

LAW FOR THE
AMERICAN
FARMER

BY

JOHN B. GREEN

The Rural Science Series
L.H. Bailey *Editor*

Feb-23

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LAW FOR THE AMERICAN FARMER



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LAW FOR THE AMERICAN FARMER

The Rural Science Series

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LAW FOR THE AMERICAN FARMER.

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LAW
FOR THE
AMERICAN FARMER

JOHN B. GREEN
OF THE NEW YORK BAR

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To

THE HONORABLE ALFRED SPRING

ASSOCIATE JUSTICE OF THE SUPREME COURT

APPELLATE DIVISION, FOURTH DEPARTMENT

OF THE STATE OF NEW YORK

— A FINE FARMER YET A FINER LAWYER —

THIS BOOK, BY PERMISSION

IS DEDICATED BY

THE AUTHOR

PREFACE

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THIS treatise is not offered to farmers as a substitute for the advice of a lawyer in any case in which legal counsel becomes necessary. No work, however exhaustive or ably written, could possibly fulfill such a function. Nor is it designed to be a text-book for lawyers. The lawyer will find little or nothing in it, the author hopes, strange to him. If sometimes it shall serve the busy lawyer as a finger-post to authorities he knows to exist, but for which at the moment he lacks time or facilities to search, well and good, but such is an incidental, not the primary, purpose of the book. The writer has aimed at aiding the lawyer in a different way, by bringing his client to him before the case has been so prejudiced as to increase the difficulties of the professional adviser. The book has been made to enable the farmer to recognize his rights and duties when a controversy likely to ripen in a litigation is impending, and to act in such wise that he shall not unwittingly sacrifice the first or neglect the second to his injury and the embarrassment of counsel whose services he may finally retain.

The purpose announced would, it was thought, be more nearly attained by resorting mainly to the reports

of cases for the law stated. Controversies that have arisen and been adjudicated in the past would seem to be the same in kind as those likely to occur in the future; and to set forth their outcome in the courts would apparently be the most useful method of guiding the conduct of new parties to old disputes.

Addressing in particular the American farmer, the author has consulted almost exclusively the decisions of the courts in the United States to glean his materials. The status of the farmer and the land laws of England differ so materially from both in the United States that the decisions of the English courts were not available to a great extent, and the American decisions are so numerous that all the needed authorities can be found among them.

As a matter of course, it has been impossible to cover the entire field of law relating to farms and farmers exhaustively, and keep the work within reasonable limits. Necessarily, therefore, some topics of interest to prospective readers have been omitted, but it is believed that on the whole the subjects treated are fairly calculated to appeal to the largest number of persons in the class addressed.

J. B. G.

ROCHESTER, N. Y.

November 1, 1910.

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LAW FOR THE AMERICAN FARMER

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CHAPTER I

LAW AND LITIGATION

§§ 1-7

§ 1. *Law defined.*

A learned lawyer, in beginning one of the standard legal text-books,¹ has said that the principles upon which all laws are founded are those of common sense. It is this truth which justifies, as he proceeded to point out, the rule that ignorance of the law is no excuse for violating it, because it is in the power of every man by means of ordinary intelligent attention to the conduct of others to ascertain what are his own duties, and every sane man is able to conform his own conduct to the laws deducible from human habit. For all present purposes law may be considered, not comprehensively nor philosophically, but usefully, as a body of rules to regulate and govern human conduct which are recognized and applied in a civilized state by courts of justice in deciding controversies among men. These rules are written and unwritten, or statutory and common.

¹ Browne, *Law of Carriers*.

§ 2. *Written law.*

Written law is the expressed will of the supreme power of the state. It is broadly designated as statute law. In the United States it is embodied in constitutions, Federal and state, adopted by the people in their sovereign capacity, in the enactments of the national Congress and of the legislatures of the several states, in the by-laws and ordinances of municipal corporations and other local governmental bodies passed pursuant to legislative authority, and to a quite limited extent in judicial rules designed to regulate procedure in the courts.

§ 3. *Unwritten law.*

The bulk of our law, declared the foremost American lawyer of his age,¹ on one occasion, is composed of those unwritten precepts and rules which are recognized and enforced by the judicial tribunals irrespective of any legislative sanction. This unwritten or common law, whatever its origin, is found in the decisions of the courts applying to concrete facts, traditional and ancient doctrines, and principles deemed in consonance with the public welfare and conservative of rights of person and property belonging to individuals. It is necessarily the outgrowth of established usage and long-accepted and continued customs. The science of law, to quote the great historian of the decline and fall of the Roman Empire,² has a "very intimate relation to the progress of civilization, and the study of the one must embrace the other." Because the common law grows out of the established customs of

¹ James C. Carter.

² Chap. XLIV.

the people it varies from age to age and in different communities.

§ 4. *Nature of the common law.*

The common law affords a rule and guide to determine the merits of a controversy between individuals when there is no pertinent legislation upon the subject. It is simply the right reason of a matter as to which there is no statute.¹ Reason, it is said, is the life or soul of the law.² When the reason for any particular law ceases to exist, the law itself becomes obsolete.³ The spirit of the common law is the spirit of common sense.⁴ In short, as one court expressed it, the common law is the embodiment of broad and comprehensive unwritten principles inspired by natural reason and an innate sense of justice and adopted by common consent to regulate and govern human affairs.⁵

§ 5. *The derivation of the common law in the United States.*

The term "common law" in this country is usually understood to mean the unwritten law of England and such statutes as had been enacted by the Parliament of Great Britain and were in force before the emigration of the first settlers of America.⁶ The English common law as shown to have been established by the decisions of the

¹ *Wilson v. Leary*, 120 N. C. 90.

² *Deitzman v. Mullin*, 108 Ky. 610.

³ *Tripp v. Nobles*, 136 N. C. 99.

⁴ *Bader v. New-Amsterdam Cas. Co.*, 120 Am. St. Rep. 613.

⁵ *State v. St. P., M. & M. Ry.*, 98 Minn. 380.

⁶ *Cowhick v. Shingle*, 5 Wyo. 87.

English courts before 1775, so far as it applies to American conditions and is unmodified by or not inconsistent with our constitutions and statutes, prevails generally in the United States.¹

§ 6. *Remedies at law.*

“Every well trained lawyer will assent to the observation that in cases of difficulty the first necessity is to devote the closest attention to the facts of the transaction. In the great majority of cases this method will solve all difficulties. . . . The principles of the classification, — the scientific order, — that is, the law, already exists. The task is to ascertain the true features of the fact or groupings of fact, and when this is done the transaction seems as it were to arrange itself in its appropriate class.”² It is a maxim of the law that where there is a wrong there is a remedy,³ and that there can be no wrong without a remedy.⁴ This maxim, however, does not apply to acts authorized by statute,⁵ and there is no legal remedy for that which is in itself illegal.⁶ A legal remedy by an appeal to the courts is available whenever a legal right is invaded.⁷ The right of every citizen to the protection of

¹ *Waters & Co. v. Gerard*, 189 N. Y. 302; *Kinhead v. Turgeon*, 74 Neb. 580.

² *James C. Carter*.

³ *Perry v. Farmers Ins. Co.*, 139 N. C. 374; *Beeks v. Dickinson Co.* 131 Iowa, 244.

⁴ *Hughes v. Auburn*, 161 N. Y. 96; *Philomath Coll. v. Wyatt*, 27 Ore. 390.

⁵ *Pietsch v. Milbrath*, 123 Wis. 647.

⁶ *U. S. Bank v. Owens*, 2 Pet. 527.

⁷ *Marbury v. Madison*, 1 Cranch, 137.

the laws is essential to civil liberty.¹ But for a wrong without damage as for damage without a wrong there is no legal remedy.²

§ 7. *Pursuit of legal remedies.*

A remedy in the legal sense is the means by which a suitor in a court of justice secures the enforcement of his cause of action, and a cause of action is simply the right to enforce an obligation regardless of how that obligation arose.³ A cause of action comprises every fact which a plaintiff must prove to obtain a judgment or which a defendant has a right to controvert.⁴ No cause of action exists unless there are in existence persons capable of suing and being sued upon it.⁵ Actions and suits in courts of justice are either civil or criminal. The criminal ones are prosecutions by the sovereignty of those who have been guilty of public offenses. The civil ones are prosecuted by natural or artificial persons against others to protect and enforce rights and to prevent and redress wrongs. A civil suit is the prosecution of a demand in a court of justice,⁶ and is any proceeding therein in which one pursues his remedy to enforce a right or recover a claim against another.⁷ Friendly suits are not disapproved, but on the contrary are favored and encouraged

¹ *Ibid.*

² *Janesville v. Carpenter*, 77 Wis. 288.

³ *Frost v. Witter*, 132 Cal. 421.

⁴ *Chesapeake & O. R. R. v. Dixon*, 179 U. S. 131.

⁵ *Riner v. Riner*, 166 Pa. St. 617.

⁶ *Cohen v. Virginia*, 6 Wheat. 264.

⁷ *Grover & B. Sew. Mach. Co. v. Florence Sew. Mach. Co.*, 18 Wall. 553.

as greatly facilitating the doing of justice between persons; but there must be a real controversy with adverse interests and a litigation in good faith. A collusive proceeding is a contempt of court, and a judgment got by means of it is a nullity.¹ It is for the public interest that litigation should end.²

¹ *Lord v. Veazie*, 8 How. 251; *Cleveland v. Chamberlain*, 1 Black, 419.

² *Fisher v. Fielding*, 67 Conn. 91; *Womach v. St. Joseph*, 201 Mo. 467; *State v. Marsh*, 134 N. C. 184; *Abbott v. Thorne*, 34 Wash. 692.

CHAPTER II

THE FARMER BEFORE THE LAW

§§ 8-11

§ 8. *Who are farmers?*

To one who does not pause to reflect upon the subject, the question, "What distinguishes a farmer from persons in occupations other than agricultural and stock raising?" appears unnecessary because the answer seems obvious. Yet courts which have been called upon to decide whether or not a litigant was included in a statute conferring privileges upon farmers denied to citizens in general, or imposing burdens upon all citizens except farmers, have had much difficulty with this very question. If a man devotes himself wholly or chiefly to the tillage of the soil, he is in law a farmer, though he may call himself a horticulturist, viticulturist, or a gardener.¹ A farmer is a cultivator of a considerable tract of land in some one or more of the customary and recognized ways of farming.² To constitute one a farmer, it is not indispensable that he should till the ground in person, nor that his operations should be limited to agricultural planting, sowing, and cultivating the soil. A farmer may cultivate all or only part of his land. He may grow wheat, corn,

¹ Slade's Estate, 122 Cal. 434.

² O'Neil v. Pleasant Prairie Ins. Co., 71 Wis. 621.

oats, rye, or grasses, as he may judge to be most useful or profitable. He may, in connection therewith, breed, feed, and rear cattle, horses, mules, sheep, and hogs for domestic use or sale, and, if he chooses, may feed his produce to his stock instead of sending it to market.¹ He is a planter who is engaged in producing crops from land, whether he sows and reaps with his own hands, or those of a tenant, a cropper, or a hired laborer.² And yet the owner of a farm who simply makes it his legal residence, and is much away from home, while all the farming is done by others, is not a farmer.³ But if he lives on his farm and makes farming his chief occupation, he is classed as a farmer although he does such other things as publishing a weekly newspaper and making and patenting proprietary medicines.⁴ And conversely one is not a farmer before the law although he owns and to some extent works a farm if his real business is something else.⁵

§ 9. *Within the National Bankrupt Law.*

A farmer, when farming is his chief occupation, by the provisions of the Federal Bankrupt Act cannot be forced against his will into bankruptcy. To get the benefit of this immunity it does not matter that a farmer has other business than farming. If his principal occupation is agriculture and he devotes most of his time to that and relies mostly upon its returns for his income

¹ Dearborn Bank *v.* Matney, 132 Fed. 75.

² Butler *v.* Ga. & A. R. R., 119 Ga. 959.

³ Johnson *v.* London Acci. Co., 115 Mich. 86.

⁴ McCue *v.* Tunstead, 65 Cal. 506.

⁵ Rochester *v.* Pettinger, 17 Wend. 265.

and wealth, he is chiefly engaged in farming and not to be subjected to involuntary bankruptcy.¹ He may, for example, besides being a farmer, keep a retail shop and be an agent to sell fertilizers,² or he may even keep an office and practice law and still be chiefly engaged in farming.³ That a farmer keeps cows partly from the products of his farm and sells milk at retail, even if he also buys and distributes milk produced by others, does not make him any the less chiefly engaged in farming or any the more liable to involuntary bankruptcy.⁴ By making a general assignment for creditors a farmer does not render himself liable to be forced into bankruptcy.⁵ A person is not chiefly engaged in farming so as not to be amenable to involuntary proceedings in bankruptcy when the occupation or business which is of principal concern to him, and of more or less permanence, and the one on which he mainly depends for his livelihood, is something other than farming although he is also occupied as well in tilling land.⁶ For instance, one whose products from the land he cultivates do not exceed two thousand dollars in value annually, while yearly he spends on an average fifteen thousand dollars in buying live-stock and fodder for which he incurs most of his debts, cannot truthfully claim to be chiefly engaged in farming and therefore may be forced by his creditors into bankruptcy.⁷

¹ *Wulbern v. Drake*, 120 Fed. 493.

² *Rise v. Bordner*, 140 Fed. 566.

³ *Hoy's case*, 137 Fed. 175.

⁴ *Gregg v. Mitchell*, 166 Fed. 725.

⁵ *Olive v. Armour & Co.*, 167 Fed. 517.

⁶ *Brown's case*, 132 Fed. 706.

⁷ *Dearborn Bank v. Matney*, *supra*.

§ 10. *Under statutes exempting property from levy and sale upon execution.*

A man who earns his living by farming is entitled to the statutory exemptions of a farmer although at the time an execution is levied upon the property claimed to be exempt he does not own or lease a farm and is not engaged in any particular farm work.¹ A farmer does not lose any of his statutory privileges of exemption from execution while moving from one to another farm.² Within the meaning and purpose of the exemption statutes a man who follows another trade for a livelihood is not deemed a farmer or a person engaged in agriculture because he cultivates a kitchen garden and raises vegetables on an acre lot.³

§ 11. *Within tax and license laws and municipal ordinances.*

There is not entire harmony in the decisions of the courts as to the application of tax and license laws and municipal regulations to farmers, even in cases where there can be no doubt of the claimant's right to be classed as a farmer. Much of the discord can be explained upon differences in the wording of the pertinent statutes and ordinances, but these differences will not account for all the conflict. The contradictions will be plain when the rulings of the several courts mentioned below are carefully considered. A produce dealer is the term com-

¹ *Hickman v. Cruise*, 72 Iowa, 528.

² *O'Donnell v. Segar*, 25 Mich. 367.

³ *Simons v. Lovell*, 7 Heisk. 510.

monly applied to one whose business is buying and selling fruit, butter, eggs, poultry, cereals, and garden truck ;¹ it does not include a farmer who brings to market and sells his own produce.² In Kentucky the courts have declared that a farmer, although he may carry to market and sell what he raises or makes on his farm, is never included in laws applying to merchants in general.³ In Pennsylvania it has been decided that a statute imposing a tax upon dealers in merchandise does not apply to a farmer who sells the products of his own farm in the markets of neighboring towns even when occasionally he carries to market and sells along with his own the produce of his neighbors.⁴ A city ordinance in Idaho which prohibited farmers from selling the products of their own farms within the city limits without first procuring licenses was adjudged invalid.⁵ And the Supreme Court of Michigan has declared that a city is powerless to shut out the producers of fresh provisions and farm and garden produce from direct and convenient access to their customers.⁶ A farmer hawking for sale the products of his own farm is not classed as a peddler in the license and police laws and regulations of Pennsylvania and Louisiana,⁷ but in Minnesota, one who peddles the produce of his own farm or garden in a city is lawfully subject to

¹ *Kan. City v. Lorber*, 64 Mo. App. 604 ; *Dist. Col. v. Oyster*, 4 Mack. 285.

² *U. S. v. Simmons*, 27 Fed. Cas. 1080.

³ *Ragsdale's case*, 20. *id.* 175 ; *Dyott v. Letcher*, 29 Ky. 541.

⁴ *Barton v. Morris*, 10 Phila. Rep. 360.

⁵ *Snyder's Case*, 10 Idaho, 682.

⁶ *Hughes v. Detroit Recorder's Court*, 75 Mich. 574.

⁷ *Com. v. Gardner*, 133 Pa. St. 284 ; *Roy v. Schuff*, 51 La. Ann. 86.

pay a license fee imposed by municipal ordinance upon peddlers.¹ In Massachusetts a municipality may by ordinance require all persons to obtain permits from a clerk of the market before offering for sale in certain streets products of the farm.² The fact that one raises his own produce gives him no right in Louisiana to sell it in violation of a municipal ordinance.³ In that state, too, a planter or a farmer who keeps a store on his plantation or farm and sells goods and liquors, although to no one but his own employees, must take out a license such as everybody "doing a business at retail" is required by a statute to have.⁴ And in the same state, a person engaged in the business of dealing in vegetables in the public markets does not come under an exception in a license statute of those engaged in agricultural pursuits.⁵ This is quite right, for in New York it has been decided that a butcher carrying on a retail meat market for his livelihood is not classifiable as a farmer selling the meat and produce of his own farm within an exception in a municipal ordinance regulating sales within the city limits of meat and farming truck, even though he does own a farm in the neighborhood and runs it to supply his shop.⁶ The exemption of peddlers of agricultural or farm products from laws requiring peddlers in general to take out licenses does not vitiate such laws as class legislation.⁷

¹ *State v. Jensen*, 100 N. W. 644.

² *Nightingale's Case*, 11 Pick. 168; *Com. v. Brooks*, 109 Mass. 355.

³ *State v. Sarradat*, 46 La. Ann. 700.

⁴ *Thibaut v. Kearney*, 45 La. Ann. 149.

⁵ *State v. Cendo*, 38 La. Ann. 828.

⁶ *Rochester v. Pettinger*, *supra*.

⁷ *McKnight v. Hodge*, 104 Pac. 507.

CHAPTER III

THE MODES OF ACQUIRING A FARM

§§ 12-18

§ 12. *Estates in land.*

An estate is the degree, quantity, nature, and extent of the interest a person has in real-property.¹ An estate in fee simple is an estate to one and his heirs forever.² Such an estate includes all qualifications or restrictions as to the persons who may inherit as heirs.³ It is the fullest and most absolute estate one can have in lands.⁴ It is the highest estate recognized in the law⁵ — the largest known to the law.⁶ A title in fee is a full and absolute estate beyond and outside of which there is no other interest or even shadow of right.⁷ All restrictions on the power of a grantee to deal with land conveyed to him in fee simple absolute are repugnant and void.⁸

¹ *Messmore v. Williamson*, 189 Pa. St. 73.

² *Brown v. Freed*, 43 Ind. 253.

³ *Warden v. Lyons*, 118 Pa. St. 396.

⁴ *Robb v. Beaver*, 8 Watts & S. 107.

⁵ *McMillen v. Anderson*, 95 U. S. 37.

⁶ *Brackett v. Ridlon*, 54 Me. 426.

⁷ *Earnest v. Little River Land & Lum. Co.*, 109 Tenn. 427.

⁸ *Kessner v. Phillips*, 189 Mo. 515.

This, therefore, is the estate the farmer should acquire when he gets his farm. The law favors vested rather than contingent estates.¹

§ 13. *How title to land is acquired.*

The ownership of land is gained in three ways: first, by a grant from a previous owner; second, by operation of law; and third, by the addition to land already owned of more land through the working of the forces of nature. The grant may take any one of several forms; it may be a patent from the sovereign, or a deed of bargain and sale, gift, or quit-claim from a living owner, or a devise by the last will and testament of one who died seised of the land. Title by operation of law vests in two ways: first, by descent to the heir of an owner who died intestate; and, second, through an adverse possession for such a period of time as has been prescribed by the local statute of limitations. And lastly, one who owns land upon the sea-shore, the margin of a lake, or the bank of a stream may acquire more land through the action of the waters in building up accretions or in retreating and uncovering land hitherto submerged.

§ 14. *Title by grant.*

The title to land is best shown by a grant from the sovereign of the soil and a regular chain of conveyances uniting it to the possessor.² In tracing titles slight proof of the identity of a grantor in the chain is sufficient;

¹ *Chartrand v. Brace*, 16 Colo. 19.

² *Sulphur Mines Co. v. Thompson*, 93 Va. 293.

identity of name is *prima facie* or presumptive proof of identity of person,¹ but, of course, the presumption is not conclusive.² A deed is necessarily a written instrument.³ It is a writing which transfers an interest in real estate from one owner to another.⁴ Although a grantor can convey no greater estate than he, himself, has,⁵ yet a quit-claim deed will convey all the interest he has at the time he makes it.⁶ In its popular sense a deed means a conveyance of the fee in land.⁷ A deed is an executed contract⁸ and none the less a contract from not being signed by the grantee.⁹ It is, however, simply the contract of conveyance and does not necessarily express the contract of the sale and purchase of the land it conveys.¹⁰ A deed passes at once to the grantee a present interest in the land conveyed by it although it may be that the right to possess and enjoy that land will not accrue until later.¹¹ The execution of a deed consists in the signing, and sealing (wherever seals are required), of it by the grantor and the delivery of it to the grantee; it is the consummation of the contract to convey — the effectual completion of the conveyance.¹²

¹ *Stebbins v. Duncan*, 108 U. S. 32.

² *Wilson v. Holt*, 83 Ala. 528; *Williams's Est.* 128 Cal. 552.

³ *Pierson v. Townsend* (N. Y.) 2 Hill, 550.

⁴ *Reed v. Hazleton*, 37 Kan. 321.

⁵ *Gregg v. Sayre*, 8 Pet. 244.

⁶ *Babcock v. Wells*, 25 R. I. 23; *Livingstone v. Murphy*, 187 Mass. 315.

⁷ *Sanders v. Riedinger*, 30 App. Div. 277.

⁸ *Watkins v. Nugen*, 45 S. E. 262.

⁹ *Wierengo v. Amer. Fire Ins. Co.*, 98 Mich. 621.

¹⁰ *Lynch v. Moser*, 72 Conn. 714.

¹¹ *Bowdoin Coll. v. Merritt*, 75 Fed. 480.

¹² *Brown v. Westerfield*, 47 Neb. 399.

§ 15. *Delivery of the deed.*

In the popular sense delivery means a mere tradition of a deed, but in law it signifies the final absolute transfer from grantor to grantee of a complete legal instrument.¹ A deed takes effect only from the time it is delivered.² It does not become operative until it is accepted by the grantee, for his acceptance is necessary to complete the delivery.³ Delivery is all important; that is the final act of the grantor which makes his conveyance effectual, and without it all other formalities will not suffice to pass title.⁴ Delivery, or what is legally equivalent to a delivery, of a deed is absolutely essential for it to take effect.⁵ The delivery of a deed is the absolute transfer of it after it has been duly executed in such a way that the grantor cannot recall it.⁶ A delivery of a deed may be either actual or constructive, but it must in any case be the unqualified surrender of all dominion over it.⁷ No particular form or ceremony is requisite to effect the delivery of a deed; any words or conduct manifesting an unconditional giving of it up are enough.⁸ When a deed has once been delivered, the title has irrevocably

¹ *Black v. Shreve*, 13 N. J. Eq. 455.

² *Calhoun Co. v. Amer. Emig. Co.*, 93 U. S. 124.

³ *Tyler v. Cate*, 29 Ore. 515.

⁴ *Provart v. Harris*, 150 Ill. 40; *Best v. Brown*, 25 Hun, 223.

⁵ *U. S. Bank v. Dandridge*, 12 Wheat. 64; *Parmellee v. Simpson*, 5 Wall. 81; *Gore v. Dickinson*, 98 Ala. 363; *Porter v. Woodhouse*, 59 Conn. 568; *Weber v. Christen*, 121 Ill. 91; *Colee v. Colee*, 122 Ind. 109.

⁶ *Byers v. McClanahan*, 6 Gill & J. 250.

⁷ *Tucker v. Allen*, 16 Kan. 312; *Payne v. Hallgarth*, 33 Ore. 430; *Brown v. Dickerson*, 2 Marv. 119.

⁸ *Benneson v. Aiken*, 102 Ill. 284; *Tarlton v. Griggs*, 131 N. C. 216; *White v. White*, 34 Ore. 141.

passed from the grantor, and, for this reason, he cannot be again clothed with title by any such simple proceeding as returning the deed and agreeing to cancel and destroy it.¹ It may, however, in certain circumstances give him an equitable right to a title.² The possession of a deed by the grantee named in it is *prima facie* proof of its delivery,³ and so also is its possession by the grantee's personal representatives.⁴ The recording, or leaving with the proper officer to be recorded, of a deed implies that it was delivered to the grantee.⁵ Deeds are presumed to have been executed and delivered on the days they bear date even when they are acknowledged later.⁶ When a deed duly executed is not delivered to the grantee, but given instead to a third person to be delivered to him later upon the performance of some condition or the happening of some contingency, it is said to be delivered in escrow; and when a deed is delivered in escrow, it does not pass title until it is delivered to the grantee when the contemplated contingency has happened or the prescribed condition has been fulfilled.⁷ A deed is of no effect if delivered without the consent and against the will of the grantor.⁸

¹ *Washington v. Ogden*, 1 Black, 450; *Mead v. Pinyard*, 154 U. S. 620; *Ames v. Ames*, 80 Ark. 8.

² *Crossman v. Keister*, 223 Ill. 69.

³ *Sicard v. Davis*, 6 Pet. 124; *Hanrick v. Neely*, 10 Wall. 364; *Strough v. Wilder*, 119 N. Y. 530; *Devereux v. McMahon*, 108 N. C. 134.

⁴ *Lewis v. Watson*, 98 Ala. 479.

⁵ *Fisher v. Hall*, 41 N. Y. 416; *Cooper v. Jackson*, 4 Wis. 537; *Whitaker v. Whitaker*, 175 Mo. 1.

⁶ *L. E. & W. R. R. v. Whitham*, 155 Ill. 514; *Conley v. Finn*, 171 Mass. 70; *Purdy v. Coar*, 109 N. Y. 448; *McFarlane v. Loudon*, 99 Wis. 620.

⁷ *Hubbard v. Greeley*, 84 Me. 340; *Cagger v. Lansing*, 57 Barb. 421; *Thomas v. Sowards*, 25 Wis. 631.

⁸ *Felix v. Patrick*, 145 U. S. 317.

§ 16. *Title by devise or descent.*

The title to land passes from one living individual to another only by a deed,¹ but a will is just as effective as a deed to pass title to land; only, title by will does not pass to a devisee until the death of the testator, and he may revoke the devise any time before he dies.² Technically, a devise is the testamentary disposition of land.³ It is the written direction of a testator of sound mind for the disposal of his landed property after death.⁴ Devise is the proper word to denote the gift of real estate by will.⁵ Title by descent is the title one acquires as heir at law upon the death of an ancestor to the estate of which the ancestor died seised.⁶ Technically, descent denotes the transmission of real estate upon the death of its owner without a will and by inheritance to a successor indicated by law.⁷ Title by devise is a title by purchase, the same as if it was given by deed; whereas title by descent is a title vested by operation of law.⁸

§ 17. *Title by prescription.*

Title by prescription is a right which a person in the possession of land upon which he entered at first with-

¹ *Morris v. Harmer*, 7 Pet. 554.

² *Jordan v. Jordan's Admr.*, 65 Ala. 301; *McDaniel v. Johns*, 45 Miss. 632; *Hazleton v. Reed*, 46 Kan. 73.

³ *Scholle v. Scholle*, 113 N. Y. 261; *Ferebee v. Procter*, 19 N. C. 439; *Davis's Will*, 103 Wis. 455.

⁴ *Jenkins v. Tobin*, 31 Ark. 306.

⁵ *Borgner v. Brown*, 133 Ind. 391; *Oothout v. Rogers*, 59 Hun, 97; *McCorkle v. Sherrill*, 41 N. C. 173.

⁶ *Adams v. Akerlund*, 168 Ill. 632; *Bennett v. Hibbert*, 88 Iowa, 154; *Priest v. Cummings*, 20 Wend. 338; *Freeman v. Allen*, 17 Ohio St. 527.

⁷ *Hudnall v. Ham*, 172 Ill. 76.

⁸ *Allen v. Bland*, 134 Ind. 78.

out right acquires by an adverse possession of it during the time fixed by statute.¹ It is the same as title by limitation.² Formerly the whole theory of title to land by prescription was thought to depend on a supposititious grant.³ It was said that a grant would be presumed from a sufficiently long and uninterrupted possession of land under a claim of ownership;⁴ and that when the possessor of land lacked any conveyance of it, he might show title by proving such a state of facts as would warrant presuming a grant.⁵ This presumption that there had been a grant to the adverse possessor of land, however, arose only after the adverse possession had continued for the statutory limitation period.⁶ No presumption of a grant could arise until that time had expired, and then only in respect of so much of the land as had been actually occupied,⁷ so that after all, title by prescription really rested upon the statute of limitations. Nowadays the statute of limitations is regarded as enough in itself for the foundation of a title by prescription. In modern times statutes of limitations are more favorably regarded than they were anciently; they are no longer thought to be harsh, but are considered statutes of quiet and beneficent because they tend to end disputes and prevent litigation.⁸ The object of a statute of limitations

¹ *Burdell v. Blain*, 66 Ga. 169.

² *Dalton v. Rentaria*, 2 Ariz. 275.

³ *Burbank v. Fay*, 65 N. Y. 57.

⁴ *Smith v. Cornelius*, 41 W. Va. 59.

⁵ *Sulphur Mines Co. v. Thompson*, *supra*.

⁶ *Gayetty v. Bethune*, 14 Mass. 53.

⁷ *Snoddy v. Kreutch*, 3 Head 301.

⁸ *Nelson v. First Nat. Bank*, 139 Ala. 578.

is to quiet persons in their possessions.¹ It is a statute of repose operating to mature a wrong into a right by cutting off the remedy, and its effect is to shut out all inquiry into the true title and to award a title to him who has had possession of the land for the length of time it has prescribed.² A title gained by adverse possession is marketable.³ Such a title is a complete legal one created and conferred by law, flowing from the statute and not from any contract for succession of ownership which could be put in writing and recorded.⁴

§ 18. *Title by accession.*

Land that borders on the sea or inland waters often grows by the action of the waters. It grows in two ways. The waves of the sea cast sand upon the beach, the lakes cast earth upon their shores, and the streams bring down mud and leave their burden upon their banks; or, ocean, lake, and river retreat and uncover land which their waters formerly overflowed. These two different processes are called accretion and reliction. Accretion is that addition to littoral or riparian land made by the gradual deposit of soil upon the shores of tide waters or banks of streams by natural causes,⁵ and riparian owners acquire all accretions resulting from gradual changes in the shore lines of the streams opposite.⁶ The land formed

¹ *Turpin v. Brannon*, 3 M'Cord L. 261.

² *Creekmur v. Creekmur*, 75 Va. 430.

³ *Barnard v. Brown*, 112 Mich. 452.

⁴ *MacGregor v. Thompson*, 7 Tex. Civ. App. 32.

⁵ *St. L. I. M. & S. Ry. v. Ramsey*, 53 Ark. 314.

⁶ *Welles v. Bailey*, 55 Conn. 292.

by accretion is termed alluvion or alluvial land, and it is formed by sedimentary deposits added by the imperceptible action of the bordering water.¹ The chief characteristic of alluvion is an imperceptible growth so that it cannot be perceived how much is the increase in each moment of time;² for title to be acquired to alluvion, its increase must be unperceived.³ Title to alluvion is purely accessory; it attaches exclusively to riparian ownership and is incapable of independent existence.⁴ An accretion becomes a part of the land to which it is built and follows whatever title covers the mainland whether it is title by deed or title by possession. In its nature it is not, while forming, susceptible of that kind of possession which characterizes the occupation of dry land; but it attaches to the dry land even while it is under water, and it is in the actual possession of him who holds actual possession of the upland, or, if the mainland is in fact not occupied, then it is in the constructive possession of the owner of the true title; but if the mainland is held in adverse possession, then the true owner has no constructive possession of the accretion; the *indicia* of the adverse possession extends to the forming alluvion.⁵ "Reliction" is the term applied to land added to shore land by the slow and imperceptible permanent retreat of overlying waters.⁶ Land which is occasionally and temporarily uncovered by the retreat of the waters

¹ *Sapp v. Frazier*, 51 La. Ann. 1718.

² *Freeland v. Penn'a R. R.*, 197 Pa. St. 529.

³ *Halsey v. McCormick*, 18 N. Y. 147.

⁴ *White v. Leovy*, 49 La. Ann. 1660.

⁵ *Bellefontaine Improv. Co. v. Niedringhaus*, 181 Ill. 426.

⁶ *Hammond v. Shepard*, 186 *id.* 235; *Sapp v. Frazier*, *supra*.

of a lake or stream only to be flowed again is not added to adjoining land by reliction.¹ The owner of land bordered by waters acquires no title to land uncovered or built up artificially by human action; the doctrine of accretion does not apply to land reclaimed by man by filling in soil under water;² nor does the doctrine of reliction apply to land uncovered through the operation of public drainage.³ Alluvial accretions to lands belonging to several owners are to be divided among the riparian proprietors by extending their side lines to the nearest river bank so as to give each owner the accretion formed in front of his own tract.⁴ The extent of the old frontage upon the water is the most important factor in determining the new frontage when land formed by accretion is to be divided among several proprietors; the bearings and courses of the side lines are of minor importance.⁵ If an island forms in a navigable stream, the owner of the land opposite acquires no title to it, even if by accretion it reaches and unites with his land on the shore.⁶

¹ *Sapp v. Frazier*, *supra*.

² *Sage v. N. Y. City*, 154 N. Y. 61.

³ *Noyes v. Collins*, 92 Iowa, 566.

⁴ *Hubbard v. Manwell*, 60 Vt. 235.

⁵ *Newell v. Leathers*, 50 La. Ann. 162.

⁶ *Moore v. Farmer*, 156 Mo. 33; *Holman v. Hodges*, 112 Iowa, 714.

CHAPTER IV

TITLE TO THE FARM BY DEED

§§ 19-27

§ 19. *Buying the farm.*

One who acquires a farm by the will or as the heir of one who died owning it, simply takes whatever title the testator or intestate had at the time of his death, — no more, no less. The law takes care of and assures him all his rights. But one who purchases a farm from its living owner is obliged to look out for himself and make sure either that he gets that for which he has bargained and paid, or, if he does not, that he is secured against loss. Every one who purchases a farm desires, of course, a perfect title, and a perfect title is one which shows the absolute right of property and possession in his particular person.¹ It is the duty of one who sells real property to make the title good;² the covenant of the vendor to give a good title is implied in every contract to sell land.³ A buyer of land who stipulates for a good title cannot be compelled to take one that is not marketable.⁴ A title may be good and yet be unmarketable.⁵ Every

¹ *Henderson v. Beatty*, 99 N. W. 716.

² *Perry v. Boyd*, 126 Ala 162.

³ *Meyer v. Madreperla*, 68 N. J. L. 258.

⁴ *Hedderly v. Johnson*, 42 Minn. 443.

⁵ *Block v. Ryan*, 4 Dist. Col. App. 283.

buyer of real estate is entitled to a marketable title.¹ A good title in sales of land is not merely a valid title, but one that is marketable as well — such a title as a reasonable man will purchase or accept as security for a loan.² A title is not marketable if he who accepts it is exposed to litigation in defending it.³ A marketable title is not only a good title, but one that is beyond and free from reasonable doubt.⁴ A title is unmarketable if upon the facts or the law, there is a reasonable doubt about its validity.⁵ A contract to furnish a satisfactory title is fulfilled when a good, marketable title, free from reasonable doubt, is furnished.⁶ A title depending on the statute of limitations is a marketable title if it is clearly established beyond all doubt that the former owner is barred.⁷ If a title is open to a reasonable doubt, no court can make it marketable by deciding an objection dependent upon a disputed question of fact or a debatable question of law when the person in whom the outstanding supposed right may be vested is not a party to the controversy pending before the court.⁸

§ 20. *Effect of a deed.*

An invalid deed may be a good contract for the sale of the land it purports to convey.⁹ A grantee who per-

¹ *Vought v. Williams*, 120 N. Y. 253.

² *Moore v. Williams*, 115 N. Y. 586.

³ *Herman v. Somers*, 158 Pa. St. 424; *Brokaw v. Duffy*, 165 N. Y. 391.

⁴ *Ormsby v. Graham*, 123 Iowa, 202; *Austin v. Barnum*, 52 Minn. 136; *Kilpatrick v. Barron*, 125 N. Y. 751; *Holmes v. Woods*, 168 Pa. St. 530.

⁵ *Hedderly v. Johnson*, and *Herman v. Somers*, *supra*.

⁶ *Moot v. Business Men's Inv. Asso.*, 157 N. Y. 201.

⁷ *Pratt v. Eby*, 67 Pa. St. 396.

⁸ *Brokaw v. Duffy*, *supra*.

⁹ *Lyon v. Pollock*, 99 U. S. 668.

sonally accepts and retains a conveyance made to him is presumed to know its contents.¹ The acceptance of the deed will bind the grantee upon its covenants as effectually as would his signature to it.² Of course, the deed binds the grantor; he cannot have it set aside merely because he omitted to read it³ unless, indeed, he was induced by fraud not to read it and its contents were misrepresented to him.⁴ It is an essential feature of a deed that the description of the land conveyed by it shall be sufficiently certain and definite to identify or furnish the means to identify what is intended to be conveyed.⁵ A deed, for example, of a certain quantity of land to be taken from a larger tract, and which is merely described as lying on both sides of a highway, is void for uncertainty.⁶ It is, however, a maxim of the law that whatever can be made certain will be deemed certain.⁷ An addition to or change in a deed does not avoid it if made by consent of both the parties.⁸ An erasure or interlineation in a deed does not affect its validity if made before its execution, and when one appears in a deed, it is presumed to have been made before execution;⁹ but an interlineation or erasure in a material part of a deed made after it has been executed and delivered will make it void.¹⁰ A

¹ *Blinn v. Chessman*, 49 Minn. 140.

² *Hickey v. L. S. & M. S. R. R.*, 51 Ohio St. 40.

³ *Hale v. Hale*, 62 W. Va. 609.

⁴ *Acme Food Co. v. Older*, 17 L. R. A. (N. S.) 807.

⁵ *McRoberts v. McArthur*, 62 Minn. 310.

⁶ *Smith v. Proctor*, 139 N. C. 314.

⁷ *Abererombie v. Simmons*, 71 Kan. 538.

⁸ *Speake v. U. S.*, 9 Cranch, 28.

⁹ *Hanrick v. Patrick*, 119 U. S. 156.

¹⁰ *Van Horne v. Dorrance*, 2 Dall. 304.

deed made to correct a mistake in a prior deed will, in respect of the land described and its boundaries, prevail over the earlier conveyance.¹ The actual and true consideration for a deed may always be proved by oral testimony no matter what consideration is expressed in the instrument,² and it may always be proven, if such is the fact, that the grantor whose signature purports to be appended to it never executed the deed.³ These are well-recognized exceptions to the general rule of evidence that oral testimony shall not be received to vary the terms of a written instrument.

§ 21. *The contents of the deed.*

It has already been noted⁴ that a quit-claim deed (which is a mere release) will convey whatever and all the title a grantor may happen to have when he executes and delivers it; and it follows that if such title is really one in fee simple absolute that the grantee will get it. But no prudent purchaser properly advised will accept or agree to accept a simple quit-claim deed. Its office practically is limited to extinguishing real or fancied outstanding titles for the sake of peace. The purchaser of a farm should insist upon a higher form of deed; and the higher forms of deed extend through several gradations from a plain bargain and sale to a full covenant and warranty deed. The principal covenants will be referred

¹ Builders' M'rt'g. Co. v. Berkowitz, 118 N. Y. Suppl. 804.

² Hiltz v. Metrop. Bank, 111 U. S. 722; Richardson v. Traver, 112 *id.* 423.

³ Marsh v. Nichols, S. & Co., 128 *id.* 605.

⁴ See *ante*, Chap. III. § 14.

to later, but some other provisions of the deed are worthy of passing notice. It is quite true that a deed of real property will pass the appurtenances to it without using the word or an equivalent term;¹ and yet it will be wise in one taking a deed to a farm to see that it conveys in terms the "lands, tenements, hereditaments, and appurtenances," because each of these words adds something of strength, and all together include all lands and interests in lands, corporeal and incorporeal, which descend to an heir at law.² The word "tenements" often has a somewhat wider meaning than land, for while the latter word comprehends any ground, soil, or earth, such as meadow, pasture, woods, moors, waters, marshes, furzes, and heaths, the former includes land, rents, commons, and sundry other rights and interests connected with land.³ In the ordinary acceptance of the word, hereditaments apply to houses and other structures, but legally it embraces everything heritable;⁴ it is a word of more extended signification than lands or tenements and denotes everything capable of being inherited.⁵

§ 22. *The covenant of warranty.*

One of the principal covenants in a deed is the covenant of warranty, by which the grantor warrants and undertakes to defend the title. A warranty in a deed is a covenant of protection or indemnity in case that which

¹ *Jarvis v. Seele Mill. Co.*, 173 Ill. 192; *Scott v. Moore*, 98 Va. 668.

² *Bedlow v. Stillwell*, 91 Hun, 384.

³ *Canfield v. Ford*, 28 Barb. 336.

⁴ *Musgrave v. Sherwood*, 23 Hun, 669.

⁵ *Nellis v. Munson*, 108 N. Y. 453.

is granted is disturbed.¹ The covenant of warranty is an undertaking by the grantor that if the title which his deed purports to convey fails in whole or in part and the grantee is ousted by a superior title, he will make compensation for the loss sustained by the failure of title.² By the covenant of warranty the grantor undertakes to protect the premises conveyed against all lawful claims and demands existing at the time of the grant.³ He assures the grantee a permanent and undisturbed possession of the premises.⁴ The covenant of warranty and the covenant for quiet enjoyment and peaceable possession, often added, are virtually the same; whatever constitutes a breach of the one is a breach of the other.⁵ A covenant of general warranty applies only to the estate conveyed. It does not enlarge that estate.⁶ It adds nothing to the grant.⁷ A warranty does not run against baseless attacks upon the title.⁸ To amount to a breach of a covenant of quiet enjoyment the acts of disturbance complained of must be united to a lawful title.⁹

§ 23. *The covenant against encumbrances.*

A general covenant of warranty is held not to embrace a covenant against encumbrances,¹⁰ so these should be

¹ Allison v. Allison, 1 Yerg. 16.

² King v. Kerr's admr., 5 Ohio, 154.

³ King v. Kilbride, 58 Conn. 109.

⁴ Kincaid v. Brittain, 37 Tenn. 119; Wight v. Gottschalk, 48 S. W. 141.

⁵ Prestwood v. McGowin, 128 Ala. 267.

⁶ Hull v. Hull, 35 W. Va. 155; Reynolds v. Shaver, 59 Ark. 299.

⁷ Babcock v. Wells, 54 Atl. 596.

⁸ Thorne v. Clark, 112 Iowa, 548.

⁹ Barry v. Guild, 126 Ill. 439.

¹⁰ Peo. Sav. Bank v. Parisette, 68 Ohio St. 450.

specifically covenanted against. An encumbrance upon land is a right to or interest in it subsisting in a third person and which lessens its value to the owner of the fee.¹ It is a burden or clog upon the title,² or anything whatever that is a lien upon the land.³ Any lien, easement, or servitude resting upon land will come within the term "encumbrance."⁴ A general covenant in a deed against encumbrances cannot be varied by oral proof that a particular encumbrance was known and intended to be excepted, but it may be shown that the grantee undertook to discharge a particular encumbrance and that the consideration for the deed was correspondingly reduced.⁵ If an encumbrance is seemingly valid but really invalid, it constitutes a cloud upon the title.⁶ A covenant somewhat like the covenant against encumbrances often inserted in a deed is the covenant against the grantor's acts. It is not the same and should never be accepted instead. For example, a general covenant against encumbrances covers taxes;⁷ but a grantor's covenant against encumbrances due to anything done or suffered by him does not embrace taxes that are liens upon the land at the time it is conveyed but which are not payable until afterwards.⁸

¹ *Prescott v. Trueman*, 4 Mass. 627; *Huyck v. Andrews*, 113 N. Y. 81; *Kelsey v. Remer*, 43 Conn. 129.

² *Seitzinger v. Weaver*, 1 Rawle, 377.

³ *Campbell v. Hamilton Ins. Co.*, 51 Me. 69.

⁴ *Harrison v. Des. M. & Ft. D. R. R.*, 91 Iowa, 114; *Batley v. Foerderer*, 162 Pa. St. 460; *Clark v. Swift*, 44 Mass. 390; *Gerry's case*, 112 Fed. 958.

⁵ *Johnson v. Elmen*, 94 Tex. 168.

⁶ *Goodkind v. Bartlett*, 136 Ill. 18; *Teal v. Collins*, 9 Ore. 89.

⁷ *McPike v. Heaton*, 131 Cal. 109.

⁸ *Smith v. Eigerman*, 5 Ind. App. 269.

§ 24. *The covenant of seisin.*

The covenant of seisin is an important one. In its customary form it is a covenant that the grantor is well and truly seised of a good and indefeasible title and estate of inheritance in fee simple absolute and has a good right to convey it in the manner and form of his deed. In American jurisprudence seisin means generally ownership,¹ and at common law it signifies possession.² A covenant of seisin and a covenant of good right to convey mean the same thing in a deed.³ A covenant in a conveyance of land that the grantor is seised of an indefeasible estate in fee simple is a covenant of perfect title.⁴ It is a covenant for title.⁵ The grantor who gives a covenant of seisin may be called upon at any time afterwards to make a perfect title.⁶ Seisin means the whole legal title.⁷ The covenant of seisin is an assurance to the grantee that the grantor has the very estate which he undertakes to convey.⁸ And like the covenant of seisin a covenant of title assures the purchaser that the grantor has the estate both in quantity and quality that he assumes to grant.⁹ The covenant of right to convey is equivalent to a covenant of seisin.¹⁰ A covenant of

¹ *McNitt v. Turner*, 16 Wall. 352.

² *Bragg v. Wiseman*, 47 S. E. 90.

³ *Peters v. Bowman*, 98 U. S. 56.

⁴ *Douglass v. Lewis*, 131 U. S. 75.

⁵ *Kincaid v. Brittain*, *supra*.

⁶ *Baker v. Hunt*, 40 Ill. 264.

⁷ *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429.

⁸ *De Long v. Spring Lake & Sea Girt Co.*, 65 N. J. L. 1; *Wetzell v. Riehreck*, 53 Ohio St. 62; *Curtis v. Brannon*, 98 Tenn. 153.

⁹ *Bowne v. Woleott*, 1 N. Dak. 415.

¹⁰ *Adams v. Schiffer*, 11 Colo. 15; *Allen v. Sayward*, 5 Greenl. 227.

seisin does not estop a grantor from setting up in himself an after acquired paramount title; it requires a covenant of warranty to produce such an effect.¹

§ 25. *Breaches of the covenants.*

No cause of action arises upon a covenant of warranty in a deed until an eviction, either actual or constructive, has taken place.² To constitute an eviction within a covenant of warranty the occupant of land must be dispossessed by one who has the real title to the premises.³ It was once deemed necessary in order to constitute an eviction that the possession of the premises should be disturbed by legal proceedings, but this is no longer the case; if the disturbing title is really paramount and possession is yielded to it, the breach of warranty is complete.⁴ The actual expulsion of its possessor from the land is not essential to an eviction so as to amount to a breach of warranty; but it is enough if the free and uninterrupted use of the land is substantially disturbed.⁵ No eviction is necessary to give a right of action upon a broken covenant of seisin,⁶ that covenant, if broken at all, is broken the very instant it is made.⁷ It is broken as soon as the deed containing it is delivered;⁸ the

¹ *Thompson v. Thompson*, 19 Me. 235.

² *Wight v. Gottschalk*, *supra*.

³ *Ferriss v. Harshea*, 8 Tenn. 48.

⁴ *Cowdrey v. Coit*, 44 N. Y. 382.

⁵ *Eller v. Moore*, 48 App. Div. 403; *Wusthoff v. Schwartz*, 32 Wash. 337.

⁶ *Pollard v. Dwight*, 4 Cranch, 421; *Le Roy v. Beard*, 8 How. 451; *Peters v. Bowman*, *supra*.

⁷ *Ibid.*

⁸ *Abbott v. Allen*, 14 Johns. 248; *Clement v. Rutland Bank*, 61 Vt. 298.

grantee's right of action for the breach is complete at once.¹ The same thing is true of the covenant against encumbrances; if land is encumbered when it is conveyed, the covenant is broken the moment the deed is delivered,² but the damages are not substantial until the encumbrance is enforced.³

§ 26. *Covenants that run with the land.*

A covenant is said to run with the land when either the liability to perform it or the right to enforce it passes to subsequent grantees,⁴ that is, when it enures to such as are privy in estate with the grantee to whom the covenant was made. The phrase "privity in estate" denotes mutual or successive relationship to the same rights of property.⁵ Examples of covenants that run with the land are a covenant against waste, — not to cut timber or plow meadows;⁶ the covenant of a railroad company to fence and keep fenced its right of way through the premises of the covenantee;⁷ and a covenant by a grantee of land with water rights to pipe enough water to the grantor's residence for all domestic uses.⁸ Now the covenant of warranty runs with the land;⁹ so does

¹ *Webb v. Wheeler*, 17 L. R. A. (N. S.) 1178.

² *Bailey v. Agawam Bank*, 190 Mass. 20; *Hanlin's case*, 133 Wis. 140.

³ *Hanlin's case*, *supra*.

⁴ *Hurxthal v. St. Lawrence Boom Co.*, 53 W. Va. 87.

⁵ *Mygatt v. Coe*, 124 N. Y. 212.

⁶ *Kellogg v. Robinson*, 6 Vt. 276.

⁷ *Midland Ry. v. Fisher*, 125 Ind. 19; *Kelly v. Nypano R. R.*, 200 Pa. St. 229.

⁸ *A. K. & N. Ry. v. McKinney*, 124 Ga. 929.

⁹ *Mitchell v. Warner*, 5 Conn. 497; *Flaniken v. Neal*, 67 Tex. 629; *Tillotson v. Prichard*, 60 Vt. 94.

the covenant for peaceable possession¹ or for quiet enjoyment.² As one court expressed it, whatever else it may or may not be, a covenant of general warranty in a deed is a covenant against eviction running with the land.³ In New York, however, after a most protracted litigation embracing four appeals to the court of last resort, it was finally adjudged that a remote grantee of land could not recover damages on a breach of a covenant of warranty and for quiet enjoyment in a deed to his predecessor in title by the husband of the grantor who had joined her in a warranty deed. The husband, being himself a stranger to the title, was not privy in estate to the successive grantees, and his covenant was, therefore, held to have been a personal one to the first grantee and not to run with the land.⁴ The courts are not agreed as to whether covenants of seisin do or do not run with the land. In the United States Supreme Court,⁵ in North Carolina⁶ and Vermont,⁷ they are thought to be personal covenants merely; while in Indiana,⁸ Iowa,⁹ and Missouri¹⁰ they are held to run with the land. In New York¹¹ and Minnesota¹² covenants against encumbrances

¹ Schwallback v. C. M. & St. P. R. R., 69 Wis. 292.

² Garrison v. Sandford, 12 N. J. L. 261; Willard v. Worsham, 76 Va. 392.

³ Williams v. O'Donnell, 225 Pa. St. 321.

⁴ Mygatt v. Coe, 124 N. Y. 212; 142 *id.* 78; 147 *id.* 456; 152 *id.* 457.

⁵ Le Roy v. Beard and Peters v. Bowman, *supra*.

⁶ Eames v. Armstrong, 146 N. C. 1.

⁷ Swasey v. Brooks, 30 Vt. 692.

⁸ Coleman v. Lyman, 42 Ind. 289.

⁹ Schofield v. Homestead Co., 32 Iowa, 317; Boon v. McHenry, 55 *id.* 202.

¹⁰ Maguire v. Riggan, 44 Mo. 512; Johnson v. Johnson, 170 *id.* 34.

¹¹ Geiszler v. De Graaf, 166 N. Y. 339.

¹² Security Bank v. Holmes, 65 Minn. 531.

are held to run with the land, but this is not so in California¹ and Vermont.²

§ 27. *Exceptions and reservations in deeds.*

The words "excepting" and "reserving" are frequently used synonymously, or at least without discrimination in deeds.³ In a strict sense a reservation in a deed is something created out of the thing granted which had not a prior existence, such as an easement; while an exception is some existing thing kept back out of what is granted.⁴ The exception does not convey, the reservation takes back;⁵ thus, a reservation of a right of way in a deed reserves only an easement, while an exception of a strip of land traversed by a right of way withholds the fee.⁶ The books call attention to the constant misuse of the terms "reservation" and "exception," but all the cases give effect to a clause as one or the other, according to the subject matter to which it applies, regardless of the word used;⁷ for instance, if a thing is really excepted from a conveyance, mentioning it merely as reserved does not defeat its effect as an exception.⁸ Examples of exceptions are the setting off from the land

¹ *McPike v. Heaton, supra.*

² *Swasey v. Brooks, supra.*

³ *Martin v. Cook*, 102 Mich. 267; *McAfee v. Arline*, 83 Ga. 645; *Stockbridge Iron Co. v. Hudson I. Co.*, 107 Mass. 290.

⁴ *Winston v. Johnson*, 42 Minn. 398; *Cochecho Mfg. Co. v. Whittier*, 10 N. H. 305; *Moffitt v. Lytle*, 165 Pa. St. 173.

⁵ *Pritchard v. Lewis*, 125 Wis. 604; *Ammons v. Toothman*, 59 W. Va. 165.

⁶ *Pritchard v. Lewis, supra.*

⁷ *Frank v. Myers*, 97 Ala. 437.

⁸ *Elsea v. Adkins*, 164 Ind. 580.

conveyed of a part of it for burial purposes with the right to make interments there;¹ and the taking out from the premises conveyed of a plot of land of certain stated dimensions for a way to the grantor's cellar.² On the other hand, a right to cut timber on the land granted,³ a right to all the slabs made at a sawmill conveyed,⁴ and a crossing over a railroad right of way deeded⁵ are each and all reservations. A reservation in a deed of a gate or passageway about five feet wide reserves nothing more than a gate or passageway of sufficient width for convenient use suitable for the purposes of the reservation.⁶ An oral reservation of a barn when conveying a farm is useless; it will not prevent the title from passing.⁷ If one intends, when conveying a farm, to keep the growing crops himself, he should take pains to except them in his deed or by some other writing. An oral exception of this sort has, indeed, been held good,⁸ but the weight of judicial authority appears to be against its validity.⁹ The identity of the subject-matter of an exception, for instance, that a well excepted was located at a particular place in the tract of land conveyed, may

¹ *Mitchell v. Thorne*, 134 N. Y. 536.

² *Mount v. Hambley*, 22 Misc. 454.

³ *Blackman v. Striker*, 142 N. Y. 555; *Rich v. Zeilsdorff*, 22 Wis. 544.

⁴ *Adams v. Morse*, 51 Me. 497.

⁵ *Knowlton v. N. Y., N. H., & H. R. R.*, 72 Conn. 188; *Biles v. Tacoma, O. & G. H. R. R.*, 5 Wash. 509.

⁶ *Atkins v. Bordman* (Mass.) 2 Metc. 457.

⁷ *Leonard v. Clough*, 133 N. Y. 292.

⁸ *Grabow v. McCracken*, 23 L. R. A. (N. S.) 1218.

⁹ *Gibbons v. Dillingham*, 10 Ark. 9; *Gam v. Cordrey*, 4 Pennew. 143; *Turner v. Cool*, 23 Ind. 56; *Brown v. Thurston*, 56 Me. 126; *Adams v. Watkins*, 103 Mich. 431; *McIlvaine v. Harris*, 20 Mo. 457.

be proved by oral testimony.¹ It is, however, said to be a well-settled principle, declared in the old text-books and coming down to us without dissent or contrariety of opinion anywhere, that when in a conveyance complete and perfect in itself of premises well identified and described there is embodied an exception of an uncertain and undefined part of the property conveyed, the exception is void for uncertainty, and the grant is good.²

¹ *Elsa v. Adkins, supra.*

² *Frank v. Myers, supra.*

CHAPTER V

THE FARMER IN POSSESSION OF THE FARM

§§ 28-34

§ 28. *Actual and constructive possession.*

There is nowadays little if any difference in the legal meaning of possession and seisin of land.¹ To possess land is to occupy it,²—to hold and exercise exclusive dominion over it.³ The person who has the true title to unoccupied land is in constructive possession of it.⁴ Constructive possession is a fiction of law, while actual possession is a tangible fact.⁵ Actual possession is a possession in fact, really and absolutely, as opposed to a virtual, constructive, theoretical, or potential possession.⁶ It is the opposite of possession in law, or the same as what is called *pedis possessio*, or *pedis positio*, by which is meant a foothold on the land — a standing upon it, an occupation of it as a real demonstrative act done. It is the contrary of that possession in law which is termed

¹ Slater v. Rawson, 47 Mass. 439.

² Nathan v. Dierssen, 146 Cal. 63; Evans v. Foster, 79 Tex. 48.

³ Booth v. Small, 25 Iowa, 177.

⁴ Richbourg v. Rose, 53 Fla. 173.

⁵ Carey v. Cagney, 109 La. 77.

⁶ Doty v. O'Neil, 95 Cal. 244.

constructive possession and which follows in the wake of the title.¹ Actual possession of land is the subjecting of it to the use and dominion of the occupant.² It is manifested by visible acts, such as improvements, inclosures, and cultivation, to afford absolute and exclusive enjoyment to the possessor.³ It is such a possession as the character and situation of the land require,⁴ and if land is occupied and used as it is adapted to be, the possession of it is actual.⁵ Land which is used and cultivated by its owner is actually possessed by him even if he does not reside upon it.⁶ And one who goes upon timber land and makes turpentine year after year has been held to be an actual possessor of it as against the constructive possession of the owner of the legal title.⁷

§ 29. *The advantages of possession.*

There are several advantages which the occupant of land has over one claiming to own it but out of possession. The occupant's right to stay may be dubious, but only one who has a superior right can dislodge him. A plaintiff in ejectment can recover only upon the strength of his own title;⁸ the weakness of the occupant's title is no help to him.⁹ He must show title in himself and cannot rely

¹ Churchill v. Onderdonk, 59 N. Y. 134; Cutting v. Patterson, 82 Minn. 375.

² Webber v. Clarke, 74 Cal. 11; Gildehaus v. Whiting, 39 Kan. 706.

³ Courtney v. Turner, 12 Nev. 345; Pendo v. Beakey, 15 S. Dak. 344.

⁴ Allaire v. Ketcham, 55 N. J. Eq. 168.

⁵ Morrison v. Kelly, 22 Ill. 610.

⁶ Lyons v. Andry, 106 La. 356.

⁷ Richbourg v. Rose, *supra*.

⁸ King v. Mullins, 171 U. S. 404; McGuire v. Blount, 199 *id.* 142.]

⁹ McNitt v. Turner, 16 Wall. 352; Bigler v. Baker, 40 Neb. 325.

on the defects of his adversary's title;¹ because it is his right, not the occupant's wrong-doing, that is the ground of recovery.² On the other hand, the mere possession of land is good enough evidence of ownership against any mere trespasser,³ because the presumption is that a person in possession of land owns it;⁴ that is, the law presumes every possession of land to be lawful unless it is proved to have commenced and continued wrongfully.⁵ It presumes that the possessor of land who claims to own it is the owner of it unless there are facts or circumstances to prove the contrary.⁶ It is a principle of law also that any notice sufficient to attract one's attention, to put one upon guard, and to call upon one to make inquiry, is notice as well of everything that the inquiry would have disclosed.⁷ In respect of another's title to land, one is bound equally by his actual knowledge or express notice of facts and by circumstances such as will lead to knowledge by the exercise of due diligence.⁸ Now, the possession of land is notice to the world of whatever right or title the occupant has to it;⁹ every purchaser of occupied land is charged, as a general rule, with notice of the rights and equities of the person in possession.¹⁰ No one

¹ *Stiff v. Cobb*, 126 Ala. 381; *Hammond v. Shepard*, 186 Ill. 235; *Wilson v. Leary*, 120 N. C. 90; *Illinois Steel Co. v. Bilot*, 109 Wis. 418.

² *Home Fire Ins. Co. v. Barber*, 67 Neb. 644.

³ *Campbell v. Rankin*, 99 U. S. 261.

⁴ *White v. White*, 89 Ill. 460. ⁵ *Ricard v. Williams*, 7 Wheat. 59.

⁶ *Morris v. U. S.*, 174 U. S. 196; *Bradshaw v. Ashley*, 180 *id.* 59.

⁷ *Shauer v. Alerton*, 151 U. S. 607.

⁸ *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417.

⁹ *Bridger v. Exch. Bank*, 126 Ga. 821.

¹⁰ *May v. Sturdivant*, 75 Iowa, 116; *Tate v. Pensacola Gulf Land Co.*, 37 Fla. 439; *Pleasants v. Blodgett*, 39 Neb. 741; *Chapman v. Chapman*, 91 Va. 397.

can be an innocent purchaser of land as against the person in possession,¹ even if there is no record of the possessor's rights,² or a record that shows title in another person.³ This is so regardless of the record.⁴

§ 30. *The nature of adverse possession.*

Every adverse possession begins with a disseisin;⁵ and a disseisin is a wrongful putting out from his freehold of one who is seised.⁶ It is an actual, visible, and exclusive appropriation of land begun and continued under a claim of right either openly avowed or manifested by the conduct of the disseisor.⁷ It is the divesting of the landowner of his seisin and the substitution of the disseisor in his place.⁸ Actually taking possession of land under color of title is a disseisin.⁹ Disseisin differs somewhat from dispossession; the former is always a wrongful ouster, but the latter is an ouster either wrongful or rightful.¹⁰ To possess land adversely is to occupy it without the consent of its legal proprietor,¹¹ and in hostility to the legal title.¹² Adverse possession is a possession by one not the owner, inconsistent with the right of

¹ *Smith v. Reid*, 134 N. Y. 568; *Banks v. Allen*, 127 Mich. 80.

² *Turman v. Bell*, 54 Ark. 273.

³ *Dennis v. Nor. Pac. R. R.*, 20 Wash. 320.

⁴ *Doyle v. Teas*, 5 Ill. 202.

⁵ *Little v. Libby*, 2 Greenl. 242; *Springer v. Young*, 14 Ore. 280.

⁶ *Mitchell v. Warner*, 5 Conn. 497.

⁷ *Portis v. Hill*, 3 Tex. 273; *Gilchhaus v. Whiting*, *supra*.

⁸ *Clapp v. Bromagham*, 9 Cow. 530; *M'Call v. Neely*, 3 Watts, 69.

⁹ *Weston v. Reading*, 5 Conn. 255.

¹⁰ *Slater v. Rawson*, *supra*.

¹¹ *Bryan v. Atwater*, 5 Day, 181.

¹² *French v. Pearce*, 8 Conn. 440.

possession of the true owner.¹ It implies that it commenced in wrong and is maintained against right.² It is an actual appropriation of the land begun and continued under a claim of right hostile to another's claim,³ an actual occupation of land as one's own.⁴ It is an unequivocal assertion by the occupant of land of title in himself when he really has none, and of a title of his own exclusive of all other rights.⁵

§ 31. *Adverse possession under color of title.*

Color of title as a foundation of an adverse possession of land has distinct advantages. In the first place it quite plainly marks the beginning of the adverse possession and fixes with some certainty the time when the statute of limitations commences to run against the true owner. In the next place it extends constructively the adverse possession over all the land it describes;⁶ it affords the occupant of the land ground for claiming possession up to the boundaries mentioned or traced in the instrument which constitutes the color of title.⁷ Color of title is the apparent right an occupant of land derives from his paper title, which distinguishes him from an intruder or naked trespasser;⁸ it is that which has the appearance without

¹ Sheaffer *v.* Eakman, 56 Pa. St. 144; Faloon *v.* Simshauser, 130 Ill. 649.

² Hunnewell *v.* Burchett, 152 Mo. 611.

³ Stanley *v.* Schwalby, 147 U. S. 508.

⁴ Simmons *v.* Parsons (S. Car.), 2 Hill, L. 492, *note*.

⁵ Sherry *v.* Frecking, 4 Duer, 452.

⁶ Hornblower *v.* Banton, 103 Me. 375.

⁷ Johnston *v.* Case, 131 N. C. 491.

⁸ Saltmarsh *v.* Crommelin, 24 Ala. 347.

the reality of title — a something that seems to be title; but really is no title.¹ There is color of title only when there is some sort of a written conveyance which purports to transfer an estate in the land.² Any paper having the looks of title will do for color of title.³ Any writing which describes the land and purports to convey it is color of title although it is invalid and conveys none.⁴ No matter what may be the source of its invalidity, a deed which purports to convey land and which in form does so is color of title;⁵ for color of title does not depend upon the effect or validity of the instrument which gives the color but wholly upon its intent and meaning.⁶ Any writing which serves to define the extent and character of an occupant's claim to land with parties from whom and to whom it comes answers for color of title,⁷ no matter how imperfect or defective as a deed it may be.⁸ Indeed, a deed may be wholly void because made pursuant to a judicial decree absolutely void and yet be sufficient as color of title to serve the purposes of an adverse possession.⁹ To be color of title it is only necessary for the writing to be an instru-

¹ *Wright v. Mattison*, 18 How. 50; *Cameron v. U. S.*, 148 U. S. 301; *Bolden v. Sherman*, 110 Ill. 418; *Erdman v. Corse*, 87 Md. 506; *Dugan v. Farrier*, 47 N. J. L. 383; *Lindt v. Uihlein*, 116 Iowa, 48; *Swift v. Mulkey* 17 Ore. 532.

² *Bloom v. Strauss*, 70 Ark. 483; *Williamson v. Tison*, 99 Ga. 792; *Williams v. Scott*, 122 N. C. 545; *Wood v. Conrad*, 2 S. Dak. 334; *Alldrich v. Griffith*, 66 Vt. 390; *Mullan v. Carper*, 37 W. Va. 215.

³ *Core v. Faupel*, 24 W. Va. 238.

⁴ *Allen v. Mansfield*, 108 Mo. 343.

⁵ *Chi. R. I. & P. R. R. v. Allfree*, 64 Iowa, 500.

⁶ *Hindley v. Manhattan R. R.*, 185 N. Y. 335.

⁷ *Burdell v. Blain*, 66 Ga. 169.

⁸ *Street v. Collier*, 118 Ga. 470; *Randolph v. Casey*, 43 W. Va. 289.

⁹ *Hamilton v. Witner*, 50 Wash. 689.

ment which purports to convey the title, but that is an essential feature and supremely important.¹ A deed cannot be color of title beyond what it purports to convey.² Color of title should not be confounded with claim of title; they are different things.³ The phrases "color of title" and "claim of title" are not equivalent in meaning; to constitute color of title there must be a paper title of some sort, but a claim of title may rest altogether in parol.⁴ Nor does a claim of title necessarily include color of title.⁵

§ 32. *Adverse possession by squatter.*

It was the early view that a mere trespasser on land without color of title could not hold adversely to the true owner.⁶ To bar the legal owner of his title to land, according to a recent utterance of the United States Supreme Court, an adverse possession needs to be held under a claim of title, in hostility to the true title, and to have been open, notorious, exclusive, continuous, and undisturbed all the time the statute of limitations was running;⁷ and it is significant that in the case in which this was said nothing was said concerning the necessity of color of title. There is, it has been asserted, no case in which a private person owning land will not be barred by another's adverse possession if it has continued for the full period of the

¹ *Deffeback v. Hawke*, 115 U. S. 407; *Coleman v. Billings*, 89 Ill. 183; *Converse v. Calumet River R. R.*, 195 *id.* 204.

² *Woods v. Banks*, 14 N. H. 101; *Wells v. Jackson Iron Co.*, 48 *id.* 491.

³ *Herbert v. Hanrick*, 16 Ala. 581.

⁴ *Hamilton v. Wright*, 30 Iowa, 480.

⁵ *Allen v. Mansfield*, *supra*.

⁶ *Jackson v. Huntington*, 5 Pet. 402; *Harvey v. Tyler*, 2 Wall. 328.

⁷ *Ward v. Cochran*, 150 U. S. 597.

statute of limitations.¹ At the present time the list is a long one of cases in which it has been held that an adverse possession may begin by a naked trespass without even a pretense of color of title. A mere intruder or squatter, who takes possession of land as his own, openly and notoriously claiming title to it, and excludes everybody else from it, if left unmolested for the full statutory time, will in the end gain a title by prescription to all the land he has actually occupied.²

§ 33. *The distinction in cases of adverse possession with and without color of title.*

The distinction between an adverse possession under color of title and one in which there is no color of title is universally understood. The courts refer to it as well settled, important, undoubted, well marked, and widely recognized. And they refer to it also as the only difference in the two kinds of adverse possession. Concisely stated, the distinction is this: A possession under color of title when it is actual as to a part of the land is constructive as to the rest of it; that is, a possession under color of title, when any part of the land described in the instrument which gives the color is actually occupied by the claimant under it, constructively covers the whole of it except in so far as it may happen to be actually occupied by some one else. On the other hand, a possession without any color

¹ *Portis v. Hill*, *supra*; *Drayton v. Marshall*, Rice's Eq. 373.

