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PRINCIPIA OF LAW

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DEDICATION

This teacher's manual, a statement in simple language of some principles of law, is dedicated to Hon. Howell Cobb, whose mind moved in principle, who thought in the large
CHAPTER I.

LAW AND LAWS.

Law is the science of right living. Laws are the applications thereof to the conduct of man in organized society. Law never varies: laws must continually change. Adjustment of principle to social conditions is a never ending process. The closer this adjustment the more beneficent and efficient is the legal system. Laws should express the needs of the enlightened conscience of the community. “To follow not to force public inclination, to give direction and form to the general sense of the community is the true end of legislation.”

As law is the embodiment of principles of which laws are the applications, in elucidating principles we discuss the rules adopted by man for the applications. Man in society forms government. Government promulgates rules. These rules constitute the legal fabric.

ESSENTIALS OF A LAW.

1. Law must emanate from the supreme power in the State. Were the author equalled in authority by any other power, were it less in authority than any other power, in the former case, obedience would be a matter of choice, in the latter, disobedience, a duty. Legislation is the supreme act of the sovereign. In America sovereignty resides in the people. The lawmaker and the subject are one and the same. In theory government derives all its just powers from the consent of the governed. Although the laws are the result of the consent of the governed, it must be understood that this consent is given when the law making power is conferred on government and does not affect the imperative nature of laws duly enacted by government. Laws thus enacted bind all alike.

2. It follows inevitably from the proposition just stated that laws are imperative. The command of the laws is irresistible. The whole physical force of the State is behind it. It is true that in many instances neither laws nor physical force can compel obedience. Pains and penalties are imposed upon the disobedient.

3. Laws are permanent, not subject to change to suit varying circumstances. They continue in force until repealed or
changed by the law-making power. Laws are uniform, acting alike on all matters coming within their scope. Laws are universal, applying equally to all persons and conditions under their operation.

4. Laws must be published before they become operative. As ignorance of the law excuses no man, clearly every man should have an opportunity to acquaint himself with their provisions. This essential also forbids retroactive laws.

5. A law should operate in the future and not affect or impair rights in existence at the time the law was enacted. The phrase is a law should not be ex-post facto or retroactive. To illustrate, the States agree in the Constitution of the United States not to enact an "expost facto law or a law impairing the obligation of a contract." The first part of the phrase forbids the enactment of a law, making an act criminal which was innocent at the time the law was made, applicable to such act done before the law was made. The latter part of the phrase forbids any law making a change in the rights of parties to a contract entered into before the law was enacted. Most of the States have broader provisions and forbid their legislatures to enact retroactive laws of any sort.

Montesquieu comes near including in one sentence the concepts of law both jus and lex when he says: "Laws are the relations (rapports) arising from the nature of things, as the laws of things inanimate, of beasts, of man, of the Deity.''

SUBSTANTIVE AND ADJECTIVE LAWS

Considered from the viewpoint of the object sought to be accomplished, laws have been grouped as Substantive and Adjective. Substantive laws are, in the true sense, rules for the guidance of conduct. Adjective laws provide the means for enforcing substantive laws. Declaratory laws set forth and defend legal rights, and point out wrongs, which invade them. Directory laws enjoin duties on all to observe the legal rights of others and to abstain from wrongs. Adjective laws are subdivided into Remedial and Vindicatory laws. Remedial laws afford to persons, members of the State, protection and vindication of their rights, and redress for wrongs inflicted upon them. Vindicatory laws provide the means and methods
of punishing the violators of public laws. They are generally comprehended under the Criminal Law.

A word may here be appropriately said as to the relation of human laws, the laws for man's guidance in society, and other systems of laws.

The revealed laws are found in the Decalogue. The commands from the third to the ninth inclusive are, in one or another form, embodied in the laws of all civilized States. As to the remaining three commands, they are beyond the province of man's laws.

Many of the precepts of moral law are embodied in the human law, as to many others of those precepts, the laws of man are silent. Covetousness is beyond the reach of human laws. A debased disposition, impure thoughts are not subject to any rules of civil conduct. Further there is a vast field covered by human laws into which neither revealed nor moral law enters. When an act is under the ban of both moral and human law it is said to be malum in se; when an act violates human law only, it is said to be malum prohibitum.

From these essentials Blackstone concludes that "Man's law is a rule of civil conduct prescribed by the supreme power in a State commanding the observance of the rights declared by law and prohibiting their invasion."

CLASSES OF LAW

At the outset, it is proper to enumerate the classes of laws of this country, and to indicate briefly their relation to each other, reserving the discussion of their origin, scope and relation to the individual to the more appropriate place of the chapter on government.

Constitution is the organic law of the State or of the United States establishing and defining the powers of government, prescribing the functions of the several departments, the methods of performing them, and enumerating the inalienable rights of persons.

Legislation is the exercise of powers conferred by the Constitution in the application of the principles therein enunciated to social conditions.

1. Constitution of the United States. This is the embodiment of the powers conferred by the States upon the Federal
State. It is the supreme law of the land. Any Act of Congress, any clause of a State Constitution, any act of a State Legislature, or of any law-making body whatever, which contravenes this Constitution is null.

2. Acts of Congress and Treaties made by the treaty-making power, in accord with the Constitution, rank next in authority. Acts of Congress are valid only when dealing with the subjects permitted in the Constitution. At first sight, it might seem strange that a treaty, a compact between this country and a foreign nation, should be regarded as a law, when we recall that at least one of the parties participating in the making, is not in any sense the people nor any of the people of the United States. It matters not who frames the treaty, the adoption by the proper authority of the country is the act which gives it the force of law here.

3. Constitutions of the States. Third in order of authority are the Constitutions of the States. These are written instruments framed by delegates chosen by the people of the States and ratified by the people themselves. They emanate from the people direct. They give, affirmatively or negatively, the subjects upon which the State Legislatures may or may not enact laws.

4. Acts of Legislatures. The Acts of the Legislatures of the States are fourth in order of supremacy. The people of the States can, of course, authorize their law-making body to legislate upon any subject whatever, except those subjects which they have expressly agreed to commit to the Federal Government and those subjects upon which they expressly agreed (by adopting the Constitution of the United States) that they will not legislate. In adopting a Constitution the people expressly name the subjects of legislation, and either affirmatively or negatively confine the law-making body within these limits. Acts of the Legislature therefore must be upon those subjects only which are permitted by the State Constitution, and, of course, not upon those subjects expressly declared to be within the domain of the Federal Government, nor upon those subjects forbidden in the Constitution of the United States.

5. Municipal Ordinances. Ordinances of Municipal Corpora-
tions properly adopted in accordance with the charters and not in conflict with any of the laws of the classes above enumerated have the force and effect of laws.

WRITTEN AND UNWRITTEN LAWS.

Laws are frequently spoken of as written or unwritten. By the former is meant all rules of conduct prescribed by the duly authorized law-making power. The terms written law and statute are practically synonymous. By the latter is meant customs which have the binding force and effect of laws.

All the laws of the United States are written; i. e., are either in the Constitution or have been enacted by the Federal law-making power. There is no Federal Common Law. The laws of the several States are mostly written; i. e., enacted or adopted by the proper law-making bodies. Unwritten or customary laws prevail in some of the States wherein certain principles of the Common Law of England applicable therein which have not been expressly adopted by legislative enactment are of force.

WRITTEN. The written laws are found in the Constitutions and in the Acts of Congress and of the State Legislatures. In some States, of which Georgia is one, all the laws are statutory, and all the public laws are codified; i. e., arranged systematically and published by authority of the State.

UNWRITTEN. Customary laws are found in treatises of private persons learned in the law, or in the decisions of courts of last resort, where they are stated as being recognized laws of the State from the foundation of its government.

TRADE CUSTOMS. Trade usages are not laws, but when general and known are binding on parties as terms of contracts. To illustrate: if one buy of a silversmith a solid silver dish, finds that it is composed of half metal silver and half alloy; should it be a custom of the silversmiths’ trade to call this compound solid silver, the contract is good and the price of the article is collectable at law.

INTERPRETATION OF LAWS.

The rules for the interpretation of laws and for the construction of statutes are the result of human reason applied to human experience. They are the direct application of prin-
ciple to practice. Statutes sometimes repeat them with modifications and additions. The foundation rules are stated by Blackstone with his usual unapproachable clearness, and the substance of his statement is here given.

The object of all interpretation is to ascertain the intention of the maker of the law. The means resorted to for this purpose are embodied in the rules.

1. Words. The words of the law shall be given their usual and known signification, the popular use being preferred. Technical terms and terms of art are to be taken according to their acceptation in the science or art. Thus a law regulating the keeping of tigers, and another law making blind tigers nuisances, clearly use the word tigers in two very different senses.

2. Context. If the meaning of the words is doubtful, it is useful to compare them with the context in which they are employed. The preamble should throw light upon the whole law. Other laws dealing with the same matter may be looked to, for the proper meaning of the law under investigation. Thus a statute abolishing entails, must be explained by the laws defining entails.

3. Subject Matter. Words are always to be understood as having regard to the subject matter of the law. Thus a law dealing with ecclesiastical matters may use the word provisions in a peculiar sense, different from the ordinary meaning.

4. Effect and Consequences. Where words literally understood bear an absurd meaning, the received sense must not be taken. The Bolognian law inflicting severe penalties on one who drew blood in the street, was held not to apply to a surgeon who bled a man, fallen in a fit, with the object of relieving him.

5. Reason and Spirit. This rule forbids a technical and too strict interpretation of a law. It is a valuable but dangerous rule. Where the law works a hardship in a particular case, it should not be annulled by reasoning. A reasonable interpretation is neither too strict nor yet too lax. The sailor who remained on the vessel when deserted by the crew, because he was too ill to leave, was not within the reason of the law which rewarded one who stayed by the ship when in danger of being...
wrecked. A strict interpretation of a law is however less
dangerous than too liberal a construction. The latter tends
to unsettle the law itself and thus destroy it.

The rules for construing statutes are:
1. In construing a statute, three things are to be considered,
the old law, the mischief and the remedy. That is, how the
the law stood at the making of the statute, what was the mis-
chief for which it did not provide, and what remedy does the
statute provide therefor?
2. Penal statutes are construed strictly. Acts not covered
by the words of the statute are not within the penalty.
3. Statutes against fraud are construed liberally. The dis-
tinction between this and the preceding rule is, that a penal
statute inflicts punishment on a person, statutes against fraud
apply to acts and serve to point out when they are voidable.
4. One part of a statute must be construed with another, so
that effect be given to the whole. A saving totally repug-
nant to the body of the law is void.
5. Where statutes conflict, the last one prevails as it re-
peals former conflicting laws. This may by direct negation
of the former statute, or by necessary implication in case the
two are repugnant to each other.
6. If a statute repeal another and is itself repealed, the first
statute is revived without formal words to that effect.

In general then it may be said that laws cover the social
organism as the atmosphere surrounds the earth. There is no
bare spot, no vacuum. When a new law is made, it takes
the place of existent law. When a law is repealed, pre-exist-
ent law takes it place.
Laws are rules defining and protecting rights. The definition of rights constitutes the substantive law; the protection of rights is the province of remedial law.

**SUBSTANTIVE LAW.**

**Rights.** Rights are those things which persons in human society possess and enjoy under the laws, and some things which they demand of others. Rights are conferred by law upon persons. A person is either a human being or a corporation. The one is created by God, the other is the creature of human society acting through government. The privation of a right is a wrong. Wrongs may be perpetrated, either by a direct infraction of a legal right, or by a dereliction of duty causing damage to the one to whom the duty is owed. Generally speaking every wrong involves a dereliction of duty, but the division just given is usually recognized for convenience. Rights are grouped as individual and relative. Individual or primary rights are conferred by the laws upon a member of society independently of his connection with other members. Relative rights are given by the laws to members of the society by reason of their connection with the government or with other members.

**Primary Rights.** The best known classification of the primary rights of an individual is given by Blackstone, as: security, liberty and property. The first of these he subdivides into security of life, limb, body, health and reputation. Liberty, the freedom from interference with locomotion, might well be treated in modern times as a subdivision of the right of security, but it also includes today religious liberty, freedom to labor, freedom of speech, right to form the marriage tie and to contract in matters not involving property. Property, in its highest sense, is that absolute, despotic dominion a person may have in things external, exclusive of the rights of others. Its elements are, possession, the right of possession, power of control and disposition, the thing owned passing by succession at the death of the owner and being reachable for debt.

**Relative Rights.** Relative rights are classed as public, civil and private. The first deal with the relation of the individual
to society, and include the structure and powers of government. The second define the powers and privileges of citizens, including the elective franchise, equal participation in the benefits conferred by government, (notably education), and enjoyment of public utilities without discrimination. The last are called the domestic relations and cover the rights and duties conferred and imposed by the laws upon persons related to each other as master and servant, husband and wife, parent and child, guardian and ward.

WRONGS. Wrong is a privation of a legal right. Private wrongs take the shape either of a breach of a contract or the privation of the legal non-contractual right of another. The former is treated under the subject of contracts, the latter of torts.

DUTIES. Rights and duties are reciprocal terms, the definition of the former necessarily indicates the latter. For this reason the subject does not require or receive a separate treatment. Nevertheless there are instances where a statute imposes duties upon persons or classes of persons. A nice question arises whether imposition of duty on one confers rights on another, what is the nature of the right and upon whom is it conferred. This may usually be answered by reference to the statute itself.

Where the law confers right on one, that of itself imposes duties on others to observe that right.
CHAPTER III.

PUBLIC RELATIONS.

SOVEREIGNTY—GOVERNMENT.

The logical order in which rights should be treated is the following: (1) Public Relations; (2) Primary Rights, Security and Liberty; (3) Civil Rights; (4) Private Relations; (5) Primary Right of Property.

The third primary right, viz.: that of property is taken last, because of the greater length of the discussion, and because the subject may be better comprehended after some acquaintance with rights which it would naturally precede.

PUBLIC RELATIONS.

The connection of the individual with the public gives rise to rights and duties, which are ascertained by a study of the structure and functions of government. Government is the machinery created by the sovereign for the purpose of declaring and protecting rights. As government is a creature of the sovereign, our first inquiry must be into the attributes of sovereignty. As has been said, sovereignty resides in the people. The agencies designated by the people to exercise such portions of sovereignty as the people permit constitute the branches of government.

The attributes of sovereignty are:

1. Supremacy. That the sovereign is supreme within the jurisdiction is axiomatic. Sovereignty and supremacy are sometimes used as interchangeable terms. Evidently it is essential to the very existence of an independent State that no power, foreign or domestic, shall equal her own in her territory. In this sense the people are supreme, and there is no power equal to that of the people in the territory composing the United States. The people through government, their creature, make and enforce laws. These laws are therefore of supreme force. This is a government of law not of men. An illustration of this principle is found in the rule that one cannot sue a State.

2. Perfection. The ancient writers ascribe to the sovereign the attribute of perfection, the maxim being: "The King can do no wrong." This might mean that whatsoever the people in the exercise of sovereign power should ordain and declare to be
The sense of the maxim is clear if we use the words right and lawful as synonymous. As this is not so it is better to say the sovereign can do no unlawful act. Illustrating this principle are the rules that the statute of limitations of actions at law do not apply to the State. The State is never under disability nor is it ever chargeable with laches. The motive of the legislature cannot be impugned.

3. Ubiquity. The legal ubiquity of the sovereign means that any act of an officer in the discharge of duty is the act of the sovereign. Thus whenever a court is in session, the sovereign is there present in the person of the officers.

4. Perpetuity. Any end of sovereignty or any break in its continuity must mean destruction. Sovereignty must reside somewhere. When sovereignty over the American Colonies was relinquished by the British crown, eo instanti it vested in the people of the several States mentioned in the treaty. Upon the adoption of the Constitution of the United States a part of the sovereignty was relinquished by the people and at once vested in the Federal State. The residue not delegated in the State Constitutions to the State Governments, of course, is reserved to the people.

5. Foreign Relations. Transactions between independent States and Nations are relations between the respective sovereigns. To represent and in fact to be the State in all foreign relations is a prerogative necessarily inherent in the sovereign. The usual exercise of this prerogative is in making treaties, declaring war and concluding peace.

6. Domestic Affairs. The sovereign power of a State establishes government, with the necessary machinery for the discharge of functions, legislative, executive and judicial; with authority to support by levying and collecting taxes; to sustain by maintaining an army and navy; with the duty of maintaining highways; with the power to condemn private properties for public purposes.

HISTORICAL.

During the colonial period the sovereignty of what were afterward known as the Original Thirteen States resided in the
British crown. Upon the signing of the treaty of peace after the war of the Revolution, each of the colonies became a sovereign State. Each had a form of government or immediately adopted a form of government suited to her needs, and through these State governments sovereignty was exercised by the people in whom it had vested the moment it was relinquished by Great Britain. Neither then nor since was the whole power of sovereignty entrusted by the people to the governments. The people of each State have declared in writing the powers entrusted to the State government and have prescribed the methods by which these powers thus conferred are to be exercised. These are the State Constitutions. They will be treated later. Suffice it to say at this point that they are usually so framed that the governments created by them have the right to exercise all the sovereign powers resident in the people of the State, subject to the limitations in the State Constitutions themselves.

For reasons not necessary to be discussed there was in the year 1787, a surrender by the people of the several States, or by the States themselves, or by the whole people (it is useless to enquire by which) of certain specified sovereign powers to a separate person, viz.: The United States of America. These powers are enumerated in the Constitution of the United States. This act, clothing with sovereign powers, defining and providing means and machinery for their exercise, in a word creating a government, had the effect of creating a new State, viz.: the Federal State. We find therefore that each State and the people of each State parted with a portion of their sovereign powers, that in this country sovereign power is divided and is resident partly in the Federal State and partly in the several States. Neither exercises complete sovereignty. Neither in the complete sense is a State.

Thus we conclude, the Federal Government exercises those branches of sovereignty to it delegated in the Constitution of the United States, as the administrator of powers resident in the people. The State Government exercises those sovereign powers conferred upon it by the people of the State, as the creature of the people of the State. In the people of the several States reside all undelegated power.
Our first inquiry is, what branches of the sovereign power are in the Federal State and the manner in which they are exercised? For this purpose we look to the Constitution of the United States. Of this instrument we make for convenience the following analysis:

(I) Powers expressly and directly conferred; (II) Powers renounced by the States; (III) Limitations upon the power of the United States.

I. POWERS CONFERRED.

1. To organize a government, for the exercise of the delegated powers.

2. To lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States.

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

4. To regulate foreign and inter-state commerce, and commerce with the Indian Tribes.

5. To establish uniform rule of naturalization, and uniform bankruptcy laws.

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

7. To provide for punishing counterfeiters of the currency and securities.

8. To establish post-offices and post roads.

9. To issue patents and copyrights to inventors and authors.

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

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

12. To raise and support armies; to provide and maintain a navy.

13. To make rules for the government and regulation of the army and navy.

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

17. To legislate for the District of Columbia and all lands ceded to the United States for public purposes.

II. POWERS RENOUNCED BY THE STATES.

The States agree that they will exercise none of the following powers:

1. Enter into any treaty, alliance, or confederation.
2. Grant letters of marque and reprisal.
3. Coin money; emit bills of credit.
4. Make anything but gold and silver coin a legal tender.
6. Pass any ex post facto law, or law impairing the obligation of contracts.
7. Grant any title of nobility.

The States further agree that, without the consent of Congress, they will exercise none of the following powers:

8. Lay any imposts or duties on imports or exports, except for executing inspection laws. Lay any duty of tonnage.
9. Keep troops, or ships of war, in time of peace.
10. Enter into any compact or agreement with another State, or with any foreign power.
11. Engage in war, unless invaded or in imminent danger of invasion.

The States made further agreements which are in the nature of renunciation of sovereign power, as follows:

13. Neither slavery nor involuntary servitude, except as a punishment for crime, shall exist within the United States, or any place subject to their jurisdiction.

14. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside: (a) No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; (b) Nor shall any State deprive any person of life, liberty, or property, without due process of law; (c) Nor deny to any person within its jurisdiction the equal protection of the laws.

15. The right of the citizens of the United States to vote shall
not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

It will be noticed that of the powers renounced by the States those enumerated as 1, 2, 3, 8, 9, 10, 11, are expressly conferred upon the United States.

III. LIMITATIONS UPON THE POWER OF THE UNITED STATES.

The Constitution of the United States contains an enumeration of things which the Federal Government is forbidden to do, as they concern chiefly the rights of individuals, they are sometimes called the bill of rights, they are as follows:

1. The privilege of the writ of habeas corpus shall not be suspended, except the public safety require it in case of rebellion or invasion.

2. No bill of attainder, or ex post facto law, shall be passed.

3. No capitation, or other direct tax, shall be levied, except in proportion to the census.

4. No tax or duty shall be laid on articles exported from any State. No preference shall be given to the ports of the States.

5. No money shall be drawn from the treasury, but in consequence of appropriations made by law.

6. Congress shall make no law respecting an establishment of religion, the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

7. The right of the people to keep and bear arms shall not be infringed.

8. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner prescribed by law.

9. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

10. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due pro-
cess of law; nor shall private property be taken for public use, without just compensation.

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

14. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

15. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

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

17. No attainder of treason shall work corruption of blood or forfeiture except during the life of the person attained.

18. The right of the citizens of the United States to vote shall not be denied or abridged on account of race, color or previous condition of servitude.

The Constitution imposes on the United States the following duties: to guarantee to every State in the Union a republican form of government, to protect them against invasion, and on application of the legislature or of the executive, against domestic violence.

Provision is also made for the admission of new States, and for amendments to the Constitution.

The powers not delegated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively or to the people.

It will be seen from this analysis that some of the powers renounced by the States are delegated to the United States. Attention has been called to these. Some of the renounced powers are denied to the United States, and as to some the Constitution is silent. Thus the States agree to pass no ex post facto law, or law impairing the obligation of a contract. The United
States is forbidden to pass any ex post facto law, and the impairing of the obligation of a contract is not mentioned. It may be generally stated that the limitations on the powers of the United States are usually placed upon the State Governments by their respective Constitutions.
CHAPTER V.

UNITED STATES GOVERNMENT.

The government created to exercise the powers conferred on the United States consists of three independent and co-ordinate branches: the legislative, the executive and the judicial.

CONGRESS.

The law-making power is vested in a body called the Congress of the United States. It is composed of two chambers or houses, viz.: the Senate and the House of Representatives.

SENATE.

The Senate is composed of two Senators from each State, chosen by popular vote, for a term of six years. One Senator from each State is elected every third year. The Senate is therefore a permanent body. Senators must be thirty years of age; nine years citizens of the United States; and inhabitants of the States from which they are chosen. The Vice-President of the United States is ex-officio President of the Senate, he has no vote except in case the Senate be equally divided on a question. The Senate alone has power to confirm or reject nominations to office made by the President. In case of impeachment of an officer, the Senate sits as a court for the trial, being presided over by the Chief Justice of the United States. The prosecution is conducted by the members of the House chosen for that purpose.

HOUSE OF REPRESENTATIVES.

The members of the House of Representatives are chosen for a term of two years by the people of the several States, who are qualified to vote for members of the most numerous branch of the State Legislatures. The House of Representatives is a new body every two years. At the organization of the new House, the Congress is known as the 5th, 10th, or 40th Congress, as the case may be. The number of Representatives is apportioned among the States according to population. Representatives must be twenty-five years of age; seven years citizens of the United States; and inhabitants of the State where elected. All bills for raising revenue must originate in the House. The House begins impeachment proceedings before the Senate.
Except in the case of the presidency of the Senate, each house elects its own officers. Each house formulates its own rules of procedure and judges the qualifications of its members.

The Congress has power to legislate upon any of the subjects already enumerated in a previous chapter, and may enact any laws necessary to the exercise of the powers delegated. The latter is called an implied power. The exercise of implied powers has been much extended since the early days of the government, and especially has the power to promote the general welfare been greatly enlarged. When a bill has been passed by both Houses of Congress and signed by the President it becomes a law. If the President veto the bill, it may be passed over his objection by a two-third majority of both Houses.

THE PRESIDENT.

The executive power of the United States is vested in the President. The machinery of the executive branch of the government is under the management of appointees of the President. These constitute the cabinet. They are twice mentioned in the Constitution, as principal officers in the executive departments, and as heads of departments. Of these officers and their duties, we will speak later.

POWERS AND DUTIES. The powers and duties of the President are the following:

1. He shall be Commander-in-Chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require written opinions of cabinet officers; he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He has power by and with the advice and consent of the Senate, (two-thirds concurring) to make treaties; he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, not in the Constitution otherwise appointed.

3. He has power to fill vacancies occurring during the recess of the Senate, such appointee holding to the end of the next session.

4. He shall give Congress information of the state of the
Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraor-
dinary occasions, convene both Houses or either of them; he may
adjourn them, when they disagree on time of adjournment;
he shall receive ambassadors and other public ministers; he
shall take care that the laws be faithfully executed; he shall
commission all officers of the United States.

Elections and Qualifications. The President is elected for a
term of four years. The election is held in November of the
year preceding the expiration of a presidential term. For ex-
ample, the term of a president expires on 4th March, 1905, the
election for his successor is held on Tuesday, 8th November,
1904. On the same day in all the States, the voters, who are
qualified under the laws of the States, choose by ballot the
members of the electoral college. Each State is entitled to as
many members as the whole number of Congressmen from the
State. The electors shall meet at the State capitals, cast their
ballots for President and Vice-President, make lists thereof, and
transmit the lists to the President of the Senate at Washington.
In the presence of both Houses of Congress, the President of the
Senate opens and counts the ballots. The person receiving a
majority of the votes cast for President, is declared elected
to that office. If no one receives a majority, the House of Rep-
resentatives immediately elects a President, from the three
persons receiving the highest number of electoral votes.

Each State has one vote in the election by the House. The
Vice-President is elected in the same manner.

The President must be a natural-born citizen of the United
States, must be thirty-five years of age, must have been a resi-
dent within the United States for fourteen years.

Vice-President.

In case of the removal of the President from office, or of his
death, resignation, or inability to discharge the powers and
duties of the office, the same shall devolve on the Vice-President.
Failing this, the members of the Cabinet shall succeed in the
order mentioned below.

Cabinet.

The principal officers of the executive departments, or the
heads of the departments constitute the President’s cabinet.
These offices are created by Congress, under the general power to effectuate by legislation the powers expressly conferred in the Constitution. The members of the cabinet are appointed by the President by and with the advice and consent of the Senate. To them is committed the general supervision of the affairs of their several departments, the execution of the laws governing the same. They form a council of advice to the President and under his supervision manage the details of the departments.

The Cabinet officers are: Secretary of State, Secretary of the Treasury, Secretary of War, Attorney General, Postmaster General, Secretary of the Navy, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce and Secretary of Labor.

The power of the President to veto a bill passed by Congress is in the nature of a negative legislative function. When the Vice-President casts a deciding vote in the Senate, he participates in making laws.

**JUDICIARY.**

The judicial power of the United States is vested in the Supreme Court, and such other courts as Congress may establish. The other courts established by Congress will be enumerated and their powers and jurisdictions will be discussed in the appropriate place under remedial laws.

The Supreme Court, established by the Constitution, is one of the three co-ordinate branches of the government.

Powers. The judicial power extends to all cases in law and equity, arising under the Constitution, the laws of the United States, and treaties; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States is a party, to controversies between two or more States, between citizens of different States; between a State, or the citizens thereof, and foreign States, citizens, or subjects, of offenses against the laws of the United States.

By virtue of a decision of long standing, the Supreme Court decides whether or not an Act of Congress is contrary to the Constitution; and if so, declares the Act null. This power of this Court makes it unique in the whole world. Of course this power is exercised only in a case regularly instituted and com-
ing before the Court for decision. While the Court has no legislative function, the exercise of this power is a negation on legislation.

The Court has original jurisdiction in all cases affecting ambassadors other public ministers and consuls, and those in which a State shall be a party. In all other cases it has jurisdiction of review.

Judges. The Court is composed of a Chief Justice of the United States, and eight associate justices of the Supreme Court. They, as well as all other United States judges are appointed by the President and confirmed by the Senate and hold office during good behavior.

IMPEACHMENT.

The President, Executive Officers and Judges may be impeached for misconduct in office. The trial is had by the Senate, the Chief Justice presiding, on charges preferred by the House. The votes of two-thirds of the Senators are requisite to convict.

Circuit Court of Appeals. The United States is divided into nine circuits in each of which there is a court called the Circuit Court of Appeals. The judge of this court associates with himself in the sessions of the court District Judges. The court has jurisdiction of review in cases originating in the District Courts, within the circuit.

District Courts. Each circuit is sub-divided into a number of Judicial Districts for each of which is a judge. These courts have original jurisdiction in matters cognisable by the Federal Courts.

The powers and jurisdictions of the several United States Courts will be more fully treated under the head of remedial laws.

Having outlined the powers of the United States and its Government, it only remains to add that the government thus created acts directly upon the inhabitants of the States. By an amendment to the Constitution "citizen" of the United States is defined and his status determined. Therefore citizenship of a State gave the right to participate in the United States Government. Since that amendment, one may be a citizen of the United States who has no State citizenship. The States can not
make any law which shall abridge the privileges or immunities of citizens of the United States. One who is born or naturalized in the United States, and subject to the jurisdiction thereof is a citizen of the United States and of the State where he resides.

A woman who has no State residence may become a citizen of the United States.
Each of the States composing the Union is, within her territory, sovereign in all matters not, by the States and the people, transferred to the United States. We have seen that where the State renounces a sovereign power, it is not ipso facto conferred upon the United States. It is a prerogative not conferred on either government. Though not exercisable it is resident in the sovereign, viz: the people. There are therefore two sets of limitations on the State Government, first, the powers delegated to the United States, and second, the powers, renounced by the States. Of the residue of sovereignty in the people of the State a part only is conferred upon the State Government, as appears in the State Constitution.

We recall that at the time of the adoption of the Constitution of the United States, the States entering into the Union had each a government. Upon these State Governments the Government of the United States was modelled. There is a general resemblance among all the State Governments, of the original thirteen States, of the States admitted from the territories, and of those annexed. While they differ in details, much that has been said of the United States Government will help us in our study of the State Governments.

The frame and powers of the State Government are found in the State Constitutions. These are written statements of the organic law. They are adopted by the people acting through their regularly elected delegates, and ratified by popular vote. The adoption of a Constitution is a direct political act of the people, the supreme act of the sovereign. Almost all of the old States have, at various times since the year 1787, abrogated their Constitutions and adopted new ones, in the place of the old ones. Massachusetts is an exception. Observers of our institutions make the comment, that the tendency seems to limit by constitutional provisions the subjects of legislation. Much matter, which is purely legislative, has been incorporated in the recently framed Constitutions of some of the States. This would seem to indicate a distrust of the legislature by the people, and
an intention to remove from the field of legislative operation many subjects by embedding them in the fundamental law. Whether a constitutional convention should do anything except propose a constitution is a matter of speculation, their power is undoubted. A constitutional convention of Georgia adopted a code of laws, civil, criminal, and remedial.

STATE GOVERNMENTS.

Following the general model of government in this country, each of the State Governments is composed of the three co-ordinate branches, legislative, executive, and judicial.

LEGISLATURE.

The law-making body of the State is called the Legislature or the General Assembly and is composed of two houses, the Senate and the House of Representatives. The members of both Houses are chosen by popular vote. The laws of the State regulate the qualifications of voters. The Senators are fewer in number than the members of the House. They are chosen by the voters of senatorial districts into which the State is divided. The members of the House are chosen by voters of counties or assembly districts. The number of members is apportioned to population. Hence some counties have more members than others less populous. The Legislature convenes at the State Capital, at such times and for such length of time as the laws provide. The sessions are usually annual, and in some States they are biennial. All the members of the Legislature are elected for two years. Each Legislature is a new body every two years. The same general methods of enacting laws prevail as obtain in Congress. The Senate confirms or rejects appointments of the Governor, and sits as a court in the impeachment of certain State officers. The House originates the supply bills.

In some States many officers are elected by the Legislature, judges of the courts, prosecuting officers, and others.

The general powers of the Legislature extend to the making of all laws and ordinances consistent with the State Constitution, and not repugnant to the Constitution of the United States, which they may deem necessary and proper for the welfare of the State. The limitations on the powers of the Legislature are
usually enumerated in the Bill of Rights and consist of certain rights of the individual, as set forth in the Constitution of the United States, with such additions as each State has made. The people of a State have the inherent, sole and exclusive right to regulate their internal government and police, and to alter and abolish their Constitution. The enumeration of rights in the Constitution does not deny to the people any inherent rights which they have always enjoyed. The Legislature provides for the levy and collection of taxes for the support of the State Government, and enacts law for the creation and regulation of corporations, municipal and private.

GOVERNOR.

The executive power of the State Government is vested in a Governor, and such other executive officers as are provided for in the Constitution.

GOVERNOR. The Governor is the Chief Executive officer of the State. The Constitution fixes the time and mode of his election, the length of his term of office, his qualifications, also makes provision for case of death or disqualification of the Governor.

POWERS AND DUTIES. The Governor is commander-in-chief of the State forces. He has the power to grant reprieves and pardons. He can veto an Act of the Legislature. He appoints officers as provided by the Constitution. Fills vacancies in offices where there is no other provision for so doing. He communicates to the Legislature information upon the state of the commonwealth, recommends measures which he deems necessary and expedient. He is charged with the general duty of seeing that the laws are enforced.

EXECUTIVE OFFICERS.

The number, names, powers and duties of the other executive officers differ in the several States. Usually there are; a Secretary of State, a Treasurer, an Attorney General, an Accountant General. Their qualifications, elections and duties are stated in the Constitution of the State. The Secretary of State is the keeper of the Great Seal, custodian of the archives and discharges other duties as provided. In some States he certifies to the compliance with law of persons applying for incorporation, and charters are passed upon in his office. The Attorney
General is the legal adviser of the executive department and represents the State in litigation where its interest require it. The Treasurer has charge of the public funds, disburses them on the warrant of the Governor in accordance with appropriations by the Legislature. The Accountant General, (Comptroller General) audits all claims against the State, and allows or disallows them. The books and accounts of the tax officers pass under his supervision. The States have officers of the military, agricultural and other departments. There are also officers of the penitentiary, and of the asylums for the afflicted.

COURTS.

The judicial powers of the State are vested in the several courts provided for in the Constitution. The court of last resort is called the Supreme Court or the Court of Appeals. It has jurisdiction of review of other courts and sometimes of appeal. In perhaps all of the States there is a court of original and general jurisdiction which is called by various names in the several States, the Superior Court, the Circuit Court, the General Court and the like. It has exclusive jurisdiction in certain matters, appellate jurisdiction over lower courts and general original jurisdiction in all matters, civil and criminal, in law and in equity with a few exceptions. There are also inferior courts of counties. In some States there is a separate court of probate and surrogate, in others, the jurisdiction is in the county courts.

The States are divided into a great number of magisterial districts, in each of which there is a court, usually called the court of the Justice of the Peace, which has jurisdiction in minor matters of contract and tort, and in some States in small criminal cases.

The Constitution, powers and procedure of courts will be discussed under remedial laws.

COUNTIES.

The States are subdivided into districts called counties in all except Louisiana, where they are called parishes. Through the counties, the State government impinges directly upon the individual. The county officers are usually, sheriff, registrar, tax receiver, tax collector, treasurer, county commissioners.
1. The Sheriff is the ministerial officer of the courts. He makes arrests, serves processes, enforces judgments, executes sentences, attends the sessions of the courts.

2. The Registrar is usually the clerk of the Circuit or Superior Court. He is the keeper of the county records, registers deeds, mortgages and other instruments, issues the processes and makes minutes of the proceedings of the court.

3. The Tax Receiver makes a digest of taxable properties in the county, and the taxes due thereon.

4. The Tax Collector gathers the taxes as they appear on the digest, and turns in the money to the proper officers.

5. The Treasurer is the custodian of the county funds. He disburses them on orders of the commissioners, makes reports of his collections and expenditures.

6. The County Commissioners have charge of the fiscal affairs of the county. They assess and expend the taxes, maintain the highways and county buildings and properties. They are overseers of the poor.

In a general outline of this sort it is not considered advisable to attempt a treatment of municipal corporations. The governments as originally framed contemplated a rural population. The absence of provisions for the regulation of populations in congested districts presents today many serious problems for the law-maker and the statesman.

As this subject will be more fully treated under the head of public corporations, it is sufficient here to mention only the salient characteristics of these branches of government. Towns, cities, villages, (sometimes counties) are incorporated by the Legislature as agencies of government. Certain powers of sovereignty are conferred upon them. They may adopt local law, called ordinances, impose and collect taxes, establish courts, arrest, try and punish offenders against the ordinances, maintain police force, provide for other officers necessary to the conduct of the municipal government. They are charged with the supervision of ways, streets and bridges, with the protection of the safety, health and property of the inhabitants.
CHAPTER VII.

PEOPLE OF THE UNITED STATES.

The word people means a State in its collective and political capacity. It is not synonymous with citizens nor with inhabitants. There is little difference however between the meaning of the expression body of citizens and people. The expression in the Constitution of the United States, "We the people of the United States" does not include all the inhabitants of the then territory, slaves among others not being covered by the word people. The inhabitants of the territory under the jurisdiction of the United States are citizens, aliens, Indians, and Filipinos.


Aliens are: 1. Aliens resident in the territory of the United States. 2. Aliens who vote in State and Federal elections.

Indians, Hawaiians and Filipinos form classes apart.

CITIZENS OF THE UNITED STATES.

Previous to the adoption of the amendment, the term citizen in the Constitution of the United States had no other meaning than citizen of one of the States composing the Union. The fourteenth amendment declares that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. Thenceforward there could be no doubt that there is a Federal States. For how can one be a citizen except there be a State of which he is citizen? Thus the citizen of a State occupies a dual position. He is a citizen of the State and also a citizen of the United States. Unus homo pluries personas sustinet. He owes allegiance to two sovereignties.

The term person in a general sense includes corporation. A corporation is not a citizen having any political capacity. Like other persons, a corporation is entitled to the equal protection of the laws and to the enjoyment of the rights conferred by the laws.

There are two branches to the definition of a citizen of the United States. First, the place of birth. Second, naturalization.
First. The first part of the definition seems to renew the ancient common law definition of a British Subject. The child of aliens, permanently resident in this country, born in the United States is a citizen. The child of aliens temporarily in this country is an alien. The international rule, the jus sanguinis, that the allegiance of the child follows that of the parent is not our law, but the common law rule, that the place of birth fixes the allegiance, prevails. The children of persons naturalized, coming to this country, born before coming hither and before naturalization are aliens; those born after coming to America, whether before or after naturalization of parents, are citizens.

Second. Naturalization is the other method of acquiring citizenship. At one time it was held that a subject could not abjure his allegiance to his natural sovereign. Naturalization is now well recognized by the laws of nations. The statutes of the United States specify the manner of acquiring citizenship by naturalization. The alien declares, before one of the courts mentioned in the statute, two years before his admission, that he intends to become a citizen. After five years residence in this country, and one year’s residence in the State, he abjures allegiance to his sovereign, swears allegiance to the sovereignty of this country, makes proof of good moral character. All this is made a matter of record in the court competent to admit. An alien under the age of twenty-one years resident continuously for three years may, after reaching majority, and after a residence of five years, be naturalized.

CITIZENS OF THE STATE.

The laws of each State will define citizenship of the State, always with the proviso that any citizen of the United States residing in a State is a citizen of that State. While there are citizens of the United States who are not citizens of any State, it is probable that there is no citizen of a State who is not also a citizen of the United States.

CITIZENS WHO ARE QUALIFIED VOTERS.

The right to vote is regulated by the laws of the States. The qualifications differ in the several States. In all the States the voter must be twenty-one years of age. In all the States periods
of residence are required. In some the payment of taxes is a requisite. In some a property or educational qualification is made. In most of the States registration with officers of the law is required. The States have the right to declare who can and who cannot exercise the franchise of election. The only limitation upon this power is that no discrimination shall be made on account of sex, race, color or previous condition of servitude.

CITIZENS, NOT QUALIFIED VOTERS.

The right to vote does not necessarily belong to a citizen. It is not one of the privileges or immunities guaranteed by the Constitution of the United States. This is self evident, when we recall that in all of the States infants, and in most of them, women were formerly denied the right to vote. Members of both of these classes are citizens. All citizens who are not qualified under the laws of the State of which they are citizens are denied the right to vote.

ALIENS RESIDENT IN THE UNITED STATES.

Persons resident or temporarily in the United States, who are the subjects of another sovereignty, are aliens. They are entitled to the protection of the laws, but do not participate in government.

ALIENS WHO VOTE.

It is somewhat strange to note that in some of the States, perhaps nine in all, voters need not be citizens of the United States. In Nebraska an alien, who has declared his intention to become a naturalized citizen thirty days before the election, may vote.

INDIANS AND FILIPINOS.

Indian tribes within the territory of the United States are alien though dependent powers. An Indian born within the territorial limits of the United States a member of and owing immediate allegiance to his tribe is not a citizen of the United States. He stands in the same position as a child of the subject of a foreign government born within the dominion of that government. An Act of Congress provides the method by which an Indian may become a citizen.
By the treaty of cession Porto Rico and the Philippine Islands ceased to be foreign country. They came under the complete and absolute sovereignty and dominion of the United States and so became territory of the United States over which civil government could be established. The allegiance of the native inhabitants became due to the United States and they became entitled to its protection. Since the cession Porto Rico has been erected into a Territory of the United States and the inhabitants stand on the same footing as the inhabitants of the other Territories. The Philippine Islands have been governed by a commission. This has been partially superseded and many of the rights of a Territory have been conferred on the inhabitants. The Virgin Islands, acquired by purchase as also the Hawaiian Islands, are in the same condition as the Philippines.

GENERAL NOTE.

Before leaving the subject of Government we may remark that the law makes no distinction, as to individual rights, between persons or classes of persons. It applies alike to public officers and to private individuals. Nor is there any ecclesiastical establishment. The laws governing religious societies, associations and corporations are the same as those regulating similar lay bodies. The army, navy and militia are managed and provided as already indicated.

Filipinos, who did not elect to retain Spanish allegiance, obtained by the treaty of 10th December, 1898, the international status of citizens of the United States. They are not citizens in the meaning of the Constitution, and until their status is established by Congress, they occupy an anomalous position of citizens of the Philippine Islands.
CHAPTER VIII.

PRIMARY RIGHTS OF INDIVIDUALS.

Human beings are found collected in societies. Many of the members enter the society without volition on their part. It is useless then to speculate about the natural liberties and rights of man independent of society. There are certain rights so generally recognized by free governments and wise systems of laws that they are usually called the natural or absolute rights. Without discussing whether these rights are derived to man from Nature, and observing that there are no absolute rights, but only those conferred by law and limited by the rights of others, we proceed to the elucidation of what we now call the primary rights of an individual. We shall follow the order mentioned in Chapter II.

