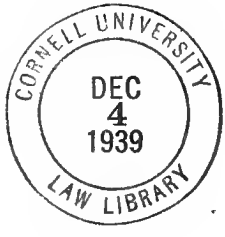

A TREATISE

ON THE

LAW OF PERSONAL PROPERTY

BY

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PREFACE.

In the early history of our law under the English feudal system, personal property was regarded as of small consequence in comparison with real estate. The latter was the measure of wealth, and the gauge of social and political rank. It is quite different at present with the relative importance of the two kinds of property, especially in the United States. The great change in our country is the result of various causes; among which may be mentioned as prominent, the form and genius of our government, the character of our institutions, and the allodial system of land ownership. The last half century has witnessed an increase in new and varied industries, an enlargement and extension of commerce and manufactures, little less than marvelous, and marked changes in sociological conditions, all contributing to the volume and great importance of the law of personal property. The cultivation of this department of jurisprudence has not been equal to its demands, as measured by the importance of the subject, and its varied application to human relations and affairs. When this work was undertaken, the only American publication treating exclusively upon the subject of Personal Property, known to the author, was the learned and elaborate work of Mr. Schouler, in two volumes; while on most branches

of the law there were numerous text-books at command of the profession. A practice of many years in the profession, supplemented by ten years' experience with students at the Albany Law School, impressed the writer with the conviction that a treatise on this subject, differing somewhat in character and aim from any then before the public, might be a useful addition to our legal literature. Under this conviction, and with the view of meeting what seemed to be a want, the following pages were prepared. The plan and aim of the work is, to bring the leading and essential principles of the law of personal property within a narrow compass, and in such a manner as to serve the following purposes: First, to furnish the student with the means of acquiring an adequate and discriminating knowledge of the subject, without unnecessary and confusing discussion; secondly, the practitioner with a ready and reliable solution of questions arising in the exigencies of his professional business, when time is wanting for extended research; and, third, to meet the wants of those outside the legal profession, who may desire to obtain a knowledge of the general principles of the subject, as a qualification for business, or an essential to a liberal education, but are unable to devote much time to the study. In carrying out his plan, the writer has endeavored to state the rule or principle of law on points in question, as settled by the weight of authority, in a manner as clear and succinct as practicable, without entering at large upon philosophical discussion, or marshaling in the text an array of conflicting cases. Yet, sufficient references to decided cases,

and standard text-books, have been furnished to facilitate an exhaustive examination of questions when necessary or desirable. Special care has been taken, however, to formulate definitions, and state principles, with such perspicuity and reliable accuracy as to render extended research unnecessary.

The author might have constructed a more elaborate and imposing work with much less cost of time, thought, and labor; but the product, he believes, would have been less intrinsically valuable for the purpose intended. If he has succeeded to a reasonable extent in realizing his purpose, the reader will find in one small volume all the leading and essential principles of this department of law, so systematized and presented as to be easily available for study or use. The author has not the vanity to think that his work is free from imperfections; but he hopes that it may prove useful to the classes for which it is designed, and trusts that it will be received with considerate kindness by a liberal profession.

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(c) Waifs; and
(d) Reclamation of animals *ferœ naturœ*.

2. Accession, including:
(a) Fruits of the earth produced naturally or by human industry;
(b) The increase of animals;
(c) Materials of one person united to the materials of another; and
(d) Confusion of goods.

Second. Transfer by act of law, embracing:
1. Forfeiture;
2. Succession;
3. Judgment;
4. Intestacy;
5. Insolvency; and
6. Marriage.

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THE LAW OF PERSONAL PROPERTY

CHAPTER I.

INTRODUCTORY.—DEFINITION AND USES OF THE WORD "PROPERTY."—GENERAL CLASSIFICATIONS.

SECTION 1. Definition of the term.
2. Uses of the term.
3. Real, and personal, property.
4. Absolute, and qualified, property.
5. Limitations of absolute ownership.

§ 1. **Definition of the term.**— The word "property" may be defined briefly as the exclusive right of possessing, enjoying, and disposing of, lands and chattels.[1] The term "exclusive right," however, does not confine the ownership to a single individual, for property may be owned by two or more persons at the same time, jointly, or in common;[2] nor does it necessarily imply *immediate* possession; for there may be an intermediate and temporary rightful possession by a third party having a special or qualified property in the subject of ownership; as in cases of a life interest, a mere usufruct, a lease, a bailment, or a trusteeship. The *exclusive* right in our definition of property, is the *ultimate proprietary right vested in one or more persons as owners.*

[1] Sch. Pers. Prop., pp. 4, 5; And. L. Dict., "Property;" Bouv. L. Dict., "Property;" 1 Cooley's Black., p. 139, notes (18), (19); Jackson v. Housel, 17 Johns., 281, 283; Morrison v. Semple, 6 Binn. Pa., 94.

[2] See *infra* §§ 26, 27; Bouv. L. Dict., "Property," sub. 4.

§ 2. **Uses of the term.**—The word "*property*" as used in the law, has two general significations; first, to indicate the right or interest of a person in or to the subject in question, as whether *absolute* or *qualified*; the absolute right being the ultimate, exclusive proprietary right, constituting ownership; and the qualified property being an intermediate, limited and temporary interest, or a rightful possession.[1] And, second, in connection with qualifying words it characterizes the particular subject or kind of property in question, in respect of classification, as whether *real* or *personal*.[2] In other words, it is used both to indicate the kind or class of property in question, and the interest of a party therein; sometimes the one, and sometimes the other.

§ 3. **Real, and personal, property.**—The principal line of distinction between the two classes runs between *mobility* and *inmobility*. Real property is that which is immovable and permanent in its character or use. Under the feudal law it was designated by, and embraced in, the terms "lands, tenements and hereditaments." The term *real property*, as now used in contradistinction to *personal property*, includes land, together with permanent structures upon and under its surface; and, in legal contemplation, land extends upwards *usquæ ad cœlum*, and downwards *usquæ ad inferos*. It will be seen, however, in a subsequent chapter, that certain things personal in their character are, under some circumstances, regarded as part of the realty.

Personal property is movable in its nature, and em-

[1] Bouv. L. Dict., "Property," sub. 3; see *infra* § 4; And. L. Dict., "Absolute Property."

[2] See *infra* § 3.

braces every species of property not possessing the characteristics of real property, as above defined.[1]

As personal property constitutes the subject of this treatise, its characteristics will be more fully shown in subsequent chapters.

§ 4. **Absolute, and qualified, property.**— Absolute property consists in a full and complete title to, and dominion over, a thing. Qualified property is a temporary or special interest in a thing, which is liable to be totally extinguished by the occurrence of some particular contingency, without the act of the intermediate possessor or proprietor. For examples of this class may be mentioned the interest of a person in light; title to animals *feræ naturæ* when captured; the interest of a bailee in goods bailed or pledged; the title of executors and administrators to decedent's estate; and title of trustees and guardians to the trust estate. And, the *legal title* to a thing may be in one person and the *equitable interest* in another, at one and the same time.[2]

§ 5. **Limitations of absolute ownership.**— It should be noted in passing that to absolute ownership of property there are certain limitations which are the necessary conditions of organized society and civil government:

First. A person is not at liberty to so use his own as to injure the rights of another. *Sic utere tuo ut alienum non lædas* is the legal maxim.[3]

[1] Tiede. on R. Prop., §§ 1, 2; Bouv. L. Dict., "Real Property," "Personal Property;" 1 Sch. Pers. Prop., p. 25; 2 Black. Com., p. 385; 2 Kent Com., pp. 340, 341 and note.

[2] Bouv. L. Dict., "Property," sub. 3; 2 Kent Com., pp. 347, 348; 2 Sch. Pers. Prop., p. 695; Edw. Bail, §§ 36–42, 369–372.

[3] Broom's Leg. Max., pp. 275–289; 1 Sch. Pers. Prop., p. 21; 1 Cooley's Black., pp. 217–219; Bishop Non-Cont. Law, §§ 14, 15, 412-422.

Second. The State, under what is known as the *police power*, has authority to control the use of property in the hands of its owner, within certain limits; and, in some cases, even to take it from him without his consent and against his will. *Salus populi suprema lex.*[1]

Third. The citizen owes to government allegiance and support, in return for protection and benefits received; and the government has a rightful claim upon so much of his property as may be requisite for its maintenance and due administration. On this claim rests the authority for taxation.[2]

Fourth. The prerogative of *eminent domain*, a sovereign power of the state, by which private property may be taken for public use without the consent of the owner. This power is lodged in the Legislature as the representative of the state, and its exercise conditioned, in this country, upon providing for compensation to the owner.[3]

Fifth. The property of every person is liable for the satisfaction of all his just debts, except in so far as it may be exempt by statute. He cannot legally alienate his property by gift, or otherwise dispose of it, in fraud of his creditors. A *bona fide* purchaser, however, will be protected as having an equity superior to that of a cred-

[1] Broom's Leg. Max., pp. 2–7; Bishop Non-Cont. Law, §§ 91–96; Thurlow v. Mass., 5 How. U. S. Rep. 504.

[2] 1 Sch. Pers. Prop., pp. 22–24; 1 Story Const., §§ 906–1053; Cooley Const. Law, pp. 54–62; Cooley Const. Lim., pp. 479–521.

[3] 2 Kent Com., p. 339; Bishop Cont. (Enl. Ed.), § 573; 1 Sch. Pers. Prop., pp. 22–23; Bishop Non-Cont. Law, § 119; Const. U. S. Amend'ts, Art. V.; Barron v. Baltimore, 7 Pet., 243; Withers v. Buckley, 20 How. U. S. Rep. 84; Transportation Co. v. Chicago, 99 U. S. Rep. 635, 642; Kohl v. United States, 91 U. S. Rep. 367; Charles River Bridge v. Warren Bridge, 7 Pick. 344, 445.

itor.[1] The enforcement of this limitation is ordinarily effected through the instrumentality of the courts of justice.[2]

[1] Bishop Cont. (Enl. Ed.), §§ 1200–1213; 1 Sch. Pers. Prop., p. 21; 1 Whart. Cont., § 377

[2] 2 Kent Com., pp. 340, 341 (note a); 2 Black. Com., pp. 16, 17, 384, 385–397; 1 Sch. Pers. Prop., p. 25; Tiede. R. Prop., § 1; McCall R. Prop., pp. 1, 2.

CHAPTER II.

CHARACTERISTICS OF PERSONAL PROPERTY.

SECTION 6. Mobility.
7. Change from personal to real, and *vice versa*.
8 Duration of the time of enjoyment.

§ 6. **Mobility.** The leading and an essential characteristic of personal property, that which distinguishes it from real property, is mobility. Under this distinction it is quite easy to classify all subjects of property that are tangible; but without further instruction the student might find difficulty in the case of intangible property, of which there is a large class, such as debts, obligations, and the like, denominated *choses in action*. These, in contemplation of law, are movable. They are supposed to attend the person of the owner, are subject to the laws of his domicile in case of intestacy and insolvency, and actions concerning them are generally transitory.

§ 7. **Change from personal to real, and vice versa.**— It should be noticed that, through the operations of nature, or the act of man, things immovable in their character become movable, so as to change them from *real*, to *personal*, property, and *vice versa*. Examples of *real*, changed to *personal*, property: A tree while growing on the land is real property, but when felled and cut into timber or wood it becomes personal; minerals while in the earth are part of the realty, but when quarried they become personal property; and growing fruit trees are real property, but their severed fruit is personal.

Examples of *personal*, changed into *real*, property: Building materials, which are personal property, when wrought into a house become real; a young tree planted temporarily in a nursery is personal property, but when sold and transplanted it is converted into real property.[1] Other examples might be given, but these are sufficient for illustration.

§ 8. Duration of the time of enjoyment.— But the term *personal property*, at common law, includes more than is characterized by the word *movable*. Duration of the time of enjoyment is, in some cases, a determining factor in the classification, placing in the general division of personal property things immovable in their nature.

In the English law, any interest in the realty less than a life estate was classed as personal property. This for the reason that under the feudal system personal property was regarded as of small importance compared with real estate; an interest in land limited in duration to a determinate period did not rise to the dignity of a freehold, and was consigned to the inferior rank of personal property.

In the progress of events, the advance of civilization, and the expansion of commerce, there has been a marked change in the comparative importance of the two classes of property, especially in the United States; yet the old classification remains unchanged at common law. Hence it is that a life estate in lands and tenements is real prop-

[1] 1 Sch. Pers. Prop., pp. 26, 27; Crouch v. Smith, 1 Md. Ch. Rep. 401; Golden v. Glock, 57 Wis. 118; Lewis v. Rosler, 16 West Va. Rep. 333; Higgins v. Kusterer, 4 Mich. 318.

erty, while an estate for years ranks as personal property, albeit the years of the latter may far outnumber the years of the former. Personal property, then, includes two elements, *mobility* and *duration of the time of enjoyment.*[1]

[1] Pom. Mun. Law, §§ 376, 377; 2 Black. Com., pp. 385–388; 2 Kent Com., pp. 341–343; 4 Kent Com., pp. 93–95; 1 Sch. Pers. Prop., pp. 27, 28; Williams Pers. Prop., pp. 1, 2, and note 1.

CHAPTER III.

IRREGULAR SPECIES OF PROPERTY.

FIXTURES.

SECTION 9. What are fixtures.
10. Rules for guidance.
11. Between what parties.
12. Time of removal.

EMBLEMENTS.

13. What are emblements.
14. What products the tenant may remove.
15. Who, and when, entitled to emblements.
16. Incidents.

HEIR-LOOMS.

17. Character, and law of, defined.

MANURE.

18. When real, and when personal, property.

CHURCH FURNITURE.

19. Law of this species of property.

MORTUARY PROPERTY.

20. Kinds, legal rules, and burial rights.

There are certain species of property which, for reasons appearing in this chapter, are irregular in respect of classification, and require separate notice.

1. *Fixtures.*

§ 9. What are fixtures.— They are things which, though personal in their nature, may become real property when annexed to, or used in connection with, the freehold. They are ambulatory, being sometimes on one side of the dividing line between real and personal property, and again on the other. On which side of the

line the law will place a thing in a given case may depend upon one or more of these conditions: 1, the permanency of the annexation; 2, the purpose and use of the thing annexed; 3, the intention of the parties; and, 4, other circumstances being the same, the turning point may be the parties concerned, or, in other words, the parties between whom the question is raised.[1]

§ 10. Rules for guidance.— The subject of fixtures has caused considerable perplexity in the administration of the law; and it is impossible, in a concise discussion, to relieve it from all practical difficulties; but a few rules, deduced from the authorities, may be helpful to the student and practitioner.

1. Annexation to the soil, either actual or constructive, is requisite to convert a thing personal in its nature into a fixture. *Actual* annexation implies physical attachment to the freehold; *constructive* annexation is that which exists in contemplation of law, where there is no actual physical attachment.[2] To the latter kind belong things adapted for use in connection with the realty; and things essential to the beneficial enjoyment of the premises; as deeds and other muniments of title, keys, fencing materials, family pictures, and other things of like character and use.

[1] Tiede. R. Prop., §§ 3-7; 1 Sch. Pers Prop., pp. 135-160; And. L. Dict., "Fixtures;" Bouv L. Dict., "Fixtures;" 2 Kent Com., pp 343-347; Williams Pers. Prop., pp. 343-347, and notes; Wadleigh v. Janvrin, 41 N. H. 503; Prescott v. Wells, 3 Nev. 82; State v. Bonham, 18 Ind. 231; Sampson v. Graham, 96 Pa. St. 405; Teaff v. Hewitt, 1 Ohio N. S. 511.

[2] Tiede R. Prop., § 3; 1 Sch. Pers. Prop , pp. 137-139; Bouv. L. Dict., "Fixtures," sub. 2; Williams Pers. Prop., p. 14, n. 1; And. L. Dict., "Fixtures."

2. As a general rule, things actually annexed to the freehold become part of the realty; and they so remain when their removal cannot be effected without serious injury to the freehold.[1] But, when their removal can be effected without such injury, there are cases in which annexation does not convert personal into real property. For example, where the thing has been annexed for the purpose of carrying on a trade; where it is manifest that it is the intention to use the fixture in some employment distinct from that of the occupant of the real estate; and, generally, when it is clearly the intention of the parties concerned that the thing annexed shall not become part of the realty.[2]

3. In some cases, where the attachment to the freehold is slight, or where things permanently used in connection with the land are temporarily detached, they may be regarded as fixtures passing with the land. For example, hop-poles stacked in piles; rolls in an iron mill lying loose in the mill; and machinery fastened by screws to the floor. Here, *intention* may become an important factor in determining the class of the thing in question.

4. It should be remembered that the common law on this subject is sometimes modified by statutory enactments; and these must be examined in all cases to which they apply. For example, in New York the rule as between the heir and the executor is fixed by statute.[3]

[1] Citations *supra*, under § 9; Tayl. Land. and Ten., § 550; Bouv. L. Dict., "Fixtures," sub. 3; 1 Sch. Pers. Prop., p. 140; McCall R. Prop., pp. 88–91; And L. Dict., "Fixtures."

[2] 1 Sch. Pers. Prop., p. 141, and citations *supra*, under § 9; Potter v. Cromwell, 40 N. Y., 287; McRea v. Central Nat. Bank of Troy, 66 N. Y., 489; Potts v. New Jersey Arms, etc., Co., 17 N. J. Eq., 395;

§ 11. **Between what parties.**— The question whether in a particular case a thing is, or is not, a fixture, and also the right of removing the same, may depend for solution upon the parties interested. Such parties are, 1, the heir and the executor; 2, devisees and the executor; 3, the executor of the tenant for life, and the remainder-man or reversioner; 4, vendor and vendee; 5, mortgagor and mortgagee; 6, debtor and creditor, and the heir or vendee and the widow, in respect to premises set off to her for dower; and, 7, landlord and tenant. In the first, second, fourth, fifth, and sixth of these classes the general rule is that things firmly annexed to the freehold pass with it respectively to the heir, devisee, vendee, mortgagee, heir or vendee and the widow; and cannot be removed by the other parties. While in the third and seventh classes the right of removal belongs respectively to the executor of the tenant for life, and the tenant. Especially is the rule against removal relaxed in favor of tenants. As between landlord and tenant the prevailing doctrine now is, that the latter may remove all fixtures annexed by him for trade, agriculture, or domestic use and convenience, when such removal will not result in serious and permanent injury to the freehold.[1]

§ 12. **Time of removal.**— The right of removing fixtures may be affected by the time of its attempted exercise.

Hill v. Wentworth, 28 Vt., 428; Henkle v. Dillon, 15 Ore., 610; Smith v Waggoner, 50 Wis., 155; McClintock v. Graham, 3 McCord (S. C.), 553; Ottoman Woolen Mills Co. v. Hawley, 44 Iowa, 57; Bishop v Bishop, 11 N. Y., 123.

[1] Citations *supra*, under § 9; Despatch Line of Packets v. Bellamy

1. A tenant for years may remove them at any time before he yields possession, although he may be holding over. But when the landlord has resumed possession the fixtures become his property, and the tenant's right of removal is gone.

2. If, on the expiration of his term, the tenant accepts a new lease, containing no reservation of the right of removal, he thereby loses his right in the fixtures.

3. Tenants for life or at will, having uncertain interests in the land, are permitted to remove their fixtures within a reasonable time, after the termination of their tenancy without their own fault.

4. If the term be forfeited by any act of the lessee, his assignee or sub-lessee has a reasonable time after such termination of the lease in which to remove the fixtures.[1]

2. *Emblements.*

§ 13. What are emblements.— The term is derived from the Norman French word *emblear*, meaning to sow; and, in legal terminology, emblements are the annual products of the soil, to which the tenant is entitled on the termination of his estate, as the result of his own

Mf'g Co., 12 N. H., 205; Dudley v. Hurst, 67 Md., 44; Scheifele v. Schmitz, 42 N. J. Eq., 700; Maguire v. Park, 140 Mass., 21; Fullington v. Goodwin, 57 Vt., 641.

[1] Citations *supra*, under §§ 9 and 10; Meigs' Appeal, 62 Pa. St., 28: Richard v. Borden, 42 Miss., 71; Eaves v. Estes, 10 Kan., 314; Holbrook v. Chamberlin, 116 Mass., 155; Blanche v. Rogers, 26 N. J. Eq., 563; Hutchins v. Masterson, 46 Tex , 551; Hederich v. Smith, 103 Ind., 203; Smith v. Park, 31 Minn., 70; Marks v. Ryan, 63 Cal., 107; McIver v. Estabrook, 134 Mass., 550; Laughlin v Ross, 45 N. Y., 792; Darrah v. Baird, 101 Pa. St., 265; Stansfield v. Portsmouth, 4 C. B. (N. S.), 119.

rightful care and labor. While outgrowths of the soil, and hence in their nature part of the realty, emblements are treated as personal property. The doctrine of emblements is founded upon the just principle that a tenant, who cultivates and sows the land with a reasonable expectation of reaping the harvest, ought to be permitted to enjoy the fruits of his industry.[1]

§ 14. What products the tenant may remove.— They are the *annual* products of the sowing or planting and cultivation of the tenant, the outcome of his own care and labor. They are characterized by the term *fructus industriales*, in contradistinction to *fructus naturales*. As a rule, only such products of the soil as are of annual cultivation are regarded as emblements; but to this rule hops are an exception, and for the reason that, although the product of *perennial* roots, they require annual culture. Cereals and vegetables generally are included; while products of spontaneous growth, perennial in their nature and not requiring annual cultivation, such as grasses and trees, are excluded.[2]

But, as to what constitutes emblements the common law may be, and sometimes is, varied by local customs, and by statutory enactments. The scope of this work will not permit a reference to such changes. They are not numerous, and the careful student and practitioner

[1] Web. Dict. Unab'gd, "Emblement;" And. L. Dict., "Emblements;" Bouv. L. Dict., "Emblements;" Tiede. R. Prop., §§ 8, 70; 1 Washb. R. Prop., pp. 104, 132–137; 1 Sch. Pers. Prop., pp. 126–128; Williams Pers. Prop. (4 Ed.), pp. 17–19, and Am. notes; 4 Kent Com., p. 73; Tayl. Land. and Ten, § 534; Cooley's Bl., B. II, p. 123, and notes 3, 4.

[2] Citations *supra*, under § 13; Benj. Sales, §§ 120–128.

will here, as in all common law cases, examine the statutes and adjudications of his own State.

§ 15. Who, and when, entitled to emblements.— 1. To entitle one to the crops, they must have been sown and planted by himself, and not by another. Cultivation and care of the crops will not alone confer upon the claimant the right of removal, where the sowing or planting was done by another. In such case one may not reap where another has sown.[1]

2. The right belongs only to a tenant whose estate was of uncertain duration. Included in this class are tenants for life, and their representatives. Tenants at will, also, have the right; but not tenants for years, or tenants at sufferance. The distinction between certain and uncertain tenancies is based upon the doctrine that it is unwise for the tenant to sow with full knowledge, or a reasonable probability, that he cannot reap, by reason of the termination of his tenancy before the time of harvest.[2]

3. As the *reason* of the rule does not apply to a case where the estate of the tenant has terminated unexpectedly, and without his fault, the *rule* does not apply.

[1] Tiede. R. Prop., § 70; 1 Sch. Pers. Prop., p. 128; 1 Washb. R. Prop., p. 103; Grantham v. Hawley, Hob., 132; Gee v. Young, Hayw., 17; Price v. Pickett, 21 Ala., 741; Thompson v. Thompson, 6 Munf., 514.

[2] Tiede. R. Prop., §§ 8, 70, 71; Tayl. Land. and Ten., § 534; 2 Bl. Com., pp. 145, 146, 122–124; 4 Kent Com., p. 110; Co. Litt., 56; Chelsey v. Welch, 37 Me., 106; Kittredge v. Woods, 3 N. H., 503; Whitmarsh v. Cutting, 10 Johns., 360; Graves v. Weld, 5 B. & Ad., 105; Kingsbury v. Collins, 4 Bingh., 209; Mason v. Moyers, 2 Rob. (Va.), 606; Morgan v. Morgan, 65 Ga., 495

But if the estate terminates through the fault of the tenant, he loses his right to emblements.[1]

4. As between the executor of the tenant in fee and the heir, the former is entitled to the crops if they are ripe for harvest. And the right to emblements extends to assignees, and sub-lessees, except when the tenant is restricted from aliening the land.[2]

5. When the owner sows the land, and then conveys it away, the title to the crops passes to the vendee by the conveyance; and the vendor's executors and administrators have no interest in either land or emblements. So, also, emblements pass by devise of the land, and by the conveyance of a reversion subject to an existing particular estate.[3]

6. A mortgagee, as against the mortgagor and his grantees, has the paramount right to the emblements.[4] But a foreclosure after the crops are severed carries no interest in them to the mortgagee or purchaser.[5] It is

[1] 1 Sch. Pers. Prop., pp. 127–129; 2 Kent Com., p. 73; Tayl. Land. and Ten., § 535; Debow v. Colfax, 5 Halst., 411; Reeder v. Sager, 70 Id., 180.

[2] Tiede. R Prop., § 71; Penhallow v. Dwight, 7 Mass., 34; Kingsley v. Holbrook, 45 N. H., 319; Howe v. Batchelder, 49 N. H., 319; Pattison's Appeal, 61 Pa. St., 29; Doe v. Mace, 7 Black., 2; Tobey v. Reed, 9 Conn., 216; Cooper v. Davis, 15 Conn., 556; McCall v. Lenox, 9 Serg. & R., 302; Allan v. Carpenter, 15 Mich., 88; Jones v. Thomas, 8 Blackf, 428.

[3] 1 Sch. Pers. Prop., p. 130; 1 Washb. R. Prop., p. 104; 1 Williams Ex'rs, p. 674; Foote v. Colvin, 3 Johns., 216; Burnside v. Weightman, 9 Watts, 46; Cooper v. Woolfitt, 2 Hurl. & N, 122

[4] Tayl. Land. and Ten., § 537; Tiede. R. Prop, § 71; Lane v. King, 8 Wend., 584; 1 Sch. Pers. Prop., p. 133; 1 Washb. R. Prop., p. 106; Howell v. Schenck, 4 Gabe, 89.

[5] 1 Sch. Pers. Prop., p. 133; Buckout v. Swift, 27 Cal., 438; Codington v. Johnstone, 1 Beav., 520.

held by some authorities that, if the purchaser under a foreclosure sale permit the mortgagor, or one claiming under him, to retain possession and plant crops, the latter will be entitled to them.[1] But, on this point, there does not seem to be entire unanimity of judicial opinion.[2]

7. The doctrine of emblements has no application to the public lands of the United States.[3]

§ **16. Incidents.**— 1. As a rule, the tenant or his representative, when entitled to emblements, has a right to enter upon the land after the termination of the tenancy, for the purpose of taking necessary care of the growing crop, and harvesting and removing it when ripe. But this right is limited to what is reasonably requisite for the purposes, and must not be abused.[4]

2. An agreement for a transfer of the property in something that is attached to the soil, as growing crops, or trees, but which is to be severed from the soil before delivery to the purchaser, is a sale of *personal property.*[5]

3. Growing crops of the species *fructus industriales* are subject to levy and sale by execution as *personal property.*[6]

[1] Doe v. Mace, 7 Black., 2; Tobey v. Reed, 9 Conn., 216; Cooper v. Davis, 15 Conn., 556; McCall v. Lenox, 9 Serg. & R., 302; Jones v. Thomas, 8 Blackf., 428.

[2] Mayo v. Fletcher, 14 Pick., 525; Lynde v. Rowe, 12 Allen, 101; Lane v. King, 8 Wend., 584.

[3] Rogers v. Williams, 5 Mo., 335; Rasor v. Qualls, 4 Blackf., 286.

[4] Tiede. R. Prop., § 70; 1 Sch. Pers. Prop., p. 131; 1 Washb. R. Prop., pp. 105, 136, 137; 1 Williams Ex'rs (6 Ed.), p 679; Co. Litt., 56*a*; Handson v. Porter, 13 Conn., 59; Forsythe v. Price, 8 Watts, 282; Humphries v. Humphries, 3 Ired., 362.

[5] Benj. on Sales (Ed. 18-8), § 118, and Am. Notes to §§ 111–133.

[6] Smith's Sherf. and Cons., pp. 323, 324; Caldwell v. Fifield, 24 N. J. L., 150; Parham v. Thompson, 2 J. J. Marsh. (Ky.), 206; Craddock v.

3. *Heir-looms*

§ 17. Character and law of, defined.— Law writers and philologists do not agree as to the etymology of the word *heir-loom.* By some it is thought to be composed of "heir" and "loom," the latter word originally meaning a loom to weave in, which descended to the heir; and that the composite, by use and accommodation, has grown to embrace many other things. Others regard the termination *loom* as of Saxon origin, in which language it signified a *limb* or *member*, giving to heir-loom the signification of a limb or member of the inheritance. Others, still, derive *loom* from the Saxon "loma," or "geloma," which signifies *household stuff*, and this with the English word *heir* makes heir-loom, meaning such utensils and other things as go to the heir.[1]

The etymology, however, is of very little practical importance. Heir-looms are a species of property, personal in their nature, which, by force of special custom, or because they are essential to the completeness and full enjoyment of the freehold, are treated as real property, and descend to the heirs with the inheritance.[2]

In respect of usefulness to the enjoyment of the freehold, heir-looms rest upon the same basis of reason as the class of fixtures which are not physically annexed to

Riddlesbarger, 2 Dana (Ky.), 206; Penhallow v. Dwight, 7 Mass., 34; Hartwell v. Bissell, 17 Johns., 128; Hare v Pearson, 4 Ired. (N. C.), L., 76; Shannon v. Jones, Id, 206; Salsbury v. Parsons, 43 Hun, 12; Favorite v. Deardoff, 84 Ind., 555.

[1] Bouv. L. Dict "Heir-loom;" And. L. Dict., "Heir-loom;" Webster's Dict. (unab'gd), "Heir-loom;" 1 Sch. Pers. Prop., p. 117; 2 Black. Com., p. 428.

[2] Cooley's Bl., B. II, pp. 427–429, n (2); Williams Pers. Prop., pp. 13, 14; 1 Sch. Pers. Prop., pp. 117–122; Co. Litt. 18*b*.

the soil; and the fact that the same things are, by some text-writers, assigned to both kinds of property indiscriminately, and without explanation, tends to confusion in the minds of students.

As examples of heir-looms mentioned in text-books are, among other things, ancient jewels of the British crown; the coat of arms of an ancestor hung in the church, and his sword and insignia of rank; ancient portraits and family pictures in a house; conies in a warren, and doves in a dove-cote; fish in an artificial pond; deeds and other muniments of title, together with the chest or box in which they have usually been kept; and the keys of a house.

It will be noticed that some of these things are also classed with fixtures by text-writers. They are classed with heir-looms for the same reason that they are treated as fixtures, namely, on account of their special relation and importance to the free-hold; while those not placed in both classes are regarded in law as heir-looms in obedience to special custom. Among these are some things not essential to the full enjoyment of the free-hold.[1]

It may be noticed in passing that heir-looms do not pass by devise or bequest, separate from the freehold; and this for the reason that a will does not take effect till *after* the death of testator; whereas the realty, including everything that goes with the land, passes to the heir simultaneously with the passing of the breath from the body of decedent, vests instantaneously in the heir, and thus takes precedence of the devise or bequest.[2]

[1] See citations *supra*, under § 17.

[2] 1 Sch. Pers. Prop., p. 118; 2 Black. Com., p. 429; Co. Litt. 185 *b*; 1 Williams Ex'rs (6 Eng. Ed.), 681.

4. *Manure.*

§ 18. When real, and when personal, property.— As a general rule, in this country, manure made upon the farm by consumption of its products is real property. And, in the interest of good husbandry, which requires that manure made from the products of the land shall be used to renew and enrich the soil, the rule has been established that, when a farm is leased for agricultural purposes, the manure made upon it the last year of the term shall be left by the out-going tenant. Local or neighborhood custom may, however, affect the question in some cases; but with no particular agreement in such leases in regard to the manure, it belongs to the farm, and not to the tenant. He has no right to remove it, or dispose of it to others, so that it shall not be used on the farm. But, if the manure be made from products purchased elsewhere and brought to the land by the tenant, as in case of a livery stable, it is personal property, and belongs to the tenant with the right of removal; and is subject to all the incidents of personal property.[1]

It is held in one case that, manure left in the street belongs originally to the owners of the animals that dropped it, but is to be regarded as abandoned property. Being abandoned property, the first taker has a right to

[1] Tiede. R. Prop., § 2; Tayl. Land. and Ten., § 541; McCall Real Prop., p. 90; Bouv. L. Dict., "Manure;" Goodrich v. Jones, 2 Hill, 142; Parsons v. Camp, 11 Conn., 525; Perry v Carr, 44 N. H , 122; Fay v. Muzzy, 13 Gray, 53; Witherby v. Ellison, 19 Vt., 379; Middlebrook v. Corwin, 15 Wend., 169; Daniels v. Pond, 1 Pick., 371; Lassell v. Reed, 6 Greenl., 222; Lewis v. Jones, 5 Harris, 226; Snow v. Perkins, 60 N. H., 493; s c., 49 Am. Rep., 333; Plumer v. Plumer, 30 N. H., 558; And. L. Dict., "Manure."

appropriate it; and after one has gathered it into heaps he must be regarded as entitled to it, against any person having no title, and must be allowed a reasonable time to take it away. It cannot be regarded as real estate.[1]

5. *Church Furniture.*

§ 19. Law of this species of property.—As a general rule, both in England and in this country, pews are regarded as part of the realty. But in some of our States they are made personal property by statute.[2] The pew-holder has, as a rule, the exclusive right to occupy his pew; and he may maintain an action of trespass against any one who, without lawful authority, disturbs him in his seat.[3] But, as against the society or corporation, the interest of the pew-holder in his pew is not absolute, but qualified and conditional. It is usufructuary merely, consisting in the right of occupancy upon occasions of public worship.[4] The right of occu-

[1] Halsen v. Lockwood, 37 Conn., 500.

[2] Cooley's Bl. B. II., p 429 n. (2); 1 Washb. R. Prop., p. 9; 2 Potter Corp., § 603; Bouv. L Dict., "Real property," sub. 6. and "Pews:" 1 Sch. Pers. Prop., pp. 158, 159; Baptist Ch. v. Bigelow, 16 Wend., 28; Viele v. Osgood, 8 Barb., 130; St. Paul's Ch v. Ford. 34 Barb., 16; Bates v. Soarrell, 10 Mass., 332; Hodges v. Green, 28 Vt., 358; And. L. Dict., "Church," "Pew."

[3] Gray v. Baker, 17 Mass, 435; Gorton v. Hadsell, 9 Cush., 508; Shaw v Beveridge, 3 Hill, 26; O'Hear v. Goesbriand, 33 Vt., 593, and citations last *supra.*

[4] Wheaton v. Gates, 18 N. Y., 395; Cooper v. Presb. Ch., 32 Barb., 222; White v. Methodist Epis. Ch., 3 Lans., 477; Abernethy v. Ch of the Puritans, 3 Daly, 1; Howe v. Stevens, 47 Vt., 262; Sohier v. Trinity Ch., 109 Mass., 1; Union Meeting House v. Rowell. 66 Me., 400; Gay v. Baker, 17 Mass., 435; Daniel v. Wood. 1 Pick., 102; Kimball v. Rowley, 24 Pick., 347; Presb. Ch. v. Andrus, 1 Zabr., 325;

pancy must yield to circumstances of necessity or expediency, growing out of the rights in common of the society; and if the trustees, or other authorized officials, make such changes in the edifice as the necessities or interests of the society demand, and thereby destroy the owner's pew, he must be content with adequate compensation.[1] But, it would seem, that, should the church edifice become useless by dilapidation or other cause, and have to be rebuilt, the right of the pew-holder to his pew, and to compensation as well, would be gone.[2]

Bells, organs, furnaces, stoves and pipes, may, by their use or placing, become real property or fixtures.[3]

6. *Mortuary Property.*

§ 20. Kinds, legal rules, and burial rights.— The grant of a burial lot in a churchyard, or public cemetery, though in terms a conveyance of the fee, is, generally, an easement merely. It will be protected from disturbance, and the rights of the owner for burial purposes secured to him, while the place continues to be used as a burial ground, but the grant of a burial lot in a church-

Kincaid's Appeal, 66 Pa. St., 411; *Ex parte* Brick Presb. Ch., 3 Edw. Ch. 155.

[1] Wentworth v. First Parish, 3 Pick., 344; Cooper v. Presb. Ch., 32 Barb., 222; Heeney v. St. Peter's Ch., 2 Edw. Ch 608; Fassett v. Boylston, 19 Pick., 361; Jones v. Towne, 58 N. H., 462.

[2] Voorhes v. Presb. Ch., 17 Barb., 103; Howard v. First Parish, 7 Pick., 138; Van Houten v. Reformed Dutch Ch., 2 Green. (N. J.), 126; Kellogg v. Dickinson, 18 Vt., 266; Gorton v. Hadsell, 9 Cush., 508.

[3] 1 Sch. Pers. Prop., p. 159: Congregational Society v. Fleming, 1 Iowa, 533; Rogers v. Crow, 40 Miss., 91.

yard will not empower the grantee to prevent a sale of the church property; and in all cases his right must yield to public necessity.[1]

Vaults and monuments erected upon a lot in a public cemetery, and decorations of the grave, are the personal property of the holder of the lot, and he may remove the same at his pleasure.[2]

While a corpse, in the strict sense of the common law, is not the subject of property, there is in it a *quasi* property which confers upon the relatives of the deceased the rights of custody and control; which rights the courts will protect. And the person having charge of the body holds it as a sacred trust for the benefit of all who may, from family ties or friendship, have an interest in it; which trust a court of equity will regulate and enforce.[3]

The doctrine is quite generally laid down in the books, without qualification, that in the absence of any testamentary directions on the part of the deceased, the right, and place, of burial belongs exclusively to the next of kin.[4] If, by the term "next of kin," as thus used, husband and wife are to be excluded, it may well be doubted whether there should not be a qualification of the broadly

[1] Richardson v. Dutch Ch., 32 Barb., 42; *Ex parte* Reformed Presb. Ch., 7 How. Pr. R , 476; Windt v. German Reformed Ch., 4 Sandf. Ch., 471; Page v. Symonds, 63 N. H., 17; Buffalo City Cemetery v. Buffalo, 46 N. Y., 503.

[2] Partridge v. First, etc., Ch., 39 Md., 631; Kincaid's Appeal, 66 Pa St., 411; Snyder v. Snyder, 60 How. Pr., R. 368.

[3] Griffith v. Charlotte, etc , R. R. Co., 23 S. C., 25; s. c. 55 Am. Rep. 1; Guthrie v. Weaver, 1 Mo. App., 136; Pierce v. Proprietors, etc., 10 R. I., 227; Snyder v. Snyder, *supra*; Bogert v. Indianapolis, 13 Ind., 134.

[4] Law of "Burial," 4 Bradf. Surr. R., 503-532; And. L. Dict.,

stated doctrine in their favor.[1] In case of disagreement among relatives in regard to the burial, the court will determine the matter upon equitable grounds.[2]

"Burial;" Tyler's Ecc. Law, § 971; Moak's Eng. Rep , vol. 12, p. 656; Wynkoop v. Wynkoop, 42 Pa. St., 293; Rosseau v. City of Troy, 49 How. Pr. R., 492.

[1] Johnston v. Marinus, 18 Abb., N. C., 72, and Appendix to same, p. 75; Secor v. Secor, 18 Abb. N C., 78, n ; Snyder v. Snyder, *supra.*

[2] Weld v. Walker, 130 Mass., 422; s. c. 39 Am. R., 465; Peters v. Peters, 43 N. J. Eq., 140; Snyder v. Snyder, *supra.*

CHAPTER IV.

NOMENCLATURE, AND SUBORDINATE DIVISIONS, OF PERSONAL PROPERTY.

SECTION 21. Chattels, real, and personal.
22. Choses in possession; choses in action.
23. Estate, real and personal.
24. Goods, wares, merchandise, effects, credits.
25. Personal property in expectancy.

§ 21. Chattels, real, and personal.—The term *chattel*, according to Blackstone, is derived from the technical Latin word *catella*, which primarily signified beasts of husbandry, *cattle*; but which, by accommodation, has a wider application, including every species of property which is not real estate, or a freehold.

It is a fact of historic interest to the student, that anciently property was not, as at present, nominally divided into real and personal, but into *lands*, *tenements*, and *hereditaments* on the one hand, and *goods and chattels* on the other. This division and nomenclature was the outgrowth of the feudal system; and it will be remembered that, under the proprietary rights and social conditions of that system, goods and chattels were regarded as constituting an inferior, and a comparatively unimportant, class of property.

In the course of time certain estates and interests in land grew up which had no existence under the ancient feudal system; notably, leases for years. To these the feudal rules concerning the realty did not apply; and,

moreover, being regarded as inferior in character and value to lands held under the feudal tenure, they were assigned to the rank and class of goods and chattels. But, as leases for years, and other interests of a like nature, are in fact interests in land, they are denominated *chattels real*, to distinguish them from property personal in its nature, all species of which are embraced in the term *chattels personal*.

Chattels real, then, may be defined briefly as such interests as are annexed to, or concern, real estate; chattels personal, such things as are movable, annexed to or attend the person of the owner. It will be seen that the present general division of property is into real, and personal; and that the term *chattel* is equivalent to the term *personal property*, including every species of property not embraced in the division termed indifferently *real property*, or *real estate*.[1]

§ 22. Choses in possession; choses in action.—The word "*chose*," which is a contribution from the French, means a *thing*; and in our law it is applied to personal property. According to Blackstone, a *chose* or thing in possession "subsists there only, where a man hath both the right, and also the occupation, of the thing;" while a *chose* or thing in action, is "where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law; from whence the thing so recoverable is called a thing or *chose* in action."

Mr. Schouler, in his learned treatise on personal prop-

[1] 2 Black Com. p. 385; 2 Kent Com. p. 341; 1 Sch. Pers. Prop. pp. 39, 45; Williams' Pers. Prop. p. 2; Bouv. L. Dict. "Chattels."

erty, suggests that these terms are calculated to mislead; that "they do not intend just what they appear to express;" and that Blackstone "confounds two senses of the word 'property,' the one signifying the thing possessed, the other the right of possessing." He thinks a general division of property into things *corporeal* and things *incorporeal* would be preferable to the ordinary classification of the common law. However this may be, the classification generally adopted, and thoroughly incorporated into the law of personal property, is sufficiently accurate for the purpose, and quite consonant with the plan, of this work, which is to present a clear and succinct statement of the law as generally laid down by text writers, and recognized by the courts; and not to make law, or to enter upon philosophical discussion.

Adopting, then, the ordinary divisions and nomenclature, *choses* in possession are things in which the right of property, and the occupancy, unite in the same person; while *choses* in action are things in which a person has the right of property, but not the occupancy, possession being recoverable by an action at law; hence the significance of the designation, *choses in action.*

The latter division covers a broad field, including a great variety of subjects of personal property. "It embraces," says Chancellor Kent, "the most diffuse, and in this commercial age, the most useful learning of the law. By far the greater part of the questions arising in the intercourse of social life, or which are litigated in the courts of justice, are to be referred to this head of personal rights." [1]

[1] 1 Black Com. p. 397; 2 Kent Com. p. 351; 1 Sch. Pers. Prop. pp. 32-

§ 23. Estate, real and personal.—The term "estate," —in Latin *status*,—is derived from *stare*, to stand, meaning the fixed condition of anything or person. Applied to law, it signifies the condition or circumstances in which the owner stands in relation to his property. The term "estate" is properly applicable only to real property. It is indigenous to the feudal system, under which absolute ownership is unknown, an estate being all that can be held or enjoyed by the tenant.

By the English common law, all lands were held, either mediately or immediately of the crown, the king being called *lord paramount*. This is, in brief, the feudal tenure, by which all lands in England are held; but which, with few exceptions, does not exist in the United States. True, it is maintained by jurists of repute, that there cannot be an absolute ownership of lands in any system of jurisprudence, and that in this country the ultimate absolute ownership vests in the state. On the other hand, it is insisted by high authority that, while in the United States lands pass to the state in case of forfeiture and escheat, this does not constitute the feudal relation proper, but results from the attribute of sovereignty in the body politic.

In this country, generally, lands are *allodial*, not *feudal* in character or tenure.

The distinction between the two systems is, in brief, this: under the *feudal* tenure, the absolute ownership of land, the *dominium directum*, is in one man, while the actual possession and profitable use, the *dominium utile*,

40, 76, 86; Bouv. L. Dict. "Choses in Action;" Williams' Pers. Prop. pp. 4-7, 63; Pom. Mun. Law, §§ 779-781.

is in another; whereas, under the *allodial* system the ownership and use, the *dominium directum* and the *dominium utile*, unite in the same person.

While, however, the term "estate," in its original and proper use, applies only to real property, it is frequently employed to designate personal property. Especially is this true in testamentary instruments and law, and in bankrupt and insolvent law. "All my estate, real and personal," is a phrase often found in wills, and sometimes in other written instruments. The term "estate" alone is sometimes used to cover both real and personal property; and sometimes to cover real, or personal, property only; depending in each case upon intention, which must be sought by the rules of interpretation and construction.

As, under the feudal system, estates or interests in land may be absolute or qualified, so when the term "estate" is applied to personal property, it may represent an absolute, or a qualified interest.[1]

§ 24. Goods, wares, merchandise, effects, credits.— The word "goods" applies to personal property, and when not joined to other substantives, is generally held to be more limited in its scope than the word "chattels," embracing inanimate objects only. It should be noticed, however, that in wills it may embrace all the personal property of the testator, animate and inanimate, corporeal or incorporeal; depending for scope and significance in

[1] Bouv. L. Dict. "Estate," "Allodium;" Williams' Pers Prop. pp. 7, 8, 259, 206; Pom. Mun. Law. §§ 378-385, 434, 435, 842, 843; Tied. Real. Prop. §§ 19, 25; 3 Kent Com. pp. 513, 514; Goodeve Pers. Prop. p. 3; Dayt. Surr. p. 232; Van Rensselaer v. Dennison, 35 N. Y., 393.

every case upon the context and construction of the instrument.

The terms "wares" and "merchandise," when standing by themselves, require no explanation. In the English Statute of Frauds the phrase "goods, wares, and merchandises" is employed, and like words are found in our American statutes. As thus employed, these terms have been under judicial consideration, both in England and in this country; and the result shows some contrariety of judicial interpretation. While generally held to be very comprehensive in their scope, embracing all corporeal movable property, these terms, it is held by some courts, do not embrace all kinds of personal property. The prevailing doctrine of the English authorities is, that these words comprehend only corporeal movable property; while the American authorities generally adopt a more liberal construction, including incorporeal property, choses in action, as well. But the courts in our States are not in full accord in regard to the interpretation of this statutory phrase.

The term "effects" is often used to designate personal property, and generally has a broader signification than the term "goods." In a will it may carry the whole of a testator's personal estate, depending upon intention as determined by judicial construction.

The word "credits" applies to debts due, money demands, and to all choses in action.[1]

[1] Bouv. L. Dict. "Goods," "Merchandise," "Effects," "Credits;" 1 Sch. Pers. Prop. pp. 39, 40, 86, 87; Benj. on Sales, pp. 105, 118; Am. Notes, §§ 111-133; Bishop Con. (Enl. Ed.) § 1315; 2 Pars. Con. (7 Ed.) pp. 49-51.

§ 25. Personal property in expectancy.—Contrary to the ancient common law doctrine, it is now well established that there may be an interest in expectancy in personal property That is to say, one person may have the right of possession and the usufruct for a term of years, or for life, while another at the same time has a reversion or remainder in the same property.

It should be noticed, however, that the rule against perpetuities is made applicable to personal property. The subject is regulated by statute in some of our States. For instance, New York has the following provision: "The absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator." [1]

[1] Sch. 1 Pers. Prop. pp. 161-185; Williams' Pers. Prop. pp. 260-262, and n. 1; 2 Kent Com. pp. 352-354; R. S. of N. Y. (Banks & Bro. 8 Ed.) vol. IV, p. 2516.

CHAPTER V.

PERSONAL PROPERTY, HOW HELD OR OWNED.

SECTION 26. Joint owners.
27. Ownership in common.
28. Part-owners of ships.
29. Partners.
30. Corporations.
31. Joint-stock companies.

§ 26. **Joint owners.**—Ownership in severalty requires no discussion, the expression itself being plainly significant, and fully characteristic. Joint ownership is more complicated in its nature. It exists where two or more are joined in the ownership of the same property by four unities, namely, title, time, interest, and possession. Unity of title signifies that the title of all the joint owners accrued under one and the same instrument, or was created by the same act on the part of the vendor or donor. Unity of time requires that the interest of each should have vested at the same moment. Unity of interest implies that the interest of each in the property is the same in quantity, and for the same duration. Unity of possession means that each of the owners has an undivided possession of each entire part, and also of the whole. In ancient technical expression, each is possessed "*per my et per tout.*" But as to unity of time, the case of joint ownership created by will is an exception.

To the relation of joint ownership, thus created, certain important rules appertain, which must not be overlooked.

First. The right of survivorship, the *jus accrescendi.* That is, in case of the death of one joint owner, the survivor or survivors will take the entire interest in the property, unaffected by any disposition the deceased joint owner may have made by his will, if there had been no severance of the joint ownership in the lifetime of the parties.

To the right of survivorship, however, an exception has been made in favor of trade and agriculture, in cases of partnership and joint undertaking in these branches of commerce and industry, in which cases the interest of a deceased joint owner vests in his executors or administrators.

The operation of survivorship in diverting the interest of a deceased owner from his next of kin, to whom it naturally belongs, is generally regarded as unreasonable and unjust, and hence is not favored by courts or legislatures. Numerous statutes have been passed providing in effect, that where property is given or sold, granted or devised, to two or more persons without words expressly, or by necessary implication, creating a joint tenancy or ownership, it shall be held to constitute a tenancy or ownership in common, rather than a joint tenancy or ownership. And, in the absence of legislation on the subject, courts generally incline to a construction of instruments that will establish a tenancy or ownership in common, in preference to a joint tenancy or ownership.

But the doctrine of survivorship is well adapted to executors, administrators, trustees, and others acting in a fiduciary capacity, who have the legal title, but no equitable interest in the property; and hence they are generally held and treated as joint owners.

Second. As between themselves, each of the joint owners is entitled to an equal share of the rents, income, and profits, during his life; and, as a logical result of this rule, if one receives more than his share, the others have an action against him to recover the excess.

Third. From the unity of possession, each owner having an undivided possession of each part as well as of the whole, it follows that the possession of one is the possession of all. Hence the rule, that one cannot maintain an action against his co-owner for the possession; but in case of a wrongful conversion of the property by one, the others may maintain an action against him for damages.

Fourth. Joint ownership in personal property may be severed by agreement of the parties, by act of one in disposing of his interest, by a decree of a court of equity, and, as some authorities hold, by levy and sale of the interest of one under an execution; but as to the latter mode of severance there might, in some cases, be serious practical difficulty as each joint owner is entitled to the possession of the whole property. In case of more than two joint owners of the same property, if the interest of one pass to a third party, the latter will become an owner in common, to the extent of such interest, with the remaining joint owners, who will continue joint owners as between themselves.[1]

[1] Williams' Pers. Prop. pp. 302-306; 1 Sch. Pers. Prop. pp. 186-193, 195; 2 Bl. Com. p. 399; 2 Kent Com. p. 351; 4 Id. pp. 363, 364; Davis v. Lottich, 46 N. Y., 393; VanDoren v. Balty, 11 Hun, 239; Anderson v. Schulze, 64 Wis., 460; Gates v. Fraser, 9 Ill. App., 624; Taylor v. Cox, 2 B. Mon (Ky.), 429; Southworth v. Smith, 27 Conn., 355; Terrell v. Martin, 64 Tex., 121; Franklin Sav. Inst. v. People's Sav. Bank, 14 R.

§ 27. **Ownership in common.**—In analogy to a tenancy in common of real estate, ownership of personal property is constituted by one unity, that of possession. Some or all the other unities essential to joint ownership, title, time, and interest, may be wanting; yet, if the several parties in interest have a united possession they are owners in common, or, as the relation is generally expressed, tenants in common. The titles of the respective owners may have come from different sources, and have vested at different times, and their interests may be unequal, still, if united in possession, they will be tenants in common; but, in the absence of this unity, whatever else their relations or interests may be, they will not be owners in common, for unity of possession is absolutely essential to this kind of ownership. The owners are interested, in legal technics, "*per tout, et non per my*," each in contemplation of law, having a separate ownership in the whole of his own share whatever it may be, and not, as in joint tenancy, an undivided interest in each part as well as in the whole. The unity of possession consists in a combination of the respective units of the several owners, the share of each measuring his interest in the common property.

The doctrine of survivorship does not apply to ownership in common, but on the death of one his interest passes to his executors or administrators.[1]

I., 632; Waldman v. Broder, 10 Cal., 378; Buck v. Spofford, 31 Me., 34; Brinley v. Kupper, 6 Pick., 179; Stone v. Aldrich, 43 N. H., 52; Postell v. Skirling, Desaus. (S. C.) Eq., 158.

[1] 1 Sch. Pers. Prop., p. 193, *et seq.;* Williams' Pers. Prop., p. 306; Will. Real Est., pp., 184, 185; Beaumont v. Crane, 14 Mass., 400; Knox v. Campbell, 1 Pa. St., 366; Welch v. Sackett, 12 Wis., 243;

The principal incidents of ownership in common are:

First. The possession of one is the possession of all, and all are equally entitled to possession.[1]

Second. One cannot maintain an action against his co-tenant to recover possession of the common property; but he may have an action of tort against him for its conversion or destruction.[2]

Third. The interest of one is subject to levy and sale by execution for his debts; but if the officer sell the whole property, and not merely the interest of the judgment debtor, he will be liable to an action by the other co-owner for his undivided interest.

Fourth. One owner in common of chattels may recover from another any money properly expended on it beyond his due proportion; but there must have been a previous request to join in making the necessary repairs, unless there exist some agreement or prescription binding either party exclusively to make repairs.[3]

Fifth. Where personal property in common bulk and of the same quality, severable in its nature, is owned by two or more persons in common, each may sever and

Blessing v. House, 3 Gill. & J., 290; Brown v. Graham, 24 Ill., 628; Bernecker v. Miller, 40 Mo., 473.

[1] References last *supra*; Williams v. Watkins, 3 Pet., 51; Strong v. Colter, 13 Minn., 82; Southworth v. Smith, 27 Conn., 355.

[2] Dain v. Cowing, 22 Me., 347; Leonard v. Scarborough, 2 Ga., 73; Weld v. Oliver, 21 Pick., 559; White v. Brooks, 43 N. H., 402; Hyde v. Stone, 9 Cow., 230; Potter v. Neal, 62 How. Pr. R., 158; Agnew v. Johnson, 17 Pa. St., 373; Needham v. Hill, 127 Mass., 133; Davis v. Lottich, 46 N. Y., 393.

[3] Loring v. Bacon, 4 Mass., 575; Carter v. Miller, Id., 559; Converse v. Ferre, 11 Mass., 325; Doane v. Badger, 12 Id., 65; Gardner v. Cleveland, 9 Pick., 334; Peyton v. Smith, Dev. & B. (N. C.), L., 325.

appropriate his share if it can be determined by measurement or weight, without the consent of the others, and without liability to an action for the conversion of the common property.[1]

Sixth. Owners in common of personal property may maintain a suit in equity for partition; and in case a division be impracticable, they may have a decree for the sale of the common property, and a division of the proceeds.[2]

§ **28. Part-owners of ships.**— A ship is a personal chattel; and when owned by two or more parties, they hold a peculiar relation to each other in respect of the joint property, characterized in the law as "part-owners." They are not classed with joint owners, tenants in common, or as partners. Generally, however, they are owners in common of the ship, and partners in the maritime enterprises in which the vessel is engaged.

But they may be, and sometimes are, partners in the ship as well. Partners may own a ship as partnership property; and persons not general partners may, by agreement, become owners as partners of a particular ship. In the absence of these conditions, they are not regarded in law as either partners, or, technically, tenants in common, but part-owners.

[1] Forbes v. Shattuck, 22 Barb., 568; Tripp v. Riley, 15 Id., 333; Cannon v. Lusk, 2 Lans., 211; Stall v Wilbur, 77 N. Y., 158.

[2] Godfrey v. White, 60 Mich., 443; Tripp v. Riley, *supra*, 333, 336; Tinney v. Stebbins, 28 Barb., 290; Wetmore v. Zabriskie, 29 N. J. Eq., 62; Crapster v. Griffith, 2 Bland, 525; Smith v. Smith, 4 Rand., 95; Kerley v. Clay, 4 Bibb., 241; Marshall v. Crow's Adm'r, 29 Ala., 278; Conover v. Earl, 26 Iowa, 167; 3 Pom. Eq., § 1391; Potter Will. Eq., p. 705.

In respect to third parties, the several part-owners of a ship are but one owner; and hence in actions of contract by and against them, all should be joined. But if torts be committed by several, an action for damages may be maintained against a part or all of them, at the pleasure of the injured party.[1]

§ 29. **Partners.**— Chancellor Kent defines partnership thus: "Partnership is a contract of two or more competent persons, to place their money, effects, labor and skill, or some, or all of them, in lawful commerce or business, and to divide the profit, and bear the loss, in certain proportions." In the judgment of the writer no better definition of partnership has been, or need be, formulated. Other definitions by approved authors, differing somewhat in expression, are substantially the same in effect.[2]

The leading characteristics, and ordinary features, of a partnership are, a community of interest for business purposes in the stock and profit of the firm, and a sharing of profit and loss. While community of interest in the stock or profit is essential to a partnership, community in the property does not, in itself, constitute a partnership; for such a community exists in other relations,

[1] Pars. Part. pp., 549–577; 3 Kent Com., p. 152, *et seq.*; 1 Sch. Pers. Prop., p. 250, *et seq.*; 2 Coll. on Part., pp. 1169–1197; Abb. Ship. (Ed. 1854), pp. 1, *et seq.*, and 127, *et seq.*; Bishop Non-Con. L., §§ 927, 928: Mumford v. Nicoll, 20 Johns., 611; Merrill v. Bartlett, 6 Pick., 46; Holderness v. Shackels, 8 B. & C., 612; Rex v Collector, 2 M. & S., 223; Bulkley v. Barker, 6 Ex., 164; Robertson v. Smith, 18 Johns., 459; Bower v. Stoddard, 10 Met., 375.

[2] 3 Kent Com., p. 24; Pars. Part., p. 6; Coll. on Part. (Wood's Ed.), § 2; 1 Sch. Pers. Prop., p. 205.

as, for example, in joint and common ownership. And there may be a sharing in the profits of a business as a compensation for services rendered by a person who is not a partner; the ascertained profit of the firm being a fund from which such compensation is derived, and his share the measure of the same.

There are other qualifications and rules touching the creation and test of a partnership, but their discussion in this connection is forbidden by the limitations of the plan and scope of the work in hand; the purpose here being to briefly explain the ownership of personal property by partners.[1]

Partners are joint tenants or owners of their stock in trade and effects, but without the right of survivorship; and on a dissolution of the partnership they become tenants in common of the partnership property.

The death of one partner is, *ipso facto*, a dissolution of the partnership; and thereupon his interest in the concern passes to his personal representatives, who become tenants or owners in common with the survivors. It should be added, however, that on the death of one, the survivors have the exclusive right to the possession of the partnership property, and the management of the business, for the purpose of closing up the same, paying the firm debts, and adjusting the equities between themselves and the deceased partner. The survivors become

[1] Pars. Part, pp. 43-45, 67; Coll. on Part. (Wood's Ed.), § 2, and notes; 1 Sch. Pers. Prop., p. 210; Mason v. Hackett, 4 Nev., 420; Atherton v. Tilton. 44 N. H., 452; Buckle v. Eckhart, 3 N. Y., 132; Leggett v. Hyde, 58 Id., 272; Hanna v. Flint, 14 Cal., 73; Parker v. Fergus, 43 Ill., 437.

the trustees of the property, and in its administration are subject to the rules applicable to that class of fiduciaries. The interest of the deceased partner will be the residue of his share after payment of partnership debts, and adjustment of the equities.[1]

Real estate, bought with partnership funds, and used for partnership purposes, is treated in equity as personal property, and is subject to the same rules as other personal assets of the firm. But, after paying partnership debts and adjusting the equities between the partners, what becomes of the residue, if any? Does it retain the impress of personalty, and pass to executors and administrators for the benefit of the next of kin, or does it resume its original and intrinsic character as real estate, and descend to heirs? The authorities disclose a disagreement between the English and American doctrine on this point; the former holding that when once converted into personalty for partnership purposes, it so remains and passes to personal representatives for the benefit of the next of kin; while, by the weight of authority, in this country, it resumes its true character of real estate, and descends to heirs.[2]

Each partner is the agent of all, and has full authority to bind the others by his acts and contracts relating to the business of the firm. He may sell, assign, and

[1] Pars. Part., pp. 438–447; 1 Sch. Pers. Prop., p. 225; 3 Kent Com., p. 37; Coll. on Part. (Wood's Ed.), §§ 623, 624.

[2] Pars. Part., pp. 369–372; Essex v. Essex, 20 Beav., 442; Derby v. Derby, 3 Drew., 495; Ripley v. Waterworth, 7 Ves., 425; Bonner v. Campbell, 48 Pa. St., 286; Brewer v. Browne, 68 Ala., 210; Shanks v. Klein, 104 U. S., 18; Rice v. Barnard, 20 Vt., 479; Buchan v. Sumner, 2 Barb. Ch., 165.

transfer partnership property in the regular business of the partnership, and for the payment of the firm debts. But in regard to the authority of one partner to make a general assignment of all the partnership property for the benefit of creditors, without the knowledge or consent of his co-partners, there is some contrariety of judicial opinion; the weight, however, seems to be against such authority, especially where preferences are made.[1]

The interest of each partner in the tangible partnership property is liable to sale by execution for payment of his individual debts; and the purchaser on such sale becomes a tenant or owner in common with the other partners. But partnership property must first be applied to the payment of the partnership debts, and the adjustment of partnership equities; and, hence, a purchaser on a sale at the instance of an individual creditor, will take only the interest of the judgment debtor remaining after the payment of such debts, and an adjustment of equities between the partners.[2]

[1] Pars. Part., pp. 95, 103, 163–169, 170 *et seq.*; Coll. on Part. (Wood's Ed.), §§ 641–644; Story Agen., § 37; Bouv. L. Dict., "partners," sub. 9, *et seq.*; Pettee v. Orser, 18 How. Pr. R , 442; Fisher v. Murray, 1 E. D. Sm., 341; Wells v. March, 30 N. Y., 344; Osborne v. Barge, 35 Fed. Rep. 92; Coleman v. Darling, 66 Wis., 155.

[2] Pars. Part. pp. 351–361, 481–484; 1 Coll. on Part. (Wood's Ed.), p. 187, n. 3; Wright v. Ward, 65 Cal., 523; Daniel v. Owen, 70 Ala., 297; Randall v. Johnson, 13 R. I., 338; Read v. Lanahan, 47 N. Y. Super. Ct. Rep., 275; Hutchinson v. Dubois, 45 Mich. 143; Hershfield v. Claflin, 25 Kan., 166; Atkins v. Saxton, 77 N. Y., 195; Strauss v. Frederick, 19 N. C., 121; Smith v. Jones, 18 Neb., 481; Davis v. Howell, 33 N. J. Eq., 72.

§ **30. Corporations.**— A corporation is an artificial person, created by law, and endowed by its creator with certain attributes, rights, and privileges, common to a natural person. It has, however, some franchises which do not belong to individuals generally of common right, and is subject to some limitations from which natural persons are free. In contemplation of law, the artificial body thus created is an entity distinct from the individuals that compose it; and corporations aggregate are characterized as *immortal* by *Chief J. Marshall*, in the famous Dartmouth College case, meaning thereby that they have the property of succession, by which the body remains the same under all changes of its membership.[1]

Corporations are created by the sovereign power of the state which, in this country, is exercised through the legislature. They may rest on prescription; but in such case long user presupposes an original grant from which their existence was derived.[2]

The United States Congress, as well as the State legislatures, has power to create corporations, public or private, "whenever these become an appropriate means of exercising any of the constitutional powers of the general government, or of facilitating its lawful operations in the States or Territories."[3]

[1] 1 Potter Corp., § 6; 1 Dill. Mun. Corp., § 9; 2 Black. Com., p. 468, *et seq.*; Boone Corp., § 1; Dartmouth Coll. v. Woodward, 4 Wheat, 633; People v. Assessors, etc., 1 Hill, 616, 620; Providence Bank v. Billings, 4 Pet., 562; Brunswick v. Dunning, 7 Mass., 445, 447.

[2] 1 Potter Corp., § 6; 1 Dill. Mun. Corp., §§ 15, 17; 2 Kent Com, p. 276; McCulloch v. Maryland, 4 Wheat., 316, 424; Franklin Bridge Co. v. Wood, 14 Ga., 80; Stone v. Flagg, 72 Ill., 397; Sherwood v. Am Bible Soc., 1 Keyes, 561.

[3] 1 Dill. Mun. Corp., § 18; 1 Potter Corp., § 6; Osborne v. Bank of

Corporations are classified thus: Public, and private; aggregate and sole; ecclesiastical or religious, and lay; and the latter are subdivided into eleemosynary, and civil. But the plan and scope of this work do not require more than a statement of the classification; and most of the doctrines presented under this section apply especially, though not exclusively, to private corporations aggregate, as illustrating the method of holding or owning personal property, the point now under discussion.[1]

It is quite apparent, from the nature and organization of corporations, that they must act through natural persons as agents; and these are primarily and principally the officers of the corporate body. But, corporations generally have the same power as natural persons of appointing sub-agents, when the legitimate business of the body makes it necessary or proper. The officers are, in a sense, superior to their principal in so far as the individual corporators constitute the body. They are charged by law with certain duties, and clothed with certain authority; and in the discharge of these duties, or the exercise of this authority, the corporators cannot rightfully interfere; and courts of equity will not exercise their jurisdiction to direct or control officers in regard to their duties, except in clear cases of fraud or

U. S, 9 Wheat., 738; Thompson v. Pacific R. R. Co., 9 Wall., 519; Pacific R. R. Co. v. Lincoln Co., 1 Dill. C. C. R., 314.