² *Lucy v. Tenn. & C. R. R.*, 92 Ala. 246; *McClellan v. Kellogg*, 17 Ill. 498; *Campau v. Dubois*, 39 Mich. 274; *Swan v. Munch*, 65 Minn. 500; *Swope v. Ward*, 185 Mo. 316; *Rosa v. Mo. K. & T. R. R.*, 18 Kan. 124; *Keefe v. Bramhall*, 3 Mackey, 551.

of title — the squatter's sovereignty, so to speak — never extends a single inch beyond the ground actually occupied — the land under foot, as it is termed. It embraces the soil dwelt upon, cultivated, inclosed, used, and it includes nothing beyond.¹

§ 34. *The intent in holding adversely.*

He who would acquire by prescription title to land must entertain and cherish an intention to claim its ownership. There cannot be an adverse possession where there is no intention to claim ownership.² If, for instance, a farmer should occupy land up to a certain fence in the belief that such fence was on the true line between him and his neighbor when the fence was in fact entirely beyond and altogether on his neighbor's land, but honestly intending all the time to claim only what belonged to him and never intending to claim any of his neighbor's land, he will not be in adverse possession, because the intention to claim ownership is wanting.³ Merely occupying another's land by mistake or inadvertence up to a supposed but misplaced line fence is no disseisin.⁴ But if a landowner occupies his land up to a certain fence in the mistaken belief that it stands on the true boundary line between

¹ *Chastang v. Chastang*, 141 Ala. 451; *Roots v. Beck*, 109 Ind. 472; *Campau v. Campau*, 44 Mich. 31; *Foulke v. Bond*, 41 N. J. L. 527; *Anderson v. Burnham*, 52 Kan. 454; *Sumner v. Blakslee*, 59 N. H. 243; *Humphries v. Huffman*, 33 Ohio St. 395; *Turpin v. Brannon*, 3 M'Cord, L. 261; *Collins v. Hipshire*, 2 Swan, 109; *Whitehead v. Foley*, 28 Tex. 268; *Creekmur v. Creekmur*, 75 Va. 430; *M'Call v. Neely*, *supra*; *Maxwell v. Cunningham*, 50 W. Va. 298.

² *Hess v. Rudder*, 117 Ala. 525.

³ *Ibid.*

⁴ *Winn v. Abeles*, 35 Kan. 85.

him and the next owner, and all the time claims and means to claim as his own all the land on his side of the fence, whether the fence is on the line or not, then his possession is hostile and adverse to his neighbor's title; and if it persists without hindrance long enough will ultimately give him title up to the fence.¹ The encroachment, however, as has been said, of one landowner on his neighbor's land because he is confused and uncertain about the location of the division line is not an adverse possession.²

¹ *Preble v. Maine Cent. R. R.*, 85 Me. 260.

² *King v. Brigham*, 23 Ore. 262.

CHAPTER VI

THE FARM: ITS EXTENT, AREA, AND COMPONENTS

§§ 35-38

§ 35. *What a farm is.*

The word "farm" is one of wide meaning; circumstances and the intention of those who deal respecting any given farm have much to do in determining what it includes in any particular case.¹ The word is indefinite and somewhat ambiguous.² At times it is necessary to prove by oral testimony just what land is included in what is called a farm.³ A farm generally means an area of land under single ownership and devoted to agriculture — either to raising crops or for pasturage; it may consist of any number of acres — of one field or many fields; it may lie wholly in one township or county or in more than one; it has no necessary relation to the political subdivisions of the county.⁴ A farm is not necessarily inclosed land;⁵ it is simply an area of land under a single control devoted to cultivation, and it may be large or small and consist of a single tract or be made up of a number of parcels.⁶ There

¹ Riddle *v.* Littlefield, 53 N. H. 503.

² Doolittle *v.* Blakesley, 4 Day, 265.

³ Locke *v.* Rowell, 47 N. H. 46.

⁴ Rogers *v.* Caldwell, 142 Ill. 434.

⁵ Finley *v.* Langston, 12 Mo. 124.

⁶ Drake's case, 114 Fed. 229.

is nothing commonly or popularly understood by the word "farm" which contravenes the idea that the parts which compose it must necessarily adjoin one another or be adjacent to each other; nothing which precludes the separation of one part of the farm from the rest by a considerable distance so as to prevent the whole from being considered as one entire farm.¹

§ 36. *The extension of the farm.*

Land fit for cultivation has been defined in one case as land in such a natural state of soil that a farmer of reasonable skill and knowledge can regularly and annually, by tilling it, raise upon it grain and other staple crops;² and the surface of land, in another case, as that part of it which is used for agricultural purposes.³ As a matter of course, then, a farm extends over the surface of the earth fit for cultivation and circumscribed by its metes and bounds. It covers all the ground, soil, and earth whatever.⁴ Laterally it extends to its boundary lines, and when one of these is a highway or an unnavigable stream of water, unless the deed has otherwise provided, and generally where the common law prevails, the farm extends to the middle of the road and the thread of the stream.⁵ If the farm is on the sea-shore or is bordered by navigable waters in

¹ *Bell v. Woodward*, 46 N. H. 333.

² *Keeran v. Griffith*, 34 Cal. 580.

³ *Murray v. Allred*, 100 Tenn. 100; *Williams v. So. Penn. Oil Co.*, 52 W. Va. 181.

⁴ *Mitchell v. Warner*, 5 Conn. 497.

⁵ *Banks v. Ogden*, 2 Wall. 57; *Hardin v. Jordan*, 140 U. S. 371; *Friedman v. Snare & T. Co.*, 71 N. J. L. 605; *Healey v. Babbitt*, 14 R. I. 533; *Morrow v. Willard*, 30 Vt. 118; *Mariner v. Schulte*, 13 Wis. 693.

which the tides ebb and flow, it stops at the water's edge — highwater mark; ¹ that is, at common law and wherever the common law prevails. ² The rule applies also to large rivers and great lakes. ³ A farm also in the eye of the law extends from the surface of the ground indefinitely upward to the sky above and downward to the center of the earth. ⁴

§ 37. *The area of the farm.*

If the farm is described in the conveyance by metes and bounds, the use of the general phrase “containing——acres” does not amount to a warranty of quantity. ⁵ When land is sold as of a stated acreage or dimension, more or less, and it turns out, when accurately surveyed, to be either a little larger or a little smaller in area, the seller can claim no additional compensation for any excess nor the buyer any reduction in price for a deficit. ⁶ The words more or less in such case are words of qualification, and the conveyance is well satisfied by about the number of acres mentioned. ⁷ Those words are words of safety and precaution to cover slight and unimportant errors and inaccuracies in surveying. ⁸ The buyer takes the chances

¹ *Barney v. Keokuk*, 94 U. S. 324; *Shively v. Bowlby*, 152 *id.* 1.

² *U. S. v. Pacheco*, 2 Wall. 587.

³ *Revell v. Peo.*, 177 Ill. 468; *Peo. v. Silberwood*, 110 Mich. 103.

⁴ *Smith v. Atlanta*, 92 Ga. 119; *U. S. Pipe Line Co. v. D. L. & W. R. R.*, 62 N. J. L. 254; *Mott v. Palmer*, 1 N. Y. 564; *Winton v. Cornish*, 5 Ohio, 477; *Erickson v. Crookston W. Wks., P. & Lt. Co.*, 105 Minn. 182.

⁵ *Andrews v. Rue*, 34 N. J. L. 402; *Ricketts v. Dickens*, 5 N. C. 343; *Russell v. Keeran*, 8 Leigh, 9.

⁶ *Melick v. Dayton*, 34 N. J. Eq. 245; *Frenche v. Chancellor*, 51 *id.* 624.

⁷ *Hodges v. Kowing*, 58 Conn. 12.

⁸ *Oakes v. De Lancey*, 133 N. Y. 227; *Crislip v. Cain*, 19 W. Va. 438.

of minor shortages if the vendor acts in good faith.¹ The words "more or less" will not cover a large surplus or deficiency; if the difference is very considerable, relief will be afforded to him who suffers from it.² If the deficiency is very great, deceit or a mistake which amounts to a fraud is inferred.³ The variation ought not to exceed ten or fifteen per centum at the outside.⁴ Value has much to do with the matter, a shortage of ten acres in a tract supposed to contain one hundred and sixty-six acres where land is worth fifty dollars an acre,⁵ or a deficiency of five and a quarter acres of land worth fifty five dollars an acre⁶ in a contract to convey "about one hundred and forty acres," are each too great to be covered by the phrase "more or less." A deed of a tract of land definitely identified, and said to be about a certain number of chains and links in depth, conveys the whole tract, although it is in fact a few links deeper.⁷

§ 38. *Of what the farm is composed.*

In the term "land" is embraced any part of the surface of the earth that can be held as individual property, whether soil or rock or ground under water, and also everything annexed to it either by nature or the hand of man;⁸ thus it includes trees, grass, water, buildings, and fences.⁹

¹ *Tyler v. Anderson*, 106 Ind. 185; *Tyson v. Hardesty*, 29 Md. 305.

² *Harrison v. Talbot*, 32 Ky. 258; *Gentry v. Hamilton*, 38 N. C. 376.

³ *Wylly v. Gazan*, 69 Ga. 506.

⁴ *Fannin v. Bellomy*, 68 Ky. 663. ⁵ *Triplett v. Allen*, 26 Gratt. 721.

⁶ *Stevens v. McKnight*, 40 Ohio St. 341.

⁷ *White v. Woodruff*, 24 N. J. L. 753.

⁸ *Conn. Mut. L. Ins. Co. v. Wood*, 115 Mich. 444.

⁹ *Harder v. Plass*, 57 Hun, 540.

Gravel and sand in their native beds are real estate.¹ Land spoken of as a subject of ownership includes land covered by water,² and water-power both used and unused.³ Land includes standing timber, for growing trees are a part of the land upon which they grow.⁴ While they remain rooted in the ground, growing grasses, both wild and cultivated,⁵ growing crops,⁶ fruit trees and their fruits, and perennial bushes, shrubs, and other plants⁷ are all part of the soil. Manure accumulated on a farm in the usual course of husbandry is a part of the farm and goes with it when it is deeded or descends to an heir or devisee.⁸ As the ownership of land extends downward to the center of the earth and upward to the sky, the minerals lying underneath the farm, — petroleum,⁹ natural gas,¹⁰ and coal and iron,¹¹ — and meteorites that fall from the sky,¹² all belong to the landowner and constitute a part of his

¹ *Glencoe Land Co. v. Hudson Bros. Com. Co.*, 138 Mo. 439.

² *Hardin v. Jordan*, 140 U. S. 371.

³ *Kimberly & C. Co. v. Hewitt*, 75 Wis. 371.

⁴ *Gulf Red Cedar Lum. Co. v. O'Neal*, 131 Ala. 117; *Balkcom v. Empire Lum. Co.*, 91 Ga. 651; *Fox v. Pearl Riv. Lum. Co.*, 80 Miss. 1; *Kingsley v. Holbrook*, 45 N. H. 313; *Gulf, C. & S. F. R. R. v. Foster*, 44 S. W. 198.

⁵ *Smith v. Leighton*, 38 Kan. 544.

⁶ *Bagley v. Columbus So. Ry.*, 98 Ga. 626; *Sullens v. Chic. R. I. & P. Ry.*, 74 Iowa, 659.

⁷ *Sparrow v. Pond*, 49 Minn. 412.

⁸ *Fay v. Muzzey*, 79 Mass. 53; *Collier v. Jenks*, 19 R. I. 137.

⁹ *Brown v. Spilman*, 155 U. S. 665; *Williamson v. Jones*, 39 W. Va. 231; *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317; *Swayne v. Long Acre Oil Co.*, 98 Tex. 597.

¹⁰ *Peo. Gas Co. v. Tyner*, 131 Ind. 277.

¹¹ *Stoughton's Appeal*, 88 Pa. St. 198; *Williamson v. Jones*, *supra*.

¹² *Goddard v. Winchell*, 86 Iowa, 71; *Maas v. Amana Soc.*, 16 Alb. L. Jour. 76.

land. Oil and gas in the earth indeed, unlike the solid minerals, cannot be owned separately from the overlying soil.¹ It is an old maxim of the law that whatever is affixed to the soil belongs to the soil² and so all structures—dwellings, stables, barns, fences, and other buildings, are parts and parcels of the farm, styled fixtures. The common law rule that whatever is once annexed to the freehold becomes a part of it is insisted upon more strongly between executor and heir in favor of the heir; somewhat less strongly as between a life tenant and the remainderman, and still less as between landlord and tenant in favor of the tenant.³

¹ *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9.

² *Broom's Leg. Maxim*, 299.

³ *Van Ness v. Pacard*, 2 Pet. 137.

CHAPTER VII

THE BOUNDARIES OF THE FARM

§§39-46

§ 39. *The existence and recognition of the boundary.*

It is a rule of the common law which attaches to the ownership of land wherever man's private ownership in real property is admitted, that every one's domain is inclosed by a boundary either visible or invisible — a material hedge, fence, or wall, or an ideal and unseen barrier, and that every unwarrantable intrusion on the ground within by a person or his cattle is a trespass by breaking the close: this rule is no arbitrary regulation, but is incidental to the ownership of the land.¹ If one selling a farm points out its boundaries to the purchaser where they are not visibly indicated and marked, he will be liable to make good any deficiency if the true lines turn out to be within the boundaries he has pointed out, but not if he merely expresses his opinion or belief as to the location of the lines, although he proves to be mistaken.² If the seller knows where the true lines are and falsely misrepresents their location, he is guilty of a fraud on the buyer;³ but

¹ *Bileu v. Paisley*, 18 Ore. 47.

² *Odell v. Story*, 116 N. W. 269.

³ *Clark v. Baird*, 9 N. Y. 196; *Schwenk v. Naylor*, 102 *id.* 683; *Harlow v. Green*, 34 Vt. 379.

if he is honest in his belief, but mistaken, it is no fraud.¹ Every one is bound to know the boundaries of his own land, and none can defend a charge of trespassing upon adjoining land by alleging his ignorance of the true boundary line.²

§ 40. *Running the lines.*

In locating lands described in a deed, it is a general rule that natural objects, such as mountains, lakes, rivers, creeks, rocks, etc., called for, control artificial objects, such as marked lines, stakes, blazed trees, stone-piles, etc.; that artificial objects or monuments, so called, control courses and distances; that courses control distances; and, finally, that both courses and distances control quantities.³ All visible marks or indicators upon natural or artificial objects which show the lines or boundaries of a survey of land are monuments.⁴ When there are defined monuments, errors in the courses in a description of land in a conveyance are disregarded.⁵ So, also, of mistakes as to distances; thus, when a line is stated in a deed as about a certain number of poles long to a named river, it extends to the river,⁶ and when a line is given as about a certain number of feet in length ending in a monument, it extends to the monument unless no monument can be located.⁷

¹ *Stow v. Bozeman*, 29 Ala. 397; *Hall v. Thompson*, 1 Smed. & M. 443.

² *Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.*, 11 Colo. 223.

³ *Ayers v. Watson*, 113 U. S. 594.

⁴ *Grier v. Penn'a Coal Co.*, 128 Pa. St. 79.

⁵ *Higuera v. U. S.*, 5 Wall. 827.

⁶ *Purinton v. Sedgley*, 4 Greenl. 283.

⁷ *Cutts v. King*, 5 *id.* 482.

But although monuments called for in a conveyance of land generally prevail over the courses given, they yield where adhering to them would defeat the deed, and the courses and distances given inclose the land.¹ If a course and distance on one side is missing in a conveyance of land, the other courses and distances should be run and their ends united by a line inclosing the land.²

§ 41. *Inclosing the farm.*

To be inclosed, land must be shut in on all sides,³ and it is inclosed when it is entirely surrounded by a fence.⁴ The legislature exercising the police power may require every man to inclose his land and deny him any remedy for the trespasses of cattle if he does not do so.⁵ Such statutes are constitutional⁶ and many states have enacted them. If a landowner neglects in states where such statutes are in force to inclose his land by a fence strong enough and tight enough to keep out cattle not ordinarily disposed to break fences, he can recover no damages for the trespasses of cattle.⁷ In the graphic language of the farm, fences should be "bull-strong, pig-tight and horse-high." The test of a lawful fence for the restraint of stock is its state at the place where the stock pass through or over it, and the fact that it was not high enough at

¹ *White v. Luning*, 93 U. S. 514.

² *McEwen v. Den*, 24 How. 242.

³ *U. P. R. R. v. Harris*, 28 Kan. 206.

⁴ *Kimball v. Carter*, 95 Va. 77; *Haynie v. State*, 75 S. W. 24.

⁵ *Bileu v. Paisley*, *supra*; *Clarendon Land Co. v. McClelland Bros.*, 89 Tex. 483.

⁶ *Poindexter v. May*, 98 Va. 143.

⁷ *Clarendon Land Co. v. McClelland Bros.* *supra*.

another place or that somewhere else a gate in it was left open is of no consequence if it was all right at the place where the animals crossed it.¹ A landowner is not required to fence against cattle that are wrongfully on adjoining land, hence, he may recover damages caused by stock which escape from control while being driven along the highway and cross intervening unfenced land to trespass on his uninclosed land.² Neither is he under any obligation to fence his land to prevent trespassing animals injuring themselves, and so he is not liable for damages when animals trespass on his uninclosed land and are injured in a pitfall there.³ If, however, a landowner puts up a barbed wire fence without stretching the wires taut, he is negligent and liable for injuries suffered by beasts which get entangled in the loose and hanging wires.⁴

§ 42. *Division fences.*

A division fence is a fence which separates the contiguous lands of adjoining owners.⁵ The owners of adjoining lands divided by a fence which they mistakenly suppose to be upon the true line between them, and who only claim title up to the true division line wherever it may be, must conform to the true line when it is discovered and traced.⁶ All that a landowner is called upon to do regarding the keeping up of a common division line fence is to be as careful as prudent men generally are; he is not bound to provide

¹ *Montgomery v. Glasscock*, 121 S. W. 668.

² *Wood v. Snider*, 187 N. Y. 28.

³ *St. L., I. M. & S. Ry. v. Ferguson*, 57 Ark. 16.

⁴ *Loveland v. Gardner*, 79 Cal. 317.

⁵ *Hoar v. Hennessy*, 29 Mont. 253.

⁶ *Battner v. Baker*, 108 Mo. 311.

against extraordinary gales of wind and tempests which he could not reasonably have expected;¹ nor is he liable for the dangerous condition of such part of the line fence as by contract with his neighbor it was the latter's duty to maintain.² It is no trespass for one of two adjoining landowners to hang his property on the division fence even where it was built by the other one.³ When a landowner knows or has the means of knowing where the true division line is between him and his neighbor, he has no right to rely upon a division fence as marking the line, where it was built in recent years by mistake of his neighbor.⁴

§ 43. *Settling disputed division lines.*

The law has always favored the settlement of disputes and avoidance of litigation. The compromise and settlement of a dispute always afford a sufficient consideration for a promise or to support a contract; but it is essential that there be a real dispute,—an honest controversy,—as otherwise there is nothing to compromise. There must be mutual concessions; each side must give up something for the sake of peace.⁵ An honest belief by both parties to a controversy that the outcome of it is doubtful makes it a proper subject for a valid compromise whatever may be the real merits on either side.⁶ An unascertained or disputed boundary line between adjoining lands may be established by the respective owners, by their written

¹ *Quinn v. Crimmings*, 171 Mass. 255.

² *Ibid.*

³ *Hannabalsen v. Sessions*, 116 Iowa, 457.

⁴ *Cottrell v. Pickering*, 10 L. R. A. (N. S.) 404.

⁵ *Silander v. Gronna*, 15 N. Dak. 552.

⁶ *Smith v. Farra*, 21 Ore. 395; *Galusha v. Sherman*, 105 Wis. 263.

contract; by their oral agreement accompanied by their actual possessions up to the agreed line on the respective sides; and by their acts, declarations, and acquiescence during a limited period prescribed by statute.¹ Twenty years' occupation under an oral agreement settling a disputed boundary gives a title by adverse possession.² An agreement settling a boundary line may be proved by circumstances and recognition by and conduct of the parties.³ Oral agreements of this kind have many times been declared valid when definite in terms and immediately carried out.⁴ Oral agreements settling doubtful and disputed division lines are upheld upon the idea that the parties to them do not undertake to acquire and pass title to real estate, which can only be done by written contract or conveyance; but that they simply fix and determine by agreement the situation and location of what each already owns, — that their purpose is merely by their agreement to identify their respective holdings and to make certain what they have regarded theretofore as uncertain.⁵ Agreements of this character depend for their validity upon the fact that the true line is unknown definitely and the division doubtful, uncertain, and in dispute;⁶ if both adjoining owners know the location of the true dividing line between them, an oral agreement laying it out elsewhere is void.⁷

¹ *Osteen v. Wynn*, 131 Ga. 209. ² *Boyd v. Graves*, 4 Wheat. 513.

³ *Galbraith v. Lunsford*, 87 Tenn. 89.

⁴ *Watrous v. Morrison*, 33 Fla. 261; *Jones v. Pashby*, 67 Mich. 459; *Diggs v. Kurtz*, 132 Mo. 250; *Strickley v. Hill*, 22 Utah, 257; *Teass v. St. Albans*, 38 W. Va. 1.

⁵ *Lecomte v. Toudouze*, 82 Tex. 208.

⁶ *Terry v. Chandler*, 16 N. Y. 354; *Hartung v. Witte*, 59 Wis. 285.

⁷ *Vosburgh v. Teator*, 32 N. Y. 561; *Gilchrist v. McGee*, 9 Yerg. 455; *Lewis v. Ogram*, 149 Cal. 505.

§ 44. *Trees on and near division lines.*

Trees standing on a boundary line belong to the respective owners of both sides as tenants in common,¹ and although it was asserted in one case² that when a tree stands on a boundary line the landowner on either side has a right to lop off limbs and roots on his side close to the trunk, yet it has been more reasonably declared in several other cases that neither owner may destroy a boundary line tree without the other's consent,³ and if he does, the other owner may recover damages against him.⁴ A fruit tree growing several feet from a division line belongs exclusively and wholly to the owner of the surface soil out of which the trunk issues although its roots below and branches above the surface extend across the line.⁵ A landowner does not own fruit growing on the branches which overhang his land of a tree standing entirely on his neighbor's ground;⁶ he has no right to gather the fruit from such branches, but if they are a nuisance to him, he may lop them off,⁷ especially after giving notice of his purpose to the owner of the tree.⁸ For example, a railroad company has a right to lop off the limbs of trees that overhang its right of way and are so low as to strike and injure its servants when on the tops of cars moving along

¹ *Musch v. Burkhardt*, 83 Iowa, 301; *Robinson v. Clapp*, 67 Conn. 538; *Dubois v. Beaver*, 25 N. Y. 123; *Griffin v. Bixby*, 12 N. H. 454.

² *Robinson v. Clapp*, *supra*.

³ *Harndon v. Stultz*, 100 N. W. 329.

⁴ *Dubois v. Beaver and Griffin v. Bixby*, *supra*.

⁵ *Skinner v. Wilder*, 38 Vt. 115; *Lyman v. Hale*, 11 Conn. 177.

⁶ *Hoffman v. Armstrong*, 48 N. Y. 201.

⁷ *Lyman v. Hale*, *supra*; *Hickey v. Mich. Cent. R. R.*, 96 Mich. 498.

⁸ *Hickey v. Mich. Cent. R. R.*, *supra*.

its tracks.¹ But the branches of a tree neither poisonous nor in any way noxious growing upon one side of and overhanging a boundary line are not in and of themselves a nuisance which he whose land is shadowed is entitled to remove summarily; to warrant him in cutting away the overhanging limbs they must in some sensible and practical way damage him by lessening his use or enjoyment of the underlying land.²

§ 45. *Highways as boundaries.*

In all places where the common law prevails, and that is generally, the boundary line of a farm, when a highway, is always, unless the deed provides otherwise, the center line of the road.³ A deed of land bounded along a road laid out entirely upon the grantor's own land, but upon the extreme edge of it, will convey the whole road;⁴ but a deed which calls for the line of a private road as a boundary of the land conveyed, and gives to the grantee a right to open and use such road, conveys no title in fee to any part of the road.⁵ This ownership of the highway, whether to the middle line or of the whole road, carries with it, subject to the public easement, the rights of the owner of a fee. The abutting owner is entitled to the trees and grass which grow upon his part of the highway.⁶ He retains his exclusive right to all timber growing in the highway

¹ *Pitts, C. C. & St. L. Ry. v. Parish*, 28 Ind. App. 189.

² *Countryman v. Lighthill*, 24 Hun, 405.

³ See *ante*, Chap. VI, § 36, note 3.

⁴ *Haberman v. Baker*, 128 N. Y. 253.

⁵ *Clayton v. Gilmer Co. Ct.*, 58 W. Va. 253.

⁶ *Barclay v. Howell*, 6 Pet. 498; *Peo. v. Foss*, 80 Mich. 559.

not incompatible with the public right of way.¹ Any one who recklessly or heedlessly injures trees growing beside the highway is liable to prosecution for wrongfully injuring the property of the abutting owner.² A highway commissioner who causes trees to be removed from the highway without giving the owner notice and an opportunity to remove them himself is liable in damages; and if the trees do not obstruct the highway, their removal cannot be compelled.³ But trees which do obstruct travel or interfere with the public use cannot be permitted to remain.⁴ The owner of the soil has a lawful right to plant, rear, and maintain shade trees along the edge of the highway where they in nowise interfere with the use of the walk or driveway, and he may repel, with force, if necessary, any one who threatens their injury or destruction.⁵

§ 46. *Water lines.*

The title of a landowner whose land is bounded by a stream of water extends to the middle of it if it is not navigable and to high-water mark, if it is navigable.⁶ When the title runs to the thread of the stream, it includes any islands lying in the stream between the channel and the bank.⁷ No matter on which side of a stream an accretion forms, the boundary will still remain in the middle of the channel.⁸

¹ *Jackson v. Hathaway*, 15 Johns. 447; *Overman v. May*, 35 Iowa, 89; *Comr's Shawnee Co. v. Beckwith*, 10 Kan. 603.

² *Daily v. State*, 51 Ohio St. 348.

³ *Clark v. Dasso*, 34 Mich. 86.

⁴ *Patterson v. Vail*, 43 Iowa, 142.

⁵ *Graves v. Shattuck*, 35 N. H. 257; *Wellman v. Dickey*, 78 Me. 29.

⁶ *Ante*, Chap. VI, § 36. *Welles v. Bailey*, 55 Conn. 292.

⁷ *Chandos v. Mack*, 77 Wis. 573.

⁸ *Nebraska v. Iowa*, 143 U. S. 359.

The channel of a stream is the passageway between the banks through which the water flows.¹ A natural water-course called for as a boundary of land must have a bed and banks and show evidence of a permanent stream of running water.² Title of a riparian owner upon a navigable stream above the ebb and flow of the tide is sometimes said to extend to the middle of the stream subject to the public rights of navigation;³ but, in general, it does not run to the middle of a navigable stream,⁴ and it always stops at high-water mark on a navigable stream in which the tide ebbs and flows.⁵ If the high-water mark changes, the boundary line changes with it.⁶ The boundary of riparian land advances as the water retires and accretions form, and recedes as the waters encroach and eat away the bank.⁷ The high-water mark of a fresh water stream is not the highest point reached by its waters in freshets, but the lines along its banks which are covered with water enough to destroy vegetation and the value of the soil for cultivation.⁸ When a boundary line is said to meander, the meaning is that it follows the sinuous and winding course of a river or stream.⁹ In government surveys meander lines along navigable rivers do not trace the boundary, but are merely to show the sinuosities of the

¹ *Morton v. Oregon S. L. Ry.*, 48 Ore. 444.

² *Howard v. Ingersoll*, 13 How. 381.

³ *Grey v. Paterson*, 60 N. J. Eq. 385.

⁴ *Moore v. Farmer*, 156 Mo. 33.

⁵ *Sage v. N. Y. City*, 154 N. Y. 61.

⁶ *Steele v. Sanchez*, 72 Iowa, 65.

⁷ *Cox v. Arnold*, 129 Mo. 337.

⁸ *Dow v. Electric Co.*, 69 N. H. 498.

⁹ *Seneca Indians v. Knight*, 23 N. Y. 498; *Turner v. Parker*, 14 Ore.

bank as a means of ascertaining the quantity of land in the tract surveyed; the rivers themselves are the true boundaries.¹ The right and left banks of a stream, when either is mentioned in a deed, are the banks on the right and left of a person facing or an object passing downstream as it flows from source to mouth.² Properly speaking, a river has no shores,³ only banks. The shore of the sea or a lake is the land on the margin between ordinary high and low water.⁴ By the common law, fresh water lakes, great navigable ones excepted, belong to the owners of their shores,⁵ and a deed of land bounded on one side, as along a pond, unless it expresses the contrary, will carry title to the middle of the pond.⁶ But if the lake although not navigable is a large one, for example, several miles long and scores of rods wide, a deed of land running to it and along its shore will convey no part of its bed;⁷ at most, title will run only to low-water mark.⁸ On large rivers and great lakes shore titles will not extend beyond the waters' edge even where the level has been permanently raised by artificial conditions.⁹ Avulsion, that is, the sudden and violent change in the course and banks of a stream, leaves the boundary line unchanged in its old place and neither confers nor takes

¹ *Jefferies v. E. Omaha Land Co.*, 134 U. S. 178; *Horne v. Smith*, 159 *id.* 40.

² *Borkenhagen v. Vianden*, 82 Wis. 206.

³ *Child v. Starr* (N. Y.) 4 Hill, 369; *Bainbridge v. Sherlock*, 29 Ind. 364.

⁴ *Shively v. Bowlby*, 152 U. S. 1.

⁵ *Hardin v. Jordan*, 140 U. S. 371.

⁶ *Gouverneur v. Nat. Ice Co.*, 134 N. Y. 355.

⁷ *Noyes v. Collins*, 92 Iowa, 566.

⁸ *Lembeck v. Nye*, 47 Ohio St. 336.

⁹ *Pewaukee v. Savoy*, 103 Wis. 271.

away title up to that line.¹ A sudden and violent flood, due to an ice gorge in a navigable river bounding two states, which visibly cuts a new channel, for instance, leaves the boundary line unchanged and the titles and boundaries of private landowners on each side unaffected.²

¹ *Chicago v. Ward*, 169 Ill. 392; *Rees v. McDaniel*, 115 Mo. 145; *Bouvier v. Stricklett*, 40 Neb. 792.

² *Fowler v. Wood*, 73 Kan. 511.

CHAPTER VIII

APPURTENANCES AND EASEMENTS

§§ 47-54

§ 47. *Appurtenances.*

Appurtenances signify things appertaining to some principal thing which go with it as incidents when it is transferred to another owner.¹ They are things used with and related to or dependent upon another thing more worthy and agreeing with it in its nature and quality.² A thing is appurtenant to something else only when it occupies the relation of an incident to a principal with the use and enjoyment of which it is necessarily connected.³ A right not connected with the use or enjoyment of land is not an appurtenance to it and does not pass when the land is conveyed.⁴ When the word "appurtenances" is used in conveyances of land, it means the things which are adjuncts or appendages to the land and incidental to the reasonable and convenient use and enjoyment of the premises granted.⁵ Therefore, one parcel of land can-

¹ *Harris v. Elliott*, 10 Pet. 25.

² *Jarvis v. Seele Mill. Co.*, 173 Ill. 192.

³ *Humphreys v. McKissock*, 140 U. S. 304.

⁴ *Linthicum v. Ray*, 9 Wall. 241.

⁵ *Scott v. Moore*, 98 Va. 668; *Sherrick v. Cotter*, 28 Wash. 25; *Cleary v. Skiffich*, 28 Colo. 362.

not be appurtenant to another parcel;¹ land beyond the boundaries described in a deed never does and never can pass as an appurtenance.² A deed of land with the appurtenances will convey all the appurtenances actually existing at the time it is executed, but it will not create any others.³

§ 48. *Easements.*

An easement is a burden on one and an appurtenance to another estate necessary to the enjoyment of the latter and something more than a convenience.⁴ It exists distinct from the ownership of the soil.⁵ It is a liberty, privilege, or advantage in land without profit⁶ which the owner of one estate may exercise for his own benefit in or over the estate of another.⁷ It is created by a grant expressed or implied from one landowner to another conferring a use, benefit, dominion, or advantage from or over the grantor's estate.⁸ It is a privilege without profit which the owner of one tenement has a right to enjoy with respect of his tenement in or over the tenement of another whereby that other is bound to permit or to refrain from doing something on his own tenement for the advantage of the first.⁹ It is a privilege off and beyond the local

¹ *Moss v. Chappell*, 126 Ga. 196; *Humphreys v. McKissock*, *supra*.

² *Jones v. Johnston*, 18 How. 150; *Woodhull v. Rosenthal*, 61 N. Y. 382.

³ *Muscogee Mfg. Co. v. Eagle & Phoenix Mills*, 126 Ga. 210.

⁴ *Jarvis v. Seale Mill. Co.*, *supra*.

⁵ *Stokes v. Maxson*, 113 Iowa, 122; *Burnet v. Crane*, 56 N. J. L. 285.

⁶ *Stokes v. Maxson*, *supra*; *Albright v. Cortright*, 64 N. J. L. 330.

⁷ *G. L. & P. J. R. R. v. N. Y. & G. L. R. R.*, 134 N. Y. 435.

⁸ *Huyck v. Andrews*, 113 N. Y. 81.

⁹ *Stevenson v. Wallace*, 27 Gratt. 77.

boundaries of the tenement to which it is appurtenant.¹ It is a dominant estate imposed upon a servient tenement.² It always involves two distinct tenements: a dominant estate to which it is appurtenant, and a servient estate upon which it is a burden.³ It necessarily implies a fee in another than him who owns it; it is only a right to a use of land for some special purpose and is not inconsistent with the general property in the land upon which it rests.⁴ It belongs to the land which constitutes the dominant estate and not to him who owns it.⁵ An easement that is not mentioned in a deed will not pass by implication unless it naturally and necessarily belongs to the premises conveyed.⁶ An easement is always an estate in lands and consequently is not to be granted orally;⁷ it must rest in a written grant or arise by prescription, by which a grant is presumed.⁸ But an oral grant of an easement certain in its terms, made for a good consideration followed by such a possession and enjoyment by the grantee, as would be sufficient to take an oral contract for the sale and purchase of real estate out of the operation of the statute of frauds, will be effectual in the same way.⁹ A statute

¹ *Tucker v. Jones*, 8 Mont. 225.

² *Consol. Gas Co. v. Baltimore*, 101 Md. 541.

³ *McMahon v. Williams*, 79 Ala. 288; *Bonney v. Greenwood*, 96 Me. 335; *Seymour v. Lewis*, 13 N. J. Eq. 439; *Nellis v. Munson*, 108 N. Y. 453.

⁴ *Cincin. H. & D. R. R. v. Wachter*, 70 Ohio St. 113.

⁵ *Ross v. Thompson*, 78 Ind. 90.

⁶ *Walker v. Clifford*, 128 Ala. 67; *Whiting v. Gaylord*, 66 Conn. 337; *Bumstead v. Cook*, 169 Mass. 410.

⁷ *Howes v. Barmon*, 11 Idaho, 64; *Laesch v. Morton*, 38 Colo. 171.

⁸ *Walker v. Shackelford*, 49 Ark. 503.

⁹ *Znamanacek v. Jelinek*, 69 Neb. 110.

which requires deeds to be recorded applies as well to conveyances of easements.¹ Easements are continuous or discontinuous: a continuous easement is used or enjoyed without an intervening human agency, and a discontinuous easement is one which is enjoyed or used only by a person. The discharge of rain water from a spout is an example of a continuous easement, and a right of way is an example of a discontinuous one.² Easements are further distinguished as appurtenant easements and easements in gross. The latter, unlike the former, are neither assignable nor inheritable; they die with the person and are so exclusively personal that they who own them cannot take other persons with themselves to enjoy them in their company.³ Whether in a given case an easement is an appurtenant one or one in gross is determined mainly by the nature of the right and the intention of its creators.⁴ An appurtenant easement is an incorporeal right attached to and belonging with some greater or superior right; it is something annexed to another thing more worthy, and it passes as an incident to that other thing. It is a species of what the civil law called a servitude and is incapable of a separate existence apart from the particular messuage or land to which it is annexed.⁵ An easement is an incorporeal hereditament — something inheritable but intangible — a creature of the mind which can neither be seen nor handled.⁶ Ejectment, therefore, is not available

¹ *Dawson v. West*, Md. R. R., 107 Md. 70.

² *Bonelli v. Blakemore*, 66 Miss. 136; *Fetters v. Humphreys*, 18 N. J. Eq. 260. ³ *Cadwalader v. Bailey*, 17 R. I. 495.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Hegan v. Pendennis Club*, 64 S. W. 464; *Stone v. Stone*, 1 R. I. 425; *Slingerland v. Internatl. Contr. Co.*, 43 App. Div. 215.

to recover an easement, because to sustain ejection there must be something of which the possession can be delivered.¹ An easement may be lost by abandonment, but the abandonment must be intentional and done of set purpose. Mere neglect to use it without a design to relinquish it is not an abandonment;² something more than mere passivity is required.³

§ 49. *Fixtures.*

A fixture in the law of real property is a piece of personal property so affixed to land as to become a part of the real estate.⁴ In general, that which can be removed without injury to the freehold and especially without even disfiguring it is not a fixture.⁵ As a general thing an actual physical annexation and attachment to the realty is essential to convert a personal chattel into a fixture.⁶ This is regarded as the most certain and practical test of a fixture,⁷ but it is not absolute nor wholly satisfactory.⁸ There is no universal test whereby the character of what is claimed to be a fixture can be abstractly determined; neither the mode of annexation nor the manner of use is in all cases conclusive; it must usually depend

¹ *Hancock v. McAvoy*, 151 Pa. St. 460.

² *Welsh v. Taylor*, 134 N. Y. 450; *Gassert v. Noyes*, 18 Mont. 216; *Dill v. Camden Bd. of Educ.*, 47 N. J. Eq. 421.

³ *Wm. Wolff & Co. v. Can. Pac. R. R.*, 123 Cal. 535.

⁴ *Cole v. Roach*, 37 Tex. 413; *Padgett v. Cleveland*, 33 S. Car. 339; *Hamilton v. Austin*, 36 Hun, 138; *Davis v. Muga*, 56 Mo. App. 311.

⁵ *Swift v. Thompson*, 9 Conn. 63; *Farrar v. Chaurffetête*, 5 Denio, 527; *M'Clintock v. Graham*, 3 M'Cord, L. 553.

⁶ *Blancke v. Rogers*, 26 N. J. Eq. 563.

⁷ *Baker v. Davis*, 19 N. H. 325.

⁸ *Strickland v. Parker*, 54 Me. 263.

upon the understanding, express or tacit, of the parties concerned.¹ A rule which perhaps comes nearer than any other to being of general application is: that to constitute a fixture it is essential that the chattel be annexed to the freehold, and also from an inspection of the property in the light of the character of the annexation, the nature, adaptation, and uses of the annexed chattel, and of the structure to which it was annexed at the time the annexation was made, and of the relation to the property of him who made it that it should clearly appear that a permanent accession to the freehold was intended.² Buildings in general become a part of the land upon which they stand, but by contract between the landowner and him who erects them they may be made to remain the latter's personal property.³ Things may be fixtures although not fastened in any way to the realty, as where they are parts of permanent buildings, as, for instances, doors, window-sashes, and blinds, merely hung and capable of being lifted bodily from their hinges.⁴ A key belonging to the door of a house, although carried in the pocket, is always a fixture, while a carpet never is, although nailed to the floor.⁵ All fixtures are for the time being a part of the realty, and when he who set them up has a right to remove them, he must exercise that right during the term of his lawful possession or else the right is lost.⁶ As be-

¹ *Wheeler v. Bedell*, 40 Mich. 693.

² *Capen v. Peckham*, 35 Conn. 88; *Hutchins v. Masterson*, 46 Tex. 554.

³ *Kinkead v. U. S.*, 150 U. S. 483; *Tift v. Horton*, 53 N. Y. 377. *Fifield v. Farmers' Bank*, 148 Ill. 163.

⁴ *Farrar v. Stackpole*, 6 Greenl. 154.

⁵ *Goodin v. Elleardsville Hall Asso.* 5 Mo. App. 289.

⁶ *Preston v. Briggs*, 16 Vt. 124.

tween landlord and tenant, whatever has been affixed to the land for the purposes of trade may be removed at the end of the term;¹ it remains personal property.²

§ 50 *Trade Fixtures.*

Anciently the law was more strict in respect of making things erected upon and attached to the land a part of the freehold than in modern times. As civilization has advanced and trade and mechanic arts and other industries have multiplied and developed, and, correspondingly, their necessities and wants of reasonable convenience, there has been a relaxation of the strict rule of law in their favor. It is the policy of the law to encourage trade, manufactures, and transportation, and buildings, fixtures, machinery, certainly intended and calculated to promote them, are treated, not as part of the land, but distinct from it, belonging to the tenant, to be disposed of or removed at his will and pleasure, during the term and, in some cases, after it has ended. This exception to the rule referred to above does not depend upon the character of the structure or thing erected, nor whether it is built of one or another material, nor whether it is set in or upon the earth, but whether it was intended for the purposes of trade or manufacture and not intended to become a part of the land.³ The English doctrine that all this does not apply to structures made solely for agricultural purposes is not accepted in the United States.⁴

¹ *Freeman v. Dawson*, 110 U. S. 264; *Wiggins Ferry Co. v. Ohio & M. R. R.*, 142 *id.* 396.

² *Herkimer Lt. & P. Co. v. Johnson*, 37 App. Div. 257.

³ *West. N. Car. R. R. v. Deal*, 90 N. C. 110.

⁴ *Van Ness v. Pacard*, 2 Pet. 137.

Personal property not fixtures will not pass as appurtenances upon a conveyance of land.¹ A wooden building that rests by its own weight on flat stones laid upon the surface of the ground is personal property and not a fixture.² As a rule agricultural implements which can be removed without injury to the freehold do not become fixtures.³ For examples, a boiler, saw-rig, shingle-mill, and planer,⁴ a bell used for farm purposes and hung on but not fastened to posts set in the ground,⁵ a cider mill and press set up by a farm tenant from year to year at his own expense and for his own use, although embedded in the ground,⁶ a portable detached sawmill,⁷ a portable detached gristmill,⁸ a cotton gin and press,⁹ a cotton gin with its band and rollers,¹⁰ an unattached gin-stand,¹¹ are none of them fixtures. But a gin-house with its running gear and packing screw all firmly affixed to the land has been held to be a fixture,¹² and so has a portable gristmill fastened to a building to be there used in grinding grain for hire and intended to be kept permanently in place.¹³ Hewn timber, posts, and logs which lie loose

¹ Ottumwa Mill Co. v. Hawley, 44 Iowa, 57; Scheidt v. Belz, 4 Ill. App. 431; Bloom v. West, 3 Colo. App. 212.

² Carlin v. Ritter, 68 Md. 478; Dubois v. Kelly, 10 Barb. 496.

³ McJunkin v. Dupree, 44 Tex. 500.

⁴ Choate v. Kimball, 56 Ark. 55.

⁵ Cole v. Roach, *supra*.

⁶ Holmes v. Tremper, 20 Johns. 29.

⁷ Brown v. Lillie, 6 Nev. 244; Hughes v. Edisto Shingle Co., 51 S. Car. 1.

⁸ McJunkin v. Dupree, *supra*.

⁹ *Ibid*.

¹⁰ Gresham v. Taylor, 51 Ala. 505.

¹¹ Cole v. Roach, *supra*.

¹² McDaniel v. Moody (Ala.), 3 Stew. 314.

¹³ Potter v. Cromwell, 40 N. Y. 287.

upon the ground, although gathered and designed for materials to build a granary, are not fixtures;¹ neither are loose and movable boards used for making bins.² A cotton gin, being a chattel and not a fixture, does not pass by a conveyance of the land on which it stands;³ but corncribs upon a leased farm built by the tenant upon posts sunk in the ground will pass as fixtures to a purchaser of the farm who has no notice of an oral agreement between the tenant and his grantor that the former might take them away.⁴

§ 51. *Rights of way.*

The term "right of way" has a twofold meaning. It is used to describe a right belonging to a person,—a mere intangible right to cross,—a right of crossing over a tract of land; and it is also used to denote the strip of ground which a railroad company appropriates for the construction of its road-bed.⁵ The term is used here in the sense of a right or vested privilege of passage over the land of another, of an incorporeal hereditament, of which, it is said, it is the most conspicuous example.⁶ A conveyance of land and its appurtenances carries an appurtenant right of way⁷ reasonably necessary to the enjoyment of the land.⁸

¹ Cook v. Whiting, 16 Ill. 480.

² Whiting v. Brastow, 4 Pick. 310.

³ Hancock v. Jordan, 7 Ala. 448.

⁴ Smyth v. Stoddard, 203 Ill. 424.

⁵ Joy v. St. Louis, 138 U. S. 44; Keener v. U. Pac. R. R., 31 Fed. 126.

⁶ Hegan v. Pendennis Club; Slingerland v. Internat. Contr. Co.; Stone v. Stone, *supra*.

⁷ Corea v. Higuera, 153 Cal. 451.

⁸ Shields v. Titus, 46 Ohio St. 528; Valentine v. Schreiber, 3 App. Div. 235; L. & N. R. R. v. Koelle, 104 Ill. 455.

A way which is appurtenant is an inheritable estate passing to the heirs and assigns of the grantees of the land to which it is attached.¹ The rights of the owner of a right of way are paramount to those of the owner of the servient soil.² If the way has defined limits, the owner of it has not only the right of free passage over the traveled part, but also of unobstructed passage over every part of it within such limits.³ And he has not only a right to this free passage at all times, but also to all rights that are incidental or necessary to the enjoyment of such right of passage.⁴ Although generally a right of way rests in a grant, yet it may be acquired by prescription through an adverse, exclusive, and uninterrupted use under a claim of right for the requisite length of time.⁵ And although an oral grant is void under the statute of frauds, yet if the easement is enjoyed under it until the statute of limitations has fully run, an unassailable right to it will ripen by prescription.⁶ Once a right of way has been selected and located it cannot be materially changed by either party without the other's consent,⁷ but a temporary change in the course of the way made for the convenience of either of the landowners is not an abandonment of the original route.⁸ The owner of the servient soil is under no obliga-

¹ *Schmidt v. Brown*, 226 Ill. 590.

² *Harvey v. Crane*, 85 Mich. 316.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Graham v. Walker*, 78 Conn. 130.

⁶ *Schmidt v. Brown*, *supra*; *Legg v. Horn*, 45 Conn. 409; *Wells v. Parker*, 74 N. H. 193; *Blaine v. Ray*, 61 Vt. 566.

⁷ *Dudgeon v. Bronnson*, 159 Ind. 562.

⁸ *Crouse v. Wemple*, 29 N. Y. 540; *Boyd v. Morris*, 32 Ky. L. Rep. 642.

tion to repair a way. If it needs repairs, it is the duty of the owner of the right of way to make them;¹ he is bound to keep up, maintain, and protect the way for use.² But he has no right to inclose it by fences,³ except when it lies along one side only of the servient land and fences are necessary to prevent passing live-stock from trespassing on the adjoining land.⁴ The owner of the land subject to a right of way may rightfully use the way in any manner not inconsistent with the rights of the owner of the easement.⁵ A naked grant of right of way for travel will not preclude the grantor from putting up gates and bars at the ends of the way.⁶ The gates or bars must not, of course, interfere to an unreasonable extent with the proper use of the way.⁷ The mere putting up of gates or bars across the entrance to a private way when they can be opened and passed through by anybody at will, and keeping them up for the whole statutory limitation period, will not extinguish the easement;⁸ but if the way is inclosed permanently in a field, and the ground over which it ran is plowed up and cultivated for the limitation period, the easement will be extinguished.⁹ The owner of a right

¹ *Harvey v. Crane, supra.*

² *Bellevue City v. Daly*, 14 Idaho, 545.

³ *Sizer v. Quinlan*, 82 Wis. 390.

⁴ *Harvey v. Crane, supra.*

⁵ *Ibid.*

⁶ *Whaley v. Jarrett*, 69 Wis. 613; *Phillips v. Dressler*, 122 Ind. 414; *Hartman v. Fick*, 167 Pa. St. 18.

⁷ *Johnson v. Borson*, 77 Wis. 593; *Hartman v. Fick, supra.*

⁸ *Hinks v. Hinks*, 46 Me. 423; *Hempsted v. Huffman*, 84 Iowa, 398; *Van Blarcom v. Frike*, 29 N. J. L. 517.

⁹ *Bowen v. Team*, 6 Rich. L. 298; *M. & B. S. R. R. v. Holton*, 100 Ky. 665.

of way created by grant need not use it all the time nor even frequently in order to retain it;¹—no presumption that the right has been abandoned arises from the fact that the way is not used continuously.² Mere neglect to use the way for any length of time short of the statute of limitations will not work an extinguishment of the easement,³ the disuse must be accompanied by an intention to abandon the way.⁴ A way not used for twenty years is presumed to have been abandoned.⁵ An open and visible private way across land at the time it is conveyed is notice to the new owner of the existence of a burdening easement;⁶ but if the way is obliterated through disuse so that the purchaser has no notice of it, the easement is said to be extinguished.⁷

§ 52. *Ways of necessity.*

A right of way of necessity is a right which arises when a landowner conveys a part of his land and retains title to the rest of it entirely surrounding the part he has conveyed. In such a case his grantee has of necessity a right

¹ *Hofherr v. Mede*, 226 Ill. 320; *Heughes v. Galusha Stove Co.*, 118 N. Y. Supp. 109.

² *Bombaugh v. Miller*, 82 Pa. St. 203.

³ *Edgerton v. McMullan*, 55 Kan. 90; *Cox v. Forrest*, 60 Md. 74; *Emerson v. Wiley*, 10 Pick. 310; *Manning v. P. Reading R. R.*, 54 N. J. Eq. 46; *Miller v. Garlock*, 8 Barb. 153.

⁴ *Hayford v. Spokesfield*, 100 Mass. 491; *Welsh v. Taylor*, 134 N. Y. 450; *Mason v. Ross*, 71 Atl. 141; *Lathrop v. Elsner*, 93 Mich. 599.

⁵ *Wright v. Freeman* 5 Harr. & J. 467; *Browne v. Meth. Church*, 37 Md. 108.

⁶ *Kripp v. Curtis*, 71 Cal. 62; *Brown v. Kemp*, 46 Ore. 517; *Macdonald v. Ferdais*, 22 Can. S. Ct. 260.

⁷ *Kammerling v. Grover*, 9 Ind. App. 628.

to cross to and fro the land which shuts him off from access to the public highway.¹ A grantor is presumed to convey whatever is in his possession, which is reasonably necessary to the enjoyment of the land he conveys.² A way of necessity always rests upon an implied grant as an incident to the land conveyed by him over whose remaining land the way must go;³ and there cannot be an implied grant of a right of way upon considerations merely of convenience, but it must invariably rest upon a necessity.⁴ The necessity must be something more than a simple convenience, though it need not be an absolute one.⁵ A right of way of necessity passes to the grantee in each successive conveyance.⁶ It does not exist without unity of ownership of the surrounding land.⁷ The right to locate a way of necessity belongs to the owner of the land over which it must pass, but he must exercise it reasonably and promptly upon request;⁸ if he does not do so, the grantee may select the route subject, if he abuses this privilege, to correction by the courts.⁹ After a way of necessity has been definitely located, it can be changed only by consent

¹ *Ellis v. Bassett*, 128 Ind. 118; *Fairchild v. Stewart*, 117 Iowa, 734; *Whitehouse v. Cummings*, 83 Me. 91; *Palmer v. Palmer*, 150 N. Y. 139; *Turnbull v. Rivers*, 3 M'Cord, L. 131.

² *Robinson v. Clapp*, 65 Conn. 365.

³ *Voorhees v. Burchard*, 55 N. Y. 98; *Banks v. McLean Co. School B'd*, 194 Ill. 247.

⁴ *Ward v. Robinson*, 77 Iowa, 159; *Hildreth v. Googins*, 91 Me. 227; *Staples v. Cornwall*, 114 App. Div. 596; *Meredith v. Frank*, 56 Ohio St. 479.

⁵ *Paine v. Chandler*, 134 N. Y. 385.

⁶ *Blum v. Weston*, 102 Cal. 362.

⁷ *Ellis v. Blue Mt. Forest Asso.*, 69 N. H. 385.

⁸ *Ritchey v. Welsh*, 149 Ind. 214.

⁹ *Palmer v. Palmer*, *supra*.

of both landowners.¹ There cannot be a way of necessity if there is any other reasonable and practical way to reach the land it would serve,² — if there is any other suitable means of access to it;³ especially not when there is free access without it to and from a public highway.⁴ Access by water to land on the sea-shore destroys the right to a way of necessity across private land surrounding the other sides.⁵ A right of way created by necessity ends when the necessity ends;⁶ thus, if a public road is opened to lands which enjoy a way of necessity, the way is extinguished even though it is more convenient to use than is the road.⁷ It is also extinguished when both the dominant and the servient estates are reunited in one owner.⁸ The grantee of land over which an earlier grantee of his grantor has a right of way of necessity takes it subject to that easement.⁹

§ 53. *Water service.*

When land is conveyed and is supplied with water from a spring and conduit upon other land of the grantor, the right to a continuance of the supply passes as an appurtenance.¹⁰ The right to the continued use of water piped

¹ *Ritchey v. Welsh*, *supra*.

² *Trump v. McDonnell*, 120 Ala. 200.

³ *Charleston & W. C. R. R. v. Fleming*, 118 Ga. 699; *M'Donald v. Lindall*, 3 Rawle, 492; *Rice v. Wade*, 111 S. W. 594.

⁴ *O'Brien v. Murphy*, 189 Mass. 353; *Smyles v. Hastings*, 22 N. Y. 217. ⁵ *Kingsley v. Gouldsbrough Land Co.*, 86 Me. 279.

⁶ *Ann Arbor Fruit & V. Co. v. Ann Arbor R. R.*, 136 Mich. 599.

⁷ *Pierce v. Selleck*, 18 Conn. 321; *Cassin v. Cole*, 96 Pac. 277.

⁸ *Lebus v. Boston*, 107 Ky. 98; *Hahn v. Baker Lodge*, 21 Ore. 30.

⁹ *Logan v. Stogsdale*, 123 Ind. 372.

¹⁰ *Coolidge v. Hager*, 43 Vt. 9.

from a spring on one farm to another belonging to the same owner, the use of which is worth a substantial annual rental and materially enhances the value of the second farm, passes by implication as an easement of necessity when the latter farm is conveyed to a new owner;¹ the owner of the first farm will not be allowed in such a case to interrupt or cut off the flow of water from the spring to the second farm.² A water pipe leading from the main of an aqueduct company in a highway and traversing intervening land belonging to a stranger is an appurtenance to the premises it serves, and passes as such when those premises are conveyed.³ And a water-pipe from a driven well to a pump in a kitchen by which water is habitually drawn for domestic uses is an apparent easement, although both the well and the conduit are all the time completely hidden from view.⁴ A reservation made by a landowner in a deed of a part of his land containing a spring of the right to take water from that spring and conduct it to buildings on the unsold portion of his land makes such water right an appurtenance to the land he keeps.⁵

§ 54. Licenses.

A license is a permission⁶ to do something without which it would not be lawful to do.⁷ With respect of real property it is an authorization to do some act or acts upon

¹ Paine v. Chandler, *supra*.

² *Ibid*.

³ Philbrick v. Ewing, 97 Mass. 133.

⁴ Larsen v. Peterson, 53 N. J. Eq. 88.

⁵ Mason v. Thwing, 94 App. Div. 77.

⁶ Gibbons v. Ogden, 9 Wheat. 1.

⁷ Standard Oil Co. v. Com. 82 S. W. 1020; Jefferson Co. Com'rs v. Mayr, 31 Colo. 173.

the land of him who gave it, and its continuance depends wholly upon the will of the person who created it.¹ It is a personal privilege and, unlike an easement, creates no estate in land,² and therefore an oral license is good.³ The mere oral permission given gratuitously by a landowner to another person to make a certain use of his land, even though both parties contemplate that such use will be permanent and the person given the permission makes valuable improvements on the land upon the faith of it, is, after all, only a license revocable at the landowner's pleasure.⁴ It is purely a personal privilege that may be withdrawn at will and which the person to whom it is granted has no power to transfer to another.⁵ An easement of a right of way is construed preferably as appurtenant to some other estate rather than a personal privilege.⁶ Although every license may be revoked at any time,⁷ yet a license to use a driveway enjoyed for thirty years, where on the faith of its perpetuity the licensee has spent money to set up and maintain gates, cannot be revoked.⁸ The death of a landowner who has given a license operates as a revocation;⁹ in fact, a license ends when either party dies.¹⁰ A conveyance of land revokes

¹ Asher v. Johnson, 82 S. W. 300.

² *Ibid.* Howes v. Barmon, 11 Idaho, 64; Curtis v. La Grande Water Co., 20 Ore. 34.

³ Howes v. Barmon, *supra*.

⁴ Huber v. Stark, 124 Wis. 359.

⁵ De Haro v. U. S., 5 Wall. 599.

⁶ Reise v. Enos, 76 Wis. 634.

⁷ Wheelock v. Noonan, 108 N. Y. 179; Crosdale v. Lanigan, 129 id. 604; Harris v. Brown, 202 Pa. St. 16.

⁸ Nowlin v. Whipple, 120 Ind. 596.

⁹ Metcalf v. Hart, 3 Wyo. 513; Hodgkins v. Farrington, 150 Mass. 19.

¹⁰ De Haro v. U. S., *supra*.

an oral license to cut a ditch upon it ;¹ and an oral license to use water from a spring is revoked when the owner of the spring by a deed to another person grants him the right to draw off enough water to exhaust it.² An oral license to gather fruit from an orchard is good ; no grant is requisite for its validity, but it is revoked by a conveyance of the orchard without mentioning it.³ A license is strictly limited by its terms ; for example, a license to go upon land and take the herbage confers no right to dig potatoes or gather apples, for herbage is simply green pasture and vegetation that is the natural food of cattle.⁴ A purchaser of personal property on the seller's land has an implied license to go upon the land and take away his purchase.⁵

¹ Hicks Bros. v. Swift Mill Co., 133 Ala. 411.

² Eckerson v. Crippen, 110 N. Y. 585.

³ Taylor v. Millard, 118 N. Y. 244.

⁴ Simpson v. Coe, 4 N. H. 301.

⁵ Nettleton v. Sikes (Mass.), 8 Metc. 34 ; Giles v. Simonds, 15 Gray 441.

CHAPTER IX

FARM WORKERS AND LABORERS

§§ 55-61

§ 55. *The legal relation of the farmer and his workers.*

By the common law of England servants were divided into classes, and agricultural laborers and workers were put in a different class from those of menials and apprentices; but in the United States in general no distinction has ever been made, but all persons who work for others are classed in law as servants, no matter what the grade or character of their employment.¹ And correspondingly all farmers who employ human help of any kind are masters in respect of those whom they employ. The legal relation, then, between the farmer and his worker, as in all other contracts of employment and service, is that of master and servant. That relation in modern times and in this country rests upon a contract by which one person engages to serve another and the other to pay wages or other compensation for the service. The farmer's contracts for labor hired by him are so far effected by the statute of frauds that if they are not to be performed within a year after they are made, they must be in writing to be valid.²

¹ Wood, Mast. & Serv., Chap. I, § 2.

² Comstock v. Ward, 22 Ill. 248; Broadwell v. Getman, 2 Denio, 87; Herrin v. Butters, 20 Me. 119.

But an oral contract hiring a laborer for a year to begin the next day has been held valid.¹

§ 56. *The right to discharge.*

When a farmer hires a person to work for him, if no definite time is fixed for the employment to last, its continuance depends upon the will of either party, and the farmer may at any time, with or without a reason, dismiss the worker.² A contract for the services of a laborer will end if he becomes permanently ill or too disabled to do his work.³ A master may always discharge his servant for a good cause; for instances, if the servant commits a crime,⁴ or is guilty of immoralities with another servant in the household,⁵ or acts injuriously to the master's business.⁶ A servant ordinarily may be justifiably discharged if he is absent without leave from his work⁷ or gets drunk,⁸ but the right to dismiss him for these reasons appears to have some limits. A very careful and able author has said upon the subject, that if a farm hand is absent a day or two without leave at a time when his services are not specially needed and when the farmers' interests cannot suffer by his absence, it might not furnish a sufficient ground to discharge him; but if he should stay

¹ Dickson *v.* Frisbee, 52 Ala. 165.

² Whitcomb *v.* Gilman, 35 Vt. 297; Coffin *v.* Landis, 46 Pa. St. 426; Evans *v.* Bennett, 7 Wis. 404.

³ Hubbard *v.* Belden, 27 Vt. 645.

⁴ Libhart *v.* Wood, 1 Watts & S. 265.

⁵ Atkin *v.* Acton, 4 Car. & P. 208.

⁶ Drayton *v.* Reed, 5 Daly, 442.

⁷ Ford *v.* Danks, 16 La. Ann. 119; Robinson *v.* Hindman, 3 Esp. 235.

⁸ Wise *v.* Wilson, 1 C. & K. 662.

away without leave even a single day in harvest time, when his services were urgently needed, and the farmer's interest suffered from his absence, there would be good ground summarily to discharge him and hire another man to take his place;¹ and, again, that if a farm laborer gets drunk when off duty on a holiday but returns to work sober, he cannot justifiably be discharged for the offense.² However that may be, a farmer is certainly not bound to keep in his employ a hired man who habitually gets drunk.³ A servant may always be discharged for neglect of his duties. He must be diligent and faithful,⁴ must honestly do his work⁵ with ordinary care,⁶ be respectful,⁷ and obey all reasonable orders.⁸ A refusal by a servant to obey a proper and reasonable order about his work is cause enough to discharge him.⁹ And he may be discharged if he is abusive or insolent.¹⁰ A hired girl, for example, guilty of insolence and wilful disobedience of lawful orders, may be summarily dismissed.¹¹

§ 57. *The right to quit.*

As the farmer has an absolute right to discharge a laborer hired for no definite length of time, so the laborer has the

¹ Wood, *Mast. & Serv.*, Chap. IV., § 114.

² *Ibid.*, § 111.

³ *Gonsolis v. Gearheart*, 31 Mo. 585.

⁴ *Crawford v. Reid*, 1 Shaw's Rep. (Scot.) 124.

⁵ *Callo v. Brouncker*, 4 Car. & P. 518.

⁶ *McCracken v. Hair*, 2 Speers, L. 256.

⁷ *Baillie v. Kell.*, 4 Bing. N. Cas. 638.

⁸ *Lawrence v. Gullifer*, 38 Me. 532; *Harrington v. First Nat. Bank*, 1 Thomp. & C. 361.

⁹ *Marsh v. Ruleson*, 1 Wend. 515.

¹⁰ *Champion v. Hartshorne*, 9 Conn. 570; *Singer v. M'Cormick*, 4 Watts & S. 265.

¹¹ *Beach v. Mullin*, 5 Vroom, 343.

corresponding right to quit the service at his pleasure.¹ A servant hired by the month or year cannot be required to labor an unreasonable number of hours every day.² He can be required to work in lawful pursuits only.³ A servant is warranted in leaving his employment if required to work on Sundays beyond caring for the live-stock and except in a case of urgent necessity.⁴ Although a servant cannot be required to do a different work than that for which he was hired and may not lawfully be discharged if he refuses, yet he may be called upon in emergencies where his aid is necessary and will be insubordinate if he declines to obey. Thus, a farm laborer cannot be compelled to act as an household servant,⁵ neither can a lady's maid be required to milk cows;⁶ but a farm laborer who refuses to carry mortar for bricklayers employed by the farmer in putting up a farm building may be discharged for insubordination.⁷ If a farmer boards and lodges his hired man, the lodging furnished must be suitable and clean and the food sound and wholesome, or the man may quit.⁸ If a master is cruel or inhuman to his servant⁹ or assaults and beats him even moderately,¹⁰ he has a right to quit work; but mere rough language from a farmer to his hired man

¹ *Whitecomb v. Gilman*; *Coffin v. Landis*; and *Evans v. Bennett*, *supra*.

² *Wood, Mast. & Serv.*, Chap. IV., § 86.

³ *Berry v. Wallace* (Ohio), *Wright*, 657.

⁴ *Warner v. Smith*, 8 Conn. 14.

⁵ *Stuart v. Richardson*, *Hume* (Scot.) 390.

⁶ *Bell's Princip.*, 117.

⁷ *Angle v. Hanna*, 22 Ill. 429.

⁸ *Griffin v. Tyson*, 17 Vt. 35.

⁹ *McGrath v. Herndon*, 4 T. B. Mon. 480.

¹⁰ *Matthews v. Terry*, 10 Conn. 455.

is not sufficient provocation for the latter to abandon his service before his time expires.¹

§ 58. *The servant's right to wages.*

A laborer discharged, although for good cause, before his time is up is entitled to his wages up to the time of his dismissal;² and a servant employed for a definite term, and discharged before it is up, without a sufficient cause, is entitled to compensation up to the end of the term for which he was engaged.³ In the latter case such compensation ordinarily will be the agreed wages if the servant has diligently tried and failed to get other work, but if he earns anything before the end of the term, it will be lessened by the sums earned.⁴ If a servant quits work without a valid excuse before his time is up or before the work he was hired to do is done, he will be entitled to nothing.⁵ If no definite wages are agreed upon, the servant's compensation will be what his services are reasonably worth,⁶ and this generally will be the usual wage paid at the same time and place for services of the same kind.⁷ It has been decided in Kansas that for the services of a man in taking charge of a farm and stock, who worked hard and faithfully, and for those of a woman who worked for a farmer in cooking, housekeeping, milking a dozen cows, and helping to feed

¹ *Marsh v. Ruleson*, *supra*.

² *McWilliams v. Elder* (La.), 27 So. Rep. 352.

³ *Rose v. Williamsville, G. & St. L. Ry.* (Mo. App.), 123 S. W. Rep. 946.

⁴ *Seymour v. Oelrichs* (Cal.), 106 Pac. Rep. 88.

⁵ *Walsh v. Fisher*, 102 Wis. 172.

⁶ *Mattocks v. Lyman*, 16 Vt. 119.

⁷ *Bagley v. Bates* (Ohio) Wright, 705.

and care for a large number of hogs, horses, and cattle, where both worked for several years without any agreement as to wages and neither received anything beyond a living, that seventy five dollars a month to each was not too much.¹ If a man hired by a farmer to work upon a farm occupies a house and has the use of a garden in part payment for his services, he may, if wrongfully discharged, recover damages for being deprived of the dwelling and use of the garden.²

§ 59. *The servant's lien for wages.*

In many of the states there are statutes giving to farm laborers liens for their wages on the farm or its products or both. It is not always an easy task to decide whether a person who works on a farm is or is not within the favored class. One employed to cut and stack hay is a farm laborer who is entitled to a lien,³ and so is one employed in making sugar on a sugar plantation,⁴ although one employed in repairing the sugarhouse and cane-grinding machinery and as a watchman is not such.⁵ Neither is one employed by a refining company to weigh and load sugar upon cars and who hires others to do the manual labor, for he is a contractor.⁶ And one who with his machinery and own servant threshes grain for another, although he assists in and directs the work himself, is not within a statute giving a lien to any one doing any labor on a farm or in harvesting, securing, or housing any crop grown upon it.⁷ A woman

¹ Grisham v. Lee, 61 Kan. 533; and Same v. Greer, *ibid.*

² Fulton v. Heffelfinger, 23 Ind. App. 104.

³ Beckstead v. Griffith, 11 Idaho, 738.

⁴ Saloy v. Dragon, 37 La. Ann. 71.

⁵ *Ibid.*

⁶ Fortier v. Delgado, 122 Fed. 604.

⁷ Mohr v. Clark, 3 Wash. Terr. 440.

employed in a farmer's family in household service and in cooking meals for the hired men is held not to be a farm laborer and hence not entitled to a lien for her wages.¹ An overseer is not an agricultural laborer within the meaning of statutes giving agricultural laborers liens on crops made by them and exempting the products of their labor from levy and sale on execution,² but a foreman in charge of the laborers on a farm is deemed a farm laborer within the Massachusetts employer's liability act.³ Statutes which give mechanics liens for work and labor are liberally construed.⁴ The area of land subject to a mechanic's lien depends upon the character of the improvement which gives rise to the lien; for instance, a lien for an irrigation ditch covers the whole tract of land necessary for a convenient use of the ditch.⁵ Improvement, when that word is used in relation to land, is a comprehensive term embracing any bettering of the land which changes its natural state to a condition fitting it for man's use and enjoyment. It may consist of clearing, fencing, building, or other things which adapt and enrich the soil for human use.⁶ A mechanic's lien upon land may often be acquired for labor and materials in sinking a well. In some states it is expressly given by statute.⁷ Others hold it to be an "improvement,"⁸ though elsewhere it is deemed not in-

¹ *Lowe v. Abrahamson*, 19 L. R. A. (N. S.) 1039.

² *Barkman v. Duncan*, 10 Ark. 465; *Isbell v. Dunlap*, 17 S. Car. 581.

³ *Rowley v. Ellis*, 197 Mass. 391.

⁴ *Davis v. Alvord*, 94 U. S. 545; *Flagstaff Silv. Min. Co. v. Cullins*, 104 *id.* 176.

⁵ *Springer Land Asso. v. Ford*, 168 *id.* 513.

⁶ *Johnson v. Gresham*, 35 Ky. 542.

⁷ *McAuliffe v. Jorgenson*, 107 Wis. 132.

⁸ *Bates v. Harte*, 124 Ala. 427; *Hoppes v. Baie*, 105 Iowa, 648.

cluded by that word.¹ And again in some places a well is,² and in other places it is not,³ "an appurtenance" within the meaning of the mechanic's lien statute. It is of the very nature and essence of a lien that no matter into whose possession the property subject to it may go, the lien goes with it.⁴ Every person who bestows labor and skill upon a chattel put into his possession for the purpose, and thus enhances its value, has a lien upon it at common law and a right to keep possession of it until his just and reasonable charges are paid;⁵ but that lien is waived or lost if possession of the chattel is given up before it is satisfied.⁶

§ 60. *Liabilities and rights of the farmer as a master.*

An entire treatise might easily be written without exhausting this particular topic, but just here only a few points will be brought to the reader's attention, embracing the farmer's liability to third persons on account of his servant's conduct, his rights against third persons on account of their conduct toward his servant, and finally an instance of his liability to the servant, apart from a question of wages. These points are presented in the briefest manner possible. It is a maxim of the law of long standing that whatever one does by an agent or servant is the same in effect as if he did it himself, and a second legal maxim is that when one of two innocent persons must suffer, the loss shall fall upon him who put it in the power of a third

¹ *Guise v. Oliver*, 51 Ark. 356.

² *Balch v. Chaffee*, 73 Conn. 318.

³ *Omaha Vinegar Co. v. Burns*, 49 Neb. 229.

⁴ *Burton v. Smith*, 13 Pet. 464.

⁵ *Drummond Carriage Co. v. Mills*, 54 Neb. 417.