SECURITY.

We take the several classes of the Right of Security in the order mentioned.

1. Life. The highest right of an individual is to be secure in his life. The violation of this right is called homicide, which is the destroying the life of a human being of any age, sex, or condition. The State has an interest in the life of each individual under the protection of her laws. The taking of human life, unless justified or excused under some rule of law, is regarded as a wrong against the State. Homicide, not justified by law, is a high crime and is punished at the instance of the State.

Although the person slain has had his highest right invaded, it is evident from the very fact itself, that law can afford him no redress, either of restitution or compensation, and none is given to his representative. Formerly no one had a right to bring a civil action at law on the killing of a human being. The maxim is "actio personalis moritur cum persona." At present the laws specify the parties who may maintain actions for the killing of another. These are usually near relatives of the person killed, who are considered in law to have such an interest in the life of the deceased, as makes the killing an invasion of a legal right of such relative.

So highly is the right of life regarded that one is permitted to
take the life of another, provided he cannot otherwise save his own. This is called self-defense. The first law of Nature.

The term life means the natural life. Civil death is unknown in this country. The term is usually taken to cover the period from birth to death. For some purposes life is considered by law to begin when the child quickens in the womb. The killing of such unborn child is a crime punishable by law.

2. Limb. The right to possess and use unimpaired the limbs and members of the body is guaranteed by law to all individuals in civil society. The violation of this right is known as mayhem. Mayhem is both a private and a public wrong, both a tort and a crime. Mayhem is the unlawfully depriving another of the use of a limb or member.

Mayhem is a civil injury to the person maimed and the law gives him an action for damages against the wrong doer. It is also a crime varying in gravity from a capital felony, like castration, to a misdemeanor, like biting the ear.

The old distinction whereby mayhem was confined to the destruction or damaging of members useful in fighting is not recognized generally by our laws. The mutilation or destruction of any member of the body is mayhem.

The right of self defense of one's members sometimes extends to the taking of the life of the assailant.

3. Body. The third primary right of security is the possession of one's body free from hurt or invasion. Wounding, beating, assaulting another, and perhaps a mere threat whereby another is put in bodily fear or subjected to inconvenience, are violations of this right. These are usually both crimes and torts, and give rise to a prosecution by the State and an action for damages by the person injured. The hurt or damage inflicted is immaterial in determining the wrongful nature of the act. Merely touching the body of another unlawfully is an invasion of his right.

4. Health. The right which every one has to health is perhaps better comprehended by stating that the law imposes a duty on each member of society to refrain from acts deleterious to the health of another. Giving, selling, or furnishing unwholesome food or drink, or any other article to be consumed, whereby the health of another is impaired or physical suffering caused
is such a violation of this right as amounts to a crime, under the laws of most of the States, and under the laws of all of them, is an injury actionable in damages. Nuisance affecting injuriously the health of another or causing him physical discomfort and inconvenience is a violation of this right. Such nuisance may be the doing of something the person had no right to do, or in failing to discharge a legal duty to another. It may consist in exercising a right unconscionably, without a due regard to the right of another. From the view point of the individual, nuisance is not a crime, but is a civil injury. The relation of the individual to a public nuisance will be treated later in the proper place.

5. Reputation. The law not only recognizes the right of every individual to a good reputation, but goes a step further and presumes that every one has a good reputation. The reason and necessity for this presumption will be more fully explained later.

The right of reputation is invaded by libel and by slander. These are false, malicious, defamatory publications concerning another. The former is communicated through the eye, the latter by way of the ear. The former consists of writing, signs, pictures and the like. The latter is oral defamation. Publication is complete when the defamatory matter is communicated to one person other than the one defamed. Libel is a crime and a tort, slander is a civil injury only. Both give a right of action to the person defamed for the private wrong. Libel may be criminally prosecuted.

LIBERTY.

1. Bodily Freedom. The right of free and unrestrained locomotion is the birthright of all inhabitants of this country and is fully guaranteed by all the constitutions. This right is violated by false imprisonment, which consists in restraining one of his liberty by actual force or otherwise. The injury is complete when one, even without violence and on the highway, compels another to go or remain against his will. A fortiori incarceration in a house or elsewhere is a violation of this right. Duress, whereby one is compelled unwillingly to submit to another, when not accompanied with acts of physical force, but is accomplished by threats only, is called duress per minas and is
false imprisonment. We have already mentioned the provision of the Constitution of the United States in reference to the writ of Habeas Corpus. This is a summary proceeding, whereby one restrained of his liberty can immediately have a hearing and investigation by an officer of the law as to the grounds of his detention, and should the imprisonment be unlawful he may be at once set at large.

2. RELIGION. Religious liberty is a right of the individual not to be invaded by the government or by an individual. Every one has the right to worship God according to the dictates of his own conscience, or not to worship a Supreme Being at all. To engage in immoral, indecent, scandalous or unlawful practices under the pretense of religious worship is not within the bounds of religious liberty.

3. LABOR. The right to engage in lawful occupation for pleasure, gain, or to support existence is undoubtedly a branch of the right of liberty. While the right to refuse to labor for any particular person or to engage in any particular kind of work is undoubted, and the right to be idle, under certain circumstances, is fully recognized, any act whereby the right to engage in work is interfered with is clearly a violation of this right of individual liberty.

4. SPEECH. The right to discuss orally or in writing any and all matters of a public nature, to express one’s opinions or beliefs without let or hindrance is fully recognized. This right, like all other rights, must be exercised under the regulations and restrictions of law, and with a due regard to the rights of others. Thus, there is no censorship of the press. One may print and publish in a newspaper a defamatory statement of another. But if the statement is false, he violates the law and is liable criminally and civilly, for the crime and tort of libel.

5. FAMILY RELATION. The right to marry and form the family relation is a primary right of the individual. The exercise of the right in each case is subject to the laws governing it. Thus persons under the age prescribed by law, persons who are related to each other within the degrees of kinship forbidden by law, and under other legal disabilities, are not permitted to marry.

6. CONTRACT. The right to make contracts allowed by the law
falls more properly under the head of the right of property. Contracts to perform labor and services, marriage contracts, and other contracts not involving the transfer and devolution of lands or chattels belong under the head of the right of liberty. The freedom of contract marks the degree of advancement of a human society. The growth of this right is the movement of man from law to liberty.

The invasions of the rights above enumerated are called in law wrongs, they are either public or private, in other words are either crimes or torts. They will be more fully treated under those heads. They are mentioned at this point for the purpose of explaining the rights and by way of illustration.

Pursuing the order above mentioned, we postpone the discussion of the third primary right, viz: property, to the treatment of civil rights and of private relations.
Civil and political rights, in the broad sense, comprehend all the rights of a member of civil society. These are enumerated in the Constitution, and are generally covered by the provisions, that, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The primary and relative rights are discussed generally in the proper place. At this point the term civil rights is used in the narrow sense applicable to rights growing out of legislation forbidding discrimination against negroes.

1. Right to Vote. The Constitution of the United States having conferred citizenship on the negro, provided further that, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." All laws defining the qualifications of voters must apply equally to negroes and to members of other races. A State may require a property, educational, or other qualification, and if it apply without discrimination to all citizens it is Constitutional. This provision of the Constitution mentions specifically the right to vote.

2. The Right to Hold Office. If not within the letter of this provision, this right is clearly covered by the prohibition against abridgement of privileges. The right to vote and hold office is a privilege of a citizen of the United States, who meets the qualifications made by the State and not otherwise, the sole restriction on the power of the State being discrimination.

The 18th Amendment to the Constitution of the United States confers the right to vote upon women, under the usual State regulations.

3. Highways, Public Buildings. The right to use the highways and public buildings is clearly guaranteed to all persons
under the protection of the laws, whether citizens or not. Like all rights they are exercisable according to reasonable regulations of Federal, State, Municipal Governments. Public parks stand on the same footing with highways.

4. **Education.** There is no duty incumbent on the State to provide for education. Where the State makes provision for education out of the public funds, it is unconstitutional to deny to any person within its jurisdiction the equal participation in the benefits. “No right is violated when colored pupils are merely placed in different schools, provided the schools are equal, and the same measure of privilege and justice is given to each.”

5. **Public Utilities.** There are certain kinds of business of a public nature in which the members of the community have rights which do not exist in the case of a purely private business. Typical of these is the business of a common carrier. A common carrier, as a rule, has rights and powers over highways which are prerogatives of the sovereign, and consequently is held to duties greater than those imposed on one engaged in a private enterprise. The right to operate a railroad, for example, is a franchise, a branch of the prerogative in the hands of a private person. Hence any discrimination made by such a carrier is to some extent the act of the State. If discrimination is based on race or color it is in contravention of the constitutional provision.

Again it may be said that it is competent for a State or for a carrier to require the separation of races. The setting aside of carriages for the exclusive use of women, or of persons of color is permissible.

Innkeepers and others engaged in like business designed to serve the public come under a different rule from common carriers. Under the common law of England they were bound to accommodate without discrimination persons who offered themselves as patrons. Some States have made laws requiring innkeepers, managers of theatres and persons engaged in similar businesses to serve their patrons without discrimination as to race. Whether or not the same is imperative in States which have not adopted such rules is uncertain. It must be remembered that the constitutional prohibition as to discrimination is
upon the State and not upon the individual. It is only when the act is an act of the State or can be attributed to the State that it comes within the provisions of the Constitution of the United States.

In all cases whether of carriers, innkeepers or of others engaged in similar occupations, it is perfectly competent to make reasonable rules for the conduct of their several businesses, to refuse to accommodate objectionable individuals, such as drunken, crazy and diseased persons. The law does not require that the same treatment be accorded to all, but that equal treatment be given to all, and especially that no discrimination be made on account of color.

Other instances of public utilities are found in the businesses of telegraph, telephone companies, keepers of public baths, barber shops, eating houses.

6. Other Civil Rights. Usually classed as civil rights are some others mentioned in the Bill of Rights; to assemble peaceably, to petition for the redress of grievances, to have and carry arms. The laws regulate the reasonable exercise of these rights. As to the last, it provides that to carry arms at specified times and places and in a certain manner is forbidden.

There are perhaps other civil rights, but these mentioned are sufficient as examples at least to suggest them to the student.

Civil Rights Laws. The fourteenth amendment to the Constitution of the United States forbids any State to make or enforce any laws which shall abridge the privileges and immunities of the citizens of the United States. The Congress made it criminal for any person to deny to any citizen, on account of race or color, the full and equal enjoyment of the privileges and accommodations of inns, public conveyances, theatres and other places of public amusement. The constitutional prohibition is upon the State not on the individual. This law exceeds the power granted to Congress and is unconstitutional. Some States have adopted this law, most of them have not done so. In many of the States equal and separate accommodation is required.
CHAPTER X.

PRIVATE RELATIONS.

The outline of government necessarily indicates the relation of the individual to the public. We now come to the relations of individuals to each other. These may be profitably grouped under three heads, legal, contractual and domestic.

1. LEGAL RELATIONS. The first class comprehends the legal rights of the individual and the reciprocal duties of other members of civil society to respect those rights. The treatment of this group of relations is to be found in no one separate place. It permeates the whole discussion of the substantive law of legal rights and civil injuries, and, in some of its phases, of rights and obligations imposed by reason of the existence of a contract.

2. CONTRACTUAL RELATIONS. So far as they affect property, these will be discussed under a separate head, viz: contracts. Contracts not touching property have already been mentioned.

3. DOMESTIC RELATIONS. The third class of private relations covers the domestic relations. The rights, duties, powers, privileges and disabilities of the parties to these relations inter sese and to strangers are regulated by the law of the relation. This is called status. This term is usually used in contradistinction to contract. The rights, duties and obligations of parties to a contract are determined primarily by the terms of the contract. To illustrate, a man and a woman take each other for husband and wife. They enter into a contract of marriage. There are no expressed terms, beyond the mere consent. Immediately the laws of the relation of husband and wife become applicable. The relation is now one of status. The husband is responsible for debts contracted by the wife for her support. The contract is silent as to this liability, the status fixes it. The enlarged power of making contracts, voluntary agreements, enacting in each case little laws governing the transaction, the movement from status to contract marks the advance of human society from law to liberty. In ancient societies one's place and rights were fixed in almost all instances by law. One was born vassal or lord, bond or free, subject or alien. He was thus bound and directed by laws throughout life. The freedom of contract largely alters this condition.
It should always be remembered that the freedom to contract is bounded by the general provisions of law. Within these limits the power to contract is unlimited.

As generally understood the domestic relations are those of; Master and Servant, Husband and Wife, Parent and Child, Guardian and Ward.

DOMESTIC RELATIONS.

Some writers hold the opinion that the relation of master and servant is one of contract and not of status. In support of our position in classing it under status, we give one concrete example. The contract between a railway corporation and an employee may be silent on the subject of torts to passengers, or may expressly forbid such torts. The right of a passenger, injured by an employee, to recover damages from the corporation is controlled by the law of the relation of master and servant, and not by the terms of the contract.

MASTER AND SERVANT.

This unimportant domestic institution has, in modern times, become one of the most important branches of the law. Upon the rules governing it are founded most of the rules of liability of corporations for torts. The relation is further important because it is the type of the other three. The rights and obligations of the first person in the other three are frequently those of a master; of the second person, those of a servant. Whenever one person acquires the right to control the acts of another the relation of master and servant arises. This relation ordinarily originates on a contract of employment. The contract serves to fix the rights of the master and servant toward each other, and to define the extent of the servant's authority. We usually look to the contract to ascertain whether the act is within the scope of the servant's powers and duties. Servants are, in many particulars, agents of the master, but the relation of master and servant differs widely from that of principal and agent. One is status, the other is contract.

1. KINDS OF SERVANTS. The old classification of servants, as stewards, factors, bailiffs, apprentices, laborers, and menials, is no longer useful. It served to indicate the manner in which the
relation originated, whether by being born a vassal or serf, or by agreement. The apprentice deserves to be mentioned. He is bound by articles to the master, usually for the purpose of learning a trade. He is subject to the control of the master in certain particulars, which have disappeared as to the other kinds of servants in modern times.

EFFECT UPON THE PARTIES.

1. Rights of Masters. The master has a property in the services of the servant. One who entices, beats, maims, or otherwise incapacitates the servant inflicts an injury upon the master. He may bring an action against the wrongdoer for damages per quod servitium amisit. Of course the servant has his action against one who wrongs him, independent of the relation.

2. Power of Master. The master has power to control the conduct of the servant in the discharge of his duties. Except in the case of an apprentice, this power does not extend to corporal chastisement or coercion. Upon this power depends the liability of the master for the servant’s acts. It would seem then that he should be armed with larger powers than he, at present, has.

3. Duties of Master. The master is bound to protect the servant while in the discharge of his duties, from all unreasonable risks and dangers which his superior knowledge and position would presumably enable him to prevent. Apprentices must be humanely treated, must be taught a trade, and must be reasonably provided for at the expiration of the term of service.

4. Rights of Servants. The servant has the right to require of the master the faithful performance of the duties above mentioned. He is entitled to receive wages, either as agreed in the contract of employment, or as a fair compensation for the work done. Wages are collectable, like any other legal claim, by an action at law.

EFFECT UPON STRANGERS.

1. Mutual Rights. Formerly the law permitted the master to maintain the servant in a law suit; also the master might justify an assault in defense of the servant; and the servant could justify an assault in defense of the master. The growth of the relation from a domestic to a commercial one renders these
views unimportant, if not obsolete. These mutual rights still exist in the case of an apprentice.

2. Responsibility of Master. The responsibility imposed by law upon the master for the conduct of the servant depends primarily upon the principle expressed in the maxim, "qui facit per alium, facit per se."

(a). An act done by the servant at the command, express or implied of the master is in law an act of the master. Example: Should the master order the servant to open a ditch, whereby damage accrues to another's land, and a right of action arises in that other, the master is responsible for the injury.

(b). So likewise an act done by a servant within the regular scope of his duties, in the usual course of his employment, is the act of the master. Example. A banker's clerk, whose duty is to collect money, embezzles the money collected from a customer. The loss falls on the banker and not upon the customer. It would be the other way, if the servant was not the collector for the banker.

(c). An act done by the servant while on the actual business or errand of the master is the master's act. Example. A coachman, going to the railway station to meet the master's guest, carelessly drives over and hurts a man, the master is responsible for the injury. If the coachman carelessly hurt one, while using his master's vehicle for his own purposes, this is the act of the coachman and is not attributable to the master.

The three instances given are explained by applying the maxim, and perhaps all cases of repondeat superior might be explained in the same manner. Where, however, the master is held liable for an act of the servant expressly or impliedly forbidden some confusion might arise, and therefore it is expedient to state the rule of liability more fully. The master has the right to control the acts of the servant in a particular employment or generally. This right of control imposes on him the duty to control. For torts committed by the servant through failure of the master to control his acts, the master is responsible. It is not sufficient for the master to give orders, he must see that they are obeyed. And further the master commands an act, which it was his duty to prohibit. Cases of this sort usually arise where the master owes to another or to
the public special or peculiar duties, the performance of which he commits to servants. Examples. The conductor of a railway train receives instructions as to the proper care and treatment of passengers. He violates his orders and maltreats a passenger, the corporation, his master, is held liable for the injury.

Again, the servant of an innkeeper steals from a guest, the innkeeper is responsible. In the former case the servant disobeyed the express, in the latter the implied command of the master.

The liability of the master for a contract made by his servant depends more usually on the law of agency, but there are many instances wherein the doctrine of master and servant control. A wife buys necessaries for the family, the contract is the husband's and he must pay.

This subject will be further noticed under the heads of torts and contracts.

FELLOW SERVANTS.

The ancient doctrine that the master is not responsible for a tort committed by a servant upon his fellow-servant, has been radically modified by statute of the United States and of some of the States. In some kinds of employment the doctrine has been practically abolished. The matter more appropriately belongs to the subject of torts, and will there be noticed. The present state of the laws grows out of the duty of the master to provide the servant a safe place to work, to furnish him safe and proper tools. It follows that as a drunken or incompetent fellow servant is a dangerous and improper implement, injury inflicted by such servant upon a fellow servant is the act of the master.
CHAPTER XI.

HUSBAND AND WIFE.

This relation arises on the consummation of the contract of marriage. The common law regarded marriage purely as a civil contract. Among other results of this view was that the contract having once lawfully been consummated, it could not be annulled. The Ecclesiastical Courts might, on a case made, declare that the impediments, known as canonical disabilities, existing at the time of the attempted marriage were sufficient to render the contract void ab initio, and thus bastardise the issue. Until such decree however, the marriage was voidable and not void.

This is an excellent illustration of the difference between a void, and a voidable transaction. Where parties, or either of them labored under civil disabilities and attempted to intermarry, it was simply a void proceeding, and the intercourse was meretricious, not matrimonial.

There being no divorce in the English Civil Courts, the attempted marriage was disregarded. Where canonical impediment existed at the time of marriage, the contract was voidable, and if no decree was had during the lifetime of the parties, it was valid and the issue was legitimate. If the matter were brought to the attention of the Ecclesiastical Courts a decree might be had declaring the voidable contract void ab initio, as having never been legally entered into. All persons may disregard a void act. Usually one person only may claim avoidance of a voidable transaction.

MARRIAGE CONTRACT.

1. NATURE. While our law regards marriage as a contract, it is looked upon as a peculiar kind of contract.
   (a). The parties or either of them cannot disregard it at their option, and as in case of other contracts, take the consequences of an action at law.
   (b). The laws of all the States, except one, provide methods of annulling this contract and fixing the after relations of the parties. This latter is the radical difference between divorce under our laws and under the old English system.

2. REQUISITES. The requisites of the marriage contract differ
in the several States. We can only speak generally on the sub-
ject.

(a). Disabilities. All individuals not laboring under dis-
abilities are capacitated to contract. The disabilities are usually
nearness of relationship by consanguinity or affinity, existing
marriage, idiocy, impotency, insanity, non-age. The period of
non-age differs in the different jurisdictions, and is different in
the male and in the female. This disability would not always
render the marriage void. Consent of parent or guardian
obviates it.

3. Consummation. The mode of consummating marriage is
set forth in the statutes. The laws usually direct the procure-
ment of a license or the publication of banns, the assent of the
parties in words of the present tense, in the presence of an
officer authorized by law to administere an oath or of a minister
of the gospel. Some or all these provisions may be mandatory,
and some or all of them may be directory. Failure to comply
with a mandatory provision renders the attempted marriage
void. Non-compliance with a directory provision may subject
the parties or the officer to pains and penalties, but does not
vitate the transaction. As has been said, in some jurisdictions,
all these provisions are directory, and persons, capable of inter-
marrying, who cohabit and recognize each other as man and
wife are considered such by law. This is called a common law
marriage, because no such marriage was recognized as common
law. When the statutory provisions are followed the marriage
is complete. "Consensus non concubitus facit nuptias."

EFFECT OF MARRIAGE.

Anciently on the consummation of the contract there was a
merger of identity. The woman ceased to exist in law. There
was but one person, and the husband was that person. By
consequence the woman's personality vested absolutely in the
husband, her realty vested in him sub modo, her choses in
action were subject to his martial rights. He became liable for
her ante-nuptial debts. Torts and crimes (except treason and
felony) committed by the wife, were in law the acts of the
husband. Debts contracted by her for necessaries were his not
hers. Ante-nuptial debts between them were cancelled. They
could not testify for or against each other. They could not inter-contract.

There have been radical modifications of these rules in modern laws. For many purposes the wife's separate personality is recognized. Yet where the statutes have not made a change the old rules prevail. A revolution in the laws of married women's property rights has taken place. The rules on the subject vary all the way from a near approach to the common law to the statement that, "all properties of the woman at the time of her marriage, and all properties given to, or inherited, or acquired by her shall remain her separate property, and not be liable for the debts of her husband." There is a curious restriction on her powers under some systems of laws. She may do anything with her own except pay her husband's debts. Her promise to do this is a nullity, and money used for that purpose may be recovered by her.

Note. The history of a married woman's property rights aptly illustrates the correlation of law and laws, the immutability of the former and the adaptability of the latter. The principle is that the woman should have the enjoyment of her own. Time was when might was the measure of enjoyment and a woman's properties could be secured to her only under the protection, coverture, of a man. As civilization advances the enjoyment by the woman of her own is better attained by giving her the power to control. Thus the principle remains the same, the application must change as conditions change to insure accord and to promote justice.

In other respects than property, the effects of marriage have been modified. The wife is now responsible for crimes and can be prosecuted separately. She is responsible for such torts committed by her as are not imputable to her husband under the rules of master and servant. As the husband was held responsible for the wife's acts, it was anciently the rule that he could control her, even to the extent of physical correction. So far from this being the modern view, it is now a crime for a husband to strike his wife. In the prosecution of this crime, the wife is a competent witness. Husband and wife, under the old law, being one person, could not give evidence for or against each other in court. "Nemo in propria causa testis esse debet,"
and "Nemo tenetur seipsum accusare." This prohibition is now removed in civil causes, but is yet of force in a criminal prosecution against either, except in the instances expressly allowed by statute.

From the foregoing we may summarize, that the husband is the head of the family, has control in many matters of the wife's acts, is in duty bound to support the wife, is liable for some of her torts. We see that in many important particulars the wife's separate personality is recognized. She controls her properties, is responsible for debts, torts and crimes, and may prosecute her husband.

**Dissolution of Relation.**

This relation is dissolved, by the death of either party, or by divorce.

**Divorce.** The laws of every State in the Union, except one, recognize divorce and confer on the courts the power to annul the contract of marriage.

1. **Kinds.** The two kinds of divorce are, a vinculo matrimonii, which annuls the tie; and a mensa et a toro, which is a legalized separation. This latter does not annul the contract.

2. **Effect.** The total divorce breaks the contract, dissolves the relation, and restores the parties to the positions they legally occupied before marriage. The issue is legitimate, being born in wedlock. Ordinarily the custody of infant offspring is provided for, and a settlement of the properties between the parties is had.

3. **Grounds.** The grounds for divorce are so various in the different States that it is impracticable to review them.

(a). **Imperative.** A divorce may be claimed as a matter of right on any of the legal incapacities at the time of the marriage, a voidable contract being thus avoided; or on the ground of adultery, desertion, or other ground, thus breaking a valid contract.

(b). **Discretionary.** The court and jury have discretion to grant divorce on grounds specified in the statutes, ranging all the way from non-support, cruel treatment and the like to incompatibility of temper. The grounds for a separation are not usually specified, but are to be judged of in each case.
ALIMONY.

Pending a divorce or at the time of the decree, the court may compel the husband to pay to his wife money called alimony, for the support of herself and infant children. Prior to the decree it is temporary, after the decree, it is permanent alimony. Temporary alimony is awarded as a matter of course, independent of the merits of the divorce proceeding. It includes her expenses and counsel fees. Permanent alimony is apportioned in amount to the condition in life and financial ability of the parties. It may be ordered paid in a single sum in full settlement or in instalments. Alimony may vary in amount from a few dollars per month from a negro laborer, to a million dollars from a wealthy man.
CHAPTER XII.

PARENT AND CHILD.

This relation arises from nature, and the rules governing the same are in a strict sense the laws of status.

Children are legitimate or bastard. A legitimate child is one born in lawful wedlock, or within the usual period of gestation after wedlock ends. This presumption of law may be rebutted by proof, and children born in wedlock of adulterous intercourse, may be shown to be illegitimate. The presumption prevails unless the contrary be established by proof. The presumptions of law are in favor of legitimacy, innocence, honesty, sanity, legal capacity, and official duty discharged. The contrary must be established in each case in order to overcome the presumption.

Provision is usually made in the statues that the intermarriage of the bastard's parents legitimate him. There are also methods of legitimating bastards, by proceedings for that purpose and by adoption.

PARENT'S DUTY.

The father of a legitimate child, and if the father be dead, the mother, is bound to support, protect and educate him until he reaches his majority. This age of majority is twenty-one years. The disabilities of infancy are partially removed by statute at successive periods before majority, and parental powers and duties decrease pari passu.

1. Support. During infancy the father must provide the necessaries of life for the child, suitable to his condition. The term necessaries must be interpreted to suit the facts of each case. To declare and fix a sum of money would be to permit gross injustice to be done in many cases, and would inflict hardship on the parent in others. In order that the law may preserve the proper rigidity, as a rule, and at the same time be sufficiently elastic to be adaptable to all cases, the interpretation is said to be reasonable.

2. Protection. The right rather than the duty of the parties to this relation mutually to protect each other is fully recognized in all systems of laws. The parent or the child may justify
assault, nay even homicide, in defense each of the other, under circumstances where a mere stranger would be guilty.

3. Education. It is the duty of the parent to afford the child such education as his means warrant.

The duty to support is absolute and is enforceable at law. The duty to educate is nearer a moral than a legal obligation and is not compulsory. Protection is scarcely a duty. It is more a permissive right.

Reciprocal of the parent’s duty to support is the child’s right to a support. This is a right of perfect obligation, because it is compulsory under the law. The right to an education is one of imperfect obligation, because not enforceable at law.

PARENTAL POWER.

The father’s powers are, as follows:

1. Wages. To receive the wages of the child. As he is charged with the child’s support, this right follows logically. There are in many States laws forbidding the employment of children at labor under certain age. These laws are statutory restrictions on parental power.

2. Control. To control the conduct of the child, even to the extent of corporal correction. “Molliter manus imponere.” The father being held responsible in law for the acts of the child, it is of the essence of the relation that he should have the power to control those acts.

3. Guardian. To appoint, under certain conditions, a guardian for the child, who will stand in loco parentis. He can also confer temporary parental power on school teachers and tutors.

The father being dead, parental powers and obligations pass to the mother. Parental power may be lost by voluntary surrender, either to the child or to another. The parental power may be taken away by a proceeding at law, for such causes as cruelty, non-support and rearing the child in vicious or immoral surroundings.

PARENT’S LIABILITY.

1. Contracts. As it is the duty of the parent to support the child, the law permits the child, in case the parent fail in this duty, to contract for the necessaries of life, and the contract is binding on the parent. The parent is the proper party to decide
upon the sufficiency of the support he furnishes, and he is not liable for anything over and above. When the parent fails to furnish the necessaries, and he is compelled to pay for them furnished by another, they must be reasonable and suited to the condition of the parent and the child. The term necessaries, of course, include food, clothing, medicine.

The right of the child to an education is peculiar, and marks a change in the relation from former views on that subject. If the parent fail to educate the child, the latter has no redress at law therefor.

2. Torts. The parent is liable for the torts committed by the child, under the same conditions and rules as impose responsibility on the master for the torts of his servants. In all transactions where the law of the relation imposes a duty on the parent to control the act of the child, and the father's failure to control, enables the child to perpetrate the wrong, the parent is liable.

BASTARDS.

Bastards are children born out of lawful wedlock, or under such circumstances as are sufficient to overcome the legal presumption of legitimacy. Proof that the child is the issue of adulterous intercourse, continued absence of husband during the period of gestation, birth at time beyond the period of gestation after a divorce, birth during a separation a mensa et a toro, are instances of illegitimacy. In case of continued absence of husband the presumption of legitimacy exists until removed. If no case be made, the issue is legitimate. In case of a separation, the law presumes obedience to the decree, and the issue is bastard.

Formerly a bastard had no rights except those acquired by him, in other words he had no heritable blood. Descent was conveyed only through the male line, and the bastard had no father, he was filius nullius.

At present the bastard may inherit from his mother. In some States he stands in the same position as other offspring of the mother, and his collateral kinsmen by the mother may inherit from him.

The bastard takes his mother's name. He has all the rights
of acquisition of properties and the control thereof as other men have and all his political rights are complete.

The laws have always provided that the father of a bastard shall be compelled to support him. This is to protect the public from the charge of supporting the bastard. The ordinary method is to compel the father to give bond for the support through the machinery of a bastardy warrant.

RIGHTS AND DUTIES OF CHILD.

The rights of the child have been sufficiently indicated in what has already been said, when speaking of the parent.

The infant child owes obedience to the parent, is subject to parental control, the fruit of his labor belongs to the parent. Parental power ends at the majority of the child. After reaching majority, the child owes no legal duty to support the parent.
This relation is a species of artificial parentage created by law. The ward is an infant. Infants are not recognized in law for many purposes, and must be represented by one sui juris. So far as the control of the conduct of the infant is concerned, the parent is the guardian, and is called the natural guardian. Where the infant has a separate estate or where it is necessary for the infant to be represented in court, a guardian is appointed under the proper proceeding at law.

The guardian thus appointed is the parent if alive, if not, then such person as the statute directs. Where the parent is dead, the guardian controls both the person and the estate of the infant. In the former capacity, he is in loco parentis, in the latter, he is a trustee.

The parent may by will designate the guardian. The infant, on reaching the age specified in the statute (fourteen years) may choose his guardian. Whenever lands or chattels come into the hands of the guardian, he must be appointed by the proper officer of the law, must give bond for the faithful discharge of his trust, and must make reports to the proper officer of his actings and doings.

NECESSITY FOR GUARDIAN.

The disabilities under which infants labor necessitate a guardian. These are generally, inability to contract, and to appear in court.

1. CONTRACTS. The general rule is that an infant can make no binding contract. The exceptions to the rule are contracts for necessaries and for education. The difference between the infant's contract for necessaries, and the instances where he may bind his parent by contract for necessaries must be kept in mind. One is the infant's contract, the other is the parent's contract.

2. COURT PROCEDURE. In matters in court the infant must appear through his guardian, touching his lands and chattels. An infant may bring an action at law, but it must proceed in the name of a person sui juris, certainly if objection be made. Where the cause of action is personal injury, the action pro-
ceeds in the name of a person sui juris, for the infant's use. This person is the next friend, prochein ami. On a recovery being had, the prochein ami on receiving the fund, gives bond and is governed by the rules in case of a regularly appointed guardian.

**PRIVILEGES OF INFANCY.**

1. **Contracts.** As the infant is incapacitated to contract, he may defend an action brought against him on contract, on the ground of infancy. This is a personal privilege and must be specially claimed.

   Where an infant has received a benefit under a contract, fulfilled by the other party, he must return the benefit or compensate for it.

2. **Torts.** Infants are liable for their torts, and may be sued accordingly. It is not permissible to render an infant liable for a contract by bringing the action in tort for negligence. The subject will be further noticed under Torts.

3. **Crimes.** Infants under the age specified in the statute are considered incapable of forming the criminal intent and therefore incapable of committing a crime. At common law an infant under seven years of age was incapable of crime, over fourteen years of age he was doli capax, between those ages, the facts of each case controlled. The question turned upon whether the infant on trial was or was not doli capax.

**AGE OF MAJORITY.**

Infancy continues up to the age of twenty-one years. This age is reached on the morning of the day preceding the twenty-first anniversary of birth. This rule follows from the rule that there are no parts of a day in law. The period from midnight to midnight is an unit.

We may say in passing that the periods of time covered by the words, day, month, year are specified in the statutes. If not so specified, the common law computation prevails.
Property is the third great primary right of the individual. It is strange that it should ever have been considered a natural right. In fact it owes its existence to human society, is highly artificial, and exhibits startling variations and contradictions at different periods in the laws of civilized peoples. In its complete sense it is the last of the primary rights to be recognized. Observation of man in the tribal state, in village communes, convince us that as we look backward along the line of march from savagery to civilization, the idea of property grows more dim. We are justified in believing that there was a time when all things capable of ownership were at large. Occupancy alone gave right, and occupancy and property were coextensive. So long as the one continued, the other existed; when the former ceased, the latter was gone. The origin of right, separate from possession, began with personalty. The exclusive use of flocks and herds gave property therein. When the expenditure of labor in caring for them and in increasing their value was added the highest and surest foundation of the right was reached. Naturally followed the right of disposition and as naturally the succession by the kindred of the owner when he abandoned them at death. Thus personalty when the actual occupancy ceased, no longer went back into the common, subject to be seized by the first taker. There are today certain things which from their nature are subject to this early notion, such as animals farae naturae, air, water, literary productions.

That land was common and not the subject of individual ownership is evident from the history of peoples in primitive state of advancement. The Indian tribes in America held their lands in common. In India there are instances of community ownership. The inhabitants of northern Europe, even after they became settled, redistributed the lands at stated intervals. As civilization advanced the recognition of the individual right in one to habitation by him constructed, to lands by him reclaimed, grew. Society recognized the right as it evolved and laws protected the individual ownership of chattels and of lands, including enjoyment and disposition, regulating the succession at
death, and providing for the return to the Society itself in default of an individual owner.

The true origin of property is the enhancement of the value of a thing by labor expended upon it, this is something which man has made which is his own. The other recognized origin among ancient peoples is conquest. This exists today not in the individual, but in the Society itself. The only relic of it is sailors' prize money.

This rough outline sufficiently indicates that property is in no sense a natural right, but is the creature of organized society. It is fully protected by the laws of all civilized peoples. It is a maxim of government that "all things capable of ownership shall have an owner designated by law." Things in individual ownership cannot be taken by the sovereignty itself except on just compensation made.

Property has already been defined and its elements have been mentioned. The term is loosely used to mean either the right or the thing in which the right exists. Thus land is spoken of as real property. It is correct to speak of the land as realty, and one's property therein as the interest or estate. So likewise the property in a chattel is not the chattel itself, but the right of dominion over the chattel. It is suggested that clearness may be attained by using the term property to mean the right, and by designating all possible subject-matter of property as properties. We shall see that more than one individual may have a property or proprietary right in the same subject-matter at the same time. Complete property has all the elements heretofore mentioned, should any of them be wanting, there may be a qualified property.

**PROPERTIES.**

The subject-matter of property is divided into two groups, viz: realty and personalty. There are certain species of properties which are not strictly real nor personal, and hence are known as mixed. These require no separate treatment, but will be noticed along with the two well defined species. Of these first in order we take up realty.
REALTY.

1. Land. Land is the general name for realty or things real. By this term is meant anything fixed, permanent, immovable. It includes the surface of the earth and all things permanent above and below, from the centre of the earth indefinitely upward. "Cujus est solum ejus est usque ad coelum." It is a violation of of right amounting to a trespass to intrude upon the land of another, either on the surface, or by subterranean excavations, or by overhanging with buildings, trees, or even by passing over the same in flying machines or otherwise. Water on land is subject to the use of the owner, if it escape from the land, it cannot be regained. We speak of so much land covered by water. Trees and other natural growth on land are a part thereof. Everything permanently included in lateral boundaries is land. Hence it has been called a definite part of space, so as to cover soil, minerals, liquid or gaseous, and growing plants. In the definition, the terms fixed and immovable refer to the substance of the thing, as soil, mineral, trees; the term permanent describes the property or interest in the thing, which is perpetual. Anything lacking either of these elements is not strictly speaking land.

REALTY. The subject is fixed and immovable; the property is perpetual.

PERSONALITY. The subject is movable, the property is perishable.

CHATTLE, REAL. The subject is fixed and immovable; the property is perishable, e. g., a term under a lease of and for years.

2. Tenement. This term was at one time broader than the term land, and included the latter and anything of a permanent, fixed and immovable nature which could be holden. It is now ordinarily applied to structures on land.

3. Fixtures. This term is broader than tenement, it covers the same things and certain others of a similar nature. There are two sorts of fixtures, viz: true fixtures, and trade fixtures.

(a). True fixtures are such structures on the land as in law become a part thereof. (b). Trade fixtures are removable from the land at the option of the temporary tenant.
The rule for determining whether or not a structure or other erection on land is one or the other kind of fixture is the intention of the parties, the owner and the tenant.

To ascertain the intention, we look first to the terms of the contract, called a lease. If it provide that buildings, structures, machinery, placed on the land shall not become a part of the realty, then no matter how substantial the structure or other thing may be, it remains personalty. If land be leased for the purpose of operating a business thereon requiring substantial buildings and machinery, such things will ordinarily be regarded as personalty and are called trade fixtures. The intention of the parties is here interpreted according to the nature of the business to be conducted on the land.

If there be no express lease, or if the lease be silent on the subject of fixtures, then we look to the thing itself and to the manner of its attachment to the soil. If it is a permanent structure and substantially affixed, it is considered to be the intention of the parties that such structure shall become a part of the land. If one build such a structure on another's land by mistake, thinking that he was on his own land, the rule applies and the structure is a part of the land.

To illustrate, where one rents a house and puts in grates, they are true fixtures and part of the land. Where land is leased to an electric power corporation all structures necessary for the conduct of its business are trade fixtures and removable by the lessee. These include machinery, buildings, dams.

4. APPURTENANCES. Additional to fixtures, which are part of the land, there are certain rights, which attach to land and which attain to something of the dignity of land. These are appurtenances. They are incorporeal, incapable of perception by the senses, but are permanent, and sometimes necessary to the complete enjoyment of the land, hence it is proper to notice them at this point.

(a). EASEMENTS. The most usual appurtenance to land is an easement, which is a right one land owner has in the lands of another. The subject may be best treated by taking a concrete example, a right of way. This is a right which one has to pass over the lands of another. It arises in one of three ways; agreement, prescription, law.
1st. **By Agreement.** This is an individual right, not trans-ferable, and must be exercised in accordance with the agree-ment. It is revocable, unless founded on value, or unless ex-euted and the grantee has expended money on account thereof.

2nd. **By Prescription.** Where one has exercised a right of passing over another’s land for the period of time specified in the statutes, without objection on the part of the owner, consent is presumed and the easement is complete.

3rd. **By Law.** Where one alienes land to another, so situate that ingress and egress is possible only over the lands of the alienor, the law confers the right of way on the alienee. The right must be exercised with due regard to the rights of the alienor. Should he fail to indicate the way, the alienee may locate it.

The first of these easements is not necessarily appurtenant to land, the last two are, always appurtenances.

It is evident that the number of easements is great, and it is impossible to do more than mention some of the most important. These are: to pond water, to conduct drains, to swing wires, to overhang with structures.

(b). **Servitude.** Where one estate is subject to an easement of another estate it is really a servitude, the former being the servient and the latter the dominant estate. In a more confined sense, where there is a natural easement, the term servitude is used. Thus, where adjoining lands lie so that one is above the other. The lower lot is servient to the higher as to the natural flow of water. E converso the upper lot is servient to the lower as to washings, and deposits of soil. Any artificial change of conditions will destroy the servitude.

5. **Hereditaments.** Since all kinds of properties are heritable in this country, the term hereditament is of little practical use among us. Anciently it covered lands which passed by descent, incorporeal properties which were heritable, and certain peculiar chattels known as heirlooms, which from their nature descended to the heir as a limb of the inheritance. As inheritances are partible in this country, and both realty and personalty are assets to pay debts of the decedent, and heir-looms do not exist with us, hereditaments do not cover any clearly defined terri-tory.
THINGS INCORPOREAL. There were discussed by ancient writers, a number of intangible subjects of property, called incorporeal hereditaments. Today such of these as survive may be classed as appurtenances, or easements, with perhaps one striking exception, to-wit: shares of stock in a trading corporation. These are not cognisable by the sense, are capable of ownership, may be disposed by sale, gift, or will, and are subject to debt. In fact are recognized by law as properties, in which one may have complete property.

Old writers, in dealing with realty, have viewed the subject from the points of, tenure, estate, title. As this order is familiar, and because we may the more easily comprehend the present state of our law by a comparative study, we shall pursue the subject on the old lines.
CHAPTER XV.

TENURE.

Tenure is the manner in which the tenant hold lands, tenements and hereditaments. The definition clearly shows that the tenant is not the owner, but a mere holder of the land. It is derived from the feudal notion, that all land was owned by the sovereign, the lord paramount, and that all others held mediate-ly or immediately of him, upon the making of renders, i.e. performing service as vassals. The ultimate property or ownership of land is called alodium. Such ownership is incorrectly called allodial tenure, because the land is not held of anyone. Under the Roman Empire the lands of Europe were owned alodial-ly by their proprietors. After the fall of the Empire, the Northern Nations introduced feudal tenure. It was introduced into England by the Norman Conquerors. The English Colonies in this country followed this system to a limited extent. The royal colonial grants were feudal, the grant to the Georgia Company being to hold of us and our heirs, in free and common socage, as of our Honor of Hampton Court, and not in capite.

By the Act of the Parliament of the Commonwealth, re-enacted in Stat. 12, Car. II. feudal burdens were abolished, and the lands of England, for all practical purposes, became alodial.

Upon the organization of our State Governments, the proprietorship of land was declared to be alodial. "By one of those singular revolutions incident to human affairs, alodial estates, once universal in Europe and then almost universally exchanged for feudal tenure, have now after the lapse of many centuries regained their primitive estimation in the minds of freemen."