[1] 1 Potter Corp., §§ 15–20; 1 Dill. Mun. Corp., § 34; Dartmouth Coll. v. Woodward, 4 Wheat., 518; People v. Assessors, etc., 1 Hill, 616; Robertson v. Bullions, 11 N. Y., 243; Silsby v. Barlow, 16 Gray, 329; Boone Corp., §§ 6–12.

excess of authority, where there is no adequate remedy at law.[1]

The early common law doctrine that a corporation aggregate has no power of contract except by specialty, is so changed that such a corporation, when acting within the limits of its chartered powers, and the range of the purposes of its organization, may make binding parol contracts. In case of specialties the corporate seal is still essential to a binding contract, but in all other respects the power of a corporation to perform all legitimate acts, and make all necessary and proper contracts by parol, through its authorized agents, is substantially the same as that of a natural person. And, as in case of a natural person, promises may be implied from the acts of a corporation, or of its agents.[2]

By the common law, corporations have the capacity of taking, holding, possessing, aliening, and transmitting in succession, real and personal property to the same extent as natural persons, so far as necessary for the purposes of their creation. But this capacity may be,

[1] 1 Potter Corp., § 126–133; Ang. & Ames Corp., § 312; Pom. Eq., § 1090; Boone Corp., § 127–132; Planters' Bank v. Andrews, 8 Port., 404; N. H. Sav. Bank v. Downing, 6 N H., 187; Church v. Sherman, 36 Wis., 404; Belmont v. Erie R'way Co., 52 Barb., 637.

[2] 1 Potter Corp., § 36, 37; 2 Kent Com., pp. 289–291; Ang. & Ames Corp., § 228, *et seq.*; Bank of Columbia v. Patterson, 7 Cranch, 299; Fleckner v. U. S. Bank, 8 Wheat., 338; Burrill v. Nahant Bank, 2 Met., 163; Strauss v. Eagle Ins. Co., 5 Ohio St., 59; Partridge v. Badger, 25 Barb., 146; Barry v. Merch. Exch. Co., 1 Sandf., Ch. 280; Merchants' Bank v. Bank of Columbia, 5 Wheat., 326; Bank of U. S. v. Dandridge, 12 Wheat., 68; Sheldon v. Fairfax, 21 Vt., 102; Palmer v. Medina Ins. Co., 20 Ohio, 537.

and generally is, limited by their charter, or by general statutory law, especially in respect to real estate.[1]

The individual corporators have not the same ownership or interest in the corporate property, as have tenants or owners in common, joint owners, or partners, in the common property of their respective associations. In other words, they are not owners in common, joint owners, or partners; but the title is in the artificial body which, in contemplation of law as we have seen, is distinct from the members of the corporation. The capital of private corporations aggregate is divided into shares, called *stock*. These shares give to holders an interest in the capital to the extent of their value, and entitle them to a corresponding and proportionate part of the profits of the business. The term *stock*, in its full legal import, embraces the whole interest of the shareholders in the corporation, and all their rights growing out of the relation. It includes the right to share in all dividends, and surplus profits issuing from the use of the capital stock, and also their proportionate share of the capital and property of the corporation on its dissolution, after payment of the debts.

But a share-holder has no legal title to the property or profits until a division is made, or a dividend is actually declared. When declared it is, in contemplation of law, severed from the common fund, and becomes the individual property of the stockholders, which they are

[1] Ang. v. Ames Corp., §§ 110, 111; 2 Kent Com , p. 278; 1 Potter Corp., § 61; Boone Corp., § 40; Dutch Church v. Mott, 7 Paige, 83; Raymond v. Commissioners, etc., 5 Ohio, 205; McCartee v. Orph. Asy. Soc., 9 Cow., 437; Ketchum v. Buffalo, 14 N. Y., 356; Robie v. Sedgwick, 35 Barb., 319; *Infra*, Ch. XIII.

entitled to receive, and for which, on demand and refusal, they may severally maintain an action of assumpsit against the corporation. A dividend declared is thereafter held as a trust fund by the corporation, and it cannot rightfully be devoted to other objects.

The owner of stock may assign or transfer it at pleasure, and give to the assignee the same title and interest held and owned by himself, including dividends thereafter declared, whether earned before or after the transfer; and the assignee will be subject to the obligations and disabilities of the assignor among which is the liability for installments thereafter called for. But a share-holder cannot so dispose of his interest as to separate it from the body of stock held in common with other stockholders.

At common law, stock cannot be taken in execution and sold for the debts of the owner; but it may be reached for the benefit of creditors by means of equity proceedings.[1]

§ 31. **Joint-stock companies.**— These associations occupy a middle ground between corporations and partnerships, having features peculiar to each. Like corpor-

[1] 1 Potter Corp., §§ 256–262; Pom. Eq. Jur., § 1090; Boone Corp. §§ 106, 122–125; 1 Sch. Pers. Prop., p. 642; Ang. & Ames Corp., §§ 588–589; Hyatt *et al.* v. Allen, 56 N. Y., 196; Brightwell v. Mallory, 10 Yerg., 196; State v. Franklin Bank, 10 Ohio, 90, 97; Duvergier v. Fellows, 5 Bing., 248; Quiner v. Marblehead Ins. Co., 10 Mass., 476; Moore v. Bank of Commerce, 52 Mo., 377; Bayard v. Farmers, etc., Bank, 52 Pa. St., 232; Sabine v. Bank of Woodstock, 21 Vt., 353; Howe v. Starkweather, 17 Mass., 240; Denton v. Livingston, 9 Johns., 96; Granger v. Bassett, 98 Mass, 462; LeRoy v. Globe Ins. Co., 2 Edw. Ch., 657.

ations they have a common name, usually descriptive of their business, and which does not, as in partnerships, consist of the names of the members. They have also, like corporations, their officers, by-laws, and rules of procedure, and by these rules and by-laws the election of officers, transaction of business, and the transfer of shares, is regulated. The transfer of shares or the interest of a member in the property of the company, is made by certificate or scrip, issued and recorded in substantially the same manner and form as in the case of corporations. But they are more assimilated to partnerships than to corporations, both in respect of organic character, and of their internal and external relations; and they are generally subject to the law of partnerships. They have been characterized as partnerships in which the capital is divided, or agreed to be divided, into shares so as to be transferable without the express consent of all the co-partners, not an inapt characterization.[1]

In England, and sometimes also in this country, joint-stock companies are regulated by statute. When not incorporated, or organized under and regulated by statute, general or special, they are in essence partnerships by whatever name christened, albeit partnerships of a peculiar character.[2]

[1] Pars. Part., pp. 541–546; Potter Corp., §§ 621–623; 1 Sch. Pers. Prop., pp. 247–250; 3 Kent Com., pp. 27, 28; Bouv. L. Dict., "joint-stock companies"

[2] Citations *supra*; and Williams v. The Bank of Mich., 7 Wend., 542; Tenney v. The N. E. Protective Union, 37 Vt., 64; The King v. Dodd, 9 East., 516; Holmes v. Higgins, 1 B. & C., 74; Hess v. Werts, 4 Serg. & R., 356; Gorman v. Russell, 18 Cal., 688; Robbins v. Butler, 24 Ill., 387.

Between corporations and joint-stock companies there is a marked difference in this: In the former the rights, duties, and responsibilities of the body and of its members, are prescribed and governed strictly by the provisions of their respective charters, and the general corporation laws applicable to such corporations; and stockholders are not personally or individually liable for the acts or contracts of the officers or members of the body, unless expressly so made by the charter, or the general statutory law applicable to such bodies. Whereas, in all unincorporated companies, where the common law rule is not changed by statute, the stockholders are personally responsible in their individual capacities for all acts and contracts of the company, and of its authorized agents, within the scope of the business of the association, the same as in partnerships proper.[1]

There is an important difference between a partnership and a joint-stock company in the effect produced by the death of a member, or the transfer of all his interest in the association. In the former it works a dissolution of the company; but not necessarily, or generally, so in the latter.[2]

[1] Story Part., pp. 107–109; Pars. Part., pp. 544, 545; 2 Coll. Part. (Wood's Ed.), § 832; Babb v. Read, 5 Rawle, 157; Tappan v. Bailey, 4 Md., 535; Cox v. Badfish, 35 Me., 302; Skinner v. Dayton, 19 Johns., 513; Penn. Ins. Co. v. Murphy, 5 Minn., 36; Henry v. Jackson, 37 Vt., 431; and Gorman v. Russell, 18 Cal., 688; Williams v. The Bank of Mich., Tenney v. The N. E. Protective Union, and Robbins v. Butler, cited *supra*.

[2] Pars. Part., pp. 545, 547; Putnam v. Wise, 1 Hill, 234; Murray v. Bogart, 14 Johns., 318; Marquand v. N. Y. Manuf. Co., 17 Id., 535; Woodwell v. Keeler, 8 Watts & S., 63; Kingman v. Spurr, 7 Pick., 235; Mason v. Connell, 1 Whart., 381; James v. Woodruff, 2 Denio, 574.

From what has now been said in regard to joint-stock companies, it will be correctly inferred that the common law rules applicable thereto may be changed by statute, or modified in their application by articles of agreement. And it should be noted that, when associations intended as joint-stock companies, fail to become such on account of some informality in their organization, they generally constitute partnerships, and are subject to the laws applicable thereto.[1]

In some cases the legal title to all the property of the company is vested in trustees, who hold it in trust for the benefit of the share-holders, who have the equitable interest; but this does not affect the rules herein presented as governing such companies.

It may be added that generally, as in the case of corporations, the business of joint-stock companies is managed by their officers and other agents employed for the purpose; and to the relation of principal and agent, thus created, the general law of agency applies.[2]

Joint-stock companies, like corporations aggregate and partnerships, may take, hold, and alien, both real, and personal property, subject to statutory limitations and regulations.

[1] Pars. Part., p. 548; Whipple v. Parker, 29 Mich., 370; Manning v. Gasharie, 27 Ind., 399; National Bank v. Landon, 45 N. Y., 410.

[2] Pars. Part., p. 542; 2 Coll. Part. (Wood's Ed.), § 845.

CHAPTER VI.

MODES OF ACQUIRING TITLE TO PERSONAL PROPERTY.

SECTION 32. Modes of acquiring title classified and analyzed.

§ 32. Modes of acquiring title classified and analyzed.— By a common and convenient analysis and grouping, there are three general ways in which title to personal property may be acquired, viz:

First. By original acquisition;

Second. By transfer by act of law; and

Third. By transfer by act of the parties.[1]

These general ways are severally sub-divided into particular methods, each embracing its specific ways of acquiring title to-wit:

First. Original acquisition; sub-divided into —

1. *Occupancy;* embracing (a) goods taken by capture in war; (b) goods casually lost by the owner, and unreclaimed, or designedly abandoned; (c) waifs; and (d) reclaiming animals *ferœ naturæ.*
2. *Accession;* embracing (a) fruits of the earth, produced naturally, or by human industry; (b) the increase of animals; (c) materials of one person united to the materials of another; and (d) confusion of goods.

[1] 2 Black. Com., pp. 2 *et seq.*, 401; 2 Kent. Com. p. 356; 2 Sch Pers. Prop., p. 4.

3. *Products of intellectual labor;* embracing (a) patents for inventions and designs; (b) copyright; (c) letters addressed from one correspondent to another; and (d) lectures.

4. *Trade-marks.*

Second. Transfer by act of law; sub-divided into (1) forfeiture; (2) succession; (3) judgment; (4) intestacy; (5) insolvency; and (6) marriage.

Third. Transfer by act of the parties; sub-divided into (1) gifts *inter vivos;* (2) gifts *causa mortis;* (3) title by will or testament; (4) sales; (5) indorsements; (6) assignments; and (7) bailments.

In the chapters following, these general and particular methods of acquiring title to personal property will be discussed briefly in the order above named, including the specific modes under each sub-division.

In considering the methods of *acquiring* title, the ways of *losing* it will necessarily appear; and hence direct treatment of the latter would be superfluous.

CHAPTER VII.

TITLE BY ORIGINAL ACQUISITION.

SECTION 33. Occupancy; the first known method of acquiring title.
34. Goods taken by capture in war.
35. Goods lost or abandoned.
36. Waifs.
37. Reclamation of animals *ferœ naturæ*.
38. Title by accession; defined.
39. Fruits of the earth.
40. Increase of animals.
41. Materials of one person united to those of another.
42. Products of intellectual labor, discussed.
43–46. Patents for inventions and designs.
47–50. Copyright.
51. Letters from one correspondent to another.
52. Lectures.
53–60. Trade-marks.

§ 33. Occupancy.—Under original acquisition, the first general mode of acquiring title to personal property, occupancy is primal. This includes the original or beginning of title, and also the recommencement when the chain has been broken, and the connecting link is lost. Occupancy is generally regarded as the first known method of acquiring exclusive title to property.

The origin and foundation of the right of private property has given rise to much learned discussion, and some contrariety of opinion among publicists. Without attempting in this connection to present the different views and lines of argument on the question, it will be assumed in accord with the author's belief, that the right

of property is of Divine origin, derived by title deed from the original Creator of all things, and attested by universal intuition. Among all nations and peoples, from the rudest and most barbarous to the most highly civilized and polished, there has always existed a natural sense of property, the recognition of a natural law of property. There has always and everywhere existed an intuitive conviction of a natural right to gratify the universal desire of mankind to acquire and possess external things, and to exercise exclusive dominion over them. And it is written by the pen of inspiration that our infinitely wise and beneficent Creator gave to men "dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth."[1]

But, assuming that by force of natural law and Divine ordinance, the right of property in external things in the aggregate belongs to the human race collectively, the question still remains,— How can an individual acquire exclusive title to things in the segregate? To this question no writer has given a more satisfactory answer than Chancellor Kent, who says: "The exclusive right of using and transferring property, follows as a natural consequence, from the perception and admission of the right itself;" that is, the perception and admission of the truth that the acquisition and enjoyment of property is a law of man's nature.

It is claimed by some writers, that in the infancy of society there was a community of goods. There may have been a community in the substance of things, in the

[1] Genesis, ch. I, v 26.

sense that property in the aggregate belongs to mankind as a whole; but community cannot reasonably be predicated of the use of things while in the possession of individuals, it being impracticable, and in conflict with the natural right of private property. Referring to the germinant period of legal ideas in the early stages of society, we find that the usufruct constituted the only benefit and value of property; and hence the theory of a community in the substance of things, based upon the doctrine that to mankind in general belong the subjects of property as a whole, is not incompatible with the right of individuals to the exclusive use of particular things.

But, whatever theory we adopt the fact is, that he who first appropriated a thing to his own use acquired a property therein, and an exclusive right thereto, by common consent; which property and right continued so long as the exclusive use or occupancy continued, and no longer. The *right* of possession was limited to the *act* of possession; when the latter ceased the former was lost; whereupon any other individual might appropriate the thing to his own use, with the like right and limitation; and so on in succession indefinitely. This rule is well adapted to the intelligence and wants of man in a rude and undeveloped condition of the race. His nature is largely sensuous; he is unable to grasp abstract principles, and his perception of intelligent ideas is confused and feeble. Hence the truth of the saying that "property without possession, was too abstract an idea for savage life." It may be said also with equal truth, that the mere use or occupancy of goods and chattels was

ample for the few and simple wants of man in the primitive condition of society.

But the world moved; population, and the wants of man increased; social relations became more complex; individual interests clashed; and the time came when it was seen that personal rights, and the peace and welfare of society, required practical recognition of exclusive private property in the *substance*, as well as in the *use*, of things.

This doctrine established, another step in advance, the right of transferring both the title and the possession of property, was natural and logical. Thus, advancing step by step as the exigencies of society demanded, and reason dictated, grew up that just and enlightened system of principles and rules which constitute the law of personal property. Briefly stated, the order of development was, first, the right of possession or occupancy, the usufruct; second, the right to the substance of the thing, which carries with it the *prima facie* right of possession; and, third, the right to transfer the thing itself, including both the substance and the possession.

With this brief historical sketch of title to personal property, we are prepared to discuss the different ways of acquiring title by *occupancy*, one of the subdivisions of title by original acquisition.[1]

§ 34. Goods taken by capture in war.—This constitutes one mode of acquiring title by occupancy. At the

[1] 2 Black. Com., pp. 2, *et seq.*, 258, 401; 2 Kent Com., pp. 317, *et seq.*, 356; 1 Sch. Pers. Prop., pp. 1–24; 2 Id., pp. 5–8; Bouv. L. Dict., "acquisition;" Holy Bible, Gen. I., 28; And. L. Dict., "occupancy."

common law, the title to goods taken by capture in war vested in the captor, whether seized by national agency or by voluntary individual action; but now, by the general consensus of civilized nations, the title in either case vests primarily in the sovereign; and captured goods belong to the individual captors only to the extent, and under regulations, prescribed by positive law.

The right of seizure is now generally regarded as a maritime right; and the purpose of its exercise is the destruction of the enemy's commerce and navigation, thus weakening his naval power. In contemplation of law, a declaration of war duly made by the sovereign or government of a state, is a declaration of war by all its subjects individually and collectively, and is binding upon all. As a corollary of this doctrine, not only do the belligerent nations become enemies, but by implication all the subjects of each become enemies to all the subjects of the other. From this doctrine, in connection with the rule of public law that the property of an enemy, or of his subjects, is liable to capture by the adverse nation, it would seem to follow logically that the seizure may be made voluntarily by a private citizen, as well as by direct sovereign or governmental authority; and such is the law. As a consequence, title to the captured property being lost by the owner, would, at common law, vest directly in the captors, as the title must be in some body, natural or corporate; and such is strictly and logically the rule as between the belligerent parties. But the prevailing doctrine of public law on the subject now is, that when a private citizen makes the seizure he is supposed to act in behalf of the government, whose

prerogative it is to adopt or repudiate the seizure at pleasure. Adoption by the government being equivalent to a precedent authority or command, the seizure becomes the act of the government. If the government repudiates, or fails to adopt the capture, the individual captors will take no title to the property seized.

In all maritime captures, whether by sovereign authority or by voluntary private action, the captured property, with proofs of legality of seizure, must be submitted to a prize court, whose adjudication determines the legality of the capture, and the transfer of title. If the seizure be sustained, the proceeds of the captured property is generally distributed among the captors as a "reward for bravery, and a stimulus to exertion."

Regarding the property of alien enemies found within the limits of a state on the commencement of hostilities, there has been considerable discussion; but the doctrine seems to be well established that the state has the right to capture and confiscate such property. But the exercise of this harsh and practically unjust measure rests in the discretion of the government; and the right itself has been to a large extent practically nullified by the laws and ordinances of many governments, and by international treaties. By these provisions in the interest of justice and progressive civilization, property of alien enemies brought into the country in good faith and with the sanction of the government, before the outbreak of hostilities, is protected from confiscation. In the United States the existence of this right is made to depend upon act of Congress.

The right of seizure and confiscation of private prop-

erty is not the same upon the land as in naval warfare. It is true that, in cases of military necessity, the capture or destruction of the enemy's property on land is sanctioned by the law of nations; but the doctrine seems to be established that no private right of property arises from capture by land forces. And, unnecessary depredations upon private property in the prosecution of hostilities upon land are restricted and discouraged by wise and humane commanders.

Before closing this section, it may be well to note that one consequence of a declaration of war is, to interdict all commercial intercourse between the subjects of the belligerent powers, and to render contracts between them void, except such as are made under license of the government, express or implied.[1]

§ 35. Goods lost, or abandoned.— At common law, to goods lost by the owner and unreclaimed, or designedly abandoned by him, the finder acquires title by occupancy. But the former owner must have completely relinquished the chattel before a perfect title will accrue to the finder.[2]

[1] 1 Kent Com., pp. 55-59, 97, 101, 108-112; 1 Cooley's Black., p 259, and n.; 1 Abb. U. S. Pr., pp. 545–554; Abb. Ship. (7 Am. Ed.), pp 29–34, and notes; Bouv. L. Dict., "Capture;" Conkl. Prac., p. 461; Bishop Con. (Enl. Ed.), § 1000; Brown v. United States, 8 Cranch, 110; The Cargo of Ship Emulous, 1 Gall., 563; The Angelica, Blatchf. Pr. Cas., 566; The Merimac, Id., 584; The Caledonia, 4 Wheat., 100; Carrington v. Merchant's Ins. Co., 8 Pet., 495; Taylor *et al.* v. The United States, 3 How., 197; United States v. The Active, 2 Car. Law Repos., 192; United States v. Two hundred, etc., bales of Cotton, Law Rep. N. S., 451; And. L. Dict., "capture."

[2] 2 Kent Com., pp. 356, 357; 2 Sch. Pers. Prop., p. 14, *et seq.*; Williams Pers. Prop., p. 24; Bridges v. Hawkesworth, 9 Eng. L. & Eq..

The title to lost goods remains in the former owner until he abandons the intention of reclaiming them; and such intention may be presumed by lapse of time, or shown by some affirmative act on his part; the fact in all cases being determined by the circumstances. Until such abandonment he will have the right to take possession of the lost chattel whenever and wherever he may find it, even though it may have passed into the hands of a *bona fide* purchaser. But, in the meantime, the finder or purchaser will have a special property in the chattel, which will enable him to maintain trespass or trover against a stranger for an unauthorized interference with, or conversion of, the property.[1]

In case the finder knows the owner, or if circumstances come to his knowledge indicating the true ownership, and he conceals the finding and converts the property to his own use, he may be held guilty of larceny. But some cases hold that, to constitute larceny the finder must have had the *animus furandi* when the property was found and taken by him, and that no subsequent act or intent can render him guilty of larceny.[2]

424; Livermore v. White, 74 Me., 456; S. C. Am. Rep., 600; Hamaker v. Blanchard, 90 Pa. St., 377; S. C. 35 Am. Rep., 664; Brown v. Sullivan, 62 Ind., 281; Tancil v. Seaton, 28 Gratt. (Va.), 601; Durfee v. Jones, 11 R. I., 586; New York & H. R. Co. v. Haws, 56 N. Y., 175.

[1] 2 Kent Com., p. 356; 2 Sch. Pers. Prop., p. 14, *et seq.*; Williams Pers. Prop., pp. 23–26; Armory v. Delamirie, Str. Rep., 556; Brandon v. Huntsville Bank, 1 Stewart (Ala.), 320; Agar v. Lisle, Hob., 187; Knapp v. Winchester, 11 Vt., 351; Cook v. Patterson, 35 Ala., 102; Jeffries v. Great Western R. R. Co., 34 Eng. L. & Eq., 122; Sylvester v. Girard, 4 Rawle, 185.

[2] 2 Kent. Com., p. 357; Bishop Crim. L., §§ 880–883; 2 Sch. Pers. Prop., pp. 24, 25; Rex v. Mucklow, 1 Ryan & M., 160; Butler's Case, 3 Inst., 107; People v. Anderson, 14 Johns., 294; People v. Cogdell, 1

The acquisition of title by finding is limited to chattels on the earth's surface, and does not apply to *treasure trove*, goods hidden in the earth. It is held with reason that, the fact of burying or concealing the property by the owner, indicates his purpose of retaining, and negatives the intention of abandoning, the same.[1]

Stolen corporeal property may be recovered by the owner, not only from the thief, but from any person in whose hands it may be found, even from a *bona fide* purchaser. The thief acquires no title, and has none to convey.[2]

But commercial policy has established a different rule in respect to money, bank notes, and current negotiable securities, to which a *bona fide* holder acquires and will retain title against a former owner, in whatever way he may have lost the chattel, even though it were stolen from him.[3]

And, for like reasons, the *bona fide* holder of negotiable commercial paper indorsed in blank, or payable or

Hill, 94; The State v. Weston, 9 Conn., 527; People v. McGarren, 17 Wend., 460; McAvoy v. Medina, 11 Allen, 548; Bridges v. Hawksworth, 7 Eng. L. and Eq., 424; And. L. Dict., "abandoned."

[1] 2 Kent Com., p. 358; and cases cited *supra*.

[2] 3 Pars. Cont. (7 Ed.), p. 520; 2 Sch. Pers. Prop., p. 22; Bearce v. Banker, 115 Mass., 129; Moody v. Blake, 117 Mass., 23, 26; Prime v. Cobb, 63 Me., 200; Bryant v. Witcher, 52 N. H., 158, 161; Klein v. Seibold, 89 Ill., 540; Nixon v. Brown, 57 N. H , 34; Coombs v. Gorden, 59 Me., 111; Barker v. Dinsmore, 72 Pa. St., 427; Mechanics, etc., Bank v. Farmers, etc., Bank, 60 N. Y., 40; Hill v. Snell, 104 Mass., 173; Pease v. Smith, 61 N. Y., 477.

[3] 2 Sch. Pers. Prop., p. 23; Ventress v Smith, 10 Pet., 161; Hoffman v. Carow, 22 Wend., 285: Goodman v. Simonds, 20 How., 343; Backhouse v. Harrison, 5 B. & Ad.. 1098; Lowndes v. Anderson, 13 East., 130; Raphael v. The Bank of England, 17 C. B. 161.

indorsed to bearer, and acquired by him before its maturity, for a valuable consideration, and without notice of the loss, acquires a good title, and can maintain it against the former owner. Nothing short of *mala fides* will defeat the holder's title.[1]

As it is the duty of the finder to take proper care of the goods, and to make all reasonable efforts to ascertain the true owner, it is but simple justice that he should receive suitable compensation for his trouble and expense in that regard; and this the law awards him. But it is held that the finder has no lien on the property for his trouble and expense, except as to a reward offered for its recovery.[2]

The common law doctrine on this subject has been more or less modified in some of our States, and elsewhere, by legislation; making the state instead of the finder the paramount owner, subject to the rights of the true owner, and also in some other particulars. Presumably every student and practitioner will examine the modifying statutes for himself, whenever it may be requisite for his purposes.

§ **36. Waifs.**— Stolen goods waived or thrown away by a thief in his flight, through fear of apprehension, are called waifs. If the goods thus waived be seized by a public officer, or by a private person, before the owner

[1] 2 Dan. Neg. Inst., § 1469; Story on Notes, § 382; Story, Bills, § 416; Chitty, Bills (13 Am. Ed.), pp. 254, 255; Murray v. Lardner, 2 Wall., 710; Garvin v. Wiswell, 83 Ill., 216.

[2] 2 Kent Com., p 356; 2 Sch. Pers. Prop., pp. 15, 16; Williams Pers. Prop , p. 28, *et seq.*; Nicholson v. Chapman, 2 H. Bl., 254; Wentworth v. Day, 3 Met., 352; Marvin v. Treat, 37 Conn., 96; Wood v. Pierson, 45 Mich., 313.

reclaims them, the latter, at common law, loses his title thereto. This on the assumption that the owner was culpably negligent in pursuing the thief and reclaiming his goods, and therefore should lose his title as a punishment. In England, when waifs are first seized by somebody other than the owner, the title vests in the crown; but if first seized and reclaimed by the owner he does not forfeit his title. When the title does pass to the crown, the owner may regain his goods by following and capturing the thief, or by furnishing evidence sufficient to cause his conviction after capture. If the thief conceals the goods, or does not take them with him in his flight, they are not waifs and the owner may have them again at his pleasure.

The goods of a foreign merchant, though stolen and waived in flight by the thief, are not deemed waifs or *bona waviata;* the reason whereof, suggested by Blackstone, being, "not only for the encouragement of trade, but also because there is no willful default in the foreign merchant's not pursuing the thief; he being generally a stranger" to the laws, usages, and language of England.

In this country, it is generally held that waifs pass to the state in trust for the true owner, who may regain his property by making due proof of his rights.[1]

§ 37. **Reclamation of animals feræ naturæ.**—Another mode of obtaining title to personal property by original acquisition, through occupancy, is by reclaiming animals wild by nature, *feræ naturæ.* Wild animals belong to

[1] Black. Com. (Cooley's Ed.), p. 297, and notes; 2 Id., p. 409; Kent Com., p. 359; 2 Sch. Pers. Prop., p. 9; And. L. Dict., "waifs."

nobody in particular; yet they become the qualified property of any one who subjects them to his possession or power. The qualified property thus acquired continues in the captor while possession or control is maintained, or until the animal becomes so far domesticated that it will not voluntarily leave without the *animus revertendi*. When this point is reached the *qualified*, has ripened into *absolute*, property, the nature of the animal being changed from *ferœ naturœ* to *domitœ naturœ*, wild to tame. Until thus changed, and while in the possession or power of the captor, his qualified property will be fully under the cognizance and protection of law; but if the animal escape and regain its natural freedom, without the *animus revertendi*, the captor's title is wholly lost, and any other person may rightfully take the fugitive, thereby acquiring the same qualified property possessed by the first captor; and so on indefinitely.[1]

Some text writers have suggested a practical difficulty in drawing the dividing line between the two classes of animals, wild and tame; and there has been some controversy among distinguished publicists respecting the origin of the distinction. By some it is claimed that all animals are by nature wild and free; the mild and docile character of those classed as tame being the natural effect of their subjugation and bondage to men; while others insist that wild and savage animals are by nature mild and tame, their wild and ferocious disposition being due to the violent and inhuman treatment of man.

[1] 2 Black. Com. (Cooley's Ed.), pp. 390–395, and notes; Id., p. 404; 2 Kent. Com., pp. 348–350; 1 Sch. Pers. Prop., pp. 77–83; Williams Pers. Prop., pp. 19, 20; And L. Dict., "animal."

These speculations are of little or no practical value; facts and experience far outweigh theories. From a remote age of the world two classes of animals, wild and tame, have been universally recognized; and there ought not to be any serious embarrassment in marking the division line between them. Animals that are generally found living contentedly in and about the dwellings of man, or grazing in his fields, and that minister to his pleasure or profit, such as dogs, horses, sheep, oxen, and other cattle, are classed as tame or domestic by common and unquestioning consent. While animals of a predatory or ferocious character, that run at large in fields and forests, and never visit the abodes or haunts of men except on stealthy and mischievous excursions, or on bold raids in quest of prey, are known and classed as wild without doubt or hesitancy. Belonging to the latter class there are, however, some of an exceptionally mild type that frequently become domesticated, and hence absolute property in their owners; among which are deer, hares, rabbits, doves, and others of like character.[1]

Honey-bees are *feræ naturæ;* but, when reclaimed and hived, they become the subjects of qualified property. But the finding of a bee-tree on the land of another, and marking it, does not give title to the finder. If bees when hived escape, or a swarm departs from the hive, the owner does not lose his property in them so long as he pursues and is able to identify them.[2]

[1] Citations *supra*, and Manning v. Mitcherson, 69 Ga., 447; S. C., 47 Am. Rep., 764; Amory v. Flyn, 10 Johns., 102.

[2] Kent Com., p. 350; 2 Black. Com. (Cooley's Ed.), p. 393; 1 Sch. Pers. Prop., p. 83; Gillet v. Mason, 7 Johns., 16; Furgeson v. Miller, 1 Cow., 243; Idol v. Jones, 2 Dev. (N. C.) L., 162; State v. Murphy, 8 Blackf., 498; Goff v. Kilts, 15 Wend., 550.

While property in wild animals can be acquired only by occupancy, actual or constructive, an actual taking is not always necessary to create title; it is sufficient if the pursuer bring the animal within his power or control.[1]

§ 38. Title to personal property by accession.— Falling under the second subdivision of original acquisition, is title by accession. Chancellor Kent, following the French and Louisiana Codes, defines the right of accession "to be the right to all which one's own property produces, whether that property be movable or immovable, and the right to that which is united to it by accession, either naturally or artificially." This definition is sufficiently accurate and comprehensive for practical purposes; and a better it would be difficult to formulate. It embraces fruits of the earth, the increase of animals, and materials of one person united to the materials of another.

Confusion of goods, though differing somewhat from accession proper, and sometimes treated separately, is near of kin to accession, and may conveniently be discussed in the same connection.[2]

§ 39. Fruits of the earth.— It is a familiar doctrine that the fruits of the earth, whether produced naturally or by human industry, belong generally to the owner of the soil, and this doctrine rests upon the right of accession.

[1] 1 Sch. Pers. Prop., p. 80; 2 Kent Com., pp. 349, 350; Pierson v. Post, 3 Cai. Cas., 175; Buster v. Newkirk, 20 Johns., 75.

[2] 2 Kent Com., pp. 361–365; French Code, Civil, No. 546, 547; Civil Code of La., Art. 490, 491; 2 Black. Com., p. 405; 2 Sch. Pers. Prop., pp. 31–40; Bouv. L. Dict., "accession."

The same rule applies to trees, plants, and seeds, set out or sown on land, whether by the owner or some other person; excepting, however, trees and plants placed temporarily in the soil of another by his consent, with the privilege of removal at pleasure.

Under sanction of this general doctrine, it has been held, that a party in possession of land, claiming adversely, may pass the legal title to the crops raised thereon by him, as against the true owner of the land who is out of possession.[1]

§ **40. Increase of animals.**— Of tame or domestic animals, the offspring belong to the dam or mother, by the law of accession. The maxim *partus sequitur ventrem* applies to the brute creation, both under the English, and the civil, law; but not, generally, to the human species. Under the Roman law, however, and also by the slave code formerly existent in the United States, the maxim was applied to the children of slave mothers; and for the reason, doubtless, that in contemplation of these laws slaves were chattels. The reason of the rule as applied to the brute creation is, according to Puffendorf, that the male is frequently unknown, and that the dam during pregnancy is almost useless to the proprietor, while having to be maintained at his expense; and, therefore, "as her owner is the loser by her pregnancy, he ought to be the gainer by her brood." Blackstone

[1] Citations *supra*; and Johnson v. Hunt, 11 Wend., 135; Fryatt v. Sullivan Co., 7 Hill, 529; Gallup v. Josselyn, 7 Vt., 334; Ricketts v. Dorrell, 55 Ind., 470; Stockwell v. Phelps, 34 N. Y., 363; Martin v. Thompson, 62 Cal, 618; s. c., 45 Am. Rep., 663; Lindsay v. Winona & St. Peter R. R., 29 Minn., 411; s. c., 43 Am. Rep., 228.

mentions an exception to the rule in question in the case of young cygnets, which belong equally to the owner of the cock and hen; and this because the male is well known by his constant association with the hen, and the owner of one does not suffer more than the other during pregnancy and nurture; and hence, as the reason of the rule ceases in this case, the rule itself ceases, the maxim being *cessante ratione cessat et ipse lex.*

The rule in question applies, also, to the hirer of domestic animals for a limited period, he being entitled to their increase during the demise.[1]

§ 41. Materials of one person united to the materials of another.— The general doctrine on this variety of accession commonly found in our text-books is, that where the materials of one person are united to the materials of another, by the labor of the latter, who furnishes the principal materials, the property in the joint product is in the latter by right of accession.

While this statement of the law is correct as far as it goes, a more comprehensive statement of the general doctrine may be formulated thus: Where materials are furnished by one person, or several, and are united by the labor of another, the joint product will, in the absence of any agreement, belong to the contributor of the most important or valuable constituent, whether it be materials or labor. The word "accession" fairly implies a drawing of the less to the greater.

[1] 2 Black. Com., p. 390; 2 Kent Com., pp. 361, 362; 1 Sch. Pers. Prop., 79; Droit Nat. Lib., 4, ch. 7, § 4; Inst. 2, 1, 37; Wood v. Ash, Owen's Rep., 139; Putnam v. Wiley, 8 Johns., 432; Stewart v. Bell, 33 Miss., 154; Concklin v. Havens, 12 Johns., 314.

In many of the reported cases, however, the skill of the artist, or labor of the manufacturer, is not weighed as against the materials, because the latter are delivered to the former to be wrought into a chattel, on a bailment or other contract; and in doubtful cases of fact, which doctrine shall apply and govern, contract or accession, will depend upon the intention of the parties. But, that under the doctrine of accession the value of the skill or labor contributed to the joint product may constitute the principal element, and carry the ownership, there can, on principle, be no reasonable doubt.

This view is in accordance with the Roman law which, in case of a fine painting on canvas, deemed the latter the accessory, and awarded the picture to the artist by right of accession. Mr. Kent suggests that the Roman law on this point was inconsistent, in holding that the same rule did not apply to a poem or history, but gave the joint product to the person furnishing the paper or parchment. But Blackstone's comment upon the rule of the Roman law in question seems to relieve it from inconsistency. After stating the rule involving the supposed inconsistency, he adds, "meaning thereby the mechanical operation of writing, for which it directed the scribe to receive a satisfaction; for in works of genius and invention, as in painting on another man's canvas, the same law gave the canvas to the painter." This explanation vindicates the consistency of the Roman law, and at the same time recognizes the just rule that the minor contributor is not denied compensation for his labor or materials.[1]

[1] Citations *supra*, under § 38; Pulcifer v. Page, 32 Me , 404; Merritt

The rule that the most important or valuable constituent of the combination draws to itself as accessories all the others, finds illustration in the case of building materials furnished by one person, and by him wrought into a house on the land of another. In such case, under the combined operation of personal, converted into real, property, and the right of accession, the materials will belong with the house to the owner of the land, provided the building be of such a character as to make it part of the realty. Generally, however, the builder is entitled to compensation for his materials and labor, either by express or implied contract.

The doctrine is sometimes laid down without qualification, that where the materials of one person are converted by another into a new species of chattel, and the identity of the materials destroyed, the new product belongs to the transformer; as where wine, oil, or bread, is made out of another's grapes, olives, or wheat.[1] But the rule thus broadly stated needs qualification. The true doctrine, the writer thinks, is pronounced by the Court of Appeals of New York, in the case of *Silsbury v. McCoon*. The question is there thoroughly discussed by several of the judges; and the report gives also, the very learned and elaborate argument of that eminent lawyer, the late Nicholas Hill, of counsel for the plaintiffs in error. The reporter's head notes bearing upon this question, are as follows: "If a chattel wrongfully taken retains its

v. Johnson, 7 Johns., 473; Betts v. Lee, 5 Johns., 338; Stevens v. Briggs, 5 Pick., 177; Gregory v. Stryker, 2 Den., 628; Eaton v. Munroe, 52 Me., 63.

[1] 2 Kent. Com., pp. 364, 365; 2 Black. Com., p. 405; Silsbury v. McCoon, 6 Hill, 425.

original form and substance, or may be reduced to its original materials, it belongs to the original owner; and this rule, it seems, holds against an innocent purchaser from the wrong-doer, without regard to the increased value bestowed by him upon the chattel."

"But if the chattel be converted by an *innocent* purchaser or holder into a thing of a *different species*, as where wheat is made into bread, olives into oil, or grapes into wine, the original owner cannot reclaim it."

"There is no such distinction, however, in favor of a *willful* wrong-doer. He can acquire no property in the goods of another by any change wrought in them by his labor or skill, however great the change may be, provided the article was made from the original material. There is no difference between the civil and the common law in this respect."

That a person cannot acquire title by a willful tort, as against the true owner, is not only just in itself, and in harmony with the general doctrines and spirit of the law, but is sanctioned by numerous adjudications.[1]

§ 42. Products of intellectual labor.— These constitute the third division of the first general way of acquiring title to personal property, that of original acquisition; and embrace patents for inventions and designs, copy-

[1] Citations *supra;* Brown v. Sax, 7 Cow., 95; Curtis v. Groat, 6 Johns., 169; Chandler v. Edson, 9 Johns., 362; Betts *et al.* v. Lee, 5 Johns., 348; Babcock v. Gill, 10 Johns., 287; Baker v. Wheeler, 8 Wend., 505, 508; Hyde v. Cookson, 21 Barb., 92; Eaton v. Munroe, 52 Me., 63; Riddle v. Driver, 12 Ala., 590; Strubee v. Cincinnati So. Ry. Trustees, 78 Ky., 481; s. c. 39 Am. Rep., 251; Wetherbee v. Green, 22 Mich., 311.

right, letters addressed from one correspondent to another, lectures and telegrams.

The general doctrine in regard to proprietary rights in the products of intellectual labor is, that every one has a natural right to, and dominion over, his own ideas and the fruits of his brain-work; he may keep them to himself or impart them to others at his option; but when once voluntarily published by him, in the absence of statutory provisions for their protection, they are beyond his control, and become the property of the public, equally available to all. Hence, for the purpose of promoting science, encouraging literature, and stimulating inventions, legislation is invoked, by which the natural rights of authors and inventors are protected, and the public at the same time benefited by their genius.'

§ **43. Patents for inventions and designs.**— The practice of patent law is generally a specialty, confined to a few members of the profession. A thorough knowledge of the subject is essential to the successful practitioner; and such a knowledge can be acquired only by a careful study of the text-books, statutes, and adjudications relating exclusively to the law of patents. It will not, therefore, be attempted in this treatise to do more than give an outline view of the subject, showing the nature, and mode of obtaining, a patent, and the general principles and rules applicable to this species of personal property.

[1] 2 Kent Com., pp. 365, 366; 2 Black. Com., p. 406; 1 Sch. Pers. Prop., p. 654; 2 Id., p. 29; Williams Pers. Prop., p. 235, *et seq.;* Goodeve Pers. Prop., pp., 180, 181; Bell's Princp., § 1349; Phillips Pat., ch. 11; Drone Copyr., p. 1, *et seq.*; Bouv. L. Dict., "patent," "copyright;" Curtis, Pat. (3 Ed.), preliminary obs.

A patent is concisely and accurately defined to be "a grant by the state of the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend, an invention."[1] The grant by government is upon certain conditions; the grant on one side, and a compliance with the conditions on the other, constituting in effect a contract. In consideration of the probable benefits that may accrue to the public from a knowledge and use of a patentable invention, and also with the view of stimulating and fostering inventive genius, the state offers to the inventor its guaranty of an exclusive right to his invention for a limited period, on condition that he will publish it in such a manner that it may become available to the public at large on the expiration of his exclusive term, and on certain other prescribed conditions. Under this governmental guaranty, the inventor retains his exclusive right after publication for the stipulated term, and has a property therein which is under the protection of law as fully as any property to which he may have title.

In the United States, Great Britain, and a majority of foreign states, the subject of patents is regulated by statute, and in most, if not all, foreign states having no legislation on the subject, special privileges are granted to inventors through the executive departments of their respective governments.[2]

The authority for patent legislation in the United States is derived from the Federal Constitution, which confers upon Congress the power: "To promote the

[1] 2 Kent Com., p. 366; Phillips Pat., p. 2.
[2] Whitman Pat. Law, Part II.

progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[1] Under this provision of the Constitution acts of Congress have been passed from time to time, culminating in the act of revision and consolidation passed July 8, 1870.[2]

§ 44. Essentials of a patentable invention or discovery.— To entitle a person to the privileges and protection offered by the government, he must, first of all, present a patentable invention or discovery. The essentials of such invention or discovery, under the laws of the United States, are as follows:

1. The alleged invention or discovery must be new, "not known or used by others in this country." Novelty is essential; and it is new in contemplation of the patent law when, and only when, it is *substantially* different from what has been known to precede it.[3]

In determining the question of novelty, the character of the result, and not the apparent amount of skill, ingenuity, or thought, exercised by the inventor, is the controlling consideration. If the result, or the mode of producing the result, be substantially different from what has gone before, the requisite of novelty is so far satisfied.[4]

[1] U. S. Const., Art. I, Sec. 8.

[2] U. S. Rev. St. (2 Ed.), §§ 4883–4947; citations *supra* under § 42.

[3] U. S. Rev. St. (2 Ed.), § 4886.

[4] Curtis Pat., § 41: Kneass v. The Schuylkill Bank, 4 Wash., 9, 11; Davis v. Palmer, 2 Brock., 298, 310; Hall v. Wiles, 2 Blatchf., 194–200; Ryan v. Goodwin, 3 Sum., 514, 518; Foote v. Silsby, 2 Blatchf., 260; Crane v. Price, Webs. Pat. Cas., 409.

The invention must be new as to all the public; not the abstract discovery merely, but the concrete invention; not the newly discovered principle resting in the brain of the discoverer, but the principle embodied and utilized in an "art, machine, manufacture, or composition of matter."[1]

Moreover, the embodied result of the alleged invention or discovery must be new, and not merely the purpose to which it is applied, constituting what is known as "a double use." Illustrating this essential of novelty, *Buller, J.*, said, "it would be a very extraordinary thing to say that, all mankind having been accustomed to eat *soup* with a spoon, a man could take out a patent because he says you might eat *peas* with a spoon."[2]

2. Another requisite of a patentable invention is *utility*. It must be both new and useful. The degree of utility, however, is not important; but the invention must have, at least, a small measure of usefulness. Inventions of a mischievous or immoral nature, and such as are wholly useless, are not patentable. For illustration, in 1870, an application was made for letters patent for "a new process of making butter, to be used in the place of ordinary butter." The process of manufacture described by the applicant consisted in taking about ten

[1] Washburn v. Gould, 3 Story, 122; Reed v. Cutter, 1 Id., 590; Woodcock v. Parker, 1 Gall., 438; Lowell v. Lewis, 1 Mass., 182; Allen v. Blunt, 2 Woodb. & M., 121; Parker v. Ferguson, 1 Blatchf., 407; Ellithorp v. Robertson, 4 Id., 307; Manny v. Jagger, 1 Id., 372; Parkhurst v. Kinsman, Id., 488; Goodyear v. Day, 2 Wall., jr., 283; Colt v. Mass. Arms Co., 1 Fish., 108.

[2] Losh v. Hague, 1 Web. Pat. Cas., 207; Benton v. Hawkes, 4 B. & Ald., 540, 550; Bean v. Smallwood, 2 Story, 408; Hotchkiss v. Greenwood, 11 How., 248.

pounds of ordinary butter, and washing it in clear lime water; next, warming the butter and mixing it with sweet milk and flour into paste; and then coloring it with eggs, carrot, or annotta and tumeric; thus increasing the weight of the compound to eighteen pounds of "*prime dairy butter.*" The application was rejected as not possessing the patentable requisite of utility.[1]

3. To be patentable, the invention must not have been known or used by others in this country. The applicant for a patent must have been not only an *original*, but the *first* inventor; that is, the first inventor who has reduced his invention to a practical condition. The statute on the subject contemplates a knowledge and use existing in a form and condition accessible to the public; and, therefore, a machine constructed for experiment merely, and not completed or practically tested, is no bar to a patent for a perfected practical invention.[2]

Two persons may have conceived the same machine, each being an original inventor; but the one who first reduces his conception to practice, or to a condition in which it may be utilized for its purpose, is the first inventor, and entitled to a patent. In such case the maxim applies, "*Qui prior est in tempore, prior est in jure.*"[3]

[1] Curtis Pat., § 106; Bedford v. Hunt, 1 Mason, 301, 303; Whitney v. Emmett, 1 Baldw., 303; Manny v. Jagger, *supra*; Stanley v. Whipple, 2 McLean, 35; Wintermute v. Reddington, 1 Fish., 239; Page v. Ferry, Id., 298.

[2] Reed v. Cutter, Woodcock v. Parker, Lowell v. Lewis, and Washburn v. Gould, *supra;* Cahoon v. Ring, 1 Cliff., 592; Teese v. Phelps, 1 McAll., 48; and Ellithorp v. Robertson, Parkhurst v. Kinsman, Goodyear v. Day, *supra.*

[3] Citations *supra*; Allen v. Hunter, 6 McLean, 303; Cox v. Griggs,

4. To entitle an applicant to a patent, the invention must not have been "patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned."[1]

The language of the statute is, be it noted, "*before his invention or discovery*," and not before his *application for a patent.* It may well happen that a foreign patent, or the publication mentioned in the statute, ante-dates the *application*, but not the *invention;* the former of which the courts say is not sufficient to bar or invalidate a patent. It is also held, that to give effect to the "printed publication" mentioned in the statute, the description therein of the invention must have been so full, clear and accurate, that from it a competent mechanic, instructed in the business to which it relates, could embody and utilize its principles in a practical manufacture.[2]

The "two years" clause in the statute is a recognition and embodiment of a provision first introduced into our system of patent law by an act of Congress passed in 1839. Prior to that act, if an inventor consented to the public use of his invention at any time before application for a patent, however limited such use, he might forfeit his right to a patent. Now, he may experiment

2 Fish., 174; Many v Sizer, 1 Id., 17; Singer v. Walmsley, Id., 558; Matthews v. Skates, Id., 602; Rich v. Lippincott, 2 Id., 1; Johnson v. Root, Id., 201.

[1] U. S. Rev. Stat. (2 Ed.), § 4886.

[2] O'Reilly v. Morse, 15 How., 62; Smith v. Ely, Id., 137; Parker v. Stiles, Id., 44; Judson v. Cope, 1 Fish., 615; Hays v. Sulsor, Id., 532; Bartholomew v. Sawyer, Id., 516; White v. Allen, 2 Fish., 440.

himself in private or public, and permit others to use his invention during the "two years," without losing his right, provided it do not appear that he intended to abandon his invention, or dedicate it to the public.[1]

§ 45. Mode of obtaining, and conditions, of a valid patent.— If the invention be patentable within the rules now stated, and the inventor wishes to obtain letters patent therefor, he must make application to the commissioner of patents in the manner prescribed by statute. The application must be accompanied by a written description of the invention, "and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery."[2]

When the subject of the invention is a composition of matter, the applicant, when required by the commissioner, must furnish specimens of ingredients, and of the

[1] McCormick v. Seymour, 2 Blatchf., 240; s. c., 16 How., 480, and 19 How., 96; Root v. Ball, 4 McLean, 177; Sanders v. Logan, 2 Fish., 167; Bell v. Daniels, 1 Id., 372; Hovey v. Henry, West. Law J., 153.

[2] U. S. Rev. St. (2 Ed.), § 4888, and cases there cited.

composition, sufficient in quantity for the purpose of experiment.[1]

In cases which admit of representation by model, the applicant, if required by the commissioner, shall furnish one of convenient size to exhibit advantageously the several parts of the invention or discovery; and when the nature of the case admits of drawings, the applicant must furnish a copy to be filed in the patent office; and a copy of these is issued with the patent when granted, and forms part of the specification.[2]

There are other conditions precedent to the issuance of letters patent, but these are the most important. Their purpose is, to render the invention available to the public on the expiration of the patent; and hence the requisite of a specification from which alone the invention could be constructed and used. The benefit to the public constitutes the principal consideration of the grant, and a want or failure of consideration would invalidate the patent. It is of special moment that the inventor's claim be intelligently and carefully stated in the specification. It should be as broad as the invention, but no broader; should clearly discriminate between the old and the new; must not contain statements intended to deceive the public; and should be free from ambiguity. A mistake in any of these particulars would be dangerous, and might vitiate the grant.

An applicant with a patentable invention, or one that the officials at the patent office regard as patentable,

[1] U. S. Rev. St. (2 Ed.), § 4890.

[2] U. S. Rev. St. (2 Ed.), § 4891; Hogg v. Emmerson, 6 How., 437; McCormick v. Talcott, 20 Id., 409.

having complied with all the conditions prescribed by the government, is entitled to letters patent, granting to him, "his heirs or assigns, for the term of seventeen years, the exclusive right to make, use, and vend the invention or discovery throughout the United States, and the Territories thereof."[1]

Patents thus granted are *prima facie* valid; but in an action for infringement, the defendant may defeat the plaintiff by showing the invalidity of the grant on either of the following grounds:[2]

First. "That for the purpose of deceiving the public the description and specification filed by the patentee in the patent office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or,

Second. "That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or,

Third. "That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof; or,

Fourth. "That he was not the original and first inventor or discoverer of any material or substantial part of the thing patented; or,

Fifth. "That it had been in public use or on sale in

[1] U. S. Rev. St. (2 Ed.), § 4884, and cases there cited.

[2] Curtis Pat., § 472; Alden v. Dewey, 1 Story, 336; Woodworth v. Sherman, 3 Id., 172; Stearns v. Barrett, 1 Mason, 153; Minter v. Wells, Webs. Pat. Cas., 129; Phila. & Trenton R. Co. v. Stimpson, 14 Pet., 458; U. S. Rev. St. (2 Ed.), § 4920, and cases there cited.

this country for more than two years before his application for a patent, or had been abandoned to the public."

Unfortunately for sanguine inventors, many patents are issued that will not bear the test of a thorough judicial investigation.

§ 46. Other points in the law of patents.— There may be granted for the term of three years and six months, for seven years, or for fourteen years, as the applicant may elect, patents for designs; and all the regulations and provisions of the statutes in relation to obtaining or protecting patents for inventions or discoveries will apply to patents for designs so far as the same may be applicable thereto, and not inconsistent with other provisions of the statutes.[1]

A patent for a new and useful improvement of an "art, machine, manufacture, or composition of matter," may be granted with the same rights, and under the same rules and conditions, as for an original; but if the original be patented, the patentee of the improvement does not, by his grant, acquire any right in the former patent; nor does the patentee of the original, by virtue of his patent, acquire any right in or to the patented improvement.[2]

There may, also, be a valid patent for a combination of several things, whether the constituents of the combination are, or are not, separately patented. The

[1] U. S. Rev. St. (2 Ed.), §§ 4929–4993.

[2] U. S. Rev. St. (2 Ed.), § 4886; Curtis Pat., §§ 35, 42; Rex v. Arkwright, Webs. Pat. Cas., 71, 72, 73; Kneass v. The Schuylkill Bank, 4 Wash., 9, 11; Whitney v. Emmett, 1 Baldw., 303; Pitts v. Wemple, 6 McLean, 558; Woodworth v. Rogers, 3 Woodb. & M., 135.

patent, be it noted, is for the *combination*, and not for any or all of its elements separately. As the combination patented consists in the union of a certain number of things, a union of less than the prescribed number does not constitute the combination, and is not protected by the patent; nor does the use of one or more of the constituent elements, less than the whole number forming the combination, constitute an infringement of the patent. If a patent for any of the elements be held by another, the patentee of the combination does not, by virtue of his grant, acquire any right in such other patent; nor does the patentee of the element, by virtue of his patent, acquire any right to use the patented combination.[1]

A patent is property, and the owner has the same right to dispose of it as have the owners of any other species of personal property. He may assign it in whole or in part, for all or a portion of the territory covered by it, thus giving the assignee a right in the patent itself; or he may grant special licenses under it, giving the licensee the privilege of making, using, or selling the invention, on payment of a royalty.

For infringement of a valid patent the law affords ample remedies in the Federal Courts, by actions at law, suits in equity, and injunctions.[2]

There are other questions connected with the law of patents; but they are not essential to a general view of

[1] 1 Curtis Pat. §§ 111, 332; Buck v. Hermance, 1 Blatchf., 398; Forbush v. Cook, 20 Law R., 664; Barrett v. Hall, 1 Mason, 447; Pitts v. Whitman, 2 Story, 609; Lee v. Blandy, 2 Fish., 89; Pitts v. Wemple, 6 McLean, 558.

[2] U. S. Rev. St. (2 Ed.), §§ 4919, 4992; Curtis Pat., §§ 494–499.

the principles involved in the subject, and are omitted from this discussion for the same reasons stated *supra*, under § 43.

A few, only, of the numerous authorities on the subject of patent law have been cited in the outline view now presented.

§ 47. Copyright.—This product of intellectual labor furnishes another instance of title to personal property by original acquisition. "Copyright is the exclusive right of the owner to multiply and to dispose of copies of an intellectual production. It is the sole right to the copy or to copy it."[1] Otherwise stated it "is the exclusive right of the owner to possess, use, and dispose of intellectual productions," which have the attributes of property "when embodied in written or spoken language."[2]

The nature and source of this right has been the subject of much learned discussion; the principal question being its source, whether a natural right recognized and protected by the common law, or a statutory grant; and if the former, whether the right is lost by publication, or destroyed by statute.[3] The limited scope of this work will not permit a presentation of the arguments and authorities *pro* and *con;* nor is such a presentation requisite to a correct statement of the law of copyright as now settled. A full and very able historical and critical discussion of the subject may be found in "Drone

[1] Drone Copyr., pp. 100, 101; Williams Pers. Prop , p. 246.
[2] Drone Copyr., pp. 97, 98.
[3] Drone Copyr., pp. 1, 2.

on Copyright," to which reference is herein freely made as the best service the author could render his readers.

It seems quite clear that, prior to the statute of Anne in 1710,[1] the common law right was unquestioned in England; and that for half a century thereafter the courts of chancery recognized the right, holding in effect that it was not lost by publication, or destroyed by statute.[2] In the case of *Millar v. Taylor*, decided by the Court of K. B. in 1769, the question was thoroughly discussed, and decided in accordance with the opinions of Lord Mansfield and Justices Aston and Willes, sustaining the common law right, Justice Yates dissenting. But five years later the House of Lords decided the question adversely to the Court of K. B., holding that the common law right, if any existed, could not be exercised beyond the time limited by statute.[3]

The English statute was copied by Congress in 1790, and the Supreme Court of the United States, in *Wheaton v. Peters*,[4] decided in 1834, followed the English case of *Donaldson v. Becket.*

It is now the settled doctrine, both in England and the United States, that at common law the author of an unpublished literary composition has an absolute property therein. It is personal property, and governed by the same rules, and entitled to the same protection, as other personal property. But when published in print, the common law right is lost, unless protected by statute;

[1] 8 Anne, Ch. 19.

[2] Drone Copyr., pp. 1, 54–82; Millar v. Taylor, 4 Burr., 2303.

[3] Donaldson v. Becket, 4 Burr., 2408; and Drone Copyr., cited *supra.*

[4] 8 Pet., 591; and see citations *supra.*

the author or proprietor having then "no exclusive common law right to multiply copies, or to control the subsequent issue of copies by others;" the right to multiply copies to the exclusion of others being the creation of statute.[1]

Practically, in this country, the proprietary right after publication, namely, the exclusive right to the profits of publication, rests upon, and is regulated and protected by, the acts of Congress.

§ 48. How to secure the statutory right.— The same constitutional provision which gives to Congress jurisdiction of the subject of patents, confers upon it authority to legislate on the subject of copyright.[2] By virtue of this authority Congress has enacted[3] that: "Any citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the

[1] Drone Copyr., pp. 101–104; Donaldson v. Becket, 4 Burr, 2408; Colburn v. Simms, 2 Hare, 543; Jefferys v. Boosey, 4 H. L. C., 962; Prince Albert v. Strange, 2 De G. & Sm., 652; Wheaton v. Peters, 8 Pet., 591; Pulte v. Derby, 5 McLean, 328; Palmer v. De Witt, 47 N. Y., 532; Rees v. Peltzer, 75 Ill., 475; Boucicault v. Wood, 2 Biss., 34.

[2] U. S. Const., Art. I., § 8.

[3] U. S. Rev. St. (2d Ed.), § 4952.

case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others. And authors may reserve the right to dramatize or to translate their own works."

To entitle a person to a copyright he must,

1. Before publication, "deliver at the office of the librarian of Congress, or deposit in the mail addressed to the librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book or other article, or a description of the painting, drawing, chromo, statue, statuary, or a model or design of a work of the fine arts, for which he desires a copyright." [1]

2. "Not later than the day of the publication thereof in this or any foreign country, deliver at the office of the librarian of Congress, at Washington, District of Columbia, two copies of such copyright book or other article; or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same." [2]

3. "The proprietor of every copyright book or other article shall deliver at the office of the librarian of Congress, or deposit in the mail addressed to the librarian of Congress at Washington, District of Columbia, not later than the day of the publication thereof in this or any foreign country two complete printed copies thereof, of the best edition issued, or description or photograph of such article as hereinbefore required, and a copy of every subsequent edition wherein any substantial changes shall be made." [3]

[1] U. S. Rev. St. (2 Ed.), § 4956.
[2] U. S. Rev. St. (2 Ed.), § 4956.
[3] U. S. Rev. St. (2 Ed.), § 4959.

For a failure to comply with either of the last two provisions the proprietor of the copyright is liable to a penalty of twenty-five dollars.[1]

4. Pay to the librarian of Congress for recording the title or description of any copyright book or other article, fifty cents; and for every copy under seal of such record actually given to the person claiming the copyright, or his assigns, fifty cents.[2]

A compliance with the foregoing conditions secures to the author, inventor, or designer, a copyright for the term of twenty-eight years.[3]

And, upon recording the title of the work, or description of the article so secured, a second time, and complying with all other regulations in regard to original copyright, within six months before the expiration of the first term, the author, inventor, or designer, if he be still living and a citizen of the United States or a resident therein, or his widow or children if he be dead, shall have the same exclusive right continued for the further term of fourteen years. "And such person shall, within two months from the date of said renewal, cause a copy of the record thereof to be published in one or more newspapers, printed in the United States, for the space of four weeks."[4]

Literary property in unpublished work, being personal, is assignable, and governed by the general rules applica-

[1] U S. Rev. St. (2 Ed.), § 4960.
[2] U. S. Rev. St. (2 Ed.), § 4958.
[3] U. S. Rev. St. (2 Ed.), § 4953.
[4] U. S. Rev. St. (2 Ed.), § 4954.

ble to other personal property.[1] And copyright is expressly made assignable by statute.[2]

To entitle the owner to maintain an action for infringement of his copyright, he must "give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following it, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model, or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words, 'Entered according to Act of Congress, in the year , by A. B., in the office of the librarian of Congress, at Washington.'[3] Or, 'Copyright, 18 , by A. B.'"[4]

A person inserting or impressing such notice, who has not obtained a copyright, is liable to a penalty of one hundred dollars.[5]

§ 49. Essentials to copyright.—Legislation is silent in regard to the character and qualities essential to copyright, and the law must be sought in judicial records. On several points the courts have spoken, and the following rules may be regarded as established:

1. *Originality.*—That originality is essential to copy-

[1] Drone Copyr. p. 104, *et seq.*; Palmer v. DeWitt, 47 N. Y., 538; Parton v. Prang, 3 Cliff., 537, 550; Little v. Gould, 2 Blatchf., 165, 362.

[2] U. S Rev. St. (2 Ed.), § 4955; Stat. 5 & 6 Vict. c. 45, s. 25.

[3] U. S. Rev. St. (2 Ed.), § 4962.

[4] Drone Copyr. p. 265, n. 8.

[5] U. S. Rev. St. (2 Ed.), § 4963.

right admits of no reasonable doubt. The constitutional authority to legislate on the subject was given to Congress for the purpose of promoting "the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to *their* respective writings and discoveries."[1] Both the letter and the spirit of this provision demand originality and exclude plagiarism; require honesty and give no countenance to fraud; and on this point the courts are in accord. But what constitutes originality, or when that requisite is wanting in a work, it is not always easy to determine. The test of originality furnished by Mr. Drone is the following: "In all cases, whatever may be the kind or character of the work for which protection is claimed, the true test of originality is whether the production is the result of independent labor, or of copying. A close resemblance between two publications may afford strong evidence of copying; and in some cases, especially when the similarity is not explained, it may amount to conclusive proof of piracy. But, when it is established that a work is the result of honest authorship, its likeness to another publication is immaterial."[2]

2. *Merit or value.*—That a production should possess some merit or value, literary or other, to entitle it to the privilege and protection of the copyright law is quite obvious. There are quite enough objects and subjects of weighty human interest to engage the genius and labor of writers and compilers of every grade, without adding to the catalogue things of no value or importance. But

[1] U. S. Const, Art. I., § 8; Drone Copyr., pp. 198–208.
[2] Drone Copyr., p. 208.

mere literary merit is not essential to copyright; it is enough that a production may contribute to useful knowledge; and the courts have been quite liberal in this direction, extending the protection of the copyright law to compilations of various kinds, annotations consisting of common materials, collections of statistics, calendars, catalogues, and other compilations involving no literary ability.[1]

3. *Seditious or libellous publications.*— The law universally condemns publications which are seditious and libellous, and cannot, therefore, consistently extend to them its protection. Such publications are justly treated as outlaws. On this point there is no ground for contrariety of judicial opinion, and none is found in reported cases.[2]

4. *Immoral productions.*—These, like seditious and libellous publications, are under the condemnation of the law, and excluded from its protection. The law has no higher or nobler function than the encouragement and protection of public and private morality. This truth is expressed in the spirit of Blackstone's definition of municipal law, "a rule of civil conduct prescribed by the supreme power in the state, commanding what is right

[1] Drone Copyr , pp 153, 208–212; Folsom v. Marsh, 2 Story. 109; Scoville v. Tolland. 6 West. Law Jour., 84; Collender v. Griffith, 11 Blatchf., 211; Lawrence v. Dana, 2 Am. L. T. R. N. S., 423; Jarrold v. Houlston, 3 Kay & J., 708; Pike v. Nicholas, 20 L. T. N. S., 906; Gray v. Russell, 1 Story, 11; Story's Ex'rs. v. Holcombe, 4 McLean, 306; Barfield v. Nicholson, 2 Sim. & St., 1; Carey v. Faden, 5 Ves., 24; Matthewson v. Stockdale, 12 Ves., 270; Scott v. Stanford, Law Rep. 3 Eq., 718; Lawrence v. Dana, 2 Am. L. T. R. N. S., 402.

[2] Drone Copyr., pp. 112–114, 181–185.

and prohibiting what is wrong."[1] This definition has been criticised as in some respects inaccurate; but it may well be questioned whether the criticisms are not hypercritical.[2]

5. *Blasphemous publications.*—From the principles already stated it is clear that publications of a blasphemous character cannot be the subjects of copyright, and are not, of course, under the protection of copyright law. This rule is recognized and enforced by the courts, both in Great Britain and the United States. But, what constitutes blasphemy, and what liberty is permitted to an author in treating of religious subjects, are perplexing questions for judicial determination. The decisions on the subject do not furnish a satisfactory solution of the questions; and from the nature of the case it seems quite impossible to establish a definite and universal rule for the trial and test of every case that may arise. The condition of society, the character of the government, the local laws, public opinion, and the sentiments of the tribunal, will to a greater or less extent affect the decision of each particular case presented for adjudication. While, therefore, there is unity of judicial opinion regarding the principle involved, there will necessarily be diversity in its application, even where the facts are substantially the same.

From the liberal character of the government of the United States, and the freedom of religious belief and

[1] 1 Black Com., p. 44.

[2] Drone Copyr., pp. 112–114, 185–187; Stockdale v. Onwhyn, 5 Barn. & C., 173; Martinetti v. Maguire, 1 Deady, 216; Keene v. Kimball, 16 Gray, (82 Mass.), 548; Shook v. Daly, 49 How. Pr., 366, 368

worship accorded to all its citizens, it may reasonably be inferred that large liberty of discussion and publication on moral and religious subjects would be permitted. And such is the fact, as appears from our comparatively meager judicial records involving the subject. But in this country, nevertheless, there are limitations to the liberty of speech and the press; and there is such a thing as *blasphemy* known to the law, and punishable as a crime.[1]

§ 50. Remedies for infringement.—Both the common law and statutory rights of authors and proprietors of brain products are amply protected by law. Remedies by actions at law, suits in equity, and injunction, are available for any invasion of these rights.

In the case of common law property, if the owner's manuscript be published in print, his dramatic or musical composition be publicly performed, or copies of his work of art be either publicly circulated or exhibited, without his consent, his rights are invaded; and in such case the State courts are open to the injured party for redress.[2]

For a violation of statutory copyright the remedies, legal and equitable, are provided by the statutes which confer the right; but in such cases the remedies must be sought in the Federal courts.[3]

[1] Drone Copyr, pp. 187–196; People v. Ruggles, 3 Johns., 290; Commonwealth v. Kneeland, 20 Pick. 206, 220; Updegraph v. Commonwealth, 11 Serg. & R., 394; 1 Bishop Crim. L. §§ 497, 498; 2 Id. §§ 74–78.

[2] Drone Copyr. pp. 107–110; Palmer v. DeWitt, 47 N. Y., 532.

[3] U. S. Rev. St. (2 Ed.), §§ 4963–4970; Drone Copyr. pp. 544–552, 496 *et seq.*

§ 51. Letters from one correspondent to another.— Letters addressed from one correspondent to another are classed with products of intellectual labor, and possess substantially the same proprietary qualities as other unpublished manuscripts.