⁶ *Fishell v. Morris*, 57 Conn. 547.

person to cause it. Both these maxims are so well known and have been so long established that it is unnecessary to cite authorities for them. Every man in managing his own affairs is bound so to conduct them as not to injure others, whether he acts in person or by a servant, and it is on this principle that a master is held responsible to third persons for his servant's¹ negligence. A farmer has in one case been held liable to a miller to whom he carried corn to be ground which he had innocently and ignorantly put in a sack of grain containing an iron bolt previously put there by his hired man, without telling him, and which seriously injured the machinery of the mill.² And the owner of a cow known to him to be vicious to strangers has been held liable for injuries inflicted by the beast upon a person who was employed to milk the animal and assured that she was gentle.³ A person who entices or persuades a servant to quit his employment, knowing at the time of that employment, is liable in damages to the master.⁴ This does not prevent any one from employing a person who has been the servant of another after he has actually left the employment nor from engaging another's servant to work after term of employment shall terminate.⁵

§ 61. *Croppers.*

An agreement to farm land on shares is a contract of service and not a lease.⁶ A cropper has no interest in the

¹ *Harding v. St. Louis Nat. Stock Yards*, 242 Ill. 444.

² *Tuel v. Weston*, 47 Vt. 634.

³ *Thornton v. Layle*, 33 Ky. L. Rep. 382.

⁴ *Walker v. Cronin*, 107 Mass. 555; *Campbell v. Cooper*, 34 N. H. 49.

⁵ *Wood, Mast. & Serv.*, Chap. X., §§ 235, 236.

⁶ *Bradish v. Schenck*, 8 Johns. 151; *Kelly v. Rummerfield*, 117 Wis.

land.¹ Such an agreement does not create the relation of landlord and tenant between the owner of the farm and the person cultivating it for a share of the crop.² There is a clear distinction between a tenant of land and a cropper. A tenant, though he may pay a share of the crop as rent, has an estate in the land for his term, and because he has such an estate has a right of property in the crop; but a cropper has no estate in the land, and the landowner owns the crop. The possession which the cropper has of the land and crop is analogous to the possession of a servant.³ The relation of landlord and tenant does not even arise when the cropper as an incident occupies the farmhouse while working the farm, and, therefore, he cannot be proceeded against under the landlord and tenant act for holding over.⁴ The farm-owner and the cropper are, however, tenants in common, in some states, of the crops,⁵ until they are harvested and divided.⁶ An agreement to cultivate a farm on shares, by which the landowner as security for his advances to the cropper is to retain title to the cropper's share, is in the nature of a chattel mortgage, and to protect the landowner it should be filed or recorded as if it was a chattel mortgage.⁷

¹ *Kelly v. Rummerfield, supra.*

² *Ibid.*

³ *Harrison v. Ricks*, 71 N. C. 7.

⁴ *Mead v. Owen* (Vt.), 12 L. R. A. (N. S.) 655.

⁵ *Sims v. Jones*, 54 Neb. 769; *Baughman v. Reed*, 75 Cal. 319.

⁶ *McNeal v. Rider*, 79 Minn. 153.

⁷ *Ibid.*

CHAPTER X

THE WATERS OF THE FARM

§§ 62-76

§ 62. *What the waters of the farm comprise.*

The term "waters of the farm" is used in this chapter rather loosely and in a broad and general sense. Since an owner of a farm owns the bed of every sheet of water inside its lines and of every water-course that runs between them, and to the center of lakes and streams, not navigable, that bound it, the term employed embraces, primarily, all bodies of water great and small, from lakes and ponds to springs and wells, lying within the boundary lines of the farm, and all streams that flow across it from the point of entrance to the place of departure, and, as well, every arm or inlet of the sea, and fresh water lake, and every river and creek, of which the shore or bank, the middle or thread, constitutes a farm boundary. But the term here means more; it includes also all surface waters due to rains and snows and all sub-surface and percolating waters that feed the farm's wells, springs, and pools. And it includes, in addition, water congealed naturally into ice. Some of the waters mentioned belong to the farmer as absolutely as does the soil of the farm and in all of them

he has certain rights of use, enjoyment, and disposal, either incidental to littoral or riparian proprietorship or to good husbandry in cultivating the farm. In respect of all of these waters the farmer has certain obligations and duties which he may not safely ignore if he would avoid injuring other people and incurring consequent liability for damages.

§ 63. *Bodies of water.*

Land under the sea and the great navigable lakes and rivers belongs, in general, to the sovereign. The title to a tide water bay, unless proved to be lodged elsewhere, is presumed to be in the state.¹ That is called an arm of the sea where the tide flows and re-flows, and only so far as the tide does ebb and flow.² The area of a sheet of water does not determine the question whether it is a pond or a lake.³ If an unnavigable lake is of considerable size, for example, several miles long, and four score or more rods wide, a deed of land running to and along it will convey no part of its bed.⁴ The bed of a lake includes only the soil covered more or less permanently by water so as to be unfit for the growth of vegetation; it does not include border lowland useful for pastures or meadows although frequently flooded by rising water.⁵ For some purposes a sheet of water may be a lake, notwithstanding it is too shallow for navigation of any sort; that marsh grass grows above its surface;

¹ *Cain v. Simonson*, 39 So. 571.

² Lord Hale, *De Juris Maris*, Chap. IV.; *Adams v. Pease*, 2 Conn. 481; *Hubbard v. Hubbard*, 8 N. Y. 196.

³ *Ill. Steel Co. v. Bilot*, 109 Wis. 418.

⁴ *Noyes v. Collins*, 92 Iowa, 566.

⁵ *Minnetonka Lake Improvement*, case, 56 Minn. 513.

that its bed is not always submerged; and that it is popularly known as a marsh.¹

§ 64. *Water-courses.*

A mere inlet from the sea filled and emptied more or less by the action of the tides is not a water-course.² A water-course is a channel or canal for conveying water, particularly in the drainage of lands; it may be natural or artificial, but it must have a bed, a distinct channel, and defined banks traversing the soil.³ It is a stream of water running in a certain direction in a channel between well-defined banks.⁴ It is a living stream with definite banks, a channel, and a mouth distinguishable from its source, fed by something more permanent than mere surface water.⁵ Mere gullies of running water fed by occasional rains or melting snows are not water-courses.⁶ A water-course, however, does not cease to be such by now and then running dry,⁷ nor by spreading out in places into swamps and marshes,⁸ yet it does not mean a mere slough.⁹ The volume of water flowing in a stream does not affect its character as a water-course;¹⁰ neither does the size of a stream determine whether or not it is a river.¹¹ The chan-

¹ *Ill. Steel Co. v. Bilot, supra.*

² *Chamberlain v. Hemingway, 63 Conn. 1.*

³ *Hawley v. Sheldon, 64 Vt. 491.*

⁴ *Simmons v. Winters, 21 Ore. 35.*

⁵ *Chamberlain v. Hemingway, supra.*

⁶ *Simmons v. Winters, supra; Gregory v. Bush, 64 Mich. 37.*

⁷ *Spangler v. San Francisco, 84 Cal. 12; Hawley v. Sheldon; and Simmons v. Winters, supra.*

⁸ *Case v. Hoffman, 84 Wis. 438;*

⁹ *Bloodgood v. Ayers, 108 N. Y. 400.*

¹⁰ *Maxwell v. Shirts, 27 Ind. App. 529.*

¹¹ *Ill. Steel Co. v. Bilot, supra.*

nel of a stream is its bed, more especially the deeper part of the bed where the main current flows, and, if navigable, the line of deep water followed by vessels, where they may and usually do pass each other.¹

§ 65. *Navigable streams.*

Running streams are either public or private, and whether any particular stream is public or private depends upon whether it is or is not navigable.² If it is navigable, it is public, although its bed may be owned by private riparian owners.³ A navigable stream is a public highway and must not be obstructed,⁴ but the owner of both sides of a stream not navigable has a right to build and maintain a fence across it.⁵ The government alone has the right to establish a ferry across a navigable stream; it is not a matter of private right,⁶ although any private person may rightfully keep and use a boat for himself, his family, his servants, and even to carry a guest in crossing a public river without running a ferry or infringing on a ferry franchise.⁷ All streams which are channels for useful commerce are esteemed navigable and are classed as public highways;⁸ they are natural highways, and the public easement in them, whatever its extent, is paramount to private riparian rights.⁹ The courts are not agreed upon

¹ *Buttenuth v. St. Louis B. Co.*, 123 Ill. 535.

² *Fulmer v. Williams*, 122 Pa. St. 191.

³ *Willow Riv. Club v. Wade*, 100 Wis. 86.

⁴ *Morrison v. Coleman*, 87 Ala. 655.

⁵ *Griffith v. Holman*, 23 Wash. 347.

⁶ *Mills v. St. Clair Co.*, 8 How. 569. ⁷ *Peru v. Barrett*, 100 Me. 213

⁸ *Farmers' Co-op. Mfg. Co. v. Albemarle & Ral. R. R.*, 117 N. C. 579.

⁹ *Burke Co. Com'rs. v. Catawba Lum. Co.*, 116 N. C. 731.

what constitutes a stream a navigable one. At common law streams were navigable no farther than tide water extended.¹ In New Jersey the test of whether a stream is public or private is, Does the tide ebb and flow there? and not whether it is or is not navigable in fact.² In North Carolina streams are not considered navigable unless they can be navigated by sea-going vessels.³ On the other hand, the United States' Supreme Court has said that any sort of a vessel that can float upon water, whether driven by steam, wind, or muscular power, may be an instrument of commerce and transportation, and if it is used for some useful purpose of trade, it makes the stream on which it plies navigable,⁴ and that rivers which are navigable in fact are public navigable rivers in law.⁵ Navigability in fact is enough in both Pennsylvania⁶ and Minnesota⁷ to make a stream a navigable one in law. The navigability of a stream depends upon its capacity to accommodate boats used for navigation and not upon the actual commerce carried on over its surface.⁸ A stream may be navigable although it is too shallow in places to allow the passage of boats over all parts of it,⁹ and it is navigable if it affords passage for boats and barges up and down at certain seasons of the year.¹⁰ It must, of course, contain enough

¹ *Hardin v. Jordan*, 140 U. S. 371.

² *Grey v. City of Paterson*, 60 N. J. Eq. 385.

³ *State v. Eason*, 114 N. C. 787.

⁴ *The Montello case*, 20 Wall, 430.

⁵ *Ibid.*

⁶ *Fulmer v. Williams*, *supra*.

⁷ *Lamprey v. State*, 52 Minn. 181.

⁸ *Heyward v. Farmers' Min. Co.*, 42 S. C. 138.

⁹ *St. Anthony Falls Water Power Co. v. Bd. of Water Com'rs*, 168 U. S. 349.

¹⁰ *Miller v. Enterprise Canal Co.*, 142 Cal. 208.

water to fit it for transportation for at least a goodly part of the year;¹ for if most of the time it is too shallow to accommodate any vessels except row-boats used for pleasure, and has never been actually navigated, it is not navigable.² A river not navigable in its natural state cannot be converted into a navigable stream by artificial works destructive of riparian rights, without making compensation to the riparian proprietors.³ The repeal of a statute which declared a river a public highway does not operate to extend riparian titles to the middle of the stream.⁴ A natural water-course, being a natural easement, is placed on the same basis in many respects as to the public right as is a public highway.⁵

§ 66. *Floatable streams.*

A stream that is not large enough and deep enough to be navigable in the technical sense, but which is of sufficient volume to float rafts or logs to market, is termed a "floatable" stream.⁶ If a stream is almost or quite always deep enough and strong enough to float down logs, it is a public stream and classed as navigable.⁷ The rights of the public in a stream used to float logs are measured by its capacity in its normal state.⁸ That logs, poles, and rafts are floated

¹ *Morrison v. Coleman*, *supra*.

² *Griffith v. Holman*, *supra*.

³ *Peo. v. Economy Lt. & P. Co.*, 241 Ill. 290.

⁴ *Steele v. Sanchez*, 72 Iowa, 65.

⁵ *C. B. & Q. R. R. v. Peo.*, 212 Ill. 103.

⁶ *Gerrish v. Brown*, 51 Me. 256; *Gaston v. Mace*, 33 W. Va. 14; *Parker v. Hastings*, 123 N. C. 671.

⁷ *Haines v. Hall*, 17 Ore. 165; *Willow Riv. Club v. Wade*, *supra*; *Watkins v. Dorris*, 24 Wash. 636.

⁸ *Stratton v. Currier*, 81 Me. 497; *Conn. Riv. Lum. Co. v. Olcott Falls Co.*, 65 N. H. 290.

down a stream occasionally when the water is high does not make it navigable.¹ The natural flow of a stream cannot lawfully be held back in storage by upper proprietors and let loose in floods in order to carry down floating timber if thereby lower proprietors suffer damage;² unless, indeed, the legislature by statute confers a right to build a storage dam and impound the waters and to open the dam from time to time to float logs downstream.³ The owner of logs floated carefully and prudently down a public stream is not liable for any consequential damages to lower riparian lands.⁴ If the logs are driven in a careful and prudent way, there is no liability,⁵ but the careless or reckless log-driver is liable for damages caused by jams to shore lands.⁶ The right to float timber down a stream gives the log-driver no right to use the banks in aid of his work; if he fastens booms to trees on the banks, he is a trespasser;⁷ he must not trespass on the banks to break jams and facilitate the drive.⁸ One who puts logs upon the ice of a stream and gives them no further attention renders himself liable for injuries caused to a lower landowner by the cutting of a new channel through his land in consequence of the formation of a dam by the logs and broken ice in the

¹ U. S. *v.* Rio Grande Dam Co., 174 U. S. 690.

² *Brewster v. Rogers Co.*, 169 N. Y. 73; *Monroe Mill Co. v. Menzel*, 35 Wash. 487.

³ *Brooks v. Cedar Brook Co.*, 82 Me. 17.

⁴ *Thompson v. Androscoggin River Improv. Co.*, 54 N. H. 558; *Field v. Apple River Log Co.*, 67 Wis. 569; *White River Log Co. v. Nelson*, 45 Mich. 578.

⁵ *Coyne v. Miss. & Red Riv. Boom Co.*, 72 Minn. 533.

⁶ *Watkins v. Dorris*, *supra*.

⁷ *Smith v. Atkins*, 110 Ky. 119.

⁸ *Monroe Mill Co. v. Menzel*, *supra*.

spring.¹ A statute of Wisconsin gives log-drivers a right to compensation for driving, of necessity, logs that get tangled with their own at the beginning of or along the drive.²

§ 67. *What is meant by riparian.*

The word "riparian" is derived from the Latin word "ripa," which means the shore of a river.³ Strictly speaking, when it is applied to a landowner the word refers to the proprietor of the bank of an unnavigable stream.⁴ When the proprietorship of land bordering upon the shore of tidal waters is meant, the proper word is "littoral."⁵ In practice, however, little or no distinction is made.⁶ Land is riparian only when waters flow over it or along its border.⁷ The authorities generally limit the extent of riparian land to the watershed of the stream, and hold that upland beyond, although a part of a single tract under one ownership with the bank of the stream, cannot be deemed riparian; but in some states this is not the rule. When land bordering on a navigable stream is permanently submerged or washed away, it is lost to the owner and can be regained only by accretion afterwards.⁸

§ 68. *Riparian rights.*

Water is the common and equal property of every one through whose land it flows, and the right of each land-

¹ *George v. Fisk*, 32 N. H. 32.

² *Wisc. Riv. Log Asso. v. Comstock Lum. Co.*, 72 Wis. 464.

³ *Bathgate v. Irvine*, 126 Cal. 135. ⁴ *Gough v. Bell*, 22 N. J. L. 441.

⁵ *Ibid.* ⁶ *Com. v. Roxbury*, 75 Mass. 451.

⁷ *Crawford Co. v. Hathaway*, 67 Neb. 325.

⁸ *Cox v. Arnold*, 129 Mo. 337.

owner to use and consume it without destroying or unreasonably impairing the rights of others is the same.¹ An owner of land bordering on a running stream has a right to have its waters flow naturally, and none can lawfully divert them without his consent.² Each riparian proprietor has an equal right with all the others to have the stream flow in its natural way without substantial reduction in volume or deterioration in quality subject to a proper and reasonable use of its waters for domestic, agricultural, and manufacturing purposes,³ and he is entitled to use it himself for such purposes, but in doing so must not substantially injure others.⁴ In addition to the right of drawing water for the purposes just mentioned, a riparian proprietor, if he duly regards the rights of others, and does not unreasonably deplete the supply, has also a right to take the water for some other proper uses. The most important of these, irrigation, is the subject of another chapter. If a landowner uses the water of a stream in a reasonable and lawful way without malice or negligence and an injury results to his neighbor below, he is not answerable in damages.⁵ A public water company owning land upon a stream cannot, without making due compensation, prevent an upper landowner through whose pasture the stream flows from pasturing his cattle in that pasture in an ordinary way, even though the stock fouls

¹ *Tenn. Coal, Iron & R. R. Co. v. Hamilton*, 100 Ala. 252.

² *Sturr v. Beck*, 133 U. S. 541.

³ *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; *Clark v. Penn'a. R. R.*, 145 Pa. St. 438.

⁴ *Howard v. Ingersoll*, 13 How. 381; *Holyoke Water P. Co. v. Lyman*, 15 Wall. 500.

⁵ *Barnard v. Sherley*, 135 Ind. 547.

the stream.¹ An upper landowner has a perfect right to use the bordering stream in a proper and reasonable manner, although in doing so he makes its water unfit to drink. For example, he cannot be denied his right to bathe in the stream, that is, without condemnation and compensation, because a municipality lower down takes its water supply from the stream.²

§ 69. *Riparian duty to refrain from polluting the stream.*

A riparian proprietor will not be allowed to pollute the stream on which his land borders by casting into it waste, chemicals, or foreign noxious and offensive matter from mills, mines, or factories to the damage of a lower owner.³ A lower proprietor is entitled to an injunction against an upper one who persists in polluting the stream.⁴ A city or town which discharges its sewage into and pollutes a natural stream so as to render its water unfit for domestic use is liable in damages for the nuisance to a lower proprietor who suffers in consequence.⁵ A dairy man owning land upon a stream, who needs a constant and an abundant supply of pure and wholesome water for use and for his stock, may recover damages from a prison association owning land and maintaining a prison up-stream and continually polluting its waters with discharges from the baths and privies of several hundred prisoners.⁶

¹ Helfrich *v.* Catonsville Water Co., 74 Md. 269.

² Peo. *v.* Hulbert, 131 Mich. 156.

³ Drake *v.* Lady Ensley Coal Co., 102 Ala. 501; Weston Paper Co. *v.* Pope, 155 Ind. 394; Strobel *v.* Kerr Salt Co., 164 N. Y. 303.

⁴ MacNamara *v.* Taft, 196 Mass. 597.

⁵ Mansfield *v.* Bristol, 76 Ohio St. 270; Markwardt *v.* Guthrie, 18 Okla. 32. ⁶ Trevett *v.* Va. Prison Asso., 98 Va. 332.

§ 70. *Riparian right to access and wharfs.*

Every riparian proprietor is entitled to free access to the navigable part of the water in front of his land.¹ The measure of damages for cutting off an upland owner's access to a river in front of his land is the difference in the rental value of such land with and without the access.² A riparian owner has a right to build a wharf or pier between high and low water mark in front of his premises.³ The right of a riparian owner upon a floatable stream to build a dam and divert the water for power is limited to the extent to which he can do so and not interfere with the rights of the public.⁴ The governmental power of the state over waters is never lost,⁵ and any regulation by statute of riparian rights which makes for the general advantage of the riparian proprietors will be upheld by the courts as a reasonable exercise of that power.⁶ A riparian right is not lost by neglect to use or exercise it.⁷

§ 71. *Surface waters defined.*

Ordinarily, surface waters originate in falling rains or melting snows,⁸ but overflows from streams in times of

¹ *Dutton v. Strong*, 1 Black, 1; *Yates v. Milwaukee*, 10 Wall. 497.

² *Rumsey v. N. Y. & Eng. Ry.*, 133 N. Y. 79.

³ *Boston v. Leclaw*, 17 How. 426; *Potomac Steamb. Co. v. Upper Potomac Steamb. Co.*, 109 U. S. 672.

⁴ *Conn. Riv. Lum. Co. v. Olcott Falls Co.*, *supra*.

⁵ *Auburn v. Union Water Power Co.*, 90 Me. 576.

⁶ *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9.

⁷ *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396.

⁸ *Morrissey v. C. B. & Q. R. R.*, 38 Neb. 406; *Crawford v. Rambo*, 44 Ohio St. 279.

freshets are surface waters.¹ Surface waters are of a casual and vagrant character, oozing through the soil, diffusing themselves over it, and following no particular course.² They are waters that lie upon, overspread, or percolate the soil, and flow in no particular direction.³ Water from rains and melting snows spreading over the ground is surface water until it converges into a defined channel in which thenceforward it continues to flow.⁴ Surface waters include water carried off by surface drainage;⁵ they are such as are shed and passed from the lands of one person to another without having any distinct or defined channel.⁶ A pool in a hollow filled by rains that fall upon the neighboring highlands, and which has no outlet and parts with its water only by evaporation or seepage, and occasionally dries up altogether, is surface water.⁷

§ 72. *Disposal of surface water.*

The right one has to have water flow to or from his land or mill over and across the land of another is an example of an incorporeal hereditament.⁸ The owner of the upper of two adjoining tracts of land has a natural easement to have the surface water which falls upon his land flow off to the lower tract,⁹ and the owner of land next to a river

¹ *Shane v. Kan. C., St. Jo., & C. B. R. R.*, 71 Mo. 237; *Jean v. Penn'a Co.*, 9 Ind. App. 56.

² *Lawton v. So. Bound R. R.*, 61 S. Car. 548.

³ *Case v. Hoffman*, *supra*.

⁴ *C. B. & Q. R. R. v. Emmert*, 53 Neb. 237.

⁵ *Bunderson v. Burl. & M. Riv. R. R.*, 43 *id.* 545.

⁶ *Tampa Water W'ks v. Cline*, 37 Fla. 586.

⁷ *Brandenberg v. Zeigler*, 62 S. Car. 18.

⁸ *Cary v. Daniels*, 46 Mass. 236.

⁹ *Total v. Bonnefoy*, 123 Ill. 653.

with a levee upon its bank has an easement to have the seepage water flow unobstructed from his to adjoining lower land.¹ Every landowner may turn surface water away from his land to his neighbor's, and the neighbor has no remedy except to pass it on;² nobody is subject to an action for deflecting surface water from his own to lower land in the proper use and improvement of his own land, unless he is negligent or vindictive; the recipient must pass it along.³ At common law surface water was always regarded as a common enemy which every landowner for the protection of his own property was at liberty to cast upon neighboring land even if thereby he damaged the latter.⁴ And in some states this rule of the common law still prevails;⁵ in other states the rule has undergone some modification. In New Hampshire a landowner's right to defend his land from surface water is restricted to what is reasonable in the circumstances and having in view the effect of his acts upon neighboring land,⁶ and in Iowa the right to interfere with the surface water is limited by the rule that one who improves his own land must do it in such a way as to cause his neighbor no unnecessary injury.⁷ This is also the rule in Nebraska.⁸ The rule undoubtedly is, according to the Illinois Supreme Court, that the owner of a higher tract of land has a right to have the surface

¹ *Gray v. McWilliams*, 98 Cal. 157.

² *Johnson v. Chi., St. P. M. & O. R. R.*, 80 Wis. 641.

³ *Churchill v. Beeche*, 48 Neb. 87; *Jessop v. Bamford Silk Co.*, 66 N. J. L. 641.

⁴ *Edwards v. Char. C. & A. R. R.*, 39 S. Car. 472.

⁵ *Ibid.*

⁶ *Franklin v. Durgee*, 71 N. H. 186.

⁷ *Willitts v. Chi. B. & K. C. R. R.*, 88 Iowa, 281.

⁸ *Beatrice v. Leary*, 45 Neb. 149.

water that falls or comes naturally upon his land pass off through natural drains upon or over the adjoining lower lands; and he has a right also by ditches and drains to conduct such surface water into the channels which nature has provided, even though he thereby raises the quantity of water thrown upon the neighboring land; but he has no right to cut away natural barriers to let down water upon the adjoining lands which naturally would not flow in that direction.¹

§ 73. *Restrictions on the disposition of surface waters.*

The right of a landowner to cast surface water upon neighboring land does not authorize him to gather it in basins and discharge it in floods by artificial means.² No landowner has a right to concentrate surface water and throw it bodily upon his neighbor's land.³ Any one who collects surface water in artificial channels and casts it upon his neighbor's land commits a nuisance for which he must answer in damages; ⁴ but one who owns a hill-slope at the foot of which is another's mill-pond is not liable for filling the pond with his surface water in the course of cultivating, manuring, and draining his land in the ordinary way of husbandry.⁵ A landowner has no right by means of drains to and along a highway to cast surface water on his neighbor's land on its way to a ravine that might have been

¹ *Dayton v. Drainage Com'r*, 128 Ill. 271; *Lambert v. Alcorn*, 144 *id.* 313.

² *Todd v. York Co.*, 66 L. R. A. 561.

³ *Mayor v. Sikes*, 94 Ga. 30; *Fremont, etc., R. R. v. Marley*, 25 Neb. 138.

⁴ *Paddock v. Somes*, 102 Mo. 226.

⁵ *Middlesex Co. v. McCue*, 149 Mass. 103.

reached directly from his own premises.¹ If there is a drain or water-course at hand, surface water must be sent into it and not cast upon neighboring land.² Although the owner of highlands may not collect the surface waters in one place and cast them in mass upon adjoining land, yet he may guide and quicken their flow by artificial means into hollows and along gullies formed by nature, so long as the increased flow does not deviate from the natural course.³ A landowner acting in good faith in improving and tilling his land, and by good husbandry, may fill in sag holes upon it, so that surface water will not gather nor remain there, even though the result is that such water finds its way in greater quantities to the adjacent lowlands; but he must not by artificial drains collect the water of pools, ponds, or basins on his land and throw it in a body on the land of his neighbor.⁴ Surface water flowing naturally in a defined course toward a near-by stream must not be obstructed or interfered with so as to be cast back to the injury of land it is leaving.⁵

§ 74. *Underground and percolating waters.*

Water naturally percolating through the soil is a part of that soil,⁶ and percolating sub-surface water that does not flow in a natural channel as a defined stream may be intercepted and diverted by a landowner under whose

¹ *Jacobson v. Van Boening*, 48 Neb. 80.

² *Sheehan v. Flynn*, 59 Minn. 436.

³ *Ribordy v. Murray*, 177 Ill. 134; *Rhoads v. Davidheiser*, 133 Pa. St. 226; *Shaw v. Ward*, 131 Wis. 646.

⁴ *Launstein v. Launstein*, 150 Mich. 524.

⁵ *Wharton v. Stevens*, 84 Iowa, 107.

⁶ *Edwards v. Haeger*, 180 Ill. 99.

land it is found.¹ A grant of a spring does not by implication convey percolating water that feeds it before it reaches the spring.² A landowner has an unrestricted right to dig a well upon his own land for his own use, and if by doing so he draws away underground waters from his neighbor's well, he is not liable for the damage;³ he is entitled also to make a reasonable use of a stream flowing beneath the surface of his land, even though it supplies his neighbor's spring or well;⁴ but he has no right to make merchandise of the water drawn from his well if by doing so he deprives his neighbor's well of its supply.⁵ No landowner will be permitted to draw, collect, or divert underground waters on his own lands not needed for any useful purpose and merely to waste them wantonly to the injury of his neighbor's spring.⁶ A landowner may tap underground water upon his own land for any useful purpose without incurring any liability to other landowners in the neighborhood whose wells and springs are depleted by his acts, provided he diverts only percolating waters and does not interfere with any underground water-course or sub-surface stream.⁷ A subterranean stream flowing in a defined channel may no more be diverted or polluted by the owner of the overlying land than a surface stream may by the riparian proprietor.⁸ A surface land-

¹ *Bloodgood v. Ayers, supra.* ² *Wheelock v. Jacobs*, 70 Vt. 162.

³ *Houst. & T. C. R. R. v. East*, 98 Tex. 146.

⁴ *Miller v. Black Rock Sp'gs. Co.*, 99 Va. 747.

⁵ *Erickson v. Crookston Water W'ks.* 100 Minn. 481.

⁶ *Stillwater W. Co. v. Farmer*, 89 *id.* 58; *Barclay v. Abraham*, 121 Iowa, 619.

⁷ *Katz v. Walkinshaw*, 141 Cal. 116; *Huber v. Merkel*, 117 Wis. 355.

⁸ *Tampa Water W'ks. v. Cline, supra*; *Kinnaird v. Standard Oil Co.*, 89 Ky. 468.

owner who permits offensive and polluting fluids to soak into his soil and impregnate sub-surface waters that feed the wells and springs of his neighbors, making them disagreeable, unwholesome, and unfit to use, is liable in damages.¹ One who buries the carcass of a dead animal on his own land, which pollutes his neighbor's spring, is, however, only liable to that neighbor if the circumstances are such that a reasonably prudent person ought to have anticipated such an effect.² The escape from a pipe line of oil brought from a distance is not a necessary and natural incident to the transportation of oil, and, when injury is caused by such escape by percolation to adjacent land, the owner of the pipe line is liable for maintaining a nuisance regardless of any question of negligence.³

§ 75. *Ice.*

Ice that forms on a stream belongs to the owner of its bed.⁴ It belongs to the owner of the soil under the water on which it forms, whether that water is wholly or only partly upon his land.⁵ The ice, however, which forms upon overflowed land taken by a public water company by right of eminent domain in condemnation proceedings belongs to the corporation and not to the landowner.⁶ The rights to ice formed upon a stream are the same as those

¹ *Kinnaird v. Standard Oil Co.*, *supra*; *Beatrice Gas Co. v. Thomas* 41 Neb. 662.

² *Long v. L. & N. R. R.*, 13 L. R. A. (N. S.) 1063.

³ *Hauck v. Tide Water Pipe Line*, 153 Pa. St. 366.

⁴ *State v. Pottmeyer*, 33 Ind. 402.

⁵ *Bigelow v. Shaw*, 65 Mich. 341.

⁶ *Wright v. Woodcock*, 86 Me. 113.

to the water of that stream.¹ The right to cut and remove ice from an unnavigable stream belongs to the riparian proprietor, who may exercise it freely for his own use and for storage or sale, provided he does not infringe in any way upon the rights of the lower proprietors by sensibly diminishing the flow of the stream.² Natural ice is personal, not real property,³ and belongs to the tenant and not the landlord, unless it is reserved in the lease.⁴ The owner of land on a public river or lake, even when he has a grant from the state of the land under water, has no exclusive right, as against individual members of the public, to the ice which forms in front of his premises.⁵ The right to take ice from public navigable waters belongs to all the people alike.⁶ But this common right does not warrant the cutting and removing for sale of such large quantities of ice as to lower the natural level of the water.⁷ Staking off the banks and the ice upon a public stream or body of water long before the ice is ready to cut or thick enough to harvest, with the purpose of garnering it later when it becomes merchantable, is not sufficient for a legal appropriation; ⁸ it is otherwise, however, when the ice is in a state fit for immediate sale and the intention is to cut and remove it at once.⁹

¹ *Brown v. Cunningham*, 82 Iowa, 512.

² *Gehlen v. Knorr*, 101 *id.* 700; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238.

³ *Higgins v. Kusterer*, 41 Mich. 318.

⁴ *Marsh v. McNider*, 88 Iowa, 390.

⁵ *Slingerland v. International Contr. Co.*, 169 N. Y. 60; *Concord M'fg. Co. v. Robertson*, 66 N. H. 1.

⁶ *Rossmiller v. State*, 114 Wis. 169.

⁷ *Sanborn v. Peo. Ice Co.*, 82 Minn. 43.

⁸ *Becker v. Hall*, 116 Iowa, 589.

⁹ *Ibid.*

§ 76. *Liability for casualties.*

The owner of a pond in which a boy drowns while skating or bathing is not liable in damages for his death, particularly where the boy had no license or invitation to go to the pond and the landowner had no knowledge of his presence there.¹ But, although this is so, even if no precautions have been taken to guard the pond and keep children away from the water,² it is none the less wise for a landowner upon whose land there is a sheet or stream of water to which children have access to take some little pains to prevent accidents, as otherwise it may be both troublesome and costly to escape liability. It has been held that one who maintains an unprotected and dangerous reservoir of water in an open field near a highway where children resort to play is liable for the death by drowning of a child who fell into the water while at play.³ And the owner of a deep unguarded pond near a highway in which a horse was drowned, in consequence of taking fright at some goats and backing off the road, was not allowed to escape liability for the death of the animal upon the plea that it would not have happened if it had not become frightened.⁴ Although it is certainly negligence of an actionable kind to leave unguarded a hole made by cutting ice upon public waters near a line of travel in disobedience of a statute, it does

¹ *Arnold v. St. Louis*, 152 Mo. 173; *Moran v. Pullman P. C. Co.*, 134 *id.* 641; *Cooper v. Overton*, 102 Tenn. 211; *Stendel v. Boyd*, 73 Minn. 53; *Sav. F. & W. R. R. v. Beavers*, 113 Ga. 398; *Dobbins v. Mo. K. & T. R. R.*, 91 Tex. 60.

² *Sullivan v. Huidekoper*, 27 Dist. Col. App. 154.

³ *Franks v. South. Cotton Oil Co.*, 12 L. R. A. (N. S.) 468.

⁴ *Strange v. Bodcaw Lum. Co.*, 79 Ark. 490.

not make the person who left the hole that way liable for the loss of horses that plunge in and are drowned while running away from fright, unless the guard required by law would have prevented the casualty had it been in place.¹

¹ *Sowles v. Moore*, 65 Vt. 322.

CHAPTER XI

IRRIGATION

§§ 77-90

§ 77. *Irrigation at common law.*

Irrigation has been defined to be the systematic application of water to land in order to promote present or prospective vegetation.¹ In the legal as well as in the popular sense in the United States, irrigation is the artificial watering of land adapted and devoted to agriculture for the purpose of raising crops of the products of the soil.² In England, whence is derived the body of the common law of the United States, rain is abundant for the needs of agriculture, and until past the middle of the last century the English landowner's occasional use of his riparian waters to irrigate his land had affected so slightly the lower proprietors that no legal rules had been formulated recognizing and regulating the use of streams for such purpose.³ In this country the right of riparian proprietors to use in a reasonable way and to a limited extent the waters of adjacent streams for the irrigation of their lands was recognized and established by several early decisions of the courts of New England.⁴ This right, however, was

¹ Encyc. Brit.

² *Platte Water Co. v. No. Colo. Irrig. Co.*, 12 Colo. 525.

³ Lord Wensleydale in *Chasemore v. Richards* (1859), 7 H. L. Cas. 349.

⁴ *Weston v. Alden*, 8 Mass. 136; *Perkins v. Dow*, 1 Root, 535; *Blanchard v. Baker*, 8 Me. 266.

strictly a riparian right and governed by the principles of the common law that apply to riparian rights, and where the common law prevails, a riparian owner alone has the right to use the adjacent waters for irrigation¹ and then only to irrigate riparian land.² The common law with respect of irrigation is the law of riparian right.

§ 78. *The limits of the right at common law.*

Every riparian proprietor may rightfully use a reasonable quantity of the water which flows by or through his land for irrigation, provided sufficient is left to supply the needs of the several other proprietors.³ His use of the water must be reasonable and duly regardful of the equal rights of other landowners along the stream.⁴ He must not in any case take the water of the stream to irrigate his land when his doing so operates to destroy, render useless, or materially affect the use of the water for proper purposes by lower proprietors.⁵ Where the common law prevails, the quantity of water drawn off by a riparian proprietor to irrigate his land must not be so great as materially to reduce the volume of the stream to the substantial injury of lower proprietors; such a use is unreasonable.⁶ The use of water to irrigate riparian land must be reasonable in view of the size, situation, and character of the stream, the nature of the country through

¹ Hayden *v.* Long, 8 Ore. 244.

² Chauvet *v.* Hill, 93 Cal. 407; Gould *v.* Eaton, 117 Cal. 539.

³ Low *v.* Schaffer, 24 Ore. 239.

⁴ Clark *v.* Allaman, 71 Kan. 206; Crawford Co. *v.* Hathaway, 67 Neb. 325.

⁵ Union Mill. & Min. Co. *v.* Ferris, 2 Sawy. 176.

⁶ Lux *v.* Haggin, 69 Cal. 255.

which it flows, the season of the year, and the needs of other riparian owners.¹ An upper owner upon a stream of water has no right prior or superior to that of a lower one to use the water to irrigate his land; he is permitted only to divert from the stream as much as shall fairly represent his share when the quantity of water and the number of persons entitled to its use are considered.² In an arid country the diversion of a greater quantity of water for irrigation will naturally be tolerated as reasonable than in places where aridity does not exist, and only an occasional drought makes irrigation temporarily necessary.³ The question of reasonableness in the use of water to irrigate riparian land is entirely one of degree, and it is said to be not only difficult but impossible to define precisely the limits dividing a permissible from an unreasonable use, although usually there is little difficulty in deciding whether a particular case falls upon one or the other side of the division.⁴ The method employed by a riparian owner to divert the water to irrigate his land does not and cannot in any wise affect the legality or the reasonableness of the diversion;⁵ thus, if the riparian land which needs irrigating lies so high above the surface of the stream that water will not flow to it by the force of gravity, the landowner has a perfect right to raise it to the necessary level by means of pumps.⁶ Neither is the manner in which the surplus

¹ *Meng v. Coffee*, 67 Neb. 500.

² *Gould v. Stafford*, 77 Cal. 66; *Jones v. Conn.*, 39 Ore. 30; *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73.

³ *Lux v. Haggin*, *supra*.

⁴ *Embrey v. Owen*, 20 L. J. Exch. (N. S.), 212.

⁵ *Charnock v. Higuerra*, 111 Cal. 473.

⁶ *Ibid.*

water diverted for irrigation is returned to the stream of any consequence to a lower proprietor, provided it reaches the stream above his land and in an uncontaminated state.¹ A riparian owner has no right to divert more water than he needs to irrigate his land and allow the surplus to evaporate, flow elsewhere, or find its way back to the stream as best it may.² The area of riparian land lying along a stream which a single proprietor may irrigate with its waters is governed by the principle of equality of right with other riparian owners and does not depend upon governmental division lines.³ It is the physical conditions of land bordering upon a stream which determine whether or not it is riparian so as to be entitled to be irrigated with water from the stream and not the governmental lines nor yet the circumstance that the land was acquired from sundry grantors of whom some were not riparian owners.⁴ If, however, there are no other circumstances to decide the matter, it is said the boundaries of the government sub-divisions, so far as they lie within the watershed, will control.⁵

§ 79. *The doctrine of appropriation.*

The arid region of the United States, in which irrigation is absolutely essential to the profitable cultivation of the land, is of vast extent. It covers a great deal of the area of the Pacific states, more of that of the mountain states,

¹ Gould v. Eaton, *supra*.

² Union Mill. & Min. Co. v. Ferris, *supra*.

³ Clark v. Allaman, *supra*.

⁴ Jones v. Conn, *supra*.

⁵ Watkins Land Co. v. Clements, 98 Tex. 578.

Arizona and New Mexico, and considerable tracts in the two Dakotas, Nebraska, Kansas, and Texas. In several of these states, the common law of riparian rights prevails in respect of streams privately owned, and the doctrine of appropriation is accepted in respect of waters upon the public lands. In Arizona,¹ Colorado,² Idaho,³ Nevada,⁴ New Mexico,⁵ Utah,⁶ and Wyoming⁷ the common law doctrine of riparian rights concerning irrigation has been abrogated by either statutes or judicial decisions on the ground that it is unsuited to the prevalent local conditions of climate and aridity. In its place has been accepted the doctrine "that a right to the use of water may be acquired by priority of appropriation for beneficial purposes in contravention to the common law rule that every riparian owner is entitled to the continued natural flow of the waters of the stream running through or adjacent to his lands."⁸ The power of a state to abrogate the rules of common law respecting riparian ownership and to authorize the appropriation of flowing waters within its boundaries for such beneficial uses as the legislature may deem wise and proper, having due regard, of course, to rights already vested, is beyond question.⁹ Where the doctrine of appropriation prevails, the law regards the appropria-

¹ *Chandler v. Austin*, 4 Ariz. 346.

² *Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142.

³ *Drake v. Earhart*, 2 Idaho, 750.

⁴ *Bliss v. Grayson*, 24 Nev. 422.

⁵ *Millheiser v. Long*, 10 N. Mex. 99.

⁶ *Stowell v. Johnson*, 7 Utah, 215.

⁷ *Moyer v. Preston*, 6 Wyo. 308.

⁸ *Farm Inves. Co. v. Carpenter*, 9 Wyo. 110.

⁹ *U. S. v. Rio Grande Dam & Irrig. Co.*, 174 U. S. 690; *Crawford Co. v. Hathaway*, *supra*.

tion which is first in time to be prior in right and as constituting a vested right which the courts will protect and enforce.¹ It is an elementary principle of the law of appropriation that he who first appropriates water for irrigation is entitled to the quantity he takes and uses to the exclusion of subsequent claimants by either appropriation or right of riparian ownership.²

§ 80. *Making an appropriation.*

In the doctrine of appropriation, an appropriation consists in the diversion of water by some adequate means and its application to a beneficial use.³ The mere diversion of water, unaccompanied by an intention to put it to a beneficial use, does not constitute a legal appropriation of it.⁴ There must be both an intent to take the water for some beneficial use and some open physical manifestation of that intent.⁵ In many of the arid states local customs confirmed by statutes require that one who would appropriate water shall conspicuously post at the point where he purposes diverting it a written notice of his claim to a stated quantity of water, setting forth the use to which he means to put it, the place where he intends to use it, and the way he designs to divert it. If there is a statute upon the subject, usually it requires a public record

¹ *Low v. Schaffer, supra.*

² *Longmire v. Smith*, 26 Wash. 439.

³ *Moyer v. Preston, supra.*

⁴ *Combs v. Agric. Ditch Co.*, 17 Colo. 146; *Power v. Switzer*, 21 Mont. 523; *Toohey v. Campbell*, 24 *id.* 13.

⁵ *McDonald v. Bear Riv. Water Co.*, 13 Cal. 220; *Larimer Co. Res. Co. v. Peo.*, 8 Colo. 614; *Ft. Morgan Land & Canal Co. v. So. Platte Ditch Co.*, 18 Colo. 1.

to be made of such notice within a definite time after it is posted.¹ When there is such a statute, a strict compliance with its requirements is a condition precedent to a valid appropriation.² Unless and until some statute or universally acknowledged custom prescribes what must be done to effect an appropriation of water for the beneficial use of irrigating the soil, a settler who has acquired a possessory right to a definite tract of agricultural land in an arid region, where the doctrine of appropriation prevails, and who takes up his residence upon such tract and cultivates it by aid of water diverted to irrigate the soil, does all that is necessary to evince an intention to appropriate the water needed for the irrigation of his land; and then if afterwards he uses such water continuously for that purpose and extends with reasonable diligence the area of his land under cultivation, the courts will confirm the appropriation of the quantity used and required by him.³ The necessity for use, the actual diversion, and beneficial use of the water are the fundamentals in the acquisition of a water right by appropriation.⁴ The application of the water to a beneficial use is the final requisite in completing the appropriation.⁵ This actual use is the true and only final test to determine whether an appropriation of water has been completed.⁶ He who diverts water with a *bona fide* intention of putting it to a beneficial use can perfect his right only by actually devoting it to such a use within

¹ Long on Irrig., Chap. III., § 37.

² *Ibid.*, cases cited.

³ Longmire v. Smith, *supra*.

⁴ Ison v. Sturgill, 109 Pac. 579.

⁵ Drach v. Isola, 109 Pac. 748.

⁶ Nevada Ditch Co. v. Bennett, 30 Ore. 59.

a reasonable time.¹ A delay caused by an accident, such, for instance, as a break in the conduit, is excusable,² but a delay for two years to make an irrigation ditch, during which time water was not actually needed for irrigating the appropriator's land, is deemed an abandonment of the appropriation.³ The appropriation of the waters of the stream is held to be an appropriation of all the tributary waters above the point of diversion.⁴

§ 81. *The quantity of water that may be taken for irrigation.*

The right at common law of a riparian owner to use the water of the adjacent stream to assuage the thirst of himself, his family, and his live-stock, and for the ordinary domestic purposes, culinary and ablutionary, of his household, is usually accounted a natural right supreme above all other riparian rights, entitling its possessor in exercising it wholly to exhaust the stream, if necessary, without thereby legally wronging lower proprietors.⁵ Although this has been criticized as too broad a claim in some respects,⁶ it is generally considered that the right to use water for irrigation is inferior to the right to use it to assuage the thirst of man and in the preparation of human food.⁷ Where the common law prevails, the right of a riparian

¹ *Peregoy v. McKissick*, 79 Cal. 572; *Sieber v. Frink*, 7 Colo. 148; *Hague v. Nephi Irrig. Co.*, 16 Utah, 421; *Power v. Switzer*, *supra*.

² *Wells v. Kreyenhagen*, 117 Cal. 329.

³ *Lamborn v. Bell*, 18 Colo. 346.

⁴ *Low v. Schaffer*, *supra*.

⁵ *Ibid.* See also, Farnham on Waters and Water Rights, Chap. XXI., §§ 600-601.

⁶ Long on Irrig., Chap II., § 17.

⁷ *Watkins Land Co. v. Clements and Low v. Schaffer*, *supra*.

proprietor to use the waters of an adjacent stream is undeniably limited to the abstraction of only what is reasonable in view of the needs and rights of other riparian owners,¹ and the total exhaustion or the needless diminution of the stream is deemed clearly unreasonable.² Where the doctrine of appropriation applies, a riparian owner or his grantee has a right to use the waters of a stream for irrigation to an extent that at common law would be considered unreasonable.³ The right of an appropriator of water for irrigation is measured by and limited to the quantity actually necessary to irrigate the land he owns which needs artificially applied moisture to render it productive.⁴ No right is acquired in water diverted for irrigation in excess of actual needs and use.⁵ If the capacity of the irrigating ditch is beyond what is necessary to irrigate the owner's farm, he is restricted to the quantity he actually needs for irrigation over and above what he requires for domestic use and to water his stock.⁶ Once an appropriation has been made, the rights of the appropriator are fixed, and he cannot enlarge the use of the water at the expense of other appropriators.⁷ If the owner of a ditch needs more water for irrigation than it will carry, its capacity is the limit of his use where the rights of others have accrued.⁸ If additional water is found to be needed after

¹ *Low v. Schaffer, and Meng v. Coffee, supra.*

² *Meng v. Coffee, supra.*

³ *Smith v. Denniff, 23 Mont. 65.*

⁴ *Farnham on Waters and Water Rights, Chaps. XXI., XXII., and cases cited.*

⁵ *Porter v. Pettengill, 110 Pac. 393.*

⁶ *Barnes v. Sabron, 10 Nev. 217.*

⁷ *Union Mill. & Min. Co. v. Dangberg, supra; Becker v. Marble Creek Irrig. Co., 15 Utah, 225.*

⁸ *Barnes v. Sabron, supra.*

an appropriation has been made, there must be a new appropriation of the excess required, made with due regard to intervening rights.¹ And when the area of the irrigated land remains substantially unenlarged for several years, a new appropriation is requisite for an increase in acreage.²

§ 82. *The character of irrigation conduits and works.*

The means which one entitled to use water for irrigation adopts to divert and convey it from the source of supply to the land to be irrigated are wholly immaterial.³ He may employ any sort of a conduit whatever, provided it is not wasteful and is kept in good condition and repair.⁴ He may, for example, if he elects to do so, take advantage of any natural cut, gully, or depression in the earth and make it a part of his irrigation ditch.⁵ And although he cannot, against the will of the owner, seize and use a ditch belonging to another person⁶ unless it has been abandoned,⁷ yet he may do so by that person's consent. Two or more persons may divert water for irrigation through the same head-gate without by so doing merging their respective rights and without either of them thereby surrendering his priority.⁸ Any one who has lawfully appropriated water for irrigation may, without losing his priority, change the point of his diversion, provided his action does not in-

¹ Healy *v.* Woodruff, 97 Cal. 464.

² Porter *v.* Pettengill, *supra*.

³ Thomas *v.* Guiraud, 6 Colo. 530.

⁴ Barrows *v.* Fox, 98 Cal. 63.

⁵ Hoffman *v.* Stone, 7 Cal. 46; Simmons *v.* Winters, 21 Ore. 35.

⁶ McPhail *v.* Forney, 4 Wyo. 556.

⁷ Jatunn *v.* O'Brien, 89 Cal. 57.

⁸ Nichols *v.* McIntosh, 19 Colo. 22.

fringe the rights of others entitled to use the water.¹ And with the same proviso he may also change old ditches for new ones.² Such changes work no alteration in the quantity of water an appropriator is entitled to use.³ An abandoned ditch may be taken possession of, reconstructed, and used by a new appropriator, and his rights will be measured with respect of subsequent appropriators by the capacity of the re-made ditch.⁴ If the new ditch is of less capacity than was the old one, it may not be enlarged to the original extent after other persons have acquired rights in the water.⁵ When irrigation is provided for and regulated by statute, the means of conveying the water to the land to be irrigated are implied.⁶

§ 83. *Rights of irrigators under appropriation.*

Water rights in the same stream acquired by appropriation have priority in the order of diversion.⁷ The water can be appropriated only for a beneficial use, but it is held it may legally be used for a beneficial purpose other than the one intended and begun when the appropriation was made; that is, water appropriated for mining may afterwards lawfully be used for irrigation, and *vice versa*.⁸

¹ *Ibid.* San Luis Water Co. v. Estrada, 117 Cal. 168; Nevada Ditch Co. v. Bennett, *supra*.

² Nichols v. McIntosh, *supra*.

³ Smith v. Corbit, 116 Cal. 587.

⁴ Jatunn v. O'Brien, *supra*.

⁵ *Ibid.*

⁶ Paxton & H. Irrig. Canal Co. v. Farmers & M. Irrig. Co., 45 Neb. 884.

⁷ Porter v. Pettengill, *supra*.

⁸ Ramelli v. Irish, 96 Cal. 214; Meagher v. Hardenbrook, 11 Mont. 385; Strickler v. Colorado Sp'gs, 16 Colo. 61; Springville v. Fullmer, 7 Utah, 450.

Tenants in common of appropriated water may lawfully agree among themselves that each shall have on certain days or at stated times sole use of the water and lose none of their rights relative to other persons by such an agreement.¹ The mere neglect of one who has duly appropriated water for irrigation to use it for that purpose is no abandonment and does not work a loss of the right;² but although the right to use the water for irrigation is not lost merely by not exercising it for a longer or shorter time, the right to maintain a ditch to carry the water to the land to be irrigated may be lost by persistent neglect for a considerable time to use it as an aqueduct. For example, a ditch made by running a furrow and deepening it with a spade, if left unused for years until it becomes effaced and unnoticeable, is deemed to have been abandoned.³ One who appropriates water for a beneficial use is clearly entitled to the protection of the courts against acts which materially diminish the quantity or deteriorate the quality of the water for the uses to which he is entitled to apply it.⁴ Thus, the owner of a ditch conveying water for a beneficial use is entitled to damages and an injunction against the owner of a sawmill on the stream whence he draws his supply of water for casting sawdust, refuse, and tan-bark into the stream so as to clog and diminish the flow of water in the ditch.⁵ And an action for damages, and an injunction by the owner of a ditch carrying water for agricultural and culinary purposes, lies against the

¹ Lytle Creek Water Co. v. Perdeu, 65 Cal. 447.

² Sloan v. Glancy, 19 Mont. 70.

³ Dorr v. Hammond, 7 Colo. 79.

⁴ Phoenix Water Co. v. Fletcher, 23 Cal. 482.

⁵ *Ibid.*

owner of an ore crusher on the stream above the point of diversion who uses the water in operating the crusher and returns it to the stream holding in solution mineral and chemical poisons destructive of animal and vegetable life.¹ A right of way for an irrigation ditch across another's land may, of course, be acquired by grant, and, if it is, the terms of the contract will govern the rights and obligations of the parties. Sometimes such a grant is implied when it has not been expressly made, as, for example, when the owner of land divides and conveys it to separate grantees, and the ditch is on one parcel and irrigates the other. In that case the new owner of the latter tract takes an easement of the ditch across the former parcel, and the grantee of that parcel takes it, subject to such easement.² A right of way for an irrigation ditch over the land of another may also be acquired by prescription beginning in an oral grant and followed for the statutory period by continuous use tolerated by the owner of the servient estate.³ But the right will not grow out of a mere license.⁴ A landowner over whose land, without his consent, an irrigation canal to supply the needs of a farming community beyond has been unlawfully constructed has no right summarily to destroy the work, but must resort to the courts for redress.⁵

§ 84. *Title to and location of irrigable land.*

According to the doctrine of riparian rights and where the common law prevails unmodified, the use of the waters of

¹ Crane v. Winsor, 2 Utah, 248.

² Quinlan v. Noble, 75 Cal. 250.

³ Covention v. Scufert, 23 Ore. 548.

⁴ Yeager v. Woodruff, 17 Utah, 361.

⁵ Cresecent Canal Co. v. Montgomery, 143 Cal. 248.

a running stream is incidental to the ownership of at least one of its banks, and when the use is for the purpose of irrigating the soil, it is confined to the land which is strictly riparian. The use of such waters by a riparian proprietor to irrigate his riparian land is an established common law right¹ and in respect of private streams one that is recognized even in those states where the country requires irrigation to make the soil productive.² In the states where the doctrine of appropriation is accepted, it is not essential that the irrigator shall own the land he irrigates, nor yet that the irrigated land shall be riparian. One who rightfully occupies public land may appropriate the water on it although he has no title and although, too, the land has not even been surveyed.³ A mere possessory right to the land is all that is necessary. Thus a settler on public lands with a *bona fide* purpose to acquire title to the tract he cultivates may at the very start lawfully appropriate water to irrigate it, although he cannot perfect title for a considerable length of time.⁴ Nor does the location of the land to be irrigated affect its possessor's right to divert the water he has appropriated. The land need not be riparian.⁵ The water may even be conducted across a dividing ridge to another water-shed.⁶ It is the appropriation and use, not the place of use, which tests the right to water for irrigation.⁷ It has been held in Oregon that an appropriator of water has no right as against others to use it on

¹ Clark *v.* Allaman, *supra*.

² Benton *v.* Johncox, 17 Wash. 277; Crawford Co. *v.* Hathaway, *supra*.

³ Ely *v.* Ferguson, 91 Cal. 187. ⁴ Elliot *v.* Whitmore, 8 Utah, 253.

⁶ Hammond *v.* Rose, 11 Colo. 524.

⁶ Oppenlander *v.* Left Hand Ditch Co., *supra*.

⁷ Davis *v.* Gale, 32 Cal. 26.

lands for which the appropriation was not made,¹ but it has been decided in California that an owner of a right to use for irrigation water from a common dam and ditch in quantities sufficient to irrigate a definite number of acres of land may, if he chooses, use the water to irrigate another tract of equal area, for, it was said, a mere change of the place of use without enlarging it works no injury to others.² What has been said in this section applies when there is no statute prescribing qualifications of appropriators of water for irrigation and the eligibility of land to be irrigable. When such a statute exists in any community, its provisions will, of course, control.

§ 85. *Water rights for irrigation as property.*

The legal right to use water is termed a "water right"³ and is a right of property. The right to use water in the arid regions has been pronounced one of the most valuable property rights known to the law.⁴ The right of a riparian proprietor to use the water of the adjacent stream to irrigate his land is a property right which cannot be taken from him for public use without making him just compensation.⁵ All the courts agree in regarding the right to use water for irrigation as property, but they differ as to whether it is inseparable from and incidental to the land or exists independently. The riparian right to irrigate is a corporeal one or hereditament running with the riparian

¹ *Ison v. Sturgill, supra.*

² *Walnut Irrig. Dist. v. Burke, 110 Pac. 518.*

³ *Smith v. Denniff, supra.*

⁴ Hayt, C. J., in *White v. Farmers' High Line Canal & Res. Co.*, 22 Colo. 191.

⁵ *Lux v. Haggin, supra.*

land which follows and is included in the ownership of the riparian soil.¹ It has also been held that the right to use appropriated water for irrigation is appurtenant to the land which it has been diverted to irrigate.² It has further been said that the water appropriated for irrigation is as much a part of the improvements of a farm as the buildings and fences, and, therefore, that a transfer of the possessory right to the farm carries with it the appropriated water.³ On the other hand, it has been decided that a consumer's right to water from an irrigation canal or ditch is a property right which he may convey to another person or transfer to other lands reached by the conduit, provided he does not thereby invade the rights of others.⁴ And another court has said that although the sale of water rights separate from the land has given rise to much litigation that circumstance affords no ground for destroying the property therein by refusing to sanction their transfer.⁵ The nature of the property right, therefore, is different in different states. The prudent purchaser of an irrigated farm, then, will make sure that he acquires by express conveyance the water right as well as the land. He who constructs an irrigation ditch on the public lands, and uses it persistently for its designed purpose, is held to have a qualified ownership in it dependent upon continued use, and lost by cessation of use.⁶ If the laws authorize springs to be appropriated (sometimes they do not), he

¹ Smith *v.* Denniff, *supra*.

² Porter *v.* Pettengill, *supra*.

³ Low *v.* Schaffer, *supra*.

⁴ Hard *v.* Boise City Irrig. & L. Co., 9 Idaho, 589.

⁵ Johnston *v.* Little Horse Creek Irrig. Co., 13 Wyo. 208.

⁶ Lehi Irrig. Co. *v.* Moyle, 4 Utah, 327.

who upon the public lands first appropriates the water of a spring which nowhere overflows its brim by cutting a ditch from it to the land he intends to irrigate has a right to continue the use of the water superior to that of one who afterwards obtains title to the land on which the spring is situated.¹ The water of a spring thus appropriated is appurtenant to the ditch which conveys it and passes by a conveyance of such ditch.² Irrigating ditches and water rights of irrigation in some states have been expressly exempted from taxation apart from the land. In Colorado³ and Utah,⁴ the constitutions provide that ditches, canals, and flumes owned and used for irrigating land by either individuals or corporations shall not be taxed separately as long as they are owned and used exclusively for irrigating purposes. Nebraska, by statute, has exempted such property from all taxation, state, county, and municipal.⁵ If no special exemptions are given by law, constitutional or statutory, such works and rights, like other property, will be subject to taxation.⁶

§ 86. *Irrigation as a public use of water.*

By the civil in contradistinction to the common law, all natural streams flowing in or through the state are public waters. The state owns the waters in its sovereign capacity and holds them in trust for any citizen to appropriate for a beneficial purpose.⁷ This doctrine has been embodied

¹ *Brosnan v. Harris*, 39 Ore. 148.

² *Williams v. Harter*, 121 Cal. 47.

³ Colo. Const. Art. X., § 3.

⁴ Utah Const. Art. XIII., § 3.

⁵ Neb. Consol. Stat. of 1891, § 2035.

⁶ *Empire Land & Canal Co. v. Rio Grande Co. Com'rs*, 21 Colo. 244.

⁷ *Crawford Co. v. Hathaway*, *supra*.

in the constitutions of several states in the arid region.¹ In other state constitutions the appropriation of water for distribution, sale, or rental to consumers² or the use of it for irrigation has been declared to be a public use.³ The importance of such provisions will be appreciated when it is remembered that there is no constitutional power in the United States to take private property by right of eminent domain for any purpose except a public use, even upon making just compensation for it to the owner. The right of the state to exert the power of eminent domain to appropriate the water of any stream for any use which will subserve the public interest and welfare is indisputable, and the reclamation of arid lands is conceded to be a work of public utility for which private property may be condemned under constitutional limitations.⁴ The right to appropriate for the public use water from private lands may certainly be enforced by condemnation proceedings.⁵ The legislature has the sole power to determine when and in what case the right of eminent domain shall be exercised to condemn private property, subject to the limitations that it shall be taken only for a public use and, if taken, that just compensation shall be made for it. If the legislature in authorizing the condemnation of water and water rights for irrigation should declare irrigation to be a public use, the courts would not be warranted in pronouncing the declaration false and the legislative act unconstitutional.⁶

¹ Colo. Const., Art. XV., § 5; No. Dak. Const., Art. XVII., § 210; Wyo. Const., Art II., § 31; Art. VIII., § 1.

² Cal. Const., Art. XIV., § 1; Idaho Const., Art. XV., § 1.

³ Mont. Const., Art. III., § 15.

⁴ *Clark v. Cambridge & A. Irrig. & Imp. Co.*, 45 Neb. 798.

⁵ *St. Helena Water Co. v. Forbes*, 62 Cal. 182.

⁶ *Umatilla Irrig. Co. v. Barnhart*, 22 Ore. 389.

The use of water by a private person exclusively to irrigate his own lands is clearly a private use,¹ and it is none the less so because he diverted the water with the intention of supplying some of it to others for beneficial uses.² In some of the arid states the laws, constitutional and statutory, empower individuals to acquire rights of way for irrigation ditches across public lands, and, upon making just compensation to the owners, across private lands also.³ In Colorado the constitution guarantees private persons the right to condemn ways for irrigation ditches, and the method of exercising that right is regulated by statute.⁴ In the same state, by statute,⁵ a person may in certain cases acquire by condemnation the right to use another's ditch.⁶ Everywhere throughout the arid region the use for irrigation of water distributed to consumers by irrigation companies is a public use.⁷

§ 87. *State control, regulation, and administration of irrigation.*

When many consumers take water from the same ditch, some by taking excessive quantities may altogether deprive others of water they absolutely need to avert a total

¹ *Lorenz v. Jacob*, 63 Cal. 73.

² *Ibid.*

³ *Vide*, Colo. Const., Art. II., § 14; Art. XVI., § 7; Mills Anno Stat. Colo., §§ 2257-2260; R. S. Ariz. 1887, §§ 3201-3202; and Cal. Act, M'ch 12, 1885, § 11.

⁴ *Downing v. More*, 12 Colo. 316.

⁵ Mills Anno. Stat. Colo., § 2263.

⁶ *Water Supply & Stor. Co. v. Larimer & W. Irrig. Co.*, 24 Colo. 322.

⁷ *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112; *San Diego Flume Co. v. Souther*, 90 Fed. 164; *Lindsay Irrig. Co. v. Mehrstens*, 97 Cal. 676; *Umatilla Irrig. Co. v. Barnhart*, *supra*.

failure of growing crops, and this is equally true when several consumers take the waters of a common stream by separate ditches. Controversies in such cases are inevitable, and often they have given rise to violence. To avoid unseemly breaches of the peace, as one jurist has put it,¹ it was found expedient and necessary for the state to provide complete rules of procedure governing the taking of water from the public streams and regulating its distribution to those entitled to it. The authority of a state legislature, as another jurist² has said, to enact laws regulating the distribution of water to actual appropriators is indubitable, provided there is no invasion of constitutional or vested rights. The courts construe statutes of this sort liberally to carry out their useful purposes.³ The legislature, when unrestrained by constitutional provisions, has the same power to provide for reclaiming arid lands by irrigation and to designate the agencies for the work as it has to provide for the draining of great swamps.⁴ The public ownership of streams and control of the appropriation, diversion, and distribution of their waters for mining and irrigating purposes, provided for in state constitutions, do not necessarily require the state to construct or operate diversion and irrigation works on its own account nor to become itself a carrier of water to consumers;⁵ but just as the government sometimes undertakes to drain great marshes, it may itself undertake to construct and maintain

¹ Hayt, C. J., in *White v. Farmers' High Line Canal & Res. Co.*, *supra*.

² Elliott, J., in *Farmers' High Line Canal & Res. Co. v. Southworth*, 13 Colo. 111.

³ *Cent. Irrig. Dist. v. De Lappe*, 79 Cal. 351.

⁴ *In Re Madera Irrig. Bonds*, 92 Cal. 296.

⁵ *Farm Inves. Co. v. Carpenter*, *supra*.

irrigation works and distribute water for irrigation under the direction of public officers.¹ For that purpose the legislature may exert the power of eminent domain to take private property, since the use of water to irrigate arid lands is a public use.² In the arid region several of the states have undertaken as a governmental function to establish and administer systems of irrigation. To that end their legislatures have enacted statutes creating and providing for the administration of irrigation districts clothed with power to construct, maintain, and operate irrigation and diversion works and to supply consumers with water to irrigate their lands. Attacks upon the constitutionality of such statutes have been numerous but generally unsuccessful.³ An irrigation district is a public corporation somewhat analogous to a municipality.⁴ It is like unto a municipal corporation in some respects, although not within the purview of constitutional provisions restricting municipal powers.⁵ The means of constructing such works and acquiring water rights in irrigation districts usually are obtained by issuing bonds after they have been authorized by a vote of the electors in the district, and the bonds are met by assessments levied upon the lands in such district. In such cases the authorizing

¹ *Vide* Farnham on Waters and Water Rights, Chap. XXI., §§ 616 *et seq.*

² Fallbrook Irrig. Dist. *v.* Bradley, and Crawford Co. *v.* Hathaway, *supra*; Lake Koen Navig. Res. & Irrig. Co. *v.* Klein, 63 Kan. 484.

³ Fallbrook Irrig. Dist. *v.* Bradley, and *In Re* Madera Irrig. Bonds, *supra*; Alfalfa Irrig. Dist. *v.* Collins, 46 Neb. 411; *In Re* Cent. Irrig. Dist., 117 Cal. 382.

⁴ Herring *v.* Modesto Irrig. Dist., 95 Fed. 705.

⁵ Middle Kittitas Irrig. Dist. *v.* Peterson, 4 Wash. 147; Alfalfa Irrig. Dist. *v.* Collins, *supra*.

vote of the electors is essential to the validity of the assessments.¹ Assessments of this kind are valid if all the property in the irrigation district is taxed uniformly and equally in laying them.² These assessments, like others, are, of course, liens upon the assessed property when lawfully imposed, and if they are not paid within the time prescribed by law, the property may be sold to satisfy them, but usually the delinquent landowner is allowed an opportunity and a reasonable time in which to redeem his land from the sale.

§ 88. *Characteristics of irrigation companies.*

The several owners of water rights in the same stream, from motives of economy and convenience, may unite in a voluntary association or form a corporation in which they are the sole stockholders to distribute the water to themselves and meet the cost and expenses by *pro rata* assessments. Such an association or corporation is a mere pool of individual water rights and is a purely private body, not made for profit, but simply to serve the interests of its own members.³ Again an irrigation company may be, and usually is, an organization of capitalists for profit to sell water to consumers to irrigate their lands. The consumers may or may not be its stockholders. Such a body is a *quasi* public corporation subject to legislative and judicial oversight and control for the general welfare.⁴

¹ *Tregea v. Owens*, 94 Cal. 317; *Woodruff v. Perry*, 103 Cal. 611.

² *Pioneer Irrig. Dist. v. Bradley*, 8 Idaho, 310.

³ *Vide Farnham on Waters and Water Rights*, Chap. XXI., § 610 *et seq.*

⁴ *Wheeler v. Nor. Colo. Irrig. Co.*, 10 Colo. 582.

The great cost of constructing dams and canals and of maintaining them when constructed, and the resulting advantages in the conservation and saving of water from large and permanent works of this sort, preclude, it is said, the policy of restricting the ownership of irrigation dams and ditches to the actual appropriators of the water.¹ The difficulties arising out of the ownership and control of the means of impounding and distributing water for irrigation by individual tenants in common make it almost necessary, according to the same authority, to create corporations for the purpose, and, accordingly, such corporations have been organized, and their rights of ownership and control of irrigation works and waters recognized, in all the arid states and territories.²

§ 89. *Rights and duties of irrigation companies.*

A charter from the legislature to an irrigation company empowering it to acquire water rights does not confer such rights upon it, but only authority to get them in a manner allowed by law.³ The legislature has no constitutional power to grant such a company exclusive rights to the waters of a stream so as to impair or take away vested private rights.⁴ A legislative grant to an irrigation company of the free use of the waters of a stream or streams only grants the waters on the public lands, and should the waters belonging to riparian owners be needed by the corporation, it can acquire them against the owners' will

¹ *Slosser v. Salt Riv. Val. Canal Co.*, 7 Ariz. 376.

² *Ibid.*

³ *Mud Creek Irrig. Co. v. Vivian*, 74 Tex. 170.

⁴ *Munroe v. Ivie*, 2 Utah, 535.

only by condemnation proceedings and the payment of just compensation.¹ This it may do because for an irrigation company to condemn private property is to take it for a public use.² Like railroad corporations, irrigation companies furnishing water to consumers for a consideration paid, though private corporations,³ are charged with public duty and service.⁴ An irrigation company is entitled to a reasonable compensation for the water it furnishes,⁵ and this means that it may charge such a rate as will enable it to earn a fair profit upon the capital invested;⁶ but it will not be allowed to charge such unreasonable rates as to oppress consumers.⁷ An irrigation company will not be allowed to divert water without limit as a speculation and to create a monopoly so as to enable it to charge exorbitant rates for consumption.⁸ An irrigation company distributing water to the public for general irrigation cannot arbitrarily refuse to supply a consumer who makes seasonable application for water and tenders proper compensation.⁹ A consumer to whom a statute gives the right to purchase water from an irrigation company upon compliance with provisions of the law cannot be compelled,

¹ Mud Creek Irrig. Co. v. Vivian, *supra*.

² Prescott Irrig. Co. v. Flathers, 20 Wash. 454; Paxton & H. Irrig. Canal Co. v. Farmers & M. Irrig. Co., *supra*.

³ San Diego Flume Co. v. Souther, *supra*.

⁴ Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co., 79 Fed. 39; San Joaquin & K. R. Canal & Irrig. Co. v. Stanislaus Co., 90 Fed. 516; Merrill v. So. Side Irrig. Co., 112 Cal. 426.

⁵ Wilterding v. Green, 4 Idaho, 773.

⁶ San Joaquin & K. R. Canal & Irrig. Co. v. Stanislaus Co., *supra*.

⁷ San Diego Land Co. v. National City, 74 Fed. 79.

⁸ Combs v. Agric. Ditch Co., *supra*, New Mercer Ditch Co. v. Armstrong, 21 Colo. 357.

