with the company, he cut out his own name from the book and returned it to the company. Held, that by placing his name in the book he had perfected a contract with the company, and was just as much bound as if he had left his name in the book. — *Greer v. Railway Co.*, 96 Pa. State 391.

Rights of the Stockholders. — While the individual stockholder has but little part in the management of the corporation, he has certain rights as a holder of common stock which may be stated as follows:

1. To be notified of all stockholders' meetings.
2. To cast one vote, in person or by proxy, for each share of stock held, on all matters which come before the stockholders for action.
3. To share proportionately in all dividends declared on the common stock.
4. To share proportionately in the net assets, in the event of dissolution.
5. To inspect the corporate books and accounts.
6. To sell and transfer stock which he owns.

The rights of holders of preferred stock are the same as those of the common stockholder except as extended or restricted by conditions under which the stock was issued.

Stock Subscriptions. — The subscriptions of several persons to an agreement to take stock in a corporation thereafter to be formed, is a continuing offer to the corporation to be formed, which may be accepted by the corporation, and is binding.

The delivery of the certificate is merely evidence of the ownership of the shares, and is not necessary to make a subscriber a stockholder.

Dividends. — Out of the surplus or net profits of the corporate business the directors may vote a dividend. This is a certain per cent upon the capital stock, and when the dividend is declared the stockholders are entitled to their respective shares. Until such dividend is declared, a stockholder has no legal right to a share of the profits, although upon its being wrongfully withheld a suit in equity may be brought to compel the corporation to declare a dividend.

Whether the earnings of a corporation shall be distributed among its stockholders is purely discretionary and until a dividend has actually been declared, the stockholder has no claim thereto.

— *Lauman v. Foster*, 157 Iowa 275.

Preferred Stock. — The dividend declared must be equal on all the stock except where a part of the stock is preferred. In many corporations a certain part of the capital stock is declared in the certificates to be preferred and the balance common stock. The preferred stock gives the holder rights and privileges not enjoyed by the holders of the common stock. These rights usually include a prior claim for dividends. Six per cent preferred stock would entitle the holder to a dividend of 6 per cent before any dividend could be declared on the common stock. Cumulative preferred stock entitles the holder to dividends at the prescribed rate in every year. If the dividend is omitted in any year it must be made up in subsequent years. Preferred stock usually has also a prior right to the corporate assets in case of dissolution. Preferred stock is generally considered a safer investment than common stock, because of its prior rights, but may not be so profitable, as the dividends are limited to the rate fixed.

Transfer of Stock. — Shares of stock are transferred from one holder to another by an assignment which is usually upon the back of the certificate of stock and in a form somewhat like the following: —

For value received I hereby sell, assign, and transfer unto James D. Scott twenty shares of the capital stock represented by the within certificate. and do hereby irrevocably constitute and appoint William A. Willis my

attorney to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises.

Dated November 10, 19—

GEORGE W. ELLIS.

In the presence of

E. A. WAGNER.

The attorney named to transfer the stock is generally the secretary of the company.

Stock in a corporation is subject to sale and transfer like any other kind of personal property.

The transfer of stock must be recorded in the books of the corporation and a new certificate issued to the transferee before he is legally a stockholder. Until such transfer is made he cannot exercise the rights of a stockholder, such as voting and receiving dividends, although as between him and his transferor he is the owner of the stock and entitled to the benefits therefrom.

Benedict was the owner of ten shares of the stock of the D. L. & W. R. R. Co., transferable only on the books of the company upon surrender of the certificate. In 1856 he sold his stock to Brisbane and executed a power of attorney to Brisbane to transfer the shares on the books of the company. Brisbane took the certificate, but the transfer on the books was not made. Benedict died and after his death, in 1876, his administrator procured a transfer of the shares to himself and also procured the payment of dividends credited to Benedict between 1856 and 1876. Brisbane sued the company for the value of the ten shares transferred to the administrator and also for the amount of the dividends paid to him. Held, that the company was liable for the value of the ten shares, as it had no right to issue a new certificate without the surrender of the old one, but it was not liable for the dividends paid, as it was entitled to pay such dividends to the person who should appear on their books as the stockholder of record.

— *Brisbane v. D. L. & W. R. R. Co.*, 25 Hun (N. Y.) 438.

QUESTIONS

1. How is membership in a corporation acquired?
2. What are the rights of the individual stockholder?
3. What are the powers of stockholders?
4. Is the one who subscribes for stock bound to take it?
5. Under what conditions has a stockholder a legal right to a share of the profits?
6. What is preferred stock?
7. Is stock in a corporation subject to sale and transfer? Explain.
8. How may shares of stock be transferred from one holder to another?
9. Must a transfer of stock appear on the books of the company?
10. What is the liability of a stockholder to creditors?

4. MANAGEMENT OF CORPORATIONS

Vote of Stockholders. — As a general rule, each stockholder in a corporation is bound by all acts adopted by a vote of a majority of the stockholders of the corporation, provided such acts are within the scope of the powers and authority conferred by the charter.

A corporation was authorized to receive and hold for the benefit of a high school any land by gift, devise, or purchase. A stockholder brought action to restrain the corporation from purchasing certain real estate, claiming that it could not afford it and the result would be the bankruptcy of the corporation. Held, that the action could not be maintained, as the majority of the stockholders had voted for the purchase. Every stockholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation.

— *Dudley v. Kentucky High School*, 72 Ky. 576.

But the majority cannot bind the minority by any acts outside of the powers conferred by the charter.

It was provided in the articles of association of the Enterprise Loan Association that it should continue in operation eight years, unless it should sooner have sufficient funds to pay its debts and redeem its stock. A resolution was passed by a majority of the stockholders dissolving the association before the time limit, and it was held that without the consent of all the stockholders and with unredeemed stock outstanding, such a resolution is of no effect. — *Barton v. Enterprise Loan Association*, 114 Ind. 226.

In most cases, the management of the corporation is vested in the directors, and then the authority vested in the stockholders is the election of the directors. The directors alone are authorized to act in the management of the business. The right to make by-laws is generally in the majority of the stockholders, although in some cases that power is by charter vested in the directors.

Meetings and Voting. — Notice of the time and place of the stockholders' meeting must be given to each stockholder unless it is definitely designated by the charter or by-laws. Each stockholder is usually entitled to one vote for each share of stock owned by him, although at common law each stockholder had but one vote without regard to the number of shares of stock he owned. It is sometimes provided that each share of stock is entitled to as many votes as there are directors to be

elected, and that these votes may all be cast for one director, or divided as the stockholder may desire. This is called "cumulative voting" and is designed to secure to a minority interest representation on the board of directors. At common law the right to vote could be exercised only in person, but now the right to vote by proxy is generally conferred by statute. The proxy or authority to vote is in the form of a written power of attorney, and is revocable at the pleasure of the person executing it.

Directors. — As stated above, the active management of the corporate business is usually vested in a board of directors selected by a majority of the stockholders. The directors act by a majority vote. The powers and duties of the directors and other officers are generally fully defined in the by-laws.

A director is not personally liable for the acts of the corporation, but he is considered in the nature of a trustee for the stockholders. He must act prudently and with reasonable diligence in their interest and is liable for his negligence or wrongdoing which results in loss to them. He must act with the utmost good faith, and any personal dealings he may have with the corporation, such as borrowing money or selling goods, are regarded with suspicion.

QUESTIONS

1. Does "majority rule" apply to the stockholders of a corporation? Explain.
2. To what extent can a majority of the stockholders bind all?
3. How is a corporation managed?
4. When must stockholders be notified of a meeting?
5. (a) How do stockholders vote? (b) What is "cumulative voting"?
6. Explain the proxy vote.
7. How are the powers and duties of directors defined?
8. What officers are usually selected to manage a corporation?

5. RIGHTS OF CREDITORS OF CORPORATIONS

In General. — The creditors of a corporation generally have the same rights and remedies against the corporation and its property that they would have against a natural person. They may obtain a judgment against it and issue an execution against its property, or adopt the other remedies that they would have

against an individual. Aside from the rights of creditors to proceed against the property belonging to the corporation, there are cases in which the creditor may also look to the stockholder, notwithstanding the general rule that a stockholder is not individually liable for the debts of the corporation.

Liability of Stockholders. — The first of these cases is where the original purchaser of stock from a corporation has not paid to the corporation the full par value of his stock, and the payment of the amount is necessary to pay the creditors. It is held that such a stockholder must contribute the full amount of his subscription for stock if the amount is needed by the creditors. This amount is a part of the capital stock of the company, and the capital is held by the courts to be in the nature of a trust fund for the payment of the corporate debts.

Where a person subscribes for a certain number of shares of bank stock, but does not fully pay for it, he cannot afterwards by an agreement with the bank diminish the number of his shares so as to affect the creditors of the bank. Stock subscribed to a bank is in the nature of a trust fund for the payment of its liabilities. — *Payne v. Bullard*, 23 Miss. 88.

Creditors of a corporation who have exhausted their remedy against the corporation can, in order to satisfy their judgment, proceed against a stockholder to enforce his liability to the company for the amount remaining due upon his subscription for stock. — *Hatch v. Dana*, 101 U. S. 205.

The stockholder is also liable to the creditors of the corporation if any part of the capital assets has been unlawfully distributed or paid out to him, either directly or indirectly, leaving creditors unpaid. This may be accomplished by distributing funds as dividends when there are no surplus profits or in other ways, but, however accomplished, the stockholder may be compelled to refund for the benefit of the creditors the amount so received.

The stockholders of a corporation sold all the assets of the corporation and received and kept the proceeds of the sale. It was held that the stockholders were liable for the value of the goods sold, as their act was prejudicial to the rights of creditors, leaving certain creditors unpaid.

The statutes, which in some of the states have imposed additional liabilities upon the stockholders, vary greatly. Some make the stockholder liable for all debts until the whole capital stock is paid in. Others make him liable for a sum equal to the amount

of stock held by him in addition to the amount yet due on his stock, and so on, many different provisions being found in the different states.

In Alabama it was held that by statute a stockholder in a life insurance company was liable for the debts of the company, not only for the amount of his unpaid subscription for stock, but also for an additional sum equal to the amount of his stock.

— *McDonnell v. Alabama Gold Life Insurance Co.*, 85 Ala. 401.

In case of the failure of an incorporated bank (national or state bank) each stockholder may lose the amount he has invested in the stock and is liable to creditors for an additional amount equal to the par value of his stock.

QUESTIONS

1. What is the general rule as to the rights of creditors of a corporation?
2. To what extent is a stockholder liable for the debts of the corporation? Explain in full.
3. Is the liability of a stockholder in a national bank greater than the liability of a stockholder in a manufacturing concern? Explain.

6. DISSOLUTION OF A CORPORATION

A private corporation may be dissolved in any one of four ways: —

1. By the expiration of its charter.
2. By the surrender of its charter with the consent of the state.
3. By an act of the legislature repealing its charter, under the power reserved by the state when granting the charter.
4. By the forfeiture of its franchise or charter, upon the judgment of a proper court, for misuse or non-use of its powers.
 1. *Expiration of Charter.* — The charter usually stipulates that the corporation shall be formed for a certain time, as for twenty or fifty years. When this period expires, the association no longer has an existence, and is therefore dissolved.

Where the existence of a corporation was for a term of years, the corporation is dissolved upon the expiration of the time limited without further action. — *Merges v. Allenbrand*, 45 Mont. 355.

2. *Surrender of Charter.* — The dissolution may be effected by the association surrendering its charter, but, the charter being a contract between the state and the association, this can be done only with the consent of the state. The statutes generally provide certain formalities which must be complied with before the dissolution will be granted.

3. *Repeal of Charter.* — A charter when granted to the corporation and accepted by it, constitutes a contract between the state and the corporation. This contract exists under the clause in our federal constitution prohibiting any state legislature from passing a law impairing the obligation of the contract. The state cannot, therefore, repeal the charter of a company unless it has expressly reserved that right or unless the corporation assents thereto.

4. *Forfeiture of Charter.* — The state may institute a suit in the proper court to cause a corporate charter to be forfeited. The ground for such a suit is the abuse or misuse of the corporate powers, or the neglect or non-use of the same. But the mere abuse or misuse alone does not work a forfeiture of the charter. This results only from the judgment of the court after a hearing in which the corporation has a chance to appear and present its side of the case. A forfeiture will be decreed by the courts when the corporation is guilty of acts or has omitted to do certain things which by statute are expressly made a cause of forfeiture of its franchise.

In one of the cases under the famous "Anti-Trust" laws, it was held that when a corporation has been guilty of misconduct in the exercise of its franchise, which restricts or stifles competition, such acts will be regarded as contrary to public policy and sufficient ground for forfeiting the corporate franchise, even without proof of evil intent or injury to the public, since the inevitable tendency of such acts is injury to the public.

— *State v. Standard Oil Co.*, 224 U. S. 270.

When a railway company without authority of law leases its road to another railway company with all of its rights, property, and franchises, for a long period of time, it thereby abandons the operation of its road and is subject to forfeiture. — *State v. Atchison Railroad Co.*, 24 Nebr. 143.

Combining with other corporations to form an unlawful trust or monopoly is sufficient ground for a dissolution. This is illustrated in the case of the *State v. Standard Oil Co.*, above quoted.

Effect of Dissolution. — The effect of the dissolution is that thereafter the corporation no longer exists for any purpose, but the statutes in practically all of the states now make provisions under which the business of dissolved corporations may be liquidated and settled and the rights of stockholders and creditors may be adjusted. The usual method of doing this is the appointment of a receiver to wind up the corporate affairs, collect bills due to the corporation, and pay its creditors, after which the remainder is divided among the stockholders, according to the amount of stock they hold.

Held, that on the dissolution of a corporation at the expiration of the term of its corporate existence, each stockholder has the right, as a general rule, to have the corporate property converted into money, whether it be necessary for the payment of debts or not.

— *Mason v. Pewabic Mining Co.*, 133 U. S. 50.

QUESTIONS

1. In what four ways may a private corporation be dissolved?
2. Explain the usual method of dissolution.

7. JOINT STOCK COMPANIES

Definition. — A joint stock company is a form of association in appearance resembling a corporation while in reality it is nothing more than a partnership.