When written and sent, to whom do they belong, the *writer* or the *receiver?* Or, more accurately, in whom is the property of the writing? This question has elicited considerable discussion by the courts; but the doctrine may now be regarded as settled, that the writer has a literary property in his letters, which is not lost by their transmission to the receiver.[1] From this doctrine it follows, as a general rule, that the receiver has no right to publish the letters without the consent of the writer; and such publication will be enjoined by a court of equity.[2]

It has been judicially held that a court of equity will interpose by injunction for the reason that the unauthorized publication of private letters is an act of bad faith tending to a disturbance of the public peace, a violation of the obligations of "social ethics," and subversive of that free interchange of opinions and sentiments essential to a well-conditioned state of society.[3] While such publication may be justly obnoxious to all these criticisms, it

[1] Drone Copyr , p. 127; Duke of Queensbury v. Shebbear, 2 Eden, 329; Thompson v. Stanhope, Amb., 732; Pope v. Curl, 2 Atk., 342; Granard v. Dunkin, 1 Ball & B., 207; Perceval v. Phipps, 2 Ves. & B., 19; How v. Gunn, 32 Beav., 462; Dennis v. Leclerc, 1 Mart., (Orleans T.) 297; United States v. Tanner, 6 McLean, 128; Woolsey v. Judd, 4 Duer, 379; Eyre v. Higbee, 22 How. Pr., 198; Grigsby v. Breckinridge, 2 Bush, (Ky.) 480.

[2] See cases cited under last paragraph.

[3] Folsom v. Marsh, 2 Story, 111.

is not, according to the prevailing doctrine, for any or all of these that a court of equity exercises its restraining power, but solely on the ground of protection to the literary property of the writer.[1]

There are exceptions to the rule that the writer is the owner of the property in the letters written by him. For example, the letters of an *employe* written in and concerning the business of his employer.[2] So, also, official letters written by officers of the government belong to the government, with the right to publish them or to refrain from so doing, at will, and to restrain their unauthorized publication; and this on the ground of public policy.[3]

Does the property of the writer depend at all upon the literary merit of his letters? The affirmative of this question has been held in some reported cases.[4] But the weight of authority decides the question in the negative; and reason approves the decision.[5] Theoretically, and in contemplation of the law, every letter has literary merit in which a property exists; albeit the *quantum* may be microscopic, and undiscoverable by ordinary perception. Practically, however, the wisdom of this rule is apparent in view of the difficulty of drawing the line between the lowest degree of literary merit and zero. The opposite

[1] Gee v. Pritchard, 2 Swans., 413; Woolsey v. Judd, 4 Duer, 384; Grigsby v. Breckenridge, 2 Bush (Ky.), 486; Perceval v. Phipps, 2 Ves. & B., 24; Whitmore v. Scovell, 3 Edw. Ch., 320.

[2] Howard v. Gunn, 32 Beav., 462.

[3] Drone Copyr., p 132; Folsom v. Marsh, 2 Story, 113.

[4] Perceval v. Phipps, 2 Ves. & B., 28; Whitmore v. Scovell, 3 Edw. Ch., 515; Hoyt v. Mackenzie, 3 Barb. Ch., 320.

[5] Woolsey v. Judd, 4 Duer, 379; Grigsby v. Breckinridge, 2 Bush (Ky.), 480; Drone Copyr., pp. 132–135.

rule would render the administration of the law on this subject embarrassing, uncertain, and unequal; as no standard of literary merit could be prescribed that would suit all tribunals, and measure all cases.

What rights, if any, has the receiver in a letter addressed to him? So far as this question has been passed upon by the courts, the doctrine seems to be established that, while he has no literary property in the letter, he has a corporeal property in the material on which it is written.[1] He has the right to retain possession of it, and is not bound to preserve it for the benefit of the writer.[2]

It has been held in several cases that the receiver may publish a letter when it becomes necessary for the purpose of vindicating his reputation from false charges or unjust imputations made by the writer.[3] But Mr. Drone dissents emphatically from this holding, and his reasoning on the point is cogent.[4]

§ 52. **Lectures.**—Manifestly lectures are a product of brain-work; and, on principle and judicial authority, their creator has a common law proprietary right in them before publication, on the same ground that supports an author's right in other unpublished manuscripts.[5] On first view it may be thought that a lecture orally

[1] Drone Copyr., pp. 135, 136; Pope v. Curl, 2 Atk., 342; Oliver v. Oliver, 11 C. B., n. s., 139; Eyre v. Higbee, 22 How. Pr., 198; Grigsby v. Breckinridge, *supra.*

[2] See cases cited last, *supra.*

[3] Perceval v. Phipps, 2 Ves. & B., 19; Folsom v. Marsh, 2 Story, 111; Woolsey v. Judd, 4 Duer, 379, 407.

[4] Drone Copyr., p. 138, 139.

[5] Drone Copyr., p. 107.

delivered cannot be regarded as a manuscript and entitled to protection as such; but the courts will assume that the lecturer has a written composition, either in full or in skeleton, from which he speaks *memoriter*, and is, therefore, the author of a manuscript represented in the oral delivery.

But, will the public reading, or the oral delivery, of a lecture by the author operate as an abandonment of his exclusive proprietary right therein, and deprive him of legal protection from piratical appropriation of his brain-product? If so, the right would be of very little, if any, value to the author; for most lectures are prepared for public delivery. Both reason and the weight of judicial authority concur in the rule, that a public reading or oral delivery of a lecture is not to be regarded as in itself a relinquishment of title by the author, or as operating to divest him of his property in the manuscript. Where persons are admitted, as pupils or otherwise, to hear public lectures, it is upon the implied confidence and contract that they will not use any means to injure or take away the exclusive right of the lecturer in his own lectures. They may take notes for their own information, but may not publish them for profit.[1]

In the analagous case of playright, the question of publication has undergone much discussion by the courts, and their reasoning and opinions, applicable to lectures as well, sustain the doctrine just stated. An interesting and instructive history of this discussion will be found in Drone on Copyright.[2]

[1] Drone Copyr. pp. 118, 119, 554–584; 2 Kent Com. pp. 378, 379; Bartlett v. Crittenden, 4 McLean, 300; s. c. 5 Id., 32.

[2] Pp. 554–584; and see Palmer v DeWitt, 47 N. Y., 532; Thompkins v. Halleck, 133 Mass., 32; s. c. 43 Am. Rep., 480.

In England the sole privilege of publishing their lectures is secured to authors by statute,[1] which affords protection against piracy. But "lectures delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment or foundation," are excepted from the operation of this act.

In the United States a remedy is given by statute for the unauthorized publication of a manuscript.[2]

For a violation of the author's right he may maintain an action at law; and, in a proper case, a court of equity will interpose by injunction.[3]

The remedies are available in a state court; and a citizen or resident of the United States may obtain redress in a Federal court.[4]

§ **53. Trade-marks.**—Property in trade-marks is generally and properly classed under the first general mode of acquiring title to personal property, that of original acquisition.

A trade-mark has been well defined as "the name, symbol, figure, letter, form or device, adopted and used by a manufacturer, or merchant, in order to designate the goods that he manufactures, or sells, and distinguish them from those manufactured or sold by another; to the end that they may be known in the market as his,

[1] 5 & 6 Will. IV. c. 65; Drone Copyr., p. 658; Goode. Pers. Prop., pp. 217, 218.

[2] U. S. Rev. St. (2 Ed.), § 4967; Drone Copyr., pp. 124–127.

[3] U. S. Rev. St. (2 Ed.), § 4967; Drone Copyr., p. 124: Boucicault v. Hart, 13 Blatchf., 47.

[4] Drone Copyr., pp. 545, 546; Palmer v. DeWitt, 47 N. Y., 532.

and thus enable him to secure such profits as result from a reputation for superior skill, industry or enterprise."[1]

§ 54. A common law right.—A trade-mark is the creature of common law, and not like the subjects of patents and copyright, dependent upon statute for existence or protection. The two species of property, especially trade-marks and copyright, are sometimes confounded; but, while having some features in common, they are essentially different in character. Copyright property, as we have seen,[2] is the exclusive right of multiplying and vending copies of original productions of the mind, and "is a property in *the thing itself*, the words, letters, designs or symbols, which are the signs of things, and the forms and embodiment of thought." While trade-marks are property, "not in the words, letters, designs and symbols, as things, as signs of thought, as productions of the mind; but simply and solely *as a means of designating things;* the things thus designated being the productions of human skill, or industry, whether of the mind or the hand, or a combination of both."[3]

[1] Upton, Trade-marks, p. 9; and see 2 Bouv. L. Dict., "trade-marks;" Newman v. Alvord, 51 N. Y., 189; Hostetter v. Adams, 20 Blatch. C. C., 326; Lawrence Manuf. Co. v. Lowell Hosiery Mills, 129 Mass., 325; s. c. 37 Am. Rep., 362; Hier v. Abraham, 82 N. Y., 519; Thornton v. Crowley, 47 N. Y. Super. Ct. (15 J. & S.), 527; Am. Solid Leather Button Co. v. Anthony Cowell Co., 2 New Engl. Rep., 630; Ferguson v. Davol Mills, 7 Phila., 253; s. c 2 Brewst., 314; Boardman v. Meriden Brittania Co., 35 Conn., 402.

[2] *Supra*, § 47.

[3] Upton, Trade-marks, pp. 14, 15; Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier, 47 Hun, 521; Skinner v. Oakes, 10 Mo. App., 45; Atlantic Milling Co. v. Robinson, 20 Fed. Rep., 217; Shaver v. Shaver, 54 Iowa, 208; s. c. 37 Am. Rep., 194.

A very stringent and carefully drawn statute on the subject of trade-marks, was passed by Congress in 1870, and amended in 1876.[1] But this law was held to be unconstitutional by the Federal courts.[2] The provision of the United States Constitution for securing "to authors and inventors the exclusive right to their respective writings and discoveries," on which the law of patents and copyright is based, does not apply to trade-marks.[3]

There are also provisions in the laws of Congress looking to the protection of domestic manufacturers from the copying, or simulation, of their names or trade-mark on imported merchandise.[4]

§ 55. What may constitute a trade-mark.—By the definition *supra*,[5] a trade-mark may consist of a name, symbol, figure, letter, form or device. But it should be noticed that a name or word which expresses only the quality, kind, texture, composition, or utility of an article, will not be protected as a trade-mark. The use of such names and words is common, and equally free to all; and no one person, therefore, can monopolize their exclusive use for his own benefit.[6]

[1] U. S. Rev. St. (2 Ed.), §§ 4937–4947.

[2] Leidersdorf v. Flint, 8 Biss., C. C., 327; affirmed on appeal to the U. S. Supreme Court.

[3] United States v. Steffens, 100 U. S., 82; and see United States v. Roche, 1 McCrary, C. C., 385.

[4] U. S. Rev. St. (2 Ed.), § 2496; U. S. St. 1882–83, § 2496; U. S. St. 1889–90, § 7.

[5] § 53.

[6] Corwin v. Daly, 7 Bosw., 222; Wolfe v. Goulard, 18 How. Pr., 64; Fetridge v. Wells, 13 Id., 385, Evans v. VonLaer, 32 Fed. Rep. 153; Colgau v. Danheiser, 35 Id., 150; Runneford Chemical Works v. Muth, Id., 524; Smith v. Walker, 57 Mich., 456; Hornbottle v. Kinney, 52 N.

The same rule applies to marks, symbols, letters, and figures, which are used only to denote the quality, grade, appropriate name, or the peculiar mode or process of manufacture of the article to which they are applied.[1]

But it has been held that marks, such as arbitrary combinations of figures, indicating style or quality, which also indicate origin, may be the subject of a trade-mark.[2]

§ 56. By whom acquired.—Trade-marks are a species of personal property;[3] and may be acquired by any person capable of acquiring and possessing other kinds of personal property, an alien as well as a citizen.[4] But the exclusive right can exist only in a person who, in some form, and to some extent, possesses an exclusive right in the property to which it is appended. It is not an abstract right to the exclusive use of a certain mark, dissociated from the article or property which its use is to

Y., Super. Ct. 41; Hostetter v. Adams, 20 Blatchf. C. C., 326; Fleischerman v. Newman, 16 N. Y. State Rep., 794.

[1] Royal Baking Powder Co. v. Sherrell, 93 N. Y., 331; Amoskeag Manuf Co. v. Trainer, 101 U. S., 51; Same v. Spear, 2 Sandf. Super. Ct., 599.

[2] Am. Solid Leather Button Co. v. Anthony Crowell & Co., 2 New Eng. Rep., 630; Boardman v. Meriden Britannia Co., 35 Conn., 402; Lawrence Co. v. Lowell Mills, 129 Mass., 325; Gillott v. Esterbrook, 48 N. Y., 374.

[3] Bradley v. Norton, 33 Conn., 157; Huwer v. Dannenhoffer, 82 N. Y., 499, 502; The Leather Cloth Co. v. The Am. Leather Cloth Co. De-Gex, J. & S., 137; s. c. 11 House of L'ds. Cas., 523; The Glen & Hale Manuf. Co. v. Hall, 61 N. Y., 226.

[4] Taylor v. Carpenter, 3 Story, 458; The Collins Co. v. Brown, 3 Kay & J , 423; Same v. Cowen, Id., 428; Coats v. Holbrook, 2 Sandf., Ch. 586; Coffeen v. Brunton, 4 McLean, 516.

designate, and distinguish from other articles of the same general character.[1]

The question has been under judicial consideration, whether a drawing or picture of an article may be used as a trade-mark. It would not be safe to affirm that this question has been definitively settled. The courts of this country, so far as they have spoken on this point, and the English courts, do not seem to be in accord; the former inclining to the affirmative,[2] and the latter to the negative, of the question.[3]

§ 57. Freedom from fraud.—The right of a party to a trade-mark will not be recognized by the courts where he is guilty of fraud or deception in its acqusition or use. Courts of equity exercise jurisdiction in trade-mark cases for a two-fold purpose: First, to stimulate and reward skill and honesty in trade and manufactures; and, secondly, to protect the public against fraud and imposition by unscrupulous dealers, who seek to pass off spurious and inferior commodities for the genuine. Hence the just and wise rule that, no person can establish an exclusive right to a trade-mark acquired dishonestly, or used for fraudulent purposes.[4]

[1] Atlantic Milling Co. v. Robinson, 20 Fed. Rep, 217; Skinner v. Oakes, 10 Mo. App., 45; Ferguson v. Davol Mills, 7 Phila., 253; s. c. 2 Brewst, 214; Congress & Empire Spring Co. v. High Rock Congress Spring Co., 45 N. Y., 291; Cotton v. Gillard, 44 L. J. (N. S.) Ch., 90; Samuel v. Berger, 4 Abb. Pr. Rep., 8.

[2] *In re* Pratt, 10 U. S. Pat Gaz., 866; Tucker Manuf. Co. v. Boyington, 9 Id., 455; *Ex parte* Halliday, 16 Id., 506; *Ex parte* Smith, Id., 179. And see Popham v. Cole, 66 N. Y., 69.

[3] James v. Parry, 55 L. T. Rep., N. S., 415; s. c. 35, Albany L. J., 12.

[4] Fetridge v. Wells, 13 How. Pr. Rep., 385; Partridge v. Menck, How. App. Cas, 547; Perry v. Truefitt, 6 Beav., 66; Fowle v. Spear,

§ 58. **How acquired.**—Property in a trade-mark is primarily acquired by adoption and use by the manufacturer, or other person possessed of an exclusive right in the thing to which it is applied.[1] No duration of time as to the use is requisite to create the property right.[2]

To give an exclusive right, the use of the trade-mark by the person adopting and claiming it must be new, having never previously been used in appliance to a like article.[3]

Property in a trade-mark may, also, be acquired by a voluntary transfer from the person whose title originated in adoption and use.[4] But, as we have seen *supra*,[5] the abstract trade-mark is not assignable when disconnected with the thing designated by it; the right either to manufacture or sell the merchandise to which the mark

7 Penn. L. J., 176; Hobbs v. Francis, 19 How. Pr. Rep., 567; Siegert v. Abbott, 61 Md., 276; s. c. 48 Am. Rep. 101; Buckland v. Rice, 40 Ohio St., 526; Manhattan Medicine Co. v. Wood, 108 U. S., 218; Landreth v. Landreth, 22 Fed. Rep., 41; DeKuyper v. Witteman, 23 Id., 871.

[1] Upton Trade-marks, pp. 46, 47; Derringer v. Plate, 29 Cal., 292; Filley v. Fassett, 44 Mo., 168; Candee v. Deere, 54 Ill., 439; Bradbury v. Beeton, 39 Law J. Rep. Ch. (N. S.), 57.

[2] Hall v. Barrows, 8 L. T. (N. S.), 227; s. c. on appeal, 9 L. T. (N. S.), 561; Brown Trade-marks, § 252.

[3] Van Beil v. Prescott, 82 N. Y., 630; Derringer v. Plate, 29 Cal., 292; Upton Trade-marks, pp. 46, 47.

[4] Hoxie v. Chaney, 143 Mass , 592; s. c. 58 Am. Rep., 149; Morgan v. Rogers, 19 Fed. Rep., 596; Hegeman & Co. v. Hegeman, 8 Daly, 1; Matter of Swezy, 62 How., 215; Walton v. Crowley, 3 Blatchf. C. C., 440; The Leather Cloth Co. v. The Am. Leather Cloth Co., De Gex, J. & S., 137; s. c. 11 House of L'ds Cases, 523; The Glen & Hall Manuf. Co. v. Hall, 61 N. Y., 226, 230; Huwer v. Dennenhoffer, 82 Id., 499, 502.

[5] § 56.

has been applied must go with it, or no title will vest in the assignee; the original proprietor can transfer no greater right than that possessed by himself, which is, simply, the exclusive right to use the mark to designate, and distinguish from articles of the same general character, the merchandise which he manufactures or sells.[1]

So, also, property in a trade-mark will pass by operation of law. On the decease, or bankruptcy, of the proprietor of a trade-mark, the property in it passes to the party lawfully succeeding to the control of the business in which the mark was used.[2]

§ 59. **Infringement.**—The violation of a trade-mark consists in the unauthorized application of it, or of a colorable imitation of it, to the goods manufactured or sold by the wrong-doer, under the fraudulent representation that they are the genuine merchandise of the proprietor; whereby purchasers and consumers may be deceived, and the owner of the trade-mark damnified.[3]

From the definition of an infringement, and the authorities cited, it will appear that a colorable imitation calculated to deceive the purchaser without a close inspection, will constitute a violation of the proprietor's right,

[1] Samuel v. Burger, 4 Abb. Pr. Rep., 88; Atlantic Milling Co. v. Robinson, 20 Fed. Rep., 217.

[2] Huwer v. Dannenhoffer, 82 N. Y., 499, 502; Matter of Swezy, 62 How., 215; Croft v. Day, 7 Beav., 84; Upton Trade-marks, p. 80, *et seq.*

[3] Newman v Alvord, 49 Barb., 588; Enoch Morgan Sons' Co. v. Schwackhoefer, 55 How. Pr. R., 37; s. c. 5 Abb. N. C., 265; N. Y. Cab. Co. v. Mooney, 15 Abb. N. C., 152; Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kansas, 21 Id., 104; Godillott v. Harris, 81 N. Y., 263; Robertson v. Berry, 50 Md., 591.

and entitle him to legal and equitable relief.[1] But this rule does not include a case in which the simulation would not deceive a person of ordinary prudence; the maxim in such case applying, "*Vigilantibus non dormientibus leges subveniunt.*"[2]

§ 60. Remedies for infringement.—For a violation of trade-mark property the courts of law, and of equity, are both open to the injured party for redress. In the former, he may have an action for damages; in the latter, a suit for an injunction, and a decree for pecuniary satisfaction. The extraordinary restraining power by injunction belongs to a court of equity; an action primarily for damages, to a court of law. By a familiar rule, however, when a court of equity obtains jurisdiction of a matter for any purpose, it will exercise its powers for all purposes connected therewith, and grant full relief to injured parties. Under this rule, in a suit praying for an injunction a court of equity obtains jurisdiction of the case, and, having full control and power, will decree damages when such redress is demanded by justice and equity. The court has power also in such case to compel the defendant to render a full and true account, under oath, of all sales by him of merchandise bearing

[1] Vacuum Oil Co. v. Buffalo Lubricating Oil Co., 26 Weekly Dig., 570; New Haven Pat. Rolling Spring Co. v. Farren, 51 Conn., 324; Robertson v. Berry, 50 Md , 591.

[2] Popham v. Cole, 66 N. Y., 69; Partridge v. Menck, 2 Sandf. Ch., 622; s. c. on appeal, 1 How. App. Cas., 548; Colladay v. Baird, 4 Phila., 139; Woolam v. Ratcliff, 1 Hem. & M., 259.

the pirated trade-mark, thus facilitating the administration of justice between the parties.[1]

[1] Upton Trade-marks, pp. 233, 234; Knott v. Morgan, 2 Keen, 213; Millington v Fox, 3 Mylne & C., 338; Taylor v. Carpenter, 2 Sandf., Ch., 611, 612; Bell v Locke, 8 Paige, 275; Thompson v. Winchester, 19 Pick., 214; Jurgenson v. Alexander, 24 How. Pr Re., 269; Stonebreaker v Stonebreaker, 33 Md., 252; Shaver v. Shaver, 54 Iowa, 208; s. c. 37 Am. Rep, 194· Singer Manuf. Co. v. Kimball, 10 Scottish L. R., 173.

CHAPTER VIII.

THE SECOND GENERAL MODE OF ACQUIRING TITLE TO PERSONAL PROPERTY.—TRANSFER BY ACT OF LAW.

SECTIONS 61. Special modes included in this division.
62–65. Forfeiture.
66–67. Succession.
68–69. Judgments.
70. Intestacy.
71–74. Insolvency.
75–77. Marriage.

§ 61. The special modes included.—Transfer of title to personal property by act of law embraces: I. forfeiture; II. Succession; III. Judgment; IV. Intestacy; V. Insolvency; and VI. Marriage.

I. *Forfeiture.*

§ 62. Definition and examples.—Forfeiture is a loss of title to his goods and chattels by the owner, as a punishment for crime, a penalty for the violation of law, or a breach of contract, and a transfer thereof to the government, or other corporation, or to a private person as the case may be.[1]

As examples, may be mentioned forfeiture of all the goods and chattels of the offender for treason, and other high crimes; forfeiture of goods for evasion of the reve-

[1] 2 Kent Com., p. 385; 1 Black. Com. (Cooley's Ed.), p. 298; 2 Id., p. 408 *et seq.*, 420, 421; 4 Id., pp. 382, 387; 1 Bouv. L. Dict., "forfeiture;" And. L. Dict., "forfeiture."

nue laws, or other statutes, State or national; forfeiture under the police power of the state for the illegal use of property; and forfeiture of the shares of a stockholder in a corporation for a failure to pay assessments when due.[1]

§ 63. England, and United States.—Anciently in England there were numerous statutory forfeitures for crime; but modern legislation has largely reduced the number, and greatly softened the rigor of the ancient law.

In the United States, forfeiture for crime is of rare occurrence. Legislation, both national and State, is generally in harmony with the spirit of the Federal Constitution, which provides that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."[2] By act of Congress it is provided that, "no conviction or judgment shall work corruption of blood, or any forfeiture of estate."[3]

In most, if not all, of the States of the Union forfeiture is regulated by organic or statutory law, or both. In the absence of such regulation, forfeiture of property for treason and felony still exists, it being part of the common law inherited from England.[4]

[1] Citations *supra*; and Chit. Cr. L,. pp. 730–735; 1 Bishop Cr. L., §§ 944, 824, 835; Weeks v. Silver Islet, etc., Co., 55 N. Y. Super. Ct., (J. & S.) 1, 16; Pendergast v. Turton, 1 Young & Coll., (N. R.) 98; Story Eq Jur., § 1325; Cathcart v. Fire Department, etc., 26 N. Y., 529.

[2] U. S. Const., Art. 3, Sec. 3.

[3] U. S. Rev. St. (2 Ed.), § 5326.

[4] 2 Kent Com , p. 386.

§ **64. When title passes.**—As a general rule, the incurrence of the forfeiture does not *ipso facto* transfer the forfeited property to the state, or the party to whom it goes; but a final judgment of a court of competent jurisdiction is requisite to pass the title.[1]

But the forfeiture, when decreed, relates back to the time when it was incurred.[2]

§ **65. Forfeiture odious.**—In the administration of statutory law, it is important to observe the distinction between things odious and things favored, as affecting the rule of construction applicable to each. Statutes creating the former are subject to strict construction, while the latter kind are construed liberally. Forfeitures and penalties belong to the odious class, and fall under the rule of strict construction.[3] The rule of construction applicable may be decisive of a case.

II. *Succession.*

§ **66. Definition, and kinds.**—Defined in a general way, succession is the transfer of title or rights from one person, or set of persons to another, either by act of the parties or by operation of law, whereby the latter becomes

[1] 1 Bishop Cr. L., § 967; Fire Department of New York v. Kip, 10 Wend., 266; King v. Earbury, Fort., 37; Wells v. Martine, 2 Bay, 20; Skinner v. Perot, 1 Ashm., 57.

[2] Bulkly v. Orms, Brayt. (Vt.), 124; Clark v. Protection Ins. Co., 1 Story, 109; The Mears, 8 Cranch, 417; United States v. Seventy-six Thousand One Hundred and Twenty-Five Cigars, 18 Fed. Rep., 147.

[3] Bishop Cont. (Enl. Ed.), § 417; Bishop Written Laws, § 192 *et seq.*; Taylor v. Patterson, 9 La. An., 251; Smith v. Spooner, 3 Pick., 229; Sewal v. Jones, 9 Id., 412; Sullivan v. Park, 33 Me., 438; The State v. Stevenson, 2 Baily, 334, 335; United States v. Burdett, 9 Pet., 682.

the successor of the former in respect of such title or rights.

There are several kinds or modes of succession by operation of law, without the act of the parties, classified as follows: first, the succession to the government of the personal and real estate of an intestate, when he has no heirs, or next of kin to claim it; second, what is sometimes called legal succession, which governs the distribution of decedent estates, and which is treated, *post*, under the head of Intestacy;[1] and, third, common law succession, "the mode by which one set of persons, members of a corporation aggregate, acquire the rights of another set which preceded them."[2]

Testamentary succession is sometimes erroneously classed with succession by act of law, instead of by act of the parties, to which class it belongs, as the devisee and legatee takes title direct from the testator. This kind of succession is discussed *post*,[3] under the head, "Title by will or testament."

The third kind only, that of common law succession, will be considered in this connection.

§ 67. **Common-law succession.**—This mode of acquiring title relates mainly to corporations aggregate, which were treated *supra*.[4] According to Blackstone, the acquisition of property in chattels by succession "is, in strict-

[1] § 70.

[2] Bouv. Law Dict., "succession;" 2 Kent Com., p. 387; 2 Blacks. Com., pp. 430, 431; 1 Id., pp. 468, 469, 475; And. L. Dict., "succession."

[3] § 90, etc.

[4] § 80.

ness of law, only applicable to *corporations aggregate*," "in which one set of men may, by succeeding another set, acquire a property in all the goods, movables, and other chattels of the corporation."[1] But, as we have seen, the term "succession" may have a broader scope.

Chief Justice Marshall, in the celebrated Dartmouth College case,[2] speaking of the properties of corporations aggregate, says: "They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means a perpetual succession of individuals is capable of acting for the promotion of the particular object, like one immortal being."

In sole corporations a distinction is made in respect of succession. When a sole corporation is the representative of a number of persons, it has the same capacity as a corporation aggregate to take chattels in succession; but in case of sole corporation which represent only one person, chattel interests do not pass in succession.[3]

Sole corporations proper are rare in the United States, but there are *quasi* corporations possessing some of the

[1] 2 Black. Com., pp. 430, 431.

[2] Dartmouth College v. Woodward, 4 Wheat., 636. And see 1 Black. Com., pp. 469, 470, 471, 475; 2 Kent Com., p. 273; 1 Potter Corp., §§ 2, 3, 4.

[3] 2 Black. Com., pp. 431, 432; Kent Com., pp. 273, 274; 1 Potter Corp., § 18.

properties, and subserving some of the purposes, of sole corporations.[1]

III. *Judgment.*

§ **68. Definition.**—A judgment is the conclusion of law, upon the facts of a case judicially ascertained, pronounced by a competent tribunal having jurisdiction in the premises, in a matter regularly before it for adjudication.

Judgments in actions *ex contractu* are classed with contracts of record by some text-writers and courts;[2] but other authorities dissent, holding that no judgment has the essential elements of a contract;[3] and the weight of authority seems to be on this side of the question.

But, whatever may be the rule respecting judgments in actions *ex contractu*, there is no good reason for classing judgments *ex delicto* with contracts;[4] and it is with these mainly, that we are concerned in this connection.

§ **69. Judgments which transfer title.**— In actions of trover, or of *de bonis asportatis*, if the plaintiff recovers judgment, and obtains satisfaction, the title to

[1] 1 Potter Corp., § 18, and cases cited; Boone Corp., § 6, and cases cited.

[2] 1 Pars. Cont. (7 Ed.), p. 8; Metc. Cont., p. 4; Anson Cont., pp. 8, 37, 38; Wald's Pollock Cont., pp. 145, 146; Morse v. Tappan, 3 Gray, 411; Gebhard v. Garnier, 12 Bush., 321; Stuart v. Landers, 16 Cal., 372.

[3] Bishop Cont. (Enl. Ed.), § 141; O'Brien v. Young, 95 N. Y., 428; Louisiana v. Mayor, 109 U. S., 285; Rae v. Hulbert, 17 Ill., 572, 580; Burnes v. Simpson, 9 Kan., 658; Larrabee v. Baldwin, 35 Cal., 155, 168; McConn v. The N. Y. C. and H. R. R. Co., 50 N. Y., 176; Biddleson v. Whytel, 3 Burrows, 1545–1548.

[4] Bishop Cont. (Enl. Ed.), § 141.

the property in question is transferred to the defendant; the damages recovered being regarded as the price of the chattel so transferred by operation of law.[1]

It is a mooted question whether the recovery of judgment alone, without satisfaction, will transfer the title to the property in question to the defendant. There are cases, English and American, holding the affirmative of the question on, at least, plausible grounds;[2] on the other hand, there are numerous cases holding the negative, the judgment being regarded as a security merely, leaving the title to the property in the plaintiff until payment of the price represented by the judgment.[3]

It seems but reasonable and just that the owner should not lose title to his chattel against his will, by the tortious act of another, without receiving compensation for it; and equally reasonable and just that the wrong-doer should not profit by his tort without first paying the judgment price.

There are some other cases, generally assigned to this mode of acquiring title to personal property, of which notice should be taken. They differ somewhat from the

[1] 2 Kent Com., pp. 387, 388; 2 Black. Com., pp. 437, 438; Bishop Non-Cont. Law, § 399.

[2] Brown v. Wootton, Cro. Jac., 73; Adams v. Broughton, Strange, 1078; Rogers v. Moore, 1 Rice, 60; White v. Philbrick, 5 Greenl., 147; Carlile v. Burley, 3 Id., 250; Floyd v. Browne, 1 Rawle, 125; Marsh v. Pier, 4 Id., 273; Hunt v. Bates, 7 R. I., 217.

[3] Curtis v. Groat, 6 Johns., 168; Osterhout v. Roberts, 8 Cow., 43; Sanderson v. Caldwell, 2 Aiken, 195; Elliott v. Porter, 5 Dana, 299; Campbell v. Phelps, 1 Pick., 62; Sharp v. Gray, 5 B. Monr., 4; Hepburn v. Sewell, 5 Har. and J., 211; Spivey v. Morris, 18 Ala., 254; Drake v. Mitchell, 3 East, 258; Cooper v. Shepherd, 3 C. B., 266; Goff v. Craven, 34 Hun, 150; Thurst v. West, 31 N. Y., 215.

cases now considered, and do not in all respects strictly fall within the same doctrine, yet for all practical purposes they may properly be placed in the same category.

1. Cases of penalties given by statute, which may be recovered by any party who will sue for the same; and *qui tam* actions, in which an informer may sue for the penalty in his own name, as well on behalf of himself as the state. In this class of cases no particular person has any right in, or claim upon, the penal sum before action brought; and he who first brings the action and obtains judgment, acquires title to it.[1]

2. Damages awarded to a man as a compensation for an injury sustained; as for a battery, for false imprisonment, for slander or trespass, and, generally, for injuries resulting from torts, for which the damages recoverable are uncertain. In this class of cases, the damages, when fixed by judgment, become the property of the plaintiff, transferred to him from the defendant by operation of law.[2]

IV. *Intestacy.*

§ 70. Definition, history, and incidents.—Intestacy is the state or condition of a person dying without leaving a valid will.[3] Applied to the subject in hand, it signifies the state of one dying and leaving testable personal property undisposed of by will.

The intestate's title to his property dies with him; and where the title rests intermediate his death and the

[1] 2 Black. Com., p. 437; Bishop Written Laws, § 250 d.
[2] 2 Black. Com., p. 438.
[3] Bouv. L. Dict., "intestacy;" 2 Black. Com., p. 494.

appointment of an administrator, is a question which has caused some confusion of thought. It does not vest in his heirs at law for they take only decedent's real estate; it does not pass directly to the next of kin, for they take no legal title to his personal property; neither their title nor that of any other person can accrue in other mode than through the medium of an administrator.[1]

A brief historical sketch of the law of intestacy will relieve the question from difficulty. We have seen[2] that occupancy is the first known method of acquiring title to personal property; that the right of property in external things in the aggregate belongs to the human race collectively; that he who first appropriated a thing to his own use acquired a property therein, and an exclusive right thereto, which property and right continued so long as the exclusive use or occupancy continued, and no longer. That when possession was abandoned the right was lost, and any other person might appropriate the thing to his own use, with the like right and limitation; and so on in succession indefinitely. The abandonment of the thing by the possessor relegated it to the common stock belonging to mankind as a whole. In other words, the abandoned thing became a part of the unappropriated body of property known as *bona vacantia;* and the death of the possessor was regarded as an abandonment having this effect.

Referring especially to England, in the progress of

[1] Ferrie v. The Public Administrator, 3 Bradf. Surr. Rep., 249, 262; Beattie v. Abercrombie, 18 Ala. 9; Sneed v. Hooper, Cooke (Tenn.), 200; Beecher v. Buckingham, 18 Conn., 110; State v. Moore, 18 Mo. App., 406; Palmer v. Palmer, 55 Mich., 293.

[2] *Supra*, § 33.

events *bona vacantia* became the property of the king. He seized upon such goods as *parens patriæ* and general trustee of the kingdom.

Originally the king exercised this prerogative by his own ministers of justice; but later it was granted as a franchise to many of his lords of manors, and others who thereunder acquired a right to grant administration to their intestate tenants and suitors in their own courts baron, and other courts.

Subsequently the crown granted this right to the popish clergy. The ordinary — i. e. one who had ordinary or immediate jurisdiction in matters ecclesiastical, an ecclesiastical judge — might seize and keep the goods of an intestate, keep them without wasting, give, alien, or sell them at will, and dispose of the proceeds *in pios usus*.

But the clerical garb was not proof against temptation, and after a while the clergy came to the pious conclusion that they were the rightful beneficiaries, and appropriated to themselves most of the estates thus left them in trust, without even paying the debts of the deceased.

Finally, Parliament interposed and placed administration in the hands of the "nearest and most lawful friends of the deceased;" and by a subsequent act, it was granted either to the widow, or next of kin, or both.[1] But the ordinary still had jurisdiction in the administration of estates, and granted letters, the administrators being regarded as his officers.

[1] Statutes, 31 Edw. III, c. 11; and 21 Hen VIII, c. 5.

This is the origin, and history in brief, of administration in England. It will be seen that the administration of the property of an intestate is based upon the doctrine that his death was an abandonment of title, and that his personalty thereupon became *bona vacantia*, passing to the sovereign as the *parens patriæ*, or general trustee of the realm. The *legal* title vests in the crown; the *equitable* title in decedent's creditors and next of kin.

The same doctrine prevails in the American States, substituting "government" for "king" or "crown," and, as a necessary sequence, intermediate the death of intestate and the issuance of letters of administration, the legal title to his personal property vests in the government in trust.[1]

There are cases, however, holding that after the death of the intestate his personal property may be considered in abeyance till administration granted, and is then vested in the administrator by relation to the time of decedent's death.[2] But to this view there are several objections. First, it is historically illogical; secondly, it is in conflict with the axiomatic principle that in the matter of title to property the law abhors a vacuum, that the title must be somewhere; and, thirdly, it leaves the personal effects of intestate without lawful custody and

[1] 2 Black. Com., pp. 3, 11, 259, 401, 494–496; Pom. Munic. L., § 787; Aspinwall v. The King's Proctor, Curt. Ecc., 246; Hensloe's Case, 9 Rep., 37, 38; Public Administrator v. Hughes, 1 Bradf. Surr Rep., 125, 128, 129; Ferrie v. The Public Administrator, 3 Id., 249, 262, 263.

[2] Jewett v. Smith, 12 Mass., 309; Clapp v. Stoughton, 10 Pick., 463; Lawrence v. Wright, 23 Id., 128; Brackett v. Hoitt, 20 N. H., 257; McVaughters v. Elder, 2 Brev. (S. C.), 307; Miller v. Reigne, 2 Hill (S. C.), 592.

protection until the grant of administration, which is often delayed for a considerable length of time. True, on the appointment of an administrator, the legal title passes to him by operation of law, and relates back to the death of the intestate for the purposes of securing the estate, and protecting persons dealing with parties entitled to administration, who are afterwards appointed and assume such administration. The administrator may maintain an action for an unredressed tortious injury to, or conversion of, the property of the estate prior to his appointment;[1] yet the want of present adequate protection intermediate his appointment and the death of the intestate, might result in irreparable injury to the estate.

While the legal title to the intestate's personal property is in the administrator as trustee, so that for the purposes of administration he may sell the same and give a good title to the purchaser, the next of kin have a vested interest in the surplus of the estate, after the payment of the debts.[2]

The appointment, powers, and duties of an administrator, and the distribution of intestate's personal property, are generally regulated by statute; and the rules of the common law are more or less modified in most, if not all, of the American States.

[1] Citations *supra*, and Dayt. Surr., p. 234; Valentine v. Jackson, 9 Wend., 302; Babcock v. Booth, 2 Hill, 181; Vroom v. Van Horne, 10 Paige, 549.

[2] Ferrie v. The Public Administrator, 3 Bradf. Surr. Rept., 249, 262; Pom. Munic. L., § 798.

V. *Insolvency.*

§ 71. Meaning of the terms insolvency, and bankruptcy.— This mode of acquiring title to personal property embraces bankruptcy, which is included in the generic term insolvency.

Writers do not agree in respect to the derivation of the word bankruptcy. The weight of authority favors the view that it is derived from the words *bancus*, which means the table or counter of a tradesman, and *ruptus*, broken, signifying the broken bench or counter, and denoting one whose shop or place is broken or gone. This view is rendered probable from the custom said to have once existed among the bankers of Italy, who carried on the business in public places, seated on forms, with benches on which to count their cash; and when one became insolvent, his bench was broken, either as a mark of reproach, or to make room for another.[1]

The word insolvent means not solvent. In law it expresses the state of a person who is unable, for any cause, to pay his debts. Or, what is perhaps a better definition, the state of one who is unable to pay his debts as they fall due in the usual course of trade or business.[2]

§ 72. Distinction between bankrupt, and insolvent, laws.—Originally there were several points of difference

[1] 2 Black. Com., p. 472; Bouv. L. Dict., "bankruptcy;" 3 Pars. Cont. (7 Ed.), p. 423, n. (b); 1 Beaw. Lex *Merc.*, 371.

[2] Bouv. L. Dict., "insolvency;" Ferry v. The Bank of Central New York, 15 How. Pr. Rep., 445, 451; Thompson v. Thompson, 4 Cush., 134; Brower v. Harbeck, 9 N. Y., 589; Lee v. Kilburn, 3 Gray, 594; Hazleton v. Allen, 3 Allen, 114.

between bankrupt and insolvent laws; and such distinctions still exist where they are not modified or obliterated by statute.

1. Bankrupt laws apply only to traders or merchants; while insolvent laws apply to all indiscriminately.

2. Bankrupt laws discharge absolutely the obligation of the honest debtor; while insolvent laws discharge only the *person* of the debtor, leaving his future acquisitions still liable for his debts.

3. Formerly, while all persons owing debts could take the benefit of an insolvent law, none who were not traders, or *quasi* traders, could be forced into bankruptcy against their will, at the suit of others.

But these distinctions are of very little practical importance at present, in this country, having been quite generally, to a large extent, obliterated by the legislation both of the Federal Government and the States.[1]

§ 73. General purposes, and effect, of insolvent laws.—We have seen that one of the limitations to the absolute ownership of personal property, is its liability for the satisfaction of all his just debts, except in so far as it may be exempt by statute.[2]

The effect of insolvency is, in contemplation of law, to convert the insolvent's estate into a common fund for the payment of his debts; and the proceedings in bank-

[1] 3 Pars. Cont. (7 Ed.), pp. 430, 431; R. S. of U. S. (2 Ed.), § 5014; Blanchard v. Russell, 13 Mass., 1; Ogden v. Saunders, 12 Wheat., 213; Sturges v. Crowninshield, 4 Id , 119; Sackett v. Andross, 5 Hill, 327; Adams v. Storey, 1 Paine C. C., 79.

[2] *Supra* § 5; and see 3 Pars. Cont. (7 Ed.), pp. 428, 429.

ruptcy, or insolvency, constitute the legal machinery by which the estate is transferred to his creditors.[1]

Under these proceedings the insolvent's property is transferred by operation of law to an assignee or trustee, who is clothed with authority to administer the same for the benefit of creditors. He sells the property, or so much thereof as may be necessary for the purpose, and, after paying expenses of administration, distributes the residue among the creditors *pro rata*, if the fund be insufficient to pay them in full. If there be a surplus after paying expenses and all the creditors in full, it is paid over to the insolvent or his legal representatives.

The operation of these laws embraces two classes of debtors: 1. Dishonest debtors, who do not wish or intend to pay their debts, in whose case the law interposes and does for them, and for the benefit of their creditors, what they ought to do voluntarily, but will not. 2. Honest debtors, who wish to pay their debts, but are unable to do so in full; in this class of cases the law comes to the aid of both debtor and creditor, takes the property of the former for the benefit of the latter, and relieves the honest but unfortunate debtor from further obligation and embarrassment.[2]

§ 74. United States bankrupt, and insolvent, laws.— Under the Federal Constitution Congress is authorized to establish "uniform laws on the subject of bankruptcies throughout the United States."[3] In virtue of this authority, Congress has enacted three general laws on

[1] Sturges v. Crowninshield, 4 Wheat., 195.

[2] 3 Pars. Cont., p. 431; 2 Black. Com., pp. 473, 474.

[3] U. S. Const., Art. I, § 8.

the subject, all of which have been repealed, viz: 1. The act of April 4, 1800, repealed December 19, 1803; 2. The act of August 19, 1841, repealed March 3, 1843; and 3. The act of March 2, 1867, repealed June 7, 1878; aggregating less than eighteen years during the century of national life under the Federal Constitution.

But the omission has been largely supplied by State insolvent laws. It is well settled that the States have the reserved power to enact insolvent laws, notwithstanding the authority vested in Congress by the United States Constitution; and the laws passed on the subject, by Congress and the State legislatures, have, generally, each contained the distinctive features of both bankrupt and insolvent laws.[1]

To the power of the States, however, there are certain limitations.

1. The State bankrupt or insolvent law must not impair the obligation of a contract.

2. It must not conflict with any existing act of Congress on the subject.

3. The State cannot pass a law that shall act upon the rights of citizens of other States, who do not voluntarily become parties to proceedings under it affecting such rights.[2]

As to when statutes are in conflict it is held, that two

[1] 2 Kent Com., p. 391; 3 Pars. Cont., pp. 435–446; Story's Com. on Const. U. S., Vol. III, p. 11.

[2] 2 Kent Com., p. 391, *et seq.*; Sturges v. Crowninshield, 4 Wheat., 122; Gibbons v. Ogden, 9 Id., 197, 227, 235, 238; Houston v. Moore, 5 Id., 34, 49, 52, 54; Ogden v. Saunders, 12 Id., 213; 3 Pars. Cont. (7 Ed.), pp. 431-446.

having the same general object, and acting upon the same persons and the same cases, by different modes and in different jurisdictions, must be in conflict with each other. Though the modes by which the remedy is administered may vary, yet, where the bankrupt act and the State insolvent law have substantially the same scope and object, and act upon the same persons and cases, the State law is suspended.[1]

The effect of a conflict is to *suspend*, not to *abrogate*, the State insolvent law. If the act of Congress which suspends a State law be repealed, the latter is thereby revived and rendered operative.[2]

VI. *Marriage.*

§ 75. Transfer of chattels by marriage.— At common law marriage vests the husband with title to the chattels of the wife, and with the same degree of property, and the same powers, as the wife when sole had in and over them.[3]

This effect of marriage is the logical outcome of the doctrine that husband and wife constitute a unit, of which the husband is the embodiment. By the common law the individuality, and being, even, of the wife is in

[1] Martin v. Berry, 2 Bankr. Reg., 629; s. c., 37 Cal., 208; Van Nostrand v. Carr, 30 Md., 128; Shears v. Sollinger, 10 Abb. Pr. Rep. (N. S.), 287; 3 Pars. Cont. (7 Ed.), p. 446 and notes.

[2] Sturges v. Crowninshield, 4 Wheat., 122; 3 Pars. Cont. (7 Ed.), p. 446.

[3] 2 Black. Com., p. 433; 2 Kent Com., pp. 130, 134; Reeve Dom. Rel. (4 Ed.), p. 1, *et seq.*; Browne Dom. Rel., p. 29; Bish. Mar. and Div., §§ 14, 15.

a degree suspended during coverture, or legally merged in that of her husband.[1]

The personal property of the wife in possession at the time of her marriage, in her own right, vests immediately and absolutely in her husband. He can dispose of it at will, and on his death it passes to his representatives.[2]

§ 76. As to the wife's choses in action.— The husband has a qualified property in the *choses in action* belonging to his wife at the time of their marriage; but to obtain an absolute title, and render them available to him, he must reduce them to possession by some unequivocal act signifying his claim of ownership. He may sue for and recover, or release and assign, them; and when recovered or assigned the avails, whether in specie or money, become absolutely his own property.[3]

But, in case the husband dies without having reduced the *chose in action* to possession, it will belong to the wife in her own right without administering on his estate.[4]

[1] 2 Black. Com., p. 433; 2 Kent Com., p. 129.

[2] 2 Kent Com., p. 143; Hyde v. Stone, 9 Cow., 230; Harper v. McWhorter, 18 Ala, 229; Mahoney v. Bland, 14 Ind., 176; Burgess v. Heape, 1 Hill (S. C.), Ch. 397; Vaden v. Vaden, 1 Head (Tenn.), 444; Carleton v. Lovejoy, 54 Me., 445.

[3] 2 Kent Com., p. 135; Reeve Dom. Rel. (4 Ed.), p. 2, and notes; Winslow v. Crocker, 17 Me., 29; Tryon v. Sutton, 13 Cal., 490; Fourth Ecclesiastical Soc. v. Mather, 15 Conn., 582; Young v. Ward., 21 Ill., 223; Evans v. Secrest, 3 Ind., 545; Lowery v. Craig, 30 Miss., 19; Tritt's Adm'rs v. Colwell's Adm'rs, 31 Penn., 232.

[4] 2 Kent Com., p. 135; Reeve Dom. Rel. (4 Ed.), p. 4, and n. 1; Legg v. Legg, 8 Mass., 99; Howes v. Bigelow, 13 Id., 384; Griswold v. Penniman, 2 Conn., 564; Searing v. Searing, 9 Paige, 283.

On the other hand, in case of the wife's death before the husband has reduced her *choses* to possession, he, surviving her, is not vested with the absolute title in virtue of his marital rights; but he may recover the same to his own use through letters of administration, to which the husband is generally entitled.[1]

§ 77. No unjust discrimination against the wife.— To relieve the common law from the unmerited reproach cast upon it by ardent reformers, on account of its alleged cruel discrimination against the wife, it should be noticed that the marital relation lays burdens upon the husband from which the wife is relieved. He becomes liable for the payment of her debts contracted before marriage; and this, even though she brings him no dower.[2] He is obliged to maintain his wife, and provide her with necessaries suitable to her situation and his condition in life; and is liable for debts that she may contract for such things during cohabitation.[3]

He is also liable for her torts committed both before and after marriage.[4]

Not merely does the law relieve the wife of burdens incident to humanity, and lay them upon her husband, but it carefully and tenderly provides protection for her rights, and security against injustice and oppression by

[1] 2 Kent Com., p. 135; Reeve Dom. Rel. (4 Ed.), p. 13; Garforth v. Bradley, 2 Ves., 675; Richards v. Richards, 2 Barn. and Adol., 447; Barnes v. Underwood, 47 N. Y., 351.

[2] 2 Kent Com., pp. 143, 144; Browne Dom. Rel., pp. 18, 19; Reeve Dom. Rel. (4 Ed.), p. 95, *et seq.*

[3] 2 Kent Com., pp. 146-149; Browne Dom. Rel., pp. 20-25.

[4] 2 Kent Com., pp. 149, 150; Reeve Dom. Rel. (4 Ed.), p. 100; Browne Dom. Rel., p. 26.

her husband. If, for example, the husband seeks the aid of a court of equity to get possession of his wife's property to which he may be entitled in law, he will be required first to make a reasonable provision out of it for the maintenance of herself and her children.

And chancery will sometimes restrain the husband from recovering her property at law, until a suitable provision is made for her support.[1]

It only remains to notice, that by statute in many States of the Union the marital unit is broken into fractions, the wife being empowered to hold and deal with her property independent of her husband, with equal freedom, and to the same extent, as a *feme sole*.

For the law on this subject as thus changed, reference must be had to the statutes of the several States.

[1] 2 Kent Com., p. 139, *et seq.*; Reeve Dom. (4 Ed.), p. 12 and notes

CHAPTER IX.

THE THIRD GENERAL MODE OF ACQUIRING TITLE TO PERSONAL PROPERTY — TRANSFER BY ACT OF THE PARTIES.

SECTIONS 78–84. Gifts *inter vivos*.
85–89. Gifts *causa mortis*.
90–95. Title by will or testament.
96–114. Sales.
115. Indorsement.
116. Assignment.
117. Bailment.

This general mode includes: I. Gifts *inter vivos;* II. Gifts *causa mortis;* III. Title by will or testament; IV. Sales; V. Indorsements; VI. Assignments; VII. Bailments.

These will now be severally discussed in their order.

I. *Gifts Inter Vivos.*

§ 78. Definition, and subjects, of these gifts.— A gift *inter vivos* is a voluntary, actual, and immediate transfer of a thing by one living person to, or for, another living person. The student should observe that the term "voluntary" here, and generally in the law, means without consideration.[1]

[1] Bouv. L. Dict., "gift;" 2 Kent Com., p. 438, *et seq.*; 1 Pars. Cont., (7 Ed.), pp. 234–236; 2 Sch. Pers. Prop., p. 68, *et seq.*; Williams Pers. Prop., p. 36; Bish. Cont. (Enl. Ed.), §§ 82, 83; Faxon v. Durant, 9 Met., 339; Penfield v. Thayer, 2 E. D. Smith, 305.

Personal property of every description, corporeal or incorporeal, may be transferred by gift.[1]

§ 79. Delivery essential.—To complete a transfer by gift, the donor must have a present intention of renouncing all right to, and dominion over, the thing given, without power of revocation; and he must deliver possession to, or for the donee.[2] This rule is satisfied by an absolute delivery to a third person divesting the possession and title of the donor, and intended to confer the title upon the donee.[3] And it has been held, even, that the donor may, by an apt declaration to that effect, convert himself into a trustee for the donee.[4] Delivery may be constructive or symbolical, as well as actual and manual.[5]

A debt due from the donee to the donor may be the subject of a gift from the latter to the former; and the gift may be consummated by a delivery to the donee by the donor of any evidence of the debt existing; and if there be none, then by a delivery of a receipt in full.[6]

[1] Citations last *supra;* and see Bogan v. Finlay, 19 La. An., 94.

[2] Citations *supra* under § 78; Sewal v. Glidden, 1 Ala., 52; Anderson v. Baker, 1 Ga., 595; People v. Johnson, 14 Ill., 342; Dole v. Lincoln, 31 Me., 422; Reed v. Spaulding, 42 N. H., 114; Carpenter v. Dodge, 20 Vt., 595; Irish v. Nutting, 47 Barb., 370; Brink v. Gould, 7 Lans., 425; Jackson v. Twenty-third Street Railway Co., 88 N. Y., 520, 526; Wallace v. Burdell, 97 Id., 131.

[3] Hurlbut v. Hurlbut, 49 Hun, 189; Young v. Young, 80 N. Y., 422, 430; Hutchings v. Miner, 46 N. Y., 456; Sch. Pers. Prop., pp. 80, 82.

[4] Taylor v Kelley, 5 Hun, 115; Gray v. Barton, 55 N. Y., 68, 72.

[5] Citations *supra* under § 78; Allen v. Cowan, 23 N. Y., 502; Marsh v. Fuller, 18 N. H., 360; Cooper v. Burr, 45 Barb., 9; Hackney v. Vrooman, 62 Id., 650; Camp's Appeal, 36 Conn., 88; Gardner v. Merritt, 32 Md., 78.

[6] Gray v. Barton, 55 N. Y., 68; 2 Sch. Pers. Prop., p. 90.

If the subject of the gift be a *chose in action*, there must be an assignment or what is equivalent to it; and the transfer must be actually executed.[1]

Equitable assignments are recognized and enforced where there is not a perfect legal transfer under the rules of the common law, and yet where the donor has so far completed his gift that the donee is entitled, in justice, to invoke the aid of a court of equity to perfect his title.[2]

§ 80. Validity of gifts.— Stolen goods cannot be the subject of a valid gift as against the true owner. The thief takes no transmissible interest; and the general rule of law that one cannot transfer a better title than he possesses applies with full force to gifts.[3] But the equities of subsequent *bona fide* purchasers will be respected.[4]

Gifts of chattels prejudicial to the rights of creditors are invalid. It is a well established rule of law, that a man holds his property subject to its liability for his debts; that he must be *just* before he is *generous;* and he is not at liberty to alien his property by gift, or otherwise, in fraud of his creditors.[5]

[1] 2 Sch. Pers. Prop., pp. 72-74; 2 Kent Com., p. 439.

[2] 2 Sch. Pers. Prop., pp. 75-79; Williams Pers. Prop., p. 36; Grover v. Grover, 24 Pick., 261; Wing v. Merchant, 57 Me., 383; Allerton v. Lacey, 10 Bosw., 362; Ellison v. Ellison, 6 Ves., 656; *Ex parte* Dubost, 18 Id., 140, 150; Vandenberg v. Palmer, 4 Kay & John., 204.

[3] 2 Sch. Pers. Prop , 100; Hoffman v. Carow, 22 Wend., 285.

[4] 2 Sch. Pers. Prop., p. 100; Anderson v. Green, 7 J. J. Marsh , 448; Black v. Thornton, 31 Ga., 641; Green v. Kornegay, 4 Jones (N. C.), L., 66; Moultrie v. Jennings, 2 McNull (S. C.), 508.

[5] *Supra*, § 5; 2 Sch. Pers. Prop., p. 101, *et seq.*: 2 Kent Com., pp. 440-443; 1 Pars. Cont. (7 Ed), p. 235; Thomson v. Dougherty, 12 Serg. and R., 448; Hanson v. Buckner, 4 Dana, 251; Sexton v.

§ 81. Gifts on condition, with reservation, or a trust.—Gifts are sometimes made with a condition or reservation imposed by the donor; in which cases the transfer is sometimes upheld as a qualified gift, and sometimes fails altogether, according to circumstances.[1]

If there be a lawful condition precedent imposed, the gift will take effect when, and only when, the condition is complied with.[2]

Trusts are sometimes attached to gifts at the time of delivery, which are sustained by the courts.[3]

§ 82. Gifts between parent and child.—Ordinarily the law does not presume a gift; but, in the absence of qualifying or contrary evidence, a delivery of personal property by a parent to his child, on or after marriage, will be regarded as a gift or advancement. And, generally, less evidence is requisite to characterize the transfer of personal property by parents to children as a gift, than in cases of non-kinship.[4]

Wheaton, 8 Wheat., 229; Gannard v. Elslava, 20 Ala., 732; Clark v. Depew, 25 Penn. St., 509; Trimble v. Ratcliffe, 9 B. Mon., 511.

[1] Citations last *supra;* The Lucy Ann, 23 Law Rep., 545; Duclaud v. Rousseau, 2 La. An., 168; Wolf v. Estes, 7 Ind., 448; Hope v. Hutchins, 9 Gill and J. (Md.), 77; Duncan v. Self, 1 Murph. (N. C.), 446; Pitts v. Mangum, 2 Bailey, 588; Withers v. Weaver, 10 Penn. St., 391.

[2] 2 Sch. Pers. Prop., p. 116; Berry v. Berry, 31 Iowa, 415; Martrick v. Linfield, 21 Pick., 325.

[3] 2 Sch. Pers. Prop., pp. 115–117; Marston v. Marston, 1 Fost., 491.

[4] Hallowell v. Skinner, 4 Ired. (N. C.) L., 165; White v. Palmer, 1 McNull (S. C.), Ch. 115; Whitfield v. Whitfield, 40 Miss., 352; Syler v. Eckhart, 1 Binn. (Pa.), 378; Young v. Glendeming, 6 Watts (Pa.), 509; Van Deusen v. Rowley, 8 N. Y., 358; Caldwell v. Pickens, 39 Ala., 514.

But a gift by the child to the parent, while the former is still under parental authority, is presumed to be made under parental influence, and therefore invalid. The burden of proof rests upon the parent to rebut the presumption, by showing that the child had independent advice, or was otherwise in a position to exercise an independent judgment as to the gift.[1]

§ 83. **Gifts between husband and wife.**—At common law there cannot be a gift from the husband to the wife during coverture, they being one person only, in contemplation of law. But equity has always upheld such gifts, whether made with, or without, the intervention of a trustee, when the claims of creditors were not affected.[2]

§ 84. **Revocation of gifts.**—When a gift is fully executed it is irrevocable as to the parties and their legal representatives, except for fraud, force, undue influence, or mental incapacity on the part of the donor. Gifts are no more revocable in their nature than transfers of property in other modes. Possession being given with intent to part with the property in the thing, the right of ownership and dominion for all purposes goes with it. But in behalf of creditors and *bona fide* purchasers, executed gifts may be set aside.[3]

[1] Story Eq. Jur., § 309; Pom. Eq. Jur., § 962; Browne Dom. Rel., p. 78; Burgen v. Udal, 31 Barb., 9; Taylor v. Taylor, 8 How., 199; Archer v. Hudson, 7 Beav., 551.

[2] 2 Kent Com., p. 163; Shuttleworth v. Winter, 55 N. Y., 624; Rynders v. Crane, 3 Daly, 339; Scott v. Simes, 10 Bosw., 314; Woodson v. McClelland, 4 Mo., 495; Neufville v. Thomson, 3 Edw., Ch. 92; Mack v. Mack, 3 Hun, 323.

[3] 2 Sch. Pers. Prop., p. 114; 2 Kent Com., p. 440; 1 Pars. Cont. (7 Ed.), p. 236; Sanborn v. Goodhue, 28 N. H., 48; Thomson v. Dough-

II. *Gifts Causa Mortis.*

§ 85. Definition.—Various definitions of gifts *causa mortis* are found in the books, differing in some unimportant respects, but none is more accurate and comprehensive than that of Judge Redfield. He says: "They may be defined as gifts of personal estate, made in prospect of death at no very remote period, and which are dependent upon the condition of death occurring substantially as expected by the donor, and that the same be not revoked before death."[1]

The original source of our law upon this species of gift is found in the civil law.[2] It occupies a middle ground between gifts *inter vivos* and legacies, partaking in some respects of the nature of both, while differing from each in other particulars.[3] It has the substantial qualities of a legacy in being ambulatory and revocable during the life of the donor, in not vesting until donor's death, and in being subject to the debts of the deceased; but differs from a legacy in that no action of a court, or assent of the executor, is essential to confirm and effectuate it.[4] It is

erty, 12 Serg. & R., 448; Hanson v. Buckner, 4 Dana, 251; Clark v. Depew, 25 Penn. St., 509; Saxton v. Wheaton, 8 Wheat., 229.

[1] 3 Redf. Wills (2 Ed.), p. 322, § 42; and see 2 Sch. Pers. Prop., p. 122; 2 Black. Com., p. 514; 2 Kent Com., p. 444; Bouv. L. Dict., "*dona mortis causa;*" Michener v. Dale, 23 Penn. St., 59; Nicholas v. Adams, 2 Whart., 22; And. L. Dict., "*Donatio mortis causa.*"

[2] 2 Kent Com., p. 444.

[3] 3 Redf. Wills (2 Ed.), p. 322, § 42, sub. 3; 2 Sch. Pers. Prop., p. 126; Bunn v. Markham, 7 Taunt., 224, 231; Merchant v. Merchant, 2 Bradf. Surr. Rep., 432; Ward v. Turner, 2 Ves. Sen., 431, 439, 440; Lawson v. Lawson, 1 P. Wms., 441.

[4] Citations last *supra.*

like a gift *inter vivos* in respect to the competency of the donor, the subjects of the gift, what constitutes the gift, delivery, and invalidity as against the rights of creditors; and unlike in respect of its revocability during the life of the donor.[1]

§ 86. Essentials to this gift.—To constitute a gift *causa mortis* three elements are essential: 1. It must be made with a view to donor's death from present illness, or from external and apprehended peril; 2. The donor must die of that ailment or peril; and 3. There must be a delivery.

Under the head of gifts *inter vivos* were discussed the competency of the donor, the subjects of the gift, delivery, and the effect upon creditors of the donor;[2] and as the same doctrines apply to and goverm gifts *causa mortis* in the particulars named, it is only necessary here to consider the rules specially applicable to this species, and not common to both.

1. The gift must be made with a view to the donor's death from present illness, or from external and apprehended peril.

This requisite has been the subject of much discussion, and some contrariety of judicial opinion. But the general doctrine established by the best considered cases is, that the donor must be in expectation of death, then *imminent*, either from illness or external peril.[3] The

[1] Citations last *supra*; and see 1 Pars. Cont. (7 Ed.), p. 237.

[2] *Supra*, §§ 78-84.

[3] Gourley v. Linsenbigler, 51 Penn. St., 345; Irish v. Nutting, 47 Barb., 370; Nicholas v. Adams, 2 Whart., 17; Smith v. Dorsey, 38 Ind., 451; Craig v. Kittredge, 46 N. H., 57.

case of *Grymes v. Hone*[1] has been cited as holding that old age alone will satisfy the rule under consideration. But a careful examination of the facts and opinion will show, that in addition to old age, *failing health*, from which the donor never recovered, was an important factor in the case.

2. The donor must die of the ailment, or peril, in view of which the gift was made. If he be ill and recover, or in peril and escape, the gift does not take effect. On this point the authorities are in harmony.[2]

§ 87. Title of donee, delivery, and effect.— The donee derives title directly from the donor in his lifetime, and not from his executors, or by virtue of administration. Nor has the executor or administrator of the donor any claim upon the subject of the gift, for the purpose of administration and the shares of distributees.[3]

To complete this kind of gift, as in case of gifts *inter vivos*, delivery is essential. But there are some points of difference between the two species in this regard, which should not be overlooked. In the case of a gift *inter vivos* there must be such a delivery by the donor, either actual or symbolical, to or for the donee, as will divest the former of all title to, and dominion over, the subject of the gift, and irrevocably vest the same in the donee. In the case of gifts *causa mortis* a distinction is made

[1] 49 N. Y., 17.

[2] 3 Redf. Wills (2 Ed.), p. 324, § 42, sub. 5; 2 Kent Com., p. 444; 2 Sch. Pers. Prop., p, 151; Drury v. Smith, 1 P. Wms., 404; Blount v. Burrow, 1 Ves. Jun., 546; Grymes v. Hone, 49 N. Y., 17, 20.

[3] Gannet v. Tucker, 18 Ala., 27; House v. Grant, 4 Lans., 296; Webster v. DeWitt, 36 N. Y., 340.

between delivery to an agent of the donor, and a trustee of the donee. The possession of the agent would be the possession of his principal, the donor, whose death would terminate the agent's authority, so that he could not thereafter make a valid delivery to the donee. But possession of the trustee would be the possession of *his* principal, the donee; so that delivery to the trustee is, in effect, delivery to the donee, thus completing the gift, subject to revocation; and the trustee has power to make actual delivery to the donee after the donor's death, in case of non-revocation.

The fact that the donor of a gift *causa mortis* has, during his life, the power of revocation, logically implies that such a delivery has taken place as would sustain a gift *inter vivos*, otherwise there would be nothing to revoke.[1]

§ 88. **Revocation.**—We have seen that gifts *inter vivos*, when complete, are irrevocable.[2] But a gift *causa mortis*, until fully confirmed by the donor's death as contemplated, is revocable in three instances: 1. By the donor's recovery from the particular illness, or escape from the imminent peril, in view of which the gift was made; 2. By the death of the donee prior to that of the donor; and, 3. By the act of the donor revoking the gift.[3]

[1] 2 Sch. Pers. Prop., pp. 152–167; Ward v. Turner, 2 Ves. Sen., 431; Irish v. Nutting, 47 Barb., 370; Hatch v. Atkinson, 56 Me., 324; Sessions v. Mosely, 4 Cush., 87; Farquharson v. Cave, 2 Coll., 356; Moore v. Darton, 4 DeG. & Sm , 517.

[2] *Supra*, § 84.

[3] 2 Sch. Pers. Prop., p. 176, *et seq.;* 2 Kent Com., p. 444; Weston v. Hight, 17 Me., 287; Merchant v. Merchant, 2 Bradf. Surr. Rep., 432; Bunn v. Markham, 7 Taunt., 230; Wiggle v. Wiggle, 6 Watts, 522; Parker v. Marston, 27 Me., 196.

But these gifts are not revoked by the donor's subsequent will; and for the reason that on his death the title of the donee becomes absolute, and therefore irrevocable by the will, which is inoperative during the donor's lifetime, the only period during which he could exercise the power of revocation.[1]

§ 89. **Not favored in the law.**—In closing this topic it should be noticed, that gifts *causa mortis* are not favored in the law. They are regarded as a fruitful source of litigation, and lack the formalities and safeguards surrounding wills, designed to prevent fraud and injustice.[2]

III. *Title by Will or Testament.*

§ 90. **Why assigned to this division.**—Title by will or testament is classed with transfers by act of the party, for the reason that it is derived immediately from the testator who, by virtue of his will, executed with due formality, gives direction to his property after his death. The title comes to his legatees, not in virtue of a common law rule, or by force of a statutory provision, as to distributees in case of intestacy, but by act of the testator in making and publishing his last will and testament. True, the beneficiaries do not take possession of, and acquire dominion over, the property given them by the will without the action of an intervening party or court,

[1] Merchant v. Merchant, *supra*; Nicholas v. Adams, 2 Whart., 17; Jones v. Selby, Prec. Ch., 300.