⁹ Combs v. Agric. Ditch Co., *supra*.

as a condition precedent to receiving the service he requires, to assent to the rules and regulations of the company unless they are both reasonable and conformable to the law.¹ An irrigation company may be compelled by mandamus to furnish water to a consumer who shows himself entitled by law to have it.² The consumers of water for irrigation who for one or more seasons have been supplied by a water company with water for which they have paid and who also have observed all their other legal obligations are entitled to a preference over new applicants the next season of the same quantities of water previously used.³ An irrigation company which has failed to supply a consumer with the water it contracted to furnish him when he was entitled to have it is liable for the loss of, or damage to, the consumer's crop which has resulted from the breach of contract.⁴ The company can escape such liability only by showing that its failure to furnish the water was due to some unforeseen and unavoidable cause.⁵ A failure from natural causes of the source of supply, such, for example, as a scanty and inadequate rain-fall, is a good excuse for not performing the contract;⁶ but that the company was restrained by an injunction from diverting the water to its ditch affords it no legal excuse.⁷

¹ *Ibid.* Golden Canal Co. v. Bright, 8 Colo. 144.

² Merrill v. So. Side Irrig. Co., *supra*, Peo. v. Farmers' High Line Canal & Res. Co., 25 Colo. 202.

³ Nor. Colo. Irrig. Co. v. Richards, 22 Colo. 450.

⁴ *Ibid.* Sample v. Fresno Flume & Irrig. Co., 129 Cal. 222.

⁵ Pawnee Land & Canal Co. v. Jenkins, 1 Colo. App. 424.

⁶ Landers v. Garland Canal Co., 52 La. Ann. 1465.

⁷ Sample v. Fresno Flume & Irrig. Co., *supra*.

§ 90. *Measurement of water used for irrigation.*

There is at common law no need of measuring the water taken from a stream by a riparian proprietor to irrigate his land. All such proprietors are entitled to have the stream flow substantially in undiminished volume. All have equal rights to use the water. None may use more than his reasonable share so as to lessen the quantity to which the others are entitled. The situation is vastly different under the doctrine of appropriation. The first appropriator takes as much water as he needs, the second, from what remains, takes as much as he needs, and each successive appropriator in his turn takes what he needs or can get after the prior appropriators have been satisfied. It is obvious that under such a system some standard of measurement is necessary, or at least highly desirable. In most of the arid states a unit of measurement is prescribed by statute. The statute of Washington, to cite a typical instance, makes the unit measure of water for irrigation, mining, milling, and mechanical purposes a cubic foot flowing in a second of time.¹

Such statutes do not prevent the employment by individuals in private contracts of another unit than the one they prescribe.² If individuals do employ another than the statutory standard, they should use a definite one. The term "miner's inch" is indefinite,³ and the term "miner's measurement" has no certain and fixed meaning.⁴ Such terms are valueless as a standard of measurement of water

¹ 1 Ballinger's Anno. Codes & Stat., § 4090.

² Longmire v. Smith, *supra*.

³ *Ibid.*

⁴ Dougherty v. Haggin, 56 Cal. 522.

delivered for irrigation without a specification of the head or pressure.¹ The courts have not agreed as to the meaning of the phrase "an inch of water." The hydraulic inch when used with reference to the flow of water, according to one court, is a circle an inch in diameter,² while another court has said that a grant of simply a certain number of inches of water will be construed to convey square inches because lineal inches would be meaningless.³ According to the same authority, the term "square inch of water," when used in a grant of a right to use water, means a volume or stream of water an inch square in cross section area measured at right angles to the line of its flow and flowing with the velocity due to the head stated in the conveyance.⁴ The term "inch of water," in the ordinary and usual sense of the words, does not convey to the mind any idea of volume, but if at any particular place where and time when it has been used in a conveyance or contract it had acquired a settled, fixed, and well-understood meaning not substantially disputed, the courts will accord it that meaning in interpreting the instrument.⁵ The multiplication of the width by the depth of an irrigation ditch affords no measure of the inches of water it conveys.⁶

¹ Longmire *v.* Smith, *supra*.

² Schuylkill Navig. Co. *v.* Moore, 2 Whart. 477.

³ Jackson Mill, Co. *v.* Chandos, 82 Wis. 437.

⁴ Janesville Cotton Mills *v.* Ford, 82 Wis. 416.

⁵ Jackson Mill. Co. *v.* Chandos, *supra*.

⁶ Dougherty *v.* Haggin, *supra*.

CHAPTER XII

THE POLICE POWER OF THE STATE

§§ 91-96

§ 91. *The nature of the police power.*

In its broadest sense the police power virtually includes all legislation and almost every function of civil government.¹ It is the power of a state to enact all laws necessary for the government of the people and the public welfare.² It is a power belonging to the sovereignty of the state and one that cannot be bartered away by contract or otherwise,³ or in any way limited by the action of the legislature.⁴ The police powers of government relate to the safety, health, comfort, morals, peace, good order, and welfare of the people.⁵ All laws and regulations needful or adapted to promote any of these things are within the legitimate scope of the police powers of the legislature.⁶ The police powers are also properly exercised in regulating the civil rights and business of individuals⁷ and to smooth the

¹ *Barbier v. Connolly*, 113 U. S. 27.

² *Peo. v. Budd*, 117 N. Y. 1.

³ *C. B. & Q. R. R. v. State*, 47 Neb. 549.

⁴ *State v. Broadbelt*, 89 Md. 565.

⁵ *Lochner v. N. Y.*, 198 U. S. 45; *Ritchie v. Peo.*, 155 Ill. 98; *State v. Heinemann*, 80 Wis. 253.

⁶ *Ford v. State*, 85 Md. 465; *Boyce's case*, 27 Nev. 299; *State v. Powell*, 58 Ohio St. 324.

⁷ *Com. v. Reinecke Coal Min. Co.*, 79 S. W. 287.

conditions of the life of the people.¹ These powers extend to the regulation of the use of private property and the restraint of personal conduct in the interest of the community at large.² The police power is not restricted to suppressing what is offensive, unsanitary, or noxious, but it may constitutionally be employed to promote the common enjoyment, public convenience, and general prosperity.³

§ 92. *The limits of the police power.*

The police power is not wholly unrestrained. Broad as it is, it must be wielded in subordination to the constitution,⁴ but its only limit is the constitution.⁵ It may not be used to invade constitutional rights.⁶ An arbitrary or unjust restriction of property rights or personal liberty may not be made either by the legislative or executive department of the government under the guise of a police regulation.⁷ To be constitutional, police legislation must in some way tend to protect the public from a manifest evil.⁸ In order that a statute regulative, for example, of a lawful private business may be sustained as a constitutional exercise of the police power of the state, the courts must be able to see that it tends in some degree to prevent offenses or to preserve the public health, morals, safety, or

¹ *Williams v. State*, 85 Ark. 464.

² *Peo. v. Ewer*, 141 N. Y. 129.

³ *Bacon v. Walker*, 204 U. S. 311; *Brown v. Walling*, 204 *id.* 320.

⁴ *State v. Goodwill*, 33 W. Va. 179.

⁵ *State v. Moore*, 104 N. C. 714.

⁶ *Ruhrat v. Peo.*, 185 Ill. 133; *State v. Julow*, 129 Mo. 163; *Smiley v. MacDonald*, 42 Neb. 5.

⁷ *Block v. Schwartz*, 27 Utah, 387.

⁸ *Smith v. Farr*, 104 Pac. 401.

welfare, and that it was both intended to serve some such purpose and is somehow connected with its avowed end;¹ but subject to this the legislature is the sole judge of the necessity and expediency of the statute.² The legislature has no power, under cover of police legislation, to enact laws imposing onerous and needless burdens upon persons and property which do not really affect public health, morality, or welfare.³ A state must not in its police laws discriminate between its own citizens and those of other states to the disadvantage of the latter. For example, it has been decided that a statute requiring all sheep, both healthy and diseased animals, brought into the state from beyond its borders at all times and seasons of the year, to be dipped in an antiseptic bath before they will be allowed to enter the state and at the same time exempting from dipping all sheep belonging within the state between December first and shearing time in the following spring, and also exempting all domestic ewes with lambs between the middle of March and the middle of May, was unconstitutional and void because it violated that provision of the Federal constitution which requires citizens of the several states to be accorded equal privileges and immunities in all the states.⁴

§ 93. *Quarantine and inspection laws.*

Among the more familiar examples of the exercise of the police power are statutes enacted to prevent the intrusion

¹ *Peo. v. Steele*, 231 Ill. 340.

² *Halter v. State*, 74 Neb. 757.

³ *Hayden's case*, 147 Cal. 649; *Huber v. Merkel*, 117 Wis. 355; *Horwich v. Walker-Gordon Lab. Co.*, 205 Ill. 497.

⁴ *State v. Duckworth*, 5 Idaho, 642.

and spread in the community and to eradicate, after they have gained a foothold, contagious and infectious diseases among men, animals, and plants. The apprehension of danger to the public health is a sufficient justification for exercising the police power even to the restraining of the personal liberty of the citizen,¹ and all legislation to conserve, by quarantine and inspection laws, the health and to prevent and suppress diseases of domestic live-stock is a constitutional exercise of the police power of the state.² A state may lawfully prohibit and punish the bringing of live-stock into the state until after the animals have been duly inspected and officially certified to be healthy.³ The courts, in some states at least, take judicial notice without requiring proof, that Texas cattle ordinarily suffer from a contagious disease popularly called "Texas fever" which will infect sound beasts of other states with which the Texas animals are allowed to mingle.⁴ The courts have declared to be contagious such diseases of animals as glanders and farcy in horses⁵ and scab in sheep.⁶ A statute making it a misdemeanor for any owner of sheep to neglect for a fortnight to report an outbreak of contagious disease in his flocks to an official sheep inspector is a constitutional exercise of the police power.⁷ A state has constitutional power to regulate the nursery business and sales of nursery stock because trees, shrubs, and plants are subject to de-

¹ *Morris v. Columbus*, 102 Ga. 792.

² *Reid v. Pco.*, 29 Colo. 333.

³ *State v. Asbell*, 74 Kan. 397 ; *Aff'd*, 209 U. S. 251.

⁴ *Grimes v. Eddy*, 126 Mo. 168.

⁵ *Wirth v. State*, 63 Wis. 51.

⁶ *Mount v. Hunter*, 58 Ill. 246.

⁷ *North v. Woodland*, 12 Idaho, 50.

structive communicable diseases. It may to this end require license fees to be paid and bonds to be given by growers and dealers or certificates of inspection to be obtained from competent entomologists as a condition precedent to making sales.¹

§ 94. *The abatement of nuisances.*

The police powers justify the summary abatement without a resort to the courts of everything that can be deemed a public nuisance.² Summary proceedings to abate whatever is dangerous to the public health or safety are often necessary and have always been permitted when authorized by appropriate legislation.³ Property which has become a nuisance, or which unlawfully exists, or which is injurious to the health, morals, or safety of the public, may be destroyed or rendered innocuous without compensating the owner.⁴ Abating a nuisance is not taking property for public use and requires no compensation to be made.⁵ The constitutional prohibition against taking private property for public use without compensating the owner does not apply to exercises of the police power.⁶ The legislature may constitutionally clothe boards of health with power to use all means necessary to the protection of the public health even to the destruction of private property.⁷ It may authorize the destruction of property

¹ *State v. Nelson*, 15 L. R. A. (N. S.) 138.

² *Lawton v. Steele*, 152 U. S. 133.

³ *State v. Main*, 69 Conn. 123.

⁴ *Houston v. State*, 98 Wis. 481.

⁵ *State v. Meek*, 112 Iowa, 338.

⁶ *Carthage v. Frederick*, 122 N. Y. 268.

⁷ *Lowe v. Conroy*, 120 Wis. 151.

if the use of it constitutes a nuisance.¹ The constitutional prohibition against depriving any person of his property without due process of law does not limit the power of the state to enact laws protective of the public health and promotive of good order and public safety.² We know of no limitation of legislative power, said the New York Court of Appeals on one occasion, which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests, or to the injury of the health, morals, or welfare of the community, public nuisances, although not such at common law. There are, of course, limitations on the exercise of this power. The legislature may not use it as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction, and if the courts can judicially see that the statute is a mere evasion or was framed for the purpose of individual oppression, they will set it aside as unconstitutional.³

§ 95. *The power to destroy private property.*

The state in the exercise of the police power may by appropriate legislation always devote to summary destruction private property inimical to the public welfare.⁴ Examples of such legislation are very numerous, and it is worth while to give here several of peculiar interest

¹ *State v. Yopp*, 97 N. C. 477.

² *Deems v. Baltimore*, 80 Md. 164.

³ *Lawton v. Steele*, 119 N. Y. 226.

⁴ *State v. Main*, *supra*.

to farmers. The legislature, for instance, may declare hogs to be public nuisances and authorize them to be killed at sight without thereby depriving their owner of his property without due process of law, in case they are found running at large on or near the public levees of rivers which they are likely to weaken by rooting.¹ Again, cattle stricken with a malignant contagious disease may lawfully be destroyed as a menace to public health.² The public has a right summarily to destroy a consumptive cow without compensating its owner or making a judicial investigation.³ A general law making all animals having infectious or contagious diseases common nuisances subject to sudden slaughter authorizes the killing of horses suffering from glanders.⁴ A police officer has a legal right in a time of danger from hydrophobia to kill an unmuzzled dog running unattended, contrary to a municipal ordinance.⁵ A statute requiring peach trees which have been attacked by the "yellows" to be destroyed by a public officer is a valid exercise of the police power.⁶ The destruction of a fruit tree affected by a disease like the "yellows," communicable to other trees, against the will of its owner and without giving him any compensation, according to Judge Baldwin and his associates of the Connecticut Supreme Court, is as fully within the police power of the state as is the destruction of a house to stop a spreading conflagration, or the clothes of a victim of small-pox.

¹ Ross v. Desha Levee Bd., 83 Ark. 176.

² Lowe v. Conroy, *supra*.

³ New Orleans v. Charouleau, 121 La. 890.

⁴ Newark & S. O. R. R. v. Hunt, 50 N. J. L. 308.

⁵ Walker v. Towle, 156 Ind. 639.

⁶ State v. Main, *supra*.

Such property is not taken for public use; it is destroyed because of the judgment of officials to whom the law has given the power to decide it is of no use and is a source of public danger.¹ Village trustees charged with the care and safeguarding of the public highways have a legal right to burn down a mill and blow up a mill-dam in a case of urgent necessity when an unusual flood in the mill stream has turned aside its current and endangered the highway by a washout.²

§ 96. *Official immunity and liability for loss or damage by exercises of the police power.*

As a general rule, when a public officer acts in good faith and by authority of law in discharging a police duty, he is not liable in damages to any one who may be injured by his conduct. Boards of health are corporate bodies clothed with public powers to be used for the public benefit, and their members are not liable in private litigation for what they do in performing their official duty.³ They are not, for example, personally liable for a loss of crops by a person they quarantined for a contagious disease although they were mistaken about the existence of the disease.⁴ A health officer sued for damages for killing an animal may justify the slaughter by showing that he killed the beast by the authority of a reasonable police regulation for promoting the public health.⁵ This general rule has excep-

¹ *Ibid.*

² *Aitken v. Wells River*, 70 Vt. 308.

³ *Forbes v. Escambia Co. Bd of Health*, 28 Fla. 26.

⁴ *Beeks v. Dickinson Co.*, 131 Iowa, 244.

⁵ *Barrett v. Mobile*, 129 Ala. 179.

tions which require public officers to make sure of their facts before they destroy property and to perform their work carefully. To justify a board of health in destroying property as a nuisance detrimental to health, it must really be a nuisance. If it is not such, its destruction is unlawful, but the determination of the board that it is a nuisance is *prima facie* right.¹ A law which commands the killing of animals infected with contagious diseases will not protect an officer who slays a sound beast.² Such a law, or one authorizing the slaughter of domestic animals which have been exposed to contagion, will justify public officers in killing horses suffering from or which have been exposed to glanders, but an officer who kills a horse free from disease and which has not in fact been exposed to infection will be liable to its owner even though he acted in good faith and on probable grounds.³ A sheep inspector who undertakes to dip sheep which have been quarantined and ordered to be dipped for disinfection is liable for injuring the animals by using improper materials in the bath.⁴ Laws which authorize agents and officers of humane societies to kill without notice to the owners neglected or abandoned animals, or domestic beasts incapacitated for any use by age, incurable injury, or disease are held to be unconstitutional because they deprive people of their property without due process of law. To be constitutional,⁵ such laws should at least provide for notice to the owner

¹ *Peo. v. Bd. of Health*, 140 N. Y. 1.

² *Miller v. Horton*, 152 Mass. 540.

³ *Pearson v. Zehr*, 138 Ill. 48; *Lowe v. Conroy*, *supra*.

⁴ *Bair v. Struck*, 29 Mont. 45.

⁵ *Carter v. Colby*, 71 N. H. 230; *Goodwin v. Toucey*, 71 Conn. 262; *King v. Hayes*, 80 Me. 206.

of the condemned brute if such owner is known or discoverable.¹ However it may be with cats and dogs, such domestic animals as horses, cattle, sheep, and swine may not be summarily confiscated and destroyed by a humane society without notice to the owner, and a statute which should assume to authorize such action would clearly be unconstitutional.² It is no defense to an action for damages for destroying property that the property was worthless;³ the right to maintain an action for the value of property however trifling, of which the owner has been deprived, is never denied.⁴

¹ *Loesch v. Kochler*, 144 Ind. 278.

² *Fox v. Mohawk & H. R. Humane Soc.*, 165 N. Y. 517.

³ *Ft. Wayne Land Co. v. Maumee Gravel Rd.*, 132 Ind. 80.

⁴ *Wartman v. Swindell*, 54 N. J. L. 589.

CHAPTER XIII

THE POLICE POWER IN MUNICIPALITIES

§§ 97-101

§ 97. *The relations of the farmer with neighboring towns.*

All farmers whose farms are in the vicinity of cities and incorporated villages have occasion to visit them more or less frequently either for recreation or to transact business with their inhabitants. The visits for business may be made only now and then to purchase needed supplies or at regularly recurring intervals to market the numerous products of farm, garden, dairy, and orchard. Whatever the purpose of the farmer's visit to town, he will come under the operation of sundry local laws, municipal ordinances, and police regulations to which his conduct while in town must conform. In general these by-laws and rules are measures designed to promote the public health and good hygienic and sanitary conditions; but some are enacted to secure safety and good order among the people, others make for the convenience and comfort of the citizens, others regulate traffic on the public streets, and some are exercises of the taxing power. All measures of the municipality taken to preserve the public health are exercises of governmental functions¹ and this is also true of ordinances passed for the other purposes mentioned.

¹ Love v. Atlanta, 95 Ga. 129.

§ 98. *Nuisances in municipalities.*

Anything injurious to health, obstructive to the free use of property, or offensive either to the senses or to decency that interferes substantially with the enjoyment in comfort of living or property is a nuisance.¹ A municipal corporation needs no express statutory power to abate what is really a nuisance, and to destroy that which creates the nuisance,² but it has no power to make anything a nuisance which is not a nuisance either at common law or by some statute.³ Municipal ordinances may not declare things to be and prohibit them as nuisances unless they are nuisances in fact.⁴ A city, however, has a constitutional right to forbid any dairy or cow stable to be established and maintained within its limits except by express permission of a municipal ordinance.⁵ A city may constitutionally be invested by the legislature for the protection of the public health with power to inspect and regulate the keeping of cattle and to destroy kine found to be tuberculous without compensating the owner or instituting judicial inquiry,⁶ but a city has no power and may not be clothed with it by legislation, it has been decided in one case, to enter private property and suppress as nuisances pig-pens and cow stables distant as far as two miles from the city limits.⁷ A chicken house properly

¹ *Acme Fertilizer Co. v. State*, 34 Ind. App. 346.

² *First Nat. Bank v. Sarlls*, 129 Ind. 201.

³ *Hagerstown v. Balt. & O. R. R.*, 107 Md. 178.

⁴ *Des Plaines v. Poyer*, 123 Ill. 348; *Tissot v. Gt. So. Tel. Co.*, 39 La. Ann. 996; *O'Leary's case*, 65 Miss. 80; *St. Louis v. Heitzburg Paeking Co.*, 141 Mo. 375.

⁵ *Fischer v. St. Louis*, 194 U. S. 361.

⁶ *New Orleans v. Charouleau*, 121 La. 890.

⁷ *Malone v. Williams*, 118 Tenn. 390.

cared for and kept clean is not a neighborhood nuisance even if the fowls annoy invalids and others by their characteristic noises and odors.¹ Yet a municipality may forbid and punish as a nuisance, in some places at all events, the keeping of hogs in hog-pens within the city limits and nearer than two hundred feet from streets and alleys.²

§ 99. *Animals in the public streets.*

Given the proper legislative authority, a city may lawfully penalize owners of cattle who allow the beasts to run at large within the city limits.³ In order for a city to enact and enforce a penal ordinance of this character, however, it must have a more specific grant of power from the legislature than a simple general authority to make by-laws and ordinances to promote public welfare and good order.⁴ A municipal ordinance authorizing after a judicial determination of its violation the impounding and sale of animals found at large is valid.⁵ A municipal corporation may lawfully forbid horses to be hitched in the streets except at certain designated places, and may punish those who disobey it.⁶ A city or village may declare it a nuisance and ordain a punishment for a stallion to be exhibited in the public streets.⁷ It is clearly a nuisance to keep standing jacks and stallions within the immediate view of a private dwelling, especially when the brutes are noisy and

¹ *Wade v. Miller*, 188 Mass. 6.

² *Miller v. Syracuse*, 8 L. R. A. (N. S.) 471.

³ *Cochrane v. Frostburg*, 81 Md. 54; *Wilson v. Beyers*, 5 Wash. 303.

⁴ *Cosgrove v. Augusta*, 103 Ga. 835; *Wilson v. Beyers*, *supra*.

⁵ *Armstrong v. Brown*, 106 Ky. 81.

⁶ *Wells v. Mt. Olivet*, 11 L. R. A. (N. S.) 1080.

⁷ *State v. Iams*, 11 L. R. A. (N. S.) 736.

heard day and night;¹ that is offensive to decency and entitles the householder to an injunction.² The local authorities may lawfully suppress and punish as a nuisance the service at stud of any stallion, jack, or bull in public places.³ Every municipality has a right, and it is its bounden duty, to prevent the carcasses of dead animals from becoming nuisances in its streets, and, therefore, it may regulate the manner and limit the time of the removal of the bodies by their owners.⁴ If the owner fails to remove his dead beast within the time limited, the municipality may make away with it in its own way.⁵ It may lawfully grant a contractor the exclusive privilege of removing the carcasses of animals dying in the streets.⁶ But the owner of an animal does not lose his property in its body because it dies in the streets of a city, hence he is entitled to a reasonable time and opportunity to take it away.⁷

§ 100. *Regulating collection and removal of garbage.*

The farmer often finds a profitable use for the household refuse of his city neighbors, and the denizens of the city are in turn desirous of getting rid of it as soon as possible and grateful to whosoever will regularly take

¹ *Hayden v. Tucker*, 37 Mo. 214.

² *Ibid.* *Farrell v. Cook*, 16 Neb. 483.

³ *Foote's case*, 70 Ark. 12; *Hoops v. Ipava*, 55 Ill. App. 94; *Nolin v. Franklin*, 4 Yerg. 163; *Robinson's case*, 30 Tex. App. 493.

⁴ *Knauer v. Louisville*, 20 Ky. L. Rep. 196.

⁵ *Schoen v. Atlanta*, 97 Ga. 697; *State v. Morris*, 47 La. Ann. 1660; *Meyer v. Jones*, 20 Ky. L. Rep. 1632.

⁶ *Lowe's case*, 54 Kan. 757; *State v. Fisher*, 52 Mo. 174; *Nat. Fertilizer Co. v. Lambert*, 48 Fed. 458.

⁷ *Campbell v. Dist. Col.*, 19 D. C. App. 131; *River Rend'g Co. v. Behr*, 77 Mo. 91.

it away. But the collection and removal of garbage in cities has such an important relation to health and sanitation that it is folly to leave it to voluntary and desultory effort. Its regulation is, therefore, a proper and legitimate exercise of the police power. The courts generally hold that municipal corporations invested by statute with ordinary police powers for the conservation of the public health and improving of urban sanitary conditions may lawfully grant exclusive privileges to gather and remove garbage.¹ Municipal laws and ordinances giving certain contractors exclusive rights to collect and remove garbage and forbidding under penalties all others to do so are perfectly valid and legal exercises of the police power.² Such ordinances infringe no constitutional right of the farmer or any one else.³ Where such ordinances are in force farmers can be punished for collecting and carrying away garbage in violation of them; for, notwithstanding garbage may not in fact be a nuisance actually detrimental to health, this circumstance will not entitle any and everybody to engage in collecting and transporting it in violation of a municipal ordinance.⁴ Sometimes municipalities, instead of turning over the general collection and removal of garbage to one or more public contractors, permit any one who meets certain prescribed conditions and receives a license to do so to gather and carry away garbage. In such a case, one who

¹ Gardner *v.* Michigan, 199 U. S. 325; Atlantic City *v.* Abbott, 73 N. J. L. 281; State *v.* Orr, 68 Conn. 101; Gd. Rapids *v.* De Vries, 123 Mich. 570.

² Iler *v.* Ross, 64 Neb. 710; Walker *v.* Jameson, 140 Ind. 591; State *v.* Payssan, 47 La. Ann. 1029.

³ California Reduction Co. *v.* Sanitary Reduction Co., 199 U. S. 306.

⁴ State *v.* Orr, *supra*.

wishes to take up and remove garbage must first procure the necessary license. If a license is wrongfully refused him, he may not proceed without it, but must apply to the courts to compel its issue.¹

§ 101. *Huckstering.*

Almost all municipalities are clothed by the legislature with power to regulate and license certain occupations. The farmer who carries his own products to the city and retails to its inhabitants fruits, garden truck, milk, butter, eggs, etc., is interested chiefly in the ordinances concerning hucksters. A city by virtue of its police power may establish and control public markets and regulate and supervise private ones. It may require all perishable food to be sold only at the public markets or other designated places, and under prescribed conditions.² It may require hucksters to keep moving except when actually making sales.³ A city empowered by the legislature to license, regulate, and tax all kinds of business, and to inspect all food products and dairies and charge a reasonable fee for doing so, may, by ordinance, lawfully exact a fee of fifteen dollars for each wagon used in distributing milk, a moderate license fee for each cow that produces milk sold within the city limits, and also charge a reasonable occupation tax to dairy-men who sell butter or milk in such city.⁴ But a city has not the power to prohibit altogether the sale of wholesome, if perishable, food by any person within its limits.⁵ An

¹ *Ibid.*

² *State v. Perry*, 65 S. E. 915.

³ *Shreveport v. Dantes*, 118 La. 113.

⁴ *Birmingham v. Goldstein*, 151 Ala. 473.

⁵ *State v. Perry*, *supra*.

ordinance which undertakes to impose a penalty for selling within the municipal limits sound, wholesome, and nutritious food under the guise of a health and sanitary measure is void.¹ The courts have held such ordinances unreasonable and null in respect of sales of fresh pork and sausages in the summer months,² and sales of meats, fish, butter, cheese, and vegetables in department stores.³ A general authority given by the legislature to a municipal corporation to make by-laws and ordinances to promote public welfare and good order is not sufficiently specific to enable it to ordain and enforce penal ordinances preventing people from carrying on within the city limits any lawful trade or business in a lawful way.⁴

¹ *Helena v. Dwyer*, 64 Ark. 424.

² *Ibid.*

³ *Chicago v. Netcher*, 183 Ill. 104.

⁴ *Wilson v. Beyers*, and *Cosgrove v. Augusta*, *supra*.

CHAPTER XIV

LAWS TO SECURE PURE MILK

§§ 102-108

§ 102. *The general regulation of milk production and sale.*

In recent years widely throughout the United States statutes have been enacted and municipal ordinances by legislative authority adopted relating to milk sold for public consumption. They are chiefly health measures pure and simple, and, in so far as they are such, are exercises of the police power for the protection of the public health. Time and time again epidemics of typhoid fever have been traced with unerring certainty to contaminated milk supplied to the communities in which they have occurred. Germ-laden milk has ever been a potent factor in increasing infant mortality. There is, too, a well-grounded opinion among medical men that cases of tuberculosis in human beings are sometimes caused by milk drawn from tuberculous cows. The importance of milk in the dietary of the people cannot be overestimated; it enters every household to be consumed daily by virtually every person in the land. Milk is so easily contaminated innocently and ignorantly, it is so difficult even with the widest knowledge and utmost honesty of purpose to keep it free from contamination, and there are so many places between cow

and consumer where it may become infected that experience has made it necessary to adopt and enforce the most stringent laws to insure its purity and richness when delivered to the people. Inasmuch as the observance of these laws entails great labor and some additional expense upon every one engaged in milk production and traffic, their validity has been challenged, their efficiency denied, their need disputed, and their enforcement vigorously combated. The courts, however, have generally concurred in sustaining them as constitutional exertions of the police power. The equal protection of the laws is not denied to milk dealers by singling out the milk business of a city for regulation if all of them in the city selected are affected alike by the regulating statute.¹ The courts, it may be added, take judicial notice that when the statutes mention milk, they mean the fluid secreted by female mammals to nourish their young and not white plant juice, such, for an example, as the milk of the coconut.²

§ 103. *Sales regulation with reference to conditions of production.*

It is a valid exercise of the police power to prohibit under penalties the sale of milk that comes from unclean and unsanitary premises,³ or that is drawn from cows fed with distillery slops,⁴ or upon brewers' slops or brewers' grains.⁵ The courts will not stop to inquire in prosecutions for vio-

¹ N. Y. *v.* Van de Carr, 199 U. S. 552.

² Briffitt *v.* State, 58 Wis. 39.

³ State *v.* Broadbelt, 89 Md. 565.

⁴ St. Louis *v.* Schuler, 190 Mo. 524; Sanders *v.* Com., 117 Ky. 1.

⁵ Sanders *v.* Com., *supra*.

lating statutes of this class whether the milk is or is not unwholesome or detrimental to health;¹ it is enough that the law has forbidden it to be sold. The state may legally delegate its police power to any municipal corporation and authorize it to make and enforce ordinances to secure to its citizens pure, unadulterated, wholesome milk.² The sale of milk from kine which appear by the tuberculin test to be diseased may lawfully be prohibited by municipal ordinance.³ It is not unreasonable in a municipal ordinance to require owners of milch cows who desire to sell milk in the city to consent that the animals be subjected to the tuberculin test as a condition precedent to allowing them to sell milk.⁴

§ 104. *License laws.*

A city has the power to license and regulate the sale of milk within the municipal limits, and in exercising that power it may lawfully require milkmen to pay a reasonable license fee and may prohibit under penalty sales of milk by unlicensed dealers.⁵ A statute forbidding any person to sell milk in a designated city without first procuring a license in writing from the local board of health is a constitutional police regulation.⁶ So is a statute forbidding milk to be received, held, kept, offered for sale, or delivered within a particular city without the written permission of the city health officers.⁷ So, also, is a provision in a law

¹ *Ibid.* St. Louis *v.* Schuler, *supra*.

² Norfolk *v.* Flynn, 101 Va. 473.

³ State *v.* Nelson, 66 Minn. 166.

⁴ *Ibid.*

⁵ Littlefield *v.* State, 42 Neb. 223.

⁶ Peo. *v.* Van de Carr, 175 N. Y. 440.

⁷ Peo. *v.* N. Y. Health Dept., 189 *id.* 187.

regulating sales of milk and cream requiring dealers in those commodities to register with the local health commissioners, pay a registration fee, and procure a license before they are allowed to sell their wares to the public.¹ A board of health may lawfully revoke without notice a license it has granted to sell milk, provided it does not act arbitrarily, oppressively, unreasonably, and upon untruthful statements in doing so; ² but if in revoking a license the board acts tyrannically and upon false information, it may be compelled by *mandamus* to issue it again.³

§ 105. *The right to seize milk without payment.*

It has already been pointed out that no constitutional right of the citizen is invaded when his property is taken from him without compensation in the lawful exercise of governmental police power. That doctrine has been applied when, under police regulation of sales of milk, samples of it are taken for examination, and condemned milk is seized and destroyed. A health officer or milk inspector, if the statute authorizes him to do so, has a legal right without a warrant to seize, in order to test it, milk in quantities necessary for that purpose.⁴ A penal ordinance requiring vendors of milk to the general public to furnish samples of milk not exceeding a half pint free of charge to sanitary inspectors for examination and analysis is valid.⁵ A municipal ordinance adopted by a city empowered by

¹ *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 507.

² *Peo. v. N. Y. Health Dept.*, *supra*.

³ *Ibid.*

⁴ *St. Louis v. Liessing*, 190 Mo. 464.

⁵ *State v. Dupaquier*, 46 La. Ann. 577.

the legislature to regulate the sale of milk within the corporate limits which provides for the inspection of all milk brought into the city to sell, and forbids the sale and authorizes the destruction of milk which does not meet prescribed tests, is valid.¹ Milk found, when tested, to fall below the standard set by statute or ordinance may be summarily condemned by the official inspectors and poured into the sewers without infringing any constitutional right of the owner.²

§ 106. *The right to prescribe standards of richness.*

The police regulations of milk traffic which have provoked the most opposition and been most stubbornly contested in the courts have been those which set up standards of quality and required the condemnation and destruction of all milk which failed to reach the prescribed standards when offered for sale even when in the precise state in which it came from the cows and wholly regardless of any question of dilution or skimming or of the knowledge or intent of the dealer. Yet laws of this character have been sustained repeatedly by the courts, and their constitutional validity is now well established.³ The legislature for the conservation of the public health may lawfully declare any commodities sold for food unwholesome and unfit for consumption and may penalize their sale when they fail to reach a prescribed standard.⁴ A municipal ordinance is not so

¹ *Deems v. Baltimore*, 80 Md. 164.

² *State v. Newton*, 45 N. J. L. 469.

³ *State v. Campbell*, 64 N. H. 402; *State v. Smyth*, 14 R. I. 100; *State v. Crescent Cream. Co.*, 83 Minn. 284; *Peo. v. Cipperly*, 101 N. Y. 634; *Com. v. Warren*, 160 Mass. 533.

⁴ *Peo. v. Biesecker*, 169 N. Y. 53.

unreasonable as to be void when it forbids the sale of milk containing, according to a prescribed test, less than three per centum of butter fat¹ or less than seven tenths of one per centum of ash,² or the sale of cream containing less than twenty per centum of fat.³ It is no excuse to a person prosecuted for selling milk below the standard fixed by law to prove that such milk came from the cows below grade although he fed the animals on proper food.⁴ Milk in penal statutes against adulteration includes cream and milk in its natural state from which cream has not been taken away.⁵ By skimmed milk, when the words are used in the laws, is meant milk from which the cream has been removed in any manner, whether by the old-fashioned process of skimming, or the Cooley process of drawing off from the bottom after the cream has risen, or by the modern mechanical separator.⁶ Skimmed milk is not classifiable as adulterated milk and may be lawfully sold for what it is under laws which simply prohibit sales of adulterated milk.⁷

§ 107. *Laws against adulteration.*

To adulterate is to debase, — to mix an impure or spurious thing with a pure or genuine thing, or an inferior with a superior commodity of the same kind.⁸ Milk diluted

¹ *St. Louis v. Grafeman Dairy Co.*, *supra*.

² *St. Louis v. Liessing*, *supra*.

³ *State v. Crescent Cream. Co.*, *supra*.

⁴ *State v. Campbell*, *supra*.

⁵ *Com. v. Gordon*, 159 Mass. 8.

⁶ *Com. v. Hufnal*, 185 Pa. St. 376.

⁷ *Ibid.*

⁸ *Grosvenor v. Duffy*, 121 Mich. 220.

with water is adulterated.¹ The power of a state to prohibit and penalize the sale of milk to which water or anything else however harmless has been added even as a preservative is indisputable.² The state may constitutionally forbid the sale of milk containing preservatives, regardless of whether they are or are not actually deleterious to health.³ If the state does do so, the courts will not consider that question.⁴ An intent to defraud is not a necessary element in the offense committed by violating a statute forbidding the adulteration of milk intended for sale by the addition to it of anything whatever.⁵ An employer whose servant without his knowledge maliciously adulterates milk delivered to customers is liable for any damage that directly and necessarily results.⁶

§ 108. *The regulation of measures of quantity.*

The police power of the state has long been exercised to regulate weights and measures used in selling commodities to the people. The laws and ordinances for this purpose are general in application to all merchandise and have long been familiar. They have required all weights and measures to conform to established standards and to be inspected and certified as accurate. They have forbidden and penalized the use of false weights and measures and of those not officially sealed. All such laws apply to sales of milk by measure precisely the same as they apply to sales

¹ *Peo. v. West*, 44 Hun, 162.

² *State v. Schlenker*, 112 Iowa, 642.

³ *St. Louis v. Schuler*, *supra*.

⁴ *Ibid.* *Sanders v. Com.*, *supra*.

⁵ *State v. Schlenker*, *supra*.

⁶ *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 398.

of other commodities. Thus, when a statute makes it a misdemeanor to sell goods by unsealed measures, including milk, a seller of milk at wholesale in cans not officially sealed cannot recover the price of it from the buyer.¹ Certain conditions attendant upon the sale of milk peculiar to the traffic have made these laws and ordinances ineffective, and it has become necessary to extend their scope. At the present time milk is almost universally sold, especially at retail, in glass bottles nominally, probably in most cases actually, containing a quart or a pint of the fluid each. But there is no assurance that they do in fact contain the quantities they are supposed to hold when filled. A municipal ordinance prohibiting under penalties milk to be sold in glass bottles or jars not permanently stamped or marked with their fluid capacity, and imposing penalties on all vendors of milk in glass bottles or jars for having in their possession, with intent to use them in making sales and deliveries of milk or cream, bottles or jars that hold less than they purport to contain, is valid.² It is no defense to one charged with selling milk from unmarked bottles in violation of such an ordinance that he did not know what quantity they held.³

¹ *Miller v. Post*, 1 Allen, 434.

² *Chicago v. Bowman Dairy Co.*, 234 Ill. 294.

³ *Ibid.*

CHAPTER XV

PURE FOOD LAWS

§§ 109-113

§ 109. *General scope and validity.*

The power of the legislature to enact reasonable laws, penal and otherwise, to prevent and punish adulteration of food and fraud in the sale of provisions is beyond question.¹ The legislature is the sole judge of the necessity and propriety of enacting statutes prohibiting the sophistication of food and deceit and imposition in selling it.² All articles, simple and compound alike, which man uses for food or drink are embraced in food laws.³ They do not include feed for animals⁴ nor yet tobacco.⁵ In many states there has been much pure food legislation. The legislature of New Hampshire, for example, has enacted from time to time statutes requiring the inspection of flour, beef, pork, butter, lard, and fish, regulating the sale of milk and bread and penalizing the sophistication of these commodities to protect the public from fraud, and all such

¹ *State v. Marshall*, 64 N. H. 549.

² *State v. Campbell*, 64 *id.* 402.

³ *Arbuckle v. Blackburn*, 113 Fed. Rep. 616; *Com. v. Hufnal*, 4 Pa. Super. Ct. 301.

⁴ *Botelor v. Washington*, 3 Fed. Cas. 962.

⁵ *State v. Ohmer*, 34 Mo. App. 115.

acts have been characterized as legitimate and constitutional exercises of the police power of the state.¹ A statute prohibiting under penalty the coloring, coating, or polishing of any article intended for food so as to conceal its inferiority or damage is valid.² A statute which forbids the manufacture and sale and keeping for sale of vinegar artificially colored is constitutional, and its violation is punishable even if the coloring matter employed is harmless.³ The Ohio statute against the adulteration of vinegar is violated when, in making low wine vinegar from fermented grain, which is colorless if not treated, the fluid is passed, before it becomes acid, through roasted malt simply to give it color, aroma, and flavor.⁴ It is not essential to a conviction of one prosecuted for violating a statute prohibiting the sale of an adulterated article of food, and defining in what the adulteration shall consist, to prove his guilty knowledge or criminal intent.⁵

§ 110. *Limitations on the power of the legislature.*

The power of the legislature to enact pure food laws is subject, of course, to constitutional restrictions. It has no power to make the mixing or commingling of articles of food or foodstuffs all of which are wholesome and nutritious criminal acts and penalize them.⁶ It has no power to prohibit the sale of an article of food indisputably wholesome and nutritious under its own proper designation and

¹ State *v.* Marshall, *supra*.

² Arbuckle *v.* Blackburn, *supra*.

³ Peo. *v.* Girard, 145 N. Y. 105.

⁴ Weller *v.* State, 53 Ohio St. 77.

⁵ Peo. *v.* Snowberger, 113 Mich. 86; Com. *v.* Weiss, 139 Pa. St. 247.

⁶ Dorsey *v.* State, 38 Tex. Crim. R. 527.

not as simulating something else.¹ For example, the manufacture and sale of oleomargarine as such is perfectly lawful and cannot be prohibited without violating the constitution. All the legislature may constitutionally do about it is to require that it be sold for precisely what it really is and to forbid the addition to it of anything to make it look like dairy butter.² A person may not be punished under a pure food law for selling oleomargarine as wagon grease.³ A statute not designed to prevent the adulteration of foods which should forbid the use of anything, except in certain cases sugar, salt, or ardent spirits, to preserve dairy products without declaring other preservatives adulterants and regardless of their harmlessness would be unconstitutional.⁴

§ 111. *Congressional legislation.*

The acts of Congress upon this subject are not exercises of the police power, but are to be referred either to the taxing power or to the power to regulate interstate and foreign commerce. But "the power to tax is the power to destroy." The Congressional power to tax the manufacture and sale of oleomargarine is unquestionable.⁵ Congress has not only the constitutional power to lay a tax on oleomargarine, but also to lay a higher tax upon it when it is artificially colored than when it is not, and the courts cannot inquire into the motives of Congress in thus

¹ *State v. Layton*, 160 Mo. 474.

² *Peo. v. Hale*, 114 N. Y. Supp. 945; *Peo. v. Fried*, 118 *id.* 1131.

³ *Com. v. Schollenberger*, 153 Pa. St. 625.

⁴ *Peo. v. Biesecker*, 169 N. Y. 53.

⁵ *U. S. v. Eaton*, 144 U. S. 677.

discriminating, since the taxes are conclusively presumed to have been laid to raise revenue.¹ Oleomargarine is artificially colored so as to be subject to the higher tax when there is added to it only a small quantity of a vegetable oil substantially serving no other purpose than to give the article a yellow shade and make it resemble butter,² or, when there is added butter itself which has been artificially colored.³ The sale of oleomargarine in original packages as imported is said to be interstate commerce and so subject to regulation by Congress,⁴ but this is disputed.⁵ The object of the Federal legislation concerning oleomargarine has been expressly declared by the Supreme Court to be rather the raising of internal revenue and the prevention of fraud in collecting it than the protecting of purchasers from imposition.⁶ And the same tribunal has held constitutional the tax under the act of Congress of June 6, 1896, on filled cheese manufactured for export and exported.⁷

§ 112. *State legislation.*

Apart from the acts of Congress referred to and the general national pure food laws, there has been much legislation in the states to prevent adulteration of food-products and frauds in the selling of them to the public. The laws concerning milk production and sale have been treated in

¹ *McCray v. U. S.*, 195 *id.* 27.

² *Cliff v. U. S.*, 195 *id.* 159.

³ *McCray v. U. S.*, *supra.*

⁴ *Gooch's case*, 44 Fed. Rep. 276.

⁵ *Com. v. Huntley*, 156 Mass. 236.

⁶ *Kollock's case*, 165 U. S. 526.

⁷ *Cornell v. Coyne*, 192 *id.* 418.

a preceding chapter and perhaps all that may be necessary to mention here as likely specially to interest farmers are such as relate to other dairy products. Laws to prevent the adulteration of dairy products and forbidding the manufacture and sale of counterfeit butter colored to resemble the genuine article are not open to the objection that they deny to those offending against them the equal protection of the laws in violation of the Federal constitution.¹ A statute prohibiting the manufacture and sale of any substance or compound imitating yellow butter and not composed wholly of milk or cream is constitutional.² A state has the constitutional power to enact a statute requiring under stated penalties oleomargarine and artificial or adulterated butter to be colored a particular hue, — pink, for example, — wholly different from the color of natural unsophisticated butter made from cream, and such a statute is valid.³ A statute which forbids the manufacture, sale, or the offering for sale of any commodity imitating yellow butter, but which allows oleomargarine to be sold in its true character when free from anything resembling real butter in appearance is valid even when applied to sales of original packages imported from other states.⁴

§ 113. *Laws requiring identifying marks.*

The state in the exercise of the police power has a constitutional right to forbid the sale of any substance not

¹ *Powell v. Pennsylvania*, 127 U. S., 678; *Capital City Dairy Co. v. Ohio*, 183 *id.* 238.

² *State v. Rogers*, 95 Me. 94; *Butler v. Chambers*, 36 Minn. 69.

³ *State v. Myers*, 42 W. Va. 822.

⁴ *Com. v. Huntley*, *supra*.

pure butter and yet made to imitate it, unless it is not only sold under its true name and description, but as well in packages plainly marked with such name.¹ It may lawfully forbid the manufacture and sale of process butter, unless it is plainly marked "Renovated Butter."² A law which regulates under penalty the sale of lard in order that the public by a bare inspection of the package may tell what ingredients enter into it or were used in preparing it in case it is not all pure fat of healthy swine is open to no constitutional objection.³ It has been decided in England that a farmer cannot recover the price of butter which he sold without complying with a statute requiring under penalties the branding of the firkins with the name of the maker and of the farmer or dairyman who made and packed the butter, and the weight of the tare.⁴

¹ State *ex rel* Monnett *v.* Capital City Dairy Co., 62 Ohio St. 350.

² Hathaway *v.* McDonald, 27 Wash. 659.

³ State *v.* Snow, 81 Iowa, 642.

⁴ Foster *v.* Taylor, 5 Barn & Adol. 887.

CHAPTER XVI

CROPS, AND OTHER FARM PRODUCE

§§ 114-122

§ 114. *Husbandry, and the products of the farm.*

Although in a general way equivalent to agriculture, husbandry is somewhat more comprehensive. It is the entire business of farming. It includes, not only the cultivation or tillage of the soil, but the building and maintaining of fences and drains. It embraces also the raising and fattening of live-stock and poultry for market, the management of the dairy, the preparation of dairy products, and the sale of domestic animals, fowls, eggs, crops, fruit, and garden truck.¹ Every operation of the farmer undertaken to increase the productivity of his land, or the quality of what he produces in order to gain a profit from his capital and labor is a branch of husbandry. By farm products is usually understood grain, — wheat, maize, rye, oats, and barley — and cotton, fruits, hay, and vegetables, and the transmutation brought about directly or indirectly by the cultivation of the soil; and in a broader sense, horses, cattle, sheep, and swine.² A product of agriculture in the usual sense means that which directly

¹ *Simons v. Lovell*, 54 Tenn. 510.

² *State v. Kennerly*, 98 N. C. 659.

results from husbandry and the tillage of the earth — a product in its natural unmanufactured state, cotton and wheat, for examples, but not calico or flour.¹ In the common parlance and practice of the country all those things have been considered farming or agricultural products which are produced upon the farm or brought into condition for the uses of society by the labor of those engaged in agricultural as distinguished from manufacturing and other pursuits; and, therefore, the products of the dairy and the poultry yard, while they do not come directly out of the soil, are deemed none the less agricultural products because they are necessarily connected with the soil and those engaged in cultivating it.² Among the things which the courts have decided are embraced in the term “farm products,” when used in the laws, are wheat,³ pine-apples,⁴ live-stock and fresh meats,⁵ horses, neat-cattle, sheep, swine, cord-wood, hay, vegetables, fruit, eggs, butter, and lard.⁶ The question has usually arisen under laws exempting farm products from statutory burdens; thus beef cattle raised and slaughtered upon a farm has been held to be a product of the farm that a farmer may sell without a license required to be taken out by vendors of commodities not products of the farm,⁷ but it has also been held that live-stock is not exempt under a statute exempting agricultural products from taxation.⁸ A statute

¹ *Getty v. Barnes Milling Co.*, 40 Kan. 281.

² *Dist. of Col. v. Oyster*, 15 D. C. Rep. 285.

³ *Union Nat. Bank v. German Ins. Co.*, 71 Fed. 473.

⁴ *Long v. State*, 42 Fla. 509.

⁵ *State v. Spaugh*, 129 N. C. 564.

⁶ *Phila. v. Davis*, 6 Watts & S. 269.

⁷ *Snyder's case*, 10 Idaho, 682.

⁸ *Davis v. Macon*, 64 Ga. 128.

authorizing the entry of lands suitable for raising agricultural crops is authority for the entry of lands only good for growing fruit.¹

§ 115. *The legal status of growing crops.*

It is often of the highest importance to the farmer to know when the products of his farm are to be deemed real estate and a part of the land, and when they are personal property to be dealt with regardless of the ownership of the soil. It is not an easy thing to determine this in many cases and for some purposes. The rights of purchasers, tenants, and mortgagees of the farm and of executors, administrators, heirs, or creditors of the farmer are very often greatly affected by the determination. It may be said that as a general rule growing crops follow the title to the soil in which they are rooted.² They are a part of the land on which they stand when both belong to the same owner.³ If not expressly reserved when the land is sold, growing crops will pass by the deed as an appurtenance to it.⁴ Ungarnered crops pass to the purchaser of the land on a mortgage foreclosure sale, but those that are harvested before the sale is confirmed do not.⁵ If a crop is actually standing upon the land when it is sold on mortgage foreclosure, it will pass by the sale to the purchaser notwithstanding there has been a previous sale or

¹ *Reeves v. Hyde*, 77 Cal. 397.

² *Wootton v. White*, 90 Md. 64; *Jones v. Adams*, 37 Ore. 473.

³ *Bagley v. Columbus So. R. R.*, 98 Ga. 626.

⁴ *Kammrath v. Kidd*, 89 Minn. 380; *Crews v. Pendleton*, 1 Leigh, 297; *Turner v. Cool*, 23 Ind. 56; *Gibbons v. Dillingham*, 10 Ark. 9; *Coman v. Thompson*, 47 Mich. 22; *Wilkins v. Vashbinder*, 7 Watts, 378.

⁵ *Reilly v. Carter*, 75 Miss. 798.

mortgage of the crop made by the farmer to another person.¹ To be good against a subsequent owner of the land a grant of a right to gather fruit growing or to be grown must be in writing and recorded like a deed.² The successful plaintiff in an action of ejectment is entitled to the crops growing on the land he recovers.³ A vendee, however, in a contract for the purchase and sale of a farm, who goes into possession of the land under it, owns the crops as long as he is not in default,⁴ unless the contract expressly provides otherwise.⁵ And when one tenant in common is in the sole and exclusive possession of the land owned by him and others he alone is the owner of the crops he grows and harvests while his possession continues, and can recover their value from his co-tenants if they appropriate them.⁶

§ 116. *Emblements.*

There are, however, two classes of crops; those which grow spontaneously without special cultivation, and those which result from the annual labor of sowing, planting, fertilizing, weeding, etc. The former class are always a part and parcel of the soil, and hence, real estate, and do not become personal property until they are detached.⁷ The latter class of crops are termed emblements.⁸ Em-

¹ *Wootton v. White*, and *Jones v. Adams*, *supra*.

² *Taylor v. Millard*, 118 N. Y. 244.

³ *Carlisle v. Killebrew*, 89 Ala. 329; *McGinnis v. Fernandes*, 135 Ill. 69.

⁴ *Killebrew v. Hines*, 104 N. C. 182.

⁵ *Whiting v. Adams*, 66 Vt. 679.

⁶ *Le Barron v. Babcock*, 122 N. Y. 153.

⁷ *State v. Crook*, 132 N. C. 1053.

⁸ *Ibid.*

lements are the annual fruits or produce of seed sown or planted — the crops produced by labor and industry and not grown spontaneously.¹ They include such products as corn and cotton,² hops and berries borne by annual plants,³ but do not include grasses,⁴ fruits that grow on trees,⁵ nor small fruits that grow on bushes.⁶ Thus, for example, blackberry bushes which are perennial and yield when once planted successive crops, although the berries may be improved in quality and increased in number by cultivation, fertilization, and labor applied annually, are none the less, while unpicked, a part of the land, and so not subject to seizure and sale on execution as personal property.⁷ Emblements, on the contrary, are personal property, and not real estate.⁸ They may be sold orally, as real estate may not be, and wholly regardless of whether they are still growing or have ceased to be nourished by the soil.⁹ While still standing and ready for harvesting, but unharvested, they are transferable like chattels.¹⁰ They belong to the tenant instead of the landlord, and pass on the death of the landowner to the administrator and not to the heir.¹¹ In some states growing grain uncreaped is considered personal property. This is so in Illinois,

¹ *Owens v. Lewis*, 46 Ind. 488; *Cottle v. Spitzer*, 65 Cal. 456.

² *Walker v. State*, 111 Ala. 29.

³ *Hamilton v. Austin*, 36 Hun, 138.

⁴ *Perley v. Chase*, 79 Me. 519.

⁵ *Rogers v. Elliott*, 59 N. H. 201.

⁶ *Sparrow v. Pond*, 49 Minn. 412. ⁷ *Ibid.*

⁸ *Westbrook v. Eager*, 16 N. J. L. 81.

⁹ *Garth v. Caldwell*, 72 Mo. 622; *Swafford v. Spratt*, 93 Mo. App. 631.

¹⁰ *Delaney v. Root*, 99 Mass. 548; *Harris v. Frink*, 49 N. Y. 24; *Cayce v. Stovall*, 50 Miss. 396; *Willis v. Moore*, 59 Tex. 628.

¹¹ *State v. Crook*, *supra*.

California, and Pennsylvania, in particular;¹ and in the latter state it is well settled,² but in Alabama³ and North Carolina⁴ it is not the case. The distinction made in law when crops are considered as property by which those naturally indigenous and requiring neither care nor attention from man to bring them to maturity are deemed real estate until actually severed from the soil, and crops raised annually by human labor and industry are considered personal property while still growing, is well recognized and established.⁵ In a comparatively recent case⁶ in Minnesota, Judge Mitchell of the Supreme Court of that state clearly and succinctly stated the law upon the subject. At common law, said he, those products of the earth which are annual and are raised by yearly manuring and labor, which essentially owe their annual existence to cultivation by man — termed “*emblements*,” and sometimes “*fructus industriales*” — were, even while standing, annexed to the soil, treated as chattels with the usual incidents of such in respect of seizure on attachment during the owner’s life and transmission after his death. This class included grain, garden vegetables, and the like. On the other hand, the fruit of trees, perennial bushes, and grasses growing from perennial roots, called by way of distinction “*fructus naturales*,”

¹ Reed v. Johnson, 14 Ill. 257; Raventas v. Green, 57 Cal. 254.

² Backenstoss v. Stahler’s Est., 33 Pa. St. 251; Hershey v. Metzgar, 90 *id.* 217.

³ McCall v. State, 69 Ala. 227.

⁴ State v. Helmes, 27 N. C. 364.

⁵ Evans v. Hardy, 76 Ind. 527; Brittain v. McKay, 235 N. C. 265; Edwards v. Thompson, 85 Tenn. 720.

⁶ Sparrow v. Pond, *supra*.

were while unsevered from the soil considered to pertain to the realty, and as such passed to the heir on the death of the owner and were not subject to attachment during his life. A possible exception to this classification is the case of hops on the vines which have been held to be personal chattels and subject to sale as such. The ground of this appears to be that although the roots of hops are perennial, the vines die yearly, and the crop from the new vines is wholly or mainly dependent upon annual cultivation. It is sometimes stated, he continued, that the test whether the unsevered product of the soil is an emblemment, and as such personal property, is whether it is produced chiefly by manuring and the industry of the owner; but, while this test is correct as far as it goes, it is incomplete. Under modern improved methods all fruits are cultivated, the quality and quantity of the yield depending more or less upon the annual expenditure of labor upon the trees, bushes, or vines, but it has never been held that fruit growing on cultivated trees was subject to levy as personal property. No doubt all emblemments are produced by manuring and the labor of the owner, and are "*fructus industriales*" for that reason; but the manner as well as the purpose of planting is an essential element. If the purpose of planting is not the permanent enhancement of the land itself, but merely to secure a single crop which is to be the sole return for the labor expended, the product would naturally fall under the head of emblemments. On the other hand, if the tree, bush, or vine is one which requires to be planted but once and will then bear successive crops for years, the planting, naturally, would be calculated permanently to enhance the value of the land itself, and the

product of any one year could not be said essentially to owe its existence to labor expended during that year, and, hence, it would be classed among "*fructus naturales*" and the right of emblements would not attach. This classification, he added, is, of course, more or less arbitrary, but it is the one uniformly adopted by the courts and it is the only one which will furnish a definite and exact rule.

§ 117. *Effect of severing crops from the soil.*

All crops cease to be real estate and become personal property as soon as they are severed from the land.¹ Thus, a crop grown upon a farm which is exempt as a homestead, as long as it remains unharvested, is exempt also, but it loses its immunity after it has been gathered.² And crops grown by one in actual possession of land under a claim of right belong to him if he harvests them before he is ousted by the owner of the true title.³ It is ordinarily a trespass and not a larceny to take and carry away against its owner's will a part of the real estate, because in general real property is not the subject of a larceny,⁴ but this rule is not allowed to interfere with the punishment of a thief. The courts in such cases find a way out of the theoretical difficulty by invoking the rule that property severed from the freehold is by the act of severance converted from real into personal estate.⁵ Thus, it is held that crude turpentine, in boxes formed by cuts in the trees made to catch it as it exudes, when it is in a state ready to be dipped up,

¹ *Jones v. Adams, supra.*

² *Coates v. Caldwell*, 71 Tex. 19.

³ *Faulcon v. Johnston*, 102 N. C. 264; *Johnston v. Fish*, 105 Cal. 420.

⁴ *Junod v. State*, 73 Neb. 208.

⁵ *Ibid.*

is personal and not real property. It is, say the courts, no longer a part of the tree, although still lying in it, for it has been separated by cultivation and labor and become a chattel. The box cut in the tree is a mere receptacle to catch and hold the sap. If, then, a person feloniously takes and carries away crude turpentine from the tree-boxes without the consent and against the will of the owner, he is guilty of larceny and may be punished accordingly.¹ Of course the same thing would be true if maple sap should be stolen in similar circumstances.

§ 118. *Damages for the loss or destruction of crops.*

A farmer whose growing crops are destroyed by the fault or negligence of another may recover their value from the careless or faulty one.² The measure of damages when growing crops are injured or destroyed is their value at the time of the injury or destruction and not their value in the market when matured and harvested or during the selling season.³ The cost of a growing crop up to the time of its destruction is not the measure,⁴ neither is the depreciated rental value of the land.⁵ When full grown forest trees or nursery stock ready for market are destroyed the ordinary measure of damages is their value severed from the soil.⁶ Crops planted by a landowner upon his land after a railroad has been located there but before he has

¹ *State v. Moore*, 11 Ired. L. 70; *Dickens v. State*, 142 Ala. 49.

² *Fremont, E. & M. Val. R. R. v. Marley*, 25, Neb. 138.

³ *Lester v. Highland Boy Gold Mining Co.*, 27 Utah, 470.

⁴ *Teller v. Bay & R. Dredging Co.*, 12 L. R. A. (N. S.) 267.

⁵ *Byrne v. Minneapolis & St. L. Ry.*, 38 Minn. 212.

⁶ *Dwight v. Elmira C. & N. R. R.*, 132 N. Y. 199.

been given notice of an intention to enter and before his compensation has been paid or secured, constitute a proper item of damage to him from the taking of his land;¹ the landowner has a right in such case to cultivate his land up to the time the railroad takes it and to receive compensation for the growing crop destroyed by its entry.²

§ 119. *Rights of landlord and tenant in the crops.*

In the ordinary case when a farm is leased for a fixed rent, whether payable in money or produce or both, the crops grown and harvested during the tenancy belong, of course, to the tenant. But questions frequently arise when the lease is up, or the tenancy is otherwise terminated. It is held in Michigan that in general a farm tenant who surrenders the farm while a crop is growing has no right afterwards to the crop.³ In Pennsylvania, on the other hand, a tenant of agricultural lands is entitled to the "way going crop"; that is, the crop sown and cultivated during the tenancy but which does not mature until after the term has expired.⁴ The rule is the same in Delaware.⁵ In Nebraska, if the tenancy of the farm is uncertain as to time, so that the tenant cannot certainly know when it will end, if it does end before a crop that he has sown ripens, he is entitled to re-enter the land and harvest the crop at its maturity.⁶ A landlord who re-enters the farm after the lease is forfeited

¹ *Lafferty v. Schuylkill River E. S. R. R.*, 124 Pa. St. 297.

² *Ibid.*

³ *Kiplinger v. Green*, 61 Mich. 340; *Smith v. Sprague*, 119 Mich. 148.

⁴ *Stultz v. Dickey*, 5 Binney, 285.

⁵ *Ellison v. Dolbey*, 3 Penn. (Del.), 45.

⁶ *Monday v. O'Neil*, 44 Neb. 724.

is entitled to the crops then growing on the land.¹ A farm tenant has the same right to the straw grown upon the farm during the tenancy that he has to the grain. It belongs to him and he may take it away and dispose of it,² and, in those states where he has a right to take the crop after his term expires, he has a right for a reasonable time afterwards to come back and take the straw.³ In a number of the states there are statutes which give the landlord a lien for rent upon the crops grown upon the leased land;⁴ some of these statutes extend the lien to all the products of agriculture raised on the farm and secure advances and supplies as well as rent.⁵ The landlord's lien for rent attaches to the crops as well when the rent is payable partly in produce, as when it is payable wholly in money, and even though the crops are exempt from general debts of the tenant.⁶ One who buys a crop from a tenant takes it subject to the landlord's lien when the law gives such a lien.⁷ Under statutes giving a landlord a lien for advances upon the tenants' crops, goods he furnished to stock a plantation shop for supplying the field hands and other laborers have been held to be "advances,"⁸ and so, too, has table board furnished to the tenant and his family.⁹

¹ Myer v. Roberts, 50 Ore. 81.

² Craig v. Dale, 1 Watts & S. 509; Colville v. Miles, 127 N. Y. 159.

³ Smith v. Boyle, 66 Neb. 823.

⁴ Butt v. Ellett, 19 Wall. 544; Morgan v. Campbell, 22 id. 381; Walworth v. Harris, 129 U. S. 355; Saloy v. Bloch, 136 U. S. 338.

⁵ Ball v. Sledge, 82 Miss. 749; Cain v. Pullen, 34 La. Ann. 511; Brown v. Brown, 109 N. C. 124.

⁶ Keim v. Myers, 89 N. E. Rep. 373.

⁷ Beck v. Minnesota & W. Grain Co., 131 Iowa, 62.

⁸ Cain v. Pullen, *supra*.

⁹ Brown v. Brown, *supra*.

But these statutes do not give the landlord a lien upon the crops for becoming a surety for the tenant upon his buying a horse.¹

§ 120. *Crops grown on shares.*

An agreement between a landowner and another person that the latter shall occupy and cultivate a farm belonging to the former and that each shall furnish part of the seed, implements, and stock and divide the products or the receipts from their sale does not create a partnership but the relation of landlord and tenant.² The owner and tenant of a farm leased for a term of years upon an agreement to divide the produce equally are tenants in common of the crops.³ If no time for dividing the crop is fixed when a farm is let on shares, the division is due when the crop is harvested and overdue after a reasonable time has elapsed since it was garnered.⁴ A tenant's agreement to deliver to the landlord half of all the crops is not fully performed until the shares have been divided and set apart.⁵ The title to crops grown on land rented to a season cropper and the right to their possession are in the landlord until his claims are satisfied.⁶ A cropper's share is due only when the crop is harvested.⁷ A cropper has no interest in the growing crop that he can sell or mortgage,⁸ except

¹ *Kaufman v. Underwood*, 83 Ark. 118.

² *Shrum v. Simpson*, 155 Ind. 160.

³ *Aiken v. Smith*, 21 Vt. 172; *Frost v. Kellogg*, 23 Vt. 308.

⁴ *Jones v. Adams*, *supra*.

⁵ *Hurd v. Darling*, 14 Vt. 214.

⁶ *Betts v. State*, 65 S. E. Rep. 841.

⁷ *Lamberton v. Stouffer*, 55 Pa. St. 284.

⁸ *Ponder v. Rhea*, 32 Ark. 435.

in cases where a statute provides otherwise.¹ It has been held in California that a crop raised by a tenant on shares is in certain circumstances subject to levy upon an execution against him,² but in general this is not so.³

§ 121. *Estovers.*

In legal nomenclature concerning farm tenancies, estovers are wood and timber which the tenant is entitled to take from the land during the tenancy for fuel, fences, improvements, and repairs. Estovers are of three kinds: first, house-bote, or timber necessary to repair the farm buildings and for fuel to heat them; second, plow-bote, or wood required to make or repair implements of husbandry; and third, hay-bote, or materials needed to repair hedges and fences.⁴ The right of a farm tenant to estovers is an incident to the mere leasing of the farm.⁵ In exercising the right of estover the tenant must not destroy or dispose of the timber nor do any permanent injury to the estate.⁶ He is allowed to cut only what he needs for immediate use and such as is fit for that use.⁷ It is a general principle that what he does cut must be used on the farm and not elsewhere.⁸ A tenant of a farm has the right to use fallen and dead timber for firewood, but must not fell growing trees for that purpose.⁹ It is waste when a tenant

¹ Parks v. Webb, 48 Ark. 293.

² Farnum v. Hefner, 79 Cal. 575.

³ Tipton v. Martzell, 21 Wash. 273.

⁴ Anderson v. Cowan, 125 Iowa, 259.

⁵ *Ibid.*

⁶ Zimmerman v. Shreeve, 59 Md. 357.

⁷ *Ibid.*

⁸ Anderson v. Cowan, *supra*.

⁹ *Ibid.*

cuts down ornamental trees or cuts timber to sell at a profit,¹ and for such waste the tenant is liable in damages.² But if a tenant in good faith and mistaking his rights commits technical waste by cutting timber to put into buildings constructed and left on the land, the measure of damages against him is the value of the timber in the stump, with interest from the time it was appropriated.³

§ 122. *Manure.*

Considered as farm produce, crops and manure are essentially different. Crops are raised of purpose to be harvested and removed from the land. With the possible exception of hay and fodder, crops are grown to be sold, and are income and profits. Manure, on the other hand, is never sold unless by very thriftless husbandmen, but is returned to the land to enrich the soil. Manure, therefore, is seldom or never to be deemed personal property, but always as belonging to the land.⁴ Manure made upon a leased farm by the consumption of the produce of the farm belongs to the landlord and not to the tenant.⁵ A tenant has no right to remove manure produced on the leased land during his term,⁶ unless it is produced by stock in excess of the number that the farm can support and which are fed by fodder procured elsewhere.⁷ When that is the case the excess manure belongs to the tenant and not to the landlord.⁸

¹ Calvert *v.* Rice, 91 Ky. 533; Learned *v.* Ogden, 80 Miss. 769.

² U. S. *v.* Bostwick, 94 U. S. 53.

³ Lewis *v.* Virginia-Carolina Chem. Co., 69 S. C. 364.

⁴ Sawyer *v.* Twiss, 26 N. H. 345.

⁵ Pickering *v.* Moore, 67 N. H. 533.

⁶ Brigham *v.* Overstreet, 128 Ga. 447; Roberts *v.* Jones, 71 S. C. 404.

⁷ Nason *v.* Tobey, 182 Mass. 314.

⁸ Pickering *v.* Moore, *supra*.

CHAPTER XVII

LIVE-STOCK

§§ 123-135

§ 123. *Animals in the statutes.*

A statute which refers to "animals" or "dumb animals" without mentioning particular species includes every living creature but man.¹ Penal statutes are not so broadly construed. A law, for example, which penalizes the killing of beasts embraces cows² and hogs³ but not dogs.⁴ If a statute speaks of swine or hogs, either in the singular or plural, all animals of the hog species, living and dead — boars, sows, pigs, shoats, and dressed pork carcasses, are included.⁵ The statutes which exempt animals from execution are quite numerous and in the main have been construed with inclusive liberality. One that exempts a milch cow has been held to exempt a heifer that the debtor was raising to supply milk later to his family.⁶ An exemption of beasts of the plow includes horses,⁷ and

¹ *Peo. v. Brunell*, 48 How. Pr. 435.

² *Taylor v. State*, 25 Tenn. 285.

³ *State v. Enslow*, 10 Iowa, 115.

⁴ *U. S. v. Gideon*, 1 Minn. 292; *State v. Phillips*, 1 Shannon, Cas. 34.

⁵ *Lavender v. State*, 60 Ala. 60; *Whitson v. Culbertson*, 7 Ind. 195; *State v. Godet*, 29 N. C. 210; *Rivers v. State*, 10 Tex. App. 177.

⁶ *Nelson v. Fightmaster*, 4 Okla. 38.

⁷ *Somers v. Emerson*, 58 N. H. 48.

one of horses extends to colts,¹ geldings,² jackasses,³ and mules.⁴ A single horse, wagon, and harness is exempt under a statute exempting a team,⁵ and a single ox under one exempting a yoke of oxen.⁶ It is not necessary for steers to be actually broken and put at work to be exempt as a yoke of oxen.⁷ Yet it has been held that for a team to be exempt under a statute exempting a team of horses simply as such, it must be used, or in good faith be intended for use, as an instrument of labor to support the owner and his family.⁸ Whether this is sound law or not, high-bred carriage horses used to drive their owner to and from his business and to take his family out for recreation are not exempt as "work horses";⁹ no horses are if kept merely for pleasure driving¹⁰ unless owned by a liveryman who earns his livelihood by hiring them out to others.¹¹ A statute exempting a farm horse exempts a stallion used on a farm for farm work,¹² but not one kept solely for breeding purposes.¹³ If, however, a statute exempts a team by means of which the owner

¹ *Kennedy v. Bradbury*, 55 Me. 107; *Berg v. Baldwin*, 31 Minn. 541.

² *Allison v. Brookshire*, 38 Tex. 199.

³ *Robinson v. Robertson*, 2 Will. Civ. App. Cas. §§ 253-254.

⁴ *State v. Cunningham*, 6 Neb. 90; *Richardson v. Duncan*, 49 Tenn. 220; *Allison v. Brookshire*, *supra*.

⁵ *Lockwood v. Younglove*, 27 Barb. 505; *Dains v. Prosser*, 32 Barb. 290.

⁶ *Mallory v. Berry*, 16 Kan. 293; *Wolfengbarger v. Standifer*, 35 Tenn. 659.