In America the sovereign is the source, not the owner. It may be instructive to recall the facts, so as to show the relation of the State to the land, after it has passed into individual proprietorship. At the time of the independence of the thirteen original States, all lands therein, which were in private hands, became alodial. The States having succeeded to the sovereignty of the British Crown became thenceforward the source of title. That land not in individual proprietorship became eo instanti
the property of the State. When subsequently acquired by individuals or corporations, it was by direct grant from the State. Lands within the boundaries of the United States and not within the limits of a State vested in the United States, either by succession to British Sovereignty or by discovery, exploration or conquest. Such of those lands as were in individual proprietorship were regarded in law as derived from the United States. Other lands in these Territories were granted by the United States direct to individuals or corporations or were retained as public domain. Upon the organization of a State out of such Territory, the State succeeded to the rights and position of the United States. Thus all lands in the new States are derived from the State. In that territory acquired by the United States by cession, as for instance, from Virginia, Georgia, France, Spain, Mexico, lands in individual proprietorship were protected by the Acts and Treaties of cession. The estates became allodial, if not such before. The subsequent erection of any such territory into a State conferred on the State all the rights of the United States. The Republic of Texas acquired her rights by war and her lands were in law derived from her as their source. Annexation to the United States made no change. Thus all titles have their source in the State or the United States.

**Eminence Domain.** The Government exercises the right to condemn land for public purposes, upon making just compensation to the owner.

**Escheat.** Lands for which there is no taker, from failure of heirs or otherwise, pass to the State or to the United States as ultimate heir.

It is erroneous to consider these as relics of feudal tenure. They are powers and rights inherent in the sovereign over the soil of the sovereignty, necessary for self preservation and to prevent disputes.

As all landed proprietorship is allodial, we may say then that there is no tenure of land in this country, in the sense of holding of a superior and mediately or immediately of the owner. The individual proprietor is the owner.

**Seisin.** The term seisin has a definite meaning in the feudal law. The person seised is he on whom the overlord conferred the
manual investiture of the fee in the land. All who derive from him are successively seised. As we have no feudal tenure and, of course, no investiture, the term has a different meaning with us. As eminent authorities have declined to define the term in American law we shall not attempt it. Suffice it to say that one who owns a life estate or a greater estate in land, is said to be seised. It is not synonymous with possession, for one may have possession of land of which another is seised. It may be described as a freehold estate, in land, accompanied with actual possession, or the right of possession, or the right to the future possession.
Estate is the quantity and quality of interest one has in land. Thus, the owner has the entire interest. If his interest is defeasible it is conditional. If more than one is interested in the same land at the same time, their estate is in common. Again one may have an interest of a term of ten years, another a life interest expectant on the term, and a third may have the fee interest in remainder. Here all three interests, the term, the life estate, and the remainder subsist at the same time, and all three together constitute the fee.

1. **Quantity of Interest.** Quantity of interest, when spoken of an estate, means the length of time of the enjoyment of the owner. From this viewpoint, estates are grouped as, freehold and less than freehold. Freehold estates are further subdivided into, freeholds of inheritance and freeholds not of inheritance.

2. **Quality of Interest.** In this sense estates may be, upon condition, in expectancy, or in common.

We will take up estates in the order thus indicated.

**FREEHOLD ESTATES.**

Blackstone describes a freehold to be an estate which passes by livery of seisin in things corporeal, and by acts equivalent thereto, in things incorporeal. We have no livery. The test of seisin is that it applies only to freeholds. Hence we complete a circle, and the definitions are worthless. A freehold is an estate in land greater than a term of years and includes a life estate and a fee.

A term of years or a less interest in land (if the latter amount to an estate at all) is an Estate less than a Freehold.

**FREEHOLD ESTATES OF INHERITANCE.**

A freehold estate of inheritance is one which vests in the heir at the death of the owner.

1. **Fee Simple.** The great type of this estate is the fee or fee simple. This is a freehold of inheritance, unlimited and unconditioned. The fee is the entire estate and in contemplation of law continues forever and without break. This is the highest estate known to the law. The interest of the fee owner is property in its complete sense. The only limitation of ownership is the power of eminent domain resident in the State. The only
elog upon his power is the prohibition to convey for the purpose of defeating his creditors.

At common law it was necessary to use words of inheritance, heirs or similar words, in order to create a fee. The failure to do this had the effect of creating a life estate in the grantee. This rule no longer prevails in this country. If the language of the conveyance shows an intention of the grantor to create a fee in the grantee, such will be the effect, even though words of inheritance be not used. This was the construction put upon conveyances by devise at common law, and the same rules now apply to conveyances inter vivos.

2. Base Fee. There is today no practical difference between a base fee and a fee estate upon condition. Conditional estates will be noticed under the quality of estates. The base fee is mentioned here only to enable us to understand the fee tail.

3. Fee Tail. An estate fee limited to the heirs of the body of the grantee was called a fee tail. It was a conditional fee, but by force of the statute de donis it was not freed from the condition by the birth of issue. Herein it differed from the ordinary conditional fee. It was forever fixed in a certain line of descent. On failure of heirs in that line the estate reverted to the grantor or his heirs. Entails are forbidden by our statutes. A deed purporting to create an entailed estate is construed to convey the fee to the grantee. Limitations, which by construction would create by implication an estate tail, give a life estate to the grantee with remainder in fee to children and descendents, if no issue remainder to beneficiaries intended by the maker of the instrument.

4. Incidents of Fee Estates. As has already been intimated the person in whom the fee vests is the absolute owner of the land. He has the right to possess it and may by action at law acquire the possession from an adverse holder. He can dispose of the estate by voluntary conveyance, or for a consideration. He can devise it by will to whomsoever his fancy or caprice may dictate. At his death intestate the estate passes by descent to those whom the law designates as his heirs at law. He may use and abuse the land at will, so long as he does not work a nuisance to others. It is subject to the claims of his creditors under the proper legal proceeding for that purpose.
CHAPTER XVII.

FREEHOLD ESTATES NOT OF INHERITANCE.

This paraphrase is another name for life estates. A life estate is one which endures in the present owner only during the life of the person on whose life it is limited. The owner of the estate is called the life tenant, the one on whose life the estate is limited is called cestuy que vie. Upon the death of the cestuy que vie the estate ceases in the life tenant, hence it is not an estate of inheritance. Life estates, from the manner in which they arise, are grouped as conventional and legal, the former is created by the act of the parties, the latter by the act of the law.

1. Conventional Life Estates. Where from a deed or devise appears the intention of the maker to create a life estate in the grantee or devisee, this intention will be effectuated. Conventional life estates are of three kinds:

(a) For the life of the grantee. This is the simplest form and where the conveyance is so expressed there is no question. Where the conveyance is for life, without stating for whose life, it is construed to create a life estate in the grantee. The rule of construction is that the deed shall be taken most strongly in favor of the grantee and against the grantor. An estate for the life of the tenant being the most desirable kind, this estate is created by such a conveyance.

(b) For the life of another. This is called an estate pur auter vie. It is created by a conveyance of an estate to one for and during the life of another. The estate ceases in the life tenant at the death of the cestuy que vie.

(c) For the lives of several. A conveyance of an estate to several for and during life creates this estate. All the grantees must be in life at the time the estate is created, so that really this is an estate to endure until the death of the survivor.

2. Legal Life Estates. These estates are created by operation of law. They are dower and curtesy. The latter is universal, the former has disappeared in most of the States.

(a) Dower. This is a life estate of a married woman in one-third of all realty, of which the husband was beneficially seised in law or in fact during overture, which her issue might inherit, vesting at the time of marriage, but postponed in enjoyment to the contingency of her surviving the husband.
First. Essentials of Dower. In order to create this estate three things must occur: First, a valid marriage must have been contracted, and must not have been annulled by divorce. Second, the husband must have been seised. By this we understand that he must have been the owner and in the enjoyment of an estate freehold, and in this case of a freehold of inheritance. Third, the death of the husband must occur to vest the estate in possession in his widow.

Second. Commencement of the Estate. In some States the definition of dower above given is the law. The wife's life estate begins at the time of the marriage in any lands then in seisin of the husband; and in lands acquired during the coverture, at the moment of acquisition. In both cases the dower is postponed in enjoyment until the death of the husband. In these States, in order to convey realty, the wife must join the husband in the deed, or must execute a separate instrument relinquishing the dower. In some States the dower attaches only to lands of which the husband was seised beneficially at the time of his death. Provision is made to protect the vendor for unpaid purchase money, the mortgagee who has loaned money on the security of the land. In these States the dower commences at the death of the husband, and the widow has the right to have it admeasured or set apart.

Third. Assignment of Dower. The methods of setting apart dower differ in the several States. The rules are usually found in the statutes regulating the administration of decedents' estates. The amount is one-third of the land. The capital mansion house in the country is included without being valued.

Fourth. Dower Barred. The dower estate may be destroyed in one of several ways.

(1) By deed. Where the wife voluntarily relinquishes her dower by a properly executed conveyance, the estate is defeated in those States where it attaches to all lands in seisin during coverture.

(2) By ante-nuptial settlement whereby the wife accepts a provision in lieu of dower.

(3) Where the statutes recognize the widow as an heir at law, she may choose to inherit and thus relinquish the dower. Or in case the husband devise land to the wife in lieu of dower,
she may choose between the devise and the dower. (Note—In some States she may make an equitable election, in others she cannot.)

(4) By failure to apply for the assignment of dower, within the time prescribed in the statutes.

(5) By adultery of the wife, unpardoned by the husband, the dower is barred.

(b.) Curtesy. This was a life estate in a widower in the lands of his deceased wife, which postponed her heirs in enjoyment until his death. As in most, if not all, of the States the rules of inheritance recognize the widower as an heir of the deceased wife, the reason for this estate has ceased and the estate has disappeared. Cessante ratione cessat et ipsa lex.

3. Incidents of Life Estates. The tenant for life is entitled to the full use and enjoyment, so that he exercise the ordinary care of a prudent man in preservation and protection, and commit no act causing permanent damage to the next taker. Thus he may continue to use the land as it had previously been used. He may continue a mine in operation. He cannot open a new mine, if the effect would be permanently to impair the value of the freehold. He may use wood or other things on the land. He may sell wood or timber from the land, provided he does not so denude it, as to destroy or seriously diminish its value. He may alter or remove buildings or other structures, with the like restrictions, always having in view the reasonable enjoyment. Sic utere tuo ut alienum non laedas.

(a) Waste. Acts which exceed the reasonable use of the land are termed waste. In some States the life tenant forfeits the estate for waste committed. In other jurisdictions, he may be restrained by injunction, and made to compensate in damages the person next entitled. The subject of waste will be noticed under the head of torts.

(b) Emblements. Crops planted on the land and not matured at the time of the death of the life tenant are called emblements. His representative has the right to enter on the land for the purpose of completing the cultivation and to harvest. Emblements can be claimed only in annual crops, not the fruit of trees growing on the land, but such things as are the fruit of the planting by the tenant. Should the life tenant forfeit the estate, by
committing waste or otherwise, he loses his right to emblements. "No man can take advantage of his own wrong." Should the life tenant lease or rent the land to another, the sub-tenant’s right to emblements will not be lost, by the death of the life tenant, by forfeiture of life tenant, by condemnation for public purposes. These are all beyond his control and should work him no damage. The act of God injures no man. The act of the law injures no man.

PERPETUITIES.

Before leaving the subject of the quantity, i. e., the duration of an interest in lands, it is proper to say a word as to perpetuities. The tying up of estates, so that the land ceases to subserve many of the purposes of untrammeled holdings, is against the policy of our law. Estates tail are abolished and forbidden. One is permitted to control the devolution of his land for a period of time only. The statutes as a general thing permit one to limit an estate to a life or lives in esse and three lifetimes thereafter. Thus a man may by will devise his land to his son for life, and to his grandson, then living, and limit the grandson’s power of alienation until he reaches the age of twenty-one years. The expression three lifetimes means twenty-one years and the usual period of gestation thereafter. Seven years is a lifetime. The usual period of gestation is considered to be nine months (two hundred and eighty days), and thirty days, reckoned from conception to birth. Where an attempt is made to create a perpetuity, these limitations apply and the fee vests accordingly.
ESTATES LESS THAN FREEHOLD.

An estate in lands for any fixed or certain period; or any estate at will; or any estate at sufferance is less than a freehold.

ESTATE FOR YEARS.

Estate for Years is the type of this species of estate and is one limited in duration to a certain period of time. Thus an estate to A and his heirs for ninety-nine years, or for six calendar months, either is an estate for years. An estate to A until B shall marry or reach the age of twenty-one years is also an estate for years, because the duration of the estate is ascertainable from the terms of the instrument. Id certum est quod certum reddi potest. The freehold in this estate remains in the grantor and his heirs. The tenant for years has an estate in the land called, at common law, a term, which is regarded as a chattel interest. He is possessed of the term and in order to have a complete property must be in possession of the land. In the case above given the word heirs of the term or indicate the successors in the term, and are words not of inheritance but of purchase. The act of corporal investiture, livery of seisin, whereby alone, in feudal times, the freehold could pass and vest, does not prevail with us. Hence, where the common law says the grantor and his heirs are seised in fee, and the tenant or termor is possessed of his term, we may express the idea by saying that the grantor and his heirs are the ultimate owners of the fee estate, and the tenant owns a term of years carved thereout.

LANDLORD AND TENANT. A clear distinction exists between an estate for years and the relation of landlord and tenant. The latter arises from a contract. The owner of land grants another the right to possess and enjoy the use of it, for a certain time or at will; the other accepts the grant. No estate passes, the tenant has the mere usufruct, which he cannot convey, and which is not subject to his debts. Some States fix a period, as five years, within which such grants convey no estate.

INCIDENTS OF ESTATES FOR YEARS. Tenant for years has the right to the use and enjoyment as fully as the true owner would have if in possession. Acts and omissions which would work a
forfeiture of a life estate will have that effect upon a term of years.

Emblements. The doctrine of emblements finds no place in estates for years, except the estate be prematurely terminated by the happening of an event beyond the control of the tenant and injurious to him. Thus, if A be tenant of a farm for ten years, beginning on the first day of August, and he sow in the spring, he cannot claim emblements, because he knew that his tenancy must terminate before harvest. If, however, the tenancy commence at New Year and the grantor be a life-tenant, and the grantor die after the crop is sown and before harvest, the termor is entitled to emblements.

ESTATES AT WILL, OR ON SUFFERANCE.

Where one is in possession of the land of another under an agreement either express or implied that the owner may resume possession at any time, such possession is not regarded as an estate at all. The rights and liabilities of the parties will be determined by the terms of the contract.

A fortiori, where one is in possession by the mere sufferance of the owner, such possessor has no estate recognizable in law. In such cases the circumstances, in the absence of express agreement, must be looked to, in order to ascertain the rights of the parties. In case of tenancy at will, the statutes usually provide that the owner must give notice to the tenant of the termination of the relation, and sometimes provision is made that the tenant shall notify the owner of his intention to quit the tenancy, and the tenant, in the absence of such notice, is liable for rent. Summary means for regaining possession are afforded the owner.

In the absence of express agreement, the paying and receiving of rent, as well as the times at which it was paid and other facts will serve to guide the court. Where rent is paid a certain sum each month, the tendency of the law is to presume that the tenancy is for twelve months. This presumption is easily removable by evidence.
Having said thus much upon the quantity of estates, we now come to treat estates from the viewpoint of their quality, whereby we mean the qualifications of the interests of the owners. In this sense, the estate may be unconditional, clogged with limitations, in present enjoyment, postponed in enjoyment; or the interest may be sole, or in connection with others. First we take up Estates upon Condition.

ESTATES ON CONDITION.

A condition is an uncertain event upon the happening or not happening of which an estate is created, enlarged or defeated.

1. CONDITION IMPLIED. This is a condition inseparably annexed from the very nature of the estate, so that a breach of it works a forfeiture. For example, it is condition inseparable from a life estate, that the life-tenant shall not so use the land as to work injury to the one in expectancy. Should he commit waste, he thereby forfeits his estate by breach of the condition upon which he holds.

In this sense then all estates, except the fee simple, are estates upon condition implied. For it is a general rule that any dealing with the estate in a manner repugnant to the nature thereof will work a forfeiture of it. This rule has in modern laws many qualifications. For instance, if a life-tenant, at common law, attempted to aliene in fee, he forfeited his estate and the alienee acquired nothing. Now the alienee acquires an estate for the life of the alienor.

Blackstone pushes the doctrine of implied conditions even to fee simple estates, for says he, it is granted on the implied condition that the tenant will not commit a crime involving forfeiture. Forfeiture for crime having been abolished in this country, and condemnation by the State under the power of eminent domain being the only way of depriving an owner of a fee simple estate, it seems a useless refinement to say that a fee simple estate is clogged with any condition whatever, and serving no good purpose is likely to breed confusion.

2. CONDITION EXPRESS. An express condition is set forth in
the instrument creating the estate. Express conditions are precedent and subsequent.

(a) Condition Precedent. A precedent condition is one which must be fulfilled before the estate can commence or be enlarged. Thus, the conveyance of an estate to A upon his marriage with B, clearly contains a condition, i.e., an uncertain event. It is express, being set out in the instrument, it is precedent because A will never acquire the estate unless and until he intermarry with B.

(b) Condition Subsequent. A condition subsequent is one whereby an estate already vested may be defeated. Thus, an estate is devised to A during her widowhood, (durante viduitate); should she marry she forfeits the estate. As she may not marry, she may enjoy the estate during her life, this is a life estate on condition subsequent. It is a life estate, because under the rule of construction the highest estate possible under the language of the instrument is held to be intended, it is clogged with the condition that the widow shall not marry.

As has been already suggested, fee estates may be clogged with express condition either precedent or subsequent. An illustration of the former has been given under condition precedent. As illustrating the latter, suppose an estate in the manor of Dale be granted to A and his heirs forever, tenants of the manor of Bolingbroke. This is a fee, for it may endure forever; it has a condition subsequent which may defeat it. For should A or his heir cease to own Bolingbroke, eo instanti he loses Dale.

(c) Limitation. A distinction is made at common law between a condition subsequent and a limitation. The former is called a condition in deed, the latter a condition in law. In a condition subsequent it was necessary that the grantor or his heir claim the forfeiture of the estate, and in case he did not, then the estate would remain in the hands of the tenant, even after condition broken. In the example just given, should A or his heir lose the manor of Bolingbroke, it was necessary that the grantor or his heir should claim the forfeiture and make entry or bring action, otherwise the ownership of the manor of Dale would continue in A and his heirs. This is a condition subsequent. But had the conveyance contained a limitation over to third parties, on the happening of the condition, the estate ceases
in A and his heirs and at once vests in the third party or his heir, by an act of law without the intervention of any party. The third party must maintain the action in his own name. In the above example had the conveyance been to A and his heirs owners of the manor of Bolingbroke, and failing that then to C and his heirs, now as soon as A or his heir loses the manor of Bolingbroke, the rights of C or his heir arise, and he can proceed to claim the manor of Dale. This is a limitation. From the foregoing, it would seem then, that a limitation is an express statement by the grantor of the period of the grantee’s enjoyment.

As the object of the distinction was to protect third parties, in case the grantor through collusion or neglect failed to claim the forfeiture, and as the right of the third party, to bring action and claim remedies in his own name, is now fully recognized, the distinction is no longer important.

(d) Covenant. In construing conveyances, it is important to distinguish a condition subsequent and a covenant. On breach of the former, the estate is forfeited; on breach of the latter (a collateral promise) an action for damages will lie. Thus, should a deed recite, that the land conveyed shall revert to the grantor or his heir, in the event it should ever be used for any but church purposes, this would be a condition subsequent and on breach the land would revert. But should the deed stipulate that the land should be used for church purposes only, without more, this would be a covenant only, and for breach thereof, the grantor or his heir may claim damages against the guilty party.

(e) Void Conditions. Certain conditions are not recognized in law and are called void conditions. An estate already vested will not be divested on failure to perform such condition. These are illegal, immoral, impossible and repugnant to the nature of the estate. Thus if one be invested with an estate which will be void unless within a twelvemonth he commit a crime, here the estate is stripped of the condition, because it is illegal.

Clearly the doctrine of void conditions applies only to conditions subsequent. A man may impose an impossible condition precedent, which would simply mean that he did not intend to convey anything. A grant of an estate to one upon condition that he go to China and return in one day conveys nothing. A
limitation is sometimes effective where a condition subsequent would not attach.

(f) **Performance of Conditions.** Care should be taken to distinguish the opposite effects of the happening of the uncertain event. We may best illustrate with the two qualified fees of the English law. A base fee contains a condition subsequent, upon the happening of which the estate is defeated. An example has been above given of a conveyance of the manor of Dale to one and his heirs tenants of the manor of Bolingbroke. When the grantee or his heir loses Bolingbroke, he instantly loses Dale. A fee conditional contains a condition subsequent, which being performed, the estate is freed therefrom. As where an estate is conveyed to one and the heirs of his body. When a child is born to the grantee, the condition is performed and the estate is stripped of it, the grantee has a fee simple. As the grantee then had the right to alien the estate, the statute de donis was enacted for the purpose of perpetuating this estate in the line of descent, and this is an exception to the general rule of conditions. As we have seen, the effect was to create a statutory estate peculiar to the English law called an estate tail.

3. **Estates in Vadio, Gage, Pledge.** There is an important group of estates on condition subsequent, which estates were created for a temporary purpose, usually until a sum of money was paid. The conveyance created an estate defeasible on condition subsequent.

(a) **Vivum Vadium.** The living pledge existed where one owed money to another, and conveyed land to the creditor, on condition that the estate thus created should be defeated, whenever the rents, issues and profits of the land should pay the debt. This transaction required that the creditor should go into possession. It became obsolete and gave way to the mortgage.

(b) **Mortuum Vadium.** The mortgage or dead pledge was a defeasible conveyance on condition subsequent, whereby the debtor creates an estate in the creditor, which estate will be defeated if the debtor pay to the creditor the sum specified in the conveyance on a certain day. The mortgagor retains possession of the land. Should the mortgagor pay the money when due, the estate ceases in the mortgagee and is again complete in
the mortgagor. If the money is not paid, the estate becomes absolute in the mortgagee and he can enter.

(c) EQUITY OF REDEMPTION. As the mortgaged premises are always more valuable than the sum due, it seemed a hardship on the mortgagor thus to lose his land. At law he had no remedy as the estate had vested in the mortgagee. The mortgagor applied to the Equity Court, and was allowed a later day on which to redeem. This indulgence was called the Equity of Redemption. It was allowed on the idea that the deed was intended to secure a debt and not to convey the land. It came in time to be recognized, without resort to court and ripened into an equitable estate. Thus a hardship was wrought upon the mortgagee, who could not get his money or the land. Hence at his instance, the Equity Court interfered in his favor and fixed a day on which the mortgagor must pay principal, interest and expenses and redeem the land, failing which, his equity of redemption was forever foreclosed, and the mortgagee had an absolute estate in the land.

Thus we see that at law, the mortgage is a conveyance of an estate upon condition subsequent; in equity, it is a security for the payment of a debt. In modern law the latter view prevails. In some States the mortgage is merely a security, and creates no estate whatever. In other States, the mortgage with power of sale does convey title and is also a security for debt.

The subject of mortgages, and the methods of enforcing the payment of the debts by them secured, will be noticed in our treatment of Equitable titles.

(d) DEED TO SECURE DEBT. In some States where the equitable idea prevails, to-wit: that a mortgage is a mere security for a debt, there has been a recurrence by statute to the ancient mortgage. The statute recognizes a conveyance of the estate, absolute in form, but for the purpose of securing a loan, and provides a remedy for the lender peculiar to that transaction. It practically creates a fee estate on condition subsequent.
CHAPTER XX.

ESTATES IN EXPECTANCY.

Estate in expectancy is a present interest in land, postponed in enjoyment. They are remainders and reversions. It was formerly the rule that the former were created by the act of parties, the latter by the act of law. The modern distinction between them seems to be: where the grantor owns the expectancy it is a reversion; where the expectancy is owned by some other party, it is a remainder. Thus, if A convey land to B for life, at B's death the life estate determines and the estate vests completely in A or his heir. This is a reversion. If A convey land to B for life and remainder to C and his heirs in fee, here C is the remainderman, and at the death of the life tenant has the full enjoyment of the estate. In all cases both the present and the expectant estates subsist together and both together constitute the complete estate, i.e., the fee. Take the case of the dowager and the heir. The dower (life estate) and the remainder in fee subsist at the death of the ancestor. The widow is the life tenant and the heir is the remainderman in fee. If the heir alienate his interest the alienee acquires the fee expectant on the dower. If the widow alienate her interest, the alienee acquires an estate pur auter vie.

ESTATES IN REMAINDER.

In order to understand remainder estates it is best to notice some of the essentials of English remainders, and note the changes introduced in modern laws. Most of the peculiarities of English remainders have their source in the requirement of livery of seisin, i.e., actual delivery of the land to pass a freehold estate. This being a physical act could only be performed in presenti, therefore it was impossible to create a freehold to commence in futuro. We have no livery of seisin in this country, and many methods of dealing with estates are possible with us, which were not allowable in England.

ENGLISH REMAINDERS.

1. There must be a particular precedent estate, less than the fee, to support the remainder; e.g., an estate conveyed to A for life with remainder in fee to B and his heirs. This estate
is perfected by making livery of seisin to A. The effect is two-fold: it divests the grantor's interest and invests the life tenant with the life estate and the remainderman with the remainder in fee. To pass the freehold livery must be made, if made to A without more it would simply vest the entire estate in him and there would be no remainder. If made to B it would in like manner vest the whole estate in him and there would be no remainder. As it was impossible to make future livery the freehold could not commence in the future, and a precedent estate was necessary to create a remainder. The destruction of the particular estate destroyed the remainder, because it created an hiatus or chasm, which is repugnant to the nature of an estate. So if the particular estate be destroyed, the land reverts to the grantor or his heir, and the remainder does not take effect.

2. The entire estate, to-wit: the particular estate and the remainders expectant thereon, must pass out of the grantor at one and the same time; e.g., an estate granted to A for life, with remainder to B and his heirs in fee. Here the life estate and the remainder, both together constituting the entire estate or fee, pass out of the grantor by one and the same act. In case of a vested remainder, the two interests, the life estate and the remainder, vest at the same time and subsist together, the one in possession and the other in expectancy.

3. The remainder must vest in the remainderman during the continuance of the particular estate or at the moment of termination. Should the remainder vest at the commencement of the particular estate, it is a vested remainder. In case it does not so vest, it is a contingent remainder pending the vesting.

(a) Vested Remainder. A vested remainder, whereby a present interest is created to be enjoyed in the future, is invariably fixed to remain to a determinate person after the particular estate is spent; e.g., in the example in the last paragraph, B's remainder vests in him at the time that A's life estate vests in him. At A's death B's right of possession at once arises. Should B die before A, instantly the remainder descends to B's heir.

(b) Contingent Remainder. Contingent remainder is limited to take effect and be enjoyed, upon a dubious or uncertain person or a dubious or uncertain event, so that the particular
estate may determine and the remainder never take effect; e. g., where A is tenant for life, with remainder to B’s eldest son unborn. Here the remainder does not vest at the creation of the particular estate, but is contingent upon the birth of B’s son, an uncertain person. Should the life tenant die before the birth of a son to B, the remainder is destroyed, and a son born afterward cannot take under the conveyance. Immediately upon the birth of a son to B during the life tenancy, the remainder vests in him, and is no longer contingent. Should such son die immediately after birth, the remainder descends to his heir. Again should an estate be conveyed to A and B for life, with remainder to the survivor in fee, manifestly the remainder is contingent upon an uncertain event, i. e., the death of one of the life tenants, and cannot vest until that event. Immediately upon the death of one of the life tenants, the estate vests in the survivor. This is an instance of a remainder being contingent up to the moment of the termination of the particular estate.

MODERN REMAINDERS.

Modern remainders are more properly estates in expectancy than true remainders. In order to understand them, it is well to follow the history of English estates. Upon the adoption of the Statute of Wills, in the reign of Henry VIII, the conveyance of estates by devise was recognized. As the devise does not take effect until the death of the devisee, livery of seisin is of course impossible, many of the requisites of remainders by deed ceased to apply to remainders by devise. These estates were anciently called executory devises to distinguish them from proper remainders.

In executory devises:

1. There was no necessity for a particular estate, in other words the freehold might be made to commence in future; e. g., an estate devised to a woman upon her marriage. Here, at the death of the devisee, the estate descends to the heir, who holds it until the contingency happens.

2. A fee or a less estate than a fee may be limited after a fee; e. g., one devises land in fee to A but should A die before the age of twenty-one, then to B and his heirs. This is a limitation as heretofore explained. It is good in a devise, but under a deed
would not be, for the whole estate having passed to A there was no remainder upon which the instrument could operate in B’s favor. The rules as to perpetuities, as already explained, apply here.

3. A term of years may be granted to one for his life, and afterward limited over to another; e. g., one devises to A for his life, a term of ninety-nine years, with remainder to B and his heirs. Here at the death of the life tenant the residue of the term vests in the remainderman. There may be as many successive remainders thus created as fancy may dictate, always with the proviso however that all the remaindermen be in esse during the life of the first devisee.

In modern law, the same relaxation of the rules, which was made in England in favor of devises, is extended to conveyances inter vivos. Hence a modern remainder is not only an estate limited to take effect after another estate is determined, but is also any estate to be enjoyed at a specified time in the future, by some one other than the grantor or his heir.

ESTATES IN REVERSION.

A reversion, says Blackstone, is the residue of an estate left in the grantor and his heirs to take effect in enjoyment after the determination of an estate in the land which he has already granted. In this sense, when the fee has been conveyed the reversion is said to remain in the grantor and his heirs, and that the reversion could never take effect unless the estate was extinguished in the grantee and his heirs, by failure of heirs. Hence it was said this estate became effective by the act of God. In modern law when the fee is conveyed, no interest whatever remains in the grantor. Reversion with us means the return of the land to the grantor or his heir when a less estate, like a life estate, has been spent; e. g., A conveys to B an estate for life without limitation over. At the expiration of the life estate the fee which remained in the grantor, enures in possession in him or his heir. As the grantor takes under the instrument, it is scarcely correct to say that this estate arises by operation of law.

MERGER. When a greater and a less estate coincide and meet in the same individual, in his individual capacity, the less estate is destroyed, i. e., merges or drowns in the greater estate.
Thus, if the life tenant acquire the reversion, the life estate merges in the fee. The rule does not apply where the estates come to one by virtue of different rights; e. g., where one estate comes to him individually and the other comes to him as executor or administrator.
CHAPTER XXI.

NUMBER OF OWNERS—TRUST ESTATES.

In all cases where more than one individual own land, with the right to simultaneous possession and enjoyment, there is a common right, and they are called tenants in common. The interests need not be equal, nor derived from the same source, nor acquired at the same time. Thus it is evident that the English estates in joint-tenancy and in coparcenary have been reduced into tenancies in common. The peculiar features of those estates do not attach to estates in common. The only test of tenancy in common is unity of possession.

INCIDENTS.

Each of the owners in common has the right to possess the land, and enjoy it, provided he occupy no greater portion than his share would be on division. One of the owners in possession and enjoyment of the whole estate is liable to account to his co-tenant for rents or for waste ratably. By pursuing the statutory methods common ownership may at the option of any owner be reduced into severalty.

TRUST ESTATES.

Trust estates are the creatures of equity, and although at the present day, they differ from legal estates less than formerly, yet a clearer conception of modern trust estates can be obtained from a consideration of their origin and history, than by attempting to state their present condition here, we postpone trust estates to the subject of equity.
CHAPTER XXII.

TITLE.

Title is the means whereby one’s right in land is established. The interest or estate in land comes to the owner and he is assured in the enjoyment by his title. There are two recognized sources of title, to-wit: descent and purchase. Where upon the death of an ancestor, one acquires an estate in land, as the heir at law, his title is by descent. This is an act of law. Where by act of the parties title is transferred from one to another, that other acquires title by purchase. It must be remembered that the same act divests and invests the title.

DESCENT.

Descent or inheritance, the acquisition of an estate by the heir upon the death of the ancestor, by operation of law, depends upon the rules by law established for the devolution of decedents’ estates. The principle underlying these rules is consanguinity. Consanguinity or community of blood is the relationship of individuals descended from the same ancestor or common stock.

The exceptions to the general application of this principle grew out of Feudal tenure in England. The inheritance was not partible, but descended to a single heir; it never lineally ascended; males were preferred to females; the eldest male excluded all others; the cognati were preferred to the agnati.

The reasons for these rules do not exist in this country. The statutes of distribution of the several States go upon the principle of consanguinity and additional thereto they recognize that husband and wife may inherit from each other. It is impossible to give the laws of States upon this subject. The land of a party deceased immediately upon his death passes to his heirs at law, as ascertained by the laws of the State where the land is situate.

RULES OF INHERITANCE.

The following rules of inheritance are typical of the laws of the several States on this subject:

1. The husband is the sole heir of the wife as to her general estate; her separate estate is inherited equally by her husband
and her children per capita, and by the descendants of children per stirpes.

2. The wife is the sole heir of the husband, in case there is no living issue.

3. Should there be issue living, the widow and children inherit share and share alike, descendants of deceased children take per stirpes. It is sometimes provided that the widow shall not receive less than a certain part, say one-fifth, even if the shares exceed five in number.

4. Children stand in the first degree, and inherit equally from the parent. The descendants of children deceased represent them, and inherit per stirpes.

5. Brothers, sisters and father, (if no father, then mother) stand in the second degree, and if there be no widow, or living issue, inherit equally. The descendants of deceased brothers and sisters represent them.

6. Uncles, aunts and first cousins stand in the next degree and inherit equally. Paternal and maternal relations are on the same footing.

7. More remote degrees are traced according to the English canons of inheritance.

The expression per capita means share and share alike, an equal distribution according to the number of distributees.

The expression per stirpes may best be explained by an illustration: A, the ancestor, had three children, B, C and D. At the time of A’s death, B was alive; C was dead leaving two living children; D was dead leaving surviving him one child and two grandchildren, whose parent was dead. B receives one-third of the ancestor’s land. C’s two children receive each one-half of their parent’s third. The child of D receives one-half of his parent’s third, and the two grandchildren receive each one-half of their parent’s half of the third of the ancestor’s estate.

Under the laws of this country the land descends to the heirs at the death of the ancestor. But all one’s properties, real and personal, are liable for his debts. (At common law the land was not so liable.) Hence the land and personality usually vest in the administrator. After the payment of the debts, the residue of the land is divided by the administrator according to the statute. If there are no debts, and all the distributees are sui juris, there is no necessity for administration.
It is well to remember that, in the disposition of a decedent’s estate, the land descends according to the laws of the state where it is situated, but the personalty is distributed according to the laws of the State of the decedent’s residence.

PURCHASE.

Purchase is the acquisition of an estate in land in any other way except by descent, and it is an act of the parties. In the legal sense purchase is used synonymously with acquisition. The old law used the words perquisitio, acquisitio and conquisitio interchangeably. Therefore if one acquire an estate by conveyance for value, by conveyance voluntary, by prescriptive occupancy, by devise, he is a purchaser. As nothing was heritable at common law except the fee, it has been already seen that in the case of a conveyance of a term of ninety-nine years to one and his heirs, the heir takes not by inheritance but by purchase.

RULE IN SHELLY’S CASE.

“When an estate passes by purchase it acquires a new heritable quality descendable in the blood of the purchaser generally. The heir is liable out of the inheritance for the bond debts of the ancestor. The purchaser takes the estate free. When one under a conveyance acquires an estate in the same manner that he would have acquired it by descent and without the conveyance, should this be called purchase it would be a fraud on bond creditors, and hence is ruled to be descent.

So we have the rule: When an ancestor by any gift or conveyance takes an estate freehold, and by the same conveyance his heirs take in fee in remainder, the word heirs is not a word of limitation but of inheritance. The heir, if he takes at all, takes by descent and not by purchase. Thus where an estate is conveyed to A for life with remainder in fee to A’s heirs, the heirs do not acquire the remainder by purchase, they take, if at all, by descent. The chief effect of the rule is to enlarge the life estate into a fee.

In this country land and personalty devolve in the same way, hence the effects of the rule are far reaching. In some States the rule has been abolished by statute, in most of them it has been modified. This is a rule of legal construction and not of intention, and cases falling under it must be determined by the former and not by the latter test.
CHAPTER XXIII.

TITLE BY PURCHASE.

The usual methods of losing and acquiring title by purchase are: Grant, Gift, Sale, Devise, Prescription, Judicial Sale, Marriage.

I. Grant. In theory of law the title to all lands originate in grant from the State. In many cases this is the fact, and the State has directly conferred on an individual the title to land within her territory. In all other cases the theory is adopted for the sake of uniformity. It has already been explained how titles come through the general government, through cession, conquest, discovery and otherwise. The methods of obtaining grants of land are set forth in the statutes. Usually an actual settler is entitled to take up a certain number of acres of the public land, and by complying with the necessary formalities he secures a grant, which is evidenced by a writing under the seal of the State, issued by the proper authority.

II. Gift. A gift is the voluntary transfer by the donor to the donee of the title to land. In order to make a valid gift there must be an intention on the part of the donor to convey, acceptance by the donee, and the perfection of the intention in the legal mode. The most usual method is the execution and delivery of a deed. The subject of deeds will be considered later. Any act, which is recognized by the law as sufficient to pass the title, whereby the donor loses the dominion and transfers it to the donee, will perfect a gift, that is to say, will make it irrevocable. A gift being voluntary, not founded on valuable consideration, it is not good until the title passes. The power of an owner to give away his land is limited by the rights of his creditors to collect their debts out of it. A man must be just, before he is generous, and can not strip himself of the means of meeting his obligations. Therefore any act thus done or conveyance thus made, for the purpose of hindering, delaying or defrauding creditors is void. This applies to all manner of acts, but in the case of a gift of land, the absence of consideration is a strong circumstance.

When we come to discuss contracts, we shall see the necessity for a consideration in an executory contract, and a valuable
consideration is money or its equivalent or marriage. A deed in consideration of marriage is not a gift.

III. Sale and Conveyance. This is the usual method of transferring the title to realty. Here the owner, called the vendor, conveys to the vendee for a valuable consideration the title to land. The evidence of the transfer is usually a deed.

**DEEDS.**

We will inquire briefly into the requisites of a deed conveying the title to land. In the broad sense, a deed is any writing sealed and delivered by the parties. It includes a promissory note under seal, bond, mortgage and other instruments. At this point, we speak of those deeds only which affect the title to land. There is no prescribed form for a deed. It must contain: (1) **Proper Parties**; (2) **Sufficient Consideration**; (3) **Proper Subject Matter**; (4) It must be executed according to law; (5) It becomes effective on delivery.

Before taking up these requisites in their order, it is well to mention some preliminary formalities. The deed should have the proper venue, i.e., the State and county where the deed is made should be written first. It is many times advisable to use a preamble or preliminary explanation of the circumstances under which the deed is made. Thus if a will give the executor the power to sell and convey land of the devisor, the executor's deed should open with a preamble reciting the clause of the will conferring the power.

1. **Proper Parties.** A deed is the most solemn contract that can be made, and the rules of contract usually govern as to the ability of the parties. Any owner of an estate in land may convey title to same and execute the deed, provided he is not laboring under some legal disability, such as infancy, lunacy, idiocy, coverture.

   (a) **Idiocy.** An idiot is one born without sense and incapable of acquiring knowledge. Clearly such an one can do no binding legal act. The deed of an idiot is void ab initio.

   (b) **Lunacy.** Person non compos mentis is one deprived of reason, it may be permanently or temporarily. Such person could make a deed during a lucid interval, but a deed made during the period of dethronement of reason is a nullity.
(c) Infancy. Persons under the age of twenty-one years are infants and labor under legal disabilities. An infant may make a deed, but on arriving at majority, may repudiate it, provided he return the purchase money. An infant's deed is not void but voidable. Should he not exercise the right to avoid the deed, the conveyance is valid.

(d) Coverture. At one period in the history of our law, a feme covert, a married woman had no legal existence and could perform no act in law. The laws of all the States have radically modified the ancient doctrine of coverture and have given the feme powers over her properties. In some States she has power to dispose of her separate estate, i.e., the estate set apart to her independent of marital control. In some States everything she owned at the time of the marriage, given to her during the coverture, or acquired by her, with the husband’s consent, is her separate estate, and her power over it is as unlimited as that of any other owner. In some States, she cannot use her properties to pay her husband’s debts. Hence the disability of a married woman has practically disappeared.

The deed should recite the names and residences of the vendor and the vendee. It is safest to write the names in full, although abbreviations of names other than surnames are allowed. If a party is acting in any other than his individual capacity, the fact should be clearly stated; e.g., A as executor of B, otherwise it would appear that A was conveying land of which he had not the title.

2. Proper Subject Matter. This means that the deed should contain a description of the land conveyed, sufficiently clear and accurate to enable the vendee to locate it. The modes of description differ in different localities. It is usually sufficient to mention the State and county where the land is situate, mark out the boundaries by the surveyor’s plat, name the adjoining land owners, and give approximately the number of acres or square feet.

3. Sufficient Consideration. Consideration is the thing which moves from the vendee to the vendor inducing the latter to make the conveyance. It is good or valuable.

(a) Good Consideration. Love and affection are usual good considerations. Blood kinship is sometimes called meritorious.
A deed founded on good consideration is to all intents and purposes a gift, and is binding on the parties, but may be made to yield to the superior rights of others.

(b) Valuable Consideration. Money, things measurable in money and marriage are valuable considerations. These include land, chattels, promise, detriment, forbearance and other benefits to the vendor. Marriage has always ranked with the highest and most binding considerations. It was a maxim of the ancient law that a man was estopped by his seal to deny the consideration expressed in his deed. In some States the statutes declare that, when necessary, the consideration of a deed may be inquired into.

4. Estate. The deed should state the character of the estate created, whether in fee simple, for life or other.

5. Execution. The formalities of execution of deeds are to be found in the statutes of the States upon that subject. In most States it is necessary to affix the seal of the maker of the deed, and as a necessary authentication of the seal to sign his name either with his hand or with his mark, in the presence of the subscribing witnesses. The witnesses, usually two in number, sign their names. As to the seal suffice it to say that any device or scroll acknowledged by signing the name of the person ensealing the instrument is sufficient. The statutes provide the methods of probating the deed for registration, usually by the affidavit of one of the witnesses, or by one of the witnesses being an officer authorized by law to authenticate the signature. The effect of registration is to give notice of the contents of the deed to the world, and to admit the deed in evidence in court without other proof.