[2] 1 Delmotte v. Taylor, 1 Redf. Surr. Rep., 417; Duffield v. Elwees, 1 Bligh (N. S.), 533; Walsh v. Sexton, 55 Barb., 251, 256; Tillinghast v. Wheaton, 8 R. I., 536; Hatch v. Atkinson, 56 Me., 324; Brown v. Brown, 18 Conn., 410.

as the donee takes from the donor in case of a gift *inter vivos*, or the vendee from the vendor in case of a sale; but the title of legatees comes, nevertheless, in virtue and by force of the act of the testator.[1]

There are several kinds of legacies: general, specific, demonstrative, cumulative, vested, contingent, absolute, conditional, and residuary; but their consideration is omitted here, as unnecessary for the purpose of explaining the method of acquiring title now under discussion, and not within the scope of this treatise. The subject of legacies is examined *post*.[2]

The student will observe, that when the will operates upon personal property it is often called a testament, and when upon real estate, a devise; but the more general and popular denomination of the instrument is, last will and testament. Devise is the appropriate term for the testamentary disposition of real estate, legacy, for personal property; bequest is applied indiscriminately to devises and legacies, embracing both real and personal property. But as bequest has no corresponding term to designate the taker, like devisee and legatee, it is not always a convenient term for use.[3] These terms are often used inaccurately and indiscriminately in testamentary instruments, sometimes causing perplexity in the construction; but as the leading rule of construction and adjudication is, to ascertain and enforce the intention of the testator, the terms employed will not be held to

[1] 2 Black. Com., pp. 512, 513; 1 Sch. Pers. Prop., p. 728, *et seq.*; 2 Redf. Wills, p. 215, § 16; 1 Rop. Leg., 842.

[2] § 130.

[3] 1 Redf. Wills, pp. 5, 6; 1 Williams Ex'rs, 6; 1 Jarm. Wills (Eng. Ed. 1861), 702, n. k; Dupper v. Mayo, 1 Saund., 276 f, n. 4.

strict definitions, and may be used indiscriminately without necessarily thwarting the will of the testator.[1]

§ 91. Last will and testament defined.—The books contain various definitions of a last will and testament, differing in phraseology and unimportant particulars, but all substantially embodied in the brief definition of Judge Redfield—"the disposition of one's property, to take effect after death."[2]

It is well said in *Turner v. Scott*,[3] that "the essence of the definition of a will is that it is a disposition of property to take effect after death."

§ 92. Testamentary capacity.—All persons, not under natural or legal disability, are competent to execute a valid will. The exceptional persons, and grounds of disability, will now be briefly noticed.

1. *Aliens.*—While by the common law aliens are incompetent to devise real estate, alien friends — subjects of governments at peace with us — may dispose of personal property by will. But alien enemies — subjects of governments at war with us — are incapable of executing a valid will of personal property, even, unless by special license from the government to reside and transact busi-

[1] 1 Redf. Wills, pp. 419, *et seq.*, 432, *et seq.*; 4 Kent Com., p. 535, *et seq.*; O'Hara Wills, p. 29, § 5, *et seq.*; Wootton v. Redd, 12 Gratt. (Va.), 196; Lepage v. McNamara, 5 Iowa, 124; Byers v. Byers, 6 Dana (Ky), 312; Pickering v. Langdon, 22 Me., 413; Creswell v. Lawton, 7 Gill & J. (Md.), 227; Penroyer v. Shelden, 4 Blatchf , 316.

[2] 1 Redf. Wills, p. 4. § 2, sub. 1; 2 Black Com., p. 500; 4 Kent Com., p. 501; Dayt. Surr., p. 42; Swinb., pt. 1, § 2.

[3] 51 Penn. St., 126; and see Frederick's Appeal, 52 Id., 338.

ness within our territorial limits during the continuance of hostilities.[1]

2. *Infants.*—Under a certain age an infant is incapable of disposing of his property, real or personal, by last will and testament. The limitation of age is regulated by statute, both in England and in the American States, and is not uniform; but quite generally the age of testamentary capacity is earlier in females than in males, and for the assumed reason that the former mature earlier than the latter. In England until a comparatively recent period, in conformity to the Roman civil law, males at fourteen, and females at twelve,[2] might dispose of their personal estate by will. But the present English statute on the subject provides, that "no will made by any person under the age of twenty-one years shall be valid."[3]

In New York, males at eighteen, and females at sixteen, may bequeath their personal estate by will.[4]

Each State has its own statutory provisions on the subject, and to these the student and practitioner will necessarily refer.

3. *Coverture.*—Under the Roman civil law, the married woman had the same testamentary capacity as a *feme sole;* but in England coverture created a disability. To this rule, however, there were several exceptions. In many of the American States women were, until a com-

[1] 1 Redf. Wills, p. 8, § 3, sub. 2; 2 Kent Com., pp. 62, 63; 1 Pars. Cont. (7 Ed.), pp. 397, 398; Williams Pers. Prop., p. 46.

[2] 2 Black. Com., p 497.

[3] 1 Vic., c. 26.

[4] 4 N. Y. R. S. (8 Ed.), p 2547, § 21.

paratively recent period, and in some of the States still are, subject to this disability. But it is fast disappearing before the tide of modern legislation setting in that direction.[1]

4. *Mental incapacity.*—This exception covers a wide field, embracing idiocy, imbecility, insanity in its various species and multiplex nomenclature, and, generally, all persons included in the comprehensive designation *non compos mentis.*

It is generally held, that where the testator is free from the presence and disturbing influence of adverse parties, a lower degree of mental capacity will suffice to make a valid will, than is requisite for the transaction of other business where two minds, stimulated by opposite interests, contend for advantage.[2]

But the testator "must, at the time of executing the will, have had sufficient capacity to comprehend perfectly the condition of his property, and his relations towards the persons who are or might be the objects of his bounty, and the scope and bearing of the provisions of his will."[3]

5. *Undue influence, and fraud.*—It is not only essen-

[1] 1 Redf. Wills, p. 21, § 3; Reeve Dom. Rel. (4 Ed.), p. 187, n. 1; Browne Dom. Rel., p. 53.

[2] Converse v. Converse, 21 Vt , 168; Stevens v. Vancleve, 4 Wash. C. C., 262; Thompson v. Hyner, 65 Penn., 368; S. P. Stubbs v. Houston, 33 Ala., 555; Howard v. Coke, 7 B. Mon. (Ky.), 655; Kinne v. Kinne, 9 Conn., 102; and see Delafield v. Parish, 25 N. Y., 9.

[3] Delafield v. Parish, last *supra*, p. 29; Van Guysling v. Van Kuren, 35 N. Y., 70; Tyler v. Gardiner, Id., 559; Hall v. Hall, 18 Ga., 40; Sutton v. Sutton, 5 Harr. (Del.), 459; Hathorn v. King, 8 Mass., 371; Domick v. Reichenback, 10 Serg. & R., 84; Horne v. Horne, 9 Ired. (N. C.) L., 99.

tial that the testator should have had the requisite mental capacity at the time of executing his will, but he must have been free to use the same. In other words, the instrument produced as his last will and testament, must have been *his* will, and not that of another. The exercise of undue influence, or practice of fraud, may so dominate or blind the testator as to induce him to affix his executive hand to an instrument that does not express his assenting will. Such an instrument, it is scarcely necessary to state, is invalid.

To constitute undue influence having the effect stated, it must be such as is exercised by coercion, imposition, or fraud, and not that which arises from gratitude, affection, or esteem.[1]

§ 93. Written, and unwritten wills.—At common law, a will of personal property was good without writing;[2] but now, both in England and the United States, nuncupative wills are not valid, as a general rule at least, except in the two cases of sailors and soldiers, while in actual service and danger.[3]

A will may be written on any material, and in any

[1] Kinne v. Johnson, 60 Barb., 69; Van Hanswyck v. Wiese, 44 Id., 494; Clarke v. Davies, 1 Redf. Surr. Rep., 249; Gardiner v. Gardiner, 34 N. Y., 155; Hartman v. Strickler, 82 Va., 225; Waddington v. Buzby, 43 N. J. Eq., 154; Trost v. Dingler, 118 Pa. St., 259; Storey's Will, 20 Ill. App., 183.

[2] 4 Kent Com., p. 517; Swinb. Wills, 6; Prince v. Hazleton, 20 Johns., 502; *Ex parte* Thompson, 4 Bradf. Surr. Rep., 154.

[3] Citations last *supra*; and Gwin's Estate, 1 Tuck. Surr., 44; Hubbard v. Hubbard, 8 N. Y., 196; Black. Com., pp. 500, 501; 4 Kent Com., p. 517.

language; in pencil instead of ink; and the whole or a portion may be in print, an engraving, or lithograph.[1]

§ **94. Revocation.**—A will, being ambulatory during the testator's life,[2] may be revoked by him at his pleasure; and it is also revocable by implication or inference of law.[3]

1. The testator may revoke by a subsequent duly executed will, or, *pro tanto*, by a codicil.[4] But the rules in regard to testamentary capacity, and formalities of execution, apply to a subsequent will, and codicil, and must be observed or the instrument will have no effect upon a former will.[5]

2. The testator may revoke his will by burning, tearing, canceling, obliterating, or otherwise destroying the instrument itself, with the intent of revoking the same.[6] But such a revocation requires testamentary capacity, the same as required to execute a will. There must be

[1] 1 Redf. Wills, pp. 165, 166; *In re* Dyer, 1 Hagg., 219; Schneider v. Norris, 2 M. & S., 286; Temple v. Mead, 4 Vt., 536; Henshaw v. Foster, 9 Pick., 312; Kell v. Charmer, 23 Beav., 195.

[2] *Supra* § 85.

[3] 4 Kent Com., p. 521.

[4] 1 Redf. Wills, pp. 344–365; Christmas v. Whingates, 3 Swab. & Tr., 81; White v. Casten, 1 Jones, L. N. C., 197; Nelson v. McGiffert, 3 Barb., Ch. 158; Conovor v. Hoffman, 15 Abb. Pr. R., 100; Van Wert v. Benedict, 1 Bradf. Surr., 114.

[5] Citations last *supra*; and Boylan v. Meeker, 28 N. J. L., 274; Wikoff's Appeal, 15 Pa. St, 281; Nelson v. Pub. Adm'r, 2 Bradf. Surr., 210; Delafield v. Parish, 25 N. Y., 9; Smith v. McChesney, 15 N. J., Ch. 359.

[6] 1 Redf. Wills, pp. 345–347; Burtenshaw v. Gilbert, Cowp., 51; Smith v. Clark, 34 Barb., 140; Smith v. Dolby, 4 Harr. (Del.), 350; Sumner v. Sumner, 7 Harr. & J. (Md.), 388.

an intelligent *animus revocandi*, and freedom of volition and action.[1]

3. Marriage and the birth of issue. The rule generally obtains that the marriage of a *feme sole* works a revocation of her will previously executed. The marriage of a man does not, of itself alone, have the same effect; but marriage and the birth of issue does so operate, unless where the father prior to making his will, or cotemporaneously therewith, makes express provision, by a separate instrument, for such future issue.[2]

4. Revocation by the birth of children subsequently to the execution of a will is quite generally regulated by statute in this country. The statutory provisions of the different States on the subject, are not in all particulars alike; but the prevailing rule is, that the birth of a child revokes a will previously made, so far, at least, as to let in the child to a share in the property, unless some provision is made for it, either in the will or otherwise.[3]

§ 95. When the will takes effect.— A will of personal property does not, as a rule, take effect, nor are there any rights acquired under it, until the death of the

[1] Idley v. Bowen, 11 Wend., 225; Matter of Forman, 54 Barb., 274; Smith v. Waite, 4 Id., 28; Laughton v. Atkins, 1 Pick., 435; 1 Redf. Wills, pp. 303, *et seq.*

[2] 1 Redf. Wills, pp. 293–302; Hodsden v. Lloyd, 2 Br. Cr. Cas., 534; Cotter v. Layer, 2 P. Wms., 623, 624; Kenebel v. Scrafton, 2 East, 530; Bush v. Wilkins, 4 Johns., Ch. 506; Warner v. Beach, 4 Gray, 162; Morton v. Onion, 45 Vt., 145.

[3] 4 Kent Com., p. 526; Walker v. Hall, 34 Pa St., 483; Ash v. Ash, 9 Ohio St., 383; Fallow v. Chidester, 46 Ia., 588; Deupree v. Deupree, 45 Ga., 415; Bloomer v. Bloomer, 2 Bradf. Surr., 339.

testator. In legal phrase, a will speaks from the death of the testator.[1]

The subject of wills is regulated by statute in the several States of the Union, presenting considerable diversity of provisions, so that general rules, only, could here be given; and only a few of the multitude of cases on the subject have been cited.

IV. *Sales.*

§ **96. Sale defined.**—A bargain and sale of goods, termed in brief "a sale," is accurately defined to be "a transfer of the absolute or general property in a thing for a price in money."[2] Chancellor Kent thus defines a sale: "A sale is a contract for the transfer of property from one person to another, for a valuable consideration."[3] This definition differs from the above by embracing cases of barter and exchange, where the consideration is other than money, and which do not, therefore, constitute a sale according to the strict common law definition, which requires a consideration in money, paid or promised.[4]

[1] Jarm. Wills (5 Am. Ed.), 600; Banks v. Thornton, 11 Hare, 176, Delasherois v. Delasherois, 11 H. L. Cas., 62; Wagstaff v. Wagstaff, Law R. Eq., 229; Deegan v. Livingston, 15 Mo., 230; Leigh v. Savidge, 14 N. J. Eq., 124; Gourley v. Thompson, 2 Sneed (Tenn.), 387; Canfield v. Bostwick, 21 Conn., 550; George v. Green, 13 N. H., 521; Van Vechten v. Van Vechten, 8 Paige, 104.

[2] Benj. Sales (Ed. 1888), p. 1; 2 Sch. Pers. Prop., 186; 2 Black. Com , p. 446; Story Sales, § 1; Martin v. Adams, 104 Mass., 262; Wittowski v. Wasson, 71 N. C., 451; Smith v. Weaver, 90 Ill., 392; Creveling v. Wood, 95 Pa. St., 152, 158.

[3] 2 Kent Com., p. 468.

[4] Benj. Sales (Ed. 1888), p. 1, n. 1; 1 Pars. Cont. (7 Ed.), p. 521, n. (g); Mitchell v. Gile, 12 N. H., 390; Vail v. Strong, 10 Vt., 457.

But it has been held that if property be taken at a fixed money price, the transfer amounts to a sale, whether the price be paid in cash or in goods.[1] The distinction between a sale and barter or exchange is frequently ignored in the books; and, indeed, it is not of much practical importance, as the principal elements of the contract, and the rights and remedies of the parties, are substantially the same in both cases.[2]

Mr. Tiedeman, in his recent excellent treatise on Sales, formulates for his treatment of the subject the following definition: "In the sense in which the term is to be employed in this book, a sale may be defined to be a contract or agreement for the transfer of the absolute property in personalty from one person to another for a price in money."[3] This definition differs from the common one by embracing in effect executory sales. The distinction between executed, and executory, contracts of sale must be observed in the study of this subject. In the former, there is a present transfer of the absolute property in the subject of the sale; in the latter, an agreement of sale and future transfer; and in such case, the subsequent transfer of the thing converts an *executory*, into an *executed*, contract. It will be observed that, while one cannot sell, he may make a valid agreement to sell, a thing to which he has no present title.[4]

[1] Picard v. McCormick, 11 Mich., 68; S. P. Keiler v. Tutt, 31 Mo., 301.

[2] Dowling v. McKenney, 124 Mass., 480; Redfield v. Tegg, 38 N. Y., 212; Commonwealth v. Clark, 14 Gray, 367; Howard v. Harris, 8 Allen, 297; Mason v. Lothrop, 7 Gray, 355.

[3] Tiede. Sales, § 1.

[4] Tiede. Sales, § 1; Benj. Sales (Ed. 1888), pp. 1, 2; Am. n. pp. 3, 4; Joyce v. Murphy, 8 N. Y., 291; Blaisdell v. Souther, 6 Gray, 152;

§ 97. **Elements of a valid sale.**— A concurrence of the following elements is essential to a valid sale, viz: 1. Parties competent to contract; 2. Mutual assent; 3. A thing, the absolute property in which is the subject of the transfer; and 4. A price in money paid or promised.

These elements will now be treated briefly in the order named.

§ 98. **Parties competent to contract.**— For a full discussion of the subject of competency, reference must be had to works embracing the subject of contracts in general, and contracts of sale. It must suffice for present purposes to state, that to constitute a valid sale, the parties must have both natural and legal capacity to contract. "By natural capacity is meant a competent measure of mental power. Legal capacity includes natural, and also the permission of the law to exercise it."[1] There may be a want of either, or both, which creates incompetency to contract. For example, infants, persons *non compos mentis*, drunkards, married women, outlaws and persons attainted, aliens, spendthrifts, and seamen may be wholly or partially incompetent.

§ 99. **Mutual assent.**— To constitute a valid contract of sale, there must be not only competent parties, but the mutual assent of these parties to all the terms and conditions of the same. The minds of the parties must

Elliott v. Stoddard, 98 Mass., 145; Dittmar v. Norman, 118 Mass., 319; Lester v. East, 49 Ind., 588; Powder Co. v. Burkhart, 97 U. S., 110.

[1] Met Cont. (Heard's Ed.), p. 41.

meet, and assent to the same thing, in the same sense, and at the same instant of time.[1]

If an offer be made by one party in writing, orally, personally, by agent, by mail or telegraph, and received by the other party, its unconditional acceptance by the latter, communicated to the first party, completes a contract.[2] If there be a conditional acceptance, or counter proposition, communicated to the first party, his assent thereto, duly communicated to the second party, is requisite to complete a contract.[3] It is not essential to the completion of the contract that the assent should be express. It may be implied from language, or conduct, such as appropriating the benefits of the proposed contract, or otherwise treating it as complete, or even inferred from silence.[4] Where the offer is made by mail or telegraph, the contract is complete when the letter of acceptance is mailed, or the telegram announcing acceptance is deposited with the telegraph company for trans-

[1] Bishop Cont. (Enl. Ed.) § 313; 1 Pars. Cont. (7 Ed.), p. 475; Metc. Cont. (Heard's Ed.), p. 16; Tiede. Sales, § 33; Benj. Sales (Ed. 1888), p. 43; Am. n. pp. 70–75; Dickinson v. Dodds, 2 Ch. D., 463, 472; Cook v Oxley, 3 T. R., 653; Jordan v. Morton, 4 M. & W., 155; Allis v. Read, 45 N. Y., 142, 149; Utley v. Donaldson, 94 U. S., 29, 47.

[2] Tiede. Sales, §§ 38, 39; Bishop Cont. (Enl Ed.), §§ 321–324.

[3] Tiede Sales, § 37; 1 Pars. Cont., p. 477; Moss v. Sweet, 16 Q. B., 493; Derrick v. Monette, 73 Ala., 75; Baker v. Holt, 56 Wis., 100; Ashcroft v. Butterworth, 136 Mass., 511; Stagg v. Compton, 81 Ind., 171.

[4] Tiede. Sales, § 38; Benj. Sales (Ed. 1888), p. 42; Am. n. pp. 70–75; Joyce v. Swaee, 17 C B. (N S), 84, 101; Gowing v Knowles, 118 Mass. 232; Street v. Chapman, 29 Ind., 142; Payne v Cave, 3 T. R., 148; Hoadley v. McLaine, 10 Bing., 482, 487; Brogden v. Metrop. Railway Co., 2 App. Cas , 666; Taylor v. Jones, L. R. C. P. D., 87, 90; Crook v. Cowan, 64 N. C., 743.

mission, although such letter or telegram should never reach the offerer.[1]

Communication by telephone and phonograph being among the latest realizations of science, the rules governing the use of these instrumentalities in commercial transactions are not yet established. But, as the human voice is the immediate vehicle of the message conveyed, such communications will probably be regarded as personal.[2]

If, by reason of a mistake of fact in regard to the subject matter, or terms of the contract, the minds of the parties do not meet, there will be no mutual assent to the same contract, and, therefore, no sale or contract binding upon either party. And the same rule applies where one of the parties mistakes the other for a third person; in which case he makes no binding contract.[3]

An offer may be withdrawn at any time before acceptance, unless there be an agreement for a valuable consideration to hold it open a stipulated time for acceptance. In case of such an agreement, should the party making the offer withdraw the same before the expiration of the stipulated time, he would become liable to the other

[1] Mactier v. Frith, 6 Wend., 103; Adams v. Lindsell, 1 B. & Ald., 681; Tayloe v. Insurance Co., 9 How., 390; Vasser v. Camp, 11 N. Y., 441; Abbott v. Shepard, 48 N. H., 14; Howard v. Daly, 61 N. Y., 362; Stockham v. Stockham, 32 Md., 196; Bryant v. Booze, 55 Ga., 438; Trevor v. Wood, 36 N. Y., 307; Durkee v. Central Railway Co., 29 Vt., 127; Thorne v. Barwick, 16 Up. Can. C. P., 369; Marshall v. Jamison, 42 Up. Can. Q. B., 120; Perry v. Mt. Hope Iron Co., 15 R. I., 66.

[2] See Tiede. Sales, § 39.

[3] Tiede. Sales, § 35; Bishop Cont. (Enl. Ed.), § 635, *et seq.*; Benj. Sales (Ed. 1888), p. 57, *et seq*

party for all damage resulting from his breach of contract to hold open.[1]

§ 100. The subject of the sale.—One of the elements of a valid sale, is a thing, the absolute or general property in which is the subject of the transfer.[2]

The distinctions between absolute and qualified property will be recalled.[3] A thing may have, in a certain sense, two owners, one of whom has the *general*, and the other the *special*, property in it. For example, when goods are delivered in pawn or pledge, the general property remains in the pawnor, and a special property vests in the pawnee. Manifestly, a transfer of the special property is not a sale of the thing.

At law, there cannot be a sale of a thing that has no existence, actual or potential. A nominal sale of property which is not in existence at the time of making, or the time of executing, the contract, conveys no title.[4] But, while there can be no executed sale of a thing not yet in existence, or the title to which has not been acquired by the vendor, there may be a valid executory agreement for the sale of such a thing.[5] And, if the

[1] Tiede. Sales, §§ 40, 41; Benj. Sales (Ed. 1888), p. 46, *et seq.*; Bishop Cont. (Enl. Ed.), §§ 78, 321.

[2] *Supra*, §§ 96, 97.

[3] *Supra*, § 4.

[4] Tiede. Sales, § 50; Benj. Sales (Ed. 1888), p. 76; Am. n. pp. 80, 81; Strickland v. Turner, 7 Ex., 208; Hastie v. Conturier, 9 Ex., 102, and 5 H. L. C., 673; Lunn v. Thornton, 1 C. B , 379; Young v. Bruces, 5 Litt., 324; Harris v. Nicholas, 5 Munf., 483; Carpenter v. Stevens, 12 Wend , 589.

[5] Tiede. Sales, § 51; Benj. Sales (Ed. 1888), pp. 78, 79; Am. n. pp. 80-82; Gittings v. Nelson, 86 Ill., 591; Chesley v. Joselyn, 7 Gray, 489; Head v. Goodwin, 37 Me., 182; Cressy v. Sabre, 17 Hun, 120; Gardner v. McEwen, 19 N. Y., 123; Stanton v. Small, 3 Sandf., 230.

vendor afterwards acquires title, and the vendee obtains lawful possession before the rights of third parties have intervened, the executory contract is converted into an executed contract of sale, and title vests in the vendee.[1]

There may, however, be a valid sale of a thing in potential existence, before maturity of actual existence, as, for example, a growing crop, the wool from a flock of sheep, or the unborn young of animals.[2]

While at law the rules are as now stated, in equity, if the subject of the sale can be identified by the description in the contract, the sale is valid even though the thing be not even in potential existence. As soon as the thing comes into existence, or into the possession of the vendee, the title passes to him.[3]

§ 101. A price in money, paid or promised.—We have seen that to distingnish a sale from barter or exchange, there must be a price in money, paid or promised.[4] The price may be fixed by the agreement of the parties, or established by implication of law. When

[1] See citations last *supra*.

[2] Tiede. Sales, § 52; Benj. Sales (Ed. 1888), Am. n. p. 82; Hall v. Hall, 48 Conn., 250; McCarty v. Blevins, 5 Yerg., 195; Fonville v. Casey, 1 Murphy (N. C.), 387; Sawyer v. Gerrish, 70 Me., 254; Grantham v. Hawley, Hob., 132; Robinson v. McDonnel, 5 M. & S., 228; Rawlings v. Hunt, 90 N. C., 270; Conderman v. Smith, 41 Barb , 404.

[3] Tiede. Sales, § 53; Benj. Sales (Ed. 1888), Am. n. p. 81; Holroyd v. Marshall, 10 H. L. C., 191; Reeve v. Whitmore, 4 De G. J. & S., 1; Mitchell v. Winslow, 2 Story, 630; Pennock v. Coe, 23 How., 117; McCaffrey v. Woodin, 65 N. Y., 459; Hunter v. Bosworth, 43 Wis., 583; Phillips v. Winslow, 18 B. Monr., 431; Smithurst v. Edmunds, 14 N. J. Eq., 408.

[4] *Supra*, § 96.

property is sold without fixing the price by stipulation, the law raises a promise by implication on the part of the purchaser, that he will pay for the same what it is reasonably worth; and this has the same binding force as an express agreement of the parties.[1]

§ **102. The Statute of Frauds.**—To the common law requisites of a valid contract of sale, the Statute of Frauds adds other conditions to certain specified contracts. The English Statute of Frauds was enacted in 1676, under the title,—"An Act for Prevention of Frauds and Perjuries;"[2] and has been adopted, in substance, in most, if not all, of the American States. The fourth and seventeenth sections of this statute affect contracts of sale; the former applying to "lands, tenements, and hereditaments, or any interest in or concerning them," and the latter to the sale of personal property, or, in the language of the English statute, "any goods, wares, or merchandises, for the price of ten pounds sterling or upwards."

It is the seventeenth section that we now have to consider. It provides that contracts of this class "shall not be allowed to be good" except upon one of three conditions, namely: 1. The buyer shall accept part of the goods so sold, and actually receive the same. 2. Or give something in earnest to bind the bargain, or in part payment. 3. Or that some note or memorandum in writing

[1] Tiede. Sales, § 47; Benj. Sales (Ed. 1888), pp. 83-85; Am. n. pp. 85, 86; Hoadly v. McLaine, 10 Bing., 482; Taft v. Travis, 136 Mass., 95; James v. Muir, 33 Mich., 224; McEwen v. Morey, 60 Ill., 32; Fenton v. Braden, 2 Cranch C. C., 550; Hountz v. Kirkpatrick, 72 Pa. St., 376.

[2] 29 Car. 2, c. 3.

of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.

These contracts and conditions will now be considered:

1. *What contracts embraced.*—It may now be regarded as settled that this section of the statute embraces executory, as well as executed, contracts of sale. This question gave rise to considerable discussion, and some conflict of opinion, in the English courts, until it was put at rest by a statute known as "Lord Tenderden's Act,"[1] which provides in effect that the seventeenth section of the Statute of Frauds shall apply to executory contracts of sale. The courts in this country have quite uniformly held that executory contracts for the future delivery of goods are embraced in this section.[2]

2. *Contracts not embraced.*—It may be regarded as established that this section of the statute does not apply to contracts for work and labor, and materials found. But the dividing line between such a contract and a contract of sale where the vendor's labor and materials enter into and become a constituent element in the subject of the sale, is not always easily drawn. Considerable discussion has arisen, and some contrariety of judicial opinion been developed, in an effort to formulate a rule for determining on which side of the line a given case

[1] Geo. IV, c. 14, sec. 7.

[2] Tiede. Sales, § 56; Benj. Sales (Ed. 1888), pp. 88, 89; Am. n. pp. 99, 100; Newman v. Morris, 4 Har. & McH., 221; Carman v. Smick, 15 N. J. L., 252; Edwards v. Grand Trunk R. R. Co., 48 Me., 379; Bennett v. Hull, 10 Johns., 364; Ide v. Stanton, 15 Vt., 685; Atwater v. Hough, 29 Conn., 513; Waterman v. Meigs, 4 Cush., 497; Cason v. Cheely, 6 Ga., 554; Jackson v. Covert, 5 Wend., 139.

belongs; but no universally satisfactory test has yet been furnished. There was a lack of unanimity in the English authorities down to the case of *Lee* v. *Griffin*;[1] and in this country the cases still fail to harmonize. Some follow the case of *Lee* v. *Griffin*, which holds, in effect, that a contract for the future delivery of a thing which is properly the subject of a sale, is a contract of sale, and not a contract for work and labor and materials furnished, notwithstanding the skill of the vendor is to be exercised, and materials are furnished by him, in carrying out the contract.[2] Other cases hold, that if the vendor's skill is bargained for, it is a contract for work and labor, not a contract of sale, and, therefore, not within the Statute of Frauds.[3] The doctrine of another line of cases, briefly stated, is, that a contract for the special manufacture of an article which the vendor does not keep in stock, is a contract for work and labor and materials furnished, and not a sale within the Statute of Frauds.[4] But where the article ordered is "what the vendor ordi-

[1] 30 L. J. Q. B., 252; 1 B. & S., 272.

[2] Hardell v. McClure, 1 Chandl., 271; Brown v. Sanborn, 21 Minn., 402; Prescott v. Locke, 51 N. H., 94.

[3] Downs v. Ross, 23 Wend , 270; Passaic Mfg. Co. v. Hoffman, 3 Daly, 495; Miller v. Fitzgibbons, 9 Daly, 505; Joy v. Schloss, 12 Id., 533; Seymour v. Davis, 2 Sandf., 239; Smith v. N. Y. C. R. R. Co., 4 Keyes, 180; Bates v. Coster, 1 Hun, 400; Kellogg v. Witherhead, 4 Hun, 273; Cook v. Millard, 65 N. Y., 352; Rentch v. Long, 27 Md., 188

[4] Mixer v. Howarth, 21 Pick., 205; Goddard v. Binney, 115 Mass., 450; Phipps v. McFarlane, 3 Minn., 109; Meincke v. Folk, 55 Wis., 427; Finney v. Apgar, 31 N. J. L., 271; Hight v. Ripley, 19 Me., 137; Allen v. Jarvis, 20 Conn , 38; Bennett v. Nye, 4 Greene (Ia.), 410; Suber v. Pulling, 1 S. C., 273; Gadsen v. Lance, 1 McMul. Eq., 87; O'Neill v. N. Y., etc., Co., 3 Nev., 141.

narily sells, and it has not been specially prepared for the vendee," it is a contract of sale, falling within the Statute of Frauds.[1]

It is to be hoped that eventually the courts will see "eye to eye" on this point, and furnish a uniform rule for guidance.

3. *What are "goods, wares, and merchandise."*— The English courts restrict this clause of the statute to corporeal movable property;[2] but the American authorities allow it a broader scope, including incorporeal property, such as shares of stock, choses in action, and the like.[3]

When the subject of the sale is part of the soil by annexation, which becomes personalty on severance, care is requisite in determining whether the case falls within the seventeenth section of the statute relating to sales of personal property, or the fourth, which applies to real estate. All contracts within the latter section must be evidenced by a writing; while in the former a writing is

[1] May v. Ward, 134 Mass., 127; Clark v. Nichols, 107 Id., 547; Gardner v. Joy, 9 Met., 177; Lamb v. Crafts, 12 Id., 353; Edwards v. Grand Trunk Railway, 48 Me., 379; 54 Me , 105; Ellison v. Brigham, 38 Vt., 64; Atwater v. Hough, 29 Conn., 509; Sawyer v. Ware, 36 Ala., 675.

[2] Tiede. Sales, § 59; Benj. Sales (Ed. 1888), p. 105, *et seq.*

[3] Benj. Sales (Ed 1888), Am n. pp. 118-120; Tisdale v Harris, 20 Pick., 9; Boardman v. Cutler, 128 Mass., 388; Pray v. Mitchel, 60 Me., 430; Fine v. Hornsby, 2 Mo. App , 61; North v. Forrest, 15 Conn., 400; Calvin v. Williams, 3 H & J., 38; Riggs v. Magruder, 2 Cranch C. C., 143; Baldwin v. Williams, 3 Met. 367; Hudson v. Weir, 29 Ala., 294; Walker v. Suple, 54 Ga , 178. The statute of New York expressly includes "things in action," Part II, Title 2, C. 7, § 3. And see Archer v. Zeb, 5 Hill, 200; Peabody v. Speyers, 56 N. Y. 230.

not requisite where the buyer accepts part of the goods sold, and actually receives the same, or gives something to bind the bargain, or in part payment. As a rule, therefore, if the contract contemplates the transfer of title before severance, it falls within the fourth section; but, if the transfer is not to take place until after severance, it is within the seventeenth section.[1]

It should be noticed, however, that in regard to contracts calling for a transfer of title before severance, the authorities distinguish between the natural products of the soil, *fructus naturales*, and annual crops, or the fruits of cultivation, *fructus industriales*. If the subject of sale be the former, it is quite generally held to fall within the fourth section.[2] But where the natural product of the soil is to be severed immediately, or within a reasonable time, and no further benefit is expected to accrue to the purchaser from its connection with the soil, the contract is governed by the seventeenth section.[3] It

[1] Smith v. Surman, 9 B. & C., 561; Falmouth v. Thomas, 1 C. & M., 105; Marshall v. Green, 1 C. P. D., 35; Parker v. Staniland, 11 East, 362; Sainsbury v. Matthews, 4 M. & W., 434.

[2] Crosby v. Wadsworth, 6 East, 602; Waddington v. Bristow, 2 B. & P., 452; Carrington v. Roots, 2 M. & W., 248; Green v. Armstrong, 1 Denio, 550; Kingsley v. Holbrook, 45 N. H., 313; Olmstead v. Niles, 7 N. H., 522; Pattison's Appeal, 61 Pa. St., 294; Huff v. McCauley, 53 Pa. St., 206; Daniels v. Bailey, 43 Wis., 566; Lillie v. Dunbar, 62 Wis., 198; White v. Foster, 102 Mass., 375; Howe v. Batchelder, 49 N. H , 204; Buck v. Rockwell, 27 Vt., 157; Slocum v. Seymour, 36 N. J. L., 138; Warren v. Leland, 2 Barb., 613; Vorebeck v. Rowe, 5 Barb., 302; Harrell v. Miller, 35 Miss., 700.

[3] Marshall v. Green, 1 C. P. D., 35; McClintock's Appeal, 71 Pa. St., 365; Whitmarsh v. Walker, 1 Met , 313; Claflin v. Carpenter, 4 Met., 580; Nettleton v. Sikes, 8 Met., 34; Smith v. Bryan, 5 Md., 141; Boyce v. Washburn, 4 Hun, 792; Brown v. Stanclift, 80 N. Y., 627; Erskine v. Plummer, 7 Greenl., 447; Banton v. Shorey, 77 Me., 48; Purney v. Piercy, 40 Md., 2 2.

is a well established American doctrine that a contract for the sale of annual crops, *fructus industriales*, is governed by the seventeenth section;[1] but some of the English authorities hold, that where the contract calls for the present transfer of title, it is not a contract for the sale of goods, wares and merchandise, and not, therefore, within the seventeenth section.[2]

The American courts hold, also, that a contract for the sale of fixtures is within the seventeenth section of the statute.[3]

4. *What contracts reach the statutory limit of £10.*— Where the sale consists of only one article, and its value is known, or agreed upon by the parties, no difficulty on this point is presented; but where the sale embraces several articles, each of which is of less value than ten pounds, the question may arise whether it reaches the statutory limit. A satisfactory test may be found in answer to the question: Was the transaction a unit, one entire contract, although composed of different parts? If yea, and the aggregate value of the articles equals or

[1] Marshall v. Ferguson, 23 Cal., 65; Bull v. Griswold, 19 Ill., 631: Bricker v. Hughes, 4 Ind., 146; Dunne v. Furgeson, 1 Hayes, 540: Brittain v. McKay, 1 Ired., 265; Moreland v. Myall, 14 Bush, 470: Evans v. Roberts, 5 B. & C., 836; Jones v. Flint, 10 A. & E., 755: Rodwell v. Phillips, 9 M. & W., 502.

[2] Hallen v. Runder, 1 C. M. & R., 267; Mayfield v. Wadsley, 3 B. & C., 357; Parker v. Staniland, 11 East, 365.

[3] Ross' Appeal, 9 Pa. St., 491; Powell McAshan, 28 Mo., 70; Bost wick v. Leach, 3 Day, 476; Strong v. Doyle, 110 Mass., 92; Shaw v. Corbrey, 13 Allen, 462; Howard v. Fessenden, 14 Allen, 124; Morris, v. French, 106 Mass., 326; Central Branch Bank v. Fritz, 20 Kan., 430; Long v. White, 42 Ohio St., 59; Rogers v. Cox, 96 Ind., 157; Foster v. Mabe, 4 Ala., 402; Scoggin v. Slater, 22 Ala., 687; Dame v. Dame, 38 N. H., 429.

exceeds ten pounds, it is within the statute; otherwise not.[1] If, at the time of the bargain, it be uncertain whether the subject of the sale will reach the statutory limit, the sale will be held to come within the operation of the statute if it turn out that the value actually equals or exceeds ten pounds sterling.[2]

A contract may include a sale of goods, and also other matters not within the statute, as, for example, the rendition of service. In such case, if the value of the goods be ten pounds or upwards, the statute will apply, at least to the goods. But whether an action can be maintained for the value of the services, or other items included in the contract besides the goods, is a question upon which the authorities do not agree. One English case, at least, holds the affirmative;[3] while some American cases hold the negative, unless there was a separate and independent consideration for the services, or other thing included.[4]

5. *Acceptance and receipt.*—To satisfy this alternative condition of the statute, two things must concur; the buyer must *accept* and *actually receive* part of the goods. There may be an actual receipt without an acceptance; and so, also, there may be an acceptance without a receipt. A receipt may be, and often is, evidence of acceptance; but it is not conclusive, or the same thing.

[1] Baldey v. Parker, 2 B. & C., 37; Gilman v. Hill, 36 N. H., 318; Gault v. Brown, 48 N. H., 183; Brown v. Hall, 5 Lans., 177; Allard v. Greasert, 61 N. Y., 1; Jenness v. Wendell, 51 N. H., 63, 67.

[2] Bowman v. Coun, 8 Ind., 58; Carpenter v. Galloway, 73 Ind., 418; Gault v. Brown, 48 N. H., 182; Brown v. Sanborn, 21 Minn., 402; Hodges v. Richmond Mfg. Co., 9 R. I., 482; Watts v. Friend, 20 B. & C., 446; Cox v. Bailey, 6 M. & G., 193.

[3] Harman v. Reeve, 25 L. J. C. P., 257; 18 C. B., 586.

[4] McMullen v. Riley, 6 Gray, 506; Irvine v. Stone, 6 Cush., 508.

The purchaser may receive the goods for the purpose of examination, that he may intelligently exercise his option of acceptance or rejection.[1] So, also, a receipt of goods by a common carrier consigned to the purchaser, although in general a delivery to the latter, is not an acceptance by him; the carrier not being his agent authorized to accept the goods.[2]

A compliance with this condition of the statute requires a delivery of the goods, or some portion of them, by the vendor with the intention of vesting the right of possession in the vendee; and an actual acceptance by the latter with the intention of taking possession as owner.[3] Acceptance and receipt by a duly authorized agent is, in law, an acceptance and receipt by the principal, and hence a compliance with the statute.[4] But, a common carrier, while an agent of the vendee to receive

[1] Smith v. Hudson, 5 B. & S., 431; 34 L. J. Q. B., 145; Chintz v. Surey, 5 Esp., 267; Philips v. Bistolli, 2 B. & C., 511; Cusac v. Robinson, 1 B. & S., 299; 30 L. J. Q. B., 261; Saunders v. Topp, 4 Ex., 390; Stone v. Browning, 51 N Y., 211; 68 Id., 598; Brewster v. Taylor, 63 N. Y., 587; Remick v. Sanford, 120 Mass., 309; Bacon v. Eccles, 43 Wis., 227; Gibbs v. Benjamin, 45 Vt., 124; Hewes v. Jordan, 39 Md., 472; Caulkins v. Hellman, 47 N. Y., 449.

[2] Rogers v. Phillips, 40 N. Y., 519; Cross v. O'Donnell, 44 N. Y., 661; Frostbury Mining Co. v. New England Glass Co., 9 Cush., 115; Grimes v. Van Fetchen, 20 Mich., 410; Loyd v. Wight, 20 Ga., 578; Astley v. Emery, 4 M. & G., 262; Johnson v. Dodgson, 2 M. & W., 656; Smith v. Hudson, 6 B. & S., 431; 34 L. J. Q. B., 145; Acebal v. Levy, 10 Bing., 376; Maxwell v. Brown, 39 Me., 98; Hausman v. Nye, 62 Ind., 485.

[3] 2 Sch. Pers. Prop., pp. 484, 500; Benj Sales (Ed. 1888), pp. 126, *et seq.*, 142, *et seq.*; Am. n. 151-155; Tiede Sales, §§ 67-70.

[4] Outwater v. Dodge, 6 Wend., 397; Barkley v. Rensselaer R. R. Co., 71 N. Y., 205; Snow v. Warner, 10 Met, 132; Dean v. Tallman, 105 Mass., 443; Jones v. Mechanics' Bank, 29 Md., 287.

the goods, is not, as we have just seen, his agent to accept them; unless, it should be added, he is specially authorized to accept.

What acts constitute acceptance has been considered by the courts, and from the authorities the rule may be deduced, that the exercise of ownership over the goods by the vendee, in whatever manner, or by whatever acts, is evidence of acceptance.[1]

As to whether inspection of the goods is requisite to constitute acceptance there is some conflict of authority.[2] But the doctrine is established by the weight of authority, that so long as the right of rejection remains to the purchaser, there has not been a sufficient acceptance to satisfy this condition of the statute.[3]

The question in regard to the actual receipt of the goods generally occurs, if at all, in cases where, at the time of the sale, the goods are in the vendor's possession. In these cases, generally, a transfer of the possession from the vendor to the vendee, or his agent, is requisite. But, on the completion of the bargain, it may be agreed be-

[1] Parker v. Wallis, 5 E. & B., 21; Gray v. Davis, 10 N. Y., 285; Tower v. Tudhope, 37 Up. Can. Q. B., 200; Dallard v. Botts, 6 Allen (N. B.), 443; Pinkham v. Mattox, 53 N. H., 606; Beaumont v. Beevgerie, 5 C. B , 301; Kent v. Huskinson, 3 B. & P., 233; Maberley v. Sheppard, 10 Bing., 99.

[2] Morton v. Tibbetts, 15 Q. B., 428; 19 L. J. Q. B., 382; Currie v. Anderson, 2 E. & E., 592; 29 L. J. Q. B., 87; Kibble v. Gough, 38 L. T. (N. S.), 204; Hunt v. Hecht, 8 Ex., 814; 22 L. J. Ex., 293; Coombs v. Bristol & Exeter R. R. Co , 3 H. & N., 510; 27 L. J. Ex., 401; Smith v. Hudson, 6 B. & S., 431; 34 L. J. Q. B., 145.

[3] Brand v. Fetch, 3 Keyes, 409; Shepherd v. Pressey, 32 N. H., 49; Messer v. Woodman, 22 N. H., 181, 182; Gilman v. Hill, 36 N. H., 311; Belt v. Marriott, 9 Gill., 331; Goram v. Fisher, 30 Vt., 428; Clark v. Tucker, 2 Sandf., 157.

tween the parties that the vendor shall retain possession as the purchaser's agent, or bailee; and this will constitute a sufficient receipt. Or, at the time of the sale, the goods may be in the possession of the buyer as agent or bailee of the vendor; in which case no act of receiving is necessary, as the vendee thereafter holds the goods as owner. Or, the goods at the time of the sale may be in, or be placed in, the possession of a third person, to hold as the agent or bailee of the purchaser, and this will be a sufficient receipt by the vendee to satisfy the statute. It should be noticed, however, that to render the receipt by a third person sufficient, he must know of and consent to the trust, as a person cannot ordinarily be made a bailee or trustee without his knowledge and consent, or by operation of law.[1]

A retention of lien by the vendor, or of any control over the goods as vendor, is incompatible with such a delivery of possession, acceptance and receipt as the statute requires. In regard to retention of vendor's lien, the reasoning runs thus: Receipt implies delivery; there can, therefore, be no actual receipt by the vendee until delivery by the vendor; the vendor's lien is lost by delivery; therefore, if vendor's lien be lost there has been an actual receipt by the vendee, otherwise not.[2]

[1] Bentall v. Burn, 3 B. & C., 423; Boardman v. Spooner, 13 Allen, 353; Bassett v. Camp, 54 Vt., 232; King v. Jarman, 35 Ark., 190; Farina v. Horne, 16 M. & W., 119; Godst v. Rose, 17 C. B., 229; 25 L. J. C. P., 61; Lucas v. Dorrien, 7 Taunt., 278; Edan v. Dudfield, 1 Q. B., 306; Lilliewhite v. Devereux, 15 M. & W., 285.

[2] Marsh v. Rouse, 44 N. Y., 643; Knight v. Mann, 118 Mass., 443; Safford v. McDonough, 120 Mass., 290; Rodgers v. Jones, 129 Mass., 422; Messer v. Woodman, 22 N. H., 182; Kirby v. Johnson, 22 Mo., 354; Green v. Merriam, 28 Vt., 801; Edwards v. Grand Trunk R. R.

6. *Earnest, or part payment.*— One of the alternative conditions of the statute is, that the buyer shall "give something in earnest to bind the bargain, or in part payment." The two things are sometimes regarded as the same, but such was not the original meaning of the statute. Earnest binds the bargain; or, in other words, renders the bargain complete and binding under the statute; while part payment pre-supposes, or assumes the existence of a bargain. The something given in earnest may be applied in payment, and thus become "part payment;" but, among the Romans, and as practised in England at an early day, it was an overt act designed to express the full and final assent of the parties to the contract.[1] Earnest must be something of intrinsic value; actually passed by the buyer to the vendor, and not returned by him.[2] If part payment is relied on to satisfy the statute, it must be something of pecuniary value, actually paid and accepted; a mere promise to pay will not suffice.[3]

It is generally held in this country that the time of the part payment is immaterial, if it be made before action brought. But in the New York Statute of Frauds, the provision corresponding to the English condition under

Co., 54 Me., 105; Barrett v. Goddard, 3 Mason, 107; Chaplin v. Rogers, 1 East, 195; Elmore v. Stone, 1 Taunt., 458; Jackson v. Watts, 1 McCord, 288.

[1] Bracton, 145; Glanville, ch. XIV; Beach v. Owen, 5 T. R., 409; Goodall v. Skelton, 2 H. Bl., 316.

[2] Blenkinsop v. Clayton, 7 Taunt., 597; Howe v. Hayward, 108 Mass., 54; Noakes v. Morey, 30 Ind., 103.

[3] Combs v. Bateman, 10 Barb., 573; Dow v. Worthen, 37 Vt., 108; Hunter v. Wetsell, 17 Hun, 135; Archer v. Zeb, 5 Hill, 205; Krohn v. Bautz, 68 Ind., 277; Edgerton v. Hodge, 41 Vt., 676; Hicks v. Cleveland, 48 N. Y., 84; Walrath v. Ingles, 64 Barb., 265.

consideration is, "unless the buyer shall, at the time, pay some part of the purchase money."[1] In construing this provision, however, the courts have held that it is satisfied if a subsequent part payment be made for the express purpose of complying with the statute, and the contract be then re-affirmed by the parties; that in such case the part payment is made "at the time," within the meaning of the statute.[2]

While the American statutes of frauds generally, and in the main, are the same in substance as the English, there may be differences in particulars and phraseology which will require attention in weighing and applying authorities.

7. *Note or memorandum in writing.*—The third alternative of the statute is in these words: "Or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." This provision, it should be observed, was not intended for cases in which the parties, either in person or by their agents, have signed a written contract; but it applies to parol contracts, only. The written "note or memorandum" of the contract, and the contract itself, are distinct things. The "note or memorandum" assumes the existence of an antecedent parol contract, of which the writing required is a brief note or memorandum, an essential under the statute to validate the parol contract.

The principal questions arising under this alternative

[1] N. Y. R. S., Part II, Title 2, Ch. VII, § 3, sub. 3.

[2] Hunter v. Wetsell, 57 N. Y., 375; 84 N. Y., 544; Webster v. Zielly, 52 Barb., 482

condition of the statute may be considered under two heads:

First. Time, and manner, of noting.—It is not essential that the note or memorandum should be made at the same time with the contract;[1] and it has been held that where the sale was made by an agent, his authority to bind the principal by executing the memorandum after the termination of his agency for other purposes, survives.[2] It is not necessary that all the terms of the contract should be noted at one time, or on one piece of paper; but it will suffice if the whole contract be in substance contained on separate pieces, and these *memoranda* make such reference to each other as to show that they are parts of one whole.[3] Where the memorandum is made up of two or more writings, they must either all be signed, or the signed papers must so refer to the unsigned parts that the latter may be identified by the description;[4] and the signed paper must refer to the unsigned; a reference in the unsigned to the signed will not suffice.[5] Parol

[1] Bird v. Munroe, 66 Me., 347; Bill v. Bament, 9 M. & W., 36; Tiede. Sales, § 72; Benj. Sales (Ed. 1888), p. 174, *et seq.*

[2] Williams v. Bacon, 2 Gray, 387.

[3] Peck v. Vandemark, 99 N. Y., 29; Jelks v. Barrett, 52 Miss., 315; Fisher v. Kuhn, 54 Miss., 480; Lerned v. Wannemacher, 9 Allen, 412; Lee v. Mahoney, 9 Iowa, 344; Tallman v. Franklin, 14 N. Y., 584; Hinde v. Whitehouse, 7 East, 558; Benj. Sales (Ed. 1888), p. 174, *et seq.*; Tiede. Sales, § 75.

[4] Tiede. Sales, § 75; Peek v. North Staffordshire R. R. Co., H. L. C., 472–569; Moale v. Buchanan, 11 Gill & J., 322; Frank v. Miller, 38 Md., 461; Farwell v. Mather, 10 Allen, 322; Hazard v. Day, 14 Allen, 494; Ide v. Stanton, 15 Vt., 685; Stocker v. Partridge, 2 Roberts, 193.

[5] Freeport v. Bartol, 3 Greenl., 340; Brown v. Whipple, 58 N. H., 209; Ridgway v. Ingraham, 50 Ind., 148; Johnson v. Buck, 35 N. J.

evidence to connect the parts is not admissible;[1] nor is it admissible to show terms or stipulations not contained in the written memorandum;[2] but parol evidence is admissible to show that the writing is not a correct or full memorandum of the parol agreement.[3] And if the reference contained in the signed paper is ambiguous, parol evidence will be allowed to explain the ambiguity, and identify the document to which the reference is made; this rule being in accordance with the doctrine of interpretation applicable to cases of latent ambiguity.[4]

Second. What the memorandum should contain.—Stated generally, and in brief, the memorandum should contain, in substance, all the material parts of the contract, including the names, or a description, of both parties;[5] the sub-

L., 339; Beckwith v. Talbot, 95 U. S., 289; Morton v. Dean, 13 Met., 388; Smith v. Jones, 66 Ga., 338.

[1] Hinde v. Whitehouse, 7 East, 558; Kenworthy v. Scofield, 2 B. & C., 945; Pierce v. Corf, L. R. 9, Q. B., 210; Rishton v. Whatmore, 8 Ch. D., 467; Benj. Sales (Ed. 1888), p. 174.

[2] Fitzmaurice v. Bailey, 9 H. L. C., 78; Boydell v. Drummond, 11 East, 142; Holmes v. Mitchell, 7 C. B. N. S., 361; Benj. Sales (Ed. 1888), Am. n. p. 200.

[3] Elmore v. Kingsgate, 5 B. & C., 583; Goodman v. Griffiths, 1 H. & N., 574; Acebal v. Levy, 10 Bing., 376; Pitts v. Beckett, 13 M & W., 743.

[4] Ridgway v. Wharton, 6 H. L. C., 238; Bauman v. James, 3 Ch., 508; Long v. Milar, 4 C. P. D., 450; Cave v. Hastings, Q. B. D., 125; Shardlow v. Cotterell, 18 Ch. D., 280; 20 Ch. D., 90, C. A.

[5] Cooper v. Smith, 15 East, 103; Allen v. Bennett, 3 Taunt., 169; Champion v. Plummer, 3 B. & P., 252; Lincoln v. Erie Preserving Co., 132 Mass., 129; Calkins v. Falk, 38 How. Pr., 62; McElroy v. Leery, 61 Md., 397; Anderson v. Harold, 10 Ohio, 399; Grafton v. Cummings, 99 U. S., 100; Sale v. Lambert, 18 Eq. Rep., 1; Rossiter v. Miller, 46 L. J. Ch. 228; 5 Ch. D , 648, C. A.

ject matter, which must be correctly stated;[1] the price, if actually agreed upon by the parties;[2] the stipulations as to credit, and the time and place of payment, if such there be;[3] and any other terms and conditions making a part of the contract.[4] If the memorandum contains all the statutory requisites, and appears as an offer, its acceptance may be proved by parol in the absence of written evidence of the acceptance.[5]

In regard to the signature of the party to be charged, or his authorized agent, it is sufficient for the present purpose to say, that this requirement of the statute has generally been quite liberally construed by the courts, where any thing has been done with the intention of signing.[6]

[1] Thornton v. Kempster, 5 Taunt., 786; Sarl v. Bourdillon, 26 L. J. C. P., 78; 1 C. B. (N. S.), 188; May v. Ward, 134 Mass., 127; McElroy v. Buck, 35 Mich., 434; Waterman v. Meigs, 4 Cush., 497; Penniman v. Hartshorn, 13 Mass., 87.

[2] Ide v. Stanton, 15 Vt., 685; Smith v. Arnold, 5 Mason, 416; Phelps v. Stillings, 6 N. H., 505; Adams v. McMillan, 7 Port., 73; Soles v. Hickman, 20 Pa. St., 180; O'Neil v. Crane, 67 Mo.. 250; Argus Co. v. Mayor, etc., of Albany, 55 N. Y., 495.

[3] Wright v. Weeks, 25 N. Y., 158; Norris v. Blair, 39 Ind., 90; Williams v. Robinson, 73 Me., 186; Keiete v. Myer, 61 Md., 558; Smith v. Shell, 82 Mo., 215.

[4] Riley v. Farnsworth, 116 Mass., 223; Oakman v. Rogers, 120 Mass., 214; Peltier v. Collins, 3 Wend., 459.

[5] Warner v. Wellington, 3 Drew., 523; 25 L. J. Ch., 662; Smith v. Neal, 2 C. B. (N. S.), 67; 26 L. J. C. P., 143; Justice v. Lang, 42 N. Y., 493; Mason v. Dicker, 72 N. Y., 598; Old Colony R. R. Co. v. Sears, 6 Gray., 25; Lowber v. Connit, 36 Wis., 176; Smith v. Smith, 8 Blackf., 208; DeCordon v. Smith, 9 Tex., 129; Lowrey v. Mechaffey, 10 Watts, 387.

[6] Tiede. Sales, §§ 79, 80; Benj. Sales (Ed. 1888), p. 204, *et seq.*

§ 103. Contract of sale in respect of passing title.— Having considered what contracts of sale are within the statute of frauds, and the conditions requisite to render such contracts "good" within the true meaning of the statute, we come now to treat of contracts of sale in the respect of passing property or title. The formation of a valid contract is one thing, and its effect when formed, another; and here we dismiss the Statute of Frauds, and recur to common law doctrines.

The first question demanding consideration, both on account of its importance and frequent occurrence, is the distinction between an *executed* and an *executory* contract of sale. This distinction has been already briefly noticed,[1] but some further attention will be given to it in this connection. The importance of the question appears from the fact that the answer may determine on whom the loss falls, where the subject of the sale has been lost or destroyed;[2] or decide conflicting claims upon the property by the creditors of the vendor and vendee;[3] and, also, in other cases sometimes arising, as where

[1] *Supra*, § 96.

[2] Martineau v. Kitching, L. R., 7 Q. B., 436; Logan v. La Mesurier, 6 Moore, P. C., 116; Rugg v. Minett, 11 East, 200; Zaquey v. Furnell, 3 Camp., 240; Oliphant v. Baker, 5 Denio, 379; Gilbert v. N. Y. C. R. R. Co., 4 Hun, 378; Joyce v. Adams, 8 N. Y., 291; Pleasants v. Pendleton, 6 Rand., 473; Lingham v. Eggleston, 27 Mich., 324; Hutchinson v. Hunter, 7 Pa. St., 140; Waldo v. Belcher, 11 Ired., 609.

[3] Hanson v. Myer, 6 East, 614; Acraman v. Morris, 8 C. B., 449; Golder v. Ogden, 15 Pa. St., 358; Brewer v. Smith, 3 Greenl., 44; Weld v. Cutler, 2 Gray, 195; Huff v. Hires, 39 N. J. L., 4; Hale v. Huntley, 21 Vt., 147; Smart v. Batchelder, 51 N. H., 140; Comfort v. Kiersted, 26 Barb., 472; Ward v. Shaw, 7 Wend., 404; Fosdick v. Schall, 99 U. S., 235.

there are conflicting claims between vendees touching the ownership of the property, or where it becomes necessary to decide upon the proper form of action for the recovery of the goods.[1]

The principal rules governing the transfer, to be considered in determining the question in cases liable to arise in practice. will now be noticed briefly:

1. *Intention of the parties.*—The leading rule is, the intention of the parties. The intention may be expressed, or implied from the circumstances; and when ascertained, if legal, it will be decisive of the question. On this point the authorities are abundant and harmonious.[2]

2. *Delivery.*— Treating delivery as related to a transfer of title, it may be stated that an actual delivery of possession from the vendor to the vendee, is not requisite to pass the title as between the parties, unless it was their intention that the title should not pass before such delivery. But it is quite generally held that retention of possession by the vendor is *prima facie* evidence of fraud upon creditors and subsequent purchasers.[3]

[1] Horr v. Baker, 8 Cal., 603; Croft v. Bennett, 2 N. Y., 258; Kimberly v. Patchin, 19 N. Y., 330; Groat v. Gile, 51 N. Y., 431; Pfistner v. Bird, 43 Mich., 14; Barrow v. Coles, 3 Camp., 92; Mires v. Solesby, 2 Mod., 243; Cushman v. Holyoke, 34 Me., 289; Devane v. Fennell, 2 Ired., 37; Davis v. Hill, 3 N. H , 382; Strauss v. Ross, 25 Ind , 300.

[2] Tiede. Sales, § 83; Benj. Sales (Ed. 1888), Am. n. pp. 239, 240; Russell v. Carrington, 42 N. Y., 118; s. c., 1 Am. Rep., 498; Terry v. Wheeler, 25 N. Y., 525; Hurd v. Cook, 75 N. Y., 454; Hatch v. Oil Co., 100 U. S., 131; Elgee v. Cotton Cases, 22 Wall., 187; Bellows v. Wells, 36 Vt., 599; Fitch v. Burk, 38 Vt., 689; Callagan v. Myers, 89 Ill., 570; Weed v. Boston Ice Co., 12 Allen, 377; Stone v. Peacock, 35 Me., 388; Lester v. East, 49 Ind., 588; Fletcher v. Ingram, 46 Wis., 201.

[3] Simmons v. Swift, 5 B. & C., 857; Gilmore v. Supple, 11 P. C., 551; Dixon v. Yates, Barn. & Ad., 313; Wade v. Moffitt, 21 Ill., 110.

3. *Delivery without transfer of title.*— The vendor may deliver possession to the purchaser, reserving to himself the title until payment of the purchase price. Delivery, however, without reservation of the title by express agreement is presumptively a waiver of prepayment, and passes title to the vendee.[1]

If the vendor thus retains title, and the purchase price be not paid according to the agreement, he may recover possession of the goods.[2]

The delivery of goods to a common carrier consigned to the vendee, is, as a rule, delivery to the vendee, and transfers the title to him. But where the bill of lading is taken by the vendor, to his own order, he reserves, presumptively, the title and the *jus disponendi*, and is at liberty to dispose of the goods to others.[3] The bill of lading represents the goods, and its transfer operates as a transfer of the same.[4]

4. *Sale of specific goods unconditionally.*—In a contract of sale of specific goods unconditionally, presump-

[1] Hammet v. Linneman, 48 N. Y., 399; Bowen v. Buck, 13 Pa. St., 146; Harlow v. Ellis, 15 Gray, 229; Mixey v. Cook, 31 Me., 340.

[2] Ayer v. Bartlett, 9 Pick., 156; Reed v. Upton, 10 Pick., 522; Hasbrouck v. Lounsberry, 26 N. Y., 598; Brant v. Bowlby, 2 B. & Adol., 932; Thompson v. Ray, 46 Ala., 224; Fosdick v. Shall, 99 U. S., 250; Boon v. Moss, 70 N. Y., 465; Vassar v. Buxton, 86 N. C., 335; Fleck v. Warner, 25 Kan., 492.

[3] Dows v. Nat. Exch. Bank, 91 U. S., 618; St. Joze v. Indians, 1 Wheat., 208; Hobart v. Littlefield, 13 R. I., 341; Farmers', etc., Bank v. Logan, 74 N. Y., 568; Wilmshurst v. Bowker, 2 M. & G., 792; Ellershaw v. Magniac, 6 Ex., 570.

[4] Marine Bank v. Wright, 48 N. Y., 1; Bank of Rochester v. Jones, 4 N. Y., 497; Mich. Cent. R. R. Co. v. Phillips, 60 Ill., 190; Schumaker v. Eby, 24 Pa. St., 521; First Nat. Bank v. Bailey, 115 Mass., 230.

tively the title passes immediately; and, according to American authorities, there is an immediate transfer of title in case the price has been paid, or credit expressly given. But where the goods are not sold on credit, prepayment of price is a condition precedent to the transfer of title.[1] It should be stated, however, that some of the later English cases hold, that the title passes on completion of the contract, without prepayment of price; but that the vendor may withhold possession until the price is paid. The American holding seems the more reasonable.[2]

5. *Sale of specific chattels conditionally.*—It is quite obvious that on a sale of specific chattels subject to a condition precedent, the title will not pass until the condition is performed. While the general doctrine thus stated is quite simple, and universally recognized, the question as to when the contract is encumbered with a condition precedent, has given rise to considerable discussion, and some conflict of judicial opinion. As the limitation of this treatise will not permit a full examination of the question, the reader is referred to the text-books hereunder named, and the authorities therein cited, for an exhaustive discussion of the subject.[3]

6. *Sale of goods not specific.*—Identification of the subject matter of the sale is essential to the transference of title thereto; and hence, where the contract is for the sale of a quantity of goods without reference to any par-

[1] Tiede. Sales, § 86; Barrett v. Pritchard, 2 Pick., 512; Ayer v. Bartlett, 9 Pick., 156; Reed v. Upton, 10 Pick., 522; Fishback v. Van Dusen, 33 Minn., 111; 33 Am. L. R., 506, note.

[2] See Tiede. Sales, § 86.

[3] Tiede. Sales, § 87; Benj. Sales (Ed. 188[3]), p. 244, *et seq.*; Am. n., 263, *et seq.*; 2 Kent Com., p. 497; 2 Sch. Pers. Prop., p. 281.

ticular lot, or of a portion of a larger bulk, no title passes in severalty until the goods which are to constitute the subject of the sale are identified, or selected for transfer.

Thus far the authorities are substantially in accord, and a few citations will suffice.[1] In regard to the sale of an unidentified portion of a larger bulk, some authorities hold that, while title in severalty cannot be acquired by the vendee without a separation from the bulk, he may acquire title to a part in common with the other proprietors of the mass.[2] This doctrine may be accepted as applicable to cases where it appears that the parties intended a transfer of the title before a separation of the part from the whole.

7. *Appropriation on sale of goods not specific.*—Under a contract for the sale of goods not specific, in order to pass the title in severalty to the vendee, there must be an appropriation of particular goods to the contract; and this must be with the consent of the vendee, express or implied.[3]

[1] Foot v. Marsh, 51 N. Y., 288; Brewer v. Smith, 3 Greenl., 44; Merrill v. Hunnewell, 13 Pick., 213; Woods v. McGee, 7 Ohio, 467; Hutchinson v. Hunter, 7 Pa. St., 140; Waldo v. Belcher, 11 Ired., 609; Bailey v. Smith, 43 N. H., 141; Wallace v. Breeds, 13 East, 522; Busk v. Davis, 2 M. & S., 397.

[2] Kimberly v. Patchin, 19 N. Y., 330; Hoyt v. Hartford Ins. Co., 26 Hun, 416; Young v. Miles, 20 Wis., 615; Iron Cliffs Co. v. Buhl, 42 Mich., 86; Hurff v. Hires, 39 N. J. L., 581; Philips v. Ocmulgee Mills, 55 Ga., 634.

[3] Tiede. Sales, § 89; Benj. Sales (Ed. 1888), pp. 283–293, 312–314; Hanson v Myer, 6 East, 614; Atkinson v. Bell, 8 B. & C., 277; Moody v. Brown, 34 Me., 107; Grove v. Brien, 8 How., 429; Bank v. Bangs, 102 Mass., 291, 295; Bennett v. Smith, 15 Wend., 493; Shawham v. Van Nast, 25 Ohio St., 490; Aldridge v. Johnson, 7 E. & B., 885; 26

§ 104. Mistake, failure, and illegality of consideration.—1. *Mistake.*—We have seen[1] that the assent of parties is an essential element of a valid contract; that the minds of the parties must meet and assent to the same thing, in the same sense, at the same instant of time; and consequently, that a mistake of fact in regard to the subject matter, or terms of the contract, in any material respect, will be fatal to the validity of the contract. Or, more accurately stated, in case of such a mistake, no contract is made for want of the requisite assent of parties.

The leading rules governing mistakes are the following.

1. The mistake under consideration is one of *fact*, and not of *law*. Every person competent to contract is presumed to know the law; the ancient and universal rule being, *ignorantia juris neminem excusat.*

2. As a general rule it is only a mutual mistake that will render a contract void, or voidable; but a mistake on one side and a fraud on the other will have the same effect. Where one party only acts under a mistake, the other party not being responsible for it, the contract is ordinarily enforceable. But to this rule there are exceptions based on special circumstances to which the reason of the rule is not applicable; and, as "reason is the soul of the law, when the reason of any rule ceases, so does the law itself." The maxim is, *cessante ratione legis cessat ipsa lex.*

L. J. B., 296; Fragano v. Long, 4 B. & C., 219; Krulder v. Ellison, 47 N. Y., 36; Alexander v. Gardner, 1 Bing., N. C., 671.