⁷ *Berg v. Baldwin*, *supra*; *Mundell v. Hammond*, 40 Vt. 641.

⁸ *Burgess v. Everett*, 9 Ohio St. 425.

⁹ *Tishomingo Sav'gs Inst. v. Young*, 87 Miss. 473.

¹⁰ *Washburn v. Goodheart*, 88 Ill. 229; *Hickok v. Thayer*, 49 Vt. 372.

¹¹ *Root v. Gay*, 64 Iowa, 399. ¹² *Tipton v. Pickens*, 31 Tenn. 25.

¹³ *Robert v. Adams*, 38 Cal. 383; *Kreig v. Fellows*, 21 Nev. 307.

habitually earns his living, it will exempt a stallion when the owner subsists on the fees gained from the services of the brute.¹

§ 124. *Registration of animals.*

The laws requiring the registration of animals are exercises of the police power. Those of the most important class are designed to aid in the conservation of public health, as, for example, those that apply to milch kine. A state may constitutionally require all herds of cattle belonging to persons who supply milk for public consumption to be registered with live-stock sanitary commissioners or public health boards as a condition of selling the milk.² A typical statute of this kind was enacted in Maryland about twenty years ago.³ The act created a state live-stock sanitary board charged with sundry duties looking to prevent the occurrence and spread of contagious and infectious disease among domestic animals in the state. It imposed a duty upon every dairyman, herdsman, or other person who supplied milk to the inhabitants of cities, towns, or villages to register their cattle with the state live-stock sanitary board under a penalty of a fine varying from four to twenty dollars for each refusal or neglect. The statute was a general regulation of the business of producing and vending milk for public consumption, and its validity was sustained after a careful and thorough argument and consideration.⁴ Colorado enacted a statute

¹ *McCue v. Tunstead*, 65 Cal. 506.

² *State v. Broadbelt*, 89 Md. 565.

³ L. 1888, Chap. 519.

⁴ *State v. Broadbelt*, *supra*.

in 1899 requiring every one owning or using any docked horse within the state to register the animal with the county clerk and recorder in the county where the brute was kept, within ninety days after the passage of the law. This act required the certificate of registration to contain the name and post office address of the owner of the docked horse and to describe fully the color, age, size, and sex of the animal and the use to which it was put. The statute made it unlawful for any one to dock the tail of a horse within the state, or to import a docked horse, or to drive, work, use, race, or deal in any docked horse not registered under the law. This statute also was sustained as a constitutional exercise of the police power,¹ except, in so far as it prohibited the importation from other states and subsequent use of docked horses, that part of the law was deemed an interference with interstate commerce and therefore in conflict with the Federal constitution.² Maine has a statute³ requiring the owner or keeper of any stallion before advertising the services of the beast to file a certificate with the county registrar of deeds, giving the name, color, age, size, and pedigree of the animal and the name of the person who bred it. The law makes neglect to file such certificate fatal to an action to recover compensation for the service of the stallion and the filing of a false certificate, if knowingly and wilfully done, subject to a fine of one hundred dollars. This statute does not apply in a case where the purchaser of a mare with foal agrees to pay the seller, as part of the price, a sum of money for the service of the sire after the colt is born.⁴ Nor does

¹ *Bland v. Peo.*, 32 Colo. 319.

² *Stubbs v. Peo.*, 40 Colo. 414.

³ R. S., Chap. 38, § 61.

⁴ *Wyman v. Wentworth*, 10 Atl. 454.

it apply to claims where the stallion has not been advertised or held out to the public as available for breeding purposes.¹ In Kentucky a contract for the service of a stallion is void when the owner of the animal has not complied with the statute of that state requiring him to procure a license or be deemed guilty of a misdemeanor and be fined.²

§ 125. *Cruelty to animals.*

Penal statutes against cruelty to animals are now virtually universal in civilized communities. They need not be particularly cited. Their general provisions are familiar. No private right of property is invaded when the owners of animals are forbidden to treat them cruelly.³ A criminal statute providing for the punishment of every person who maliciously disfigures any horse, cattle, or other animal applies when injuries are wantonly inflicted, whether slight or serious, temporary or permanent in effect. It extends to every injury done with malice toward the owner and which lessens the value of the injured beast.⁴ Thus, one is punishable under such a statute for shaving the mane and tail of a horse.⁵ The docking of horses' tails may be forbidden and punished as cruelty to animals.⁶ One engaged in violating a statute against cruelty to animals by beating a horse cannot escape liability to a by-stander whom he strikes and injures, on

¹ *Briggs v. Hunton*, 87 Me. 145.

² *Smith v. Robertson*, 106 Ky. 472.

³ *State v. Karstendiek*, 49 La. Ann. 1621.

⁴ *State v. Harris*, 11 Iowa, 414.

⁵ *Boyd v. State*, 21 Tenn. 39.

⁶ *Bland v. Peo.*, *supra*.

the ground that the blow was occasioned by the simultaneous shying of the horse and the slipping of his own foot, which he could not have anticipated.¹ One who poisons another's horses may be convicted and punished under a penal statute for unlawfully destroying another person's property;² and if he poisons fowls belonging to another, he may be convicted and punished for the offense under a statute which mentions only horses, cattle, and other beasts.³ It was held in one case that a man was not justified in killing chickens by the invasion of the fowls into his garden to eat his pease, and that for doing so he was subject to prosecution for violating the statute against cruelty to animals. His remedy, according to the court, in that case was either to sue for damages or else to impound the fowls until their owner made good his loss.⁴

§ 126. *Estrays.*

Throughout the country laws and ordinances which authorize the arrest, impounding, and sale of stray animals, sometimes quite summarily, are common. It behooves an owner of live-stock to know in what circumstances he is liable to lose his property in case the beast wanders off. An estray has been defined legally to be an animal found wandering unattended, the owner of which is unknown.⁵ It is a roving beast, free from the care, control, or custody of its owner, or one unsought, unclaimed, or abandoned by him.⁶

¹ Osborne v. Van Dyke, 113 Iowa, 557.

² Peo. v. Christy, 65 Hun, 349.

³ Com. v. Falvey, 108 Mass. 304.

⁴ State v. Neal, 120 N. C. 613.

⁵ Lyman v. Gibson, 18 Pick. 422; Roberts v. Barnes, 27 Wis. 422;

Walters v. Glatz, 29 Iowa, 437.

⁶ Roberts v. Barnes, *supra*.

Cattle running free on the ranges where they were raised are not estrays,¹ but if in a general round-up of the herd any particular animal is missing and has wandered off to a distant locality and got lost, that particular beast is an estray.² A domestic animal that has temporarily escaped from the custody of its owner and strayed a short distance away, but is neither lost nor abandoned, nor roaming about the country unknown, is not properly classed as an estray.³ A stolen horse which the thief left tied to a post in the highway is not an estray;⁴ neither are a pair of horses estrays which the owner left standing at the roadside while he entered a restaurant.⁵ Every law which authorizes stray animals to be impounded and sold must be strictly complied with in every particular for the proceedings to be valid.⁶

§ 127. *Animals running at large.*

Animals are said to run at large when they are not under the control of their owner or of any drover, shepherd, or herdsman, but are left to roam wheresoever they will.⁷ They are beasts wandering and feeding at will, not under the immediate supervision and control of any one, and whether on open or inclosed land.⁸ They are running at large in a public highway when strolling along the road without re-

¹ *Shepherd v. Hawley*, 4 Ore. 206.

² *Stewart v. Hunter*, 16 Ore. 62.

³ *Weber v. Hartman*, 7 Colo. 13.

⁴ *Hall v. Gildersleeve*, 36 N. J. L. 235.

⁵ *Alok v. Gerke*, 6 Hawaii Ter. 569.

⁶ *Ft. Smith v. Dodson*, 51 Ark. 447.

⁷ *Hinman v. Chicago, R. I. & Pac. R. R.*, 28 Iowa, 491.

⁸ *Keeney v. Oregon Ry. & Nav. Co.*, 19 Ore. 291.

straint.¹ A horse or colt running at large in the highway contrary to law is classed as a nuisance.² Cattle left alone by a boy given charge of the animals while he returned home half a mile distant and sent another boy to take his place were held to be running at large from the time the first boy left until the second arrived.³ But cattle grazing in the highway in plain view of the owner's family are not running at large.⁴ Nor can cattle be deemed to be running at large in the highway merely because the drover in charge fell asleep and they casually cropped the grass by the roadside.⁵ Upon the same principle a team of horses drawing a sleigh and wandering on a prairie at night because the driver is in a drunken stupor is not running at large.⁶ A law forbidding under penalties hogs to run at large does not deprive the owners of swine of their property without due process of law by providing that such hogs may be impounded and sold.⁷ And although it has been decided that such a law is constitutional, notwithstanding it provides for a summary sale of the animals to pay charges,⁸ yet in another jurisdiction, with what seems to be sounder reasoning, it is held to be essential to the validity of such a law that it shall provide for some sort of a judicial proceeding to determine the fact that the animals were unlawfully at large and the amount and propriety of the charges.⁹

¹ *Wright v. Clark*, 50 Vt. 130.

² *Baldwin v. Ensign*, 49 Conn. 113.

³ *Valleau v. Chicago, M. & St. P. R. R.*, 73 Iowa, 723.

⁴ *Eklund v. Toner*, 121 Mich. 687.

⁵ *Thompson v. Corpstein*, 52 Cal. 653.

⁶ *Grove v. Burlington, C. R. & N. R. R.*, 75 Iowa, 163.

⁷ *Haigh v. Bell*, 41 W. Va. 19. ⁸ *Burdett v. Allen*, 35 W. Va. 347.

⁹ *Greer v. Downey*, 61 L. R. A. 408.

§ 128. *Liability of owner for acts of domestic animals.*

The liability of the owner of a domestic animal for an injury done by it depends in general upon his negligence, and that is measured by the consideration of whether or not he ought in reason to have anticipated that the brute would, if the opportunity offered, inflict such injury, and whether, if he ought to have expected this, he took or omitted proper steps to prevent the occurrence. Ordinarily the owner of a domestic animal which injures another in person or property is excused from liability unless he ought reasonably to have foreseen and guarded against its happening. This principle has been applied in numerous cases. Thus, in each of the following cases the owner of the beast that did the injury was exonerated: where hogs broke into an adjoining field and killed a cow and her new-born calf;¹ where a turkey-cock strutting and gobbling in a highway frightened a horse into running away;² where bees attacked and severely stung horses going along the highway,³ when for seven years they had occupied the same place and behaved well; where a cow of peaceable disposition, driven to frenzy by dogs, broke away and injured a traveler on the highway;⁴ where a bull jumped a strong fence that had restrained him for a fortnight and gored a mare in the next field;⁵ where another bull driven on the highway, with its horns tied to one fore hoof, suddenly turned from the straight road and tossed a person over a

¹ *Lyke v. Van Leuven*, 4 Denio, 127.

² *Zumstein v. Shrumm*, 22 Ont. App. 263.

³ *Earl v. Van Alstine*, 8 Barb. 630.

⁴ *Moynahan v. Wheeler*, 117 N. Y. 285.

⁵ *Weide v. Thiel*, 9 Ill. App. 223.

bridge rail;¹ where a horse that had never before acted viciously, left hitched to a wagon by the roadside, bit a person passing by;² and where a stallion broke a strong halter, and pushed open a stable door supposedly securely fastened and killed a mare in a neighboring field.³ No one is liable for what he could not have prevented and, therefore, is not liable under a statute making the owner of an animal running at large liable for any damage it may do when, without his knowledge, the beast breaks out of a strong enclosure at night and kills another animal.⁴ The owner of an animal not known to be vicious is ordinarily not liable for an injury it does while in a place where it has a right to be,⁵ but it is otherwise if its owner is aware that it is vicious and the animal is where it ought not to be when it does the injury.⁶ If a domestic animal is habitually vicious and prone to mischief, its owner is presumed to know its bad traits and is charged with the duty of keeping it from injuring others;⁷ thus, a traveler on the highway attacked without cause by a steer need only prove the animal vicious in order to recover damages from the owner.⁸ The habit of an animal is proved by successive acts of a like kind.⁹ A father who sends his son out upon the highway to deliver a message, knowing the youth to be a

¹ *Barnum v. Terpening*, 75 Mich. 557.

² *Reed v. So. Exp. Co.*, 95 Ga. 108.

³ *Meredith v. Reed*, 26 Ind. 334.

⁴ *Briscoe v. Alfrey*, 61 Ark. 196.

⁵ *Morgan v. Hudnell*, 52 Ohio St. 552; *Clowdis v. Fresno Flume Co.*, 118 Cal. 315.

⁶ *Ibid.*

⁷ *Knowles v. Mulder*, 74 Mich. 202; *Strouse v. Leipf*, 101 Ala. 433.

⁸ *Harris v. Carstens Packing Co.*, 43 Wash. 647.

⁹ *Kennon v. Gilmer*, 131 U. S. 22.

reckless rider and mounted on an unruly horse, is negligent; and if the animal proves uncontrollable and does an injury, is liable.¹ A statute making every person who drives a herd of animals over a public hillside road liable for all the damage the beasts do either in destroying the banks or rolling stones into the highway is constitutional.²

§ 129. *Liabilities and redress for diseased animals.*

The owner of diseased cattle is liable in damages if he allows the brutes to run at large when he knows or has good reason to believe that they have an infectious disease, if they infect other stock;³ but he is not liable to the owner of other animals that catch the disease from his stock because of a defective and insufficient fence between the respective grazing lands.⁴ And if the owner of scabby sheep keeps his flock confined in his own pasture, he is not liable in damages to his neighbor whose sheep in an adjoining field become infected.⁵ When one who owns a drove of hogs which he knows to have a dangerous and contagious disease sells the animals to a dealer in live-stock, who in turn innocently and ignorantly sells them to a customer, he is liable to such customer when the hogs purchased communicate the disease to his other healthy stock.⁶

The damages recoverable in such a case are not only the value of the purchased hogs, but also and as well the loss

¹ *Broadstreet v. Hall*, 168 Ind. 192.

² *Brimm v. Jones*, 11 Utah, 200.

³ *Clarendon Land Co. v. McClelland*, 89 Tex. 483.

⁴ *Ibid.*

⁵ *Fisher v. Clark*, 41 Barb. 329.

⁶ *Skinn v. Reutter*, 135 Mich. 57.

sustained by the infection and death of the healthy animals.¹ One who buys from an innocent consignee, supposing it to be sound, a horse which the public authorities killed because it had glanders, can recover damages from a railroad company that brought the animal into the state and delivered it without obeying a statute requiring the brute to be inspected and certified free from any contagious disease before delivery.² He who deceitfully sells a horse which he knows to be infected with glanders to a purchaser who, in caring for the beast, contracts and dies of the disease is liable for the injury.³ And one who sells to a butcher a live steer admittedly and visibly diseased may be convicted and punished under a penal statute prohibiting the sale or exposure for sale, knowingly, of the flesh of any diseased animal.⁴

§ 130. *Runaway horses.*

It is negligence to leave a horse loose and unattended in a public street, and its owner is liable for the injuries the animal inflicts, by running away, upon a person not himself in fault.⁵ When a person injured by a runaway horse sues the owner for damages, the defendant's negligence is made out when it is shown that he left the animal alone and unsecured in a city street in violation of a municipal ordinance.⁶ That proof is enough to entitle the injured

¹ *Ibid.*

² *Evans v. Chicago & N. W. R. R.*, 122 N. W. Rep. 876.

³ *State v. Fox*, 79 Md. 514.

⁴ *Com. v. Horn*, 13 Pa. Co. Ct. 164.

⁵ *Damonte v. Patton*, 118 La. 530.

⁶ *Siemers v. Eisen*, 54 Cal. 418.

person to recover.¹ Any one who leaves a horse unhitched and unattended in a city street takes the risk of what the brute may do.² Some courts, indeed, decline to go to this length, but still hold that such proof, while not conclusive, is sufficient to warrant a jury in finding a verdict for the injured person.³ In Kentucky, however, additional proof of negligence is required.⁴ If an animal is vicious and the owner knows it, he is liable in some jurisdictions for the injuries it does while running away, regardless of any fault or carelessness on his part.⁵ The mere fact that a team of horses runs away does not of itself alone charge the owner with negligence.⁶ To leave a team of horses standing in a private lane is not *per se* negligent.⁷ Nor is it negligence, *per se*, to leave unattended in a public street a gentle team of horses with a fifty-six pound weight attached to a strap on the bridle bit.⁸ A farmer is not negligent in leaving his team tied to a hitching rail in front of a store while he goes back and forth unloading his produce; and if, owing to the antics of a small boy circussing on the hitching rail, the horses break loose, run away, and injure people, it is the boy's, not the farmer's, conduct which is the cause of the injury, and the farmer is not liable.⁹

¹ Jones v. Belt, 8 Houst. 562.

² Stevenson v. U. S. Exp. Co., 221 Pa. St. 59.

³ Maxwell v. Durkin, 86 Ill. App. 257; Lane v. Atlantic W'ks, 111 Mass. 136; McCambley v. Staten Isl. R. R., 32 App. Div. 346.

⁴ Dolfinger v. Fishback, 12 Bush, 474.

⁵ Lynch v. Kineth, 36 Wash. 368.

⁶ O'Brien v. Miller, 60 Conn. 214; Creamer v. McIlvain, 89 Md. 343; McGahie v. McClennen, 86 App. Div. 263.

⁷ Collier v. Knox, 222 Pa. St. 362.

⁸ Caughlin v. Campbell-Sell Baking Co., 39 Colo. 148.

⁹ Stephenson v. Corder, 71 Kan. 475.

§ 131. *Fright in horses.*

It is a general rule that people are bound to take precautions only against frightening such horses as are ordinarily gentle and well broken.¹ If a horse is prone to take fright at anything and everything which does not usually frighten horses, the owner must look out for and take care to control him, or suffer the consequences.² An object in a highway of such a character or form as to frighten ordinarily gentle horses is a nuisance.³ A person driving along a highway and thrown out of his wagon because his horse shied at the reflection cast by a bright sheet of metal roofing used by a railroad company to cover freight piled near by has no case against the corporation.⁴ And a woman injured by being thrown from her wagon while driving along a public road because her horse took fright from the rising of a cow that had been lying in the way just as she attempted to drive around it, has no cause of action against the owner of the cow on the ground that he suffered it unlawfully to be at large in the highway.⁵ One driving on the wrong side of the road and colliding with another coming in the opposite direction is liable for the other's injuries although the collision would not have occurred if the other's horse had not shied just as they met.⁶ The driver of an automobile meeting a frightened horse on the highway must stop until the horse can be got under control and brought past the machine.⁷ The driver of a horse on

¹ *Card v. Ellsworth*, 65 Me. 547; *Piollet v. Simmers*, 106 Pa. St. 95.

² *Phila., W. & B. R. R. v. Stinger*, 78 Pa. St. 219; *Canter v. St. Joseph*, 126 Mo. App. 629. ³ *Tinker v. N. Y., Ont. & W. R. R.*, 71 Hun, 431.

⁴ *Davis v. Penn. R. R.*, 218 Pa. St. 463.

⁵ *Marsh v. Koons*, 78 Ohio St. 68. ⁶ *Neal v. Rendall*, 98 Me. 69.

⁷ *Ind. Sp'gs. Co. v. Brown*, 165 Ind. 465; *Christy v. Elliott*, 216 Ill. 31; *McIntyre v. Orner*, 166 Ind. 57.

the highway has no rights superior to those of a bicycle rider.¹

§ 132. *Trespasses of animals.*

The common law required the owner of domestic livestock to keep his animals upon his own premises or answer in damages for their trespasses.² And, unless modified by statute, this rule of the common law generally prevails. For example, if a domestic animal breaks and enters a person's premises and injures property the owner of the beast is liable in damages whether the brute is or is not vicious.³ In many, probably in most of the United States, the common law rule has either not been adopted or else has been changed by statute so as to deny to landowners any damages for the trespasses of animals upon open uninclosed lands.⁴ The technical wrong a landowner suffers when another's cattle stray upon his unfenced land is regarded as too slight to engage the attention of the law.⁵ The owner of cattle is not liable to an action if they browse on the uninclosed land of his neighbor, but the browsing is, after all, merely an excusable trespass; it is not a matter of right, not a privilege, only an immunity from legal consequences of a trespass.⁶ Hence, a cattle owner is liable

¹ *Thompson v. Dodge*, 58 Minn. 555.

² *Taber v. Cruthers*, 59 Hun. 619.

³ *Morgan v. Hudnell*, *supra*.

⁴ *Nuckolls v. Gaut*, 12 Colo. 361; *Moore v. White*, 45 Mo. 206; *De-laney v. Errickson*, 10 Neb. 492; *Jones v. Witherspoon*, 52 N. C. 555; *Cleveland, C. & C. R. R. v. Elliott*, 4 Ohio St. 474.

⁵ *Kan. City, S. & M. Ry. v. Kirksey*, 48 Ark. 368.

⁶ *Knight v. Abert*, 6 Pa. St. 472; *St. Louis, I. Mt. & S. Ry. v. Ferguson*, 57 Ark. 16.

when he intentionally drives his stock upon another's open land.¹ A landowner, too, has a right gently and carefully to drive away stock trespassing upon his uninclosed land, only he must stop when the boundary line is once crossed.² An owner of live-stock has a right to drive his beasts along the public highways, and if, while exercising this right in a careful and watchful manner, the animals without his fault escape into adjoining lands and are as quickly as possible pursued and brought back, he is not liable for the damage they do.³ This, however, will not relieve him from liability to a more remote landowner if after escaping from the highway the animals pass over the adjoining land and injure property lying beyond.⁴ So too, if horses driven along the highway take fright and in spite of the utmost efforts of the driver to control them enter and damage adjoining land, their owner is not liable for the trespass.⁵ But if animals are unlawfully on the highway and trespass on adjoining lands, their owner is liable for the damage they do even where they get in through a defective or insufficient fence.⁶

§ 133. *Injuries to trespassing animals.*

The ancient rule that a landowner owes no duty to trespassers has been mitigated to some extent in modern times, especially with respect of irresponsible beings. If the

¹ Healy v. Smith, 14 Wyo. 263; Monroe v. Cannon, 24 Mont. 316.

² Richards v. Sanderson, 39 Colo. 270.

³ Cool v. Crommet, 13 Me. 250; Hartford v. Brady, 114 Mass. 466; Mills v. Stark, 4 N. H. 512; Rightmire v. Shepard, 12 N. Y. Supp. 800.

⁴ McDonnell v. Pittsfield & N. A. R. R., 115 Mass. 564.

⁵ Brown v. Collins, 53 N. H. 442.

⁶ Stackpole v. Healy, 16 Mass. 38; Harrison v. Brown, 5 Wis. 27.

local laws permit animals to run at large — and frequently they do — the owner of premises upon which there are structures or excavations obviously dangerous and open to wandering animals is liable in damages to the owner of a beast which strays upon such premises and is killed or injured in consequence.¹ If one wrongfully opens and carelessly leaves open the fence of an inclosure in which a high-bred mare is kept, and the animal escapes through the opening and injures itself outside by getting entangled in a barbed wire fence upon neighboring premises, he is liable in damages to the owner of the mare.² If in consequence of a landowner's negligence in not keeping up a division fence his neighbor's colt escapes from its pasture and is injured while at large, the negligent one is liable.³ And even when the negligent landowner and his neighbor are both equally bound to maintain the division fence, he is liable to his neighbor if the latter's cattle, after finding their way through a break in the line fence to his land, get out of his premises through a gate he negligently left open and are killed upon an adjacent railroad.⁴ But a landowner upon whose lands a neighbor's cattle suffer injury after escaping through a defective line fence which both proprietors were equally bound to maintain, is not liable to the owner of the injured beasts where their hurts were due to natural unevenness of the ground or to eating of a growing crop not inherently dangerous to animals.⁵ A statute which prevents the owner of unfenced land from

¹ *Hurd v. Lacy*, 93 Ala. 427.

² *West v. Ward*, 77 Iowa, 323.

³ *Wilder v. Stanley*, 65 Vt. 145.

⁴ *Pitzner v. Shinnick*, 41 Wis. 676.

⁵ *Fales v. Cole*, 153 Mass. 322 ; *Fennell v. Seguin St. Ry.*, 70 Tex. 670

recovering damages when animals trespass upon it does not make him liable for the death of an animal which wanders upon his open land and dies from drinking a poisonous liquid used by the landowner in his regular business ¹

§ 134. *Agisters.*

An agister is a person who for hire takes the live-stock of others to graze or pasture on his own land.² He is not an insurer of the animals he takes to pasture, but is only liable for negligence.³ He is bound to exercise ordinary diligence in safeguarding the beasts intrusted to his care.⁴ An agister is under an obligation to keep his pastures properly fenced, but such obligation rests upon him in order to prevent the animals from escaping and doing harm or trespassing to the injury of others; consequently he is not required to fence the bank of a navigable stream.⁵ An agister who takes to pasture for hire a healthy horse and puts it in the same field with animals having a contagious disease with which the horse becomes infected and dies is liable to its owner for its value.⁶ An agister is generally given by statute a lien for his compensation on the animals he takes to pasture.⁷ Except by special contract, such a lien does not exist unless some statute gives

¹ *Beinhorn v. Griswold*, 27 Mont. 79.

² *Williams v. Miller*, 6 Pac. Rep. 14.

³ *Bass v. Pierce*, 16 Barb. 595; *Auld v. Travis*, 5 Colo. App. 535.

⁴ *Arrington v. Fleming*, 117 Ga. 449.

⁵ *Ibid.*

⁶ *Costello v. Ten Eyck*, 86 Mich. 348.

⁷ *Fishell v. Morris*, 57 Conn. 547; *Chapman v. First Nat. Bank*, 98 Ala. 528; *Sullivan v. Clifton*, 55 N. J. L. 324; *Lambert v. Nicklass*, 45 W. Va. 527.

it.¹ The lien upon an animal, which the statute gives an agister or one who feeds and cares for an animal, does not cover such items as freight, entrance fees, and jockey's wages in horse races.² The lien of a chattel mortgage upon a team of horses is superior to the lien of an agister for caring for and feeding the animals after the mortgage was duly filed.³ The great weight of authority, it has been said, is to this effect.⁴ The legislature may constitutionally subject to police regulation the keeping and pasturing of stock.⁵ It may, for example, make it unlawful to herd sheep within a stated distance of an inhabited dwelling, and make whosoever shall violate the regulation liable in damages.⁶ All such regulations must, however, be reasonable, otherwise the courts will invalidate them as abuses of power.⁷

§ 135. *The progeny of domestic animals.*

The offspring of all domestic animals belong to those who own the dams at the time when the births occur.⁸ This is the general rule, but, of course, it may be otherwise stipulated by contract.⁹ An exception to this general rule is the case where the dam has been hired out temporarily for a definite time and her offspring is born during the term. In that case, unless the progeny is ex-

¹ Sharp *v.* Johnson, 38 Ore. 246.

² *Ibid.*

³ Erickson *v.* Lampi, 150 Mich. 92.

⁴ Nat. Bank of Commerce *v.* Jones, 18 Okla. 555.

⁵ Reser *v.* Umatilla Co., 48 Ore. 326.

⁶ Sifers *v.* Johnson, 7 Idaho, 798; Walker *v.* Bacon, 11 *id.* 127.

⁷ State *v.* Speyer, 67 Vt. 502.

⁸ Arkansas Val. Land & Cattle Co. *v.* Mann, 130 U. S. 69.

⁹ Leavitt *v.* Jones, 54 Vt. 423; Hazelbaker *v.* Goodfellow, 64 Ill. 238.

pressly reserved to the owner of the animal, it goes to the lessee.¹ But one who has possession of a mare under an agreement to pasture her for her use as long as the owner cares to leave her, is not entitled to her colt foaled while she is in his custody.² There is much seeming conflict in the courts over the question whether or not and in what circumstances, if any, the lien of a chattel mortgage upon live-stock will attach to the issue of the animals. This conflict arises out of opposing views as to the effect of a chattel mortgage upon the title to the mortgaged property. In some states it operates to transfer ownership subject to defeasance upon payment of the mortgage debt, in others it simply constitutes an incumbrance which leaves the title where it was before the mortgage was made. Keeping in mind the general rule mentioned at the head of this section, and the way to avoid it by contract, one will understand the decisions of the courts that differ upon the subject. In all jurisdictions where a chattel mortgage operates to transfer the ownership of the mortgaged property, the offspring of mortgaged live-stock born after the execution of the mortgage is subject to the lien thereof, although the instrument is wholly silent upon the subject of the increase of the animals.³ This is the case in Georgia,⁴ New Jersey,⁵ Tennessee,⁶ and Virginia⁷ in the

¹ *Hull v. Hull*, 48 Conn. 250; *Stewart v. Ball*, 33 Mo. 154; *Wood v. Ash*, 1 Owen, 139.

² *Allen v. Allen*, 2 Penr. & W. 166.

³ *Nor. West. Nat. Bank v. Freeman*, 171 U. S. 620.

⁴ *Anderson v. Leverette*, 116 Ga. 732.

⁵ *Cumberland Bank v. Baker*, 57 N. J. Eq. 569.

⁶ *Ellis v. Reaves*, 94 Tenn. 210; *Latta v. Fowlkes*, 94 Tenn. 219.

⁷ *Gannaway v. Tate*, 98 Va. 789.

United States, and in New Brunswick¹ in the Dominion of Canada. In Kansas, when animals are in gestation at the time a chattel mortgage upon them is made, the young afterwards born are from birth subject to the mortgage, even though it does not mention increase.² In the same state and in California and Nebraska a chattel mortgage on animals and their increase will not cover after-begotten progeny, when the dams were not pregnant at the time the mortgage was made.³ In certain states, a chattel mortgage on live-stock, providing in express terms that it shall be a lien upon the issue of the animals, will cover the offspring whether the dams were in gestation at the time the mortgage was made or did not conceive until afterwards.⁴ This is so in Iowa,⁵ Mississippi,⁶ and Texas.⁷ In a state where a chattel mortgage does not transfer title to the mortgaged property, if a mortgage on animals does not refer to their increase and the beasts are not pregnant when it is made, the progeny will not be subject to the mortgage.⁸ It certainly does not cover the offspring after the young animals have ceased to run with their dams and have grown to maturity.⁹ In Vermont this is so even if the dams were pregnant when the mortgage was made.¹⁰ In Montana, where a chattel mortgage does not

¹ *Nicholson v. Temple*, 20 N. Bruns. 248.

² *Holt v. Lucas*, 77 Kan. 710.

³ *Ibid.* *Battle Creek Val. Bank v. First Nat. Bank*, 62 Neb. 825; *Shoobert v. De Motta*, 112 Cal. 215.

⁴ *Cox v. Beck*, 83 Fed. Rep. 269.

⁵ *Hopkins Fine Stock Co. v. Reid*, 106 Iowa, 78.

⁶ *Packwood v. Atkinson & F. Co.*, 79 Miss. 646.

⁷ *First Nat. Bank v. Western Mtg. & Invest. Co.*, 86 Tex. 636.

⁸ *Thorpe Bros. v. Cowles*, 55 Iowa, 408.

⁹ *Rogers v. Gage*, 59 Mo. App. 107.

¹⁰ *Enright v. Dodge*, 64 Vt. 502; *Desany v. Thorp*, 70 Vt. 31.

transfer title to but only fastens a lien upon the mortgaged property, such a mortgage on cattle including pregnant cows will not, unless it mentions increase, cover after-born calves.¹ This is the case in California, where it has been held that a chattel mortgage on a flock of sheep which does not expressly mention the increase will cover neither the wool clip nor the lambs born after the mortgage was executed, even when the ewes were in gestation at the time it was made.²

¹ *Demers v. Graham*, 14 L. R. A. (N. S.) 431.

² *First Nat. Bank v. Erreca*, 116 Cal. 81.

CHAPTER XVIII

DOGS

§§ 136-140

§ 136. *Dogs in the statutes.*

In the laws and before the courts dogs are upon a somewhat different footing from other animals. They are on a lower plane than horses, cattle, sheep, and swine and upon a higher one than wild beasts. They are protected by a statute forbidding cruelty to animals,¹ yet a statute respecting beasts of burden does not apply to them,² and statutes penalizing the killing of beasts generally are considered not to embrace dogs.³ In a case in Maine⁴ a defendant indicted for killing a dog under a statute making it a crime wilfully or maliciously to kill, wound, maim, disfigure, or poison any domestic animal, successfully contended that a dog was not a domestic animal within the meaning of the statute. But Chief Justice Appleton dissented from the judgment of the court and argued earnestly

¹ *Wilcox v. State*, 101 Ga. 563.

² *Peo. v. Ct. of Spl. Sessions*, 4 Hun, 441.

³ *U. S. v. Gideon*, 1 Minn. 292; *State v. Phillips*, 1 Shannon, Cas. 34.

⁴ *State v. Harriman*, 75 Me. 562.

that a dog was properly classed as a domestic animal. "From the time of the pyramids to the present day," said he, "from the frozen pole to the torrid zone, wherever man has been there has been his dog. Cuvier has asserted," he continued, "that the dog was perhaps necessary for the establishment of civil society, and a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog. He is the friend and companion of his master — accompanying him in his walks, his servant, aiding him in his hunting, the playmate of his children, — an inmate of his house, protecting it against all assailants. It may be said that he was *feræ naturæ*, but all animals, naturalists say, were originally *feræ naturæ*, but have been reclaimed by man, as horses, sheep, or cattle; but however tamed they have never, like the dog, become domesticated in the home, under the roof, and by the fireside of their master. The dog was a part of the agricultural establishment of the Romans. There were the *canes villatici*, to guard the villa of the Roman senator, the *canes venatici*, accompanying him in his hunting expeditions, and the *canes pastorales*, by which his flocks were guarded. Virgil in his Georgics has given directions as to their management and education. To-day in many countries they are used for draught, as in France and Holland, and everywhere are regarded as possessing value and as the subject of traffic. . . . Otway, the poet, says of them : —

“ ‘ They are honest creatures
And ne'er betray their masters, never fawn
On any they love not.’ ”

§ 137. *Dogs as property.*

Large sums of money are invested in dogs and they are subjects of trade and traffic.¹ In many ways they are put to useful service, and, it has been declared by high authority, so far as pertains to their ownership as personal property, they possess all the attributes of other personal property.² At all events, at common law and generally in the United States, dogs are so far recognized as property that suits may be maintained by those who own them if they are converted or injured.³ The owner of a dog may maintain trover for its wrongful conversion,⁴ and an action against any person who wantonly or negligently kills or injures the brute.⁵ A statute of Delaware⁶ requires dogs to be registered and it is held in that state that one who unlawfully kills a registered dog is liable to its owner for its value.⁷ In many states any one who steals a dog is guilty of larceny. This is the case in Iowa,⁸ Arkansas,⁹ and New York.¹⁰ "When we call to mind," said the New York Court of Appeals,¹¹ "the small spaniel that saved the life of William of Orange¹² and thus probably

¹ *Mullaly v. Peo.*, 86 N. Y. 365.

² *Ibid.*

³ *Sentell v. New Orleans & C. R. R.*, 166 U. S. 698.

⁴ *Graham v. Smith*, 100 Ga. 434.

⁵ *Nehr v. State*, 35 Neb. 638; *Columbus R. R. v. Woolfolk*, 128 Ga. 631; *Heiligmann v. Rose*, 81 Tex. 222; *Citizens R. T. Co. v. Dew*, 100 Tenn. 317.

⁶ 16 Del. L. Chap. 48, p. 58.

⁷ *Harrington v. Hall*, 63 Atl. 875.

⁸ *Hamby v. Samson*, 105 Iowa, 112.

⁹ *State v. Soward*, 83 Ark. 264.

¹⁰ *Mullaly v. Peo.*, *supra*.

¹¹ *Ibid.*

¹² *Vide*, Motley's *Rise of the Dutch Republic*, Vol. 2, p. 398.

changed the current of modern history, and the faithful St. Bernards which, after a storm has swept over the crests and sides of the Alps, start out in search of lost travelers, the claim that the nature of a dog is essentially base and that he should be left as a prey to every vagabond who chooses to steal him will not now receive ready assent." But while dogs are property in every sense of the word they are not such in the same high degree as other domestic animals, such as horses, cattle, sheep, and swine, nor are they entitled to the same legal protection and regard in the esteem of many courts and jurists.¹ There is no property in dogs so far as the police power of the state exercised through a humane society is concerned.² In regard to the ownership of live animals, the law has long made a distinction between dogs and cats and other domestic quadrupeds growing out of the nature of the creatures and the purposes for which they are kept. Beasts which have been thoroughly tamed and are used for burden, husbandry, or food, such as horses, cattle, and sheep, are as truly property of intrinsic value and entitled to the same protection as any kind of goods. But dogs and cats, even in a state of domestication, never wholly lose their wild nature and destructive instincts, and are kept either for uses which depend on retaining and calling into action those very natures and instincts or else for the mere whim or pleasure of the owner, and, therefore, although a man might have such a right of property in a dog as to maintain trespass or trover for unlawfully taking or destroying

¹ *Sentell v. New Orleans & C. R. R.*, *supra*; *Carthage v. Rhodes*, 101 Mo. 175; *Chunot v. Larson*, 43 Wis. 536; *Cooper's case*, 3 Tex. App. 489.

² *Fox v. Mohawk & H. R. Humane Soc.*, 165 N. Y. 517.

it, yet he was held, in the phrase of the books, to have "no absolute or valuable property" in a dog which could be the subject of a prosecution for larceny at common law.¹

§ 138. *Liability for injuries done by dogs.*

If an animal is disposed to attack mankind and its keeper has notice of its dangerous propensity, the public safety demands that if he keeps the animal at all he shall keep him secure. There is no necessity for keeping exceptionally vicious individuals of a species of animals naturally peaceable which justifies keeping them on any other terms. After notice the keeper of such an animal is responsible for all injuries due to its attacks, and the fact that he endeavors so to keep the brute as to prevent the mischief will not protect him if he fails. The gist of the action is not the manner of keeping the vicious animal but the keeping of it at all with knowledge of its viciousness.² Thus, one who keeps a ferocious watch dog, knowing the brute to be vicious and dangerous, must at his peril keep it safe from doing hurt, for, though he uses diligence, if the beast escapes and injures some one, he is liable in damages.³ One who keeps a dog to protect his premises from trespassers is by that very fact charged with knowledge that it is fierce and dangerous.⁴ An owner who grossly neglects to learn the habits of his animals is charged with notice of their viciousness when they are habitually vicious.⁵ If a dog is notoriously vicious and has attacked

¹ Blair *v.* Forchand, 100 Mass. 136.

² Hammond *v.* Melton, 42 Ill. App. 186.

³ Montgomery *v.* Koester, 35 La. Ann. 1091.

⁴ Brice *v.* Bauer, 108 N. Y. 428.

⁵ Knowles *v.* Mulder, 74 Mich. 202.

and bitten several people, its general bad reputation may be proved to impute knowledge to its owner.¹ The habit of a dog to attack passing teams may be proved in case of a dispute as to whether or not he did attack a particular team passing on a certain occasion.² One may be charged with a liability as the keeper or harbinger of a dog, although not the owner of the animal; as, for examples, when it is kept on his premises by his minor child,³ or his daughter, and used as a watch dog,⁴ or his adult son for a friend,⁵ his lodger,⁶ his servant,⁷ his servant's minor son,⁸ or his partner.⁹ One is also held to be the keeper or harbinger of a dog which he has given away while it remains in his custody before the new owner takes it,¹⁰ and as long as he permits it to stay on his premises.¹¹ It is some evidence that a man owns a dog when his name is inscribed on the dog's collar.¹²

§ 139. *The lawful killing of dogs.*

Laws which provide for the summary destruction of dogs running at large are held to be valid exercises of the

¹ *Fake v. Addicks*, 45 Minn. 37; *Robinson v. Marino*, 3 Wash. 434.

² *Broderick v. Higginson*, 169 Mass. 482.

³ *Cummings v. Riley*, 52 N. H. 368; *Plummer v. Ricker*, 71 Vt. 114.

⁴ *Duval v. Barnaby*, 75 App. Div. 154.

⁵ *Wood v. Vaughan*, 28 N. Bruns. 472.

⁶ *Hahn v. Kordula*, 5 Kan. App. 142.

⁷ *Chicago & A. R. R. v. Kuckkuck*, 197 Ill. 308; *Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560.

⁸ *Snyder v. Patterson*, 161 Pa. St. 98.

⁹ *Grant v. Ricker*, 74 Me. 487.

¹⁰ *Marsel v. Bowman*, 62 Iowa, 57.

¹¹ *Mitchell v. Chase*, 87 Me. 172.

¹² *Ingraham v. Chapman*, 177 Mass. 123.

police power of the state,¹—especially those relating to unmuzzled dogs.² But a dog is not running at large unless he is off his master's premises with no person having an interest in it near at hand.³ If a dog is going along the streets by the side of his master or his master's servant, or near enough to be controlled and kept out of mischief, although not held in leash, but loose, he is not running at large;⁴ neither is a dog at play with its owner's child on its owner's grounds.⁵ Nor is a hound in chase running at large, though out of its master's sight and hearing, when near to a companion of its master.⁶ A dog cannot lawfully be killed for a mere trespass.⁷ And a mere notice to the owner of a dog to keep the beast at home will not justify killing it while trespassing on the slayer's premises.⁸ A dog frightened and chased from the highway by boys cannot be justifiably killed by one upon whose premises it seeks refuge upon a bare suspicion that it had in the past destroyed eggs and hens' nests.⁹ And merely because a valuable dog has chased cats into trees, barked at night about a man's house, tracked over his freshly painted porch, and even invaded his hen house, where he did no harm beyond the possible breaking of a single egg, will not justify the man in killing him, especially where he has never complained to the dog's owner.¹⁰ A man is not justi-

¹ *Hagerstown v. Witmer*, 86 Md. 293.

² *Walker v. Towle*, 156 Ind. 639.

³ *Nehr v. State*, *supra*.

⁴ *Com. v. Dow*, 51 Mass. 382.

⁵ *McAneany v. Jewett*, 92 Mass. 151.

⁶ *Wright v. Clark*, 50 Vt. 130.

⁷ *Marshall v. Blackshire*, 44 Iowa, 475.

⁸ *Hodges v. Causey*, 77 Miss. 353.

⁹ *Brent v. Kimball*, 60 Ill. 211. ¹⁰ *Bowers v. Horen*, 93 Mich. 420.

fied in wantonly and maliciously killing a trespassing dog merely because he suspects it is about to injure his property when the animal is not doing any actual damage.¹ A dog may not lawfully be killed by an owner of cattle for chasing the animals off its master's land where they were trespassing.² A man, however, may justifiably kill a dog caught committing depredations on his property. He may, for instance, lawfully kill a dog trapped while entering a well-fenced garden a second time after having stolen a fish from the wall of the dwelling,³ or a dog caught at night in a smoke-house eating bacon.⁴ The right given by the Connecticut statute to kill a dog found doing or attempting to do mischief, when not under any one's care, justifies the killing of a dog destroying young and tender garden plants regardless of the relative values of the beast and the plants.⁵ Hounds running through and damaging a field of wheat, when they cannot be kept out, may lawfully be shot by the farmer when they are trespassing.⁶ A vicious and dangerous dog in the habit of attacking and biting people is a nuisance, and a person attacked by it is justified in summarily killing it.⁷ But if a dog is not vicious or dangerous, although in the habit of dashing out and barking at people, his killing is not justifiable.⁸ A dog which habitually lurks about a house, barking and howling day and

¹ *Ten Hopen v. Walker*, 96 Mich. 236.

² *Spray v. Ammerman*, 66 Ill. 309. ³ *King v. Kline*, 6 Pa. St. 318.

⁴ *Dunning v. Bird*, 24 Ill. App. 270.

⁵ *Simmonds v. Holmes*, 61 Conn. 1.

⁶ *Lipe v. Blackwelder*, 25 Ill. App. 119.

⁷ *Putnam v. Payne*, 13 Johns. 312; *Dunlap v. Snyder*, 17 Barb. 561, *Nehr v. State*, *supra*.

⁸ *Jacquay v. Hartzell*, 1 Ind. App. 500.

night, disturbing the peace and quietude of its inmates, may lawfully be killed by the annoyed householder when that is the only way to suppress the nuisance.¹ And if dogs congregate at night about a man's premises and bark, quarrel, and fight, until the nuisance becomes intolerable, he may kill the brutes with a shotgun.² One is not justified in killing an unlicensed dog on the ground that it is a public nuisance, but to warrant his doing so he must have suffered by it some injury personal to himself and not common to the public.³

§ 140. *Sheep-killing dogs.*

The law does not regard sheep-killing dogs worthy of much consideration. In fact, it looks upon them with positive disfavor. A statute which requires the summary slaughter of sheep-killing dogs is not unconstitutional on the ground that it deprives their owners of property without due process of law.⁴ A tax laid upon the owners of dogs to indemnify the owners of sheep killed by dogs is constitutional.⁵ A statute making owners of dogs liable for the value of the sheep they kill is valid.⁶ It is no defense to a householder sued for damages on account of sheep killed by a dog, under a statute making the keeper of a dog liable in such circumstances, that the offending brute belonged to his daughter when she lived in his house and kept the dog there with his consent.⁷ A dog caught

¹ Brill v. Flagler, 23 Wend. 354.

² Hubbard v. Preston, 90 Mich. 221.

³ Chapman v. Decrow, 93 Me. 378.

⁴ Holmes v. Murray, 207 Mo. 413.

⁵ McGlone v. Womack, 17 L. R. A. (N. S.) 855.

⁶ Holmes v. Murray, *supra*.

⁷ *Ibid.*

worrying and killing sheep may be killed at once as a nuisance.¹ But to justify its slaughter the dog must be known to have actually worried sheep — a mere suspicion or belief that it has done so is not sufficient.² And merely chasing and barking at sheep, without attacking or biting them, is not “worrying.”³ A sheep owner who detects a dog worrying his lambs, and a few days later discovers him prowling about the premises with another dog, unattended by any person, need not wait for him to attack the lambs again before shooting him.⁴ When sheep are worried or killed by two dogs acting in concert, belonging to different persons, the owner of each dog is liable for the entire damage done by both animals, under a statute imposing upon the owner or keeper of a dog that injures sheep a liability for “all damage so done.”⁵

¹ *Dunlap v. Snyder*, *supra*; *Parrott v. Hartsfield*, 20 N. C. 110.

² *Johnson v. McConnell*, 80 Cal. 545.

³ *Campbell v. Brown*, 1 Grant, Cas. 82; *Marshall v. Blackshire*, *supra*.

⁴ *Throne v. Mead*, 122 Mich. 273.

⁵ *Nelson v. Nugent*, 106 Wis. 477.

CHAPTER XIX

CONTRACTS

§§ 141-144

§ 141. *The nature of a contract.*

The usual and most frequently employed means of acquiring property is by contract, and one of the most valuable and sacred rights is the right to make and enforce contracts.¹ Contracts and compacts have been made between men, tribes, and nations during all time from the earliest dawn of history, and the right and liberty of contract is one of the inalienable rights of man.² The liberty of contract is fully secured and protected by constitutions in the United States and may be restrained only so far as it is necessary for the common welfare and the equal protection and benefit of the people at large.³ A contract has been defined as an agreement upon a sufficient consideration to do or not do a particular thing;⁴ also, as the mutual assent of two or more persons competent to make an agreement, founded upon a sufficient and legal motive, inducement, or consideration, to do some legal act or to

¹ *Palmer v. Tingle*, 55 Ohio St. 423.

² *Ibid.*

³ *Ibid.*

⁴ Blackstone.

omit doing something not by law commanded to be done ;¹ and, again, as a deliberate or voluntary agreement between competent persons upon a legal consideration to do or not do some act.² It is spoken of by the Supreme Court of the United States as an agreement by two or more persons to do or refrain from doing certain acts or some particular thing³ and as a transaction in which each party comes under an obligation to the other and each acquires a right to whatever the other promised.⁴ A contract is a compact either executory or executed.⁵ And it is executory when the thing agreed upon is to be done or omitted in the future.⁶ That is, a contract is executory so long as anything remains to be done in order to perform it.⁷ All contracts, covenants, and promises which give one a right to recover of another by suit any personal property or sum of money are embraced by the legal phrase "choses-in-action."⁸

§ 142. *Classification of contracts.*

For the purposes of remedies in courts of justice, contracts are express, implied, or constructive.⁹ Contracts are express when voluntarily made by the contracting parties;¹⁰ they are such as are openly uttered or stated in

¹ Chitty.

² Story.

³ *Sturges v. Crowninshield*, 4 Wheat. 122; *Green v. Biddle*, 8 Wheat. 1.

⁴ *Dartmouth Coll. Case*, 4 Wheat. 518.

⁵ *Fletcher v. Peck*, 6 Cranch, 87.

⁶ *Farrington v. Tennessee*, 95 U. S. 679.

⁷ *Fox v. Kitton*, 19 Ill. 519; *Watkins v. Nugen*, 118 Ga. 372.

⁸ *Sheldon v. Sill*, 8 How. U. S. 441.

⁹ *Wickham v. Weil*, 17 N. Y. Supp. 518.

¹⁰ *Grevall v. Whiteman*, 32 Misc. R. 279.

terms.¹ An implied contract is such as reason and justice dictate and the law presumes every man has promised to perform, and, upon this presumption, makes him answerable to those who suffer from his failure to perform.² Thus, if it is the duty of a person to pay money, the law will imply his promise to pay it.³ The law never implies a promise, however, unless a duty creates an obligation.⁴ It never implies a promise against duty or to do an act contrary to law.⁵ The distinction between an express contract and an implied one is that the former is shown by the actual agreement made by the parties, the latter by the circumstances and dealings of the parties in respect of the subject matter.⁶ The difference is one of the proof to establish the contract.⁷ The express contract is stated clearly in writing or orally, and the implied contract is inferred or deduced.⁸ An implied contract cannot exist when there is an express one on the subject; ⁹ a promise is never implied when there is an express unabrogated contract between the parties relating to the same matter.¹⁰ In order that there may be either an express or an implied contract, the parties to it must have such relations with each other in regard to the subject matter that they agree

¹ *Linn v. Ross*, 10 Ohio, 412; *Thompson v. Woodruff*, 47 Tenn. 401.

² *Ogden v. Saunders*, 12 Wheat. 213.

³ *Brainard v. Hubbard*, 12 Wall. 1; *Bailey v. N. Y. C. & H. R. R. R.*, 22 *id.* 604.

⁴ *Cary v. Curtis*, 3 How. U. S. 236; *Curtis v. Fiedler*, 2 Black, 461.

⁵ *Ibid.*

⁶ *McCarthy v. N. Y. City*, 96 N. Y. 1.

⁷ *Columbus, H. V. & T. R. R. v. Gaffney*, 65 Ohio St. 104.

⁸ *Pence v. Beckman*, 11 Ind. App. 263.

⁹ *Musgrove v. Jackson City*, 59 Miss. 390.

¹⁰ *Hawkins v. U. S.*, 96 U. S. 689.

about something by mutual interaction.¹ Both express and implied contracts rest upon the intentions of the contracting parties. The difference between them is simply in the character of the evidence which goes to prove them; but a constructive contract is one implied by law without any intention on the part of the parties to it and sometimes even contrary to their actual intentions.²

§ 143. *The essentials of a contract.*

In every valid contract there are certain indispensable elements. There must be parties legally competent to make the contract, and they must act freely, mutually, understandingly, and concerning the same subject. There must be an inducement given and received, termed a consideration. There is no valid contract without a meeting of the minds of the contracting persons; that is, without an offer on one side and an acceptance on the other and a mutual willingness to agree on that basis.³ To effect a legal contract the minds of the contracting persons must agree; both must intend and mean the same thing in the same sense.⁴ A contract cannot exist unless the minds of the parties agree upon its subject and they make it voluntarily.⁵ When the terms of a contract are misunderstood, neither party is bound.⁶ It is an essential of every valid contract that each contracting person have physical and

¹ Woods v. Ayres, 39 Mich. 345.

² Bliss v. Hoyt's Est., 70 Vt. 534.

³ Davis v. Seymour, 59 Conn. 531.

⁴ Lewis v. Wells, 85 Fed. R. 896; Taylor v. Von Schraeder, 107 Mo. 206.

⁵ Gorring v. Reed, 23 Utah, 120.

⁶ First Nat. Bk. v. Hall, 101 U. S. 43.

moral power to consent to its terms and that such power be freely and deliberately exercised.¹ But then, a contract made by one too drunk to know what he was doing will be made good if he ratifies it when sober.² If a person makes a contract when so intoxicated that his reason is dethroned, he may repudiate it, but if he is only slightly intoxicated and merely indiscreet or foolish, it will bind him.³ A contract is sufficient if signed by one person and accepted and performed by the other.⁴ But if both contracting parties intend that each shall sign a writing to prove the contract they make, the contract is not complete until both have signed such writing.⁵ A signature to a contract by the signer making his mark is good.⁶ A contract for the sale and purchase of land binds neither party to it unless it is obligatory upon both.⁷ This indeed is true of all contracts; to be binding upon any party, they must be binding upon all parties. Every contract must be based upon a consideration;⁸ none is ever binding without one.⁹ A valuable consideration is an essential element.¹⁰ Without a consideration there can be no contract express or implied.¹¹ Every promise must be supported by some consideration;¹² a gratuitous promise cannot be enforced.¹³

¹ *Leep v. St. Louis, I. M. & S. R. R.*, 58 Ark. 407.

² *Carpenter v. Rodgers*, 61 Mich. 384.

³ *Cameron-Barkley Co. v. Thornton Lt. & P. Co.*, 138 N. C. 365.

⁴ *Muscatine Water Co. v. Muscatine Lum. Co.*, 85 Iowa, 112.

⁵ *Ambler v. Whipple*, 20 Wall. 546. ⁶ *Bates v. Harte*, 124 Ala. 427.

⁷ *Atlee v. Bartholomew*, 69 Wis. 43.

⁸ *Mills Co. Nat. Bk. v. Perry*, 72 Iowa, 15.

⁹ *D. Simmons Lum. Co. v. Corey*, 140 N. C. 462.

¹⁰ *Wheeler v. Glasgow*, 97 Ala. 700. ¹¹ *Davis v. Seymour*, *supra*.

¹² *Stewart v. Jerome*, 71 Mich. 201.

¹³ *Presbyt. Church v. Cooper*, 112 N. Y. 517.

But a valuable consideration however small, paid or promised in good faith without fraud, is sufficient to sustain a contract.¹

§ 144. *Construction and interpretation of contracts.*

The cardinal rule for construing all contracts is to ascertain and give effect to the intentions of those who make them if these are not contrary to law.² The manifest intention of the parties controls careless expressions and inapt language employed.³ And when contracts are expressed in dubious words or ambiguous terms, courts will seek to learn and give effect to the intentions of the contracting parties.⁴ But if a contract is perfectly plain and unambiguous, the fact that the parties to it intended to express something different will not change it.⁵ All oral agreements and negotiations of the contracting persons merge in the written contract they finally make and may not be proved for the purpose of varying it in any respect;⁶ it may not be contradicted or changed by proof of previous declarations or conduct;⁷ it may not be altered by oral

¹ *Lawrence v. McCalmont*, 2 How. U. S. 426.

² *Bradley v. Wash. A. & G. Steam Packet Co.*, 13 Pet. 89; *Chesapeake & O. Canal Co. v. Hill*, 15 Wall. 94; *N. W. Mut. Life Ins. Co. v. Gridley*, 100 U. S. 614.

³ *Rockefellow v. Merritt*, 76 Fed. R. 909; *Monmouth Park Asso. v. Wallis Iron W'ks*, 55 N. J. L. 132.

⁴ *Atchison, T. & St. F. R. R. v. Chicago & W. Ind. R. R.*, 162 Ill. 632; *Kauffman v. Raeder*, 108 Fed. R. 171.

⁵ *Cold Blast Transp. Co. v. Kan. City Bolt & Nut Co.*, 114 Fed. R. 77.

⁶ *Van Ness v. Washington*, 4 Pet. 232; *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544.

⁷ *De Witt v. Berry*, 134 U. S. 306.

testimony.¹ The language of a contract reflects its subject.² The words of a contract referring to the ordinary transactions of life must be given their usual and popular meaning.³ In a written contract the words and not the punctuation control the meaning,⁴ but if the meaning is obscure, the punctuation may be considered as an aid to its elucidation.⁵ In construing a contract it must be read as a whole,⁶ and every part of it must be accorded equal weight.⁷ The circumstances amid which a contract was made are always considered in interpreting its meaning if that is not perfectly clear.⁸ The construction of a contract to be adopted, if more than one offers, is that which in the circumstances of the case ascribes to the parties the most reasonable, probable, and natural conduct;⁹ and a contract open to two interpretations, one making it lawful and the other unlawful, must be so construed as to make it lawful,¹⁰ because it is presumed that the parties did not intend to make an illegal agreement or to do wrong.¹¹ It is also the general rule that if a contract is open to two constructions, one in harmony and the other in conflict

¹ Forsythe v. Kimball, 91 U. S. 291; Richardson v. Hardwick, 106 *id.* 252.

² Richmond Min. Co. v. Eureka Consol. Min. Co., 103 U. S. 839.

³ Moran v. Prather, 23 Wall. 492.

⁴ Holmes v. Phenix Ins. Co., 98 Fed. R. 240.

⁵ Joy v. St. Louis, 138 U. S. 1.

⁶ U. S. v. Bostwick, 94 U. S. 53.

⁷ Arbuckle v. Kirkpatrick, 98 Tenn. 221; McKay v. Barnett, 21 Utah 239; German Fire Ins. Co. v. Roost, 55 Ohio St. 581.

⁸ Remy v. Olds, 21 L. R. A. 645; Kauffman v. Raeder, *supra*; Sattler v. Hallock, 160 N. Y. 291.

⁹ Bell v. Bruen, 1 How. U. S. 169.

¹⁰ Hobbs v. McLean, 117 U. S. 567.

¹¹ Equitable Loan & Security Co. v. Waring, 117 Ga. 599.

with the common law rights of the contracting parties, the former rather than the latter construction is to be adopted.¹ If the true meaning of a contract is in doubt, the courts will adopt for it the meaning the parties have ascribed to it.² Contracts that require construction are interpreted most strongly against the parties who prepare them and most favorably to the other parties.³ If a contract is partly written and partly printed and the written and printed parts are in conflict and so repugnant to each other that they cannot be reconciled, the written parts must prevail over the printed parts.⁴ The relationship to each other of the contracting persons, their environment when making their contract, and their connection with the subject matter of the contract are all aids to its interpretation when interpretation is needed.⁵ Everything that should be fairly implied from the terms or nature of a contract is held to be a part of it.⁶ All contracts have the statutes and settled law of the states in which they are made for a part of their provisions.⁷ The laws in force in the place where it is entered into always form a part of every contract.⁸

¹ *Ullman v. Chicago & N. W. R. R.*, 112 Wis. 150.

² *Cambria Iron Co. v. Union Trust Co.*, 154 Ind. 291; *Webster v. Clark*, 34 Fla. 637; *Sattler v. Hallock*, *supra*.

³ *Orient Mut. Ins. Co. v. Wright*, 1 Wall. 456; *Garrison v. U. S.*, 7 Wall. 688; *Noonan v. Bradley*, 9 Wall. 394.

⁴ *Kratzenstein v. Western Assurance Co.*, 116 N. Y. 54.

⁵ *Chicago R. I. & P. R. R. v. Denver & R. G. R. R.*, 143 U. S. 596.

⁶ *Lawler v. Murphy*, 58 Conn. 294.

⁷ *Deweese v. Smith*, 106 Fed. R. 438.

⁸ *Bronson v. Kinzie*, 1 How. U. S. 311; *Von Hoffman v. Quincy*, 4 Wall. 535; *Walker v. Whitehead*, 16 *id.* 314; *Conn. Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51.

CHAPTER XX

ORAL AND WRITTEN CONTRACTS

§§ 145–150

§ 145. *The statute of frauds.*

In the year 1676, the twenty-ninth of the reign of King Charles II, the British Parliament enacted a statute for the prevention of frauds and perjuries which has come popularly to be known both by laymen and lawyers as the Statute of Frauds. The statute made it necessary to the validity of certain classes of contracts in order that they might be enforced in courts of justice that they be put in writing and signed by the persons to be charged upon them. The parts of that statute of importance here are, in particular, the fourth and seventeenth sections. By the fourth section of the statute no action was permitted to charge an executor or administrator upon any special promise to answer damages out of his own estate; or to charge any person upon a special promise to answer for the debt, default, or miscarriage of another person; or to charge a person upon any agreement made upon consideration of marriage, or upon any contract of sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that was not to be performed within one year after it was made, unless the contract upon which the action should be brought, or some

note or memorandum of such contract, should be in writing and signed by the person to be charged or by some one by him duly authorized to sign it in his behalf. By the seventeenth section of the statute no contract for the sale of goods, wares, and merchandise for the price of ten pounds sterling (the equivalent of fifty dollars), or upwards should be allowed to be good unless the buyer took part of the property sold, gave something as earnest to bind the bargain, made a part payment on account of the price, or unless a note or memorandum of the purchase and sale should be written and signed by the persons to be charged or by their lawfully appointed agents. These two sections, in substance, but with considerable differences in verbiage, have been adopted in almost all of the states of the American Union. The decisions in England and the United States applying this statute to the various classes of contracts mentioned in it have been exceedingly numerous and have dealt with a great many problems of extreme difficulty. The statute has been the text of several treatises and much learning has been devoted to its exposition and the discussion of cases that have arisen under it.

§ 146. *The validity of oral contracts.*

The statute of frauds does not affect all contracts, but only certain designated ones. Those not within its terms, whether written or unwritten, are still as valid as they were before the statute was enacted. For example, agreements to manufacture and deliver at stated prices articles or commodities not in existence have been held to be not

sales of goods, wares, or merchandise, but contracts to perform work and labor and furnish materials, and therefore, although the price in a given case exceeds fifty dollars, they are not void by the statute if oral.¹ And again: one's oral engagement to discharge an obligation of his own is not within the statute, although as an incident to his doing so he will thereby also answer for the debt, default, or miscarriage of another person. Thus the statute of frauds is no defense to a debtor who transfers to his creditor another's promissory note and guarantees its payment,² or to a purchaser of real property who orally agrees to assume and pay an outstanding incumbrance on it as a part of the purchase price.³ The statute does not even make oral contracts that are within its terms illegal; it simply prevents their enforcement if the person against whom enforcement is sought chooses to set up the defense of the statute.⁴ A contract required by law to be written may be composed of several separate papers, each of which forms a part of the contract.⁵ Contracts only partly in writing and completed orally are classed as parol contracts.⁶ And, except in so far as they are affected by the statute of frauds, there is no difference in standing before the law of an oral contract and one in writing but not a sealed instrument.⁷

¹ *Parsons v. Loucks*, 48 N. Y. 17.

² *Darst v. Bates*, 95 Ill. 493; *Milks v. Rich*, 80 N. Y. 269; *Morris v. Gaines*, 82 Tex. 255; *Eagle Mach. Co. v. Shattuck*, 53 Wis. 455.

³ *Enos v. Anderson*, 40 Colo. 395.

⁴ *Browne*, Stat. of Frauds, § 115 *a*.

⁵ *Salmon Falls M'f'g Co. v. Goddard*, 14 How. U. S. 446; *Ryan v. U. S.*, 136 U. S. 68; *Bibb v. Allen*, 149 U. S. 481.

⁶ *Louisville N. A. & C. R. R. v. Reynolds*, 118 Ind. 170.

⁷ *Emerson v. Shores*, 95 Me. 237.

§ 147. *Contracts concerning real property.*

Any oral agreement relating to real property is ordinarily invalid by the statute of frauds¹ in all jurisdictions where the statute is in force.² It is otherwise in states which have never enacted the statute.³ The payment of the purchase price upon an oral contract to sell land is in general not deemed sufficient to take the contract out of the operation of the statute,⁴ but if the vendor gives a written receipt for the purchase money and in it describes the land in such a way as certainly to identify it, the requirements of the statute will be satisfied.⁵ All the essentials of a contract for the sale of land — the description of the property, terms of sale, identification of the parties — must be in writing to satisfy the statute; nothing can be supplied by oral testimony.⁶ An oral contract to sell land is not taken out of the application of the statute, even by the execution and acknowledgment of a deed, so long as the conveyance is withheld from delivery.⁷ A sale of wild grass growing on the seller's land is a sale of an interest in real estate, and to be valid requires a written contract.⁸ In general, all sales of growing grasses and standing timber are deemed agreements to sell interests in lands within the terms of the statute of frauds and are required to be in

¹ *Randall v. Howard*, 2 Black, 585.

² *Lowe v. Turpie*, 147 Ind. 652.

³ *McKennon v. Winn*, 1 Okla. 327.

⁴ *Cooper v. Colson*, 66 N. J. Eq. 328.

⁵ *Henry v. Black*, 210 Pa. St. 245.

⁶ *Mentz v. Newweitter*, 122 N. Y. 491; *Lester v. Heidt*, 86 Ga. 226; *Lewis v. Wood*, 153 Mass. 321.

⁷ *Morrow v. Moore*, 98 Me. 373.

⁸ *Kirkeby v. Erickson*, 90 Minn. 299.

writing to be valid.¹ The title to growing trees can only pass by a writing.² An oral sale of standing timber is nothing but a license to go upon the land and cut the timber,³ but though not valid as a contract, it is good as a license until revoked, and the timber cut by virtue of it before revocation belongs to the buyer.⁴ The rule is not universal. In Maine and Maryland oral sales of growing timber to be cut and removed at once by the purchaser have been held to be not within the statute.⁵ An oral agreement settling a disputed boundary line is generally held to lie outside of the statute and to be valid.⁶

§ 148. *Contracts not to be performed within the year.*

To render an oral contract invalid under the operation of the statute of frauds on the ground that it is not to be performed within the year, it must affirmatively appear that it cannot possibly be performed until the year has elapsed.⁷ It is not sufficient to invalidate it that it is highly improbable that it can be performed within the year. Thus an oral contract to put in and harvest a crop may conceivably be performed within a year, and therefore is good,⁸ and this is true although the contract is made in the fall and

¹ *Hirth v. Graham*, 50 Ohio St. 57; *Carpenter v. Medford*, 99 N. C. 495; *Seymour v. Cushway*, 100 Wis. 580; *Smith v. Leighton*, 38 Kan. 544; *Mighell v. Dougherty*, 86 Iowa, 480.

² *Pierrepoint v. Barnard*, 5 Barb. 364; *Magnetic Ore Co. v. Markbury Lum. Co.*, 104 Ala. 465.

³ *Hodsdon v. Kennett*, 73 N. H. 225.

⁴ *Antrim Iron W'ks v. Anderson*, 140 Mich. 702.

⁵ *Emerson v. Shores*, *supra*; *Leonard v. Medford*, 85 Md. 666.

⁶ *Boyd v. Graves*, 4 Wheat. 513.

⁷ *Walker v. Johnson*, 96 U. S. 424.

⁸ *Cuyler v. Crane*, 25 Hun, 67.

possession of the land is not taken until the following spring.¹ If a contract by its terms cannot possibly be performed within a year, it is void under the statute no matter how short is the time beyond the year fixed for full performance.² An oral agreement to cut timber from a tract of land as fast as needed by the owner's mill is void under the statute as one not to be performed within a year, when the mill, running at its full capacity, cannot possibly work up the timber under three or four years, although all of it can be cut within a year.³ And an oral contract to clear land and seed it down, payment to be made by the receipt of the annual profits as they may accrue for three years, is void by the statute upon the same ground.⁴ Again, an oral contract by which one person agrees to buy a colt to be got by his stallion out of the other's mare and to pay a certain price for it when weaned, the dam and foal to remain in the seller's custody until the colt is weaned and taken by the buyer, has been held in two cases to be void by the statute of frauds, because a mare's gestation period being eleven months, and four to six months being required to wean the colt, the contract cannot possibly be performed within the year.⁵ These decisions have been somewhat questioned,⁶ but they do not appear to have been overruled. An action upon an oral agreement by which one person is to furnish a cow to the other at a stated time within a month and allow him to keep the animal

¹ *Burden v. Lucas*, 19 Ky. L. Rep. 1581.

² *Chase v. Hinkley*, 126 Wis. 75.

³ *White v. Fitts*, 102 Me. 240.

⁴ *Herrin v. Butters*, 20 Me. 119.

⁵ *Lockwood v. Barnes*, 3 Hill (N. Y.) 128; *Groves v. Cook*, 88 Ind. 169.

⁶ *Browne*, Stat. of Frauds, § 280.

for a year afterwards, and then either buy it or pay for its use, when broken by a refusal to deliver the cow, has been held not open to the defense of the statute of frauds as a contract not to be performed within a year because the breach terminated the contract in a less time.¹

§ 149. *Effect of performance or part performance of oral contracts within the statute of frauds.*

Once an oral contract covered by the statute of frauds has been fully performed by both parties to it, their rights and obligations growing out of it are no longer affected by the statute.² The statute has no effect upon an oral contract after it has been performed.³ Thus, should one who orally undertook to pay another's debt actually pay it, he could not recover back the money on the ground the statute did not allow his contract to be enforced; or, if one orally bought, paid for, and took away goods worth more than fifty dollars he could not return the property and recover back his money on the ground that the purchase and sale was a void contract within the statute of frauds. In both cases the contracts have been fully performed and that ends the matter. But a part performance of an oral contract is sufficient to take it out from under the statute. For example, the delivery and acceptance of personal property orally sold at a price over fifty dollars will entitle the seller to recover the purchase money.⁴ The payment of earnest money to bind the bargain, or the payment of part

¹ *Sheehy v. Adarene*, 41 Vt. 541.

² *Bibb v. Allen*, *supra*; *Webster v. Le Compte*, 74 Md. 249; *Larsen v. Johnson*, 78 Wis. 300.

³ *Huntley v. Huntley*, 114 U. S. 394.