5. Delivery. It is essential that the deed be delivered. A deed becomes operative on delivery. The date written in the deed may be incorrect or impossible, the date of delivery controls. Delivery consists in any act whereby the vendor parts with the control of the deed in favor of the vendee. The vendor or his agent may actually hand the deed to the vendee or his agent, may deposit it in any place subject to the vendee's pleasure, may deposit in the postoffice, may hand it to a common carrier, or may even retain the actual custody with the understanding that it has been delivered.
Should a deed be delivered to a third person, with instructions to hand it to the vendee upon the performance of some act, as the payment of money, until the act is performed the instrument is not a deed but an escrow.

REGISTRATION OF DEEDS.

All the States have laws for the registration of deeds. The deed is copied at large on a book kept for that purpose at the court house of the county wherein the land is situate. There are many advantages given a registered over an unregistered deed. It is admitted in evidence without proof. A certified copy may be used in lieu of a lost original. Registration is notice to the world of the contents of the deed. In some jurisdictions a registered deed takes precedence over a prior unregistered deed.

The usual method of probating a deed for registration is for one of the subscribing witnesses to make oath in writing, called an affidavit, of the execution. This is sometimes obviated by having one of the subscribing witnesses an officer authorized by law to administer an oath, who signs officially. The rules for probating a deed executed in one State to be registered in another State are found in the statutes of the States. Execution and proof before a commissioner of deeds for the State of registration is universally sufficient. The statutes provide other and additional methods.

The Torrens system of registration has been adopted by a few States, and is under advisement by others. It is not necessary to discuss the system here.

KINDS OF DEEDS.

The great number and variety of deeds invented by the old conveyancers find no place in modern law. The most usual deeds are comprehended under the following: Warranty Deed, Quit-claim Deed, Lease, Mortgage.

1. Warranty Deed. This deed, as its name indicates, is used to convey the fee simple estate in lands, with a clause of warranty, whereby the maker confirms to the grantee the quiet enjoyment, failing which he is liable to an action for breach of warranty. It sometimes happens that there are in the deed col-
lateral agreements. Such an agreement is called a covenant, i.e., a promise under seal. This covenant binds both parties, acceptance of the deed by the grantee is sufficient to bind him, although he does not seal the instrument. As most of our deeds are single, the grantee does not usually seal the instrument. For the breach of a covenant, the grantor or his heir has an action at law for damages. The difference between a covenant and a condition has already been noticed. The general form of the warranty deed is used, changing the language to suit the circumstances, for conveyances by executors, administrators, trustees and officers, omitting, when proper, the warranty clause.

2. **Quit-claim Deed.** The maker of the quit-claim deed does not warrant the title, but simply conveys all right, title, interest, which he has in and to the premises, and defends against himself and any one claiming under him. Thus A borrows money from B and gives him a warranty deed to secure the payment. B gives A a bond for title, i.e., a bond conditioned to reconvey on payment of the debt. This reconveyance is a quit-claim deed.

3. **Lease.** A lease is executed and framed like other deeds to land. It conveys a term of years, i.e., an interest, an estate in the lessee for a fixed period of time. This may be a month or many years. The difference between a lease, creating a term of years, and a contract for the rent of land has been noticed.

4. **Mortgage.** In explaining the nature of a mortgage we necessarily indicated what the instrument should contain. The stipulations will differ in conformity to the statutes of the several States. Sometimes it is a warranty deed with a clause of defeasance; sometimes it merely creates a lien on the land therein described in favor of the debt as set forth.

4. **Deeds not Conveyances.** Deeds may be made which do not convey title, but charge or encumber the estate. The most usual of these is a bond for title. A buys land of B, does not pay the whole purchase price, the latter executes to the former an obligation under seal, with a penalty in double the amount of the unpaid balance, conditioned, upon the payment of that balance, to convey the estate.

IV. **Devise.** Devise is a method of acquiring title to land by purchase. The laws of this country recognize the right of the owner of land to dispose of it by will. There are some limita-
tions on this right, in such cases as of devises made shortly before death, conveying all the devisor's lands in charity, and away from his wife and children. A will or devise is the disposition of one's estate which he directs to be made at his death. A devise is a bequest of lands. There is practically no difference between a devise of lands and a will of chattels. Both become operative on the death of the maker and affect chattels in possession and lands in seisin at that time. There is no form for a will. The intention of the testator is the guide in interpretation. The rules, on the subject of the execution of devises, of the State where the land is situate, must be strictly observed. In some States a will written entirely in the hand of the maker is good, being called a holographic will. In other States it is necessary that the will or devise be executed, published and declared in the presence of witnesses, sometimes as many as three, who subscribe the instrument in the presence of the testator and of each other. A nuncupative will is oral. At one time it could not convey land. Now it may. Many restrictions are placed upon such irregular dispositions of estates. The rule is that a will must be made in writing, the exception is strictly guarded.

The executor is the person named by the testator in the will charged with the duty of distributing the estate in accordance with the terms of the instrument. Executors and administrators will be considered later. As both land and chattels of a decedent are subject to administration the subject can be more fully and conveniently treated under one head.

V. Judicial Sale. At common law title to land could not be divested by judicial sale, for the obvious reason that the ultimate title was in the crown, and the land was not subject to the tenant's debts. In this country the legal distinctions between land and chattels has, as far as possible, been abolished. Both are reachable for the owner's debts. A debt having been reduced to judgment, an execution having issued, and having been levied on land of the debtor, the formalities of notice, and advertisement having been complied with, the officer of the court having jurisdiction of land titles, exposes the land for sale at the legally appointed time and place. The purchaser, the highest and best bidder, is entitled to a sheriff's deed. This deed conveys to the purchaser all the interest of the defendant in execu-
tion in the land, and no more. The officer does not warrant the title. This is merely a legal method of divesting the title of the debtor and investing the purchaser therewith. The foreclosure of a mortgage follows substantially this procedure. Execution issues, is levied on the mortgaged premises, sale is had as above shown. In former times the foreclosure had the effect of putting title in the mortgagee. Now the purchaser at public sale acquires the title. The fund arising from the sale is applied to the liquidation of the mortgage debt. Should there be a balance it is paid to the mortgagor. Should there be a deficit, the mortgage execution is satisfied.

VI. Prescription. Prescription was formerly a mode of acquiring title to incorporeal hereditaments, founded on the fact of immemorial enjoyment. Title to land could not be acquired in this way, there was a more certain evidence, to-wit: seisin.

At the present time, title by prescription is the right which the possessor acquires by reason of his possession for a period of time fixed by statute. Thus it is provided that one who occupies land openly, notoriously, peaceably, continuously, adversely, under claim of right, for twenty years, or for seven years under color of title, has the absolute fee.

The recognition by the occupant for one moment of paramount title in another, by such an act as paying rent, destroys the continuity of the possession and defeats the claim.

The possession must be actual and consist of the exercise of ownership, by erecting houses, building fences, clearing and cultivating the soil, planting orchards or vineyards, and occupying the land either by oneself or by one's tenant.

In the case of unoccupied lands, the mere taking of timber, establishing saw mills or the like will not be possession on which to found prescription. Such acts are more like timber stealing.

Color of title is any writing purporting to convey title, which defines the extent of the claim. It is immaterial how defective and imperfect the writing may be, so that it is a sign, semblance or color of title. The most usual instance of this title is where the claimant has been in possession for seven years under a quit-claim deed, from one who never owned the land.

The prescriptive periods differ in the several States and are fixed by the statutes.
The English Statute of Frauds, 29 Car. II, so far as it relates to land titles has been re-enacted in almost the same words in every State in the Union. It provides that any contract for the sale of lands or any interest in or concerning them, to be binding, must be in writing, signed by the party to be bound or by some one by him thereto duly authorized. Thus title to land in contemplation of law originates in writing. Prescription presupposes a grant. The theory of law is that the uninterrupted enjoyment of the premises for the requisite time is sufficient evidence of the existence of a proper conveyance. This conveyance is supposed, in the lapse of time, to have been lost or destroyed.

VII. Escheat. Escheat has a very different meaning in modern law to its signification in England. Where there was an interruption in the feudal tenure, the land passed by escheat to the over-lord, of whom the tenant held. At present, it means the return of the title to the State, in case the owner dies without any representatives capable of taking, and without disposing of the land by devise or otherwise. The land is liable to the claims of creditors, which must be satisfied before escheat can operate.

The principle is that the sovereignty is the ultimate heir of abandoned properties.

VIII. Forfeiture. Forfeiture to the crown of land and goods was one of the elements of the punishment for felony at common law. Forfeiture for crimes has been universally abolished in this country.

As has been explained for certain acts or omissions of the temporary tenant for years or for life, the interest may be forfeited in favor of him next in succession. This is perhaps the extent of title by forfeiture today.

IX. Marriage. The acquisition of title to land by marriage was at one time important in this country. In former time the doctrine of merger of legal personality prevailed in full force. The husband acquired the control of the wife's lands during the coverture, and after her death the curtesy estate for his life therein. So far as the ownership of properties is concerned this doctrine has been modified or entirely superseded in all the States. The married woman retains the ownership of her land during coverture. So that no general rule other than this can be given.
CHAPTER XXIV.

PERSONALTY.

Says a modern writer, this term "includes all objects and rights, which are capable of ownership, except real estate or some interest therein." Chattel is frequently used as synonymous with personality. Chattel in the modern acceptation does not include chattel real, that being regarded as an interest in realty. Chattels, as we shall treat of them, are chattles personal or moveables. In contemplation of law they accompany the body of the owner. Hence we have the rule that the personalty of a decedent is distributed according to the laws of the place of his residence. Examples of chattels are money, clothes, jewelry, animals, harvested crops, bonds, deeds, notes, stock scrip and other evidences of debt or value.

PROPERTY IS PERSONALTY.

Property in chattels may be absolute or qualified. The nature of the property is determined from the character of the thing sometimes, and sometimes from the fact of possession. These are the most important tests. In some things a qualified property only can be had; in other things two persons may have a property at the same time the one qualified and the other absolute. In the latter case possession and the nature of the possession usually determine the rights of persons.

Absolute Property. Absolute property in a chattel is the complete ownership which gives the owner the right of possession, control, and disposition. Chattels in absolute ownership are subject to the debts of the owner.

Possession. Possession is actual or constructive. Actual possession is the manual control and pernancy of the chattel. As where the owner of a ring has it on his finger. Such possessor having the absolute property in the chattel has now the entire property therein; i. e., the right of property and the actual possession. If he have not the right of property, he has the bare possession only. In case of a chattel possession is prima facie property, and the possessor may defend his right at law or otherwise against all except the true owner.

Actual possession extends beyond the mere physical manu- eption of a chattel. Thus a horse in a man's stable is in his
actual possession. A flock of sheep in care of a shepherd is in
the actual possession of the owner. The shepherd has a mere
custody and not possession.

Constructive possession may be said to exist where the owner
is not in actual possession but has the right to the immediate
actual possession. This does not by any means cover all cases
of constructive possession, but is sufficient for our present pur-
poses. The owner of a chattel having the right to the imme-
diate possession, the possession being in another, has what is
called a chose in action, i. e., a thing out of possession, which
he may reduce into possession by an action at law. In case A
loan B a horse, A has the property in the horse and the con-
structive possession, B has the actual possession. The former
has a chose in action, the latter a chose in possession.

Qualified Property. Applying the test of possession we may
now learn the meaning of the term qualified property in chat-
tels. If A delivers a watch to B to be repaired A has the gen-
eral property in the watch, and for some purposes the construc-
tive possession. B has the actual possession and the right of
possession, which constitute a qualified property. Each and
both have a complete property in the same chattel at the same
time. The one general and the other qualified.

There are some things in which man can have, from their
very nature, a qualified property only. Such things are light,
air, fire, water, and animals of a wild nature.

Animals Feræ Naturæ. One has general property in a
wild animal in his custody and control. Thus a circus com-
pany owns wild animals in cages and under the control of keep-
ers. When a wild animal escapes from custody, one of two
things occurs, either the animal goes back into the common own-
ership and may be taken and owned by any one, or the qualified
property of the owner remains. If the animal is in the true
sense a wild animal, a tiger or an eagle, such animal escaping
from custody becomes common, the property of the custodian is
lost, and any one may occupy such animal to his use and acquire
property therein. Where, however, the animal has what is
called the animus revertendi, i. e., is accustomed to return to the
custody of the owner when permitted to go at large, the property
of the owner is not lost by such going at large. If such animal
is fit for food, the taking of it is larceny; if not fit for food, it is a civil trespass.

PROPERTY IN CHATTELS, ACQUISITION AND LOSS.

The methods of acquiring and losing property in chattels are much the same as those applicable to estates in land, presenting such divergencies as the inherently different nature of the two species of properties demand. The usual methods are: Occupancy, Increase, Confusion, Gift, Contract, Succession, Testament, and Judicial Process.

Occupancy. Occupancy is regarded by many writers as the original means of acquiring property in chattels. Supposing all things to have been originally in common, each occupant had a temporary property, which continued during occupancy only, and was lost on quitting the occupancy, the chattel returning into common. At present, this is of but small importance and applies in the case of the finding of goods, which the owner does not come forward and claim. It must be remembered that this does not apply to those things which by voluntary abandonment or by abandonment at death without a successor go back into the common and pass to the State as ultima haeres. It is a principle in modern societies that everything capable of ownership shall have an owner ascertained by law. Laws of property are intended to point out the owner and to protect his property.

Increase. This rule applies usually to the increase of domestic animals. The property in such increase vests in the owner of the female. Partus sequitur ventre. If A’s stallion fertilize B’s mare, the foal is owned by B.

Confusion. The ancient doctrine was that one who intentionally mingled his own goods with those of another, so that the parts could not be segregated, lost the goods so commingled. Of two parties the innocent one shall not suffer. It is doubtful if there is any important instance in modern times where this doctrine prevails. It is a familiar fact that grain of many owners is stored in bulk in grain elevators, and the property of each owner in his proportionate part of the whole is clearly recognized. The same is true of cotton in a gin warehouse, and of cotton seed in bulk. It was endeavored to apply the doctrine to the mingling by a fiduciary of trust funds with his own, but
a court of equity very wisely awards the full due to the beneficiary and leaves the residue to the fiduciary.

**Gift.** A gift is the gratuitous transfer of the property in a chattel from one called a donor to another called a donee. A gift being gratuitous is not complete until the donor has done all that is necessary to part with the property in favor of the donee. Delivery of the chattel or acts equivalent to delivery is necessary. If the transaction be not thus completed, it is no gift, but a mere promise without consideration, i.e., nudum pactum and unenforceable. Therefore to constitute a valid gift there must be: (1) Intention by the donor to give; (2) Acceptance by the donee; (3) Delivery of the article given or some act accepted by law in lieu thereof. A gift, when completed, is irrevocable. Thus if A say to B, I give you my horse, or I will give you my horse, it is nothing, and B cannot enforce the delivery. But if the horse be delivered, the gift is complete and A cannot revoke it. What constitutes delivery and what acts are equivalent thereto will be explained under the subjects of contracts and sales.

**Contract.** The sort of contract now under consideration is a sale. Where pursuant to agreement the property in a chattel passes for a consideration from a seller to a buyer a sale is perfected. This is an executed contract of sale, the subject will be more fully treated under the head of contracts. Suffice it to say here that the three essentials of this transaction are: (1) Identification of the chattel; (2) Agreement upon the price; (3) Consent of the parties. The fact which marks usually the transfer of the property is the delivery of the chattel or the performance of acts equivalent to delivery. Again the transfer may take place upon the performance by the buyer of his agreement, depending upon the terms of the contract. Delivery to the agent of the buyer is delivery to the buyer, and a common carrier is considered the agent of the buyer in the absence of express stipulation to the contrary. Thus if A in New York order of B in Athens one hundred bales of good middling cotton at ten cents per pound, and B deliver that number of bales of that quality of cotton to the Southern Railway Company in Athens for transportation to A, the sale is complete and the property has passed from B to A and the goods are at the latter's risk.
Succession. Succession in chattels corresponds to inheritance in lands. The same rules for ascertaining the distributees apply in both species of properties. Upon the death of one owning chattels the property in them vests eo instanti in the administrator, who proceeds to administer the estate. In any event the first charge upon the presonalty is the debts of the decedent. The personal representative has a period of time, usually twelve months from the date of his qualification in which to marshal the assets of the estate during which he is exempt from proceedings at law.

Administrator. Upon the death of one intestate, i.e., not leaving a will, the court having probate and surrogate jurisdiction has power to appoint an administrator. The persons entitled to administer are the next of kin in the order named in the statute, failing any of them, then the creditors. In some States there is a public administrator, who qualifies in case none of those entitled apply. Application is made to the proper court, after the required notice given, and at the proper term, the court proceeds to appoint and issues letters of administration. The administrator takes an oath justly to discharge his duties and enters into a bond with approved security in double the estimated value of the estate.

Duties. The administrator will have an appraisement made, reduce the properties into possession and pay the debts according to their legal priority. If the funds in his hands are insufficient to pay the debts, he obtains permission from the court to sell the personalty or so much as may be needed to pay the debts. The personalty being exhausted, he may obtain permission to sell land for this purpose. After paying debts he distributes the residue to the legal distributees. He makes reports of his actions and doings to the court whence his letters issued, and after his final report he applies for and obtains his discharge. The distribution of the estate, in this country, covers both realty and personalty, title to land thus acquired is by descent; property in chattels thus passing is by succession.

Testament. Testament or will is the disposition one wishes made of his effects at his death. The power an owner of chattels has thus to dispose of them is one of the oldest continuously recognized rights in all the law. Human society created the right
of property, and the power to dispose of personalty at the death of the owner appears to be almost coeval with the birth of the right. When the feudal laws superseded the ancient law in England, this right was lost as to landed estates and was not fully recognized until the reign of Henry VIII. In this country testators have always had the power to dispose of chattels by will and lands by devise. There is no difference made in the statutes in the formalities of execution of the instrument. A will of chattels executed according to the statutes of the State of the decedent’s residence will pass the property in them, but will not convey the title to land situate in another State unless executed according to the statutes of the latter State. A will has already been defined and its requisites mentioned. The provisions of the will are put into effect by an executor.

**Executor.** An executor is a person named in the will by the testator charged with the duty of administering the assets according to the terms of the will. The will is the law of the estate. The statutes guide the administrator, the will guides the executor.

Upon the death of the testator, the will is deposited in the office of the proper court, and at the proper time is probated. The subscribing witnesses or some of them make affidavit as to the execution and the court passes the order admitting to probate. Probate in common form is had without notice to persons at interest, in solemn form, only after full notice according to the provisions of the statutes to all interested. Should objection to the probate, called a caveat, be lodged, the case presents an issue to be tried in the manner provided by the laws. Upon the will being admitted to probate, letters testamentary issue to the executor. He takes and subscribes an oath, and sometimes gives a bond, usually the will excuses him from this.

**Duties.** The duties of the executor are practically the same as those of the administrator up to the point of the distribution of the residue after paying debts. Frequently the will excuses him from formalities imposed by law upon the administrator, as in the matter of inventories, appraisements, the manner of making sales and the like.

**Distribution.** The properties bequeathed in a will are called legacies and the recipients are legatees. Legacies are special
and general. A bequest of a specific chattel or of a definite sum of money is a special legacy, and will have preference in the distribution. The bequest of a share or proportional part of an estate is a general legacy. In case of a deficiency of assets, such legacy must be scaled to pay debts, before a special legacy is intrenched upon.

**MEANING OF TERMS.** In case the administrator, after qualification and before dismission, die, resign or is removed, the court appoints a successor, who is charged with the administration of the goods not already administered. He is called an administrator de bonis non. Should an executor be disqualified or refuse to accept, the court appoints his successor. Being the appointee of the court and not of the testator he is an administrator, but as there is will to guide him in the discharge of his duties he is called an administrator cum testamento annexo, i.e., with the will annexed.

In case an executor, after qualification, be removed, become disqualified or die, the court appoints his successor, to administer the estate not already distributed, according to the terms of the will. He is called an administrator de bonis non, cum testamento annexo. It sometimes occurs that one administers the estate of a decedent without obtaining letters of administration, without propounding a will and without obtaining letters testamentary. He is not an administrator, not having been appointed by the court. The law presumes that a will is in existence, in which he is nominated executor, therefore he is called an executor. But as the legal formality of his recognition has not been complied with he is an executor in his own wrong, i.e., an executor de son tort. He is held to a higher degree of accountability than a regular executor or administrator, in case he mismanage the estate.

**JUDICIAL PROCESS.** Property in chattels may be transferred from the owner to a purchaser at judicial sale. A ministerial officer by virtue of a levy on a debtor's goods, or of an order of court of equity, an executor or administrator, under permission of the proper court, may sell in the manner prescribed by law, such levied chattels, or such goods of the decedent, and the purchaser acquires therein the property.
RULES OF CONSTRUCTION.

The rules for the interpretation of written instruments are here given, with the same comment, that was made on the rules for interpreting laws.

1. The construction must be favorable, and accord with the apparent intention of the parties; and must also be reasonable, and agreeable to common understanding.

2. Where the intention is clear, too minute a stress shall not be laid on the strict and precise meaning of the words and grammatical construction.

3. The construction shall be made on the entire instrument, not on disjointed parts, where discrepancies appear, that construction shall be adopted which gives effect to all the parts.

4. The instrument shall be taken most strongly against the maker. In case of a conveyance, the highest estate, the language is capable of creating, will be created.

5. Of two constructions one agreeable to law, and the other contrary thereto, the former shall be adopted.

6. Of two totally repugnant clauses, in a deed, the former; in a will the latter prevails. The first deed and the last will are effective.

7. Wills are more favorably expounded than deeds. The intention of the maker is the supreme test. Other rules yield to this.
Contracts permeate the whole law of personal rights particularly of property rights. So important is the subject that all modern writers on general law give it a separate treatment. While the general rules of law define and enforce the rights, duties and liabilities of persons to each other and to society, there is scarcely an instance of dealing between persons, in which the parties are not permitted by an agreement to regulate the details of the matter. The contract is the law of the transaction. Within the limits prescribed by law the power to contract is without limit. Thus in the contract of bailment, there are certain legal obligations of which the bailee cannot relieve himself by contract. Up to that point, the power to vary the obligations of the parties is unrestricted. A common carrier is bound to exercise diligence, as prescribed by the statute, in the care and transportation of goods bailed to it. Within this general limitation, the carrier can by contract vary in an infinite number of ways the obligation.

Definitions. "A contract is an agreement upon sufficient consideration to do or not to do a particular thing," says Blackstone. In Sturges vs. Crowningshield, Chief Justice Marshall said: "It is an agreement in which a party undertakes to do or not to do a particular thing." Both these definitions are of contracts wherein something is to be done or omitted by the parties in the future, i.e., executory contracts. They do not cover the great body of obligations, now classed as contractual, wherein one party is bound to do or refrain in return for something already done or foreborne by the other, i.e., executed contracts. The former are bilateral, the latter, unilateral.

The original concept of a contract was the voluntary meeting of minds. Contracts in modern law cover a far wider field, they extend to contractual obligations where the volition is presumed from the acts of the parties, or where the contractual obligation is imposed by law independently of volition. Hence under the general term contract is included: (1) An agreement, a voluntary meeting of minds; (2) An obligation imposed on one party based on a benefit from the other party, the facts showing
an intention to recompense, i.e., a contract implied by law as a matter of fact, for the purpose of effectuating an evident intention; (3) An obligation imposed by law upon one party to recompense for a benefit received from the other party, where there is no intention to repay, i.e., a contract implied by law as a matter of law, for the purpose of protecting a right and affording a remedy, called a quasi contractual obligation.

To illustrate the three concepts: A enters B's shop, agrees with him on the price of a book, B agrees to deliver the book. Both are bound by contract, the one to pay the price, the other to deliver the book. Again A enters B's shop, takes a book and walks out. A has receive a benefit from B under circumstances evidencing an intention to pay for it. One party has performed, the other is obligated to perform. A is under an implied contract to pay for the book. Again A enters B's shop, secretes a book, taking it away. Here A has received a benefit from B without intending to reimburse. The law feigns both the intention and the promise for the purpose of protecting B and affording him a remedy. A is obligated to pay for the book under a quasi contractual obligation.

We quote, with some modifications the language of Laurie, J., in the case of Hertzog vs. Hertzog. "There are: (1) Express contract, where the terms of the agreement are openly uttered and approved at the time of the making; (2) Implied contracts, which are (a) Resulting contract, which arises from facts showing mutual intention to contract; (b) Constructive contract, which is a fiction of the law adopted to enforce a legal duty by action of contract, where no proper contract exists.

We have constructive fraud, constructive trust, constructive notice, and whys not a constructive contract, a contractual obligation existing in contemplation of law in the absence of any agreement. With apology, we shall use the term quasi contract as covering obligation created by law and enforceable by an action ex contractu."

There are, as we shall see, contractual obligations imposed upon parties where there is no consideration, notably on accommodation endorsers of negotiable instruments. This is perhaps one reason why Judge Marshall omitted consideration from his definition.
In view of the foregoing, and with much hesitation we submit, that: A contract is an obligation assumed by the parties, or, imposed by law from their acts or from the facts.

Contracts.---

| Express.   | 1. Resulting from the facts. |
| Implied.   | 2. Constructive by the law.  |

ANALYSIS.

PARTIES. Whether viewed as an agreement or an obligation (nemum) a contract must have at least two parties. They must be persons able in law to contract or amenable to the legal obligation of the contract. The usual test of ability to contract is the power to will to do or not to do. This is not universal. Many persons have the power to exercise volition who cannot legally contract, and many transactions are held to be contractual in the absence of volition or of even the power to will. The general rule as to ability is that all persons have power to contract except those laboring under legal disability. Those partially or totally unable to contract are: idiots, lunatics, infants, married women, and persons under duress.

IDIOTS. An idiot is a natural fool, one born without intelligence and without the ability to acquire it. He can do no binding act in law. Being without natural capacity, he has no legal ability. This rule of law is wisely designed more for the protection of the unfortunate than for the limiting of legal powers.

An attempt to contract with an idiot is void, and the other party acquires no rights thereunder. All the acts necessary to be done for the purpose of protecting an idiot in his rights are performed through a person sui juris regularly empowered and known as a guardian.

LUNATICS. A person of none sane mind is called in law non compos mentis. A lunatic, during periods of insanity, can make no binding contract, contracts made during lucid intervals are binding. A monomaniacs may well make a contract relating to a subject other than that of his peculiar mania. A lunatic is endowed with reason and intelligence, but they have been overthrown by drugs, disease or misfortune.

INFANTS. Person under the age of twenty-one years is an infant and labors under partial disability to contract. On arriving at the age of majority he may usually repudiate contracts made
during infancy. Should he fail so to do within a reasonable time he is held to affirm a contract which was voidable at his option. He may affirm or disaffirm by words, acts, silence or failure to act. In case of repudiation he will be compelled to restore any benefit he may have received under the contract.

**Infants' Contracts.** An infant may bind himself by contract for the necessaries of life, which include food, clothing and medicines. In most States he may contract for education, i.e., tuition.

This contract must be clearly distinguished from those instances where the parent is made liable for necessaries furnished his infant child. The law imposes a duty on the parent to furnish suitable necessaries to his infant child, to be judged primarily by the parent. In case he fail in this, the law regards the infant as the servant of the parent and empowers him to bind the master by contract. The difficulty, if any exist, lies in determining what are necessaries suitable to the condition in life. These differ in each case.

An infant may bind himself as an apprentice to learn a trade. He may sign a peace bond and a criminal recognizance.

Where an infant, with his parent's consent, engages in independent business, he is as to that business sui juris and his contracts are valid and binding.

So when the infant is emancipated from parental control his contracts are valid.

**Married Women.** Anciently at the time of marriage, the legal identity of the woman was merged into that of the man, and during the coverture the feme covert being non existent in law could do no legal act and was of course unable to contract. Contracts for necessities of life, under certain circumstances, were made by her, but were binding upon the husband, by virtue of his legal duty to support the wife. This is not the contract of a feme covert, but is the contract of her husband made through her.

The first step toward recognizing the right of a feme covert to contract was taken when the law conferred upon her separate ownership. As a necessary consequence of this ownership she acquired the power to make contracts relating to her separate estate, and binding upon her to the extent of the separate in-
The distinct legal existence of the feme covert for many purposes is now recognized, and to the extent that this is true in the several jurisdictions, her power to bind herself by contract is recognized. In most of the States the wife may, with the husband's consent, become a free trader, and thus practically free herself of the disabilities of coverture as to the business in which she engages. She may engage in trade and employ her husband.

These disabilities were mentioned under Domestic Relations and Deeds. The repetition, however, is proper and perhaps necessary.

**Duress.** Duress is compulsion which takes away free agency. Treating a contract as an agreement, i.e., a mutual voluntary act, it is manifest that one who consents under compulsion is not entering into a voluntary agreement. This duress may be produced by physical force, by threats or by fear otherwise induced. The question to be decided in each case is whether the consent is the result of duress or not. The presumption is in favor of the contract. There being no other disability, duress to avoid the contract must be established by proof. A promissory note given to procure the forbearance to prosecute the maker criminally is not collectable, having been procured through duress.

**Formation of Contract.** Agreement in the original definition of contract carries with it also the idea of the manner in which the result is reached, how the minds came together or how the contractual obligation was imposed, what facts are express or implied, the former are written or oral, and written contracts are special or simple.

**Express Contract.** An express contract is one where the terms are set forth at the time the contract is made. This is the simplest form of contract. The terms may be declared orally or in writing. This relates to the manner of proving the contract only.

**Oral Contract.** Where the terms of the contract are declared by word of mouth, by one party and assented to by the other, here is clearly an agreement, a meeting of minds, an oral contract. Thus A says to B, I will give you ten dollars for the
books you are now reading, and B says I will take it, the contract is complete.

**Written Contract.** When the terms of the contract are reduced to writing and accepted by both parties, whether in writing or not, the transaction is complete. As the writing is presumed to express the intention of both parties, parol testimony will not be heard to vary the terms of the writing except fraud, accident or mistake be shown.

The meaning of the writing may be shown and omissions may sometimes be supplied by parol testimony. If A offers to deliver to B within thirty days one hundred bushels of corn at sixty cents per bushel, and B accepts the offer and the agreement is embodied in a memorandum in writing, signed by both parties, this is an easily understood express written contract. Should B make and deliver to A a promissory note promising to accept one hundred bushels of corn and to pay sixty cents per bushel for it within thirty days, this is a written contract binding on both, although only one signed the writing.

**Specialty.** A written contract under seal is called a specialty, all others are simple contracts. A specialty has a higher dignity than a simple contract. The general rule is that the maker is estopped by his seal to deny the recitations in the writing. This rule has been relaxed in some States, and the consideration of a deed may properly be the subject of inquiry. That the seal imports consideration is no longer an unrebuttable presumption of law. Promissory notes under seal are free from the bar of the statute of limitations for a longer time than simple notes. There are certain contracts which are required to be sealed, notably a deed to land. What constitutes a seal has been explained elsewhere. The Statute of Frauds provides that certain contracts shall not be enforceable unless reduced to writing. This subject will be discussed when we come to treat of that Statute.
Implied Contracts——

   2. Goods Bargained and Sold.
   5. Board and Lodging.
   6. Use and Occupancy of Land.
   7. Land Sold and Conveyed.
   9. Money Due as Interest.

\[\text{Resulting — — — — — — — — — — — — — — — — — — — —}\\]
\[\text{Constructive — — — — — — — — — — — — — — — — — — — —}
\]
1. Goods Obtained through Fraud.
2. Goods Obtained without Consideration.
4. Professional Skill.
6. Money Had and Received.
7. Money Paid to Use.
8. Money Paid through Fraud.
10. Money Paid through Mistake.
Other Foundations of Indebtedness.
IMPLIED CONTRACT. When one person has received from another an advantage, the idea of gift being excluded, this is in law an executed consideration, it creates an indebtedness which the law presumes will be repaid. Where the facts show an intention to return the consideration or the equivalent, the contract is implied by law as a matter of fact. The law feigns a promise to fulfill an obligation, for the purpose of effectuating the intention. Where no evidence of intention to reimburse exists, the contract is implied by law as a matter of law, juris et de jure. Here both intention and promise are feigned for the purpose of affording a remedy, by an action for breach of contract. The former is an implied contract pure; the latter is a quasi contractual obligation having the force of a contract. It must always be remembered that should the circumstances or the relations of the parties show that a gift was intended, the presumption of a contract does not arise. Illustrations of the two kinds of implied contracts have been given, they might be indefinitely multiplied. Some of the most usual which occur in transactions between man and man are given in the chart.

DISTINCTIONS. Contract is the generic term for all enforceable contractual rights, and includes all the kinds from an actual volition of the parties to an obligation imposed by law.

Agreement is the voluntary meeting of the minds of competent parties on a subject matter for a consideration, and is the original concept of a contract.

Promise is the express or implied assent of a party in return for an executed consideration, or for a promise.

Obligation is a duty or liability imposed by law in return for an executed consideration and amounts to an assumption thereof. Agreement makes a contract. Legal obligation implies a promise.

OFFER AND ACCEPTANCE. Offer and acceptance is the fact whereby the contract is made and the contractual bond established. It is a rule of law that the offer must be accepted wholly and exactly, and usually in the manner, as made. Anything less or other than this would be simply a counter offer, which the other party is at liberty to accept or reject. If A offer to deliver free on board at port one hundred bales of good middling cotton at ten cents per pound to B, and B consents to
take fifty bales. This is no contract; neither party is bound. A has the right to accept or reject B’s offer. Should A’s offer be made by letter and B’s acceptance be by wire, A is not bound to fulfill his offer. It is frequently important to determine the time of the acceptance, for that time marks the moment of the meeting of the minds. An offer is made by letter through the post, and accepted in the same manner. The contract is complete and binding when the letter of acceptance is deposited in the postoffice.

The difficult questions usually are whether acts of silence in certain cases constitute acceptance. To say I will take the horse, mentioning him, at two hundred dollars and consider it a trade unless you refuse, is no contract; the offerer cannot impose such condition on the offeree. To renew an insurance policy without instructions does not alone constitute a contract. Periodicals or books sent through the mails or by express do not create a contractual obligation to pay for them, unless the recipient receive and use them. Perhaps in case of a periodical it might be incumbent on the recipient to refuse it. The facts in each case must settle the question of acceptance.

It is evident from what has been said that a written contract need not be entirely on one sheet of paper, nor written at the same time, but frequently correspondence all taken together must be looked to for the ascertainment of the terms.

Consideration. This is an essential element of a contract. Consideration is something esteemed by the law to be of advantage or value, in return for which the promise is made. A contract without consideration is nudum pactum and unenforceable, ex nudo pacto oritur non actio. An executory contract must be founded on a valuable consideration. The consideration is the moving cause of the contract. Thus A offers to sell B a horse for one hundred dollars. B accepts the offer, and the agreement is reached. A promises to deliver the horse and B promises to pay the money. The consideration for A’s promise is B’s promise to pay; the consideration for B’s promise is A’s promise to deliver.

Consideration may be executory or executed; it may be good or valuable.

**Executory and Executed Consideration.** Where there are
mutual promises to support the contract, the consideration is executory on both sides, it is a bilateral contract. Where one party has done all that is required of him, under the terms of the contract, the consideration is executed as to him and executory as to the other party, the contract is unilateral. Where the execution of the consideration takes place pursuant to the terms of an express contract, the agreement itself declares the duty of the other party. Where without express agreement one confers a benefit upon another, this is an executed consideration and creates the contract. The duty of the other party is determined by the nature of the transaction and the law.

**Good and Valuable Consideration.** A good consideration is blood, natural affection, friendship. A valuable consideration is money, commodity, marriage. This includes forbearance and detriment. No executory agreement founded on a good consideration is enforceable. If one has executed his promise founded on a good consideration, it is in the nature of a gift and valid between the parties, but would under some circumstances not avail against the claims of creditors. A contract resting on valuable consideration is good to all intents. It is evident then that the difference between an executed and an executory agreement is vital on the point of consideration. Anything in fieri must rest on value or it is a nullity. Where a benefit has been conferred or a detriment suffered an obligation is imposed to reimburse.

In cases of bilateral agreement, where the promise of each party is the consideration moving the other to contract, the promise must not be to perform a moral duty only. It is otherwise if a moral duty rest on a prior legal duty, as a promise to pay a debt barred by the statute of limitations.

Valuable consideration includes all things measurable in money, as money, goods, land, work, board and lodging, rent of land, hire of chattels, detriment suffered, forbearance exercised as well as marriage. Contracts when evidenced in certain ways import consideration, such are deeds, bonds, other specialties, and promissory notes made negotiable. The law takes it for granted that contracts thus evidenced are founded on valuable consideration.

**Illegal, Immoral, Inadequate.** A contract founded on a
promise to do an illegal or immoral act is void. A note given on consideration that a burglary be committed is an example of illegal consideration. Gaming is usually declared by the statutes to be illegal and immoral. Contract founded on gaming consideration is void. A promise to pay the rent of a house maintained as a lewd house is on immoral consideration. In the absence of fraud the adequacy of the consideration is not usually the subject of inquiry. Men are at liberty to make contracts even foolishly unequal, and the law will not interfere. Where the inadequacy is so gross as to shock the moral sense the contract is not enforceable. It is almost inconceivable that such a case can arise between men of average intelligence, there are always present other elements of fraud. The courts have never been called upon to annul a contract on this single ground.

Subject Matter. The thing agreed to be done or omitted, the subject matter of the contract, gives rise to another classification. From this viewpoint the most usual contracts are: Sales, Bailments, Insurance, Agency, Partnership, Negotiable Instruments.
CHAPTER XXVI.

SALES.

A sale has already been defined as the transfer of the property in chattels from one to another for a valuable consideration. The distinction between a sale and a contract of sale is repeated here. The sale is complete when the property passes from the seller to the buyer; the contract of sale is complete as soon as a binding agreement is made to transfer the property and to pay for it.

ESSENTIALS OF THE CONTRACT. The essentials of a contract of sale are here repeated: (1) Identification of the thing to be sold; (2) Agreement as to the price; (3) Consent of the parties.

When in addition to these either party fully performs his part of the agreement, the property in the chattel passes and the sale is complete.

IDENTIFICATION OF THE CHATTEL. This may be accomplished by written or oral description or by acts. If the contract be for the sale of a horse, the animal may be described or pointed out. If the object be a number of sacks of wheat out of a bulk in a warehouse, the segregation from bulk, sacking the agreed number, weighing, branding, or setting aside may constitute identification.

At the common law a seller could sell or contract to sell only such things as were owned by him, in his possession or control. It is now possible by an assignment to transfer the property in things not now in control and not now in esse. Under this contract when the thing comes into the control of the assignor, the property of the assignee ensues as of the time of making the assignment.

Thus, one buys and takes an assignment of the output of a flour mill, to be delivered monthly as made, for one year. Six months after the making of the contract, the mill fails. The output of the last month before such failure is the property of the buyer. His right relates back six months, and such output is not subject to a judgment rendered against the mill, since the date of the assignment. This matter will be mentioned again under Assignments in Equity.

WARRANTY. At common law the seller made no warranty, except as to his right to sell, the doctrine of caveat emptor ap-
plied. Of course he could make an express warranty and would be bound thereby. At the present time in most jurisdictions, the seller is held by the statutes impliedly to make certain warranty, usually as follows:

(1) That he has valid property and right to sell; (2) That the article sold is merchantable and reasonably suited to the use intended; (3) That he knows of no latent defects undisclosed.

A defect in the thing sold, rendering it useless for the purpose intended, or such that it is reasonable to suppose that the buyer would not have contracted had he had knowledge of its existence is a latent defect, if known to the seller and not to the buyer and not discoverable by ordinary observation. The buyer may under these conditions refuse to accept and pay for the article and may bring his action for damages for breach of contract.

AGREEMENT. The evidence of the agreement of the parties upon the price, and the consent of the parties to the terms of the contract are the same in the contract of sale as in other kinds of contracts.

The sale then is complete when the property is transferred. (1) When the seller performs his part of the contract, that instant the goods are at the buyer's risk; (2) When the buyer tenders or pays the agreed price, he is entitled to the possession. Generally, however, the seller cannot be compelled to deliver, the buyer tenders the price and sues for damages.

DELIVERY. The act which usually, but not always, marks the completion of the sale is delivery. What acts constitute delivery must be ascertained from the particular transaction. Where the seller so deals with the thing as intentionally to part with the control, in favor of the buyer, it is delivery. If one sell a horse to another and give actual possession, or at the buyer's request retain actual possession, or give an order on a livery man, in whose possession the horse is, any of these is delivery. Delivery to an agent is delivery to his principal. Delivery to a common carrier by a consignor of goods is delivery of the consignee. The carrier in the absence of express stipulation is the agent of the consignee. A familiar illustration of delivery is the following: A residing in a prohibition county orders a gallon of alcoholic liquor of B, who has his place of business in a non-prohibition
county. When the goods are delivered to the express company in the latter county, the sale is complete there and the transaction does not violate the law of the former county. Should the shipment be made "collect on delivery," then the company is the agent of the seller and the sale is not complete until the actual delivery to the buyer, in the prohibition county, and the transaction violates the law.

Stoppage in Transit. After the goods have been delivered to the common carrier, and before they reach the possession of the buyer, should the consignee become insolvent, the consignor has the right to notify the carrier not to deliver the goods to the consignee, and thus to resume possession. This is called stoppage in transit. The property in the goods being in the consignee, the consignor can by proper proceedings have them sold and credit the account with the proceeds of the sale. If the sale produce more than the purchase price, the balance belongs to the consignee. This is what is meant by the right of the seller to retake the goods and retain them until the price is paid.
Bailment is the delivery of one's chattel to another for a temporary purpose to be returned when that purpose has been accomplished, in the same or in enhanced condition.

Judge Story's classification of bailments is useful for the purpose of showing the care and diligence required of the bailee under different circumstances, and as no other classification equally good has been suggested, we give it here. Bailment for the benefit of: (1) The bailor; (2) Both parties; (3) The bailee.

The care and diligence required of the bailee depend upon the nature of the contract itself and upon the character of the thing bailed.

Nature of the Contract. Should the owner of a chattel leave it with another for safe keeping, not paying or agreeing to pay for the service, this is a bailment for the benefit of the bailor only, usually called a gratuitous bailment. The bailee must use the care and diligence of an ordinarily prudent man in the management of his own business, must not expose the chattel to extraordinary danger, must not permit it to deteriorate or be destroyed through wantonness or neglect. One who receives the cattle of another to graze must not put them in an enclosure with dangerous animals, if they be milk kine he must use the ordinary means of preventing their becoming dry. This contract is called agistment.

Should one hire a horse of another to go a certain journey he must exercise a higher degree of care in the management of the horse than is required of a gratuitous bailee. He must go the journey and only the one contracted for, must observe the condition of the animal and take measures to relieve it in case of distress, must attend to the proper feeding and watering as a prudent man would under all circumstances, who possesses the usual skill and experience. This, of course, is a bailment for the benefit of both parties.