[1] *Supra*, § 99.

3. A mistake of the character now defined will excuse a party from the performance of an executory contract; and will also entitle him to rescind it after execution if he places the other party in *statu quo*. "And if that be not possible," says Benjamin, "the deceived party must be content with a compensation in damages." If he has paid for an article he may recover back the money, provided he restores the article to the other party in the same condition, substantially, as when received by him, otherwise not.[1]

2. *Failure of consideration.*—It is an elementary principle that a sufficient consideration is essential to a valid contract. In general a *valuable* consideration is requisite; but a *good* consideration, "such as that of blood, or of natural love and affection," will suffice in some cases.[2] Mr. Bishop's concise and comprehensive definition of a consideration is, "something esteemed in law as of value, in exchange for which the promise in a contract is made;" and such a consideration only is in question under the head of failure.

Cases sometimes occur in which the consideration, apparently valuable and sufficient at the time of the contract, turns out to be false or valueless, revealing a total failure of consideration. Money paid or deposited on such a contract may be recovered back.[3]

[1] Benj. Sales (Ed. 1888), pp. 346–356; Am. n., p. 356; Bishop Cont. (Enl. Ed.), §§ 462–466; 693–706; 1 Story Eq. Jur., § 142, *et seq.*; Pom. Eq., § 852, *et seq.*

[2] 1 Pars. Cont., p. 427, *et seq.*; 1 Bouv. L. Dict., "consideration;" Bishop Cont. (Enl. Ed.), § 35, *et seq.*

[3] 1 Pars. Cont., p. 462; Bishop Cont. (Enl. Ed.), § 71; Benj. Sales (Ed. 1888), pp. 346–355; Am. n., p. 356; Bouv. L. Dict., "consideration," sub. 12.

It should be noticed, however, that if the purchaser gets what he bargained for, in the absence of mistake or fraud, he will not be permitted to allege failure of consideration, however worthless it may be, in avoidance of the contract.[1]

If the failure of consideration be only partial, the buyer's right to rescind will depend upon the entirety, or divisibility, of the contract. If the contract be entire, and the buyer has not accepted, or is not willing to accept, a partial performance, he may reject the contract *in toto*, and recover back the price. But if he has accepted a partial performance, he is not at liberty to rescind, and must seek another remedy. If, however, the consideration and the agreement founded thereon are both divisible, consisting of several parts, and the part failure of consideration can be apportioned to a corresponding part of the agreement, it may be regarded and treated as several contracts, and the rights of the parties adjusted accordingly. Money paid on the failed portion of the agreement may be recovered back.[2]

3. *Illegality of consideration.*— It is a well established principle that a contract founded upon a consideration, or requiring the performance of an act which is immoral, illegal, or contrary to public policy, will fall before the judgment of a court, either of law or equity. If the consideration for an indivisible promise be in part legal and in part illegal, the promise will be of non-effect, because of resting in part upon an illegal consideration which vitiates the whole; but if the promise be divisible,

[1] Citations last *supra.*

[2] See authorities cited, *supra.*

or in other words if there be two promises, the one resting on the legal, and the other on the illegal, consideration, the former will stand and the latter fall.[1]

§ 105. **Fraudulent sales.**—It is a well established and wholesome rule, that fraud renders all contracts voidable. This for two reasons: first, such a contract lacks the assent of the deceived party, for an assent obtained by fraud, in contemplation of law, is no real assent; and, secondly, it is against the spirit and policy of the law to permit the defrauding party to profit by his own wrong.[2]

It is quite difficult, if not impossible, to formulate a definition of fraud that shall be at once sufficiently accurate and comprehensive; and this for the reason that its modes and forms are multifarious, and its disguises subtle and specious. It will better subserve our purpose to point out the principal elements of such fraud as will avoid a contract of sale, and the rules applicable thereto.

1. *Misrepresentation, or concealment, of a material fact.*—To constitute such a fraud there must be a misrepresentation or concealment of a material fact.

It is not necessary that the misrepresentation be in words; it may be effected by acts and devices which create in the mind of the other party a mistaken belief in regard to the fact. Great skill is often exercised in

[1] Bishop Cont. (Enl. Ed.), §§ 59, 74, 469, *et seq.*; 1 Pars. Cont. (7 Ed.), pp. 456-459; Bouv. L. Dict., "consideration," sub. 11.

[2] Benj. Sales (Ed. 1888), p. 360, *et seq.*; Bishop Cont. (Enl. Ed.), §§ 641, 642; Dambmann v. Schulting, 75 N. Y., 55; Rodman v. Thalheimer, 7 Pa. St., 232; Smith v. Smith, 21 Pa. St., 367; Jones v. Emery, 40 N. H., 348.

practicing deceit.[1] But concealment alone of a material fact is not necessarily fraudulent in law, however it may be judged in the forum of conscience; it is only so when a party is bound to disclose his knowledge in regard to all material facts by reason of his fiduciary relation to the other party; or where the subordinate condition, or mental incapacity, of the other party demands of him entire frankness and scrupulous honesty.[2] As a general rule, with the exceptions now stated, where an article is offered for sale, and is open to the inspection of the purchaser, he will not be allowed to complain that the alleged defects were not pointed out to him by the vendor.

There are two maxims that apply in such cases, namely: *Caveat emptor*, and *simplex commendatio non obligat.* The purchaser, in the absence of fraud on the part of the vendor, and with an opportunity of ascertaining the character and quality of the goods, must rely upon his own care and judgment.[3] This rule, however, must be taken with the qualification that the use of any device by the vendor to induce the buyer to omit inquiry, or to divert his attention fram defects, may constitute fraud.

While the maxim *caveat emptor* requires the exercise of care and judgment on the part of the purchaser, there

[1] Tiede. Sales, §§ 158, 164; Benj. Sales (Ed 1888), p. 361; Bishop Cont. (Enl. Ed.), §§ 651, 652.

[2] Tiede. Sales, § 159; Bishop Cont. (Enl. Ed.), §§ 655–660; Benj. Sales (Ed. 1888), p. 361; 2 Kent Com., p. 482, *et seq.*; Tate v. Williamson, L. R. 2 Ch., 55; McPherson v. Watt, L. R. 3 App. Cas., 254; Yosti v. Laughran, 49 Misso., 594; Harkness v. Fraser, 12 Fla., 336.

[3] Tiede. Sales, § 159; Benj. Sales (Ed. 1888), p. 362; 2 Kent Com., p. 485.

are cases holding that he may rely on a misrepresentation without inquiry, believing it to be true, and yet have his action for fraud.[1] These cases do not seem to be wholly consistent with the general trend of authorities on the subject.

The vendor may lawfully commend his goods, even to exaggeration, provided he do not make any false representations as to matters of fact. The mere expression of an opinion in regard to the qualities or value of an article will not, as a rule, constitute an element of fraud; the distinction in law is between the expression of an *opinion* and the statement of a *fact*.[2]

2. *Intention to deceive.*—An essential element of a fraudulent sale is an intention to deceive; or, what is equally culpable, a reckless false statement of facts to induce a purchase, without knowledge of the truth or falsity of the statement. Fraud cannot be predicated of representations which the vendor honestly believes to be true, albeit they are false in fact. But a party has no moral or legal right to make representations of the truth or falsity of which he is ignorant; and if such repre-

[1] Jones v. Rimmer, 14 Ch. D., 588, 592; Redgrave v. Hurd, 20 Ch. D , 1, 13; Hitchins v. Pettengill, 58 N. H., 3; Central Railway v. Hisch, Law Rep , 2, H. L., 99, 120; 2 Chit. Cont. (11 Am. Ed.), 1040, 1041; Leake Cont. (2 Ed.), 380-383; Bishop Cont. (Enl. Ed.), § 655.

[2] Ellis v. Andrews, 56 N. Y., 83; Bishop v. Small, 63 Me., 12; Somers v. Richards, 46 Vt., 170; Homer v. Perkins, 124 Mass., 431; Buschman v. Cold, 52 Md., 202, 207; Sledge v. Scott, 56 Ala., 202; Gordon v. Butler, 105 U. S., 553; Graffenstein v. Epstein, 23 Kan., 443; Tiede. Sales, §§ 158, 166; Bishop Cont. (Enl. Ed.), § 664; 2 Kent Com., pp. 485-487.

sentations prove false, he will be held responsible as for an intentional misrepresentation.[1]

3. *Reliance upon the representations.*—To sustain a charge of fraud, it must appear that the false representations were relied upon by the party whom they were intended to influence; otherwise he could not complain of having been deceived, or defrauded, by such representations. It is not necessary, however, that the misrepresentations should have constituted the sole inducement to the contract; but to sustain the charge of fraud, it must appear that the false representations were so far influential, that without them assent to the contract would not have been given.[2]

4. *Damage sustained.*— Another essential element in an actionable fraud, is the resulting damage sustained by the party deceived. No matter how gross the fraud, if no damage ensues no cause of action arises. The doctrine applicable is tersely stated by Lord Croke thus: "Fraud without damage, or damage without fraud, gives no cause of action." [3]

[1] Bishop Cont. (Enl. Ed), § 661; Tiede. Sales, § 160; French v. Vining, 102 Mass., 132; Weeks v. Burton, 7 Vt., 67; Cowley v. Smith, 46 N. J. L., 380; Boyd v. Browne, 6 Barr, 310; Seller v. Clelland, 2 Col., 532; Weir v. Bell, L. R., 3 Ex. D., 238; Mitchell v. Zimmerman, 4 Tex , 75; Grim v. Byrd, 32 Gratt., 293; Parmlee v. Adolph, 28 Ohio St , 10.

[2] Bishop Cont. (Enl. Ed.), §§ 653, 654; Tiede. Sales, § 161; Hull v. Fields, 76 Va., 591; Winter v. Bandell, 30 Ark., 362; Gregory v. Schoenell, 55 Ind., 101; Smith v. Hughes, 6 Q. B., 597; 2 Sch. Pers. Prop., p. 632.

[3] 3 Bulst., 95. Tiede. Sales, § 162; Smith v. Kay, 7 H. L. Cas., 774; Atwood v. Small, 6 Clark & F., 443; Weaver v. Wallace, 9 N. J. L., 251; Neidefer v. Chastain, 71 Ind., 363; Morrison v. Lods, 39 Cal., 385; Phipps v. Buckman, 30 Pa. St., 402; Hanson v. Edgerton, 29

5. *Fraud on the vendor.*—What has now been said of fraudulent sales relates mainly to frauds practiced by the vendor upon the buyer. The latter may become the fraudulent party to the contract, and the former his victim. Frauds of the buyer are various in forms and modes, but all are schemes to procure from the vendor his goods without payment of the purchase price. In essence and moral quality, they constitute the crime of larceny in the guise of honest traffic. The effect of the buyer's fraud upon the contract is substantially the same as that of the vendor, to render it void *ab initio*, or voidable.[1]

The doctrine is often met with in the books, that in case of a fraudulent purchase the title does not pass from the vendor to the vendee. This is not an accurate statement of the law. A distinction should be made between a *sale* to a fraudulent purchaser, and a mere delivery of goods into his possession. Or, differently stated, a distinction between a case where the owner intends to transfer both title and possession, and where he only intends to transfer the possession. In the former case there is a sale, however fraudulently procured; in the latter not. This distinction is manifest in view of the effect of a transfer of the goods by the fraudulent vendee to a third party, a *bona fide* purchaser. If the vendee takes both title and possession, and transfers the goods to a *bona fide* purchaser before disaffirmance of the contract by the vendor, such purchaser will take a good

N. H., 357; Young v. Hall, 4 Ga., 95; Castleman v. Griffin, 13 Wis., 535.

[1] Tiede. Sales, § 168; Benj. Sales (Ed. 1888), p. 366.

title which he can maintain against the rights of the original vendor. On the contrary, if the original transferee took possession only, the vendor not intending to pass the title, he cannot convey a title to anybody, and for the sufficient reason that he has none to convey. It may be difficult to see, at a glance, how the defrauded vendor may reclaim his property from his vendee when the title has passed to the latter, so that he could transfer a good title to a third party. Chief Justice Shaw speaks to this difficulty in *Hoffman v. Noble*,[1] where he says: "It is a well established rule, that goods obtained by fraud in the sale, as by false representations, may be reclaimed by the vendor. This does not proceed on the ground that the property in the goods does not pass by the sale, but that the dishonest purchaser shall not hold it against the deceived vendor." But when such a purchaser transfers the goods to a third party, a *bona fide* purchaser, the superior equity of the latter will prevail over the legal rights of the vendor.[2]

Cases sometimes occur in which a buyer purchases goods with the intention of not paying for them. The doctrine may be regarded as established by the weight of

[1] 6 Met., 73.

[2] Benj. Sales (Ed. 1888), p. 366, *et seq.*; Tiede. Sales, § 168; Stevenson v. Newnham, 13 C. B., 285; 22 L. J. C. P., 10; Pease v. Gloahec, L. R., 1 P. C, 220; Kingsford v. Merry, 11 Ex., 577; 25 L. J. Ex., 166; Oakes v. Turquand, L. R. 2, H. L., 325; Naugatuck Cutlery Co. v. Babcock, 22 Hun, 481; Van Nest v. Conover, 20 Barb., 547; Butler v. Hildreth, 5 Met., 49; Buckley v. Morgan, 46 Conn., 393; Dibley v. Sheldon, 10 Blatch., 178; Easter v. Allen, 8 Allen, 7; Pringle v. Phillips, 5 Sandf., 157; Devoe v. Brandt, 53 N. Y., 462; Paddon v. Taylor, 44 N. Y., 371.

authority, that in such cases the purchase is fraudulent and voidable, although no false representations were made, or active fraud committed by the vendee. It should be noticed that to constitute this species of fraud the purchaser, at the time of the sale, must have an affirmative intention not to pay for the goods; a mere negative or purposeless condition of mind will not suffice.[1]

6. *Fraud on creditors.*—We have seen[2] that one of the limitations to the absolute ownership of property, is its liability for the satisfaction of the just debts of the owner; that he cannot legally alienate it by gift, or otherwise dispose of it, in fraud of his creditors.

The English statutes on this subject[3] have been incorporated, in substance, into the statutes of most, if not all, of the States of this country; and they expressly declare void all conveyances made with intent to "hinder, delay, or defraud creditors." These statutes embody, clearly express, and re-enforce by legislative sanction, a principle of the common law. By virtue of this principle, a contract unimpeachable by the parties, may be void as against existing creditors. And a transfer may be avoided by subsequent creditors, even, where it is made to appear that the conveyance was made for the purpose of defrauding such creditors, as a voluntary conveyance

[1] Tiede. Sales, § 170; Hennequin v. Naylor, 24 N. Y., 139; Dow v. Sanborn, 3 Allen, 181; Donaldson v. Farwell, 93 U. S., 631; Wright v. Brown, 67 N. Y., 1; Farges v. Pugh, 93 N. C., 31; Mulliken v. Millar, 12 R. I., 296.

[2] *Supra*, § 5.

[3] 13 Eliz., ch. 5, and 27 Eliz., ch. 4.

with the view of shielding the property from liability for anticipated indebtedness.[1]

Discussion of subordinate and incidental rules applicable to the species of frauds under consideration is necessarily omitted under the prescribed limitations of this treatise. The reader will find these rules fully discussed in the text-books hereunder named, and the adjudications therein cited.

§ **106. Illegal contracts of sale.**— Illegality of consideration has been already noticed.[2] Illegality of subject-matter, purpose, or tendency, will now be considered.

The general doctrine on this subject is concisely and comprehensively stated by Mr. Bishop as follows: "Any act which is forbidden either by the common or the statutory law — whether it is *malum in se*, or merely *malum prohibitum*; indictable, or only subject to a penalty or forfeiture; or however otherwise prohibited by a statute, or the common law — cannot be the foundation of a valid contract; nor can any thing auxiliary to, or promotive of, such act. And this doctrine is the same in the equity tribunals as in those of law."[3]

[1] Benj. Sales (Ed. 1888), p. 412, *et seq.*; Tiede. Sales, § 174; 2 Kent Com., p. 440, *et seq.*; 3 Pars. Cont. (7 Ed.), pp. 447, n. (g), 440-443; Bishop Cont. (Enl. Ed.), §§ 1200-1213; 2 Sch. Pers. Prop., p. 101, *et seq.*

[2] § 104, sub. 3.

[3] Bishop Cont. (Enl. Ed.), § 171; and see Id., § 169, *et seq.*; Tiede. Sales, § 290, *et seq.*; Benj. Sales (Ed. 1888), p. 462, *et seq.*; 2 Sch. Pers. Prop., p. 643, *et seq.*; Cannan v. Bryce, 3 B. & Ald., 179, 183, 184; White v. Buss, 3 Cush., 448, 450; Poplett v. Stockdale, Ryan & M. N. P., 337; Bartlett v. Vinor, Carth., 251; Furgusson v. Norman, 5

If the contract of sale be void from any of the causes now mentioned, neither party can maintain an action upon it. *Ex turpi causa, non oritur actio* is the maxim that applies. Nor will either party be relieved from the effect of executing the sale; the vendor will be at liberty to retain the price if it be paid, and the buyer may hold the goods if delivered.[1]

§ 107. Conditions, and conditional sales.—Of conditions affecting the sale and transfer both of personal and real property, there are three kinds, namely: Conditions precedent, subsequent, and concurrent. If by the terms, or true construction, of the contract, the property in the subject of the sale does not vest in the vendee until performance of the condition, it is a condition precedent. If the condition be such that the effect of its non-performance will be to defeat or impair an estate or interest already vested, it is a condition subsequent. If, by the terms, or true construction, of the contract, its execution or performance by the parties simultaneously is required or intended, the condition is termed mutual or concurrent, and under such a condition neither party will be heard to complain of its non-performance by the other, without performance, or an offer of performance, on his own part.

Bing. N. C., 76; Cook v. Phillips, 56 N. Y., 310; Hathaway v. Moran, 44 Me., 67; Carpenter v. Beer, Comb., 246; Stanley v. Nelson, 28 Ala., 514; Hall v. Mullin, 5 Har. & J., 190, 193; Sykes v. Beadon, 11 Ch. D., 170; Hotham v. East India Co., 1 Doug., 272, 277.

[1] Montefiori v. Montefiori, Wm. Bl., 363; Peck v. Burr, 10 N. Y., 294; Horton v. Buffington, 105 Mass., 399; Moore v. Murdock, 26 Cal., 514; Shuman v. Shuman, 27 Pa. St , 90; O'Donnell v. Sweeney, 5 Ala., 467; Tucker v. West, 29 Ark., 386; Finn v. Donahue, 35 Conn., 216; Ryno v. Darby, 20 N. J. Eq., 231.

A promise, statement, or representation, made before, or at the time of the contract, is not necessarily a part of it in contemplation of law; but may be merely an inducement, or something collateral, to the contract. If it be an integral and essential part of the contract, the question may arise whether it is a dependent, or an independent, covenant. If the former, it becomes in effect a condition precedent, or concurrent, the performance of which must be made or tendered by the covenantor before he can rightfully claim performance by the other party to the contract. If the latter, each party is bound to perform on his part without regard to performance or non-performance of the other party; or, failing, he will be liable to an action for a breach of contract; and non-performance by the other party will entitle him to damages for the breach.

The distinctions between the several kinds of conditions often present difficulties in construction, which have produced some confusion and conflict in the adjudications. And, indeed, the whole subject of conditions is generally regarded as "subtle and perplexing;" but the authorities hereunder cited will, it is believed, furnish the intelligent and discriminating student and practitioner with ample means of mastering all the difficulties involved.[1]

[1] Tiede. Sales, § 200, *et seq.*; Benj. Sales (Ed. 1888), p. 507, *et seq*; Am. n., p. 551, *et seq.*; 2 Sch. Pers. Prop., p. 273, *et seq.*; Hickman v. Shimp, 109 Pa. St., 16; Redman v. Ætna Ins. Co., 49 Wis., 438; Fishback v. Van Dusen, 33 Minn., 111, 116; Cadwell v. Blake, 6 Gray, 402; Chapin v. School District, 35 N. H., 450; Sedden v. Prindle, 17 Barb., 466; N. & N. W. R. R. Co. v. Jones, 2 Cold., 584; Jones v. Barkley, 2 Doug., 684–691.

§ **108. Warranty.**— A warranty in the sale of goods is a collateral undertaking, forming a part of the contract by agreement of the parties, express or implied; but in the absence of such agreement, it is not an essential element of the contract, for a sale may be complete without a warranty. Antecedent representations made by the vendor as an inducement to the buyer, but not entering into and forming part of the contract, are not warranties. On the other hand, a representation made during the negotiation and before the conclusion of the bargain, may, by the express or implied agreement of the parties, enter into and become a part of the contract, and a warranty.[1] A warranty given after the consummation of of the sale, without some new consideration, is void.[2]

There are express, and implied, warranties. An express warranty is the direct statement of a material fact, either past or existing; but no form of words is requisite to constitute a warranty, a mere affirmation being sufficient when it is so intended. For determining whether an affirmation amounts to a warranty, this test has been given: "Did the vendor assume to assert a fact of which the buyer was ignorant, or merely give an opinion or judgment upon a matter of which the buyer could as well judge as the vendor?"[3] An implied war-

[1] Benj. Sales (Ed. 1888), p. 563; Tiede. Sales, § 180; Foster v. Smith, 18 C. B., 156; Mondell v. Steele, 8 M. & W., 858; Hopkins v. Tanqueray, 15 C. B., 130; 23 L. J. C. P., 162; McFarland v. Newman, 9 Watts, 55.

[2] Bryant v. Crosby, 40 Me., 9; James v. Bocage, 45 Ark., 284; Bloss v. Kittridge, 5 Vt., 28; Summers v. Vaughn, 35 Ind., 323; Morehouse v. Comstock, 42 Wis., 624; Hogins v. Plympton, 11 Pick., 99.

[3] Pasley v. Freeman, 3 T. R., 51; Cross v. Gardner, Carth., 90; Medina v. Stoughton, 1 Ld. Raym., 593; Powell v. Barham, 4 A. &

ranty is one deduced by the law when the execution of the contract, and the evidence, justify or demand it. As a rule, the existence of an express warranty excludes an implied one; but from the operation of this rule are excepted cases where the former relates to quality, and the latter to title, in which cases the co-existence of both in the same contract involves no inconsistency.

It is the well established doctrine in this country, that in the sale by a vendor, as his own, of an article in his possession, there is an implied warranty of title; but otherwise when the property is not in his possession at the time of the sale.[1]

As a general rule, there is no implied warranty of quality in the sale of personal property, where the buyer has an opportunity to inspect the goods and determine the quality for himself. In the absence of fraud, and of an express warranty, each of the parties relying upon his own judgment, the maxim *caveat emptor* applies.[2] But to the general rule there are some exceptions.

1. *Sales by sample.*—In a sale by sample, intended by

E., 473; Hahn v. Doolittle, 18 Wis., 196; Marsh v. Webber, 13 Minn., 109; Tewksbury v. Bennett, 31 Ia., 83; Gifford v. Carvill, 29 Cal., 589; Miller v. Young, 33 Ill., 354.

[1] Bishop Cont. (Enl. Ed.), § 243; 2 Kent. Com. p. 478; Williamson v. Sammons, 34 Ala., 691; Linton v. Porter, 31 Ill., 107; Chancellor v. Wiggins, 4 B. Monr., 201; Sherman v. Champlain Transp. Co., 31 Vt., 162; Fawcett v. Osborn, 32 Ill., 411; Word v. Cavin, 1 Head, 506; Lackey v. Stouder, 2 Ind., 376; Scranton v. Clark, 39 N. Y., 220; Huntington v. Hall, 36 Me., 501; Tiede. Sales, § 185; Benj. Sales (Ed. 1888), p. 564, *et seq.*; Am. n., p. 614. *et seq.*

[2] Tiede. Sales, § 187; Benj. Sales (Ed. 1888), p. 644, *et seq.*; Bishop Cont. (Enl. Ed.), § 244; 2 Kent Com., p. 478, *et seq.*; 2 Sch. Pers. Prop., p. 353.

the parties as such, there is an implied warranty that the bulk of the goods shall be equal to the sample.[1]

2. *Sales by description.*—Where the buyer has no opporiunity to inspect the goods, either in bulk or sample, and the vendor's description is positive, definite and exact, there is an implied warranty that the goods will answer the description, both in kind and quality.[2]

3. *Merchantability; fitness for a particular use.*—In a sale by a manufacturer, there is an implied warranty that the goods are merchantable, such as are free from serious defects, and will command the ordinary market price. And where goods are bought for a particular purpose or use, known to the vendor, and are selected by him, the buyer not relying on his own judgment, there is an implied warranty that the articles shall be fit for such purpose or use.[3]

4. *Sales of provisions.*—In the United States it is held, that in a sale of provisions for immediate domestic consumption, there is an implied warranty that the articles

[1] Merriman v. Chapman, 32 Conn., 146; Webster v. Granger, 78 Ill., 230; Gill v. Kauffman, 16 Kan., 571; Gunther v. Atwell, 19 Md., 157; Gallagher v. Waring, 90 Wend., 20; Barnard v. Kellogg, 10 Wall., 383.

[2] Hastings v. Lovering, 2 Pick., 215; Hogins v. Plympton, 11 Pick., 97; Behn v. Bumess, 3 Best & Smith, 751; Wolcott v. Mount, 36 N. J. L., 262; Maxwell v. Lee, 27 N. W. Rep., 196.

[3] Howard v. Hoey, 23 Wend., 350; Gallagher v. Waring, 9 Wend., 20, 28; Merriam v. Field, 24 Wis., 640; McChing v. Kelley, 21 Iowa, 508; Mesner v. Granger, 4 Gilm., 69; Cullen v. Bimm, 37 Ohio St., 236; Wilcox v. Hall, 53 Ga., 635; Brantley v. Thomas, 22 Tex., 270; Deeming v. Foster, 42 N. H., 165; Walker v. Pue, 57 Md., 155; Port Carbon Iron Co. v. Groves, 68 Pa. St., 149; Tilton Safe Co. v. Tisdale, 48 Vt., 83.

are sound, wholesome, and fit for food.[1] But where provisions are sold as merchandise and not for immediate consumption by the purchaser, there is no implied warranty of fitness for use.[2]

5. *Sale of commercial paper.*—In the sale of commercial paper there is an implied warranty by the vendor that the signatures are genuine, and the signers competent to contract; but the warranty does not extend to the pecuniary responsibility or solvency of the signers.[3]

It may be regarded as an established doctrine, that an express general warranty does not cover patent defects; that where such defects exist the buyer must exact a special warranty against them, or submit to the application of the rule, *caveat emptor.*[4]

§ **109. Delivery in performance of the contract.**—Delivery as related to the transfer of title has already been considered,[5] and it remains to notice briefly the rules governing delivery of possession in performance of the executory contract of sale. When the contract is complete, and the buyer has complied, or is ready to comply, with the conditions precedent or concurrent, it becomes the immediate duty of the vendor to deliver

[1] Morehouse v. Comstock, 42 Wis., 626; Hoover v. Peters, 13 Mich., 51; Van Bracklin v. Fonda, 12 Johns., 468; Divine v. McCormick, 50 Barb , 116.

[2] Moses v. Meed, 5 Denio, 617; 1 Denio, 378; Howard v. Emerson, 110 Mass , 321; Ryder v. Neitge, 21 Minn., 70; Humphreys v. Comline, 8 Blatchf., 516; Lukens v. Freiund, 27 Kan., 664.

[3] Benj. Sales (Ed. 1888), Am. n., pp. 620, 621; 1 Dan. Neg. Inst., § 670.

[4] Tiede. Sales, § 195; Benj. Sales (Ed. 1888), pp. 567–569.

[5] *Supra*, § 102.

possession of the goods in performance of the contract, in the absence of stipulations to the contrary.

1. *How, and where, delivery to be made.*— In the absence of an express agreement in respect to delivery, the vendor is under no obligation to transport the goods to the purchaser. He is only required to hold the goods ready for delivery to the buyer, or his order, on demand. And if the vendee fails to call for the goods, and they remain in the possession of the vendor, he may recover the price in an action for goods bargained and sold.[1] When the parties have not agreed upon a place of delivery, the goods must be held ready for delivery at the place where they were at the time of the sale; and should the vendor attempt to deliver them elsewhere he would incur all the attendant risk, and be liable to the vendee for the increased expense, if any, arising from such unauthorized delivery.[2]

Obviously, if a place of delivery be designated by the parties, or either of them thereto authorized by the contract, it cannot rightfully be made elsewhere, without the consent of all the parties. If the buyer is to designate the place, and he neglects to do so within a reasonable time, it will excuse the vendor from making delivery, and enable him to maintain an action for the purchase

[1] Kohl v. Lindley, 39 Ill., 195; Morse v. Sherman, 106 Mass., 430, 432; Wade v. Moffit, 21 Ill., 110; 74 Am. Dec., 79; Frazier v. Simmons, 139 Mass., 531, 535; Turner v. Langdon, 112 Mass., 265; Stearns v. Washburn, 7 Gray, 187; Allingham v. O'Mahoney, 1 Pugsl., 326.

[2] Rice v. Churchill, 2 Den., 145; Brownson v. Gleason, 7 Barb., 472; Middlesex Co. v. Osgood, 4 Gray, 429; Barr v. Ayers, 3 Watts & S., 299; Kraft v. Hurtz, 11 Mo., 109; Miles v. Roberts, 34 N. H., 253; 2 Sch. Pers. Prop., p. 400.

price while the goods remain in his possession.[1] If the vendor is to select the place of delivery, it becomes his duty to give the vendee reasonable notice in advance of the place selected, so that delivery there will transfer the possession of the goods to the latter.[2]

2. *Delivery to a common carrier.*—Where the contract binds the vendor to send the goods to the purchaser, delivery to a common carrier is a compliance, it being in contemplation of law a delivery to the purchaser himself. The carrier, in such cases, is the bailee of the purchaser, or consignee.[3] But where the contract requires the seller to make the common carrier his own agent, or he does so voluntarily, transfer of possession and risk from the vendor to the vendee will not take place, until the goods have been actually delivered by the carrier to the vendee or his agent.[4]

3. *Quantity to be delivered.*— A contract for a specific quantity will not be satisfied by a tender or delivery of more or less; or by sending the goods bargained for mixed with other goods, thus compelling the buyer to select and separate for himself. In either case the purchaser may rightfully refuse to accept the whole.[5]

4. *Time of delivery.*— In the absence of a stipulated time for delivery, the law prescribes a reasonable time;

[1] Hunter v. Westell, 84 N. Y., 594; 88 Am. Rep., 544; Smith v. Wheeler, 5 Gray, 309; Boyd v. Gunnison, 14 W. Va., 1; Brunshill v. Muir, 15 Up Can. Q. B., 213; Bolton v. Riddle, 35 Mich., 13.

[2] Rogers v. Van Hoesen, 12 Johns,, 221; Davies v. McLean, 21 W. R., 264; 28 L. T. (N. S.), 113.

[3] Tiede. Sales, § 95; Benj. Sales (Ed. 1888), pp. 146, 647.

[4] Citations last *supra*; and see Dunlop v. Lambert, 6 Clark & F., 600; Perkins v. Eckert, 55 Cal., 400; Hall v. Gaylor, 37 Conn., 550.

[5] Benj. Sales (Ed. 1888), p. 642, *et seq.*; Tiede. Sales, § 101.

and what is a reasonable time becomes a question of fact for the jury, to be determined by the circumstances of each case.[1] Where the contract expresses the time of delivery, the question involved is one of construction, and hence a question of law for the court, and not of fact for the jury.[2]

5. *Actual, constructive, and symbolical delivery.*— An actual delivery is the "manual or bodily transfer of possession." Constructive delivery is the intentional transfer of title and possession in place of actual, by agreement of the parties, or where actual delivery is impossible. As examples of constructive delivery may be mentioned cases where the goods are in the actual possession of the vendee at the time of the sale; where it is the intention of the parties that the goods shall remain in the possession of the vendor as bailee after the sale; where the goods are in possession of a warehouseman, or other third party, at the time of the sale, and he thereafter holds them as bailee of the purchaser; where the goods are at sea, or otherwise beyond the power of the vendor to make actual delivery; where the goods are too ponderous for possible or convenient actual delivery; and where the subject of the sale is growing crops, not ripe for actual delivery. Symbolical delivery is the actual delivery of something as the representative or symbol of the property sold, as the key of the warehouse where the goods are stored; the bill of sale of a

[1] 2 Sch. Pers. Prop., p. 401, *et seq.*; Tiede. Sales, §§ 98-100; Terwilliger v. Knapp, 2 E. D. Sm., 86.

[2] Benj. Sales (Ed. 1888), p. 638; Atwood v. Clark, 2 Me., 249; Cameron v. Wells, 30 Vt., 633.

vessel and cargo at sea; and, indeed, in all cases of impossible or impracticable delivery.[1]

6. *Acceptance.*—It is only necessary in this connection to add, that acceptance is the complement of delivery, both being essential to a full performance of the contract. This subject was briefly discussed under the requirements of the Statute of Frauds.[2] The rules there stated will apply to acceptance in performance of the contract, and need not be repeated. But the reader, desiring a more elaborate discussion of the subject, is referred to the authorities hereunder cited.[3]

§ **110. The vendor's lien.** — A lien is a "right to hold goods, the property of another, in security for some debt, duty, or other obligation."[4] The vendor of personal property, still in his possession, has a lien upon it as security for the purchase price.[5] But this lien may be waived or lost, either expressly or by implication. A sale on credit is a waiver. The receipt of other security for the payment of the purchase price is a waiver by implication. Delivery of the goods is a waiver. A legal tender of payment by the vendee discharges the lien. And, in short, any agreement, or dealing with the goods,

[1] Tiede. Sales, §§ 104, 105; Benj. Sales (Ed. 1888), p. 648; 2 Kent Com., p. 500; 1 Pars. Cont. (7 Ed.), p. 531; 2 Sch. Pers. Prop., p. 408, *et seq.*

[2] *Supra*, § 102, sub. 5.

[3] Tiede. Sales, ch IX; Benj. Sales (Ed. 1888), pp. 662-667.

[4] Arnold v. Delano, 4 Cush., 33, 38.

[5] Tiede. Sales, § 119; Benj. Sales (Ed. 1888), p. 750, *et seq.*; Am. n., p. 773, *et seq.*; 1 Sch. Pers. Prop. 482, *et seq.*; 2 Id., p. 579, *et seq* ; Bouv. L. Dict., "Lien;" And. L. Dict., "Lien."

inconsistent with the retention of the lien, will operate as a waiver.[1]

§ 111. Stoppage in transitu. — Where the vendor has parted with the possession of goods sold before payment of the purchase price, and placed them in the hands of a carrier, or other middleman, for delivery to the buyer, if, while the goods are in *transitu* he discovers that the vendee has become insolvent since the sale, or, unbeknown to him, was insolvent at the time of the sale, he may retake and hold the goods as security for the price.[2] "This is a right," it is well said, "which arises solely upon the insolvency of the buyer, and is based on the plain reason of justice and equity that one man's goods shall not be applied to the payment of another man's debt."[3]

While the right of stoppage *in transitu*, and the vendor's lien, are nearly related in spirit and purpose, there is a distinction between them which is not always observed, leading to some confusion and apparent conflict in the cases. We have seen[4] that the vendor of personal property, still in his possession, has a lien upon it as security for the price; but that in a sale on credit no lien attaches, or, as it is sometimes expressed, the lien is waived by implication. The right of stoppage *in tran-*

[1] Tiede. Sales, §§ 120-122; Benj. Sales (Ed. 1888), p. 751, *et seq.*; Am. n., p. 774.

[2] Benj. Sales, p. 778, *et seq.*; Am. n., p. 817, *et seq.*; Tiede. Sales, § 125, *et seq.*; 2 Sch. Pers. Prop., p. 586, *et seq.*; 2 Kent Com., p. 540, *et seq.*; Gibson v. Carruthers, 8 M. & W., 337.

[3] D'Aquila v. Lambert, 2 Eden, at p. 77; s. c. Amb., 399.

[4] *Supra*, § 110.

situ, on the contrary, is not affected by the credit, and may be exercised before payment falls due.[1]

The theory or principle on which the right of stoppage *in transitu* depends, and the effect of its exercise, have given rise to considerable discussion, and some contrariety of opinion. On one theory, there is a constructive possession in the seller for the purpose of a lien, which is enforced by the stoppage; on another, the vendor has a right to rescind the contract in case of insolvency, which right may be exercised by stoppage *in transitu*. The lien theory is favored by the weight of American authority, which seems to establish the doctrine that the exercise of the right of stoppage does not operate as a rescission of the contract of sale; and that the vendee is afterwards entitled to the possession of the goods on payment or tender of the purchase price; and this notwithstanding the goods may have greatly appreciated in value.[2]

Chief J. Shaw, in *Arnold v. Delano*,[3] speaking of the waiver of vendor's lien by the giving of credit, says: "But the law in holding that a vendor, who has thus

[1] Stubbs v. Lund, 7 Mass., 453, 456; Clapp v. Peck, 55 Ia., 270; Clapp v. Sohmer, 55 Ia., 273; Babcock v. Bonnell, 80 N. Y., 244, 249; Bell v. Moss, 5 Wheat, 189; Atkins v. Colby, 20 N. H., 154; Newhall v. Vargas, 13 Me., 193.

[2] Babcock v. Bonnell, 80 N. Y., 244, 250, 251; Jordan v. James, 5 Ohio, 88; Rowley v. Bigelow, 12 Pick., 312; Patten's Appeal, 45 Pa. St., 151; Kemp. v. Falk, 7 App. Cas., 573, 581; Newhall v. Vargas, 13 Me., 93; Rogers v. Thomas, 20 Conn, 53; Rucker v. Donovan, 13 Kan., 251; Stanton v. Eager, 10 Pick., 475; Wart v. Scott, 6 Grant, (Ont) 154; Grout v. Hill, 4 Gray, 361; Chandler v. Fuller, 10 Tex., 2; McElroy v. Seerey, 61 Md., 389; 48 Am. Rep., 110.

[3] 4 Cush., 33, 38-41.

given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment, the vendee become bankrupt or insolvent, and the vendor still retains the custody of the goods, or any part of them, or if the goods are in the hands of a carrier, or middleman, on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do, can regain his actual possession, by a stoppage *in transitu*, then his lien is restored and he may hold the goods as security for the price."

The right of stoppage, being considered just and equitable, is extended to others than vendors, to persons occupying a similar position, *quasi* vendors. For examples, a factor or commission merchant, who buys for the consignee;[1] to one who pays the price for the vendee, and takes the bill of lading in his own name, or has it assigned to him;[2] and the vendor of an interest in an executory agreement.[3]

When does the transit begin, and when does it end? Answering generally, it begins when the vendor parts with the possession fully, so that his right of lien is gone; and ends when the goods reach the actual possession of the vendee, or his authorized agent. The statement often found in the books that the transit terminates when the goods reach their ultimate destination is liable to

[1] Newhall v. Vargas, 13 Me., 93; Seymour v. Newton, 105 Mass., 275; Ilsley v. Stubbs, 9 Mass., 65, 71; *Ex parte* Miles, 15 Q. B. Div., 39.

[2] Muller v. Poudir, 55 N. Y., 325, 337; Gossler v. Schepeler, 5 Daly, 476.

[3] Jenkyns v. Usborne, 7 M. & G., 678, 698; 8 Scott, N. R., 505.

mislead, and is not accurate if the expression "ultimate destination" be used in the sense of locality, and not the actual possession of the vendee. The goods may have reached the place of consignment, and still be in transit to the vendee while in the hands of a wharfinger, warehouseman, cartman, or other middleman.[1]

§ **112. Payment and tender.** — On compliance with the contract of sale by the vendor, he is entitled to payment according to its terms, express or implied. Where no stipulation is made by the parties in regard to the mode, or time, of payment, an immediate and absolute payment in cash is implied by law, and obligatory upon the vendee. But the contract may provide for other kinds of payment, or a credit may be given for a stipulated time. When payment becomes due, the debtor cannot safely wait for demand to be made, but must seek the vendor or his authorized agent, and make, or tender payment.[2]

Other than money payments:

1. *Payment by note or bill.*—A payment by bill or note may be absolute or conditional. It is generally held that the debtor's own note or bill given in liquidation of his debt, is a conditional payment, and will not effect an absolute discharge of the debt until itself is paid; unless it be taken by agreement of the parties as an absolute payment. The indebtedness of the buyer in itself gives the vendor an implied promise of payment, and a

[1] Tiede. Sales, §§ 129-133; Benj. Sales (Ed. 1888), p. 784, *et seq.*, Am. n., pp. 820-825; 2 Sch. Pers. Prop., p. 590, *et seq.*; Harris v. Pratt, 17 N. Y., 249.

[2] 2 Sch. Pers. Prop., p. 425; Benj. Sales (Ed. 1888), pp. 669, 670.

promissory note only supplements the implied, unwritten, with an express, written, promise; it does not increase the obligation of the buyer, or add to the security of the vendor; but the latter is at liberty to accept the written promise as an absolute payment and discharge of the debt, if he will. The transfer to the vendor by the purchaser of a note or bill of a third party is in some cases an absolute, and in others only a conditional, payment. If payable to bearer, and transferred at the time of the sale without indorsement, it is *prima facie* an absolute payment; but if payable to order and transferred by indorsement, it will operate only as conditional payment unless otherwise agreed by the parties. In some of the States, the transfer of a negotiable bill or note by a debtor to his creditor for a precedent simple contract debt, is deemed, *prima facie*, an absolute payment or discharge of the debt; but in a majority of the States such a transfer is held to be only a conditional payment in the absence of proof of a different agreement by the parties.[1]

As a rule, the acceptance of a bill or note conditionally in payment of a debt, suspends the right of action on the original debt until maturity of the paper.[2] On maturity the right of action revives; and it is then optional with the creditor to bring his action on the paper, or on the

[1] Tiede. Sales, § 144; Benj. Sales (Ed. 1888), Am. n., pp. 699, 700, where the holdings of the several States on this point are collated.

[2] Stedman v. Gooch, 1 Esp., 3; Griffith v. Cowen, 13 M. & W., 58; Black v. Zacharie, 3 How., 483; Putnam v. Lewis, 8 Johns., 389; Price v. Price, 16 M. & W., 231; Armstead v. Ward, 2 Pat. & H., 504; Phœnix Ins. Co. v. Allen, 11 Mich., 501.

original debt.[1] Should he elect the latter alternative, he must produce in court and surrender the paper, or so account for its absence as to show that the debtor will be free from liability upon it to a third party.[2]

If the debtor becomes liable on the bill or note as a drawer or indorser, failure of the holder to exercise due diligence in presenting the same for payment, and giving notice of dishonor, will, it is generally held, discharge the debtor both from his liability on the dishonored paper, and on the original debt, where such negligence results in loss.[3]

2. *Payment by check or draft.*—The authorities are not entirely agreed upon the effect of payment by check or draft. Some hold that the buyer's negotiable check is *prima facie* payment, conditionally; and if the drawer has no funds in the drawee's hands to meet the check, or draws them out before the holder has a reasonable time to present the check, it will not operate as a payment, and the creditor may resort to his original cause of action.[4] But if, at the time of giving the check, the drawer has sufficient funds in the hands of the drawee, and the payee neglects for an unreasonable time to pre-

[1] Bank of Ohio Valley v. Lockwood, 13 W. Va., 426; Owenson v Morse, 7 T. R., 50; Steadman v. Gooch, 1 Esp., 4; Price v. Price, 16 M. & W., 231; Tobey v. Barber, 5 Johns., 68.

[2] Jones v. Savage, 6 Wend., 658; Dayton v. Trull, 23 Wend., 345; Raymond v. Merchant, 3 Cow., 147, 150; Alcock v. Hopkins, 6 Cush., 484; Miller v. Lumsden, 16 Ill., 161; Matthews v. Dare, 20 Md., 248.

[3] Smith v. Miller, 43 N. Y., 171; s. c., 52 N. Y., 546; Betterton v. Roope, 3 Lee (Tenn.), 220; Phœnix Ins. Co. v. Allen, 11 Mich, 501; Mehlbery v. Fisher, 24 Wis., 607; Allan v. Eldred, 50 Wis., 123; Dayton v. Trull, 23 Wend., 345.

[4] Broughton v. Silloway, 114 Mass., 71.

sent the check, and the drawee in the meantime fails, the loss falls upon the creditor; he becomes the victim of his own negligence, and cannot maintain an action on the original indebtedness.[1] Other cases hold that the creditor may recover on the original cause of action, unless the debtor shows that the check has been paid, or or that a loss has resulted from an unreasonable delay of the creditor in presenting the check for payment.[2]

3. *Payment in counterfeit, or worthless bills.*—Counterfeit or forged bills, bank notes, or personal notes, given in payment, do not constitute payment, or discharge the debt. The creditor in such case, gets no value, no *quid pro quo*. Some cases hold that the receiver of counterfeit or forged paper is bound to use due diligence in ascertaining its character, and to promptly return the same, or notify the other party of its character; and that failing in this regard, its receipt by him will be deemed a valid payment. The necessity or utility of returning an utterly worthless piece of paper, or of notifying the other party of its character, is not obvious on first thought; but in some cases, an early notice might enable an innocent party to obtain redress from prior parties.[3]

[1] Cushman v. Libbey, 15 Gray, 358; Taylor v. Wilson, 11 Met., 44; Hodgson v. Barrett, 33 Ohio St., 63; Barnard v. Graves, 16 Pick., 41; Warriner v. The People, 74 Ill., 346; McIntyre v. Kennedy, 29 Pa. St., 448.

[2] Bradford v. Fox, 38 N. Y., 289; Smith v. Miller, 43 N. Y., 171; Thompson v. The Bank of British N. A., 82 N. Y., 1; Kerneyer v. Newbt, 14 Kan., 164; Phillips v. Bullard, 58 Ga., 256; DeGampart v. Brown, 28 Ark., 166.

[3] Benj. Sales (Ed. 1888), Am. n., pp. 697, 698, and cases cited; Tiede. Sales, § 149; 2 Pars. Cont. (7 Ed.), p. 622.

4. *Payment in specific articles.*—By agreement of the parties, the price may be payable in specific articles. It is only necessary to say, that when so payable, the articles must be delivered in accordance with the terms of the contract, and in default thereof the price becomes payable in cash.[1]

5. *Payment by mail.*—Where the creditor authorizes or requests payment by mail, or other specific mode, he thereby appoints his own agency for the transmission of the funds, and assumes all the risk attendant upon such mode of remittance. The obligation of the debtor will be fully discharged by sending the money as authorized or requested, even although it may never reach the creditor.[2] But money sent by mail without authority of the creditor, or the sanction of any general usage or custom, is at the risk of the debtor, and if not received by the creditor, the debt remains uncanceled.[3] It has been held, however, that depositing the money in the postoffice, in an envelope properly addressed to the creditor at his place of business, is *prima facie* evidence that he received it.[4]

6. *Appropriation of payments.*—Questions in regard

[1] Perry v. Smith, 22 Vt., 301; Roberts v. Beatty, 2 Pen. & Watts, 63; Church v. Feterow, 2 Pen. & Watts, 301; Stone v. Nichols, 43 Mich., 16.

[2] Gurney v. Howe, 9 Gray, 404; Morgan v. Richardson, 13 Allen, 410; Palmer v. Phœnix Mut. Ins. Co., 84 N. Y., 63; Townsend v. Henry, 9 Rich. L., 318.

[3] Crane v. Pratt, 12 Gray; 348; First Nat. Bank v. McManigle, 69 Pa. St., 156; Buell v. Chapin, 99 Mass., 596; Williams v. Carpenter, 36 Ala., 9; Holland v. Lyns, 56 Ga., 56.

[4] Huntley v. Whittier, 105 Mass., 391; Waydell v. Velie, 1 Bradf., 277.

to the appropriation of payments arise where several debts are due from one person to another, and a payment is made which is insufficient to satisfy all. The general rules governing such cases may be briefly summarized.

1. The debtor, at the time of payment, has the right to designate the claim to which it shall apply. This done, and the appropriation so made by the creditor, it cannot afterwards be changed by the debtor, and will not be changed for him by the law.

2. If the debtor fails to make the application where he has the opportunity of so doing, the creditor may apply the payment to any one of several legal claims at his option. He may apply it to a claim barred by the statute of limitations, but such appropriation will not revive the balance of the debt, if any; to a debt against the payer and others; to an unsecured debt in preference to one secured; and to a debt not enforceable by reason of the Statute of Frauds. But he is not at liberty to apply it to an illegal claim; nor to a debt absolutely void for usury; nor to a debt not yet due, if there be sufficient indebtedness due to absorb the payment.

3. If neither debtor nor creditor make the application, the law will apply the payment as justice and equity require, and in accordance with the probable intention of the parties.[1]

7. *Payment on Sunday.* — A payment made and received on Sunday, if retained by the creditor, will discharge the debt.[2] But such payment is not as effectual

[1] Benj. Sales (Ed 1888), Am. note, pp. 704, 705; Tiede. Sales, § 152; 2 Whart. Cont. §§ 923-934; 2 Pars. Cont. (7 Ed.), p. 630, *et seq.*

[2] Johnson v. Willis, 7 Gray, 164; Lamore v. Frisbie, 42 Mich., 186.

for all purposes as a payment on a week day. For example, a partial payment on Sunday will not revive a debt barred by the Statute of Limitations.[1]

8. *Tender.*—While nothing but payment, or its equivalent accepted by the vendor, will discharge the buyer's indebtedness for the price, a valid tender will relieve him from liability for costs, and for subsequently accruing interest. The requirements of such a tender are:

First.—It must be made in gold or silver coin, or United States treasury notes. But if the tender be made of bank notes which commonly pass current as money, and no objection be made by the vendor to the money tendered, it will be sufficient.

Second.—The full amount due must be tendered; a tender of a part, if refused by the vendor, will not suffice. An exception to this rule, however, occurs where the vendor alone knows the exact amount due, and declines to inform the buyer, in which case the latter may tender a reasonable sum in payment, and an inconsiderable deficiency will not render it invalid.

Third.—As a rule, the money must be actually produced and offered to the vendor or his authorized agent, in such a manner that the person to whom the tender is made may have an opportunity to examine and count it for himself. But its production may be waived by the person to whom the tender is made, or rendered impracticable by his refusal to examine or accept it; and in such

[1] Wainnaman v. Keinman, 1 Exch., 118; Clapp v. Hale, 112 Mass., 368; Bumgardner v. Taylor, 28 Ala., 687; Dennis v. Sharman, 31 Ga., 607. But see Thomas v. Hunter, 29 Md., 412; and Ayers v. Bane, 39 Iowa, 518, differing as to admission of debt by a Sunday payment.

case if the buyer, or his authorized agent, has the right amount of legal tender present, and offers to produce it for examination and acceptance, the tender will be sufficient and legal.

Fourth.—The tender must be unconditional. It is a well settled rule that a tender with conditions imposed, as that the debtor shall receive a release or a receipt in full, or the like, is not good. But it has been held that where a statute makes it obligatory upon the debtor to give a release, it may properly be demanded where the tender is made;[1] and a note may be demanded as the condition of a tender of its payment.

Fifth.—The tender must be kept good. If it be properly made, and acceptance be refused, the debtor must thereafter have the money in readiness for the creaditor on his demand; otherwise the original tender would be insufficient. And if suit be subsequently brought upon the claim for which the tender was made, the money must be brought into court for the use of the plaintiff.[2]

§ 113. Remedies of the vendor.—A vendor of personal property has several remedies for securing the purchase price, or for breach of the contract, each adapted to circumstances.

1. *Vendor's lien.*—As we have seen, he may have a lien for the purchase price upon goods sold, while they remain in his possession. It is only, however, where the

[1] Saunders v. Frost, 5 Pick., 270; Balme v. Wambaugh, 16 Minn., 116.

[2] Tiede Sales, § 140; Benj. Sales (Ed. 1888), Am. note, pp. 706-708; 2 Pars. Cont., pp. 637, *et seq.*, and 647, *et seq.*; 2 Sch. Pers. Prop. pp. 428-432; Bouv. L. Dict., "Tender," And. L. Dict., "Tender."

property in the goods has passed to the vendee that his lien attaches, for, obviously, one cannot have a lien on his own property.[1] The lien, it should be noted, is only good as security for the unpaid price, and will not hold for any other claim, whether one growing out of the same transaction, or otherwise.[2]

2. *Re-sale.*—The vendor may re-sell the goods in the case of non-acceptance by the vendee, and hold the latter liable for any difference between the contract price and the sum realized on the re-sale. This right may be exercised within a reasonable time after the buyer's default. The vendor should notify the buyer that he will sell the goods for the account of the buyer, and hold the latter liable for the difference between the contract price and the re-sale price; and, while not absolutely essential to the right of re-sale, it is prudent for the vendor to give notice to the buyer of the time and place of the intended sale, thus forestalling a charge of unfairness in the transaction.[3] Where the vendor elects to re-sell on

[1] *Supra*, § 110. And see Tiede. Sales, 119; Benj. Sales (Ed. 1888), p. 720, Am. n., p. 773; 2 Sch. Pers Prop., p. 556, *et seq.*; Clark v. Draper, 19 N. H., 419; Arnold v. Delano, 7 Cush., 33; Bowen v. Burk, 13 Pa. St., 146; Carlisle v. Kinney, 66 Barb., 363; Bradley v. Michael, 1 Ind., 551.

[2] Crommelin v. N. Y. & Harlem R. R. Co., 4 Keyes, 90; Somes v. British Empire Shipping Co., 1 E. B. & E., 367; L. J. Q. B., 220; 8 H. L. C., 338; 30 L. J. Q. B., 221.

[3] Tiede. Sales, § 334; Benj. Sales (Ed. 1888), p. 737, *et seq.*, Am. n., p. 747; Lewis v. Greider, 49 Barb., 606; Dustan v. McAndrew, 44 N. Y., 72; Mason v. Decker, 72 N. Y., 595, 599; Adams v. Mirick, 5 Serg. & R, 32; Saladin v. Mitchell, 45 Ill., 85; Barnett v. Terry; 42 Ga., 283; Atwood v. Lucas, 53 Me., 508; Shawhaut v. VanWest, 25 Ohio St., 490; Holland v. Rea, 48 Mich., 218; Smith v. Pettee, 70 N. Y., 13; Camp v. Hamlin, 55 Ga., 259; Linden v. Eldren, 49 Wis, 305; Rosen-

default of acceptance by the vendee, and notifies the latter of his intention of so doing, the vendor becomes the agent of the buyer for the purposes of such sale, and is bound to the exercise of good faith and reasonable diligence to effect a sale at the best price; and, it has been held that the vendor is bound to obey the instructions given him by the vendee as to the time and manner of sale, where he can do so without sacrificing his lien under the contract. If the vendor neglects to give notice to the buyer of the time and place of the re-sale, and there be evidence of fraud or unfairness in the transaction, the courts may adopt some other standard than the price obtained as a test of the market value of the goods, in determining the difference between it and the market price.[1]

3. *Stoppage in transitu.*—Another remedy of the vendor against the goods is *stoppage in transitu.* This remedy has already been sufficiently considered, for the purposes and plan of this treatise.[2]

4. *Reclamation.*—We have seen that where the vendee purchases goods under false representations, or with an intention not to pay for them, he does not acquire a good title as against the defended vendor, who may reclaim

baum v. Weeden, 18 Gratt., 785; Smith v. Pettee, 70 N. Y., 13, 18; Consinery v. Pearsall, 8 Jones & Sp., 114; Pickering v. Bardwell, 21 Wis., 562; Brownlee v. Bolton, 44 Mich., 218.

[1] Tiede. Sales, § 334; Girard v. Taggart, 5 Serg. & R., 32; Chapman v. Ingram, 30 Wis., 290; Rickey v. Tenbroeck, 63 Mo., 587; Haskell v. McHenry, 4 Cal., 411; McCombs v. McKennan, 2 Watts & S., 219; Coffman v. Hampton, 2 Watts & S., 399.

[2] *Supra*, § 111.

the goods from the fraudulent vendee, or from any one other than a *bona fide* purchaser of such vendee.[1]

5. *Action for refusal to receive the goods.*—Where the property in the goods has not passed to the buyer, and he wrongfully refuses to accept and pay for them according to promise, the vendor may have an action against the vendee, in which he will be entitled to recover the actual damages sustained, but not the full purchase price of the goods. The measure of damages generally governing in this action, is the difference between the contract price and the market price of such goods at the time when the contract was broken; and the date of breach is the time when the goods were to have been delivered.[2]

6. *Action for the price.*—According to the weight of American authority, when the vendor has complied with the contract on his part he may regard the goods as the property of the buyer, notwithstanding his refusal or neglect to accept, and recover of him the full contract price.[3] There are some authorities which are not in

[1] *Supra*, § 105, sub. 5.

[2] Benj. Sales (Ed. 1888), pp. 708, 710, Am. n., p. 716. Tiede. Sales, § 333; Gibbons v. United States, 8 Wall., 269; Clement, etc., Co. v. Meserole, 107 Mass., 362; Rand v. White Mountains R. R. Co., 40 N. H., 79; Young v. Merton, 27 Md., 114; Harris Mfg. Co. v. Marsh, 49 Iowa, 11; Hayden v. Demets, 53 N. Y., 426; Danforth v. Walker, 37 Vt., 239; Nixon v. Nixon, 21 Ohio St., 114.

[3] *Supra*, § 109, sub. 1; Tiede. Sales, § 333; 3 Pars. Cont. (7 Ed.), p. 210; Mason v. Decker 72 N. Y., 595, 599; Bement v. Smith, 15 Wend., 493; Doremus v. Howard, 23 N. J. L., 390; Bridgford v. Crocker, 60 N. Y., 627; Higgins v. Murray, 73 N. Y., 252; Nichols v. Moore, 100 Mass., 277; Wade v. Moffet, 21 Ill., 110; Bell v. Offutt, 10 Bush, 639; Ballentine v. Robinson, 46 Pa. St., 177.

harmony with the general trend of judicial opinion on this point.[1]

7. It is hardly necessary to add that in case the goods are delivered to, and accepted by, the vendee, and he refuses or neglects to pay for them when payment is due, the vendor may maintain an action against him for the purchase price.

§ **114. Remedies of the vendee.**—The vendee, as well as the vendor, has several remedies for non-performance or breach of the contract, each adapted to the particular circumstances of the case.

1 *Action for non-delivery.*—In case of failure by the vendor to deliver the goods in pursuance, and according to the terms, of his contract, the buyer has an action against him for damages. When the price has not been paid, the measure of damages will be the difference between the contract price and the market value at the time and place of delivery.[2] The authorities do not agree

[1] Pittsburg, etc., R. R. Co. v. Heck, 50 Ind., 303; Indianapolis, etc., R. R. Co. v. Maguire, 62 Ind., 140; Fell v. Muller, 78 Ind., 507; Moody v. Browe, 34 Me., 107.

[2] Tiede. Sales, § 335; Benj. Sales (Ed. 1888), p. 829, *et seq.*, Am. n. p. 859; Dana v. Fielder, 12 N. Y., 40; Parsons v. Sutton, 66 N. Y., 92; Sleuter v. Wallbaum, 45 Ill., 44; Grand Tower Co. v. Phillips, 23 Wall., 471; Bush v. Holmes, 53 Me., 417; Somers v. Wright, 115 Mass., 292; Miles v. Miller, 12 Bush, 134; Chadwick v. Butler, 28 Mich., 349; Guice v. Crenshaw, 60 Tex. 344; Gray v. Hall, 29 Kan. 704; Kribs v. Jones, 44 Md., 396; Gordon v. Norris, 49 N. H., 376; Rose v. Bozeman, 41 Ala., 678; Worthen v. Wilmot, 30 Vt., 555; West v. Pritchard, 19 Conn., 215; Behner v. Dale, 25 Ind., 433; Cannon v. Folsom, 2 Iowa, 101; White v. Tompkins, 52 Pa. St., 363; Hill v. Chapman, 59 Wis., 211; Porter v. Barrow, 3 La. An., 140; Crosby v. Watkins, 12 Cal., 85. And see *supra*, § 103.

as to the measure of damages where the contract price has been paid. One class hold that the buyer is only entitled to receive the market price at the time and place of delivery.[1] Other authorities hold that the measure of damages is the highest market price of the goods between the time of delivery and the commencement of the action.[2]

2. *Special damages.*—In some cases the buyer is entitled to special damages beyond the difference between the market value and the contract price. While the alleged loss of mere speculative profits constitutes no ground for the recovery of damages, profits which would naturally result from the possession of the goods bought, and the reasonable expectation of which may have been an inducement to the purchase, may be recovered as special or consequential damages; and this especially where the vendor knows the use for which the goods were bought.[3]

[1] Cofield v. Clark, 2 Cal., 102; Shepherd v. Hampton, 3 Wheat., 200; Bear v. Harnish, 3 Brewst., 116; Balto. etc., Co., v. Sewell, 36 Md., 238; White v. Sailsbury, 33 Mo., 150; Hill v. Smith, 32 Vt., 433; Rose v. Bozeman, 41 Ala., 678; McKenney v. Haines, 63 Me., 74; Smith v. Dunlap, 12 Ill., 184; Smithhurst v. Woolston, 5 Watts & S., 106; Humphreysville, etc., Co. v. Vermont etc., Co., 33 Vt., 92; Douglass v. McAllister, 3 Cranch, 298.

[2] Clark v. Pinney, 7 Cow., 687; Arnold v. Suffolk Bank, 27 Barb., 424; West v. Wentworth, 3 Cow., 82; Dabovich v. Emeric, 12 Cal., 171; Cannon v. Folsom, 2 Iowa, 101; West v. Pritchard, 19 Conn., 212; Meyer v. Wheeler, 65 Iowa, 390; Kent v. Ginten, 23 Ind., 1; Randon v. Barton, 4 Tex., 289; Gilman v. Andrews, 66 Iowa, 116; Maher v. Riley, 17 Cal., 415.

[3] Tiede Sales, § 336; Benj. Sales (Ed. 1888), p. 829, *et seq.*, Am. n. p. 859, *et seq.*; Royalton v. Royalton, etc., Co., 14 Vt., 311; Masterton v. Mayor of Brooklyn, 7 Hill, 62; Cook v. Com'rs of Hamilton Co., 6 McLean, 612; Burrell v. N. Y. etc., Co., 14 Mich., 34; Hubbard v. Rowell, 51 Conn., 423; United States v. Behan, 110 U. S., 338; Nat.

3. *Specific performance.*—Cases of non-delivery sometimes occur in which an action at law will not afford the buyer an adequate remedy; and in such cases the court of equity grants relief by compelling specific performance of the contract by a delivery of the goods in accordance with its terms. For the rules governing an action for specific performance, the student and practitioner will consult works on equity jurisprudence.[1]

4. *Remedies for breach of warranty.*—Receipt of the goods by the vendee under an executory contract of sale, does not bar his remedies for a breach of warranty. There may be a breach of the warranty of title; of the quality of the goods; in not delivering goods of the same kind or quality as those bought; in delivering goods that do not correspond with the sample, where the sale is by sample. In these cases the buyer has the choice of three remedies: First, he may, except in the case of a specific chattel in which the property has passed to him, refuse to accept the goods, and return them, or give notice to the vendor that he rejects them, and that they remain at the seller's risk; second, he may accept the goods and have his action for a breach of the warranty; or, third, if he has not paid the price, and is sued therefor by the

Filtering Oil Co. v. Citizens Ins Co., 106 N. Y., 535; Morrison v. Lovejoy, 6 Minn , 224; Passenger v. Thorburn, 34 N. Y., 634; White v. Miller, 7 Hun, 427; s. c. 71 N. Y., 118; s. c , 78 N. Y., 393; Flick v. Weatherbee, 20 Wis., 392; Bell v. Reynolds, 78 Ala., 511; Shepard v. Milwaukee Gas Light Co., 15 Wis., 318; Bartlett v. Blanchard, 13 Gray, 429; Adams Exp. Co. v. Egbert, 36 Pa. St., 360; Fessler v. Love, 48 Pa. St., 407; Richmond v. Dubuque, etc. R. R. Co., 40 Iowa, 264; s. c. 43 Iowa, 422.

[1] Tiede. Sales, § 337; Benj. Sales (Ed. 1888), p. 848, Am. n. p. 862.

vendor, he may set up the breach of warranty as a defense in recoupment, or as a counterclaim.[1]

In some of the States the courts hold, that in the absence of fraud, of knowledge of the defect by the vendor, or of an agreement to return, the mere breach of warranty does not confer that right.[2] There is a lack of unanimity in the authorities on this point.

5. *Mistake and failure of consideration.*—If, by reason of a mistake in regard to a material fact, the minds of the parties fail to meet upon the subject matter, or terms in an executory contract of sale, the vendee is excused from its performance. If the mistake be not discovered until after the execution of the contract, the vendee may then rescind by placing the other party in *statu quo*, and recover back what he has paid. And the same rule, substantially, applies in case of a failure of consideration.[3]

6. *Illegal contracts of sale.*—Before passing from the subject of remedies, it should be stated that, according to

[1] Benj Sales, (Ed. 1888), p. 851, *et seq.*, Am. n p 863, *et seq.*; Tiede. Sales, § 197; Hoadley v. House, 32 Vt., 179; Butler v. Northumberland, 50 N. H., 33; Magee v. Billingsley, 3 Ala., 679; Voorhes v. Earl, 2 Hill, 288; Gates v. Bliss, 43 Vt., 299; Freyman v. Knecht, 78 Pa. St., 141; Douglass Axe Co. v. Gardner, 10 Cush., 88; Perrin v. Terrell, 30 N. J. L. 454; Mandell v. Buttles, 21 Minn., 391; Northwood v. Rennic, 3 Ont. Ap., 37 (1878); Kimball v. Vorman, 35 Mich., 310; Muller v. Eno, 14 N. Y. 597; Day v. Pool, 52 N. Y., 416; Vincent v. Leland, 100 Mass., 432.

[2] Lightburn v. Cooper, 1 Dana, 273; Voorhes v. Earl, 2 Hill, 288; Muller v. Eno, 14 N, Y , 597; Kase v. John, 10 Watts, 107; Walls v. Gates, 6 Mo. Ap., 242. See *supra*, §§ 105, 107, 108, in regard to fraud, conditions and warranty

[3] Benj. Sales (Ed. 1888), p 346, *et seq.*, Am. n. p. 356; Tiede. Sales, § 35; Bish. Cont. (Enl. Ed.), §§ 693-714, 632; 2 Kent Com. p. 491. See *supra*, § 104.

the weight of American authority, the courts will not grant relief to either party to an illegal contract of sale, whether executory or executed; and this upon the ground of public policy. The vendor can retain the price if paid, but if unpaid he cannot maintain an action for the value of the goods. This just and wholesome rule is in accordance with the common law maxim: *Ex turpi causa non oritur actio*, which applies as well to a statement of defense as to a statement of claim. Says Lord Mansfield, in *Montefiori v. Montefiori*,[1] "no man shall set up his own iniquity as a defense any more than as a cause of action."[2] But English cases hold, that under an unlawful agreement remaining executory, the party paying the price or delivering the goods, may repudiate the transaction, and recover back his money or goods. The action, it is said, "is there founded, not upon the unlawful agreement, but upon its disaffirmance."[3] To the same effect is a recent decision of the Supreme Court of the United States.[4]

V. *Indorsement.*

§ **115.** There are several kinds of instruments, *choses in action*, which, contrary to our inherited common law, are now held in this country to be negotiable; the title to, and property in which will pass from vendor to vendee by indorsement and delivery, or delivery alone, according to the tenor of the instrument. The principal

[1] Wm. Bl. 363.