⁴ *Browne*, Stat. of Frauds, Chap. XV., §§ 315 *et seq.*

of the agreed price, will take an oral sale out of the statute.¹ On an oral sale at a stated price the ton of hay to be baled by the buyer, the baling of the hay by the purchaser is a sufficient part performance to make the contract good.² Oral contracts made invalid by the statute of frauds are often enforced by the courts when they have been performed or partly performed on one side. This is done wherever it would be a fraud upon him who has performed, if the other party should be permitted to persist in his refusal to perform on his side.³ The acts relied upon to constitute a part performance of an oral contract to take it out of the scope of the statute of frauds must clearly and definitely be done with reference to and in pursuance of the contract; ⁴ such acts must have been done in reliance upon the agreement and must have been at least related to and connected with the agreement even if they were not acts for which the contract stipulated.⁵

§ 150. *Oral abrogation or alteration of written contracts.*

It was anciently a rule of law that a sealed contract might not effectively be waived, varied, or discharged orally, but that rule has virtually now become obsolete.⁶ Any written contract may at the present time be changed by a later oral one, provided it is not required in law to be in writing.⁷ As a general rule, contracts which are required

¹ *Ibid.* Chap. XVI., §§ 341 *et seq.* ² *Driggs v. Bush*, 152 Mich. 53.

³ *Svanburg v. Fosseen*, 75 Minn. 350.

⁴ *Lewis v. North*, 62 Neb. 552.

⁵ *Brown v. Hoag*, 35 Minn. 373.

⁶ *McCreery v. Day*, 119 N. Y. 1; *McKenzie v. Harrison*, 120 N. Y. 260; *Lee v. Hawks*, 68 Miss. 669.

⁷ *Chesapeake & O. Canal Co. v. Ray*, 101 U. S. 522; *Teal v. Bilby*, 123 U. S. 572.

by the statute of frauds to be in writing to be valid, — for example, those concerning interests in land, — may not be altered or modified by oral agreements;¹ but all other written agreements may be modified or superseded by later oral agreements upon a new consideration.² Oral authority, however, to alter a sealed instrument is not sufficient.³

¹ *Heisley v. Swanstrom*, 40 Minn. 196; *McConathy v. Lanham*, 116 Ky. 735; *Clark v. Guest*, 54 Ohio St. 298; *Heth v. Wooldridge*, 6 Rand. (Va.) 605; *Atlee v. Bartholomew*, 69 Wis. 43.

² *Piatt v. U. S.*, 22 Wall. 496.

³ *Drury v. Foster*, 2 Wall. 24.

CHAPTER XXI

THE ENFORCEMENT OF CONTRACTS

§§ 151-159

§ 151. *Time for performance when not fixed.*

It is often the case that a contract leaves indefinite the time when it is to be performed. This does not affect its validity or prevent its enforcement after a sufficient length of time has elapsed in which it could or should have been performed. Contracts that name no time for their performance are to be performed in a reasonable time.¹ For example, when goods are sold and no time is fixed for them to be delivered, they must be delivered in a reasonable time.² What is a reasonable time in any particular case depends upon a variety of considerations, — the nature of the contract, its subject matter, the purpose for which the contract was made, and all the attending circumstances. In some cases, a reasonable time may be very short, and in others of considerable length. An agreement between a buyer and seller that the former will accept a specified quantity of a commodity sold at a named price if delivered between certain dates entitles the seller to select his own time within the named limits in which to make delivery.³

¹ *Whiting v. Gray*, 27 Fla. 482.

² *Eppens, S. & W. Co. v. Littlejohn*, 164 N. Y. 187.

³ *Wheeler v. New Brunswick & C. R. R.*, 115 U. S. 29.

A contract to pay a sum of money as soon as a crop can be sold is a contract to pay it within a reasonable time after the crop is ready for sale.¹ And a contract for the sale of apple and peach trees and grape vine roots, to be delivered in the fall, requires delivery to be made in the autumn at a time suitable for transplanting and at the usual time selected by nurserymen and fruit growers for transplanting in that particular territory.²

§ 152. *Compelling specific performance.*

A court of equity may compel people to perform the contracts they have made, but it has no power to make contracts for them.³ Any one who seeks to compel another to perform a contract must show a performance on his own part or, at least, his willingness and ability to perform.⁴ It is entirely discretionary with a court of equity either to decree or deny specific performance of a contract. Decreeing it is a matter of grace to him who asks it, not his right, but the judicial discretion is never exercised arbitrarily or capriciously.⁵ To warrant a court in compelling the specific performance of a contract it must be legally a valid one,⁵ free from every imputation of fraud or deceit,⁷ not unreasonable, nor unjust, nor inequitable, nor founded

¹ *Nunez v. Dautel*, 19 Wall. 560.

² *Weltner v. Riggs*, 3 W. Va. 445.

³ *Hunt v. Rhodes*, 1 Pet. 1.

⁴ *Boone v. Missouri Iron Co.*, 17 How. U. S. 340; *Walsh v. Preston*, 109 U. S. 297.

⁵ *Pope M'fg Co. v. Gormully*, 144 U. S. 224; *Ryan v. McLane*, 91 Md. 175; *Winne v. Winne*, 166 N. Y. 263.

⁶ *Barry v. Coombe*, 1 Pet. 640; *Hedges v. Dixon Co.*, 150 U. S. 182.

⁷ *Kelly v. Cent. Pac. R. R.*, 74 Cal. 557; *Brown v. Pitcairn*, 148 Pa. St. 387.

in a mistake,¹ and neither hard nor unconscionable.² A court will not attempt to compel one to perform a contract that he has the power to rescind or terminate,³ or one which he cannot enforce against the other party.⁴ A person will not be compelled to carry out a vague and uncertain contract,⁵ nor one in which some of its terms are left open for future settlement.⁶ A court will refuse a decree of specific performance to one who unreasonably delays to sue for it,⁷ or if he who asks for it can be fully compensated in another way.⁸ Contracts to convey land must describe the property sufficiently so that it can be identified with certainty,⁹ for equity will not decree the specific performance of a contract for an interest in land unless it is definite, and, if the contract is oral, unless it is definite in all its parts.¹⁰ In general, specific performance of an oral agreement to convey land will not be decreed, because such a contract is void by the statute of frauds,¹¹ but the courts make an exception where the contract has been partly performed and injustice would result from denying a decree.¹² The courts will not compel the specific performance of a contract to purchase land when the title

¹ *King v. Hamilton*, 4 Pet. 311; *Cathcart v. Robinson*, 5 Pet. 264.

² *Swint v. Carr*, 76 Ga. 322.

³ *So. Exp. Co. v. West. N. C. R. R.*, 99 U. S. 191.

⁴ *Rutland Marble Co. v. Ripley*, 10 Wall. 339.

⁵ *Colson v. Thompson*, 2 Wheat. 336; *King v. Thompson*, 9 Pet. 204.

⁶ *Metcalf v. Hart*, 3 Wyo. 513.

⁷ *Holgate v. Eaton*, 116 U. S. 33; *Nickerson v. Nickerson*, 127 U. S. 668.

⁸ *Memphis v. Brown*, 20 Wall. 289.

⁹ *Sanders v. Bryer*, 152 Mass. 141; *Hayes v. O'Brien*, 149 Ill. 403.

¹⁰ *Crosdale v. Lanigan*, 129 N. Y. 604.

¹¹ *May v. Sloan*, 101 U. S. 231.

¹² *Williams v. Morris*, 95 U. S. 444.

is defective or unmarketable,¹ nor in case the vendor has conveyed away the land to a *bona fide* purchaser.² The remedy of specific performance is seldom allowed in respect of contracts relating to personal property.³ Unless the remedy at law of a suit for damages is inadequate, specific performance of a contract for the sale of chattels or other personal property will not, as a general thing, be decreed.⁴ An exception is made when the property is of such a nature that it cannot be purchased in the market.⁵

§ 153. *Avoiding performance.*

Neither party may put an end to a contract without the other's consent.⁶ And he who asks to be relieved from his contract must return or tender back the consideration he has received.⁷ The courts will not annul a contract merely because it is unwise or even foolish.⁸ A person who voluntarily signs a contract is conclusively presumed to have read and understood its terms,⁹ and he is bound by it though he did not read it,¹⁰ provided he was not prevented by fraud from reading it. Thus, it is no defense to the maker of a promissory note that it is different from what he supposed it to be and that he signed it without

¹ *Wesley v. Eells*, 177 U. S. 370.

² *Halsell v. Renfrow*, 202 U. S. 287.

³ *Clarke v. White*, 12 Pet. 178.

⁴ *Manton v. Ray*, 18 R. I. 672; *Eckstein v. Downing*, 64 N. H. 248
Steinmeyer v. Siebert, 190 Pa. St. 471.

⁵ *Nor. Cent. R. R. v. Walworth*, 193 Pa. St. 207.

⁶ *West. Union Tel. Co. v. Penn. R. R.*, 129 Fed. Rep. 849.

⁷ *Cates v. Sparkman*, 73 Tex. 619.

⁸ *Equitable Loan & Sec. Co. v. Waring*, 117 Ga. 599.

⁹ *Fivey v. Penn. R. R.*, 67 N. J. L. 627.

¹⁰ *Upton v. Tribilcock*, 91 U. S. 45.

reading it, relying on what the person who drew it told him, if no fraud was practiced upon him and he had ample opportunity to read it and was not prevented from so doing.¹ Nor may one be relieved from a contract that he made freely, after abundant time to investigate, upon the ground that he was in straitened circumstances and pressing need of money when he made it and so accepted a less consideration than he ought to have received.² Mere inadequacy of the price paid for a purchase is not a sufficient ground for setting aside a sale that was in other respects perfectly fair.³ It is a rule of common law that whosoever attacks the validity of a contract assumes the burden of proving its invalidity.⁴

§ 154. *Excuses for non-performance.*

If an oral contract is void under the statute of frauds, no excuse is needed for refusing to perform it. One may decline to perform with or without reason.⁵ And one is excused from performing a contract which the law has made impossible of performance.⁶ The performance of a contract which it is impossible to perform need not be attempted. No liability is incurred for not doing what cannot be done. But to excuse the failure to perform a contract on the ground that performance is impossible, the impossibility must be inherent in the nature of the

¹ *Walton Guano Co. v. Copelan*, 112 Ga. 319.

² *French v. Shoemaker*, 14 Wall. 314.

³ *Eyre v. Potter*, 15 How. U. S. 42; *Hammond v. Wallace*, 85 Cal. 522.

⁴ *Bayles v. Kan. Pac. R. R.*, 13 Colo. 181.

⁵ *Kemensky v. Chapin*, 193 Mass. 500.

⁶ *Macon & B. R. R. v. Gibson*, 85 Ga. 1; *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. L. 240.

thing contracted to be done and not in the mere inability to do it of the person who contracted to do it. The thing to be done must be something nobody can do. If it is possible for anybody to do it, he who contracted to do it will not be excused for not doing it.¹ The rule that one who makes an absolute executory contract is not excused from performing it by his inability to do so through misfortune or accident, but must answer in damages if he has failed to foresee and provide against what happened, is softened by the rule that courts may imply a condition in a contract relieving a party when without his fault performance became impossible and both parties contemplated at the outset that contingencies might arise to prevent the carrying out of the contract. Thus where a contract bound a farmer to sow and grow a certain acreage of sugar beets on his farm and to follow minute instructions in cultivating the crop and then to deliver the beets raised to the other party or, if he failed, to pay twenty-five dollars an acre as damages, the court implied the condition that if he faithfully followed the instructions, and the seed planted failed to produce a crop because the climate was unpropitious, the farmer should not be liable.² A farmer who agrees to raise, sell, and deliver a certain quantity of beans of various kinds, without designating any particular tract of land upon which they are to be grown, is not excused from performing his contract by the unexpected blasting of his crop by early frosts so that he is unable to deliver the quantity he engaged to deliver.³ And one who

¹ *Reid v. Alaska Paek. Co.*, 43 Ore. 429; *Klauber v. S. Diego St. Car Co.*, 95 Cal. 353.

² *Whipple v. Lyons Beet Sugar Ref. Co.*, 118 N. Y. Supp. 338, 1150.

³ *Anderson v. May*, 50 Minn. 280.

has contracted to sell and deliver a crop of hops cannot refuse to perform his contract on the ground that the crop raised was not up to the standard of quality agreed upon, when the buyer is willing to accept the crop as a sufficient performance of the contract ¹

§ 155. *Illegal contracts.*

All contracts made in violation of law are absolutely void;² this is a rule to which there is no exception.³ All contracts that contravene the provisions of any statute are nullities,⁴ and contracts void at common law because contrary to public policy are equally as illegal and void as if they were contrary to some express statute.⁵ If a contract is void it is void as to everybody whose rights would be affected by it if it was valid.⁶ All contracts forbidden by law or contrary to good morals are void as against public policy.⁷ No right of action can spring out of an illegal contract ⁸ nor from a deliberate violation of law.⁹ A suit will not lie to enforce a contract made in violation of a statute, or of the common law, or against public policy.¹⁰ The courts refuse to enforce such a contract;¹¹ the law will

¹ *Livesley v. Johnston*, 45 Ore. 30.

² *Youngblood v. Birmingham Trust Co.*, 95 Ala. 521; *Mason v. McLeod*, 57 Kan. 105; *Buckley v. Humason*, 50 Minn. 195; *Haggerty v. St. Louis Ice M'fg Co.*, 143 Mo. 238.

³ *Cox v. Donnelly*, 34 Ark. 762.

⁴ *State Bank v. Coquillard*, 6 Ind. 232.

⁵ *Harvey v. Merrill*, 150 Mass. 1. ⁶ *Kellogg v. Howes*, 81 Cal. 170.

⁷ *Standard Furn. Co. v. Van Alstine*, 22 Wash. 670.

⁸ *Pratt v. Short*, 79 N. Y. 437.

⁹ *Jemison v. Birmingham & A. R. R.*, 125 Ala. 378.

¹⁰ *Kelton v. Millikin*, 2 Coldw. 410.

¹¹ *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281.

not lend its aid to enforce a contract founded on its own violation.¹ It will aid neither party to a contract against public policy or repugnant to sound morality and civic honesty;² it will simply leave the parties to such a contract in whatever situation it finds them.³ A contract that is void where it is made and is to be performed is void everywhere,⁴ and if it is invalid as to one party, it is not valid as to the other.⁵ A contract that is void because contrary to a statute or public policy cannot be ratified or made good by any subsequent agreement,⁶ nor validated by estoppel.⁷ As long as an illegal contract remains unperformed, either party may rescind it without regard to which one is the more blamable.⁸ Public policy, as it bears upon contracts, is the principle which maintains that no one can rightfully do or bind himself to do aught inimical to the public good;⁹ thus, contracts which have for their purpose to monopolize the market and control prices of a given commodity are contrary to public policy and therefore illegal and void.¹⁰ If a contract seemingly illegal may be performed in any legal way, the courts will assume that the parties to it intended to perform it in that way and will hold them to that method.¹¹

¹ *Coppell v. Hall*, 7 Wall. 542.

² *Veazey v. Allen*, 173 N. Y. 359; *Woodson v. Hopkins*, 85 Miss. 171.

³ *Brooks v. Cooper*, 50 N. J. Eq. 761; *Richardson v. Buhl*, 77 Mich. 632.

⁴ *Buckley v. Humason*, *supra*.

⁵ *Portland v. Bituminous Pav. Co.*, 33 Ore. 307.

⁶ *Moog v. Hannon*, 93 Ala. 503.

⁷ *Reed v. Johnson*, 27 Wash. 42.

⁸ *Congress & Emp. Spring Co. v. Knowlton*, 103 U. S. 49.

⁹ *Superior City v. Douglas Co. Teleph. Co.*, 122 N. W. Rep. 1023.

¹⁰ *Arnot v. Pittston & C. Coal Co.*, 68 N. Y. 558.

¹¹ *Burne v. Lee*, 104 Pac. Rep. 438.

§ 156. *Wagering or gambling contracts.*

All wagering and gambling contracts generally throughout the United States are held to be illegal and void as against public policy.¹ Wagers are inconsistent with the interest of society and in conflict with the morals of the age.² Thus, a contract by which one person for a sum of money paid him by another guarantees that the other's cattle will bring in the market when sold a certain stated price the pound, and the other in turn promises to pay the guarantor all the excess of the selling price above the sum named, is a gambling contract and hence illegal and void.³ The famous "Bohemian oats" scheme, exploited some years ago in the Middle West, by which a set of sharpers made contracts with the farmers that in consideration of receiving ten or fifteen dollars a bushel for a certain quantity of the so-called Bohemian oats they would sell for the purchaser the next season a larger quantity at the same or a higher price, had the gambling element as a prominent feature. The Ohio courts refused to allow the victims to recover back the money they had paid,⁴ and the Iowa courts declined to cancel the notes given to the swindlers for oats purchased.⁵ The illegality of these contracts was obvious, but in Michigan the victimized farmers were more tenderly treated in the courts. While it was admitted there that the law rigidly forbids relief to be granted in illegal transactions where both parties are equally

¹ *Irwin v. Williar*, 110 U. S. 499.

² *Bernard v. Taylor*, 23 Ore. 416.

³ *First Nat. Bk. v. Carroll*, 80 Iowa, 11.

⁴ *Shirey v. Ulsh*, 2 Ohio C. C. 401; *Carter v. Lillie*, 3 *id.* 364.

⁵ *Shipley v. Reasoner*, 80 Iowa, 548.

guilty, nevertheless it was said that if a person is defrauded by the misrepresentations of another person who assumes to know, so that the first is actually deceived and not consciously does wrong, the fact that the transaction in which he takes part is against public policy does not necessarily compel the victim to submit to the loss caused by the fraud of the real villain.¹ Accordingly a recovery upon a promissory note given for Bohemian oats bought at fifteen dollars a bushel was denied.² The law protects the ignorant and credulous man against one who defrauds him and treats his credulity and ignorance as innocence in an unlawful transaction in which he has been swindled.³ And so, one who is really ignorant of the nature of the "Bohemian oats" swindle and does not suspect the corporate existence of the pretended company exploiting the scheme, who believes in its integrity and honesty of purpose, and who relies upon the sharper's representations that the business is an honest one, may not be defeated in his action for fraud and deceit against the person who inveigled him into the scheme on the ground that he was a participant in the illegal enterprise.⁴

§ 157. *Contracts obtained by fraud.*

Relief may always be had in the courts against a contract secured by fraud.⁵ Fraud vitiates every transaction,⁶

¹ *Hess v. Culver*, 77 Mich. 598.

² *Ibid.*

³ *Pearl v. Walter*, 80 Mich. 317.

⁴ *Knight v. Linzey*, 80 Mich. 396.

⁵ *Boyce v. Grundy*, 3 Pet. 210.

⁶ *U. S. v. The Amistad*, 15 *id.* 518; *Stoddard v. Chambers*, 2 How. U. S. 284.

nullifies every contract.¹ Fraud is never presumed; it must be proved;² the legal presumptions are always in favor of honesty and innocence.³ An artifice by which one is induced to do something which the law would have compelled him to do anyway is no fraud,⁴ and if no damages follow from a falsehood or a fraud, the law takes no cognizance of it.⁵ A mere cherished intention to defraud without some act or speech really fraudulent does not afford a cause of action.⁶ A fraudulent transaction is not purged of its fraud simply by a strict and careful observance of all the legal forms in carrying it out.⁷ Oral testimony may always be adduced to establish fraud in procuring a contract.⁸ It is not necessary to have direct and positive evidence to establish a fraud; it may be proved by circumstances, and in most cases that is all the proof that can be had.⁹ False or fraudulent misrepresentations of material facts which induce a person to make a contract entitle him to be released from its obligations.¹⁰ A false representation to afford an action must be one likely to deceive a person of common prudence and caution and must be a statement of an existing fact.¹¹ A misrepresen-

¹ *Finlayson v. Finlayson*, 17 Ore. 347.

² *Farrar v. Churchill*, 135 U. S. 609.

³ *N. Y. Life Ins. Co. v. Davis*, 96 Va. 737; *Mayers v. Kaiser*, 85 Wis. 382.

⁴ *Deobold v. Oppermann*, 111 N. Y. 531.

⁵ *Kountze v. Kennedy*, 147 N. Y. 124; *Britton v. Sup. Council Royal Arcanum*, 46 N. J. Eq. 102.

⁶ *Clarke v. White*, 12 Pet. 178.

⁷ *Graffam v. Burgess*, 117 U. S. 180.

⁸ *Morris v. Nixon*, 1 How. U. S. 118; *Selden v. Myers*, 20 *id.* 506; *Barreda v. Silsbee*, 21 *id.* 146.

⁹ *Castle v. Bullard*, 23 *id.* 172; *Rea v. Missouri*, 17 Wall. 532.

¹⁰ *Rorer Iron Co. v. Trout*, 83 Va. 397.

¹¹ *Sawyer v. Prickett*, 19 Wall. 146.

tation to vitiate a contract of sale must relate to a material matter which was an inducement to make the contract, which he to whom it was made had no means of knowing whether it was true or false, and upon which he relied, and by which he was misled to his injury.¹ One who investigates for himself and is not hindered from doing so fully when all the means of knowledge are open to him cannot escape obligations that he assumes on the ground that the other party made false representations to him, because he did not rely upon and was not induced to act by the other's statements.² Expressing an opinion without stating any fact does not constitute fraud.³ An opinion as to value based upon uncertain and prospective improvements, no matter how erroneous and extravagant it may turn out to be and no matter what injury results from accepting it, does not amount to a legal fraud.⁴ It is as fraudulent to affirm the truth of what one is ignorant as it is to assert what one knows to be false.⁵ A person who without knowledge of its falsity recklessly makes a statement calculated to deceive, which really is false, is guilty of knowingly making a false statement,⁶ and it affords good ground for rescinding a contract made on the strength of it.⁷ A deliberate concealment is equivalent to willful falsehood.⁸ It is a fraudulent concealment if one is silent when it is his duty to speak.⁹ The suppression of a material fact by one who is

¹ *Smith v. Richards*, 13 Pet. 26; *Slaughter v. Gerson*, 13 Wall. 379.

² *Farrar v. Churchill*, *supra*.

³ *South. Devel. Co. v. Silva*, 125 U. S. 247.

⁴ *So. Branch Lum. Co. v. Ott*, 142 U. S. 622.

⁵ *Bullitt v. Farrar*, 42 Minn. 8.

⁶ *Cooper v. Schlesinger*, 111 U. S. 148.

⁷ *Smith v. Richards*, *supra*.

⁸ *Crosby v. Buchanan*, 23 Wall. 420.

⁹ *Wheeler v. N. Bruns. & C. R. R.*, *supra*.

bound in good faith to disclose it is equivalent to a false representation.¹ But there must be some obligation to make disclosure; if there is none, there is no fraud. Thus, the purchaser of land who knows that there is a mine upon it of which the owner is in ignorance, owes the seller no duty to inform him, and is not bound to tell;² and the mere fact that one who sells an animal knows that the beast has a latent defect and does not mention it is no fraud upon the buyer; to be such the seller must do or say something to deceive the buyer or to prevent his discovering the defect.³

§ 158. *Contracts procured by duress.*

Duress is a sort of fraud in which some form of compulsion takes the place of deceit in accomplishing an injury.⁴ Duress may be of either person or goods.⁵ There are two kinds of duress of person: (1) that of imprisonment, and (2) that of fear — the fear of death, mayhem, or imprisonment.⁶ Unlawful duress is such constraint or peril, either inflicted or threatened and impending, which in its severity or apprehension is sufficient to overpower the will of a person of ordinary firmness.⁷ A contract procured under threats made by one party to it against the life of the other may be avoided for duress;⁸ such a contract is inoperative and void.⁹ Payments compelled by duress

¹ Tyler v. Savage, 143 U. S. 79.

² Stackpole v. Hancock, 40 Fla. 362.

³ Court v. Snyder, 2 Ind. App. 440.

⁴ Foote v. De Poy, 126 Iowa, 366.

⁵ *Ibid.* Bailey v. Devine, 123 Ga. 653.

⁶ *Ibid.* ⁷ U. S. v. Huckabee, 16 Wall. 414.

⁸ Brown v. Pierce, 7 *id.* 205. ⁹ Baker v. Morton, 12 *id.* 150.

either of person or of goods may be recovered back.¹ A contract made to regain property unlawfully withheld from him who makes it may be avoided on the ground of duress.² Whenever there is an actual or threatened exercise of power over a person's property by one exacting a payment of money, there is duress which makes the payment involuntary and compulsory.³ If an unlawful demand for the payment of money is made upon a man and he can save his property only by temporarily yielding, he may pay under protest and recover back the payment;⁴ but if he can successfully resist the demand in court and in any way protect his property without paying, he cannot recover back the payment, though he protested.⁵ Voluntary payments may not be recovered back.⁶ The fact that they were paid under protest makes no difference.⁷ When a buyer of cattle in order to get possession of the animals he has purchased, and who otherwise would be exposed to great loss, makes the seller a payment he has no right to exact upon his refusal to part with the beasts until he gets it, the payment is not voluntary but compulsory and may be recovered back.⁸ A farmer compelled to pay unreasonably high rates to an irrigation company to obtain the necessary supply of water may recover the excess over

¹ Sweet *v.* Kimball, 166 Mass. 332; Cribbs *v.* Sowle, 87 Mich. 340; Joannin *v.* Ogilvie, 49 Minn. 464; Adams *v.* Irving Bank, 116 N. Y. 606.

² Oliphant *v.* Markham, 79 Tex. 543.

³ Cleaveland *v.* Richardson, 132 U. S. 318.

⁴ State *v.* Nelson, 41 Minn. 25; De la Cuesta *v.* No. Amer. Ins. Co., 136 Pa. St. 62.

⁵ *Ibid.*

⁶ Hamilton *v.* Dillin, 21 Wall. 73; Little *v.* Bowers, 134 U. S. 547.

⁷ *Ibid.*

⁸ Lonergan *v.* Buford, 148 U. S. 581.

proper and reasonable rates when he pays under protest without assenting to the charges.¹ There is no duress when one without force or intimidation and with knowledge of all the facts accepts in satisfaction of a disputed and unliquidated claim a sum less than he asserted to be due.²

§ 159. *Contracts made under mistake.*

To warrant reforming a contract on the ground of mistake, the mistake must be one of both parties.³ If facts assumed by both parties to it as a basis for a contract do not exist, there is no contract.⁴ A mutual mistake as to the identity or existence of the subject of a contract is fatal to it.⁵ Money may be recovered back if it was paid under a mistake of fact.⁶ To entitle one to judicial relief because of mistake, the mistake must have been material in the transaction and affected the substance and not merely the incidents of it; and the mistake must have been important enough to determine the action of him who was misled.⁷ The mistaken fact must have had a controlling influence upon his conduct, and he must as well have availed himself of all the accessible sources of information.⁸ Ignorance of a fact extrinsic and unessential to the contract is not such

¹ Salt River Val. Canal Co. v. Nelssen, 12 L. R. A. (N. S.) 711.

² U. S. v. Child, 12 Wall. 232.

³ Drachler v. Foote, 88 App. Div. 270.

⁴ Fink v. Smith, 170 Pa. St. 124; Nordyke & M. Co. v. Kehlror, 155 Mo. 643.

⁵ Bedell v. Wilder, 65 Vt. 406; Hecht v. Batcheller, 147 Mass. 335.

⁶ Wolf v. Beaird, 123 Ill. 585; McKibben v. Doyle, 173 Pa. St. 579.

⁷ Hoops v. Fitzgerald, 204 Ill. 325.

⁸ Grymes v. Sanders, 93 U. S. 55.

a mistake as will relieve a person from performing his contract even if such fact might have influenced his conduct had he known it.¹ Oral testimony is received to prove a mistake of facts in the making of contracts.² Ignorance or mistake of law is not enough to procure the annulment of a contract.³ A mistake due to ignorance of law is no ground for reforming a deed founded upon it except possibly in a few cases of peculiar character,⁴ nor, unless there are other circumstances, for reforming any written instrument.⁵ No suit can be maintained to recover back money paid under a mere mistake of law⁶ where the facts were known and there was no duress⁷ and no fraud or deceit employed.⁸ But it has been decided in one case,⁹ that the maxim that ignorance of the law is no excuse for not performing a contract does not apply to a mistake in the law of another state than the one in which the person seeking to be excused has his domicile.

¹ *Cleaveland v. Richardson*, *supra*.

² *Ivinson v. Hutton*, 98 U. S. 79; *Walden v. Skinner*, 101 *id.* 577

³ *Kleimann v. Gieselmann*, 114 Mo. 437.

⁴ *Hunt v. Rhodes*, 1 Pet. 1.

⁵ *Snell v. Atlantic Ins. Co.*, 98 U. S. 85.

⁶ *Elliott v. Swartwout*, 10 Pet. 137.

⁷ *Painter v. Polk Co.*, 81 Iowa, 242; *Phillips v. McConica*, 50 Ohio St. 1.

⁸ *Scott v. Ford*, 45 Ore. 531.

⁹ *Morgan v. Bell*, 3 Wash. 554.

CHAPTER XXII

SALES

§§ 160-168

§ 160. *The state of the law of sales.*

There is no subject of greater importance and magnitude in the law than that relating to the change of ownership of property from one to another person by contract of sale and delivery. The greatest amount of litigation with which courts have to deal grows out of disputes over the sale and delivery of goods and chattels. The questions that have arisen and that are still constantly coming up are not only numerous, various, and weighty, but exceedingly puzzling. The law of sales of personal property has been among the topics most frequently considered by the courts and has been elucidated or clouded, as one looks at it, by a great variety of distinctions and refinements.¹ The courts of England for centuries have been striving to settle the law by which sales of chattels are governed;² and they have not yet succeeded in doing so. The law of contracts of sale, according to one authority of good standing,³ is "still involved in much confusion, notwith-

¹ State *ex rel* Vilas *v.* Wharton, 117 Wis. 558.

² Halterline *v.* Rice, 62 Barb. 593.

³ Shealy *v.* Edwards, 73 Ala. 175.

standing the vast resources of learning expended upon it by the jurists and law writers of the past century." Were it desirable it would not be possible to do more than sketch the state of the law of sales respecting a few topics of special interest to the readers here addressed and ought further would not be useful.

§ 161. *The essentials of a sale.*

A sale has been defined as a transfer of the absolute or general property in a thing for a price in money¹ or other recompense of value.² This, in substance, is Blackstone's definition.³ Other authorities have defined it as an executed contract by which the right of property in what is sold is transferred from seller to buyer,⁴ and, as ordinarily, a transfer from seller to buyer of the property in an article for a consideration paid or promised.⁵ The essence of a sale is a transfer of the property in the subject of it from seller to buyer in consideration of a price.⁶ A price is essential.⁷ No contract of sale is perfect without an agreement as to price.⁸ The assent of both buyer and seller is necessary to make a sale⁹ and mutuality of obligation is also essential.¹⁰ The elements in every contract of sale are persons legally competent to make it, an agreement to

¹ *Foley v. Felrath*, 98 Ala. 176.

² *Woodward v. Soloman*, 7 Ga. 246.

³ 2 Com. 447.

⁴ *Field v. Moore*, Hill & Den. Supp. 418.

⁵ *Stephens v. Gifford*, 137 Pa. St. 219.

⁶ *McIver v. Young Hardware Co.*, 144 N. C. 478.

⁷ *Fuller v. Bean*, 34 N. H. 290.

⁸ *State v. Asso. Press*, 159 Mo. 410.

⁹ *Ketchum v. Duncan*, 96 U. S. 659.

¹⁰ *Brashier v. Gratz*, 6 Wheat. 528.

sell, a meeting of minds upon the subject of the sale, and a mutual assent to the price to be paid.¹ The specific individual thing sold must be agreed upon by seller and buyer.² The subject of the sale must be ascertained and identified. That is indispensable.³ It must be certainly known as a thing distinct from its kind.⁴ And finally, as in every contract, there must be a consideration,⁵ but then the promise of the buyer to pay the purchase price is a good consideration for the covenant of the seller to convey the property.⁶ A sale is distinguished from a bailment by the absence of an obligation to return its subject.⁷

§ 162. *Executory and executed contracts of sale.*

An executory contract of sale is an agreement to sell, and an executed contract of sale is a completed sale. A sale differs from an agreement to sell in that upon a sale the title to the thing sold passes to the buyer, while upon an agreement to sell it remains in the seller. This is the fundamental difference.⁸ The sale does, the agreement to sell does not, transfer the ownership of the property.⁹ In many cases of sales it is a very nice and difficult question to determine whether or not the title has passed.¹⁰ When all the terms of a sale of property in a state ready for

¹ Gardner *v.* Lane, 12 Allen, 39.

² Murphy *v.* State, 1 Ind. 366.

³ Field *v.* Moore, *supra*.

⁴ Blackwood *v.* Cutting & Packing Co., 76 Cal. 212.

⁵ Tuttle *v.* Campbell, 74 Mich. 652.

⁶ Rodman *v.* Robinson, 134 N. C. 503.

⁷ Sturm *v.* Boker, 150 U. S. 312.

⁸ Blackwood *v.* Cutting & Packing Co., *supra*.

⁹ Buskirk Bros. *v.* Peck, 57 W. Va. 360.

¹⁰ Olyphant *v.* Baker, 5 Denio, 379; Graff *v.* Fitch, 58 Ill. 373.

delivery and clearly specified have been agreed upon, and the bargain has been struck and everything the seller was to do has been done, the sale is absolute and as between seller and buyer the title passes without either payment of the price or actual delivery of the property,¹ but this does not preclude the seller's retention of the possession of the property until the price is paid.² If the sale is complete in all its parts and nothing more is to be done to ascertain the identity, quality, quantity, or price of what is sold, as a general rule the title vests at once in the buyer by virtue of the contract itself and before either payment or delivery,³ but if any material act remains to be done either to identify what is sold, fit it for delivery, or fix its price, then, as a general thing, the title does not pass until it is done.⁴ This is a well settled principle⁵ of elementary law.⁶ If it is necessary for the seller to finish the property sold fit for use, or to put it in merchantable condition or a deliverable state before delivering it to the buyer the title to it does not pass from seller to buyer until everything of that sort has been accomplished.⁷ A sale is incomplete and executory as long as anything remains to be done by either buyer or seller before delivery of the commodity sold.⁸

¹ Hatch v. Standard Oil Co., 100 U. S. 124.

² Ark. Val. Land & Cattle Co. v. Mann, 130 U. S. 69.

³ Screws v. Roach, 22 Ala. 675.

⁴ McFadden v. Henderson, 128 Ala. 221; Priest v. Hodges, 118 S. W. Rep. 253; Welch v. Spies, 103 Iowa, 389; Sumner v. Hamlet, 12 Pick. 76.

⁵ Hagins v. Combs, 102 Ky. 165.

⁶ Caruthers v. McGarvey, 41 Cal. 15.

⁷ Foster v. Ropes, 111 Mass. 10; Schneider v. Westerman, 25 Ill. 514; McClung v. Kelley, 21 Iowa, 508.

⁸ Foley v. Felrath, *supra*.

§ 163. *The intention of the parties.*

The courts attach great weight to the intention of the parties as a criterion for determining whether a sale is or is not executory. It is the intention of seller and buyer as gathered from their contract of sale, the attending circumstances, and the nature and situation of the subject of the sale that is decisive in all ordinary cases of whether the sale is complete or only executory.¹ Whether upon a sale of personal property the title does or does not pass is generally a question of the intention of the parties to the bargain.² If both seller and buyer intend the title to the property sold to pass from the one to the other and the seller delivers the property into the possession of the buyer then the ownership of it is transferred and the sale is an executed one notwithstanding the quantity is still to be counted, measured, or weighed and the price of the whole is yet to be computed.³

§ 164. *Offers and acceptances.*

An offer to sell property imposes no obligation upon the owner until it is accepted according to its terms.⁴ Such an offer may be withdrawn any time before it is accepted.⁵ To make the offer binding, it must be ac-

¹ Osborne v. Francis, 38 W. Va. 312.

² Greene v. Lewis, 85 Ala. 221; Lester v. East, 49 Ind. 588; Levasseur v. Cary (Me.), 3 Atl. R. 461.

³ Shealy v. Edwards, *supra*; Lassing v. James, 107 Cal. 348; Riddle v. Varnum, 20 Pick. 283; Bass v. Walsh, 39 Mo. 192

⁴ Minneapolis & St. L. R. R. v. Columbus Rolling Mills Co., 119 U. S. 149; Tilley v. Cook County, 103 *id.* 155.

⁵ Ryan v. U. S., 136 U. S. 68; Frank v. Stratford-Handcock, 13 Wyo. 37.

cepted, and accepted unconditionally.¹ Any qualification or departure from the terms of an offer to sell is equivalent to rejecting it.² The acceptance of an offer before it is withdrawn makes a contract, no matter how such acceptance is communicated.³ An offer cannot be withdrawn after it has been accepted, even though the acceptance has not yet reached him who made the offer.⁴ If an offer is withdrawn before it is accepted, there can be no contract, since it is utterly idle to accept an offer after it has been withdrawn.⁵ An unconditional and positive offer to buy or sell property made by letter and accepted the same way makes an absolute contract of sale.⁶ It is the same when the telegraph is used instead of the mails.⁷ A complete contract of sale may be made by telegraphic dispatches.⁸ Upon a sale of an article to be selected by the buyer at a certain time and place, if the buyer does not appear at the agreed time and place to make the selection, the seller is at liberty if he chooses to do so to treat the bargain as at an end.⁹

165. *Sales made out of a mass.*

It is an elementary principle of general application alike to sales and exchanges of property that the contract is

¹ Weaver v. Burr, 31 W. Va. 736.

² Carr v. Duval, 14 Pet. 77; Eliason v. Henshaw, 4 Wheat. 225; Minneapolis & St. L. R. R. v. Columbus Rolling Mills Co., *supra*.

³ Perry v. Mt. Hope Iron Co., 15 R. I. 380.

⁴ Brauer v. Shaw, 168 Mass. 198.

⁵ Lincoln v. Gay, 164 Mass. 537.

⁶ Summers v. Hibbard, 153 Ill. 102.

⁷ Perry v. Mt. Hope Iron Co., and Brauer v. Shaw, *supra*.

⁸ Utley v. Donaldson, 94 U. S. 29.

⁹ Warren v. Buckminster, 24 N. H. 336.

executed so as to transfer title only by the appropriation of the specific goods or chattels to which the bargain relates.¹ Chancellor Kent has declared it to be a fundamental principle everywhere prevalent that if goods are sold by number, weight, or measure the sale is incomplete until they have been counted, weighed, or measured and the specific property sold has been separated from the stock and identified as the subject of the sale.² The sale is incomplete until the property sold is completely separated so as to be distinguishable from the bulk or mass of which it was part.³ This is the general and well-settled rule of law.⁴ The rule frequently has been applied to sales of farm products. Thus, when a farmer makes a sale out of a larger quantity in his possession of, for examples, a definite number of tons or other quantity of hay,⁵ or an indefinite quantity of fodder, a part of several stacks,⁶ or a certain number of bushels of corn, part of the contents of a crib,⁷ or a sufficient quantity of unginned cotton, to make a stated number of bales of average weight,⁸ the buyer will get no title to and will not become the owner of what he has purchased until it has been counted, weighed, or measured out of and set apart from the rest of the hay, fodder, corn, or cotton so as

¹ Cloke *v.* Shafroth, 137 Ill. 393.

² 2 Comm. 496.

³ Upham *v.* Dodd, 24 Ark. 545; Dunn *v.* State, 82 Ga. 27; Courtright *v.* Leonard, 11 Iowa, 32.

⁴ Block *v.* Maas, 65 Ala. 211; Harwick *v.* Weddington, 73 Iowa, 300.

⁵ Stone *v.* Peacock, 35 Me. 385; Lawry *v.* Ellis, 85 *id.* 500; Holmes *v.* Bailey, 16 Neb. 300; Messer *v.* Woodman, 22 N. H. 172.

⁶ Fagan *v.* Faulkner, 5 Ark. 161.

⁷ Wood *v.* Roach, 52 Ill. App. 388; Scott *v.* King, 12 Ind. 203; Keeler *v.* Goodwin, 111 Mass. 490; Gresham *v.* Bryan, 103 Ala. 629.

⁸ Baldwin *v.* McKay, 41 Miss. 353.

to be recognized and known definitely as the subject of the sale. An agreement by the owner of a quantity of husked corn lying in heaps in his fields to sell enough of it at a stated price the hundred to pay a note of his held by the buyer, both parties to join in hauling the corn to the buyer's crib, neither transfers the ownership of any of the corn nor extinguishes the note so long as the corn lies undisturbed in the heaps.¹ If, however, a certain quantity of corn greater than the contents of a single crib is sold to be taken from two cribs upon an agreement that one of them is to be turned over unopened to the buyer the title to one of the cribs at least, it has been held, will pass at once to the buyer, if in other respects the sale is all complete.²

§ 166. *The "American" doctrine, so-called.*

The general rule that the title to property sold out of a mass will not pass from seller to buyer until it is separated from the bulk of which it is a part is held by a number of strong courts in several states to be subject to one very important exception. The decisions of these courts upon the question have given rise to what has become known as the "American" doctrine because it is opposed to the decisions of pretty much all the courts in England. That doctrine, briefly stated, is that when there is a sale of but part of a mass running perfectly uniform throughout, in every respect so that each particle is exactly like every other particle, then if buyer and seller so intend and so agree the title to the portion sold may pass from the one to the other without separating it from the mass. This

¹ *Caruthers v. McGarvey*, 41 Cal. 15.

² *Welch v. Spies*, *supra*.

doctrine will apply to sales of a certain number of gallons of oil out of a tank, or of whisky out of a cask, a certain number of bushels of wheat, corn, oats, or other grains out of a granary or elevator, or a certain number of tons of coal out of a heap all of the same kind and size. The reason given for this doctrine is that it is utterly indifferent both to buyer and seller which part of the mass is taken or left or which one takes it. This doctrine has been accepted and applied in New York,¹ Connecticut,² Minnesota,³ Missouri,⁴ and several other states. Thus, it has been held in Maine, that if the buyer of a certain number of bushels of corn out of a larger quantity kept by the seller in bulk pays for his purchase and from time to time afterwards with the seller's consent carries away part of what he bought, the title to all he purchases passes to him at once without any separation of it from the mass.⁵ The Minnesota Supreme Court has decided that the title passes to the buyer of a definite quantity of seed wheat to be taken out of a bin that contains a larger amount all of the same kind and value when the purchaser is at liberty to remove the part he bought whenever he wishes to do so.⁶ And it has been decided in Kansas that one who buys and pays for a number of plants out of a greater number all tied together in bundles containing the same number in each and all of the same kind, quality, and value may

¹ *Kimberly v. Patchin*, 19 N. Y. 330.

² *Chapman v. Shepard*, 39 Conn. 413.

³ *Fishback v. Van Dusen*, 33 Minn. 111; *Mackellar v. Pillsbury*, 48 Minn. 396.

⁴ *Kaufmann v. Schilling*, 58 Mo. 218.

⁵ *Waldron v. Chase*, 37 Me. 415.

⁶ *Nash v. Brewster*, 39 Minn. 530.

recover from a third person to whom the seller afterwards transferred the entire lot with notice of the transaction but without separating the plants sold, damages for conversion upon his refusal to deliver the plants on demand.¹

§ 167. *The wiser practice.*

The American doctrine is of great value to lawyers in affording ground for contending in a case to which it applies where there has been no actual breaking of bulk that the sale of a part passed title to the buyer; but when a farmer is actually selling his wheat, corn, or other grains, his potatoes, or his apples, he will be wise to make sure that the title passes to the buyer upon the conclusion of the bargain. This he can do whether the American doctrine is sound or unsound by actually measuring out the quantity sold and setting it apart by itself distinctly labeled, ready for actual delivery. The importance of the transfer of title in the law of sales is very great because the risk of loss goes with the title. If goods or chattels sold are destroyed or injured by flood or fire, or otherwise lost or damaged by accident before the buyer removes them and while they remain in the seller's possession, the buyer suffers if the title has passed, and if it has not passed the seller bears the loss. In the one case the buyer is bound to pay the purchase price, in the other, the seller cannot collect it. Again, property sold and left in the possession of the seller is liable if the title has not passed to the buyer to seizure upon legal process for the seller's debts.

¹ *Kingman v. Holmquist*, 36 Kan. 735.

§ 168. *Sales of indefinite quantities.*

A contract to sell and deliver about a certain number of tons, bushels, or feet of a particular commodity allows a margin in performance for a reasonable excess or deficit of the stated quantity.¹ The use of the word "about" in such a sale means not far from the stated quantity.² When the words "more or less" or their equivalent are used in good faith in contracts and conveyances they qualify the quantity with which they are associated so that neither party can gain or lose by the surplus or deficiency;³ that is, provided the discrepancy is not too great. The variation from the quantity named must be unimportant in comparison. The use of the words "about" or "more or less" in a contract for a sale of grain will not enable the seller to force upon the buyer a very great excess over the stated quantity; the buyer, for example, of "about" three hundred quarters of rye cannot be compelled to take three hundred and fifty quarters.⁴ Again, a tender of one hundred and seventy-eight beasts in fulfilling a contract to deliver two hundred and sixty-two head of cattle more or less is not a good offer of performance.⁵ A deficiency of seven thousand feet in a contract for the sale of twenty-three thousand feet of lumber is too large to be covered by the phrase "more or less";⁶ and an excess of nineteen thousand two hundred feet of logs upon an agreement to deliver rafts of pine logs containing three hundred and fifty

¹ *Salmon v. Boykin*, 66 Md. 541.

² *Indianapolis Cabinet Co. v. Herrman*, 7 Ind. App. 462.

³ *Jones v. Plater*, 2 Gill, 125.

⁴ *Cross v. Eglin*, 2 Barn & Adol. 106.

⁵ *Tilden v. Rosenthal*, 41 Ill. 385.

⁶ *Creighton v. Comstock*, 27 Ohio St. 548.

thousand to four hundred thousand feet more or less is too much.¹ One who has contracted to cut and take away about two and three quarters millions feet more or less of dead and fallen timber upon a certain tract of land can be neither compelled nor permitted to cut and remove from the designated tract seventeen millions of feet.² An agreement of a purchaser to accept from the seller from two to six tons of the commodity purchased is an agreement to accept any number of tons between two and six that the seller tenders in performance.³

¹ *Patterson v. Judd*, 27 Mo. 563.

² *Pine River Logging Co. v. U. S.*, 186 U. S. 279.

³ *Wheeler v. New Brunswick & C. R. R.*, 115 U. S. 29.

CHAPTER XXIII

COMPLETING SALES

§§ 169–175

§ 169. *Delivery.*

A sale of chattels or goods is completed by an actual or a symbolical delivery of the thing sold.¹ The word “delivery” is used in law books in two different senses. It is often used to denote the change in possession of a chattel transferred and sometimes to denote a change of ownership of the chattel which may take place without a change of possession. It usually means a change of possession but often a change of title.² The delivery of a chattel has, of necessity, three features, viz. a chattel to be delivered, a person to deliver it, and a person to receive the delivery.³ Both payment and delivery must concur to transfer the ownership and complete the sale of property sold for cash on delivery.⁴ The delivery of goods sold is an overt dealing with them by the seller which puts them in a possession adverse to him.⁵ There are two kinds of delivery; an actual delivery and an implied, constructive, or symbolical

¹ *Stephens v. Gifford*, 137 Pa. St. 219.

² *Bloyd v. Pollock*, 27 W. Va. 75.

³ *Wahpeton Nat. Bank v. Hanberg*, 10 N. Dak. 383.

⁴ *Masoner v. Bell*, 20 Okla. 618.

⁵ *Smith v. Edwards*, 156 Mass. 221.

delivery.¹ An actual delivery needs no explanation; it is, of course, an absolute surrender by the seller and a taking by the buyer of possession of the property sold. An implied or constructive delivery of property sold is such a delivery short of an actual one as the nature of the case permits.² If property is so situated that the buyer can take possession of it at his will and pleasure and has a right to do so, it is constructively delivered.³

§ 170. *The requisites of a delivery.*

No particular act or formal ceremony is necessary to make a legal delivery of property sold. Any act done with the intention to transfer the ownership and which changes the dominion over the property from seller to buyer is a delivery.⁴ What will constitute a delivery of personal property sold depends upon the character of the property and the circumstances of the particular transaction.⁵ The nature and situation of the property determines what will constitute a delivery of it, and actual removal of it from the place where it lies is never essential.⁶ This is especially the case when the subject of the sale is a large quantity of bulky and ponderous articles lying apart by themselves and easily identifiable.⁷ The constructive or symbolical delivery of ponderous or bulky goods is equally as effective as an actual delivery to pass the title.⁸ If the situation

¹ Cowgill v. Ford, 2 Houst. (Del.) 164.

² Shindler v. Houston, 1 Denio, 48.

³ Williams v. Lerch, 56 Cal. 330.

⁴ Dodge v. Jones, 7 Mont. 121; Cady v. Zimmerman, 20 *id.* 225.

⁵ Williams v. Lerch, *supra*.

⁶ Little Rock & Ft. S. R. R. v. Page, 35 Ark. 304.

⁷ Calkins v. Lockwood, 17 Conn. 154; Jewett v. Warren, 12 Mass. 360.

⁸ Houdlette v. Tallman, 14 Me. 400; Hall v. Richardson, 16 Md. 396.

and character of personal property is such that it is incapable of an actual delivery at the time it is sold it may be delivered symbolically and a bill of sale or some other evidence of transfer of it will effectually pass title to the purchaser.¹ Thus, the contents of a warehouse, trunk, chest, or other receptacle are constructively delivered by handing over the keys.² One who buys at auction a wagon may be held for the price when the wagon is pointed out at the time it is put up for sale, and he is told when he bids it off that he can take it away, although he does not take possession of or remove it.³

§ 171. *The sale and delivery of live-stock.*

If upon a sale of neat cattle the seller in the presence of a witness points out to the buyer the animals sold, saying at the same time, "I deliver you this stock free of all incumbrance," and receives the purchase price, the sale is complete, there is a good delivery, and a transfer of title.⁴ If a definite number less than an entire herd, flock, or drove of animals are sold, the particular beasts that the buyer is to have must be sorted out and separated from the rest of their kind before the title will pass to the buyer.⁵ It is obvious that the so-called "American" doctrine cannot apply to live-stock, since no two animals are precisely alike. A sale of five hundred head of cattle out of a herd running at large on the seller's range passes no title until the

Gibson v. Stevens, 8 How. U. S. 384.

² Ellis v. Secor, 31 Mich. 185; Jones v. Brown, 34 N. H. 445; Westerlo v. De Witt, 36 N. Y. 341; Thomas's Admr. v. Lewis, 89 Va. 1.

³ Beller v. Block, 19 Ark. 566.

⁴ Goodwin v. Goodwin, 90 Me. 23.

⁵ Stafford v. Anders, 8 Fla. 34.

beasts are rounded up, picked out, and corralled apart, or marked in some way to identify them from the rest of the herd;¹ but when the animals have been selected and marked with the purchaser's own brand the title to them passes, although afterwards they are allowed to return with the herd to the range to graze.² On a sale of lambs, a part of a flock, the ownership passes to the buyer when the particular animals are selected, paid for, and marked with his brand.³ One buying at a stated price the head an uncounted flock of sheep less three particular animals kept out and especially identified, who pays a part of the price and agrees to return on a future day and pay the balance and take away the animals, at once becomes the owner of the sheep and their fleeces, and if the seller afterwards shears them and takes the wool, he must make its value good to the purchaser.⁴ On the sale of a large flock of sheep estimated at a certain number of animals where it is found when they come to be delivered that several are missing, having strayed away, the delivery and acceptance of the rest of the flock and the search for those astray carries title to the missing animals.⁵ When there is a sale of live-stock which the seller is to deliver on a future day and keep and feed in the meantime at a price calculated upon the weight of the animals at the time of delivery the contract is executory and does not transfer title.⁶ If cattle are sold by weight under an agree-

¹ *McLaughlin v. Piatti*, 27 Cal. 451.

² *Walden v. Murdock*, 23 Cal. 540.

³ *Cady v. Zimmerman*, 20 Mont. 225.

⁴ *Groat v. Gile*, 51 N. Y. 431.

⁵ *Kinney v. First Nat. Bank*, 10 Wyo. 115.

⁶ *Restad V. Engemoen*, 65 Minn. 148.

ment to weigh them at a certain place and on specified scales no title passes until the animals are weighed at that place and on those scales.¹ Title to beeves bought does not pass to the buyer so as to subject them to his debts when they are sold under an agreement that he is to slaughter them and pay a price computed according to the weight of the quarters of dressed meat until the animals are killed and dressed.² The title of a cow sold by live weight to be paid for when taken away passes to the buyer when the beast is selected from kine in the pasture and roped by the buyer to a tree in an adjoining field, although the buyer with the seller's consent leaves her for a time purposing to return, slaughter her, and pay for the dressed meat.³

§ 172. *Delivery of warehouse receipts.*

Transferring a warehouse receipt is a common and well understood method of delivering personal property stored in a warehouse.⁴ The delivery of a warehouse receipt is a good symbolical or constructive delivery of the property it describes.⁵ An offer to transfer warehouse receipts for five thousand bushels of grain sold is a good offer to deliver the grain if no specific objection is made to that method of delivery.⁶ The title passes to the purchaser by the sale at a stated price the bushel of a definite number of bushels

¹ Nesbit *v.* Burry, 25 Pa. St. 208.

² Ward *v.* Shaw, 7 Wend. 404.

³ Riley *v.* Du Bois, 14 Ill. App. 236.

⁴ Shepard *v.* King, 96 Ga. 81; Broadwell *v.* Howard, 77 Ill. 305.

⁵ Newcomb *v.* Cabell, 10 Bush, 460; Nat. Exch. Bank *v.* Wilder, 34 Minn. 149; Collins *v.* Wayne Lumber Co., 128 Mo. 451.

⁶ McPherson *v.* Gale, 40 Ill. 368.

of corn lying in the seller's cribs and warehouse by the giving of a receipted bill for the purchase and a warehouseman's certificate for delivering the corn at stated dates to a carrier free on board.¹ It seems to be tacitly admitted that the delivery of a warehouse receipt representing, for instance, a certain number of bushels of wheat, a part of a great quantity in a grain elevator, operates as a constructive delivery and transfer of title to the wheat for which it stands. Be that as it may, it has been decided that where there is a sale of a part of a commodity stored in bulk in a warehouse, the units of which do not run uniform, the transfer of a warehouse receipt for a certain number of those units not particularly described will not, standing alone, operate to transfer title. For example, a warehouse receipt simply for a certain number of bales of cotton without particularizing when there are a much greater number of bales in the warehouse all differing in weight, size, and the quality of cotton in them, does not of itself when transferred pass title to the cotton sold.²

§ 173. *Delivery to common carriers.*

A delivery to a carrier designated by the purchaser of the property sold is a delivery to the buyer,³ and if a buyer of property directs the seller to ship it to him by a common carrier generally, a delivery to any common carrier completes the sale.⁴ The delivery to a common carrier of property sold to be delivered to the buyer is a delivery

¹ *Barker v. Bushnell*, 75 Ill. 220.

² *Pierson v. Metropolitan Bank*, 106 La. 298.

³ *Templeton v. Equitable M'fg. Co.*, 79 Ark. 456.

⁴ *Schaff v. Meyer*, 133 Mo. 428.

to the buyer and passes the title subject to the seller's right in a proper case of stoppage while it is in transit.¹ The seller of property who ships it to the purchaser by a carrier has a right if the purchaser becomes bankrupt or insolvent to stop delivery and have it returned to him any time before it goes into the buyer's possession. This right is called the right of stoppage *in transitu*. It was first recognized and enforced in England in 1690 in the case of *Wiseman v. Vandeputt*, 2. Vern. 203 and in a court of equity.² If the seller of property engages to deliver it to the buyer at a place distant from where the sale takes place, the carrier to which he intrusts its transportation is his agent to make the delivery and not the buyer's agent to receive the property.³ And this is the case also when upon the sale the seller is to deliver the property and nothing is said about the mode of delivery.⁴ If the title to property sold passes according to the contract of sale from seller to buyer when it is delivered to a common carrier for transportation and the property is lost in transit, the loss falls upon the buyer; but if the agreement is that the property is to be delivered to the buyer at the end of the journey so that the title is not to pass until the consignment reaches the consignee, then a loss occurring before that falls upon the seller.⁵ That is, loss as usual follows title. When a seller of property undertakes to deliver it "f.o.b." cars at a place of shipment his engagement is to put it

¹ *Kelsea v. Ramsey & G. M'fg. Co.*, 55 N. J. L. 320; *State v. Cairns*, 64 Kan. 782; *Neimeyer Lum. Co. v. Burlington & M. R. R.*, 54 Neb. 321.

² *O'Brien v. Norris*, 16 Md. 122.

³ *Templeton v. Equitable M'fg. Co.*, *supra*.

⁴ *Pierson v. Crooks*, 115 N. Y. 539.

⁵ *Main v. Jarrett*, 83 Ark. 426.

free on board; that is, deliver it to the carrier at the designated point without any expense to or assistance from the buyer.¹

§ 174. *Effect of buyer's accepting the property.*

If there is neither fraud nor a warranty in selling property the buyer who receives and retains the property sold is deemed to have waived his right to object.² When wheat of a specified grade and quality is sold and the buyer after inspecting, or a fair opportunity to inspect, accepts wheat tendered by the seller in performance of the contract, he is precluded from denying that the contract is satisfied.³ The delivery and acceptance of a part of a commodity sold does not end the contract, unless both parties so agree. It does not entitle the buyer to refuse to take any more,⁴ nor, of course, the seller to refuse to deliver the rest. The buyer who accepts goods or chattels purchased by him long after the time stipulated for delivering them waives any right to rescind the sale and any defense to the payment of the price, but, it is held in several jurisdictions, he retains his right to recover from the seller any damages he has sustained by the failure to deliver his purchase on time.⁵ Thus, when a contract of sale of oranges requires as one of its essential elements that the fruit be shipped before a stated date, the acceptance by the purchaser of a shipment made after the stipulated time is no waiver of his

¹ *Vogt v. Shienebeck*, 100 N. W. Rep. 820.

² *Miller v. Tiffany*, 1 Wall. 298.

³ *Jones v. McEwan*, 91 Ky. 373.

⁴ *Moore v. U. S.*, 196 U. S. 157.

⁵ *Johnson v. No. Balto. Bottle Glass Co.*, 7 L. R. A. (N. S.) 1114; *Crocker-Wheeler Co. v. Varick Realty Co.*, 104 App. Div. 568.

right to damages due to the delay.¹ This rule is not adopted everywhere. Some courts hold that the acceptance of purchased property unduly delayed in delivery must be deemed a complete satisfaction of the contract of sale and an extinction of all claims for damages. Others hold that such acceptance is presumptive evidence of a waiver of claims for damages from delay but that the buyer may rebut the presumption by stronger controverting proof. Goods sold and delivered must be paid for by one who intelligently accepts and uses them even though he did not order them; ² but no one can be compelled against his will to buy property, and no trick or conspiracy of a seller with another's agent to put property into the other's possession will make a sale of it to the principal.³

§ 175. *Remedy when buyer refuses to accept the property.*

The buyer of a particular article cannot be compelled to take another in its place even though the offered article is just like the one sold.⁴ In New York, and some other states, one who sells personal property which the buyer refuses to take has his choice of three courses: (1) He may keep or store the property subject to call by the purchaser and sue the buyer for the entire purchase price; or, (2) he may sell the property over again and recover from the first purchaser the difference between the new and the old price; or, (3) he may keep the property for himself and sue the purchaser for the difference between its value

¹ Redlands Orange Growers' Asso. v. Gorman, 161 Mo. 203.

² Cincinnati S. L. Gas Illum. Co. v. West. S. L. Co., 152 U. S. 200.

³ Schutz v. Jordan, 141 U. S. 213.

⁴ Columbian Iron W'ks & Dry Dock Co. v. Douglas, 84 Md. 44.

and the price the purchaser agreed to pay for it.¹ In Maine, an action for the price of goods sold which the buyer has refused to take when tendered cannot be maintained. The seller's remedy in that state is limited to a suit for damages for the breach of the contract of sale.² This appears to be the rule in the state of Minnesota as well.³

¹ *Moore v. Potter*, 155 N. Y. 481; *Ackerman v. Rubens*, 167 *id.* 405.

² *Greenleaf v. Gallagher*, 93 Me. 549.

³ *McCormick Harvest. Mach. Co. v. Balfany*, 78 Minn. 370.

CHAPTER XXIV

WARRANTY

§§ 176-184

§ 176. *Express and implied warranties in sales.*

A warranty in a sale of personal property is a contract by the seller that the article sold is what he states and represents it to be in respect of its quality and condition.¹ It is always a representation although every representation is not a warranty.² No particular form of words is necessary in order to make a warranty.³ Any assertion by the seller concerning the quality of the subject of the sale which induces the buyer to purchase and on which he relies in buying will amount to a warranty.⁴ These are express warranties, but the law also recognizes certain implied ones. For example, the offer of personal property for sale by one in possession of it is an implied warranty of title.⁵ If an article sold is expressly warranted in some respects, no warranty in other respects may be implied.⁶ If goods are

¹ *Pemberton v. Dean*, 88 Minn. 60.

² *Matteson v. Rice*, 116 Wis. 328.

³ *Buckman v. Haney*, 11 Ark. 339.

⁴ *Smith v. Holbrook*, 1 Buff. Super. Ct. (Sheld.) 474.

⁵ *Boyd v. Bopst.*, 2 Dall. 91; *Otis v. Cullom*, 92 U. S. 447.

⁶ *Reeves v. Byers*, 155 Ind. 535.

purchased for a particular purpose of which the seller is aware and the buyer has no opportunity to inspect them before delivery, there is an implied warranty by the seller that they are reasonably fit for that purpose.¹ If one applies to a manufacturer to buy an article made by him and tells him the use for which he wants it and relies upon the seller's judgment to furnish him such an article as will answer his purpose, the seller by implication warrants the article he sells to be suitable and reasonably fit for the use to which the buyer intends to put it. This principle has been applied to the sale of a corn-cutter,² a potato digger,³ a threshing machine,⁴ a feeder for a threshing machine,⁵ a harvester,⁶ and binders.⁷ But although a purchaser may desire an article for a particular purpose and go to a dealer to buy it and ask for an article supposed to have been made for such a purpose by its particular and distinctive name without telling the dealer for what he wants it for, no warranty that it is fit for the desired use is implied.⁸ And this is so even if the dealer guesses the purpose for which the buyer intends to use the article.⁹ Of course, if the seller is wholly ignorant of the buyer's purpose in purchasing, he cannot be held impliedly to warrant the thing

¹ *Dushane v. Benedict*, 120 U. S. 630.

² *Alpha Checkrower Co. v. Bradley*, 105 Iowa, 537.

³ *Hallock v. Cutler*, 71 Ill. App. 471.

⁴ *Parsons Band Cutter & Self-Feed. Co. v. Mallinger*, 122 Iowa, 703.

⁵ *Ferguson Impl. Co. v. Parmer*, 128 Mo. App. 300.

⁶ *Aultman v. Hunter*, 82 Mo. App. 632.

⁷ *Creasy v. Gray*, 88 Mo. App. 454; *D. M. Osborne & Co. v. Walley*, 8 Pa. Super. Ct. 193.

⁸ *Davis Calyx Drill Co. v. Mallory*, 137 Fed. Rep. 332; *Morris v. Bradley Fertilizer Co.*, 64 Fed. Rep. 55.

⁹ *Grand Ave. Hotel Co. v. Wharton*, 79 Fed. Rep. 43.

sold to be fit for its intended use.¹ It has been decided in Indiana that a sale for a sound price is not an implied warranty of soundness,² while in South Carolina on the contrary it has been held that a sound price calls for a sound property.³ In the last case there was a sale of corn at the market price for sound corn, and a warranty of soundness was implied. The conflict between these cases is not so irreconcilable as it appears. The two courts have in mind different classes of property, — property which has an established fixed general market value at the time and place of sale, and property which has none or a variable and uncertain market value. For examples, if the best and highest grade of wheat is selling in the open market at a certain definite price the bushel, a sale of wheat at that price, nothing more being said, may very well imply a warranty that it is of the best and highest grade; but if farm horses bring from ninety to a hundred and fifty dollars apiece, the sale of any particular horse at the top figure does not necessarily imply that it is free from faults or defects.

§ 177. *Seed and nursery stock.*

There are express and implied warranties upon sales of seed and nursery stock. A nurseryman, for example, who sells peach trees and represents that they will bear large white bright peaches, readily sold, warrants that they will produce such fruit and is liable for a breach of the warranty

¹ *McCray Refrigerator Co. v. Woods*, 99 Mich. 269; *Mark v. Williams Cooperage Co.*, 204 Mo. 242; *Rollins Engine Co. v. East. Forge Co.*, 73 N. H. 92.

² *Court v. Snyder*, 2 Ind. App. 440.

³ *Bulwinkle v. Cramer*, 27 S. C. 376.

if the trees bear inferior and worthless peaches.¹ A person advertising seed rice for sale and who represents to a customer that the rice he sells him is good seed warrants it to be such and is liable in damages if it does not sprout when planted properly in due season.² The principle that the producer of an article who sells it to a person applying to him for such an article as will serve the applicant's intended purpose impliedly warrants it to be reasonably fit for that purpose has been applied to sales of seed wheat³ and millet seed.⁴ When a market gardener applies to a dealer for seed to produce the earliest possible crop of pease and is sold seed which the seller guarantees to "pick four or five days earlier than any other seed on the market," there is a warranty implied that such seed will produce an early and ample crop of its kind.⁵ If a nurseryman who is applied to for trees of a certain sort to be set out in an orchard delivers trees of a different sort which are set out and cultivated until it is certain they are not the kind for which the purchaser called, he is liable in damages for a breach of the implied warranty.⁶ When a shop-keeper delivers wild mustard seed to a customer who asks for rape seed and does not know the difference, he is liable for a breach of warranty whether or not he himself knew what the seed was.⁷ A farmer who applies to a seed dealer or grower to buy seed productive of a particular variety of

¹ *Long v. Pruyn*, 128 Mich. 57.

² *Reiger v. Worth*, 130 N. C. 268.

³ *Prentice v. Fargo*, 53 App. Div. 608.

⁴ *Moore v. Koger*, 113 Mo. App. 423.

⁵ *Landreth v. Wyckoff*, 67 App. Div. 145.

⁶ *Shearer v. Park Nursery Co.*, 103 Cal. 415.

⁷ *Hoffman v. Dixon*, 105 Wis. 315.

plant-life is entitled to receive precisely that and no other for which he calls; and as he cannot tell by inspection or examination or any available test whether the seed delivered is of the special sort he purchased and will germinate, the seller is held to warranty by implication both the genuineness and reasonable fertility of what he delivers. Thus a purchase of a variety of cabbage seed designated as "Van Wyck's flat Dutch, raised at New Lots, L. I.," entitles the buyer who has been given seed in likeness to it which totally fails to yield cabbages to damages from the seller for a breach of warranty.¹ And a farmer who bought of the growers "Bristol" cabbage seed and was given impure seed that produced chiefly cabbages of no value except as food for cattle was held to be entitled to damages from the sellers on the same ground.² He who sells seed bought with the express understanding that it is to be sown for the purpose of raising a crop impliedly warrants it to be suitable for that purpose.³ But one who merely fills a buyer's order for a certain kind of seed by supplying that kind does not warrant it to be fit for the buyer's purpose.⁴ If seed sold is not the kind and quality the seller warranted it to be, and the buyer discovers it before he plants it, he may keep it and recover as damages the difference between its market value and the price he paid for the seed he bought, if the price was higher; but if he does not discover it until he has planted and raised a crop from it, then his damages are the difference in the values of the crop he got and the crop which would have been produced by the seed

¹ *Van Wyck v. Allen*, 69 N. Y. 61.

² *White v. Miller*, 71 N. Y. 118.

³ *Shaw v. Smith*, 45 Kan. 334.

⁴ *Gardner v. Winter*, 117 Ky. 382.

he bought.¹ A seed dealer who has sold seed with an express or implied warranty cannot escape liability upon a breach of the warranty by printing a disclaimer of any and all warranties upon the invoice sent with the seed when it is delivered.² This is only an application of the principle that one party cannot change a contract without the other's consent.

§ 178. *Grain, fruit, and vegetables.*

An offer of a certain price the bushel for corn, "provided it is good salable corn" accepted "for one carload of corn," raises by implication a warranty by the seller that the corn is good and salable.³ There is an implied warranty upon a sale of fruit not yet grown that the fruit shall be sound and merchantable.⁴ A sale of a quantity of "good" potatoes implies a warranty that those delivered will be of fair merchantable quality and free from latent defects.⁵ One who buys a carload of corn after inspecting it may still recover of the seller damages for a breach of warranty if it turns out that the corn was falsely packed so as to display sound corn on the surface and conceal musty corn underneath.⁶ One who sells potatoes to a retail grocer and warrants them good is charged with notice that the potatoes he delivers will doubtless be mingled with others and consequently if he delivers decaying ones that infect others on hand and added, he will be liable to the grocer for all the

¹ *Dunn v. Bushnell*, 93 Am. St. Rep. 474.

² *Landreth v. Wyckoff*, *supra*.

³ *Holloway v. Jacoby*, 120 Pa. St. 583.

⁴ *Blackwood v. Cutting Packing Co.*, 76 Cal. 212.

⁵ *Nor. Supply Co. v. Wangard*, 123 Wis. 1.