Should one borrow another's chattel and is to make no return for the use, this is a bailment for the benefit of the bailee only. He is required to use the care and diligence of an unusually prudent and cautious man, in dealing with another's goods. One
who borrows a motor car must possess and exercise the technical skill of one who is competent to operate such a machine. Damage occurring to the machinery would not be excused on the ground of care of an unskilled person.

CHARACTER OF THE THING BAILED. It is at once evident that this is an important factor in measuring the bailee's duty.

Should one deposit with a shopkeeper to be kept gratuitously a book, a watch and a sum of money, the bailee's duty would be performed by placing the book on his shelves, the watch in his pocket and the money in his safe.

Should one hire of a liveryman a carriage and a motor car, he would be in his right to have one accustomed to manage horses to drive the carriage, but for the car he must provide one skilled in its operation and management.

Should one borrow a microscope and a sledge hammer; to handle the former in a manner proper for the latter would be wanton destruction; to manipulate the latter as the former should be, would be absurd.

DEGREES OF DILIGENCE. Modern writers discard the classification of diligence into slight, ordinary and extreme, as well as that of negligence into slight, ordinary and gross. They say that the bailee is bound to use care and diligence commensurate with the circumstances in each particular case, the two chief factors in settling this question have been discussed and illustrated. These classifications are mentioned here because they are expressly made by the statutes of some States. The result is the same either way.

CONSIDERATION. It would seem at first blush that a gratuitous bailment is a contract without consideration and binds the bailee to nothing. This illustrates with great nicety the radical difference between an executed and an executory transaction. If A agrees to take charge of B's horse and keep him gratuitously, he is not bound to do so and on his refusal B has no claim against him. But if A takes possession of the horse under the agreement, he is bound to exercise the diligence in caring for it commensurate with the circumstances. Failing this, he is liable to B in damages.

IMPLIED BAILMENTS. The contractual relation of bailor and bailee may arise by implication as well as by express agreement.
If one comes into possession of another's chattel, the owner may treat him as a bailee, and his rights and remedies will be fixed by the law of bailment. If this be with the knowledge and consent of the owner the case is clear. It is believed that this is true even if the possession originated without the knowledge or consent of the owner.

**Special Bailors.** Under the terms of the statutes of the States there are peculiar duties and liabilities imposed on certain classes of bailees. Among these may be mentioned common carriers, warehousemen, and inn-keepers. This results from the nature of their occupation as dealers with the public. A common carrier of goods is bound to transport and deliver them undamaged, and in the event of loss or damage must respond in damages to the bailor, his liability covering all cases except the act of God or the public enemy. The carrier is an insurer of goods, not of passengers.

Warehousemen are not held to exercise the same diligence as carriers, but may excuse the loss or damage of goods stored on any ground short of ordinary negligence in the care of another's goods.

The liability of an inn-keeper extends to the care of the goods and luggage of the guest in the inn. He in fact does not have actual possession of the goods, but in law is considered to have, and is bound accordingly.

Telegraph companies receive the possession of nothing to be delivered or returned, and it is only by statutory regulation that they are put upon the same plane as carriers and treated like bailors.

**Special Deposit.** Where a bank is engaged in a regular banking business and also receives valuables for safe keeping, and a customer deposits one hundred dollars, this is a sale of that money on the promise of the bank to pay for it. The property in the currency passes to the bank, and it may be lawfully paid out to any one having a claim on the bank. If the customer seal in an envelope one hundred dollars in currency and deposit it with the bank for safe keeping, this is a bailment. The property remains in the depositor, and the bank promises to return that specific package of currency. Some confusion arises on this point where the statute gives the bank a lien for its debts upon
the funds of an insolvent customer. This makes the transaction from that viewpoint a mixture of sale and bailment.

**Rights of Bailees.** The bailee has the actual possession of the chattel and the right of possession. These give him a qualified but complete property. He may defend and vindicate this right against all persons except the true owner. If the chattel be damaged or destroyed in the possession of the bailee, or taken out of his possession, he may proceed against the wrong doer as the owner. The bailor and bailee each and both have a complete property in the chattel at one and the same time, the one being the general and the other a qualified property.
CHAPTER XXVIII.

INSURANCE.

Insurance is a contract whereby one agrees to indemnify another in case he suffer loss in respect to a specified subject from a specified peril. The party who insures is called the underwriter or insurer, the party to be indemnified is called the insured. The written evidence of the contract is the policy. The contract may be oral, unless required by statute to be written. The consideration paid by the insured is called premium.

It is well to keep in mind the difference between insurance and bailment. The bailee promises to return or deliver the chattel bailed in the same or improved condition; the underwriter agrees to pay for the thing insured in case of loss. One contract contemplates safe keeping; the other contemplates loss or destruction. The destruction by vis major excuses the bailee, but renders the insurer liable. Bailment cannot exist without possession in the bailee, possession is not indispensable nor usual in insurance. Where one delivers a diamond to an express company to be transported, he pays a larger sum than he would do for the transportation of a less valuable article. The company is both a bailee and an insurer. If the diamond is lost through the act of God, the company must pay for it as an insurer. If the value had not been declared and the contract had been bailment only, the company would not be liable for a loss occasioned by the act of God, provided always that the company exercised the diligence required by law of a common carrier. Except in case of loss by the act of God or the public enemy, a common carrier is practically an insurer of goods bailed for transportation.

DETAILS OF THE CONTRACT. The time when the contract takes effect, the time and manner of paying the premium, the method of making the contract need not be discussed here. The general rules of contracts apply, as modified by the insurance laws of the States.

In the interpretation of contracts of insurance, the courts are liberal in favor of the insured.

The insured must have an interest in the thing insured, some pecuniary value which may be jeopardized.
Any act of the insured, without the consent of the insurer, whereby the risk is increased, will avoid the policy.

Representations made by one to obtain insurance stand on the same footing with representations in other contracts. If the necessary elements be present false representations will render the contract voidable. This subject comes properly under the treatment of fraud in contracts.

AGENCY.

The contractual relation of principal and agent arises where one authorizes another to act for him. The subsequent ratification of an unauthorized act brings it under the rules of agency.

DISTINCTION. The similarity in some respects of the relation of principal and agent to that of master and servant causes some writers to regard both relations as purely contractual. It is submitted that this is untenable. The master in many instances is responsible for acts of the servant where under like conditions the principal is not responsible for the acts of the agent. The relation of principal and agent is purely contractual and the rights and obligations of the parties are determined by the terms of the contract. The relation of master and servant is one of legal status, and many of the rights and liabilities are fixed by law independent of the contract creating the relation.

The most important feature of both these relations is the responsibility of the superior for the acts of the inferior, and this may safely be taken as the distinguishing test. The difference is more frequently apparent in case of torts than of contracts. Where one employs an agent to collect money, and the agent in the course of collection beat the debtor, the principal is not liable for the tort. The contract did not contemplate the tort. Where the servant of an innkeeper steals from a guest contrary to express command, the innkeeper is responsible to the guest. The reason for the distinction is that the master has the right to control the acts of the servant, this right imposes a duty on him so to do, failing to discharge this duty, he is legally responsible to the injured party. One who does not prohibit a thing which he ought to have prohibited, commands it. In a great number of instances, however, the distinction is unimportant, the liability attaches to the superior under the contract whether it be agency or service.
WHO MAY BE AGENT. Any person of sound mind may act as agent. A corporation may act as agent provided the powers are broad enough under the charter. An infant may act as agent and may bind his principal by acts which he could not do for himself. Whatever one may do himself he may do by an agent, except some act calling for skill, discretion or judgment, i. e., where special confidence is imposed.

The agent cannot delegate his power to another. Delegated power cannot be delegated. The nature of the business may permit the agent to call others to his assistance in the transaction thereof, but this is in no sense a delegation of power.

KINDS OF AGENTS. Agents are general or special. A general agent is one to whom a principal entrusts all his business or all transactions in a particular part or branch of his business. A manufacturer may employ a general agent to manage the whole business of manufacturing his product. He may also employ a general agent to sell and collect payment for the manufactured product.

A special agent is employed to conduct a particular transaction, or is authorized to perform a specified act. He is strictly bound by the terms of his appointment. A special agent of the latter kind is usually called an attorney in fact. The power authorizing him to act must be executed with the same formality the act itself requires.

Thus if one conveys land through an agent, the power of attorney must be executed with the same formality as a deed. If a corporation convey land a regular authority should be given one to execute the conveyance for and in the name of the corporation. This is a resolution at a stockholders’ or members’ meeting. The special agent should annex his power to the instrument. Where a writing is signed by an agent for his principal, it should so state: e. g., A. B. by his agent C. D. If the principal be undisclosed, he is not bound, it is not his act. The word agent after a name is mere designatio personae and binds the writer only.

CONTRACT. The contract does not differ as to the manner of formation from other contracts. It may be express or implied, may be oral or written. The law as to the necessity for writing certain kinds of contracts applies to this contract. The most
important point connected with this contract is that one, dealing
with another through an agent of the latter, is on notice of the
extent of the agent's authority to bind his principal.

One of the most important contracts of agency is that of
partnership. Where several persons engage in business together,
agreeing to share profits and losses, each becomes the principal
and the agent of the others as to the partnership affairs.
CHAPTER XXIX.

NEGOTIABLE INSTRUMENTS.

Yet another class of contracts in the form of negotiable instruments requires a separate consideration. These contracts differ radically from other contracts.

Definitions. A negotiable instrument is either a bill of exchange or a negotiable promissory note. Other evidences of debt are made negotiable by the statutes of some of the States, but the two mentioned are the generally accepted types.

“A bill of exchange is a written order or request by one person to another for the payment of money at a specified time, absolutely and at all events,” says Kent. This omits “payments to a specified person, or his order.”

A negotiable promissory note is a written engagement by one person to pay another therein named, or order or bearer, absolutely and unconditionally a certain sum of money at a time specified therein. This adds the words of negotiability to Story’s definition of a bill of exchange. A promissory note has been generally held to be non-negotiable unless it contain words of negotiability. Certain other forms of words are recognized, such as payable at a bank of discount and the like. Promissory notes were not recognized as negotiable instruments in England for many years after bills of exchange had been in general use. A cheque on a bank of discount is a bill of exchange drawn on oneself, i. e., the drawer.

There are three parties to a negotiable instrument, thus a cheque on a bank payable to self, the drawer and payee, are the same person. A cheque payable to the bank, the drawee and payee are the same person.

Foreign and Inland Bills. A foreign bill of exchange is one drawn in one State or country and payable in another State or country. An inland bill is drawn and payable in the same State or country. The distinction is historical and has but little meaning now, as the same rules apply generally to both kinds of bills.

Parties and Form. The parties to a bill of exchange are: the drawer, who makes the bill, the drawee, the one who is requested to pay it, the payee, to whom the payment is to be made. The common form of bill is as follows:
Atlanta, Ga., 1st May, 1910.

At sight, pay James Jones (payee) or order, one hundred dollars, value received, and charge to account of

John Smith, (drawer.)

To George Doe, (drawee), New York."

**LAW MERCHANT.** Ordinary contracts are derived from the common law of England. The laws regulating them are the result of growth and statutory changes the common law being the foundation. Negotiable instruments come from the law merchant. This special custom of merchants came into England from the Mediterranean bankers. Thus there were two sets of conflicting laws, the one the general custom, the other the special custom of merchants. Later the law merchant was by statute engrafted on the common law, thus it happens that parties to negotiable instruments are upon an entirely different footing from parties to other contracts.

**NEGOTIATION.** One of the chief distinguishing characteristics of a negotiable instrument and the reason for its existence is the power of the payee to transfer his rights to another. This could not be done with a common law chose in action. Chose in action was not assignable at common law. And today where the holder of an ordinary chose in action is permitted to transfer, it is not negotiation but a very different thing, to-wit: assignment.

Where the instrument is made payable to bearer, it may be transferred by delivery. Where the bill or note is payable to a named payee or order, it is negotiated by indorsement. The payee writes his name on the back of the paper. If the name only is endorsed it is a general indorsement, and the bill is payable to bearer. If the indorsement is to a person named, this person is called an indorsee and stands in the place of the payee who is now an indorser.

**BONA FIDE HOLDER.** The most striking peculiarity of a negotiable instrument is that a bona fide holder for value, before due, without notice of dishonor, takes it free from defects and defenses between the prior holders and parties, as to the property therein, and the amount of the consideration. It has been said that: "though the instrument be stolen, though the maker have claims against a prior holder, though the instrument be procured by fraud, be paid, have no consideration, involve usury,
such defects perish with the transfer as to the innocent holder."

Forgery, alteration, infancy and any fact showing that the contract is not that of the maker, or is a mere nullity are good defenses against even an innocent holder.

**Negotiation and Assignment.** The ancient rule that a chose in action was not assignable has been abrogated by statute. The owner of a claim upon another has the right to transfer it to a third person, by assignment. The effect is to put the assignee in exactly the position of the assignor. All defects, defenses and equities between the original parties remain, after assignment, against the assignee.

Negotiation produces a radically different result, as we have already shown in the preceding paragraph. Hence the vital importance of being able to decide whether an instrument is negotiable or merely assignable. Bills of exchange and promissory notes as already explained are negotiable instruments, so also are bank cheques. Some States make other papers negotiable, such as bills of lading, and even an obligation payable in specifics. Some States allow defenses such as are not recognized in the general law. It is much to be regretted that the laws of the States differ in this respect. Uniform laws among commercial countries are here an imperative necessity.

**Consideration.** One is not bound to discharge an obligation not resting on a valuable consideration is the general law of ordinary contracts. But one who, for mere accommodation, indorses a bill or note assumes a valid legal obligation and may be compelled to pay the bill or note, although no consideration moved him to indorse. This arises from the very nature of the contract, whereby we have seen the rights of a bona fide holder are protected.

**Parties.** The general rules as to the competency of parties to contracts apply in ease of negotiable instruments. Some regulations peculiar to corporations are found in the statutes. These may be more properly mentioned under the head of corporations.

**Duty of Holder.** The holder of a bill of exchange, whether payee or indorsee, must present it promptly, to the drawee. If payable at sight, the drawee must pay or refuse payment; if payable at a specified time, the drawee must accept or refuse
acceptance. If he accepts, he does so by writing the word "Accepted" on the bill and signing his name. In case of refusal to pay a sight draft or to accept a time draft, the holder must protest the paper. A commercial notary presents the paper during business hours to the drawee, and on refusal to pay or accept, he makes a written statement of these facts under his seal and promptly gives written notice thereof to the indorsers and the drawer. This is strict statutory requirement, and is necessary to fix the liability of those parties. Failure in any of these details discharges them from liability, unless the bill waives demand and protest.

DISTINCTIONS. Let us briefly review the differences between an ordinary chose in action and a negotiable instrument.

1. The former may be oral; the latter must be written and signed.

2. The former may be satisfied in money, specifics or otherwise; the latter calls for money only.

3. The former was once non-assignable, if now assignable, the assignee takes it eum onere of all the defenses between prior parties; the innocent holder for value before due of a negotiable instrument takes it free from defects and defenses as already explained.

4. The absence or failure of consideration will defeat the former; an accommodation endorser is liable, without consideration.

5. The common law rules of contract fix the obligations of the parties to the former; precise statutory regulations must be met to hold the parties to the latter.

6. The one is an evolution of the customary law of England; the other is a creation of statute founded on the lex mercatoria.
PRINCIPIA OF LAW

CHAPTER XXX.

STATUTE OF FRAUDS.

A statute was adopted in the reign of Charles II of England to prevent frauds and perjuries, requiring certain contracts to be in writing, failing that, providing that such contracts should not be enforceable in the courts. The fourth and seventeenth sections of this statute have been enacted into law by every State in the Union, either substantially or in toto in verbis.

Provisions of the Statute. The fourth section provides that no action shall be brought whereby to charge:

1. Any executor or administrator upon any special promise to answer damages out of his own estate.
2. Or to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person.
3. Or to charge any person upon any agreement made upon consideration of marriage.
4. Or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them.
5. Or upon any agreement that is not to be performed within the space of one year from the making thereof.

Unless the agreement or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person thereunto by him lawfully authorized.

The seventeenth section provides that no contract for the sale of any goods, wares and merchandise for the price of ten pounds sterling (fifty dollars) or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, unless some note or memorandum of the bargain in writing be made and signed, as required in the fourth section.

A short explanation of these provisions may be useful.

1. The debts of a decedent are a charge upon the assets of his estate, and the representative is under no obligation to discharge them. Should he see fit to assume a personal liability for the debts of the estate, such liability is not enforceable unless the agreement is evidenced as required by this statute. The statute applies only to debts existing against the estate.
2. Liability of any person, whether growing out of contract or tort, cannot be legally assumed by another except in writing as provided by the statute. This means the liability is one previously fixed, not one to arise in the future. The rights of three persons are involved, the one who is liable, the one to whom he is liable and the third person sought to be charged.

3. This provision refers not to mutual promises to marry, but to a collateral promise made upon condition that the marriage takes place. Such is an ante-nuptial agreement by a man to make a settlement on a woman in consideration of her marriage with him. The subsequent marriage of the parties is not such part performance as will take the contract out of the operation of the statute.

4. This clause covers all interests in land. The only difficulty lies in determining what is covered by the word interests. In the absence of statute the term is synonymous with estate, including every sort of interest from an absolute fee to a term of years. Unless otherwise provided it also includes growing crops and timber.

5. The agreement here contemplated must be impossible of performance within a year. The possibility of performance within a year does not bring it within the statute. If it may be terminated within a year it is obnoxious to the statute if oral. Some difference of opinion prevails as to whether or not the contract must be impossible to be performed by either party within a year.

SALE OF GOODS, WARES AND MERCHANDISE.

Oral sales of goods of fifty dollars value and more must be evidenced in writing, unless (1) the buyer receives part of the goods; (2) the buyer gives something in earnest to bind the bargain.

This means that an executory contract for the sale of goods worth fifty dollars or more comes within the statute; such contract when partly executed on either side is not within the statute.

The delivery in order to take the case out of the statute must be complete and accepted by the buyer; so also the money or other thing given in earnest to bind the bargain must be actually delivered, and accepted as part payment.
The doctrine of performance has in some States been extended to the contracts enumerated in the fourth section of the statute. It is provided that where there has been such part performance of the contract as would render it a fraud of the party refusing to comply, the fact that the matter has not been reduced to writing will not serve to render the contract unenforceable. If the status cannot be restored, the case is taken out of the statute.

MEMORANDUM.

The memorandum required by the statute of frauds must show:
1. An agreement on the part of the party sought to be charged.
2. The subject-matter and the terms of the agreement and the parties thereto.
3. In some jurisdictions, the consideration.

This memorandum is the acknowledgement that a contract has been made, rather than a written contract. It must be signed. Where the party to be bound writes the memorandum himself, it is sufficient to mention his name in the body as a party. The memorandum may be signed by an agent. For this purpose certain persons are the agents of both parties, e. g., a broker, an auctioneer.

There is, of course, no special form for the memorandum.
CHAPTER XXXI.

AVOIDANCE OF CONTRACTS.

Before leaving the subject of contracts it is well to call attention to the ways in which the obligations of contracts are sometimes avoided or released. From the original concept that a contract is the result of volition it follows logically that the law cannot compel persons to contract, and as a necessary corollary, that the law cannot annul contracts. This is the general rule today, certainly at least in courts of law. Where a party thinks that he ought not to be held to a contract, he does not apply to a court to set the transaction aside, but refuses performance, and on action brought by the other party, sets up his reason for refusal by way of defense.

VOID CONTRACTS. A supposed contract, which lacks any of the essential elements, is a nullity, is void ab initio, and no rights ensue and no obligations attach thereunder. Thus if one of the parties is an idiot, under duress, or the promise is to do an illegal or immoral thing, such transaction is void in law. The situation is the same as if nothing had been done or attempted. It has been held that where a house was on fire and one offered a sum of money to any one who would rescue his child from the house, and a by-stander entered the house and rescued the child, that this did not constitute a contract, as the parent was under such duress of fear and distress that he was not capable of volition under the circumstances.

VOIDABLE CONTRACT. Where, for any reason, one of the parties is relieved from the obligation of a contract, such contract is voidable. The most usual instances of this arise out of fraud. Fraud rendering contracts voidable is of two sorts, actual and implied or resulting.

1. Where one party by false representation of a material fact, knowingly or recklessly made, induces the other party to contract to his detriment, the contract is voidable for actual fraud. Thus if one sell another a rope, falsely stating that it had been tested to bear a certain weight, which statement caused the purchase, and the purchaser sustained a loss, the transaction is voidable for fraud. On action brought for the purchase price, the defense of fraud is complete.

2. Where there is a confidence reposed by one party, as to
the subject-matter of the agreement, under circumstances giving him the right to confide, and the fiduciary makes a profit out of the transaction, this constitutes implied fraud and renders the contract voidable. The profit is a badge of fraud. Not only may the party defrauded defend an action at law, but sometimes in equity the transaction will be annulled and the status be restored. This doctrine applies not only to the well recognized confidential relations, such as, parent and child; guardian and ward; attorney and client; trustee and beneficiary; director and stockholder, but to any case where the facts show abuse of confidence properly reposed. Thus where a guardian buys land from his ward, making a profit out of the purchase, this contract is voidable for implied fraud. The ward may defend an action of ejectment. He may also actively obtain restoration of the land by a decree in equity.

INFANCY. Usually the contract of an infant is voidable. The infant may defend an action for the enforcement of his contract with a plea of infancy. There are exceptions to the rule in case of contracts for necessaries furnished, sometimes for education and other instances.

VOID CONTRACTS. A void contract is a mere nullity, it never had any existence; a voidable contract is one where the party injured may refuse performance.

Where, from the intrinsic nature of the transaction it is illegal, immoral or otherwise under the ban of law, it is constructively fraudulent and void. This is an implication of law as a matter of law. Thus a gaming contract is void for fraud, no rights arise under it and the parties have no standing in court.

Contracts tainted with fraud are voidable, when the fraud is actual, or implied from the facts; they are void when the fraud is constructive, conclusively inferred by law from the nature of the transaction.

UNENFORCEABLE CONTRACT. Where the contract has all the necessary elements of a binding agreement, but there has been a failure to comply with some regulation of law, it is unenforceable in court. The most salient instance of this is that of a contract not reduced to writing when so required by the statute of frauds. Thus if A agrees orally to be surety for a debt owed
by B, the debtor has no legal claim upon A; the latter's obligation is moral only and not enforceable by law.

Defensible Contracts. The statutes usually provide that where the consideration on which a promise is founded, fails, the obligation of the contract is released. Thus if A sells B hay for cattle, and it is not fit for cattle food, B may refuse payment and defend an action brought to collect the price.
CHAPTER XXXII.

TORTS.

In General. Tort has not yet been satisfactorily defined, what the term covers is not strictly delimited.

Wrong is the privation of a legal right, public, private, primary, relative, political, contractual.

Injury is the privation of a private (civil) right, as contradistinguished from crime, which is the violation of a public right.

Tort is the privation of any civil right not contractual. Injury and tort are frequently used interchangeably, but the former is the broader term. It includes breach of a contract.

Originally a trespass was the transgression of a right, direct and usually with force. After the adoption of the Statute of Westminster II, omissions of duty and improper performance of duty which resulted in damage became actionable as civil injuries. The term tort was then applied to all actionable injuries not strictly breach of contract. It included the ancient trespass and the injuries made actionable by the statute. Hence we may say: A tort is the privation of a private, non-contractual, legal right. It is either direct or indirect.

A direct tort is a distinct wrong, which in itself constitutes the invasion of the right of another. The law presumes that some damage follows, and damages are awarded for the invaded right. The amount of the recovery may depend on the evidence. Thus, where one without license merely touches another, it is a direct tort and nominal damages at least are recoverable. If damage be inflicted, compensation therefor is recoverable.

An indirect tort takes one of two shapes:

First. It may be an act or omission, not in itself a distinct wrong, from which damage consequentially accrues to another. In this case damage must be shown and it must appear to be the proximate result of the act or omission. Thus, where a liberty pole erected in the highway fell and hurt a traveller, although the original act of erecting the pole was not wrongful, this might constitute a tort upon the person hurt.

Second. It may be a wrongful act, naturally tending to inflict damage, which does inflict damage upon another. Thus,
where an obstruction was placed in the highway and a traveller was hurt by falling over it, this is an indirect tort upon him.

In almost all cases of indirect torts, we find that there was a duty resting upon the tort-feasor and that the dereliction of this duty, proximately causing damage to another, constitutes the tort. This point will be noticed under the head of negligence. It may be said, in passing, that in modern practice, it is usual to refer almost all indirect torts to the class of negligence.

The statement that a tort involves the two elements of injury and damage is incorrect and misleading. A direct tort is an actionable injury independent of damage. No loss need be inflicted or proven. Damages are awarded to compensate for the invaded right. If one step across another’s land line, inflicting no damage whatever, the act is a tort. It is actionable per se, that is to say actionable without proof of actual damage. It is injuria sine damno.

In an indirect tort, however, it is essential that loss be sustained, or that damage be inflicted. Damage is an element of the tort. There is no privation of right in the absence of loss or damage. An indirect tort is actionable on proof of actual damage. There must be injuria et damnum. Where the driver of a motor car exceeds the speed limit, he is derelict in his duty to every user of the highway. Yet, if he inflict no damage on anyone, he commits no tort. The element of damage is lacking. Again, a common carrier, to whom goods are bailed for transportation, though the train be derailed through negligence, if the goods are delivered in good order, is not a tort-feasor. The negligence of the carrier is a dereliction of his duty to the bailor, but as it inflicts no loss on him, no tort has been committed.

In the event damage is inflicted but no right is invaded, this is no tort, and is not actionable. It is damnum absque injuria. A pure accident is such.

LIABILITY.

Conferring a right carries with it the protection of the right, and imposes a duty upon others to respect the right. When a right is invaded, the injured party is entitled to redress. In
the converse of this proposition we have the rule of liability. Every tort-feasor is liable in damages to the injured party. At once we see that this is far broader than criminal or contractual liability. The rule is founded on the protection of the injured party, the circumstances of the wrong doers are exceptions and constitute defenses.

1. Persons sui juris are liable for their torts, independently of motive, and for direct torts independently of damage. Where one strikes another, except through pure accident, it is a tort, redress is afforded, motive and damage play no part. There are some torts wherein motive is an element. Fraud is such a tort.

2. Infants, as a general rule, are liable for their torts. This follows from the doctrine that motive is not an essential element. The infant is not liable where motive is essential. Should an indirect tort of an infant involve the breach of a duty growing out of a contract, and this duty is inseparable from the contractual duty the infant is not liable. Thus if an infant hire a horse and through failure to exercise the proper diligence in caring for the animal, it die, this is a breach of contract and the infant cannot be made liable under the guise of tort. If, however, the infant maltreat the horse in such a way as to cause its death, this is a tort for which the infant is liable. The tort actually committed by an infant may under the law of master and servant be attributable to the parent. This does not change the rule as to the infant’s liability.

3. Idiots and non-sane persons are liable for their torts. The exceptions to this rule are more numerous than the instances of its application. In a direct invasion of another’s legal right by one mentally incompetent, the act is regarded as an accident and not a tort. In indirect tort, where the discharge of the duty requires the exercise of judgment, the breach is not a tort. Ordinarily the instances of liability arise where properties of the incompetent are so managed as to inflict damage on another. Thus where an incompetent owns a mill, and the dam is raised so as to flood the lands of another, this is a tort for which the owner of the mill is liable.

4. Married woman, in the present state of the law, stands practically in the same attitude as to liability for torts as do persons sui juris. Certainly in all things pertaining to the
management of her properties she is liable. Other torts committed by her may sometimes be regarded as the torts of her husband, under the law of master and servant. This does not relieve her, but makes her a joint tort-feasor with her husband. Thus if a married woman slander another, under the ancient theory that she acts under direction of her husband, he might today be held liable. Formerly he alone was liable as the woman had no legal existence. But now she is liable for her tort.

5. Corporations are liable for torts committed by their servants. The character of the corporation as well as the nature of the tort will effect the application of the rule.

(a) Private corporations are liable for torts committed by their servants, under the same rules applying to human persons. Some discussion has been had as to whether a corporation is liable for a tort involving motive. It is now generally conceded that it is liable. The motive of the human persons exercising the corporate powers is attributable to the legal person. Thus where the officers of a railroad corporation, in order to acquire certain lands, pursued a regular scheme of moving the station, closing up approaches, thus causing a mortgage to be foreclosed and the land sacrificed, the whole taken together was held to be a fraud and the corporation was liable for the tort.

(b) Municipal corporations are sometimes, but not usually liable for their torts. They are regarded as branches of the sovereignty, and as such exempt from liability. This exemption applies to all acts and omissions in the discharge of governmental functions. This rule is easy to state, but the applications of it are inconsistent not to say contradictory. The difficulty is removed only one step. The question remains, what is a governmental function? The answers to this question are not uniform. No liability attaches to the municipality where an officer, in making an arrest, maltreats the prisoner, nor where one is unjustly sentenced to a term in prison. But the corporation is liable where, by reason of the unsanitary condition of the prison, the prisoner contracts disease. The distinction here is made between a judicial and a ministerial act. Damage resulting from an obstruction in the street, made during the course of repairing and left unguarded, is attributable to the municipality. A negro operating a street sprinkler is in the discharge of a
governmental function, and the municipality is not liable for
tort committed by him in the prosecution of the work. The
reason for the distinction is not clear.

On one side, we are clear that a municipal corporation is not
liable for damages consequent upon the exercise or non-exercise
of discretionary legislative, executive and judicial powers, as
distinguished from ministerial acts. On the other side the
municipality is ordinarily held liable for negligence in the con-
struction and maintenance of streets, sewers, bridges, for tres-
pass and for nuisance.

Between these two well defined territories lies the debatable
ground. The question is thus stated. Is the municipality liable
for damages inflicted in the management or condition of cor-
porate properties? The test, which has been suggested, is
whether or not the properties are used for public purposes or for
corporate benefit. A child hurt by an unsafe stairway in a pub-
lic school cannot recover damages from the municipality. A
municipal corporation has been made liable for negligence in
failing to keep a toll bridge in repair. A water works plant,
maintained by a municipal corporation, which charges con-
sumers for the use of water, would seem to fall in the latter
class, but there is at least one decision holding the contrary.

(b) Eleemosynary corporations performing duties for pur-
poses of charity and not for private gain are not liable for torts
committed by their servants. To utilize the fund dedicated to
charity for the payment of damages is unlawful.
CHAPTER XXXIII.
MANNER OF COMMITTING.

Already it has been intimated that one is liable for torts of his own commission and for others not actually of his own commission.

1. Commission by Tort-Feasor. Where one by his own act invades another's right or by dereliction in some duty which he owes to another inflicts loss upon that other, this is a clear case of a tort by personal commission and needs no explanation.

2. Command. Where one having authority commands another to commit a tort, it is clear that he is to all intents the actual perpetrator. He is simply using another as an instrument to commit the wrong. The maxim, who acts through another, acts himself, is applicable.

3. Relationship. When, by reason of legal relation, one person has the right to control the acts of another, it is his duty so to do, and failure in this respect makes the act or omission of the one under control the act or omission of the person having control. This is the doctrine of responsibility of the superior, respondeat superior. It applies to the domestic relations herefore treated, of master and servant, husband and wife, parent and child, guardian and ward. The treatment is usually under the title of the first relation as it is the test in all cases.

MASTER AND SERVANT.

It is believed that all the instances of the liability of one person for the torts of another may be referred to the rules governing the relation of master and servant. Where one has the right to control the acts of another, the former is the master and the latter is the servant. It is not sufficient for the master to give orders, he must see that they are obeyed. Where the master ought to prohibit a thing and does not prohibit, he commands it. Where the nature of the service puts it in the power of the servant to commit the tort, it is the act of the master. These general propositions may be stated more in detail. The master is responsible for the torts committed by the servant:

1. When the act is committed under the command of the master, express or implied. Where the master ordered the ser-
vant to drive off a trespassing animal, the servant killed the animal, it is the master's act.

2. When the act or omission of the servant occurs in the regular conduct of the business or discharge of the duties of his employment. This may occur, where there are no express instructions or where the act has been expressly forbidden, or express warning against the omission. Thus one who operates a motor car as the chauffeur of another, exceeds the speed limit and collides with a vehicle on the highway. The master is responsible for the injury. Again, where a servant in clearing a field is warned against allowing fire to get beyond control, and the fire does damage to another, this is the master's omission and negligence for which he is liable.

3. When the servant is actually engaged upon the business or errand of the master, and not otherwise. Section foreman using hand car for his own business, negligently hurt a man, this is not the company's act.

4. When under the circumstances the master owed a peculiar duty to the injured person, and this duty is discharged through a servant, the conduct of such servant is more peculiarly the conduct of the master than would be the case under ordinary circumstances. What are called the wilful torts of the servant are attributable to the master. If the conductor of a railway train become angry with a passenger, and insult and maltreat him, this aggravated tort is attributable to the railway corporation, because of the peculiar duty of the carrier to the passenger.

FELLOW SERVANTS.

Anciently it was the doctrine that the master was in no way responsible for a tort committed by one of his servants upon a fellow servant. Judicial opinion has long since made decided modifications of this rule. Statutes have confirmed these rulings and in some instances the master's liability has been pushed much further. It is believed, however, that the statutes apply to certain kinds of servants only, and not to the general relation of master and servant. In Georgia and under the Federal statute an employe of a railway corporation upon a train has about the same rights as a passenger. This view of the matter, cannot be extended beyond the terms of the statute.

The liability of the master for torts of one servant on a fellow
servant grows out of the duties of the master to the servant. Among others it is the master’s duty to provide safe and efficient tools and machinery for the work. Clearly this duty extends to providing competent animate machinery, i.e., competent and safe fellow servants in sufficient number. There is sometimes a difficulty in determining who are fellow servants, whether the injured party and the tort-feasor are fellow servants. They must be within the same general employment and not engaged in occupations wholly independent of each other. A cook and a coachman are not such fellow servants, but a train dispatcher and a conductor may be.

The master is liable for torts committed by a servant on a fellow servant when the servant committing the tort is:

(a) **Vice Principal.** A vice principal is one who is exercising the powers of the master at the time and in the conduct of the affair, out of which grew the tort to a servant of the common master. Where the insufficient elevation of the outer rail on a curve caused a train to be derailed and the engineman received serious hurt, the remark of the general manager that he had intended for some time to remedy the defect, is the voice of the railway corporation, and a statement of the master’s knowledge of the danger. Even where the servant it not at the time in his regular line of duty, he may be vice principal. A flagman, who signals a hostler in coupling a train to an engine, and whose signals are obeyed, is vice principal, although it is not his but the conductor’s duty to control the hostler in making up the train.

(b) **Gross Misconduct.** Where through the gross misconduct of a servant another servant engaged in the same general business is hurt, he is the alter ego of the master, whose duty is to control the servant’s acts, and the master is liable for tort. A train dispatcher fails to give a conductor an order for the meeting point of a delayed train, and a collision ensues in consequence thereof, the railway corporation is liable for hurt inflicted on trainmen by the collision.

(c) **Incompetent.** The master is charged with the duty to exercise ordinary care and diligence, to furnish competent and sufficiently numerous fellow servants, his failure to do this amounts to furnishing dangerous appliances and renders him
liable for torts committed on fellow servants by incompetent servant. Where a drunkard is employed with others in blasting, and a fellow servant is hurt by the misconduct or negligence of the drunkard the master is liable.

INDEPENDENT CONTRACTOR.

Independent contractor is one employed to perform certain acts, and is not subject to the direction and control of the employer in the performance. The master is liable for the conduct of his servant; the employer is not responsible for the torts of the independent contractor. The act of the servant is the act of the master; the act of the independent contractor is his own.

One cannot relieve himself of liability through the device of an independent contractor under the following circumstances:

1. Where he exercises any control of the business contracted to be done. Where one employs a contractor to build a house, and through his interference a defective implement, a ladder, is used, by the breaking of which a workman is hurt, the employer is liable.

2. Where the act is wrongful, the business intrinsically dangerous. Where one employs another to blast in a thickly populated place, he is responsible if the blasting cause damage amounting to a tort.

3. Where the nature of the business, the terms of the contract or the provisions of statute impose special duties on the employer he is responsible for the negligence or misconduct of those performing the business. Thus where a land owner employed a contractor to build a dam, which wrongfully ponded water on another’s land, the employer is responsible. Again, a railroad corporation cannot relieve itself of liability for damage caused by the use of defective machinery through a contract employing another person to keep the machinery in repair.

4. INSTRUMENTALITIES. The instrument by the use of which the tort is committed frequently is important in fixing liability. Instrumentalities are animate and inanimate. Animate human instrumentalities have been considered under the treatment of master and servant. Our present discussion then concerns: (1) animals; and (2) machinery, structures and land.
Trespass upon land by animals stands upon a footing different from other injuries by them. Every unwarrantable entry by one's animal upon the lands of another is a tort. This is independent of whether there is or is not a physical enclosure. Fencing statutes modify this rule in some cases. The duty of the owner of animals is to keep them from trespassing. This duty is absolute and whatever care was used to prevent the trespass, it is none the less a tort. Negligence is not involved. Thus if a cow is tethered to graze and break the tether rope and enter another's land, it is a trespass by the owner of the cow. To other injuries by animals a different rule applies.

1. TAME ANIMALS. The owner of a tame animal is bound to exercise the proper care in the management of it. Having done this, his duty is discharged, and damage inflicted by the animal is without legal remedy. It is damnum absque injuria. Thus in the example above given, if a tethered cow break the tether rope and gore another's animal, the test of the owner's liability is the care or absence of care in the tethering, the place of grazing and other concomitant circumstances bearing on the question of the owner's diligence, or negligence.

2. VICIOUS ANIMALS. Where the owner of a tame animal of vicious propensities knows or is chargeable with knowledge thereof, any damage inflicted by the animal from such propensity constitutes a tort. It is a dereliction of duty causing damage. Thus if the owner of a bull knows or has reason to know that the animal is given to goring, and through failure to control or to exercise the proper care in controlling the animal, he gore another, the owner is liable for the tort.

3. WILD ANIMALS. Formerly it was the rule that one who kept a ferocious animal was unconditionally liable in tort for damage inflicted by it. Now it seems that the test of diligence in keeping the animal is applied. Of course, the care and diligence must be commensurate with the nature of the animal, and the circumstances of its keep. The care necessary in keeping a vicious animal falls far short of that required in the control of a wild animal. Thus if through a defect in a cage a tiger, owned and kept by a circus company, escape and hurt a man, it is a
tort of the company. The care, construction and inspection of
the cage must be rigidly looked to by the company.

In the second group, the scienter, the knowledge of the
vicious propensity, is a matter of proof, and must be established
by the one bringing the action. In the third group, the nature of
the animal is sufficient to put the burden on the owner to show
the exercise by him of proper care.

In all cases where the animal is in the actual control of
another than the owner, not a mere custodian, that person and
not the owner is liable.

INANIMATE INSTRUMENTALITIES.

Where damage is inflicted by the use of inanimate instrument-
alities, the liability is sometimes absolute, and sometimes the
test is the diligence of the operator of the instrumentality. The
nature of the thing causing the damage is frequently important.

1.  MACHINERY. Where damage is inflicted by the use of ma-
chinery, tools, weapons, explosives, heavy articles, bodies in
motion, the test is the diligence of the user, the care exercised by
him under the circumstances. The care is often measured by
the character of the thing. It may or may not be intrinsically
dangerous. In blasting with high explosives, much greater care
is demanded than in sinking a shaft without them.

One who operates a railroad train is held to much greater
care than the driver of an ox wagon.

A railroad transported crude petroleum in one case and
naphtha in another case. Defective valve caused leak, fire, ex-
plosion, destruction of building. There was liability in the sec-
ond case; none in the first. Naphtha is intrinsically dangerous;
petroleum not, as explosives.

2.  LAND. Management of land in such manner as to inflict
damage upon the land of another or even so as to be an in-
trusion on another's land is a tort per se. The element of care
and diligence does not enter, the liability is absolute. The
owner of the land has the right to have others keep off. Thus
if by the breaking of a dam on land, another's land is over-
flowed, the owner of the dam is liable in tort to him whose land
is overflowed. So also an overhanging roof is a trespass, tort
per se. But if one on the highway be hurt by the fall of an
overhanging shutter, the question is one of diligence of the owner of the shutter.

**JOINT TORTS.**

Where more than one person participates in the perpetration of a tort, they are joint tort-feasors. Each and all are liable. One or more or all may be sued for the tort. A joint tort is both joint and several. Where one of the joint tort-feasors has satisfied the tort, by paying the damages awarded or settling the matter without action brought, it is the rule that he had no claim upon his co-tort-feasors for contribution. Statutes in some of the States now recognize the right to contribution. Where this is allowed, if two persons are equal owners of a mill and the raising of the dam endamage another's land and commit a tort on him, should one of the mill owners pay the damages, he may compel the other owner to contribute one-half of the sum paid.
MOTIVE AND MALICE.

It is necessary to state briefly the effect of the presence or absence of motive or malice in torts.

Motive is the formed intention to do an act. As such it plays no part, (with one possible exception) in determining whether an act is a tort or not a tort. A tort may be committed from a pure motive; an evil motive does not make a lawful act a tort. The law deals with conditions, not with mental states. Where one strikes another, whatever be the motive of the assailant, a tort has been committed, a right has been invaded, and the law looks to the protection of the injured party. Where a tort has been committed, evidence of the motive is admitted for the purpose only of assessing damages. If the motive is pure, it may mitigate; if evil, it may aggravate damages.

Fraud seems to be the only tort of which motive is an element. As we have seen, the wrong doer must intend to deceive, and must intend that the deception be acted on. This will be treated later under Fraud.

Malice is the evil motive prompting a wrong doer; or the absence of legal justification for doing a wrongful act. The former is express malice, the latter is implied malice.

Malice may be present: (1) When the motive is evil; (2) When motive is lacking; (3) When the motive is pure. The tort of slander well illustrates all three phases of malice. Slander is a false, malicious, defamation of another published orally.

1. To say falsely of one’s enemy in another’s presence, that he burned a gin house is slander. The desire to hurt the enemy, the bad feeling, does not make it any the more a slander. It is malicious and evidently so from the hatred of the slanderer. This is express malice.

2. To make a false statement of another, toward whom the speaker is wholly indifferent, derogatory to him in his profession is slander, though motive is lacking. It is malicious, because there is no legal justification for invading another’s right of reputation. This is implied malice, implied by law as a matter of fact.

3. To pray in public for a converted sinner and to enumerate crimes, which he is charged with having committed, if the
charge be false, the prayer is slanderous. It is a false, malicious
defamation. The purity of the motive does not rob it of malice.
There was no legal justification for the utterance. This is im-
plied malice, implied by law as a matter of law.