Incorporation is expensive in England, and there the joint stock company is common, but in the United States the joint stock company is seldom found, as corporations generally are more satisfactory.

As has been said, joint stock companies resemble corporations in form. They have officers and by-laws. Their capital is divided into shares which under their by-laws are transferable. Their by-laws generally regulate the mode of conducting their business and electing their officers. A member of a joint stock company, although he may style himself but a stockholder, is a partner, and as such is liable to the same extent and in the same manner as any ordinary partner.

Holden and others associated themselves together without incorporation under the name of the Bridgeport Coöperative Association for the pur-

pose of procuring meat and provisions at a lower rate for the members of the organization. Sales were made to persons not members at a higher rate, but no profit was expected beyond the expense of management. The members held meetings and elected officers. Held, that the individuals composing the association were liable personally as partners for goods purchased by the managers of the association for its benefit. It made no difference that they did not intend to become individually responsible or that they did not know or believe that they would be. — *Davison v. Holden*, 55 Conn. 103.

Sale of Shares. — It is generally held that under the by-laws of the company a member may sell or transfer his shares without working a dissolution of the company as would be the result in a partnership. And the death of a member does not work its dissolution. In some of the states joint stock companies are given certain privileges by statute; as, for instance, allowing them to sue or be sued in the name of their president or treasurer. The business of a joint stock company cannot be changed or extended without the consent of all the members, although in its ordinary business arrangements a majority will govern.

QUESTIONS

1. What is a joint stock company?
2. Why is it that joint stock companies are not common in this country?
3. In what ways does a joint stock company resemble (a) a corporation?
- (b) a partnership?
5. Are shares of stock in a joint stock company transferable? Explain.
6. What is the liability of a stockholder in a joint stock company?

IMPORTANT POINTS

A corporation is an artificial person created or authorized by law.

A corporation is composed of a number of natural or corporate stockholders.

Stockholders as individuals do not represent the corporation.

A stockholder may deal with the corporation, may sue it and may be sued by it.

Change in the membership of a corporation does not affect its existence.

The special powers of a corporation are granted by its charter.

The capital stock or share capital is the total amount of stock the corporation is authorized by its charter to issue.

The capital is the actual assets or property owned by the corporation.

Common stock is the ordinary stock of a corporation, issued without special privileges or restrictions.

Preferred stock has some preference as to dividends and assets over other stock in the same corporation.

The directors of a corporation are elected by the stockholders.

The directors usually elect the officers of a corporation (president, vice-president, secretary, and treasurer).

A stock certificate is issued by the officers of the corporation.

No two corporations in the same state are permitted to have the same name.

A majority of the stock and not a majority of the stockholders usually controls a stock corporation.

A director in a corporation must be a stockholder unless this requirement is waived by a provision in the charter.

The directors of a corporation represent the stockholders.

The transfer of stock must be entered on the books of the company before the purchaser becomes a stockholder of record, entitled to vote and share in the dividends.

PARTNERSHIPS COMPARED WITH CORPORATIONS

A partnership is a relation resulting from a contract.

A corporation is an artificial person created by law.

Change in the membership of a partnership operates as a dissolution.

Change in the membership of a corporation does not affect its existence.

A partner is individually liable for his firm's obligations.

A stockholder's liability is limited.

Each partner is a business agent of the partnership.

A corporation's business is managed by officers.

Membership in a partnership results from agreement between the partners.

An interest in a stock corporation is acquired by purchasing stock.

Suit against a partnership, in most of the states, must be brought in the name of the individuals composing it.

A corporation has the power to sue and be sued in its corporate name.

A partnership cannot contract with or transact business with its members.

In business transactions a corporation bears the same relation to its members as to any one else.

TEST QUESTIONS

1. Would it be possible to form a corporation with only one incorporator?

2. Is it possible for a corporation to be organized without capital stock? Give an illustration.
3. What are the principal differences between a partnership and a corporation?
4. What advantages has a corporation over a partnership?
5. In a stock corporation, how are the profits divided?
6. What is the usual procedure in forming a corporation?
7. What is the difference between par value and actual value as applied to stock?
8. What is the difference between the "capital stock" and "capital"?
9. Which would you consider the safer investment, preferred stock or common stock?
10. Sometimes common stock is more valuable than preferred stock. Why?
11. What is necessary after purchasing stock in a corporation before the purchaser is entitled to the privileges of a stockholder?
12. Can a stockholder who owns more than half of the stock in a corporation assume the management of the business and make contracts?
13. Explain the organization, management, and control of a stock corporation.
14. What are the usual duties of the directors of a corporation and to whom are they responsible?
15. What is the usual course of procedure in the dissolution of a corporation?

CASE PROBLEMS

Give the decision and the principle of law involved in each case.

1. The Union Supply Co. was a corporation which owned a piece of real property that was sold by the officers of the corporation, the deed being signed personally by all of the stockholders in their individual names. Was the conveyance good?
2. Webster owes the Standard Novelty Works, a corporation, \$500. Three persons own all the stock of the corporation. They in their individual names sue Webster for the amount. Can they succeed?
3. The Georgia Railroad Co. has authority by its charter to maintain a railroad between the towns of Atlanta and Brunswick. It buys boats and seeks to establish a boat system on one of the rivers running into the town of Brunswick. Has it that authority?

4. The American Dry Goods Co. is incorporated for the purpose of buying and selling goods. In the course of its business the company borrows \$1000 and gives its note therefor. Has it this authority?

5. The above-named corporation owns a store and land where it conducts business. It places a mortgage upon this property for the purpose of raising \$5000. Has it the right?

6. The above-named corporation forms a partnership with one Greene in an adjoining town for the purpose of conducting a branch dry goods store. Has it the authority?

7. The Southern Tobacco Co., a corporation, entered into a combination with twenty other manufacturers of tobacco for the purpose of forming a tobacco trust and combining all of their business under one management. An action is brought to dissolve the Southern Tobacco Co. Can it be done?

8. Newell is a stockholder in a corporation. He learns that the profits for the past year have been about 10 per cent on the amount of capital stock, but no dividends have been declared. He therefore sues the corporation for an amount equal to 10 per cent on his stock. Can he recover? If not, what remedy has he against the corporation?

9. In the above case suppose Newell sells his stock to Jordan on January 1, and no transfer is made on the company's books. On July 1 a dividend of 10 per cent is declared. Jordan enters a claim against the company for the dividend. Can he recover?

10. Downs, Butler, and Hargan are original subscribers to the stock of the Standard Glass Co. They have paid to the corporation only 50 per cent of the par value of their stock. The corporation fails and the creditors, finding that the company has no assets, sue Downs, Butler, and Hargan personally for the amount of their subscription not yet paid. Can they recover?

11. After a corporation is practically bankrupt, certain of the assets are sold and the proceeds distributed among the stockholders. When the corporation fails, can the creditors recover those proceeds from the stockholders?

12. A certain corporation has earned dividends equal to 10 per cent of the stock. The directors do not declare a dividend but put the earnings aside into a surplus fund. Beam, a stockholder, brings an action to compel the directors to declare a dividend. Will he succeed? Explain.

BANKRUPTCY

Early Bankruptcy Legislation. — Bankruptcy legislation can be traced to an old Roman law under which an insolvent debtor might, by surrendering all of his property to his creditors, obtain immunity from the penalty imposed by the law, which was imprisonment and severe corporal punishment. The first English bankruptcy law was passed in 1542 and forms the basis for much of our bankruptcy legislation. This English law, however, contained no provision for voluntary bankruptcy or for the discharge of the debtor's remaining unpaid debts.

National Bankruptcy Laws. — The United States Constitution gives Congress the power to enact uniform bankruptcy laws. Congress has enacted five different bankruptcy laws. The last law — the only one to be considered, as the others have all been repealed — was enacted in 1898 and as amended in 1903, 1906, 1910, and 1917 is still in force.

The object of the National Bankruptcy Law is to protect an insolvent debtor's property from seizure by any one or more creditors to the exclusion of other creditors and to prevent an insolvent debtor from giving one creditor preference over other creditors in the distribution of his assets or payment of his debts.

Solvency and Insolvency. — Any business firm is said to be solvent so long as its available assets are equal to or greater than its liabilities, but just as soon as its liabilities exceed its assets a state of insolvency exists. Insolvency is said to be determined by one's inability to pay one's debts. A state of temporary insolvency may come about through inability to realize promptly on the assets of a business. A debtor may be insolvent due to the fact that he is not able to meet his debts as they mature, although his assets are greater than his liabilities. What he lacks is sufficient cash and if time were given him he could convert his assets into cash and meet his obligations.

Bankruptcy Statute. — The national bankruptcy law provides that "Any person, except a municipal, railroad, or banking

corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a state or territory, or of the United States."

Before a person may be considered a bankrupt he must be insolvent in the sense that his property at a fair valuation is less than his liabilities, and in addition to this he must commit one of the five acts of bankruptcy hereafter described.

Five Acts of Bankruptcy. — Before a court can decree an insolvent debtor bankrupt without his own consent and take charge of his property for the protection of his creditors, the debtor must commit an act of bankruptcy, and this act must be committed within four months of the filing of a petition by the creditors. Insolvency alone does not give creditors the right to start bankruptcy proceedings against a debtor. He must have committed one of the following five acts:

1. Conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property, with intent to hinder, delay, or defraud his creditors, or any of them.

2. Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors. The transfer must result in diminishing the insolvent estate. Thus the payment while insolvent of a preëxisting debt will suffice, but the payment of a debt which arose simultaneously with or after payment would not amount to a preference. For example, the purchase of merchandise on "C.O.D." or "C.W.O." (cash with order) terms will not result in a preference, or diminution of the estate, but merely in the substitution of one asset (merchandise) for another asset (cash).

3. Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference. This would result in depleting the insolvent's estate, to the benefit of one creditor and to the detriment of all others.

4. Made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property, or, because of insolvency, a receiver or trustee having been put in charge of his property under the laws of a state, of a territory, or of the United States.

5. Admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

Until the insolvent debtor commits one of these acts, the creditors may not force him into bankruptcy. Sometimes, in order to create an act of bankruptcy, one creditor, with the approval of the others, will bring suit for a claim, obtain judgment, and levy execution against the debtor's property. Thus an act of bankruptcy will be committed and the creditors may then file their petition.

Settlement of a debtor's affairs by a bankruptcy court may be of advantage to both the creditors and the debtor. Creditors grow impatient and insist upon immediate settlement, sue the debtor, obtain judgment, and authorize sale of the debtor's property, usually at a sacrifice, and the amount realized is not sufficient to pay all creditors in full. The bankruptcy law affords the debtor protection against such an invasion by the appointment of a receiver. A receiver may be appointed upon application of creditors or the debtor himself. When the application is accompanied by proof of the debtor's inability to meet his debts as they mature, a bankruptcy court will appoint a trustee or receiver to sell the assets of the debtor and with the proceeds settle with the creditors on a *pro rata* basis. In this way the assets can be marketed to a greater advantage and the interests of all protected.

Trustee and Creditors. — As soon as a person is adjudged a bankrupt a meeting of his creditors is called, at which time they can examine the bankrupt and do any other business proper at

the time. As soon as the trustee is appointed and he has filed his bond, he becomes vested by operation of law with the title of the bankrupt to all of his property except that exempt by law, to all property transferred in fraud of creditors, and to all rights arising upon his contracts and agreements. It is then the duty of the trustee to convert the assets into cash, which he divides among the creditors whose claims have been accepted.

Duties of Bankrupt. — As soon as the voluntary petition is filed, or after the hearing upon the involuntary petition, if allowed, the party is a bankrupt, and the duties imposed upon him are as follows:

1. He must attend the first meeting of his creditors, if directed by the court, and also the hearing upon the application for his discharge.

2. He must comply with the lawful orders of the court;

3. Examine the proofs of claims filed against his estate;

4. Execute such papers as shall be ordered by the court;

5. Execute to his trustee a transfer of all his property in foreign countries;

6. Inform his trustee of any attempts of his creditors to evade the provisions of the bankruptcy law, coming to his knowledge, or of any attempt of creditors to prove false claims;

7. Prepare, make oath to, and file in court within ten days after the adjudication, if an involuntary bankrupt, and with the petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known (if unknown, that fact to be stated), the amounts due each of them, the consideration therefor, the security held by them, if any, and a claim for such exemptions as he may be entitled to.

8. He must submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate. No testimony given by him shall be offered in evidence against him in any criminal proceeding.

The bankrupt is entitled to the same exemptions as are allowed to any other debtor by the laws of the state in which he resides.

The National Bankruptcy Law further provides that when a debtor avails himself of the law and his assets are all liquidated, he may be discharged in bankruptcy proceedings and relieved from any further obligations even though his assets were not sufficient to pay his creditors in full.

Discharge in Bankruptcy. — The bankrupt, after one month and within twelve months after being so declared, may file an application for a discharge in the court of bankruptcy, and the judge shall grant the discharge unless at the hearing held thereon it shall appear that the bankrupt has “committed an offense punishable by imprisonment as herein provided; or with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property with intent to hinder, delay, or defraud his creditors; or in voluntary proceedings been granted a discharge in bankruptcy within six years; or in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by, the court.”

The discharge of the bankrupt acts as a discharge of all of the debts and contracts of the bankrupt at the time of the filing of the petition except a certain class of debts which are tinged with wrong or fraud, or debts due the government, or debts due creditors who were not duly notified of the proceedings, or whose claims were not listed by the bankrupt on his schedules.

Hartman is insolvent; his assets are fifteen thousand dollars and his liabilities are twenty thousand. He is discharged in bankruptcy by settling with his creditors at seventy-five cents on a dollar. This relieves him from further payment and his creditors will have to lose twenty-five per cent of the claims they had against him.

Settlement. — The creditors frequently join in a composition agreement whereby they accept a *pro rata* share of the assets in full settlement of their claims. The legal effect is practically the same as a final determination by the bankruptcy court, it avoids delay, and usually gives the creditors more money by saving the expenses of the proceeding. Such an agreement is not binding on any creditor who does not join in it.

The Remedy of Injunction. — Instead of asking for the appointment of a receiver, the creditors may ask for an injunction to restrain other creditors from taking action which would affect their rights or interests as creditors. If an injunction will serve to protect the rights of all creditors the court may not appoint a receiver, but instead grant the remedy of injunction.