⁶ *Miller v. Moore*, 83 Ga. 684.

resulting damages.¹ A buyer of perishable fruit who accepts a draft for the price of it before it is delivered and inspected and finds when he examines it that it is not as it was warranted to be and then gives immediate notice to the consignor of his refusal to take it at the price charged is entitled after waiting a reasonable time for instructions and getting none to sell the fruit for the seller's account and hold him for the loss.²

§ 179. *Food for man.*

It is a general rule that in a sale of goods for human food there is an implied warranty that the articles are wholesome.³ The seller of provisions for domestic use is bound at his peril, the New York Supreme Court has declared, to know that they are sound and wholesome, adding emphatically that the principle is not only salutary but necessary to preserve health and life.⁴ Thus, it has been decided in that state that one who sells a heifer, knowing that it is diseased and unfit for human food, and knowing also that it is bought to kill and sell for meat, is liable for the resulting damage.⁵ In Minnesota, however, it has been held that a farmer who sells a steer to a butcher does not impliedly warrant the meat from the animal to be fit for domestic consumption.⁶ In that case the beast had "lumpy jaw," and both parties noticed a lump on its jaw when bargaining. The seller, too, knew that the beast was

¹ *Nor. Supply Co. v. Wangard, supra.*

² *Hitchcock v. Griffin & S. Co., 99 Mich. 447.*

³ *Nat. Cotton Oil Co. v. Young, 74 Ark. 144.*

⁴ *Van Bracklin v. Fonda, 12 Johns. 468.*

⁵ *Divine v. McCormick, 50 Barb. 116.*

⁶ *Hanson v. Hartse, 70 Minn. 282.*

intended by the buyer to be killed and sold as meat to customers. In Massachusetts, also, it has been held that no warranty is implied that a domestic animal killed and sold by a farmer who is not a regular dealer in meats is fit for food.¹ In that state the broad proposition has been laid down that a sale of food by one not a dealer carries no implied warranty that it is wholesome and fit to be eaten.² In Vermont, too, it has been decided that a farmer who without fraud or misstatement sells by weight to a butcher on the buyer's inspection several hogs, knowing they are to be slaughtered, dressed, and sold for food, is not liable in damages if it turns out that some of the animals were diseased and not fit for food.³ In that case seven hogs were sold and two of the number proved to be tuberculous. Notwithstanding these decisions, it is sound advice to the farmer to take no chances in selling animals for human food when he knows them to be unfit, even though he makes no misrepresentation to the buyer. He may indeed escape the payment of damages, but he is almost certain to be put to the annoyance and expense of a lawsuit. It is held even in New York that there is no implied warranty of fitness for food when beef cattle are sold by a drover totally ignorant of any defects or unsoundness in any of the beasts.⁴ And a like decision has been made in Tennessee.⁵

§ 180. *Food for animals.*

A somewhat different rule applies in respect of implied warranties upon sales of food for animals. The rule that

¹ Giroux *v.* Stedman, 145 Mass. 439.

² Farrell *v.* Manhattan Market Co., 198 Mass. 271.

³ Warren *v.* Buck, 71 Vt. 44. ⁴ Goldrich *v.* Ryan, 3 E. D. Smith, 324.

⁵ Goad *v.* Johnson, 6 Heisk. 340.

goods sold for human food are impliedly warranted to be wholesome, it has been said, does not apply to sales of food for animals.¹ Hence it has been held, in what is perhaps an extreme case, that a warranty is not implied by a sale of foodstuff for cattle, that it is fit for cattle food, nor even that its constituents are not deleterious to cattle.² And yet if a farmer sells oats to be fed to the buyer's horses to a purchaser who has no opportunity to see or inspect the grain before delivery, there is an implied warranty that the oats are fit for horses to eat.³ It is apparently safer in Massachusetts to sell diseased animals for human consumption than it is to sell unwholesome food for live-stock. It has been decided in that commonwealth that if a person who has accidentally spilt white-lead upon hay and diligently tried to remove all of it that was damaged and, believing he has succeeded, sells the rest of it, he takes the risk of its being good and if the buyer's stock are fed with the hay and die of white-lead poisoning, the seller is answerable in damages.⁴ A commodity labeled and offered for sale as a nostrum to fatten and improve stock and poultry, although not intended as a regular food is yet covered by a statute enacted as a pure food regulation relating to domestic animals.⁵

§ 181. *Horses and other animals.*

An oral warranty of horses made at the time the price is agreed upon but before the bill of sale is delivered and the

¹ Nat. Cotton Oil Co. v. Young, *supra*.

² *Ibid.* Luken v. Freund, 27 Kan. 664.

³ Coyle v. Baum, 3 Okla. 695. ⁴ French v. Vining, 102 Mass. 132.

⁵ Pratt Food Co. v. Bird, 148 Mich. 631.

sale is complete binds the seller.¹ Thus, if one selling a horse merely says to the buyer before the bargain is struck, "this horse is sound," he warrants the animal to be sound.² A binding warranty may be made after part of the price has been paid and before the thing sold has been delivered;³ but after a horse has been actually sold and delivered, a statement by the seller to the buyer that the animal is sound is no warranty.⁴ A representation on selling a horse that it is sound and kind in single and double harness is no warranty that the animal will not take fright at a trolley car.⁵ One who sells a horse which he knows is unsound and represents it as sound and so misleads a purchaser unable by ordinary observation to perceive the brute's defects is guilty of a fraud that nullifies the sale.⁶ A warranty that a horse sold is sound is not broken when the animal has a temporary and curable injury which does not render it unfit for immediate use.⁷ A general warranty that a horse is sound does not cover visible quarter-cracks observed and mentioned by the buyer when purchasing;⁸ nor yet defects in the animal's eyes impairing its vision obvious even to casual observers and which, in fact, the buyer notices.⁹ This is equally so if the horse is lame and the buyer notices the lameness.¹⁰

¹ *Hobart v. Young*, 63 Vt. 363.

² *Norton v. Doherty*, 69 Mass. 372.

³ *Douglas v. Moses*, 89 Iowa, 40.

⁴ *Cady v. Walker*, 62 Mich. 157.

⁵ *Meyer v. Krauter*, 56 N. J. L. 696.

⁶ *Whitworth v. Thomas*, 83 Ala. 308.

⁷ *Roberts v. Jenkins*, 21 N. H. 116.

⁸ *Hill v. North*, 34 Vt. 604.

⁹ *Fisher v. Pollard*, 2 Head, 314.

¹⁰ *Huston v. Plato*, 3 Colo. 402.

But if the buyer, seeing the horse to be lame, refuses to buy it without and insists upon a warranty and the seller thereupon expressly warrants the brute, the warranty covers lameness.¹ A general warranty that a horse is sound in every way covers such visible defects as ring-bones which it requires skill and expert knowledge to discover and recognize.² If one selling a lame horse warrants it sound and represents when he knows better that the lameness is merely the result of fatigue and stiffness from exposure to cold and not permanent, his warranty covers the lameness.³ This is also the case when he falsely represents the lameness to be due entirely to a nail in the hoof.⁴ A warranty that a horse is sound will cover obvious and visible defects which the seller artfully and fraudulently conceals from the buyer's notice.⁵ To speak in a sale of swine of the hogs as "hard-fed" is to represent them as corn-fed animals, and, as corn-fed hogs are worth more than hogs fed on other food, a representation that they are "hard-fed" amounts to a warranty.⁶ A general warranty that an animal sold is sound and free from disease makes the seller liable for damages caused when the beast communicates an infectious or contagious disease from which it suffers to other live-stock with which it is placed in the ordinary or usual course of things in ignorance of its condition.⁷

¹ *Brown v. Bigelow*, 10 Allen, 242.

² *Birdseye v. Frost*, 34 Barb. 367.

³ *Chadsey v. Greene*, 24 Conn. 562.

⁴ *Brown v. Weldon*, 27 Mo. App. 260.

⁵ *Kenner v. Harding*, 85 Ill. 264.

⁶ *Bartlett v. Hoppock*, 34 N. Y. 118.

⁷ *Joy v. Bitzer*, 77 Iowa, 73.

§ 182. *Animals sold for breeding purposes.*

There is a difference of opinion among the courts as to whether or not upon the sale of an animal for breeding purposes any warranty is implied as to the brute's fitness to generate progeny. In Indiana it has been decided that a person engaged in the business of stock-raising and of selling animals for breeding purposes and who knows the qualities and capabilities of the beasts he has raised impliedly warrants when he sells a stallion for breeding purposes that the brute is reasonably fit and capable for such purposes.¹ But in Wisconsin it has been decided that stock-raisers who sell a bull although they know the buyer desires it for breeding purposes if they commit no fraud and make no untrue representations do not impliedly warrant the animal as fit and competent to breed from, even if its price was fixed upon the assumption that it was.² In Maine, too, it has been decided that in a contract for a stallion's service no warranty is implied that the animal is free from and will not transmit disease to the colt.³ The buyer, therefore, of an animal for breeding purposes should assure himself by exacting an express warranty. A stallion sold and guaranteed satisfactory for breeding purposes upon an agreement that he may be returned if unsatisfactory, provided he is in as sound and healthy a condition as he was when delivered, may be thrown back on the seller's hands although in the interval it has become more unsound by the development and progress of a disease which existed at the time of sale.⁴

¹ *Merchants & Mech. Bank v. Frazee*, 9 Ind. App. 161.

² *McQuaid v. Ross*, 85 Wis. 492.

³ *Briggs v. Hunton*, 87 Me. 145.

⁴ *Rosenthal v. Rambo*, 3 L. R. A. (N. S.) 678.

§ 183. *Farming implements and machinery.*

There is no implied warranty that a machine ordered by its own proper name and description from the manufacturer will answer the purpose for which the buyer desires it. If a buyer means to protect himself in such a case, he should demand an express warranty.¹ There is, however, an implied warranty by the manufacturer that the article he makes and sells is free from defects arising out of the process of manufacture or the use of unsound and unsuitable materials.² For example, a manufacturer of farming implements who made and put on the market a road roller having a tongue of cross-grained wood with a knot-hole in it which he filled with a soft wood plug and covered up the defects with putty and paint has been held liable in damages to a farmer who bought the roller from a retail dealer and was injured by the breaking of the tongue in the ordinary use of the machine.³ There is an implied warranty by one who sells a windmill to be erected upon a site pointed out by the buyer at the time of the purchase that the mill will work well in the designated place.⁴

§ 184. *Buyer's rights and remedies.*

The buyer of personal property not grown or manufactured by the seller and not expressly warranted who has ample opportunity to inspect his purchase and is not deceived by fraudulent conduct or misrepresentations must look out for himself. If the property proves defective, it

¹ *Seitz v. Brewers' Refrig. Mach. Co.*, 141 U. S. 510.

² *Bierman v. City Mills Co.*, 151 N. Y. 482.

³ *Kuelling v. Roderick Lean Mfg. Co.*, 2 L. R. A. (N. S.) 303.

⁴ *McClamrock v. Flint*, 101 Ind. 278.

is his loss, and he has no remedy.¹ Although a buyer examines his purchase and relies on his own judgment, he may still exact an express warranty and may rescind the purchase if it is broken.² A buyer may accept, use, and pay for a defective machine sold under an express warranty and still recover damages for a breach of the contract of sale.³ If one buys a harvesting machine on condition that he can return it if it does not work to his satisfaction, he has an absolute right if he so chooses to throw it back on the seller's hands without giving any reason.⁴ The buyer of a farming implement sold with a warranty may return it to the seller when it proves to be materially different from what it was warranted and unable to answer the ends it was warranted to serve.⁵ And he may do so, it has been held, notwithstanding he gave a note for the price containing a statement that "no promise or contract outside of this note will be recognized."⁶ If an article sold is warranted and the warranty is broken, the buyer may either offset his damages when sued for the price or bring his own action for damages against the seller,⁷ and he need not return or tender back the property beforehand.⁸ The buyer of an article expressly warranted when there is a breach of the warranty has his choice of three courses: (1) he may either refuse to receive the article

¹ *Kircher v. Conrad*, 9 Mont. 191.

² *Smith v. Hale*, 158 Mass. 178.

³ *Benjamin v. Hillard*, 23 How. U. S. 149.

⁴ *Osborne v. Francis*, 38 W. Va. 312.

⁵ *Gale Sulky Harrow M'fg Co. v. Stark*, 45 Kan. 606.

⁶ *Ibid.*

⁷ *Lyon v. Bertram*, 20 How. U. S. 149.

⁸ *Smeltzer v. White*, 92 U. S. 390.

when offered, or, if it has been delivered, may return it and rescind the sale; or, (2) he may accept and retain the article and sue for damages for the breach of the warranty; or, (3) he may wait until he is sued for the purchase price and offset or recoup his damages from the breach of the warranty.¹ The purchaser of a horse warranted sound has a right to make a proper and reasonable use of the animal before rejecting and returning it as unsound without affecting his right to recover back the purchase price he paid for the beast; but he has no right to injure the brute by willfully or negligently overworking or overdriving it, and if he does so, he cannot recover.² If a farmer buys a farming implement — a harvester, corn-husker and shredder, or a threshing machine — under a contract to notify the seller if it fails to work within a stated time in order to be relieved from paying the price, he does not become liable by neglect to give the notice if the limited time is consumed by the seller's agents and servants in unsuccessful efforts to make the implement work.³ One who buys a harvester on trial with the right to return it if unsatisfactory, and who, finding it does not answer, notifies the seller that he will not keep it and offers to return it, does not make himself liable for the price by consenting to try it again upon the seller's promise to put it in good order and repair fit for use.⁴ This will be otherwise if the buyer, after rejecting the machine on the first trial when the contract stipulated that the seller should be allowed to

¹ *Underwood v. Wolf*, 131 Ill. 425.

² *McKnight v. Nichols*, 147 Pa. St. 158.

³ *Baker v. Nichols & S. Co.*, 10 Okla. 692; *First Nat. Bank, v. Dutcher*, 1 L. R. A. (N. S.) 142; *Champion Mach. Co. v. Mann*, 42 Kan. 372.

⁴ *Walter A. Wood Mowing, etc., Co. v. Calvert*, 89 Wis. 640.

remedy any defects, went right on using it,¹ because the voluntary use of a purchased article, after it is found not to answer, when done without promise, request, or inducement from the seller, amounts to accepting it.² One who buys for breeding purposes a stallion which proves incapable and unfit and who gives prompt notice and offers to return the animal to the seller does not by consenting at the seller's request to keep the brute and try him another season waive his right to rescind the sale and recover damages by not making a second tender back of the animal before it dies on his hands during the trial season.³

¹ *Aultman v. Therier*, 34 Iowa, 272.

² *Fox v. Wilkinson*, 14 L. R. A. (N. S.) 1107.

³ *Merch'ts. & M. Bank v. Frazee*, *supra*.

CHAPTER XXV

FACTORS OR COMMISSION MERCHANTS

§§ 185-194

§ 185. *The commission merchant as the law knows him.*

A person to whom goods are consigned to sell for the consignor's account is known to the law as a factor.¹ He is an agent given the possession of his principal's property with authority to sell it and receive payment.² One who carries on business for himself and is employed by another to sell personal property put in his possession or control and to collect and account for the price is called a factor.³ The factor is often called a commission merchant.⁴ Both names mean the same thing.⁵ A factor or commission merchant is an agent who has the actual or constructive possession of the property he is employed to sell. Thus, he may have the goods in his own warehouse, or he may hold a bill of lading from a carrier, or a warehouse receipt from a warehouseman, representing and entitling the holder to the delivery of the property. In either case he is *prima facie* the owner in respect of those to whom he

¹ *Butler v. Dorman*, 68 Mo. 298.

² *Ibid.*

³ *Howland v. Woodruff*, 60 N. Y. 73; *Rabenau's case*, 118 Fed. R. 471.

⁴ *Spears v. Loague*, 46 Tenn. 420; *Duguid v. Edwards*, 50 Barb. 288.

⁵ *Thompson v. Woodruff*, 47 Tenn. 401.

makes sales.¹ One who is employed to sell another's property and not put in possession of it is a broker, not a factor.² A broker does not have possession of the property he is employed to sell.³ The distinction between factors and brokers has long been settled — the former have and the latter have not possession of the property they are authorized to sell; and factors, too, are empowered to collect payment, while brokers usually have no such authority.⁴ A consignee of property for sale differs also from an ordinary bailee mainly in being clothed with authority to sell the property bailed to him in the ordinary course of business.⁵

§ 186. *Powers of factors.*

Unless hampered by instructions, a factor may sell the goods consigned to him at his discretion in the usual course of trade without consulting his principal.⁶ He may sell the property in his own name.⁷ And he may sell on credit unless directed not to do so.⁸ If the purchaser is apparently responsible and the factor acts in good faith, he may accept a note for the price.⁹ The weight of authority is to the effect that a factor or commission merchant, unless he is expressly instructed to the contrary, has the

¹ *Robinson v. Corsicana Cotton Factory*, 124 Ky. 435.

² *Ibid.*

³ *Butler v. Dorman*, *supra*.

⁴ *Ibid.*

⁵ *Romeo v. Martucci*, 72 Conn. 504.

⁶ *Butterfield v. Stephens*, 59 Iowa, 596.

⁷ *Delafield v. Smith*, 101 Wis. 664.

⁸ *Edgerton v. Michels*, 66 *id.* 124; *Laussatt v. Lippincott*, 6 Serg. & R. 386.

⁹ *Greely v. Bartlett*, 1 Me. 178; *Goodenow v. Tyler*, 7 Mass. 36.

implied power to sell his principal's goods on a reasonable credit provided he is prudent and careful about the buyer's responsibility and diligent in collecting the price.¹ But a factor who sells his principal's goods on credit has no authority afterwards to extend the purchaser's time to pay, and if he does, he makes himself personally liable for the debt.² Unrestricted authority to a factor to sell gives him authority to warrant the property sold.³ A factor has full authority to collect and receive payment for property sold by him. The payment of the purchase price of goods bought of a factor or commission merchant to him is a full discharge of the buyer from all liability to the owner for the price.⁴ In this respect the factor's authority differs from that of a broker, who, as a general rule, has no authority to receive payment for the property he is employed to sell.⁵ And he has authority to deposit his collections in the bank to his own credit. His insolvency and act of bankruptcy even do not terminate his authority to deposit in bank in his own name proceeds of sales of his customer's property.⁶ By the common law a factor has no power unless it is expressly conferred to pledge the property sent him to sell, whether it is in his actual custody or potentially so by bill of lading.⁷ But this rule of

¹ *Walker Co. v. Dubuque Fruit & Produce Co.*, 113 Iowa, 428; *Daylight Burner Co. v. Odlin*, 51 N. H. 59; *Roosevelt v. Dogherty*, 129 Mass. 301; *Joslin v. Cowee*, 52 N. Y. 90.

² *Douglas v. Bernard*, Anth. N. P. 278.

³ *Schuchardt v. Allen*, 1 Wall. 359.

⁴ 12 Am. & Eng. Encyc. of Law (2d Ed.) 628.

⁵ *Higgins v. Moore*, 34 N. Y. 417; *Graham v. Duckwall*, 8 Bush., 12.

⁶ *Interstate Bank v. Claxton*, 97 Tex. 569.

⁷ *Allen v. St. Louis Nat. Bank*, 120 U. S. 20; *Com¹ Bank v. Hurt*, 99 Ala. 130.

the common law has very generally been set aside by statutes in favor of innocent persons who advance money in good faith to factors and other persons upon the security of personal property in their possession as apparent owners.¹

§ 187. *Limitations of factors' authority.*

A factor must sell goods consigned him for sale in the market where he transacts his business generally.² Even if he makes advances to the consignor he does not thereby get a license to reship the goods to another market.³ A factor who ships to another market than his own goods consigned to him to sell makes himself liable for the deficit if they fail to bring as high a price as that ruling in his home market at the time of sale.⁴ As a general rule a factor cannot bind his principal by disposing of the consigned property out of the usual and ordinary course of business.⁵ For instance, a factor has no right to dispose of consigned goods by way of barter.⁶ Merely intrusting an agent with a horse to sell, for example, does not warrant a stranger in supposing him authorized to swap the animal for another horse and boot.⁷ The authority of a factor to warrant the goods of his principal to a buyer is usually limited to their then present condition and quality

¹ *Soltau v. Gerdau*, 119 N. Y. 380; *Macky v. Dillinger*, 73 Pa. St. 85; *Price v. Wisconsin Ins. Co.*, 43 Wis. 267.

² *Wootters v. Kaufman*, 73 Tex. 395; *Marr v. Barrett*, 41 Me. 403.

³ *Phillips v. Scott*, 43 Mo. 86.

⁴ *Weidner v. Olivit*, 108 App. Div. 122.

⁵ *Com¹ Bank v. Heilbronner*, 108 N. Y. 439; *Warner v. Martin*, 11 How. U. S. 209.

⁶ *Guerreiro v. Peile*, 3 Barn & Ald. 616.

⁷ *Kearns v. Nickse*, 80 Conn. 23.

and does not extend to what may happen in the future.¹ The factor's employment is a personal one, he has no right to pass his agency on to another; it has been held that even his death will not authorize the representatives of his estate to dispose of the principal's goods.² This does not preclude the factor from employing such assistants as he needs or desires in his business.

§ 188. *The duty of factors.*

A consignor is entitled to the exercise of all the skill, ability, and industry of his factor in selling the consigned property upon the best obtainable terms. It is the duty of a commission merchant to sell the property intrusted to him for sale for the highest procurable price, but he is only bound to use proper and diligent efforts to get it.³ A commission merchant does his whole duty when he sells the consigned property at the market price in his own market and within a reasonable time.⁴ It is the duty of a factor to keep correct accounts of sales and of the charges to which he is entitled to credit, and to have such accounts open to the inspection of his principals.⁵ It is his duty also to take such care of the goods consigned to him for sale as a reasonably prudent man would take of his own property similarly situated.⁶ The utmost good faith is demanded of an agent in all his transactions with his

¹ *Upton v. Suffolk Co. Mills*, 11 Cush. 586; *Palmer v. Hatch*, 46 Mo. 585.

² *Gage v. Allison*, 1 Brev. 495; *Jackson Ins. Co. v. Partee*, 9 Heisk, 296.

³ *Craig v. Harrison, etc., Milling Co.*, 103 Ill. App. 486.

⁴ *Wynne L. & Co. v. Schnabaum*, 94 S. W. Rep. 50.

⁵ *Armour v. Gaffey*, 30 App. Div. 121.

⁶ *Ives v. Freisinger* (N. J.) 57 Atl. R. 401.

principal in everything relating to the subject of his employment.¹ When goods are consigned to a factor for sale the consignor has a right generally to control the sale according to his pleasure by instructions given at the outset or from time to time afterwards; and the factor, if he has made no advances or incurred no liabilities, is bound to obey the orders.² The factor must obey his principal's instructions and is not allowed to deal with the property as his own.³ If, however, a factor makes advances on a consignment, he acquires a special property in the consigned goods, and has then a right to sell them, at least to whatever extent may be necessary for his re-imbusement, of his own volition and without interference from the consignor.⁴ But if the consignor stands ready and offers to repay the advances and to make good the factor's liabilities, he must still follow his instructions.⁵ Although a factor does make advances and is entitled to sell the goods to re-imburse himself, nevertheless, inasmuch as in these modern days communication is so easy and quick, he is not at liberty to disobey late instructions without notice to his principal and affording the principal an opportunity to make good the outlay.⁶ A factor is not bound to obey instructions contrary to an express contract he made at the beginning.⁷

¹ *Wadsworth v. Adams*, 138 U. S. 380; *Boswell v. Cunningham*, 32 Fla. 277.

² *Brown v. M'Gran*, 14 Pet. 479.

³ *Foerderer v. Tradesmen's Bank*, 107 Fed. R. 219.

⁴ *Brown v. M'Gran*, *supra*.

⁵ *Ibid.*

⁶ *Marfield v. Goodhue*, 3 N. Y. 62; *Walker Co. v. Dubuque Fruit & Produce Co.*, *supra*.

⁷ *Sturtevant Co. v. Cumberland D. & Co.*, 68 Atl. 351.

§ 189. *Factor's liability to consignor.*

If a factor honestly and diligently does his best to get a good price for the property consigned to him to sell, he is not liable to the owner for selling it below the market value.¹ If a factor returns to the consignor in a damaged condition property which he received sound, he is liable for the depreciation in its value unless he can prove that the damage occurred without his fault.² The refusal of a factor to return property delivered to him for sale and not subject to a lien for charges, on the demand of the consignor, amounts to a conversion.³ A conversion may be found from a demand and refusal.⁴ A conversion is the assumption to oneself of the property in and the right of disposing of another's goods.⁵ It is an unauthorized assumption and exercise of the right of ownership over personal property belonging to another to the alteration of its condition or the exclusion of the owner's rights.⁶ Every unauthorized taking of personal property and all intermeddling with it beyond the extent of the authority conferred, in case a limited authority has been given, with intent to interfere with the owner's dominion over it, is a conversion.⁷ A factor who reports sales for less than what he receives, and destroys his books and accounts while his employer is inspecting them, may be held liable

¹ Drum-Flato Com. Co. v. Union Meat Co., 77 S. W. Rep. 634.

² Ives v. Freisinger, *supra*.

³ Anker v. Smith, 87 N. Y. Supp. 479.

⁴ Tome v. Dubois, 6 Wall. 548.

⁵ Lord Holt in Baldwin v. Cole, 6 Mod. Rep. 212; and Lord Ellenborough in M'Combie v. Davies, 6 East. 540.

⁶ Industrial Trust v. Tod, 63 N. E. 285.

⁷ Laverty v. Sneathen, 68 N. Y. 522; Field v. Sibley, 74 App. Div. 81.

for the conversion of the property.¹ A factor who gets possession of consigned property ostensibly to deliver it to a purchaser but really to convert it or the proceeds of it to his own use, no sale having previously been made, steals such property, and can give no title to it to a subsequent purchaser, even an innocent one.² A factor who fails to exercise reasonable care and prudence to sell to a responsible buyer is liable for the loss if a loss follows.³ He is not liable for a loss which results from his refusal to sell the property on credit to a purchaser whose responsibility he doubts, and doubts honestly.⁴ And he is not liable if he is not negligent for loss or damage of his principal's goods while in his custody.⁵ To make a factor liable for not obeying his instructions the orders must be clear and distinct.⁶

§ 190. *Sales by factors to themselves.*

The general interests of justice and the safety of those compelled to repose confidence in others alike demand that courts inflexibly maintain the great and salutary rule that an agent employed to sell cannot make himself the purchaser.⁷ The law prohibits one who sells on account of another from buying at the sale on his own account.⁸ An agent may not without the full knowledge and

¹ *Armour v. Gaffey, supra.*

² *Soltau v. Gerdau, supra.*

³ *West. U. Cold Storage Co. v. Winona Produce Co., 94 Ill. App. 618.*

⁴ *Durant v. Fish, 40 Iowa, 559.*

⁵ 12 *Am. & Eng. Encyc. Law* (2d Ed.) 655.

⁶ *Sturtevant Co. v. Cumberland D. & Co., supra.*

⁷ *Porter v. Woodruff, 36 N. J. Eq. 179.*

⁸ *Marsh v. Whitmore, 21 Wall. 178.*

consent of his principal purchase for his own benefit the property intrusted to him to sell.¹ It is a fundamental rule that an agent employed to sell may not, unless his employer knows and consents to it, be himself a purchaser.² He is not permitted to buy of himself, for himself; not allowed to act both for himself and his principal in the same transaction.³ All the profits gained by an agent out of property purchased by himself which he was employed to sell for another belong to his employer.⁴ The profits made by a commission merchant by re-selling consigned goods which he took himself even at the highest market quotation on a board of trade and exchange on the day he took them belong to his consignor.⁵ A custom or usage among the commission merchants of a particular market to buy produce consigned to them for sale for themselves at the highest figure of the day on the exchange at the close of business if no sale has been effected during the day does not make the transaction lawful.⁶ The principal is not estopped from repudiating the factor's purchase in such a case unless he ratifies it with full knowledge of all the details, including a re-sale at a profit.⁷ And if an agent employed to sell property sells it to his wife, his employer may, if he chooses, repudiate the sale on learning the facts.⁸

¹ Jansen v. Williams, 36 Neb. 869.

² Ruckman v. Bergholz, 37 N. J. L. 440.

³ McNutt v. Dix, 83 Mich. 328.

⁴ Boswell v. Cunningham, *supra*.

⁵ State v. Edwards, 94 Minn. 225.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Tyler v. Sanborn, 128 Ill. 136.

§ 191. *Factor's compensation and lien.*

A factor's services in selling property consigned to him to sell are compensated for commonly by a commission on the sale, called in the law books, "factorage."¹ A factor has a lien upon the property intrusted to him to sell for his compensation and expenses.² The right of a factor to a lien upon the property consigned to him for sale for his commissions and expenses is personal to himself, and does not pass to a third party.³ A factor loses his lien by putting the consigned property in a warehouse and giving the consignor the warehouse receipt.⁴ A factor has no lien upon property which the principal sends or delivers directly to the purchaser and which never comes into the factor's possession.⁵ And a factor is not entitled to a lien upon property the possession of which he acquired in bad faith.⁶ If in any material respect a factor willfully disregards a duty devolving upon him by law by reason of his agency, he is not entitled to his commissions.⁷

§ 192. *Factor's right to re-imburement for advances.*

When a factor makes advances upon goods consigned to him for sale there is an implied agreement by the con-

¹ *State v. Thompson*, 120 Mo. 12; *Ruffner v. Hewitt*, 7 W. Va. 585; *Edgerton v. Michels*, *supra*.

² *Graham v. Duckwall*, *supra*; *Higgins v. Moore*, 34 N. Y. 417; *Kellogg v. Costello*, 93 Wis. 232.

³ *Holly v. Huggford*, 8 Pick. 73; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158.

⁴ *Rowland v. Dolby*, 59 Atl. 666.

⁵ *Warren v. First Nat. Bank*, 149 Ill. 9.

⁶ *People's Bank v. Frick Co.*, 13 Okla. 179.

⁷ *Jansen v. Williams*, *supra*.

signor to re-pay him any deficit in case the goods fail to bring enough to cover the advances.¹ If goods sent a commission merchant for sale do not realize enough to make good his advances, he may recover the deficiency from the consignor.² When goods upon which a factor has made advances are lost in transit he may recover the advances from the consignor.³ A lien for advances made by a factor to, for, or on account of his consignor on the property intrusted to him for sale is implied by law.⁴ For the purposes of such lien the title to commodities delivered to a common carrier, to be forwarded to commission merchants who have made advances on the consignment to sell and repay such advances, passes at once to the consignees upon being delivered to the carrier.⁵ A factor receiving a consignment of fruit to sell, with instructions not to sacrifice it but to put it in cold storage unless it shall bring a stated average price, and who disobeys the instructions because when the fruit arrives it is in such a decayed condition that to save any of it, it is necessary to re-assort it and sell it as quickly as possible, is not precluded by his disobedience of orders from recovering from his consignor the excess of his advances, expenses, and commissions over and above the sum realized by the sale of what fruit was vendible out of the consignment.⁶

¹ *Murphy Co.'s Estate*, 214 Pa. St. 258.

² *Kelley v. Maguire*, 99 Ill. App. 317.

³ *Kufeke v. Kehler*, 19 Fed. R. 198.

⁴ *Plattner Implement Co. v. International Harvester Co.*, 133 Fed. R. 376.

⁵ *Halliday v. Hamilton*, 11 Wall. 560.

⁶ *Lippmann v. Brown*, 88 N. Y. Supp. 141.

§ 193. *The consignor's title to the goods and proceeds.*

A delivery of goods to an agent to sell on commission is a bailment, not a sale, and passes no title to the recipient.¹ The title to the property remains in the consignor until it is sold in due course to a *bona fide* purchaser.² Property consigned to a factor for sale is not subject to his debts.³ The rights of the consignor are superior to those of ordinary execution creditors of the factor.⁴ A bank which knows its depositor to be a factor has no right to apply to its own debt money he deposits in his general account which he received from the sale of his principal's goods. The owner of the property sold can in such a case recover its proceeds from the bank.⁵ Yet it cannot be affirmed that in every case a bank is bound to take notice that money deposited generally by a factor or commission merchant to his own credit is the proceeds of sales of property intrusted to him to sell for his employer; but, in those cases where there are circumstances imputing such knowledge to the bank, or when the bank has actual knowledge to this effect, it will be liable over to the factor's principals. The mere fact that a commission merchant becomes insolvent will not charge a bank in which he keeps his account with misappropriation of his employer's funds and with liability for them to his principals because it honors in the regular course of business his after-drawn cheques.⁶ If a factor in violation

¹ *Gilman v. Gilby*, 8 N. Dak. 627.

² *Barnes' Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, *supra*.

³ *Peek v. Heim*, 127 Pa. St. 500.

⁴ *Corzine v. Brents*, 123 Ill. App. 613.

⁵ *Boyle v. N. W. Nat. Bank*, 125 Wis. 498; *Clemmer v. Drovers' Bank*, 157 Ill. 206; *Union Stockyards Bank v. Gillespie*, 137 U. S. 411.

⁶ *Interstate Bank v. Claxton*, *supra*.

of the terms of consignment and out of the usual course of business transfers the consigned goods, even to an innocent purchaser for value, as, for example, where he sells out his entire stock in bulk and delivers with it the consigned property to the purchaser immediately after receiving the consignment, the consignor is entitled to follow and retake the property.¹ This is said to be too thoroughly established to permit of argument.² One who buys consigned property from a factor, then sells him other goods, and finally upon a settlement of accounts pays him the computed balance is still liable to the consignor for the price if the factor fails to pay over the proceeds to his principal, because a factor may neither barter his employer's property nor use it to pay his own debt.³

§ 194. *Regulation by statute of commission merchants and their business.*

Many, probably most, of the states have enacted Factor's Acts regulative of the business, rights, duties, and liabilities of commission merchants. The statutes vary but little in substance and generally embody the above stated principles, with penalties for violation. The constitutionality of these laws has been attacked in the courts with diverse results. In Illinois⁴ and Minnesota⁵ it has been decided that the legislature may constitutionally enact statutes classifying separately from

¹ *Romeo v. Martucci, supra.*

² *Ibid.*

³ *Liebhardt v. Wilson*, 88 Pac. 173.

⁴ *Lasher v. Peo.* 183 Ill. 226.

⁵ *State ex rel. Beek v. Wagener*, 77 Minn. 483.

other occupations commission merchants who sell farm produce and which regulate the business so as to guard against the abuses peculiar to the trade. In Michigan,¹ however, it has been decided that a law requiring all merchants who sell farm produce on commission to give large penal bonds conditioned faithfully to perform their contracts with consignors is unconstitutional class legislation and an unwarrantable, unreasonable interference with the right of every man to do a legitimate business. The better reason appears to be on the side of those who maintain the commission merchant's business to be a proper subject for reasonable police regulation by the legislature.

¹ *Peo. ex rel. Valentine v. Berrien Circuit Judge*, 124 Mich. 664.

CHAPTER XXVI

COMMON CARRIERS

§§ 195-200

§ 195. *Common carriers of freight.*

A common carrier undertakes to transport either or both freight and passengers,¹ as in the familiar and conspicuous example of a railroad company.² Telegraph companies are indeed common carriers of messages, but they may well be ignored. Nor do we need to consider at present common carriers of passengers, but only those which undertake the carriage of property. Any transportation company engaged in the carriage of freight is a common carrier although it may have no road of its own.³ One who engages to transport for hire from one place to another the property of whosoever chooses to employ him is a common carrier.⁴ Every one who undertakes to carry goods for any one who asks him is a common carrier,⁵ that is, every one who undertakes to do so for a compensation for all persons who choose to employ him.⁶

¹ Thompson-Houston Elec. Co. v. Simon, 20 Ore. 60.

² Falvey v. Georgia R. R., 76 Ga. 597.

³ Merch'ts Dispatch Transp. Co. v. Bloch, 86 Tenn. 392.

⁴ The Niagara, v. Cordes, 21 How. U. S. 7.

⁵ Ingate v. Christie, 3 Car. & K. 61.

⁶ Jackson Architectural Iron W'ks v. Hurlbut, 158 N. Y. 34; Fuller v. Bradley, 25 Pa. St. 120; Lang v. Brady, 73 Conn. 707; Buckland v. Adams Exp. Co., 97 Mass. 124.

§ 196. *Public obligations of carriers.*

In undertaking the carriage of goods for anybody and everybody who may require the service, a common carrier is bound to treat all his patrons impartially and equally. Any agreement by a common carrier to give one shipper a favor or advantage over others by rebates or otherwise is illegal at common law independent of any statute upon the subject.¹ A carrier has no right, for example, to grant exclusive privileges to a particular express company,² for, as has been said, if it had this power, "it might build up one set of men and destroy the others; advance one kind of business and break down another."³ It is well settled, according to a learned author, that a carrier may not lawfully charge more than a reasonable sum for the carriage of goods or passengers, although it is not always easy in a given case to determine what is such a reasonable sum.⁴ If a common carrier makes excessive charges for freight or secretly allows some shippers lower rates, while positively assuring others that it does not discriminate, those who pay the excessive charges or rates may recover back the overcharges.⁵ Public policy and safety require that common carriers be held to the greatest care and diligence.⁶ Common carriers in the absence of any legislative provision prescribing a different rule

¹ *Fitzgerald v. Grand Trunk R. R.*, 63 Vt. 169.

² *Sandford v. Catawissa W. & Erie R. R.*, 24 Pa. St. 378.

³ *Ibid.*

⁴ *Wheeler*, Mod. L. of Carriers, Chap. VII., § 1.

⁵ *Cook v. Chic. R. I. & Pac. R. R.*, 81 Iowa, 551; *Louisville, & C. R. R. v. Wilson*, 132 Ind. 517.

⁶ *Phila. & Read. R. R. v. Derby*, 14 How. U. S. 468; *Indianapolis & St. L. R. R. v. Horst*, 93 U. S. 291; *City of Panama v. Phelps*, 101 U. S. 453.

are insurers of goods shipped by them and are liable in all events for every loss or damage however occasioned unless it happens from the act of God or the public enemy or by the act of the shipper or from some other cause or accident expressly excepted in the bill of lading.¹

§ 197. *The legal meaning of the term "act of God."*

The carrier of freight is not liable when it is lost or injured in transit by the act of God; it is, therefore, of the greatest importance to know what the law understands the phrase "act of God" to mean. In legal acceptance an act of God is an act which cannot happen by the intervention of man.² The term denotes a cause beyond human control producing a loss without interference by human agency.³ It means something superhuman, or something in opposition to the act of man;⁴ and something overwhelming and not merely an incidental circumstance.⁵ A loss or injury is attributable to an act of God when it results exclusively from the operation of natural causes which human care and skill could neither foresee nor prevent.⁶ An act of God involves the notion of an accident from natural causes impossible to foresee and guard against, such as a storm, lightning, or tempest, or a shoal or bank unknown to navigators or suddenly appearing in the ocean.⁷ Nothing less than fortuitous circumstances that prevent the performance of a duty and which could

¹ The ship *Maggie Hammond*, 9 Wall. 435.

² *Niblo v. Binsse*, 44 Barb. 54.

³ *Klair v. Wilmington Steamb. Co.* (Del.), 54 Atl. 694.

⁴ *Hale v. N. J. Steam. Nav. Co.*, 15 Conn. 539.

⁵ *Oakley v. Portsmouth, etc., Packet Co.*, 11 Exch. 618.

⁶ *Wald v. Pittsb. C. C. & St. L. R. R.*, 162 Ill. 545.

⁷ *Ewart v. Street*, 2 Bailey, L. 157.

not have been foreseen by the exercise of any reasonable prudence or overcome by any reasonable care and diligence will constitute an act of God excusing the discharge of that duty.¹ There is a distinction between the terms "act of God" and "unavoidable accident," although sometimes they have been used in an equivalent sense. That may be an unavoidable accident which no foresight could foresee nor protection prevent; but an act of God denotes a natural phenomenon which could not happen by the intervention of man, as storms, lightnings, and tempests.² An act of God is something which human power cannot prevent nor human prudence avert. But while no human agency can stay an act of omnipotence, yet such an act may often be foreseen and its consequences guarded against. If this can be done with due diligence, a failure to exercise such diligence will be negligence.³ The act of God which prevents the performance of a duty will excuse the failure to perform a duty imposed by operation of law, but not one assumed by contract.⁴

§ 198. *Examples of what are and what are not acts of God.*

Acts of God are commonly exemplified by natural convulsions, such as lightnings and tempests, unknown and shifting shoals, and the like.⁵ An earthquake is an unusually good example of an act of God which excuses a carrier.⁶ A loss by flood or storm is attributable to the act of God

¹ *Southern Pac. R. R. v. Schoer*, 114 Fed. 466.

² *Merritt v. Earle*, 29 N. Y. 115.

³ *Smith v. Ala. West. R. R.*, 91 Ala. 455.

⁴ *Mitchell v. Hancock Co.*, 91 Miss. 414.

⁵ *Reaves v. Waterman*, 2 Speers, L.197.

⁶ *Slater v. So. Car. R. R.*, 29 S. C. 96.

and also excuses a carrier.¹ The flood, however, must be such an one as no human power can withstand and no foresight or prudence anticipate and counteract.² If it is an extraordinary and unprecedented flood, it is an act of God, and a carrier is not liable for a loss it causes.³ Thus, an unusual and extraordinary freshet⁴ or a sudden and unprecedented overflow⁵ in a river is an act of God and excuses a carrier from liability for loss or damage to freight due to it. But acts of God do not include such floods as occur so frequently that ordinarily prudent men are expected to look out for their happening,⁶ for although every shower of rain is in a sense an act of God, yet an ordinary freshet or river flood is not sufficient to excuse the failure to perform a contract.⁷ A landslide caused by an ordinary rain storm is not deemed an act of God sufficient to excuse a common carrier.⁸ A heavy dew which delays a carrier is not classed as an act of God.⁹ But great snow storms which delay railroad transportation are recognized acts of God.¹⁰ Mere inclement weather, on the other hand, such as is common to the climate of the country, is not an act of God that will excuse a carrier.¹¹ A loss occasioned

¹ *Memphis & C. R. R. v. Reeves*, 10 Wall. 176.

² *Long v. Penn. R. R.*, 147 Pa. St. 343; *Libby v. Maine Cent. R. R.*, 85 Me. 34. ³ *Norris v. Savannah, F. & W. R. R.*, 23 Fla. 182.

⁴ *Wallace v. Clayton*, 42 Ga. 443; *Dorman v. Ames*, 12 Minn. 451; *Nashville & C. R. R. v. David*, 53 Tenn. 261; *New Haven & No. Hampton Co. v. Quintard*, 31 N. Y. Super. Ct. 89.

⁵ *Smith v. Ala. West. R. R.*, *supra*.

⁶ *McCoy v. Danley*, 20 Pa. St. 85. ⁷ *Doster v. Brown*, 25 Ga. 24.

⁸ *Gleeson v. Virginia Midland R. R.*, 140 U. S. 435.

⁹ *Mo., Kan., & Tex. R. R. v. Truskett*, 2 Ind. Ter. 633.

¹⁰ *Pruitt v. Han. & St. Jo. R. R.*, 62 Mo. 527; *Black v. C. B. & Q. R. R.*, 30 Neb. 197. ¹¹ *Cannon v. Hunt*, 116 Ga. 452.

by a sudden gale of wind such as rarely occurs is due to an act of God,¹ but one caused by a sudden but not an unusual gust of wind is not.² Accidental fires, unless caused by lightning, are not regarded as acts of God,³ not even when they become great conflagrations.⁴ The sudden insanity of a railroad engineer which impels him recklessly to run his train at such a high speed as to wreck it and thus destroy and damage property in course of transportation has been held not to be an act of God which excuses the carrier from liability.⁵

§ 199. *Act of God and concurrent negligence of carrier.*

The act of God in destroying or injuring property undergoing transportation excuses the carrier from liability only when the carrier's own negligence did not occasion the damage.⁶ To excuse one from performing his contract on the ground that he was prevented by an act of God he must have been free from negligence and not lacking in judgment, skill, and diligence.⁷ For example, if a carrier unloads a consignment of fruit in zero weather so that it is destroyed or damaged by the cold, he is negligent and cannot avoid liability on the ground that the freezing was an act of God.⁸ The same thing is true of a shipment

¹ *Spencer v. Daggett*, 2 Vt. 92; *McClary v. Sioux City & R. R.*, 3 Neb. 44. ² *Elliott v. Rossell*, 10 John. 1.

³ *Miller v. Steam Nav. Co.*, 10 N. Y. 431; *Chevallier v. Straham*, 2 Tex. 115.

⁴ *Chicago & N. W. R. R. v. Sawyer*, 69 Ill. 285; *Merchts. Despatch v. Smith*, 76 *id.* 542.

⁵ *Georgia Cent. Ry. v. Hall*, 124 Ga. 322.

⁶ *Jones v. Minneapolis & St. L. R. R.*, 91 Minn. 229.

⁷ *Smith v. No. Amer. Transp. Co.*, 20 Wash. 580.

⁸ *The Aline*, 19 Fed. Rep. 875; *Wessels v. The Aline*, 25 *id.* 562.

of any perishable freight.¹ An injury to fruit trees by frost while in transit is held to be due to an act of God where the carrier was not at fault in neglecting proper care.² The courts have not agreed as to whether or not a carrier is liable for the loss or injury of property intrusted to him for transportation in consequence of an act of God where the calamity would have been escaped if the carrier had not unreasonably and inexcusably delayed to forward the property promptly upon its receipt. In a recent case (decided in 1906) the Supreme Court of Alabama has held the carrier liable in such circumstances.³ The court there said that the precise question of the liability of the carrier in such a case had arisen and been adjudicated in other states and in some of them it had been answered in the affirmative and in others in the negative. The courts of New York and Pennsylvania were the leaders on opposite sides and when the question came up in other jurisdictions, some courts followed New York and others followed Pennsylvania. In New York the carrier was held liable;⁴ in Pennsylvania the carrier was exonerated.⁵ The doctrine of the New York cases has been approved and adopted in Alabama,⁶ Illinois,⁷ Kentucky,⁸ Missouri,⁹ and Tennessee.¹⁰

¹ *Wing v. N. Y. & Erie R. R.*, 1 Hilt. 235.

² *Vail v. Pac. R. R.*, 63 Mo. 230.

³ *Ala. Ct. So. R. R. v. Quarles*, 145 Ala. 436.

⁴ *Michaels v. N. Y. Cent. R. R.*, 30 N. Y. 564; *Read v. Spaulding*, 30 *id.* 630. ⁵ *Morrison v. Davis*, 20 Pa. St. 171.

⁶ *Louisville & N. R. R. v. Gidley*, 119 Ala. 523.

⁷ *Wald v. Pittsb. C. C. & St. L. R. R.*, *supra*.

⁸ *Hernsheim Bros. & Co. v. Newport News & M. Val. Co.*, 18 Ky. L. Rep. 227.

⁹ *Pruitt v. Han. & St. Jo. R. R.*, *supra*.

¹⁰ *So. Exp. Co. v. Womack*, 1 Heisk. 256.

On the other side are the United States Supreme Court¹ and the courts of Massachusetts,² Michigan,³ Mississippi,⁴ and Ohio.⁵ In what is perhaps the latest reported case at the time this is written, the Supreme Court of Iowa has taken its place alongside of New York and affirmed the carrier's liability under the stated conditions.⁶

§ 200. *The public enemy.*

A carrier is not responsible for the loss or injury of freight in his possession in consequence of the acts of the public enemy when the encounter could not have been avoided. A carrier is bound to use at least ordinary care to prevent the property in his custody from falling into the hands of or being destroyed by the public enemy and if he neglects to do so, he must answer for the loss.⁷ It is not always clear who are to be deemed public enemies so as to excuse a common carrier who loses freight by their acts. Soldiers and sailors in arms against the country of the carrier are unmistakably public enemies, but ordinary predatory criminals most certainly are not. There is an intermediate class as to which the *status* is doubtful. Thus, a band of marauding Indians are "public enemies" whose acts in plundering a common carrier relieve it from liability for the loss of freight,⁸ but a riotous mob is not a

¹ *Memphis & C. R. R. v. Reeves, supra.*

² *Hoadley v. Nor. Transp. Co.*, 115 Mass. 304.

³ *Mich. Cent. R. R. v. Burrows*, 33 Mich. 6.

⁴ *Yazoo & M. Val. R. R. v. Millsaps*, 76 Miss. 855.

⁵ *Daniels v. Ballantine*, 23 Ohio St. 532.

⁶ *Green-Wheeler Shoe Co. v. Chicago, R. I. & Pac.*, 5 L. R. A. (N. S.) 882.

⁷ *Holladay v. Kennard*, 12 Wall. 254.

⁸ *Ibid.*

public enemy the acts of which will excuse a carrier.¹ And yet courts have finally come to hold a carrier not liable when it is prevented from performing its contract by strikes and the violence of strikers.²

¹ *Missouri Pac. R. R. v. Nevill*, 60 Ark. 375.

² *Geismer v. Lake Shore & M. S. R. R.*, 102 N. Y. 563.

CHAPTER XXVII

DUTIES OF COMMON CARRIERS

§§ 201-210

§ 201. *Duty to receive freight.*

A common carrier is bound in law to receive and carry to its destination all freight of the kind it is accustomed and undertakes to transport if offered at a reasonable time and place.¹ The obligation to do so rests upon the carrier at common law. A statute requiring railroad companies to take freight offered for shipment, and making them responsible for damages when they refuse, merely puts in written form the common law of the subject.² A carrier, however, may be required to accept freight for transportation only when it is tendered at a regular station or a place designated for the purpose.³ A carrier is not justified in declining freight addressed to a point beyond its line.⁴ A common carrier may not lawfully require a shipper to waive any of his legal rights as a condition of receiving

¹ Kirby v. West. U. Tel. Co., 4 S. Dak. 105.

² St. Louis S. W. Ry. v. State, 85 Ark. 311.

³ Louisville, N. A. & C. R. R. v. Flanagan, 113 Ind. 488.

⁴ Seasongood, S. K. Co. v. Tenn. & O. Transp. Co., 21 Ky. L. Rep. 1142.

freight.¹ A carrier which refuses to receive fruit offered for transportation when ordinarily it undertakes to carry fruit is liable for all the direct and proximate damages which result from such refusal and not merely for such as result from unreasonable delay in transportation.² A common carrier which refuses to accept freight tendered it for transportation is liable for its loss by theft from a warehouse on the carrier's wharf committed before the shipper has time to care for it after notice of the refusal to receive it.³ A carrier cannot be compelled when the law forbids to accept infected cattle for transportation.⁴

§ 202. *Duty to furnish cars.*

The obligation of a common carrier to receive and transport freight carries with it the obligation to furnish the necessary cars on which to carry it, provided of course the shipper applies for them and gives reasonably timely notice of his needs. The cars may only be required at a regular station or one of the receiving points designated by the carrier.⁵ A railroad company that refuses to furnish a shipper with the cars he needs unless he will comply with illegal conditions imposed by it may be compelled by mandamus to supply the necessary cars.⁶ A common carrier does not perform its public duties by providing rolling-stock and equipment only adequate to handle and trans-

¹ Missouri Pac. R. R. v. Fagan, 72 Tex. 127.

² Mathis v. So. R. R., 65 So. Car. 271.

³ Seasongood, S. K. Co. v. Tenn. & O. Transp. Co., *supra*.

⁴ Chic. & A. R. R. v. Gasaway, 71 Ill. 570.

⁵ Louisville, etc., R. R. v. Flanagan, *supra*.

⁶ Loraine v. Pittsburg, etc., R. R., 205 Pa. St. 132.

port freight during the dullest seasons of the year.¹ It is bound to be prepared to meet the demands of the busiest seasons. A written request by a shipper to a railroad agent to furnish freight cars "at once" is sufficient to make a carrier liable to a statutory penalty if the cars are not furnished within the time fixed by law after application for them.² The circumstance that the object of a shipper of live-stock in requesting a car to transport his cattle was to offer the animals for sale on Sunday in violation of law is no excuse for a carrier to break its contract to furnish a cattle car and deliver the beasts to the consignee on a stated date.³ The damages for which a railroad company is liable for failure to furnish a shipper with cars to ship property to fulfill his contract are, it has been decided in one case, the profits the shipper would have gained by his contract had the cars been furnished.⁴

§ 203. *Duty to furnish suitable cars.*

A carrier is not only bound to furnish cars to carry offered freight, but cars which are suitable for the carriage of such freight. Thus, a carrier receiving for transportation perishable property is bound to furnish cars suitable to preserve it between the shipping and delivery points during the ordinary time required to carry it from one to the other place.⁵ A carrier that undertakes to transport garden truck which can properly be carried and delivered in sound condition only in refrigerator cars, and who is seasonably noti-

¹ *Yazoo & M. Val. R. R. v. Blum*, 88 Miss. 180.

² *Patterson v. Mo. Pac. R. R.*, 77 Kan. 236.

³ *Waters v. Richmond & D. R. R.*, 110 N. C. 338.

⁴ *Houston, E. & W. T. R. R. v. Campbell*, 91 Tex. 551.

⁵ *St. Louis, I. M. & S. R. R. v. Renfroe*, 82 Ark. 143.

fied to provide suitable cars for the carriage of vegetables ready for shipment and who neglects to provide fit cars, in consequence of which the shipment decays and is spoiled, is liable in damages for the shipper's loss, and it is no excuse that the carrier did not own any refrigerator or other suitable cars.¹ A common carrier of butter is not excused from liability for a damage to it by heat because it did not have refrigerator cars, especially when it could have prevented the loss by supplying ice to the cars it used.² A carrier is liable for the loss by freezing of a shipment of fruit it carried in a car having openings which admitted cold air and snow.³ A railroad company undertaking to carry live-stock must furnish suitable cars for transporting animals.⁴ It is the duty of a railroad company as a carrier of live-stock to furnish suitable cars on reasonable notice to one desiring to ship animals over its road.⁵ A shipper of fruit who, after notifying a railroad carrier that he will need a certain number of refrigerator cars, tenders more fruit for carriage than that number of cars will hold, may, nevertheless, hold the company liable on its refusal to receive the excess if the circumstances are such that the carrier could have taken care of the surplus.⁶

§ 204. *Duty to furnish cars free from defects.*

It is the duty of a common carrier by rail not only to furnish cars, and suitable ones, but also to furnish cars

¹ Atlantic Coast Line Ry. v. Geraty, 166 Fed. Rep. 10.

² Beard v. Ill. Cent. R. R., 79 Iowa, 518.

³ Merch^{ts} Desp. & Transp. Co. v. Cornforth, 3 Colo. 280.

⁴ Eckert v. Penn^a. R. R., 211 Pa. St. 267.

⁵ Leonard v. Whitcomb, 95 Wis. 646.

⁶ Mathis v. So. R. R., *supra*.

that are safe. This duty is absolute and the carrier is liable for its breach if it fails to exercise proper care and furnishes defective cars, though they are ignorantly accepted and used by the shipper.¹ A carrier who knows its cars to be unsound and unsafe cannot escape liability to a shipper for injury or loss in consequence of their defective condition by exacting a contract requiring him to select and inspect the car and take the risk of its safety and then foisting upon him a car that appears sound but is really defective.² If a carrier furnishes unfit and unsafe vehicles for transporting goods accepted for carriage he cannot escape responsibility on the plea that the shipper used them knowing them to be defective.³ A carrier is liable for injuries to live-stock due to carrying the animals in defective, unfit, and unsafe cars, although in combination with the crowding, bumping, and kicking of the brutes while in transit according to their nature.⁴ A carrier who receives live-stock for transportation over its own and other lines is liable for injuries sustained by the beasts in consequence of the defective condition of the car furnished, notwithstanding the injuries happened on another line.⁵ A carrier, however, is not bound to furnish cars strong enough to withstand the assaults of particularly vicious and unruly animals.⁶

¹ Leonard *v.* Whitcomb, *supra*.

² Lake Erie & West R. R. *v.* Holland, 162 Ind. 406.

³ Ogdensburg & L. C. R. R. *v.* Pratt, 22 Wall. 123.

⁴ Betts *v.* Chic. R. I. & P. R. R., 92 Iowa, 343; Lake Erie & W. R. R. *v.* Holland, *supra*.

⁵ Blatcher *v.* Phila., Balt. & Wash. R. R., 31 Dist. Col. App. 385.

⁶ Betts *v.* Chic. R. I. & P. R. R., *supra*; Selby *v.* Wilm. & Weld. R. R., 113 N. C. 588.

§ 205. *Terminal facilities for reception and delivery of freight.*

It is the duty of a common carrier of live-stock to provide necessary facilities for receiving animals offered for shipment and for the delivery of the beasts to the consignee at their destination.¹ A common carrier who undertakes to transport live-stock is bound to provide suitable yards and pens for the animals at points of embarkation and delivery.² And it is also bound to keep such stockyards and pens reasonably safe for the beasts and is liable in damages if it neglects that duty.³ Thus, if a carrier of live-stock permits salt water to flow into its shipping pens, it is negligent and liable for the injuries to the stock caused by drinking it.⁴ Again, a common carrier of live-stock is liable to the owner of cattle delivered for transportation when the beasts, while awaiting shipment, escape from the receiving pen, in consequence of the falling of one side because the posts were too rotten to support it, and are injured.⁵ The carrier is also liable for personal injuries sustained by a stock-warder in falling from a walk built around the top of a stock pen while inspecting cattle because its support was decayed and defective and had been so long enough to charge the carrier with notice of its unsoundness.⁶ A common carrier of live-stock must provide proper facilities for unloading the animals when they reach their destination and if they are injured in con

¹ Covington Stockyard Co. v. Keith, 139 U. S. 128.

² Norfolk & W. R. R. v. Harman, 91 Va. 601.

³ St. Louis & S. F. R. R. v. Beets, 75 Kan. 295.

⁴ Norfolk & W. R. R. v. Harman, *supra*.

⁵ St. Louis & S. F. R. R. v. Beets, *supra*.

⁶ Atchison, T. & S. Fé R. R. v. Allen, 75 Kan. 190.

sequence of the lack of such facilities the carrier is responsible.¹ It is equally the duty of a common carrier who accepts milk for transportation to provide reasonably proper facilities to receive and deliver it and to care for it during transportation.² But it has been held that if a carrier has no agent or freight house or other structure than an open platform at a stopping place on its line designated for the delivery of goods carried by it, and it has stipulated in its bill of lading for a delivery on such platform at the owner's risk, it is not at fault in unloading the consignment in a storm and leaving it on the platform unprotected from the weather.³ Every court, however, may not be willing to accept unqualifiedly this decision as altogether sound.

§ 206. *Duty not to delay or deviate.*

It is the duty of a common carrier to forward with promptitude and without unreasonable delay all goods accepted for transportation.⁴ The delay of a common carrier to move property intrusted to it for transportation which will make it liable if the freight is lost in consequence by unavoidable casualty must be negligent, unreasonable, and inexcusable.⁵ For example, a delay by a common carrier on account of refraining from business on a public holiday is excusable.⁶ And a carrier delayed solely by

¹ *Louisville & N. R. R. v. Gormley*, 121 S. W. Rep. 965; *Texas & P. Ry. v. Henson*, 121 *id.* 1127.

² *Baker v. Bost. & Me. R. R.*, 74 N. H. 100.

³ *Allam v. Penn^a. R. R.*, 183 Pa. St. 174.

⁴ *Bibb Broom Corn Co. v. Atchison, T. & S. Fé R. R.*, 69 L. R. A. 509.

⁵ *Rodgers v. Mo. Pac. R. R.*, 75 Kan. 222.

⁶ *Penn^a. R. R. v. Naive*, 112 Tenn. 239.

a mob is liable neither for a decline in the price in the market to which the goods carried were consigned nor for the deterioration of perishable freight.¹ A carrier is not justified in deviating from the regular transportation route without notifying the shipper and receiving his instructions unless the deflecting obstruction is such that the freight cannot be properly taken care of until the shipper's orders can be had.² If an express company has a choice of two routes over which to send property, one safe and the other hazardous, and chooses the risky one, it is liable if a loss occurs.³ A carrier which sends, for instance, a carload of orange trees early in March from New Orleans, La., to Riverside, Cal., by a northern route through Denver, Colo., and Ogden, Utah, without notice to or direction from either consignors or consignees, is liable for a loss by freezing, notwithstanding its route through Texas, New Mexico, and Arizona was temporarily impassable on account of storms and washouts.⁴ A common carrier who after notice that a shipment of freight was liable to injury by freezing and specially contracting to make a timely delivery delays without reasonable excuse or justification to forward the freight to a connecting carrier is liable in case the property freezes after leaving its line.⁵ If a consignee of cattle feed notifies the carrier on arrival of the shipment that he is out of feed and needs it at once for his stock, the carrier is liable for resulting damages if he is not prompt and diligent in making delivery.⁶

¹ *Gulf, etc., R. R. v. Levi*, 76 Tex. 337.

² *Louisville & N. R. R. v. Odil*, 96 Tenn. 61.

³ *U. S. Exp. Co. v. Kountze Bros.*, 8 Wall. 342.

⁴ *Pierce v. So. Pac. Co.*, 120 Cal. 156.

⁵ *Fox v. Bost. & Me. R. R.*, 148 Mass. 220.

⁶ *Bourland v. Choctaw, O. K. & Gulf Ry.*, 99 Tex. 407.

§ 207. *Duty to deliver to consignee.*

A common carrier may excuse a failure to deliver freight to a consignee by proving a delivery of it to its true owner ;¹ but when a carrier delivers property it has transported contrary to or without the orders of the shipper it undertakes to establish the right of the person to whom the property was delivered to receive it.² The failure of a carrier to deliver freight intrusted to it for transportation presupposes negligence unless the circumstances of its loss are shown.³ A common carrier by water who accepts goods marked to be delivered at a private landing place is liable for damages caused by delivering them elsewhere unless he has a good excuse.⁴ The measure of damages for the failure of a common carrier to deliver goods accepted for transportation is their market value at the time and place when and where they should have been delivered, and subsequently accruing interest.⁵ If the freight is taken from the carrier by public officers of the government, delivery of it to the consignee is excused.⁶ A carrier is not liable for not delivering to the consignee fruit which the local public health authorities at the destination forbid the carrier to unload.⁷

§ 208. *Duty to make good freight lost in transit.*

The contract for the carriage of property is one of insurance against every loss or damage save such as may

¹ *The Idaho*, 93 U. S. 575. ² *Wolfe v. Mo. Pac. R. R.*, 97 Mo. 473.

³ *Browning v. Goodrich Transp. Co.*, 78 Wis. 391.

⁴ *Stricker v. Leathers*, 68 Miss. 803.

⁵ *Mobile & M. R. R. v. Jurey*, 111 U. S. 584 ; *N. Y., L. E. & W. R. R. v. Estill*, 147 *id.* 591.

⁶ *Stiles v. Davis*, 1 Black, 101 ; *Wells v. Maine S. S. Co.*, 4 Cliff. 232.

⁷ *Ala. & Vicksb. Ry. v. Tirelli Bros.*, 21 L. R. A. (N. S.) 731.

be occasioned by the act of God, or the public enemy, or the fault of the owner of the property.¹ A common carrier subject to the stated qualifications is responsible for the safe custody and due transportation of property intrusted to him for carriage.² If goods are lost during transportation the carrier is *prima facie* liable³ unless protected by agreement under which they were accepted only at the shipper's risk.⁴ The negligence of the carrier is presumed when goods are lost in transit and the loss is not adequately explained.⁵ Thus, a carrier who has undertaken to transport three and who delivers but two dogs is presumed to have been negligent when it does not account for the missing one.⁶ The burden is on a carrier who delivers freight in bad order to prove that it was not in good order when it came into his possession.⁷ Nor will a "clear receipt" given on receiving goods delivered by a common carrier preclude the consignee from showing afterwards that they were really wet and damaged when delivered.⁸ The strict rule of liability just stated is qualified by some important exceptions independent of any special contract for exemption. A loss or injury due to the act of God or the public enemy, as has already been stated, exonerates the carrier. In addition to this the carrier is not liable for losses due to the nature of the freight. It is not liable, for example, for losses in transit due to natural

¹ Ala. Gt. So. R. R. *v.* Quarles, 145 Ala. 436.

² Com¹ Transp. Co. *v.* Fitzhugh, 1 Black, 574.

³ Inman *v.* So. Car. R. R., 129 U. S. 128.

⁴ N. J. Steam Nav. Co. *v.* Merch^{ts} Bank, 6 How. U. S. 344.

⁵ Browning *v.* Goodrich Transp. Co., *supra*.

⁶ Adams Exp. Co. *v.* Walker, 67 L. R. A. 412.

⁷ Beard *v.* Ill. Cent. R. R., *supra*.

⁸ Mears *v.* N. Y., N. H. & H. R. R., 75 Conn. 171.

and ordinary evaporation of liquids, or the leakage of fluids from casks, or the bursting of vessels in consequence of the fermentation of their contents.¹ Nor is the carrier liable for loss or injuries to freight caused by the fault of the shipper. Thus, it is the duty of the shipper properly to pack the goods he ships. The carrier therefore is not liable for a loss caused by negligent packing, since that is something he could neither know nor obviate.² Then again, if a shipper does not tell the truth to the carrier when asked about the value or valuable character of the offered freight, the carrier will not be responsible in case it is lost, unless possibly for gross negligence or conversion.³ And a carrier is not liable for freight lost because it was incorrectly addressed to the consignee.⁴

§ 209. *Duty to care for live-stock in transit.*

The liability of a common carrier for live-stock is not as broad as it is for goods.⁵ A common carrier of live-stock is not an insurer against loss or injury of the animals due to the nature of the beasts.⁶ A carrier who accepts live-stock for transportation, while not subject to the common law liability of common carriers, is, however, bound to transport the stock cars and animals with ordinary care,

¹ *Nelson v. Woodruff*, 1 Black, 156; *Faucher v. Wilson*, 68 N. H. 338.

² *Browne, Carriers*, Chap. VI., § 108.

³ *Wheeler, Mod. Law. of Carriers*, Chap. IX.

⁴ *Erie Ry. v. Wilcox*, 84 Ill. 239; *So. Exp. Co. v. Kaufman*, 12 Heisk. 161.

⁵ *No. Penn^a. R. R. v. Com^l Bank*, 123 U. S. 727; *Myrick v. Mich. Cent. R. R.*, 107 *id.* 102.

⁶ *Louisville & N. R. R. v. Smitha*, 145 Ala. 686; *Dow v. Portland Steam Packet Co.*, 84 Me. 490; *Ayres v. Chic. & N. W. R. R.*, 71 Wis. 372; *Squire v. N. Y. Cent. R. R.*, 98 Mass. 239.

skill, and promptitude.¹ If cattle shipped in good condition arrive at destination in bad condition, it is for the carrier to show that the change was caused by something for which it was not responsible.² It is negligence in and of itself for a carrier to disobey a statute requiring cattle in transit after twenty-eight hours of confinement to be unloaded, fed, watered, and rested, and such neglect makes the carrier liable in damages notwithstanding the insertion in the contract of carriage of a stipulation exempting it from liability in case it violates the law.³ It is the duty of a common carrier of live-stock to furnish bedding for the animals whenever bedding is needed for the safe and proper transportation of the beasts, and the carrier is not excused from that duty by the shipper's agreement to load and unload and feed, water, and care for the stock on the journey.⁴ If a common carrier, knowing a shipper of live-stock has failed to send along a caretaker as agreed, still undertakes to carry the animals according to the shipping contract, it assumes the duty of taking proper care of the beasts and guarding them from injury.⁵ A carrier transporting hogs liable to die from overheating is charged with the duty of now and then cooling them by showers;⁶ and if the shipper has agreed to accompany and feed and water the hogs on the journey, the carrier is bound to provide the water.⁷ A railroad company carrying hogs

¹ *Heller v. Chic. & Gd. T. Ry.*, 109 Mich. 53.

² *C. B. & Q. R. R. v. Slattery*, 76 Neb. 721.

³ *Reynolds v. Gt. Nor. Ry.*, 40 Wash. 163.

⁴ *Allen v. C. B. & Q. R. R.*, 82 Neb. 726.

⁵ *C. B. & Q. R. R. v. Williams*, 61 *id.* 608.

⁶ *Toledo, W. & W. R. R. v. Hamilton*, 76 Ill. 393; *Wallace v. Lake Shore & M. S. R. R.*, 133 Mich. 633.

⁷ *Wabash, St. L. & P. R. R. v. Pratt*, 15 Ill. App. 177.

whose train crew, aware of their condition and the need of showering the animals, on reaching a junction, shunts the stock cars to a connecting line and a train departing at once, well knowing that another train leaves later in the day after an interval long enough for the shipper to shower the hogs, is not excused from liability by the consent of the shipper to go on immediately when he was ignorant as to when the next train would be ready.¹ When the negligence of a common carrier of live-stock causes miscarriages in cows it is transporting, the loss of the calves is a proper item of damage against it whether it had or had not notice when the shipment was made that the cows were pregnant.² A common carrier is liable for animals destroyed in transit by a fire not caused by the act of God or the public enemy.³ And if a carrier puts next to the locomotive a live-stock car containing straw bedding which takes fire from sparks from the locomotive and the animals are burned to death, it is liable because of its negligence, notwithstanding it had stipulated in the bill of lading for exemption from liability in case of loss or damage by fire.⁴ A carrier who puts healthy live-stock in cattle cars infected with Texas fever is negligent and liable in damages if the beasts become infected.⁵

§ 210. *Duty respecting perishable property.*

A carrier must be diligent to protect freight from all loss and injury which may be averted and which ordinary

¹ Peck v. Chic. Gt. West. R. R., 16 L. R. A. (N. S.) 883.

² N. Y., Lake Erie & W. R. R. v. Estill, 147 U. S. 591.

³ Stiles v. Louisville & N. R. R., 18 L. R. A. (N. S.) 86.

⁴ McFadden v. Mo. Pac. R. R., 92 Mo. 343.

⁵ Ill. Cent. R. R. v. Harris, 184 Ill. 57.

care and intelligence should have foreseen and guarded against.¹ To escape liability for delay in transporting and delivering perishable freight a carrier must prove diligence.² A carrier is bound to give perishable freight a preference over other freight when unable to forward both at once;³ and is bound to take notice of marks on the casings indicating the nature of the contents.⁴ A common carrier who undertakes to transport perishable property in refrigerator cars is bound to keep the cars properly supplied with ice during the journey.⁵ If the ice bunkers of a refrigerator car loaded with small fruits are virtually empty when the car arrives at its destination, the carrier's negligence is proved.⁶ A carrier of perishable commodities in refrigerator cars is bound to furnish an ample supply of ice to preserve the shipments both at the place of shipment and all along the route during the time usually required for transportation with all incidental delays.⁷ The carrier's liability for loss of perishable freight in refrigerator cars not properly nor sufficiently chilled cannot be escaped by showing that the cars were leased from another company which had agreed to keep them iced.⁸ A railroad company cannot escape liability for a breach of its duty to keep properly iced a refrigerator car used to carry fruit by obtaining the car from another and delegat-

¹ Beard v. Ill. Cent. R. R., *supra*.

² Parker v. Atl. Coast Line R. R., 133 N. C. 335.

³ Marshall v. N. Y. Cent. R. R., 45 Barb. 502.

⁴ Hastings v. Pepper, 11 Pick. 41.

⁵ Johnson v. Toledo, S. & M. Ry., 133 Mich. 596.

⁶ Taft Co. v. Amer. Exp. Co., 133 Iowa, 522.

⁷ *Ibid*.

⁸ N. Y., P. & N. R. R. v. Cromwell, 98 Va. 227; Mathis v. So. R. R., *supra*.

ing to that other the duty of icing it.¹ Neither can a common carrier who has undertaken to renew ice at specified stations in a refrigerator car containing perishable produce escape liability for damage to the shipment by neglect by taking refuge behind a rule not to add ice unless the bunkers will take six hundred pounds of it.² But a carrier is not negligent in following a general custom not to change ventilators on fruit cars without instructions from the shipper, although a failure to do so causes the loss of the fruit by frost.³

¹ St. Louis, I. M. & So. R. R. v. Renfroe, *supra*.