Three torts require as elements the existence of malice; they
are slander, libel and malicious prosecution. These will be con-
sidered in the proper place.

The difference between malice in criminal law and in the law
of torts is important. In the former it refers to the mental
state of the person accused, in the latter to the injured person's
right being invaded without justification or excuse.

\[
\text{Malice} = \begin{cases} 
\text{Actual} & \text{Evil motive prompting wrongful act.} \\
\text{Implied} & \text{Wrongful act without justification or excuse} \\
\end{cases}
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1. Motive Absent.
2. Pure Motive.

LIABILITY IN GENERAL.

It has been aptly said: "There is a definite theory of liability
for a contract. Responsibility is based on consent actual or
implied. There is a definite theory of liability for crimes. Re-
sponsibility is based on intent, actual or constructive." But the
test of the liability in tort differs in different torts, all the way
from absolute liability, through the conduct of the wrongdoer
to the actual condition under existing law.
CHAPTER XXXV.

RIGHT TO SUE.

From what has been stated, we are now in position to inquire: (1) Under what circumstances one may bring an action for a tort? (2) Who is the party designated by the law to bring the action?

1. Right to Sue. The tests of the right to bring an action for a tort are Immunity, Diligence and Good Faith.

(a) Immunity. Right conferred on one guarantees him the full enjoyment free from the interference by all persons whatever. He is entitled to be let alone, to be immune from interference. "In all civil actions the law doth not so much regard the intent of the actor as the right of the party suffering" and damage is not an element of such tort. "Liability for torts is regarded from the viewpoint of the person suffering." This doctrine is applicable to certain direct torts. The direct invasion of a well defined legal right is actionable, independently of the damage to the injured party and of the motive of the wrong-doer. If one is struck, is restrained of his liberty, if his land is entered, his chattel converted, the tort is complete. This doctrine does not apply to slanders actionable on proof of actual damage, nor to nuisances to health caused by the conduct of a lawful business.

Illustrations of this rule have been given in our previous discussions. They might be multiplied. If A hires B's horse to go to a certain place and goes to another place, this is in law a conversion of the chattel and a tort on B, whose right of action is complete.

(b) Diligence. In the greater number of cases, however, one charged with committing a tort, is exercising a right. The conferring of a right on one imposes a duty on others to respect the right. Where the one discharging the duty is also exercising a right he is bound so to exercise his own right as not to invade the right of another. Here comes in his duty to that one person. The diligence employed in the exercise of a right which impinges upon another's right is the decisive test of the question of tort or no tort. He may inflict damage and commit no injury. As a rule, he is not chargeable with tort unless damage resulted from his negligent discharge of duty. This subject will
be further considered under the head of negligence. The doctrine of proximate cause and also the various kinds of duties will be more fully set forth. It is evident that in indirect torts negligence is the usual test of liability. Neither motive nor malice are elements, but damage is essential. The dereliction of duty causing damage constitutes the tort.

To illustrate the doctrine of diligence, if one permit poisonous fumes to escape from his furnace in a thickly settled neighborhood, whereby the health of a resident is deteriorated, he has been derelict in his duty in the management of the furnace and is guilty of tort.

If one to whom a cow is bailed for grazing under a contract of agistment fail to supply the animal with water so that it suffer, this neglect of duty resulting in damage is a tort.

If an engineman of a railway train fail to check the speed of the train on approaching a highway crossing and the vehicle of a passenger on the highway is destroyed by the engine this is dereliction of duty causing damage is a tort upon the owner of the vehicle.

Statutes frequently impose duties on certain persons and classes of persons. This does not confer rights on all persons as to the discharge of these duties. Only such person as has received damage from the failure or negligent discharge of the duty can claim to be injured. The statute must be looked to to determine whose right is involved.

(c) Good Faith. The mental state of the person charged with tort is not usually a matter of any import. In one tort, however, that of fraud, it is essential that the wrongdoer should be actuated by evil motive, and so the good faith of the person charged with fraud is a test of his innocency. So in actions of slander and libel, where the defense is qualified privilege, the motive with which the defamation was published is the test of liability.

WHO MAY SUE.

The right to bring an action at law is in the person whose right has been invaded.

1. DIRECT TORT. In a direct tort it is easy to apply the rule. The person whose primary right of security is invaded, whose liberty is restrained, whose property in chattel, whose estate in
land has been interfered with, is the proper party to bring the action. Thus where land has been unwarrantably entered, the person in possession brings action. Where waste is committed, the person holding the estate in expectancy is the proper party to sue.

2. INDIRECT TORT. The one to whom a duty is owed and who has sustained loss by reason of the dereliction of the duty is the proper party to bring the action. Where a common carrier is negligent in the discharge of the duty he owes to a passenger, whereby the passenger sustains damage, the right of action is in the passenger.

3. STATUTORY TORT. In some instances by general law and in others by statutory provision, one person has an interest in another person, so that something done to the second person is an invasion of the legal right of the first person. In such cases the rule applies and the one whose right is thus invaded has his action.

(a) The master has a property in the services of the servant, any tort committed upon the servant whereby the master’s right is invaded gives the master the right to sue the wrongdoer, per quod servitum amisset. The same doctrine applies where the relation of master and servant is that of parent and child or husband and wife. Mention has been made of the fact that the law lags behind civilization in measuring damages by the loss of service, when the chief element is the disgrace occasioned by the debauching of wife or daughter.

Where one debauches an infant daughter living with her parent, his property in the services of the infant has been invaded and he may bring his action on the per quod. Some States have attempted to remedy this defect by permitting the facts of shame and disgrace to be considered as elements of damage and not merely as aggravation of damages.

(b) Statutes recognize the interest one person has in another, and when that other is unlawfully or negligently done to death, the persons mentioned in the statute are entitled to bring the action. This right is not created by the statute, but by affording a remedy, the statute recognizes the right. The action is not allowed to redress the wrong done to the deceased person (actio personalis moritur cum persona), but for the vindication of the
rights of those persons whose interest in his life is recognized by the statute. Therefore in each case, the statute must be consulted to ascertain the proper party. Ordinarily the statutes give the right of action to the widow and children, or to parents dependent. The personal representative is sometimes named by the statute as the proper party to sue for the benefit of the persons injured. The recovery goes of course to the injured party and not to the estate of the deceased person. Thus where a passenger is killed through the negligence of a carrier, during the existence of the relation of passenger and carrier, the widow may bring the action against the carrier. The recovery may be measured by the full money value of the life of the deceased. The widow’s interest in the deceased husband’s life being so declared by the statute.

Where the person entitled to bring the action as not sui juris, such person must sue through a representative.

1. **Infant.** An infant sues in the name of his guardian. If he have no natural guardian and none has been appointed, he may bring the action in the name of his next friend, prochein ami, who is a kind of guardian for that purpose.

2. **Idiots.** Persons non compos mentis. Idiots and lunatics bring actions through the committee. The committee is usually called a guardian.

3. **Married Women.** A married woman brings action in her own name for torts committed on her and upon her separate estate. Where it is sought to assess damages by the loss of money earning power of the woman, this loss is not an injury to the woman, but invades the husband’s right in her services. He must bring action or join in the action. These questions belong more properly to the remedial law, but must be noticed here for a clear understanding of torts.
CHAPTER XXXVI.
DEFENSES.

Loss and damage may be inflicted and yet no injury be committed, no legal right be invaded. The act is damnum absque injuria. A tort may be committed and the perpetrator may be justified or excused under some rule of law. Both of these constitute defenses to actions for tort.

1. HARM NOT TORTS. Cases of harms not torts fall under the first class of defenses.

(a) INEVITABLE ACCIDENT. At one time it was the rule that damage inflicted by accident gave the person suffering the right to recompense from the person inflicting. At present the rule is that it is not a tort to inflict damage by "such an accident as could not have been avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed." In stopping a dog fight, one in raising a stick, accidentally struck another in the eye inflicting a serious hurt. This was held not actionable and no tort.

(b) VIS MAJOR. Loss attributable to the act of God is in no sense a tort; no human being has inflicted the loss and none can be held responsible for it. Where a railway train is derailed by a sudden washout, all precautions of policing the track having been taken, it is not the basis of an action to one who suffers loss thereby.

(c) SUPERIOR RIGHT. Where loss is inflicted by the exercise of one's own right, it has been said that no amount of damage can make a lawful act unlawful. Where one opens a shop near a shop already in operation, and diverts the profits, so as to inflict loss on the owner of the old shop, it is no tort.

It has been held that one can build a fence on his own land, out of pure spite, and cut off the light from his neighbor's land, thus causing him damage, and yet not be guilty of wrong. No motive however immoral can make the exercise of a right unlawful. It is suggested that this ruling goes too far, and violates the precept which forbids such exercise of one's right as will invade another's right.

2. LEAVE AND LICENSE. Where one consents to an act, he cannot complain of the consequences. Volenti non fit injuria. The conduct must be measured by the consent and the consent is limited by law. Where persons play football, they consent to
the ordinary incidents of the game. This does not include wrongful and intentional hurts, e. g., slugging. Where persons box, each consents to a battery by the other, but not to anything beyond the ordinary practice in boxing, e. g., kicking, biting, "gouging." Where one gives license of entry on land, he cannot complain of damage suffered from the reasonable exercise of the license. In case of abuse of license the party endamaged has his action. The familiar distinction is made between a license given by law and one given by the party. "Where an entry, authority or license is given to any one by the law, and he doth abuse it, he shall be a trespasser ab initio; but where an entry, authority or license is given by the party, and he abuse it, then he must be punished for his abuse, but shall not be a trespasser ab initio."

The law sets limits to consent to commit torts, and does not recognize consent to conduct which is a breach of the peace, or which is forbidden by positive law. It is difficult to reconcile the latter part of this statement with the boxer's consent to a battery, which is not only a tort but also a crime, in the absence of such consent.

3. CONTRIBUTORY CONDUCT. Where the person complaining proximately contributed to his own hurt, he cannot recover damages. Where conduct or negligence was such that otherwise the damage would not have occurred, then this conduct or negligence has proximately contributed to the damage. This rule has been modified in some of the States, and in the Federal Employers' Liability Law, and recovery may be had, even where there was contribution by conduct, provided the other party was guilty of misconduct amounting to malfeasance; or where he falls so far short in the discharge of his duty as to render it equivalent to misconduct. To say the recovery shall be diminished in accordance with the contribution is to make a rule somewhat difficult to apply. Contribution by conduct is usually pleaded in actions on negligence and is called contributory negligence. Where a railway train being negligently run at high speed over a highway crossing, strikes one on the crossing and hurts him, he would have contributed, if he had not used the ordinary precaution of looking and listening for the train before going upon the crossing. Under the general rule,
his recovery would be defeated, under the statutory modification, the jury will consider the facts, may award damages, and must diminish the amount.

4. **Assumption of Risk.** This defense is available only in case of action by a servant against his master the rule is, the servant assumes the risk of dangers ordinarily incident to the business in which he is engaged. The master’s duty having been discharged, the servant assumes the ordinary risks. Where the master’s duty ends, the servant’s assumption of risk begins. The servant does not assume the risk of being endangered through the master’s negligence. Assumption of risk and contributory conduct have sometimes been confused, the difference is apparent.

A workman, engaged in raising great weight with jacks, is hurt by the "kicking" of a jack. If the kick was due to a defect in the jack, the master is responsible for the injury, having failed in his duty to furnish a safe and suitable implement. If it was due to false placing by the servant, it is negligence on his part, and he cannot hold the master responsible. If it was due to neither of these but to a sinking of the earth under the jack, it is attributable to ordinary risk of the business, and the master is not liable to the servant.
CHAPTER XXXVII.

DAMAGES.

Damages is the pecuniary indemnity afforded by the law to one who has sustained an injury. Damages may be awarded to indemnify one for an invaded right; or to compensate one for damage suffered through the dereliction of a duty. Damages from the viewpoint of the jury are nominal, punitive or vindictive, compensatory, aggravated.

1. Nominal Damages. In a direct tort, where no damage is inflicted, damages will be awarded, if at all, as an indemnity for the invaded right. For a mere technical violation of a right only nominal or contemptuous damages can be recovered. Unless some other reason than the recovery of damages be present, such an action will not be entertained by the court. De minimis non curat lex. If the action is brought to vindicate the right or to prevent an easement accruing to the other party or for some legal reason other than the mere recovery of nominal damages, the action will be sustained. Where one swings a telephone wire over another's land, an action brought on the trespass for damages only is too trifling for the law to consider, but if the object be to prevent an easement accruing to the other party, damages will be awarded in a minimum sum.

2. Punitive Damages. Where the invasion of the right inflicts no actual loss, but the circumstances show ill will of the perpetrator, or shame and annoyance to the injured party, substantial damages may be awarded as a punishment to the wrongdoer as well as for the vindication of the right. This is called punitive or vindictive damages. Where an infant daughter is debauched, the father may recover vindictive damages from the seducer on account of the disgrace. His injury in law is the invasion of his right in the services of the child.

3. Compensatory Damages. The sum awarded in payment for the actual loss occasioned by the tort is called compensatory damages. In a direct tort causing damage, the loss measures the recovery. In all indirect torts, damage is a necessary element and the loss is the measure of damages. Where one converts another's chattel, the value of the chattel is the measure of damages.

4. Aggravated Damages. Where the tort has caused actual
loss, the circumstances of the perpetration may call for an increase over the actual loss sustained. This would be aggravated damages. Where one is ejected from a street car under circumstances of humiliation, the actual loss is only the fare paid, but the amount may be increased by the circumstances.

GENERALLY.

Punitive damages can be awarded only where the recovery would otherwise be nominal; aggravated damages can be awarded only to increase compensatory damages for actual loss sustained.

One who sustains loss, however small, under circumstances making it a tort, can recover compensatory damages, and can also by proof of the attendant circumstances, of mental suffering, recover aggravated damages. Unless there is some actual loss, measurable in money or physical pain, or sensible discomfort, there is no right of action for a tort of which damage is an element. Mental suffering, shame, humiliation and the like are circumstances of aggravation of damages for actual damage sustained, and of themselves alone are not sufficient to supply the element of damage. There is a tendency to extend this doctrine and to recognize mental pain as an element of damage sufficient to complete the tort. Cases in Texas and several other States hold that the mental suffering caused by the delay in delivering a telegram was sufficient to complete the tort of negligence on the part of the company.

Damages from the viewpoint of the court are classed as general and special.

1. GENERAL DAMAGES. This term includes the sum of money awarded in compensation for loss resulting, by implication of law or actually, from the wrong declared on. General damages include the damage presumed in case of a direct invasion of a right and the actual loss sustained from an indirect tort. Hence nominal and compensatory damages fall under this class.

2. SPECIAL DAMAGES. This term covers any sum awarded as aggravation of actual damage or as a punishment for the manner of inflicting nominal damage, or any actual pecuniary loss other than general damages. Nominal damage need not be specially alleged or proven; all other elements of damage must be pleaded and proven.
Confusion is sometimes caused by the loose use of the terms damage and damages. Special damages is used when special damage is intended. The expression special damage is itself faulty and actual damage or peculiar damage would be more accurate. A public nuisance becomes a private wrong when it inflicts peculiar damage. Some slanders are torts per se; others are objectionable on proof of actual damage.

Examples. One enters another’s land. The law presumes damage. The pleader calls the recovery asked, general damages. The practitioner calls the recovery, nominal damages. Should the trespassor commit depredation, the actual loss inflicted is claimed by the pleader as general damages, the practitioner asks for compensatory damages.

Again. One is ejected from a car of a carrier under circumstances of insult and humiliation. The actual damage, his car far, is recoverable as compensatory damages on the trial, but is alleged as general damages in the pleadings. Should the jury increase the recovery on account of the circumstances they would regard it as aggravation of damages; the pleader calls it special damages.

One’s daughter is debauched. The recovery is based on the services of the child; it is damage presumed, and the pleader calls it general damages; the jury awards nominal damages. A recovery based on shame and disgrace the pleader calls special damages; the jury awards it as punitive damages.

These distinctions are more important in remedial than in substantive law.

We repeat here what has been suggested in the course of the discussion. Some acts are torts per se and actionable without damage inflicted. Such an act is “injuria sine damno.”

Some conduct is tortious when it inflicts actual damage only. Such conduct is “injuria et damnum.”

Some acts and conduct inflict damage but are not torts, not actionable. This class come under the rule “damnum absque injuria.”
CHAPTER XXXIX.

SPECIFIC WRONGS—WRONGS AFFECTING SECURITY.

The general outline of the principles underlying responsibility for wrongs enables us intelligently to discuss the several invasions of rights. The same order which was pursued in treating of rights will be observed here. In discussing the invasions of the primary rights of security and liberty, the tort occasioned by the wrongful taking of human life will be taken up last, it being more a matter of statutory regulation than of general law. The wrongs now discussed are invasions of the primary rights of security of limb, body, health and reputation. The greater number of these torts are also crimes and have the same names in the criminal law and in the civil law. Care should be taken not to confuse these very distinct views of the same act.

1. THREATS. Threats, as defined by Blackstone, are menaces of bodily hurt, through fear of which a man’s business is interrupted. He says further: “A menace alone, without consequent inconvenience, makes not the injury; but to complete the wrong, there must be both of them together, this being an inchoate, though not an absolute violence.” He does not mean that the person injured must suffer damage to complete the wrong, for this is an invasion of the primary right of security in body and is a tort in the absence of damage. There are few if any instances where the action is founded on a threat. One who really means to hurt another rarely announces his intention.

2. ASSAULT. Assault is an attempt to beat another, without touching him. This is a tort, the invasion of the right of bodily security, and is actionable, though the party assaulted suffer no damage, and independently of the motive of the assailant. If the assailant voluntarily abandons his attempt, he does no wrong, but if he fails or is prevented, the injury is complete. Where one strikes at another and misses him, this is an assault, and actionable.

3. BATTERY. Battery is the unlawful beating of another, and is complete when one, without justification, touch the body of another in anger or otherwise. The contact need not necessarily be actually with the body. To knock off a man’s hat is battery. Battery also invades the primary right of bodily security, and is actionable without proof of damage. To blow
tobacco smoke in one's face is battery. Motive does not affect
the character of the act in law. Where a man tenderly em-
brace a woman, without her consent, he was held liable in
damages for the tort of battery.

4. WOUNDS. Wound is an aggravated battery. The serious-
ness of the hurt does not affect the legal aspect of the act, but
will serve to increase the damages recoverable. Where one
defends an action on the ground that the other party was the
assailant, and had beat the person sued, then the excessive char-
acter of the battery is important to determine whether it was a
mere defense, repelling force with force, or was itself a tort.
Where a man strikes another with his fist, and the other reply
with a club inflicting a wound, both are guilty of tort.

5. MAYHEM. Mayhem is violently depriving another of the
use of a member of his body. This is an aggravated invasion of
a primary right, and is a tort, independently of damage or mo-
tive. Where men are engaged in a friendly wrestle, and one
knocks out the other’s tooth, it is mayhem. The doctrine of
inevitable accident does not apply, the mayhem is the probable
consequence of the rought sport. Nor does leave and license
excuse.

It is evident that in the torts thus far mentioned, the liability
is absolute. The right invaded is one of immunity. The person
has the right to be let alone. His body is sacred from the slight-
est interference from others.

6. INJURIES AFFECTING HEALTH. Where by any unwholes-
some practices of another, one sustains any apparent damage in
his vigor or constitution, a tort has been committed, invading the
primary right to health. These torts are ordinarily committed
by furnishing bad food or drink; by exercising a noisome trade
or doing similarly offensive acts; malpractice of physicians,
surgeons, nurses, apothecaries.

(a) IMPURE Food. The furnishing of impure food or drink
does not alone complete the tort; it is essential that the party
injured suffer some impairment of health. He need not be made
ill, but must suffer at least some apparent and sensible dis-
comfort. The vast amount of adulterated food, drink and drugs
sold and consumed in this country and the consequent evils have
demonstrated the utter inadequacy of the remedy by single
actions on the tort. The United States and most of the States have enacted statutes providing machinery for the inspection of foods and drugs, and for the punishment of offenders. These statutes are cumulative of the existing remedy by action for damages, and are designed to penalize the acts of the offender, rather than to redress the wrong of the injured party.

(b) NUISANCE. The term nuisance is unfortunately applied to two distinct torts, because the same act frequently amounts to both. Invasions of the right to health, comfort and convenience and also certain invasions of the right of enjoyment of land are both called nuisances. There is a radical difference between the two and the distinction has been pointed out by the courts. It is thought best to consider both kinds of nuisances together, and the discussion is now postponed to the treatment of nuisances to land.

(c) MALPRACTICE. The impairment of health through improper treatment by physicians, surgeons, nurses and apothecaries is a tort, whether occasioned by intention, negligence or unskillfulness. Where the patient suffers loss of health through lack of skill in the treatment, the act may be regarded as a crime, a tort or a breach of an implied contract, as already explained. This tort is of aggravated nature by reason of the confidence reposed. The tort is not complete unless the party injured suffer some impairment of health. It is a direct tort when the wrongdoer commits malpractice. It is indirect when the elements of negligence or unskillfulness and damage are present.
CHAPTER XL.

INJURIES AFFECTING REPUTATION.

The primary right of reputation is invaded by defamation. Defamation is a false, malicious publication affecting one's reputation. Every one is presumed to have a good reputation. Therefore any defamatory publication is presumed to be false, malicious and damaging, where damage would naturally result. Defamation takes the form of slander, libel and malicious prosecution.

Slander is a false, malicious defamation published orally; libel is like defamation published by writing, signs, pictures, effigies. The one is addressed to the ear, the other to the eye.

SLANDER.

There are two groups of slander: slander actionable per se, and slander actionable on proof of actual damage. Slander actionable per se is where the law presumes damage without proof. Reputation is injured, damage must legally result, it is a direct tort. In slander actionable on proof of actual damage, to complete the tort it is necessary that damage should result from the defamation, and the fact must be proven to maintain the action.

Slander is actionable per se which charges:
1. An indictable offense, involving moral turpitude, punishable ignominiously.
2. Affliction with an infectious or contagious disease, tending to exclude from society.
3. Incompetency in office, trade or profession.
Slanders not actionable per se constitute a fourth group.
4. Defamatory publications concerning another, not falling in one of the three above mentioned groups, are slanderous when actual damage results therefrom.

1. IMPUTING CRIME. The crime charged must be indictable and punishable ignominiously. Ignominious punishment, in this country, means death or imprisonment. In some States all crimes are punishable ignominiously. The alternative penalty of fine or imprisonment makes the crime punishable ignominiously. In some statutes the provision as to moral turpitude is omitted. It is generally provided by statute that unchastity is a crime,
hence such a charge imputes a crime. To charge a man with having begotten a bastard is to impute a crime, fornication or adultery, and is actionable per se.

2. IMPUTING DISEASE. The language of this rule is broad enough to cover any infectious or contagious disease, which tends to exclude one from the society of his fellows, and except by special provision of statute, cannot be confined to disgraceful diseases. Under modern ideas of sanitation one afflicted with measles is excluded from society. So it seems a false charge of this nature falls within the rule.

3. OFFICE, TRADE, PROFESSION. The occupation must be a legitimate one. Charges affecting one in the pursuit of an illegal occupation are not within the protection of law. To say that a gambler cheats at play is no slander. To say that a clergyman is a drunkard is slander.

ACTUAL DAMAGE. All other slanders than those actionable per se have as an essential element the production of damage to the one slandered. The damage must be material or pecuniary, and must result proximately from the defamation. If insignificant or remote it is not sufficient to complete the tort. To say falsely of one that he cannot add a column of figures, whereby he lost a position as accountant is actionable. Mental anxiety, distress, humiliation without more are not sufficient to support the action.

SLANDER OF TITLE. There is a tort called slander of title, which is not an injury to reputation, but is a wrong to property. False statements which diminish the value of one’s land, chattels or business are such slanders. No presumptions arise in this case as do in case of real defamation. Proof must be made that the charge is false, maliciously made, and caused damage. The injured party’s interest must also be shown. This tort may be committed by oral or written publication.

LIBEL.

Libel differs from slander in the manner of publication, and also radically in the nature of the charges. Many charges are libellous, which would not be slanders if published orally. Libel is much broader than slander, and is a more aggravated tort, by reason of the permanency of the charge and the deliberation of reducing it to writing. Libel is a false, malicious, defamation,
expressed in print, writing, pictures, signs, effigies, tending to injure the reputation of an individual, exposing him to public hatred, contempt or ridicule, or designed to blacken the memory of one deceased and tending to disgrace his relatives. Further it has been said by at least one eminent writer, "If there is a libel at all, it is a libel per se." Certainly all slanders per se, if published in writing would be libels per se. A caricature holding the subject up to public ridicule is a libel; a word painting ridiculeing one is not necessarily slander. It was held to be libel to say of one in a newspaper that he was a great swine and lived on dead horses.

Publication. To complete the tort of libel or slander publication is essential. Publication is communication to any other than the one defamed. Slander spoken to the defamed person is not published. If spoken in the hearing of another, or if heard by another, even by accident, it is published. Where one in the remote country, shouts defamatory charges, if no one hears them, they are not published. Where such charge is spoken and overheard by one in an adjoining room it is published. A libellous letter seen only by the person libeled is not published, nor is it published if the recipient show it to a third person. The defamer is not then the publisher. Where one dictates a libellous letter to a stenographer, it is publication. Where a libellous writing is read by one looking over the shoulder of the writer, without the writer's knowledge, it is publication.

Meaning of Words. Where the defamatory words are plain and unambiguous the court will not allow another meaning to be given them. They will be taken in their usual acceptation. Where the words are ambiguous, by reason of local usage or otherwise, the words will be given the meaning put upon them by the hearers or readers, provided they are fairly susceptible of that interpretation. Thus to call one a grafter is slander, because that term carries the idea of dishonest gain. The local meaning may differ from the general meaning. The local meaning would usually be adopted. To say that one is a clever fellow, means in some localities that he is a good natured ne'er do well. Illustrations might be multiplied.

Malice. We have seen from the definition of both slander and libel that malice is an element of the tort. Our work, at this
point, is much simplified by what has already been said on the subject of malice generally in torts. Malice is express or implied, malice in fact or malice in law. The former must be proven, the latter may be disproven, it is implied in all cases of defamation, and need not be proven.

Express Malice is evil motive, hatred, revenge, which actuates the defamer. It is so called because it is usually capable of proof through acts or utterances external to the act of defamation. It may serve to aggravate damages.

Implied Malice consists of a defamatory publication without justification or excuse. It may be mere wantonness without motive, or the publisher may have been actuated by pure motive. Absence of motive or purity of motive may mitigate damages.

The several phases of malice have already been illustrated.

DEFENSES.

The defenses to actions for slander and libel are justification and privilege.

JUSTIFICATION. One of the elements of defamation is falsity. The truth of the charge is a defense, as it destroys one of the essentials of the tort. A man has the right to speak the truth. The motive with which he does so cannot make it wrong. Should the defense of justification fail, it may aggravate damages, as it is a reiteration of the defamation. It was once the rule that in a criminal prosecution for libel, truth was no defense. The greater the truth, the greater the libel. It is suggested that there is perhaps a difference here between the torts of slander and libel. In slander the truth justifies the charge. In libel, where even a true charge is published, for ulterior purposes and from evil motive, the truth, if the jury sees fit, may excuse, but does not justify the act. Where one duns another and fails to collect the debt, and then publishes the debtor’s name in a black list, the purpose clearly is not to collect the debt, but to humiliate and damage the debtor. This seems to be a libel, although the charge is true.

PRIVILEGE. Statements made on certain occasions, are, on grounds of public policy, privileged. The one uttering them is immune. Privilege is absolute or qualified.

1. Absolute Privilege. The occasions of absolute privilege
are: legislative proceedings, judicial proceeding, naval and military affairs:

(a) No member of Congress or of a State Legislature is responsible in court for anything he may say in the house of assembly. The privilege is confined to the house, speeches published outside do not come within the immunity.

(b) JUDICIAL PROCEEDINGS. Anything said in the course of a judicial proceeding pertinent to the inquiry by the judge, the witness, the counsel, is privileged. The immunity extends to all the records of the cause. In some States the privilege of counsel is not absolute. For false defamatory statements actuated by bad motive, counsel is responsible.

(c) NAVAL AND MILITARY AFFAIRS. Reports of officers, proceedings in court martial are absolutely privileged.

2. QUALIFIED PRIVILEGE. Language uttered on privileged occasions does not carry the presumption of malice, and if used on an occasion of qualified privilege, express malice must be shown. The existence of privilege is for the court, the motive is for the jury. The fact that the person making the charge knew that it was false, is proof of express malice. Innocent motive cannot coexist with knowingly making a false defamatory charge.

Communications protected by qualified privilege are those made:

(a) In matters of public interest and general concern.
(b) To one to whom duty is owed to speak.
(c) In self defense.

Criticism made in good faith, even if false, of public institutions, buildings, officials, candidates for office, books, pictures publicly exhibited, and of any matter of general concern to the inhabitants of a community are privileged. The privilege covers fair reports of court proceedings, council meetings, legislative deliberations, stockholders’ meetings. Where one has reasonable grounds to believe that the water furnished by a municipality is infected with disease germs, he may lawfully make that charge.

(b) MADE UNDER DUTY. Communications between persons in confidential relations are protected by qualified privilege. Besides the four domestic relations, the law recognizes as falling
within the protection, the relations of principal and agent, landlord and tenant, lawyer and client, partners, and sometime intimate friends. So in giving a character to a servant, making a report to a commercial agency, and in any case where there is a duty to make the communication. If there is no duty there is no privilege. One, who in the discharge of this duty, makes a false statement in good faith is protected by the privilege.

(c) Self Defense. Instances of this privilege are rare, and no general statement can be made covering them. Where one makes to and of another a defamatory statement, and the other afterward, in the presence of third persons, demand an explanation, the repetition of the language is made in self defense and if without express malice is privileged. It is clear that in cases of qualified privilege good faith is the test of liability. Motive is essential to complete the tort.

NEWSPAPERS.

Any one who prints libellous matter in a newspaper, which is read by a third person, is of course responsible for the tort. Freedom of the press means that there is no censorship. Any statement may be published through the press, but the publishers are liable like other publishers by other means.

MALICIOUS PROSECUTION. Malicious prosecution is a tort which invades the right of reputation, by instituting a malicious, unfounded proceeding at law. The proceeding is usually criminal (but may be civil.) The elements of the tort are: malicious motive, absence of probable cause, and the proceeding must have terminated.

CRIMINAL PROSECUTION.

MALICIOUS MOTIVE. Malice here includes any motive actuating the prosecutor, except to bring an offender to justice. Where one institutes a criminal prosecution for the purpose of compelling the payment of a debt, the motive is malicious.

PROBABLE CAUSE. Probable cause is the evidence of facts, which would induce a reasonable man to believe the person was guilty. Where such facts are presented to the prosecutor, there is probable cause for the prosecution, it is not unfounded, whether the prosecutor be actuated by hatred, love or the good of society. The actual guilt or innocence of the person charged
is not the test. Acquittal is not conclusive of the absence of probable cause, nor is conviction of the existence of it.

Termination of Proceeding. This means termination by judicial act. The prosecution must fail. The termination by the court must be such that the prosecution must begin anew. Where the jury acquits, the grand jury ignores the prosecution, the State officer enters a nolle prosequi, the magistrate dismisses a warrant, the proceeding terminates.

Civil Action.

Upon the same principles an action for tort may be instituted for malicious abuse of civil process. In some States this action is confined to those cases of process of civil arrest or seizure of goods, in others there is no such limitation. Where one without probable cause sues out a possessory warrant, for the purpose of holding the party in the jurisdiction until other proceedings against him can be instituted, this is a malicious use of legal process and a tort. The motive is malicious if the purpose is ulterior to the legal object of the proceeding.

Damages. This is a direct tort and actionable per se. Any expenses incurred may be recovered as special damages, and the recovery may be increased on account of mental suffering, humiliation and the like.
CHAPTER XLI.

WRONGS AFFECTING PERSONAL LIBERTY.

The next primary right, the invasion of which is a direct tort, is liberty. Anciently this right was in a class apart. With us the right is so ingrained in our social system, that it may well be regarded as a right of security. Formerly it applied to the freedom of bodily locomotion only; now liberty is a broader term and includes, besides freedom of bodily locomotion, religious freedom, freedom of speech, freedom to labor, to contract, to marry.

1. Bodily Freedom. This is a right of immunity and is invaded by the tort of false imprisonment. False imprisonment is any unlawful restraint of freedom of locomotion, by force or threats; or detention without lawful authority. Restraint may be imposed without physical violence, or contact of the body. Where one, through fear induced by threats, is kept within certain bounds, whether enclosed or not, restraint is complete. It has been held that being shadowed by a detective is complete restraint. Closing one or more avenues of escape is not sufficient. Entering an enclosure on the highway roped off to view a boat race, the entrance being open, is not complete restraint.

LAWFUL RESTRAINT.

All restraint of bodily freedom being tortuous, it will simplify the treatment to mention the cases of restraint allowed by law. Lawful restraint is (1) without legal process and (2) under legal process.

(a) Without Legal Process. The necessity for the preservation of good order sometimes demands more prompt and efficient action than is afforded by resort to legal proceedings. In such cases the law allows the individual by his own act to impose restraint upon the acts of another. The enumeration of the usual instances is sufficient, without explanation, to show the necessity for the rule. The parent may restrain the child; the teacher, the pupil; the guardian of the person; the ward; a shipmaster, the crew and passengers; military officers, those under their authority; a surety on a bail bond, his principal. Any one may restrain another who is dangerous from insanity.
or intoxication, but must without delay surrender such person to the officers of the law.

**ARREST WITHOUT PROCESS.** Arrest without process may sometimes be made by peace officers or by private individuals.

**PEACE OFFICERS.** A peace officer may arrest without warrant:
1. To prevent a breach of the peace in his presence.
2. One who commits a crime in his presence.
3. One whom he has ground to believe has committed a felony, not in his presence; but not one thus suspected of a misdemeanor.

**PRIVATE INDIVIDUALS.** A private individual may arrest another:
1. To prevent a breach of the peace in his presence.
2. One whom he has reasonable ground to believe has committed a felony, which he knows has been committed.

In cases of arrest without warrant, the person arrested must be taken without delay to the proper officers of the law.

Where a peace officer arrests for a past felony, his good faith will protect him, though the arrested party is innocent and even though there had been no felony committed. The private individual, however, acts at his peril, must know that a felony has been committed, otherwise he is liable.

In all cases the restraint of liberty must be reasonable, and if excessive becomes tortuous.

**UNDER LEGAL PROCESS.** Arrests made under legal process are prima facie lawful. If the process issue from a court of general jurisdiction, no matter how unlawful and irregular, the judge is not liable civilly, so long as he acts in good faith. A judge of limited jurisdiction, who exceeds his authority, is liable, and good faith is no defense. The arresting officer is justified when the process issued from a court having jurisdiction, is regular on the face, and he acts promptly and moderately. All persons, attorneys and others, who are concerned in procuring illegal process, under which arrest is made, are liable to the person arrested. If the process is extra-judicial, the tort is false imprisonment; if the process is issued on improper or false ground but not extra-judicial, the tort is malicious prosecution.

2. **RELIGIOUS LIBERTY.** Every one has the right to worship God according to the dictates of his own conscience, and not to worship at all. This does not permit immoral, indecent and
illegal practices under the guise of religious worship. The government may, through statutes and rulings of courts, impose restrictions. These are not denial but regulations of the exercise of the right. Any interference with this right of an individual is a tort, and actionable per se. Should any person or persons compel another by threats or otherwise to subscribe a creed and engage in a worship against his wish, it is an invasion of this right. Where a Hebrew was compelled on pain of expulsion from a community to engage in Christian worship, this was a tort.

3. **Freedom of Speech.** The right freely to express one's opinion on any subject does not mean unrestricted license of language. Blasphemous, obscene, seditious publications may be suppressed by the authorities of law. Defamatory utterances subject the author to action of tort. With these limitations, the right to speak or write on any subject is unrestricted. An invasion of this right is actionable in damages. If the interference is under authority of law, it must be shown that the utterance is within the prohibited class, otherwise it cannot be suppressed. If the interference is by an individual it is a tort. The individual has his remedy by institution of criminal prosecution, or by action for damages. Where one reads a libellous writing to another, stating his intention to print it in a newspaper, the person libelled must invoke the aid of the law to prevent the publication; any other method of prevention is tortious.

4. **Right to Labor and Employ Laborers.** Every one has the right to labor for another, and to employ others to labor for him, free from interference by others.

(a) **Right to Labor.** Wage earners have the right to combine and agree not to labor for any one they may see fit. This is a voluntary act. No person or combination of persons has the right to interfere with another in his choice to labor for the person thus banned. If by threats, intimidation or coercion one is prevented from taking employment, his right is invaded and he may have his action accordingly. The strikers may use persuasion to induce one not to enter an employ. Should a striker decide not to abide by his agreement to strike or not to be governed by the order to strike, he has the right to do this.
(b) Right to Employ. One has the right to employ such persons to labor for him as his judgment or whim may suggest. Refusal to employ another is no wrong. Acts tending to compel the employment of certain persons and preventing the employment of those of the employer's choice are tortious and invade the employer's right. So where the laborer is prevented from engaging in the work for which he is employed, the right of the employer is invaded, and he has his action. These torts are ordinarily committed through strikes, boycotts, and lockouts. The remedy by separate actions on the tort is inadequate, and equity will usually intervene by injunction.

The common shapes these torts take are to prevent: (1) An employer from hiring whom he pleases; (2) a laborer from hiring to whom he pleases; (3) A laborer from working at a certain employment; (4) A man from engaging in a certain business, or the reverse of these.

5. Freedom of Marriage. Marriage is encouraged by law. This is the well settled policy of all civilized States. The family is the State in embryo. The State is an aggregation of families. Contracts in restraint of marriage are not favored, and are sometimes voidable. The State prescribes the age at which one may marry, without the consent of parent or guardian; also makes restrictions, as to lunatics, idiots and persons afflicted with disease. These are not only legitimate but wise provisions. It is a subject of regret that the rules as to persons diseased are not more stringent and more strictly enforced. Where none of these restrictions exist the right to marry shall not be impeded. He who interferes with the right is a wrongdoer and liable accordingly. If the interference is by bodily restraint, it is also false imprisonment.

6. Freedom of Contract. The law confers the right to make contracts upon all persons except those under legal disabilities. Within these limits, the liberty to contract is unlimited. The interference with this right is a tort, but other and more effective remedies are provided, and resort to action for damages is rarely if ever had.

Generally.

Some of the rights here treated are, by some writers, classed as civil or political rights, and not as examples of the primary
rights of security and liberty. The rights and their invasions thus far discussed are examples of the general primary rights of security and liberty, and by no means cover the whole ground comprehended under those general terms. Some act or omission not before brought to the attention of the court may be referred to the general right of security, and may be declared to be a civil injury. It is no new right which has been invaded, but simply a new example of the general existent right. An apt illustration of this statement is afforded by actions recently brought on tort for invasion of the right of privaey. The Supreme Court of Georgia held that the unauthorized publication of a photograph, not amounting to libel, was an invasion of the primary right of security, and actionable per se. Nominal damages are recoverable and the amount can, of course, be increased by circumstances of aggravation. A majority of the New York court of last resort held otherwise in a similar case. Suffice it to say, that the general right of security and liberty is elastic enough to cover all personal rights not surrendered for the public good. For invasions thereof the law affords redress, under the doctrine, "ubi jus: ibi remedium."
CHAPTER XLII.

WRONGS AFFECTING RELATIVE RIGHTS.

CIVIL RIGHTS.

Having completed the treatment, as far as is deemed necessary, of torts invading the right of security and liberty, it is germane to observe that invasions of rights of the next group, viz.: rights growing out of public relations do not give rise to private remedies, but subject the offender to punishment at the instance of the State. These are treated under criminal law. The next group, wrongs against property, are postponed to a later part of the discussion, in pursuance of the order adopted in dealing with rights. This brings us to the treatment of wrongs affecting those groups of relative rights, known as civil rights, and then to those arising out of the strictly private relations.

WRONGS AFFECTING CIVIL RIGHTS.

Civil rights, as we know, are those conferred on an individual by virtue of his membership in the State. The usual examples are: the right of suffrage; to hold office; to enjoy public institutions and public utilities.

1. Suffrage. Suffrage means the right to vote for officers of government and as a corollary includes the right to hold office and exercise the duties thereof. Discrimination against a citizen of the United States on account of race is the only restriction upon the power of the State to prescribe the qualifications of voters and office holders. Any one, official or other person, who impedes a qualified voter in voting or offering to vote or prevents the counting of his vote is a wrongdoer and liable in an action for damages. The redress for this tort is usually sought in some other way than by action for damages. The rights of voters are safeguarded by statutes, under which those who invade or deny it are subjected to punishment.

2. Assembly. The right peacefully to assemble for any lawful purpose is guaranteed to the citizens of the State. Any one who interferes with such assembly commits a tort. In some cases as in an assembly for the exercises of religion, the act is criminal.

3. Bear Arms. The constitutions confer the right on all persons to have and carry arms. The States and the United
States can and do regulate the time, place and manner of the exercise of this right. Interference with one who is exercising the right is a tort.

PUBLIC INSTITUTIONS.

4. EDUCATION. Systems of education supported at public expense are public institutions. The right of all persons in the State to participate in the benefits shall not be denied. Statutes giving equal facilities in separate schools to children of different races do not deny, but regulate the exercise of the right. Statutes, which under the guise of regulation, actually deny the right are unconstitutional. One who enforces such a statute is a wrongdoer. A municipal ordinance locating a public school building for negroes in a place inaccessible to the children of negro inhabitants violates this right.

4. HIGHWAYS, PARKS, BUILDINGS. The right of all the inhabitants to the equal enjoyment of public institutions extends to highways, parks and buildings maintained at public expense. It is competent for the State to make any regulation of the enjoyment of the right, justified by the necessity of preserving good order. Statutes may provide for the separation of races or sexes. This is no discrimination or abridgement of privileges. The facilities must be equal, not necessarily the same. Laws requiring negroes and whites to use opposite sides of the highway, and setting apart certain parts of a public park for females only are regulative. The exclusion of a negro because he is a negro is a denial of his right. Any interference with the right to participate in the benefits of a public institution is a tort.

PUBLIC UTILITIES.