Exemption Laws. — Laws are in force in nearly all if not all of the states by which certain property is exempt from seizure to satisfy a judgment for debt. Usually household furniture up to a certain amount, varying in the different states, tools used in following a trade, and certain articles necessary in carrying on a business are exempted. The laws of one's own state should be consulted.

QUESTIONS

1. What is the object of the National Bankruptcy Law?
2. When is a business firm said to be solvent?
3. When is a business firm said to be insolvent?
4. What conditions may cause a state of temporary insolvency?
5. What are the principal provisions of the bankruptcy statute?
6. When does a state of bankruptcy exist?
7. What are "acts of bankruptcy"?
8. What are the principal duties imposed upon one who is a bankrupt?
9. In what way does the bankruptcy law protect debtors?
10. Who is a trustee or receiver?
11. What are the principal duties of the trustee or receiver?
12. What is the meaning of "discharge in bankruptcy"?
13. What is the effect of a discharge in bankruptcy?
14. What is the special remedy of injunction?
15. What are exemption laws?

COURTS AND THEIR JURISDICTION

Courts. — We have dealt with law as defining the rights and limitations of individuals in their dealings with one another; but these rights must often prove of little value in protecting the individual in his property and personal relations unless a means of enforcing them is provided. For this purpose the constitutions of the United States and of the several states have established a system of Courts.

Jurisdiction. — The jurisdiction of a court is defined as the power to hear and determine a cause. The courts of a particular class are empowered to hear only a certain line of causes or disputes; while another line of cases, involving different amounts or arising between different parties or being of a different nature, will be determined by entirely different courts. It is essential in all cases that the particular court before which a question is brought for determination shall have jurisdiction, for if it has not, its decision is of no effect, and may be set aside at any time.

Jurisdiction of Subject-matter. — The jurisdiction of a court must be both of the subject-matter and of the person. Jurisdiction of the subject-matter means the power of the court regarding the subject or thing in dispute. Thus, in an action concerning the title to a particular piece of land in one judicial district in a state, if the case were brought in the district court of another judicial district, this court would have no jurisdiction of the question of the title to land outside its own district; therefore, there would be a lack of jurisdiction of the subject-matter. Again, the justice courts have no power to determine questions affecting the title to real property, and, therefore, the above case could not be determined by any justice court, as such court has no jurisdiction of the subject-matter.

Jurisdiction of the Person. — Jurisdiction of the person, or of the party, against whom an action or cause is brought, is necessary, or the decision will have no effect as against such person or party. Jurisdiction of the person is generally acquired by

service of a notice or command upon the party, which notice is generally called a summons and will be treated later.

Classification of Courts. — The courts of the United States and of the different states may be arranged under several classifications, as follows:

Courts of Original Jurisdiction. — Courts of Original Jurisdiction are those courts that have authority to hear and determine questions when they are first presented for judicial determination or decision. They are the courts that hear both sides of the dispute and render their decision therefrom.

Courts of Appellate Jurisdiction. — A Court of Appellate Jurisdiction has no power to hear a case when it first arises. It can only review the decision of a lower court when such decision is brought before it for determination. The taking of a case from a lower court to a higher one is called an appeal.

Original and Appellate Jurisdiction. — There are other courts that have in some cases original and in other appellate jurisdiction; that is, they have jurisdiction to hear appeals from some lower court or courts, and they can also try certain cases in the capacity of courts of original jurisdiction.

Courts of Record and Not of Record. — Courts are known as Courts of Record and Courts Not of Record. Courts of record are, as their name implies, those which are required by law to keep a record of their proceedings, this record being kept on file in some safe place for future reference. Courts not of record, on the other hand, have no permanent record of their proceedings.

Civil and Criminal Courts. — Courts are either Civil or Criminal. Civil courts hear cases in which the rights and liabilities of individuals towards each other are in dispute. A civil action is one which seeks the establishment, recovery, or redress of private rights, while a criminal action has for its purpose the protection of the community against those whose acts would endanger it. Criminal courts are those which administer criminal law and hear and determine criminal actions.

Common Law and Equity Courts. — Civil Courts may be either Common Law Courts or Equity Courts. The distinction between the common law court and the equity or chancery court

was in former times well defined, a different set of judges presiding over, and an entirely different system prevailing in, each court. But the line of distinction is in most jurisdictions less pronounced now than formerly, and in many of the states the same judge presides in both a common law and an equity court; at one term of court hearing common law cases and at another equity cases.

General and Special Jurisdiction. — Courts of general jurisdiction are those in which it is assumed, unless the contrary is shown, that they have jurisdiction to hear the cases before them. In such a court the fact that it has jurisdiction does not have to be expressly pleaded or proved, while in the case of a court of inferior or special jurisdiction, the jurisdiction of the court over the case in question is not presumed, but must be especially set out in the pleadings.

Federal Courts. — The courts of the United States are called Federal Courts and are empowered to hear cases arising under the United States Constitution, laws, and treaties. The Constitution provides that 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 establish. In pursuance of this authority, Congress has established, in addition to the Supreme Court, inferior courts which are known as the Circuit Court of Appeals, the District Court, and others.

The Federal courts have jurisdiction only in those cases in which it is expressly conferred upon them by the Constitution, and by Congress under the power granted to it by the Constitution. This jurisdiction extends to all cases arising under the United States Constitution, the laws of the United States and treaties made under their authority, and all cases affecting ambassadors, public ministers, and consuls; to all cases of admiralty and marine law, which includes all things done upon and relating to the seas and all transactions in connection with commerce and navigation and to damages for injuries upon the high seas and the navigable lakes and rivers of the United States. They also have jurisdiction of controversies in which the United States is a party, and of cases 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 the grant of a different state, and between a state or its citizens and foreign states, citizens, or subjects.

Supreme Court. — The Supreme Court consists of the chief justice and eight associate justices.

This court has both original and appellate jurisdiction, its original jurisdiction extending over all proceedings brought against ambassadors, public ministers, and their families, and over all controversies of a civil nature in which a state is a party.

It has appellate jurisdiction to hear appeals from the circuit court of appeals and the district court.

Circuit Court of Appeals. — This is a court of intermediate appeal between the District Court and the Supreme Court. It has appellate jurisdiction by appeal or writ of error to review final decisions in the District Courts, except in a few cases in which appeals may be taken from the district court direct to the Supreme Court. In many cases the decision of the Circuit Court of Appeals is final. The United States is divided into nine circuits, in each of which there is a Circuit Court of Appeals, to which is assigned one of the Justices of the Supreme Court, who with the circuit or district judges constitutes the Court.

District Court. — This is the federal court of original, general jurisdiction. Part of its jurisdiction was formerly exercised by the Circuit Courts, which were abolished in 1911 and their jurisdiction transferred to the District Courts. There are numerous districts in the United States, each state having at least one and some states having four. A District Court is established in each district, presided over by a district judge.

The district courts have original jurisdiction of all civil suits brought by the United States; and of suits which arise under the Constitution, laws or treaties of the United States, or between citizens of different states, or a citizen of a state and a foreign country. Also of all crimes and offenses cognizable under the authority of the United States; of civil cases of admiralty and maritime jurisdiction; of cases arising under the revenue, postal, patent, copyright, trade-mark, and bankruptcy laws; and many other cases. Actions involving federal questions, or between citizens of different states, which have been commenced in a state

court may be removed to the District Court under certain circumstances and by proper procedure.

Other Federal Courts. — Congress has also established a Court of Claims to hear and determine claims against the United States; a Court of Customs Appeals, to hear certain matters arising under the revenue laws imposing duties on imports; and, in certain foreign countries, Consular Courts, at which American citizens may have their cases heard, in order to be relieved of the uncertain and sometimes barbarous laws of non-christian countries.

State Courts. — While the federal or United States courts above enumerated deal only with certain specific cases over which they are given jurisdiction by the Constitution, the great mass of questions not specifically placed within the jurisdiction of these federal courts is within the jurisdiction of the state courts.

Justice Court. — The systems of courts in the different states differ somewhat, but in the more important features are essentially the same. The lowest court is the Justice Court, presided over by the justice of the peace. This court is called by various other names in different states, such as District Court, etc. It is a court not of record, and has original jurisdiction only. It hears both civil and criminal cases and is of limited or special jurisdiction.

In the larger cities there are two modifications of this court, one branch hearing civil cases and being known as the Municipal or City Court, and the other branch dealing with the criminal cases and known as the Police or Magistrate's Court.

The jurisdiction of the justice court is over the minor or more trivial cases, and includes the punishment of petty offenses which it is not thought necessary to bring before the higher courts. In civil cases it has jurisdiction when the amount involved does not exceed a sum fixed by statute. It has no jurisdiction when the title to real property is involved. In its criminal branch it has exclusive jurisdiction of certain prescribed misdemeanors, such as petit larceny, assault in the third degree, malicious mischief, etc.

By way of definition of the term "misdemeanor" it may be said that crimes are classified as felonies and misdemeanors. A

felony is a crime punishable by either death or imprisonment in a state's prison. All other crimes are misdemeanors.

County Court. — In most of the states the court next in importance is a county court of special or limited jurisdiction, confined exclusively to those cases in which jurisdiction is expressly conferred on it. In many states it is called the Probate Court, or Orphans' Court, and has to deal with the settlement of the estates of deceased persons, the probating of wills, and the protection of minor children. In some states it has jurisdiction also of certain civil and criminal cases arising within the county. In a few states there are two courts for each county, one held by the county judge for civil and criminal cases, and the other by the surrogate for the work of a probate court.

Circuit Court or District Court. — In each state there is a court of original and general jurisdiction, which is called in some states the Circuit Court, in others the District Court, Superior Court, or the Supreme Court. This is a court of record and has unlimited jurisdiction, both in law and equity, regardless of the amount involved or the nature of the controversy, provided it is not a case in which the federal courts, or minor state courts, have exclusive jurisdiction. In some cases the equity powers of the court are exercised by a separate tribunal, called Chancery, but in most states law and equity are administered by the same court and its judges. There usually is a separate circuit or district court for each county or other judicial district in the state.

Courts of Intermediate Appeal. — In some of the states appeals run from the circuit or district court to a court of intermediate appeal, called the Appellate Division or a similar name, whose decision is final in certain cases. The purpose of the courts is to dispose of some of the many appeals which otherwise would seriously interfere with the work of the court of last resort.

Supreme Court. — The court of last resort in a state is usually called the Supreme Court, but in some states is called the Court of Appeals. This court has exclusively appellate jurisdiction. It never hears the evidence in a case, which is presented to the court in the form of a printed record of the proceedings in the lower court, and it decides questions of law as to which its decision is final.

Court of Claims. — The state is a sovereign body and cannot be sued without its permission. There are many claims against the state which should be determined by some tribunal, and to meet the necessity most states have established Courts of Claims, which have exclusive jurisdiction to hear and determine such claims.

Reference. — A Referee is a person appointed by the court to hear the evidence in a case and to report thereon to the court. It is customary for the court to grant a reference when the case requires the examination of a long account. In some other cases a reference may be had either upon motion of the parties or in the discretion of the judge.

A case involving a long account is tried before a referee because of the difficulty the jurors would have in carrying in their minds the numerous items involved therein and the great delay to which the court would be subjected on account of the expenditure of time required to hear cases of this character. A referee hears the case in the same manner as a judge, and has the same power to preserve order and grant adjournments.

QUESTIONS

1. For what purpose are courts established?
2. What is the jurisdiction of a court?
3. What is the effect of a decision of a court not having jurisdiction of the question?
4. Name and define the two different classes of jurisdiction.
5. (a) What is a court of original jurisdiction? (b) Of appellate jurisdiction?
6. Define courts of record; courts not of record.
7. Define civil and criminal courts; common law and equity.
8. Distinguish between the courts of general jurisdiction and those of special jurisdiction.
9. How are the courts of the United States established, and over what question; have they jurisdiction?
10. Name the different United States courts, and describe each.
11. (a) What is the lowest court in your state? (b) What are the limits of its jurisdiction, both civil and criminal? (c) By whom is it conducted?
12. (a) Is there a county court in your state? (b) What is its name and its jurisdiction?

13. (a) What court in your state has jurisdiction over the probate of wills? (b) What other jurisdiction, if any, has it?
14. (a) What is the lowest court of general jurisdiction in your state? (b) Are there any classes of cases which it cannot determine?
15. What courts in your state hear equity cases?
16. What court in your state, if any, has intermediate appellate jurisdiction?
17. What is the highest court in your state and what is its jurisdiction?
18. (a) Is there a court of claims in your state? (b) Why is such a court established? (c) Over what questions does it have jurisdiction?

PLEADING AND PRACTICE

We have learned that a system of courts is established in each state as well as in the United States. To enable the courts to conduct their business in an orderly manner, certain rules of practice are prescribed which must be observed by those desiring relief in these courts.

Action. — When a person desires the relief afforded by the courts, he institutes an action or suit. An action is defined as the legal and formal demand of one's rights made upon another person or party and insisted upon in a court of justice.

Parties. — In an action at law it is necessary that there be two or more parties. The party who brings the action is known as the plaintiff, and the one against whom it is brought, as the defendant. In a criminal action the plaintiff is the state or the people of the state, and the defendant is the one accused of the crime. The same person cannot be both plaintiff and defendant. A party in all civil cases must be competent to contract; but when incompetent, as in the case of an infant or lunatic, he may bring suit through a person appointed for that purpose and known as a guardian.

Summons. — An action is commenced by the service of a notice upon the defendant, this notice being called a summons. The summons is in some jurisdictions issued by the judge or clerk of the court, while in other jurisdictions it may be issued by the attorney for the plaintiff.

This summons must be served personally upon the defendant, either by a sheriff or a constable, or by a person of suitable age. The laws expressly provide in a few cases that the summons

may be served upon the defendant by advertising it in a newspaper, but this is only in case the defendant is not within the state, or if within the state he cannot be located.

Pleadings. — After an action or suit has been commenced by the service of a summons, the parties must serve their pleadings within a certain prescribed time. These pleadings are the formal allegations of the parties by which both plaintiff and defendant present to the court and to each other their respective versions of the question in dispute.