[2] Tiede. Sales, § 293; Benj. Sales (Ed. 1888), p. 462, *et seq.*, Am. n. p. 497, *et seq.* And see *supra*, § 106.

[3] Taylor v. Bowers, 1 Q. B. D., 291, C. A.; Symons v. Hughes, 2 Eq., 475, 479.

[4] Spring Co. v. Knowlton, 13 Otto, 49.

instruments of this class are Bills of Exchange, Promissory Notes, Coupon Bonds, Checks, Certificates of Deposit, Bank Notes, Certificates of Stock, Drafts, Bills of Credit, Circular Notes, Bills of Lading, Guarantees, and Letters of Credit.[1]

Bills of lading and certificates of stock, however, are only *quasi* negotiable, but are generally classed with negotiable instruments.

Mr. Daniel, in his excellent treatise on Negotiable Instruments, gives this definition of such an instrument: "An instrument is called negotiable when the legal title to the instrument itself, and to the whole amount of money expressed upon its face, may be transferred from one to another by indorsement and delivery by the holder, or by delivery only."[2] When made payable to order, title passes by indorsement and delivery; and by delivery without indorsement when payable to bearer in terms, or legal effect.[3]

In order to constitute a sale and transfer of a negotiable instrument, it must have a pre-existing vitality; otherwise there is nothing to sell or transfer.[4]

Negotiable instruments are referred to in this connection merely as examples of the acquisition of personal property by indorsement. It is not within the scope of

[1] 1 Dan. Neg. Ints., pp. 1-3, 5-7, 28-31, 351, *et seq.*, 660, *et seq.*; 2 Dan. Neg. Ints., pp. 442, *et seq.*, 456, 458, 529, 532, 638, 641, 646, 647, 650, 651, 612, *et seq.*

[2] 1 Dan. Neg. Ints., p. 1.

[3] Edw. Bills, p. 263; 1 Dan. Neg. Inst., p. 92.

[4] Edw. Bills, p. 352; 1 Dan. Neg. Inst., pp. 603, 604; Powell v. Waters, 8 Cow., 669; Williams v. Storm, 2 Duer, 52; Eastman v. Shaw, 65 N. Y., 522.

this work to treat of such instruments, or the contract and effect of indorsement, in other relations and branches of the law.

VI. *Assignment.*

§ **116.** Transfer by assignment is generally treated in the books as a distinct method of acquiring title to personal property; but in fact the term "assignment" is very comprehensive, including every kind of transfer. By use the term is appropriated to special transfers, such as an assignment for the benefit of creditors; transfer of commercial paper not negotiable, and of such as is negotiable without indorsement; transfer of bonds; and transfers by a written instrument. But the term is not confined to written transfers.[1]

VII. *Bailment.*

§ **117.** Bailment,—from the French word *bailler* signifying to deliver,—is sometimes classed as a mode of acquiring title to personal property, in the third division now under treatment. Between this and the other modes of acquiring title already considered, there is the important distinction that in a bailment the special property only, at the most, passes to the bailee, the general or absolute property remaining in the bailor, while in the other modes of transfer the full title and absolute prop-

[1] Tiede Sales, § 13; 1 Dan. Neg. Inst., p. 585; 1 Bouv. L. Dict. "Assignment;" Edw. Bills, p. 245; 2 Sch. Pers. Prop., p. 678, *et seq.*; Williams Pers. Prop., pp. 34-36, 117, 118; Bish. Cont. (Enl. Ed.), §§ 1177-1189; Ball v. Chadwick, 46 Ill., 31; Cowles v. Ricketts, 1 Iowa, 582; Chase v. Walters, 28 Iowa, 460; Hight v. Sackett, 34 N. Y., 447, 451; Perrins v. Little, 1 Green, 248; Potter v. Holland, 4 Blatchf., 210.

erty, as a rule, pass to the transferee.[1] Generally, however, the bailee has a right to the possession for the purposes of the bailment, and may protect it, and the thing bailed, against everybody except the true owner.[2] And in some cases the bailee may have an action against the true owner for a violation of the contract, or an infringement of the right of the former based upon his special property in the thing bailed.[3]

The subject of bailments covers an important and separate branch of the law, and its discussion is not in place here, except in so far as it constitutes a mode of acquiring a special property or possessory interest in personal property.

[1] Tiede. Sales, § 3; Story Bailm., §§ 93–96; Benj. Sales (Ed. 1888), Am. n. p. 4; 2 Sch. Pers. Prop., p. 695. *et seq.*

[2] 2 Black. Com., p. 452; Story Bailm , § 93; Bouv. L. Dict., "Bailment," sub. 5; Hurd v. West, 7 Cow., 752; White v. Bascom, 28 Vt., 268; Chesley v. St. Clair, 1 N. H., 189; Bliss v. Schaub, 48 Barb., 339.

[3] 2 Pars. Cont., pp. 126, 127; Hickok v. Buck, 22 Vt., 149; Benjamin v. Stremple, 13 Ill., 466.

CHAPTER X.

LIMITATIONS.

SECTION 118. History and purpose.
119. When the period of limitation begins to run.
120. New promise.

§ 118. History and purpose.—At common law, the period of limitation for the commencement of actions upon personal claims was twenty years; and this is still the law where the time has not been changed by statute.[1] This limitation, it is thought, was based upon the presumption of payment after the lapse of so many years, a presumption favored by the natural desire of honest debtors to pay, and the general inclination of creditors to enforce payment within a reasonable time.[2] The common law limitation was changed by act of Parliament, 21 James I, c. 16, which prescribed the period of six years for the commencement of certain actions therein named. The provisions of this statute, and of the act of 9 George IV, c. 14, subsequently passed, have been quite generally adopted in this country, and now prevail in substance in most of our States; there being, however, other statutory provisions for special demands or debts.

The history of adjudications under these statutes in England developes much apparent conflict of opinion; but this contrariety is largely due, it is believed, to different views in regard to the true theory or ground of

[1] 3 Pars. Cont. (7 Ed.), p. 61, *et seq.*; Bish. Cont. (Enl. Ed.), § 1351.
[2] See 3 Pars. Cont. (7 Ed.), at p. 61.

limitation. One line of decisions is based upon the theory of presumption of payment, as was the common law limitation; the other upon the ground of impolicy in suffering claims to lie unsettled for a long period of time, and the danger of injustice in the enforcement of stale demands. The question of difference was, and is, in brief, whether statutes of limitation are statutes of presumption, or of repose. The two views lead to quite different results, and account for the conflict of authority. If the lapse of time simply raises a presumption of payment, it is neutralized by whatever will rebut the presumption; and anything will have this effect which implies, or amounts to an acknowledgment, that the debt has not been paid or satisfied. As to what acknowledgment, under this theory, is sufficient to take a case out of the Statute of Limitations, *Lord Mansfield*, in *Truman* v. *Fenton*,[1] says: "The slightest acknowledgment has been held sufficient, as saying 'prove your debt, and I will pay you;' 'I am ready to account, but nothing is due you.' And much slighter acknowledgments than these will take a case out of the statute." But if the Statute of Limitations be a statute of repose, it remains a bar to the enforcement of a claim within its provisions, unless the debtor voluntarily renounces its benefit, and makes a new promise to pay the old debt.

The course of adjudications by the English courts under these statutes, is somewhat remarkable. The early decisions adopted the theory of repose, but soon the theory of presumption obtained, and continued through a long line of adjudications. This view, how-

[1] Cowper, 548.

ever, gradually yielded to the first, which is now the prevailing doctrine both in England and the United States.[1]

§ 119. When the period of limitation begins to run. —This may be governed by the wording of the particular statute in question in a given case; but as a general rule the limitation begins to run when the right of action accrues. It is then only that the reason of the limitation applies, whether the theory of presumption, or of repose, be adopted as the basis of the statute.[2]

The period of limitation once begun, continues to run, as a general rule, notwithstanding the subsequent occurrence of some disability which did not exist at the commencement of the action, and which, had it then existed, would have postponed the running of the statute until removal of the disability.[3]

To the general rule governing the time when the statute begins to run, there are certain exceptions. By the statute of James, above referred to, it is provided in substance, that if the plaintiff, at the time the action

[1] 3 Pars. Cont. (7 Ed.), p. 63; Bish. Cont. (Enl. Ed.), § 1351; 2 Sch. Pers. Prop., p. 687. For English statutes on this subject, see Goodeve Mod. L. Pers. Prop., p. 271, *et seq.*

[2] 3 Pars. Cont. (7 Ed.), pp. 90–94; Bish. Cont. (Enl. Ed.), §§ 1354–1355; 2 Sch. Pers. Prop., p. 680; Jones v. Jones, 91 Ind., 378; McMichael v. Carlyle, 53 Wis , 504; Wittersheim v. Lady Carlisle, 1 M. & W., 533; Fryer v. Roe, 12 C. B., 437; 22 Eng. L. & Eq., 440; Bell v. Lamprey, 57 N. H., 168.

[3] 3 Pars. Cont. (7 Ed.), p. 95; Harris v. McGovern, 99 U. S., 161; People v. Gordon, 82 Ill., 435; Hunton v. Nichols, 55 Tex., 217; Kistler v. Hereth, 75 Ind., 177; Howell v. Young, 5 B. & C., 259; Crawford v. Gaulden, 33 Ga., 173; Waters v. Thanet, 2 Q. B., 757; Leonard v. Pitney, 5 Wend., 30.

accrues, be an infant, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, he may bring his action at any time within the prescribed period of limitation after the disability ceases. Substantially like provisions exist in the statutes of the several States of our Union, with some variety of details. And it is held, that if several disabilities co-exist when the right of action accrues, the statute does not begin to run until all are removed. But if only one exists where the cause of action accrues, other disabilities arising afterwards cannot be tacked to the first, so as to extend the time of limitation.[1]

Absence of the defendant from the jurisdiction of the State, will also create a disability, and postpone the running of the statute against the plaintiff until such disability ceases.[2]

The expression in the English statute "beyond the seas," or similar substituted phrases, are used in some of the American statutes, and the courts have not fully agreed in their construction. Some construe such phrases to mean beyond the limits of the United States, while others hold, that beyond the State or jurisdiction where the action is tried, will satisfy the statutes.[3]

§ 120. New promise.—A new promise, either in fact or by operation of law, will take a case out of the statute,

[1] 3 Pars. Cont. (7 Ed.), p. 94, *et seq.*; 2 Sch. Pers. Prop. pp. 689, 690; Demarest v. Wynkoop, 3 Johns. Ch., 129; Jackson v. Johnson, 5 Cow., 74; Butler v. Howe, 13 Me., 397; Jackson v. Wheat, 18 Johns., 40; Eager v. Commonwealth, 4 Mass., 182; Dease v. Jones, 23 Miss., 133; Scott v. Haddock, 11 Ga., 258.

[2] 3 Pars. Cont. (7 Ed.), p. 96, *et seq.*; 2 Sch. Pers. Prop. p. 690.

[3] 3 Pars. Cont. (7 Ed.), p. 99.

revive a claim already barred, and extend the time of limitation when made before its expiration. In either case a new, or extended, limitation begins to run from the making of the new promise, of the same duration as that of the original period. Otherwise stated, the new promise, whether made by the debtor in fact, or for him by operation of law, as by part payment, establishes a new initial point for the period of limitation.[1]

By the English statute, and the statutes in most of our States, a new promise effectual to take a case out of the statute must be in writing.

There is not entire uniformity in the authorities upon the question,—What will constitute a new promise? The contrariety may be due in part to differences in the statutory provisions on the subject. Eliminating from the discussion the conflict, or apparent conflict in adjudications resulting from diversity of statutes, there are certain rules which may be considered as established by the weight of authority.

1. There must be either an express promise, or an acknowledgment of an existing indebtedness so expressed, and under such circumstances as to give it the meaning, and therefore the force and effect of a new promise.[2] The rule laid down by *Story J.* in *Bell v. Morrison*,[3] is, that an acknowledgment sufficient to remove the bar of the statute, must be an unequivocal and positive recog-

[1] Bish. Cont. (Enl. Ed.), §§ 1359-1365; 2 Sch. Pers. Prop. pp. 691-694; 3 Pars. Cont. (7 Ed.), p. 80, *et seq.*

[2] Tanner v. Smart, 6 B. & C., 603; Morrell v. Frith, 3 M. & W., 405; Hart v. Rendergast, 14 M. & W., 746.

[3] 1 Peters, 362.

nition of an existing debt, which the party is liable and willing to pay. And to the same effect are many other American authorities.[1]

2. It is not necessary that the acknowledgment should be of any particular amount. If there be an admission of a legal debt, and of a liability to pay it, evidence is admissible to show the amount.[2]

3. An acknowledgment of a general indebtedness, merely, will not suffice; it must be broad enough to include the specific debt in question, and yet sufficiently precise and definite to indicate unmistakably such debt.[3]

4. We have seen that an acknowledgment, effectual to remove the bar of the statute, must be equivalent to a new promise. It follows that an acknowledgment, although in other respects complete, which is so guarded and qualified by the maker as to negative a promise, or which cannot be fairly construed into a promise, will not suffice.[4]

[1] Purdy v. Austin, 3 Wend., 187; Allen v. Webster, 15 Wend., 284; Stafford v. Bryan, 2 Paige, 45; Loomis v. Decker, 1 Daly, 186; Chambers v. Garland, 3 Green, G. (Ia.), 322; Stockett v. Sasscer, 8 Md., 374; Pritchard v. Howell, 1 Wis., 131; Moore v. Bank of Columbia, 6 Pet., 86; Guier v. Pearce, 2 Browne (Pa.), 35; Young v. Monpoey, 2 Bailey (S. C.), 278.

[2] Dickinson v. Hatfield, 1 Moody & Rob., 141; Hazlebaker v. Reeves, 12 Pa. St., 264; Dinsmore v. Dinsmore, 21 Me., 433; Chelsyn v. Dalby, 4 Young & C., 238; Barnard v. Bartholomew, 22 Pick., 291; Davis v. Steiner, 14 Pa. St., 275; Hale v. Hale, 4 Humph., 183; Thompson v. French, 10 Yerg., 453.

[3] Moore v. Hyman, 13 Ired., 272; Buckingham v. Smith, 23 Conn., 453; Dawson v. King, 20 Md., 442; Stafford v. Bryan, 3 Wend., 532; Clark v. Dutcher, 9 Cow., 674.

[4] Tanner v. Smart, 6 B. & C., 609; Mitchell v. Selman, 5 Md., 376; Danforth v. Culver, 11 Johns., 146; Creuse v. Defiganier, 10 Bosw.,

5. Part payment of a debt will, as a rule, take it out of the statute. The fact of payment is an acknowledgment of an existing indebtedness, and on such acknowledgment the law raises a promise of payment.[1] But it must appear that the payment is made only as a part of a larger debt; for in the absence of conclusive testimony, it will not be deemed an admission of any more indebtedness than the sum paid.[2]

6. The Statute of Limitations affects the remedy only; it does not discharge the debt, but simply bars an action upon it after the lapse of the statutory limitation.[3] Hence it follows logically that, while the remedy by action is gone with the lapse of the limitation, a lien or security for the debt is not lost by the running of the statute; and to such effect is the weight of judicial authority.[4]

122; Lawrence v. Hopkins, 13 Johns., 288; Brown v. State Bank, 10 Ark., 134; Martin v. Broach, 6 Ga. 21; Conway v. Reyburn, 22 Ark., 290; Arey v. Stephenson, 11 Ired. L., 86; Robbins v. Farley, 2 Strobh., 348.

[1] 3 Pars. Cont., p. 80, *et seq.*; 2 Sch. Pers. Prop., pp. 691–694; Bish. Cont. (Enl. Ed.), § 1363; Whipple v. Stevens, 2 Foster, 219; Baxter v. Penniman, 8 Mass., 134; Bodger v. Arch, 28 Eng. L. & Eq., 464; Bank of Utica v. Ballou, 49 N. Y., 155; Walker v. Wait, 50 Vt., 668; Cucully v. Hernandez, 103 U. S., 105; Engman v. Immel, 59 Wis., 249; Glick v. Crist, 37 Ohio St., 388; Buxton v. Edwards, 134 Mass., 567.

[2] Tippets v. Heane, Cromp. M. & R , 252; Linsell v. Bonsor, 2 Bing., N. C., 241; Waugh v. Cope, 6 M. & W., 824; Hodge v. Macauley, 25 Vt., 216; Pickett v. King, 34 Barb., 193; Lock v. Wilson, 9 Heisk., 784, 10 Heisk., 441; Harris v. Howard, 56 Vt., 695.

[3] 3 Pars. Cont., pp. 100, 101; 2 Sch. Pers. Prop., p. 693.

[4] Spears v. Hartley, 3 Esp., 81; Williams v. Jones, 13 East, 439; Higgins v. Scott, 2 B. & Ad., 413; Mayor of N. Y. v. Colgate, 2 Duer., 1; s. c., 12 N. Y., 140; Alexander v. Whipple, 45 N. H., 502; Pratt v. Huggins, 29 Barb., 277.

7. No new consideration is requisite to validate a new promise, whether it be a promise made in fact by the debtor, or one made for him by operation of law. As the debt itself is not paid or discharged by the running of the statute, the original consideration will sustain the new promise.[1] The renewal of a debt barred by the statute, so far as the necessity of a new consideration to sustain a new promise is concerned, must not be confounded with the voluntary release of a debt by the creditor for a sufficient consideration, or under seal without consideration in fact, in which case the debt itself is discharged. A new promise, founded on a new and sufficient consideration, may create a new contract, obliging the debtor to pay the old debt; but this contract will not rest upon the original consideration as in case of limitation, for that consideration died with the original obligation of which it formed the basis.[2]

There are some other incidental rules of minor importance pertaining to this topic, which cannot be noticed under the limitations of this treatise; but the foregoing outline view of the general principles governing the subject, will, it is believed, furnish a sufficient guide to the student and the practitioner.

[1] Bish. Cont. (Enl. Ed.), §§ 1360, 1361.

[2] See Bish. Cont. (Enl. Ed), § 1360, in connection with §§ 95–99; also Hale v. Rice, 124 Mass., 292; Dunham v. Johnson, 135 Mass , 310; Valentine v. Foster, 1 Met., 520; Montgomery v. Lampton, 9 Met., Ky., 519; Warren v. Whitney, 24 Me., 561; Snevily v. Read, 9 Watts, 396.

CHAPTER XI.

INSURANCE.

SECTION 121. Definition and terms employed.
122. Nature, and form, of the contract.
123. Classes of policies.
124. Consummation of the contract.
125. Subject-matter of the contract.
126. Insurable interest.
127. Warranties; representations; statements.
128. Special provisions of the contract.
129. Mutual insurance.

§ 121. Definition, and terms employed.— The risk or policy of insurance, being a species of incorporeal personal property, is entitled to recognition in this treatise; but for a full discussion of the subject in all its details, reference must be had to works specially devoted to insurance law.

Insurance is, in brief, a contract of indemnity against a loss which may arise on the occurrence of some event. It may provide for the payment of a specified sum in case of loss, as in marine and fire insurance contracts; or for the payment of the stipulated value of the articles insured, as provided in what are termed "valued policies" in fire insurance; thus putting the party insured in as good a condition as he would have been had no loss occurred. Or, as in "open" or non-valued fire insurance contracts, the provision for indemnity may be only for the repayment of expenses incurred, and payment for the lost property at its market value at the commencement of the risk. In either case the insurer takes upon

himself certain risks to which the insured would otherwise be exposed; and hence the contract of insurance is like in character and effect to a bond of indemnity, or the guaranty of a debt.[1]

The party undertaking to make the indemnity is called the *insurer* or *assurer;* the party indemnified, the *insured* or *assured*; the consideration of the contract is called the *premium;* the instrument embodying the contract is termed the *policy;* the events and causes of loss insured against are named *risks* or *perils;* and the property or rights of the insured, in respect of which he is liable to loss, constitutes the *subject-matter* of the insurance, or *insurable interest.*[2]

§ 122. Nature, and form, of the contract.—It is a personal contract, and does not run with the subject matter of the insurance, unless by force of special stipulations which are not usual or legitimate elements of the contract itself.[3] Whatever may be the kind or form of insurance, the object and intent of the contract is indemnity, as shown in the last section, *supra.* Whether the contract provides for the payment of a fixed sum on the occurrence of a certain event, as in the case of life and marine insurance, and of valued policies in fire insurance; or simply guarantees indemnity for loss, whatever it may be, within the limitations and conditions of the contract,

[1] Phillips Ins., p. 1; May Ins., §§ 1, 2, 8; Williams Pers. Prop., p. 175; 1 Sch. Pers. Prop., p. 677; Bouv. L. Dict. "Insurance;" Lucena v. Crawford, 2 Bos. & Pul., N. R., 300.

[2] Citations last, *supra.*

[3] May Ins. § 6; Wilson v. Hill, 3 Met. (Mass.), 66; Disbrow v. Jones, Harr. (Mich.), Ch. 48; Carpenter v. Providence, Wash. Ins. Co., 16 Pet., 495; Sadlers' Company v. Babcock, 2 Atk., 554.

as in the case of open or non-valued policies; the principle is the same, the distinction between the different kinds and forms of contract being only in the measure, and mode of determining the amount of indemnity in case of loss.[1] In the further discussion of the subject, therefore, the different kinds of insurance, mutual excepted, will not be treated separately. Mutual insurance has some peculiar features which are pointed out in a subsequent section.[2]

Re-insurance is an indemnity to the insurer against a loss from a risk already assumed by him. The insurer by a contract with another party becomes the insured against loss on a risk for which he is the insurer. The new contracting party undertakes in reference to the first insurer, what the latter has undertaken in reference to the party insured by him, and subject to like rights, duties and obligations.[3]

The original insured remains liable on his contract with the party insured by him; there being no privity of contract between the latter and the re-insurer, he has no claim upon him in case of loss.[4] If a loss occur the reinsured may have an action against the reinsurer, without first paying the loss to the original insured; and to maintain the action he must prove his

[1] May Ins., § 7.

[2] § 129.

[3] May Ins. §§ 9, 11; 1 Sch. Pers. Prop., p. 686; 3 Kent Com., p. 279; 1 Phillips Ins., §§ 78 a, 404.

[4] 1 Sch. Pers. Prop., p. 688; 3 Kent Com., p. 279; Bowery Fire Ins. Co. v. N. Y. Ins. Co., 17 Wend., 359; Philadelphia Ins. Co. v. Washington Ins. Co., 23 Pa. St., 250; Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443.

interest in the subject matter, and the fact and amount of loss, as the original insured must have proved them against him; and he is entitled to the same defenses that are available to the original insurer on the first contract.[1]

Double insurance means two or more insurances on the same risk, and the same interest. But, as the insured is only entitled to indemnity, he can recover no more than enough for that purpose in case of loss. He may, however, recover his whole loss of any one of the insurers; and the one paying the loss will have a claim for contribution against the other insurers for their respective proportions of the amount paid; the several insurers holding substantially the relation to each other of co-sureties, with the like rights, duties, and obligations.[2] The amount of recovery against any one of the co-insurers is now quite generally limited in the contract to such proportion of the loss as the amount insured by him bears to the aggregate amount of insurance.[3]

The form of the contract is not essential. If, as a whole, on a fair and reasonable interpretation, it imports an insurance, it will stand, however informal and inartificial in structure. Written insurance contracts, termed *policies*, are quite generally in use, and are advisable in

[1] May Ins. § 11; 3 Kent Com., p. 279; New York Mar. Ins. Co. v. Prot. Ins. Co, 1 Story (C. C. Rep.), 458; Eagle Ins. Co. v Lafayette Ins. Co., 9 Ind., 443; Hone v. Mut Safety Ins. Co., 1 Sandf., 137.

[2] May Ins., § 13; 1 Sch. Pers. Prop., pp. 688, 689; 3 Kent Com, pp. 281, 282; Lucas v. Jefferson Ins. Co., 6 Cow., 635; Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill., 553; Merrick v. Germania Fire Ins. Co., 54 Pa. St., 277; Baltimore Fire Ins. Co. v. Lovey, 20 Md., 20; Gordon v. London Assurance Co., 1 Burr., 492.

[3] Citations last, *supra*.

all cases; but, on the weight of authority, an oral contract may be valid when not contrary to statute.[1]

§ 123. Classes of policies.—There are three classes of policies; *valued*, and *open; wager* and *interest;* and *time* and *voyage.*

A valued policy is one in which the value of the property insured, and the sum to be paid in case of loss, are fixed by the terms of the contract; and in an action on the policy by the insured, when the loss is total, no proof on these points dehors the written contract is requisite or admissible. And if the insurance be upon several articles of equal value at a stipulated aggregate valuation, the insured will recover for the loss of one the proportion which it bears to the whole.[2]

An open policy is one in which the value, and damages in case of loss, are not fixed by the policy, but left open to be proved, or otherwise determined by the parties, which determination is called adjustment of the loss.[3] The same policy, it should be noticed, may be open as to one or more articles insured, and valued as to others.[4]

[1] May Ins., § 14, *et seq.*; 1 Sch. Pers. Prop., p. 680; Flaud. Fire Ins., 62, 63; Commercial, etc., Ins. Co. v. Union Mut. Ins. Co., 19 How., 318; Davenport v. Peoria, etc., Ins. Co., 17 Iowa, 276; Baptist Church v. Brooklyn Ins. Co., 19 N. Y., 305.

[2] May Ins., §§ 30, 31; 1 Sch. Pers. Prop., pp. 680, 681.

[3] Citations last, *supra.* And see Alsop v. Com. Ins. Co., 1 Sumner, 451; Carson v. Marine Ins. Co., 2 Wash. C. C., 468; Haight v. De la Cour, 3 Camp., 319; Feise v. Aquilar, 3 Taunt., 506; Holmes v. Charlestown Mut. Fire Ins. Co., 10 Met. (Mass.), 211; Cushman v. North Western Ins. Co., 34 Me., 487; Harris v. Eagle Ins. Co., 5 Johns., 368.

[4] May Ins., § 32; Post v. Hampshire Mut. Ins. Co., 12 Mass., 555; Cushman v. North Western Ins. Co., 34 Me., 487.

A wager policy is one in which the insured has no interest, nothing insurable, and hence runs no risk; it is, in other words, a gambling contract. The want of interest appears by the terms of the policy, indicated by such expressions as, "*without further proof of interest than the policy*," "*interest or no interest*," and the like.

Wager policies are prohibited in England, and such clauses as those just quoted are held as conclusive proof that the contract is a wager. But in this country it has been held that these clauses are only *prima facie* evidence, and are open to explanation. As to whether wager contracts are enforceable the authorities in this country are not in full agreement.[1] But the better opinion, in accordance with sound morality and the demands of public policy, is against the enforcement of such contracts, however christened, or in whatever guise they may appear.

Mr. Bishop in his late work on Contracts, uses this language: "And on a just view of things, a judge would better serve the state, and more adorn his office, to go round with blacking and brush shining the boots of the officers of his court, than to sit on the bench enforcing a wager." [2]

An *interest* policy is one in which, by its terms, the insured has an interest in the subject matter of the insur-

[1] Winchester v. Nutter, 52 N. H., 507; Ball v. Gilbert, 12 Met., 395, 399; Wilkinson v. Tousley, 16 Minn., 299; Hill v. Kidd, 43 Cal., 615; Merchants' Savings, etc., Co. v. Goodrich, 75 Ill., 554; Boughner v. Meyer, 5 Colo., 71; Gridley v. Dorn, 57 Cal., 78.

[2] Bish Cont. (Enl. Ed.), § 531.

ance, and hence a risk constituting the basis for indemnity in case of loss.[1]

A *time* policy, as its name indicates, is one in which the duration of the risk is fixed by definite periods of time.

A *voyage* policy is one in which the duration of the risk is determined by geographical limits, as from New York to Glasgow, and is applicable, also, to transportation by land as well as by water.[2]

§ **124. Consummation of the contract.**—As a general rule, delivery of a written contract, whether a specialty or a simple contract, is essential to its completion and validity. Otherwise stated, if the parties intend to reduce the agreement to writing, it will not take effect until delivery of the intended written instrument.[3] There is, however, authority for saying that there are exceptions to the general rule; that parties may be bound by an agreement, if perfect in all other respects, even where it is thereafter to be reduced to writing, in the absence of a stipulation to the contrary. But the fact that the parties do intend a reduction of their agreement to writing, will be regarded as strong evidence that they did not consider the unwritten negotiations as constituting a complete and binding contract.[4]

Insurance contracts, more frequently than most others,

[1] May Ins., § 33; 3 Kent Com., pp. 371, 277, 278.

[2] May Ins. § 34; Boehem v Combe, 2 M. & S., 172.

[3] Bish. Cont. (Enl. Ed.), § 349, and cases cited.

[4] Waldo's Pollock Cont., pp. 41, 42; Pratt v. Railroad Co., 21 N. Y., 305: Blaney v. Hoke, 14 Ohio St., 292; Bell v. Offutt, 10 Bush, 632; Blight v. Ashley, 1 Pet. C. C., 15; Wharton v. Stoughtenburgh, 35 N. J Eq., 266; Paige v. Fullerton Woolen Co., 27 Vt., 485; Ridgway v. Wharton, 6 H. L. C., 238, 264, 268; Lyman v. Robinson, 14 Allen,

fall within the exception to the general rule; and this may be due to the character of these contracts, and the machinery of insurance companies and their agencies. Where negotiations for insurance have been had, the question sometimes arises whether such negotiations have resulted in an agreement binding upon the parties; and in some cases this question is not readily solved. The test applied by the courts is: Have the parties come to a definite agreement upon all the elements and terms of the contract, so that nothing remains to be done, but to fill up and deliver the policy by the insurers, and to pay the premium by the insured? If yea, the contract is consummated, in the absence of a stipulation by the parties, and of a law, making delivery of the policy essential to the validity of the agreement; if nay, the contract is not completed.[1] Where the terms are all agreed upon by the parties, the liability of the insurers may become fixed before the issuance of the policy, so that the insured will be entitled ro recover for a loss happening in the interim; and if the insurers refuse to issue a policy in pursuance of the agreement, when the rights and interests of the insured require it, a court of equity will compel its issuance.[2]

242, 254; Brown v. Railroad Co., 44 N. Y., 79, 86; Methudy v. Ross, 10 Mo. App., 101, 106.

[1] May Ins. § 44; Hallock v. Commercial Ins. Co., 2 Dutch. (N. J.), 268; s. c., 3 Dutch. (N. J), 645; Flint v. Ohio Ins. Co., 8 Ohio, 501; Am. Home Ins. Co. v. Patterson, 28 Ind., 17; Xenos v. Markham, 2 Law Repts. (H. L.), 296; Kelly v. Commonwealth Ins. Co., 10 Bosw., 82; Com Mut. Marine Ins. Co. v. Union Mut. Ins. Co., 19 How., 318; New England, etc , Ins. Co. v. Robinson, 25 Ind., 536; Davenport v. Peoria, etc., Ins. Co., 17 Iowa, 276.

[2] May Ins., § 45; Kohne v. Ins. Co. of North America, 1 Wash. (U.

When the negotiations are conducted by written correspondence through the mail, the time when the contract is consummated so as to bind both parties has been much discussed, and developed some contrariety of judicial opinion. The same rule that governs other contracts thus negotiated, and which is fully treated in works specially devoted to the subject of contracts, applies to insurance negotiations and contracts as well; and there is, therefore, no call for considering the question in this connection.

Where delivery of the policy is essential to the consummation of a contract, the question occurs: What constitutes delivery? Obviously, an actual manual transfer from one party to the other will constitute a delivery; but this is not a necessary formality. It has been well said that the "delivery may be by any act intended to signify that the instrument shall have present validity."[1] The question of delivery is often one of intention.[2]

Mr. Justice Dodderidge, in his Sheppard's Touchstone, quaintly defines delivery thus: "Delivery is either actual, i. e., by doing something and saying nothing; or else verbal, i. e., by saying something and doing nothing; or it may be by both; and either of these may make a good delivery and a perfect deed."[3]

§ 125. Subject-matter of the contract.—The field of

S. C. C.), 93; Goodall v. N. E. Mut. Fire Ins. Co., 5 Fost. (N. H.), 169; and see, also, citations last *supra*.

[1] Hallock v. Com. Ins. Co., 2 Dutch. (N. J.), 268; s. c., 3 Dutch. (N. J.), 645.

[2] May Ins., § 60; Whittaker v. Farmers' Union Ins. Co., 29 Barb., 312; Kentucky Mut. Co. v. Jenks, 5 Ind., 96.

[3] 1 Shep. Touch., 57.

insurable property is very broad. Any property which is the subject of lawful ownership or use, and which is lawfully employed, may be insured. The doctrine is well stated by May as follows: "Whatever has an appreciable pecuniary value, and is subject to loss or deterioration, or of which one may be deprived, or which he may fail to realize, whereby his pecuniary interest is or may be prejudiced, may properly constitute the subject matter of insurance."[1] This statement, it will be seen, embraces every species of property, real, personal, and mixed; corporeal and incorporeal; *in esse* or *in posse;* and in possession or expectancy. The doctrine thus broadly and comprehensively stated is fully sustained by the authorities.[2]

§ **126. Insurable interest.**—That the insured must have some insurable interest in the subject matter of the insurance is a cardinal and well established principle. Without such interest the contract would be essentially a gambling contract, and hence invalid.[3] This rule, it should be understood, applies only to an insurance for the benefit of a party to the contract; a person having no insurable interest in the subject-matter may insure in his own name for the benefit of the true owner of the property.[4] It is not easy to define with accuracy what con-

[1] May Ins., § 72.

[2] May Ins., §§ 71-73; Wilson v. Hill, 3 Met., 66; Carpenter v. Prov. Wash. Ins. Co., 16 Pet., 495; Ellicott v. United States Ins. Co., 8 Gill & Johns. (Md.), 166; Carter v. Boehm, 3 Burr., 1095; Lucena v. Crawford, 2 New Rep., 301.

[3] *Supra*, § 123; May Ins., §§ 33, 74; 1 Sch. Pers. Prop., p. 682; 1 Bouv. L. Dict. "Insurable Interest;" 3 Kent Com., p 262.

[4] 1 Sch. Pers. Prop, p. 684; Flaud. Fire Ins., 378; Turner v. Bur-

stitutes an insurable interest, so as to relieve the question from doubt in all cases that may arise; but it may suffice for practical purposes in general to say, that the insured must have such an interest in the subject-matter as, in case of its destruction, or injury, he would suffer pecuniary damage. Within this rule the property, title, or interest, of the insured in or to the subject-matter of the insurance may be absolute or qualified, general or special, legal or equitable, existent or potential, present or prospective. Numerous examples are furnished in the books.[1] From a legitimate practical application of this doctrine, it logically follows that there may be separate insurable interests in the same property, as the legal, and equitable, title or interests; and in other cases embraced in the principle stated.[2]

To entitle the insured to recover on his contract, he must have had an interest in the subject-matter at the time when it was consummated, and also when the loss occurred.[3] It follows that alienation of the insured prop-

rows, 8 Wend., 144; Work v. Merchants', etc., Fire Ins. Co., 11 Cush , 271.

[1] May Ins., § 76, *et seq.*; 3 Kent Com., p. 262, *et seq.*; 1 Sch. Pers. Prop., p. 682, *et seq.*; Bouv. L. Dict. "Insurable Interest."

[2] May Ins., § 81 *et seq.*; 1 Sch. Pers. Prop., pp. 682-684; Strong v. Manuf. Ins. Co., 10 Pick., 40; Columbian Ins. Co. v. Lawrence, 2 Pet., 725; Allen v. Franklin Ins. Co., 9 How. Pr. Rep., 501; Franklin Ins. Co. v. Findlay, 6 Whart. (Pa.), 483; Niblo v. North Am. Ins. Co., 1 Sandf., 551; Fletcher v. Commonwealth Ins. Co., 18 Pick., 419; Tongue v. Nutwell, 31 Md., 302; Franklin Ins. Co. v. Drake, 2 B. Mon. (Ky.), 47; Abbott v. Hampden Mut. Fire Ins. Co., 30 Me , 414; Harris v. York Mut. Ins. Co., 50 Pa. St., 341; and many other cases, illustrating the application of the doctrine, too numerous for citation.

[3] May Ins., § 100; 1 Sch. Pers. Prop., p. 685; Howard v. Albany Ins. Co., 3 Denio, 301; Fowler v. Indemnity Ins. Co., 26 N. Y., 422;

erty after insurance, continued until occurrence of the loss, will bar a recovery by the party insured; and it has been held that alienation of title will have this effect, even although the insured should regain title and hold it at the time of the loss.[1] But the soundness of this holding may well be doubted, as it has been on high authority.[2]

Modern policies quite generally, if not in all cases, contain stipulations in regard to the assignment of the policy, and the alienation of the subject-matter of insurance; and these stipulations, as construed by the courts, determine the rights of the respective parties.

§ 127. Warranties, and representations. — Statements, provisos, conditions, by-laws, and stipulations of various kinds, when found in the policy and expressly made part of it, become *warranties*, and are so held and treated by the courts. A warranty, it is held, is an agreement in the nature of a condition precedent, and must be strictly complied with.[3] The existence or non-existence of a warranty will not depend in any case upon a particular form of words; but any statement or stipulation, upon the literal truth or fulfillment of which it is apparent that the parties intended to rest the validity of the

Lynch v. Dalzell, 3 Bro. P. C., 492; Sadler's Co. v. Babcock, 2 Atk., 534.

[1] Cockerell v. Cincinnati Ins. Co., 16 Ohio, 148.

[2] May Ins., §§ 101, 265, and cases there cited; Worthington v. Bearse, 12 Allen, 382; Hooper v. Hudson River Ins. Co., 17 N. Y., 424, 426; West Branch Ins Co. v. Helfenstein, 40 Pa. St., 289.

[3] Daniels v. Hudson River Fire Ins. Co., 12 Cush., 416; Ripley v. Ætna Fire Ins. Co., 30 N. Y., 136; Campbell v. N. E Mut. Life Ins. Co., 98 Mass., 381; May Ins., § 156, *et seq.*; 3 Kent Com., p. 289; 1 Sch. Pers. Prop., pp. 686-688.

contract, will constitute a warranty.[1] And whether the fact stated or stipulation made be material to the risk, or otherwise, will not affect the question of warranty.[2]

Of warranties there are two classes, *affirmative*, and *promissory*. The former concern the present, being such as affirm the existence or non-existence of some fact at the time of insurance; while the latter look to the future, requiring something to be done or omitted by the insured during the continuance of the risk. A breach of either will avoid the contract.[3]

A representation is defined as "a statement incidental to the contract, relative to some fact having reference thereto, and upon the faith of which the contract is entered into."[4] The difference between a warranty and a representation is, in brief, this: the former enters into and becomes an essential part of the contract, while the latter is a statement incidental or collateral to the contract. If an affirmative representation be material to the risk, and substantially false, the contract cannot be enforced; and the breach of a material promissory representation will have the same effect. But, as already stated, under warranties the question of materiality does not arise; they must be strictly and literally complied

[1] Citations last *supra*; and Westfall v. Hudson River Fire Ins. Co., 2 Duer, 490, 494; Kingsley v. N. E. Mut. Fire Ins. Co., 8 Cush., 393.

[2] Sayles v. North Western Ins. Co., 2 Curtis (U. S. C. C.), 612; New Castle Fire Ins. Co. v. McMorran, 3 Dow. P. C., 255; Witherell v. Marine Ins. Co., 49 Me., 200; Pawson v. Watson, Cowp., 785; Anderson v. Fitzgerald, 24 Eng. L. & Eq., 1; 4 H. of L. Cas., 484.

[3] Citations *supra*; and Borradaile v. Hunter, 5 M. & G., 639; Jennings v. Chenango Co. Mut. Ins. Co., 2 Denio, 75; Stout v. City Fire Ins. Co., 12 Iowa, 371.

[4] May Ins., § 181.

with, whether material or immaterial to the risk; while a substantial compliance with a representation in such particulars as may reasonably be supposed to have influenced the insurers in consummating the contract, will suffice.[1]

Representations, like warranties, are of two kinds, *affirmative* and *promissory*. The former are allegations of facts existing at the time the contract is made; the latter are statements or promises in regard to matters in the future during the term of insurance, which may affect the risk.[2] The representations of the insured should be full, as well as true. That is, every fact material to the risk which is known to the insured, and which he believes, or has reason to believe, is material must be disclosed. A failure in this respect, termed in the law of insurance *concealment*, will be treated as a fraudulent suppression of the truth, and invalidate the contract. And facts material to the risk, if called for by the insurer, must be disclosed by the insured in his application, even though he do not think them material; and when expressly made part of the contract, the representations, whether voluntary or in response to questions, become warranties.[3]

[1] May Ins., §§ 181-184; 1 Sch. Pers. Prop., pp. 686-688; 3 Kent Com., p 282, *et seq.*; Daniels v. Hudson River Fire Ins. Co., 12 Cush., 416; Campbell v. N. E. Mut. Life Ins. Co., 98 Mass., 381; Nicol v. Am. Ins. Co., 3 Wood & M. (U. S. C.), 529; Wainwright v. Bland, 2 Mad. & Rob., 481; s. c. 1 Mees. & W., 32; Abbott v. Howard, Hayes (Irish), 381; Kimball v. Ætna Ins. Co., 9 Allen, 540; Tyler v. Ætna Ins. Co., 12 Wend., 507; Protection Ins. Co. v. Harmer, 2 Ohio St., 452; Insurance Co. v. Chase, 5 Wall., 509; Tesson v. Atlantic Mut. Ins. Co., 40 Mo., 33; Mut. Ins. Co. v. Dale, 18 Md., 26; Gates v. Madison Co. Mut. Ins. Co., 5 N. Y., 469.

[2] May Ins., § 182.

[3] May Ins., § 200 *et seq.*; Lindeneau v. Desborough, 3 Man. & Ry.,

§ 128. Special provisions of the contract.—Modern insurance policies contain numerous provisions, and have become so complicated in their structure that a full understanding and proper construction of them often requires considerable legal acumen, and careful study. The practice of accepting them without intelligent examination, or competent legal advice, has been the subject of judicial animadversion. In *Woodbury Savings Bank v. Charter Oak Ins. Co.*,[1] it was said in substance by the court, that before executing almost any other instrument of equal perplexity, the parties would deem it necessary to take the advice of counsel; that questions frequently arise as to the proper construction of the terms used, which divide the opinion of the most learned jurists.

For a discussion of the special provisions of insurance policies separately, and in detail, reference must be had to works specially devoted to the law of insurance; only the classes, and the general rules governing each class, can be noticed in this connection.

There are generally two classes of provisions or stipulations in the modern policy; one of which embraces matters *before*, and the other, things done or omitted *after*, the loss. The purpose of the former is to define and determine the risk, including title, alienation, location, occupation, use, character, habits, mode of life, or whatever may affect the risk; the office of the latter is to prescribe the rights and duties of the respective parties after a loss, and the mode of enforcing the

45; Vose v. Life and Health Ins. Co., 6 Cush., 42; Miles v. Conn. Mut. Life Ins. Co., 3 Gray, 580; Gladstone v. King, 1 Maule & S., 35.

[1] 31 Conn., 517.

contract. The first class, it will be seen, affect the substance of the contract, determining its validity, the liability of the insurers, and the security of the insured; while the second class apply only when the rights and liabilities of the respective parties have become fixed by the terms of the contract, and relate to the formalities prescribed for observance by the insured in enforcing his claim for indemnity. By reason of their superior importance, the rule has become established that the first class of stipulations will be more strictly construed than those of the second class. The latter, however, must be substantially complied with.[1]

There are two provisions which it may be well to notice specially in passing; the one concerning limitation of an action on the policy, and the other in reference to arbitration. It is quite common for the parties to a contract of insurance to create for themselves and the contract a limitation unknown to the statute, by inserting a provision in the policy that no action upon it on a claim for indemnity shall be maintained, unless it be commenced within a specified time after the loss, or after notice of the loss. Such a provision is held to be valid, binding the insured.[2] Coupled with this provision is the

[1] May Ins., § 216, *et seq.*; Northwestern Ins. Co. v. Atkins, 3 Bush, (Ky.), 328; Walsh v. Washington, etc , Ins. Co., 32 N. Y., 427; Sexton v. Montgomery Ins. Co., 9 Barb., 191; Lycoming, etc., Ins. Co. v. Updegraff, 40 Pa. St., 311.

[2] May Ins., § 478; Amesbury v. Bowditch Mut. Fire Ins. Co., 6 Gray, 596; Brown v. Roger Williams Ins. Co., 7 R. I., 301; s. c. 5 R. I., 304; Peoria Ins. Co. v. Whitehill, 25 Ill., 466; North Western Ins. Co. v. Phœnix Oil and Candle Co., 1 Pa. St., 449; Wilson v. Ætna Ins. Co , 27 Vt., 99; Bruce, *et ux.* v. Savannah Mut. Ins. Co., 24 Ga , 97; Portage County Mut. Ins Co. v. West, 6 Ohio, 599; Carter v.

further one, that the lapse of the prescribed period of limitation without commencing an action, shall be conclusive evidence against the plaintiff's claim in an action for its enforcement subsequently commenced. These stipulations, combined, not only create for the parties and contract a special limitation, but also establish for the parties and the court, a new and special rule of evidence for an action on the policy. Both of these provisions are held to be valid.[1] The other provision to which attention is directed is, that in case of loss, and of disagreement upon the terms of adjustment, all matters in dispute shall be submitted to arbitration. But it is generally held by the courts that this provision has no binding force. The parties may voluntarily arbitrate their differences, and this course will be approved by the courts; but they cannot, by an agreement between themselves in advance, deprive the courts of their jurisdiction conferred by law. The parties are not above the law, or in all respects a law unto themselves. Moreover, as the courts have power to compel specific performance of contracts, if the provision in question were held valid, they might be called upon to enforce it, thus obtaining judicial cognizance of a matter as to which the stipulation of parties had denied them jurisdiction. This result, it is said in *Hill v. Hollister*,[2] would place the parties in "the

Humbolt Fire Ins. Co., 12 Iowa, 287; Riddlesbarger v. Hartford Ins. Co., 7 Wall., 386.

[1] Citations last *supra*, and Cray v. Hartford Ins. Co., 1 Blatchf., 280; Riddlesberger v. Hartford Ins. Co , 6 Wall., 386; Fullam v. New York, etc., Ins. Co., 7 Gray, 61; Schroeder v. Insurance Co., 2 Phil. Pa., 286.

[2] 1 Wilson, 129. And see May Ins., § 492; Scott v. Avery, 2 Eng. L. & Eq., 327; s. c. 5 H. L. C., 311; Scott v. The Phoenix Ass. Co., 1

ludicrous attitude of coming into court for the purpose of compelling each other to keep out."

But, while the courts cannot, by a stipulation in the policy, be deprived of jurisdiction, or the insured of an action at law to determine his right of recovery, a provision in the contract for the adjustment of damages, or other subordinate particulars, not affecting the merits of the claim for indemnification, will bind the parties, and be enforced by the courts.[1]

§ 129. Mutual insurance. — It has been already stated [2] that mutual insurance differs in some respects from other kinds of insurance. The leading peculiarity of mutual insurance is, that each person insured becomes a member of the company insuring, participates in the management, shares in the profits and losses of the business, is clothed with the rights, and subject to the liabilities, of a stockholder. "He is at once insurer and insured." The acceptance of a policy by a party makes him a member of the company; and he thereby becomes bound by its rules which he is presumed to know.[3] But neither a by-law, nor any other act of the company,

Stuart (Lower Canada), 152; Robinson v. Georges Ins. Co., 17 Me. 131; Commercial Union Ins. Co. v. Hocking, 115 Pa. St., 407; Crossley v. Conn. Fire Ins. Co., 27 Fed. Rep., 30.

[1] May Ins., § 493; Braunstein v. Accidental Death Ass. Co., 1 Best & Smith, 7 2; Tredwen v. Holman, 1 Hurl. & C., 72; Lowndes v. Stamford, 18 Q. B., 425; Trott v. City Ins. Co., 1 Cliff. (U. S. C. Ct.); 438; Soars v. Home Ins. Co., 140 Mass., 343.

[2] § 122 *Supra.*

[3] May Ins., §§ 548, 552; 1 Sch. Pers. Prop., pp. 678, 679; Bouv. L. Dict. "Insurance Company;" Mygatt v. N. Y. Prot. Ins. Co., 21 N. Y., 52; Ohio Mut. Ins. Co. v. Marietta Woolen Factory, 3 Ohio St., N. S., 348; Union Ins. Co. v. Hoge, How. (U. S.), 35; White v. Havens,

affecting his contract or relation to the company, passed or done without his consent, will bind him.[1]

There are noticeable differences between a joint stock, and a mutual, insurance company in respect to capital. In the former, the capital is limited in the act of incorporation; while in the latter, it is ordinarily unlimited, depending upon the amount earned by the company and invested for the purposes of its business. The former, like other joint stock companies with a cash capital, issues transferable shares representing the capital; while in the latter, the capital is made up by what are termed "deposit notes," by premiums paid on insurance, and by the business earnings of the company.[2] In addition to the deposit notes given to make up the capital stock of the company, and assessable to pay losses, notes are sometimes given to the company in advance for premiums, usually called "stock notes," made payable in terms by insurance from time to time, as the makers may require. The former class are subscription notes to the capital stock of the company, are held for the security of

2 How. Pr. Rep., 177; Mitchell v. Lycoming Ins. Co., 51 Pa. St., 402; Coles v. Iowa State Mut. Ins Co., 18 Iowa, 426; Diehl v. Adams Co. Mut Ins. Co., 58 Pa. St., 443; Sands v. Hill, 42 Barb., 65; Traders' Mut. Ins. Co. v. Stone, 9 Allen (Mass.), 483; Currie v. Mut. Ass. Soc., 4 H. & M. (Va.), 315; Fell v. McHenry, 42 Pa. St., 41; New England Mut. Fire Ins. Co. v. Belknap, 9 Cush., 140.

[1] New England Mutual Fire Ins. Co. v. Butler, 34 Me., 351; Hamilton Mut. Ins. Co. v. Hobart, 2 Gray, 543; Insurance Co. v. Connor, 17 Pa. St., 136; Great Falls Mutual Fire Ins. Co. v. Harvey, 45 N. H., 292.

[2] 1 Sch. Pers. Prop., p. 678; May Ins., § 549; Fland. Fire Ins., 18, 19; Cumberland Valley Mut. Prot. Co. v. Schell, 29 Pa. St., 31; Sun Mut. Ins. Co. v. Mayor, 8 Barb., 450; Corn v. Mut. Assurance Co., 6 Crabbe, 192.

dealers, are negotiable, or collectable for the payment of losses or debts, and valid obligations to the full amount thereof, whether any premiums have been actually earned or not; while in the latter class the makers are only liable for the *pro rata* share of such losses as may occur upon risks thereafter assumed, in common with all other premium notes held by the company. The former, being payable absolutely, are subject to the Statute of Limitations; while the latter, being payable on a contingency that may never happen, are not, as a whole, subject to the statute, but only such portion of them as may be called for, and from the time of the call.[8]

[8] May Ins., § 549; 1 Sch. Pers. Prop., p. 680; Dana v. Munro, 38 Barb., 528; Ewell v. Crocker, 4 Bosw., 22; Bell v. Shilley, 33 Barb., 610; McIntyre v. Preston, 5 Gilm. (Ill.), 48; White v. Haight, 16 N. Y., 310; Tuckerman v. Brown, 33 N. Y., 297.

CHAPTER XII.

LEGACIES AND DISTRIBUTIVE SHARES.

LEGACIES.

SECTION 130. Definition, and principal classes.
131. Minor divisions, rules and incidents.
132. Abatement, ademption, payment and satisfaction.

DISTRIBUTIVE SHARES.

SECTION 133. Defined and explained.

Legacies and distributive shares, being species of incorporeal personal property, are legitimate subjects of notice in this treatise.

I. *Legacies.*

§ 130. Definition and principal classes.—A legacy is a testamentary gift of personal property. The word "bequest" has the same significance; and its verb "bequeath" is generally used in wills, the substantive "legacy" having no corresponding verb.[1]

Legacies naturally range in three general classes, namely, general, demonstrative, and specific.

1. *General.*—A general legacy is one which simply gives a sum of money, or other property, without further description, and, consequently without limiting the subject of the gift to any particular portion of the estate, in exclusion of other portions of the same kind.

[1] 1 Sch. Pers. Prop., p. 328; Bouv. L. Dict., "Legacy;" O'Hara's Wig. Wills, p. 330, *et seq.*; And. L. Dict., "Legacy."

2. *Demonstrative.*— A legacy of this class is briefly defined, a gift of a general legacy to be drawn from a specific fund. If the fund fails, the legacy becomes a charge upon the general assets.

3. *Specific.*— A specific legacy is the gift of a thing in specie, and not of its value. In other words, it is a bequest of a specified part of a testator's personal estate, distinguished from all others of the same kind.[1]

Between general and specific legacies there is this important difference: In the latter, if the testator do not leave the specific thing bequeathed the gift fails altogether, the legatee having no claim on the estate at large in virtue of the legacy. But if the specific thing be found among the assets, the legatee will be entitled to it without diminution, or contribution by reason of a deficiency in the estate to pay all the legacies in full.[2] A general legacy, on the other hand, is a charge upon the whole personal estate, and must be paid in full if the assets be sufficient to satisfy debts and legacies in full; but in case the personalty be insufficient for such purpose, the general legacy will abate or be subject to contribution.[1]

[1] O'Hara's Wig. Wills, p. 330; Redf. Wills, p. 131, *et seq.;* 1 Sch. Pers. Prop., p. 730; Will. Exrs., p. 340; 2 Maed., Ch. Pr., pp. 7, 8; Coleman v. Coleman, 2 Ves., Jr., p. 160; Tifft v. Porter, 8 N. Y., 518; Ludlam's Estate, 1 Harris, 188; Walls v. Stewart, 4 Harris, 281; Malone v. Mooring, 40 Miss., 247; Millens v. Smith, 1 Drew & S. (Ireland, Ch.), 204; Gilmer v. Gilmer, 42 Ala., 9.

[2] 1 Sch. Pers. Prop., pp. 730, 731; Will. Exrs., p. 350; 2 Williams Exrs., 1076, *et seq.;* 2 Redf. Wills, pp. 131-136; Fountain v. Tyler, 9 Price, 94, 104; Purse v. Snaplin, 1 Atk., 414; Morris v. Thomson, McCart. (N. J.), Ch. 493; Foote, Appellant, 22 Pick., 299; Stephenson v. Dowson, 3 Beav , 342.

[3] Citations last *supra.*

Demonstrative legacies partake, in certain respects, of the nature both of general, and specific legacies; of the former, in that if the fund from which the legacy is to be paid for any reason fails, the legatee will not lose his bequest, but may receive it from the general assets; of the latter, in the particular that the legacy is not liable to abatement upon a deficiency of assets to pay all the legacies.[1]

It should be observed in passing that the courts are disinclined to construe legacies as specific, unless compelled so to do by the clearly expressed intention of the testator; and for the reason that specific legacies are regarded as "less consonant to reason and justice," and more liable to render a provision of the testator ineffective, than general legacies.[2]

§ 131. Minor divisions, rules and incidents.— In addition to the principal classes of legacies now briefly noticed, there are several minor divisions, with rules and incidents, that require attention.

1. *Cumulative legacies.* — When the same, or a different, amount of money, or other things, estimated by

[1] 1 Sch. Pers. Prop., p. 732; O'Hara's Wig. Wills, p. 331; 2 Redf. Wills, p. 136; Will. Exrs., p. 357; Creed v. Creed, 11 Clark & F. 508; Coleman v. Coleman, 2 Ves. Jr., 640; 2 Wms. Exrs. (6th Eng. Ed.), 1078.

[2] 2 Redf. Wills, p. 145, *et seq.*; O'Hara's Wig. Wills, pp. 333, 334; Will Exrs., p. 349; Sibley v. Perry. 7 Ves., 530; Smith v. Lampton, 8 Dana, 69; Briggs v. Hosford, 22 Pick., 288, 289; Chaworth v. Beech, 4 Ves., 555; Mayraunt v. Davis, 1 Desaus., 202; Cuthbert v. Cuthbert, 3 Yeates, 486; Ellis v. Walker, Ambler, 310; Walton v. Walton, 7 Johns. Ch R., 264; Tifft v. Porter, 8 N. Y., 518; Enders v. Enders, 2 Barb., 362, 367.

quantity, is given to the same person more than once by will or codicil, the question arises whether the several bequests are to be construed as cumulative, or merely repetitions, giving the beneficiary but one legacy. The rule of construction governing such cases seems to be well established, that where the legacies are of the same amount, and in the same instrument, it will be presumed that they are repetitions of the same gift, and will be so adjudged, unless a different intent is shown by the language of the instrument, and the surrounding circumstances. But where the legacies are not in the same instrument, or of the same amount, the presumption is that they are cumulative, and the legatee will take both, unless it be clearly shown that the testator intended but one gift.[1]

2. *Residuary legacy.* — A residuary bequest carries to the legatee all the personal property of the testator which he did not attempt to otherwise dispose of by his will, and also every thing that he did attempt to otherwise dispose of, but ineffectually, as void and lapsed legacies. This effect results from a presumption in favor of the residuary legatee, and a decided disclination of the courts to adopt a construction of wills which would result in partial intestacy.[2]

[1] 2 Redf. Wills, p. 178, *et seq.*; O'Hara's Wig. Wills, pp. 350-352; 1 Sch. Pers. Prop., p. 733; Will. Exrs., pp. 362, 363; Suisse v. Lowther, 2 Hare, 424, 432, 433; Holford v. Wood, 4 Ves., 76; Manning v. Thesiger, 3 Mylne & K., 29; Ridges v. Morrison, 1 Br. Cr. Cas., 389; Yockney v. Hansard, 3 Hare, 620, 622; Lobley v. Stocks, 19 Beav., 392; DeWitt v. Yates, 10 Johns., 156; Jones v. Creveling, Harr. N. J., 127; Masters v. Masters, 1 P. Wms., 424.

[2] 2 Redf. Wills, p. 115, *et seq.*; 1 Sch. Pers. Prop., p. 732; O'Hara's Wig. Wills, pp. 349, 350; Attorney General v. Johnstone, Amb., 577;

3. *Vested, and contingent, legacies.* — A vested legacy is one that takes effect, or becomes vested, on the death of the testator; at testator's decease it becomes "a certain interest in a certain person." A contingent legacy on the other hand, is one the vesting of which depends upon some uncertain person or event.[1] If there be nothing in the will clearly indicating a contrary intention, the legacy will take effect at testator's decease, the presumption being in favor of a vested, rather than a contingent, legacy; and, in case of ambiguity, the courts in construing the will incline to a vested, in preference to a contingent, interest.[2]

It must not be understood, however, that the mere fact that the legatee does not become entitled to the immediate possession and enjoyment of the legacy at the death of the testator, or at the time when legacies are payable by law, necessarily makes it contingent; for two estates or interests may vest at testator's death, the one in possession and the other in expectancy. The enjoyment of the gift by the legatee may be postponed for a limited period after testator's death, and yet be a

Cowling v. Cowling, 26 Beav., 449; King v. Strong, 9 Paige, 105; Peay v. Barber, 1 Hill Ch. (S. C.), 95; Cambridge v. Roas, 8 Vesey, 12, 15; Leake v. Robinson, 2 Mer., 363, 393; Reynolds v. Kortright, Beav., 417, 427.

[1] O'Hara's Wig. Wills, pp. 261-265; 2 Redf. Wills, p. 215; 1 Sch. Pers. Prop., pp. 737-738; Will. Exrs., p. 358; Redf. Surr., p. 322.

[2] Citations last *supra*, and see Guyther v. Taylor; 3 Ired. (N. C.), Eq., 328; Eldridge v. Eldridge, 6 Cush., 516; Devane v. Larkins, 3 Jones (N. C.), Eq., 377; Gill v. Weaver, 1 Dev. & B. (N. C.), Eq., 41; Burd v. Burd, 4 Pa. St., 182; Gilford v. Thorne, 9 N. J. Eq., (1 Stock.), 702; Van Vechten v. Van Vechten, 8 Paige, 104; Dominick v. Moore, 2 Bradf. Surr., 201; Newport v. Cook, Id., 332.

vested legacy; the interest may vest in right, although not in immediate possession.[1]

4. *Absolute, and conditional, legacies.* — These are nearly allied to, and in some respects the same as, vested and contingent leagacies. An absolute legacy is an unqualified testamentary gift. A conditional legacy is a bequest depending upon the occurrence or non-occurrence of an uncertain event, by which the legacy will vest, or be defeated.[2]

There are two kinds of conditions, *precedent* and *subsequent.* The former are those in which the vesting of the legacy is postponed to, and made conditional upon, the happening of some given event, or the arrival of some specified time. The latter is a legacy which, though vested, may be defeated by the happening or not happening of some future event.[3]

5. *Lapsed legacies.* — Lapse is the failure of a testamentary gift, generally caused by the death of the donee prior to that of the testator. But a legacy may lapse after the death of the testator, by reason of a contingency upon which the vesting is conditioned; so that a general legacy which never vests is deemed a lapsed legacy, whether the lapse occurs before or after the testator's death.[4]

[1] 2 Redf. Wills, pp. 215, 216; O'Hara's Wig. Wills, p. 261; 1 Sch. Pers. Prop., pp. 739, 740; Dayt. Surr., p. 387, *et seq.*

[2] Will. Exrs., p. 358, *et seq.*; 1 Sch. Pers. Prop., p. 738; 1 Rop. Leg., 645.

[3] Citations last *supra.*

[4] O'Hara's Wig Wills, p. 416; 2 Redf. Wills, p. 157, *et seq.*; 1 Sch. Pers. Prop., p. 735; Dayt. Surr., pp. 338-391; 2 Wms. Exrs., 1084; Fisk v. The Attorney General, Law Rept. 4 Eq., 521; *In re* Lewes'

Where the legacy is to several persons jointly, a lapse will not occur unless all the donees die prior to the death of the testator; but it is otherwise if the legatees take as tenants in common.[1] And a bequest to a class, as to the children of A., whether he be alive or dead, will not lapse so long as any one of the class survives.[2]

The lapsed legacy will either fall into the residuum, or be undisposed of by the will and subject to the law of distributions. The first alternative will be preferred in construing the will, partial intestacy not being favored by the courts.[3]

It should be noticed that there is an important distinction between personal, and real, estate in regard to the devolution of void and lapsed legacies; the former, it is generally held, fall into the residuum, while the latter descend to the heirs.[4]

§ 132. Abatement, ademption, payment and satisfaction.

Trusts, Law Rep. 11 Eq., 236; Elliott v. Davenport, 1 P. Wms., 83; Corbyn v. French, 4 Ves., 418; Wentworth's Exrs. 2 Phill., 261.

[1] Citations last *supra*. And see Buffar v. Bradford, 2 Atk., 220; Paye v. Paye, 2 P. Wms., 489; Gardner v. Printup, 2 Barb., 83, 89; Man v. Man, 2 Str., 905; Bagwell v. Dry, 1 P. Wms., 700; 2 Id., 400.

[2] 2 Redf. Wills, p. 169; Shuttleworth v. Greaves, 4 Mylne & C., 35; Doe d. Stewart v. Sheffield, 13 East, 526; Anderson v. Parsons, Greenl., 486; Sparhawk v. Buell, 9 Vt., 41; Hocker v. Gentry, 3 Metc. (Ky.), 463; Knight v. Wall, Dev. & B. (N. C.) L., 125; Stires v. Van Rensselaer, 2 Bradf. Surr., 172; Carver v. Oakley, 4 Jones (N. C.), Eq., 85; Hawkins v. Everett, 5 Id., 45.

[3] Redf. Wills, pp. 117, 126; Dayt. Surr., pp. 439, 440; *supra*, § 131, sub. 2, and cases cited.

[4] Redf. Wills, pp. 117, 126; Cox v. Harris, 17 Md., 23, 31; Brown v. Higgs, 4 Ves., 708, n. b.; Tongue v. Nutwell, 13 Md., 415; Faust's Adm'rx v. Birner, 30 Mo., 414.

I. *Abatement.*

We have seen that one of the limitations to the absolute ownership of property, or, in other words, absolute property in things, is the liability of one's property to appropriation in satisfaction of his just debts.[1] The application of this principle to legacies involves their partial or total abatement when the assets are insufficient to pay all the debts. The order of abatement is, first, general legacies; second, if there still be a deficiency, the demonstrative and specific legacies. Demonstrative legatees must first look to the demonstrative fund for payment; but if this fund prove insufficient for the purpose, the deficiency, in common with general legacies, will be a charge upon the general fund. A "demonstrative legacy," it is said, "has the priority of right to the fund out of which it is directed to be paid, as against all other claims except those of creditors."[2] A specific legacy is only liable to abatement in case of a deficiency of assets to pay all the debts, after abatement in full of general and demonstrative legacies.[3]

As already shown, it is not liable to contribution towards a deficiency of assets to pay all the legacies in full.[4]

II. *Ademption.*

Used in this connection, ademption means the revocation or taking away of a legacy. Specific legacies are

[1] *Supra*, § 5, sub. 5.

[2] Redf. Wills, pp. 141, 142; Will. Exrs. p. 382; O'Hara's Wig. Wills, p. 353, *et seq.*; Sellon v. Watts, 7 Jur. N. S., 134; 9 Weekly Repr., 847.

[3] Will. Exrs., p. 382; Redf. Surr., p. 331.

[4] *Supra*, § 130.

adeemed when the subject of the gift is wholly lost, destroyed, or disposed of by the testator during his life; or when its form is so changed as not to remain in specie.[1] An exception to this rule is found in cases where the change in the subject of the bequest is effected by operation of law, instead of the act of the testator, or through other agency.[2]

The question of ademption of general legacies is ordinarily connected with advancements and portions. While the intention of the testator must govern, courts of equity incline to treat advancements to a child by a father, or one *in loco parentis*, as an ademption of a general legacy theretofore given by his will, to the extent of the amount advanced.[3] In cases of doubtful intention, the courts have received parol evidence, not for the purpose of directly affecting the will, or of varying or contradicting the written instrument, but to establish inde-

[1] 2 Redf. Wills, p. 431, *et seq.*; 1 Sch. Pers. Prop. 740, 741; O'Hara's Wig Wills, p. 361; Will. Exrs. p. 351; Ashburner v. McGuire, Br. C. C., 108; Durant v. Friend, 5 DeGex & Sm., 343; Ford v. Ford, 3 Foster (N. H.), 212; Walton v. Walton, 7 Johns. Ch., 258, 262; McKinnon v. Thompson, 3 Johns. Ch., 307; Badrick v. Stevens, 3 Br. C. C., 431; Rider v. Wager, 2 P. Wms., 329, 330; Donahue v. Lea, 1 Swan (Tenn.), 119; Havens v. Havens, 1 Sandf. Ch., 324; Smith v. Jones, 4 Ohio, 115.