Persons carrying on a business the purpose of which is to serve the necessities, comfort, convenience or pleasure of the members of the public are operating public utilities. They are bound to serve members of the public in so far that they are not allowed by law to exercise their own caprices. These usually are exemplified by the business of common carriers, innkeepers, operators of telegraph and telephone lines, proprietors of theaters, barber shops, public houses. Without repeating what has been said on the subject of this right, and referring to that dis-
cussion, we may say generally that a denial of the right gives rise to an action for damages. If the case come under the Federal Statute then that must be looked to; if under a State statute then it will control. The difficulty is to decide when the State statute is overridden by the Federal statute. Some illustrations may prove of benefit. Exclusion of a negro, because of his race, from the vehicle of a common carrier, or failure to furnish him equal (in some States separate accommodation) violates the State statutes. On the lines of inter-state carriers, the Federal statute prevails, and being silent as to separate accommodation, to deny a negro equal and perhaps the same accommodation on day cars, dining cars, sleeping cars, violates his right.

In States where the common law as to the duty of an innkeeper prevails the negro cannot be excluded on account of his race, but must be given equal accommodation with whites. In some States the common law rule has been modified and in one at least has been abolished. The State law controls the case. In all other public utilities the manager has greater right of exclusion than has a carrier or an innkeeper. The State laws govern the transactions. A proprietor of a theater may exclude negroes, if the State law allows him. The State has not discriminated, but the individual has, and is within his right.

PRIVATE RELATIONS.

Torts affecting the private relations are invasions of the right of the superior through something done to the inferior in the relation. This does not affect the right of the inferior. The superior has a property in the services of the inferior. The invasion of this right is an injury to the superior, for which an action lies.

1. MASTER AND SERVANT. This relation is typical of the other three. The rules governing it are applied to the others. The master has property in the services of the servant. Any act depriving him of this service is an invasion of the right, and gives the master his action, per quod servitium amisit, against the wrongdoer. Any one who entices a servant to leave his master's employ, who kills another's servant, who by beating or other acts renders the servant less able to perform the service, commits a tort upon the master.

Damage is presumed, the tort is actionable per se. Actual
loss may be recovered as special damages. Circumstances of inconvenience, annoyance and the like will aggravate the damages.

Where one furnishes another’s servant unwholesome food or drink, whereby he is made ill and incapacitated for service, he commits a tort upon the master. Where a master and his servant are passengers on the same train, and the servant is hurt through the negligence of the carrier, the master has his action against the carrier for the tort to him. This does not affect the servant’s right of action for the injury to his right.

2. Husband and Wife. In this relation the theory of the right of the superior in the inferior has been carried a step further. It is now generally stated that the right of the husband is to the companionship of the wife. His action sounds per quod consortium amisit. Any interference with this companionship is an invasion of the husband’s right. One who abducts, seduces or inflicts physical hurt upon a wife commits a tort upon her husband. This has been extended to the case of alienation of a wife’s affections, even where she does not quit the company of the husband. Damage is presumed, the consortium is considered by law to be valuable, and its equivalent in money need not be proven to sustain the action. Actual loss in money may be recovered as special damages, and the circumstances may call for punitive damages. Where the wife is physically hurt and her capacity to make money is destroyed or diminished, this element is recoverable by the husband. Where a wife was hurt through the negligence of a municipal corporation in leaving an open ditch across the highway unguarded, the husband is entitled to recover all loss occasioned by her diminution of capacity to make money.

3. Parent and Child. The parent stands toward the child in the attitude of a master to his servant. Debauching, abducting, enticing, or physically maltreating a child invades the parent’s right to the services of the child. Although the cost of the support of the child is usually more than the value of his services, yet the law presumes a loss to the parent and damages are recoverable. Any actual loss, as well as increased damages for shame, humiliation, disgrace are recoverable. Where one seduces a female child, the ground of action originally was the loss of service. Under some modern statutes the elements of shame
and humiliation are allowed as elements of damage. In any case
the jury may by finding exemplary damages reach the real
wrong.
4. Guardian and Ward. Where the guardian is the tutor,
guardian of the ward’s person, the same rules apply as in the
relation of parent and child.
CHAPTER XLIII.

WRONGS AFFECTING PROPERTY.

The order in which these wrongs will be treated varies somewhat from the order in which the rights were discussed. The wrongs as to personality being made to precede those against realty. These wrongs are grouped as follows: wrongs affecting property in things incorporeal, property in things personal, property in things real.

WRONGS TO PROPERTY IN THINGS INCORPOREAL.

Wrongs which invade one’s property in things of an incorporeal nature are grouped according to the order in which the rights were discussed. These rights are conferred under the rules of general law and by statute. The former are usually known as easements, the latter are copyrights or patent rights.

1. Wrongs to Easements. Easement is the right one has in another’s land. They arise under contract or naturally. The latter are known as servitudes. The most usual easements are rights (a) Of way; (b) To overhang with structures; (c) To maintain subsurface drains, pipes, conduits; (d) To flow water; (e) To take timber, water or other mineral; (f) Of lateral support. These and similar rights arise under contract, by prescription or from natural situation.

The right of the owner of an easement or servitude is to be immune from interference. The same rule applies as in case of the ownership of land. Interference with the enjoyment of the easement is a tort, independently of motive and damage. Where one owns a right of way across another’s land and it is obstructed, the person obstructing the way, whether he be the land owner or a third person interferes with the easement and commits a tort. So also where a land owner, by excavation, destroys the lateral support of the adjacent land, although there is no structure on it, and hence no damage; and although it may have been his belief that he was not on the boundary, the act is a tort. Where an upper proprietor diverts water to such an extent as to destroy the fertility of the lands of the lower proprietor, he commits a tort. A stream flowing from one’s land to another’s is under a different rule, viz.: usufructuary property.

2. Copy-right, Patent-right. Before an invention, literary,
artistic work or other creation of the intellect is published to the world, the inventor or author has absolute property therein. One who gets knowledge of such thing and turns it to his own advantage or publishes it, is a tort-feasor and is liable in damages. Should the inventor or author by publication give his creation to the public he loses his property and it may be used by any one. This has been compared to a bird in a cage, in which the property is absolute, but is lost when the bird escapes or is set free. Cases of the sort here mentioned are rare, and are usually dealt with in equity, the remedy being injunction.

The United States law gives an inventor or author a monopoly for a certain time in his creations, provided he comply with the statute and have his production protected by a copy-right or patent-right. This having been done, any infringement is a tort. Thus where one invents a triple valve, for applying compressed air to check the motion of railway cars, and a patent is granted to him, another who uses the device without his consent commits a wrong.

These wrongs are actionable without proof of actual damage, the actual loss is of course recoverable as special damages.

In treating the general subject of torts it is not practicable to do more than give a glance at so large a branch of the subject as copy-right and patent-right. The questions presented are usually taken out of the law court and into equity, where the remedies are more adequate.

3. Shares of Stock. In modern times, by far the most important thing incorporeal, which is the subject of property, is a share of stock in a trading corporation. The ownership thereof is clothed with all the attributes of complete property. The subject itself is sometimes treated as personality. Suffice it to say that any interference with one’s property in a share of stock, which would be a tort if the interference was with property in personality, is a tort. Here again the remedy by action for damages is not usually invoked, but recourse is had to equity.

WRONGS TO USUFRUCTUARY PROPERTY.

1. Water. The most usual instance of a tort to usufructuary property is in case of streams of water. Where a stream flows from one man’s land on to another’s land, both have the proprietary use of the water, but each with a due regard for the
other's right. The upper proprietor may use the water for
turning machinery, irrigation, manufacturing and domestic pur-
poses, provided the stream flows to the lower proprietor in quality
and volume substantially unimpaired. The interference by one
proprietor with the rights of the other is a tort. This may be
an unfair use by the upper proprietor or by obstruction and
damming by the lower proprietor. In such cases it is necessary
to prove damage. It is an indirect tort. The fouling of the
stream is a nuisance when it impairs the value of the lands below
for habitation or for other purposes. It is also a nuisance if it
is unreasonable and causes sensible damage to the health or phys-
ical comfort of an ordinary person.

2. Air. The same rules apply to fouling air. This subject
comes more properly under the head of nuisance.

3. Lights. The English doctrine of ancient lights does not
exist in this country. One cannot acquire the right to an unob-
structed outlook over another's land by prescription. If, how-
ever, the right has been properly granted, it is like any other
right and under the protection of law. Any interference there-
with is a tort.

WRONGS AFFECTING PROPERTY IN PERSONALITY.

1. Dispossession. The first element of property as already
mentioned is possession. Possession has been explained as actual
or constructive. One in actual possession of a chattel is prima
facie the owner. One who interferes with the possession is a
wrongdoer. This is a direct tort and actionable per se. The
actual possessor although not the owner may maintain an action
against any one who deprives him of the possession, except the
true owner. Thus where one who steals a watch is himself de-
prived of the possession, he may proceed against the one thus
delining the watch.

One in constructive possession of a chattel is injured when
this right is invaded. Thus where one has placed a garment
with a pressing concern to be pressed, and it is taken away by
a third person, the owner being in constructive possession may
bring action against the wrongdoer. The tort may be either the
dispossession or in some instances the mere interference with
possession.

2. Mutilation, Destruction. Property carries the right of
enjoyment. It follows that any act whereby the chattel of another is mutilated or destroyed is a direct invasion of his right. The fact of possession by the owner or by another does not affect the tort, but serves to indicate the form of the action. If one poisons a man's drinking trough and cattle are killed by the poison the wrong is clear. If a man's horse be in the possession of another and the horse be damaged by hard driving or other ill usage the owner has been injured.

3. Conversion. One of the elements of property is control. Any turning away of the property in a chattel from the owner is conversion and invades his right. This tort is so broad in scope that it almost includes the two just mentioned. The usual ways in which conversion occurs are: (a) The changing the nature of another's chattel, as where one converts another's cow into beef; (b) Dealing with another's chattel in any manner inconsistent with the owner's property therein, to drive a horse hired to go to a certain place to any other place is a technical conversion; (c) Taking and carrying away another's chattel is such interference with his property as amounts to conversion; (d) Refusing to deliver one's chattel after demand made is conversion. The injured party can recover damages, the damage being usually the value of the chattel converted. It is clear that the injured party may be in possession actual or constructive or he may be out of possession depending upon the way in which the conversion is effected.

WRONGS AFFECTING RIGHTS IN REALTY.

The right of property in reality is classed among the primary rights of individuals and is guarded by the most solemn sanctions of the law. The chief torts invading this right are ouster, trespass, waste, nuisance.

1. Ouster. Ouster is illegally depriving one of the possession of land, whether by actual physical force or otherwise. The injury is regarded as the forcible invasion of a right. The presumptions of law are in favor of the person in possession. One who by stealth, artifice or force dispossesses him is guilty of a tort.

DAMAGES. The fact of the ouster having been established, damage is presumed as a necessary concomitant, and damages will be awarded accordingly.

2. Trespass. Trespass is intruding upon the land of another
in his possession and without his consent. While it is true in theory that any unauthorized intrusion upon another’s land is a trespass, in fact the rule is not so strictly applied. Unless one give notice in some way that he does not permit an individual or the public to enter upon his land, it is usually considered that casually passing through, not inflicting actual damage is not trespass. The removal of enclosures, trampling growing crops, depasturing the land would, of course, alter the case. There is implied license to go upon land for the purposes of business with the possessor, and sometimes for one’s own interest or convenience as to offer articles for sale, to make inquiries and for like purposes. The lateral boundaries of land extend from the centre of the earth indefinitely upward. It is trespass to pass this boundary by boring or mining under the surface, by merely stepping across the land line, the whole body not entering the land, or by passing in an airship over the land. This is true even if the trespasser did not know the location of the line, or thought he was on his own land. To erect buildings, stretch wires, lay pipes, on or over another’s land, even when the act was though to have been done on the land of the person so doing are strictly speaking acts of trespass. Usually, however, the maxim “de minimis non curat lex” would be applied, and the action would not be sustained, for the recovery of merely nominal damages. Where there is actual damage, or where the act, if unopposed, would ripen into an easement, the action lies. The doctrine of trespass ab initio has been mentioned and we need only add here that in many cases there is license to any member of the community to enter upon the lands of persons engaged in business designed to serve the public. Instances of this license are found in shops, inns, theatres, the buildings and yards of carriers. Officers, in the discharge of duty, have license to enter private premises, but not to force entry into houses unless armed with authority as provided by law. In some exceptional cases, to prevent the spread of fire, disease, destruction by flood, it is lawful to enter and even to destroy buildings and change the condition of the land.

Nature. Trespass is a direct tort, an invasion by force actual or implied of the right of property in land in possession. Motive and damage are not elements and the action lies for the
recovery of damages for the invasion of the right. The right of the person in possession is of immunity. Actual damage is of course recoverable. Motive may serve to aggravate the wrong and increase the damages.

Possession. Usually the person in actual possession has the right of action. The question of title is not involved, unless the intruder claims to be the owner and that he has the right to enter. The one having constructive possession may maintain the action. Then the title is important as an element of such possession. As we have said above constructive possession is composed of two elements, ownership and the right of possession.

Waste. Waste is doing or permitting lasting, substantial damage to land usually by one in possession to the injury of one who has an interest therein. A life tenant who wastes land injures the remainderman or reversioner.

Kinds of Waste. Waste is voluntary or permissive. Voluntary waste includes all positive acts which cause permanent, substantial damage to the land. It may consist of tearing down buildings, cutting timber, removing soil, opening mines. As the common law expresses it, any act changing the nature of the freehold is waste.

Permissive Waste. Permissive waste consists of negligence whereby the premises fall into disrepair. It may consist in permitting buildings to become dilapidated, ditches to fill, enclosures to decay, arable land to grow up.

Damages. Actual damage is an element of waste, and the recovery will be measured thereby. In some States the premises wasted are forfeited by the wrongdoer. The right of action is in the person interested in expectancy, as this is not an injury to possession.

Motive. The motive of the wrongdoer is immaterial. The rule is one of diligence. Did the tenant exercise the care of an ordinarily prudent man who is managing his own land? If he did not, then substantial damage to the land is waste.

At common law there was meliorating waste, whereby the premises were changed, but the value enhanced. This is not waste in this country. Equitable waste will be considered under the head of equity.
CHAPTER XLIV.

There are several torts which invade both personal and property rights and hence cannot be discussed according to the order which has been pursued up to this point. These are nuisance, fraud and negligence.

NUISANCE.

Nuisance has been defined as anything that worketh hurt, damage or inconvenience to another. Clearly this is too broad, as it comprehends all conceivable torts. It is nearer the truth to say that it is some use of one's rights carried beyond the limits which a just regard for the welfare of others prescribes, contrary to the maxim "sic utere tuo ut alienum non laedas." About the best we can do is to say it is any violation of a right not covered by other well defined torts.

Confusion, in discussing nuisance, must be avoided by noting that the invasion of two distinct and very different rights is called by the same name. Nuisance invades sometimes the primary right of security in health and sometimes the right of property, in land. The same act or omission may invade both rights. An act or omission may invade one right and not the other. The consequences are widely different.

Again, nuisance may invade a public right, or a private right, or the same act or omission may invade both a public and a private right.

NUISANCE TO HEALTH. The word health as used here covers not only physical well being, but also comfort and convenience. Any act which interferes with one's quiet or personal freedom, injuriously affects the senses or nerves, causes illness, physical discomfort or inconvenience of a sensible kind, capable of being measured in damages, is a nuisance to health. It must be such a thing as would incommode the ordinary person, not one supersensitive or fastidious. Sickening odors, poisonous gases, unusual noises, at unconscionable hours, producing illness, disturbing sleep, interrupting the pursuit of legitimate business, or pleasure, are nuisances to health. Thus the fumes from gas works, the odor of pig pens, cess pools, stables, stagnant water, the heat from manufacturing plants may be nuisances. So also may dangerous acts, blasting, keeping explosives, maintaining pest houses, polluting the water of springs and streams, causing
filthy percolations. Interfering with the regular flow of water in a stream may be a nuisance.

**Nuisance to Property.** Any act similar to those above mentioned, which causes sensible damage to land is a nuisance to property.

The difference between the two kinds of nuisance is well illustrated in the case where the fumes from smelting works caused physical discomfort and also destroyed vegetation on nearby land. As to the former, a lawful business properly conducted is not a nuisance. The test is the diligence of the person charged. Persons within the sphere of the influence of the objectionable thing must submit to the inconvenience for public benefit. As to the latter, the right of the person injured is immunity. No matter how carefully the business is conducted, sensible damage to land is a nuisance. It is not supposed that the law guards property more jealously than it does security, but the reason may well be, that the person may move away from the objectionable thing; the land is immovable. The test in nuisance to health is usually the reasonableness of the act and the diligence of the actor. Sensible damage controls in declaring an act a nuisance to property.

Where the fumes create a nuisance to health amounting to a tort damages recoverable in a court of law is deemed a sufficient remedy. Where, however, the damage is to land irreparable in damages equity will enjoin the nuisance. Equity will enjoin a nuisance to health only in extreme case, for the reason that equity usually protects property rights only, and leaves the protection of other rights to courts of law.

**Coming to a Nuisance.** The location frequently controls the question of nuisance or no nuisance. A fertilizer plant in the suburbs is not a nuisance. Should the town extend so that vacant lands near the plant come into demand for residences, the plant may be held to be a nuisance. The owners of the plant and of the land both have rights, the latter must not be deprived of his rights because the other was "there first."

**Public and Private Nuisances.** As already stated nuisances are public or private or both.

1. **Public Nuisance.** A public nuisance is the privation of a public right, usually a public easement. The sovereign alone
can proceed therefor, either to abate the nuisance or to punish the perpetrator. Thus where a public watering trough is poisoned, the right of any member and of all members of the community to water animals there is invaded, the public easement is violated.

2. Private Nuisance. The violation of any right of an individual by any act deemed a nuisance is a private nuisance. Where one allows filthy drainage from his land to contaminate a neighbor’s well he perpetrates a private nuisance. The person injured has his remedy against the wrongdoer.

3. Public and Private Nuisance. An act which invades a public easement may also be a privation of a private right. The mere interference with the public easement is sufficient to make it a public nuisance. In order to be also a private nuisance it must inflict damage upon an individual different in kind and not in degree from the public inconvenience. In other words it must invade a private right. To illustrate with the poisoning of the public drinking trough, the interference with the right of the members of the community to water animals there is a public nuisance. Should the animal of an individual be poisoned by drinking there, it would be a private nuisance. It invades his right of property. Should this happen to every member of the community it would be a private nuisance to each person so wronged.

Test of Liability. As we have seen, the test of liability in nuisance to land is the immunity of the one wronged; in nuisance to health it is the diligence of the one charged.

Damage. - When the act inflicts no damage, it is no nuisance. Nuisance to land must cause sensible loss, usually deterioration in value of the land. Nuisance to health must be such a thing as would incommode a normal human being. There must be some basis for the assessment of the damages by way of compensation.

Authorized Nuisance. An act which would ordinarily be a public nuisance may be authorized by the sovereign through legislation. Obstruction or intrusion upon the highway (perpetrature) authorized by law is a case in point. But complications arise when the public nuisance also invades a private right. Where a municipal corporation licenses street vendors who ob-
struct the approach to a shop or dwelling the license does not excuse the invasion of the private right.

A private nuisance which has been maintained for the length of time prescribed in the statute, usually twenty years, is authorized.

FRAUD.

Fraud is any trick or artifice whereby one is deceived to his damage. There are many classifications of fraud. For the discussion of the tort it is sufficient to treat of actual fraud and of fraud in confidential relations.

Actual Fraud. The elements of actual fraud are: (1) False representation of a material fact; (2) Knowingly made; (3) With intention that it be acted upon; (4) Believed to be true, (5) Inducing action, and causing damage.

False Representation. Representations may be made by oral or written statements, by act, by failure to act, by silence. It is essential that the representation be one of fact, not a matter of opinion nor yet of law. If it is a representation of fact, it must be a material fact. This does not forbid a seller from endeavoring to enhance the price of his wares, by praising them, so long as his statements do not amount to a warranty of their quality, quantity or value. Thus the seller of a horse may assert that he believes that the horse can trot a mile in a certain number of minutes. But to declare that the horse has made a mile in a certain number of minutes, this not being true, is a false representation of a fact.

The representation must be false. Even if it is believed by the maker of it to be false, and yet it is true, this element of fraud is lacking. The test of the materiality of the fact is whether or not the other party would have acted had the existence of the fact been a matter of indifference. While it must have been the inducing cause of acting, it need not be the sole cause.

The representation must be of a fact existent or past. The false statement of a future occurrence is not sufficient.

Furthermore, the representation is not sufficient if it be of a mere matter of law. All have equal opportunity to know the law, and a false statement of the law deceives no one. The case might be different if the misrepresentation were made by an
attorney at law, but then other elements enter, unequal opportunity, and confidence reposed.

**KNOWINGLY FALSE.** Knowledge of the falsity of the representation may exist:

(a) Where the party actually knew that the statement was untrue.

(b) Where he states a thing recklessly, not knowing whether it is true or false.

(c) Where he states a thing on his own knowledge, when he only believes it to be true. An innocent statement upon reasonable grounds is not a misrepresentation, even if it turn out to be untrue.

(d) Where the party, with no bad motive, makes an untrue statement, his situation being such that he was bound to know the truth. As where one acts as agent, he is bound to know the extent of his powers. An honest exceeding of them is a false statement.

**INTENT.** The statement must be made with the intent to induce the other party to act, otherwise it is no fraud. Statements between parties to a contract are presumed to be made with this intent. Only those whom the representation are intended to influence can claim to have been deceived. If others act thereon they do so at their peril.

Sometimes all the members of the community are included in the intention. Such is the case of a prospectus of a corporation, to induce investment in its securities.

**ACTED ON, CAUSING DAMAGE.** If the misrepresentation be not the moving cause of action, the actor has not been deceived thereby. If he seek extraneous information and base his action thereon or if he knew the statement was false, he was not thereby deceived. One is usually entitled to rely upon the statement made to him and need not investigate. This does not relieve him of the necessity to use ordinary precautions. One who signs a writing without reading it, cannot deny his knowledge of the contents. An illustration of the meaning of inducing action is the case of a merchant making a statement of his resources for the purpose of obtaining credit. If the seller extend credit on information furnished by a commercial agency, the falsity of the purchaser’s statement is not deception.
DAMAGE. Damage must result from the act induced by the deceit. If there is no damage there is no tort. Merely to fool one does not invade his legal right. The damage must have been actually sustained and does not mean something anticipated or threatened.

The damage necessary to support this tort must be: (1) Pecuniary loss; (2) Physical hurt or pain; (3) Physical discomfort of a sensible nature. Mental pain, suffering, anxiety is not generally sufficient to satisfy this element. As damage may affect one in his body, lands or chattels, it is clear that this tort may invade any of one’s rights.

Thus we see that both motive and damage are elements of actual fraud.

FRAUD IN CONFIDENTIAL RELATIONS. This kind of fraud differs from actual fraud chiefly in the manner in which it is established. The rule may be broadly stated as follows: Whenever one reposes confidence in another in a business matter, having the right so to do, and an advantage is gained, a profit is made by the latter out of the transaction, this is presumably fraudulent. It is at once evident that the rule applies to dealings between parties to the four economic relations, but it is extended beyond them and includes all fiduciaries. Examples may be found in cases of the dealings of trustees, executors, administrators, receivers, partners, agents, attorneys, physicians, clergymen, corporation officers and others in whom special confidence is imposed.

A few illustrations will suffice for all. If a guardian purchase land of his ward and thereby makes a profit, the profit is a badge of fraud. This is a tort invading the property right of the ward, for which an action of deceit will lie.

If a man of negro blood engage himself to marry a white woman, and induce her to enter into a supposed marriage, this is a fraud upon her. The tort violates her right of security.

A young man in financial straits asked the assistance of his grandfather. The latter sent a relative to his aid. The relative ascertained that the young man owned land on which there was a mineral deposit making it worth twice the debts which embarrassed him. The relative agreed to pay the debts and take the land. This was a fraud violating the confidence reposed.
PRINCIPIA OF LAW

If, however, there is no confidential relation between the parties and they deal as equals and at arms' length, either party is entitled to all advantage which superior skill, intelligence or knowledge gives him. If one know of a valuable mine on another's land, unknown to the owner, there is no duty to disclose resting on the one having the knowledge.

A merchantman, who discovers a pearl of great price in another's field, has the right to purchase the field without mentioning the jewel.

Fraud Due to Inequality. In case the parties are not equal, an advantage obtained by the superior is strong proof of fraud. It may be overcome by evidence showing that the inequality did not give the advantage. Where one of the parties is a person of weak mind not a mere difference in degree of intelligence, the rule just stated applies. Dealing with an imbecile and reaping an advantage is a fraud. Where from senility, disease, intoxication or for other reason the ability to transact business with ordinary safety is absent, dealing with such an one by a party of ordinary intelligence is not on equality.

In actual fraud all the elements must be established by proof. In the other sorts the relation or the inequality being shown, the making of a profit establishes the fraud. The test of liability is good faith or rather the want of good faith.
CHAPTER XLV.

NEGligence.

Negligence, like fraud, was not at common law regarded as a distinct tort, nor can we mention any one right or group of rights which it invades, because it may invade almost any of the rights of security, liberty or property.

Negligence is the dereliction of a legal duty proximately causing damage. It is the inadvertent failure of a legally responsible party to use ordinary care in observing or performing a non-contractual duty, imposed by law, which failure proximately causes damage to an individual to whom the duty is due.

Elements of Negligence. (1) A legal duty to use commensurate care; (2) Breach of the duty; (3) Absence of distinct intention to produce the precise damage; (4) Damage proximately resulting from the dereliction of duty.

1. The first inquiry is as to the duty. It may be one of three kinds: (a) General legal duty; (b) Statutory duty; (c) Duty imposed by the obligation of a contract.

An illustration of the first kind is the duty imposed by law on all persons travelling on the highway to use the care commensurate with the circumstances not to hurt other travellers. Should such traveller cause his vehicle to collide with that of another by careless driving it is a dereliction of a general legal duty.

Again, should one driving an automobile exceed the speed limit fixed by statute, and such violation of the statute cause hurt to another, this is negligence in violating a statutory duty.

Further, a common carrier who receives goods for transportation makes a contract so to do, but additional thereto the law imposes duties on the carrier of which he cannot free himself by contract. If the goods are lost or destroyed in the hands of the carrier, otherwise than by the act of God or the public enemy, the carrier has failed in the duty imposed by law by reason of the contractual relation. Care must be had here always to distinguish the contractual obligation and the legal duty imposed upon the parties to the contract. To confuse the two in the action would be disastrous.

Commensurate Care. It has been customary to speak of ordinary care, extreme diligence, ordinary and gross negligence.
These terms are used in the statutes of some of the States. It is believed that there are no degrees of diligence and negligence. The rule is that the care which an ordinarily diligent and prudent man would exercise in the circumstances of the particular transaction, is always required by law. The failure to use such care is negligence. Statutes frequently impose the duty to exercise greater care than the circumstances, in the absence of statute would demand. These statutes usually deal with the duties of carriers and others engaged in occupations intrinsically dangerous.

It is evident then that the facts of each case will determine whether proper care has or has not been exercised. The care must be commensurate with the facts. These circumstances will include the nature of the duty, the character of the thing dealt with and all other concomitants of the transaction. The duty of a gratuitous bailee is not so high as that of a bailee for hire. The care used in handling and safeguarding an anvil and a glass vase differs according to the nature of the two things.

Thus we see that the duty is one imposed by law, either primarily or through the intermediary of a contract to exercise the care dictated by the circumstances to an ordinarily prudent man. In case of a statutory duty, less difficulty is presented, because the mere non-observance of the statute is a breach of such duty.

2. Breach of Duty. Breach of duty amounting to negligence has been denominated, non-feasance, mis-feasance, mal-feasance. Some writers reject these terms. Without discussing this point we may use them to illustrate the rule. The expression dereliction of duty covers all three ideas intended by these words. Negligence may consist in simply not performing a duty; or in doing something one had a right to do, and was obligated to do, in an improper or careless manner; or in doing something from which the duty is to abstain. To illustrate, a railway company receives a car load of ice for transportation, and allows the ice to melt by not moving it promptly. This is a breach of a duty by merely not discharging it. It is an omission and a negative violation. Again, a railway company transports flour in sacks in a car in which kerosene oil had been shipped. The duty to transport has been performed, but the manner in which it is
done is improper. Further, if one pile rubbish against another’s wall and thus cause it to fall, this is a breach of a duty by doing something he had no right to do, and may be treated as negligence. This act is also a trespass, so almost all cases of malfeasance would be distinct, positive torts. In many instances where the conduct is negligent and also a direct wrong, it is permissible to waive the trespass and base the action on the negligence. This is safe because he thus over-proves his allegation. Thus in case of a collision on the highway the one who sustains damage from the carelessness of the other may declare on the direct forceful wrong, or may waive it and base his action on the negligence. So likewise where the tort involves the breach of a contract it is permissible to waive the breach and declare on the tort. Thus where under a contract of affrightment a carrier in consideration of one hundred dollars agrees to transport horses worth several thousand dollars, and the horses are killed in a collision, the usual practice is to bring action on the tort and not on the breach of the contract.

3. ABSENCE OF INTENTION. The term negligence excludes the idea of intention. Such expression as wilful negligence is self-contradictory. The rule is that there is no malicious intention or wilfulness to produce the damage inflicted. If, however, in cases, as above mentioned, of negligence concurring with direct wrong, the action is based on negligence, the other party cannot escape by proving that he acted wilfully.

4. PROXIMATE CAUSE OF DAMAGE. Negligence is not actionable unless it cause damage. Negligence is the typical indirect tort and damage is an essential element. One may be derelict in his duty to another, but inflicts no injury on him unless he also inflict damage. In a State where the property in a dog is not general, the dog has no value in law, the charge of negligence against a railway company in carelessly running over and killing a dog cannot be sustained. The element of damage is wanting. Should one intentionally shoot another’s dog, he would directly invade a property right and it would be a tort.

(a) DAMAGE. It has been stated already that damage to sustain a tort where it is an element must be: actual loss measurable in money; or physical hurt, pain and suffering; or physical discomfort of a sensible kind capable of being compensated
in damages. There seems to be a tendency now to extend the doctrine to mental distress. The leading case was where the delay in delivering a telegram caused great agony of mind, but no physical hurt nor inconvenience and no loss of a pecuniary nature.

(b) Proximate Cause. In determining whether the dereliction of duty is the proximate cause of the damage, we should first inquire whether the one is in any sense the cause of the other, and that it is not a mere coincidence. Where a passenger on a negligently delayed train was hurt by a sudden storm, it might well be that the storm and not the negligence of the carrier caused the damage.

While it is true that every event may by an unbroken line of causation be traced back to the Great First Cause, the law is practical and takes first into consideration the nearest cause. Next it applies the test of efficiency. If the nearest be not the efficient cause, then the cause back of that cause must be considered. When we reach the nearest efficient cause, the inquiry then is, whether it is wrongful, that is to say a dereliction of a duty owing to the one endamaged. If not, then we must go another step back along the line of causation. Applying these tests each time, the moment we find the nearest, efficient, wrongful cause we have found the proximate cause, the legally responsible cause of the damage. Any cause back of this is remote and not the legally responsible cause. The nearest is not necessarily the proximate cause. It may be merely the innocent implement used by the proximate cause to produce the result.

The proximate cause is the nearest efficient wrongful cause. It is that which in a natural and continuous sequence, unbroken by any new cause, produces the event, and without which the event would not have occurred. A remote cause is, first, one which has so far expended itself that its influence in producing the damage is too remote for the law’s notice, it is a cause antecedent to the proximate cause. Second, a cause of which some independent force merely took advantage to accomplish something not the probable or natural effect thereof.

Proximate cause and both kinds of remote cause may be illustrated by the well known leading case of the squib. A man threw a lighted squib into a market place. It fell on a stall.
The stall keeper, to protect himself, threw it off; it fell on another stall and was thus thrown from one to another until it burst and destroyed a man's eyesight. The man who threw the squib last was the nearest efficient cause, but he was the innocent cause. Hence he was the remote cause of the second kind mentioned above. So of all those who threw the squib in self protection, back to the man who set it in motion. This last was the nearest, efficient, wrongful cause, and hence the proximate, the responsible cause of the damage. To go back of him to the maker or furnishers of the squib would be to seek a remote cause of the first kind in the definition. He might be an efficient, wrongful cause, but he is not the nearest. The causal connection thus established between the breach of duty and the damage fixes the legal responsibility. In another case a man came down in a balloon and was caught in a tree in a garden. A crowd rushed in breaking down the enclosure and trampling the vegetables. The conduct of the crowd was the natural and probable consequence of the trespasser's act and the balloon man and not the crowd was the proximate cause of the damage.

Where several causes concur in producing damage, the difficulty of deciding upon the legally responsible cause is enhanced. Where land was overflowed and it was charged to be due to the diverting of a stream on a neighbor's land, it appeared that the stream had been choked by the bursting of a dam, and that beavers had built a dam. Thus several apparently concurrent causes operated to flood the land. Diverting the stream set the beavers to work and the bursting of the dam only aggravated a condition which existed independently thereof. Hence the diverting of the stream was the proximate cause.

CONTRIBUTORY NEGLIGENCE. Where one's conduct efficiently contributes to his damage, he has no right of action against him whose dereliction of duty was the proximate cause thereof. For no man can take advantage of his own wrong. Where a car coupler endeavors to couple cars, whose bumpers are of unequal height, with a bar, knowing that a goose neck is the proper implement, whereby his hand is crushed, he has contributed by his conduct to his hurt to the extent of barring his action against the company for negligent operation of the switching engine. The same tests should be applied to the conduct of the plaintiff.
as those applicable to that of the defendant. This rule of contributory negligence has been modified in some of the States. In them statutes provide that one who is guilty of contributory negligence may maintain his action, where the conduct of the other party is a direct tort, or was in such disregard of rights as to be, what is called, gross negligence. In such case the damages will be apportioned, that is the amount recovered will be ratably reduced. The Federal Employers’ Liability Statute makes this provision.

As has been said, the causal connection between the negligence and the damage must in all cases be established. The fact that the defendant was engaged in an unlawful act is not of itself sufficient to establish his negligence and impose liability. Where one was unlawfully pursuing his regular avocation on Sunday, and through no want of care on his part another is damaged he is not a tort-feasor. A woodcutter works on Sunday. His axe accidently flies off of the helve and wounds a bystander. It is none the less an accident and not actionable. The unlawful Sunday work is not the ordinary or usual cause of an axe leaving the helve. Inevitable accident is not a tort.

Responsibility. In determining whether an actionable wrong has been committed, it is frequently important to inquire by whom the duty is owing.

One to Whom Duty is Due. If no duty is owing to the party complaining the conduct of the other is no tort upon him. A landowner owes a duty to an invited guest to warn him against the danger of a pit on his land. To a trespasser he owes no such duty. He is not guilty of negligence if the trespasser fall into the pit and is hurt. Of course he may not lawfully inflict hurt upon a trespasser. A traveller constructs a temporary bridge across a ditch on the highway for his own convenience. He owes no duty to any one to construct it or to make it safe. He is not liable to another traveller who uses the bridge and is hurt by a defect therein.

One Owing a Duty. One who is totally incapable of exercising care cannot be guilty of negligence. It is difficult to reconcile this sound legal principle with the one which makes infants and idiots responsible for their torts. Of course, if the person have any capacity whatever, he must exercise the care of which he is capable. The rule is important in cases of unconscious
agents, parties under duress, persons laboring under physical infirmities. The rule is reversed in case of voluntary intoxica-
tion. Negligence begins with the drinking.

The conferring of a right upon one imposes duties on others. The law frequently imposes peculiar duties upon certain persons. It is a nice question then whether or not this confers rights on others. One who is damaged by the breach of such a duty may be said without doubt to have had a right invaded. So likewise if the statute impose a penalty on the information of any one of certain ones, there is no difficulty. A statute in Georgia requires an engineer on a locomotive to sound the whis-
tle, and check the speed of the train a certain distance from a highway crossing. This duty is continually and frequently violated. Only an individual who has been endamaged by the disregard of this statutory duty is injured.

Imputed Negligence. Not infrequently one is liable for torts committed by another. The negligence of a servant, wife, child, ward, agent, person non compos mentis, is sometimes imputable to the master, husband, father, guardian, principal, committee. This rests on reasons already discussed, that the one person acts through the other, merely using him as an instrument; and upon the further principle that the innocent and the guilty parties are identified in a joint enterprise or act. Partners whose goods are damaged by the negligence of another are remediless if one partner contributed thereto. His negligence is imputed to all the partners.

It was once the rule in England that a passenger who was injured by a third party could not recover if the carrier of the passenger was guilty of contributory negligence. The negligence of the carrier was imputed to the passenger. This rule has been overthrown in England and is not recognized in any of the States.

Presumptions. Negligence is not presumed, but must be proven. The proof of a fact which could not exist except through negligence is proof of negligence. The fact of a col-
ision on a railway is proof of negligence. In some States the statutes declare that in case of damage to certain persons by a railroad, the presumption is against the company. This, of course, is an exception to the general rule.
Negligence, in modern practice, has been so extended that it includes many torts which are really distinct or direct torts. In almost every case of dereliction of a duty causing damage the action may be based on negligence.

GENERAL REMARKS.

The injuries inflicted by animals have been noticed in the introduction to the subject. It is evident that those injuries may invade one of several rights and therefore cannot be discussed according to the general plan of treating the tort from the viewpoint of the right invaded. What has been said upon this subject will suffice. Anything further would be little more than repetition.

GENERAL NOTE.

Effects in law are produced, legal situations arise in one of three ways, by the act of the parties; by combination of the act of the parties and of the law; by mere operation of law. The first is accomplished by persons acting in compliance with the directions of law. The second is an inference of law from the facts and acts of the parties. The third is the construction put by law upon the situation.

Many illustrations of this doctrine might be given. It is so far reaching that it may be said to permeate all transactions submitted to legal scrutiny. The student can multiply illustrations for himself.

\[
\begin{align*}
\text{Trusts} & \\
1. \text{Express} & & \text{Where the terms of the trust are declared as required by law.} \\
1. \text{Resulting} & \quad \text{Where there is an evident, but unexpressed intention to create a trust.} \\
2. \text{Implied} & \\
2. \text{Constructive} & \quad \text{Where in the absence of intention a trust is created to protect rights.}
\end{align*}
\]

1. EXPRESS TRUST. By properly executed instrument the legal title is conveyed to one, for the use and benefit of another who is the beneficial owner.

2. RESULTING TRUST. One furnishes the money for the purchase of land, the deed is taken in the name of another. A trust
results by implication in order to effectuate the intention to create it. The holder of the legal title is trustee and the furnish er of the money is the cestuy que trust.

3. CONSTRUCTIVE TRUST. One obtains title to another's land through fraud, a trust is constructed to frustrate the fraud and to protect rights. The former is trustee, the latter is cestuy que trust.

1. Express. - The terms of the agreement are openly uttered and assented to by the parties.

Contracts - 

1. Resulting. Facts show evident but unexpressed intention to contract.


1. EXPRESS CONTRACT. One offers to sell another a book for $5.00, the latter accepts the offer. The contract is express.

2. RESULTING CONTRACT. One enters a shop, openly takes and carries away a book worth $5.00. As an inference from the facts, the law implies a sale, and in order to effectuate the evident but unexpressed intention, implies a promise to pay the price. This is a contract implied by law from the facts.

3. CONSTRUCTIVE CONTRACT. One enters a shop and purloins a book worth $5.00. The law constructs a contract, a sale, and implies a promise to pay the price, in order to protect the right and to afford a remedy. This contract is implied by law as a matter of law, juris et de jure. It is called a quasi contractual obligation.

1. Actual. - Facts show imposition practiced by one upon another.

Fraud - 

1. Resulting. The confidential relations between the parties forbid the act as done.

1. Actual Fraud. The several elements of deceit cognizable by law are present. One, by false representation of a material fact, knowingly and intentionally made, induces another to act to his detriment.

2. Resulting Fraud. A fiduciary makes a profit out of the trust fund. The inference of law is that it is a badge of fraud.

3. Constructive Fraud. Parties to a gaming contract have no standing in court. The transaction renders the contract inherently fraudulent. This is the act of the law.

Notice is the legal cognizance of a fact.

\[
\begin{align*}
\text{Notice} & \quad \text{Direct knowledge of the fact legally brought home.} \\
& \quad \begin{align*}
1. & \text{Resulting. Knowledge of fact sufficient to cause inquiry.} \\
2. & \text{Constructive. Fastened upon one by positive law or conduct.}
\end{align*}
\end{align*}
\]

1. Actual Notice. Where one sees a deed purporting to convey land, he has actual direct notice of the title conveyed.

2. Resulting Notice. Where one sees the copy of a deed on the register, the deed not having been properly registered, he is on actual indirect notice of the title.

3. Constructive Notice. Where a deed has been properly registered in the proper jurisdiction, such registration is constructive notice to all persons dealing with the land.

Published defamation is malicious, except it be justified or excused.

\[
\begin{align*}
\text{Malice} & \quad \text{Actual malice, where the act is prompted by evil motive.} \\
& \quad \begin{align*}
1. & \text{Resulting. Where the act is perpetrated without motive.} \\
2. & \text{Constructive. Where the actor is actuated by pure motive.}
\end{align*}
\end{align*}
\]

Illustrating with the tort of libel:

1. Express Malice is present where the libellous publication is made for the purpose of harming the one libelled.
2. Resulting Malice. Where the libellous publication is made without knowledge of the truth or falsity, through mere wantonness, malice is implied, from the facts.

3. Constructive Malice. Where the libellous publication consists of a denial of a libel or slander, it is without justification or excuse, and is libellous and therefore malicious. This is malice in law.

1. Express - Created by properly executed deed, a grant.
2. Implied -
   1. Resulting. Created by prescription, unopposed user, for the statutory period.
   2. Constructive. Created by law to give ingress and egress.

1. Express Way. Created by act of the parties evidenced by deed.

2. Resulting Way. Created by act of law concurring with act of parties. Prescription gives right when statute is complied with.

3. Constructive Way. Law gives one the right of way, for the purpose of ingress and egress, where he has acquired land from one whose land excludes him from the highway.

1. Express - Conventional life estate created by properly executed deed.
2. Implied -
   1. Resulting. Arising from interpretation of the deed.
   2. Constructive. Created by law.

1. Conventional Life Estate is created by deed properly executed and clearly expressing the creation of the estate.

2. Resulting Estate. At common law where a warranty deed omitted words of inheritance the law construed it as conveying a life estate.

3. Constructive Estate. At common law life estates by courtesy and dower were created and called legal life estates.
CHAPTER XLVI.

DEFINITIONS AND CLASSIFICATIONS—MANNER OF CREATION.

Two kinds of persons are known to the law: human beings and corporations. We come now to speak of the latter.