Complaint. — The complaint, which is the first pleading in a case, and is in some states called the petition or declaration, consists of a statement of the cause of action which the plaintiff sets forth as his reason for seeking the aid of the court against the defendant. Under the old common law the forms of pleadings were very technical, but under the modern form of procedure they are required only to set forth the facts in a clear and concise manner. The complaint is commonly served with the summons, but may be served later. After the complaint has been served upon the defendant or filed with the court, as the rules of the particular court may require, it is then necessary for the defendant within a certain number of days (usually twenty) to file or serve a statement of the reasons why he should not comply with the demands of the plaintiff. If such a statement is not filed, the plaintiff is given judgment against the defendant by default. The pleading which is filed by the defendant may be either an answer or a demurrer.

Answer. — The answer, or plea as it is sometimes called, is a statement in concise form of the defendant's defense to the matters set up in the complaint. The answer may deny the claim of the plaintiff, or it may admit it and set up other facts by way of counterclaim or set-off.

To illustrate, the plaintiff may sue for \$100, which he alleges in his complaint the defendant owes him for the purchase price of a boat sold by plaintiff to defendant. The defendant in his answer may allege that he did not purchase the boat, but merely took it to keep for its use, and this would be a denial. Again, he may admit purchasing the boat for \$100, but allege that he worked for defendant three months at \$50 per month,

and that his wages had not been paid, and ask that this be an offset against the price of the boat, and that he, the defendant, be given a judgment for the balance of \$50. This defense constitutes a counterclaim or set-off.

Reply. — When a counterclaim is alleged, new facts are brought up and it is necessary for the plaintiff, if he wishes to deny them, to make a reply, or replication, which is really the plaintiff's reply or answer to the new facts set forth by the defendant.

Demurrer. — The defendant may consider that the facts set up in the plaintiff's complaint, even if true, do not constitute a sufficient case in law against him, and for this reason it does not require that a defense be interposed, therefore he demurs to the plaintiff's complaint. By demurring he in effect says, "Admitting that all the plaintiff sets forth in his complaint is true, still he is not entitled to recover." The question on the demurrer must be argued before the judge, and if the demurrer is sustained, the plaintiff must correct or amend his complaint or he fails in his action. If the demurrer is overruled, the defendant must answer or the case will go against him. A demurrer may also be interposed to an answer or a reply in the same manner as to the complaint.

Trial. — After the pleadings are served the case comes to trial. A trial is held before the court, consisting of the judge alone in some cases and in others of a judge and a jury. A jury is a body of men, usually twelve, who are brought together to hear a case and sworn to decide the same according to the evidence brought before them.

Questions of Law or of Fact. — Questions which give rise to a trial may be questions of law or questions of fact. In the former the facts of the case are admitted, and the question to be decided is the application of the law to these facts. This is a question for the court and is tried without a jury. A question of fact arises when the testimony of the witnesses differs and the true state of facts remains to be determined. Questions of fact are generally tried before a jury. Every criminal case may be tried before a jury if the defendant demands a jury trial. As a rule, an equity case is tried before the judge without a jury.

All cases involving simply a question of law are tried before a judge without a jury. It may be said that the law is to be decided by the judge, and the facts by the jury. The jurors are sworn to determine the case according to the evidence.

Evidence. — The evidence consists of the testimony of persons who know something about the facts and are sworn to tell the truth. These persons are known as witnesses. Written documents and papers pertaining to the case are also admitted as evidence.

Subpœna. — In order to procure the attendance of the witnesses at the trial of a case the court issues an order, called a subpœna, commanding them to appear at a certain time to give evidence in the case, and in default of their appearance they are subject to a fine for contempt of court. Refusal to testify when called as a witness is also contempt of court.

Deposition. — When a necessary witness is outside of the state, or, in the justice court, outside of the county or an adjoining county, it is not within the power of the court to compel his attendance, therefore statutes have been passed allowing his testimony to be taken in a certain prescribed way before a notary public or other officer, who reduces the testimony to writing and returns it to the court. The opposing party must have notice of the time and place of the taking of the deposition and also an opportunity to question the witness.

Lawyers. — The case for both the plaintiff and the defendant is conducted by officers of the court known as lawyers. The lawyer prepares the pleadings for his side of the case, presents the case to the court, and questions the witnesses. In some courts a party may conduct his own case.

Verdict. — After the jury has heard the witnesses for plaintiff and defendant, it weighs the evidence on both sides of the question and arrives at a decision as to the party in the right. This decision is called the verdict. In order to render a verdict the jurors must all agree. If, after a reasonable time, they have failed to agree, they are dismissed, and a new trial is held before another jury.

Judgment. — The verdict of a jury is but a determination of the facts of a case. It is for the judge to give the judgment,

which is the official decision of the court upon the respective rights and claims of the parties to the action. Thus in a suit for damages against a taxicab company for a collision with plaintiff's automobile, the jury might find that the plaintiff ought to recover \$100 from the defendant, and bring in its verdict to that effect. Upon this verdict the judge decrees that the defendant shall pay this amount to the plaintiff and so gives the judgment of the court to the plaintiff for \$100 and costs. The costs are an allowance given to the successful party to compensate him for his expenses in conducting the case. In a criminal matter the jury finds the defendant guilty or not guilty and the judge pronounces the penalty or punishment, or discharges the defendant.

Execution. — After the judgment of the court has been rendered, the party against whom the damages are adjudged may not voluntarily pay them. In such an event, the law provides a method of procedure called an execution, which is a command issued by the court to one of its officers, either a sheriff, constable, or marshal, authorizing and requiring him to collect the amount named as damages, and if not paid, to take certain property of the person against whom the judgment is given, sell it, and apply the proceeds upon the judgment.

Levy and Sale. — The taking of the property under the authority of the execution is called a levy. The property, after being levied upon, is advertised by the officer and sold at public sale to the highest bidder.

Exemption. — The sheriff or officer can levy upon any property owned by the judgment debtor except certain articles which he is allowed by law to claim as exempt from execution and sale. The exemptions differ in the different states and are generally more liberal to a married man or one who supports a family, than to a single man. The exemptions ordinarily consist of clothing, household articles of a certain value, etc.

New Trial. — After the judgment has been given, the unsuccessful party may within a certain time move for a new trial, either for the reason that he has discovered some new evidence, or because of some error of the judge in the first trial. If the judge can be convinced that, during the trial, he has made a

material error or that the defeated party really has discovered new evidence that is material to his case, the judge may, at his discretion, order a new trial. If a new trial is denied, the defeated party has no recourse but to pay the judgment or take an appeal.

Appeal. — The party dissatisfied with the judgment of the trial court may take an appeal to a higher court by fulfilling certain conditions, which usually consist in giving an undertaking to pay the costs if the decision of the trial court is affirmed.

The appeal is generally on questions of law alone, the decision of the trial court on questions of fact being final. The appellate court hears the arguments of the lawyers on each side, and it may then affirm the decision of the trial court, or it may reverse it and send the case back for a new trial.

When the case has been taken to the highest appellate court to which a case of its kind can be carried, and this last court affirms the judgment of the trial court, the case is finally determined.

Supplementary Proceedings. — In case the sheriff or other officer intrusted with the execution is unable to collect the money or find property sufficient to satisfy it, he may return the execution with his certificate that it is unsatisfied. The party who obtained the judgment, and who is called the judgment creditor, may then apply to the judge for an order to examine the judgment debtor in reference to his property. This order of the judge requires the judgment debtor to appear before a referee appointed by the court and answer questions which may be asked him in reference to his property. The referee also has power to subpoena other witnesses and to adjourn the proceedings from time to time. When the examination is completed the referee reports the evidence to the judge who appointed him, and if it is found that the judgment debtor has any property which is not exempt, he is ordered to turn it over to the proper officer.

Replevin. — This is an action brought to recover the possession of certain articles of personal property which have been wrongfully taken, or, if rightfully taken, are being wrongfully withheld. By giving a bond, the plaintiff can have the property

taken from the defendant and held in the custody of an officer until the action is determined. In this action their right to the possession of the goods is the question in dispute.

Attachment. — In certain cases the court will issue a writ of attachment, which is an order to the sheriff or other officers to seize certain property of the defendant and hold it as security for any judgment which may be obtained. This writ is used principally against absconding, concealed, or fraudulent debtors, but in some states is issued as a matter of course at the commencement of every action. It is used also when the defendant does not reside within the state, but the goods attached are within it. In such a case the court gets jurisdiction of the property, which it may dispose of to satisfy a judgment thereafter obtained in the action.

Garnishment. — In some states there is a provision in the law by which a person owing money to the defendant may be brought into the suit and ordered not to pay the money over to the defendant, and he may also be ordered to pay it into court. This procedure is frequently employed when the third party owes wages to the defendant, as by garnishment proceedings he will be compelled to pay over a part of the wages to the court, or retain it to apply on any judgment the plaintiff may obtain.

QUESTIONS

1. (a) Define an action. (b) Name the parties in an action.
2. What is a summons and how must it be served?
3. What are the pleadings in an action?
4. What is (a) the complaint? (b) the reply? (c) a demurrer?
5. If the demurrer is sustained, what effect does it have on the action?
6. Before whom is (a) a question of law tried? (b) a question of fact?
7. Before whom is (a) a criminal case tried? (b) an equity case?
8. What is (a) a subpoena? (b) a deposition?
9. What is (a) the verdict in a case? (b) the judgment?
10. Define execution, levy, and sale.
11. When and how may a new trial be had?
12. What is an appeal, and upon what questions is it taken?
13. Describe supplementary proceedings.
14. What is a replevin action?
15. Define (a) attachment, (b) garnishment.

TEST CASE PROBLEMS

Give the decision and the principle or principles of law involved in each case.

1. *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387. — The plaintiffs in this case entered into a contract with the defendant wherein it was agreed that they, the plaintiffs, should alter boilers belonging to the defendant and perform all the work connected with the repair of these boilers, and complete the job by the 10th of May following. It was further agreed that the work should be done in such a manner as to satisfy the defendant that the boilers as changed were a success and that they would not leak under a pressure of steam. The work was done and the boilers were turned over to the defendant within the stated time. They were accepted and used by the defendant. Later, however, upon being requested to make payment, the defendant said the boilers were not satisfactory and refused to pay. Experts were called in, and after a thorough examination by them, the boilers were pronounced satisfactory in every way.

2. *Morton v. Steward*, 5 Bradwell (Ill.) 533, was an action on a note given by an infant, and it was proved that the consideration was necessities furnished the infant. The amount of the note showed that an excessive price had been charged for the necessities.

3. In *Eaton v. Avery*, 83 N. Y. 31, defendant made false representations to a mercantile agency as to the financial responsibility of his firm, which asked for credit of plaintiff. Plaintiff went to the mercantile agency and obtained the information given by the defendant, and relying on this, he delivered goods to the firm on credit. This action was brought to set aside the contract of sale and recover the goods.

4. In *Flanagan v. Kilcome*, 58 N. H. 443, defendant promised to pay plaintiff a certain sum if he would drop a lawsuit which he had commenced against her. This was done, but defendant did not pay the agreed sum and suit was brought to recover it.

5. In *Anderson v. May*, 50 Minn. 280, plaintiff contracted in March to raise and deliver to defendant 591 bushels of beans. Plaintiff delivered only 152 bushels because most of his crop was destroyed by early and unusual frost. Defendant refused to accept or to pay for only 152 bushels.

6. *Wood v. Steele*, 6 Wall. (U. S.) 80, was an action on a promissory note dated October 11, 1858, and made by Steele and Newson, payable to their own order one year from date. It was indorsed by them to Wood, the

plaintiff. "September" had been struck out and "October" put in as the date. The change was made after Steele had signed the note as surety and without his knowledge or consent.

7. *Bird v. Munroe*, 66 Maine 337, was a case in which a verbal contract was made. The contract belonged to the class required by the Statute of Frauds to be in writing. It was broken, and the parties afterward entered into a written agreement containing the terms of the oral contract. After the writing was signed, an action was brought for breach of the contract which occurred before the written agreement was executed.

8. In *Oddy v. James*, 48 N. Y. 685, about the middle of March the parties entered into an oral agreement by which the defendant employed plaintiff to superintend his cement works for one year from April 1 next. Plaintiff worked until August 3, when defendant discharged him. Plaintiff sued and defendant set up that the agreement was void under the Statute of Frauds.

9. In *Owen v. Hall*, 70 Md. 97, at the maturity of a joint promissory note a joint renewal note was given by the three makers. After Hall had signed as maker, the other two makers added the words "with interest" to the note without Hall's knowledge or consent.

10. *White v. Corlies*, 46 N. Y. 467. — Corlies got an estimate for fitting up his offices from White, who was a builder. Then Corlies wrote White a letter in which he said: "Upon an agreement to finish fitting up of offices at 57 Broadway in two weeks from date, you can commence at once." White made no reply, but on the same day purchased lumber and made other preparations to begin the job. On the following day he received a note from Corlies in which Corlies countermanded his earlier letter. White brought suit against Corlies for damages.

11. *Drake v. Seaman*, 97 N. Y. 230. — The plaintiff was engaged by the defendant to act as salesman for a period of three years. The defendant gave the plaintiff the following memorandum of the contract: "The understanding with Mr. Drake is as follows: \$2000 for the first year; \$2500 for the second year sure, and, provided the increased sales will warrant it, he is to have \$3000." As the defendant refused to carry out the arrangement, the plaintiff sued for breach of contract. Seaman's defense was the Statute of Frauds.

12. *Dixon v. Wilmington Savings & Trust Co.*, 115 N. C. 274; 20 S. E. Rep. 464. — The plaintiff signed a paper, which was a mortgage on her land, without reading it. She did this because she relied on Davis, her agent, who told her that the paper amounted to nothing. The mortgage was made out to the defendant, who took it in good faith and paid value for it. The money

was obtained by the agent but was not turned over to the plaintiff. The plaintiff brought this action to have the mortgage canceled on the ground of mistake and fraud.

13. *Lewis v. Jewell*, 151 Mass. 345; 24 N. E. Rep. 52. — This was an action based on fraudulent representations alleged to have been made by the defendant in selling carpet. The carpet was represented to contain 900 yards, whereas it contained only 595 yards. The carpet at the time of the sale covered four floors, a hall, and a stairway in a dwelling house. The yardage of the carpet was an element in fixing its value.