² Orem Fruit & Prod. Co. v. Nor. Cent. Ry., 106 Md. 1.

³ Schwartz v. Erie R. R., 15 L. R. A. (N. S.) 801.

CHAPTER XXVIII

RIGHTS AND IMMUNITIES OF COMMON CARRIERS

§§ 211-215

§ 211. *Right to make rules and regulations.*

There are two methods by which a common carrier may limit or evade its common law liability as an insurer of the freight it undertakes to transport. One is, of course, by special contract with the shipper, as mentioned below, and the other is by means of rules and regulations adopted for conduct of its business. Common carriers have a right to adopt and enforce all proper and reasonable regulations for the carrying on of their operations that make for their own protection and the public benefit as between themselves and their patrons.¹ These rules and regulations must be reasonable ones; regulations adopted by a common carrier which are unreasonable are null and void.² The right to make and enforce proper and reasonable rules to facilitate the movement of trains of freight and passengers, conserve the welfare and safety of the public, and afford the greatest measure of useful service to its patrons is an important feature of the operations of a railroad company, and when the rules adopted are fairly adapted

¹ *Miller v. Ga. R. R. & Bank'g Co.*, 88 Ga. 563.

² *Pittsb. C. & St. L. Ry. v. Lyon*, 123 Pa. St. 140.

to one or more of these ends, the public is bound by them unless they contravene some positive statute.

§ 212. *Limitation of liability by special contract.*

The common law general liability of a common carrier may be restricted by a valid agreement between the carrier and the shipper.¹ This may be done in all ordinary cases.² Unless forbidden to do so by a constitutional provision or an express statute, a common carrier may limit its liability for loss or damage to goods transported, so far at least as such loss or injury is not due to its own misconduct or gross negligence, by a special contract fairly made and reasonable in its terms.³ Such a contract must be fairly entered into, be plain in its terms, and in other respects be reasonable to be upheld in the courts.⁴ A common carrier may lawfully stipulate for exemption from liability for loss or damage to property carried caused by strikes or mobs,⁵ or, in consideration of a reduced freight rate, on account of wetting.⁶ A carrier may also lawfully contract with a shipper to be exempt from liability for loss or damage to freight unless the claim is presented within a stated limited time.⁷ The limit fixed must be a reasonable one

¹ Kirby v. West. U. Tel. Co., 4 S. Dak. 105.

² So. Exp. Co. v. Caldwell, 21 Wall. 264; Bank of Ky. v. Adams Exp. Co., 93 U. S. 174.

³ Atchison, T. & S. Fe R. R. v. Temple, 47 Kan. 7; Russell v. Erie R. R. 70 N. J. L. 808.

⁴ Adams Exp. Co. v. Carnahan, 29 Ind. App. 606; McFadden v. Mo. Pac. Ry., 92 Mo. 343.

⁵ Gulf, C. & S. F. R. R. v. Gatewood, 79 Tex. 89.

⁶ Meers v. N. Y., N. H. & H. R. R., 75 Conn. 171.

⁷ So. Exp. Co. v. Hunnicutt, 54 Miss. 566; U. S. Exp. Co. v. Harris, 51 Ind. 127.

and afford opportunity to the shipper to present his claims; otherwise the courts will refuse to respect it.¹ The courts do not agree upon what is a reasonable time limit in such cases. As respects ordinary freight, ninety days was deemed reasonable in one case² and unreasonable in another.³ In another case thirty days was held too short,⁴ but plenty long enough in other cases.⁵ With respect of live-stock a limit as short as one day has been held reasonable in some cases,⁶ and in several cases a stipulation of the carrier requiring notice to the nearest station agent of a claim for damages to be made before the shipment has been delivered to the consignee or mingled with other stock has been held valid and reasonable.⁷ Common carriers are not permitted to contract for exemption from liability for lost or injured freight due to their own wrongful acts⁸ or negligence,⁹ especially not gross negligence or willful misconduct.¹⁰

¹ Mo. Pac. R. R. *v.* Harris, 67 Tex. 166.

² So. Exp. Co. *v.* Caldwell, *supra*.

³ Porter *v.* So. Exp. Co., 4 S. Car. 135.

⁴ So. Exp. Co. *v.* Caperton, 44 Ala. 101.

⁵ Smith *v.* Dinsmore, 9 Daly, 188; Hirshberg *v.* Dinsmore, 12 *id.* 429; Kaiser *v.* Hoey, 1 N. Y. Supp. 429.

⁶ Mo. Pac. R. R. *v.* Park, 66 Kan. 248; Kan. & A. Val. R. R. *v.* Aryes, 63 Ark. 331.

⁷ Mo., Kan. & Tex. R. R. *v.* Kirkham, 63 Kan. 255; Owen *v.* Louisville & N. R. R., 87 Ky. 626; Baxter *v.* Louis., N. A. & C. R. R., 165 Ill. 78; Hudson *v.* Nor. Pac. R. R., 92 Iowa, 231.

⁸ Baker *v.* Bost. & Me. R. R., 74 N. H. 100.

⁹ Penn.^a R. R. *v.* Raiordon, 119 Pa. St. 577; Mo. Pac. Ry. *v.* Ivy, 71 Tex. 409; Russell *v.* Pittsb. C. C. & St. R. R., 157 Ind. 305; Bird *v.* The R. R.'s, 99 Tenn. 719; Witting *v.* St. Louis & S. F. R. R., 101 Mo. 631.

¹⁰ Chic. & No. W. Ry. *v.* Chapman, 133 Ill. 96; Johnson *v.* Ala. & Vicks. Ry., 69 Miss. 191; Meuer *v.* Chic. M. & St. P. Ry., 5 S. Dak. 568.

This rule applies as well to live-stock as to other freight.¹ Contracts by which common carriers seek to exempt themselves from the consequences of their own faults and negligence are contrary to public policy and therefore void.² A stipulation made by a carrier exempting itself from common law liabilities, where the shipper is given no option but to consent by the refusal of the carrier to receive the freight on any other terms whatever, has several times been held void in different states.³ A reduced freight rate for the carriage of cattle is a good consideration for a stipulation limiting the carrier's liability to a stated sum less than the value of each beast.⁴ But if reduced rates are not offered and the shipper is not allowed to ship upon terms of common law liability, a stipulation relieving the carrier from liability on account of fire, for instance, will not be deemed valid.⁵ There are some states in which the constitutions forbid the liability of railroad corporations as common carriers to be limited at all. In those states the special contracts spoken of are nullities.⁶ And when a statute invalidates carrier's contracts for exemption from liability for the loss of property carried, all contracts limiting the liability of a common carrier for property lost while in its possession are void.⁷

¹ Chic., R. I. & Pac. R. R. *v.* Witty, 32 Neb. 275; Louis. & N. R. R. *v.* Dies, 91 Tenn. 177.

² Chic., M. & St. P. R. R. *v.* Solan, 169 U. S. 133; Balt. & O. R. R. *v.* Voigt, 176 *id.* 498; Knott *v.* Botany Worsted Mills, 179 *id.* 69.

³ Little Rock & Ft. S. R. R. *v.* Cravens, 57 Ark. 112; L. E. & West R. R. *v.* Holland, 162 Ind. 406; Parker *v.* Atl. Coast Line R. R., 133 N. C. 335; Kirby *v.* West. U. Tel. Co., *supra*.

⁴ Winslow Bros. & Co. *v.* Atl. Coast Line R. R., 65 S. E. Rep. 965.

⁵ Louisville & N. R. R. *v.* Gilbert, 88 Tenn. 430.

⁶ Latta *v.* Chic., St. P., M. & O. Ry., 172 Fed. Rep. 850.

⁷ Chesapeake & O. R. R. *v.* Beasley, 104 Va. 788.

§ 213. *Bill of lading as a contract for carriage.*

A bill of lading has a dual character. It is both a receipt and a contract — a receipt for property to be transported and a contract to transport such property and deliver it to the consignee.¹ A receipt is usually not conclusive; it is not within the rule excluding oral testimony to vary a writing.² The reason is that an ordinary receipt is only an admission or acknowledgement of one person and not a contract.³ A simple receipt not embodying a contract is open to oral explanation,⁴ but when a receipt is coupled with or contains a contract, the contract part of it is governed by the same rules that apply to other contracts.⁵ In so far, then, as a bill of lading is a receipt for property, it is, like other receipts, open to explanation and contradiction respecting the kind, quantity, and condition of the property for which it is issued.⁶ Thus, if property is shipped in barrels or boxes or otherwise covered so that it is not visible, the carrier can only be held liable for the actual contents of the packages, no matter what name is given to them in the bill of lading.⁷ But beside being a receipt for property, a bill of lading issued by a common carrier for property received for transportation constitutes the contract for carriage, and the shipper by accepting

¹ *St. Louis, I. M. & So. R. R. v. Knight*, 122 U. S. 79; *Merch^{ts}. Dispatch Transp. Co. v. Furthmann*, 149 Ill. 66.

² *D. M. Osborne Co. v. Stringham*, 4 S. Dak. 593.

³ *Wolf v. Philadelphia*, 105 Pa. St. 25; *Kenny v. Kane*, 50 N. J. Law 562; *Pendexter v. Carleton*, 16 N. H. 482.

⁴ *Davison v. Davis*, 125 U. S. 90.

⁵ *Cummings v. Baars*, 36 Minn. 350.

⁶ *Morganton Mfg. Co. v. Ohio River & C. Ry.*, 121 N. C. 514.

⁷ *Miller v. Hannibal & St. Jo. R. R.*, 90 N. Y. 430.

it becomes bound by its terms;¹ and constituting a contract, it is not open to contradiction or alteration by oral testimony.² As is the case respecting all other contracts, a bill of lading binds a shipper to its lawful terms whether he reads it or not. It is his duty to read it and inform himself of its contents.³ If bills of lading are ambiguous in language, they are construed favorably to the shipper and strictly as respects the carrier.⁴ All stipulations inserted in bills of lading prepared and issued by common carriers, exempting them from or restricting their common law liabilities, are construed strictly against the carriers.⁵ An exemption of the carrier from liability for loss or damage by fire expressly given in a bill of lading relieves the carrier.⁶ A common carrier may properly include in a bill of lading a requirement that notice of loss be given to it within a reasonable time afterwards as a condition of its liability.⁷ A carrier may, as to certain kinds of freight, stipulate in the bill of lading to accept it solely at the owner's risk and thereby relieve itself from liability for loss or damage except when due to its own misconduct, fault, or negligence.⁸ As a general rule a shipper is not bound, unless specially inquired of, to inform the carrier of the value or valuable character of offered

¹ *Davis v. Cent. Vt. R. R.*, 66 Vt. 290.

² *McElveen v. So. Ry.*, 109 Ga. 249.

³ *Grace v. Adams*, 100 Mass. 505; *Snider v. Adams Exp. Co.*, 63 Mo. 376.

⁴ *Ala. Gt. So. R. R. v. Thomas*, 89 Ala. 294.

⁵ *Queen of the Pacific case*, 180 U. S. 49.

⁶ *Cau. v. Texas & Pac. R. R.*, 194 *id.* 427.

⁷ *Gwyn-Harper Mfg. Co. v. Carolina Cent. R. R.*, 128 N. C. 280.

⁸ *Kiff v. Atch., T. & S. Fe R. R.*, 32 Kan. 263; *Moore v. Evans*, 14 Barb. 524.

freight,¹ but if he is asked to state the value and does so, and that value is inserted in the bill of lading as the basis of the contract for transportation, the figures are conclusive.² A common carrier is almost always held to have the right to limit by contract with the shipper the sum for which he shall be liable in case the freight is destroyed or lost,³ especially when it is fragile, perishable, or easily injured. Such a limit, however, is not respected in case a loss occurs by the carrier's own negligence.⁴ It has been decided that a shipper cannot be obliged to insure his shipment for the carrier's benefit, and that a stipulation in a bill of lading requiring him to do so is void.⁵ A bill of lading does not supersede a prior contract, even an oral one, between the shipper and the carrier under which the shipper delivered his property to the carrier for transportation.⁶ This is only an application of the established principle that one party to a contract cannot change it without the other's consent. Writing a bill of lading with a lead pencil does not affect its validity.⁷

§ 214. *Concerning perishable property.*

An exception to the rule that a carrier is liable as an insurer for the loss of property intrusted to it for transportation relates to goods lost in virtue of their own natural

¹ Wheeler, *Mod. Law of Carriers*, Chap. IX.

² *Coupland v. Housatonic R. R.*, 61 Conn. 531; *Ullman v. Chicago & N. W. R. R.*, 112 Wis. 150; *Duntley v. Bost. & Me. R. R.*, 66 N. H. 263.

³ Wheeler, *Mod. Law of Carriers*, Chap. V.

⁴ *Lang v. Penn'a R. R.*, 154 Pa. St. 342.

⁵ *Willock v. Penn'a R. R.*, 166 *id.* 184.

⁶ *St. Louis S. W. Ry. v. Elgin Milk Co.*, 175 Ill. 557.

⁷ *Main v. Jarrett*, 83 Ark. 426.

tendency to decay.¹ A carrier is not liable for damage to perishable freight caused by its intrinsic defects.² Perishable property in the legal sense is property which by nature speedily decays.³ It is such property as rapidly decomposes or decays and so undergoes changes of form and quality which render it unsuitable for use and valueless.⁴ This includes potatoes⁵ and many kinds of fruit and vegetables,⁶ but does not include well-cured hay⁷ nor sound, mature, and merchantable corn.⁸ Yet corn in general must be deemed perishable property within the meaning of a statute regulating the mode of disposing of perishable property by a common carrier when the consignee declines to accept delivery.⁹ A carrier is justified in selling perishable property which the consignee refuses to accept and the consignor after notice abandons.¹⁰ But a common carrier who sells perishable property in transit without notice to the consignor or waiting for his orders, if there is time and opportunity to give notice and receive orders, merely because traffic on the line is suspended because of a strike, is liable for the value.¹¹

§ 215. *Concerning drovers accompanying live-stock.*

Common carriers have endeavored to escape liability for injuries sustained by drovers in charge of live-stock

¹ Georgia R. R. v. Spears, 66 Ga. 485.

² Evans v. Fitchburg R. R., 111 Mass. 172.

³ Webster v. Peck, 31 Conn. 495.

⁴ Jolley v. Hardeman, 111 Ga. 749. ⁵ Williams v. Cole, 16 Me. 207.

⁶ Ill. Cent. R. R. v. McClellan, 54 Ill. 58.

⁷ Newman v. Kane, 9 Nev. 234.

⁸ Ill. Cent. R. R. v. McClellan, *supra*.

⁹ Chesapeake & O. R. R. v. Saulsberry, 12 L. R. A. (N. S.) 431.

¹⁰ Dudley v. Chicago, M. & St. P. Ry., 58 W. Va. 604.

¹¹ Louisville & N. R. R. v. Odil, 96 Tenn. 61.

transported by means of special contracts embodied in passes issued as tokens of the drovers' right to be carried on the trains. A drover's pass issued to a person in charge of cattle transported by a common carrier is, according to the courts, really a part of the contract for the transportation of the stock and is more a passenger ticket than a pass. The holder is not a free traveler but a passenger for hire.¹ A drover traveling on a stock pass is a paying passenger within the rule forbidding common carriers to contract for exemption from liability for the consequences of their own negligence.² Stipulations in a drover's pass exempting the carrier from liability for negligently injuring the holder are void.³ A shipper of live-stock by rail who receives and uses a drover's pass in order to accompany and care for his stock during transit does not in legal effect become the servant of the carrier nor a fellow-servant of the train crew.⁴ He has all the rights of a paying passenger, and the carrier owes him the same duties.⁵ A contract of a drover in charge of cattle undergoing transportation on a railroad, by which he agrees, in consideration of a free pass, to be considered the same as an employee of the road, to whom the railroad company shall be liable only as it is liable to its regular employees is a mere pretense or subterfuge which does not change the real relations of the carrier and the drover.⁶

¹ *Norfolk & W. R. R. v. Tanner*, 100 Va. 379; *St. Louis S. W. R. R. v. Nelson*, 44 S. W. 179.

² *Lake Shore & M. S. R. R. v. Teeters*, 166 Ind. 335.

³ *Davis v. Chicago, M. & St. P. R. R.*, 93 Wis. 470.

⁴ *Omaha & R. Val. R. R. v. Crow*, 54 Neb. 747.

⁵ *Ill. Cent. R. R. v. Beebe*, 174 Ill. 13.

⁶ *Mo. Pac. R. R. v. Ivy*, 71 Tex. 409.

CHAPTER XXIX

INSURANCE OF PROPERTY AGAINST FIRE AND OTHER LOSSES

§§ 216-233

§ 216. *The nature of insurance.*

Insurance may be defined as a contract by which one of the contracting parties, in consideration of a payment called a premium, engages to pay the other a sum of money upon the occurrence of a contemplated event. That event may be one certain sooner or later to happen, such as death, or one only likely to occur, such as a fire, but it is always one of which the time of its occurrence cannot be foretold. Every policy of insurance is a contract of indemnity by which the insurer undertakes to make good a loss which the insured may sustain under certain specified conditions from certain named causes not exceeding a stated amount.¹ It is a contract whereby one agrees to indemnify another in whole or in part for a loss or damage from a specified peril.² It is of the very essence of insurance, and forms the principal foundation of the contract, according to one authority,³ that the insurer takes upon

¹ *Imperial F. Ins. Co. v. Coös. Co.*, 151 U. S. 452; *State v. Pittsburg, C. C. & St. L. Ry.*, 68 Ohio St. 9.

² *Shakman v. U. S. Credit System*, 92 Wis. 366.

³ *Joyce, Insurance*, § 16.

himself the peril which the property or interest of the insured is liable to encounter. The same general principles control in reference to the liability of insurers and the rights of the insured against whatever casualty indemnity is contracted for except so far as they are modified by the subject matter, peculiar usages and customs, and the contracts themselves.¹

§ 217. *The insurance contract and its elements.*

The parties to a contract of insurance are the insurer and the insured. The former is often called the underwriter and, as most insurance contracts are made by corporations, is usually spoken of as the company. The contract of insurance is usually a written one called a policy, and the insured is known as the policy-holder. In every fire insurance contract there must be present and are essentially necessary to its validity certain elements mutually agreed upon by the insurer and the insured of which the absence of any one is fatal. These elements are a subject matter of which the destruction or damage would entail a loss to the insured; a danger or risk of that subject matter insured against; a fixed limit of the amount of indemnity to be paid in case the contemplated loss occurs; a time during which the insurer is to be liable on the contract; and a consideration, called the premium, paid or promised by the insured in such wise as to constitute a legal obligation on his part.² The contract may be oral or written. An agreement to insure property need not be in writing in order to bind the insurer.³ Oral

¹ Wood, *Fire Ins.*, Chap. I., § 1.

² *Tyler v. New-Amsterdam Ins. Co.*, 4 Robt. (N. Y.) 151.

³ *Ruggles v. Amer. Cent. Ins. Co.*, 114 N. Y. 415.

contracts of insurance are valid¹ if complete and definite in their terms.² They are good unless some statute or positive regulation prohibits them,³ and if not forbidden by some provision in the charter of the insuring company brought to the knowledge of the insured.⁴ But inasmuch as written policies of insurance are almost universally used, it is a legal presumption when no policy has been written and no premium paid that no contract of insurance has been made.⁵

§ 218. *Completing the contract.*

In general a contract for fire insurance is regarded as complete when all its terms have been agreed upon between the underwriter and the applicant for insurance and nothing remains to be done but to deliver the policy.⁶ As soon as the terms of a contract of insurance have been definitely settled by the insurer and insured, the rights and obligations of both are fixed without a delivery of the policy unless a delivery is either a part of the contract or is required by law for the insurance to be valid.⁷ But if pre-payment of the premium is not made nor the policy delivered without requiring it, a contract of fire insurance is not effected, unless an oral one is complete, by a mere notice to the applicant from the agent of the insurer that the policy is

¹ *Sanford v. Orient Ins. Co.*, 174 Mass. 416; *Croft v. Hanover Ins. Co.*, 40 W. Va. 508; *West. Assur. Co. v. McAlpin*, 23 Ind. App. 220.

² *King v. Phoenix Ins. Co.*, 195 Mo. 290; *Whitman v. Milwaukee F. Ins. Co.*, 128 Wis. 124.

³ *Relief F. Ins. Co. v. Shaw*, 94 U. S. 574; *Com. Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318.

⁴ *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549.

⁵ *Equitable L. Assur. Soc. v. McElroy*, 83 Fed. 631; *Heiman v. Phoenix Ins. Co.*, 17 Minn. 153. ⁶ *Stephenson v. Allison*, 51 So. 622.

⁷ *West. Assur. Co. v. McAlpin*, 23 Ind. App. 220.

ready.¹ A receipt for the premium goes to prove that a contract for insurance was made.² The mere signing of an application for insurance, followed by a statement by the agent that he would see to it, would take care of it so that it would be all right, and would get the policy, does not complete the contract.³ An oral contract of insurance is not completed by an understanding as to terms, time, amount, premium, and risk between an applicant for fire insurance and an agent of two or more companies without an agreement upon the particular company.⁴ A "binding slip" containing a memoranda of the parties to a contract of insurance, the subject of it, and the principal terms, "to be binding until the policy is delivered," is a contract of temporary insurance subject to the terms and conditions in the ordinary policy issued by the insuring company.⁵

§ 219. *The policy.*

The relation between an insurance company and its policy-holder is merely one of contract in which the respective rights and obligations of insurer and insured are measured by the language of the policy.⁶ Insurance companies have all the rights of individuals in making their contracts to limit their liabilities and to impose whatever conditions they please upon their obligations not inconsistent with statutes and public policy.⁷ An insurance

¹ *Wainer v. Milford F. Ins. Co.*, 153 Mass. 335.

² *Lightbody v. No. Amer. Ins. Co.*, 23 Wend. 18.

³ *Whitman v. Milwaukee F. Ins. Co.*, *supra*.

⁴ *Hartford F. Ins. Co. v. Trimble*, 117 Ky. 583.

⁵ *Lipman v. Niagara Ins. Co.*, 121 N. Y. 454.

⁶ *Uhlman v. N. Y. L. Ins. Co.*, 109 N. Y. 421.

⁷ *Dumas v. N. W. Nat. Ins. Co.*, 12 Dist. Col. App. 245.

company has a right to fix the terms on which it will take a risk, and when those terms have been accepted by an applicant for insurance, a contract results which courts are powerless to change.¹ It is not practicable in a work of this character nor would it be useful to mention all the clauses in fire insurance policies which have been passed upon in the courts as effective to discharge or limit the liabilities of insurers. An author of authority has remarked that if the strict rules of law are applied, the cases are probably few in which a recovery may be had upon an ordinary fire insurance policy if proper objections are taken, but, he thinks, insurance companies generally conduct their business with a fair regard to the rules of morality and do not contest cases free from suspicion on grounds merely technical. This is because, for one reason, to do otherwise tends to destroy the credit of underwriters with business men, and so to impair their business as to subject them to more serious losses than those resulting from payments to the insured.² A policy of insurance is purely a personal contract between insurer and insured and extends to no other persons.³ A mistake in the name of a person insured does not invalidate the policy.⁴

§ 220. *Delivery and acceptance of policy.*

A policy of insurance duly mailed to the insured is delivered.⁵ Mailing a policy of fire insurance to the insured

¹ Md. Casualty Co. v. Chew, 122 S. W. 642.

² Wood, Fire Ins., Chap. I., § 2.

³ Farmers' & M. Ins. Co. v. Jensen, 56 Neb. 284; Shadgett v. Phillips & Crew Co., 131 Ala. 478.

⁴ Romano v. Concordia F. Ins. Co., 106 N. Y. Supp. 63.

⁵ Dailey v. Prof. Masonic Acci. Asso. 102 Mich. 289.

completes the delivery, and if a fire loss within its terms occurs before the insured actually receives the policy in his hands, the loss is covered by it.¹ Like other contracts, a fire insurance policy binds the policy-holder who accepts it whether he does or does not read it.² The acceptance of a fire insurance policy charges the insured with notice of its contents and binds him to its conditions.³ The assent of the insured to the provisions of a policy of insurance is conclusively presumed from his acceptance of it.⁴ A policy-holder who is not deceived or imposed upon by accepting a fire insurance policy is bound to comply with every lawful provision in it, under penalty, if he fails to do so, of losing his insurance.⁵ An insured is not bound to accept a policy which does not cover all the property he applied to insure; but if he desires it corrected, he must return it promptly and ask that it be amended, because if he keeps it, he will be deemed to have accepted it.⁶ An insurance is valid without payment in advance of the premium if credit is given to the insured.⁷ If neither the application for nor the policy of insurance requires prepayment of the premium before delivery of the policy, such pre-payment is not a condition precedent to the insurance taking effect;⁸ the delivery of the policy without collecting the premium and upon an agreement for deferred payment puts the insurance in force at once.⁹ It is pre-

¹ *Travelers Fire Ins. Co. v. Globe Soap Co.*, 85 Ark. 169.

² *Wyandotte Brew. Co. v. Hartford F. Ins. Co.*, 144 Mich. 440.

³ *Parsons v. Lane*, 97 Minn. 98.

⁴ *Allen v. Germ. Amer. Ins. Co.*, 123 N. Y. 6.

⁵ *So. Home Ins. Co. v. Putnal*, 49 So. 922.

⁶ *Amer. Ins. Co. v. Dillahunt*, 117 S. W. 245.

⁷ *Croft v. Hanover F. Ins. Co.*, 40 W. Va. 508.

⁸ *N. Y. Life Ins. Co. v. Greenlee*, 84 N. E. 1101.

⁹ *Dailey v. Pref. Mas. Acci. Asso.*, *supra*.

sumed that a credit was intended when a policy of insurance is delivered without requiring the premium to be paid¹ and if a credit is intended, the policy is in force as soon as it is delivered.²

§ 221. *Rules for construing insurance policies.*

A policy of insurance and the conditions in it define and fix the relations of the insurer and insured and furnish the measure of their respective rights and liabilities; courts may not go outside the policy in determining their mutual or reciprocal obligations.³ The written prevail over the printed parts of an insurance policy in case of repugnancy.⁴ The language of an insurance policy is to be understood, not technically, but in its ordinary and popular sense.⁵ Insurance policies prepared by insurers are construed strictly against the underwriters and liberally in favor of the insured.⁶ If the meaning is doubtful, the meaning most favorable to the insured is adopted.⁷ This rule does not apply when the meaning of the policy is perfectly plain.⁸ Language must not be strained to favor an insured; the

¹ *Miller v. Brooklyn L. Ins. Co.*, 12 Wall. 285.

² *Franklin F. Ins. Co. v. Colt*, 20 *id.* 560.

³ *Dover Glass W'ks v. Amer. F. Ins. Co.*, 65 Am. St. Rep. 264.

⁴ *Faust v. Amer. F. Ins. Co.*, 91 Wis. 158; *Yoch v. Home Ins. Co.*, 111 Cal. 503.

⁵ *Vorse v. Jersey Plate Glass Ins. Co.*, 119 Iowa, 555; *Bader v. New Amsterdam Co.*, 102 Minn. 186.

⁶ *Conn. F. Ins. Co. v. Jeary*, 60 Neb. 338; *Burkheiser v. Mut. Acc. Asso.*, 61 Fed. 816; *Darrow v. Family Fund Soc.*, 116 N. Y. 537; *Hagan v. Scot. U. & Nat. Ins. Co.*, 186 U. S. 423.

⁷ *Matthews v. Amer. C. Ins. Co.*, 154 N. Y. 449; *Fenton v. Fidelity & C. Co.*, 36 Ore. 383.

⁸ *Holmes v. Phenix Ins. Co.*, 98 Fed. 240; *Thurston v. Burnett, etc.*, F. Ins. Co., 98 Wis. 476.

meaning adopted must be unforced.¹ It is only when the meaning of a fire insurance policy is dubious that it must be construed favorably to the insured. If its wording is clear and unambiguous, it must be given effect as it reads and according to the plain, ordinary sense of the words.² An insurance policy must be reasonably construed; courts have no power to make the contract over for the parties.³ Forfeitures are not looked upon with favor in the law and will be enforced only when the language of the contract admits of no escape. This rule applies to insurance policies.⁴

§ 222. *Representations and warranties by insured.*

A stipulation in an insurance policy rendering it void if any statement in the application for it proves to be untrue is a proper and reasonable one.⁵ If a policy of insurance provides that it shall be void if any question in the application is answered untruthfully, every answer is warranted; and if any one is false, even by honest mistake, it will avoid the policy regardless of its materiality.⁶ The questions whether a false statement in an application for insurance was material to the risk, or intentionally made, are of no importance when the truth of every statement is warranted and made the basis of the contract.⁷ A warranty in the law of insurance is not merely collateral to the contract but an integral part of it and, unless there is

¹ *Bader v. New Amsterdam Co.*, *supra*.

² *Preston v. Ætna Ins. Co.*, 85 N. E. 1006.

³ *Jacobson v. Liverpool, L. & G. Ins. Co.*, 231 Ill. 61.

⁴ *Hamann v. Neb. Underwriters Ins. Co.*, 118 N. W. 65.

⁵ *Deming Invest. Co. v. Shawnee F. Ins. Co.*, 16 Okla. 1.

⁶ *Stensgaard v. St. Paul R. E. Title Ins. Co.*, 50 Minn. 429.

⁷ *Cobb v. Covenant Mut. B. Asso.*, 153 Mass. 176; *Roberts v. State Ins. Co.*, 26 Mo. App. 92.

a statute to prevent, invalidates the obligation if not strictly true, even if what is warranted does not affect the risk.¹ A misrepresentation by one who applies for insurance is either stating something as a fact which is not and which he knows is not so of purpose to deceive the insurer, or else, stating positively as true without knowing whether it is or not that which is really false and which tends to mislead the insurer to his prejudice concerning a fact material to the risk.² A misrepresentation, even if made in good faith by mistake, concerning something material to the risk avoids the policy.³ If there has been a misrepresentation such as nullifies the policy, it makes no difference in what way a loss may have occurred.⁴ The words "representations" and "warranties," in relation to insurance, are not, however, equivalents.⁵ There is a difference in the legal effect of warranties and representations in applications for insurance. If a warranty is false in any particular, important or unimportant, the insured cannot recover on the policy, but for an untrue representation to defeat him it must relate to some matter material to the risk.⁶ The courts do not favor warranties in insurance contracts because they must be strictly and literally made good, and if in any case it is doubtful whether a statement in an application is a warranty or a representation, the courts will hold it to be the latter.⁷ An applicant for insurance who answers correctly and truthfully

¹ *Salts v. Prudential Ins. Co.*, 120 S. W. 714.

² *U. S. Fidelity Co. v. First Nat. Bank*, 233 Ill. 475.

³ *Ibid.* ⁴ *Hazard v. New Eng. Ins. Co.*, 8 Pet. 557.

⁵ *Minn. Mut. L. Ins. Co. v. Link*, 230 Ill. 273.

⁶ *Hoeland v. West. U. L. Ins. Co.*, 107 Pac. 866.

⁷ *Court of Honor v. Clark*, 125 Ill. App. 490.

all the questions in the application or put to him by the underwriter's agent is not chargeable with misrepresentation such as will annul the policy if the agent without his knowledge writes the application wrong.¹ And if when a policy of fire insurance is issued the underwriter or its authorized agent is notified or is fully aware of facts and conditions the existence of which would if unknown and unassented to by the terms of the policy render it void, the policy will nevertheless bind the insurer.²

§ 223. *The renewal of a fire insurance.*

Fire insurance contracts are always term contracts which expire after a certain lapse of time and require renewal if the insurance is longer desired. The renewal of a policy of fire insurance amounts simply to a postponement of the date of its termination — it is a mere continuance for an extended term of the insurance upon the identical terms and conditions of the original policy except as to time. All the incidents of the original contract attach to the renewed contract.³ A renewal, however, is so far a new contract that a change in the law made between the time when the original policy issued and the renewal affecting the risk or obligations of the parties, becomes a part of the renewed contract.⁴ Although the mere renewal of an insurance policy for an additional term works no change in the terms of it or in the rights and obligations of the

¹ *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151.

² *Hartley v. Penn'a F. Ins. Co.*, 91 Minn. 382; *Lewis v. Guard. F. Ins. Co.*, 181 N. Y. 392; *Johnson v. Ætna Ins. Co.*, 123 Ga. 404; *Queen Ins. Co. v. Straughan*, 70 Kan. 186.

³ *State F. & M. Ins. Co. v. Porter*, 3 Grant's Cas. 123; *Lancey v. Phoenix Ins. Co.*, 56 Me. 562. ⁴ *Brady v. N. W. Ins. Co.*, 11 Mich. 425.

parties to it, there is nothing to prevent the parties if they wish to do so from changing the contract in any desired particular when they renew it.¹ If in renewing the policy the parties wish to make a change, they should express it in the renewal receipt.² Unless otherwise expressly agreed, the renewal of a policy takes effect at the expiration of the original term and runs for the same period again.³ A promise by an agent of the company to renew a policy of insurance about to expire which he wholly forgets to keep does not make the company liable for a subsequent loss.⁴ The promise of an agent to attend to the renewal of a fire insurance policy in response to a statement by the policyholder that he wished it renewed in the same company for the same sum and upon the same terms, as he was going away for a time and wanted it attended to before he left, does not go quite far enough to renew the insurance.⁵ A fire insurance policy which has lapsed for non-payment of premium cannot be revived and re-instated in force after a loss occurs by payment of the overdue premium, when payment is accepted by the agents of the company in ignorance that the loss has occurred.⁶

§ 224. *Canceling the policy.*

The method prescribed in an insurance policy for canceling it at the instance of the underwriter must, to be effectual, be closely followed.⁷ An insurance policy upon which

¹ Nat. L. & Acci. Ins. Co. v. Lokey, 52 So. 45.

² Driggs v. Albany Ins. Co., 10 Barb. 440.

³ Redmon v. Phœnix Ins. Co., 51 Wis. 302.

⁴ Idaho Forward'g Co. v. Fireman's Fund Ins. Co., 8 Utah, 41.

⁵ Taylor v. Phœnix Ins. Co., 47 Wis. 365.

⁶ Johnson v. Cont'l Ins. Co., 107 S. W. 688.

⁷ Davis Lum. Co. v. Hartford F. Ins. Co., 95 Wis. 226.

no premium has been paid, and which provides that the insurer may terminate it at once by giving notice to the insured, is canceled instantly as soon as notice is given unconditionally and in good faith.¹ To be good a notice canceling a policy must be unequivocal.² If the premium has been paid, the liability of the insurance company for a loss covered by the policy continues after notice of cancellation has been given until the unearned premium has been paid or tendered back to the insured.³ To complete the cancellation the unearned premium must be returned or tendered to the insured.⁴ A telegram from the underwriter to the local agent to cancel a fire insurance policy does not cancel it until the agent does as he is told.⁵ Except in case of fraud or conduct which amounts to fraud on the part of a policyholder, a company when the premium has been paid cannot effectively cancel instantly a fire insurance policy without affording the insured a fair chance to get other insurance.⁶

§ 225. *The risks.*

A policy of fire insurance covers a loss caused by the negligence of the insured, provided that negligence is not so gross as to show an evil intent.⁷ A policy insuring livestock against death by lightning covers the loss of animals by fire started by lightning in a barn in which the brutes were stabled.⁸ If a policy insures grain in general, without

¹ *Lipman v. Niagara Ins. Co.*, *supra*.

² *Clark v. Ins. Co. of No. Amer.*, 89 Me. 26.

³ *Hollingsworth v. Germania Ins. Co.*, 45 Ga. 294.

⁴ *Tisdell v. N. Hamp. F. Ins. Co.*, 155 N. Y. 163.

⁵ *Fireman's Fund Ins. Co. v. Hellner*, 49 So. 297.

⁶ *Home Ins. Co. v. Heck*, 65 Ill. 111.

⁷ *Pool v. Milwaukee Mech. Ins. Co.*, 91 Wis. 530.

⁸ *Hapeman v. Citizens' F. Ins. Co.*, 126 Mich. 191.

specifically naming the kind of grain covered, it is the opinion of an excellent authority, matured after a careful consideration of the decisions, that it covers all seeds of plants which form a part of the food of either man or beast and such others as enter into and are known to commerce or which were intended by the parties to be considered as grain.¹ This will embrace, not only wheat, maize, rye and oats, barley and buckwheat, but also rice, pease, beans, millet, and flax-seed. A policy insuring a threshing machine while not in use against loss or damage by fire not an incident to its actual operation covers a threshing machine which after resting idle for a fortnight is hauled to a farm-house and left standing preparatory to using it a few days later.² A policy against loss or damage by wind-storms, cyclones, or tornadoes, which exempts the company from liability for losses direct and indirect from lightning and hail, does not insure against damage done by hail accompanied by high winds.³ And a policy insuring against losses by fires or storms does not render the insurer liable for a loss by a freshet due to melting snow.⁴ If a policy of fire insurance provides that the underwriter shall not be liable for property destroyed by order of the civil authorities, no recovery can be had upon it for a loss by fire which spread from pasture lands where it was kindled by order of the county supervisors to burn grass and destroy grasshoppers which threatened to devastate local orchards and vineyards.⁵

¹ Wood, *Fire Ins.*, Chap. II., § 56.

² *Minneapolis Thresh. Mach. Co. v. Fireman's Ins. Co.*, 57 Minn. 35.

³ *Holmes v. Phenix Ins. Co.*, 98 Fed. 240.

⁴ *Stover v. The Ins. Co.*, 3 Phila. 38.

⁵ *Conner v. Manchester Assur. Co.*, 130 Fed. 743.

§ 226. *Location of insured property.*

As a general rule an insurance company is only liable upon its policy insuring personal property in case it is destroyed or damaged while in the place where it is described to be. If, however, an insurance agent in preparing a policy makes an error and misstates the location of the insured property, knowing its actual location, the insured in case of loss may have the policy reformed and recover upon it.¹ It is not always easy to say when the location of the insured property at the time of loss varies from its location as described in the policy. Thus, a lightning insurance policy on grain in "stacks" on a farm has been held to cover grain stacked under a shed² and not to cover unthreshed grain in a mow in a barn.³ Fire insurance policies upon horses and mules "all contained in" a designated barn have been held to cover the animals both inside and outside of such barn while on the same farm.⁴ And policies insuring carriages "contained in" a designated barn are said to cover the vehicles usually kept in such barn when not in use.⁵ In one case, a policy insuring a barn on a farm and the live-stock in it from loss or damage from fire or lightning has been held to cover, when it did not expressly except such a risk, a young horse temporarily at another farm for the purpose of being broken to harness;⁶ while in two other

¹ *Ætna Ins. Co. v. Brannon*, 99 Tex. 391.

² *Farmers' Mut. Ins. Co. v. Reser*, 88 N. E. 349.

³ *Benton v. Farmers' Mut. Fire Ins. Co.*, 102 Mich. 281.

⁴ *Haws v. Phila. Fire Asso.*, 114 Pa. St. 431; *Amer. Cent. Ins. Co. v. Haws*, 11 Atl. 107; *Holbrook v. St. Paul Fr. Ins. Co.*, 25 Minn. 229.

⁵ *McCluer v. Girard F. Ins. Co.*, 43 Iowa 349; *Niagara Ins. Co. v. Elliott*, 85 Va. 962. ⁶ *Lathers v. Mut. F. Ins. Co.*, 135 Wis. 431.

cases such a policy has been held not to cover horses usually housed in the insured barn and killed by lightning outside¹ nor a colt so killed while in a field at pasture.² A policy of fire insurance upon farm utensils in buildings on the farm does not cover a hay press in an open hay stack yard several feet distant from any building.³ And a policy insuring a harvester "operating in grain fields and in transit from place to place in connection with harvesting" does not cover the machine while standing near a blacksmith's shop waiting to be repaired for immediate use.⁴

§ 227. *Restrictions against increase of hazard.*

It is only right and proper that, after property in a certain situation and use has been insured, the owner should not be allowed so to act as to increase the insurer's risk and still keep his insurance. All policies of insurance upon property are therefore conditioned to be void in case the insured increases the danger of loss either by neglecting to watch and protect the subject of insurance or bringing near to it dangerous things, or using it in a hazardous way; and all such conditions are held reasonable and valid. The courts are all agreed that, when a loss or damage is a consequence of something forbidden in the policy, the insurer is not liable, but they disagree over the insurer's liability when the forbidden thing has been done but has ceased to be done and a loss afterwards occurs in nowise

¹ *Farmers' Mut. Fire Asso. v. Kryder*, 5 Ind. App. 430.

² *Haws v. St. Paul F. Ins. Co.*, 130 Pa. St. 113.

³ *Phœnix Ins. Co. v. Stewart*, 53 Ill. App. 273.

⁴ *Mawhinney v. So. Ins. Co.*, 98 Cal. 184.

attributable to the doing of such thing. A reference to a few cases will make this clear. It has been held that when a policy of insurance is conditioned to be void if dynamite is kept, used, or allowed on the insured premises, and such condition is broken, the policy lapses and may not be recovered upon although the breach had no connection with the loss.¹ A fire insurance policy conditioned to be void if seed-cotton is stored upon the insured premises lapses when the condition is broken by a tenant of the insured without his knowledge.² But the temporary use for a few hours only of an engine-driven threshing machine upon the insured premises will not work a forfeiture of insurance conditioned to end in case of any change in the use or *status* of the property which increases the risk of fire.³ And yet an insurance policy upon corn-cribs and their contents, conditioned to be void in case any change in exposure to the hazard of fire occurs by the erection or occupancy of adjacent buildings or by any means whatever in the control or knowledge of the insured, lapses when an engine and boiler to furnish power for a corn-sheller are brought near and operated by or with the permission of the insured.⁴ A provision in an insurance policy avoiding it in case a change in the use of the insured property increases the risk of fire has been held to operate only so long as the extra hazard continues and to suspend rather than annul the policy;⁵ it does not, it is said, affect the insurer's liability for a loss sustained after the extra hazard ceased

¹ *Bastian v. British Amer. Assur. Co.*, 143 Cal. 287.

² *Edwards v. Farmers' Mut. Ins. Asso.*, 128 Ga. 353.

³ *Adair v. So. Mut. Ins. Co.*, 107 Ga. 297.

⁴ *Davis v. West. Home Ins. Co.*, 81 Iowa, 496.

⁵ *Trader's Ins. Co. v. Catlin*, 163 Ill. 256.

and which in nowise was attributable to it.¹ If a fire insurance policy on a farm barn contains no limitation on its use, the underwriter cannot avoid a liability for its destruction upon the plea that the hazard was increased by using it to store a particular kind of produce, — tobacco, for example, — where the policy provided for a forfeiture in case the risk was made more hazardous.²

§ 228. *Vacant and unoccupied property.*

A common clause in fire insurance policies annuls the insurance in case the insured property becomes vacant and unoccupied during the term. This is a reasonable provision, since obviously the hazard of fire is greater for an unoccupied than an occupied building. Whether or not insured property becomes vacant and unoccupied within the meaning of a policy of insurance conditioned to be void in case it does is sometimes a doubtful question, to be determined by the circumstances of the particular case.³ Insured property to be occupied must be substantially and practically used for the purposes for which it is designed, although the occupancy of a dwelling, a barn, or a mill is each of a different sort.⁴ A dwelling house and barn were held to be vacant and unoccupied when the house was only used by the insured and his servants to take their meals in while working a contiguous farm and the barn was only used for the storage of hay and farming tools.⁵ Again, a farmhouse was held to be unoccupied when the policy-holder

¹ *Trader's Ins. Co. v. Catlin*, 163 Ill. 256.

² *Hartford Fire Ins. Co. v. Chenault*, 126 S. W. 1098.

³ *Sonneborn v. M'f'rs Ins. Co.*, 44 N. J. L. 220.

⁴ *Ibid.* ⁵ *Keith v. Quincy Mut. F. Ins. Co.*, 10 Allen, 228.

lived two miles away, although the hired men when working the farm cooked, ate, and slept in it, when at other times it was empty except of furniture and was only occasionally visited for inspection.¹ Farm buildings were held to be vacant and personally unoccupied within the terms of a fire insurance policy conditioned to be void if they became so when the occupant removed his family to a neighboring village to obtain medical attendance for his wife about to be confined, although he purposed to return immediately after the child was born and in the meantime visited the farm-house almost daily in carrying on the work of the farm.² It is held that a fire insurance policy is suspended rather than annulled when the insured property becomes vacant and unoccupied, to be revived again and be in force when the vacancy ceases and the premises are re-occupied.³ A local insurance agent has no power orally to change a clause in an insurance policy relating to vacant and unoccupied premises.⁴

§ 229. *Insurable interest in insured property.*

Every policy of fire insurance to be valid must be predicated upon an interest of the insured in the property covered.⁵ A policy of insurance upon property in which the insured has no insurable interest is void.⁶ Every person who may suffer pecuniary loss by its destruction has an insurable interest in property.⁷ Thus, every mort-

¹ *Fitzgerald v. Conn. F. Ins. Co.*, 64 Wis. 463.

² *Knowlton v. Patrons' Androscoggin Ins. Co.*, 100 Me. 481.

³ *Ins. Co. of No. Amer. v. Pitts*, 88 Miss. 587.

⁴ *Harris v. No. Am. Ins. Co.*, 190 Mass. 361.

⁵ *Wood, Fire Ins.*, Chap. II., § 39.

⁶ *Smith v. Union Ins. Co.*, 25 R. I. 260.

⁷ *Wainer v. Milford Mut. F. Ins. Co.*, *supra*.

gagee has an insurable interest in the mortgaged property,¹ and a purchaser who has paid a part of the purchase price and been let into possession of the premises under a contract for a future conveyance has an insurable interest in the property.² A misrepresentation of the interest of the insured avoids the policy.³ And when the insured's interest in the insured property ceases, the insurance ceases. Insurance is a personal contract and does not follow the insured property when it is transferred to a new owner.⁴ A policy of fire insurance conditioned to end if the insured property is conveyed ceases upon the sale of the property unless the insurer chooses to continue it for the purchaser's benefit.⁵ But a mere executory contract to sell the insured property is not such a change of title or interest as will terminate the insurance.⁶ If, however, an owner of a farm contracts to sell and convey it in fee and lets the purchaser have possession, although he retains the title until the purchase money is paid, there is such a change of ownerships as will end the insurance.⁷ The levy of legal process upon insured property without any change of possession or location is not such a change of title or interest as to avoid a policy of fire insurance.⁸

¹ *Loewenstein v. Queen Ins. Co.*, 127 S. W. 72.

² *Zenor v. Hayes*, 228 Ill. 626.

³ *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507.

⁴ *Shadgatt v. Phillips & Crew Co.*, *supra*.

⁵ *Bates v. Equitable F. & M. Ins. Co.*, 10 Wall. 33.

⁶ *Evans v. Crawford Co. Farmers' Ins. Co.*, 130 Wis. 189; *Garner v. Milwaukee Mech. Ins. Co.*, 73 Kan. 127.

⁷ *Grunauer v. Westchester F. Ins. Co.*, 72 N. J. L. 289; *Baker v. Monumental Sav. & Loan Assn.*, 58 W. Va. 408.

⁸ *O'Toole v. Ohio Ger. F. Ins. Co.*, 123 N. W. 795.

§ 230. *Conditions respecting ownership, encumbrances, and other insurance.*

A policy of fire insurance is often, perhaps commonly, conditioned to be void if the interest of the insured is less than the sole and unconditional ownership of the insured property; or if the property is suffered to become encumbered; or if additional insurance upon it is procured without the insurer's consent. A provision in a fire insurance policy making its validity depend upon the sole and unconditioned ownership of the insured property by the policy-holder is reasonable and valid,¹ and binding on the policy-holder.² If the policy contains such a provision, the company is not liable upon it for a loss unless the insured has a title of that kind to the insured property.³ One is the sole owner of property when no one else has any interest in it, and he is the unconditional owner of it when the quality of his estate in it is not limited or affected by any condition.⁴ The owner of real estate under a conveyance in fee is the sole and unconditional owner of insured property within the meaning of a fire insurance policy, notwithstanding he still owes a part of the price and his grantor has by law a lien upon the land for the unpaid balance.⁵ Unless a fire insurance policy stipulates against encumbrances, the underwriter is not released from his obligations if the insured encumbers the property,⁶ but if the policy provides that it shall be void if the insured property is or

¹ *Bacot v. Phenix Ins. Co.*, 50 So. 729.

² *Ins. Co. of No. Amer. v. Erickson*, 50 Fla. 419.

³ *Tyree v. Va. Ins. Co.*, 55 W. Va. 63.

⁴ *Bacot v. Phenix Ins. Co.*, *supra*.

⁵ *Ins. Co. of No. Amer. v. Pitts*, *supra*.

⁶ *Cooper v. Amer. Cent. Ins. Co.*, 123 S. W. 497.

becomes encumbered, unless otherwise agreed, the putting of a mortgage upon it without the consent of the underwriter destroys the insurance.¹ If an applicant for insurance is asked if there is not an encumbrance on the property of one thousand dollars, his simple answer, "over two thousand dollars," when the encumbrance is really five thousand dollars, is a misrepresentation and fraudulent concealment that will avoid the policy.² A condition in a fire insurance policy prohibiting other insurance without the insurer's consent is reasonable.³ If such a condition is violated, the policy is forfeited.⁴

§ 231. *Notice and proof of loss.*

If an insurance policy requires proofs of loss to be made and submitted to the insurer within a stated time after the loss — three months,⁵ sixty days,⁶ thirty days⁷ — in order to make the underwriter liable, such proofs must be furnished within the limited time, unless that is extended definitely or indefinitely, either expressly or by implication, failing which, the insured cannot recover. It is, however, a general rule of law, probably applicable in such cases, that when the last day to do an act falls on Sunday, he who is to do it has the whole of the next day in which to do it.⁸ If the policy simply requires proofs of

¹ Moore v. Crandall, 124 N. W. 812.

² Smith v. Agric. Ins. Co., 118 N. Y. 518.

³ Bakhaus v. Germania Ins. Co., 176 Fed. 879.

⁴ Carpenter v. Providence Wash. Ins. Co., 16 Pet. 495.

⁵ Cumberland Val. Co. v. Schell, 29 Pa. St. 31.

⁶ East. R. R. v. Relief F. Ins. Co., 105 Mass. 570.

⁷ Planters' Ins. Co. v. Deford, 38 Md. 382; Troy F. Ins. Co. v. Carpenter, 4 Wis. 20.

⁸ Street v. U. S., 133 U. S. 299; Monroe Cattle Co. v. Becker, 147 id. 47.

loss to be furnished immediately, or as soon as possible, without prescribing a definite time limit, the proofs must be furnished promptly, that is, within a reasonable time.¹ The requirement of immediate notice does not necessarily mean that it must be given at the earliest time possible, but that it must be given within a reasonable time in view of all the circumstances.² As in all other matters, what is a reasonable time depends upon the circumstances of the particular case.³ The mere lapse of time before notice is given, unless fixed by the policy, is not conclusive as to an unreasonable delay. In one case a delay of fifty days in giving notice of a fire loss was held to be open to proper explanation and excuse,⁴ although in another case a failure to give notice of a fire loss for sixty days was held unreasonable and sufficient of itself to defeat the insured.⁵ The neglect of the insured to furnish proofs of loss, when the policy requires them to be furnished as a condition of the insurer's liability, prevents a recovery upon the policy unless the underwriter waives the requirement.⁶ Proofs of loss must comply strictly with the requirements of the policy in every material respect in order to fasten a liability upon the insurer.⁷ After a loss of the insured property by fire and notice of it to the insurer and a view-

¹ *Knick. Ins. Co. v. McGinnis*, 87 Ill. 70; *Palmer v. St. Paul F. & M. Ins. Co.*, 44 Wis. 201.

² *Solomon v. Continental F. Ins. Co.*, 160 N. Y. 595; *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 529.

³ *Paine v. Cent. Vt. R. R.*, 118 U. S. 152.

⁴ *Solomon v. Continental F. Ins. Co.*, *supra*.

⁵ *Ermentrout v. Girard F. Ins. Co.*, 63 Minn. 305.

⁶ *Stoebe v. Hanover F. Ins. Co.*, 112 N. Y. Supp. 553; *Home F. Ins. Co. v. Driver*, 112 S. W. 200; *Amer. F. Ins. Co. v. Haynie*, 120 S. W. 825.

⁷ *Wood, Fire Ins.*, Chap. XIII., § 436.

ing once or twice by the underwriter's inspectors of the charred remains, the insured is not bound to permit the litter and débris to lie about indefinitely awaiting the pleasure of the company in appraising the loss.¹ A clause in a policy insuring live-stock, which requires the policy-holder in case of the sickness of an insured animal to notify the insurer by telegraph, does not apply to a temporary illness of a beast lasting only a few minutes.²

§ 232. *Waivers by underwriters.*

An insurance company may always waive a stipulation or condition inserted in a policy for its benefit.³ An underwriter may waive, either expressly or impliedly, the compliance by the insured with any condition in the policy short of one essential to the maintenance of an insurable interest.⁴ The power of a stock insurance company to waive a condition in its policy requiring pre-payment of the premium is nowhere now questioned; and it has been said⁵ that there is no conflict of authority (and the cases upon the point are numerous) as to the power of an agent, having actual or apparent authority to do so, to waive pre-payment of the premium. If an insurance company accepts payment of an overdue premium, it may not forfeit the policy for non-payment on the day it became due.⁶ And if the conduct of the company toward

¹ Flynn v. Hanover F. Ins. Co., 121 N. Y. Supp. 621.

² Kells v. No. West. Live-stock Ins. Co., 64 Minn. 390.

³ Knick. L. Ins. Co. v. Norton, 96 U. S. 234; Va. F. & M. Ins. Co. v. Richmond Mica Co., 102 Va. 429; Prov.-Wash. Ins. Co. v. Wolf, 168 Ind. 690.

⁴ Bush v. Hartford F. Ins. Co., 222 Pa. St. 419.

⁵ Wood, Fire Ins., Chap. I., § 28.

⁶ Globe Mut. L. Ins. Co. v. Wolf, 95 U. S. 326.

the policy-holder has been such as to induce him to believe that payment of the premium within a reasonable time after it fell due would be accepted, a tender of the premium within a reasonable time after it becomes due will prevent a forfeiture.¹ An underwriter may waive a provision in a fire insurance policy forfeiting it in case additional insurance is procured without its consent,² and it may waive notice and proof of loss.³ An insurance company does not waive its right to be furnished with proof of loss merely because it receives and rejects an offer to compromise;⁴ but by denying altogether any liability upon the policy it waives the requirement of proof of loss.⁵ If an insurance company wittingly induces a policy-holder to think it means to waive formal proofs of loss, it will be liable on the policy if the insured, resting upon such belief, omits to furnish the proofs.⁶ There is nothing to arbitrate if an insurer denies *in toto* all liability on the policy, so a provision in it for arbitration of loss is thereby waived.⁷ Forfeitures are not favored in law and courts promptly seize upon any circumstance that indicates a waiver of the right to forfeit or an agreement not to forfeit upon which the insured has relied.⁸ A forfeiture once waived is waived for all time and may not afterwards be enforced.⁹

¹ *Phœnix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30.

² *Henderson v. Standard F. Ins. Co.*, 121 N. W. 714.

³ *Loewenstein v. Queen Ins. Co.*, *supra*.

⁴ *Lapcevic v. Lebanon Mut. Ins. Co.*, 40 Pa. Super. Ct. 294.

⁵ *Higson v. No. River Ins. Co.*, 67 S. E. 509; *Hilburn v. Phœnix Ins. Co.*, 124 N. W. 63; *Milles v. Casualty Co.*, 120 N. Y. Supp. 1135.

⁶ *Loewenstein v. Queen Ins. Co.*, *supra*.

⁷ *Higson v. No. Riv. Ins. Co.*, *supra*.

⁸ *N. Y. Life Ins. Co. v. Eggleston*, 96 U. S. 572.

⁹ *N. Eng. Mut. L. Ins. Co. v. Springgate*, 112 S. W. 681; *Union Cent. L. Ins. Co. v. Washburn*, 48 So. 475.

§ 233. *Time limitations on the bringing of suit.*

The parties to a contract of insurance may lawfully contract that no action shall be brought upon the policy after the lapse of a certain limited period of time of reasonable duration from the occurrence of a loss, and such a provision in the policy is valid and binding.¹ This provision is one which a company may expressly waive, and which impliedly it does waive by conduct which causes the insured to delay or prevents him from bringing his action within the time limit.² The return by a company to the insured for correction of defective proofs of loss and its acceptance of amended proofs later, followed by a letter from its secretary naming a day of payment beyond the stipulated limitation period, waives the limitation.³ The limitation period, however, runs notwithstanding the pendency of ordinary negotiations to adjust the loss and interviews upon the subject from time to time between the insurer and insured,⁴ provided, always, that the insurer throughout does nothing to prevent the insured or to induce him to refrain from beginning suit in season. Thus the company may not set up the delay which it has caused by insisting upon an arbitration as a bar to the policyholder's action.⁵ Nor may an insurance company hold out the hope of an amicable settlement of the loss and thus lead him to delay bringing suit and then set up the special limitation of time stipulated for in the policy.⁶

¹ Wood, *Fire Ins.*, Chap. XIV., § 460, and cases cited.

² *Peoria Ins. Co. v. Hall*, 12 Mich. 202.

³ *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 253.

⁴ *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Gooden v. Amoskeag Ins. Co.*, 20 N. H. 73.

⁵ *Barber v. F. & M. Ins. Co.*, 16 W. Va. 658.

⁶ *Thompson v. Phenix Ins. Co.*, 136 U. S. 287.

CHAPTER XXX

CO-OPERATIVE FIRE INSURANCE

§§ 234-239

§ 234. *Features in common with other insurance.*

Every policy-holder in every insurance company, whether it is a mutual company or not, has a relation to others associated in such company by which he is interested in the engagements of all, as out of the co-existence of many risks arises the principle of average which underlies all insurance.¹ The principles and their applications respecting fire insurance in general which have been set forth in the preceding chapter also govern co-operative insurance, especially in those cases where the forms of policies used are the same. A co-operative, like any other fire insurance company, may make, if not forbidden by law to do so, a valid oral contract insuring property,² and the doctrines of waiver and estoppel arising out of the knowledge and conduct of an underwriter's agents apply as well to mutual assessment insurance companies as to stock insurance companies both as respects the form and the substance of their policies.³ In common with all insurance companies, co-operative fire insurance associations,

¹ N. Y. Life Ins. Co. v. Statham, 93 U. S. 24.

² Van Loan v. Farmers' Mut. Ins. Co., 90 N. Y. 280.

³ McCarty v. Piedmont Mut. Ins. Co., 62 S. E. 1.

whether voluntary unincorporated societies or chartered corporations, are subject to state regulation and official supervision. Every state has power to regulate the business of fire insurance within its borders.¹ Those who seek to carry on the business of insurance are properly subject to reasonable governmental regulations.² The business of fire insurance is affected by a public interest and a corporation transacting it may be restrained in an action by the state from carrying out contracts injurious to public interest and welfare.³ The legislature may lawfully forbid voluntary associations to transact insurance business and confine it entirely to corporations.⁴ A state may regulate insurance companies both in virtue of its police powers for the protection and welfare of the public and its power to create and control domestic and foreign corporations.⁵

§ 235. *Distinction between co-operative and other insurance companies.*

A stock insurance company is one in which the stockholders contribute all the capital, pay the losses, and take the profits; and a mutual insurance company is one in which the members are both insurers and insured, all contributing to a fund to pay losses and expenses and dividing profits in proportion to their respective interests.⁶ A mutual fire insurance company is an association

¹ *Hoadley v. Purifoy*, 107 Ala. 276.

² *State v. Stone*, 118 Mo. 388.

³ *McCarter v. Firemen's Ins. Co.*, 73 Atl. 80.

⁴ *Com. v. Vrooman*, 164 Pa. St. 306.

⁵ *N. Y. Life Ins. Co. v. Hardison*, 85 N. E. 410.

⁶ *State v. Willett*, 86 N. E. 68.

to provide mutual relief to its members for fire losses, in which all the policy-holders are members and each policy-holder has a proportionate interest and liability.¹ In a mutual insurance company the members make contributions either in money or assessable premium notes, or both, according to the adopted plan of transacting business, to make up a common fund from which each is entitled to indemnity in case of loss.² Such a company is simply one in which the funds to pay losses are provided, not by capital subscribed by outsiders, but by premiums met by the persons insured.³ A co-operative fire insurance society aims to indemnify its members against the loss or damage of their property by fire by providing compensation upon the principle of mutual assessment. The members are mutually bound each to all the others to make good to whosoever of their number incurs it his loss or damage by fire. It is not a charitable or benevolent scheme in any sense, but a selfish one in the sense that every member goes into it for his own benefit and to protect his private interests. It is the promise to him that if his property is burned he shall be paid for it, that leads him to agree to pay annual dues and other charges and to contribute when a fellow-member's property is consumed or injured by fire a sum of money towards his compensation. The membership is composed of persons who think this plan of mutual insurance cheaper or more advantageous in some way than other modes of insurance, and the purpose of the society is to furnish insurance and not to dispense charity or benevo-

¹ *Lamb. & Co., v. Merchants' Nat. Mut. F. Ins. Co.*, 119 N. W. 1048.

² *Union Ins. Co. v. Hoge*, 62 U. S. 35.

³ *Mygatt v. N. Y. Protection Ins. Co.*, 21 N. Y. 52.

lence. The benefits it offers are restricted to its members who agree to do just what they require to be done for themselves upon suffering a fire loss. All the members contract for a benefit to themselves in certain contingencies and pay their money for it. The society is, therefore, a mutual insurance company.¹

§ 236. *The contract between a co-operative insurance company and a member.*

When one takes out a policy of fire insurance in a stock company his whole contract is contained in his policy, but if he insures in a co-operative company, this is not the case. An application for insurance in a mutual co-operative insurance company is in legal effect an application to become a member of the association upon the terms and conditions stated in its charter, constitution, and by-laws.² The articles of agreement, usually termed a constitution and by-laws, of such an organization constitute the contract of its members and are binding upon those who join unless they are contrary to public policy or the law of the land.³ The constitution and by-laws of mutual co-operative assessment companies are binding upon policy-holders when neither contrary to statutes nor unreasonable. The members of such a company are presumed to know its articles of association and by-laws⁴ — conclusively so presumed.⁵ And these by-laws are a part of every insurance contract between the association and its members.⁶

¹ Co-op. F. Ins. Order *v.* Lewis, 80 Tenn. 136.

² Van Loan *v.* Farmers' Mut. Ins. Co., *supra*.

³ Brown *v.* Stoerkel, 74 Mich. 269; Clark *v.* Mut. Res. L. Asso., 14 Dist. Col. App. 154.

⁴ Corey *v.* Sherman, 96 Iowa, 114.

⁵ Benes *v.* Sup. Lodge K. & L. H., 231 Ill. 134.

⁶ *Ibid.*

§ 237. *The liability of policy-holders to assessment.*

A policy-holder in a mutual insurance company operating on the assessment plan is bound from time to time to pay such sums as shall be assessed against him according to the by-laws and which are needed to pay losses and expenses.¹ The scheme of co-operative fire insurance is that all persons insured constitute members of the company, becoming such by taking out policies and being subject to assessments from time to time to pay expenses and losses. They may if they choose pay in advance at the outset a sum estimated as probably sufficient to meet all accruing losses, but they still remain subject to assessment if a deficit arises in the fund collected.² When the by-laws of a mutual fire insurance company provide for advance initial payments of premiums by the policy-holders and for *pro rata* assessments afterwards if necessary to meet losses, the directors are empowered, whenever the funds in hand are insufficient to pay losses, to levy assessments on the policy-holders without preliminary notice.³ If a co-operative fire insurance company becomes insolvent, its policy-holders are liable to assessment by the receiver to pay its debts, and the rights of creditors and liability of members are determined by their *status* at the time the receiver was appointed.⁴ In New York a member of a co-operative fire insurance company organized under the laws of that state is only liable for his own *pro rata* share of the losses and may not be assessed again, after once pay-

¹ *Ellerbe v. Barney*, 119 Mo. 632.

² *Skaneateles Paper Co. v. Amer. Underwriters' F. Ins. Co.*, 114 N. Y. Supp. 200.

³ *Hammond v. Knox*, 109 N. Y. Supp. 367.

⁴ *Skaneateles Paper Co. v. Amer. Underwriters' F. Ins. Co.*, *supra*.

ing his proportionate share, to make up a deficiency due to defaults of fellow-members in paying their shares.¹ And yet it has also been decided that such a company has a right to assess its policy-holders to repay loans obtained to make good deficits in previous assessments for losses.² The holder of a policy in a co-operative fire insurance company which is absolutely void, because by law the company was powerless to write it, receives no benefit or protection from it and hence is not liable to assessment.³ But one who applies for and receives a policy of fire insurance from a co-operative insurance company actually carrying on business, and who pays sundry assessments levied upon him, cannot when another assessment is regularly called successfully resist payment on account of irregularities in the incorporation and organization of the company.⁴ When a member of a co-operative insurance company withdraws, and his account with the company is settled and his policy canceled, he may no longer be called upon to pay assessments.⁵ If the charter of a mutual fire insurance company requires notices of assessments to be given to members, a policy-holder may be put in default for non-payment of his assessment only by giving him the requisite and prescribed notice; his independent knowledge, if he has any, is wholly immaterial.⁶ A by-law of an assessment insurance company making the certificate of an officer conclusive as to the mailing of notices of assess-

¹ *Pratt v. Dwelling House Mut. F. Ins. Co.*, 7 App. Div. 544.

² *Rockland & H. Town F. Ins. Co. v. Bussey*, 48 App. Div. 359.

³ *Patrons, etc., F. Ins. Co. v. Plum*, 84 App. Div. 96.

⁴ *Rockland & H. Town F. Ins. Co. v. Bussey*, *supra*.

⁵ *Patrons, etc., F. Ins. Co. v. Harwood*, 64 App. Div. 248.

⁶ *Miner v. Farmers' Mut. F. Ins. Co.*, 117 N. W. 211.

ments to policy-holders, when such officer is not required to have personal knowledge of the mailing, is unreasonable and void.¹

§ 238. *Rights and remedies of policy-holders in case of loss.*

The mere withdrawal of a member from an unincorporated voluntary association of underwriters insuring members against fire losses does not of itself alone work a cancellation of his policy.² The fact that a mutual fire insurance company has for years voluntarily paid losses due to lightning to policy-holders insured against fire only does not make it liable to another policy-holder who had been assessed for such losses for the destruction by lightning without fire of a barn insured only against fire.³ A policy-holder in a mutual co-operative fire insurance company who has suffered a loss within the terms of his policy may maintain an action against the officers of the company personally if they divert to other purposes funds collected by assessments from his fellow-members to pay his loss, even though they used the funds to pay other equally legitimate claims.⁴ He may not, however, maintain suit against the officers personally for devoting to other purposes general funds of the association which were not collected by assessments to pay his loss.⁵ A member of an insolvent mutual assessment insurance company

¹ *Duffy v. Fidelity Mut. Ins. Co.*, 142 N. C. 103.

² *Williamson v. Warfield, etc., Co.*, 136 Ill. App. 168.

³ *Sleet v. Farmers' Mut. F. Ins. Co.*, 113 S. W. 515.

⁴ *Sherman v. Harbin*, 124 Iowa, 643.

⁵ *Perry v. Farmers' Mut. F. Ins. Co.*, 139 N. C. 374.

may not set off his claim for a loss covered by the policy against an assessment due from him to the company.¹ A by-law of a mutual insurance company which provides that the neglect of a member to pay his premium before a stated date in the year in which he is insured shall exclude him from participating in the funds collected to pay losses is a reasonable and valid one.²

§ 239. *Official criticism of co-operative fire insurance.*

Associations of this class have flourished in the state of New York for about three-quarters of a century. A great many of them have been organized in that state and their operations have recently³ been the subject of a painstaking investigation by the state insurance department, preliminary to regulative legislation, just enacted.⁴ The companies of New York may be taken as typical of their class. The criticisms of them will apply generally. One of these relates to the unskilled manner in which by-laws and contracts have been drawn and the perplexing ambiguity of the language used, making it difficult when possible to determine the rights and obligations of members. The attorney general of the state, in response to a request to know the meaning of one of the forms in use by one of these companies, said: You ask as to a sample blank which you inclose, but precisely the question which you desire answered concerning it I am unable to spell out. After reading the sample blank I am unable to fathom the

¹ *Stone v. N. J. & H. R. Ry. Co.*, 66 Atl. 1072.

² *Nimic v. Security Mut. Hail Ins. Co.*, 121 N. W. 434.

³ December, 1909.

⁴ *Vide*, L. 1910, Chap. 328.

purpose of the mind which formulated it. It would be for the interest of co-operative fire insurance companies to have their by-laws, policies, and applications prepared by a competent attorney.¹

In the report² of the investigation above mentioned, the examiner declared it doubtful whether all policy-holders understood that their policies were subject to assessment. All of these associations, in compliance with the law, said he, print their by-laws on the back of the policy, but in many of the by-laws it is very difficult to determine by the wording whether the policy is assessable. In fact, he added, it is clear from complaints received regarding the extra assessments levied on the policy-holders of the associations now in liquidation that the insured believed that his advance premium was all that could be collected.

Another criticism in the report mentioned³ was that many of these associations had accumulated surpluses over the amounts needed for re-insurance reserves, while none had ever declared a dividend, and in a few cases only did directors appear to have power under the by-laws to distribute any part of a surplus. And while by law an insured is compelled to pay his *pro rata* share of the losses, the law has not provided that he shall share in the profits. Most of these associations, it was said again in such report,⁴ use the standard form of policy and agree thereby upon a cancellation on the part of the association to return the *pro rata* share of the premium, or when the

¹ Letter of Atty. Gen. Jackson to E. E. Bohakek, Rochester, N. Y., Feb. 17, 1908.

² Page 21.

³ Page 22.

⁴ *Id.*

cancellation is by the policy-holder, to return the short rate. Unless these associations have on hand that portion of the premium which has been unearned, it seems clear that they cannot carry out their part of the contract, excepting, of course, that their policies are subject to assessment.

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