[2] Redf. Wills, p. 434, and notes; Partridge v. Partridge, Cas. 1 Talb., 226; Shaftsbury v. Shaftsbury, 2 Vern., 747; Dingwell v. Askew, 1 Cox, 427; Richards v. Humphreys, 15 Pick., 133, 135.

[3] 1 Sch. Pers. Prop., pp. 741, 742; 2 Redf. Wills, p. 439, *et seq.*; In Pye, *ex parte*, 18 Ves., 140, 153; Hopwood v. Hopwood, 7 H. L. Cas., 728; Warel v. Lant, Prec. Ch., 182; Jenkins v. Powell, 2 Vern., 115; Scotton v. Scotton, 1 Str., 235; Carver v. Bowles, 2 Russ. & My., 301; Montague v. Montague, 15 Beav., 565.

pendent facts which may aid the court in discovering the testator's intention.[1]

3. *Payment and Satisfaction.*

We have seen[2] that a will speaks from the time of testator's death. And it has been shown[3] that if there be nothing in the will, or extrinsic evidence, indicating a contrary intention of the testator, a legacy will take effect, or become vested, at his decease. It follows that the title, or right, to such a legacy passes to the legatee on the death of the testator, subject to the payment of his debts; but the assent of the executor is requisite to perfect the donee's title.[4] The executor is regarded in equity as a trustee, having a right to hold the legacy until after the payment of the debts;[5] but if he unreasonably withholds his assent, a court of equity will compel him to yield it.[6]

The rule is quite general that an executor may have one year in which to ascertain the condition of the estate, nature and extent of assets, and the claims of creditors, before being compelled to pay legacies. He may, however, pay or deliver the legacy prior to the expiration of the year, or other limited period; but he

[1] Redf. Wills, p. 441, *et seq.*; 1 Sch. Pers. Prop., p. 742; Kirk v. Eddows, 3 Hare, 509; Clark v. Jetton, 5 Sneed, 229; Paine v. Parsons, 14 Pick., 318; Swooper's Appeal, 27 Pa. St., 58; Wallace v. Pomfret, 11 Ves., 542; Hall v. Hill, 1 Dru. & War., 94, 111-133.

[2] *Supra*, § 95, with citations.

[3] *Supra*, § 131, sub. 3, with citations.

[4] 2 Redf. Wills, pp. 461-464; 1 Sch Pers Prop , 744; Redf. Surr., pp. 318; Will. Exrs., pp. 379, 380.

[5] Citations last *supra*; and see 2 Redf. Wills, p. 461, *et seq.*

[6] Citations *supra*; and 2 Wms. Exrs., p 1238.

will do so at his peril should the assets prove insufficient to pay all the debts.[1]

As a general rule, a legacy by a debtor to his creditor which is of equal or greater amount than the debt, and of the same character, and payable after the debt becomes due, will be considered as a satisfaction of it; but any circumstances tending to repel the presumption that such effect was intended by the testator, will be available to prevent the application of the rule.[2]

Whether a legacy by a creditor to his debtor shall be regarded as a release or discharge of the debt, will depend upon the intention of the testator; and his intention must be determined by the structure and language of the will, under settled rules of construction, aided in doubtful cases by parol proof of circumstances whereon to found inferences and presumptions.[3]

It is a common law doctrine that the appointment by a creditor of his debtor to be his executor, operates as a release of the debt; and this for the reason that by a union of the rights of debtor and creditor in one person, the debt would no longer be the subject of an action at

[1] 2 Redf. Wills, pp. 465, *et seq.*, and 457; O'Hara's Wig. Wills, p. 343; 1 Sch. Pers. Prop., pp. 744-746; Will. Exrs., pp. 377-379; 1 Rop. Leg., pp. 456, 457; 1 Sch. Pers. Prop., pp. 472, 473; Coppin v. Coppin, 2 P. Wms., 291, 296; Keyling's Case, 1 Eq. Cas., Abr., 239, pl. 25; Orr v. Kaines, 2 Ves., Sen., 193.

[2] 2 Redf. Wills, p. 185, *et seq.*; 1 Id., pp., 539, 540, n. 6; Will. Exrs., p. 366; Dayt. Surr., pp. 395, 396; Williams v. Crary, 5 Cow., 370; 8 Id., 246; 4 Wend., 443.

[3] 2 Redf. Wills, p. 189, *et seq.*; 2 Rop. Leg., 1064, 1065, 1070; Fitch v. Peckham, 16 Vt., 150; Strong v. Williams, 12 Mass., 391; Van Ripper v. Van Ripper, 1 Green, Ch., 1; Clarke v. Bogardus, 12 Wend., 67; Zeigler v. Eckhert, 6 Pa. St., 13.

law, the rule being that in such an action the same person cannot be both plaintiff and defendant.[1] But the same rule does not apply in equity; and there the executor is held to have paid the debt to himself, and will be accountable for the amount, as assets in his hands, to any party entitled to claim them.[2]

It should be noticed that the rule of law in question does not apply to the appointment of the debtor as administrator, because that is the act of the law and not of the creditor.[3]

II. *Distributive Shares.*

§ 133. Distributive shares defined and explained.— In case of intestacy, after the payment of debts and expenses of administration, the personal property of intestate passes to his next of kin under statutes of distribution; and the several portions thus distributed constitute what are known in legal parlance as "distributive shares." The statutes of distribution in the United States are based, in large part, upon the English Statute of Distributions, 22 and 23 Charles II., ch. 10.[4]

It has been shown[5] that the legal title to intestate's personal property does not pass directly to the next of

[1] 2 Redf. Wills, pp. 191, 192; Went. Exrs. 73, 74, 75; Stagg v. Beekman, 2 Edw. Ch., 89; Berry v. Usher, 11 Ves., 87; Fox v. Fox, 1 Atk., 463; Needham's Case, 8 Co., 135 a; Cheetham v. Ward, 1 B. & P., 630; Waukford v. Waukford, 1 Salk., 299.

[2] Treakly v. Fox, 9 B. and C., 130; Strong v. Williams, 12 Mass., 391, 393; Cloud v. Clinkinbeard, 8 B. Mon., 397, 399.

[3] Waukford v. Waukford, 1 Salk., 299, 303, 306; *supra*, §§ 70, 90.

[4] 2 Kent Com., p. 420; 1 Sch. Pers. Prop., pp. 747–750; 3 Redf. Wills, pp. 424, 425.

[5] *Supra*, § 70, and cases cited.

kin on his death; that title can accrue to them only through the medium of an administrator. The legal title passes to the administrator, on his appointment, in trust for the purposes of administration; but the next of kin, entitled to distributive shares under the statute, have a vested interest in the surplus after the payment of debts and expenses of administration.

The statutes of the several States present some variety in details, an examination of which would require more space than the scope of this work will permit; but the general principles now briefly stated apply to all.

CHAPTER XIII.

STOCK AND STOCKHOLDERS.

SECTION 134. Stock, and shares of stock, defined.
135. Methods of acquiring title to stock.
136. Liability of stockholders.
137. Assets upon dissolution of the company.

We have already considered the organization and character of corporations, and incidentally therewith the nature of stock, and the interest and rights of stockholders.[1] But the great and constantly increasing importance of this species of personal property demands further attention.

§ 134. Stock, and shares of stock, defined.—The term "stock" is frequently used to signify money invested in business by an individual or firm; but in this connection it means the capital of business corporations and joint-stock companies. The money or property contributed by subscribers to the fund which constitutes the business capital of the corporation or association, is termed "capital stock." The amount of capital stock is generally fixed by the corporate charter, or limited by the statutes under which the company is organized.[2]

[1] *Supra*, §§ 30 and 31.

[2] Barry Merchants' Ex. Co., 1 Sandf., Ch. 280, 305; Burrall v. Bushwick R. R. Co., 75 N. Y., 211; Williams v. Western Union Tel. Co., 93 N. Y., 162, 188; Bailey v. Clark, 91 Wall., 284; Hightower v. Thornton, 8 Ga., 486, 500; St. Joseph R. R. Co. v. Shacklett, 30 Mo., 551, 558; St. Louis Iron M., etc., Co. v. Loftin, 30 Ark., 693, 709; Bent v. Hart, 10 Mo. App., 143, 146; Cook on Stock (2 Ed.), §§ 3, 199; 1 Potter Corp., § 254, *et seq.*; 1 Sch. Pers. Prop., p. 618, *et seq.*

The capital stock of a company is sometimes confused in thought with the amount of its property; but the two funds are clearly distinguishable. The capital stock remains as fixed in the organization of the company, unless subsequently changed in amount by authority of statute; but the property of the company may vary in amount and value from time to time, as affected by the condition of business, and by gains and losses. This distinction is emphasized by the rule that dividends can legally be made only from net profits; that dividends which impair the capital stock are illegal, and may be recovered back from the stockholders.[1]

A share of stock embraces and represents the whole interest of the holder in the corporation, or company, and all his rights growing out of the relation. These, summarized, are a right to participate in the management of the company, to share, in proportion to his interest in the stock, in the profits when declared as dividends, and to receive an aliquot part of the proceeds of the capital and assets on dissolution of the company, after payment of its debts.[2] But a shareholder, while having the rights

[1] Citations last *supra*, and Cook on Stocks (2 Ed.), §§ 546, 547; Hughes v. Vermont Cop. Mining Co., 72 N. Y., 207, 210; Chaffee v. Rutland R. R. Co., 55 Vt., 110; Elkins v. Camden, etc., R. R. Co., 36 N. J. Eq., 233; Lockhart v. Van Alstyne, 31 Mich., 76; Pittsburgh, etc., R. R. Co. v. County of Allegheny, 63 Pa. St., 126; Railroad Company v. Howard, 7 Wall, 392; Hastings v. Drew, 76 N. Y., 9; Gratz v. Redd, 4 B. Mon., 178; Bank of St. Marys v. St. John, 25 Ala., 566.

[2] Cook on Stock (2 Ed.), § 5; 1 Potter Corp., pp. 329, 330; Burrall v. Bushwick R. R. Co., 75 N. Y., 211; Plimpton v. Bigelow, 93 N. Y., 592, 599; Field v. Pierce, 102 Mass., 253, 261; Jones v. Davis, 35 Ohio St., 474, 477; Harrison v. Vines, 46 Tex., 15, 21; Fisher v. Essex Bank, 5 Gray, 373, 378; Neiler v. Kelley, 69 Pa. St., 403, 407.

now stated, has no separate legal title to the property or profits of the corporation, until a division is made, or a dividend declared.[1] The act of legally declaring a dividend, in contemplation of law, has the effect of severing the stockholder's share from the common fund of the company, and setting it apart for his use and benefit, in his individual right. The share thus set apart becomes immediately a debt due from the company to the shareholder, which he may recover by an action at law, if it be not paid on demand.[2]

It should be observed, however, that the dividend of a stockholder is applicable to a debt due from him to the company at the time the dividend becomes payable; and if an action be brought for the dividend the company may set up the debt by way of set-off or counter-claim.[3]

§ 135. Methods of acquiring title to stock. — There are two general methods of acquiring stock, and thus becoming stockholders; one by original subscription to the stock in the formation of the company; the other by transfer from a stockholder.

[1] Cook on Stock (2 Ed), §§ 534, 535; Beverage v. New York El. R. R. Co., 112 N. Y., 1, 27; Curry v. Woodward, 44 Ala., 305; Boardman v. Lake Shore, etc., R'y Co., 84 N. Y., 157; Goodwin v. Hardy, 57 Me., 143; Rand v. Hubbell, 115 Mass., 461, 474.

[2] Cook on Stock, (2 Ed.), § 544; Boone Corp., § 125, and cases cited; Jackson's Adm'rs v. Newark Plank Road Co , 31 N. J. Law, 277; Westchester, etc., R. R. Co. v. Jackson, 77 Pa. St., 321; Stoddard v. Shetucket Foundry Co., 34 Conn., 542; Hall v. Rose Hill, etc., Co., 6 Ohio St , 489; Fawcett v. Laurie, 1 Drew & Sm., 192; Dalton v. Midland Counties R'y Co., 13 C. B., 474.

[3] Cook on Stock (2 Ed.), § 545; Hagar v. Union National Bank, 63 Me., 509; King v. Patterson, etc., R'y Co., 29 N. J. Law, 504; Sargent v. Franklin Ins. Co., 8 Pick., 90; Bates v. New York Ins. Co., 3 Johns. Cas., 238.

1. *Subscription.*—The amount of capital of a private business corporation is fixed by charter, or by its articles of association when organized under a general statute, and is divided into a certain number of shares. Subscriptions to the shares of stock are requisite, both to complete the organization of the company, and to furnish the necessary capital. As the par value of the shares is not ordinarily paid in full by the subscribers at first, it becomes essential to the life of the company, and for the security of creditors, that the subscriptions should be binding and enforceable obligations, taking the place of the unpaid balance in making up the capital stock of the company. And subscriptions are held to be contracts which, when legally made, are binding and enforceable. The rights, privileges, and benefit of membership in the company, constitute a valid and sufficient consideration for the promise of the subscriber, express or implied; and the preliminary subscriptions become vested in the company immediately upon its formation, their face value being contributions to its capital stock.[1] It is a settled rule that a subscription for shares implies a promise to pay for them, without proof an express promise, or of any particular consideration.[2]

[1] 1 Potter Corp., § 227, *et seq.*; Cook on Stock (2 Ed.), § 52, *et seq.*; Boone Corp., §§ 108-111, and cases cited; Pendergast v. Turton, 1 Young & C. Ch., 97; Baltimore, etc., Turnpike Co. v. Barnes, 6 Harris & J. (Md.), 57; Kansas City Hotel Co. v. Hunt, 57 Mo., 126; Beecher v. Dillsbury, etc , R. R. Co., 76 Pa. St., 306; Junction, etc., R. R. Co. v. Reve, 15 Ind., 236; Marsh v. Burroughs, 1 Wood, 463.

[2] Citations last *supra*, and Hawley v. Upton, 102 U. S., 314; Buffalo, etc., R. R. Co. v. Dudley, 14 N. Y., 336; Waukon, etc., R. R Co. v. Dwyer, 49 Iowa, 121; Mitchell v. Beckman, 64 Cal., 117; Merrimac, etc., Co. v. Levy, 54 Pa. St., 227; Fry v. Lexington, etc., R. R. Co., 2 Metc. (Ky.), 314.

While, on the one hand, the unpaid subscription may be recovered by an action at law, on the other hand, the subscriber is entitled to a certificate of stock representing his interest in the company. If, on demand, the company refuses to issue the certificate, the subscriber or stockholder may compel its issuance by a suit in equity, provided the full capital stock has not been issued; and if it has been, the stockholder may recover of the company the value of the shares at the time of demand.[1]

2. *Transfer.*—It is well settled that stock is personal property, transferable, and capable of alienation and succession, like other species of personal property, and by the same methods. It follows, therefore, that one may acquire title to shares, and become a shareholder, by purchase and transfer from another.[2]

§ 136. Liability of stockholders, and how enforced. The several ways in which a stockholder may be liable on his stock, will now be briefly noticed.

1. *To the company, and its creditors.*—It has already

[1] Cook on Stock (2 Ed), §§ 60, 192; Fletcher v. McGill, 10 N. E., 651; Appeal of Rowley, 9 Atl. Rep,, 329; Chester Glass Co. v. Dewey, 16 Mass., 94; Fergeson v. Wilson, L. R., 2 Ch., 77; Wyman v. Am. Powder Co., 62 Mass., 168; Finley, etc., Co. v. Hurtz, 34 Mich., 89; McCord v. Ohio & Miss. R. R. Co , 13 Ind., 220; Buffalo, etc., R R. Co. v. Dudley, 14 N. Y., 336, 337; Mitchell v. Beckman, 64 Cal., 117; Burrows v. Smith, 10 N. Y., 550.

[2] Cook on Stock (2 Ed.), §§ 6, 7, 331; Boone Corp., § 122; 1 Potter Corp., § 257; Heart v. State Bank, 2 Dev. Eq., 111; Cole v. Ryan, 52 Barb., 168; Mobile Mut. Ins. Co. v. Cullum, 49 Ala., 558; Boston Music Hall v. Cory, 129 Mass., 435; Chouteau Spring Co. v. Harris, 20 Mo., 382; Poole v. Middleton, 29 Beav., 646; Brightwell v. Mallory, 10 Yerg. (Tenn), 196; Bank of Attica v. Mgfs. & Trs. Bank, 20 N. Y., 501.

been shown that a stockholder is liable to the company on his contract for the unpaid amount of his subscription.[1] So, also, is he liable to the corporation creditors for such unpaid amount; and this in virtue of the doctrine, now well established, that unpaid subscriptions constitute a trust fund for the benefit of the company creditors. Courts of equity, by their flexible and efficient methods of procedure, will always readily give their protection to the rights and interests of creditors, who are a favored class in that forum.[2]

The contract of subscription does not, generally, specify a time of payment; and hence is regarded and treated as a promise to pay in the future at such times, and in such parts, as the company may officially demand by way of "calls." The calls, however, must be made by the proper authorities, and in accordance with law, or they will be invalid and unavailable.[3]

The authorities are not in agreement respecting the

[1] *Supra*, §§ 134, 135.

[2] Cook on Stock (2 Ed.), § 199, *et seq.*; 1 Sch. Pers. Prop., p. 646, *et seq.*; Sawyer v. Hoag, 17 Wall., 610, 620; Wood v. Dummer, 3 Mason, 308; Germantown, etc., Ry Co. v. Fitler, 60 Pa. St., 124; Hightower v. Thornton, 8 Ga., 486; Crawford v. Roher, 59 Md., 599; Sanger v. Upton, 91 U. S., 56; and numerous other cases in the same line.

[3] Cook on Stock (2 Ed.), §§ 104-116; 1 Potter Corp., § 246, *et seq.*; Boone Corp., §§ 116, 118; Braddock v. Phil., etc., R. R. Co, 45 N. J. L., 363; Banet v. Alton, etc., R. R Co., 13 Ill., 504; Spangler v. Ind. & Ill. Central R. R. Co., 21 Ill., 276; Grosse Isle Hotel Co. v. L'Anson's Exrs., 42 N. J L., 10; s. c., 43 N. J. L., 442; Pittsburg & Cornellsville R. R. Co. v. Clarke, 29 Pa. St , 146; Budd v. Multnomah St. Ry. Co., 15 Pac. Rep., 659; Eakright v. Logansport & N. Ind. R. R. Co., 13 Ill., 404; Johnson v. Crawfordsville R. R. Co., 11 Ind. 280; Fairfield C. T. Co. v. Thorp, 13 Conn., 173.

necessity of giving notice of the call to the stockholders before bringing an action for the recovery of the amount called for. A majority of cases hold that notice is unnecessary in the absence of an express provision, either in the charter of the company, the statute governing, the by-laws, or the subscription, making notice a condition precedent to the maintenance of an action. This holding is based upon the ground that the contract is a promise to pay on demand, and that the commencement of an action is a sufficient demand. There are, however, weighty authorities on the other side, which seem to the writer more in accordance with sound reason, and the dictates of justice.[1]

The company is not limited to an action at law for the recovery of unpaid subscriptions, several other remedies being available. First, a suit may be brought on the subscription, a judgment obtained, and the stock sold on execution to apply on the judgment. Second, the company may bring an action for a breach of the contract, and recover as the measure of damages the difference between the value of the stock at the subscription price, and its market value at the date of default in making payment. Third, there is the remedy of forfeiture of the stock for non-payment. The common law action to collect the subscription as a debt, and forfeiture, are the

[1] Carlisle v. Cahawba & Marion R. R. Co., 4 Ala. (N. S.), 70; Wear v. Jacksonville & Savannah R. R. Co., 24 Ill., 593; Scarlett v. Academy of Music, 43 Md., 203; Essex Bridge Co. v. Tuttle, 2 Vt., 393; Spangler v. Ind. & Ill. Central R. R. Co., 21 Ill., 276; Rutland & Burlington R. R. Co. v. Thrall, 35 Vt., 536; Miles v. Bough, 3 Q. B., 845; Edinburgh, etc., Ry. v. Hibblewhite, 6 M. & W., 707; Alabama & Florida R. R. Co. v. Rowley, 9 Fla., 508; Hughes v. Antietam Mfg. Co., 34 Md., 316.

remedies generally elected. The forfeiture may be effected, either by what is termed a "strict foreclosure," where the company takes the stock to itself, or by a public sale thereof, and application of the proceeds in payment of the subscription. Forfeiture, not being a common-law remedy, is only available to the company when authorized by statute or charter, or by consent of the stockholders indorsed upon the certificate of stock.[1]

While several remedies are open to the choice of the company as now shown, it is held in the larger number of cases involving the question, that forfeiture of stock cannot be supplemented by an action at law for the unpaid balance, if any, due on the subscription; that the election of forfeiture is exhaustive of remedies.[2] It should be observed, however, that there are dissenting cases, holding that after forfeiture the company may have an action for deficiency, the same as in the case of a mortgage foreclosure.[3]

[1] Cook on Stock (2 Ed.) §§ 121, 123, and cases cited; Chase v. East Tenn., etc., R. R. Co., 5 Lea, 415; Rand v. White Mountains R. R. Co., 40 N. H., 79; Barton's Case, 4 DeGex & J., 46; Budd v. Multnomah St. Ry. Co., 15 Pac. Rep., 659; Westcott v. Minnesota, etc., Co., 23 Mich , 145; Perrin v. Granger, 30 Vt., 595; Weeks v. Silver, etc., Co., 55 J. & S. (N. Y.), 1; Matter of Long Island R. R. Co., 19 Wend., 37; s. c., 32 Am. Dec., 429.

[2] Cook on Stock (2 Ed.), §§ 124, 125; 1 Potter Corp., § 251; Boone Corp., § 119, and cases cited; Delaware, etc., Co. v. Sanson, 1 Binn., 70; Instone v. Frankford Bridge Co., 2 Bibb., 576; Rensselaer, etc., R. R. Co. v. Wetsel, 21 Barb., 56; Freeman v. Winchester, 18 Miss., 577; Mann v. Cook, 20 Conn., 178; Rutland, etc. R. R. Co. v. Thrall, 35 Vt., 536, and many other cases in the same line.

[3] See Carson v. Arctic Mining Co., 5 Mich., 288; Danbury, etc , R. R. Co. v. Wilson, 22 Conn. 435; Great Northwestern Ry. Co. v. Kennedy, 4 Exch., 417, 425.

The forfeiture of a shareholder's stock has the important effect of relieving him from liability to the creditors of the company; and this, even, where the debts were contracted prior to the forfeiture of the stock.[1] But a stockholder cannot, by his own will and act, abandon his shares and effect a forfeiture that will discharge him from liability on his own subscription.[2]

A bill in equity is the ordinary remedy of the creditor to enforce his rights; and it is both appropriate and efficient, inasmuch as it brings all the parties interested in the matter before the court, and deals with the equities.[3]

Other remedies, however, have been held available to creditors. When the stockholder is in default for non-payment of installments after call, he is a debtor of the company; and this debt, like any other, is subject to attachment or garnishment in a suit by a creditor against the company. And it has been held, also, that for an unpaid subscription, after call, the creditor has a remedy by action at law against the delinquent stockholder, who

[1] Cook on Stock (2 Ed.), § 127; Macauley v. Robinson, 18 La. An., 619; Allen v. Montgomery R. R. Co., 11 Ala., 437, 450; Mills v. Stewart, 41 N. Y., 384; Woollaston's Case, 4 DeGex & J., 437; *Ex parte*, Beresford, 2 Macn. & G., 197.

[2] Rockville, etc., Turnpike Co. v. Maxwell, 2 Cranch C. C., 451; Sweny v. Smith, L. R. 7 Eq., 324; Stocken's Case, L. R. 3 Ch., 412; Count Phalen's Case, L. R. 9 Eq., 107; Thomas' Case, L. R. 13 Eq., 437; Ross v. Bank, etc., 19 Pac. Rep.. 243.

[3] Cook on Stock (2 Ed.), §§ 204-211; 1 Story Eq. Jur., § 350; Griffith v. Mangam, 73 N. Y., 611; Ward v. Griswoldville Mfg. Co., 16 Conn., 593; Shickle v. Watts, 7 S. W. Rep., 274; Christenson v. Eno, 106 N. Y., 97, 100; Crawford v. Roher, 59 Md., 590; Hightower v Thornton, 8 Ga., 486; Adler v. Milwaukee, etc., Co., 13 Wis., 57; Henry v. Vermillion, etc., Turnpike Co , 17 Ohio, 187.

will be liable in such action to the full extent of his unpaid subscription.[1]

2. *Statutory liability.*—Stockholders in a corporation are liable only to the extent of the par value of their stock, unless made so by statute for the benefit of company creditors. Additional liability for this purpose is frequently created by charter, or by a general statute. But such a statutory provision will be strictly construed by the courts, in obedience to a well settled rule of construction applicable to statutes in derogation of the common law.[2] The statutory liability, being designed for the benefit of creditors, can be enforced by them only; and generally the remedy is in a court of equity.[3]

A court, in the exercise of its equity power, will make a call for unpaid subscriptions, or order the payment of the same for the benefit of creditors, when the company unjustifiably neglects or refuses so to do, and such action becomes necessary to meet corporate obligations. Fortunately for the public, it is not discretionary with a corporation, or its officers, to deprive creditors of the relief due them in justice and equity.[4]

[1] See Cook on Stock (2 Ed.), §§ 201, 203, and cases cited.

[2] Bishop Wr. Laws, §§ 119, 189 a; People v. Peacock, 98 Ill., 172; O'Reilly v. Bard, 105 Pa. St., 569; Chase v. Lord, 77 N. Y., 1; Gray v. Coffin, 9 Cush., 192; Grose v. Hilt, 36 Me., 22; Dauchy v. Brown, 24 Vt, 197; Salt Lake City Nat. Bank v. Hendrickson, 40 N. J. Law, 52; Davidson v. Rankin, 34 Cal., 53.

[3] Cook on Stock (2 Ed.), §§ 218, 222, and cases cited.

[4] Cook on Stock, (2 Ed.) §§ 108, 207; Scoville v. Thayer, 105 U. S., 143; Glenn v. Williams, 60 Md., 93; Hatch v. Dana, 101 U. S., 205; Glenn v. Sample, 80 Ala., 159; Marsh v. Burroughs, 1 Woods, 463; Boeppler v. Menown, 7 Mo. App., 447; Curry v. Woodward, 53 Ala., 371.

Receivers and assignees in bankruptcy of an insolvent corporation, representing both the company and its creditors, are clothed with the power, and charged with the duty, of collecting the unpaid subscriptions, so far as may be necessary for the purpose of paying the corporate debts. And the appropriate remedy is by bill in equity, to which all the delinquent share owners should be made parties.[1]

3. *Liability from defective organization.*—To effect a legal organization of a corporation, or a joint stock company, under statutory authority, all the essential provisions of the statute must be substantially complied with; and for a failure in this regard liabilities may accrue to stockholders which would not have arisen under a regular organization. While, as a general rule, a subscriber for stock cannot avail himself of a defective organization of the company as a defense when sued for calls, nor can the company repudiate its contracts on such ground, both being estopped from setting up such a defense,[2] a company creditor may proceed against the individual members for the recovery of his debt. The doctrine of estoppel does not apply to the creditor in such a case, as he is seeking to *enforce*, not to *repudiate* a contract.[3]

[1] Cook on Stock, (2 Ed.) § 208; High Rec., (2 Ed.) 1; Nathan v. Whitlock, 9 Paige, 152; Dayton v. Borst, 31 N. Y., 435; Mean's Appeal, 85 Pa. St., 75; Chandler v. Brown, 77 Ill., 333; Tobey v. Russell, 9 R. I., 58; Stewart v. Lay, 45 Iowa, 604; Clarke v. Thomas, 34 Ohio St., 46; Phœnix, etc., Co. v. Badger, 67 N. Y, 294; Sawyer v. Hoag, 17 Wall., 610, 621; Upton v. Tribilcock, 91 U. S., 45; Payson v. Stoever, 2 Dill., 427.

[2] See Cook on Stock, (2 Ed.) §§ 183-186, and cases cited; Buffalo & A. R. R. Co. v. Cary, 26 N. Y., 75.

[3] Lauferty v. Wheeler, 11 Abb. N. C., 228; Chaffe v. Ludeling, 27

But the mere fact of an irregularity in the organization, does not necessarily render the members absolutely liable for all the debts of the company. Each will be liable to the extent he would have been had the original purpose been the formation of a partnership. He will not be liable on a debt contracted before he was a member;[1] and it has been held that one who becomes a member subsequently to the attempted organization, taking no part therein, or in the management of the company, cannot be held liable for its debts.[2] Where, however, a general statute authorizes the formation of companies for the prosecution of certain kinds of business, an organization under it which does not specify its particular business will be void as a corporation, and the members will become liable as partners.[3]

4. *Liability as affected by transfers.*—This topic embraces the liability of transferer and transferee; and, also, transfers made prior, and subsequent, to registration in the corporate stock book. Shares may be transferred at any time after the contract of subscription is made, either before or after registration, and also either before or after payment in part, or in whole, of the subscription price. And where an absolute transfer in good faith is made, and duly recorded in the corporate stock book, the transferer is wholly relieved from

La. An., 607; National Bank, etc., v. Landon, 45 N. Y., 410, 414; Ridenour v. Mayo, 40 Ohio St., 9.

[1] Fuller v. Rowe, 57 N. Y., 23.

[2] DeWitt v. Hastings, 69 N. Y., 518; Stafford Bank v. Palmer, 47 Conn., 443.

[3] Cook on Stock (2 Ed.) §§ 231-234, and cases cited.

all further liability for the subscription price.[1] The burden thus lifted from the transferer rests thereafter upon the transferee.[2]

From the rules now stated, it would seem to follow logically that the transferree is not liable, either to the company for an unpaid subscription, or to creditors for corporate debts, prior to registration of the transfer, until which time the transferer is not relieved from liability; and such is the law.[3]

It may happen, that intermediate the contract of transfer and the registration, calls will be made, or creditors' rights intervene, and in such contingency what are the relations, liabilities, and rights of the respective parties? It has been shown that the transferer is, and the transferee is not, liable to the company or its creditors until registration. While this rule governs as between the parties to the transfer on the one hand and the company and its creditors on the other, a different relation exists between the parties to the transfer themselves, and to them, in that relation, equity rules apply. The transferee, being the real and beneficial owner of the stock, is

[1] Billings v. Robinson, 94 N. Y., 415; Ex'rs of Gilmore v. Bank of Cincinnati, 8 Ohio, 62, 71; Huddersfield Canal Co. v. Buckley, 7 T. R., 36; Wakefield v. Fargo, 90 N. Y., 213; Chouteau Spring Co. v. Harris, 20 Mo., 382; Allen v. Montgomery R. R. Co., 11 Ala., 437, 451; McKenzie v. Kittridge, 24 U. C. C. P., 1; Provincial Ins. Co. v. Shaw, U. C. Q. B., 533.

[2] Merimac Mining Co. v. Levy, 54 Pa. St., 227; Upton v. Hansbrough, 3 Biss., 417; Webster v. Upton, 91 U. S., 65; Hall v. United States Ins. Co., 5 Gill (Md.), 484; Merimac Mining Co. v. Bagley, 14 Mich., 501; Brigham v. Mead, 10 Allen, 245; Hartford, etc., R. R. Co. v. Boorman, 12 Conn., 530.

[3] See Cook on Stock (2 Ed.), §§ 258, 260, 261, and cases cited.

equitably bound to respond to calls and claims; and hence he may be compelled to indemnify the transferer for all liabilities incurred and paid by him after transfer and prior to registration.[1]

While title to the stock may pass absolutely by transfer from the vendor to the vendee, yet in the hands of the latter it may be subject to a corporate lien for a debt due from the former to the company at the time of the transfer. It is well settled that no such lien exists at common law;[2] but it is equally well settled that the company may have a lien in virtue of a statute, or by charter. But whether such lien may obtain by force of a by-law cannot be considered as settled, there being a contrariety of judicial opinion on the question.[3]

If a share-holder is compelled to pay a debt of the company of which he is a member, he may maintain an action against his co-shareholders for contribution. This in virtue of the just demand of equity principles, based upon the maxim that equality is equity. Where several persons are equally bound for the payment of the same debt, and are equally relieved on its payment by one of them, the plainest dictates of justice require that all should contribute, each in proportion to the benefit received by him.[4]

[1] Johnson v. Underhill, 52 N. Y., 203; Hutzler v. Lord, 64 Md., 534; Kellogg v. Stockwell, 75 Ill., 68; Walker v. Bartlett, 18 C. B., 845; Brigham v. Mead, 10 Allen, 245; Griswell v. Bristowe, L. R. 3 C. P., 112; Davis v. Haycock, L. R. 4 Exch., 371.

[2] Cook on Stock (2 Ed.), § 521, and cases cited, Boone Corp. § 124, and cases cited.

[3] See Cook on Stock (2 Ed.), § 522, *et seq.*; § 532, and cases cited.

[4] 1 Story Eq. Jur., § 493; Pom. Eq., §§ 405, 406; Cook on Stock (2

5. *Liability of pledgees.*—A pledgee in whose name the pledged stock stands on the corporate books is, as to creditors of the company, the absolute owner, and liable as such.[1] The pledgee may, however, avoid this liability by having the stock registered in the name of another person designated by him, the nominee in such case being generally a person of no pecuniary responsibility, a mere "dummy."[2]

6. *Liability of Executors and Administrators.*—The liability of a shareholder at the time of his decease devolves upon his estate in the hands of his executor or administrator. Hence, these personal representatives succeed to the liability of decedent, to the extent of the property that comes to their hands for the purposes of administration, the same as in case of other charges upon the estate.[3] And the executor or administrator

Ed.), § 227; Aspinwall v. Sacchi, 57 N. Y., 331; Umsted v. Buskirk, 17 Ohio St., 113; Stewart v. Lay, 45 Iowa, 604; Matthews v. Albert; 24 Md., 527; Hadley v. Russell, 40 N. H., 109, 112; Farrow v. Bivings, 13 Rich. Eq., 25.

[1] Cook on Stock (2 Ed.), §§ 247, 470; Pullman v. Upton, 96 U. S., 328; Autman's Appeal, 98 Pa. St., 505; Crease v. Babcock, 51 Mass., 525; Rosevelt v. Brown, 11 N. Y., 148; Matter of the Empire Bank, 18 N. Y., 199; Royal Bank of India's Case, L. R. 7 Eq., 91; Weikersheim's Case, L. R. 8 Ch., 831; Price & Brown's Case, 3 DeGex & Sm., 146.

[2] Cook on Stock (2 Ed.), §§ 247, 466, 470; Anderson, Receiver, v. Philadelphia Warehouse Co., 111 U. S., 479; Welles v. Larrabee, 36 Fed. Rep., 866; Henkle v. Salem Mfg. Co., 39 Ohio St., 547; Newry, etc., R'y Co. v. Moss, 14 Beav., 64; Hiatt v. Griswold, 5 Fed. Rep., 573.

[3] Baird's Case, L. R. 5 Ch., 725; Thomas' Case, 1 DeGex & Sm., 579; Evans v. Coventry, 25 L. J. Ch., 489; *Ex parte* Gouthwait, 3 Mac. & G., 187; Crandall v. Lincoln, 52 Conn., 73; Bailey v. Hollister, 26 N. Y., 112.

may become personally liable upon the stock, if he appropriates the assets of the estate to legacies, without making provision to meet the liability of the estate on the stock.[1]

7. *Liability of Agents.*—When stock is subscribed for, or purchased, by one person as the agent of another, and registered on the stock book of the company in the agent's name, both the agent and the principal will be liable to corporate creditors, who may hold either responsible on the stock. But the agent will have a just and enforceable claim against his principal for any charges he may have been compelled to pay on such liability.[2]

§ 137. The assets upon dissolution of the company.—We have seen that the capital stock and property of the company constitute a trust fund for the benefit of creditors,[3] and also that the stockholders are entitled to a distributive share of the assets upon dissolution of the company, after payment of the corporate debts.[4] The company is the trustee of this fund, and the corporate creditors are the beneficiaries. In virtue of the well settled doctrine of equity, the latter may follow and claim the trust property through all changes

[1] Jefferys v. Jefferys, 24 L. T. Rep., N. S., 177; Thomas' Case, *supra*; Cook on Stock (2 Ed.), § 248.

[2] Cook on Stock (2 Ed.), § 249, and cases cited.

[3] *Supra*, § 136, sub. 1.

[4] *Supra*, § 134; and see Krebs v. Carlisle Bank, 2 Wall. (C. C.), 33; James v. Woodruff, 10 Paige, 541; Wood v. Dummer, 3 Mason, 308, 322; Heath v. Barmore, 50 N. Y., 302; Burrall v. Bushwick R. R. Co., 75 N. Y., 211; Day v. Postal Tel. Co., 7 Atl. Rep. 608; Mamma v. The Potomac Co., 8 Peters, 281, 286.

of form, so long as it can be identified, and into whosoever possession it may pass, except *bona fide* purchasers.[1]

If the assets are placed in the hands of any person, official or otherwise, for distribution, they may be reached by creditors, and also by stockholders entitled to a share; the remedy of the latter being a suit in equity, to which the company, as well as the person holding the assets, should be made a party.[2]

The real estate of a corporation, it is now generally held, constitutes a part of its assets, and, on dissolution, is available to creditors and stockholders, each in their order, and according to their respective rights.[3] It should be noticed, however, in passing, that while the weight of authority sustains the rule as now stated, there is not entire unanimity of adjudications on the question. And, moreover, the decisions in some of the States are governed by statutes which change the common law rule.

Important questions have arisen and been much discussed in regard to the sale of all the corporate property by the directors, or in pursuance of a vote of a majority of the stockholders against the wishes of the minority; and especially respecting a sale to another company and

[1] Story Eq. Jur., § 1252; Pom. Eq., §§ 1048-1051, 1080; Potter Corp., § 308; Cook on Stock (2 Ed.), §§ 641, 642.

[2] Young v. Moses, 53 Ga., 628. For remedies in some other contingencies, see Horner v. Carter, 11 Fed. Rep., 362, and Re Pontius, 26 Hun, 232.

[3] Lum v. Robertson, 6 Wall., 277; Bacon v. Robertson, 18 How. (U. S.), 480; Robinson v. Lane, 19 Ga., 337; Lothrop v. Stedman, 13 Blatchf., 134; Blake v. Portsmouth, etc., R. R. Co., 39 N. H., 435; Fox v. Horah, 1 Ired. (N. C.), 358; Curry v. Woodward, 53 Ala., 371; Powell v. North Mo. R. R. Co., 42 Mo., 63; People v. O'Brien, 111 N. Y., 1.

taking its stock in payment; or a consolidation with another, for the purpose of dissolving the old, and forming a new company. Without attempting to review the discussions on the subject, it may be stated as settled by the weight of authority, that neither the directors, nor a majority of the stockholders, have power to sell all the corporate property against the dissent of a minority, however small, unless the sale be made for the purpose of paying the debts of the corporation, or with a view to its dissolution and a *bona fide* discontinuance of the business.[1] In case, however, a corporation becomes financially embarrassed, or proves a failing enterprise, it seems that a majority of the stockholders may dispose of all the corporate property with a view to a dissolution, even against the dissent of a minority;[2] and may accept stock of another corporation in payment. But dissenting stockholders cannot be compelled to take the stock of another company in payment of their interest in the assets of the dissolved company; they are entitled to cash.

The shares of stock in the new company thus taken in payment for the assets of the old, may be distributed among such of the stockholders of the old as consent to accept them; and the balance must be sold for cash, and

[1] Abbott v. American Hard Rubber Co., 33 Barb., 578; 4 Blatchf., 489; Smith v. New York, etc., Co., 18 Abb. Pr., 419, 435; Robbins v. Clay, 33 Me., 132; Sheldon, etc., Co. v. Eickmeyer, etc. Co., 56 How. Pr., 71; 90 N. Y., 607; Middlesex R. R. Co. v. Boston, etc., R. R. Co. 115 Mass., 347; Kean v. Johnson, 9 N. J. Eq., 401; Erwin v. Oregon Ry. & Nav. Co., 27 Fed. Rep., 635; Boston, etc., R. R. Co. v. N. Y. & N. E. R. R. Co., 13 R. I., 260. And see Cook on Stock (2 Ed.), §§ 629, 630.

[2] See Lanman v. Lebanon Valley R. R. Co., 30 Pa. St., 42.

the proceeds distributed *pro rata* among the dissentients according to their respective interests in the assets of the old company.[1]

[1] Cook on Stock (2 Ed.), § 667; State v. Bailey, 16 Ind., 46; Kelley v. Mariposa, etc., Co., 4 Hun., 632; McCurdy v. Myers, 44 Pa. St., 535; *Ex parte* Bagshaw, L. R. 4 Eq., 341; Treadwell v. Sailsbury Mfg. Co., 7 Gray, 392; Black v. Delaware, etc., Canal Co., 22 N. J. Eq., 130. 415; s. c. 24 Id., 455; Buford v. Keokuk, etc., Packet Co., 3 Mo. App., 159.

CHAPTER XIV.

MISCELLANEOUS SPECIES OF PERSONAL PROPERTY NOT HEREIN-BEFORE SPECIFICALLY TREATED.

SECTIONS 138–140. Money.
141–142. Debts.
143–150. Mortgages.
151–153. Bottomry, and respondentia, bonds.
154–157. Rent.

I. *Money.*

§ 138. What it is.—Money, in the ordinary and general acceptation of the term, means that which constitutes the common medium of exchange in a civilized nation. It includes coin, gold and silver and other metals stamped by public authority, and used as the standard of values and medium of commerce; and also any currency usually and lawfully employed in business as the equivalent of coined metals, such as bank notes and the like.[1]

§ 139. Constitutional money.—It is claimed that under certain provisions of the United States Constitution the term "money" is limited to, or synonymous with,

[1] Bouv. L. Dict., "Money;" Web. Unab'gd, "Money;" Bolles on Banks, § 33; Wharton v. Morris, 1 Dall., 124; Lee v. Biddis, Id., 175; Hopson v. Fountain, 5 Humph. (Tenn.), 140: Wyer v. Dorchester, etc., 11 Cush. 51; Richard v. Bankes, 13 East, 20; Parker v. Merchant, 1 Phil. (N. C.), 355; *In re* Powell, Johns., 49; s. c. 5 Jur., N. S. 331; Fryer v. Ranken, 11 Sim., 55; Vaisey v. Reynolds, 5 Russ., 12; Jenkins v. Fowler, 63 N. H., 244; Bouv. L. Dict., "Money had and Received." And. L. Dict. "Money."

coin. These provisions are found in Art. I, Secs. 8 and 10. Sec. 8 confers upon Congress the power "to *coin money*, regulate the value thereof, and of foreign coin." Sec. 10 provides that "No State shall * * * *coin money*; emit bills of credit; nor *make anything but gold and silver coin a tender in payment of debts.*" These provisions seem to indicate that the framers of the Constitution intended to make gold and silver coin the money of the United States in exclusion of other currency, and also the only legal tender in payment of debts. Congress seems to have favored this view from the fact that, until recently copper and nickel coins, although authorized to "pass current" as are the coins of foreign nations, the value thereof being regulated by Congress under the power granted by the Constitution,[1] were not, like gold and silver, declared to be "legal tender in payment of debts."[2] But under the exigencies of the late civil war Congress authorized the issuance by the government of notes, generally known as "legal tenders" or "greenbacks," and provided in effect that these notes should serve the same purpose as a circulating medium, and represent the same value, as gold and silver coin of the same denominations. The several acts of Congress known as the "Legal Tender Acts," were passed February 25, 1862; July 11, 1862; and March 3, 1863. These acts made the notes which they authorized "receivable in payment of all loans made to the United States, and of all duties, debts, and demands due to the United States, except duties on imports and interest on the public debt,

[1] Art. I, §§ 8, 10.

[2] Bouv. L. Dict. "Money;" 1 Sch. Pers Prop. p. 440; Whart. Com. Am. Law, § 412; Legal Tender Cases, 12 Wall., 457.

and of all claims and demands against the United States substantially, except for interest on its coin-bearing loans." It was further provided that these notes should "be lawful money and legal tender in payment of all debts, public and private, within the United States."

It is not surprising that an earnest controversy arose in the country, and in the courts, in regard to the constitutionality of the "Legal Tender Acts." The Supreme Court of the United States, in *Hepburn v. Griswold*,[1] decided by a majority of one judge, that the provision making such notes a legal tender, as to debts contracted both before and after the enactment of the statute, was unconstitutional. Subsequently, on the addition of two new judges to the bench, the decision in *Hepburn v. Griswold* was overruled, and the constitutionality of the statute affirmed by a majority of one.[2] The State courts furnish numerous decisions in harmony with the last cited cases; some in obedience to the authority of the United States Supreme Court, and others on an independent judgment of the law.[3] Nevertheless, in view of the clear language of the Constitution, the construction generally given it by Congress and the courts, until the preservation of the national life required extraordinary measures, and the divided opinion of the judges of the United States Supreme Court, there is ground for the opinion, widely entertained, that the Legal Tender Acts,

[1] 8 Wall., 603.

[2] Legal Tender Cases, 12 Wall., 457.

[3] Smith v. Smith, 1 Thomp. & Cook (N. Y.), 63; Smith v. Wood, 37 Tex., 616; Metropolitan Bank v. Van Dyck 27 N. Y., 400; Schollenberger v. Brinton, 52 Penn. St., 9, 100; Latham v. United States, 1 Court Cl., 149; George v. Concord, 45 N. H , 484; Carpenter v. Northfield Bank, 39 Vt., 46; and many others.

in so far as they substitute paper for coin in payment of debts generally, and make such paper legal tender, can only be justified and sustained as a temporary measure of controlling necessity.[1]

Although a debt created by a contract to pay money generally may, as the law now stands, be discharged by legal-tender notes, a contract may be made expressly or impliedly, requiring payment "in specie," or in "gold and silver coin," under which these notes cannot be substituted for gold and silver, and will not constitute a legal tender.[2]

The States, it is held, have the constitutional authority to precribe the currency in which debts due to themselves for taxes may be paid,[3] and creditors may stipulate in contracts the currency in which debts due them thereunder may, or shall, be paid.[4]

§ 140. Money subject to levy under execution.— Money, being personal property, is subject to levy by execution against the property of the defendant; and, as a general rule, must be paid over by the officer as so much money collected, without exposing it for sale.[5]

[1] 1 Sch. Pers. Prop., pp. 445-448; Whart. Com. Am. Law, § 442.

[2] Legal Tender Cases, 12 Wall., 457; Trebilcock v. Wilson, Id., 687; Bronson v. Rhodes, 7 Id., 229; Hinneman v. Rosenback, 39 N. Y., 98; Essex Co. v. Pacific Mills, 14 Allen, 389; Myers v. Kaufman, 37 Ga., 600; Bank of Commonwealth v. Van Vleck, 49 Barb., 508; Frank v. Calhoun, 59 Pa St., 381; The Surplus, etc., of the Edith, 5 Ben., 144; Bowen v. Darby, 14 Fla., 202; Maryland v. Railroad Co., 22 Wall., 105.

[3] Bronson v. Rhodes. 7 Wall., 229; Carpenter v. Atherton, 25 Cal., 564; Lane v. Gluckauf, 28 Id., 288; Linn v. Minor, 4 Nev., 462.

[4] Lane County v. Oregon, 7 Wall , 71.

[5] Smith's Sheriffs, etc., p. 326.

But in the New York Code of Civil Procedure,[1] it is provided that where the money levied upon consists of gold coin, the officer must sell it like other personal property, unless he is otherwise directed by an order of the judge, or of the judgment in the particular cause.

Money is only subject to levy, however, when it belongs to the judgment debtor, and is within his control. In obedience to this rule it has been held that money collected on an execution, while in the hands of the collecting officer, cannot be levied upon under an execution against the person for whom it was collected, the money not being strictly his till actually paid over.[2]

So as to money deposited in a bank by the judgment debtor, for such money, under an ordinary general deposit, becomes the property of the bank; the relation of debtor and creditor between the bank and the depositor is created.[3]

In application of the same rule it has been held, that money collected by an attorney for the judgment debtor is not subject to levy by execution against the latter, while the money remains in the attorney's hands.[4]

II. *Debts.*

§ 141. Definition and classification. — The term "debt" is from the Latin *debere*, signifying to owe; and

[1] § 1410.

[2] Dubois v. Dubois, 6 Cowen, 499; Baker v. Kenworthy, 41 N. Y., 215; Turner v. Tendall, 1 Cranch, 116.

[3] Canrole v. Cone, 4 Barb., 220; National Citizens' Bank v. Howard, 3 How. Pr. Rep. (N. S.), 512; Commercial Bank of Albany v. Hughes, 17 Wend., 94.

[4] Maxwell v. McGee, 12 Cush., 137.

in a general sense may be defined as that which is due a person under any form of obligation or promise; or, more concisely stated, that which is owed. But, in certain species of contract the term is ordinarily used in a more restricted sense, signifying a debt of record, or a debt by contract under seal, termed a specialty. There is a third and quite extensive class of debts under the general definition above, founded on contracts not under seal, and termed simple contract debts.[1]

The classification of actions, including the action of debt, is herein omitted as properly belonging to the subject of pleading. It does not strictly follow the above divisions, and there is, moreover, a lack of uniformity in the decisions on the subject.

The different classes of debts will now be noticed.

1. *A debt of record.*—This is briefly and well defined by Blackstone, as "a debt due by the evidence of a court of record."[2] And a court of record is defined by the same author as that, "where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony."[3] With the recognition of the fact that paper may now, as a general rule, be substituted for parchment, Blackstone's definition is sufficiently accurate for the present time. It must not be assumed, however, that the mere fact that a record is kept deter-

[1] 1 Bouv. L. Dict., "Debt;" 1 Sch. Pers. Prop., pp. 459-461; Williams Pers. Prop., pp. 96, 104, 105, 109; 2 Black. Com., p. 465; 3 Id., p. 154; Gray v. Bennett, 3 Met., 522; Cable v. McCune, 26 Miss., 371; Mildam Foundry v. Hovey, 21 Pick., 417. And. L. Dict. "Debt."

[2] 2 Black. Com , p. 465.

[3] 3 Black. Com., pp. 24, 25.

mines the character of a court.[1] Another definition of a court of record is furnished by Chief Justice Shaw, of Mass., in *ex parte*, Gladhill,[2] giving more fully the characteristics and distinctive qualities of these courts. In passing upon the character of the police court in Lowell, after mentioning its organization and functions, he says: "This indicates the establishment of a court, or judicial, organized tribunal, having attributes and exercising functions, independently of the person of the magistrate designated generally to hold it, and distinguishes it from the case of a justice of the peace, on whom, personally, certain judicial powers are conferred by law."[3]

It should be noticed, also, that the character of a court, as to whether of record or otherwise, as well as its jurisdiction, powers and functions, is often determined by statute.

The judgment roll of a court of record was regarded by the English common law of such high authority that its truth could not be questioned, the settled rule and maxim being "that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary." And if the existence of the record was denied, it had to be tried by nothing but itself, on bare inspection.[4] But this rule, wherever existing, does not prevent the impeachment of a judgment for want of jurisdiction in the court which assumed to render it, or for fraud. It is absolutely essential to the validity of a judgment, that the court rendering it should have juris-

[1] See 1 Bouv. L. Dict., "Court of Record," and cases there cited.
[2] 8 Met., 168, 170. And. L. Dict. "Court of Record."
[3] See 3 Black. Com., p. 25; 1 Sch. Pers. Prop., 461, *et seq.*
[4] 3 Black. Com., pp. 24, 25.

diction, both of the subject matter, and of the parties. Without such jurisdiction the judgment is simply a nullity; and fraud vitiates everything with which it is tainted.[1] But, as a general rule, it is not competent to show a want of jurisdiction in opposition to the recitals in the record, provided the court be competent, by its constitution, to decide on its own jurisdiction. There is a distinction in this regard between courts of general, and of special, or limited, jurisdiction. In the latter, the record of judgment should contain all the facts essential to confer jurisdiction; in the former, jurisdiction will be presumed until the contrary be shown. In *Grignon v. Astor*,[2] the distinction is thus stated: "The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if the jurisdiction does not appear on their face, is this: A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to final judgment without setting forth in its proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment, save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it,

[1] Towns v. Springer, 9 Ga., 130; Miller v. Barkeloo, 8 Ark., 318; Wicks v. Ludwig, 9 Cal., 173; Johnson v. Johnson, 30 Ill., 215; Clark v. Bryan, 16 Md., 171; Westervelt v. Lewis, 2 McLean, 511; Bryan v. Blythe, 4 Blackf. (Ind.), 249; Smith v. Knowlton, 11 N. H., 191; Barrett v. Crane, 16 Vt., 246.

[2] 2 How. 319.

whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities." [1]

In courts of general jurisdiction the question must be raised, and the evidence showing a want of jurisdiction produced, on the trial; as a rule the judgment cannot be impeached collaterally, except for fraud.[2]

As to whether foreign judgments, rendered by a court of general jurisdiction, may be impeached for want of jurisdiction, by going behind the record, the authorities are not in agreement, so far, at least, as the judgments of our sister States are concerned. These States being independent sovereignties, judgments rendered in the courts of one State are foreign judgments in every other, unless they are placed on an equality with domestic judgments by the Constitution of the United States. That instrument provides that "full faith and credit shall be given in each State to the acts, records, and judicial proceedings of every other State;" and authorizes Congress to prescribe the manner of proving such acts, records and proceedings.[3] Under this authority Congress provided that records and judicial proceedings, when authenticated as directed by the act, shall receive such faith and credit in every court within the United States as they have by law or usage in the courts of the

[1] And see Bouv. L. Dict., "Jurisdiction," subs 4 and 5 and the cases there cited. And. L. Dict. "Jurisdiction."

[2] Hartman v. Ogborn, 54 Pa. St., 120; Fisk v. Miller, 20 Tex., 579; Lewis v. Rogers, 16 Pa. St., 18; Thorn v. Newsom, 64 Tex., 161; Hall v. Durham, 109 Ind., 434.

[3] Art. 4, § 1.

State from whence they are taken.[1] Under these provisions, it would seem that judgments recovered in one State ought to have the same force and effect in every other as domestic judgments. But the courts have not all taken this view, at least in regard to discrediting the record on the question of jurisdiction.[2]

If the record of a judgment in a sister State may be attacked collaterally, and the record discredited, when it comes under judicial cognizance in other States, *a fortiori* may a judgment rendered by a court in a foreign country be impeached in like manner and on the same grounds.

That a judgment, foreign or domestic, may be impeached collaterally for fraud, by third parties whose rights or interests are endangered or injured thereby, is well settled.[3] And a court of equity may vacate and set

[1] Act of May 26th, 1790; U. S. R. S., sec. 905.

[2] See Starbuck v. Murray, 5 Wend., 148; Bradshaw v. Heath, 13 Wend., 407; Hall v. Williams, 6 Pick., 232; Gleason v. Dodd, 4 Met., 333; Norwood v. Cobb, 24 Tex., 551; Knowles v. Gas Light Co., 19 Wall., 58; Kerr v. Kerr, 41 N. Y., 272; (but see Hunt v. Hunt, 72 N. Y., 217, 240); Kerr v. Coudy, 9 Bush (Ky.), 372; Pennywit v. Foote, 27 Ohio St., 600; and Nepton v. Leaton, 71 Mo., 358; which discriminate in favor of domestic judgments; Newcomb v. Peck, 17 Vt., 302; Wilcox v. Kassick, 2 Mich., 165; Bimelar v. Dawson, 5 Ill., 536; Roberts v. Caldwell, 5 Dana, 512; Lincoln v. Tower, 2 McLean, 473; Caughran v. Gilman, 72 Iowa, 570; Rankin v. Barnes, 5 Bush. (Ky.), 20; Wetherill v. Stillman, 65 Pa. St., 105; Galpin v. Page, 18 Wall., 350; and Hanley v. Donaghue, 116 U. S., 1; which give more effect to the provision of the U. S. Constitution and the legislation of Congress above mentioned.

[3] Thompson's Appeal, 57 Pa. St., 175; Atkinson v. Allen, 12 Vt., 619; Hall v. Hamlin, 2 Watts (Pa), 354; People v. Phœnix Bank, 7 Bosw., 20; Lewis v. Rogers, 16 Pa. St., 18; Dixey v. Pollock, 8 Cal. 570; Willard v. Whitney, 49 Me., 235; Whetstone v. Whetstone, 31 Iowa, 276; Cowin v. Toole, Id., 513.

aside a judgment, at the instance of parties or privies, where it has been procured by collusion, and is injurious to their interests.[1]

But a judgment upon the merits, by a competent court, having jurisdiction over the subject matter and the parties, while unreversed, and not set aside or vacated, is binding and conclusive upon the parties and privies, both as to law and fact, in respect to all matters actually litigated in the action, and also all matters which might have been adjudicated under the pleadings.[2]

The effect of foreign judgments as *res judicata* is not so well established. It is generally agreed, however, that foreign judgments *in rem*, when not impeached for want of jurisdiction or fraud, have the same force and effect as domestic judgments. But in respect to the conclusiveness of foreign judgments *in personam*, the authorities are not in agreement.[3] The scope of this work will not permit a discussion of this point.

2. *Recognizance.*—A debt may also be created by recognizance, which is an obligation entered into before

[1] Field v. Flanders, 40 Ill., 470; Dexter v. Voorhies, 81 N. Y., 153; Hunt v. Hunt, 72 Id., 217; Harbaugh v. Kohn, 52 Ind., 243; Harris v. Cornell, 80 Ill., 54; Doughty v. Doughty, 27 N. J. Eq., 315; Craft v. Thompson, 51 N. H., 536; Holland v. Trotter, 22 Gratt., 136; Graham v. Roberts, 1 Head, 56, 59; Huxley v. King, 40 Mich., 73.

[2] Campbell v. Strong, Hemp., 265; Hollister v. Abbott, 31 N. H., 442; Wall v. Wall, 28 Miss., 409; Warburton v. Aken, 1 McLean, 460; Swiggart v. Harber, 5 Ill., 364; LaGrange v. Ward, 11 Ohio, 257; Hammell v. Thurmond, 17 Ark., 203; Housemire v. Moulton, 15 Ind., 367; Hart v. Jewett, 11 Iowa, 276; Page v. Esty, 54 Me., 319; People v. Smith, 51 Barb., 360; Gardner v. Buckbee, 3 Cow., 120; Dick v. Webster, 6 Wis., 481; Stockton v. Ford, 18 How., 418; Mathews v. Durgee, 17 Abb. Pr., 256; Fairchild v. Lynch, 99 N. Y., 359.

[3] 1 Greenl. Ev., §§ 541, 546.

a court or officer duly authorized for that purpose, with a condition to do, or cause to be done, some particular act which is therein specified. This undertaking by the cognizor is made a record of the court, and thus becomes an obligation of record. The undertaking may be made by bail, in civil cases, conditioned that they will pay the debt, interest and costs recovered by the plaintiff; and for other purposes under statutes; or, in criminal cases, conditioned for the appearance of a party before the proper court, to answer to such charges as are or shall be made against him.[1] A recognizance taken by a court of inferior jurisdiction, must contain sufficient recitals in the condition to show that the court has jurisdiction of the subject matter, or the recognizance will be void; the same rule applying to a recognizance as to a judgment by such a court.[2]

3. *Specialty debts.*—The second class of debts are what are termed, in brief, specialties, that is a deed, or contract under seal. It includes a sealed conveyance of real estate; a deed-poll, that is, a deed from one to another who does not join in it; an indenture, that is a deed in which two or more persons join in mutual covenants; bonds; and, in short, all writings obligatory under seal.[3]

[1] 2 Black. Com., p. 342; 2 Bouv. L. Dict., "Recognizance;" Williams' Pers. Prop., p. 105; Race v. Mississippi, 25 Miss., 54.

[2] Bridge v. Ford, 4 Mass., 641; State v. Smith, 2 Me., 62; Dodge v. Kellock, 13 Me., 136; Commonwealth v. Loveridge, 11 Mass., 337; Vose v. Deane, 7 Mass., 280; Darling v. Hubbell, 9 Conn., 350; State v. Whittaker, 19 La. Ann., 142; State v. Randolph, 26 Mo., 213; Commonwealth v. Otis, 16 Mass., 198; Dow v. Prescott, 12 Mass., 419.

[3] 2 Black. Com., p. 465; Bishop Cont. (Enl. Ed.), §§ 104–110; Williams Pers. Prop., p. 106; 1 Sch. Pers. Prop., p. 465; Benson v. Ben-

The essentials of a valid specialty are substantially the same as any other valid contract, with a seal added. A specialty is regarded in law as superior to an unsealed instrument; and hence, if the parties to a simple contract — that is an unsealed contract — enter into a specialty on the same matter, and co-extensive therewith, the former is merged in and extinguished by the latter.[1] It was an early and well established doctrine of the common law, that a specialty cannot be varied or abrogated by words, written or unwritten, if they are not under seal. But this rule has been modified, if not wholly reversed, as appears by modern authorities.[2]

4. *Simple contract debts.*—This is the lowest class of contract debts, and falls under the general definition above given in the beginning of this section. It includes all contracts not under seal, both oral and written, and embraces a large proportion of the debts growing out of the various departments of business, which furnish the subjects of litigation.[3]

§ **142. Debts, how discharged.**—There are various ways in which debts may be discharged, or the debtor released from his legal obligation; as payment; accord

son, 1 P. Wms., 130, 131; Marriot v. Thompson, Willes, 186, 189; Laidley v. Bright, 17 W. Va., 779; Seymont v. Street, 5 Neb., 85; Bank of United States v. Dormally, 8 Pet., 361, 371.

[1] Bishop Cont. (Enl. Ed.), § 129; 1 Chit. Cont. (11 Am. Ed.), 9; Robbins v. Ayers, 10 Mo., 538; Banorgee v. Hovey, 5 Mass., 11; Rhoads v. Jones, 92 Ind., 328; Boale v. Mayor, 19 C. B. N. S., 76; Sharp v. Gibbs, C. B. N. S., 527.

[2] Bishop Cont. (Enl. Ed.), §§ 130–137; Canal Co. v, Ray, 101 U. S., 522, 527.

[3] 2 Black. Com., p. 466; Williams' Pers. Prop., p. 110; Bishop Cont. (Enl. Ed.), § 163, *et seq.*

and satisfaction; bankruptcy; release; rescission; lapse of time; novation; former recovery; and, generally, by performance of the condition. These will now be briefly noticed.

1. *Payment.*—This subject has already been sufficiently considered.[1]

2. *Accord and satisfaction.*—This is an executed agreement between the parties, made by the debtor, and accepted by the creditor or claimant, in satisfaction and discharge of the original debt or damage.[2] A mere unexecuted agreement by way of accord, will not discharge the original obligation, nor bar an action upon it, unless the agreement itself is made the satisfaction. The creditor or claimant may accept a new promise in satisfaction of his debt or claim.[3] The effect of the new agreement, whether in itself a satisfaction, is a question of construction. If the new promise be founded upon a new and valid consideration, and is binding on the original promisor, it will generally warrant, if not require, a construction making the new, a satisfaction of the old, promise;[4] and, as in other cases of contract, the

[1] *Supra* § 112.

[2] 2 Pars. Cont. (7 Ed.), p. 681, *et seq.*; 1 Bouv. L.Dict. "Accord;" 3 Black. Com., p. 16; 2 Greenl. Ev., § 28. And. L. Dict. "Accord."

[3] 2 Pars. Cont. (7 Ed.), p. 682; Cock v. Honychurch, T. Raym., 203; 2 Keble, 690; Peytoe's Case, 9 Rep., 79 b.; Watkinson v Inglesby, 5 Johns., 386; Frost v. Johnson, 8 Ohio, 393; Woodruff v. Dobbins, 7 Blackf., 582; Ballard v. Noaks, 2 Pike, 45; Brooklyn Bank v. De-Grauw, 23 Wend., 342; Bryant v. Proctor, 14 B. Mon., 457; Bigelow v. Baldwin, 1 Gray, 245; Babcock v. Hawkins, 23 Vt., 561; Simmons v. Clark, 56 Ill., 96; Pettis v. Ray, 12 R. I., 344.

[4] Good v. Cheeseman, 2 B. & Ad., 704; Evans v. Powis, 1 Exch., 907; Bayley v. Homan, 3 Bing. (N. C.), 621; Wentworth v. Bullen, 9 B. & C., 850.

intention of the parties will be influential in determining the construction.

In case of an undisputed debt for a specific sum, or of a claim for liquidated damages, the acceptance by the creditor, or claimant, of a less sum in satisfaction, will not bar an action for the balance.[1] If, however, the promise of a smaller sum be made upon additional security by a third party, or any other new and valid consideration, the promise and payment will work a satisfaction.[2]

It is held that an accord and satisfaction made before default in payment or performance by the debtor covenantor, is not a bar to an action for a subsequent breach.[3]

3. *Bankruptcy.*—This subject has been sufficiently discussed for the present purpose, under the head of "Insolvency,"[4] to which the reader is referred.

4. *Release.*—As ordinarily used, the term "release" may be defined the giving up or surrender, in any manner, of a claim or right. It may be effected by the voluntary act of the parties, intended as a surrender, or by operation of law.[5] A consideration is essential to the validity of a release by the act of the parties, and there

[1] Harriman v. Harriman, 12 Gray, 341; Bunge v. Koop, 5 Rob., 1; Ryan v. Ward, 48 N. Y., 204; Pinnel's Case, 5 Rep., 117; Thomas v. Heathom, 2 B. & C., 477; Blanchard v. Noyes, 3 N. H., 518; Wheeler v. Wheeler, 11 Vt., 60; Bailey v. Day, 26 Me., 88.

[2] Keeler v. Sailsbury, 33 N. Y., 648; 2 Pars. Cont., pp. 619, 620, and cases there cited; 2 Greenl. Ev., § 28, and cases cited.

[3] Healy v. Spence, 8 Exch., 668; Mayor of Berwick v. Oswald, 1 El. & B., 295; Kay v. Waghorn, 1 Taunt., 428; Smith v. Brown, 8 Hawks, 580; Harper v. Hampton, 1 Harr. & J., 673.

[4] *Supra*, §§ 71-74.