14. *Moore v. Appleton*, 26 Ala. 633. — Plaintiff brought an action to be reimbursed for damages which he had been obliged to pay because of certain acts performed by him as agent for the defendant in dispossessing a third party of lands claimed by the defendant, and which plaintiff had reason to believe belonged to defendant. Is the plaintiff entitled to recover, and if so, on what ground?

15. *Walker v. Osgood*, 98 Mass. 348. — This was an action by a real estate agent for commissions. Defendant had employed plaintiff to sell or trade his farm and the agent effected an exchange and made an agreement with the third party that he was to receive from him a commission. Should the plaintiff be allowed to recover his commissions from the defendant? What would be his rights against the third party?

16. *New York Tel. Co. v. Barnes*, 85 N. Y. Supp. 327. — The defendant made Purdy the general manager of his drug store. An agreement provided that Purdy should buy goods for the store only for cash and that he should not run up any account for any goods or supplies of any kind whatever. Purdy made a contract with the plaintiff for telephone service. The telephone company sued the defendant on this contract made by Purdy.

17. *Power v. First National Bank*, 6 Mont. 251; 12 Pac. Rep. 597. — This action was brought to recover the amount of a bill of exchange which had been deposited by the plaintiff with the defendant bank for collection. The defendant, in the usual course of business, sent the bill of exchange to its correspondent. The correspondent collected the draft but negligently failed to remit the proceeds and it subsequently went into the hands of a receiver.

18. *Gaynor v. Jonas*, 104 App. Div. (N. Y.) 35. — The plaintiff made a contract with the defendant whereby the defendant agreed to employ the plaintiff for three months at \$16 a week. After one month the plaintiff was discharged because she had been sick and away from business for one and one half days. She sued for her salary for the balance of the employment period, less what she had actually earned during that time.

19. In *Haynes v. Aldrich*, 133 N. Y. 287, defendant leased certain premises for a year, the term expiring May 1. Before the expiration of the term, defendant informed plaintiff that she did not wish to renew her lease for another year. May 1 was a holiday, and possession was retained until May 4, the excuse being the difficulty to get trucks to move defendant, also that on the third of May one of the boarders was ill. On the afternoon of the fourth of May the keys were tendered plaintiff and refused. Under these circumstances what are the landlord's rights?

20. *Kitsen v. Hildebrand*, 9 B. Monroe (Ky.) 72. — In this case the defendant, Hildebrand, kept a boarding house and occasionally entertained transients. The plaintiff was a regular boarder. The plaintiff's trunk was broken into and a large sum of money stolen. This action was brought to hold Hildebrand liable as an innkeeper.

21. *Pullman Palace Car Co. v. Smith*, 73 Ill. 360. — Smith purchased a ticket on the Palace Car Company's car. While he was asleep on his trip, his money was taken from his vest pocket. This action was brought against the company as innkeepers.

22. *Rockwell v. Proctor*, 39 Ga. 105. — Defendant was an innkeeper, and plaintiff went to his hotel and, while there, gave his coat to a negro who was in charge of the check room. The coat was lost and this action was brought to recover its value.

23. *Dexter v. Syracuse Railroad Co.*, 42 N. Y. 326. — Plaintiff was a passenger on the defendant road, and his trunk was lost while being transported by said road. The trunk contained, besides his wearing apparel, material for two dresses for his wife, and for a dress for the landlady. This action was brought to recover for the entire contents of the trunk.

24. *Russel v. Langstaffe*, 2 Doug. (Eng.) 514. — Langstaffe indorsed his name upon the back of certain checks, blank as to amount, date, and time of payment. The checks were filled in by Galley, the person to whom Langstaffe gave them, with amounts, dates, and time of payment different from those authorized, and were negotiated to Russel, a holder in due course. Langstaffe refused to pay on the ground that the instruments had been improperly filled out.

25. *Shaw v. Smith*, 150 Mass. 166. — Eugene Bridgeman made an instrument in writing July 19, 1873, which read as follows: "For value received, I promise to pay F. B. Bridgeman's estate or order \$126 on demand with interest annually." F. B. Bridgeman died and the plaintiff in this case was appointed administrator of his estate. This action was brought to recover on the instrument as a negotiable note. Does the instrument contain all the essentials required to make it negotiable?

26. *Mathews & Co. v. Mattress Co.*, 87 Iowa, 246. — This action was brought on a promissory note against the Dubuque Mattress Company and John Kapp. The note read, "We promise to pay," and was signed, "Dubuque Mattress Company, John Kapp, Pt." It was shown that the "Pt." was an abbreviation used for president. Was Kapp personally liable on this instrument?

27. *Simpson v. Turney*, 5 Humph (Tenn.) 419. — A certain bank was the holder of a promissory note payable at said bank, made by James H. Jenkins and Anthony Debrell, and indorsed as follows: "A. Debrell, S. Turney, John W. Simpson." Turney lived within one mile of the bank. The note matured on February 1st and was protested on that day. On February 3d notice was sent to Turney from the bank. Simpson, the next indorser after Turney, had been notified of the failure of the maker to pay the note but gave no notice to Turney, the prior indorser. Simpson, after paying the note, brought action against Turney to recover the amount paid.

28. *Spalding v. Rosa*, 71 N. Y. 40; 27 Am. Rep. 7. — Rosa had made a contract with Spalding, who was the proprietor of a theater, to furnish the "Wachtel Opera Troupe" for a certain number of performances. Wachtel, from whom the company took its name, was well known and was the chief attraction and inducement for Spalding to make the contract. Wachtel became ill and could not sing; because of this Rosa did not carry out the contract. Spalding sued for damages for the alleged breach of contract.

29. *Labaree Co. v. Crossman*, 100 App. Div. (N. Y.) 499. — The defendant sold a certain cargo of coffee to the plaintiff to be delivered in New York at a certain time. Because the cargo came from an infected port, the Board of Health at New York refused to allow it to be landed. The plaintiff sued for damages for nondelivery.

30. *Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co.*, 63 Md. 285. — The defendant agreed to sell to the plaintiff all the coal tar manufactured by it during a certain period. The defendant refused to carry out the agreement and the plaintiff filed a bill for specific performance. It was proved on the trial that coal tar was indispensable to the plaintiff's business, that the plaintiff could not obtain the supply from any other parties in Baltimore, and that it would be subjected to great additional expense in trying to get the coal tar from distant cities.

31. *Hammer v. Schoenfelder*, 47 Wis. 455; 2 N. W. 1129. — The plaintiff, who was a butcher, had a contract with the defendant, whereby the defendant was to furnish him with whatever ice he might require for his ice-box for the season. The defendant had supplied the plaintiff with ice the previous season and knew for what purpose the plaintiff needed the ice. In

July the defendant stopped supplying ice and refused to continue the contract. As a result the plaintiff lost a considerable quantity of fresh meat and suit was brought for the value of the meat spoiled. What damages was the plaintiff entitled to?

32. *Clark v. Marsiglia*, 1 Denio (N. Y.) 317. — This was an action for work, labor, and material. The defendant had given to the plaintiff a number of paintings to be cleaned and repaired at a certain specified price. After the plaintiff had started the work, the defendant directed him to stop, but the plaintiff insisted on going on and over the defendant's objection finished the job, and then brought action to recover for the whole.

33. *Terry v. Wheeler*, 25 N. Y. 520. — The plaintiff's assignor had paid the defendant for a quantity of lumber which was in the defendant's lumberyard. The lumber had been selected, set aside, and paid for; and the bill of sale had been given. On the bill of sale there was indorsed a memorandum that the lumber was "to be delivered to the cars free of charge." Before being delivered to the railroad station, the lumber was destroyed by fire. The plaintiff sued for the return of the price.

34. *Garr Stock Co. v. Halverson*, 128 Iowa 603; 105 N. W. Rep. 108. — In this case the salesman, in selling a second-hand machine, stated that it was practically as good as new, that it would steam well, and that it was of sufficient power to drive the defendant's threshing machine. The engine turned out to be defective and did not work well. When sued for the price, the defendant set up breach of warranty.

35. *Draper v. Wood*, 112 Mass. 315. — A promissory note was made by George A. Wood and H. S. Higgins and read, "For value received, I promise to pay L. L. Draper, or order, \$1000 on demand, with interest." Higgins refused to pay the instrument on the ground that Wood, without Higgins's knowledge, changed "I" to "We" and added the words, "at 12%." It was proved that Wood made the changes in good faith but without consulting Higgins. Draper brings this action against both Wood and Higgins.

36. *Richardson v. Carpenter*, 46 N. Y. 660. — The instrument in this case was in part as follows: "Please pay A or order \$500 for value received out of the proceeds of the claim against the Peabody Estate now in your hands for collection when the same shall have been collected by you." Was this a negotiable instrument? Why?

37. *West River Bank v. Taylor*, 34 N. Y. 128. — This case involved a bill of exchange containing a number of indorsements. When the bill was dishonored, notice was sent to the last indorser, who in turn sent notice to the preceding indorser, and so on down the line. Ultimately the holder sued the first indorser who defended on the ground that he did not receive

notice of dishonor from the holder, although of course he had received notice from his indorsee.

38. *Huber v. Manchester Fire Assurance Co.*, 92 Hun (N. Y.), 223. — The plaintiff insured the furniture in her house for \$1500. The policy contained a provision that the entire policy should be void if the building described was or became vacant or unoccupied and so remained for ten days. On the 24th of August, the plaintiff went away on a visit, intending to be away five or six weeks. Before she left, she arranged to have the house papered and painted, and a friend of hers went to the house frequently to see how things were. The house and furniture burned on September 18th, and the plaintiff brought suit on her policy.

39. *Paul v. Armenia Insurance Co.*, 91 Pa. State 520. — Plaintiff took out insurance with the defendant company, and in the application blank which he filled out one of the questions was, "What is the distance, occupation, and material of all buildings within 150 feet?" Paul made no answer to this question and the company issued the policy without insisting upon the answer. This action was brought to recover on the policy.

40. *Babcock v. Montgomery Insurance Co.*, 6 Barb. (N. Y.) 637. — Plaintiff had his property insured under a policy which provided that the insurer would be liable for "fire by lightning." It was proved that lightning struck the building and so shattered it as to cause a heavy loss. No ignition occurred. This action was brought to recover on the policy.

41. *Cushman v. Life Insurance Co.*, 63 N. Y. 404. — The insurance policy in this case states that the representations made by the insured in his application were made a part of the contract, and provided that if they were untrue the policy would be void. The applicant stated that he had never been afflicted with a certain disease. It was shown that he had twice been ill with this disease before the policy was issued. What effect did this statement have upon the policy?

42. *Day v. Elmore*, 4 Wis. 190. — Basset gave his promissory note to Day, and Elmore signed a guaranty reading as follows: "I guarantee the collection of the within note for value received." The note was not paid by Bassett at maturity and Day took no proceeding to collect it for over two years thereafter. When he did proceed against Bassett, he could recover nothing and brought suit on the guaranty.

43. *Sibley v. Stull*, 15 N. J. Law 332. — Hood made his bond to Stull in the sum of \$1100 for a good consideration. Stull assigned the bond to Sibley and for consideration guaranteed the payment of all sums to become due on the bond, when they became due, and for the payment thereof by the maker of the bond. Hood did not pay, and Sibley sued Stull on his guaranty with-

out giving him any notice of nonpayment, or demanding payment from Hood. Can Sibley recover?

44. *Lindsey v. Stranahan*, 129 Pa. State 635. — Stranahan had carried on business alone prior to 1876, when he sold a half interest in his business to J. K. Lindsey. After the new firm was formed, entire management and control of the business was left to Lindsey. When settlement by Stranahan and Lindsey was made, Lindsey claimed compensation for managing the business. No express agreement was made regarding this matter.

45. *Drake v. Thyng*, 37 Ark. 228. — Drake and Thyng were partners in the brickmaking business. While Drake was away, Thyng sold the stock and plant to a third party for an inadequate sum. Drake brought this action to set aside the sale.

46. *Burchinell v. Koon*, 8 Colo. App. 463; 46 Pac. Rep. 932. — In this case, the surviving member of a partnership obtained a loan, to secure which he gave a mortgage on firm property. The proceeds of the loan were used to pay firm debts. Did the surviving partner have power to give this mortgage?

47. *Foley v. Manufacturers & Builders Fire Ins. Co.*, 152 N. Y. 131. — In this case the question arose as to whether the plaintiffs had an insurable interest in certain buildings being erected on land owned by them. At the time of the fire the buildings were incomplete; they were being erected under a contract binding the contractors to furnish the materials and complete the buildings for a sum to be paid on their completion.

48. *Getchell v. Biddeford Savings Bank*, 94 Maine 452; 47 Atl. Rep. 895. — A man deposited his own money in a savings bank in his wife's name, and never delivered the bankbook to her. There was no evidence that the wife ever saw the bankbook or knew of the deposits. To whom did the money belong?

49. *Dorsey v. Moore*, 100 N. C. 41. — Defendant was tenant for her life of a tract of land and plaintiff was the remainderman. Defendant sold standing timber to Bennett and permitted him to cut and remove it. Plaintiff sued for damage for waste.

50. *Kane v. Cortesy*, 100 N. Y. 132. — The plaintiff was the owner of a mortgage which was guaranteed by the defendant. When the time for the payment of the mortgage fell due, the plaintiff granted an extension of time to the mortgagor and the latter gave to the plaintiff a chattel mortgage on certain personal property as additional security. When the defendant was sued on the guaranty he claimed that the extension of time for paying the mortgage released him from his obligation under the guaranty.

IMPORTANT STATUTES

Interstate Commerce. — The Constitution of the United States declares that the Congress shall have power "to regulate commerce with foreign nations, and among the several States." It is evidently for the benefit of the country as a whole that commerce between the states, called interstate commerce, should be regulated by the federal government, rather than be subjected to varying and inconsistent regulation by the different states. In accordance with the power granted by the Constitution, Congress has adopted several statutes which have a direct bearing on commercial life because of their regulation of interstate commerce.