1. Definitions. A corporation is a person created by the sovereign, endowed with many of the rights of an individual, and with some rights which an individual cannot have. It is a legal entity composed of human members, having a personality distinct from the members. If all the members of a corporation sign a writing it is not the act of the corporation. The assets of a corporation are not owned by the members, the property is in the corporation. The members are not liable to the creditors of the corporation for the corporation’s debts.

2. Kinds of Corporations. Anciently corporations were known as sole and aggregate. The former has and can have but one member, e.g., the King; the latter is composed of more than one member. There are no sole corporations in this country. In a trading corporation if all the shares of stock come into the ownership of one person it is not a corporation sole, but an aggregate corporation with one human member.

Corporations were formerly classed as ecclesiastical and lay. The former was composed of ecclesiastical persons only. It does not exist in this country, there being no ecclesiastical establishment. All private corporations in this country are either trading corporations or non-trading corporations, according to the purpose of their creation; in other words all corporations are civil corporations.

(a) Trading Corporation. This kind of corporation is created for the purpose of engaging in any sort of lawful business for the gain of the members.

(b) Non-Trading Corporations. These are subdivided into eleemosynary, religious, charitable, educational, for pleasure or for any lawful purpose other than business.

The important classification, however, is of public and private corporations.

(a) Public Corporations. These are organized for the performance of public duties, and the exercise of governmental functions. The municipality is the type of this class.

(b) Private Corporations. As already mentioned these are
trading and non-trading corporations having for their object the profit or pleasure of the members; or the benefit of classes of persons.

(c) Public Service Corporations. Some corporations are organized for the profit of the members, and because they serve the public, are clothed with public powers, not granted to strictly private corporations. Thus a railway corporation operates a toll road, a sovereign prerogative, and must serve the public without discrimination.

2. Quasi Corporations. Certain bodies having public functions resemble corporations. But not having been incorporated they are not strictly speaking bodies corporate. They are called public quasi corporations. The board of education of a county or town is an example of this class.

3. Creation. To be a corporation is to have the right to exercise a franchise. A franchise is a sovereign prerogative in the hands of a subject. A corporation is the creation of the sovereign. It comes into existence by the act of the sovereign. Therein it differs from an association of persons. The power to create corporations, in this country, is lodged in the legislature, or other designated authority. The Congress of the United States creates corporations under implied powers. The constitution of the United States is silent on the subject.

Formerly a corporation was created by a special act of the legislature. The States now have general corporation laws, which set forth the things to be done by those seeking incorporation, and the method of securing the State’s approval of their acts. Usually the articles of incorporation contain the names of the corporators, the name and purpose of the corporation, the location, and in case of trading corporations the amount of the capital stock, and the statement that the percentage required by statute has been taken and paid for.

The filing of this application with some officer of the State or in a court; publication in gazettes for a specified period of time, are usually required by the statute. These requirements having been met the proper officer, the Secretary of State or the judge of the court having the authority, will grant the certificate or order of incorporation. This is, in effect, the charter, the writing setting forth the fact that the State creates the corporation, and containing a statement of the powers conferred.
The acts of the officers in some instances are ministerial. The legislature cannot and does not delegate the power to create corporation. The constitution may confer this power on the legislature or other authority.

The corporation must, within a reasonable, or within a fixed time, organize and proceed to exercise the corporate powers. Failing this the charter will lapse.

4. De Jure, De Facto. Where the requirements of the statute have been fully met, and compliance with directory provisions had, it is a corporation de jure. Where persons have made an effort to incorporate, and it is such a corporation as the law allows to be created, where they have failed to comply with the directory provisions of the statute, but act as a corporation, and others deal with it as such, it may be a corporation de facto. The corporate existence can be questioned only by the State.

Corporation by Estoppel. It differs from De Facto corporation in that it may be for an object not provided by statute, but it and persons dealing with it are estopped to deny corporate existence.

In modern times, of the two kinds of private corporations, the trading corporation takes so large a share in the activities of society that we shall treat it first.
CHAPTER XLVII.
TRADING CORPORATIONS.

POWERS.

1. Powers. A corporation may be created for the purpose of conducting any legitimate business. The first matter claiming our attention is the corporate powers. These may be grouped as Essential, Statutory, Charter, Implied Powers.

CORPORATE POWERS.

1. Essential

   1. Perpetuity.
   2. Contract, Suit.
   3. Property.
   4. Seal.
   5. By-laws.

2. Express, Charter

   Conferred on the particular corporation at creation.

   1. General. All corporations.
   2. Special. Corporations of this class.

3. Statutory

4. Implied

   Necessary to effectuate the express powers.

1. Essential Powers. By this expression is usually meant the powers which every corporation must have in order to exist. They are usually enumerated in the charter, although that is perhaps not necessary. They are as necessary to the artificial person as the vital organs are to a human being. These are:

   (a) Perpetuity by succession.
   (b) Right to sue and be sued; plead and be impleaded; contract and be contracted with by and in the corporate name.
   (c) Right to acquire, enjoy, and dispose of realty and personality in like manner.
   (d) Have and use common seal,
   (e) Make by-laws for its government not contravening constitutions and law.

   (a) Perpetuity. One of the prime objects of a corporation is the perpetuation of it, so that rights may be preserved in the same person beyond the limits of human life. In non-trading
corporations this is accomplished by admitting new members according to the rules and by-laws. In a trading corporation a share of stock represents a membership, as hereafter explained. A share of stock is the subject of ownership, and the property therein devolves as in other cases, by gift, sale, succession, so that perpetuity is preserved.

(b) Sue and be Sued. As the corporation is a person in law, it must have the right of resort to the courts for its protection, and must be subject to be hailed to court. The right to contract, to bind itself and others by agreement is inherent in a person, and needs no explanation.

(c) Property. A corollary of the preceding is the power to own properties necessary for the purposes of the business in which it is engaged. There are limitations, in the statutes of some States, upon the ownership of land. Property in the case of a corporation has the same incidents as in case of individuals, and includes control, enjoyment, disposition, encumbering, and liability for debt.

(d) Common Seal. Formerly a corporation spoke only through the seal. All corporate acts were evidenced by its seal. Today the corporation may make any contract without the seal that an individual may. Such contracts of individuals as are required to be evidenced by a seal, must, of course, when made by a corporation, be under seal. As the corporation must sign its name, and as the signatures of the members were not the act of the corporation the idea of the necessity for all corporate acts to be under seal was logical. But the business of a modern corporation could not be thus conducted, where thousands of contracts are made daily, and in widely separate places.

(e) By-laws. Rules adopted by the corporation, providing for meetings, officers, elections, membership and other such matters, are necessary. The power to make such rules is limited by the charter, the laws and the constitutions.

2. Charter Powers. As already stated the charter is the writing authenticated by the proper officer as the evidence of the creation of the corporation. The charter usually enumerates powers common to all corporations. These are not, strictly speaking, charter powers. Powers conferred on the particular corporation in the instrument of incorporation are charter pow-
ers. The name, location, and amount of capital stock, nature and character of the business are examples.

3. Statutory Powers. These are general and special.

(a) General. The statutes in providing general regulations for corporations of all kinds contain statements of powers which all corporations may exercise.

(b) Special. The regulations applicable to the particular class or kind of corporation are among the special statutory powers conferred upon the corporations of that class. Thus statutory powers of banks are different from those of carriers.

4. Implied Powers. These are such powers as are necessary for the exercise of express powers. They include such powers as are reasonably incidental to the enterprise or operation of the corporation, and not expressly forbidden in the charter, or allowed by necessary inference from the language of the charter.

ULTRA VIRES.

The expression ultra vires means beyond or in excess of corporate powers. It is loosely applied to transactions by a corporation which are:

1. Unauthorized by the charter or the statutes under which the charter is granted.

2. Irregular, performed in some other way than the one authorized by charter and statute.

3. Malum Prohibitum act forbidden by the law to the corporation or to all persons whatever.

4. Malum in se act which if done by an individual would be unlawful, involving moral turpitude.

The effect of an ultra vires act differs according to these different attributes.

ILLUSTRATIONS.

1. Where a mining corporation attempts to engage in manufacturing.

2. Where the by-laws provide the method of borrowing money and issuing bonds, as by a vote of the majority of the directors, and bonds are issued without such vote having been taken.

3. Where a corporation, such as a railroad, is forbidden to control a competing corporation.

4. Where a corporation engages in a fraudulent transaction.
PRINCIPIA OF LAW

The last two need no discussion as they are mere nullities and the proper party or the State may have them so declared. If either party has received benefit, such party is estopped from pleading ultra vires to an action brought to recover compensation for the benefit. The right to recover rests on the plain proposition that one impliedly promises to repay a benefit. This has been fully discussed under the head of Implied Contracts, viz.: quasi contractual obligations.

EXAMPLE. Should a manufacturing corporation contract for the purchase of a dozen automobiles, either party may repudiate the contract and the action by the other party may be successfully defended by a plea of ultra vires.

1. UNAUTHORIZED ACTS. Any act of a corporation not permitted by the charter is beyond its powers. A bilaterally, executory contract if ultra vires is unenforceable. No obligations arise thereunder. An action by either party to such contract may be successfully defended by the other party. If a part of the contract has been performed, as to the unexecuted part the rule just stated applies.

Where an ultra vires contract of a corporation with another person has been fully performed on both sides, that is the end of the matter. The doctrine of ultra vires is not available to either party to re-open the matter. Where the contract has been fully performed by one party, and where the sale is complete, the articles delivered, the purchase price paid, no action can be maintained by either party. Where the articles are delivered and accepted the corporation is estopped to plead ultra vires to an action for the price.

The general rule is that an ultra vires act is void, no rights arise under it. The instances in which this rule does not seem to apply are not exceptions. They depend upon the difference between the enforcement of a contract not already performed, and the repudiation of acts already completed.

2. IRREGULAR ACTS. It is not correct to say that an irregular exercise of corporate powers is ultra vires and void. The purchaser of irregularly issued bonds, based on mortgage, whose money the corporation has received and enjoyed has the right to payment, and the irregularity will not usually avail the corpora-
tion as a defense. Positive statements cannot be made on this point. The nature of the transaction, the knowledge and conduct of the parties, and other attendant circumstances will control the case.

TORTS.
Since a tort is the violation of law, as well as the invasion of a private right, it was once held that a tort being ultra vires the corporation could not be liable. The opposite doctrine now prevails.
CHAPTER XLVIII.

TRADING CORPORATION.

-- ORGANISATION—MEMBERS AND THEIR RIGHTS.

1. ORGANISATION. The charter being granted, the members should, within a reasonable time, assemble, adopt by-laws, elect officers, and proceed to transact the business for which the corporation was created, and provide for the regular meetings.

2. CAPITAL STOCK. The first question to settle is, who are the members? The capital of a corporation comprehends the entire assets. Capital stock is the amount of capital to be contributed by the stockholders for the purposes of the corporation, and is the value of the sum of the shares at par. The amount remains the same, although the value fluctuates in sympathy with the capital.

3. SHAREHOLDER. The capital stock is divided into equal shares, usually of the par value of $100.00. One who owns one or more shares is a shareholder or stockholder. On organization each incorporator agrees to contribute $100.00 for each share of stock owned by him. It does not give the right to demand any proportionate or other part of the capital so long as the corporation continues in business. Its value is regulated by the amount of the capital. It is a thing independent of the capital, and has a value, if any, of its own. It is a chattel and subject to the rules of property in chattels. The shareholder may acquire shares by being one of the original incorporators; by gift; by purchase for value; by bequest; by succession. He may sell or otherwise dispose of them. They are subject to levy and judicial sale.

SHAREHOLDERS.

The rights of shareholders may be conveniently grouped as follows:

I. RIGHTS AS MEMBERS.

1. General Collective.
   (a) Participate in meetings.
   (b) Vote for officers.
   (c) Vote on general corporate acts.
2. Individual.
   (a) Certificate of stock.
   (b) Name entered on stock book.
   (c) Inspect records.

II. Rights as Property Owners.
   1. Within the Corporation.
      (a) Dividend, after declaration.
      (b) Direct disposition of funds if insolvent.
      (c) Pro rata share on dissolution.

   2. External to Corporation.
      (a) Proceed in equity for mismanagement.
      (b) Have affairs settled up.

I. Rights as Members.
   1. General, Collective.
      (a) Participate in Meetings. The stockholder whose name is
      on the stock books has the right to attend and participate in the
      corporate meetings, regular and called, being entitled to receive
      due notice of the latter.

      The meetings are regular and called.

      Regular Meetings. The regular meetings are usually held
      annually, the time and place being fixed in the by-laws. A ma-
      jority of the stock represented at the meeting controls. The
      shareholders in regular meeting elect the directors. The direc-
      tors have the authority to exercise all the corporate powers rel-
      ating to the ordinary business of the corporation.

      The extraordinary, or unusual powers, "corporate functions,"
      are exercised by the shareholders in meeting assembled. These
      include acceptance of the charter, framing by-laws, changes in
      the capital stock, authorizing charter amendments, election of
      officers and directors, dissolving the corporation, and changing
      the general scope and character of the corporation. The leasing,
      conveying, mortgaging the properties, may be delegated to the
      directors. If not the stockholders control.

      Called Meetings. Meetings of the stockholders may be called
      according to the method prescribed in the by-laws. Each mem-
      ber must have notice, usually in writing, of the time and place.
      The notice must state the business to be transacted. No other
      business can be transacted at a call meeting.
Powers of Majority. The powers of the majority in the corporate meeting extend to all matters relating to the general policy of the corporation in the conduct of the business. The majority cannot do any act which contravenes the property rights of stockholders. The constitutional protection to property and contracts applies here. The majority cannot force the minority into enterprises different from the one stated in the charter.

(b) Vote for Officers. The members in regular meeting elect the officers. These are usually a president, treasurer, secretary and directors. Of the first three nothing need be said, as their names sufficiently indicate their duties and powers.

The directors are the managers of the corporate business. They have power to do any act the corporation can do in the conduct of the business for which the corporation was chartered. They appoint agents as needed. They have wide discretion. The members have no power to control them. The only remedy of the member within the corporation is to elect directors in accord with his views. The directors are the primary possessors of all the powers conferred by the charter, and hold the delegated power from the sovereign to perform all corporate acts.

(e) General Corporate Acts. As already explained the member has the right to vote in corporate meetings on general corporate acts. The voice of the majority controls, with the limitations already mentioned.

2. Shareholders have rights as individuals, not as members.

Votes. In a stock corporation the member is entitled to a vote for each share of stock appearing in his name on the stock book. It is customary to allow proxies. The power and execution of the proxy is regulated by the by-laws.

Corporations cannot refuse to recognize the disposition by the owners unless there be restrictions in the charter and by-laws. Some corporations, not strictly trading corporations, reserve the right to pass upon their membership. So that one might buy and own a share of stock, and yet not be admitted as a member. The owner, in the regular trading corporations, can compel the issuance of the certificate by legal proceedings.

(a) Certificate of Stock. Where one has subscribed for a share of stock, and paid for it, or has paid the percentage of the price called for by the corporation, he is entitled to have a cer-
tificate, called script, issued to him. Should the corporation refuse, he may bring his action on the breach of the contract, or may compel the issuance by decree in equity, sometimes by mandamus.

Where one acquires a share of stock by gift, purchase or succession, he has the right to have a certificate issued to him. As a share is the subject of property, the right of the owner to dispose of it is complete. A stockholder has the right to have his name entered upon the stock book of the corporation and he is then a member. The corporation has the right to say that he is not a member until his shares are registered. In other words, the corporation has the right to know the names of the members. The corporation issues to the members certificates which are the evidence of their ownership of the shares therein mentioned. The relation of the member to the corporation is contractual, and is governed by the laws of contract.

A member has the right to participate in corporate meetings.

(b) Registration. A stockholder has the right to have his name entered on the book of the corporation containing the list of members, and in case of refusal may by legal proceedings compel the corporation to register him as a member. Corporations may make reasonable rules as to the closing of the register a specified time previous to the regular meeting, and as to proof of the right of the person demanding registration.

(c) Inspect Records. A member has the right to be acquainted with the conduct of the corporate affairs, and to that end to inspect the books and records. Like all rights, this one must be reasonably exercised. The corporation must keep the records at an accessible place, and may designate proper hours during business for inspection.

II. The Rights of Members as Property Owners in Their Relation to the Corporation.

(a) Dividend. The directors have power to divide the profits of the corporation ratably among the members. They can use only legitimate profits for this purpose. In the exercise of their discretionary power they may decline to declare a dividend. The member has no rights in the matter until the dividend has been declared by the directors. From that time his dividend is a debt of the corporation and collectable at law. The dividend may be
in money, or in stock. In the latter case, the profits have increased the capital, and new stock may be issued to maintain the parity between capital and capital stock. This new stock may be divided among the members ratably as a stock dividend.

(b) FUNDS OF INSOLVENT CORPORATION. When the corporation becomes insolvent it is the right of the members to have the assets applied according to the legal priorities of the claimants thereon. This, like the other rights enforced or attempted to be enforced within the corporation, must be by action taken in meetings. External aid of the court may be invoked.

(c) SHARE ON DISSOLUTION. When the corporation is dissolved either voluntarily or otherwise, the members are entitled to share ratably in any balance of corporate funds remaining after the payment of legal claims and charges. If necessary they may resort to the courts for this purpose.

Hitherto the rights of the members, within the corporation, have been considered. The power to interfere in the management of corporate affairs is based upon the member's rights as a property owner.

(a) PROCEEDINGS IN COURT. Where a majority of the stockholders so direct the affairs of the corporation as to prejudice the property rights of the minority, unjustly discriminating against them, such action being intentional and not in good faith looking to the interest of the corporation; where the directors are guilty of a breach of the confidence reposed in them, to the injury of the other members, as will be more fully explained later, the stockholder may for himself and his fellows, in his own name or in the name of the corporation,

1. Bring and defend suits in the courts.
2. Restrain acts of the majority or of the directors.
3. Enjoin ultra vires proceedings.

Where the majority or the officers refuse so to do.

(c) INSOLVENCY DISSOLUTION. In like manner resort may be had to court to settle the affairs of an insolvent or dissolved corporation. Stockholders may bring proceedings for this purpose or intervene in proceedings already pending.
CHAPTER XLIX.

RELATIONS OF CORPORATION.

The relations the corporation sustains to the State; to the shareholders; to the directors; and to the creditors, are here discussed in one place, although reference is necessarily made thereto throughout the treatment.

I. STATE.

1. Reservation.
2. Visitation.
3. Taxation.
4. Eminent Domain.
5. Public Policy.

STATE AND CORPORATION.

The relation of the State to a corporation of the State was declared by the United States Supreme Court to be contractual. Thus the State had no power to repeal or change a charter once granted.

1. Reservation of Powers. The States immediately after this decision was rendered changed their corporation laws, so as to reserve to themselves powers over corporation charters. One of these regulations is that no corporation is now created as a perpetuity; but the corporate existence extends over the statutory term of years, with right of renewal. Even where the statute reserves this power, it is clear that it cannot be arbitrarily exercised. An amendment cannot be forced upon a corporation. It may dissolve. Repeal of a charter cannot affect the property of the corporation in reality and personality, or impair its contracts. Powers solely dependent upon the grant of the charter, not exercisable by individuals, are abrogated by the repeal of the law granting these powers.

It is useless to question the soundness of the ruling that the charter is a contract. Statutes have emasculated it. Yet it is not inopportune to say that a true contract should bind both parties, and yet for the clause of the United States Constitution the State cannot be so bound. The relation of the State to the corporation is that of a creator to a creature. Statutes regulate the relation in many instances differently from the rules
of ordinary contracts. The relation is more properly one of legal status.

2. VISITATION. The State has power to inquire into the conduct of the corporation. This may be done by the proper officers; the attorney general, hailing the corporation to court, and there investigating the affairs, and by proper compulsory proceedings requiring the corporation to conform to the law and the charter.

For several kinds of public service corporations, notably railways, the States have created commissions, with wide powers of inquiry into corporate affairs and of regulating them.

3. TAXATION. The properties of corporations are subject to be taxed by the State, uniformly with those of individuals. The taxation of corporate franchises is a modern and an extremely important doctrine.

Where a corporation is empowered by the State to engage in business necessitating the exercise of powers peculiar to the State, such power is strictly a franchise, a branch of the prerogative of the sovereign in the hands of a subject. A railway corporation having the franchise to operate a toll road as a common carrier is the best illustration. Clearly the franchise is more valuable than the physical properties. It is the chief source of income. Statutes now provide various methods of estimating the value of this asset, and of taxing it. If in addition to the general franchise, the corporation has acquired the right to use the streets of a municipality, this is a valuable thing different from the franchise. It is sometimes called a secondary franchise. It is more properly an intangible thing of value, in the nature of an easement or license. However, it may be classed, it is clearly a valuable asset, is the subject of property, and properly taxable. The methods of assessing the value of these intangible properties must be learned from the statutes and ordinances dealing with the subject.

4. EMINENT DOMAIN. The power to take private properties for public purposes is inherent in government, nay it is a part of government itself. The residuary control over things in individual proprietorship remains always in the sovereign. In this country constitutions provide that just compensation must be made to the owner. As to this power of the State, the properties
of corporations are no more sacred than those of individuals. Whether the charter be a contract or a grant of franchise, the contract or grant always has this condition inseparably annexed. This power may be granted to corporations, and is in fact granted to some public service corporations. The condemnation by a corporation of the land of another corporation presents interesting questions.

5. Police Power. There is a power abiding in the State to enact laws for the promotion of the general peace, health, and good order of the community, which is called the police power. Neither legislature nor people can bargain away this power. Government is organized for these purposes, large discretion is allowed in the exercise of this power. Neither the power nor the discretion can be surrendered. The limitations of this power is indefinable, as it must be exercised as the exigencies arise. Usually it is held that the limitations are:

(a) That the subject of the exercise must relate to the peace, health, good order or morals of the community.

(b) That it must be exercised upon grounds reasonable and necessary.

Corporations stand upon the same plane with individuals in respect to this power. Even though the statute or charter contain no reservation of it, the corporation must give way to it. The policy may be expressly declared, or may be inferred from the subject matter of the statute.

ILLUSTRATION. A State creates a corporation to conduct a brewery. Subsequently a prohibition law is enacted forbidding, among other things, the brewing of malt liquors. The corporation must cease to brew such liquors. The money invested in the plant on the faith of the charter, gives no vested right which can withstand the declaration of the State's policy.

In the fixing of tolls and charges for carriers, the State under the guise of regulation, cannot confiscate, by requiring a railroad to transport persons and goods without reward. The police power, like all powers, must be reasonably exercised.

II. SHAREHOLDERS AND CORPORATION.

The relation of the shareholders, stockholders, members to the corporation has already been discussed. Suffice it here to say the laws of contract and property control and regulate them.
III. DIRECTORS AND CORPORATION.

It is not deemed necessary to discuss the status of officers like the president, secretary, treasurer and others, because subject to the general regulations of statute, charter and by-laws they are under the immediate control of the directors.

The directors are entrusted with the management of the business of the corporation, they have a wide discretion and a free hand, they are the primary possessors of all the powers which the charter confers, they can do any business within the charter limits, they hold a power delegated by the sovereign to act for the corporation. All their acts must be characterized by diligence and good faith, with a view to advancing the interest of the corporation and of the stockholders. So long as they so act, they are free from control and interference. They are in fact the corporation in action.

The directors are fiduciaries and acts which constitute a breach of their trust render them liable to be called upon in court to give account of their stewardship. These acts are usually as follows:

(a) Some action or threatened action which is beyond the authority conferred by law or charter, ultra vires transactions.

(b) Some fraudulent transaction, completed or threatened, among themselves or with others, or with stockholders, which will result in serious injury to the corporation or to stockholders.

(c) Acts of directors in their own interest seriously detrimental to the corporation or to other stockholders, or acts discriminating between the stockholders in benefits and losses.

IV. CREDITORS AND CORPORATION.

The relation of creditor and debtor presents no difference where the latter is a corporation to the usual relation between individuals. The claim of the creditor is against the corporation and enforceable against the corporation assets only. He cannot proceed directly against corporation debtors, nor against stockholders. While under some circumstances stockholders may be made to contribute to the corporation fund for the liquidation
of corporation debts, this power is in the corporation and not in the creditor.

It is scarcely necessary to say that the corporation alone can collect its debts, and none other for it. A corporation sues and is sued in its own name. The disposition of the fund, when collected, is another matter.
CHAPTER L.

CITIZENSHIP OF CORPORATION.

DOMESTIC—FOREIGN.

I. DOMESTIC CORPORATION.

1. Citizenship. A corporation, for certain purposes, is a citizen of the State of its creation. It has no legal existence outside the State. Being purely a creature of the law, and the law having no extra-territorial force, this proposition is axiomatic. The corporation cannot migrate from the sovereignty. The constitution of the United States, which allows citizens of each State the privileges and immunities enjoyed by citizens in the several States does not apply. A corporation is a citizen to the extent that it cannot be deprived of equal protection of the laws.

The United States courts have jurisdiction over controversies between citizens of different States. For this purpose a corporation is a citizen of the State of its creation.

2. Corporate Existence. Where a corporation like a railroad, has charters from more than one State, as to each such State it is a separate corporation. This is true although the name, the members, and the officers are the same, and all are under one management.

3. Domicil. The domicil of a corporation is usually the county of its creation, or the principal place of doing business.

II. FOREIGN CORPORATION.

A corporation created by one State may transact business in other States. Corporate functions can be discharged only in the State of creation. The State may adopt rules and regulations with which a foreign corporation must comply before it can engage in business in the State. The State may issue a license to a foreign corporation to operate within her borders. These should be uniform and not discriminatory against individual corporations. The State may exclude corporations entirely from her territory. The license to do business is in no sense a charter, and is revocable.
CHAPTER LI.

CORPORATION, SHAREHOLDERS, OFFICERS.

1. CORPORATION.

1. CONTRACTS. It need scarcely be said that corporations are liable, like individuals, for their contracts. These must be such as the corporation is permitted by the charter to make, for the purpose of conducting the business for which it was created. A corporation may borrow money; and issue bonds therefor secured by mortgage upon its assets. As a rule a corporation cannot endorse negotiable instruments except in the ordinary course of business.

2. TORTS. Corporations are liable for torts committed by their servants under the same conditions as those governing the liability of the masters for the acts of servants. It was at one time supposed that a corporation could not be held liable for a tort involving motive, as an essential element. The contrary is now true, and corporations are liable in an action of deceit. So likewise torts, like libel or slander, were at one time not imputable to corporations. Such tort committed by the servant of the corporation under circumstances which would make the defamation the act of the master, is the tort of the corporation.

3. CRIMES. A crime is the violation of a public law which is the result of the joint operation of overt act and criminal intent. It would seem that as a corporation has no soul, it would be impossible for it to form the criminal intent. Statutes, however, in most of the States provide for the prosecution and punishment of corporations for crimes. It cannot now be definitely stated what crimes a corporation can and, and what crimes it cannot commit. Clearly there are crimes which it would be absurd to attribute to corporations. The line is not yet clearly drawn.

From the nature of the case the only punishment which can be inflicted is a money penalty. The corporation having no body cannot be imprisoned or executed. The forfeiture of the charter by the State is not punishment for crime.

II. STOCKHOLDERS, SHAREHOLDERS.

In some rare instances the members of a corporation are by charter liable for the obligations of the corporation, like the
members of a partnership. Usually, however, the members are not liable in any way to the creditors for the debts of the corporation. Such liability as attaches to the members is to the corporation itself.

1. **Stock.** A member is liable on his subscription to the corporation for the par value of his stock. Where a part only has been paid in, he is liable for the balance. The relation is contractual. This liability is enforceable in the name of the corporation.

2. **Statute.** The statute in some cases, usually of State banks, imposes an additional liability on the members. The corporation is, by statute, empowered to collect from each member a sum equal to the par value of his shares. This is additional to the original price of the shares, and is for the protection of the creditors of the corporation. This being a matter of strict statute, the law must be consulted in each case.

### III. Officers.

Under some statutes, notably the federal statutes against trusts, the officers of a corporation may be held criminally liable for violations of the statute. These are exceptional cases.

The method of enforcing the liability herein mentioned is stated in the chapter on dissolution of corporations.
CHAPTER LII.

Dissolution.

The methods of dissolving a corporation usually given are:
1. By act of Legislature.
2. By death of all members.
3. Forfeiture of charter.
4. Surrender of charter.

The second does not apply to a trading corporation, as the representatives of deceased stockholders immediately take their places, and the continuity of corporate existence is preserved.

1. By Act of the Legislature. The legislature may repeal the law, under which the charter was granted, for misuse or non-use, where the right so to do is reserved. Otherwise the rule of the Dartmouth College case prevails, and the legislature is powerless. The legislature is the judge of the reasonableness of the act.

3. Forfeiture of Charter. The charter of a corporation may be forfeited by the court in a proceeding instituted by the State. Individuals cannot bring the proceeding, nor may a forfeiture be had in a collateral proceeding. The sovereign gives life to the corporation and the sovereign alone can take that life away. The misconduct of the corporation must cause some substantial detriment to the public interest. Statutes specify these acts, and such are usually additional to those recognized by general law. The attorney general has discretion to institute quo warranto proceedings to forfeit a charter, and individuals, as relators, may through the attorney general have the proceeding brought in the name of the State. Forfeiture of a charter is like executing an individual under sentence. Where penalties are imposed by statute upon officers for misconduct, this is not usually considered a ground for forfeiture. It is a method of compelling the proper exercise of corporate functions.

4. Surrender of Charter. Corporations usually have the power voluntarily to surrender the franchise, and so dissolve. In case of public service corporations the State may compel the exercise of the franchise. The surrender is ineffectual unless accepted by the State. Where proceedings are taken to surrender the franchise, creditors and others in interest have an opportunity to be heard. The acceptance or refusal of the
surrender is with the State. In any event surrender is a species of suicide.

**EFFECT OF DISSOLUTION.**

Anciently when a corporation dissolved it simply ceased to exist, all its powers perished. There was no legal provision for administering the estate of a defunct corporation. All debts and contracts were cancelled, the assets reverted or went to the crown. The manifest injustice of this state of affairs caused equity first, and statutes afterward, to provide means for winding up the affairs of a defunct corporation.

Upon application made to the equity court by a party at interest, a receiver is appointed who is empowered to call in all the assets and convert them into money. Under the direction of the chancellor he pays the debts according to their priorities. Should any balance remain it is distributed ratably among the stockholders.

**INSOLVENT CORPORATIONS**

Germain to this subject is the procedure in case of insolvent corporations. The cause having been entertained by the equity court all parties at interest, the corporation, members, creditors, directors are brought into court or come in voluntarily, and the procedure is then practically the same as in case of a dissolved corporation. This explains the statement that the member is not liable to the corporation creditor. The corporation collects from the member as from other debtors the sums due under his contract and imposed by statute, and the fund thus brought into court is there administered. In case of insolvency the proceeding may be for the purpose of winding up the corporation affairs or for preserving the corporation from temporary embarrassment. This, however, belongs to equity.

Should a corporation be stripped of all assets, that does not work a dissolution. A judicial sale of all corporation properties does not convey the franchise. The State alone may provide for transfer and succession.
CHAPTER LIII.

NON-TRADING CORPORATIONS.

Much that has been said about trading corporations is applicable to non-trading corporations. The chief difference is that the shares of stock of the latter are chattels, and the laws of property apply; the former have, as a rule, no capital stock.

The method of chartering under statute, organizing, corporate meetings, management of corporate affairs, and obtaining powers from the State are similar in both classes of corporations. Each member of a non-trading corporation has one vote in corporate meeting. In the absence of provision therefor in by-laws, proxy voting is not allowed. Membership is acquired and lost in accordance with the by-laws. Members are elected, expelled, or resign. It is usual to provide that on loss of membership all interests in the assets of the corporation ceases. The relation to the State is the same in trading corporations. The members' rights do not rest upon the laws of property. Mismanagement by the governing body detrimental to the interest of the corporation may be ground of interference by the courts at the instance of a member or members. Non-trading corporations are liable on their contracts like any other persons. The rules as to ultra vires transactions apply to them. Where such corporation commits a tort, or a crime for which corporations are punishable, the rule is not uniform. In some jurisdictions the charitable corporation is not considered capable of committing a tort, the payment of damages being a misapplication of the fund. The proceeding, if any, lies against the officer perpetrating the wrong. A majority of the members in a proper meeting may exercise all corporate functions. Where their action amounts to a violation of the charter, of the laws, of the property or contractual rights of members, the minority or any one of the minority may resort to the courts for relief. The governing body is under the same regulations and have the same powers as in a trading corporation.

Where the majority of the members of a church corporation decide to sell the land and buildings and move to another locality, the court will not interfere unless a trust in the properties be violated.
Where the governors of a social club set up a liquor establishment, the majority may elect other governors who may remove the liquor traffic. The court will not interfere at the instance of one of the members being of the minority.
CHAPTER LIV.

PUBLIC CORPORATIONS—KINDS AND CHARACTERISTICS.

Public corporations, as exemplified by the free cities of the middle ages, were the first bodies corporate to become important. Next in order of importance if not in time were ecclesiastical corporations. The immense increase and great importance of trading corporations are of modern growth. It is a curious fact that the early constitutions and laws of most of the older States are nearly silent on the subject of municipal corporations. The populations were then, for the most part, rural. The laws on the subject are today voluminous, and the problems arising from the great increase of urban population are numerous and perplexing, while the laws are plentiful, the subject is today in various stages of experiment. No attempt will be made here to do more than outline the characteristics of municipal corporations.

Public corporations are of two kinds:

1. An involuntary political or civil division of the State, created by general law to aid in the administration of government.

2. A municipal corporation or body politic and corporate created by law by the incorporation of the inhabitants of a city, town or district as an agency of the State to regulate and administer the local affairs thereof.

The State is sometimes called a corporation in the same sense that the king in a monarchy is so styled, as being the sovereign, and possessing those attributes of sovereignty known as prerogatives.

To the first class of public corporations may be referred counties, townships, school districts. They are not strictly corporations, but possess some of the attributes. In some jurisdictions counties are corporations, and as such liable to be sued.

Municipal corporation, public corporation of the second class, is a complete corporation possessing all the powers and attributes thereof. We shall confine our discussion to municipal corporations. The residents of a locality may apply and obtain incorporation or the State may create a corporation of its own volition, and even in opposition to the wishes of those who thereby become members.

CREATION. A municipal corporation is usually created by act
of the legislature. In some jurisdictions it may be created in ways similar to those pointed out for trading corporations. The State has complete power at all times over the charter, and may amend or repeal it.

MEMBERSHIP. The corporation having been chartered, the boundaries thereby defined, all persons resident therein are members of the corporation. Their right to participate in corporate affairs usually consists in the right to vote. This right is regulated by the ordinances under the charter. A resident may not be eligible to vote or hold office. He is subject to the ordinances and may be taxed or compelled to perform other acts for the benefit of the corporation.

ORGANIZATION. The charter having been granted, the qualified voters elect in the manner directed, the governing body, usually a mayor and council. This body selects the officers and agents necessary to conduct the affairs of the corporation. This body has legislative powers, and drafts and adopts ordinances for the governance of the inhabitants of the town or city. It also appoints executive or ministerial officers who enforce the ordinances, arrest, imprison and execute sentence. It may exercise judicial functions in the trial of offenders, or may appoint officers clothed with such judicial functions as the charter allows. The consolidation of the three powers of government is not in harmony with American ideas.

CHARTER. The charters of municipal corporations are usually framed upon the same general model, and contain the following features:

1. The inhabitants of the town or city by the corporate name are made a body politic and corporate, with right of perpetuity by succession, power to sue and be sued, contract and be contracted with, acquire, hold, and dispose of realty and personalty, have and use common seal, enact ordinances, in accordance with the charter and the laws, for the government of the corporation.

2. The territorial boundaries are defined.

3. The governing body is established.

4. The qualifications of voters are prescribed, usually those of the State, and additional thereto residence in the corporate limits.

5. The officers to be chosen and the mode of their election.
6. The enumeration of the powers of the governing body to enact ordinances, punish violations thereof, hold courts, levy and collect taxes, open and maintain streets and parks, establish police, and fire departments, and public schools, is found in the charter and statutes.

Powers. The powers of a municipal corporation are divided into two classes:

1. Governmental, conferred upon the corporation as an agency of the State, in administering the powers of the State within the jurisdiction.

2. Corporate or Municipal, conferred for the special benefit of the urban community, which has been incorporated into a corporate person.

Governmental functions include all those which are legislative, executive, judicial, discretionary, public and political.

Municipal powers and duties include all those which are ministerial, mandatory, peremptory, private and corporate.

Under the head of governmental powers are classed: (a) powers pertaining to the administration of justice; (b) police powers; (c) eminent domain; (d) education and schools; (e) fire department; (f) all charter powers exercised by the municipality as an agency of the State for public benefit and for which it receives no compensation.

Municipal functions include all other charter powers and duties, both mandatory, such as the proper care of streets and discretionary, such as the maintenance of waterworks, gas works, electric plants from which profit may be derived by the municipality.

The distinction between the two classes of powers is important. As to the first, the corporation is a State agency, and the control of the State is direct, and the acts of the corporation and its agents are the acts of the State. No liability for such acts accrues to the municipality at the instance of any person whatever. As to the second, the relation of the State to the municipality is the same that it sustains to other corporations created by it. For injuries inflicted in the exercise of municipal powers the municipality is liable under the rules regulating the liability of private corporations.
CONDUCT OF CORPORATE AFFAIRS.

The governing body is usually called the mayor and council. The mayor is elected by the qualified voters of the municipality at large. The members of the council are elected by the voters of the respective wards which they represent.

They conduct the affairs of the corporation. Their powers and duties are: (a) those of the government of the municipality; (b) those as managers of the corporate affairs of the body politic and corporate.

In the former class are included the powers incident to government: to promote peace, protect health. They adopt ordinances, or municipal laws, define offenses and provide for the punishment of offenders, levy and collect taxes, maintain police, fire, school, health departments. For these purposes they may acquire land, erect and maintain buildings, such as a municipal building, engine houses, school buildings. They grant licenses to individuals and corporations to conduct business in the corporate limits. They regulate the character and style of buildings. They appoint the officers and agents for the conduct of these and other governmental functions. These are usually police magistrates, policemen, firemen, boards of education and of health, inspectors of buildings, and sanitary inspectors.

In the latter class are found all acts which may be done by a public service corporation for the benefit of the members. These include waterworks, sewage systems, electric plants, heating plants, street railways, cemeteries, parks, and the maintenance and care of streets. All of these are discretionary, except the last, which is mandatory. They appoint the persons who have charge of these matters, superintendents, sextons, engineers. In addition to the officers above mentioned there is usually a treasurer, and an attorney. The compensation for all employees is fixed by the mayor and council.

Borrow Money. The authority to borrow money and issue bonds of the corporation is usually a matter of charter regulation. Provision is usually made to submit the question to the voters. The mayor and council may, unless forbidden by the charter, negotiate loans to supply temporary deficiencies. Usually the charter or ordinance provides that this shall be a regular and officially authorized act. Where bonds of a municipal-
ity are issued irregularly, or a loan made irregularly it would seem from the general trend of the decisions that the money is not collectable.

LIABILITY OF MUNICIPAL CORPORATION—CONTRACTS, TORTS, CRIMES.

CONTRACTS. As the charter always provides that the corporation has power to contract and be contracted with, it follows, of course, that the corporation is bound by the contracts it makes. The rules already stated in our discussion of private corporations apply generally. The law as to ultra vires contracts applies, and it is not necessary to repeat here the remarks already made on that subject. The character of the contract will usually indicate the officer or agent who is empowered to bind the corporation. The authority is usually set forth or indicated in the ordinances establishing the office or agency. In other cases the mayor and council would be the proper agency to contract for the corporation.

As has been suggested in the matter of borrowing money, so in any event where there are express provisions in the charter or ordinances, as to the manner of entering into the contract, these must be observed. Otherwise the corporation is not bound simply because it has not contracted. Thus should it be directed that contracts for the furnishing of supplies be awarded on competitive bidding, the corporation is not bound by a contract made otherwise. Where the supplies have been furnished, the corporation must pay for them at the fair value.

So of other contracts, renting land, or buildings, hiring laborers, repairing buildings or machinery, feeding prisoners, stabling horses, and similar things for the purposes of the corporation.

TORTS. The dual nature of the powers of the corporation furnishes the test of the liability for torts. For an injury inflicted in the performance of a governmental function, the corporation is not liable, being an agency of the State.

For injuries inflicted in the exercise of municipal powers, the liability of the corporation is the same, and regulated in the same way as is the case of a private corporation engaged in serving the public. It is very easy to state the rule, the application frequently presents difficulty. The dividing line between the two classes of powers is not always clearly drawn, and it is not unusual that some doubt arise as to which class the act under consideration belongs. A list of the powers under the two classes
has already been given in a general way, and to that the reader is now referred. Thus for injury through the misconduct of officers of police, health, education, the corporation is not liable.

For injuries suffered from machinery or apparatus of water, lighting or fire plants, for defects in buildings, elevators, stairways, sanitary jails, or prisoners' camps, slaughter houses, operation of street cars, the corporation is liable in like manner with a private corporation conducting similar utilities for gain.

STREETS, BRIDGES, SIDEWALKS, PARKS. The control of the public highways has always been a prerogative of the sovereign. It seems curious that this power, when exercised by a municipal corporation is not treated as a governmental function. With but very few exceptions, the corporation is at the present day held liable for injuries suffered in consequence of negligence in maintaining in safe condition for travel the streets and sidewalks. This fact but further illustrates the truth of the statement that it is easy to state the rule of liability and non-liability, but not always so easy to determine into which class of corporate functions the act under consideration falls.

Anciently education was not a concern of the sovereign. It would seem then that the maintenance of a system of public education by a municipal corporation is not a governmental function. Yet the corporation is not liable for a tort committed by a teacher upon a pupil in a municipal school.

CRIMES. It is well established that municipal corporations are deemed capable of committing crimes, and may be punished therefor. It is evident that crimes involving a mental element are not such as can be imputed to the corporation. It is equally clear that the only method of punishment practicable is the imposition of money penalties. In some jurisdictions the statutes specify the crimes for which the corporation may be held liable, and provide the punishments.

STATE CONTROL. The State has the right to amend and repeal the charter of a municipal corporation. It is created primarily as an agency of the State, for purposes of local government. For this reason the rule differs from that of other corporations as announced in the Dartmouth College case. Furthermore, the State may exercise direct control in the management and con-
duct of the affairs of the corporation in the exercise of the govern-
mental functions.

As to purely municipal powers, the relation of the corporation to the State is the same as that of a private corporation oper-
ating public utilities.

Repeal of Charter. Should it become necessary to dissolve the corporation it is done by a repeal of the charter, usually by the legislature, from whence it issued.