[5] 2 Bouv. L. Dict., "Release;" Bishop Cont. (Enl. Ed.), § 850.

must, therefore, either be a consideration in fact, or a seal, which imports a consideration, and, as a general rule, estops a party in law from denying it.[1] But, while the seal may estop a party in law from denying a consideration, it does not estop a court of equity from looking behind it for the facts, and of granting such relief as the equities demand.[2] And in some of the States of the Union, the want or failure of consideration is held to be a good defense to an action on a specialty; the seal being presumptive evidence of consideration, but not conclusive.[3] In some other States a seal is rendered unnecessary by statute, an unsealed, being made equally effectual with a sealed, instrument.[4]

As instances in which a release may be effected by operation of law, may be mentioned the case of a release of one of two or more promisors or obligors, which

[1] Bishop Cont. (Enl. Ed.), §§ 51, 83, 119, 274, 851, 852, 874; Harris v. Harris, 23 Gratt., 737; Van Valkenburgh v. Smith 60 Me., 97; Sharington v. Stratton, 1 Plow., 298, 309; Page v. Trufant, 2 Mass., 159, 162; Fallows v. Taylor, 7 T. R., 475; Cooch v. Goodman, 2 Q. B., 580; Burkholder v. Plank, 19 Smith, (Pa.), 225; Kidder v. Kidder, 33 Pa. St., 268; Seymour v. Minturn, 17 Johns., 169; Jackson v. Stackhouse, 1 Cow., 122.

[2] Bishop Cont. (Enl. Ed.), §§ 120, 121; Lister v. Hodgson, Law Rep., 4 Eq., 30, 36; Jefferys v. Jefferys, Craig & P., 138; Keffer v. Grayson, 76 Va., 517; Logan v. Plummer, 70 N. C., 388; Hazzard v. Irwin, 18 Pick., 95, 106; Obert v. Hammel, 3 Harr., 73; Iles v. Cox, 83 Ind., 577; Thorn v Thorn, 51 Mich., 167; Coranth v. Forsyth, 68 Ga., 560; Hoydon v. Green, 56 Iowa, 733.

[3] Pierce v. Wright, 33 Tex., 631; Greathouse v. Dunlap, 3 McLean, 303; Kinnebrew v. Kinnebrew, 35 Ala., 628; Stoval v. Barnett, 4 Litt., 207; Ring v. Kelley, 10 Mo. App., 411; Campbell v. Thompkins, 5 Stew. Ch., 170; Aller v. Aller, 11 Vroom., 446.

[4] McKinley v. Miller, 19 Mich., 142, 151; McCurtie v. Stevens, 13 Wend., 527.

operates as a discharge of all;[1] a release by one of several joint promisees is effectual as against all;[2] a covenant never to sue;[3] and a bond or covenant to save harmless and indemnify the debtor against his debt, is a release of the debt.[4] And generally, whatever may be the form, or words, of the instrument, it will operate as a release, provided it clearly manifests the purpose of the creditor to discharge the debt and the debtor.

It was a common law doctrine that an obligor could only be released by an instrument of as high dignity as that by which he was bound, and hence, when obligated under seal, he could be released only by a sealed instrument. But the trend of modern authority is against this doctrine; it being held on high authority that a sealed obligation may be released by parol.[5] And it has been held that a contract which a statute requires to be in writing may be released by parol.[6]

5. *Rescission.*—In case of a debt arising upon contract, the parties by mutual consent, may rescind the contract

[1] Lacy v. Kinnaston, 3 Salk., 298; Rex v. Bayley, 1 Car. & P., 435; Rowley v. Stoddard, 7 Johns., 207; Willings v. Consequa, Pet. C. C., 301; Campbell v. Brown, 20 Ga., 415; United States v. Thompson, Gilp., 614; Myrick v. Dame, 9 Cush., 248.

[2] Myrick v. Dame, last cited; Wilkins v. Lindo, 7 M. & W., 81; Wild v. Williams, 6 M. & W. 490; Eastman v. Wright, 6 Pick., 316; Bruen v. Marquand, 17 Johns., 58; Morse v. Bellows, 7 N. H., 549.

[3] Cuyler v. Cuyler, 2 Johns., 186; Jackson v. Stackhouse, 1 Cow., 122; Dew v. Jeffries, Cro. Eliz., 352; White v. Dingley, 4 Mass., 433; Reed v. Shaw, 1 Blackf., 245; Garnett v. Macon, 6 Call, 308.

[4] Clark v. Bush, 3 Cow., 151.

[5] Bishop Cont. (Enl. Ed.), §§ 130-137, 852; Canal Co. v. Ray, 101 U. S., 522, 527.

[6] Gross v. Nugent, 5 B. & Ad. 58, 65, 66; Cummings v. Arnold, 3 Met., 486; Stearns v. Hall, 9 Cush., 31.

and thus discharge the debt. It has been held, however, that in a contract of sale, where the property has passed, as much formality will be required to re-vest the title in the vendor, as against the vendee's creditors, as was necessary to transfer the title to the vendee.[1] In case of a fraudulent sale, the defrauded party may, on discovery of the fraud, rescind the contract and relieve himself from all liability thereunder, provided the parties can be placed *in statu quo*.[2]

6. *Lapse of time.*—Discharge by lapse of time has been considered under the head of "Limitations,"[3] and requires no further discussion in this connection.

7. *Novation.*—This is briefly and comprehensively defined by Bouviere thus: "The substitution of a new obligation for an old one, which is thereby extinguished."[4]

For the present purpose it is only necessary to notice two kinds of novation: First, when a new debt takes the place of an old one, thus discharging it, the debtor and

[1] Quincy v. Tilton, 5 Me., 277; State of Maine v. Intoxicating Liquors, 61 Me., 520; Gleason v. Drew, 9 Me., 81; Beecher v. Mayall, 16 Gray, 376.

[2] Voorhies v. Earl, 2 Hill, 292; Lucy v. Bundy, 9 N. H., 278; Miner v. Bradley, 22 Pick., 457; Coolidge v. Brigham, 1 Met., 550; Fullager v. Reville, 3 Hun, 600; Higham v. Harris, 108 Ind., 246; Prentiss v. Russ, 16 Me., 30; Downer v. Smith, 32 Vt. 1; Matterson v. Holt, 45 Vt. 336; Water's Pat. Heating Co. v. Smith, 120 Mass. 444; Baker v. Lever, 67 N. Y., 304; Warren v. Tyler, 81 Ill., 15; Shaw v. Barhart, 17 Ind., 183; Blen v. Bear River, etc., Co., 20 Cal., 602; Pence v. Langdon, 99 U. S., 578; Street v. Blay, 2 Barn. & Ad., 456; Tiede. Sales, § 163.

[3] *Supra*, §§ 118, 119.

[4] 2 Bouv. L. Dict., "Novation;" And. L. Dict. "Novation."

creditor remaining the same; and, second, when the debt remains the same, but a new debtor is substituted for the old, who is thereby discharged.

To effect a novation several things are essential; first, there must be an existing valid obligation, else there will be nothing to extinguish; second, the parties innovating must consent to the substitution; and, third, there must be an express intention to innovate. An important consequence of the innovation is, that the extinction of the old debt destroys all the rights and liens thereto pertaining.[1]

8. *Former recovery.*—First, what is the effect of a judgment, as *res judicata?* The doctrine, stated generally, is, that a judgment of a court of competent authority, having jurisdiction of the subject matter and of the parties is, while unreversed, conclusive of the questions in issue, as between the parties and privies, whether privies in estate, in blood, or in law.[2] From this doctrine, and principles herein-before stated, it follows that when a simple contract debt, or a specialty debt, is merged in a judgment, the original debt is extinguished. The doctrine of *res judicata* as now stated, is generally held to apply to foreign judgments *in rem*, with the same

[1] 1 Pars. Cont. (7th Ed.), p. 217, *et seq.*; 2 Whart. Cont., § 852, *et seq.*

[2] 1 Bouv. L. Dict., "Former recovery;" 2 Id. "*Res judicata;*" 1 Greenl. Ev., § 522, *et seq.*; 2 Pars. Cont. (7 Ed.), p. 867, *et seq.*; Best Ev., pp. 574, 577, 580; Bishop Cont. (Enl. Ed.), § 270; *Supra*, under § 141; Hollister v. Abbott, 31 N. H., 442; Wall v. Wall, 28 Miss., 409; Lagrange v. Ward, 11 Ohio, 257; Trammell v. Thurmond, 17 Ark., 203; Hart v. Jewett, 11 Iowa, 276; Vandyke v. Bastedo, 15 N. J. L., 224; Kelly v. Mize, 3 Sneed (Tenn.), 59; Pierson v. Catlin, 18 Vt., 77; Martin v. Hunter, 1 Wheat., 304; Smith v. Maryland, 6 Cranch, 286.

force and effect as to domestic; but in regard to foreign judgments *in personam*, the authorities are not in full agreement.[1] The scope of this work will not permit a discussion of this point.

Although dealing with contracts, it may be of service to the student to notice in this connection that a satisfied judgment in trover, not only extinguishes the plaintiff's claim for the injury sustained, but invests the defendant with title to the property wrongfully converted by him.[2]

It may be stated generally, in conclusion, that debts may be discharged by performance of the condition of the obligation, whatever it may be, as the payment in full of a money bond, or the production of a party in court in pursuance of the exigency of a recognizance.

III. *Mortgages.*

§ **143. Definition, and essential elements.**—A chattel mortgage is the transfer of the title to personal property as security for a debt or obligation, upon condition subsequent, express or implied, that payment of the debt when due and payable, or discharge of the obligation, shall operate as a defeasance and re-vest the title in the mortgagor; but on default of payment, or discharge of the obligation, the title shall become absolute in the mortgagee.[3]

[1] 1 Greenl. Ev., §§ 541, 546.

[2] Bishop Non-Cont. Law, § 399; Osterhout v. Roberts, 8 Cow. 43; Foreman v. Nelson, 2 Rich. Eq., 287; Cooper v. Shepherd, 3 C. B. 266; Rice, Robertson v. Montgomery, Rice, 87; Chartrau v. Schmidt, Id., 229; Hepburn v. Sewell, 5 Har. & J., 211; Spivey v. Morris, 18 Ala., 254; Smith v. Alexander, 4 Sneed, 482.

[3] Parshall v. Eggert, 52 Barb., 367; Porter v. Parmly, 42 How. Pr.,

An analysis of the definition will show the essential elements of the mortgage in question.

1. A transfer of title to the chattels from the mortgagor to the mortgagee.

2. It must be intended as a security for a debt or obligation.

3. The transfer of title must be upon the condition, express or implied, that payment of the debt when due and payable, or discharge of the obligation, shall operate as a defeasance, and re-vest the title in the mortgagor.

4. That on default of payment, or performance of the condition, the title shall become absolute in the mortgagee.

§ 144. Formal requisites.—No particular form of words is requisite to constitute a mortgage. Whatever be the form or language of the instrument, if it shows an intention of transferring title to the goods as security, subject to defeasance, it will constitute a chattel mortgage.[1]

Parol chattel mortgages.—These are valid at common

445; Thomson v. Batie, 11 Neb., 147, 151; Miner v. Judson, 2 Hun, 441; Mowry v. Wood, 12 Wis. 413; Palmer v. Shirley, 16 Ind., 380; Scott v. Henry, 13 Ark., 112; Ing v. Brown, 3 Md. Ch., 521; Carpenter v. Snelling, 97 Mass., 452; Taber v. Hamlin, 97 Mass., 498; Smith v. Beattie, 31 N. Y., 542; Mosley v. Crocket, 9 Rich. (S. C.), Eq., 339; Talbot v. DeForest, 3 Iowa, 586; Flanders v. Barstow, 18 Me., 357; Conner v. Carpenter, 28 Vt., 237; Tiede Sales, § 221, *et seq.*

[1] Hart v. Burton, 7 J. J. Marsh. 322; Farmers', etc., Bank v. Lang, 87 N. Y., 209; Fowler v. Stoneman, 11 Tex., 478; Bunacleugh v. Polman, 3 Daly, 236; McKnight v. Gordon, 13 Rich. Eq., 221; Moore v. Murdock, 26 Cal., 514; Bartels v. Harris, 4 Me., 146; Barfield v. Cole, 4 Sneed, 465; Cooper v. Brock, 41 Mich., 488.

law, but to satisfy the Statute of Frauds they must be in writing.[1] And quite generally in the States of the Union there are statutes providing, in effect, that as against creditors and subsequent purchasers and mortgagees in good faith, chattel mortgages shall not be valid without recording or filing; which provisions, by implication, require a written instrument. But notwithstanding these statutes, parol mortgages, as between the parties, may be valid and enforceable.[2]

Separate Defeasance.—While one instrument usually and properly contains both the grant and defeasance, the latter may be in a separate instrument without affecting the validity of the mortgage. But it must either be executed at the same time, or subsequently in pursuance of an agreement made at the same time, of the transfer of title. When thus executed the two instruments, in virtue of an elementary principle of the law of contracts, constitute but one in contemplation of law.[3]

Parol defeasance.—It is a well-established common law rule, that parol evidence is inadmissible to vary or contradict a written instrument. This rule applied, an unconditional sale cannot be converted into a conditional transfer by parol. But equity relaxes the strict legal rule, and receives parol evidence to show that an absolute bill of sale was intended by the parties as a mortgage.

[1] *Supra*, § 102.

[2] Bank of Rochester v. Jones, 4 N. Y., 497; Flory v. Denny, 7 Exch., 581; Morrow v. Turney, 35 Ala., 131; Ceas v. Bramley, 18 Hun, 187, 188; Couchman v. Wright, 8 Neb., 1; Beeman v. Lawton, 37 Me., 543; May v. Estin, 2 Port., 414, 422.

[3] Freeman v. Baldwin, 13 Ala., 246; Bishop Cont. (Enl. Ed.), § 165; 2 Pars. Cont., p. 503.

Courts of law have caught the spirit of equity which "mitigates the rigor of the law itself," and now quite generally admit parol evidence for the purpose of showing that a written transfer of personal property, absolute on its face, was in fact conditional, intended simply as a defeasible security.[1]

There are cases, however, that adhere strictly to the common law rule, and refuse to receive parol evidence where the effect would be to vary or contradict the written instrument; while other cases confine the introduction of such evidence to cases of fraud, accident or mistake.[2]

§ 145. Subjects of a chattel mortgage. — Stated generally, all kinds of personal property, corporeal or incorporeal, in possession or in action, may be mortgaged. A party may mortgage anything in which he has a property, absolute or qualified, and which can be the subject of an absolute sale. For examples: The interest of a vendee in the subject of a conditional sale,

[1] Hodges v. Tenn. M. & F. Ins. Co., 8 N Y., 416; Coe v. Cassidy, 72 N. Y., 133, 137; Farrell v. Bean, 10 Md., 217; Caswell v. Keith, 12 Gray, 351; Hazzard v. Loring, 10 Cush., 267; Stokes v. Hollis, 43 Ga., 262; Todd v. Harding, 5 Ala., 698; Scott v. Henry, 13 Ark., 112; Hurford v. Harned, 6 Oreg., 362; Bartel v. Lope, Id., 321; Love v. Blair, 72 Ind., 281; Wilmerding v. Mitchell, 52 N. J. L., 476; Babcock v. Wyman, 19 How., 239; Sprigg v. Bank of Mt. Pleasant, 14 Pet., 201; Farmer v. Grose, 42 Cal., 169; Klock v. Walter, 70 Ill., 416; Heath v. Williams, 30 Ind., 495; Zuver v. Lyons, 40 Iowa, 570.

[2] Porter v. Nelson, 4 N. H., 130; Bassett v. Bassett, 10 N. H., 64; Boody v. Davis, 20 N. H., 140; McKinstry v. Conly, 12 Ala., 678; Sewell v. Price, 32 Ala., 97; Washburn v. Merrills, 1 Day, 139; Whitfield v. Cates, 6 Jones, Eq., 136; Brainerd v. Brainerd, 15 Conn., 575; Collins v. Tillon, 26 Conn., 368; French v. Burns, 35 Conn., 359; Chaires v. Brady, 19 Fla., 133.

if he be in possession of the goods;[1] an owner of a chattel having a general property therein, may mortgage it, notwithstanding another party has acquired possession under a special title, as in case of a pledge or lien;[2] grass growing, when it is owned by one who does not also own the land;[3] a tenant in common may mortgage his undivided share, subject, of course, to the rights of the other co-tenants, whatever they may be.[4]

The relation of this subject to fixtures presents questions of some difficulty, owing to the peculiar character of this species of property.[5] When impressed with the character of personal property, they may be the subject of a chattel mortgage; and they will possess and retain this character while removable by the tenant, or whoever annexed them to the land.[6] And it has been held, that if a mortgage be given for the purchase price of a chattel, the thing will remain personal property, as to the parties to the mortgage and all others having notice of it, although subsequently annexed to the freehold.[7] It

[1] Everett v. Hall, 67 Me., 497; Crompton v. Pratt, 105 Mass., 255; Greenway v. Fuller, 47 Mich., 557; Day v. Bassett, 102 Mass., 445; Holman v. Lock, 51 Ala., 287.

[2] Prindell v. Grooms, 18 B. Mon., 501; McCalla v. Bullock, 2 Bibb, 208; Smith v. Coolbaugh, 21 Wis., 427.

[3] Smith v. Jenks, 1 Denio, 580; 1 N. Y., 90.

[4] Gaar v. Hurd, 92 Ill., 315; Smith v. Rice, 56 Ala., 417; Shuart v. Taylor, 7 How. Pr., 251; Powder v. Rhea, 32 Ark., 435; Leland v. Sprague, 28 Vt., 746; Thompson v. Spittle, 102 Mass., 207; Nichol v. Stewart, 36 Ark., 612; Monroe v. Hamilton, 6 Ala., 226; Smith v. Andrews, 49 Ill., 28; Moline Wagon Co. v. Rummell, 2 McCrary, 301.

[5] See "Fixtures," *supra*, §§ 9, 10.

[6] Denham v. Sankey, 38 Iowa, 269; Smith v. Benson, 1 Hill, 176; Goodnow v. Allen, 68 Me., 308; Lamphere v. Lowe, 3 Neb., 131, 134.

[7] Ford v. Cobb, 20 N. Y., 344; Corcoran v. Webster, 50 Wis., 125;

is held, however, that such a mortgage is not enforceable against subsequent purchasers and mortgagees of the land without notice of the incumbrance upon the fixture.[1] And some of the decisions take the ground that where property, personal in its nature, has become so attached to the land that it cannot be removed without serious injury to the freehold, the chattel mortgage upon it is not enforceable against subsequent purchasers or mortgagees of the land, even though they had actual notice of the prior incumbrance upon the fixture.[2]

There has been considerable discussion, and some conflict of judicial opinion as to whether the filing of the mortgage will protect the mortgagee of fixtures against subsequent purchasers or mortgagees of the real estate. The weight of authority seems to be that it would not; that the constructive notice by filing will only affect subsequent purchasers and incumbrancers of the fixtures; and that nothing short of actual notice or knowledge would be sufficient as against subsequent purchasers and mortgagees of the land.[3]

§ 146. Possession of the mortgaged property.— Upon the execution and delivery of the mortgage, the mortgagee is entitled to the immediate possession of the

Kinsey v. Bailey, 9 Hun, 420; Sisson v. Hubbard, 10 Hun, 420; Coman v. Lakey, 80 N. Y., 345; Eaves v. Estes, 10 Kan., 314; Herryford v. Davis, 102 U. S., 235; Tift v. Horton, 53 N. Y., 377.

[1] Coman v. Lakey, 80 N. Y., 345; Voorhees v. McGinnis, 48 N. Y., 278, 287; Pierce v. George, 108 Mass., 78.

[2] See cases cited *supra*.

[3] Bringhoff v. Munzenmaier, 20 Iowa, 513; Richardson v. Copeland, 6 Gray, 536; Ford v. Cobb, 20 N. Y., 344. And see Snowdon v. Craig, 26 Iowa, 165; Fortman v. Goepper, 14 Ohio St., 558; Brennan v. Whittaker, 15 Ohio St., 446.

mortgaged property, except where the parties have expressly agreed that the mortgagor may retain possession until default. On this rule the authorities are in accord.[1] The title carries with it the right of possession, and the mortgagee, in the absence of an agreement that the mortgagor may retain possession, can maintain an action of trespass or trover against any person, even the mortgagor, who withholds or disturbs his possession.[2] But where the right of possession is reserved to the mortgagor until default, the mortgagee cannot maintain an action for the conversion of the chattels while the mortgagor's right continues. The action in such case must be brought by the mortgagor, as the right to immediate possession is requisite to the maintenance of the action of trover.[3] On default of the mortgagor the suspended right of possession vests in the mortgagee, and if the goods are not delivered on demand, the law will furnish him a remedy by action of replevin, or trover.[4]

[1] Ramsdell v. Tewksbury, 73 Me., 197; Brackett v. Bullard, 12 Met., 308; Broadhead v. McKay, 46 Ind., 595; Clark v. Whittaker, 18 Conn., 543; Ellington v. Charleston, 51 Ala., 166; Robinson v. Campbell, 8 Mo., 365; McGuire v. Benoit, 3 Md., 181; Smith v. Acker, 23 Wend., 654; Wilson v. Brannan, 27 Cal., 258.

[2] Hathaway v Brayman, 42 N. Y., 322; Curel v. Wunder, 5 Ohio St., 92; Simmons v. Jenkins, 76 Ill., 479; Calkins v. Clement, 54 Vt., 635; Hamilton v. Mitchell, 6 Blackf., 131; Shinners v. Brill, 38 Wis., 648; Tallman v. Jones, 13 Kan., 438; Ford v. Ransom, 39 How. Pr., (N. S.), 416; Pierce v. Hasbrouck, 49 Ill., 23.

[3] The cases last cited, *supra*; and McLeod v. Bernbold, 32 Ark., 671.

[4] Robinson v. Fitch, 26 Ohio St., 659; Lindeman v. Ingham, 36 Ohio St., 1, 9; Bell v. Shrieve, 14 Ill., 462; Whisler v. Roberts, 19 Ill., 274; Burton v. Tannehill, 6 Blackf., 470; Whitney v. Lowell, 33 Me., 318; Hall v. Snowhill, 14 N. J. L., 8; Coty v. Barnes, 20 Vt., 78.

The authorities warrant the statement that the mortgagee, by taking possession on default of the mortgagor, acquires the right to bar the mortgagor's equity of redemption by a sale of the mortgaged chattels; and this without any special grant in the mortgage of power to sell, or decree of court. The mortgagor and mortgagee in such case, it is held, sustain to each other a relation equivalent to that of pledgor and pledgee, the mortgagee having, like the pledgee, a right to sell after due notice to the mortgagor.[1]

§ 147. Mortgage distinguished from a pledge.—We have seen that a conditional transfer of the title to the property is essential to a chattel mortgage, but no such transfer takes place in case of a pledge. The pledgee takes possession of the goods, and acquires a special property therein, while the general property remains in the pledgor. Default of the pledgor does not work any change in the title of either party; a sale of the goods by the pledgee, on due notice to the pledgor, being the only way in which he can render the security available for its purpose. Whereas, on default of the mortgagor, the title to the property becomes, at law, absolutely vested in the mortgagee, no sale or decree of court being requisite to effect this result.[2]

[1] Charter v. Stevens, 3 Denio, 33; Patcline v. Pierce, 12 Wend., 61, 63; Craig v. Tappin, 2 Sandf. Ch., 78, 90; Hall v. Bellows, 11 N. J. Eq., 333; Denny v. Faulkner, 22 Kan., 89; Broadhead v. McKay, 46 Ind., 595; Wilson v. Brannan, 27 Cal., 258; Talman v. Smith, 39 Barb., 390; Flanders v. Chamberlain, 24 Mich., 305; Landon v. Emmons, 97 Mass., 37.

[2] White v. Cole, 24 Wend., 116; Gifford v. Ford, 5 Vt., 532; Wright v. Ross, 36 Cal., 414; Walker v. Staples, 5 Allen, 34; Conner v. Carpenter, 28 Vt., 237; Evans v. Darlington, 5 Blackf., 320; Eastman

Another distinction between a mortgage and a pledge is, that to constitute the latter, a transfer of possession to the pledgee is essential; while the retention of the property by the mortgagor does not necessarily affect the validity of the mortgage; and quite generally now a stipulation is inserted in the mortgage reserving to the mortgagor the right of possession till default in the condition.[1]

In some of the States there are statutory provisions for recording or filing chattel mortgages, and on compliance with these provisions the mortgagor may retain possession of the goods without endangering the security of the mortgagee. And where such provisions do not exist, it is generally held that retention of possession by the mortgagor, does not invalidate the mortgage, except as against subsequent *bona fide* purchasers and incumbrancers, and creditors.[2]

§ 148. Equity relief of the mortgagor.—Hitherto we have been considering chattel mortgages under the common law. The discussion would be incomplete without some notice of the rules of equity applicable to this species of security. At law, on default of the mortgagor the title to the mortgaged property becomes abso-

v. Avery, 23 Me., 248; Heyland v. Badger, 35 Cal., 404; Doak v. Bank of the State, 6 Ired. (N. C.), L., 309; Mowry v. Wood, 12 Wis., 413.

[1] Parshall v. Eggert, 52 Barb., 367; Barsow v. Paxton, 5 Johns., 258; Bucklin v. Thompson, 1 J. J. Marsh. (Ky.), 223; Letcher v. Norton, 5 Ill., 575; Hull v. Carnley, 2 Duer, 99.

[2] Morrow v. Turney, 35 Ala., 131; Hackett v. Manlove, 14 Cal., 85; Golden v. Cockrill, 1 Kan., 259; Johnson v. Jefries, 30 Mo., 423; Smith v. Moore, 11 N. H., 55; Winsor v. McLellan, 2 Story, 492.

lute in the mortgagee;[1] the mortgagor's rights and remedies are extinguished, notwithstanding his default may have arisen from accident or circumstances beyond his control; and the mortgaged property may far exceed in value the mortgage debt. A tender of the debt in full, with interest, would be of no avail. From the oppressive operation of this rigorous common law rule, a court of equity will relieve the mortgagor, by permitting him to redeem, on making a legal tender of the debt, principal and interest, in full.[2] While the law treats a chattel mortgage as a defeasible sale of the property, and a transfer of the title, equity regards it as a lien, simply, giving the mortgagee a special property in the mortgaged chattels by way of security.[3]

§ 149. Conditional sales with the right to re-purchase, distinguished.—We are now prepared to distinguish between a chattel mortgage and a conditional sale with the right to re-purchase. The features of the two contracts are so much alike, and the inartificial manner in which written instruments are often drawn, that in

[1] *Supra*, § 143.

[2] Charter v. Stevens, 8 Denio, 33; Wylder v. Crane, 53 Ill., 490; Flanders v. Barstow, 18 Me., 357; Dupuy v. Gibson, 36 Ill., 197; Smith v. Coolbaugh, 21 Wis., 427; Wilson v. Brannan, 27 Cal., 258; Blodgett v. Blodgett, 48 Vt., 32; Flanders v. Chamberlain, 24 Mich., 305; Bragleman v. Dane, 69 N. Y., 69; West v. Crary, 47 N. Y., 423.

[3] See cases last cited, *supra*; and Davis v. Hubbard, 38 Ala., 185, 189; Sidener v. Bible, 43 Ind., 230; Evans v. Merriken, 8 Gill & J., 39; Headley v. Goundray, 41 Barb., 282; Kinna v. Smith, 2 Green., Ch. 14; Eaton v. Whiting, 3 Pick., 484; Anderson v. Baumgartner, 27 Mo., 80; Ragland v. Justices, 10 Ga., 65; Timms v. Shannon, 19 Md., 296; Whitney v. French, 25 Vt., 663; Ellison v. Daniels, 11 N. H., 280; Deedly v. Cadwell, 19 Conn., 218; Hughes v. Edwards, 9 Wheat., 500.

many cases special care is required to distinguish the one from the other. In both there is a conditional sale which passes the title from the vendor to the vendee; the difference between them being that in case of a sale with the right to re-purchase, the right must be exercised, if at all, within the time limited by the contract; while in the case of a mortgage the right of redemption exists and may be exercised after default or condition broken. In short, the distinguishing feature is, the equity of redemption in the latter case, and the absence of it, or its equivalent, in the former. It is obviously quite desirable to have a test which, applied to a contract of conditional sale in cases of obscurity and doubt, will determine whether it is a mortgage or a sale with a right to re-purchase. Such a test is found in answer to the question: Was the transfer made as a security for a debt or liability? If yea, it is a mortgage; if nay, it is not a mortgage, but a sale with the right of re-purchase. The purpose of security, we have seen, is the very essence of a mortgage; and whatever the form of words, if the instrument manifests such intention, it may safely be pronounced a mortgage.[1]

§ 150. Foreclosure of the equity of redemption.— When the mortgage contains a stipulation that the mortgagee may sell the property on default of the mortgagor,

[1] *Supra*, §§ 143, 144; and Robinson v. Cropsey, 2 Edw., Ch. 138; Woodson v. Wallace, 22 Pa. St., 171; Kelly v. Thompson, 7 Watts, 401; Trucks v. Lindsay, 18 Iowa, 505; Page v. Foster, 7 N. H., 392; Flagg v. Mann, 14 Pick., 483; Pearson v. Seay, 35 Ala., 612; Rice v. Rice, 4 Pick., 349; Hughes v. Sheaff, 19 Iowa, 335; Heath v. Williams, 30 Ind., 495; Glover v. Payne, 19 Wend., 518; Cornell v. Hall, 22 Mich., 377; Kearney v. McComb, 16 N. J. Eq., 189.

as a means of satisfying the debt; or if, without such stipulation, he has possession of the property after default, he may make an absolute sale of the same, and thus bar the mortgagee's equity of redemption. This procedure avoids the necessity of the more dilatory and expensive foreclosure by bill in equity. In the absence of statutory requirements, the mortgagee may sell the goods at private sale, or at public auction;[1] but the sale must be conducted in good faith and fairness towards the mortgagor.[2]

In many of the States there are statutory provisions authorizing the foreclosure of chattel mortgages, and prescribing the procedure; and, in obedience to a well settled rule, these provisions must be substantially complied with in order to effect a regular and valid foreclosure. This rule applies to courts as well as to individuals.[3]

Independent of statutory provisions, however, a court of equity has power to decree a foreclosure of a chattel mortgage.[4] And there may be a foreclosure in equity notwithstanding a power of sale is contained in the

[1] Waite v. Dennison, 51 Ill., 319; Wylder v. Crane, 53 Ill., 490; McConnell v. People, 84 Ill., 583.

[2] Hale v. Omaha Nat. Bank, 64 N. Y., 550; Robinson v. Bliss, 12 Mass., 428; Stoddard v. Dennison, 38 How. Pr., 296; Hall v. Ditson, 52 How. Pr., 19; Gordon v. Clapp, 113 Mass., 355; Hungate v. Reynolds, 72 Ill., 425.

[3] Mossman v. Forrest, 27 Ind., 233; Cooper v. Sunderland, 3 Iowa, 114.

[4] Morris v. Tillson, 81 Ill., 607; Broadhead v. McKay, 46 Ind., 595; Brown v. Greer, 13 Ga., 285; Hammers v. Dole, 61 Ill., 307; Dupuy v. Gibson, 36 Ill., 197; Freeman v. Freeman, 17 N. J. Eq., 44; Packard v. Kingman, 11 Iowa, 219; Blakemore v. Tabor, 22 Ind., 446.

mortgage, designed as a substitute for an equity foreclosure.[1]

IV. *Bottomry, and Respondentia, Bonds.*

§ 151. Defined and explained.—A bottomry bond is a contract by which a ship is hypothecated as a security for money borrowed for its use, by the owner, or the master or his agent, on maritime interest.

It is called a bottomry bond because the keel or *bottom* is hypothecated as representing the whole ship, *pars pro toto.*

The term "hypothecation," borrowed from the civil law, is used to distinguish it from a chattel mortgage, from which it differs, and from a pledge, in which the possession of the property is given to the pledgee.

The term "maritime interest" means extraordinary interest, which is allowable and paid on account of the marine risk assumed by the lender. The risk arises from certain perils enumerated in the bond, it being stipulated therein, that if the ship be lost in the course of the specified voyage, or during the time limited in the contract, by any of the enumerated perils, the lender shall lose his money, principal and interest. Thus the lender, by assuming the risk, becomes a kind of insurer, and is permitted to stipulate for a premium in the shape of extraordinary interest.[2]

[1] Briggs v. Oliver, 68 N. Y., 339; Rich v. Milk, 20 Barb., 616; Marx v. Davis, 56 Miss., 745; Long Dock Co. v. Mallory, 12 N. J. Eq., 93.

[2] Abb. Ship. (7 Am. Ed.), p. 202, *et seq.*; 2 Bouv. L. Dict., "Bottomry;" 2 Pars. Cont., p. 280, *et seq.*; 1 Sch. Pers. Prop., p. 559, *et seq.*; The Draco, 2 Sumn., 157; Thorndike v. Stone, 11 Pick., 183; Bray v. Bates, 9 Met., 235.

A respondentia contract or bond is substantially the same as that of bottomry, except that it hypothecates the cargo instead of the ship and its tackle.[1] The two contracts may be embraced in one instrument.

It will be seen that the peculiarity of these bonds which distinguishes them from other forms of security is, that the lender assumes the risk of certain perils, and takes the chance of losing his money with the security in the event that the ship, or cargo, be lost by any of the enumerated perils; but receives for the use of his money, and the risk assumed, maritime interest, in case the ship or cargo—whichever be the subject of the contract—escapes loss or injury from the specified perils.[2]

§ 152. Hypothecation by the master, or the owner. —The master of a ship, from the nature and circumstances of his duties and responsibilities, is clothed with extraordinary powers as an agent, especially when at sea, or in a foreign port. He is often compelled to decide and act in exigencies involving the safety of the vessel and cargo, and consequently the interest of the owners, without an opportunity of communicating with them, and receiving special instructions for the emergency. Among the powers conceded to, and exercised by the master from an early period in the history of

[1] 2 Bouv. L. Dict., "Respondentia;" and authorties last *supra*.

[2] In addition to cases cited last *supra*, see The Cognac. 2 Hagg. Adm., 387; Sharpley v. Hurrell, Cro. Jac., 208; Simonds v. Hodgson, 3 Barn. & Adol., 50; Jennings v. Ins. Co. of Pa., 4 Binn, 244; Greeley v. Waterhouse, 19 Me., 9; Leland v. The Ship Medora, 2 Woodb. & M., 92; The Bray v. Bates, 9 Met., 237; Thorndike v. Stone, 11 Pick., 187; Rucher v. Conyngham, 2 Pet. Adm., 295; The Mary, 1 Paine, 671; Northwestern Ins. Co. v. Seward, 36 N. Y., 139.

navigation and maritime law, is that of hypothecating the ship, or cargo, or both, on bottomry and respondentia bonds. The power may be exercised in a foreign port, in the absence of the owners or employers, for the purpose of raising money for repairs or equipment, or to enable the ship to return to her home port. But, it must be a case of necessity, both as to the money required, and this way of raising it; so that, if the necessary amount of money can be obtained on the credit of the owners or employers of the ship, or otherwise, the master is not authorized to borrow it on bottomry or respondentia.[1]

The owners, or part owners, may hypothecate the ship by a bottomry contract, to the extent of their respective interests.[2] While in a bottomry contract by the owner the necessity of hypothecation is not essential to its validity, as in case of the master, it is essential that the lender should assume the risk, and put his money at hazard, in order to constitute a bottomry bond proper.[3] The owner may, of course, mortgage or

[1] Story Agen., § 116; Abb. Ship. (7 Am. Ed.), p. 203; 2 Pars. Cont. (7 Ed.), pp. 281, 284; Putnam v. The Polly, Bee Adm., 157; The Aurora, 1 Wheat., 96; Hurry v. The John and Alice, 1 Wash., 293; Walden v. Chamberlin, 3 Wash., 290; Crawford v. The William Penn, Id., 484; Patton v. The Randolph, Gilp., 457; Kleimworth v. Marrittinia, 2 App. Cas., 156; The Fortitude, 3 Sumn., 246; The Ship Packet, 3 Mason, 255; The Royal Stuart, 33 Eng. L. & Eq., 602.

[2] The Duke of Bedford, 2 Hagg. Adm., 294; The Mary, 1 Paine, 671; The Draco, 2 Sumn., 157; The Hilarity, Blatchf. & H. Adm., 90; Miller v. The Rebecca, Bee Adm., 151; Thorndike v. Stone, 11 Pick., 183; Greeley v. Waterhouse, 19 Me., 9.

[3] See The Jane, 1 Dod., 466; The Emancipation, 1 Wm. Rob., 129; The Lord Cochrane, 2 Wm. Rob., 320; The Hunter, Ware, 341; The Brig Atlantic, 1 Newb. Adm., 514.

pledge his ship, as he could any other personal property, subject to the common law rules applicable to such securities.

§ 153. **Miscellaneous.**—There are some other rules connected with this subject which may be conveniently noticed in passing, without special regard to logical arrangement.

1. "The contract of hypothecation made by the master does not transfer the property of the ship, but only gives the creditor a privilege or claim upon it, to be carried into effect by legal process." [1]

2. The owner is not personally bound by a bottomry bond executed by the master; the personal remedy of the lender being against the master, unless the bond provides for his exemption from personal liability.[2]

3. A bottomry bond takes precedence as a security to every other claim for the voyage on which it is founded, except the claim for seamen's wages, which are sacred "as long as a single plank of the ship remains." [3]

If the lender on bottomry discharges the wages due to the crew, he will be entitled to the same priority and lien on the proceeds of the ship, which they would have.[4]

[1] Johnson v. Shippin, 2 Ld. Raym., 984; Blaine v. Ship Charles Carter, 4 Cranch, 328; United States v. Delaware Ins. Co., 4 Wash. C. C. 418.

[2] The Nelson, 1 Hagg., 169, 176; Stainbank v. Fanning, 6 Eng. L. & Eq., 412; The Virgin, 8 Pet., 538.

[3] The Sidney Cove, 2 Dod., 1, 13; The Madonna D'Idra, 1 Dod., 40; Blaine v. The Ship Charles Carter, 4 Cranch, 328; The Mary Ann, 9 Jur., 95; The Constancia, 10 Jur., 850.

[4] The Kammerheive v. Rozencratz, 1 Hagg. Adm., 62; The Virgin, 6 Pet., 583.

4. The bottomry bond does not vest in the lender any absolute indelible interest in the ship; hence, as against subsequent purchasers or creditors it must be enforced within a reasonable time, or yield to their superior equities. So, also, as to judgment creditors; if, for example, the bottomry holder permits the ship to make several voyages without asserting his lien, and in the mean time other creditors levy executions upon the ship, the holder will lose his lien.[1]

5. On the arrival of the ship in the home port, if the loan be not paid according to its terms, the bottomry holder has his remedy in the Court of Admiralty, by a proceeding *in rem*. On the proper application to the Court under the procedure in Admiralty, the ship will be seized and held to await the adjudication of the claims of the several parties interested, who will be cited to appear before the Court, if they wish to be heard. The Court has power to decree a sale of the ship, if necessary, which will be conducted by the Marshal of the District, or other proper officer, and the proceeds brought into court for distribution among the claimants, as justice and equity may require.[2]

6. It should be mentioned in this connection that a bottomry bond may be sustained as to some of the claims for which it was given, and held invalid as to others; in other words, it may be good in part, and bad in part.[3]

[1] Blaine v. The Ship Charles Carter, 4 Cranch, 328; Leland v. Medora, 2 Woodb. & M., 92, 105; Packard v. Louisa, Id., 49; The Chusan, 2 Story C. C., 468; The Brig Nestor, 1 Sumn., 85.

[2] Abb. Ship. (7 Am. Ed.), p. 223.

[3] The Aurora, 1 Wheat., 96; The Packet, 3 Mason, 255; The Tartar, 1 Hagg., 1; The Nelson, Id., 169; The Hero, 2 Dod., 139.

7. While, as a rule, the maritime interest may be what the parties agree upon, the Court has power to reduce it, and will do so if, under all the circumstances, the rate be oppressive and unjustifiable. In the exercise of this power, however, the Court will act with caution, and, in the absence of fraud, will disturb the agreement of the parties only in extreme cases, and in obedience to the imperative demands of justice and equity.[1]

V. *Rent.*

§ 154. Definition and properties. — Mr. Washburn defines rent as "a right to the periodical receipt of money or money's worth in respect of lands, which are held in possession, reversion or remainder, by him from whom the payment is due."[2] In Bouviere's Law Dictionary we find the following definition: "A return or compensation for the possession of some corporeal inheritance, and is a certain profit, either in money, provisions, or labor, issuing out of the lands and tenements, in return for their use."[3] Careful attention to these definitions will show that the principal and characteristic properties of rent are, a profit to the proprietor of lands or tenements, certain in its character or capable of being reduced to a certainty, issuing periodically out of the subject of the demise to or possession of the party from whom payment is due, which must be corporeal in its nature. The proprietor is called the *landlord*, the other

[1] The Zodiac, 1 Hagg., 320, 326; The Ysabel, 1 Dod., 273; The Augusta, Id., 283; The Packet, 3 Mason, 255; Wilmer v. The Smilax, 2 Pet. Adm., 295.

[2] 2 Washb. Real Prop., 272.

[3] 2 Bouv. L. Dict., "Rent." And. L. Dict. "Rent."

party, the *tenant*, and the profit or compensation for the use of the premises, the *rent*.[1] Rent cannot issue out of a mere privilege or easement.[2]

It is not essential to rent that the profit or compensation for the use of the land should be in money; it may be wheat, corn, or other produce of the land, fowls, or, indeed, any other personal property; so, also, it may consist in services or manual operations, rendered by the tenant to the landlord.[3]

§ 155. The kinds of rent.—At common law there are three kinds of rent, known, respectively, as rent service, rent charge, and rent seck.

Rent service, as its name indicates, is that in which corporal service is rendered in return or as a compensation for the use of the land; and this kind is annexed to and connected with a reversionary estate remaining in the grantor.

Rent charge, is where the owner of the rent has no future interest in the land, but in his grant reserves to himself a rent, with a clause authorizing its collection by distress.

Rent-seck — reditus siccus — is simply a rent reserved by deed, without the distress clause, and which can only be collected by an ordinary action at law.

There is another species of rent mentioned in the books, called *a fee-farm rent*, which is, in fact, a rent-

[1] 3 Kent Com., p. 460; 2 Bouv., L. Dict., "Rent;" Tayl., Land. and Ten., § 369, *et seq.*; Tiede Real Prop., §§ 641-646.

[2] 3 Kent Com., p. 461; 2 Black. Com., p. 41; Gilb. Rents, 9; Buzzard v. Capel, 8 Bru. & C., 141.

[3] Authorities cited *supra*, under this section.

charge issuing out of an estate granted in fee. It is, therefore, omitted in the foregoing classification.[1]

The design and scope of this work will not justify a full discussion of these different species of rent, with the rules applicable to each. And, indeed, such discussion would be of little benefit, by reason of the changes in the common law, both in England and the United States. The difference between them, so far as the remedy for their recovery is concerned, has been abolished in England,[2] and generally in this country, distress for rent being authorized if payment is not made or rendered when due. In some of the States of the Union, however, distress for rent has been abolished by statute in all cases.

The subject of rent is introduced and will be treated, mainly, in its character as a *chose in action*, which justifies its discussion in a treatise on Personal Property.

§ 156. Remedy by distress.—This is an ancient and efficient remedy for the collection of rent, when available for that purpose. At common law, as we have seen,[3] this remedy did not exist in case of rent-seck; but it has been extended by statute to all kinds of rent, and is now available to the landlord in most, if not all, of the States of the Union, except those in which distress for rent has been abolished by statute.

Originally, distress as a remedy extended to other cases than rent in arrear, as, for example, the case of

[1] Authorities, *supra*, under this section.

[2] 4 Geo. II, c. 28.

[3] *Supra*, § 155.

cattle of a stranger found by the owner of lands on his premises, *damage feasant.* The owner might distrain the cattle as a pledge until he received satisfaction for the injury sustained by the trespass.[1] In the case of rent in arrear, the landlord might seize any personal chattels found on the demised premises as a pledge for the payment of the over-due rent. In both cases, and others in which distress was allowable, the distraining party was bound to hold the pledge until the other party, as pledgor, saw fit to redeem it. If the other party offered pledges for the satisfaction of the injury, or the performance of his duty, and the landlord should persist in holding the chattels distrained, the owner thereof might recover them by writ of replevin.[2]

The ancient common law rule, and practice, have been so far changed, that distress now consists of a summary seizure and sale of the property subject to distress, to obtain satisfaction for the injury, or payment of the claim.

To the existence of the right of distress, and for its exercise, there are several essential elements and rules demanding attention.

1. There must be an actual demise, at a certain fixed *rent*, or an amount that may be reduced to a certainty by calculation.[3]

[1] 3 Black. Com., p. 7.

[2] Tayl. Land. and Ten., § 557; 3 Black Com., pp. 6, 7, and note.

[3] Dunk v. Hunter, 3 Barn & Adol., 332; Valentine v. Jackson, 9 Wend., 322; Grier v. Cowan, Addis., 347; Reeves v. McKenzie, 1 Bailey, 500; Moulton v. Norton, 5 Barb., 286; Jackson v. Smith, 1 Bay, 315; Smith v. Colson, 10 Johns., 91; Smith v. Fyler, 2 Hill, 648.

2. The relation of landlord and tenant must be fully completed, and not merely in contemplation; an agreement for a lease will not suffice; but the relation once established, the right of distraining being incident thereto, the landlord can only be deprived of it by a termination of the tenancy.[1] A parol lease will be sufficient to create the relation and authorize a distress.[2]

3. An unsatisfied judgment for the rent, does not, at common law, extinguish the right of distress.[3] A promissory note, given and accepted for the rent, will not defeat the right of distress, unless upon agreement of the parties to the effect that it shall so operate, or it be taken in absolute payment.[4] A surrender of part of the premises will not bar a distress as to the residue.[5] But it has been held, that if the landlord has treated his tenant as a trespasser he cannot lawfully distrain, even though the latter remains in possession down to the day of the distress.[6]

4. The right of distress is canceled by a legal tender of the amount due, although not made until after the

[1] Schuyler v. Leggett, 2 Cow., 660; Jack v Smith, 1 Bay, 315; Hegan v. Johnson, 2 Taunt., 148; Knight v. Bennett, 3 Bing., 361.

[2] Citations last *supra*, and Cornell v. Lamb, 2 Cow., 652.

[3] Snyder v. Kunckleman, 3 Penn., 490; Chipman v. Martin, 13 Johns., 240; Bautleton v. Smith, 2 Binn., 146; Bates v. Nellis, 5 Hill, 651.

[4] Peters v. Newkirk, 6 Cow., 103; Snyder v. Knuckleman, 3 Penn., 487; Harris v. Shipway, Bull. N. P., 182; Davis v. Fyde, 4 Nev. & M., 462; Bailey v. Wright, 3 McCord, 484; Warren v. Torney, 13 Serg. & R., 52.

[5] Peters v. Newkirk, 6 Cow., 103.

[6] Bridges v. Smyth, 2 Moore & P., 740; Jackson v. Sheldon, 6 Cow., 103.

rent-day; or even not till after the commencement of distress proceedings, provided the tender includes the expenses of such proceedings.[1] But it is too late after cattle are actually impounded, because they are then in custody of the law.[2]

5. Any one of several joint tenants may distrain for the whole rent, and may appoint an agent to do so without the assent of his co-tenants.[3] But co-parcenors, before partition, must all join in the proceedings; after partition they may severally distrain.[4] Tenants in common must distrain severally.[5]

At common law, the landlord could only distrain during the continuance of the term, as a privity of estate between the tenant and the distrainor was essential to the right of distress. By statute in England,[6] the rule was so changed that the distress could be made at any time within six months next following the determination of the lease, provided the landlord's title or interest still continued, and the tenant remained in possession; and this statute, in substance, has quite generally been adopted in the United States.[7] There are, also, various

[1] Williams v. Howard, 3 Munf., 277; Hunter v. Loconte, 6 Cow., 728; Six Carpenters' Case, 8 Rep., 146, b; Hunter v. Blain, 2 Bailey, 168; Virtue v. Beasly, 2 Mood. & M. 21.

[2] Ladd v. Thomas, 12 Ad. & El., 117.

[3] Pullen v. Palmer, 3 Salk., 207; Robinson v. Hoffman, 4 Bing., 562; Bearinger v. O'Hare, 26 Iowa, 259.

[4] Steadman v. Page, 1 Salk., 390; Co. Lit., 163, b.

[5] Whitley v. Roberts, 1 McClel. & Y., 107; Harrison v. Barnsby, 5 Term R., 246.

[6] 8 Anne, c. 14.

[7] Terboss v. Williams, 5 Cow., 407; Christman v. Floyd, 9 Wend., 340: Burne v. Richardson. 4 Taunt., 720; Buckup v. Valentine, 19

statutory provisions on the subject of distress in the several States of the Union, which must be consulted by the practitioner when necessary.

7. As a distress can only be taken for rent in arrear, the landlord cannot legally make the seizure until the day following that on which it is payable, the tenant having until the last minute of that day to make payment, and will not, therefore, be in default until the following day.[1] At common law, a distress for rent cannot be made in the night, but must be a work of the day, between sunrise and sunset.[2]

8. In making a distress, if there be several articles in the house subject thereto, the landlord may seize upon any one in the name of all, with the declaration that none shall be removed until his rent is paid; and this, it is held, will authorize him to follow an article thereafter removed without his consent.[3] The landlord, for the purpose of making a distress, may enter into any building through the doors and windows which are unfastened, but if fastened, he cannot lawfully break them open. If, however, an entrance be gained through an open outer door, an inner may be broken for the lawful purpose in view.[4]

Wend., 554; Bell v. Potter, 6 Hill, 497; Weller v. Shearman, 2 Denio, 362.

[1] Gano v. Hart, Hardin (Ky.), 297; Duppa v. Mayo, 1 Saun., 287; Evan v. Herring, 27 N. J. L., 243.

[2] Co. Litt., 142, a; Gilb. Distr., 50; Attenbergh v. People, Car. & P. 212; Tutton v. Darke, 5 Hurl. & N., 654; Sherman v. Duch, 16 Ill., 283; Fry v. Breckinridge, 7 B. Mon., 31.

[3] Wood v. Munn, 5 Bing., 10; see Hutchinson v. Scott, 2 Mees. & W., 809.

[4] 1 Rol. Abr., 671, 1, 7, 17; Co. Litt., 161, a; Semayn's Case, 5 Co.

9. It is the general common law rule, that all the movable goods and chattels found on the premises may be taken upon a distress for rent, whether they belong to the tenant, under-tenant, or some other person.[1] To this general rule, however, there are various exceptions, both at common law and by statute; but the exceptions are not uniform in number or character in all the States of the Union. It would not be profitable to notice them in detail here, did the limitations of the work permit, as the practitioner will necessarily acquaint himself with the peculiar laws of his own State on the subject.[2]

10. The goods and chattels distrained must be safely and properly kept, the tenant duly notified of the seizure, and then, after the expiration of the time prescribed by law, if due notice of the time and place of the sale has been given, and the chattels have not been redeemed, the landlord may sell them at public auction, or sufficient of them to pay the rent in arrear, together with interest and cost of distress proceedings. The place and mode of keeping the distrained property, the notice of seizure to, and day of grace for, the tenant, the notice and manner of sale, and other particulars connected with the proceedings, have varied in the course of time, and are not at present uniform throughout the Union. But the aim of legislation, and of the administration of the

R., 91; Williams v. Spencer, 4 Johns., 352; State v. Thackaw, 1 Bay, 358; State v. Armfield, 2 Hawks, 246.

[1] Spencer v. McGown, 13 Wend , 256; Holt v. Johnson, 14 Johns., 425; Kesler v. McConachy, 1 Rawle, 435; O'Donnel v. Seybert, 13 Serg. & R., 57; Howard v. Rawsay, 7 Harr. & J. 120; Davis v. Payne, 4 Rand., 334; Reeves v. McKenzie, 1 Bailey, 497; Blanch v. Bradford, 38 Pa. St., 344; Stevens v. Lodge, 7 Blackf., 594.

[2] See 3 Kent Com., pp. 476-479.

law, is, to afford the landlord a summary, efficient remedy for the collection of his rent, and at the same time to protect the tenant from injustice and oppression. On seizing the goods and chattels of the tenant, the distrainor is quite generally and very properly required to give notice to the former of the distress, with an inventory of the articles taken, and a statement of his claim for rent, thus affording him an opportunity of redeeming his chattels by paying the rent and costs, or of intelligently declining so to do for what he may deem sufficient reasons. Five days are usually allowed by law for redemption, and five days previous notice of the time and place of sale required; but as already stated, the rules governing the proceedings are not uniform.[1]

There are some minor incidental rules connected with this topic, the discussion of which is necessarily omitted, but to these the attention of the reader will be directed by a study of the rules and principles set forth in this section, and the authorities cited.

§ 157. Remedies by actions at law, and a suit in equity.—For rent in arrear the landlord has a remedy by action of debt, covenant, and assumpsit, and in some cases by a suit in equity.

1. *Action of debt.*—At common law an action of debt is, in most cases, the appropriate remedy. It is called by this name because it is brought for the recovery of debt, *eo nomine* and *in numero*. In the common law classification of actions, the term debt implies a liquidated or certain sum of money due.[2]

[1] Tayl. Land. and Ten., §§ 605-614; 3 Kent Com., p. 480.
[2] Steph. Pl. (9 Am. Ed.), p. 14; Chit. Pl. (7 Am. Ed.), p. 123.

While damages are generally awarded for the detention of the debt, they are in most cases only nominal, and not the principal object of the action, as in covenant and assumpsit.[1]

By this action all kinds of rent, certain in amount, are recoverable, whether the demise be by deed or by parol; and whether payable in money, or produce of the land reserved by the lease. If payable in money, the plaintiff will recover the debt, and interest on it from the time it became due and payable; if payable in produce, he will recover its value, and interest thereon from the stipulated time of delivery.[2]

As this action is founded on the privity of contract annexed to the person in respect to the estate, and follows it when the estate is transferred, the remedy passes with it. Hence, if the lessor grants his reversion, the remedy follows to the grantee, and if he assigns it the remedy passes to the assignee.[3]

2. *Action of covenant.*—This action lies for the recovery of damages for the breach of a covenant or contract under seal, whether express or implied, and whether contained in a deed poll or indenture.[4] It is the peculiar remedy for the breach of covenant when the damages are

[1] Tayl. Land. and Ten., § 615; 3 Kent Com., p. 472; McKeon v. Whitney, 3 Denio, 452.

[2] Denny v. Parnell, 1 Rol. Abr., 591, L. 28; Cheney's Case, 3 Leon., 260; Ven Rensselaer's Ex'rs v. Jewett, 5 Denio, 135.

[3] Walker's Case, 3 Rep. 22 b.; Humble v. Oliver, Cro. Eliz., 328; Howland v. Coffin, 12 Pick, 125.

[4] 1 Chitt. Pl. (7 Am. Ed.), p. 131; Steph. Pl. (9 Am. Ed.), p. 16; Tayl. Land and Ten., § 661; Gale v. Nixon, 6 Cow., 445.

unliquidated, depending upon the opinion of a jury.[1] But it is, in most cases, a concurrent remedy with the action of debt.[2] But there are some exceptions; as, for example, where there has been an eviction from part of the land, the action of covenant will not lie against the lessee, because his liability arises on his personal covenant, which cannot be apportioned; nor can a person not a party or privy to the deed maintain an action of covenant, except where the common law rule has been changed by statute.[3] It lies only in favor of a person who is a party to the covenant, and in the name of the covenantee, who holds the legal interest; not in the name of a person only beneficially interested; nor can such person be joined in the action.[4]

3. *Action of assumpsit.*—The action of assumpsit gives still another remedy. This action lies for a breach of a *simple contract*, that is a contract not under seal, whether *parol* or written. It may be either express or implied. Where there is no express promise, the law implies a promise to do that which a party is, in justice, bound to perform; in other words, if the party makes no promise for himself in such case, the law makes it for him by imputation.[5] A landlord may recover in this action a reason-

[1] Richards v. Killam, 10 Mass., 243, 247; Smith v. Stewart, 6 Johns., 48.

[2] March v. Freeman, 3 Lev., 383; Byron v. Johnson, 8 Term R., 410; Hartshorne v. Watson, 5 Scott, 506.

[3] Tayl. Land. and Ten., § 662.

[4] Jenkins v. Norton, 3 B. Mon. (Ky.), 28; Wolf v. Washburn, 6 Cow., 201; Strohecker v. Grant, 18 Serg. & R., 237; Lord Southampton v. Brown, 6 Barn. & C., 718; Howe v. Howe, 1 N. H., 49; Berkly v. Hardy, 5 Barn. & C., 355.

[5] Steph. Pl. (9 Am Ed.), p. 19; 1 Chit. Pl. (7 Am. Ed.), pp. 112, 113; Bishop Cont. (Enl. Ed.), § 184; 2 Black. Com., p. 443.

able satisfaction for the use and occupation of his lands and tenements under any agreement, express or implied, not under seal. The recovery is not for *rent*, technically, as in the action of debt, but an equivalent therefor, namely, a reasonable compensation for the use and occupation of the premises. If the compensation is fixed by agreement, it will govern the measure of damages; if not, the damages must be determined by proofs *aliunde*.[1]

4. *A suit in equity.*—There are cases in which the law fails to furnish the landlord an adequate remedy; and in such cases it is the province of equity to grant relief.[2]

In some of our States, it should be observed, the powers and functions of law and equity are blended in one tribunal. The essential distinction, however, between law and equity is not, as many suppose, obliterated; but, simply, the two departments of jurisprudence are administered by one and the same court, instead of two distinct and independent tribunals. Law is still law, and equity is equity, as of old, each with its peculiar principles and rules of administration.

And in some States, also, the common law nomenclature of actions is blotted out by codes of procedure, and all kinds are ushered into the presence of the court by numbers, and are dressed in uniform, like the inmates of some educational and penal institutions. But the ghosts of common law actions will not all "down at the bidding" of modern law reformers; for whatever the form

[1] Tayl. Land. and Ten., § 635, *et seq.*; 1 Chit. Pl. (7 Am. Ed.) pp. 112, 120, *et seq.*, 377.

[2] See 1 Story Eq. Jur., §§ 684-687; 1 Pom. Eq. Jur., § 189; Taylor Land. and Ten., §§ 656-660.

of pleading, the distinguishing characteristics of each class still confront the bench and bar, and must be understood and observed in the administration of the law.

§ 158. Obligation to pay rent; eviction a defense.— Where the relation of landlord and tenant exists, whether created by specialty or simple contract, the tenant is under obligation to pay rent, even without an express covenant in the lease to that effect. In the absence of an express covenant, the law will, as we have seen,[1] supply an implied promise to pay, which is equally binding upon the tenant. At common law, under an express covenant to pay rent, the obligation of the tenant will continue for the term, although the tenement, in the meantime, be destroyed by fire or other external violence, unless the lease otherwise provides.[2] The tendency in modern times has been to a relaxation of this severe rule; and in some of our States it has been changed by statute, relieving the tenant from payment of rent thereafter, on destruction of the tenement, until the premises are restored to a tenantable condition. Nevertheless, prudence suggests the insertion of a provision in the lease for the protection of the tenant in such a contingency.

The obligation of the tenant to pay rent is upon the implied condition that he shall have the peaceable and quiet possession and enjoyment of the demised premises, without disturbance or eviction by the landlord; and if

[1] *Supra*, § 157, sub. 3; and see Tayl. Land. and Ten., § 371.

[2] Gates v. Green, 4 Paige, 355; Hollzapffel v. Baker, 18 Ves., 415; Lamott v. Stenet, 1 Harr. & J., 42; Philips v. Stevens, 16 Mass., 240; Howard v. Doolittle, 3 Duer, 464; Willard v. Tillman, 19 Wend., 358; 3 Kent Com., p. 465, *et seq.*; Gibson v. Perry, 29 Mo., 245; White v. Molyneux, 2 Ga., 124.

sued for the rent, the landlord's breach of this covenant will constitute a good defense. And an eviction by the landlord from part of the premises will release the tenant from obligation to pay rent, even on the part retained by him; the contract, and the consideration, being each a unit, and indivisible by the wrongful act of the landlord.[1]

Eviction from the whole of the demised premises by the lawful act of a third person, has the same effect upon the obligation of the tenant as an eviction by the landlord; but not so where the eviction by a third party is from a part, only, of the premises, in which case the rent will be apportioned, and the tenant obliged to pay for the portion enjoyed by him.[2]

Actual physical expulsion is not necessary to produce an eviction. The tenant is entitled to the quiet, peaceful, and beneficial enjoyment of the premises, without molestation or annoyance from the landlord, either directly or indirectly; and acts by the latter which deprive the tenant of such enjoyment of the premises will, in contemplation of law, amount to an eviction. For example, using, or permitting the use of an apart-

[1] Tayl. Land. and Ten., §§ 378, 379; 3 Kent. Com., pp. 464, 465; Pendleton v. Dyett, 4 Cow., 581; s. c., 8 Cow., 727; Hope v. Eddington, Lalor, 43; Ogilvie v. Hull, 5 Hill, 52; Crommelin v. Thiess, 31 Ala., 412; Jackson v. Eddy, 12 Mo., 209; Day v. Watson, 8 Mich., 535.

[2] Hegeman v. McArthur, 1 E. D. Smith, 147; Christopher v. Austin, 11 N. Y., 216; Vermilyea v. Austin, 2 E. D. Smith, 203; Carter v. Burr, 39 Barb., 59; Blair v. Claxton, 18 N. Y., 529; Tiley v. Moyers, 43 Pa. St., 404; Stevenson v. Lambard, 2 East, 576; Hunt v. Cope, Cowper, 242; Lawrence v. French, 25 Wend., 443; Ludwell v. Newman, 6 Tenn , 458.

ment connected with the demised premises, as a place of resort for lewd women, thereby producing nocturnal noise and disturbance, has been held an eviction.[1]

The eviction, to constitute a valid defense to an action for rent, must have taken place before the rent fell due; it will not, therefore, bar a recovery for rent already due.[2]

§ 159. Apportionment of rent.— It is a rule of the common law, that a unit of indebtedness, or obligation, cannot be divided into fractions, or "split up" as it is generally expressed, and enforced by action in separate parts, thereby subjecting the debtor to the trouble and expense of several suits for the one original cause of action. The case of rent forms an exception to this rule, being in some instances subject to apportionment.[3] A few examples will suffice for the present purpose. As rent is an incident to the reversion, whenever that is severed, either by act of the parties or by operation of law, the rent will follow the reversion, and become payable to the assignees or owners of the respective portions thereof.[4] Whenever there is a severance by act of law, there will be an apportionment of the rent; as upon a descent of the reversion among heirs, or a judicial sale

[1] Pendleton v. Dyett, 4 Cow., 58; Cohen v Dupont, 1 Sandf , 260.

[2] Giles v. Comstock, 4 N. Y., 270; Kesler v. McConachy, 1 Rawle, 335; Boynton v. Bobbitt, 2 Vent., 68; Stokes v. Cooper, 4 Camp., 514; Whitney v. Myers, 1 Duer, 267

[3] 3 Kent Com., pp. 469-471; Tayl. Land. and Ten., §§ 383-385.

[4] Nellis v. Lothrop, 22 Wend., 121; Van Rensselaer v. Jones, 2 Barb., 643; Van Rensselaer's Ex'rs v. Gallup, 3 Denio, 454; Cuthbert v. Kuhn, 3 Whart., 366: Farley v. Craig, 6 Halst., 262; McEllery v. Flannagan, 1 Har. & G., 308; Van Rensselaer v. Bradley, 3 Denio, 135, 3 Kent Com., p. 376.

of part of the demised premises, the tenants will be bound to pay rent to the heirs or purchasers, respectively, for the portion of the premises belonging to each.[1] In case a lessor, being owner of the fee, dies after rent becomes due, it is payable to his executors or administrators, and not to the heir at law; but if he dies before the rent accrues, it belongs to the heir, and not to his executors or administrators.[2] Where the rent is payable at stated periods during the term, as quarterly or monthly, the portion due and unpaid at the lessor's death, having, by severance from the reversion, become a *chose in action*, falls into his personal estate, and hence is payable to his executor or administrator; while the portion not yet due remains an incident of the reversion, and passes with it to the heir.

There are other species of personal property, but none possessing peculiarities that require special treatment; as they present no serious difficulties, and none that may not be readily solved by an intelligent application of the principles and rules developed and illustrated on the foregoing pages.

There only remains for consideration in this treatise, the devolution of personal property on the death of its owner, which is the subject of the next, and last, chapter.

[1] Cole v. Patterson, 25 Wend., 456; Walter v. Flint, Cro. Eliz., 742; Linton v. Hart, 25 Pa. St., 193; Crosby v. Loop, 13 Ill., 625.

[2] Cole v. Patterson, *supra*, and Duppa v. Mayo, 1 Saund. R., 287; Barwick v. Foster, Cro. Jac., 227; Norris v. Harrison, 2 Mad. Ch. R., 268; Gheen v. Osborn, 17 Serg. & R., 171; *Ex parte* Smyth, 1 Swanst., 336.

CHAPTER XV.

DEVOLUTION OF PERSONAL PROPERTY ON DEATH OF OWNER.

SECTION 160. General rules.

§ 160. General rules.— The owner of property, both real and personal, when not under disability, may, by last will and testament, determine its disposition after his death.[1] Dying intestate, his real estate descends directly to his heirs, and his personal property, after payment of debts and expenses of administration, passes indirectly to his next of kin. Who constitute heirs, and the order of inheritance, is determined by statutes, called *statutes of descent;* the next of kin, and rules of distribution, are also prescribed by statutes, called *statutes of distribution.* These statutes are generally based upon the English statutes of distribution,[2] and which Mr. Kent says were borrowed from the 118th novel of Justinian.[3] But, while the American statutes are based on the English, there are some points of difference between them; and although the statutes in the several States of the Union are alike in general character and policy, there are differences among them more or less marked. It is, therefore, impracticable to state the rules of distribution applicable to all parts of our national domain, without a special examination of the local laws of each State, which

[1] *Supra,* §§ 90-95.

[2] 22 and 23 Charles II, ch. 10.

[3] 2 Kent Com., p. 422.

the character and scope of this work will not permit. It may be assumed that the practitioner will be familiar with the general principles of law on the subject; and he will consult the local statutes when necessary for guidance in matters under consideration.[1]

This brief chapter closes the discussion, in outline, of the Law of Personal Property. In taking leave of the subject, and of his readers, the writer would fain indulge the hope, that his earnest desire to present this important branch of the law in a helpful manner, will not be regarded by his professional brethren as a failure.

[1] See 2 Kent Com., p. 420, *et seq.*; 1 Bouv. L. Dict., "Distribution;" 1 Sch. Pers. Prop., pp. 747-750; Williams Pers. Prop., pp. 361-368; Goodeve Pers. Prop., p. 285, *et seq.*

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