Interstate Commerce Act. — The most important of these regulatory statutes is the Interstate Commerce Act. By this Act was created the Interstate Commerce Commission, now composed of eleven commissioners sitting at Washington, D. C. This Commission is given wide powers and is charged with the execution of the provisions of the act.

The act, as amended at various dates, applies to common carriers engaged in the transportation of passengers or property from one state to another or to foreign countries, including pipe lines, telephone, telegraph and cable companies, railroads, express and sleeping car companies, etc.

The service and charges of common carriers must be just and reasonable under the circumstances. There can be no greater charge for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, except that such charges may be authorized by the Commission in special cases. All rates must be published, must be filed with the Commission, and kept open to public inspection. The Commission has power to revise rates and divisions of rates when unreasonable, to review all newly established rates, and, of its own motion, to establish new joint through routes and rates when necessary. Where there are two or more established through routes, the shipper has the right to designate in writing by which of such routes his goods shall be shipped.

All property for transportation must be classified, and rates, regulations, and practices established on the basis of such classification. It is unlawful for any railroad company to transport any commodity, other than timber and its manufactured products, manufactured, mined, or produced by it or which it owns or in which it has any interest, except such as may be intended for its use in the conduct of its business as a common carrier. The purpose of this provision was to attack the ownership of coal mines and lands by the railroad companies, by reason of which they had too great an influence on coal production and distribution.

This act contains many provisions to insure equal treatment for all persons using the railroads. The issuance of free passes is forbidden, except

to officers and employees of the issuing carrier or other common carriers. It is unlawful to discriminate unjustly between one shipper and another or between one passenger and another. It is unjust discrimination if the carrier, by any special rate, rebate, or other device, charges or receives a greater or less compensation from any person than it receives from any other person for doing like service under similar circumstances and conditions. Common carriers are forbidden to disclose any information about property shipped or routes of shipment, which might be used to the detriment or prejudice of a shipper or consignee, or might improperly disclose his business transactions to a competitor.

Removal or lessening of competition between carriers by agreements for pooling freights, or by dividing the earnings of such carriers, is expressly forbidden. While on its face this provision would appear to keep down freight rates and so benefit the public, its merit is doubtful. Under the federal administration of the railroads during the World War, the freight, earnings, expenses, and everything were pooled, in order to secure the greatest possible economy and efficiency.

The Commission has authority to inquire into the management of the business of all common carriers and to prescribe a uniform system of accounting. Annual reports are required from every carrier, showing in considerable detail all of its business during the year, and these enable the Commission to maintain careful supervision over the entire transportation of the country.

The Commission also investigates, either of its own motion or on complaints, anything done or omitted to be done in contravention of the act. In such investigations the Commission acts as a court, summons witnesses, tries issues of fact, grants orders, and may award damages if the facts warrant.

Elkins Act. — This act was passed to give added force to the provisions of the Interstate Commerce Act in respect to giving or receiving rebates. It provides that any person or corporation giving or receiving any concession in respect to the transportation of property in interstate commerce, whereby such property by any device whatever is transported at a less rate than the published tariff, shall be guilty of a misdemeanor and punishable by a fine of not less than \$1000, or more than \$20,000, and individuals may be imprisoned.

Bills of Lading Act. — This act makes uniform the law and practice of issuing bills of lading for interstate commerce. It defines the "straight bill" and the "order bill" and fixes the law as to negotiation of bills of lading, the respective rights and duties of carriers and shippers as to delivery of goods, damage to goods, etc. The subject is not of sufficient general importance to warrant a detailed synopsis of the statute, but it should be consulted by any person regularly engaged in interstate shipment of goods.

Anti-Trust Laws. — To prevent undue advancement of prices and stifling of competition Congress has passed laws "to protect trade and commerce against unlawful restraint and monopolies." These laws have given

rise to some of the most important and bitterly contested litigation in our history.

Sherman Anti-Trust Act. — This act was the first of the so-called “anti-trust laws” and was adopted in 1890. It provides that “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal” and every person making such contract or engaging in such combination or conspiracy is guilty of a misdemeanor and punishable by fine or imprisonment. Also every person who shall monopolize, or conspire or combine to monopolize, any part of such trade or commerce is guilty of a misdemeanor. Any person injured in his business or property by reason of anything forbidden by the act, may sue the offending person or corporation therefor, and recover threefold the damages sustained by him.

Clayton Act. — This act was adopted in 1914 “to supplement existing laws against unlawful restraints and monopolies,” and is much more far-reaching and detailed in its provisions.

Under the act it is unlawful to discriminate in price between different purchasers of commodities, where the effect of such discrimination might be to substantially lessen competition or to create a monopoly; but there may be discrimination on account of grade, quantity, or quality, or to allow for differences in transportation or selling cost, or in different communities to meet competition; and any seller of goods may select his own customers in *bona fide* transactions and not in restraint of trade. It is unlawful to sell or lease goods, or to fix a price therefor or allow a discount from such price, on condition that the purchaser or lessee shall not deal in goods of a competitor of the seller, where the effect might be to substantially lessen competition or tend to create a monopoly. Threefold damages may be recovered as under the Sherman Act.

The labor of a human being is expressly declared not to be a commodity or an article of commerce, and labor unions and similar organizations shall not be held or construed to be illegal combinations or conspiracy in restraint of trade under the anti-trust laws.

The act also forbids the acquisition by one corporation of all or part of the stock of one or more separate corporations, whereby competition between them may be lessened or commerce restrained or a monopoly created. This does not forbid the formation of subsidiary corporations to carry on the legitimate business, or extensions thereof, of the parent corporation.

“Interlocking directorates” are also prohibited, by provisions forbidding a person to be a director, officer, or employee of more than one bank of a certain kind, or a director of more than one corporation engaged in commerce, having a capital, surplus, and undivided profits of more than \$1,000,000 if such corporations have been competitors, so that the lessening of competition between them by agreement would be a violation of the anti-trust laws.

Trade Commission Act. — This act was passed in 1914 for the purpose of preventing unfair competition in interstate and foreign commerce, and

generally to assist the commerce of the country by information and otherwise.

The act creates a Federal Trade Commission, composed of five commissioners, with its principal office in Washington. The Commission has power to compile information concerning, and to investigate the business practices and management of, any corporation engaged in commerce, except banks and common carriers, and its relations to other corporations and persons; to require from such corporations annual or special reports; to investigate the manner in which decrees of the courts in suits for violation of the anti-trust laws are being carried out; to investigate and report on alleged violations of such laws; to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating such laws, in order that the corporation may maintain its organization and conduct its business according to law; to make public such information as it may have obtained, except trade secrets, as it shall deem to be of public interest; to make reports to Congress and recommendations for legislation; and to investigate and report upon trade conditions in and with foreign countries.

The act expressly declares that unfair methods of competition in commerce are illegal, empowers the Commission to prevent such unfair methods, and to that end authorizes hearings on complaints and the issuance of orders to cease the unfair methods.

Employers' Liability. — Reference has been made in the chapter on Insurance to the fact that an employer may be liable for damages for the injury or death of his employee. In actions at common law to recover such damages the employer could defend on the ground that the employee's injury was caused by his own negligence (contributory negligence) or by the negligence of another employee (fellow servant doctrine), or that the employee had assumed the risk of the accident (assumption of risk). These doctrines often resulted in injustice to the injured employee. In recent years a number of statutes have been passed which rest on the theory that accidents to employees are necessary incidents to any business, and that the injured employee should be compensated for his injury without regard to technical defenses.

Federal Employers' Liability Act. — This act provides that every common carrier by railroad engaged in interstate commerce shall be liable for the injury or death of an employee, caused by its negligence or any defect in its equipment or appliances. In any action to recover damages for such injury or death, assumption of risk is not a defense, and the contributory negligence of the employee shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to the employee. Any contract, rule, or regulation by which the carrier seeks to exempt itself from liability under the act is void.

Workmen's Compensation Laws. — A number of states have passed laws providing for the payment by the employer of compensation for injury

or death of an employee. These laws differ somewhat in details, but their general characteristics are as follows:

The laws apply to all employees engaged in certain specified employments, which are characterized as hazardous. These employments are classified, and include nearly all forms of labor in which injury is likely to occur. Farm labor and domestic service are not included.

Every employer of labor engaged in one of the classified occupations is liable for compensation for the death or disability of his employee from an accidental personal injury arising out of and in the course of his employment, without regard to negligence or the cause of the accident, unless it was caused by the willful intention or resulted solely from the intoxication of the injured employee. With these two exceptions the injured employee is absolutely entitled to compensation, regardless of its cause, if it occurred in the course of his employment.

This liability of the employer is exclusive and in place of any other liability whatsoever.

The compensation to be paid is based on the wages of the employee. He receives his wages for a certain number of weeks as provided in a schedule of different injuries and disabilities, and the employer is also required to furnish medical, surgical, and hospital facilities for a certain period after the accident.

The employee is required to notify his employer of his claim for compensation, and if they cannot agree on the amount to be paid, the matter is referred to a commission for determination.

To secure the payment of compensation the employer is required to insure the payment with an insurance company or satisfy the commission of his ability to make such payments. In case of his failure so to secure the payment of compensation, he is liable to a penalty, and an injured employee may elect to take compensation under the law, or may sue in the courts for damages, and in any such suit the fellow servant doctrine, assumption of risk, and contributory negligence are not available as defenses to the employer.

APPENDIX—FORMS

FORM 1. SHORT FORM SIMPLE CONTRACT

This agreement made the first day of May, 19—, between J. C. Boyers and Ralph Benson: Witnesseth that it is agreed that the said Ralph Benson shall serve to the best of his ability the said J. C. Boyers, as manager of the branch store of the said J. C. Boyers for the period of one year from and after the first day of May, 19—, and the said J. C. Boyers agrees to pay the said Ralph Benson the sum of one hundred and fifty dollars per month, payable monthly on the last working day of each month during the term of this contract, and it is further agreed that the said Ralph Benson shall have two weeks' vacation with full pay during the month of August.

Signed in duplicate on this first day of May, 19—.

J. C. BOYERS.
RALPH BENSON.

FORM 2. FORMAL CONTRACT

This agreement made in duplicate this first day of November one thousand nine hundred and —, by and between Andrew J. Mackey of the city of Chicago, county of Cook and state of Illinois, of the first part, and Howard M. Lee of the city, county, and state aforesaid, of the second part.

Witnesseth, that the said party of the first part for and in consideration of the agreement hereinafter contained, to be performed by the party of the second part, agrees to and with said party to construct and finish in a good workmanlike manner five delivery trucks in accordance with the plans and specifications hereto attached, on or before the first day of April next. And the party of the second part, in consideration thereof, agrees to pay to the said party of the first part for the same the sum of ten thousand dollars, lawful money of the United States, as follows: the sum of one thousand dollars at the time of signing this contract, the receipt whereof is hereby acknowledged, and the balance of nine thousand dollars when the five trucks are completed according to the plans and specifications, and delivered f. o. b. Chicago.

IN WITNESS WHEREOF, the parties named herein have hereunto set their hands and seals the day and year first above mentioned.

In the presence of
D. W. WARNER.

State of Illinois }
County of Cook } ss.

ANDREW J. MACKEY. (L.S.)
HOWARD M. LEE. (L.S.)

On the first day of November, one thousand nine hundred and —, before me, the subscriber, personally appeared Andrew J. Mackey and

Howard M. Lee, to me personally known to be the persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

JOHN W. DODD,
Notary Public for Cook County, Illinois.

FORM 3. ASSIGNMENT OF CONTRACT—INDORSEMENT FORM

For and in consideration of One Dollar and of other good and valuable considerations, the receipt whereof is hereby acknowledged, the American Utility Company does hereby sell, assign, transfer, and set over to Francis E. Palmer the within contract with all the rights, privileges, obligations, and undertakings thereof as therein set forth.

IN WITNESS WHEREOF, the American Utility Company has caused this instrument to be executed by its President and its corporate seal to be hereunto affixed and attested by its Secretary this 17th day of November, 19—.

Attest seal:

R. O. NORTH,
Secretary.

AMERICAN UTILITY COMPANY

By A. W. WALTERS, *President.*

FORM 4. BILL OF SALE

Be it known that James B. Hunter of Philadelphia, Pennsylvania, in consideration of the sum of Five Hundred Dollars paid by William J. Allen of Harrisburg, Pennsylvania, the receipt of which is hereby acknowledged, does hereby sell, transfer, and deliver unto the said William J. Allen, the following goods and chattels viz:

(List of the articles sold should be written in this space.)

To have and to hold the said goods and chattels unto the said William J. Allen, his representatives and assigns forever. And I, the said James B. Hunter, do hereby covenant that I am the lawful owner of the said goods and chattels, that they are free from incumbrances, that I have a good right to sell them, and that I will warrant and defend the title of the same against the claims and demands of all persons.

IN WITNESS WHEREOF, I have hereunto set my hand and seal in Philadelphia, Pennsylvania, this 15th day of September, 19—.

JAMES B. HUNTER. (L.S.)

FORM 5. POWER OF ATTORNEY

Know all men by these presents that I, James George, of Chicago, Illinois, have made, constituted, and appointed, and by these presents do make, constitute, and appoint John Forbes of Portland, Oregon, my true and lawful attorney for me and in my name, place, and stead to

(state fully what is to be done by the attorney);

giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this eleventh day of May in the year one thousand, nine hundred and ———.

JAMES GEORGE. (L.S.)

Executed and delivered in the presence of:

MATTHEW ARNOLD.

FORM 6. APPOINTMENT OF SPECIAL AGENT

I, the undersigned, do hereby constitute and appoint Daniel C. King, of Salt Lake City, Utah, my agent and representative, for me and in my place and stead to receive and receipt for the payment due from the business of Robert Mason, deceased, late of Salt Lake City, Utah, and authorize him to do all other things that may be necessary in connection therewith and to carry into effect the intent of this appointment and I hereby ratify and confirm all that my said agent may do in pursuance of the authority herein conferred.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, in Memphis, Tennessee, this 10th day of April, 19—.

DANIEL C. KING. (L.S.)

NEGOTIABLE INSTRUMENTS

FORM 7. CHECK BY INDIVIDUAL

No. 849

Boston, Mass., Aug. 15, 19—.

THE MERCHANTS NATIONAL BANK

Pay to the order of.....James Farley.....
Two hundred $\text{\textdollar}^{\text{\textcent}}$ Dollars.
 $\text{\$}200 \text{\textdollar}^{\text{\textcent}}$ H. E. ELDRIDGE

FORM 8. PROMISSORY NOTE

$\text{\$}100 \text{\textdollar}^{\text{\textcent}}$ Cleveland, Ohio, July 15, 19—.
Sixty days.....after date....I....promise to pay to
the order of George Bowman.....
One hundred $\text{\textdollar}^{\text{\textcent}}$ Dollars.
at.....The Merchants National Bank.....
Value received with interest at 6%.
No.... Due..... E. F. SANFORD

FORM 9. CORPORATION NOTE

\$1000 10%

New York, Sept. 10, 19—.

Ninety days...after date....Progress Construction Company prom-
 ises to pay to the order of H. C. Lyman the sum of.....
 One thousand 10% Dollars.

Value received with interest at 5%.

Payable at

PROGRESS CONSTRUCTION COMPANY.

Commercial National Bank
 New York

By JOHN E. BLAKE
President.

FORM 10. SIGHT DRAFT, INDIVIDUAL

\$500 10%

New York, Aug. 5, 19—.

At sight pay to the order of.....Homer Randall.....
 Five Hundred 10% Dollars.

Value received and charge to account of

To George Davis

JOHN G. HAWLEY

Minneapolis, Minn. }

If this draft were worded "At thirty days sight" or "Thirty
 days after date" it would be a time draft.

FORM 11. BANK DRAFT

MERCHANTS BANK OF CHICAGO

No. 22527

Chicago, Ill., Dec. 22, 19—.

Pay to the order of.....Charles M. Allen.....\$100 10%

One Hundred 10% Dollars.

To The Chemical National Bank,
 City of New York.

WILLIAM G. GANCOURT
Cashier.

FORM 12. ARTICLES OF COPARTNERSHIP

This agreement made and entered into this thirty-first day of October,
 One thousand nine hundred and ———, by and between Charles Snow
 of Portland, Oregon, the first part, and Edward M. Chapin of the same
 place of the second part, witnesseth as follows:—

1. The said parties, above named, hereby agree to become partners in
 the business of buying and selling dry goods under the firm name of Snow &
 Co., said business to be carried on in the city of Portland, or such other
 place or places as the parties may hereafter determine.

2. The capital of the said partnership shall consist of the sum of ten
 thousand dollars, to be contributed as follows: The party of the first part
 shall contribute his stock of dry goods and the good will of the business

heretofore conducted by him, which are together valued by the parties hereto at the sum of five thousand dollars; and the party of the second part shall contribute the sum of five thousand dollars in cash. Such capital is to be used and employed in common between the parties hereto for the support and management of said business.

3. At all times during the continuance of their copartnership they and each of them shall give their time and attention to said business, and to the utmost of their skill and power exert themselves for their joint interest, profit, benefit, and advantage, and truly employ, buy and sell, and trade with their joint stock and the increase thereof in the business aforesaid; and they shall also at all times during the said copartnership bear, pay, and discharge equally between them all rents and expenses that may be required for the management and support of said business; and all gains, profits, and increase that shall grow or arise from or by means of their said business shall be equally divided, and all losses by bad debts or otherwise shall be borne and paid by them equally.

4. Each of said partners shall be at liberty to draw out of the funds of the firm each month for his private expenses the sum of one hundred dollars, and neither of them shall take any further sum for his own separate use without the consent in writing of the other partner. The sums so drawn shall be charged against the partners respectively, and if at the annual settlement, hereinafter provided for, the profits of either partner do not amount to the sum so drawn out in that year, he shall at once repay such deficiency.

5. All the transactions of the said copartnership shall be entered in regular books of account, and on the first day of January in each year during the continuance of this copartnership account of stock shall be taken, and an account of the expenses and profits adjusted and exhibited on said books; said profits shall then be divided, and one half carried to the separate account of each partner. Either partner shall be at liberty to withdraw at any time the whole or any part of his share of the accrued profits thus ascertained and carried to his separate account. Each partner shall have open and free access to the books and accounts of the copartnership at all times, and no material or important changes shall at any time be made in the general business of the firm, either in the buying of stock or in any other respect, by either partner without the knowledge and consent of the other.

6. And the said parties hereby mutually covenant and agree, to and with each other, that during the continuance of the said copartnership neither of them shall indorse any note, or otherwise become surety for any person or persons whomsoever, without the consent of the other of said copartners. And at the determination of their copartnership, the said copartners, each to the other, shall make a just and final account of all things relating to their business, and in all things truly adjust the same; and all and every, the stock and stocks as well as the gains and increase thereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts, or otherwise, shall be divided equally between them.

7. This agreement and the partnership hereby created shall continue in full force and effect for the period of ten years from the date hereof.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals this thirty-first day of October, 19—.

CHARLES SNOW. (L. S.)

EDWARD M. CHAPIN. (L. S.)

(Many other provisions may be inserted, as the facts require.)

FORM 13. PROXY—SIMPLE FORM

I hereby appoint David E. Singer my proxy, with full authority to vote for me and in my place at any and all stockholders' meetings of the Union Power Company.

Witness my hand and seal this 10th day of June, 19—.

In the presence of
Martin Cook

JOHN WENDELL

FORM 14. DEED WITH FULL COVENANTS

THIS INDENTURE, made the 1st day of October, nineteen hundred and ———, between Homer Johnson of Rochester, New York, party of the first part, and Benjamin Green of the same place, party of the second part:

WITNESSETH, that the party of the first part, in consideration of Two Thousand Dollars (\$2000), lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, his heirs and assigns forever, all . . .

(Description of property to be conveyed.)

Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises:

To have and to hold the premises herein granted unto the party of the second part, his heirs and assigns forever.

And said Homer Johnson covenants as follows:

First — That said Homer Johnson is seized of said premises in fee simple, and has good right to convey the same;

Second — That the party of the second part shall quietly enjoy the said premises;

Third — That the said premises are free from incumbrances;

Fourth — That the party of the first part will execute or procure any further necessary assurance of the title to said premises;

Fifth — That said Homer Johnson will forever warrant the title to said premises.

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and seal the day and year above written.

HOMER JOHNSON (L. S.)

In presence of:

R. H. Stolte

(Should be acknowledged in due form.)

FORM 15. REAL ESTATE MORTGAGE—SHORT FORM

THIS MORTGAGE, made the 10th day of January, nineteen hundred and nineteen, between Robert C. Green of New York, N. Y., the mortgagor, and John A. Delano of the same place, the mortgagee.

WITNESSETH, that to secure the payment of an indebtedness in the sum of Twenty-Five Hundred Dollars (\$2500), lawful money of the United States, to be paid on the 10th day of January, nineteen hundred and twenty-one, with interest thereon to be computed from date, at the rate of six per centum (6%) per annum, and to be paid semi-annually, according to a certain bond or obligation bearing even date herewith, the mortgagor hereby mortgages to the mortgagee (Description of property covered by mortgage.)

And the mortgagor covenants with the mortgagee as follows:

1. That the mortgagor will pay the indebtedness as hereinbefore provided.
2. That the mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee.
3. That no building on the premises shall be removed or demolished without the consent of the mortgagee.
4. That the whole of said principal sum shall become due after default in the payment of any installment of principal or of interest for thirty days, or after default in the payment of any tax, water rate, or assessment for ten days after notice and demand.
5. That the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver.
6. That the mortgagor will pay all taxes, assessments, or water rates, and in default thereof, the mortgagee may pay the same, and all amounts so paid shall be added to the amount already secured by this mortgage.
7. That the mortgagor, within five days upon request in person or within ten days upon request by mail, shall furnish a statement of the amount due on this mortgage.
8. That notice and demand or request may be in writing and may be served in person or by mail.
9. That the mortgagor warrants the title to the premises.

IN WITNESS WHEREOF, this mortgage has been duly executed by the mortgagor.

In presence of:

C. C. Taylor

ROBERT C. GREEN. (L.S.)

(This mortgage should be acknowledged in due form.)

FORM 16. SATISFACTION OF MORTGAGE

Know all men by these presents that I, James S. Hopkins, do hereby certify that a certain indenture of mortgage, bearing date the 25th day of June, 192-, made and executed by Horace L. Harding, to secure payment of the principal sum of two thousand dollars and interest and duly recorded

in the office of the Register of Westchester County in Liber 327 of mortgages, page 186, in the 16th day of July, 192—, is paid and do hereby consent that the same be discharged of record.

Dated the 14th day of August, 192—

In the presence of

M. L. Jones

JAMES S. HOPKINS

(This instrument should be acknowledged in due form.)

FORM 17. CHATTEL MORTGAGE

KNOW ALL MEN BY THESE PRESENTS:

That I, William J. Curtis of Newark, New Jersey, am indebted unto R. H. Denmore, of the city of New York, N. Y., in the sum of Two Hundred Fifty Dollars (\$250), being for goods sold and delivered to me: Now, for securing the payment of the said debt, and interest from the date hereof, to the said R. H. Denmore, I do hereby sell, assign, and transfer to the said R. H. Denmore all the goods, chattels, and property described in the following schedule, namely,

(List of property covered by mortgage.)

Said property now being and remaining in the possession of myself, at my store, No. 840 Broad Street, Newark, New Jersey.

Provided always, and this mortgage is on the express condition, that if the said William J. Curtis shall pay to R. H. Denmore the sum of Two Hundred Fifty Dollars (\$250), within one year and six months from the date hereof, with interest at six per cent (6%) per annum, which said sum and interest the said William J. Curtis hereby covenants to pay, then this transfer is to be void and of no effect; but in case of nonpayment of the said sum at the time or times above mentioned, together with interest, then the said R. H. Denmore shall have full power and authority to enter upon the premises of the said party of the first part, or any other place or places where the goods and chattels aforesaid may be, to take possession of said property, to sell the same, and the avails (after deducting all expenses of the sale and keeping of the said property) to apply in payment of the above debt; and in case the said R. H. Denmore shall at any time deem himself unsafe, it shall be lawful for him to take possession of such property and sell the same at public or private sale, previous to the time above mentioned for the payment of said debt, and apply the proceeds as aforesaid, after deducting all expenses of the sale and keeping of said property. If from any cause said property shall fail to satisfy said debt, interest, costs, and charges, the said William J. Curtis hereby covenants and agrees to pay the deficiency.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal, this eleventh day of December, nineteen hundred and ———.

In the presence of:

James C. Crawford

WILLIAM J. CURTIS. (L.S.)

(This mortgage should be acknowledged in due form.)

FORM 18. LEASE .

This Indenture, made this 18th day of September, 19— between William E. Weaver of the City of New York, party of the first part, and Lyman Collins. of the same place, party of the second part,

Witnesseth

That the party of the first part has let and by these presents does grant, demise, and let unto the party of the second part the premises known as No. 406 West 228th Street in said City, with the appurtenances, for the term of two years from the first day of October, 19—, at the yearly rent or sum of \$960. to be paid in equal monthly payments in advance in the first day of each and every month during said term.

And it is agreed that if any rent shall be due or unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the party of the first part to reënter said premises and to remove all persons therefrom.

And the party of the second part hereby covenants to pay to the party of the first part the said rent as herein specified. And also to pay the annual rent or charge, assessed or imposed on said premises for the use of water.

And the party of the second part covenants that he will not assign this lease, nor any interest therein, or let or underlet the whole or any part of said premises, nor make any alterations therein, without the written consent of the party of the first part, under penalty of forfeiture and damages; and that he will not occupy or use said premises for any business deemed extra hazardous on account of fire or otherwise, without the like consent, under like penalty.

And at the expiration of said term the party of the second part will quit and surrender the premises hereby demised in as good condition and order as reasonable use and wear thereof will permit, damage by the elements excepted.

And the party of the first part covenants that the party of the second part, in paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

And it is further understood that the covenants and agreements herein contained are binding on the parties hereto and their legal representatives.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

WILLIAM E. WEAVER. (L.S.)
LYMAN COLLINS. (L.S.)

Sealed and delivered in the
presence of
Richard Abbot.

. FORM 19. WILL

I, Martin E. Webb, of the city of Yonkers, County of Westchester, and State of New York, being of sound mind, memory, and understanding, do make, publish, and declare the following as and for my last Will and Testament; that is to say:

First. I hereby revoke all wills, codicils, or testamentary instruments by me at any time heretofore made.

Second. I direct that my just debts and funeral expenses be paid as soon after my death as may be practicable.

Third. I give, devise, and bequeath to my wife, Helen Webb, my residence property in the city of Yonkers, known as No. 3582 Warburton Avenue, including therewith all furnishings and household effects therein contained; and also the sum of twenty thousand dollars.

Fourth. I give and bequeath to my son, George H. Webb, the sum of twenty thousand dollars, my Packard automobile, and all my personal effects.

Fifth. I give and bequeath to Children's Guardian Society, a corporation conducting a home and school for orphan children in said City of Yonkers, the sum of One Thousand Dollars.

Sixth. All the residue of my estate I give and bequeath, in four equal shares, to my wife Helen Webb, my son George H. Webb, the above-mentioned Children's Guardian Society, and my nephew James C. Katley.

Seventh. I nominate and appoint my nephew James C. Katley executor of this my last will and testament, and direct that no bond be required of him by reason of such appointment.

IN WITNESS WHEREOF I have hereunto set my hand and seal at my residence in the City of Yonkers this 30th day of June in the year one thousand nine hundred and ———.

MARTIN E. WEBB. (L.S.)

On this 30th day of June in the year one thousand nine hundred and ———, Martin E. Webb, the above named testator, in our presence and in the presence of each of us, signed and sealed the foregoing instrument and published and declared the same to be his last Will and Testament, and we thereupon at his request, in his presence and in the presence of each other, hereunto subscribed our names and residences as attesting witnesses.

SAMUEL MOORE residing at 227 Fowler Avenue, Yonkers, New York.
ROBERT MOORE residing at 252 Buckingham Road, Yonkers, New York.

COMMON LEGAL TERMS

Note: — Many additional terms are defined in the text.

Abandonment: In marine insurance, the giving up of the property partly destroyed to the insurer, the owner's purpose being to claim the full amount of the insurance.

Abrogate: To annul or destroy; to abolish entirely.

Acceptance Supra Protest: Acceptance for the protection of the drawer, by a person other than the drawee.

Accommodation Indorser: One who indorses a note or draft without consideration, in order that another may raise money upon it.

Accommodation Paper: Notes or drafts for which no consideration passes between the original parties.

Accord and Satisfaction: A means of settling a claim by compromising the amount which is in dispute, or by giving something else than that which was originally agreed upon.

Acknowledgment: The act by which a party who has executed an instrument declares or acknowledges it before a competent officer to be his or her act or deed.

Action: The formal means of recovering one's rights in a court of justice — a suit at law.

Act of God: An accident resulting from a physical cause which is irresistible, such as lightning, floods, etc.

Adjudication: The act of a court in giving judgment in a suit at law.

Administrator: One who is appointed to take charge of the property or estate of a person who died without leaving a will.

Admiralty: The court or law dealing with controversies arising out of the navigation of public waters.

Adult: A person twenty-one or more years of age. In some states, a female eighteen or more years of age is an adult.

Adverse Possession: Open, actual, exclusive, and continuous possession of real property under claim or color of title, hostile to the claim of another.

Affidavit: A statement in writing, signed by the person making it, and sworn to by him before an officer authorized to take oaths.

Age of Consent: The age at which infants are capable of entering into a valid contract of marriage.

Agistor or Agister: One who takes cattle to pasture for hire.

Alias: A Latin word meaning otherwise or hitherto.

Alien: One owing allegiance to another country; usually a foreign-born resident of a country in which he is not a citizen.

- Alien Enemy:** An alien who is the subject of a country at war with the country in which he then lives.
- Alienate:** To convey the title to property.
- Alimony:** An allowance made by order of a court to a woman out of the property of him who is or was her husband, on legal separation or divorce, or during a suit for it.
- Aliunde:** From another source; outside evidence; as, a case proved *aliunde*.
- Allonge:** A paper attached to a bill or note for indorsements which the original paper will not hold.
- Annuity:** An amount payable yearly.
- Annulment:** The act of making void.
- Anomalous Indorsement:** An irregular indorsement.
- Ante-dated:** Bearing a date earlier than the actual date.
- Appurtenance:** In a deed or lease, anything that will go with the land, as a right of way.
- Arbitration:** The hearing and determining of a cause in controversy by a person or persons either chosen by the parties involved or appointed by some authority.
- Articles of Copartnership:** The written agreement by which a partnership is formed.
- Attachment:** The seizure of property by legal process.
- Attestation:** Signing an instrument as a witness.
- Attorney in Fact:** An agent appointed by power of attorney.
- Award:** The decision of arbitrators.
- Barter:** The exchange of articles of personal property: distinguished from a sale, in which property is sold for money.
- Beneficiary:** The person who is entitled to the benefits of a contract or of an estate held by another.
- Bequeath:** To give property by will; especially, to give personal property by will.
- Bilateral Contract:** A kind of contract in which an offer in the form of a promise is accepted by a promise.
- Bill of Lading:** A document given by a carrier to a shipper; it is both a receipt and a contract.
- Bona Fide:** In good faith. Openly and without deceit or fraud.
- Bond:** A sealed instrument by which one party agrees to pay another a certain sum or to perform a certain act.
- Breach:** In the law of contracts the violation of an agreement or obligation.
- By-laws:** The regulations made by a corporation for its own government.
- Caveat Emptor:** "Let the buyer beware"; a rule which excludes or weakens the implied warranty of goods which are before the buyer and open to his examination.
- Certificate of Deposit:** A certificate issued by a bank, certifying to the deposit of a stated sum of money payable to order or bearer.
- Cestui Que Trust:** One for whose benefit property is held by a trustee.

- Chancery:** In the United States a court of equity; a court of records or office of public records.
- Charter:** (1) A formal instrument by which a government creates a corporation or grants special rights or privileges to a particular person or persons. (2) To hire or let a vessel or part of it.
- Charter Party:** The written instrument by which the owner of a vessel lets it, or a part of it, to another.
- Chattel:** An article of personal property.
- Chose in Action:** A thing, the possession of which one has a right to demand by action at law.
- Chose in Possession:** Personal property of which one has the actual possession.
- Client:** A person who employs an attorney to act for him in any legal business.
- Code:** Any systematic body of law having statutory force.
- Collateral Security:** Property, especially stocks and bonds, deposited as a pledge to guarantee the payment of a promissory note.
- Complainant:** The person who brings an action at law; the plaintiff.
- Complaint:** A formal statement of a charge or cause of action against a person named therein.
- Compromise:** To reach a settlement by mutual concessions.
- Concurrent:** Existing at the same time.
- Condition Precedent:** A condition in an agreement requiring some act to be performed by one person before another is liable.
- Condition Subsequent:** A part of an agreement relating to a future event, upon the happening of which the obligation is no longer binding upon one of the parties to a contract.
- Consanguinity:** Relationship by blood.
- Consignee:** A person to whom goods are shipped.
- Consignor:** A person shipping goods.
- Counterclaim:** A claim existing in favor of a defendant.
- Covenant:** Any promise contained in a sealed instrument.
- Coverture:** The legal status of a married woman.
- Curtesy:** The estate a man has in the lands of his wife upon her death, in case a living child has been born to them during their marriage.
- Customs:** The established habits of a trade or business which will be considered by a court as applying to a contract in such trade or business.
- Declaration:** A formal statement of the facts on which a cause of action is based; a complaint.
- Decree:** The judgment or decision of a court of equity.
- De Facto:** In fact, actually.
- Default:** Omission; neglect or failure.
- Del Credere Agent:** An agent who guarantees that the persons to whom he sells will perform the contracts he makes with them.
- Demise:** A conveyance of an estate in real property for life or for years.

- Demurrer:** A pleading by the defendant to an action, claiming that even if all the plaintiff sets forth in his complaint is true, still he is not entitled to recover.
- Deponent:** One who makes oath as to the truth of a written statement.
- Devise:** To grant real property by will.
- Disability:** Want of qualification; incapacity to do a legal act.
- Disaffirm:** To repudiate.
- Domicile:** A person's legal residence; his permanent home to which he intends to return if absent from it.
- Duress:** Personal restraint or compulsion.
- Earnest:** Formerly money paid to bind a bargain; now, a part of the price named in a contract paid by the vendee at the time the bargain is made.
- Easement:** The right one person has to use the land of another for a particular purpose.
- Embezzlement:** Appropriating to one's own use money intrusted to one's custody.
- Emblements:** Growing crops of any kind produced by expense and labor.
- Eminent Domain:** The right of the sovereign power to take private property for public purposes.
- Enact:** To make a law, or to establish by law.
- Equity (Chancery):** A system of courts granting extraordinary relief when the remedies at law are not adequate.
- Equity of Redemption:** The right which a mortgagor has to redeem his estate after he is in default on the mortgage.
- Escheat:** The reversion of land to the state upon the death of the owner without lawful heirs.
- Escrow:** A deed or bond delivered to a third party to be held and delivered to the grantee or creditor upon the performance of some condition.
- Estate:** An interest in property.
- Estoppel:** A rule of law which stops a man from asserting a fact or claim.
- Eviction:** The dispossession of a person by process of law from land which he has previously held.
- Execution:** (1) A judicial writ directing the enforcement of a judgment.
(2) The act of signing and sealing a written instrument.
- Executor:** A person named in a will to carry out its provisions.
- Exemption Laws:** Laws under which a judgment debtor may hold certain articles exempt from levy and sale.
- Ex Post Facto Law:** A law which makes criminal an act which was done previously and which when done was not a crime.
- Extradition:** The surrender by one government to another of a person charged with a crime.
- Foreclosure:** The process of enforcing a lien against property.
- Forgery:** The fraudulent making, signing, or altering of a written instrument.
- Franchise:** A privilege or right conferred by governing authority.

- Garnishment:** The process by which a person owing money to the defendant in a case may be compelled to pay it in to the court to satisfy a claim against the defendant.
- Good Will:** A property right attaching to a business and arising from its established trade and reputation.
- Hereditament:** Any species of property that may be inherited.
- Inchoate:** Commenced, but not completed; imperfect.
- Incorporeal:** Intangible; existing only in contemplation of law, as a franchise or right of way.
- Incumbrance:** A burden or lien upon property.
- Indemnity:** A compensation for damages suffered.
- Indenture:** A deed or sealed agreement.
- In Esse:** In existence.
- Insolvency:** State of being unable to pay one's debts.
- In Statu Quo:** In the same state or condition as before.
- Inter Vivos:** Between the living.
- Intestate:** One who dies without making a will.
- Invalid:** Of no legal force.
- Issue:** Offspring; in real property law, all persons who have descended from a common ancestor.
- Judgment:** The final determination by a court of the rights of the parties in an action.
- Jurat:** The certificate at the end of an affidavit showing when and before whom it is verified (sworn to).
- Jurisdiction:** The legal authority of a court.
- Lease:** A contract granting the possession and use of real property.
- Legacy:** A gift by will.
- Legal Tender:** Those kinds of money which a creditor must accept as a valid offer of payment.
- Lessee:** A person holding real property under lease; a tenant.
- Lessor:** A person who has leased real property to another; a landlord.
- Letters of Administration:** An instrument issued by the court having jurisdiction, granting power to settle the estate of one dying without leaving a will.
- Letters Testamentary:** An instrument issued by the court having jurisdiction, granting power to the person named as executor in a will to carry out the provisions of the will.
- Levy:** Taking legal possession of chattels by an officer of the law, under a writ of execution.
- Lien:** A right a person has against the property of another by way of security for a debt.
- Liquidated Damages:** The sum of money agreed upon in advance by the parties to a contract, to be paid in case of breach.
- Litigation:** A suit at law.
- L. S.:** *Locus sigilli*, meaning "the place of the seal."

Mandamus: A writ issued by a superior court to an inferior court or to an officer, commanding something to be done.

Maturity: The time at which a negotiable instrument is legally due.

Merger: The absorption or extinguishment of one thing in another; as of contracts or corporations.

Nominal Damages: Those given for the violation of a right from which no actual loss has resulted.

Non Compos Mentis: Not of sound mind.

Non-suit: The name of a judgment given against a plaintiff when he is unable to prove his case.

Ordinance: An act or law passed by a municipality.

Outlawed: Uncollectible because too old. A debt is outlawed when it is barred by the Statute of Limitations.

Par: Face value. Bills of exchange, bonds, and stocks are at par when they sell for their face value.

Paramount Title: The title to property which will prevail when a dispute as to ownership arises.

Parol Contract: Any contract not under seal; usually, an oral contract.

Perjury: A willfully false statement made by a witness in judicial proceedings.

Per Se: In or by itself; essentially. For example, an act which is not negligent *per se* may be negligent under certain circumstances.

Plaintiff: The person who brings an action at law; the complainant.

Post-dated: Bearing a date subsequent to the true date.

Probate: The act or process of proving a will.

Prima Facie: At the first appearance. *Prima facie* evidence is that which is sufficient to establish a fact unless it be controverted.

Prosecute: To proceed against by legal measures.

Protest: A formal declaration in writing by a notary public of the demand and refusal to pay a note or bill.

Proxy: (1) One who represents another. (2) A writing by which one authorizes another to vote in his place.

Quantum Meruit: As much as he deserved.

Quantum Valebat: Whatever it was worth.

Quasi: As if; corresponding to.

Quitclaim Deed: A form of deed in the nature of a release, granting whatever interest the grantor has or may have.

Ratification: Approval; giving force to a contract which otherwise is not binding.

Receiver: A person appointed to hold and manage property in dispute, the property of an insolvent, or the property of a dissolved corporation.

Recoupment: A reduction in amount of damages on account of a breach of warranty or defects in performance.

Release: An instrument by which some claim or interest is surrendered to another person.

- Remainder:** An estate in real property to take effect after another's estate is terminated.
- Replevin:** An action to recover the possession of goods wrongfully taken and retained.
- Rescission:** The annulling or dissolution of a contract either by mutual consent or by one party.
- Residuary Legatee:** The person named in a will who has the residue of the property after the payment of the other legacies specially mentioned in the will. Sometimes the words legacy and legatee are restricted to personal property; then devise and devisee are used for real property.
- Severance:** The removal of fixtures from the land.
- Specialty:** A contract under seal.
- Specific Performance:** Performance of a contract according to its terms.
- SS.:** Abbreviation for the Latin word *scilicet*, meaning to wit; that is to say.
- Status:** Standing state, or condition.
- Statute:** A law made by a legislature.
- Statute of Frauds:** An English statute, reenacted in varying form in the different states, requiring certain contracts to be evidenced by a written memorandum in order to be enforceable.
- Statute of Limitations:** A statute barring action unless begun within a certain time after the debt is due and payable.
- Subcontract:** A contract made by one who has contracted to perform labor or services, for the performance of all or part of such labor or services by another.
- Subpœna:** A writ commanding the attendance of a person to testify as a witness in court.
- Subrogation:** The substitution of one person or thing in the place of another, particularly the substitution of one person in place of another as a creditor, with a succession to the rights of the latter.
- Survivorship:** The right of the survivor or survivors, of two or more persons having joint interest in an estate or other property, to take the interest of any of the number dying.
- Testator:** A person who makes a will.
- Tort:** A private wrong or injury, other than that arising from the breach of a contract, for which damages can be collected.
- Trespass:** Any wrongful act by one person whereby another is injured; especially, unlawful entry upon the land of another.
- Uberrima Fides:** The most perfect good faith.
- Ultra Vires:** Beyond power. The acts of a corporation beyond the scope of its powers are acts *ultra vires*.
- Underwriter:** Insurer.
- Unilateral Contract:** A contract in which an offer in the form of a promise is accepted by an act.
- Usury:** Illegal interest.

Venue: The place in which an event occurs.

Vested: Already in force.

Waiver: The abandonment of a right, or a refusal to accept it.

Ward: A minor under guardianship.

Wharfinger: One who keeps a wharf for hire for the purpose of receiving and shipping goods.

Writ: An instrument issued from a court, requiring or authorizing the performance of an act.

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